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INTERNATIONAL REVIEW of the Red Cross

DETENTION

Interview with Lech Walesa*

As one of the leaders of the Polish workers, Lech Walesa was detained several times during the 1970s. He led the shipyard strike and later negotiated the Gdansk agreement of 31 August 1980. In December 1981, Walesa, along with several thousand others, was arrested when General Jaruzelski imposed martial law and "suspended" the labour movement "Solidarnosc" (Solidarity). Walesa was interned in a country house in a remote part of Poland, close to the then Soviet border, and was visited three times by ICRC delegates. During this period, the ICRC visited 4,850 other internees (79 visits to 24 different places of detention) and it provided assistance and helped to restore contact between internees and their families abroad. At the same time and in conjunction with the Polish Red Cross and the League of Red Cross and Red Crescent Societies (as it was then known), the ICRC carried out an extensive assistance programme for the benefit of the civilian population which was in dire need of basic goods.

In November 1982, Lech Walesa was released and returned to the Gdansk shipyards. He received the 1983 Nobel Peace Prize, but remained under the surveillance of State authorities. At the end of the Cold war and nine years after he had climbed over the shipyard wall during the Gdansk strike, Lech Walesa was elected President of the Republic of Poland in a general ballot and served until November 1995. He currently heads a foundation set up in his name.

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It's December 1981, the army takes over the government in Poland, and thousands of opposition activists are arrested and interned. You are one of them. How do you recall the circumstances surrounding your detention?

You have to understand my dual position at that time. I was an electrician, a worker, the father of a family and one of the thousands of people who were arrested. As an individual, I missed my family, I missed my children and I was

* The interview was conducted on 5 January 2005 in Gdansk by Toni Pfanner (Editor-in-Chief of the International Review of the Red Cross) and Marcin Monko (ICRC regional delegation in Budapest).

worried about them. I was afraid because I was isolated from the outside world. But I was also a well-known politician, the leader of the Solidarnosc movement, and I was consciously fighting the government at that time. As a politician I was waiting only for the regime's defeat, which had to come sooner or later. I told my persecutors that it was me who was the victor and that they were hammering the last nails into the coffin of the communist system by confining thousands of innocent people. Of course, it is hard to think back to those days but I did truly believe that they were actually scoring points against themselves in detaining me. So without taking this dual position into account, you cannot understand my situation. Maybe it would have been better if I had only been in one pair of shoes, as the majority of the thousands of internees were.

Compared to your colleagues, you were materially in a more privileged position.
Again, the twofold position was important. I was angry and alone and with overwhelming power against me. Of course, I had good material conditions; I was kept in a "golden cage". But that cage did not enhance the circumstances of my internment. If the jailers had received the order to get rid of me, they would have done so immediately, and very much like the infamous Damocles sword this danger was constantly looming over me. Even after a sumptuous dinner, they could have executed me. In addition, I had no contact with my colleagues, or even any chance to get in touch with them as I was very well guarded. In fact, I was arrested for the very purpose of cutting me out of the trade union and isolating me from the movement. The jailors never lost sight of me.

How did you perceive the situation of the other people who were arrested and interned?
As for the other members of Solidarnosc detained under martial law and the other persons arrested during that time, they were certainly not treated with such ceremony. For them, basic material items were crucial, they were often treated badly and kept under very harsh conditions. In addition, Poland was going through a self-made but nevertheless catastrophic economic crisis. In a strictly humanitarian sense, the visits of the ICRC delegates to them and the assistance given were maybe more important for them than for me.

What did you feel about those visits?
I was visited several times by a Red Cross delegation. I didn't have any problems in talking with the delegates openly, even in front of the government officials. As you know, I fought communism with an open visor. In my case, such visits were perhaps not typical for the ICRC, but they were important to me for political reasons. I used your visits in my political fight, especially to demonstrate how morally low the regime had sunk. A respected international organization comes to see what the government is doing to its people and to the leaders of the opposition, to see what barbaric methods they are using, putting an innocent and popular man in jail. A government is finished once it has to resort to

violence against its own people in order to keep itself in power. This recognition was important for me.

When delegates visited you then, did they ask about your health, the conditions of detention, and contacts with your family?
Obviously, but I was quite a special internee. I remember that when I tried to mention political issues during the ICRC visits, the delegates always tried to avoid them; your colleagues from the Red Cross did not want to talk about politics with me. In that sense I was a difficult case. But even during my detention, I wanted to fight the government. I did not want to talk confidentially. I did not want to hide anything and I wanted to fight openly. When I recall those moments now, I am surprised myself that I was not afraid, when I should have been. Today I would probably be more cautious.
Having said this, it should be stressed that for others those visits were very much needed and indeed indispensable. For most people deprived of their freedom, the most important issue is not their political fight, but often their sheer survival, their humane treatment and the preservation of one's dignity. Your visits gave reassurance to detainees that they were not forgotten and that there was still hope. It is extremely valuable for every person to know that. Of course, different issues are important in different places and at different times — and Poland in the 1980s was also a special case. But visits from the outside world to every detainee are always important. Those visits change their situation: the detainees who are visited know that they are not forgotten, they are less afraid, their families are reassured. These are very important issues. I did not do enough to pay back my debt to you; I know there are still places that you do not have access to, and I would be ready to help you get that access to those forgotten places.

You were clearly a political prisoner, but it's often difficult to say who is a political prisoner and who is not.
That's true, but in fact it doesn't matter. We always have to see the prisoner as a human being. Everyone is entitled to be humanely treated, to see a chance of solving one's problems, to have hope. Your mission must be purely humanitarian.

Once you were a prisoner, and then you became the head of state.
Well, I was always the same person. I was put in jail for the same things that later helped me to be elected president of Poland. Obviously, the change from being in a prisoner's cell to a presidential palace, with all the responsibility that comes with it, alters your views. I now had to care about security interests and be aware that humanitarian values and security measures have to coexist. It was hard for me, for example, when the death penalty was still in force in Poland. It was unacceptable for me, but I had to abide by the law. When I received requests from convicts asking to be pardoned, I had to weigh the interests of the State and society and the purely human sense of compassion and forgiveness.

Still, there are basic limits imposed by religion or humanity, as you will, limits that are never to be breached. There was no trade-off between the standards I fought for and security. Otherwise I would have fought in vain.

In situations of armed conflict, internal violence or when terrorist attacks occur, many persons are arrested.
Of course, arrest and detention always take place in tense security situations. You have to face this reality and establish and follow minimum humanitarian standards. You have to take into account different levels of development and State capacities and different traditions in dealing with security issues, while maintaining those standards. Even the ICRC approach has to take the security situation into account, otherwise its interventions may become counter-productive.

In the light of major terrorist attacks, do you think the security threats are bigger than before, and that there is a shift in the balance between security and humanitarian interests?
Let me say this: the threats are not necessarily bigger today, they are different. The collapse of Soviet communism consigned some of them to the history books, but new ones have appeared. We have to understand the times in which we live. Almost until the end of the 20th century the world was clearly divided. There were different threats and different opportunities. The end of the bipolar world, together with rapid technological development, has propelled us into a new era. In our globalized information society, borders are less important and defending our pieces of land is less of a priority than before. Today's threats, such as international terrorist organizations or environmental exploitation, are cross-border phenomena. This new era requires a new system of governance.

How should we deal with these new threats and simultaneously save the old values?
I have always proposed, and I do so again today, that we need a global democratic assembly, global government, including a global defence department. Those bodies should be able to resolve the old types of armed conflicts and international terrorism, and fight racism, anti-Semitism and other scourges that are the cause of our insecurity. New international governance on the basis of today's United Nations should ensure the new order, in the name of the generations of the 20th century which faced the most traumatic experiences ever known. I see the only way to resolve today's problems as being at the level of global governance.

How could this be accomplished?
Today we have only one superpower capable of ensuring global stability, but which obviously suffers from a lack of legitimacy. At the same time we have a legitimate body, the United Nations, but it is paralysed, has no executive powers and no means of giving effect to its decisions. This is one of the main reasons why we are not able to tackle current global security problems. We are just emerg-

ing from an era of great political and cultural divisions. Economic and technological progress is increasingly allowing us, and in fact to some extent requires us, to get rid of unnecessary divisions. Abandoning former restrictions, we have opened State borders and liberalized the movement of goods, services and capital. However, such a process calls for a global approach. We should not forget the potential side-effects of the process of globalization, which has also paved the way for global crime and has even triggered transnational terrorism. A coherent and adequate response to some global social needs and global truths is still largely lacking. Perhaps with time, remedies will be found and the situation will calm down by itself, but we should ask ourselves how many lives will have been lost by then. So why not try to "programme" globalization and to channel its effects in a more structured manner? On such a basis it would be much easier to anticipate potential threats and to prepare adequate structures accordingly.

Coming back to detention issues, where are the limits that because of religious or moral reasons we are not allowed to overstep?
The United States leads the world economically and militarily, but it no longer does so morally. This is partly due to the fact that it has occasionally resorted to immoral methods to fight the phenomenon of international terrorism. It says: we have the money, we have the means, and we will fix the problem ourselves. But how much will this cost in human terms? You have to prove your high moral standing by deeds, not by words. This also applies to detention. I say it with all due respect for the reasonable concerns of the United States and as a friend of the Americans, who are facing serious threats from terrorist organizations.
Terrorism as we are witnessing it today is also a leftover of the two-bloc confrontation. Both superpowers trained and equipped various groups and individuals and even entire nations to fight the enemy. When the Soviet Union collapsed, those people and groups supported by the former regime suddenly found themselves in a vacuum. Now they are engaging in their own private wars. Since no considerable concern has been shown for these people over a significant period of time — we have not assisted them in their development, we have not supported their education nor have we helped to finance their transition — many of them now resort to violence. In many ways we demand that they open their societies, their economies, and adopt our values, but at the same time we close our borders to them and we close our economies to their products. We have to find new ways to deal with this unsatisfactory situation. I see a great responsibility for Europe and its governments to cooperate constructively with America in this task and to work out modes of action that are sustainable and acceptable on both sides of the Atlantic as well as worldwide.

In Iraq the director of Care International, Margaret Hassan, was taken hostage and killed. Other humanitarian workers, including some from the Red Cross and Red Crescent, were also killed. How do you view this phenomenon?
These are acts by people who are extremely desperate and weak, who do not seem to have other means of advancing their causes. Of course, for us it's tragic

and appalling, but it is a consequence of the general situation in that part of the world, the humiliation of local people. We have to remember that we also had both torture and hostage-taking in Europe, so while we should condemn and fight these horrible acts, we should also try to understand the reasons for them — which does not mean justifying or accepting them. The prohibitions of torture or hostage-taking are venerable achievements. With my experience, I believe I have the authority to say that the Red Cross should continue its work despite all these difficulties. It is extremely dangerous and hard work, and you are up against very powerful forces, but there are lots of people who share the same concerns and goals.

What are the responsibilities of politicians?
Politicians have a moral and legal obligation to give clear and unambiguous messages and instructions to uphold minimum humanitarian standards even in the worst situations. It is their moral responsibility. I am afraid the present international atmosphere is not helping us, but I believe that everybody is increasingly aware of their responsibilities and that we are heading in a better direction.

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Human rights and indefinite detention

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"Indefinite imprisonment without charge or trial
is anathema in any country which observes the rule of law."
Lord Nicholls of Birkenhead in his ruling of 16 December 2004[1]

Abstract

International human rights law abhors a legal black hole. It applies wherever a State exercises its jurisdiction, not only in peacetime but also during armed conflict, as a compliment to humanitarian law. The deprivation of liberty is subject to certain conditions, and even initially lawful detention becomes arbitrary and contrary to law if it is not subject to periodic review. Indefinite detention is incompatible with Article 9 of the International Covenant on Civil and Political Rights. While temporary derogation from this provision is allowed in Article 4 of the ICCPR, such derogation is only possible "in time of public emergency which threatens the life of the nation" and "to the extent strictly required by the exigencies of the situation." Persons deprived of their liberty are entitled to a prompt trial or release, and in cases of arbitrary detention, they are entitled to compensation. Neither the war on terror nor restrictive immigration policies justify indefinite detention.

* I would like to thank Oldrich Andrysek and Christoph Bierwirth of UNHCR for their useful suggestions.

Persons deprived of their liberty are never *de jure* in a black hole. In principle, they enjoy legal protection under at least two legal regimes — municipal law and international human rights law. In times of armed conflict, they are also entitled to the additional protection of a third legal regime, that of international humanitarian law.

However, *de facto* tens of thousands of persons throughout the world are subjected to indefinite detention, frequently incommunicado, and governments try to justify such irregular imprisonment on the basis of "national security," "state of emergency," "illegal migration" and other so-called extraordinary circumstances.

Temporary derogation from some provisions of the applicable legal regimes is possible, but subject to specified conditions, notably the criterion of "public emergency threatening the life of the nation,"[2] and the principle of proportionality, which limits such derogation "to the extent strictly required by the exigencies of the situation."[3] Derogations cannot be open-ended, but must be limited in scope and duration. Legal analysis of the justification proffered by States for the limitations of rights frequently reveals that such derogations are not valid under either municipal or international law.[4]

The phenomenon of indefinite detention affects many categories of persons, including persons held as security risks, "terrorists," "enemy combatants," and common criminals held in pre-trial detention without bail, but also asylum-seekers, undocumented migrants, persons awaiting deportation, and persons under psychiatric detention.[5] For the purposes of this article we shall examine the legality of indefinite detention against a number of criteria — not only the temporal element, i.e. the sheer length of the detention or the time-lapse before being brought before a judge, but also other elements such as the uncertainty about the actual termination of said detention, the illegality in the

1 Lord Nicholls of Birkenhead in the eight to one majority ruling of the House of Lords on the appeal of 11 detainees held at the high-security Belmarsh prison dubbed the "British Guantánamo". *A(FC) and others (FC) (Appellants)* v. *Secretary of State for the Home Department (Respondent)*, paragraph 74 of judgment of 16 December 2004. BBC News "Terror detainees win Lords appeal"; available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk_news/4100> (last visited 17 January 2005). Glenn Frankel "British anti-terror law reined in", *Washington Post*, 16 December 2004. In the same sense, Lord Leonard Hoffmann commented: "there are no adequate grounds for abolishing or suspending the right not to be imprisoned without trial, which all inhabitants of this country have enjoyed for more than three centuries", cited in Amnesty International Press Release of 16 December 2004.

2 Article 15, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms. See also Article 4, paragraph 1, of the International Covenant on Civil and Political Rights: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed…"

3 *Ibid.*

4 A. de Zayas "La dérogation et le Comité des Droits de l'Homme des Nations Unies" in Daniel Prémont *et al.* (eds.), *Droits Intangibles et Etats d'Exception*, Bruylant, Brussels, 1996, pp. 213-234.

5 In its General Comment No. 8 concerning Article 9 of the International Covenant on Civil and Political Rights, the Committee noted "that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc."; in "International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies", UN Doc. HRI/GEN/1/Rev.7 (2004), p. 130, para. 1.

manner of effecting arrest (i.e. with or without a judicial warrant of arrest), the justification for the deprivation of liberty given to the detainee, the possibility of having access to counsel and to one's family (i.e. illegality of incommunicado detention), the possibility of testing the legality of the detention before a competent tribunal, and the conditions of detention (i.e. with respect to the inherent dignity of the human person, and without being subjected to irregular interrogation methods).

The first part of this paper focuses on relevant international norms applicable to the deprivation of liberty. The second part looks at national and international case-law. The third part surveys international redress mechanisms. The fourth part addresses the remedies available to the victims. The fifth suggests action that the international legal community may undertake to vindicate the human right to liberty and security of person, including what civil society may do when governments flout the norms.

Applicable norms

There are many norms of municipal and international law that guarantee the right to liberty and security of person, and, in particular, stipulate the right to test the legality of one's detention before a competent and impartial tribunal. In common-law countries this right is enshrined in the famous writ of *habeas corpus*, in continental-law jurisdictions it is codified in specific statutes, in Latin American countries it is known under the right to *amparo*.

It is also important to note the difference between rules of hard law (treaties, statutes), which are justiciable before national and international tribunals, and those of soft law (resolutions and declarations), which are of a promotional nature and frequently expand on the rules of hard law. Both contribute to the emergence of a universal human rights culture.

Universal norms

Among the relevant norms of international human rights law, reference may be made to the Universal Declaration of Human Rights, Article 9 of which stipulates: "No one shall be subjected to arbitrary arrest, detention or exile." The corresponding provision in the International Covenant on Civil and Political Rights[6] (ICCPR) is Article 9, paragraph 1, which stipulates: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

In its jurisprudence the United Nations Human Rights Committee, the body responsible for monitoring compliance by States party to the ICCPR, has

6 UNTS, Vol. 999, p. 171, 16 December 1966, entered into force 23 March 1976; 154 States Parties as of January 2005.

made it clear that detention which may be initially legal may become "arbitrary" if it is unduly prolonged or not subject to periodic review.[7] In its General Comment No. 8 concerning Article 9, the Committee lays down the elements that must be tested in determining the legality of preventive detention: "If so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3), as well as Article 14, must be granted."[8]

This general protection under Article 9, paragraph 1, applies to all persons under detention, whether administrative (e.g. asylum-seekers) or criminal detention.

Article 9, paragraph 3 of the ICCPR stipulates: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial." Prolonged pre-trial detention without bail is thus incompatible with Article 9 and requires specific justification and periodic review.[9]

In the context of the so-called war on terror, it is important to recall that the ICCPR applies both in times of peace and in times of armed conflict. In its General Comment No. 31 of 29 March 2004, the Human Rights Committee clarified: "The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive."[10]

7 Alfred de Zayas "The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights", in G. Alfredsson *et al.* (eds), *International Human Rights Monitoring Mechanisms*, Martinus Nijhof Publishers, The Hague, 2001, pp. 67-121. Also A. de Zayas, "Desarrollo jurisprudencial del Comité de Derechos Humanos", in Carlos Jiménez Piernas (ed.), *Iniciación a la Práctica en Derecho Internacional*, Marcial Pons, Madrid, 2003, pp. 215-277. See in particular case No.305/1988 (*Van Alphen* v. *The Netherlands*) UN Doc. A/45/40, Vol. 2, Annex IX, Sect. M, para. 5.8: "The drafting history of Article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances." Manfred Nowak, *U.N. Covenant on Civil and Political Rights. Commentary*, N.P. Engel, Kehl, Strasbourg, 1993, pp. 172 ff.

8 General Comment, No. 8, *op. cit.* (note 5), p. 131, para. 4.

9 *Ibid.* See also Bolaños v. Ecuador, case No. 238/1987, where the Committee found a violation of Article 9, paragraph 3, because Mr Bolaños was held in pre-trial detention for over five years. UN Doc. A/44/40, Annex X, Sec. I, para. 8.3.

10 See also General Comment No. 31, in "International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies", UN Doc. HRI/GEN/1/Rev.7 (2004), p. 195, "The nature of the general legal obligation imposed on States party to the Covenant",

Moreover, the application of the Covenant may not be trumped by transferring a person outside the national borders of the State concerned (e.g. to Guantanamo naval base on leased Cuban territory)[11] or to a private or public subcontractor:[12] "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."[13] And, as indicated in the Committee's General Comment No. 15, "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party."[14]

Besides constituting a violation of Article 9 of the ICCPR, indefinite detention may also entail a violation of other provisions of the Covenant, including Article 14, which guarantees a prompt trial before a competent and impartial tribunal, Article 7, which prohibits torture and inhuman or degrading treatment or punishment, and Article 10, which provides for humane treatment during detention. There can be little doubt that indefinite detention entails inhuman treatment and that in certain circumstances it may even constitute a form of torture.[15] Moreover, indefinite detention of children would be incompatible with the obligation of States Parties under Article 24, paragraph 1, of the Covenant to ensure special "measures of protection as are required" by virtue of their status as minors.

Whereas Article 4 of the Covenant permits temporary derogation from Articles 9, 14 and 24 thereof, it does not allow any derogation from Article 6 (right to life) or Article 7. Any derogation, however, must be notified to the Secretary-General of the United Nations and must satisfy strict requirements. In its General Comment No. 29, the Human Rights Committee stated: "Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature (…) Not every disturbance or catastrophe qualifies as a public

adopted on 29 March 2004, para. 11. The International Court of Justice, too, has observed "that the protection of the International Covenant on 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 a time of national emergency"; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Reports, p. 226, para. 25.

11 Alfred de Zayas, "The status of Guantánamo Bay and the status of the detainees", 37 *UBC Law Review*, Vol. 37, 2004, pp. 288 ff.

12 An American citizen Ahmed Abu Ali is being detained in Saudi Arabia and reportedly tortured. US District Judge John Bates wrote in an opinion on the case that Mr. Abu Ali's lawyers "have not only alleged, but have presented some unrebutted evidence that [his] detention is at the behest and ongoing direction of United States officials." "Saudi subcontractors", *Washington Post*, 20 December 2004, page A22.

13 General Comment No. 8, *op. cit*. (note 5), General Comment No. 31, *op. cit*. (note 10), para. 10.

14 General Comment No. 15 on "The position of aliens under the Covenant", adopted at the Committee's twenty-seventh session in 1986, in "International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies", UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 140 ff.

15 In connection with the Belmarsh prison case, a report was published on 13 October 2004, prepared by 11 consultant psychiatrists and one consultant clinical psychologist concerning the serious damage to the health of eight of the detainees.

emergency which threatens the life of the nation (…) A fundamental requirement for any measures derogating from the Covenant (…) is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency…"[16]

In the context of the "war on terror" the United Kingdom has formally derogated from Article 9 of the Covenant. In contrast, the United States has not notified any derogation from the Covenant to the United Nations Secretary-General, notwithstanding the obvious incompatibility with the Covenant of many of the provisions of the PATRIOT Act[17] and of numerous Executive Orders.

As indicated above, indefinite detention may raise issues under the peremptory international law rule against torture. Because of the psychological effects that indefinite detention may have on individuals, it may also entail violations of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[18] In this connection, indefinite detention has also been criticized by the International Committee of the Red Cross, which has access to the detainees at Guantánamo Bay and has observed their deteriorating psychological condition, leading to a high number of suicide attempts.[19]

In addition to the protection of international human rights law, persons subjected to detention enjoy the more specific protection of international humanitarian law in times of armed conflict. Of particular relevance are the Third and Fourth Geneva Conventions of 1949 and the 1977 Additional Protocols I and II thereto. Article 118 of the Third Geneva Convention[20] clearly stipulates that prisoners of war cannot be detained indefinitely: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The test here is the cessation of active hostilities, whether or not a peace treaty has been signed. This provision goes well beyond Article 75 of the 1929 Geneva Prisoners-of-War Convention, which stipulated: "When belligerents conclude an armistice convention, they shall normally cause to be included

16 General Comment No. 29, "Derogation during a state of emergency", in "International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies", UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 184 ff.

17 Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (H.R. 3162, "USA PATRIOT ACT") permits indefinite detention — also of immigrants and other non-citizens, with no requirement that those being detained indefinitely be removable as terrorists. See online archives of the American Civil Liberties Union. <http://archive.aclu.org/congress/1102301e.html> (last visited 17 January 2005).

18 UNTS, Vol. 660, p. 195, 21 December 1984, entered into force on 26 June 1987.

19 Neil A. Lewis, "Red Cross criticises indefinite detention in Guantánamo Bay", *New York Times*, 10 October 2003, page 1. "Red Cross blasts Guantánamo" BBC News, 10 October 2003. The senior Red Cross official in Washington D.C. Christophe Girod, stated that it was intolerable that the complex was used as "an investigation centre, not a detention centre (…). The open-endedness of the situation and its impact on the health of the population has become a major problem."

20 *Convention (III) relative to the Treatment of Prisoners of War*, 12 August 1949, UNTS, Vol. 75, p. 135, entered into force on 21 October 1950.

therein provisions concerning the repatriation of prisoners of war." The vague language of the 1929 Convention allowed the victorious Allies to circumvent the spirit of the Convention and keep German prisoners of war in detention for many years after Germany's unconditional surrender. The clear intention of Article 118 of the 1949 Convention was therefore to ensure that prisoners of war would be released "without delay" and not held in indefinite detention.[21]

Important in this context is, of course, the determination of who is entitled to prisoner-of-war status. Article 5 of the Third Geneva Convention requires that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

Under Article 142 of the Third Geneva Convention, the Convention is not subject to denunciation during hostilities; even if a State were to denounce it, that State would remain bound by customary international law, including the Martens clause[22] and the customary rule on the release of prisoners of war and their humane treatment.

As for other persons detained during an international armed conflict, there is a growing consensus that they would enjoy protection under the Fourth Geneva Convention of 1949. As the International Criminal Tribunal for the former Yugoslavia held in *Prosecutor* v. *Delalic et al, Celebici Camp case*, "There is no gap between the Third and Fourth Geneva Conventions and (…) if an individual is not entitled to protection of the Third Convention (…) he or she necessarily falls within the ambit of Convention IV."[23]

The above norms apply to the various categories of persons deprived of their liberty. A special case is presented by the growing number of asylum-seekers who are subjected to indefinite detention. In this connection it is important to mention the revised guidelines of the United Nations High Commissioner for Refugees on applicable criteria and standards relating to the detention of asylum-seekers. While this is "soft law", States ought to take a careful look at these provisions, including Guideline 7: "Given the very negative effects of detention on the psychological well-being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories: Unaccompanied elderly persons. Torture or trauma victims. Persons with a mental or physical disability…" The increasing use of detention as a restriction of the freedom of movement of asylum-seekers on the grounds of their illegal entry remains a matter of major concern to UNHCR.

21 Jean S. Pictet (ed.), *Commentary: III Geneva Convention relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, Geneva, 1960, pp. 540 ff.

22 Helmut Strebel, "Martens Clause", in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 3, 1997, p. 326.

23 *Prosecutor* v. *Delalic et al.*, Judgment IT-96-21-T, 16 November 1998, para. 271.

Regional international law

In the regional systems of human rights protection, Article 5, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[24] stipulates: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law…" Article 5, paragraph 4, stipulates: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Pursuant to Article 15, the European Convention is subject to derogation. In the context of the "war on terror" the United Kingdom has derogated from Article 5 of the ECHR, as it did with regard to Article 9 of the ICCPR. The effect of the House of Lords ruling of 16 December 2004 in the Belmarsh prison case is, however, that this derogation is deemed invalid.

In the Inter-American regional system, Article 7 of the American Convention on Human Rights[25] stipulates: "Every person has the right to personal liberty and security. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. No one shall be subject to arbitrary arrest or imprisonment (…). Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."

In the African regional system, Article 6 of the African Charter of Human and Peoples' Rights[26] stipulates: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

The above international norms reflect a universal consensus that an individual cannot be deprived of liberty except pursuant to specific legislative authority and with respect for procedural safeguards. Nevertheless, the reality is that not only military dictatorships but also democracies detain political opponents, refugees and aliens, sometimes indefinitely, under a variety of pretexts. It is for domestic and international tribunals to test the legality of such detentions and to ensure the release and compensation of persons who have suffered arbitrary arrest and detention.

Recent legislation in the context of the war on terrorism gives cause for concern. A case in point is Malaysia's Internal Security Act (ISA) which, as a preventive detention law originally enacted in 1960 during a national state of

24 Council of Europe, *European Convention on Human Rights/Convention européenne des Droits de l'homme, Collected Texts/Recueil de textes*, Strasbourg, 1981.

25 OASTS, No. 36, UNTS, Vol. 1144, p. 123, of 22 November 1969, entered into force on 18 July 1978.

26 Adopted at Nairobi on 26 June 1981, entered into force on 21 October 1986.

emergency as a temporary measure to fight a communist rebellion, has lately seen quite a renaissance.[27] Under Section 73(1) thereof, the police may detain any person for up to 60 days, without warrant or trial and without access to legal counsel, merely on the suspicion that "he has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof…"[28]

Case-law

Indefinite detention violates the constitution and bills of rights of most countries, as well as a number of international treaties. Norms, of course, are subject to interpretation. The case-law provides concrete illustration and further development of the codified norms.

War on terror: National case-law

In the context of the "war on terror" some countries have adopted legislation allowing the indefinite detention of terrorism suspects. Particularly worrisome are certain pieces of legislation adopted in countries that are bound by the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms, and the American Convention on Human Rights.

In the United Kingdom the 11 Muslim detainees in the Belmarsh prison case, most of whom have been held since December 2001, successfully challenged their indefinite detention and obtained a favourable ruling from the House of Lords on 16 December 2004, which reversed the Court of Appeal finding of October 2002 that indefinite detention was compatible with the United Kingdom's human rights obligations. It is now up to the British Parliament to repeal or modify Article 23 of the Anti-terrorism, Crime and Security Act of 2001 (ATCSA), which the Lords have ruled to be incompatible with the British Human Rights Act and with the European Convention on Human Rights. In particular, the Lords found that indefinite detention discriminates on the grounds of nationality (Article 14 of the ECHR), because it applies only to foreign nationals suspected of terrorism, notwithstanding a comparable threat from terrorism suspects holding United Kingdom nationality. As noted by Baroness Hale of Richmond: "The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation."[29] The 11 Muslim detainees, however, have not yet been released or

27 Human Rights Watch, "Malaysia's Internal Security Act and suppression of political dissent", available at: <http://www.hrw.org/backgrounder/asia/malaysia-bck-0513.htm> (last visited 17 January 2005).

28 Malaysia, *Internal Security Laws*, Malaysian Law Publishers, Kuala Lumpur, 1982, p. 52 ff.

29 House of Lords, *A(FC) and others (FC) (Appellants)* v. *Secretary of State for the Home Department (Respondent)*, Opinion of 16 December 2004, para. 231.

indicted. If this situation persists, the detainees could submit a complaint to the European Court of Human Rights and demand their release.

Persons suspected of terrorism in the United States have been similarly subjected to indefinite detention. Since January 2002 more than 700 persons have been held as terrorism suspects at the United States naval base in Guantánamo Bay, Cuba, pursuant to a Military Order issued by President George W. Bush: "Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism."[30]

In a number of early cases, several federal district and circuit courts held that the United States Constitution and the Bill of Rights did not apply to aliens detained in Guantánamo,[31] who did not even have the right to *habeas corpus*. They were deemed to be in a "legal black hole."[32] In the meantime, as many as 200 persons have been released from Guantánamo,[33] but approximately 500 are still held in indefinite detention and only four of them have been charged[34] with rather vague offences such as "conspiracy to commit war crimes."

On 28 June 2004, by a six to three judgment, the Supreme Court of the United States rejected the fiction of the legal black hole and held that the persons being held in Guantánamo Bay are entitled to counsel and to challenge the legality of their detention.[35]

Meanwhile military commissions have been operating in Guantánamo to determine the threat, if any, posed by the detainees to American security. But Pentagon officials have confirmed that Guantánamo detainees may still be kept in detention even if they are found not guilty by a military tribunal.[36]

Not only foreigners but also American citizens have been held incommunicado and subjected to indefinite detention as "enemy combatants." One of them, Yaser Hamdi, was initially held in Guantánamo and subsequently transferred to a naval brig in Charleston, South Carolina, where he was held in solitary confinement. He challenged his detention on the grounds that for American citizens Congressional authorization of detention is required by 18 USC § 400(a) — which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Hamdi

30 66 F.R. 57833 (2001).

31 Alfred de Zayas, *op. cit*. (note 11), pp. 277-341. See e.g. *Coalition of the Clergy* v. *Bush*, 189 F. Supp. 2nd 1036 (C.D. Cal. 2002).

32 Lord Johan Steyn, "Guantánamo Bay: The legal black hole", 27th F.A. Mann Lecture to the British Institute of International and Comparative Law, 53 ICLQ 1-15 (2004).

33 "U.S. to free 140 Guantánamo war detainees" Reuters, 30 November 2003; "Transfer of juvenile detainees completed" (concerning the release to their home countries of three juvenile detainees who had been detained in Guantánamo for two years), Department of Defence News Release No. 057-04, 29 January 2004; "Delight at release of Guantánamo men", BBC News, 11 March 2004 (it is interesting to note that all Guantánamo detainees released to the United Kingdom were freed without charge by British authorities shortly after their arrival and interrogation); Alan Cowell, "4 Britons and an American to be freed at Guantánamo", *New York Times*, 12 January 2005.

34 BBC News, 6 August 2004, <http://news.bbc.co.uk/1/hi/world/americas/3541126.stm> (last visited 17 January 2005).

35 *Al Odah et al* v. *United States* (No. 03-343) 2004, *Rasul* v. *Bush* (No. 03-334) 2004. <http://127.0.0.1:8080/%2E%2E%2Flegal%2F41541db54%2Epdf> (last visited 17 January 2005).

36 BBC News, Nick Childs, BBC Pentagon Correspondent "US may hold cleared detainees", 25 February 2004, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/Americas/3487958.stm> (last visited 17 January 2005).

successfully took his case to the Supreme Court, which on 28 June 2004 held that he was entitled to counsel and to challenge his detention. In the Court's majority opinion Justice Sandra Day O'Connor stated that "a state of war is not a blank check for the president."[37] Rather than give Mr Hamdi a trial, the United States government struck a deal with him whereby he was released in October 2004, after nearly three years in pre-trial detention, and deported to Saudi Arabia.[38]

Another US citizen still in indefinite detention is José Padilla, who is being held in solitary confinement on a military brig in South Carolina. In principle, according to the Fifth Amendment to the US Constitution, US citizens cannot be detained without charge. However, the Bush Administration has circumvented this constitutional right by labelling Mr Padilla as an "enemy combatant," although he was not captured in Afghanistan or Iraq but at O'Hare airport in Chicago.[39] This aberration is now being tested before a US federal court. In the meantime Mr Padilla remains held indefinitely.

National security: International case-law

In the 1970s and 1980s several countries in Latin America suffered internal unrest that led to military coups and government by military juntas. Under the pretext that the national security of their respective countries was at stake, the juntas adopted emergency legislation against "terrorism" (e.g. Uruguayan State Security Act, Law, No. 14068, *Acta Institucional* No. 4 of 1 September 1976 and No. 8 of July 1977), which enabled them to arrest without warrant (Uruguayan "prompt security measures") and hold suspects indefinitely or try them before military courts under charges of "subversive association" (*asociación subversiva*) and "conspiracy" (*conspiración contra la constitución*). A number of these cases came for examination before the Human Rights Committee, which found that indefinite detention, incommunicado detention or detention following the conclusion of a term of imprisonment constituted a violation of Article 9 of the Covenant. In case No. 5/1977 the Committee found a violation of Article 9, paragraph 1, because Luis María Bazzano "was kept in custody in spite of a judicial order of release."[40] In case No. 8/1977, a violation of Article 9, paragraph 1, was found because the persons concerned "were not released in the case of Alcides Lanza Perdomo, for five months and, in the case of Beatriz Weismann de Lanza for 10 months, after their sentences of imprisonment had been fully served."[41] In case No. 9/1999 the

37 *Hamdi* v. *Rumsfeld*, Case No. 03-6696, 2004 U.S. LEXIS 4761 at 51.

38 Jerry Markon, "Hamdi returned to Saudi Arabia: U.S. Citizen's detention as enemy combatant sparked fierce debate", *Washington Post*, 12 October 2004, p. A02.

39 Robert A. Levy, "Jose Padilla: No charges and no trial, just jail", Cato Institute, 21 August 2003, <http://www.cato.org/cgi-bin/scripts/printtech.cgi/dailys/08-21-03.html> (last visited 17 January 2005).

40 *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume I, p. 42. UN Doc.CCPR/C/OP/1, New York, 1985.

41 *Ibid.*, p. 49 para. 16. See also case No. 43/1979 *Drescher* v. *Uruguay, Selected Decisions*, UN Doc. CCPR/C/OP/2, Volume 2, pp. 80 ff., para. 14; case No. 84/1981, *Dermit* v. *Uruguay*, pp. 112 ff., para. 10; No. 107/1981, *Almeida de Quinteros* v. *Uruguay*, pp. 138 ff.; No. 139/1981 *Conteris* v. *Uruguay*, pp. 168 ff., para. 10.

Committee found that Article 9, paragraph 4, had been violated because during his detention Mr Santullo "did not have access to legal counsel. He had no possibility to apply for *habeas corpus*. Nor was there any decision against him which could be the subject of an appeal."[42] In case No. 52/1979, the Committee found a violation of Article 9, paragraph 1, because Mr López Burgos had been abducted from Argentina and brought by force into Uruguay, which constituted "an arbitrary arrest and detention."[43]

Incommunicado detention, moreover, has been found to constitute a violation of Articles 7 and 10 of the Covenant. In case No. 63/1979, the Committee noted that Mr Raul Sendic, the leader of the *Movimiento de Liberación Nacional* (MLP-Tupamaros) had been subjected to prolonged periods of solitary confinement in an underground cell, lack of food and general harassment, that he had been subjected to *plantón* (standing upright with eyes blindfolded) and being allowed to sleep or rest only for a few hours at a time, and that he had been denied family visits and medical treatment.[44] Similarly, in case No. 10/1977, the Committee found a violation of Article 10 of the Covenant because Mr Altesor had been held in incommunicado detention for 16 months.[45]

Indefinite detention of refugees and migrants: National case-law

Indefinite detention has been the fate of tens of thousands of asylum-seekers and illegal migrants in a number of democracies, including the United States and Australia. Even though the numbers are staggering, the press has taken relatively little notice of the thousands of Haitians held by the United States in Guantánamo Bay in the 1990s, the more than 1,000 "Marielitos" (refugees from Cuba) who have been held in United States prisons for some twenty years, or the thousands of Afghan refugees intercepted on Australian waters and currently being held in Nauru under immigration custody without any realistic hope of release.

Although the 30,000 Haitians were repatriated to Haiti, there are still many Haitian boat people being held indefinitely in detention centres in Florida. On 26 April 2003 US Attorney General John Ashcroft ruled, in the case of a Haitian immigrant who had won the right to be released on bail while awaiting a decision on his asylum claim, that illegal immigrants who have no known links to terrorist groups can be detained indefinitely to address national security concerns. While the Attorney General did not claim that the man was a security threat, he argued that his release and that of others like him "would tend to encourage further surges of mass migration from Haiti by sea, with attendant strains on national security and homeland security resources."[46] Mr Ashcroft held that his ruling was necessary to discourage mass migration.

42 *Ibid.*, Vol. I, p. 44, para. 10.
43 *Ibid.*, Vol. I, p. 91, para. 13.
44 *Ibid.*, Vol. I, p. 104, para. 20.
45 *Ibid.*, Vol. I, p. 107, paras. 9.2 and 15.
46 Rachel L. Swarns, "Illegal aliens can be held indefinitely, Ashcroft says", *New York Times*, 26 April 2003.

Meanwhile the "Marielitos" have had their day in court. The case of Daniel Benítez,[47] a Cuban refugee from the 1980 refugee transport to the United States from the port city of Mariel in Cuba,[48] was argued before the Supreme Court on 13 October 2004. The judgment of the Supreme Court has just been rendered public on 12 January 2005. It reaffirms the ruling in the landmark immigration case decided by the United States Supreme Court in 2001, holding that the detention of immigrants should be limited to a "reasonable period." The 2001 ruling covered the detention period required while the United States endeavours to find a third country prepared to accept an alien subject to deportation. In *Zadvydas* v. *Davis*, 533 US 678 (2001), the Supreme Court decided that a non-citizen who was already admitted to the United States as a lawful permanent resident and could not be deported should not be held in indefinite detention. Justice Stephen Breyer's five to four majority opinion noted that indefinite detention would pose a "serious constitutional threat" and that a reasonable time-limit of six months should be interpreted into the law.[49] The Supreme Court judgment in the cases of *Clark, Field Office Director, Seattle, Immigration and Customs Enforcement, et. al.* v. *Martínez*, certiorari to the United States Court of Appeals for the Ninth Circuit, and *Daniel Benitez v. Michael Rozos, Field Office Director, Miami, Florida Immigration and Customs Enforcement*, on writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, held that:

"Since the Government has suggested no reason why the period of time reasonably necessary to effect removal is longer for an inadmissible alien, the six-month presumptive detention period we prescribed in Zadvydas applies.[50] Both *Martínez* and *Benítez* were detained well beyond six months after their removal orders became final. The Government having brought forward nothing to indicate that a substantial likelihood of removal subsists despite the passage of six months (indeed, it concedes that it is no longer even involved in repatriation negotiations with Cuba); and the district Court in each case having determined that removal to Cuba is not reasonably foreseeable, the petitions of *habeas corpus* should have been granted. Accordingly, we affirm the judgment of the Ninth Circuit, reverse the judgment of the Eleventh Circuit, and remand both cases for proceedings consistent with this opinion."[51]

47 *Benítez* v. *Rozos*, No. 03-7434, and *Clark* v. *Martínez*, No. 03-8978, were argued before the Supreme Court on 13 October 2004. See Stanley Mailman and Stephen Yale-Loehr, *New York Law Journal*, 25 October 2004. See also Charles Gordon, Stanley Mailman and Stephen yale-Loehr, Immigration Law and Procedure §62.01 (rev. ed. 2004); Stephen Henderson, "Justices question indefinite detention of Cubans due deportation", *The Advocate*, Baton Rouge, Louisiana, 14 October 2004, p. 10; Steve Lash, "Court mulls Cubans' indefinite detention", *Chicago Daily Law Bulletin*, 14 October 2004, p. 2. See also Amicus Brief of the Florida Immigrant Advocacy Centre and the American Civil Liberties Union on behalf of Mr Benítez: <http://www.aclu.org/Files/OpenFile.cfm?id=16647> (last visited 17 January 2005).

48 Some 125,000 Cubans came to the United States in 1980 when Fidel Castro allowed them to leave. About 1,000 of them came into conflict with US law enforcement, served their sentences and have been languishing in immigration custody pending deportation.

49 533 U.S. 678 (2001) at 701.

50 *Ibid.*, at 699.

51 543 U.S. (2005).

In her concurring opinion, Justice Sandra Day O'Connor indicated, however, that the US government still has other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks. Justice Antonin Scalia observed that Congress could amend the immigration statutes governing detention. The implication is that international law concerns are essentially irrelevant, and that whatever the US Congress does, even if in violation of the International Covenant on Civil and Political Rights, is the law. Whether and when Mr Benítez and the other "Marielitos" will be released from indefinite detention remains a matter of speculation.

Moreover, it is important to note that, although the *Martínez* and *Benítez* cases had nothing to do with the war on terrorism and their detention well predates 11 September 2001, the Bush Administration is borrowing national security arguments in order to limit immigration. Solicitor General Theodore Olson warned the Supreme Court that a ban on indefinite detention would risk creating a "back door into the United States" for dangerous aliens, and that requiring the release of these detainees would create "an obvious gap in border security that could be exploited by hostile governments or organizations that seek to place persons in the United States for their own purposes."[52] And, indeed, the Eleventh US Circuit Court of Appeals in the *Benitez* case had ruled that the courts should not interfere with the power of the other political branches to imprison dangerous illegal immigrants.

In Australia, under the mandatory detention regime, the Migration Act requires unlawful non-citizens to be detained until they have either obtained a visa, are deported or are removed from Australia. On 6 August 2004 the High Court of Australia, by a vote of four to three, upheld the Australian government practice to detain failed asylum-seekers indefinitely pursuant to the Migration Act 1958, overruling an earlier Federal Court decision that such persons should not be detained indefinitely even if no country could be found willing to take them. The High Court ruling concerned two asylum-seekers, stateless Palestinian Ahmed al-Kateb, and Iraqi Abbas al Khafaji, who had failed to be granted visas but were unable to be returned home or to any other country. The ruling also affects 13 other asylum-seekers who had been released pending the decision.

On 7 October 2004 the High Court of Australia again ruled that indefinite detention was lawful under Australian law, notwithstanding the fact that it may be incompatible with Australia's international human rights obligations. *Woolley (Manager of the Baxter Immigration Detention Centre); Ex parte Applicants M276/2003 by their Next Friend GS* concerned four children of Afghan origin who have been detained for more than three years in immigration custody. In dismissing their application for release Justice McHugh observed:

"The decisions of the United Nations Human Rights Committee in *A* v *Australia*,[53] *C* v *Australia*[54] and *Bakhtiyari* v *Australia*, the deliberations of

52 See <http://www.twmlaw.com/resources/defalien.html> (last visited 17 January 2005). See also "Supreme Court agrees to consider immigrant detention case", 16 January 2004, available at <http://www.cnn.com/2004/LAW/01/16/scotus.immigrants.ap/> (last visited 17 January 2005).

53 Case No 560/1993, Views adopted on 3 April 1997, UN Doc. A/52/40, Vol. II, Annex VI Sec. L.

54 Case No. 900/1999, *C.* v. *Australia*, Views adopted 28 October 2002. UN Doc. A/58/40, Vol., II, Annex VI R.

the United Nations Working Group on Arbitrary Detention[55] and the detention regimes in the United States, Canada, the United Kingdom and New Zealand indicate that a regime which authorises the mandatory detention of unlawful non-citizens may be arbitrary notwithstanding that the regime may allow for the detainee to request removal at any time. They suggest that something more is required if the regime is not to be found to breach the Refugees Convention, the ICCPR or the Convention on the Rights of the Child, or to be otherwise contrary to international law. Something more may include periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens.

"However, the issue in this Court is not whether the detention of the present applicants is arbitrary according to international jurisprudence, whether it constitutes a breach of various Conventions to which Australia is a party or whether it is contrary to the practice of other States. It is whether Parliament has the purpose of punishing children who are detainees so that, for the purpose of the Constitution, the Parliament has exercised or authorised the Executive to exercise the judicial power of the Commonwealth. On that very different issue, the international jurisprudence and the practice of other States do not assist. That is because the purpose of ss 189 and 196 is a protective purpose — to prevent unlawful non-citizens, including children, from entering the Australian community until one of the conditions in s 196(1) is satisfied. (…) Whether or not Australia may be in breach of its international obligations cannot affect that constitutional question. For the reasons that I have given, ss 189 and 196 are valid enactments and apply to children who are unlawful non-citizens."[56]

Accordingly, the four children remain in indefinite immigration custody.

Immigration detention: International jurisprudence

As shown above, it has been the role of the United Nations Human Rights Committee to establish important international jurisprudence against the practice of indefinite detention of migrants. This jurisprudence clarifies the constitutive elements of an illegal detention. Thus it is not merely the time element that leads to the conclusion that detention is illegal, but the combination of factors attending the deprivation of liberty, the possibility of periodic review and the principle of proportionality.

In a recent decision under Article 9 of the ICCPR concerning the detention of an Afghan family, the Committee held that:

55 United Nations Economic and Social Council, Commission on Human Rights, Civil and Political Rights, including Questions of: Torture and Detention, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN4/2000/4, (1999) Annex 2. In its Deliberation No 5, the Working Group proposes a number of principles concerning the detention of asylum-seekers, including Principle 7, which requires that detention should be for a defined period "set by law" and "may in no case be unlimited or of excessive length": Annex 2, p. 30.

56 *Woolley (Manager of the Baxter Immigration Detention Centre); Ex parte, Applicants M276/2003 by their Next Friend GS*, paras. 114-116.

"Concerning Mrs Bakhtiyari and her children, the Committee observes that Mrs Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State Party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State Party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State Party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs Bakhtiyari and her children for the length of time described above, without appropriate justification, was arbitrary and contrary to Article 9, paragraph 1, of the Covenant."[57]

In another case concerning Australia, the individual kept in indefinite immigration custody suffered psychological trauma because of the prolonged detention. The Committee determined that not only had Article 9 of the ICCPR been breached, but also that a violation of Article 7 had occurred. In its views the Committee observed:

"As to the author's allegations that his first period of detention amounted to a breach of Article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State Party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State Party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State Party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under Article 7 of the Covenant."[58]

57 On 29 October 2003 the Human Rights Committee adopted Views on communication No. 1069/2002, submitted by Mr Ali Acsar Bakhtiyari and Mrs Roquahia Bakhtiyari, UN Doc. A/59/40, Vol. II, Annex IX DD, para. 9.3.

58 *C.* v. *Australia, op. cit.* (note 54). UN Doc. A/58/40, *op. cit*. (note 54), para. 8.4.

Redress mechanisms

Individual complaint procedures

Individuals have no standing before the International Court of Justice at The Hague and therefore cannot directly submit their cases for determination by the ICJ. However, the World Court can examine a violation of the human rights of individuals if a State with standing before the ICJ were to submit a contentious case for adjudication, or if the General Assembly or Security Council, pursuant to Article 96 of the UN Charter, were to submit a legal question concerning individual rights to the ICJ for its advisory opinion. This occurs rarely; the most recent instance was in the context of the Advisory Opinion of 9 July 2004 concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Other than the ICJ, the principal universal organs that can examine petitions from individuals are the Human Rights Committee, under the Optional Protocol to the International Covenant on Civil and Political Rights, and the Committee against Torture, pursuant to Article 22 of the Convention against Torture.

Neither of these procedures is available for persons detained by the United States or the United Kingdom, because these countries have not recognized the respective individual complaints procedures. Australia, however, has accepted both, and individual complaints in relation to indefinite detention have been successfully examined.

Individuals wishing to avail themselves of the Optional Protocol procedure must exhaust domestic remedies to the extent that these are available. The Committee may, however, examine cases even when such remedies have not been exhausted if the legislation and case-law of a State Party render them futile. This was the situation in *Omar Sharif Baban* v. *Australia*, in which the Committee ruled on admissibility and merits on 6 August 2003:

"As to the author's claims under Article 9, the Committee notes that the State Party's highest court has determined that mandatory detention provisions are constitutional. The Committee observes, with reference to its earlier jurisprudence, that (…) the only result of *habeas corpus* proceedings in the High Court or any other court would be to confirm that the mandatory detention provisions applied to the author as an unauthorized arrival. Accordingly, no effective remedies remain available to the author to challenge his detention in terms of Article 9, and these claims are accordingly admissible."[59]

The Committee went on to find violations of Article 9, and observed:

"As to the claims under Article 9, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State Party can provide appropriate justification.[60] In the present case, the author's detention as a non-citizen

59 UN Doc. A/58/40, Vol. II, Annex VI CC, para. 6.6.

60 *A.* v. *Australia*, Case No 560/1993, Views adopted on 3 April 1997, UN Doc. A/52/40, Annex VI Sec. L.

without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State Party advances particular reasons to justify the individual detention (para. 4.15 ff.), the Committee observes that the State Party has failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia (para. 4.12). In particular, the State Party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State Party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under Article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of Article 9, paragraph 1. In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under Article 9, paragraphs 1 and 4, of the Covenant were violated."[61]

Besides the quasi-judicial petitions procedures of the Human Rights Committee and of the Committee against Torture, there also exist non-binding redress mechanisms such as the intercession of the United Nations Working Group on Arbitrary Detention, which, for instance, in its report to the 59th session of the United Nations Commission on Human Rights (2003) condemned the indefinite detention of Afghan and other persons in Guantánamo Bay,[62] and the "1503 Procedure" of the Sub-Commission on Promotion and Protection of Human Rights, which for several years confidentially examined the situation of the indefinite detention of the "Marielitos", without, however, persuading the United States to terminate this abuse.[63]

61 *Ibid.*, para. 7.2.

62 Report of the Working Group on Arbitrary Detention, UN ESC HCHROR, 59th Session, UN. Doc. E/CN.4/2003/8.

63 The impasse results from the fact that the United States wants to deport Mr Benítez and some 1,000 other "Marielitos" back to Cuba, but Cuba refuses to accept them. Thus, they remain in indefinite detention in the United States. As the lawyer of Mr Benítez, John Mills of Jacksonville, Florida, noted, they "face the very real possibility of spending the rest of their lives incarcerated, not because of any crimes they may have committed, but because their countries will not take them back." See <http://www.aclu.org/court/court.cfm?ID=15151&c=261> (last visited 17 January 2005).

In the European regional system, all persons under the jurisdiction of member States of the Council of Europe may submit individual complaints to the European Court of Human Rights at Strasbourg. In the American regional system, all persons under the jurisdiction of member States of the Organization of American States may submit cases to the Inter-American Commission on Human Rights in Washington DC. In the African regional system, all persons under the jurisdiction of States party to the African Charter may submit individual complaints to the African Commission on Human and Peoples' Rights at Banjul, the Gambia.

Interim measures of protection

All individual complaints procedures also include the possibility of requesting interim measures of protection, e.g. under Rule 86 of the rules of procedure of the Human Rights Committee and under Rule 108 of the rules of procedure of the Committee against Torture. In both cases the test is that of "irreparable harm" to the victim, which the Committees enjoin the States Parties to prevent.

Inter-State complaints procedures

Bearing in mind that human rights treaties create *erga omnes* obligations, any State may potentially bring a case before an international tribunal or expert committee, provided that certain admissibility criteria are satisfied. Indefinite detention is *ratione materiae* a legitimate subject for an inter-State complaint, since every gross violation of human rights is a matter of concern to every State and to the international community as a whole.

Under Article 36 of its Statute, the International Court of Justice accepts cases referred to it by States seeking adjudication of a particular dispute; the Court does so also on the basis of a general declaration of recognition of its jurisdiction, and when States accept the Court's jurisdiction in the text of a specific treaty. Some States, however, do not accept the compulsory *ipso facto* jurisdiction of the International Court of Justice, including the United States of America. When the latter appears before the ICJ, it is usually by virtue of a treaty provision requiring the settlement of disputes by the ICJ, such as the Vienna Convention on Consular Relations, to which the United States is a party. This was the case in the 31 March 2004 judgment in *Mexico* v. *United States*, with respect to Mr Avena and 50 other Mexican nationals, in which the ICJ found that the United States had violated the said Vienna Convention.

Under Article 41 of the International Covenant on Civil and Political Rights, a State that has declared its recognition of the competence, in respect of itself, of the Human Rights Committee to investigate and adjudicate may bring a case against another State that has also recognized the Committee's competence. Since the United States has made that declaration, any other State that has likewise done so may submit an inter-State complaint of a violation of Article 9 of

the Covenant with regard to the persons being detained in Guantánamo or the indefinite detention of the "Marielitos". It is not necessary for the State lodging the complaint to be the State of nationality of the person or persons concerned, since a violation of Article 9 of the Covenant is *erga omnes* and thus constitutes a genuine interest giving standing to other States party to the ICCPR. Australia and the United Kingdom have similarly made the said declaration under Article 41.

Under Article 21 of the Convention against Torture, a State that has declared its acceptance, in regard to itself, of investigation and adjudication by the Committee against Torture may bring a case against another State that has also made that declaration. Considering that indefinite detention constitutes inhuman treatment in violation of Article 16 of the Convention and is arguably also a violation of other of its provisions, an inter-State complaint would be admissible *ratione materiae*. Australia, the United States and the United Kingdom have made the said declaration recognizing the Committee's competence.

In the European, American and African systems inter-State complaints are also possible and could be effective in pressuring States to abandon the practice of indefinite detention.

States may also request the relevant tribunal to call for interim measures of protection to be taken, e.g. pursuant to Article 41 of the Statute of the International Court of Justice or the relevant inter-State complaints procedures.

Remedies available to the victims

The most important remedy for victims of indefinite detention is immediate release. This principle is enshrined in universal and regional human rights conventions.

Pursuant to the principle *ubi jus, ibi remedium*, compensation should also be granted, whether or not the universal and regional human rights conventions specifically envisage such compensation.

Article 9, paragraph 5, of the International Covenant on Civil and Political Rights stipulates: "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation."

In the European regional system, Article 5, paragraph 5, of the European Convention stipulates: "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation." More generally, Article 50 of the Convention stipulates: "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The American regional system lacks a specific provision for compensation in case of arbitrary detention. Article 10 of the American Convention on Human Rights merely stipulates: "Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice."

It would seem logical that someone like Yaser Hamdi, who has always maintained his innocence and who was detained for nearly three years and then deported to Saudi Arabia without trial, should be entitled to compensation for arbitrary detention and for the inhuman conditions of said detention. However, it may have been part of the deal that release was granted on condition that he would not sue the US government for compensation. Or he may have been so traumatized and intimidated by his experience in US detention that he will only want to forget it.

Steven Watt, a British lawyer who represented released British Guantánamo detainees Shafig Rasul and Asif Iqbal, stated that they would claim compensation. "They have spent two-and-a-half years languishing in that prison — it is a complete travesty of justice. I think they are owed something by the US Government, but whether they will ever be able to get it is another thing."[64]

In relation to indefinite immigration detention, the Human Rights Committee has made concrete recommendations to States Parties. For example, in its Views in case No. 900/1999 *C.* v. *Australia*, the Committee recommended: "As to the violations of Articles 7 and 9 suffered by the author during the first period of detention, the State Party should pay the author appropriate compensation. As to the proposed deportation of the author, the State Party should refrain from deporting the author to Iran. The State Party is under an obligation to avoid similar violations in the future."[65]

In its Views concerning *Bakhtiyari* v. *Australia*, the Committee observed:

"In accordance with Article 2, paragraph 3 (a), of the Covenant, the State Party is under an obligation to provide the authors with an effective remedy. As to the violation of Article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs Bakhtiyari, the State Party should release her and pay her appropriate compensation. So far as concerns the violations of Articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State Party is under an obligation to pay appropriate compensation to the children. The State Party should also refrain from deporting Mrs Bakhtiyari and her children while Mr Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State Party would result in violations of Articles 17, paragraph 1, and 23, paragraph 1, of the Covenant."[66]

At the time of writing the present article, Australia has not complied with this recommendation.

64 BBC News, 11 March 2004, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/3500156.stm> (last visited 17 January 2005).

65 UN Doc. A/58/40, Vol. II, Annex VI R, para. 10.

66 UN Doc. A/59/40, Vol. II, Annex IX DD, para. 11.

With regard to the even more serious case No. 900/1999 concerning Mr C., at the time of writing this article Australia has likewise not complied with the Committee's recommendation. It did furnish an interim response by *note verbale* of 10 February 2003 stating that every effort was being made to resolve the situation, but that given the complex nature of the issues, high-level consultation among government authorities was required. The lawyer of Mr C., however, informed the Committee that the State Party had taken no measures to give effect to its Views and that the author continued to be detained.[67]

Conclusions and recommendations

Among the many legal questions that policy makers must pose and answer is that of the legitimate objectives of detention. If the purpose is national security, a balancing of rights must take place. It is more important to address the root causes of terrorism than to attempt to cure the symptoms one by one. Fundamental rights and freedoms must not be compromised in the effort to save them from terrorism. If the objective of detention is to discourage illegal immigration, other strategies must be found that do not deny the human dignity of would-be immigrants. In this sense, proportionate solutions must be devised that enhance rather than destroy human rights.

Bearing in mind that human rights obligations are *erga omnes*, it is important that the international community show solidarity in rejecting the indefinite detention of persons in whatever context, whether in connection with the war against terrorism or in the context of restrictive immigration policies. More concretely, the gap must be closed between international human rights standards and national law and constitutions that limp behind, as illustrated in the Australian *Woolley* judgment.[68] Civil society should demand that international human rights conventions be incorporated into national constitutions and legislation. In the event of conflict between international and national law, it is international law that should enjoy primacy. The French *Cour de Cassation* has just quashed a lower court decision denying jurisdiction in a claim of ex-Guantánamo detainees for illegal and arbitrary detention.[69] It is now for the French courts to examine how French international commitments under the Third Geneva Convention of 1949 and the International Covenant on Civil and Political Rights are to be applied by French judges in the context of detention.[70]

67 UN Doc. A/58/40, Vol. I, para. 225. UN Doc A/59/40, Vol. I, para. 230.

68 See text accompanying note 56 above.

69 *Le Monde*, 4 January 2005, concerning two ex-Guantánamo detainees, Mourad Benchellali and Nizar Sassi. The judge in Lyon had refused to take jurisdiction arguing that "aucune convention internationale ne donne compétence aux juridictions françaises pour connaître la situation dont les parties civiles se plaignent, laquelle est le résultat, sous l'égide des Nations Unies, de ripostes à des actes terroristes et qui ne saurait dès lors être régie par le seul droit français."

70 *Ibid*. The lawyer of the two ex-Guantánamo detainees, Maître William Bourdon, commented: "C'est une décision de principe très importante parce que la Cour de cassation refuse l'idée que, s'agissant de la lutte contre le terrorisme, la fin justifie les moyens et que le droit international humanitaire et le droit français s'effacent devant les résolutions de l'ONU (…). Cela ouvre la voie à des poursuites pénales."

Both individuals and States should make better use of the human rights mechanisms established by the United Nations and by the regional human rights protection systems. For instance, individual petitions provide a useful way of giving visibility to grave human rights violations that frequently escape the attention of the media.

The inter-State complaints procedure remains highly under-utilized. It is high time for a group of States to coordinate inter-State complaints under Article 41 of the ICCPR and Article 21 of the CAT. An examination of the problem of indefinite detention by the Human Rights Committee and by the Committee against Torture may contribute to the formulation of more humane policies in those States responsible for the indefinite detention of both citizens and aliens.

The United Nations Human Rights Committee has established meaningful jurisprudence concerning incommunicado detention and indefinite detention. The same principles that have been applied to condemn such detention in countries throughout the world, particularly in the 1970s and 1980s, must also apply in the context of today's war against terrorism. While international human rights law is not mathematics, it does require consistency, and double standards must not be tolerated. Indefinite detention and torture in Guantánamo violate Articles 7 and 9 of the Covenant in the same way that similar practices violated the Covenant at the time of the military juntas of Argentina, Chile and Uruguay.

Both municipal and international law give justiciable rights to persons deprived of detention. These rights should be invoked by the victims and by civil society on their behalf. Indeed, it is the duty of every victim of a violation of law to denounce it and to demand reparation. Acquiescence in the practice of indefinite detention by the victims and/or by civil society is incompatible with the culture of human rights that has been gradually emerging through the efforts of the United Nations and other regional human rights tribunals.

Only an effective system of sanctions against perpetrators and appropriate reparation to victims will serve as a deterrent to future violations. Reparation and deterrence/prevention go hand in hand. Moreover, international solidarity requires special programmes for the rehabilitation of victims of indefinite detention, many of whom suffer traumata as a consequence of their detention and are in need of assistance in order to reconstruct their lives. This places an important responsibility on civil society.

It bears repeating that human rights and security are not in conflict with each other, but must mutually support each other. States would be ill-advised to seek greater security by limiting human rights. Conversely, if States observe human rights domestically and internationally, they will contribute to an international environment that will sustain peace and greater security for all.

Civil society must reject State terrorism and its dangerous totalitarian laws. In this sense it is appropriate to conclude with the words of Lord Leonard Hoffmann in the 16 December 2004 ruling in the Belmarsh prison case:

"The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory."[71]

71 Lord Leonard Hoffmann in the judgment of 16 December 2004, *op. cit.* (note 1), para. 97.

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Casting light on the legal black hole: International law and detentions abroad in the "war on terror"

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"Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."
George W. Bush, Address to a Joint Session of Congress and the American People, 20 September 2001

Abstract

Thousands of individuals have been detained abroad in the context of the "war on terror", both during the armed conflicts in Afghanistan and in Iraq and as a result of transnational law-enforcement operations. This paper argues that, notwithstanding contrary positions expounded by some States, the protections of international humanitarian law and/or international human rights law remain applicable to these individuals, wherever detained, and examines recent decisions of domestic courts and international bodies which appear to reveal a reassertion of international standards.

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The "global war on terror" waged by the United States and its allies after the attacks of 11 September by definition transcends national borders. The very nature of the "enemy" in this so-called "war" implies that States are required to take action against international terrorist organizations not only within their territory, but also often outside their national borders, in areas subject to the territorial sovereignty of other States. Whilst in the past most anti-terrorist actions had the character of internal law enforcement operations conducted by governments within their own territory, after 11 September most of the operations in the "war on terror" have been carried out outside the national borders of the States spearheading the campaign, often — but not always — with the consent and the cooperation of the State exercising sovereign authority over the area where the operations are taking place.[1] Owing to the extraterritorial character of these operations, in many cases persons captured have been detained by armed forces or non-military law enforcement agencies operating outside their national territory.

"Detention abroad" may be very broadly defined as any deprivation of liberty of an individual against his or her will[2] by agents acting outside the sovereign territory of the State on behalf of which they act. For the purposes of this paper, it is also to be understood to cover the exceptional situation where an individual is held by a third State at the request of, and under the effective control of, the agents of another State.

Detention abroad is by no means a new phenomenon; international humanitarian law expressly envisages that States will detain individuals outside their own national territory, especially in the course of international armed conflict and belligerent occupation, and in some circumstances requires them to do so. Furthermore, in transnational law enforcement operations it will often happen that persons find themselves in the custody of agents of a State other than the territorial State, for instance during transfer from the custody of one State to another in cases of extradition/rendition.

However, the phenomenon is of particular interest in the context of the "war on terror", for not only have an unprecedented number of persons been detained outside the national territory of the State holding them, but such detentions have also and above all sparked legal controversy as to which — and indeed, whether — international legal standards providing for the protection of

1 E.g. the strike by an unmanned aircraft in Yemen which killed six suspected terrorists: J. Risen and J. Miller, "U.S. is reported to kill al Qaeda leader in Yemen", *New York Times*, 5 November 2002. It seems that Yemen had given its prior consent to this action and was cooperating with it, although reports were nuanced: see e.g. W. Pincus, "Missile strike carried out with Yemeni cooperation", *Washington Post*, 6 November 2002.

2 In this respect, the definition is by no means limited to the detention of convicted criminals or of suspects pending trial, but is wide enough to cover any form of deprivation of liberty, including the detention of prisoners of war during an armed conflict, internment during a belligerent occupation, and administrative detention (for instance of illegal immigrants pending expulsion), as well as other forms of *de facto* detention which may not be easily fitted into any of these traditional categories. It is also sufficiently wide to cover the situation of arrest and detention outside national territory by agents of the State, whether or not with the consent and cooperation of the territorial State.

individuals in detention are applicable. Since 9/11, certain States have adopted a policy of detaining individuals abroad, while at the same time denying the applicability of the legal guarantees which, under both domestic and international law, are generally accepted as protecting persons deprived of their liberty.

Regardless of whether and to what extent these arguments may be sound as a matter of domestic law, it is indisputable that, as a matter of international law, they are inherently flawed. The position that, by keeping individuals detained during the "war on terror" outside the national territory of the State, State authorities can bypass some or all of the guarantees and limits on State action enshrined in international humanitarian law (IHL)[3] and/or in international human rights law[4] is not justified.

The practical importance of determining with precision which rules apply to the treatment of individuals deprived of their liberty during the "war on terror" has been repeatedly stressed during the last three years, most prominently by the International Committee of the Red Cross. In September 2004, the ICRC recalled that, from its "decades of experience in visiting places of detention in vastly different, rapidly changing environments", it was clear that "only by determining and adhering to a clearly established legal framework does one prevent arbitrariness and abuse."[5]

The overall purpose of the present paper is to attempt to clarify which rules of international law are applicable to persons held in detention abroad in the "war on terror", and in particular to show that, despite the arguments put forward by some States, they are not in some "legal black hole"[6] without any international legal protection. It starts by reviewing the phenomenon of extraterritorial detentions in the context of the "war on terror". In the main section

3 In particular the protections for persons deprived of their liberty contained in the Third Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, UNTS, Vol. 75, p. 135 (hereinafter GC III); the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS, Vol. 75, p. 287 (hereinafter GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS, Vol. 3, entered into force 7 December 1978 (hereinafter P I).

4 The focus is on general instruments of international human rights law, or on regional instruments which are particularly pertinent because of their applicability to one of the main protagonists: International Covenant on Civil and Political Rights, New York, 16 December 1966, UNTS, Vol. 999, p. 171 (hereinafter ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS No. 5 (hereinafter ECHR); American Convention of Human Rights, San José, 22 November 1969, OAS Treaty Series, No. 36 (hereinafter ACHR); United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, New York, 10 December 1984, UNTS, Vol. 1465, 85 (hereinafter CAT).

5 International Committee of the Red Cross, "ICRC reactions to the Schlesinger Panel Report", 8 September 2004, para. I (A), available at <http://www.icrc.org> (last visited 10 February 2005).

6 See the English Court of Appeal in *R (on the application of Ferroz Abbasi and another)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, which expressed its concern (at para. 64) as to the manner in which the applicant was detained at Guantánamo Bay, noting that "in apparent contravention of fundamental principles recognised by [US and English] jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black-hole'". See also Johan Steyn, "Guantánamo Bay: The legal black hole" (the 27th FA Mann Lecture, 25 November 2003), reprinted in *International and Comparative Law Quarterly*, Vol. 53, 2004, p. 1.

of the article the applicability of the rules of IHL and international human rights law to persons detained abroad during the "war on terror" is then discussed, juxtaposing the positions adopted in that regard by the States principally involved in extraterritorial detentions. A short analysis of the nature of the "war on terror" is followed by sub-sections examining the applicability of IHL to those captured during the armed conflicts in Afghanistan and Iraq, the question of the continued applicability of human rights law in situations of armed conflict, the principles relating to the extraterritorial application of human rights law, and the principle of *non-refoulement*. In the final section a brief survey is made of recent developments, which appear to show an incipient reassertion of the traditional understanding that the protections of IHL and/or international human rights law apply to all persons detained by the State, wherever they are held.

The focus is on the applicability of the two potentially relevant branches of law; there is consequently no detailed analysis of the content of the substantive protections of international human rights law and IHL, although reference is necessarily made to those rules in passing.[7]

The phenomenon of extraterritorial detentions in the "war on terror"

As a result of US military and security operations since the beginning of hostilities in Afghanistan and Iraq, a cumulative total of 50,000 individuals have been in the custody of US forces.[8]

Thousands of people were taken prisoner by Coalition forces during the conflict in Afghanistan. They were initially detained in the custody of Coalition forces in Afghanistan or on US navy vessels in the region. Since then, the large majority of them have been handed over to the new Afghani authorities. However, some are still held in detention facilities run by Coalition forces and located within Afghanistan and Pakistan.[9]

In addition, since early 2002 the United States has transferred hundreds of individuals suspected to be members of al Qaeda or the Taliban to the American base at Guantánamo Bay. As indicated by senior officials of the US Department of Defense, detainees were transferred to Guantánamo because they were either deemed to have "significant intelligence value", or were thought to

7 For a more detailed examination of substantive guarantees, see S. Borelli, "The treatment of terrorist suspects captured abroad: Human rights and humanitarian law" in A. Bianchi (ed.), *Enforcing International Law Norms against International Terrorism*, Hart Publishing, Oxford, 2004, p. 39.

8 "Final report of the independent panel to review DoD detention operations", 24 August 2004, available at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>, p. 11 (last visited 10 February 2005).

9 See Amnesty International, *Report 2004*, "United States of America", available at <www.amnesty.org>; see also Human Rights First, "Ending secret detentions", June 2004, pp. 3-4 available at <www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf>, (last visited 10 February 2005), listing a large number of disclosed and suspected facilities both in Afghanistan and elsewhere. A recent report from an independent human rights organization stated that, in addition to the notorious situation of detentions at Guantánamo Bay, "the United States is also believed to be holding detainees at some 39 other overseas prisons, in Afghanistan, Iraq, and elsewhere": see Human Rights Watch, "The United States' 'disappeared'. The CIA's long-term 'ghost detainees'", Briefing Paper, October 2004, p. 4.

pose "a continuing and significant threat" to the United States; "Those select few make their way to Guantánamo for development of their intelligence value."[10]

Similarly, according to official sources more than eight thousand people were held by US forces at the end of October 2004 within Iraq itself.[11] Immediately after the end of the "principal operations" there in May 2003,[12] the US set up a network of prisons and detention facilities in Iraq where individuals apprehended during the military operations are held and interrogated.[13] While most of those taken prisoner during the conflicts in Afghanistan and Iraq are in the custody of the United States, a smaller number have been detained by other Coalition forces.[14]

The number of people in detention abroad as part of the "war on terror", however, is not limited to those who have been taken prisoner during the US-led military operations in Afghanistan and during the war in Iraq and subsequent military occupation by Coalition forces. Since 11 September 2001, others have been arrested and detained in law enforcement operations carried out worldwide by the States engaged in the fight against international terrorism.[15] Those captured by the US have in some cases been handed over to the competent authorities of the territorial State concerned; in numerous cases, however, they have been transferred to Guantánamo Bay or to other detention facilities in undisclosed locations outside the territory of the United States.[16]

10 See "Press briefing by White House Counsel Judge Alberto Gonzales …", Office of the Press Secretary of the White House, 22 June 2004, available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (last visited 10 February 2005). Since 11 January 2002, when the first group of prisoners was transferred, more than 750 people have been detained in the US naval base at Guantánamo Bay.

11 See B. Graham, "Offensives create surge of detainees", *Washington Post*, 27 November 2004.

12 See "Remarks by the President from the USS Abraham Lincoln…", 1 May 2003, available at <www.whitehouse.gov> (last visited 10 February 2005).

13 See Human Rights Watch, "Iraq: Background on US detention facilities in Iraq", 7 May 2004, available at <http://hrw.org/english/docs/2004/05/07/iraq8560.htm>. The report lists ten major facilities and "a number of other detention facilities located in US military compounds, used as temporary facilities for initial or secondary interrogation". See also Human Rights First, "Ending secret detentions", *op. cit.* (note 9).

14 During the recent examination of the UK report before the Committee against Torture, the UK delegation described detention operations carried out by the UK in Iraq and in Afghanistan as follows: "Initially in Iraq individuals detained by British Forces were housed in the US detention facility at camp Bucca. (…) Since 15 December 2003, British held internees have been housed in the UK-run Divisional Temporary Facility at Shaibah in Southern Iraq. This is the only detention facility in Iraq and houses all British held internees"; "Although UK internees at one time numbered in the hundreds we have regularly reviewed their cases and released individuals that no longer pose a threat to us. As at 14 November 2004, there were only 10 internees held at Shaibah"; "In Afghanistan we have one small temporary holding facility at Camp Souter in Kabul which is currently empty. This facility has been used on less than fifteen occasions since its construction." Opening address, 17 November 2004, available at <http://www.ohchr.org/english/bodies/cat/docs/UKopening.pdf>, paras. 93; 96-97 (last visited 10 February 2005).

15 At the end of January 2003, in his Address on the State of the Union, the US President declared that "more than 3,000 suspected terrorists have been arrested in many countries. Many others have met a different fate. Put it this way, they're no longer a problem to the United States and our friends and allies." See G.W. Bush, "State of the Union Address", 28 January 2003, available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> (last visited 10 February 2005).

16 According to news reports, shortly after the attacks of 11 September the President of the United States signed a secret order authorizing the CIA to set up a network of secret detention and interrogation centres outside the United States where high value prisoners could be subjected to interrogation tactics which

Quite apart from concerns about the treatment and the conditions of detention of individuals detained abroad by the US military or law enforcement agencies of the United States, more serious misgivings stem from the persistent reports of transferrals of individuals characterized as terrorist suspects in the custody of the United States who are "unresponsive to interrogations" to foreign countries for further questioning. While in some cases the individual transferred was originally found on the territory of the United States,[17] a number of terrorist suspects captured by US agents operating on the territory of a third State have been transferred directly to other countries, through rendition procedures that fall short of the minimum standards set forth by applicable international extradition procedures.[18] Several of the countries receiving the suspects handed over have a particularly negative human rights record and, in particular, a history of using torture and other unlawful methods of interrogation.[19] Moreover, there appear to have been a number of irregular renditions by States to US officials outside the United States, who have then transferred the person or persons concerned to third States.[20] Finally, the most disturbing cases involve individuals who have "disappeared" after being captured by or handed over to US forces and whose whereabouts are totally unknown.[21]

With regard to the US, it seems clear that the choice of detaining individuals abroad as part of the "war on terror" is based, at least in part, on the assumption that by keeping them outside national territory, the military or the other agencies will not be restricted by standards of national (and international) legal protection in the same way as if they were held on national territory. This much is evident from a number of internal memoranda providing legal advice

would be prohibited under US law. The US government negotiated "status of forces" agreements with several foreign governments allowing the US to set up CIA-run interrogation facilities and granting immunity to US personnel and private contractors; see J. Barry, M. Hirsh and M. Isikoff, "The roots of torture", *Newsweek*, 24 May 2004; D. Priest and J. Stephens, "Secret world of US interrogation: Long history of tactics in overseas prisons is coming to light", *Washington Post*, 11 May 2004. See also D. Priest and S. Higham "At Guantánamo, a prison within a prison", *Washington Post*, 17 December 2004: "The CIA is believed to be holding about three dozen al Qaeda leaders in undisclosed locations (…) CIA detention facilities have been located on an off-limits corner of the Bagram airbase in Afghanistan, on ships at sea and on Britain's Diego Garcia island in the Indian Ocean", in addition to a separate section at Guantánamo Bay.

17 See e.g. D. Priest, "Top justice aide approved sending suspect to Syria", *Washington Post*, 19 November 2003, reporting the case of a Syrian-born Canadian citizen who was detained whilst making a connection at a US airport, and transferred via Jordan to Syria, where he alleges he was tortured.

18 See D. Priest and B. Gellman, "US decries abuse but defends interrogations: Stress and duress tactics used on terrorism suspects held in secret overseas facilities", *Washington Post*, 26 December 2002; see also Amnesty International, *op. cit*. (note 9).

19 These countries include e.g. Egypt, Syria, Jordan, Saudi Arabia and Morocco. See R. Chandrasekaran and P. Finn, "US behind secret transfer of terror suspects", *Washington Post*, 11 March 2002.

20 See e.g. C. Whitlock, "A secret deportation of terror suspects", *Washington Post*, 25 July 2004, describing the rendition of two individuals suspected of links to al Qaeda who were arrested in Sweden, and then irregularly transferred into the custody of CIA agents, and thence to Egypt, where it is suspected that they were tortured. See also D. van Natta and S. Mekhennet, "German's claim of kidnapping brings investigation of US link", *New York Times*, 9 January 2005, describing the alleged arrest and detention of a German citizen in Macedonia who was then handed over to US agents and taken to Afghanistan for interrogation, where he alleges that he was tortured.

21 See Human Rights Watch, *loc. cit*. (note 9). See also Priest and Higham, *op. cit*. (note 16).

to the Bush administration, which has consistently attempted to argue either that the United States is not bound by certain obligations, or that certain international obligations are simply not applicable to the new paradigm of the "war on terror", or that the obligations in question are not applicable to agents of the United States when acting abroad.[22]

The international legal framework

Preliminary considerations: The multifaceted nature of the "war on terror"

Any attempt to clarify the rules applicable to persons detained during the "war on terror" must start by recognizing the multifaceted nature of that "war."[23]

However appealing it is to the mass media or as a rhetorical device used for the purposes of political discourse, the concept of a "war on terror" — i.e. an armed conflict[24] waged against a loosely organized transnational terrorist network — does not stand up when analysed from the viewpoint of international law.[25]

22 The principal motivation for transferring prisoners to Guantánamo Bay was apparently that it was "the legal equivalent of outer space"; see Barry, Hirsh and Isikoff, *op. cit.* (note 16) (quoting an administration official). An internal memorandum dated 28 December 2001 from the Office of the Legal Counsel of the Justice Department expressed the view that the US domestic courts had no jurisdiction to review the legality of detention of prisoners held at Guantánamo Bay, or to hear complaints relating to their ill-treatment (*ibid.*). There have also been news reports to the effect that other unreleased memoranda exist which advised that if "government officials (...) are contemplating procedures that may put them in violation of American statutes that prohibit torture, degrading treatment or the Geneva Conventions, they will not be responsible if it can be argued that the detainees are formally in the custody of another country." The apparent basis for this advice was that "it would be the responsibility of the other country": see J. Risen, D. Johnston and N.A. Lewis, "Harsh CIA methods cited in top al Qaeda interrogations", *New York Times*, 13 May 2004.

23 The question of the legal character of the "war on terror" has been the object of much debate in the academic community: see e.g. J. Fitzpatrick, "Jurisdiction of military commissions and the ambiguous war on terrorism", *American Journal of International Law*, Vol. 96, 2002, p. 345, in particular pp. 346-350; C. D. Greenwood, "International law and the 'war against terrorism'", *International Affairs*, Vol. 78, 2002, p. 301; G. Abi-Saab, "Introduction: The proper role of international law in combating terrorism" in A. Bianchi (ed.), *Enforcing International Law Norms Against International Terrorism*, Hart Publishing, Oxford, 2004, p. xiii.

24 The concept of "war" has been abandoned for some time in the context of IHL, being replaced by the concept of "armed conflict", whether internal or international. See Article 2 common to the Geneva Conventions, and C.D. Greenwood, "The concept of war in modern international law", *International and Comparative Law Quarterly*, Vol. 36, 1987, p. 283.

25 The renewed efforts against international terrorism which started after 9/11 cannot be characterized as a whole as an armed conflict within the meaning that contemporary international law gives to that concept: the transnational nature of the operations carried out in the context of the global "war on terror", coupled with the fact that an international coalition is currently involved in those operations, directly excludes the possibility of qualifying that "war" as an internal armed conflict. Nor can it be characterized as an international armed conflict, since it is generally accepted that international law does not recognize the possibility of an international armed conflict arising between a State (or group of States) and a private non-State organization. see e.g. Greenwood, *op. cit.* (note 23), and G. Abi-Saab, *op. cit.* (note 23), p. xvi: "'War' or 'armed conflict', in the sense of international law, necessarily involves internationally recognisable entities which are capable of being territorially defined…". See also A. Cassese "Terrorism is also disrupting some crucial legal categories of international law ", *European Journal of International Law*, Vol. 12, 2001, p. 993.

It is nonetheless indisputable that within the wider context of the "war on terror", two international armed conflicts *stricto sensu* have taken place, namely the conflicts in Afghanistan and Iraq.[26]

To the minds of those who invoke that notion, however, the "war on terror" extends far beyond the conflicts in Afghanistan and Iraq to encompass all the anti-terror operations which have taken place since September 2001. Whilst a large proportion of those operations have been carried out within the territory of the States involved and by agents of those States, several have had a transnational character and have seen the involvement of law enforcement agencies and military forces of numerous States. From the perspective of international law, the latter operations are not part of any "war" or of any armed conflict, and are to be considered as law enforcement operations on an international scale against a transnational criminal organization.[27]

A necessary distinction has therefore to be drawn between captures and detentions which took place in the context of an armed conflict *stricto sensu*, i.e. during the conflicts in Afghanistan and Iraq and the subsequent military occupation, and arrests and detention carried out in the context of law enforcement operations.

Despite different views expressed by some of the protagonists, the rules of IHL regulating international armed conflict (and military occupation) were applicable in full to the conflicts in Iraq and Afghanistan.[28] Moreover, as will be discussed in more detail below, certain rules of international human rights law were and remain applicable to individuals held in that context.

Finally, as regards the law enforcement operations outside the two armed conflicts, although IHL does not apply to such operations,[29] the international law of human rights is fully applicable.[30]

26 In relation to the conflict in Afghanistan, see Borelli, *op. cit.* (note 7), pp. 40-41. Note, however, that not all commentators characterize the conflict in Afghanistan as international; some have referred to it as an "internationalized" armed conflict; see A. Roberts, "Counter-terrorism, armed force and the laws of war", *Survival*, Vol. 44, 2002, p. 7. On that concept see H-P. Gasser, "Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea and Lebanon", *American University Law Review*, Vol. 33, No. 1, Fall 1983, pp. 145-61, and J.G. Stewart, "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict", *International Review of the Red Cross*, Vol. 85, 2003, p. 313.

27 Compare C.D. Greenwood, "The law of war (international humanitarian law), in M.D. Evans (ed.) *International Law*, Oxford University Press, Oxford, 2003, p. 793, who speaks of "an underground terrorist movement whose recourse to violence is criminal".

28 In this regard it may be noted that despite continued references to the "war on terror", there are now no ongoing purely international armed conflicts: that in Afghanistan has ended (although no formal declaration to this effect was ever made); similarly major combat operations in Iraq were declared to have ended on 1 May 2003, and the occupation ended when authority was formally transferred to the Iraqi Interim Government on 28 June 2004. See *op. cit.* (note 12) and Council Resolution 1546 (2004). Note also that prisoners of war must be released "without delay" upon the close of active hostilities (GC III, Art. 118(1)) unless they have been indicted for criminal offences (Art. 119(5)). Similarly, protected persons under GC IV who have been interned during the conflict should be released as soon as possible after the close of hostilities (Art. 133); however, those who continue to be detained after the end of the armed conflict retain the protections of GC IV until their release (GC IV, Art. 6(4)).

29 Although the protections of individuals under IHL are inapplicable, certain rights given to States (e.g. to detain without charge or intern until the end of hostilities) also are not applicable.

30 Subject to the possibility of derogation in accordance with the terms of the instrument in question. See below, "Applicability of international human rights law during armed conflict or states of emergency".

Detention in the context of armed conflict/military occupation: applicability of the protections of international humanitarian law

Although at the start of the two armed conflicts in Afghanistan and Iraq, all States involved were party to the Geneva Conventions,[31] the main Coalition States have adopted very different positions as to the applicability of the protections contained therein. While the United Kingdom did not dispute the overall applicability of the Geneva Conventions to the conflicts in Afghanistan and Iraq,[32] the US has taken a much more controversial stance, in particular with respect to the conflict in Afghanistan, based on the peculiar assumption that the military operations in Afghanistan were carried out in two different "wars".

The applicability of the Geneva Conventions to the first "war", the one between the Coalition forces and the Taliban, was not disputed.[33] However, the US approach with regard to the status of persons apprehended during the said conflict has not been consistent with that position, and has in effect divested the formal recognition of the Conventions' applicability of any practical significance: on 7 February 2002 the US declared that, although in principle the Geneva Conventions applied to members of the Taliban, Taliban soldiers taken prisoner in Afghanistan could not be considered prisoners of war under the Third Geneva Convention, as they were "unlawful combatants" in that they did not satisfy the requirements of Article 4 thereof.[34]

With respect to the other "war" fought on Afghan territory, that against al Qaeda, the administration's position was that "none of the provisions of Geneva [sic] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva [sic],"[35] consequently, members of al Qaeda could not qualify as prisoners of war.[36] According to the US administration, all persons captured during the conflict in Afghanistan were therefore "unlawful combatants"[37] who did not "have any rights under the Geneva Convention [sic]."[38]

31 For the status of ratification of the Geneva Conventions, see <www.icrc.org>.

32 Although it takes the view that the Conventions ceased to apply to Iraq at the moment when authority in Iraq was transferred to the Interim Government on 28 June 2004; in particular, see the written answer provided by Mr. Hoon, 1 July 2004, 423 HC Deb. (2003-2004), 419w.

33 George W. Bush, Memorandum on 'Humane treatment of Taliban and al-Qaeda detainees', 7 February 2002, para. 2(b); available at <http://pegc.no-ip.info/archive/White_House/bush_memo_20020207_ed.pdf>.

34 *Ibid*., para. 2 (d).

35 *Ibid*, para. 2 (a).

36 *Ibid*, para. 2 (d). See also A. Gonzales, "Decision reapplication of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban, Memorandum for the President", 25 January 2002, available at <http://pegc.no-ip.info/archive/White_House/gonzales_memo_20020125.pdf>.

37 In current US military manuals two terms with apparently identical meaning, "unlawful combatants" and "illegal combatants", are used to refer to those who are viewed as not being members of the armed forces of a party to the conflict and not having the right to engage in hostilities against an opposing party. US Army, *Operational Law Handbook*, JA 422, pp. 18-19; and US Navy, *Commander's Handbook of the Law of Naval Operations*, NWP 1-14M, paragraph 12.7.1.

38 Secretary of Defense, News Briefing, 11 January 2002, available at <http://www.defenselink.mil/news/Jan2002/briefings.html>. (last visited 10 February 2005).

A different approach was taken by the US vis-à-vis persons captured during the conflict in Iraq and the subsequent occupation. From the early days of the conflict, the United States recognized that the Geneva Conventions applied comprehensively to individuals captured in the conflict in Iraq.[39]

Recent evidence indicates a shift in the position of the United States: a draft legal opinion produced by the Department of Justice in March 2004[40] expressed the view that whilst Iraqi citizens in the hands of Coalition forces are to be considered POWs, some non-Iraqi prisoners captured by American forces in Iraq are not entitled to the protections of the Geneva Conventions and can therefore be removed from the occupied territory and transferred abroad for interrogation, and further that detained Iraqi citizens could be removed from Iraq for "a brief but not indefinite period, to facilitate interrogation". The conclusions of that draft were adopted by the administration.[41]

No specific statements appear to have been made with regard to persons captured abroad outside the conflicts in Iraq and Afghanistan, as a result of US or foreign law enforcement operations. It is to be inferred, however, that the US position is the same as that adopted towards members of al Qaeda captured in Afghanistan and that, although they are alleged to have been captured in the context of a "war", the protections of the Geneva Conventions are not applicable to them.

The position of the US is in conflict with the generally accepted principles relative to the application of IHL. The official commentary to the Geneva Conventions posits that there is a "general principle which is embodied in all four Geneva Conventions of 1949", namely that during an armed conflict or a military occupation:

"Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third

39 See e.g. Press briefing by Gonzales, Haynes, Dell'Orto and Alexander, 22 June 2004, available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (last visited 10 February 2005). The position adopted was that "it was automatic that Geneva would apply" to the conflict, since it was a "traditional war", "a conflict between two states that are parties to the Geneva Conventions" (*ibid.*). In a statement made in April 2003, the US government gave assurances that it intended to comply with Article 5 of GC III by treating all belligerents captured in Iraq as prisoners of war unless and until a competent tribunal determined that they were not entitled to POW status: see e.g. "Briefing on Geneva Convention, EPW and War Crimes", 7 April 2003, available at <www.defenselink.mil/transcripts/2003/t04072003_t407genv.html>.

40 See J. Goldsmith, Assistant Attorney General, "(Draft) memorandum to Alberto R. Gonzales, Counsel to the President, re: Possibility of relocating certain 'protected persons' from occupied Iraq", 19 March 2004, available at <http://pegc.no-ip.info/archive/DOJ/20040319_goldsmith_memo.pdf>. (last visited 10 February 2005). An earlier memorandum entitled "The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations" (22 March 2002) has not been released and its full contents are not known.

41 See Senate Judiciary Committee confirmation hearing on the nomination of Alberto R. Gonzales to be Attorney-General, 6 January 2005, transcript available at <www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html> (last visited 10 February 2005). For earlier reports of application of the policy, see D. Jehl, "Prisoners: US action bars right of some captured in Iraq", *New York Times*, 26 October 2004; D. Priest, "Memo lets CIA take detainees out of Iraq", *Washington Post*, 23 October 2004, reporting that "as many as a dozen detainees [had been transferred] out of Iraq in the last six months".

Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no 'intermediate status'; nobody in enemy hands can be outside the law."[42]

As long as this interpretation is accepted, the answer to the question "which rules apply to individuals captured during the wars in Iraq and Afghanistan?" is relatively straightforward: every person taken prisoner during those conflicts and the occupation of Iraq is entitled to some degree of protection under the Geneva system, albeit the protection afforded differs in extent depending on whether the person concerned is a prisoner of war or a civilian.

In particular, as regards individuals belonging to the regular armed forces of the adverse party, the general principle is that any member of the armed forces of a party to a conflict is a combatant, and any combatant captured by the adverse party is a prisoner of war. Article 4A(1) of the Third Geneva Convention provides that captured "members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces", are prisoners of war, while under Article 4A(2) "members of other militias and members of other volunteer corps" who have fallen into the hands of the enemy are POWs if they (a) are commanded by a person responsible for his subordinates, (b) have a fixed distinctive sign, (c) carry arms openly, and (d) conduct their operations in accordance with the laws of war. Art. 4A(3) further specifies that members of the armed forces of the adverse party have to be considered prisoners of war, regardless of whether the party to which they profess allegiance has been recognized by the detaining power into whose hands they have fallen.

It is important to note that, as is clear from the structure and internal logic of the provision, the above-mentioned conditions in Article 4A(2) apply only to persons belonging to "other militias" and "voluntary groups" and not to those belonging to other categories of protected persons under Article 4A. Accordingly, only members of "other militias" under Article 4A(2) can be lawfully denied the status of prisoners of war if they do not fulfil one of the said conditions.[43]

The members of the Taliban army captured during the war in Afghanistan indisputably belonged to the category outlined in Article 4A(3), in that they were "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power". The position of the US seems, on the contrary, to be based on the assumption that combatants under Article 4A(3) of the Third Geneva Convention must fulfil the conditions set forth in Article 4A(2) in order to enjoy POW status.[44] Even conceding,

42 O. Uhler and H. Coursier (eds.), *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1950, Commentary to Art. 4, p. 51.

43 Note however the evolution of the conditions for qualification as a combatant contained in P I, Art. 44 (3).

44 According to the US authorities, the justification for the decision to deny the status of prisoners of war to those individuals was that "The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda"; A. Fleischer, "Special White House announcement re: Application of Geneva Conventions in Afghanistan", 7 February 2002. See also "White House Fact Sheet: Status

for the sake of argument, that the conditions relating to what could be termed "voluntary militias" in Article 4A(2) apply to other categories of combatants, it is clear from the text of Article 4 that in any case, in order to deprive a prisoner of his POW status, it is necessary to prove that *the individual personally* has failed to respect the laws of war. The general determination that no Taliban prisoner is entitled to POW status because of the Taliban's "alliance" with a terrorist organization is thus based on a misinterpretation of Article 4.[45]

As for members of al Qaeda captured in Afghanistan, they were not "members of the armed forces" of one of the belligerents. They could arguably fall into the second category outlined in Article 4A, in that they constituted a "voluntary militia", but as such they, unlike the Taliban, would have had to fulfil the conditions set out in Article 4A(2) in order to be considered prisoners of war.

Whatever the questions of categorization, no individual status determinations have been made by any "competent tribunal."[46] Under Article 5 of the Third Geneva Convention, if "any doubt arise[s]" as to whether enemy combatants meet the criteria for POW status, the detaining power must grant detainees "the protection of the present Convention until such time as their status has been determined by a competent tribunal." Moreover, Article 5 requires not only that the status of a combatant who falls into the hands of the enemy be determined by a competent tribunal, but also that it be assessed on a case-by-case basis. Generalized determinations relating to the status of a group of detainees or of a whole category of enemy combatants therefore do not comply with the requirement of Article 5, in particular when such a determination is made by the executive.

Therefore, al Qaeda members captured in the theatre of military operations while fighting alongside the armed forces of a belligerent in the conflict should have been considered POWs until their status had been determined by a competent tribunal.[47] But even if a determination were made that a particular individual is not entitled to POW status, he or she would still enjoy some degree of protection under the Geneva system. In particular, captured enemy

of detainees at Guantánamo", 7 February 2002, both available at <www.whitehouse.gov> (last visited 10 February 2005). For criticism, see G.H. Aldrich, "The Taliban, al Qaeda, and the determination of illegal combatants", *American Journal of International Law,* Vol. 96, 2002, p. 894; or see R. Wedgwood, "Al Qaeda, terrorism, and military commissions", *ibid*., p. 335, arguing that "these 'material characteristics' [listed in Art. 4Ab] are prerequisite to even qualifying as 'armed forces' and 'regular armed forces'".

45 As noted in this respect by one commentator, "[p]roviding sanctuary to Al Qaeda and sympathizing with it are wrongs, but they are not the same as failing to conduct their own military operations in accordance with the laws of war." Aldrich, op. cit. (note 44), p. 895. See also R.K. Goldman and B.D. Tittemore, "Unprivileged combatants and the hostilities in Afghanistan: Their status and rights under international humanitarian and human rights law", ASIL *Task Force on Terrorism Paper*, December 2002; available at <www.asil.org> (last visited 10 February 2005), pp. 8-14; or see Wedgwood, *op. cit*. (note 44), p. 335.

46 Note that the Combatant Status Review Tribunals established by the US Department of Defense in response to the decision of the Supreme Court in *Hamdi* v. *Rumsfeld*, 124 S.Ct. 2633 (2004) in order to decide whether the detainees qualify as "enemy combatants", and consisting of three "neutral officers"; see "Order Establishing Combatant Status Review Tribunals", 7 July 2004, available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (last visited 10 February 2005), are not sufficient for these purposes, as recognized in *Hamdan* v. *Rumsfeld*, 8 November 2004 (Memorandum Opinion) (D.Ct., D.C.) (available at <www.findlaw.com>), pp.17-19.

47 To this effect, see the decision in *Hamdan* v. *Rumsfeld*, op. cit. (note 46).

combatants who do not qualify for POW status would generally still qualify as "protected persons" under the Fourth Geneva Convention.[48] The category of "protected persons" under that Convention includes not only persons not taking part in the hostilities, but also the so-called "unprivileged belligerents,"[49] i.e. individuals engaging in belligerent acts but who are determined by a competent tribunal not to be entitled to POW status under Article 4 of the Third Geneva Convention. The main consequence of the denial of POW status is that such individuals do not enjoy "combatant privilege" and may therefore be prosecuted for the mere fact of having engaged in combat.[50] On the other hand, nationals of the adverse party who are not entitled to POW status and who are therefore "protected persons" under the Fourth Geneva Convention enjoy certain protections not afforded to POWs, including in particular the absolute prohibition of deportation from occupied territory.[51]

However, the situation is less clear with respect to members of al Qaeda or other terrorist groups captured in Afghanistan or Iraq, who do not qualify as POWs under Article 4A of the Third Geneva Convention and are not nationals of the State in which they are captured. The applicability of the Fourth Geneva Convention to those individuals depends on their nationality; Article 4(2) thereof excludes from the category of protected persons:

"Nationals of a State which is not bound by the Convention (…) [n]ationals of a neutral State and nationals of a co-belligerent State (…) while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."[52]

Accordingly, those individuals who are captured on the battlefield and do not qualify for POW status under Article 4 of the Third Geneva Convention and are nationals of States with which the detaining power has normal diplomatic relations are arguably not protected under the Fourth Geneva Convention.[53]

48 Art. 4, defining the scope of application of GC IV, states that it protects "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".

49 See, in general, R. Baxter, "So-called 'unprivileged belligerency': Spies, guerrillas and saboteurs", *British Yearbook of International Law*, Vol. 28, 1951, p. 323; see also K. Dörmann, "The legal situation of 'unlawful/unprivileged combatants' ", *International Review of the Red Cross*, Vol. 85, 2003, p. 45.

50 See e.g. Goldman and Tittemore, *op cit*. (note 45), pp. 4-5.

51 GC IV, Art. 49; note that violation of this prohibition is a "grave breach" under Art. 147 of GC IV. On the prohibition and the narrow exceptions to it, see H.-P. Gasser, "Protection of the civilian population", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, Oxford, 1999, p. 209, at 252-254.

52 Art. 4 also expressly excludes from the protection of the Convention those persons who, although in principle covered by the definition in the first paragraph, are entitled to protection under one of the other three Geneva Conventions (para. 4). In addition, nationals of a State which is not bound by the Convention are not protected by it (para. 2).

53 On this point see Dörmann, *op. cit*. (note 49), p. 49. The reasoning behind the exclusion can clearly be traced back to the assumption that those persons would be protected more efficiently by their national State through diplomatic protection. Although in the current political context such an assumption may not be particularly sound, the United Kingdom at least has been partially successful in securing the release of some of its citizens who were detained at Guantánamo Bay, while other governments have obtained the release of their nationals on condition that they prosecute them upon their return, or have obtained guarantees that the death penalty will not be sought for their citizens if put on trial.

Quite apart from the potential protection afforded by diplomatic protection, even those who are not protected persons under the Fourth Geneva Convention because of their nationality would in any case be protected by the "minimum yardstick"[54] of fair and humane treatment contained in Article 3 common to the Geneva Conventions, and would also be entitled to the protections contained in Article 75 of Protocol I.[55]

Protection of detainees under international human rights law

Some prisoners in the "war on terror", however, fall outside the protection of the Geneva system. The first and most numerous category is that of persons captured in the context of law enforcement operations carried out by the US and its allies throughout the world after 11 September 2001. As already discussed, those operations cannot be characterized as being part of an "armed conflict" within the meaning that international law attributes to that term. In this respect, the US assertion that "none of the provisions of Geneva [sic] apply to our conflict with al Qaeda,"[56] whilst being undeniably correct, is irrelevant: the Geneva Conventions do not apply for the very simple reason that the "war on terror" is not an armed conflict.

But quite apart from the question of the applicability of the rules of IHL, the fundamental rights of every individual detained in the context of the "war on terror", including those detained as a result of law enforcement operations outside the context of an armed conflict, are protected by international human rights law.

In relation to international human rights law, the United States has in the past consistently denied the extraterritorial application of human rights obligations.[57] It has also denied that human rights apply in time of armed conflict,[58] and has recently reiterated both of these positions with regard to the detainees at Guantánamo Bay.[59]

54 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America), Merits, ICJ Reports* 1986, p. 114, para. 218.

55 P I, Art. 75, applies to any person finding themselves in the power of a party to the conflict, insofar as they do not benefit from more favourable treatment under the Conventions or under the Protocol itself. Although the US is not a party to Protocol I, it has declared that it will consider itself bound by those rules contained in it which reflect customary international law, and has long recognized the customary nature of its Art. 75. See M. J. Matheson, "The United States position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions", *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 419 ff., in particular pp. 420 and 427; more recently, see W.H. Taft IV (Legal Adviser to the US Department of State), "The law of armed conflict after 9/11: Some salient features", *Yale Journal of International Law*, Vol. 28, 2003, pp. 321-322.

56 See above, text accompanying note 35.

57 See *op. cit*. (note 77).

58 See e.g. the position adopted by the US before the Inter-American Commission on Human Rights in *Coard et al.* v. *United States*, Case No. 10.951, Report No. 109/99, *Annual Report of the IACHR 1999*, para. 38.

59 See "Additional response of the United States to request for precautionary measures on behalf of the detainees in Guantánamo Bay", 15 July 2002, in relation to applicability during armed conflict, and see US Department of Defense, "Working group report on detainees interrogations in the global war on terrorism: Assessment of legal, historical, policy, and operational considerations", 6 March 2003, in relation to both points.

The UK government has taken the more nuanced position that the European Convention on Human Rights is not applicable to the actions of UK troops overseas. In particular, it denied the applicability of the Convention with regard to Iraq on the ground that that country is outside the territorial scope of the Convention, and that in any case British troops did not exercise the required degree of control.[60]

None of the arguments put forward as to the non-applicability of international human rights law is sufficient to justify the non-application of human rights norms to individuals detained abroad in the context of the "war on terror". In response to those arguments, the considerations affecting the extent to which international human rights law affords protection to individuals detained abroad will now be discussed.

The first question is that of the continued applicability of international human rights law during an armed conflict to individuals who are also protected by IHL. The second and more complex question concerns the extent to which a State is bound by its international human rights obligations when its agents perform acts outside its own territory, and therefore outside that State's normal sovereign jurisdiction (applicability *ratione loci*). Finally, the so-called principle of *non-refoulement* is also of clear relevance in relation to individuals held in detention in the "war on terror".

Applicability of international human rights law during armed conflict

Notwithstanding contrary views expressed by an increasingly limited number of States,[61] it is a well-established principle of contemporary international law that the applicability of international human rights law is not confined to times of peace, and that the existence of a state of armed conflict does not justify the suspension of fundamental human rights guarantees. This principle, affirmed by the ICJ in the *Nuclear Weapons* Advisory Opinion in 1996,[62] has recently been restated by the Court in the following terms:

"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."[63]

60 See e.g. the written answers provided by Mr. Straw on 17 May 2004, 421 HC Deb. (2003-2004), col. 674w-675w, and 19 May 2004, 421 HC Deb. (2003-2004), col. 1084w.

61 Including the United States (see note 77 below), and notably Israel (see note 80 below).

62 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996(I)*, p. 240, para. 25.

63 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004 (hereinafter "The Wall"), para. 106.

Similarly, in a case relating to the military operations conducted by US forces in Grenada, the Inter-American Commission, rejecting the US contention that "the matter was wholly and exclusively governed by the law of international armed conflict,"[64] held that:

"While international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a 'common nucleus of non-derogable rights and a common purpose of protecting human life and dignity', and there may be a substantial overlap in the application of these bodies of law."[65]

Although all human rights treaties of a general scope contain a provision that allows States to derogate from some of the guarantees contained in them to the extent strictly necessary to counter threats to the life of the State during times of national emergency or armed conflict,[66] there are a number of rights that can never be derogated from. The list of non-derogable rights varies from instrument to instrument. However, those such as the right not to be arbitrarily deprived of life, the right to respect for physical integrity, and the right not to be subjected to torture or cruel, inhuman or degrading treatment are universally recognized as non-derogable rights that States are required to respect, and to ensure respect for, in *all* circumstances.[67]

Besides the possibility of derogation in accordance with the terms of the instrument in question,[68] the exact content of the rights of individuals under international human rights law may differ during armed conflict owing to the simultaneous applicability of the *lex specialis* contained in the applicable rules of IHL. As observed by the ICJ in *Nuclear Weapons*, even the content of some non-derogable rights (in particular, the right to life) may be different in the context

64 *Coard, op. cit*. (note 58), para. 35.

65 *Ibid*., para. 39 (footnotes omitted). The principle of the continued applicability of human rights obligations in times of armed conflict had previously been recognized by the monitoring organs of the American Convention. See e.g. the Commission's decision in *Abella* v. *Argentina*, Case No. 11.137, Report No. 5/97, *Annual Report of the IACHR 1997*, paras. 158-161; IACHR, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102 doc. 9 rev. 1, 26 February 1999.

66 E.g. ECHR, Art. 15(1), and ACHR, Art. 27(1). Although the corresponding provision (Art. 4) of the ICCPR does not expressly mention "war" or "armed conflict", it is undisputed that the reference therein to "state of emergency" includes situations of armed conflict. See Human Rights Committee, *General Comment No. 29*, *States of Emergency* (*Article 4*), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 3; see also *General Comment* No. 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

67 The vast majority of these rights are effectively paralleled by the minimum standards of IHL. See e.g. Borelli, *op. cit*. (note 7).

68 In all human rights treaties, derogation is achieved through the lodging of a declaration or communication to that effect with the competent body, usually the depositary (see e.g. ECHR, Art. 15(3); ICCPR, Art. 4(3); ACHR, Art. 27(3)). Whilst some States involved in the "war on terror" have made the appropriate declarations, e.g. the derogations made by the UK in relation to Art. 5(1) of the ECHR and Art. 9(4) of the ICCPR (available at <www.conventions.coe.int> and <www.ohchr.org>, respectively) on 18 December 2001 with regard to detention of non-national terrorist suspects under the Anti-Terrorism, Crime and Security Act 2001), the US has made no such declaration in relation to any of the international human rights instruments by which it is bound.

of an armed conflict.[69] However, this issue is of little relevance to the question of detention, as the right to life retains its full force for persons who are not active combatants, given the parallel prohibition in IHL of arbitrary deprivation of life of individuals not taking an active part in the hostilities. Similarly, the applicability of IHL does not result in it operating as a *lex specialis* in relation to the prohibition of torture, given the parallel absolute prohibition contained in it.

Finally, in addition to the substantive rights expressly declared to be non-derogable, a number of procedural rights which are instrumental to the effective protection of non-derogable rights, must also be respected in all circumstances. Among them is the right to have access to domestic courts for violations of non-derogable rights, and the right to *habeas corpus*. Some fundamental aspects of the right to fair trial are also generally considered as non-derogable.[70] Again IHL, where applicable, may have an impact on the content of the non-derogable procedural rights protected under international human rights law, insofar as it provides for different rules. For instance, whether or not the trial of a POW was fair will be determined by the standards laid down in IHL, rather than by those laid down in international human rights law.[71]

The extraterritorial applicability of international human rights law

Most human rights treaties expressly require States Parties to ensure to all persons subject to their jurisdiction the free and full exercise of the rights and freedoms contained therein.[72]

For the purpose of application of international human rights law, the notion of "jurisdiction" assumes a meaning wider in scope than that normally attributed to it under other branches of international law.[73] When asked to determine whether a given act carried out extraterritorially by agents of the State constitutes an exercise of "jurisdiction" for the purposes of application of human rights obligations, the human rights monitoring bodies have indicated

69 *Nuclear Weapons, op. cit.* (note 62), p. 240, para. 25. See also *The Wall, op. cit.* (note 63), para. 106; Coard, *op. cit.* (note 58), para. 39; and Human Rights Committee, *General Comment No. 29, op. cit.* (note 66), para. 3.

70 For instance, the right to an independent and impartial tribunal and the presumption of innocence. See Human Rights Committee, *General Comment No. 29, op. cit.* (note 66), para. 16; also *Habeas Corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, Inter-Am.Ct.H.R., Series A, No. 8 (1987); *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, Inter-Am.Ct.H.R., Series A, No. 9 (1987).

71 See e.g., in relation to POWs, GC III, Arts. 99-107. In relation to persons who have taken part in hostilities, but are not entitled to POW status, see P I, Arts. 45(3) and 75.

72 E.g. ACHR, Art. 1(1), and ECHR, Art. 1. An exception to this pattern is Art. 2(1) of the ICCPR, whereby each State undertakes to ensure the rights contained in the Covenant to persons "within its territory and subject to its jurisdiction", which appears to impose a cumulative test. Such an interpretation has been firmly rejected by both the Human Rights Committee and the ICJ. See Human Rights Committee, *General Comment No. 31, op. cit.* (note 66), para. 10; *The Wall, op. cit.* (note 63), paras. 108-113, in particular para. 109.

73 See, in general, P. de Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Giappichelli, Turin, 2002.

that States are "bound to secure the (…) rights and freedoms of all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad,"[74] and that "in principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."[75] Whilst acknowledging the primarily territorial nature of each State's jurisdictional competence, human rights bodies have found that in "exceptional"[76] or "special"[77] circumstances the acts of States party to a humanitarian treaty which are performed outside their territory or which produce effects there may amount to exercise by them of their "jurisdiction" within the meaning of the jurisdictional provisions.

An analysis of the relevant case-law of both universal and regional human rights bodies shows that the "exceptional circumstances" justifying the extraterritorial application of human rights obligations may be roughly grouped into the following broad categories.

a) Exercise by the State of its authority and control over an area situated outside its national territory

A State may be held responsible under human rights law for conduct which, though performed outside its national territory, occurs in an area over which it exercises its authority and control. There are a number of situations in which the level of that control exercised by a State may be sufficient to render its human rights obligations applicable extraterritorially, including those relating to the treatment of persons in detention

A first such situation is undoubtedly that of military occupation.[78] In its Advisory Opinion on *The Wall* the ICJ observed that Israel, as the occupying power, had exercised its territorial jurisdiction over the occupied Palestinian

74 European Commission of Human Rights, *Cyprus* v. *Turkey*, Decision on Admissibility, 26 May 1975, reproduced in *European Human Rights Reports*, Vol. 4, 1982, p. 586, para. 8.

75 Coard, *op. cit.* (note 58), para. 37.

76 In relation to the ECHR, see e.g. the judgments of the Grand Chamber in *Loizidou* v. *Turkey*, *Merits*, ECHR Reports 1996-VI, para. 52, *Cyprus* v. *Turkey*, *Merits*, ECHR Reports 2001-IV, para. 77, *Banković* v. *Belgium and 16 Other Contracting States*, Decision on Admissibility, ECHR Reports 2001-XII, para. 59, and *Ilaşcu* v. *Moldova and Russia*, Judgment of 8 July 2004, para. 314. See most recently the decision of the Court in *Issa* v. *Turkey, Merits*, Judgment of 16 November 2004.

77 In relation to the ICCPR, see e.g. the Comment of the Committee on the Report of the United States, where the Committee stated that "… the view expressed by the government that the Covenant lacks extraterritorial reach under all circumstances (…) is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject matter jurisdiction of a State party even when outside that state territory"; UN Doc. CCPR/C/79/Add 50 (1995), para. 19. See also *General Comment No. 31, op. cit.* (note 66), and the decisions in the cases relating to the responsibility of Uruguay under the Covenant for violations committed by its agents on foreign territory, discussed below (text accompanying note 98).

78 The definition of occupation contained in Article 42 of the Hague Regulations respecting the Laws and Customs of War on Land (annex to Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, *Martens Nouveau*, Vol. 3, Series 3, p. 461, speaks in terms of whether the territory is "actually placed under the authority" of the occupying force, and "occupation" is expressly limited to those areas "where such authority has been established and can be exercised".

territories and was therefore required to respect its obligations under international human rights law with regard to every individual living within that area.[79] A similar approach has consistently been taken by the Human Rights Committee when called upon to comment on the applicability of the ICCPR to situations of military occupation.[80] Accordingly, the States which took part in the occupation of Iraq after the armed conflict were bound to respect their human rights obligations in relation to the areas under their control.

A second situation, in many ways similar to the one mentioned above, is where a State deploys its armed forces on foreign soil in response to an "invitation" by the territorial State or other entities exercising *de facto* control over the area in question. This would appear to be an appropriate characterization of the situation of the Coalition forces in both Afghanistan and Iraq after the restoration of power to the local authorities, with the result that their human rights obligations are fully applicable in relation to individuals detained by them in those States.

Whilst a level of control justifying the applicability of human rights obligations is inherent in the situation of military occupation, with the consequence that the State is held to exercise jurisdiction as if it were the territorial sovereign, in other situations of "military presence on foreign soil" the assessment of whether the State does in fact exercise "jurisdiction" has to be made on a case-by-case basis.

Within the European system, the Turkish military intervention in northern Cyprus in 1974 and the continuing presence of Turkish armed forces have given rise to a line of jurisprudence which is of obvious significance in determining whether a State party to the European Convention is to be deemed responsible for breaches occurring in military operations on foreign territory that fall short of occupation. The European Court has held that, for the purpose of determining whether in such circumstances the State is actually exercising its "jurisdiction", the characterization of the legality of military operations under the rules relating to the use of force and/or territorial integrity is completely irrelevant, since "[t]he obligation to secure, in such an area, the rights

79 *The Wall, op. cit*. (note 63), para. 111, in relation to the ICCPR. See also *ibid*., para. 112, in relation to the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, UNTS, Vol. 993, 3), and para. 113 in relation to the Convention on the Rights of the Child, New York, 20 November 1989, UNTS, Vol. 1577, 44.

80 See e.g. the Committee's Observations on Israel's initial report, in which the Committee stated its deep concern about the fact that "Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories", UN Doc. A/53/40 (1998), para. 306. The Committee reiterated its position when commenting on the latest Israeli report as follows: "… in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affects the enjoyment of rights enshrined in the Covenant and falls within the ambit of State responsibility of Israel under the principles of public international law"; UN Doc. CCPR/CO/78/ISR (2003), para. 11. Note also the comments made in 1991 when considering Iraq's third report, in which the Committee expressed its "particular concern" for the fact that the report did not address events in Kuwait after 2 August 1990, "given Iraq's clear responsibility under international law for the observance of human rights during its occupation of that country"; UN Doc. A/46/40 (1991), para. 652.

and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration."[81]

In addition, as regards the "degree" of control a State has to exercise over the area in question for its responsibility under the Convention to be engaged, the European Court has made clear that "it is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even *overall control* of the area may engage the responsibility of the Contracting Party concerned."[82]

In the case of overall control over an extraterritorial area the responsibility of the State "is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of [its] military and other support."[83] Furthermore, it appears that responsibility in these situations extends not only to violations of the negative duties not to infringe rights that are protected, but also the procedural "positive" duties which the European Court has derived from the Convention.[84]

A third situation in which the "extraterritorial" responsibility of a State may be engaged is where it exercises effective and exclusive control of a — normally relatively small — area outside its territory with the valid consent of the territorial State. Situations falling within this hypothesis are, for instance, those in which two States conclude an international agreement by virtue of which one of the parties acquires the right to maintain a military or other base on a portion of the other's territory. These may range from the quasi-permanent UK "sovereign" bases in Cyprus and the US naval base at Guantánamo Bay to less permanent agreements relating to the stationing of troops abroad. This category is of particular relevance for the present analysis, given that since 11 September 2001 the United States has set up military bases housing around sixty thousand troops in Afghanistan, Pakistan, Kyrgyzstan, Uzbekistan and Tajikistan, in addition to the pre-existing bases in Kuwait, Qatar, Turkey and Bulgaria. Also of importance is the US naval base on the British territory of Diego Garcia in the Indian Ocean.

All aspects of jurisdiction and authority over bases in host countries are generally spelled out in the agreements on the status of the base and what are

81 *Loizidou Merits, op. cit*. (note 76), para. 52 (citing *Loizidou* v. *Turkey*, *Preliminary Objections,* ECHR Series A, No. 310 (1995), para. 62).

82 *Ibid*., para. 56 (emphasis added).

83 *Ilaşcu, op. cit*. (note 76), para. 316 (referring to the passage from *Cyprus* v. *Turkey, op. cit*. (note 76), quoted below in note 84). Compare, however, the apparently more restrictive approach taken by the Court in *Banković*, *op. cit*. (note 76), para. 71.

84 See e.g. *Cyprus* v. *Turkey, Merits, op. cit*. (note 76), para. 77: "Having effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to *securing the entire range of substantive rights set out in the Convention and those additional Protocols* which she has ratified, and that violations of those rights are imputable to Turkey" (emphasis added), and *ibid*., paras. 131-136.

normally referred to as "status of forces agreements". Although the question of jurisdiction over the somewhat unusual US base at Guantánamo Bay has been considered by the Inter-American Commission,[85] no cases of violations at the more normal types of bases have come before the international human rights monitoring bodies. However, it may be conjectured that the extent to which responsibility attaches for acts at the respective base, and to which State, largely depends upon the amount of jurisdiction retained by the host State. As regards Guantánamo Bay, for instance, although in theory Cuba still retains ultimate sovereignty over the territory, the US exercises "exclusive control and jurisdiction,"[86] thus the performance of both positive and negative duties deriving from international human rights norms must necessarily be the responsibility of the US.[87] When the grants of jurisdiction to the visiting State are more limited, such as those where criminal jurisdiction over soldiers is reserved for the visiting State only for acts performed in an official capacity, the positive duties deriving from international instruments (e.g. the duty to carry out an effective investigation in connection with the right to life)[88] may remain at least to some extent incumbent upon the territorial State. But this will depend in every case on the particular violation complained of, and on the terms of the individual agreement with the host State.[89]

As for the ECHR, a limit to the extraterritorial scope of application of the Convention due to the exercise of overall control may arise from the regional nature of that instrument. The decision of the European Court in *Banković*[90] appeared to introduce a limit to the wide interpretation previously given to the term "jurisdiction" under the ECHR. In response to an argument by the applicants that the European Convention should apply to NATO bombing operations in Serbia in order to prevent a "regrettable vacuum in the Convention system of human rights' protection,"[91] the Court, having emphasized the "special character of the Convention as a constitutional instrument of *European* public order" and the "essentially regional vocation of the Convention system,"[92] responded that:

85 Inter-American Commission on Human Rights, *Precautionary Measures in Guantánamo Bay*, 12 May 2002, ILM, Vol. 41 (2002), 532.

86 Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, 16/23 February 1903, 6 Bevans 1113, Art. III. See also the supplemental agreement of 2 July/2 October 1903, 6 Bevans 1120; the lease was rendered perpetual by the Treaty on Relations with Cuba, Washington, 29 May 1934, 48 Stat 1682, Art. III.

87 See e.g. *Precautionary Measures in Guantánamo Bay, op. cit.* (note 85), where the Inter-American Commission granted precautionary measures on the basis that the detainees at Guantánamo Bay "remain wholly within the authority and control of the United States government", and affirmed that "determination of a state's responsibility for violations of the international human rights of a particular individual turns not on that 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" (*ibid.*, fn. 7).

88 See e.g. in relation to the positive duty deriving from ECHR, Art. 2, *McCann and Others* v. *United Kingdom*, ECHR, Series A, No. 324 (1995).

89 Even if responsibility due to control over the area is not established in such a case, it may still exist because of physical control over the person of the individual, as discussed in the following paragraphs.

90 *Banković*, *op. cit.* (note 76).

91 *Ibid.*, para. 79.

92 *Ibid.*, para. 80 (emphasis in original).

"The Convention is a multilateral treaty operating (…) in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. (…) The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."[93]

The natural reading of this passage is that it imposes a general spatial limit on the applicability of the Convention; the position of the UK with regard to the non-applicability of the ECHR to the actions of its forces in Iraq, mentioned above, is clearly based on this reasoning.

However, in the most recent case concerning jurisdiction, the Court appears to have reduced almost to vanishing point the importance of the limitation apparently introduced in *Banković*. In *Issa* v. *Turkey*,[94] a case brought by the relatives of Kurds resident in northern Iraq who were allegedly killed by members of the Turkish armed forces on Iraqi territory, the Court did not dispose of the case on the basis that the victims were outside the *espace juridique* of the Convention,[95] and indeed the reasoning of the Court does not appear to envisage that the notion of *espace juridique* would have been an obstacle to the responsibility of Turkey if sufficient proof of Turkish involvement had been produced. The Court held that:

"The Court does not exclude the possibility that, as a consequence of this military action, the Respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States."[96]

What the Court appears to be saying here is that, once it is established that a State exercises "overall control" over an area outside its territory, that area automatically is under the jurisdiction of the said State and consequently falls within the *espace juridique* of the Convention, regardless of its actual geographical position or the fact that it remains the territory of another State which is not a party to the Convention.

b) Extraterritorial action of State agents in situations short of overall control

An alternative way in which the "extraterritorial" responsibility of a State can be engaged is where its agents perform *ad hoc* operations in the territory of another State and exercise control over the person of an individual, but without exercising sufficient control over an area for the human rights obligations to be

93 *Ibid.*, para. 80.

94 *Issa Merits, op. cit.* (note 76).

95 Rather, the Court decided the case on the basis that at the relevant time, Turkey did not exercise "effective overall control" of the entire area of northern Iraq (*ibid.*, para. 75), and it was not satisfied to the required standard of proof that Turkish troops had conducted operations in the area in question (*ibid.*, para. 81).

96 *Ibid.*, para. 74.

applicable in accordance with the principles set out in the previous section. This is of obvious relevance as a fall-back argument for invoking the applicability of human rights norms to all situations where individuals are detained abroad in the custody of agents of a State, whatever the scale of that State's operations in the foreign territory.[97]

Under the ICCPR, the responsibility of a State for violations of protected rights committed by its agents in the territory of another State, whether or not this other State acquiesced in those actions, has been recognized by the Human Rights Committee, which has observed that:

"Article 2(1) of the Covenant places an obligation upon a State Party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State Party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. (…) 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."[98]

This principle has also been recognized, in a particularly wide formulation, by the European Commission of Human Rights:

"Authorised agents of a State not only remain under its jurisdiction when abroad, but bring any other person 'within the jurisdiction' of that State to the extent that they exercise authority over such persons. Insofar as the State's acts or omissions affect such persons, the responsibility of the State is engaged."[99]

It should be noted that, in this situation, the reason for application of the State's international human rights obligations is a recognition of the fact that during the operations in question its agents exercise a certain *de facto* control over the person of individuals, and that it is on this basis that the State's responsibility for infringements of individual rights by those agents is engaged.[100] However, unlike the situations described above, the fact that in these cases the control is exercised in a more or less limited, incidental and *ad hoc* manner

97 As for example in the particular instances briefly described above in note 20.

98 *Lopez Burgos* v. *Uruguay* (Comm. No. 52/1979), UN Doc. CCPR/C/13/D/52/1979 (1981), para. 12.3; *Celiberti de Casariego* v. *Uruguay* (Comm. No. 56/1979), UN Doc. CCPR/C/13/D/56/1979 (1981), para. 10.3. In relation to its jurisdiction to hear the complaints under the Optional Protocol, which also speaks of "individuals subject to its jurisdiction", the Committee held that "The reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' (…) is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred"; see *Lopez Burgos*, para. 12.2; *Celiberti de Casariego*, para. 10.2.

99 *Stocké* v. *Federal Republic of Germany*, ECHR Series A, No. 199, Opinion of the European Commission, p. 24, para. 166.

100 No attempt has been made to define the level of control sufficient to justify responsibility. It may be noted that all the cases in which *de facto* control has been found seem to have involved actual custody of the person in question; see e.g. *Öcalan* v. *Turkey, Merits*, 12 March 2003, para. 93 (NB: the case is currently before the Grand Chamber). It should also be noted that in *Öcalan* the Court did not appear to see any contradiction between its finding that the applicant was within the "jurisdiction" of Turkey even when in Kenya, and the "*espace juridique*" principle enunciated in *Banković*.

implies that the State is not required to fulfil the whole range of obligations under human rights law, but arguably only to respect its negative obligation not to infringe the rights of the individuals involved.[101]

The principle of non-refoulement

Quite apart from the situations mentioned in the previous section, where applicability of human rights law is premised on the fact that the State exercises a sufficient degree of control either over an area as a whole or over particular individuals, there is a further scenario in which a State may be considered responsible for a breach of its obligations under international human rights law, even when the actual violation of an individual's fundamental rights takes place outside its national territory and under the jurisdiction of a third State. In the words of the European Court of Human Rights, "[a] State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."[102]

The main corollary of this principle is that a State will violate its international obligations if it hands over a person to another State where there are reasonable grounds to believe that there is, in the formulation of the European Court, a "well-founded fear" or a "real risk" that he or she will suffer a violation of his or her fundamental rights in the receiving State.[103] In this regard, the Human Rights Committee has stated that:

"If a State Party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State Party itself may be in violation of the Covenant. This follows from the fact that a State Party's duty under Article 2 of the Covenant would be negated by the handing over a person to another State (whether a State Party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over."[104]

The list of fundamental rights whose potential violation precludes rendition includes at least the right not to be subjected to torture or cruel, inhuman

101 Note however, the decision of the English Court of Appeal in *Al Skeini, op. cit*. (note 124), where it was held that the fact that an individual had died in the custody of British forces in Iraq had the consequence that the UK was required to carry out an effective investigation into the circumstances of his death.

102 *Ilascu and Others* v. *Moldova and Russia*, judgment of 4 July 2004, para. 317 (citing *Soering* v. *United Kingdom* Series A, No. 161 (1989), paras. 88-91).

103 See *Soering, op. cit*. (note 102), para. 88; *Cruz Varas* v. *Sweden, Merits*, ECHR Series A, No. 201 (1991), paras. 75-76; see also *Vilvarajah and Others v. United Kingdom*, ECHR Series A, No. 215 (1991), paras. 107-108, 111. See, in general, G. Gilbert, *Aspects of Extradition Law*, Kluwer, Dordrecht, 1991, pp. 79-90; C. Van den Wyngaert, "Applying the European Convention of Human Rights to extradition: Opening Pandora's box?", *International and Comparative Law Quarterly*, Vol. 39, 1990, p. 757; C.J.R. Dugard and C. Van den Wyngaert, "Reconciling extradition with human rights", *American Journal of International Law*, Vol. 92, 1998, p. 187; S. Borelli, "The rendition of terrorist suspects to the United States: Human rights and the limits of international cooperation", in A. Bianchi (ed.), *Enforcing International Law Norms Against International Terrorism*, Hart Publishing, Oxford, 2004, p. 331.

104 *Kindler* v. *Canada* (Comm. No. 470/1991), UN Doc. CCPR/C/48/D/470/1991 (1993), para. 6.2.

or degrading treatment,[105] basic fair trial rights,[106] and the right to life and physical integrity.[107] The risk of being subjected to the death penalty has also in certain cases provided a bar to extradition.[108]

The principle that in some cases is referred to as the principle *of non-refoulement*[109] is expressly stated in several instruments for the protection of human rights[110] and is generally considered to be a rule of international customary law, binding on all States whether or not they have acceded to any of the treaties governing international refugee law and international human rights law. Although a number of treaties, including the ICCPR, the ACHR and the ECHR, do not contain corresponding express provisions, the monitoring bodies of such treaties have consistently recognized that States Parties would be acting in a manner incompatible with the underlying values of those treaties if they were to transfer in such circumstances an individual who is subject to their jurisdiction.[111] With respect to the ICCPR, the Human Rights Committee has 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, (…) either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[112]

105 CAT, Art. 3; and see *Mutombo* v. *Switzerland* (Comm. No. 13/1993), *Report of the Committee against Torture*, U.N. GAOR, 49th Sess., Supp. No. 44, Annex 5, at 45, U.N. Doc. A/49/44 (1994); *Khan* v. *Canada* (Comm. No. 15/1994), *Report of the Committee against Torture*, U.N. GAOR, 50th Sess., Supp. No. 44, Annex 5, at 46, U.N. Doc. A/49/44 (1994). The European Court of Human Rights has consistently held that expulsion or deportation is precluded "where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to [torture]" (see e.g. *Ahmed* v. *Austria*, *Merits*, ECHR Reports 1996-VI, para. 39), as well as other potential violations of Art. 3 of the European Convention: see *D.* v. *United Kingdom,* ECHR Reports 1997-III. The Human Rights Committee has also expanded the prohibition to cover some situations involving the death penalty, see e.g. *Ng* v. *Canada* (Comm. No. 469/1991), UN Doc. CCPR/C/49/D/469/1991 (1993), but also *Kindler* v. *Canada*, *op. cit*. (note 104).

106 See *Soering, op. cit*. (note 102), para. 113. See also Art. 3(f) of the UN Model Treaty on Extradition, which provides that extradition is barred if the person whose extradition is requested "has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, Article 14".

107 See e.g. the European Commission of Human Rights in *Dehwari* v. *Netherlands*, Report of the Commission of 29 October 1998, *European Human Rights Reports*, Vol. 29 (2000), 74, para. 61, and of the European Court in *Gonzalez* v. *Spain*, judgment of 29 June 1999, para. 4 (where the case failed on the facts, although the Court did not rule out the possibility of relying upon Art. 2 in this way).

108 In the European system, this is now an absolute prohibition: see Protocols 6 and 13 and *Öcalan Merits*, *op. cit*. (note 100), paras. 196 and 198. Within other systems for the protection of human rights, a similar prohibition has been derived from the prohibition of *refoulement* of individuals at risk of being subject to torture or cruel, inhuman or degrading treatment; see e.g. the decision of the Human Rights Committee in *Ng* v. *Canada, op. cit*. (note 105).

109 The principle originates in Article 33 of the Convention relating to the Status of Refugees, Geneva, 28 July 1951, UNTS, Vol. 189, p. 150.

110 See e.g. Article 3 of the CAT; Art. 33 of the Refugee Convention, *op. cit.* (note 109).

111 See e.g. *Soering, op. cit.* (note 102), paras. 88-91; *Ng* v. *Canada*, *op. cit*. (note 105).

112 Human Rights Committee, General Comment No. 31, *op. cit.* (note 66), para. 12.

Although this line of jurisprudence could be seen as an extensive interpretation of the concept of jurisdiction, the better view is that the recognition of the responsibility of the State involved in such cases is based simply on the recognition of a causal link between an act carried out by the State with respect to an individual within its jurisdiction and potential violation of that individual's fundamental rights committed by third States.[113]

This principle applies to every case in which an individual subject to the jurisdiction of the State (whether or not within its territory) is transferred from its jurisdiction. The formal characterization of the act through which the individual is actually transferred to the jurisdiction of another State is without relevance for the applicability of the principle of *non-refoulement*, as that principle applies equally to extradition, deportation, expulsion of illegal immigrants[114] and irregular renditions. Furthermore, the principle of *non-refoulement* applies to every person, whatever his or her past crimes or the danger he or she is perceived to pose to the State in the custody of which he or she is held.[115]

It should also be emphasized that the prohibition of *refoulement* not only prohibits States to surrender individuals under their jurisdiction to States where there is a substantial risk that they will be subjected to violations of their fundamental rights, but also prohibits their surrender to countries which are likely, in turn, to surrender them to States where their fundamental rights may be breached.[116]

Lastly, a State cannot avoid its human rights obligations when transferring individuals who are in its custody to another State, even if they are not and never have been held on its national territory. If the relevant test of "jurisdiction" for the purposes of human rights law is whether or not the individuals are "under the authority and control" of the detaining party, the principle logically applies also to the transfer of detainees from the custody of the Coalition forces to the local authorities in Iraq and Afghanistan. It is not to the point to argue, as the United Kingdom has done before the Committee against Torture, that the principle of *non-refoulement* in Article 3 of the CAT is not applicable to the transfer of suspects into the physical custody of the Iraqi or Afghan authorities "because the individuals in question are subject to the jurisdiction of either

113 See e.g. de Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo, op. cit*. (note 73), pp. 24-30.

114 See e.g. *Cruz Varas, op. cit*. (note 103), para. 70.

115 See e.g. in relation to a risk of torture: *Chahal* v. *United Kingdom, Merits*, ECHR Reports 1996-V, para. 80: "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration" and *Ahmed* v. *Austria, Merits*, *op. cit.* (note 105), para. 41.

116 This logical corollary of the principle of *non-refoulement* has been clearly recognized by the Committee against Torture in the following terms: "the phrase 'another State' in article 3 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" (Committee against Torture, *General Comment No. 1, Implementation of Article 3 of the Convention in the Context of Article 22* (1996), UN Doc. A/53/44, annex IX, para. 2). See also: *Mutombo* v. *Switzerland, op. cit.* (note 105), para. 10; *Korban* v. *Sweden* (Comm. No. 88/1997), UN Doc. CAT/C/21/D/88/1997 (1998), para. 7. See also Human Rights Committee, *General Comment No. 31, op. cit.* (note 66), para. 12 (quoted above, note 112).

Iraq or Afghanistan throughout. There is therefore no question of extradition or expulsion."[117]

As much is confirmed by the response of the Committee, which, having affirmed that "the Convention protections extend to all territories under the jurisdiction of a State Party and (…) this principle includes all areas under the *de facto* effective control of the State Party's authorities,"[118] rejected the United Kingdom's argument, recommending that it "should apply articles 2 and/or 3, as appropriate, to transfers of a detainee within a State Party's custody to the custody whether *de facto* or *de jure* of any other State."[119]

Recent developments: Reaffirmation of the applicable legal framework?

This brief analysis has set out the principles governing the applicability of the two bodies of law which provide protection for individuals detained during the "war on terror". It demonstrates that no matter where they are held, they are always entitled to some measure of protection under international human rights law and, depending on the context in which they were captured, also under IHL. A number of recent decisions, both international and, more importantly, domestic, indicate an incipient reaffirmation of the orthodox understanding of the applicability of the rules of IHL and international human rights law.

With regard to the status of individuals captured in Afghanistan, the distinction that the US seeks to draw between the "war" against the Taliban and that against al Qaeda has recently been firmly rejected by a judge of the District Court for the District of Columbia. In *Hamdan* v. *Rumsfeld*,[120] Judge Robertson held that:

"The government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with."[121]

The judge further held that detainees could only be denied POW status and treatment following a determination by a competent tribunal, and that the presidential determination and the "combatant status review tribunals" were not sufficient for these purposes.[122] As a result, it was held that the trial of the

117 United Kingdom, "Responses to list of issues", p. 22, available at <http://www.ohchr.org/english/bodies/cat/docs/UKresponses.pdf> (last visited 10 February 2005). Conversely, the UK made clear that in Iraq, where prisoners were transferred temporarily to the custody of the US, it retained responsibility, pursuant to a memorandum of understanding with the US, as the detaining power under the Geneva Conventions, *ibid*., pp. 24-25.

118 "Conclusions and recommendations of the Committee against Torture: United Kingdom", UN Doc. CAT/C/CR/33/3, 25 November 2004, para. 4(b).

119 *Ibid*, para. 5(e).

120 *Hamdan* v. *Rumsfeld, op. cit*. (note 46); the case concerned a habeas petition presented on behalf of a man accused of being Osama bin Laden's driver and bodyguard, and who was standing trial before a military commission set up under the Presidential Military Order of 11 November 2001.

121 *Ibid*., p. 15.

122 *Ibid*., p. 18.

applicant before a military commission could not proceed until such a determination had taken place.

In relation to human rights law and specifically the two points discussed above, namely its continued applicability during armed conflict and its extraterritorial application, a number of decisions are of interest. As regards the first point, in May 2002 the Inter-American Commission, requested to issue an order for precautionary measures concerning the treatment of the detainees held at Guantánamo Bay, reiterated its position as to the continued applicability of human rights obligations in situations of armed conflict. The Commission upheld its competence in the matter, pointing out that:

"It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. (…) in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another (…), sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity."[123]

With regard to the second point, the UK position that the European Convention does not apply to actions of its armed forces in Iraq in detaining individuals has recently been partially rejected by an English court. *R (on the application of al Skeini and others)* v. *Secretary of State for Defence*[124] concerned the mistreatment and murder of an Iraqi man in the custody of the British army in Iraq, and the shooting of five other persons within Iraq. After an extensive review of the case-law of the European Court relating to the meaning of the term "jurisdiction" in Article 1 of the ECHR, including the decision in *Issa*,[125] the Court concluded that the individual who had died in custody was "within the jurisdiction" of the United Kingdom for the purposes of the Convention by reason of the fact that he was in the custody of State agents, even though the alleged violation had taken in place in a territory outside the *espace juridique* of the Convention.[126] However, in the case of the other five individuals, the Court held that the United Kingdom did not have sufficient "effective control" over the area in question to justify a finding that "exceptional" extra-territorial jurisdiction on that basis existed.[127] In this latter respect, the ruling may be compared with a recent resolution of the Parliamentary Assembly of the Council of Europe, which called on "those of its Member States that are engaged in the [Multinational Force] to accept the full applicability of the European Convention on Human Rights to their forces in Iraq, insofar as those forces exercised effective control over the areas in which they operated."[128]

123 Inter-American Commission on Human Rights, *Precautionary Measures in Guantánamo Bay, op. cit.* (note 85).

124 [2004] EWHC 2911 (Adm.), 14 December 2004 (Rix LJ and Forbes J sitting as a Divisional Court of the Queen's Bench Division of the High Court).

125 *Ibid.*, paras. 117-222.

126 *Ibid.*, para. 286.

127 *Ibid.*, para. 281.

128 See also Resolution 1386 (2004) entitled "The Council of Europe's contribution to the settlement of the situation in Iraq", adopted on 24 June 2004, para. 18.

Although the position of the US that detainees at Guantánamo Bay are not subject to US domestic legal protections was initially approved by some US courts and disapproved by others,[129] in June 2004 the Supreme Court in *Rasul* v. *Bush* held that US courts had jurisdiction to hear claims for *habeas corpus* in relation to prisoners at Guantánamo Bay, by virtue of the mere fact that they were being held by the State.[130] The holding of the Supreme Court, although based solely on considerations of domestic law, parallels the finding of the Inter-American Commission (again in the *Precautionary Measures* decision) that as a matter of international law, for the purposes of applicability of the American Declaration of the Rights and Duties of Man, individuals held at Guantánamo Bay were under the "authority and control" of the US.[131]

Finally, in *Abu Ali* v. *Ashcroft*[132] a US court has taken a huge step towards holding the executive accountable in relation to the detention of persons abroad by third States on behalf of the US. The judge ruled that, in principle, the US courts have jurisdiction to entertain a petition for *habeas corpus* by an individual detained by a foreign government where there is *prima facie* unrebutted evidence that he is in the "constructive custody" of the US, in that, *inter alia*, agencies of the US had "initiated" his arrest abroad, US officials had been involved throughout his detention and in his interrogation abroad, and the foreign State would release the individual into the custody of US officials if so requested.[133] In rejecting the argument of the executive that *habeas corpus* was not available on the sole basis that the individual was detained by a foreign State, the judge observed:

"The full contours of the position would permit the United States, at its discretion and without judicial review, to arrest a citizen of the United States and transfer her to the custody of allies overseas in order to avoid constitutional scrutiny; to arrest a citizen of the United States through the intermediary of a foreign ally and ask the ally to hold the citizen at a foreign location indefinitely at the direction of the United States; or even to deliver American citizens to foreign governments through the use of torture (…). This Court simply cannot agree that under our constitutional system of government the executive retains such power free from judicial scrutiny when the fundamental rights of citizens have allegedly been violated."[134]

129 See e.g. *Al Odah* v. *United States*, 321 F 3d 1134 (D.C. Cir., 2003), where the Court held that US courts had no jurisdiction to entertain *habeas corpus* petitions brought on behalf of non-US citizens detained at Guantánamo Bay, on the basis that the substantive rights enshrined in the US constitution did not apply to non-US nationals outside the sovereign territory of the United States. But see *Gherebi* v. *Bush*, 352 F.3d 1278 (9th Cir. Cal., 2003), where the opposite conclusion was reached on the ground that the US exercises "territorial jurisdiction over Guantánamo" (at 1289-1290). The decision was amended in the light of the Supreme Court's decision in *Rasul* and in *Rumsfeld* v. *Padilla* (124 S. Ct. 2711); see 374 F.3d 727 (9th Cir. Cal. 2004).

130 *Rasul* v. *Bush*; *Al Odah* v. *United States*, 124 S Ct. 2686 (28 June 2004).

131 Precautionary Measures in Guantánamo Bay, *op. cit*. (note 85).

132 *Abu Ali* v. *Ashcroft* (DCt, D.C., 16 December 2004), available at <www.dcd.uscourts.gov/04-1258.pdf> (last visited 10 February 2005).

133 *Ibid*., pp. 1-2.

134 *Ibid*, p. 19.

Concluding remarks

After several years in which governments have played fast and loose with the applicable international rules, ignoring strident criticism, recent decisions seem to indicate that the protections provided by domestic and international law are starting to be reasserted. It is perhaps overly optimistic to hope that, as a result of a handful of judicial pronouncements, all the States involved will fully accept the applicability of all the relevant international legal norms. However, the recent developments can be interpreted as evidence that legal institutions, and in particular domestic courts, are finally now beginning to recover from the shock of 9/11 to the international and domestic legal systems.

It is now over three years since the first detainees were taken into custody and held in violation of their rights and international law. Declarations of violations of international law may be of little comfort to all those whose rights have been violated over this period. However, when what is at stake is the prevention of violations of norms and values as fundamentally important as those implicated in the detention of individuals abroad in the "war on terror", even the merest glimmer of light shed on the "legal black hole" is to be welcomed.

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Visits by human rights mechanisms as a means of greater protection for persons deprived of their liberty

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Abstract

Although international humanitarian law and human rights law were originally intended to operate in different areas of competence, thirty years of visits by human rights mechanisms to places of detention in parallel with visits made by the International Committee of the Red Cross have shown that they are clearly complementary in several respects. First, there is complementarity in terms of action, in that different but not competitive visits are made. Secondly, through the formulation of increasingly precise legal rules there is complementarity in codification. Lastly, there is institutional complementarity through cooperation between the respective bodies. The result is broader and above all more effective protection for detainees — whatever the legal status assigned to them — which, if it cannot entirely eliminate the possibility of torture and cruel, inhuman and degrading treatment or punishment, can at least help to prevent and remedy such abuses.

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* The original version of this article is available in French at: <http://www.cicr.org/fre/revue>.

On 25 September 1975, Jean-Jacques Gautier first unveiled his idea of a convention which would establish "roving commissions authorized to visit any prison or police station without prior notice"[1] in order to combat torture and cruel, inhuman or degrading treatment or punishment more effectively, it would have been certainly very hard to imagine that, thirty years later, numerous bodies operating under human rights law would be visiting places of detention or confinement.

At the time, the classic approach to international human rights law had essentially been limited to an exercise in standard-setting. Although many texts banning torture and cruel, inhuman or degrading treatment or punishment had been adopted at the United Nations,[2] the Council of Europe[3] and the Organization of American States,[4] implementing machinery had not necessarily been put in place.

Jean-Jacques Gautier's idea was prompted primarily by the limitations inherent to this classic approach and its consequent failure to put a stop to the heinous assault of torture and cruel, inhuman or degrading treatment or punishment on human dignity. It also originated more explicitly from the protective activities of the International Committee of the Red Cross (ICRC), which, under the Geneva Conventions for the protection of war victims and the Statutes of the International Red Cross and Red Crescent Movement, was visiting prisoners of war. Jean-Jacques Gautier believed that, if this practical approach to preventing torture were also carried out in peacetime, on a basis of cooperation and confidentiality and included in the material scope of human rights protection, it could go a long way towards averting the torture and ill-treatment of all persons deprived of their liberty, especially common-law detainees.

The position is quite different thirty years on; the adoption by the United Nations General Assembly of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (hereinafter "the Protocol" or "OPCAT") on 18 December 2002 was an important, albeit not the final, step in this new approach,[5] since the Protocol, which is open to all States party to that Convention, provides for a uniquely global system of regular visits to persons deprived of their liberty. These visits are conducted by independent national and international bodies, which, working on the basis of state cooperation, submit recommendations to the competent authorities with a view to preventing torture and ill-treatment.[6]

1 *Jean-Jacques Gautier et la prévention de la torture: de l'idée à l'action: Recueil de textes*, APT and the European Institute of Geneva University, Geneva, 2004, p. 56.

2 For instance, Article 5 of the Universal Declaration of Human Rights; Article 7 of the United Nations International Covenant on Civil and Political Rights; United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and United Nations Standard Minimum Rules for the Treatment of Prisoners.

3 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4 Article 5 of the American Convention on Human Rights.

5 Antonio Cassese, "Une nouvelle approche des droits de l'homme: la Convention européenne pour la prévention de la torture", in *Revue Générale du Droit International Publique*, 1989-I, pp. 5-43.

6 For more details, see *The Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention*, APT and the Inter-American Institute for Human Rights, Geneva, 2004, <www.apt.ch>(visited on 3 March 2005).

This new approach, to the protection of international human rights, which closely resembles the humanitarian protection work of the ICRC, is not confined to the United Nations alone; visiting mechanisms have also been set up within various national and regional systems for the protection of human rights.

The Council of Europe played a major part in creating one such mechanism for visits akin to those of the ICRC, namely the European Committee for the Prevention of Torture (CPT), which has the power to make regular or ad hoc visits to places of detention. In the early 1980s, Jean-Jacques Gautier, realizing that it was both impossible and inadvisable to institute a worldwide visiting system at that early date, decided to push for the establishment of regular visits under the auspices of the Council of Europe.[7] The CPT, which began its work in 1989 is composed of independent experts; since 1989 it has carried out 189 visits in member States.[8] The CPT makes regular visits[9] or "such other visits as appear to it to be required in the circumstances."[10] After these visits, it sends a confidential report to the State, in which it puts forward recommendations designed to improve the situation of persons deprived of their liberty and to prevent torture and ill-treatment.

Within the Organization of American States, the Inter-American Commission on Human Rights (IACHR) is responsible for making *in situ* visits to assess the general human rights situation in a given country, or to investigate particular circumstances. During these visits, which are subject to the consent of the State concerned, the IACHR may inspect places of detention. In terms of visits that included inspections of places of detention, the IACHR has conducted seven visits in Haiti, five in Nicaragua and Peru, four in the Dominican Republic, Panama, the United States of America and Guatemala, three in El Salvador, two in Mexico, Argentina, Venezuela, Honduras, the Bahamas, Jamaica, Ecuador, Surinam and Paraguay, and one in Colombia.[11]

7 For more details about the lead-up to the adoption of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and of OPCAT, and about the link between the two texts, see *OPCAT Manual, op. cit.* (note 8); *20 ans consacrés à la réalisation d'une idée: Recueil de textes en l'honneur de Jean-Jacques Gautier*, APT, Geneva, 1997; Emmanuel Decaux, "La Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants", AFDI, 1988, pp. 618-634; Jean-Daniel Vigny, "La Convention européenne de 1987 pour la prévention de la torture et des peines ou traitements inhumains ou dégradants", ASDI, 1987, pp. 62-78; Malcolm D. Evans and Rodney Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Clarendon Press/Oxford University Press, Oxford/New York, 1998, in particular Chapter IV, "The origins and drafting of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", pp. 106-141.

8 For a complete list of the visits made by the CPT and an account of all its activities, see <www.cpt.coe.int> (visited on 3 March 2005).

9 Art. 7, para. 1, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

10 *Op. cit*. (note 9).

11 Dominican Republic (1965-1966, 1996 and 1997), Nicaragua (1978, 1980, 1988, 1992 and 1999), Haiti (1978, 1987, 1988, 1990, 1993, 1994 and 2000), El Salvador (1978, 1986 and 1987), Panama (1977, 1989, 1991 and 2001), Argentina (1979), USA (1982, 1996, 1998 and 1999), Venezuela (1996), Guatemala (1982, 1985, 1992 and 1998), Honduras (1982), Surinam (1983 and 1985), Mexico (1983), Peru (1991, 1992, 1993, 1998 and 2002), the Bahamas (1994), Jamaica (1994), Ecuador (1994), Paraguay (1999) and Colombia (1997 and 2001). This list does not include visits in connection with other rights, when no place of detention was visited and which did not concern torture or ill-treatment. Source: IACHR, Annual Reports (1970-2003) and various reports on follow-up visits available at: <http://www.cidh.oas.org/publi.eng.htm> (visited on 3 March 2005).

In 1996, the African Commission on Human and Peoples' Rights appointed a Special Rapporteur on Prisons and Conditions of Detention in Africa who is mandated to visit, with the consent of the State concerned, places of detention in Africa in order to assess the general conditions of detention and the treatment of detainees. To date, the Rapporteur has been to Benin, the Gambia, Malawi, Mali (twice), Mozambique, the Central African Republic and Zimbabwe.[12]

The United Nations Special Rapporteur on Torture should also be mentioned because, although he does not regularly visit places of detention, he may nonetheless visit a country, subject to the consent of the government concerned. The first Special Rapporteur was appointed in 1985[13] by the United Nations Commission on Human Rights and to date he and his successors have carried out 28 visits.[14]

In some countries, visits to places of detention are carried out by national entities or officials such as ombudspersons, national human rights institutions, parliamentary commissions, judges and non-governmental organizations (NGOs).[15] For example the Moroccan Prison Observatory (OMP),[16] the Centre for Victims of Torture, Nepal,[17] the Georgian Young Lawyers Association,[18] the Peace and Justice Service (SERPAJ) in Uruguay,[19] the Bulgarian Helsinki Committee[20] and the Independent Medico-Legal Unit (IMLU) in Kenya[21] are all NGOs which visit places of detention. Similarly, the national human rights commissions of Uganda,[22] South Africa[23] and Fiji,[24] the Argentine prison ombudsman (Procurado Penitenciario),[25] the Polish ombudsman[26] and the Chancellor of Justice in Estonia[27] are empowered, under a variety of procedures, to go to places of detention in order to prevent torture and ill-treatment.

Two main difficulties arose, both in theory and in practice, owing to the multiplicity of bodies actively engaged in the protection of persons deprived of

12 <www.legal.apt.ch/Mechanisms/Africa> (visited on 3 March 2005).
13 Commission on Human Rights resolution 1985/33, 13 March 1985, E/CN.4/RES/1985/33.
14 For a complete list, please see: <http://www.ohchr.org/english/issues/torture/rapporteur/visits.htm> (visited on 3 March 2005).
15 For more details, see *Visiting places of detention. Lessons learnt and practices of selected domestic institutions. Report on an expert seminar*, APT and Office of the United Nations High Commissioner for Human Rights, <www.apt.ch> (visited on 3 March 2005).
16 Amnesty International, "Preventing torture at home: A guide to the establishment of national preventive mechanisms", AI Index: IOR 51/004/2004 (1 May 2004).
17 <www.cvict.org.np/legal.html> (visited on 3 March 2005).
18 <www.gyla.ge> (visited on 3 March 2005).
19 <http://www.serpaj.org.uy/> (visited on 3 March 2005).
20 <http://www.bghelsinki.org/index_en.html> (visited on 3 March 2005).
21 <http://www.imlu.org/> (visited on 3 March 2005).
22 *Op. cit.* (note 16).
23 <www.sahrc.org.za> (visited on 3 March 2005).
24 <www.humanrights.org.fj> (visited on 3 March 2005).
25 See Procuración Penitenciaria, Ley 25.875 (20 January 2004), Articles 15-21, <http://infoleg.mecon.gov.ar/txtnorma/92063.htm> (visited on 3 March 2005).
26 Act on the Commissioner for Civil Rights Protection, of 15 July 1987, Article 13, <http://www.brpo.gov.pl/index.php?e=1&poz=360> (visited on 3 March 2005).
27 <http://www.oiguskantsler.ee/> (visited on 3 March 2005).

their liberty. The first stemmed from a perceived potential for states to play off new visiting mechanisms against the established role of the ICRC, the second from the potential contradictions between the classic, essentially institutional, normative approach and the innovative essentially operational and practical approach.

Twenty-five years later, it must be said that, in both respects, pitfalls have been avoided. The ICRC and the visiting mechanisms forming part of the human rights protection system have succeeded in developing in tandem and cooperating in such a way as to increase the protection of persons deprived of their liberty, while retaining in common the visiting methods used.

As for the second issue, the highly specialized approach developed by visiting mechanisms and the expert knowledge they have built up on detention-related problems have enhanced the legal standards applicable to persons deprived of their liberty.

The International Committee of the Red Cross and human rights visiting mechanisms: Two-pronged action for persons deprived of their liberty

The growing number of agencies engaged in detention-related activities has resulted in coverage of a wider range of situations by visiting mechanisms and in complementary protections for persons deprived of their liberty.

The broader competence of visiting mechanisms

Before human rights bodies were mandated to assist persons deprived of their liberty, the ICRC was the only organization to visit them; it did so within the terms of reference defined by the Geneva Conventions and the Statutes of the Movement. The emergence of mechanisms operating under human rights law not only extended the scope of organizations to protect such persons, but also supplemented their range of activities.

A theoretical distinction becomes blurred

Since international humanitarian law and international human rights law "have totally different historical origins, the codification of these laws has until very recently followed entirely different lines."[28] When formulated, there was a clear-cut distinction between them, and the various organizations working in those two domains were intent on retaining their own independence and specific field of action. That being the case, although the applicability of human rights in wartime was solemnly reaffirmed at the United Nations Teheran Conference in 1968, the tendency for many years has been to regard the two bodies of law as absolutely distinct from one another.

28 Louise Doswald-Beck and Sylvain Vité *International Humanitarian Law and Human Rights Law* in International Review of the Red Cross, No. 293, March-April 1993, pp. 94-119, p. 94.

Notwithstanding the drafters' original intention, however, it is now increasingly difficult for at least two reasons to dissociate them. First, the principles embodied in the various human rights instruments are largely echoed in the norms of international humanitarian law. Particular examples are Article 3 common to all four Geneva Conventions and Article 75 of Additional Protocol I, which are nowadays interpreted as belonging to both bodies of law, for although "international human rights law and the humanitarian law of armed conflicts have a dissimilar material field of application, they have an identical concern — to protect human beings in "ordinary" or "daily" circumstances, as it were, on the one hand and in armed conflicts, on the other and they necessarily come to share a number of fundamental rules ..."[29] Moreover, while humanitarian law still pertains specifically to armed conflicts, the purpose of human rights law is no longer solely to govern relations between States and individuals in peacetime only, as the Human Rights Committee recently reaffirmed in its General Comment No. 29 referring to Article 4 of the International Covenant on Civil and Political Rights[30] and as the International Court of Justice made clear in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. [31]

Parallel action

While in theory their respective fields of action were, if not completely separate, then at least sharply delimited,[32] the work of the ICRC and human rights mechanisms has in practice revealed situations where both legal regimes were applicable and where both types of organizations therefore found themselves acting, if not jointly, then at least in parallel. For example, in Peru the Inter-American Commission on Human Rights made several visits to places of detention between November 1998 and August 2002 and subsequently made a number of recommendations to the authorities in its report on Peru in 2000 and its special report on Challapalca Prison.[33] Throughout this period, the ICRC was

29 Frédéric Sudre, *Droit international et européen des droits de l'homme*, Presses Universitaires de France, Paris, 5th edition, 2001, p. 31.

30 Paragraph 3 of General Comment 29, States of Emergency, adopted on 24 July 2001, A/56/40 Annex VI.

31 ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 106, "... 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."

32 For example, Article 17.3 of the European Convention for the Prevention of Torture stipulates: "The Committee shall not visit places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977 thereto." Similarly, but in a less categorical manner, Article 32 of OPCAT states: "The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law."

33 IACHR Special Report on the Human Rights Situation in the Challapalca Prison, Department of Tacna, Republic of Peru, OEA/Ser.L/V/II.118 Doc.3, 9 October 2003 available at <http://www.cidh.oas.org/countryrep/Challapalca.eng/toc.htm> (visited on 15 December 2004) and IACHR, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter IX.

present in Peru and was also visiting places of detention.[34] In Azerbaijan, places of detention were likewise visited by the United Nations Special Rapporteur,[35] the CPT[36] and a local NGO, the Human Rights Centre of Azerbaijan,[37] in parallel with the ICRC's activities. The same is true of Chechnya, beset for many years by a non-international armed conflict: while ICRC protection activities in that connection continued,[38] the CPT has made seven visits there since 2000.[39] The CPT has even taken the exceptional step of releasing two public statements[40] on the critical situation in that region, and is the last international agency still working in the Chechen Republic.

Furthermore, some human rights mechanisms have found it necessary to exercise their powers in circumstances where international humanitarian law was applicable *prima facie*, but where the ICRC was not authorized to step in. This has been the case in Turkey, where the authorities have always denied the existence of an internal armed conflict in their territory and have consequently always refused the ICRC access. In contrast the CPT, which is not subject to the same requirement — the existence of an armed conflict — before visits under the Geneva Conventions can take place, has been on numerous missions to Turkey, including visits to the conflict areas.

Hence, although in theory the ICRC and human rights mechanisms might have been expected to intervene in different and almost completely separate situations, more often their action has proved to be parallel or overlapping. Furthermore, the complementary nature of the two bodies of law has led to operations that are truly complementary in practice, to the undeniable benefit of persons deprived of their liberty.

Diversification of operating methods has encouraged complementarity

The fact that the ICRC and human rights mechanisms take action in the same areas and therefore sometimes visit the same places of detention has not entailed pointless duplication; on the contrary, it has often led to operational cooperation that has been to the advantage of persons deprived of their liberty. In the early years, the mutual indifference of the various agencies striving to prevent torture and ill-treatment did result in useless duplication and operational blunders,[41] but they have gradually learnt to turn their different ways of working to good account and to cooperate effectively.

34 See ICRC Annual Report 2002, p. 212.
35 E/CN.4/2001/66/Add.1.
36 CPT/Inf (2004) 36, visit from 26 November 2002 to 6 December 2002.
37 <www.peacewomen.org/campaigns/regions/westasia/abouteng.htm> (visited on 3 March 2005).
38 ICRC Annual Report 2001, p. 270.
39 To date, none of the visit reports on this region has been published, but information on the dates and places visited is available on <http://www.cpt.coe.int/fr/etats/rus.htm> (visited on 3 March 2005).
40 CPT/Inf (2001) 15 of 10 July 2001 and CPT/Inf (2003) 33 of 10 July 2003.
41 On one occasion, both the CPT and the ICRC decided not to visit a place of detention, as each was sure that the other was going to visit it.

Distinct operating methods

While the manner in which the actual visits to places of detention are conducted is more or less the same for all mechanisms, irrespective of whether they are working under humanitarian or human rights law,[42] the diversity of operational procedures is a source of complementarity.

The first difference is one of presence. Unlike the ICRC, which maintains a continued presence in the places of detention it visits, most human rights mechanisms spend but a few days at best in a given place and return only during a follow-up visit, if any. Such a difference naturally has implications for the type of visit made, the protection of inmates interviewed and the manner in which recommendations are submitted to the relevant authorities. Whereas the ICRC delegation will establish a direct, ongoing relationship with the detaining authorities, and especially the person in charge of the place of detention, in order to improve the treatment of detainees, human rights mechanisms such as the CPT will turn to the supervisory governmental authorities.[43] The nature of the addressee naturally affects the content of recommendations, which will be more practical and specific in the first case, and more concerned with the overall structure in the second.

The second difference relates to confidentiality. Some human rights mechanisms are theoretically bound by this requirement, which for them is not so much a principle as a condition for action. However, although a literal reading of Article 11 of the European Convention for the Prevention of Torture would give the impression that confidentiality is the rule and disclosure the exception, in practice the opposite is true: reports on 139 out of 169 visits have been made public. Other mechanisms, such as the Inter-American Commission on Human Rights, the Special Rapporteur on Prisons and Conditions of Detention in Africa and *a fortiori* NGOs which visit places of detention, are not bound by this confidentiality requirement; nor are the national preventive mechanisms under OPCAT, which may "make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations."[44]

The third difference has to do with conditions of access to places of detention. But this time, there are differences among the human rights mechanisms; the distinction is not between human rights mechanisms on the one hand and the ICRC on the other. Article 126 of the Third Geneva Convention[45] gives the ICRC the right to go to any place of detention where prisoners of war may be held and to talk to them without witnesses, either personally or with the

42 In this connection, see *Monitoring Places of Detention: A Practical Guide*, APT, 2004, <www.apt.ch> (visited on 3 March 2005).

43 It should, however, be noted that in practice the CPT is making increasing use of immediate on-the-spot observations made directly to the person in charge of the place of detention at the end of a visit.

44 Article 19(b).

45 Article 143 of the Fourth Geneva Convention guarantees the ICRC identical rights of access to protected persons.

assistance of an interpreter. This provision also guarantees the ICRC full liberty to select the places it wishes to visit. Similarly, under Article 2 of the European Convention for the Prevention of Torture and Article 14 of OPCAT, States Parties must accept visits to their territory by the CPT and the Sub-Committee on Prevention, which are not required to obtain authorization for each visit.

Conversely, the Inter-American Commission on Human Rights, the United Nations Special Rapporteur on Torture, the Special Rapporteur on Prisons and Conditions of Detention in Africa and even the ICRC in situations of non-international armed conflict must obtain the authorities' agreement before they can visit places of detention. This need to secure prior consent does not mean, however, that these mechanisms must bow to the government's demands. The ICRC will carry out a visit only if it receives a number of guarantees: it must be able to go to all places where persons covered by its mandate are held, it must be able to meet them and talk to them without witnesses. It must also be able to repeat these visits as often as it wishes. The United Nations Special Rapporteur likewise demands guaranteed freedom of movement throughout the country, access to all places of detention, free contact with the authorities, civil society and the media, confidential and unsupervised contacts with the persons of his choice, access to all relevant documentation and assurances that persons who have been in contact with him will not be subjected to retaliation of any kind.[46] The Inter-American Commission sets very similar conditions.[47]

Fruitful complementarity

The ICRC and human rights mechanisms have become well acquainted with each other and have learnt to turn their differences to good account to enhance the protection of persons deprived of liberty. The ICRC and CPT in particular maintain frequent informal contacts, not to exchange information but to coordinate their activities.

This coordination can take two forms: they may decide to share out between them, according to the geographical area covered or the type of place, the places of detention to be visited; they may also decide to visit the same place of detention, but not to make the same kind of visit. For example, the CPT might choose to focus on the sanitation at a prison, while the ICRC will concentrate on protection activities. This type of coordination makes it possible to maximize the use of resources and expert knowledge to the best advantage of persons deprived of their liberty.

Enhancement of the legal rules protecting persons deprived of their liberty

Multiple reporting by a plethora of bodies mandated to conduct visits under human rights law has also had a considerable impact on the legal rules protecting

46 See <http://www.ohchr.org/english/issues/torture/rapporteur/visits.htm> (visited on 3 March 2005).

47 Regulations of the Inter-American Commission on Human Rights, reprinted in *Basic Documents pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 103 (1992), Article 58.

persons deprived of their liberty. First, these mechanisms have helped to elaborate and improve the standards applying to such persons. Secondly, they have prompted traditional mechanisms for human rights protection to give close attention to the question of deprivation of liberty.

Enhancement of the norms applicable to persons deprived of their liberty

While for twenty-five years the United Nations,[48] the Council of Europe,[49] the Organization of American States[50] and the African Commission on Human and Peoples' Rights[51] have unstintingly adopted standards relating to the prohibition of torture and ill-treatment in general and to deprivation of liberty in particular, the influence of visiting mechanisms has also greatly furthered the development and enhancement of the legal rules applying to persons deprived of their liberty.

Development of new standards

The CPT, initially for practical reasons, established its own standards for the treatment of persons deprived of their liberty.

Faced with the wide variety of approaches applied by individual members of its visiting teams, the CPT set out to devise *pro domo* standards to provide them with a common frame of reference. For this purpose, beginning in 1991, the CPT set out in its annual reports standards for specific matters related to deprivation of liberty. Such standards now cover police custody,[52] imprisonment,[53] prison health services,[54] foreign nationals detained under aliens legislation,[55] involuntary placement in psychiatric establishments,[56] juveniles deprived of their liberty,[57] women deprived of their liberty,[58] the training of law enforcement personnel[59] and combating impunity.[60] These standards have gone from being a compilation intended for in-house use to being a point of references for many other bodies that deal with cases or situations of deprivation of liberty.[61]

48 *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, of 10 December 1984.

49 In particular *Recommendation R (87) 3 on the European Prison Rules*, adopted by the Committee of Ministers on 1 February 1987; *Recommendation R (89)12 on education in prison*, adopted by the Committee of Ministers on 13 October 1989; *Recommendation R (98) 7 concerning the ethical and organisational aspects of health care in prison*, adopted by the Committee of Ministers on 8 April 1988; *Recommendation R (80) 11 concerning custody pending trial* adopted by the Committee of Ministers on 27 June 1980.

50 *Inter-American Convention to Prevent and Punish Torture of* 9 December 1985.

51 Article 5 of the African Charter on Human and Peoples' Rights*; Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines*), available at: <http://www.apt.ch/africa/rig/Robben%20Island%20Guidelines.pdf> (visited on 3 March 2005).

52 CPT/Inf(92)3; CPT/Inf(96)21 and CPT/Inf(2002)15.

53 CPT/Inf(92)3; CPT/Inf(97)10 and CPT/Inf(2001)16.

54 CPT/Inf(93)12.

55 CPT(97)10 and CPT/Inf(2003)35.

56 CPT/Inf(98)12.

57 CPT/Inf(99)12.

58 CPT/Inf(2000)13.

59 CPT/Inf(92)3.

60 CPT/Inf(2004)28.

61 See above.

Enhancement of existing standards
At the same time, the formulation of these standards and the activity of these new bodies had a considerable influence on the development of similar standards elsewhere. Consequently, at both international and regional level, a process of upgrading the standards applying to persons deprived of their liberty took shape in the late nineties. At the United Nations, mainly owing to lobbying by Penal Reform International, the Standard Minimum Rules for the Treatment of Prisoners were tabled for review. This process, which should have culminated in a revision of the rules,[62] has nevertheless led to the adoption of a draft Charter of Fundamental Rights of Prisoners[63] by the four regional preparatory meetings. Various initiatives are being taken at regional level. For example, an African Charter on Prisoners' Rights[64] and an Inter-American Declaration Governing the Rights and the Care of Persons Deprived of Liberty[65] have been drawn up. Within Europe, a process of revising or adopting standards for the treatment of detainees has been launched concomitantly, though not in a coordinated fashion, at the Council of Europe and European Union. Working in close cooperation with the European Union, the Council for Penological Cooperation (PC-CP), which answers to the Committee of Ministers of the Council of Europe, has embarked on a revision of the European Prison Rules. It should be completed in 2005 with the adoption of a European Prisons Charter, which would become the benchmark standard not only within the Community, but also throughout Europe. This process of reviewing and improving existing European standards springs directly from the recent progress achieved by the CPT in preventing torture and ill-treatment.

Stronger protection by traditional mechanisms for persons deprived of liberty

Despite the fact that torture and cruel, inhuman or degrading punishment or treatment were treated at the United Nations as a violation of human rights in connection with detention or imprisonment, conditions of detention have long been the poor relation of the traditional human rights protective machinery. The activities of the various above-mentioned visiting bodies have led to a marked improvement in that regard.

Development of the case-law of the European Court of Human Rights
Again, it was not until the late 1990s that the European Court of Human Rights turned its attention to conditions of detention in the light of Article 3 of the

62 To date this subject has not been put on the agenda of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, which is to be held in Bangkok from 18 to 25 April 2005.
63 E/CN.15/2003/CRP.9.
64 This text was adopted by the Fifth Conference of the Eastern, Southern and Central African Heads of Correctional Services, held in Windhoek, Namibia, from 4 to 7 September 2001, and debated during the Pan-African Conference on Prison and Penal Reform in Africa, held at Ouagadougou from 18 to 20 September 2002.
65 Draft resolution tabled by the Permanent Mission of Costa Rica to the Permanent Council of the OAS on 24 April 2002.

Convention, which prohibits torture and inhuman or degrading treatment or punishment. This development owes much to two kinds of healthy competition from the CPT.

First of all, in 1995, when the CPT had already been active for six years, the Parliamentary Assembly of the Council of Europe passed Recommendation 1257 (1995) urging that work on a draft protocol to the European Convention on Human Rights concerning prisoners' rights be concluded as soon as possible. The purpose of this draft text was to circumvent the Court's inertia in this respect, since the protocol would have enhanced the right of applicants to submit a complaint regarding conditions of detention to the Court. It was also designed to end a certain inconsistency within the Council of Europe, arising from the fact that the CPT's work rested on Article 3 of the European Convention on Human Rights,[66] whereas the Court — the main institution for implementation of the Convention — refused to apply Article 3 to deprivation of liberty.

The call for this draft protocol induced the Court to agree for the first time, in the case of *Tekin* v. *Turkey* of 9 June 1998,[67] to examine disputes involving deprivation of liberty in the light of Article 3 of the Convention. In the case in question, the applicant alleged that he had been detained in a cold and dark cell and blindfolded and treated in a way which left wounds and bruises on his body in connection with his interrogation.[68] The Court found that these conditions of detention and the manner in which he had been treated amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.[69]

The influence of the CPT was again evident in the case of *Assenov and Others* v. *Bulgaria*.[70] In order to assess the conditions of detention of a juvenile delinquent suspected of theft and arrested by the Bulgarian police,[71] the Strasbourg court had regard to "the size of the cell and the degree of overcrowding, sanitary conditions, opportunities for recreation and exercise, medical treatment and supervision and the prisoner's state of health."[72] Each of these criteria had been dealt with in turn by the CPT in its 2nd General Report in the section on substantive issues[73] devoted to police custody.[74] By thus introducing the CPT's standards into the body of its own legal doctrine, the Court at last brought deprivation of liberty within its jurisdiction.

The Court subsequently issued decisions on ill-treatment by prison warders[75] and on conditions of detention in a Lithuanian prison[76] and in the

66 Third preambular paragraph of the European Convention for the Prevention of Torture.
67 *Tekin* v. *Turkey*, 9 June 1998, ECHR, Reports of Judgments and Decisions, 1998-IV.
68 *Ibid*., para. 9, 24, 42.
69 *Ibid*., para. 53.
70 *Assenov and Others* v. *Bulgaria*, 28 October 1998, ECHR, *Reports of Judgments and Decisions*, 1998-VIII.
71 The Court even took the view that the application, although originally filed under Article 5.1 of the Convention, should be examined in relation to Article 3 thereof so that the conditions of detention could be considered.
72 *Op. cit*. (note 70), para. 135.
73 See above.
74 CPT/Inf (1992)3, para. 42.
75 *Labita* v. *Italy*, 6 April 2000, ECHR, *Reports of Judgments and Decisions*, 2000-IV.
76 *Valašinas* v. *Lithuania*, 24 July 2001, ECHR, *Reports of Judgments and Decisions*, 2000-IV.

segregation unit of a Greek prison.[77] The Court has consistently held that "under [Article 3] the State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject that person to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, the said person's health and well-being are adequately secured."[78]

The case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY)
Similarly, but in the normative context of international criminal law, the ICTY has established precedents that are of particular relevance to deprivation of liberty. Although the effect of "competition" is non-existent here, it should be emphasized that, in most of the cases in question, the Presiding Judge of the Chamber was Antonio Cassese, the former President of the CPT.

In the Tadic judgement,[79] the judges "confined" themselves to mentioning the particularly harsh conditions in the Omarska and Keratem[80] detention camps, but did not characterize them as a crime. Later, in the "Celebici camp" case,[81] the judges made a point of characterizing detention conditions as the offence of "inhumane conditions."[82] More specifically, the court in The Hague also took into account deprivation of food or water,[83] the lack of medical care,[84] inadequate sanitation and the smallness of rooms[85] and overcrowding in prisons.[86] In the same way, the atmosphere of terror,[87] death threats and the constant intimidation to which detainees were subjected[88] were deemed by the Tribunal to constitute inhuman treatment since they inflicted damage on human dignity.[89]

The use of information
Lastly, mention must be made of the informative role played by visiting mechanisms. Until very recently, places of detention were completely sheltered from the public gaze, but visiting bodies have helped in two ways to lift the lid on what goes on inside prisons. First, the publication of the reports of the CPT, the Inter-American Commission on Human Rights and the African Commission's Special Rapporteur have had a perceptible impact on the public's awareness of detention-related problems. The same can be said of the reports of the United

77 *Peers* v. *Greece*, 19 April 2001, ECHR, *Reports of Judgments and Decisions*, 2001-III.
78 *Kudla* v. *Poland*, 26 October 2000, ECHR, *Reports of Judgments and Decisions*, 2000-XI, para. 94.
79 *Prosecutor* v. *Dusko Tadic aka Dule*, 7 May 1997, ICTY, IT-94-1-T.
80 *Ibid*., paragraphs 159-160 and 169.
81 *Prosecutor* v. *Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hacim Delic and Esad Landzo also known as "Zenga",* 16 November 1998, IT-96-21-T.
82 *Ibid*., para. 554.
83 The *prosecutor* v. *Tihomir Blaskic*, 3 March 2000, ICTY, IT-94-14-T, para. 681.
84 *Op. cit*. (note 79), para. 170.
85 *Op. cit*. (note 83) para. 694.
86 *Op. cit*. (note 81), para. 151.
87 *Op. cit*. (note 83), para. 700.
88 *Op. cit*. (note 79), para. 154.
89 *Ibid*, para. 744.

Nations Special Rapporteur on Torture. To judge by the heated manner in which he was called to account during the 60th Session of the United Nations Commission on Human Rights by one government whose country he had visited, it is plain that his visits and reports not only cause a stir within the State concerned, but also provoke an international reaction. The above-mentioned reform of European standards is likewise largely due to the wider awareness generated by the propagation of these mechanisms' findings.

From a more institutional angle, the information in these reports is being increasingly used by traditional mechanisms to assess the human rights situation of persons deprived of their liberty. When the United Nations Committee against Torture considers the periodic reports of States Parties which are also Members of the Council of Europe, it tends as a matter of course to question them about the implementation of CPT recommendations and/or about changes in conditions at a place of detention following a CPT visit there.[90]

Furthermore, it is not rare for the European Court of Human Rights to use information from and the assessments of the CPT to determine whether Article 3 of the European Convention on Human Rights has been violated. In the Dougoz case, for example, the Court explicitly refers to the conclusions of the CPT visit report as the basis for its appraisal of the compatibility of the conditions of detention with Article 3 of the Convention.[91] This last example is an apposite illustration of the cross-fertilization[92] of different legal regimes and institutional and operational approaches.

90 It should be noted that this practice owes much to the presence of a CPT member in the CAT (Dr Bent Sorensen from 1988 to 2000 and Mr Ole Vedel Rasmussen since 2000).

91 *Dougoz* v. *Greece*, 6 March 2001, ECHR, *Reports of Judgments and Decisions,* 2001-II.

92 Antonio Cassese, *International Law*, Oxford University Press, Oxford, 2001, p. 45.

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INTERNATIONAL REVIEW of the Red Cross

Protection of detainees: ICRC action behind bars

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Abstract

The author describes the history and the premises and characteristics of the action of the ICRC in favour of persons deprived of liberty. He believes that the efficiency of its approach, in particular the visits to detainees, is closely linked to the respect of a constant and rigorous working method including the modalities of the visits and the confidentiality of the interventions to the authorities. Finally, the implication of the ICRC is to be inscribed in a large process and is complementary to the efforts of the authorities, other organizations and mechanisms as well as of the international community at large. Its approach however remains unique in several aspects.

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Founded in 1863 in reaction to the suffering on the battlefields, the ICRC soon took an interest in the situation of persons deprived of their liberty.[1] After the wounded and the sick, detainees are, historically, the third category of vulnerable persons with whom the ICRC has been concerned.

The ICRC's efforts aim, as a priority, to ensure that detainees are treated humanely and with respect for their dignity. Every detainee is in a situation of particular vulnerability, both vis-à-vis their captor and in relation to their environment. The change in status from free person to detainee means the loss of all points of reference and immersion in an unknown world where the rules are different and the values unfamiliar. Life in a closed environment away from the outside world tends to dehumanize people by eliminating

* The original version of this article is available in French at <www.cicr.org/fre/revue>. The views expressed in this article reflect the author's opinions and not necessarily those of the ICRC.

individuality and responsibility. Detention is thus a fundamental change for each individual person, even if he or she is prepared for it.[2] This vulnerability is accentuated in situations of armed conflict and collective or political violence when the isolation and the temptation to use force in an abusive manner are even greater.

Facts and figures

In 2004, the ICRC visited 571,503 detainees held in 2,435 places of detention in more than 80 countries. Of this number, 29,076 detainees were registered and visited in 2004 for the first time and a total of 39,743 detention certificates were issued. The ICRC also organized seminars and advanced courses for police and security forces in 36 countries, in which several thousand participants took part.

Historical background

Developments in the nature of ICRC activities

The ICRC's first activities on behalf of detainees (for prisoners of war) took place during the Franco-Prussian War of 1870. Individual parcels (relief supplies) were distributed and mail forwarded to and from prisoners and their families.[3] During the First World War the ICRC helped prisoners of war on a regular basis, and also took its activities a stage further. In addition to the distributing of parcels and delivering mail, internment camps were visited with a view to improving conditions there, reports were compiled on these visits, and individual information concerning the prisoners of war (based in particular on notifications sent by the various warring parties in the form of lists of prisoners) was centralized.

In 1918 and 1919, following the Bolshevik Revolution and the events in Hungary, the ICRC made its first visits to civilians and detainees held in connection with internal unrest (so-called political detainees). During the Second World War, the activities of the ICRC were similar to those it had deployed before; it also visited civilian internees. Its approach, in particular in the reports drawn up after visits to internment camps, was primarily factual and descriptive.

From 1947 to about 1975, the main conflicts occurred in the Middle East and Indochina, but the ICRC also turned its attention to a number of

1 In this article, the term "detainee" will be used to mean all persons deprived of their liberty, regardless of their status.

2 See on this subject Vivien Stern, *A Sin against the Future: Imprisonment in the World*, Penguin Books, London, 1998.

3 See in particular François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC, Geneva, 2003.

situations within individual countries.[4] It continued to carry out the same type of activities in aid of detainees, but improved its working methods.[5]

During the period from 1975 to 1990, characterized by an intensification of Cold War conflicts and the end of wars of decolonization, the ICRC's areas of operation increased and its activities on behalf of persons detained for security reasons or so-called political detainees were expanded. The ICRC visited them in their places of detention, registered them fairly systematically and worked to restore contact between them and their families. It also sought to address the problem of forcible disappearances and took a broader view in general by analysing more closely the detainees' environment and the different stages or places of detention through which they had passed. It standardized its procedures and developed internal directives in a number of domains.[6]

The further increase in the ICRC's activities for detainees was partly spurred by several phenomena directly linked to the end of the Cold War. Some States had lost their external means of economic support, were bankrupt and could no longer maintain State structures, including prisons. This prompted the ICRC to extend the scope of its activities in terms both of the categories of detainees it was caring for (what is known as the "all-detainees" approach) and of the kinds of problems to which it sought to respond (structural, organizational, food emergencies, etc.). At the same time, many areas were experiencing periods of ethnic cleansing in which a clear desire to exterminate part of the population was evident. The ICRC consequently developed a more holistic approach in its activities for detainees, combining visits (or ascertaining the facts and conditions) with alerting the authorities to their responsibilities, providing training and expertise (via seminars on a wide variety of subjects), and giving assistance (health, habitat, etc.) in several fields.

Since the attacks of 11 September 2001, the ICRC has had to reconcile two sometimes contradictory priorities. On the one hand, a response must be found to the questioning of the legal framework and the widespread challenge to the inviolability of the physical and moral integrity of all or some detainees. On the other hand, appropriate solutions must be found to the growing disregard for their detainees of an increasing number of States. In the context of what is called the "war on terror", global and local elements are often intermingled, requiring an even greater consistency in the approach adopted and the action taken.

Development of the legal framework and the ICRC's visiting procedure

Before the twentieth century, the rules of customary law were more substantial than the codified international norms applicable to detainees, which were still

4 See in particular Jacques Moreillon, *The International Committee of the Red Cross and the Protection of Detainees*, Henry Dunant Institute, Editions L' Age d'Homme, Lausanne, 1973.

5 In particular, the conditions and procedure for visits were developed and standardized.

6 For example, with regard to hunger strikes and the death penalty.

relatively scant.[7] The Hague Conventions of 1899 and 1907 contained an implicit ban on torture in that they required prisoners of war to be treated humanely. Following the experiences of the First World War, the 1929 Geneva Convention on prisoners of war quite clearly defined the status of prisoners and their living conditions, and notably introduced protection against acts of violence, cruelty, insults and the exertion of pressure.[8] It also provided for detention to be monitored by protecting powers and the ICRC. The procedure for visits by them was defined, but an essential part of them was not made mandatory, namely the interview in private with the detainee.[9] The 1929 Convention also laid the foundations of the Central Agency of Information (later the Central Tracing Agency) of the ICRC, which was responsible in particular for pooling information on prisoners of war and restoring contact between them and their families.

The Geneva Conventions of 1949 mark a watershed in that they extend the field of application from international armed conflict to non-international armed conflict and lay down conditions for the detention and treatment of detainees. They also confirm the right of the ICRC to visit prisoners of war during international armed conflicts and establish the same right with regard to civilian detainees. On the basis of the ICRC's experience, the Conventions introduced a procedure for visits from which no derogation is allowed.[10] This procedure and the related conditions were to set the standard for the ICRC in all types of situations and are still scrupulously applied today. The two 1977 Protocols additional to the Geneva Conventions specify the fundamental guarantees to which detainees are entitled.

Under the impetus of the human rights movement, the treatment of persons in detention became a focus of attention for the international community. Since the 1960s, the human rights system and the framework of protection it provides for detainees has developed steadily, with the International Covenant on Civil and Political Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of the Child (1989). Non-prescriptive texts, too, have been adopted within the framework of the United Nations[11] and have been

7 One of the first texts to mention the respect due to detainees is the Lieber Code of 1863, which is the first codification of the laws of war and contains instructions for the humane treatment of prisoners. It was drawn up for the Northern armed forces fighting in the American Civil War.

8 Article 2 of the Geneva Convention of 1929.

9 According to Article 86 of the Geneva Convention of 1929, interviews may be held as *a general rule* without witnesses (emphasis added).

10 This resulted in particular from the ICRC's visit in June 1944 to the Theresienstadt camp, a "model" Potemkin camp used by the Nazis as propaganda to disguise the atrocities committed against the Jews and other target groups. As he was not allowed to speak in private with the Jewish internees and was constantly escorted by SS officers, the ICRC representative did not realize the real nature of the camp, the true situation of its occupants and the fate that was in store for them.

11 Notably the Standard Minimum Rules for the Treatment of Prisoners (1977), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (1990), the Code of Conduct for Law Enforcement Officials (1979), the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

increasingly considered as the relevant international standards. Professional associations have also established codes of conduct, including medical ethics applicable to health workers, particularly doctors, in protecting prisoners and other detainees from torture and other cruel, inhuman or degrading treatment or punishment. Regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969), the African Charter on Human and Peoples' Rights (1981), the Inter-American Convention to Prevent and Punish Torture (1985), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) have likewise been adopted.

In parallel, various bodies, mechanisms, institutions and organizations likewise concerned with the situation of detainees have come into being, whose work often also includes visits to places of detention. The conditions and procedure for ICRC visits to persons in detention have gained widespread acceptance and are a point of reference for most other agencies and institutions that wish to make such visits. They have, for example, been fully incorporated in international conventions setting up visiting bodies.[12]

The basis for the ICRC's work

The ICRC determines the beneficiaries of its activities on the basis of existing humanitarian needs and according to criteria linked to the prevailing situation in a given context.

In situations of international armed conflict, the ICRC's mandate for its activities on behalf of detainees (prisoners of war, civilian internees and security or common law detainees in occupied territories) is very clear. The Geneva Conventions give the ICRC the right of access to these persons and entitle it to receive all relevant information pertaining to them.[13]

In non-international armed conflicts there is no explicit treaty basis for the ICRC to have access to persons deprived of their liberty: neither Article 3 common to all four Geneva Conventions, which authorizes the ICRC to offer its services (the right of initiative), nor Protocol II additional to the said Conventions refers to visits to detainees or prerogatives specific to the ICRC. Legally, the parties concerned are thus under no obligation to accept ICRC visits to detainees in internal conflicts. Nonetheless, such visits are a constant

12 See in particular Articles 2, 7 and 8 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987, which established the European Committee for the Prevention of Torture (CPT), and Articles 4, 13 and 14 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 2002 (not yet in force), which establishes the Sub-Committee on Prevention of Torture along with national mechanisms for the prevention of torture.

13 Articles 123 and 126 Third Geneva Convention relative to the treatment of prisoners of war of 1949 (GC III) and Articles 76, 140 and 143 Fourth Geneva Convention relative to the protection of civilian persons in times of war (GC IV).

practice on the part of the institution; they are recognized internationally, in particular via numerous resolutions adopted at the International Conference of the Red Cross and Red Crescent[14] and hence also by States party to the Geneva Conventions, and are accepted in nearly all contexts.

In determining the detainees for whom its activities are deployed in internal armed conflicts, the ICRC draws in practice partly on concepts applicable to international armed conflicts. It accordingly seeks to have access first and foremost to persons who have taken a direct part in the hostilities (members of government armed forces or rebel forces in enemy hands) and to civilians arrested by the government or the rebels on account of their support, whether real or presumed, for the opposing forces. During visits to persons detained in connection with an internal armed conflict, the ICRC is often led by extension to concern itself with other detainees held in the same places of detention, but for ordinary penal offences (common law detainees). In such cases, the ICRC considers either that all detainees are affected by the prevailing situation, or that it is contrary to its principles of humanity and impartiality to address the needs of only one category of detainees when others have identical, or sometimes even greater, humanitarian needs.

As mentioned above, the ICRC has widened its focus and has extended its activities beyond armed conflicts[15] to situations of internal violence, and especially internal disturbances.[16] The same applies to other situations of internal violence, i.e. political or social tension or political unrest, which have not yet reached the level of internal disturbances but which affect a large number of people, in which an intervention by the ICRC is a suitable means to address the needs of those persons affected by the situation. Characteristic of them is the

14 Notably Resolution I of the 25th Conference (1986), Resolution IV of the 24th Conference (1981), Resolution XVIII of the 21st Conference (1969), Resolution XXXI of the 20th Conference (1965), and Resolution XIV of the 16th Conference (1938).

15 Currently, approximately 75% of the contexts in which the ICRC is visiting detainees are not situations of international or internal armed conflict.

16 Internal disturbances are characterized by a profound disruption of internal law and order, resulting from acts of violence which do not, however, have the characteristics of armed conflict. They do not necessarily imply armed action, but consist of serious acts of violence over a prolonged period or a situation of latent violence. For a situation to be qualified as internal disturbances, it is irrelevant whether there is State repression, whether the disturbances are prolonged or of brief duration but with long-lasting or intermittent effects, whether they affect part or all of the national territory, or whether they are of religious, ethnic, political, social, economic or any other origin. They include riots or isolated and sporadic acts of violence (see Article 1 (2) of Protocol II additional to the Geneva Conventions of 1977 (AP II GC)) whereby individuals or groups of individuals openly make known their opposition and their demands. They may also include struggles between factions or against the authorities in place, or acts such as mass arrests, forcible disappearances, detention for security reasons, suspension of judicial guarantees, the declaration of a state of emergency or the proclamation of martial law, see *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva, 1987, pp. 1354-1356 (N. 4471-4479); Agreement of 26 November 1997 on the organization of the international activities of the International Red Cross and Red Crescent Movement, *International Review of the Red Cross*, No. 829, March 1998, p. 175; Marion Harrof-Tavel, "Action taken by the International Committee of the Red Cross in situations of internal violence", *International Review of the Red Cross*, May-June 1993, No. 294, p. 204.

absence of any effective means for detainees to protect themselves from abuse or arbitrary acts which are being or may be inflicted upon them, for they do not or no longer enjoy the minimum protection they can expect from the authorities[17] or are subject to the arbitrary power of individuals. In such cases the ICRC intervenes to compensate for the absence or failure of internal regulatory mechanisms (able to curb the effects of violence) in the given context. Where necessary, the ICRC also seeks to limit the consequences should the authorities concerned (whether legal or *de facto*) lose their monopoly on force or their control over its use.

The ICRC offers its services if warranted by the gravity of humanitarian needs and the urgency of responding to them. In so doing it acts on the basis of its own right of initiative conferred by the Statutes of the International Red Cross and Red Crescent Movement.[18] The authorities approached are therefore under no legal obligation to accept such an offer of services by the ICRC or to grant it access to the persons detained.[19] However, its activities and visits to detainees in all these situations below the threshold of armed conflict can be considered a consistent and recognized ICRC practice that has been accepted in numerous contexts. The main consideration for the authorities concerned, over and above the legal aspects, is the experience and the professional competence of the ICRC and the potential practical interest of the visits, not forgetting the favourable image that often results from their acceptance.

ICRC visits are destined first of all for persons detained in connection with a situation of internal violence, mainly those who, because of their words, actions or writings, or even the simple fact of belonging to a particular ethnic group or religion, are considered by the authorities as a threat to the existing system. Broadly speaking, these persons are often classified as opponents who

17 In this article, the term "authority" is used in the broadest possible sense. It covers public or legal authorities (representatives of State structures), but also persons assuming responsibilities and acting in the name of an armed group or any other organized entity that is not recognized as a State.

18 Article 5 (2) lit. (d) of the Statutes of the International Red Cross and Red Crescent Movement which establish the ICRC mandate to provide assistance and protection to the victims of internal disturbances; see also Article 5 (3) of the Statutes.

19 Indirect reference to ICRC access to detainees outside situations of armed conflict can also be found in the resolutions of the International Conference of the Red Cross and Red Crescent (Resolution VI of the 24th Conference (1981) and Resolution XIV of the 16th Conference (1938)). Certain international conventions also refer to ICRC visits to detainees outside of armed conflicts (but do not constitute a legal basis for such visits): Article 6 (5) of the Convention against the Taking of Hostages (1979), Article 10 (4) of the Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), Article 7 (5) of the Convention for the Suppression of Terrorist Bombings (1997), Article 9 (3) of the Convention for the Suppression of the Financing of Terrorism (1999), and Article 32 of the Optional Protocol to the Convention against Torture (2002). Lastly, Resolution 23 of the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990 – following which the General Assembly of the UN, in its Resolution 45/121, invited governments to be inspired by the resolutions and instruments adopted on said occasion to develop legislation and appropriate directives – states that "the international community has given [the ICRC] a mandate in the Geneva Conventions of 1949, the Protocols Additional thereto of 1977 and the Statutes of the International Red Cross and Red Crescent Movement, to protect persons deprived of their liberty as a result of these events [that is, situations of armed international and other conflict and internal troubles], in particular prisoners of war, civilian internees and security detainees".

must be punished or at least controlled by depriving them of their liberty. Sometimes they are placed under special jurisdiction or are accused of crimes against the security of the State which are covered by specific national legislation. At other times they are detained under ordinary criminal law. The risk of being subjected to abuse or arbitrary acts is often greater for these detainees than for others. Lastly, the ICRC is concerned with the situation of detainees who are more likely to receive harsh treatment or suffer deprivations than in a stable situation, for instance when the authorities have, for whatever reason, lost full control over the law-enforcement officials.[20] In that case the ICRC's potential intervention will be for all detainees, regardless of the reasons for their detention.

The acceptance of an ICRC offer of services does not equate with recognition of the existence of a particular situation, especially a situation of armed conflict.[21] The acceptance of ICRC visits is often an expression of the authorities' desire to ensure that detainees receive decent, humane treatment.

Outside of international armed conflicts, the ICRC has to obtain authorization to carry out its visits through negotiation, including with armed groups and possible non-State entities;[22] these authorizations are given orally or in writing (in the form of an exchange of letters, safe-conducts signed by a minister, orders issued by the executive or the signing of a formal accord). The criteria determining the choice of procedure depend on the legal system, the functioning of the country's institutions, and considerations of advisability or national practice. The ICRC fairly often signs formal visiting agreements which, depending on the respective constitutional system, may have the formal value of international treaties and are sometimes published in official national bulletins.[23]

Obtaining access to detainees can sometimes be difficult. It often requires time, patience and negotiating talent. In some situations the ICRC is present but is unable to have access to detainees. Similarly, other situations in which the ICRC would like to be active remain closed to it, and the relevant authorities are completely impervious to dialogue with the ICRC on any questions relating to detention as a whole and especially possible ICRC access to detainees. Sometimes, too, the ICRC does not obtain all it wants, for instance when certain authorities grant access only to some of the persons or only after a certain period of time has elapsed.

In practice, on more than one occasion governments have not respected or have sought to evade their obligation to permit visits by the ICRC in

20 This was notably the case in President Mobutu's Zaire, where there was practically no budget assigned to prisons and where the prisoners had to pay to meet their essential needs, or die.

21 Article 3 common to all four Geneva Conventions explicitly spells out this principle: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

22 The ICRC has visited detainees held by numerous armed movements such as the TPLF (Tigray People's Liberation Front) in Ethiopia, the RPF (Rwanda Patriotic Front) in Rwanda, the SPLA/M (Sudanese People's Liberation Army/Movement) in Southern Sudan, UNITA (National Union for the Total Independence of Angola), the LTTE (Liberation Tigers of Tamil Eelam) in Sri Lanka, the FARC (Colombian Revolutionary Armed Forces) in Colombia, the main Kurdish parties and *de facto* authorities in Iraqi Kurdistan, *de facto* authorities in Abkhazia and in Nagorny Karabakh, the Palestinian Authority, etc.

23 For instance, the treaty signed in South Africa in 1995 and with Azerbaijan in 2000.

international armed conflicts. They have either disputed the existence of an armed conflict (including situations of occupation) or the international nature of the conflict, or they have required the ICRC to negotiate access, or have simply refused access to all or some of the detainees.

To give a complete picture, the visits made by the ICRC to persons detained under the authority of international tribunals should also be mentioned (the International Tribunal for the former Yugoslavia, the International Tribunal for Rwanda, the Special Court for Sierra Leone). The ICRC has likewise regularly had access to the detainees held by various international forces (for peacekeeping, peace-making or peace-enforcement) such as UNOSOM in Somalia, SFOR in Bosnia, UNMIK and KFOR in Kosovo, and INTERFET and UNTAET in East Timor.

Preconditions for action

Analysis of the problems and situation

Any action on behalf of detainees requires the overall situation to be understood and analysed as carefully as possible. This knowledge is needed to establish relevant objectives and an appropriate strategy of action. The information needed is obtained with complete transparency and, if possible, with the cooperation of the authorities concerned. However, it may turn out that the latter consider certain questions to be a matter of national security, and this can on occasion hamper or at least significantly delay an appropriate understanding and analysis of the situation and the problems.

The main groups of factors to be taken into consideration are as follows:

- *The characteristics of the situation*
  The type of conflict or other situation which, in the particular case in question, justifies intervention by the ICRC, the nature and extent of what is at stake for the warring parties and the persons concerned can influence the seriousness of the risks to which the detainees are exposed.
  The type of entities in charge of the arrest and detention of persons deprived of their liberty (military and paramilitary forces, police forces, special intervention troops, militias, armed groups, private security organizations, etc.) is an important factor.
  Socio-cultural factors which influence the level of tolerance for the use of violence in social relations in general and towards persons considered "deviants" or "delinquents" in particular must also be taken into account.

- *The State authorities' policies and practices*
  The main considerations here are the international commitments of the State and the warring parties (in particular, international humanitarian

law and international or regional treaties dealing with the protection of persons) and the incorporation of international rules into national legislation and regulations. Knowledge of the national legal and normative framework (legislation, rules, governmental directives), the possible deficiencies thereof and the extent to which it is or can be implemented[24] is important.
The custodial policy (the objectives to be achieved by imprisonment, the characteristics of different custodial systems and regulations in the prisons, the existence of stringent forms of detention and high security sections, etc.) and the methods of policing used (mass or targeted arrests, duration of periods of detention *incommunicado*, duration of detention in provisional places, brief or long-term deprivation of liberty, etc.) must be known. This also applies to the types of deprivation of liberty used (internment, administrative detention, penal detention, provisional detention).

- *The* modus operandi *of State authorities, particularly those linked to the administration of justice*
  Knowledge of such factors as the *modus operandi* of the authorities, the reliability and functioning of the chains of command, the centralization or decentralization of structures and decision-making, and the degree of autonomy of the bodies in charge of policing, is of fundamental importance. The same is true of the workings of key institutions involved in detention such as the prison administration, the interaction between the different bodies concerned (police, judiciary, prison administration, ministries supporting the penitentiary services in key questions such as finance, health, education, work, etc.), and the existence of various supervisory mechanisms within the administration or judiciary.

- *The financial, material and human resources available to the authorities*
  The factors to be taken into account are, in particular, the country's living standards and economic development, the level of the existing infrastructure, the national budget and the proportion allocated to prisons and the system of repression in the broad sense, the number of personnel engaged in the justice administration system, the tasks they perform and their level of training.

- *The organization of the diverse places of detention*
  The focus here is on the system of detention and its regulation (in terms of categories of detainees, gender, age and the length of sentences

24 In a significant number of countries, particularly developing countries, the constitutional system and the laws are not implemented in full or are not respected throughout the national territory for a variety of reasons (budgetary problems, insufficient judges, refusal by civil servants and law enforcement officials to work in isolated regions or areas subject to security problems, etc.). In other cases, the executive suspends the application of certain laws either in actual fact or by adopting various decrees or directives.

imposed), the actual running of places of detention and detainees (including aspects such as the existence and quality of medical supervision and care, the possibilities for contact between detainees and their families, the availability of productive and educational activities for the detainees, and the system of disciplinary sanctions).

Favourable environment and regulatory mechanisms

Understanding the situation and phenomena and analysing the functioning of the various custodial institutions and facilities is no easy matter. When intervening from outside the administration, it is very difficult to claim an ability to understand all the issues involved.

Respect for the dignity and well-being of detainees depends on the existence of a favourable environment. The primary responsibility for establishing and maintaining such an environment rests with the authorities concerned. They are duty-bound to provide for the vital needs of the persons they arrest and detain and to guarantee that they receive decent, humane treatment. When they become aware of problems, they have to take all necessary steps as soon as possible to remedy them. This also means proceeding to make a prompt and impartial investigation wherever there are grounds to believe that abuses have taken place,[25] and then, if the facts are confirmed, imposing appropriate penalties.[26]

This favourable environment, even if it does exist, is potentially unstable. It may be undermined at any time by unforeseen events such as terrorist attacks, the appearance of social tensions or simply changes in attitudes. Thus the risk of abuse is constant. Favourable environments therefore have to be monitored, developed and consolidated by mechanisms able to detect abuses as soon as they come to light and exert the necessary pressure on the relevant authorities to ensure that they take the appropriate steps. This is what is known as regulatory mechanisms.

There are essentially two different types of regulatory mechanism:

- internal regulatory mechanisms, i.e. those which act inside the country and are specific to the society in which they work. They include the independent media, various citizens' rights groups, lawyers, an independent judicial system, the traditional role of elders in certain societies,[27] etc.;
- external regulatory mechanisms, i.e. those which act at the level of the international community, mainly by bringing diplomatic and economic pressure to bear on the authorities concerned. They include the

25 This obligation is notably contained in Article 12 of the Convention against Torture.

26 In particular, on the basis of Article 4 of the Convention against Torture, but also under the provisions of the Geneva Conventions concerning grave breaches and other serious violations of international humanitarian law (Articles 40, 50, 129 and 146 of GC I, II, III and IV respectively).

27 For example in Somali or Burundi society.

international media, international tribunals, other governments,[28] international humanitarian organizations (UN agencies and NGOs) and international human rights bodies or organizations.[29]

The response of the various intervening parties forming the regulatory mechanisms cannot be simple and reduced to a single common denominator. Diverse and complementary action is required (in particular, political measures and measures to foster development and cooperation) whose common goal is to restore the parameters that ensure respect for the fundamental rights of the individual. The ICRC, essentially by virtue of its independence, its day-to-day presence on the ground, its contacts with all relevant authorities and its marked preference for confidential dialogue, acts as a substitute for internal regulatory mechanisms and intervenes mainly in crisis situations when internal regulatory mechanisms are dysfunctional, obstructed, or do not or no longer exist.

Characteristics of the ICRC's approach

The ICRC's approach in the field of detention has several particular characteristics.[30] Some are shared by other organizations and bodies. Others are specific to the ICRC (comprehensive approach, individual follow-up, total independence vis-à-vis political authorities, ability to intervene inside the countries concerned, ongoing dialogue with all relevant authorities at various levels). Those characteristics combined are what makes the ICRC's approach unique.

An adapted approach

The ICRC's priority is to persuade the responsible authorities to respect the fundamental rights of individuals. For that purpose the best response or responses have to be defined, based on an analysis of the situation as a whole and adapted to the problems identified and their causes.

The causes of problems and dysfunction may be attributable to a policy or strategy of repression whose concept or implementation does not comply

28 Under Article 1 common to all four Geneva Conventions, the States Parties are required not only to respect the Conventions, but also to ensure respect for them in all circumstances.

29 The latter may be linked to the UN bodies established by treaties such as the Committee against Torture (established by the Convention against Torture), the Human Rights Committee (established by the 1966 Covenant on Civil and Political Rights), the Committee on the Rights of the Child (established by the 1989 Convention on the Rights of the Child); mechanisms established by resolutions of the UN Commission on Human Rights such as the Special Rapporteur on Torture, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, or the Working Group on Arbitrary Detention; the Office of the High Commissioner for Human Rights); or regional organizations (bodies established by regional treaties, such as the European Committee for the Prevention of Torture, the Inter-American Commission on Human Rights, or the African Commission on Human and Peoples' Rights) and mechanisms established by the resolutions of regional organizations (such as the Special Rapporteur on Prisons and Conditions of Detention in Africa; or they may be NGOs).

30 See in particular Pascal Daudin and Hernan Reyes, "How visits by the ICRC can help prisoners cope with the effects of traumatic stress", in *International Responses to Traumatic Stress*, Baywood Publishers, New York, 1996, pp. 219-256.

with international norms and standards. Others are due to failures, or even an inability, of the authorities to ensure that their institutions and systems operate in such a way that the detainees' integrity and dignity are respected. Lastly, social factors, such as the level of tolerance for the use of violence, may play a role. In practice, it is not always possible to identify clearly the respective importance of these different parameters.

For the ICRC, the principal challenge is to ensure that its activities are suited to the needs and diversity of the situations in which it is working at a given time; adapted approaches are thus required. Moreover, these vary increasingly from one situation to another. There are few points in common, for example, between an interrogation and detention centre such as that in Guantánamo Bay, run by a country with such substantial resources at its disposal as the United States, and overpopulated, outdated prisons in a developing country such as Rwanda. The ICRC thus makes regular efforts to adapt accordingly the forms of action it takes.[31]

An integrated approach: From visits to assistance

In its approach, the ICRC gives priority to make the relevant authorities aware of their responsibilities. Efforts to promote a sense of responsibility are effective, provided there is a minimum of political will to follow the recommendations made and to cooperate properly. This political will may also be generated by third parties able to influence the authorities (mobilization), or even by public pressure (denunciation).[32] The ICRC's own practice with regard to denunciation is restrictive and requires the existence of specific conditions.[33] When the

31 There are five main forms of action:
- persuasion or promotion of a sense of responsibility: convincing the authorities to take action themselves to stop an abuse or violation or to help the victims thereof;
- support: direct or indirect cooperation with the authorities by giving them the means to fulfil their legal obligations;
- substitution: acting in lieu of the defaulting authorities to stop an abuse or violation or help the victims thereof;
- mobilization: generating the interest and external influence of other entities (States, NGOs, institutions of civil society, international or regional organizations) to obtain support enabling an abuse or violation to be prevented or stopped or to elicit encouragement or help for the authorities in fulfilling their legal responsibilities and obligations;
- denunciation: publicizing the existence of abuse and violations so as to exert pressure on the authorities and compel them to take action to stop an abuse or violation or to help the victims thereof.
- For definitions, see: Paul Bonard, *Modes of action used by humanitarian players: criteria for operational complementarity*, ICRC, Geneva, 1999; Sylvie Giossi Caverzascio, *Strengthening Protection in War: A Search for Professional Standards*, International Committee of the Red Cross, Geneva, 2001, pp. 29-33; *Humanitarian Protection: A Guidance Booklet*, Hugo Slim and Luis Enrique Eguren, ALNAP, London, 2005 (forthcoming).

32 In situations of armed conflict, denunciation and calls for action by States party to the Geneva Conventions are based in particular on Article 1 common to all four Conventions which requires them "to respect and to ensure respect for the present Convention in all circumstances".

33 See "Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law", *International Review of the Red Cross*, January-February 1981, No. 220, pp. 76-83; see also reference 42.

political will is there but the means or know-how are lacking, the ICRC can provide support through various activities, including the strengthening of local capacities. In emergencies or when, despite the best of intentions, the authorities are incapable of meeting all the basic needs of detainees, the ICRC can go further and provide direct assistance by selectively assuming on some of the authorities' duties.

Visits to detainees are the very core of the ICRC's approach. Visits are clearly an effective way of identifying the incidence of ill-treatment, inadequate conditions of detention and the existence of any other problem. By simply taking place they can to some extent also have a prophylactic effect and thus be instrumental in preventing abuse. They play a psychological role, too: for months or even years, the ICRC delegate is often the only benevolent person to whom the detainees can speak and in particular voice all their frustrations and anxieties without fear. Visits are lastly an opportunity to start a practical dialogue with the detaining authorities, for the ICRC's intermittent presence in a place of detention cannot guarantee that the detainees' physical and moral integrity will be respected. Only the detaining authorities themselves can assume this responsibility. That is why the purpose of the ICRC's activities is to convince the authorities, by approaching them, to adopt the solutions it recommends for the humanitarian problems it has observed.

While focusing primarily on people — the detainees with whom the ICRC delegates speak — the visits do give insight into all aspects of detention and consequently all factors influencing the detainees' lives (for example, the premises, the organization of the prison service, the administration's internal regulations and directives, etc.).

On the basis of these visits and its findings, the ICRC adopts a whole range of measures. First there are discussions with the administration of the places of detention and their superiors, then working documents summarizing its findings and the recommendations made, followed by summary reports on the situation at one or more places or with regard to a particular problem. These approaches take place at all levels of the custodial system and the chain of command, whether civilian, military or under police control. In parallel, and with the consent of the authorities concerned, the ICRC can take a series of interdependent steps and initiatives to support its work of overseeing the places of detention or its approaches to ensure that the detainees receive decent, humane treatment. They include:

- advising on legal and similar matters (e.g. prison legislation, regulations on prison organization, etc.);
- translating reference works published by the ICRC or, with their consent, those of other authors or organizations[34] into a national language;

34 This was particularly the case in Ethiopia with the translation into Amharic of the manual "*A Human Rights Approach to Prison Management: Handbook for Prison Staff*", Andrew Coyle, International Centre for Prison Studies, London, 2002.

- advising, sometimes with the provision of material support, on the establishment and organization of State services and facilities;[35]
- setting up specialized training for law enforcement personnel (police and security forces and the military),[36] prison personnel[37] or specialists working in prisons,[38] e.g. medical personnel and those in charge of the water supply and sanitary facilities;
- organizing interdisciplinary workshops bringing together professionals from a wide variety of fields to work on the same problem;[39]
- bringing the authorities together with organizations specialized in fields in which the ICRC does not claim to have specialized knowledge;
- renovating or providing new sanitation, (latrines, septic tanks, showers, etc.), kitchens or health facilities (building and equipping clinics and/or providing medical supplies, etc.);
- organizing the exchange of family news between detainees and their families (in the form of Red Cross Messages) monitored, or even censored, by the competent authorities;
- delivering hygiene products or recreational items directly to the detainees;
- providing food or setting up a food chain in exceptional circumstances,[40] or taking emergency action in the event of epidemics such as cholera.

Flexibility

Since its vocation is to act in highly varied contexts across the world, the ICRC has to be as flexible as possible. The main priorities are to serve the interests of the people affected — the detainees — and to meet their needs. There is no room for dogmatism or a single approach.

The visits and follow-up activities are not the same with regard to detainees in what are called provisional places of detention such as police stations,

35 In particular improving prison medical services.

36 The ICRC organizes courses at various levels (particularly basic courses and courses for instructors) with the main objective of creating a national long-term capacity to continue the same type of training. It seeks essentially to familiarize participants with the laws, ethical codes of conduct and professional standards in force, and places a very strong emphasis on respect for the physical and moral integrity of suspects during arrest and detention. It is careful not to teach techniques (e.g. for interrogation) in fields where it is not competent and could not get involved without compromising its principles of action, especially its neutrality. For police and security forces, the basis for these courses is found in the publication "*To Serve and Protect: Human Rights and Humanitarian Law for Police and Security Forces*", ICRC, Geneva, 1998. For the armed forces the ICRC has published a training guide: *The Law of Armed Conflict: Teaching File for Instructors*, ICRC, Geneva, 2002.

37 This can take the form of international seminars on a regional scale, support for seminars organized by other organizations, national training seminars on international standards and workshops on various problems to do with imprisonment and the prison system. Where appropriate, these workshops are held with the participation of foreign experts or officials or specialized organizations.

38 Such training can take the form of practical workshops at a single prison, at a regional level, or at the national level, the implementation of pilot projects or the provision of technical experts.

39 For instance on the treatment of tuberculosis, or more generally on the organization of custodial services (judges, criminal investigation department, prison administration).

40 In 2004, e.g. in Rwanda, Madagascar and Guinea.

interrogation centres, or even military bases and permanent places of detention as prisons. Being faced with administrative detention or internment is not the same as detention under judicial control. The detention of hostages, in particular by private persons or militias having no direct or organic link to the authorities, poses challenges of its own. The same is true of detention by international forces or international tribunals. Activities on behalf of detained women or children require many specific questions to be taken into consideration.[41]

This flexibility also applies to the mere organization of ICRC visits. The number of delegates or specialists involved (from one to a dozen), the frequency of visits (sometimes one a week, or even one a day; in other situations, one a year or even fewer), the type of visits (a complete tour of the entire premises and installations, or a partial visit relating to limited problems) can all vary significantly. The steps and recommendations to which the visits give rise can also differ substantially, as can the possible measures and initiatives which follow the visits.

Proximity and regular presence

The ICRC does not comment nor act in the field of detention if, for whatever reason, it has not visited the detainees and has no firsthand knowledge of the situation. When it is authorized to visit the detainees, the ICRC establishes a permanent representation, sized according to the number of places of detention and detainees and the importance of the identified or prospective needs. Where appropriate, the ICRC deals with several countries from the same representation.

This direct presence enables the ICRC simultaneously to acquire sufficient knowledge of the situation, be in close proximity both to the detainees and the authorities, maintain an ongoing dialogue, and intervene very rapidly on the ground in the acute phase of a crisis.

A strictly humanitarian, non-political and independent approach

The ICRC has a precise objective in mind, namely improving the situation of detainees by doing all it can to ensure that they are treated with dignity and humanity.

Anxious to preserve the trust of all parties, the ICRC is independent not only with regard to political interests: it likewise does not get involved in any way in the political problems giving rise to the tense situations in which it intervenes, or comment on the reasons for detention. Similarly, the pertinence of the accusation, the guilt of the detainee, the legitimacy of the laws permitting the detention (martial law, exceptional laws, the normal penal code — or simply the absence of law) are not a direct consideration for the ICRC. The offence of which the detainee is accused (armed combat, terrorism, subversion, wrong thinking, etc.)

41 On this subject see in particular "*Addressing the Needs of Women affected by Armed Conflicts: An ICRC Guidance Document*", ICRC, Geneva, 2004, pp. 113-160.

is therefore irrelevant to the ICRC once it has determined that he or she falls within its field of interest.

Independence is one of the fundamental principles of the ICRC. In its work, the ICRC takes constant care to be perceived also as independent and exclusively motivated by the desire to alleviate suffering.

Dialogue – confidentiality – impact

The cornerstone of the ICRC's approach is dialogue, both with the detainees and with the authorities.

Since it seeks cooperation and not confrontation with the authorities, the ICRC has to maintain a close, structured, professional and transparent relationship with them. Dialogue in particular is the logical next step after any visit to a place of detention. It enables a regular flow of objective information, based on regular contact with the detainees, to be maintained with the relevant authorities and culminates in the formulation of proposals for solutions. As mentioned above, constant dialogue with all parties responsible, at whatever level, enables the visit to be part of an ongoing process. It is also conducive to the sense of proximity between the ICRC and the authorities, law enforcement services and detainees.

The priority given to dialogue is an incentive for the ICRC to multiply its contacts and devise new ways of reaching the potential perpetrators of violence or those who control them. In crisis situations, dysfunction in the official chains of command or problems in the supervision of subordinates regularly come to light, often requiring all echelons of the civil and, if need be, military hierarchy to be contacted, informed and convinced of the soundness of the ICRC's recommendations. Sometimes a State disintegrates into several factions with a direct or indirect influence on the situation and treatment of detainees: it then becomes crucial to be able to contact and discuss with them.

To be constructive and successful, the ongoing dialogue envisaged by the ICRC must be firmly rooted in a relationship of trust. This trust, nurtured by frequent meetings between the ICRC and the authorities, is established and built up thanks, among other things, to the confidential nature of its work. Confidentiality is a working method and it is a strategic choice. It is therefore not an end in itself. It also allows work to be done on what are generally very sensitive issues, in complete independence and free of any pressure by public opinion, the media or political organizations. Moreover, confidentiality unquestionably makes access easier, particularly to places to which the authorities are reluctant to admit outsiders.

By accepting the working methods of the ICRC and its presence and involvement in places of detention, the authorities agree to enter into discussions on sensitive issues such as the occurrence of torture and commit themselves to dealing with them in good faith. The ICRC also has to be wary that its presence and activities are not exploited by the authorities. So confidentiality has its limits.

When the ICRC's representations and efforts have no significant impact or when the authorities do not abide by the agreed procedures, the ICRC may decide to publicize its concerns. This may also lead to a suspension of its activities, primarily its visits to detainees, until a new agreement has been reached or the authorities have renewed their commitment not to tolerate further abuses. The ICRC decides to make a public denunciation only when strict conditions are met,[42] and when it is convinced that emerging from its customary reserve in this way will benefit the detainees and not harm them. In general, the main concern of the detainees to whom the ICRC has access is not to be abandoned, rather than wanting to see their situation made public. In every such case, the decision whether to go public and when to do so is given considerable thought.

The ICRC insists that the authorities in the countries in which it is working must observe the same rules of confidentiality with regard to its findings and recommendations. When they fail to do so, the ICRC in turn may then also decide to abandon those rules. Historically, confidentiality has on the whole been respected by the authorities. Situations in which leaks have led to partial or complete publication in the press of ICRC reports on places of detention generally date back quite a long time, to Algeria (1960), Greece (1969), Pakistan (1972), Chile (1975) and Iran (1979). More recently, the report handed over by the ICRC to the American authorities and detailing its findings during visits from May to November 2003 to detainees in Iraq was published by the *Wall Street Journal*.[43] Likewise, information in its confidential reports on its visits to the internment camp at Guantánamo Bay was published in the press.[44] The ICRC expressed its concern about these leaks, which are contrary to the conditions, procedure and cooperation agreed in advance with the relevant authorities. Apart from the effects they might have on the detainees' situation, such repeated leaks could also detract from the importance, in the minds of the authorities of other countries, of the confidentiality that the ICRC imposes upon itself and strictly adheres to, or wrongly give them the impression that it has changed its working methods.

Interest in the individual, and individual follow-up

The ICRC's vocation is to attend above all to individuals and their problems, and it has given itself the ability to do so. Throughout their time in captivity it

42 These conditions are: 1) the existence of large-scale and repeated violations; 2) the ICRC delegates have directly witnessed such violations, or their existence and extent and respective data have been established by means of reliable and verifiable sources; 3) the ICRC's confidential approaches to end these violations have had no impact or results; 4) a public statement by the ICRC would be conducive to the interests of the persons concerned. Cf. "Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law", *International Review of the Red Cross*, January-February 1981, No. 220, pp. 76-83.

43 "Excerpts from the executive summary of the 'Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation'", *Wall Street Journal*, 7 May 2004.

44 "Red Cross finds detainee abuse in Guantánamo", A. Lewis, *New York Times*, 30 November 2004; "Iraq: new war, old tactics?", *Newsweek*, 24 January 2005.

monitors the detainees it deems to be at risk. The risk factor is assessed according to their status or the abuse to which they have been, or are potentially likely to be, subjected. Individual monitoring may also sometimes take place on an ad hoc basis during a particular period of captivity (in particular until the detainee has been sentenced in due process of law and his or her situation thereby normalized, or until satisfactory conditions of detention have been granted), or for detainees who are vulnerable or have particular problems.

More specifically, the ICRC takes note of the identity of such detainees, which is then entered into a database and stored at its headquarters for several years after its intervention in the respective context has ended. During its subsequent visits, the ICRC regularly checks whether the detainees it has registered are still present or where they have been transferred to, and whether or how their situation has changed. Interviews in private with the detainees enable the ICRC to find out how they are coping with imprisonment and the difficulties encountered in their daily life. They also give it an opportunity to identify detainees or groups who are suffering abuse. In principle, each case will then be followed up either by a request to the authorities concerned to take corrective measures, by a repetition of the visit, or even by individually addressing the personal problems of certain detainees.

Individual approach and structural approach

In many contexts the ICRC has realized that an approach centred on only some detainees or categories of detainees with specific problems necessitating protection was inappropriate or needed to be complemented by a wider approach covering the detainees as a whole. In such cases all factors that are related to or significantly influence detention and the detainees' situation, and thus their lives, have to be taken into account. In principle, this can have a greater impact than by intervening simply to address individual problems. The structural approach and the individual approach are moreover generally inseparable and complementary.

The main problems encountered in the prisons are in fact very often structural in origin. For instance, a lack of rules clearly defining the duties and responsibilities of personnel often results in abuses that could be prevented. Also, slowness of the judicial system leads to big delays in dealing with cases of detainees awaiting trial. These delays cause congestion in the penitentiary system, which in turn gives rise to a series of problems in running the prisons and maintaining adequate material conditions of detention. Quite often, the shortcomings and abuses identified are nothing new and existed well before the situation which justified the ICRC's intervention, even though that situation may have exacerbated them.

The structural approach focuses on improving the way the places of detention are run and the administration of justice in the broad sense so as to benefit a large number of the detainees, if not all of them. The ICRC takes a comprehensive view of the problems and thus often carries out a kind of audit or consultancy, producing a thorough appraisal of the situation for the relevant authorities. The purpose is to recommend means of reducing structural shortcomings and

dysfunctioning, to render the work of law enforcement institutions more compatible with international standards, to educate and to enable systems and behaviour to be reformed in the long term.

Wherever the authorities show a genuine desire to improve the situation by strengthening their institutional capacities and/or implementing recognized practices, the ICRC often backs up its initiatives and recommendations with practical hands-on support for these efforts. It then regularly calls on the services of consultants or works in partnership with organizations specialized in a particular field.

Conditions and procedure for visits to detainees

The ICRC carries out its visits to places of detention according to specific terms and conditions which are applied across the board[45] and have to be accepted by the authorities in question before any visit can take place. They are the guarantee for professional and credible work and enable the ICRC to assess the situation as accurately as possible, whilst safeguarding the interests of the detainees.

There are five main conditions governing ICRC visits:

1. Access to all detainees within the ICRC's field of interest

The ICRC must have the guarantee and the genuine possibility of coming into contact with all persons having the status, or belonging to the category, for which it has negotiated access.

2. Access to all premises and facilities used by and for detainees

This condition is the logical corollary of the first one. The ICRC wants to have access to all detainees, wherever they may be (prison, camp, police station, military garrison, etc.). It also wants to have access to the entire premises there, including communal facilities (cells, WC, showers, kitchens, refectory, visiting room, workshops, sports areas, places for worship, infirmary, punishment cells, etc.). Such access makes it possible, in particular, to verify the conditions of detention and make sure that there are no detainees concealed from the ICRC during its visit.

3. Authorization to repeat the visits

Experience shows that a single visit has few positive long-term effects and does not enable protective activities to be developed. It is, moreover,

45 See also Philippe de Sinner and Hernan Reyes, "Activités du CICR en matière de visites aux personnes privées de liberté. Une contribution à la lutte contre la torture", in Antonio Cassese (ed.) *La lutte internationale contre le terrorisme*, Nomos Verlagsgesellschaft, Baden-Baden, 1991, pp. 153-171; Pascal Daudin et Hernan Reyes, "How visits by the ICRC can help prisoners cope with the effects of traumatic stress", in *International Responses to Traumatic Stress*, Baywood Publishers, New York, 1996, pp. 219-256; Hernan Reyes, "Visits to prisoners by the ICRC", in *Torture Supplementum* No. 1, 1997, pp. 28-30; Marina Staiff, "Visits to detained torture victims by the ICRC (I): Management, documentation, and follow-up", *Torture*, Vol. 10, No. 1, 2000, pp. 4-7.

imperative to be able to see certain detainees again to ensure that they have not been subjected to reprisals after their interview with the ICRC. The possibility to repeat visits is therefore one of the key conditions for any ICRC action on behalf of detainees. Each detainee registered by the ICRC will be monitored throughout his or her entire detention and will be seen again periodically, whether transferred elsewhere or not. As a general rule, the frequency of visits is adapted to the detainees' needs. For objective reasons consideration must also be given, however, to the available human, material and financial resources.

4. Possibility to speak freely and in private (without witnesses) with the detainees of the ICRC's choice

The private interview without witnesses is truly a fundamental principle of the ICRC's work in places of detention. It enables the ICRC to get to know the detainees' point of view and individual circumstances, and to gain insight into the reality of prison life – not only the material and psychological conditions in the place visited but also all aspects of the treatment experienced by the detainees in other places. In the day-to-day life of the detainees the private interview is intended as a special time in which they can genuinely say what they think without being overheard by the authorities and their fellow detainees, and can sometimes even vent their feelings orally without fear of punishment.

The interviews are conducted at a place chosen by the ICRC as best guaranteeing confidentiality (e.g. a cell, the library, the exercise yard, etc.) and, within reason, take place without any time limit. The private interview is a time for listening and dialogue, during which it is of utmost importance to be able to communicate in a language understood by the detainee; the presence of an ICRC interpreter or, if unavoidable, of a fellow detainee chosen to act as an interpreter, is therefore sometimes necessary.

The information obtained during the private interview is essential for the ICRC, but it is aware of certain subjectivity on the part of the detainees and takes this into account when evaluating problems. Before mentioning to the detaining authorities any information given by a detainee, the ICRC makes sure that the detainee in question agrees to that information being passed on.

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 the various stages of their detention.

Other terms and conditions can be negotiated and added to the agreement reached with the authorities concerned: the possibility to make visits at any time without prior notice or at short notice; the possibility to provide certain services

(distribute aid or family messages); automatic notification by the authorities of arrests, transfers and releases, etc.

Irrespective of the type of place of detention, the organization of the visits and the actual visiting procedure are, in principle, basically the same. A standard visit to a place of detention normally consists of the following stages:

- an initial interview with the authorities of the place of detention to enable the ICRC to clarify both its and their expectations and constraints. It is also an opportunity to gather information on how the place is run and the main problems facing the authorities;
- a tour of the entire premises, accompanied by the authorities, so that the ICRC can familiarize itself with the place of detention and find out how it is organized and handles its daily work, including the functioning of installations such as the kitchens, the sanitary installations or the facilities for family visits;
- interviews in private with the detainees, which generally account for most of the time taken up by the visit;
- a final interview with the authorities of the place of detention to relate their perception of the situation to that of the detainees and to outline the ICRC's findings and recommendations;
- a follow-up to the visit by contacting the authorities concerned, either the person in charge of the place of detention or at a higher level, as mentioned above.

Professionalism

In order to be relevant, formulate recommendations adapted to the various contexts and take appropriate action, the ICRC makes a point of being professional in its approach. Its various activities, in particular the visits to places of detention, are carried out by duly trained delegates. Doctors experienced in matters relating to detention, and experts in fields such as water, sanitation and habitat, nutrition or judicial guarantees are regularly included in its teams. When it feels that none of its staff has the requisite expertise, it may call in consultants, especially experts on prison organization.

Good offices and interventions as a neutral, independent intermediary

In a significant number of situations, the ICRC has played a part in the release and/or repatriation of detainees. In principle, the parties to an international conflict must themselves release and repatriate prisoners of war; ICRC participation is not mandatory. It has nevertheless always been the ICRC's practice to be available in complex situations or when dialogue between the former belligerents remains difficult. Over the last 20 years it has been systematically requested to take part and has thus acquired considerable experience and know-

how, imbued with great tenacity. That tenacity is particularly evident when the process takes several years, as it did for the prisoners of war of the Iran-Iraq conflict or those held in connection with the Western Sahara conflict. In practice, the ICRC agrees with the respective parties on the conditions and procedures for release and repatriation (in particular, it insists on interviewing all detainees in private to find out whether they object to being repatriated, so as to ensure that the principle of *non-refoulement* is respected, i.e. that they are not being returned against their will). Next, agreement is reached on a repatriation plan defining all the practical aspects and mainly the logistics available. Besides the two conflicts mentioned above, the ICRC has acted as a neutral and independent intermediary in connection with the Gulf War and various other conflicts: in Nagorny Karabakh, the Democratic Republic of Congo, between Eritrea and Ethiopia and previously between Eritrea and Yemen, and in southern Lebanon, Croatia and Bosnia-Herzegovina.

More recently, the ICRC has also been asked to supervise the release and return home of persons detained in connection with an internal armed conflict, either during the hostilities (e.g. soldiers held by the FARC in Columbia, the NPA movement in the Philippines and the LTTE in Sri Lanka) or more often after the signing of a peace agreement (as in Angola, Sudan, Liberia or the Ivory Coast).

Arousing public awareness and a sense of responsibility among States

In numerous countries there is little awareness of — or interest in — matters of detention. Yet prison conditions in many cases are alarming, and all too often prisoners die for want of care or food. Cooperation programmes and projects supported by economic institutions such as the World Bank or the International Monetary Fund often bypass this complex area. Whilst many countries do admittedly receive aid to reform their judicial system, the custodial system and conditions in prisons, including the need for renovation, often receive only marginal attention.

The ICRC regularly seeks to use its presence in numerous international fora and its network of high-level contacts to highlight the difficult situation of prisons in many countries, stressing the urgent need for swift action and assistance. It also periodically publicizes these issues. All its efforts to raise awareness and generate action take place within the limits imposed by its confidentiality, although the difficult material conditions in prisons are often public knowledge in the countries directly concerned.

Standards and reference bases

Working to achieve the adoption of standards

Throughout its history, the ICRC has vigorously participated in the development and adoption of legal standards protecting various categories of

detainees.[46] In addition, it has regularly taken part in meetings of experts, sessions of working groups set up within the framework of the UN, notably by the Commission for Human Rights, and diplomatic conferences which have led to the adoption of new detention-related norms. The acknowledged expertise of the ICRC, its international standing as well as its observer status in the United Nations General Assembly and the Economic and Social Council enable it to participate in most discussions on peremptory norms and non-mandatory texts taking place at an international level. One of the most recent examples was the participation of the ICRC in various meetings held over a period of several years within the framework of the Commission for Human Rights that led to the adoption in 2002 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

The ICRC also regularly takes part in meetings of experts or professional groups seeking to formulate professional standards in various technical fields. It participates, for instance, on a regular basis in meetings of the World Medical Association on the work of doctors in the field of detention. One of its staff members also took part in the preparatory work which led to the formulation of the Istanbul Protocol on the documentation of torture.[47]

Lastly, the ICRC has published, either on its own or in partnership with other organizations, various manuals in which it shares its experience and seeks to establish professional standards in areas such as water, sanitation, prison hygiene and habitat,[48] and the prevention and treatment of tuberculosis in prisons.[49]

Reference bases

In situations of international armed conflict, the content and form of the assessments made and steps taken by the ICRC are based on the rules and obligations laid down by the Third and Fourth Geneva Conventions (which regulate in quite a detailed manner the living conditions and treatment in captivity) and by Additional Protocol I. In areas where international humanitarian

46 These efforts were first made within the ICRC's role as the driving force behind IHL. The Statutes of the Movement stipulate (in Article 5 (2) lit g) that one of the major functions of the ICRC is "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (in Article 5 (2) lit g). In February 2003, the ICRC accordingly organized an international conference of governmental and non-governmental experts which examined the question of missing persons and adopted a declaration (see the ICRC report "The missing and their families: Summary of the conclusions arising from events held prior to the International Conference of Governmental and Non-Governmental Experts" (19-21 February 2003), (ICRC/The Missing/01.2003/EN-FR/10) and the "Acts of the Conference" (The Missing/03.2003/EN-FR/90)).

47 See United Nations High Commissioner for Human Rights, *The Istanbul Protocol: Manual on the Effective Investigation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series No. 8, United Nations, New York and Geneva, 2001.

48 See Pier Giorgio Nembrini, *Eau, assainissement, hygiène et habitat dans les prisons*, ICRC, Geneva, 2004.

49 See Dermot Maher, Malgosia Grzemska et al., *Guidelines for the Control of Tuberculosis in Prison*, World Health Organization, Geneva, 1998.

law is silent or incomplete, the ICRC can refer to other bodies of law, notably those cited earlier,[50] insofar as they are applicable in the State in question.

International humanitarian law applicable in non-international armed conflict contains general principles but remains succinct with regard to the situation, organization and management of detainees, their treatment and their conditions of detention. It may refer, by analogy, to concepts expressly formulated for international conflicts. More often, it has recourse to other bodies of law and it often makes general reference to minimum humanitarian principles or recognized international standards, with or without mentioning a specific norm or article. Where appropriate, it also cites national law.

In internal disturbances and other situations of internal violence the ICRC may, again by analogy, invoke concepts laid down in international humanitarian law, but generally bases its activities on other rules of law. The texts to which it most readily refers are the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment,[51] which serve as a universal benchmark for detention and prison matters. At the same time the ICRC is careful not to take a stance on what should be social objectives (punishment, reintegration into society) or on the conditions in which the deprivation of liberty takes place (administration of justice, penitentiary policy).

In dealing with more technical matters such as health and sanitation, new developments and the latest studies by specialists and professional associations, if relevant in the respective context, are taken into full consideration.

The ICRC's recommendations are generally based more on a reasoned response to the immediate needs observed than on legal concepts. In the steps it takes and the recommendations it submits, the ICRC tries to be as flexible as possible. In particular, it has not established what might be called "ICRC standards" that it follows or that are more or less applicable in all contexts.[52] Its approach will depend on factors such as the kind of situation, the law in force, the international treaties ratified by the country or binding on the authorities, the country's traditions, culture and level of development, the capabilities of the detaining authority, the categories of detainees concerned and the type of detention.

Objectives of ICRC activities

In general, the purpose of the ICRC's intervention is to have the detaining authority respecting the detainees' physical and moral integrity.

50 See the part *Development of the legal framework and the ICRC visiting procedures* (reference 11)2.

51 For a commentary on these minimum rules, see *Making standards work, an international handbook on good prison practice*, Penal Reform International, London, 2001.

52 An institution such as the European Committee for the Prevention of Torture (CPT) has adopted a different approach and has published the standards it recommends and on which it bases its work. They appear in reports drawn up by the CPT after its visits and made public if the State concerned agrees. See Rod Morgan and Malcolm Evans, *Combating Torture in Europe*, Council of Europe Publishing, Strasbourg, 2001.

In the course of an armed conflict, whether international or internal, one of the objectives of ICRC visits is to check that international humanitarian law is and continues to be applied. The various problems that affect the life, the physical and mental well-being and the dignity of a detainee are often interconnected. In all situations the ICRC concentrates on the detainees' needs it considers to be the most important, i.e. it seeks first and foremost to prevent or terminate:

- disappearances;
- torture and other forms of ill-treatment;
- inadequate or degrading conditions of detention;
- severance of family links;
- disregard for essential judicial guarantees.

Efforts to prevent disappearances and summary executions

Efforts to prevent disappearances are essentially based on the earliest possible identification of persons at risk. Under international humanitarian law, the parties to a conflict must pass on all information they possess about combatants and civilians who have been reported missing.

In international armed conflicts, it is mandatory for the detaining power to have a capture card filled in by each prisoner of war, to draw up and pass on lists of prisoners of war, to establish a national information bureau responsible for centralizing information on those persons and to send all relevant information to the ICRC.[53] Through its Central Tracing Agency, the ICRC in turn centralizes the information supplied by all parties to the conflict and gathers information itself on persons deprived of their liberty who are protected by the Geneva Conventions. Many of these rules are also applicable in internal armed conflict. In all other situations, the immediate, accurate registration by duly appointed government officials of all persons taken into custody is an obligation under national law and in various instruments of international public law.[54] Registration by the authorities constitutes an official recognition of the arrest and deprivation of liberty. Respect for this rule of transparency is indispensable to protect individual persons and to combat disappearances, extrajudicial executions and arbitrary arrests.[55] Alongside the registration of information by the authorities, much can be done to prevent disappearances by informing the families about the arrest and detention, in accordance with the right to know expressly laid down in international humanitarian law[56] and deriving also from the interpretation of diverse rules and principles in situations not covered by that law.

53 Article 122 GC III; with regard to civilian internees see Articles 106 and 138 GC IV.

54 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 12 and 16 (1).

55 Precise registration guidelines are given notably in the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (Principle 12) and the Standard Minimum Rules for the Treatment of Prisoners (Rule 7).

56 The right to know is stipulated in particular in Article 32 AP I GC. It also derives from Articles 69 and 70 GC III; Articles 25 and 26 GC IV; and Article 5 .(2) lit.(b) AP II GC.

The ICRC places particular emphasis on the prevention of disappearances by reminding the authorities of their obligation to register and notify. When capture or arrests are followed immediately by summary execution, only insistent enquiries by the ICRC based on general data or on specific cases witnessed by survivors (families, or persons captured at the same time and visited subsequently by the ICRC) can have an effect. When the disappearance occurs some time after the arrest, usually during the interrogation phase, the identification of detainees by the ICRC assumes its full value. This identification process, which consists in noting the identity of detainees whom the ICRC deems to be at risk, must take place as soon as possible. Identification can play its preventive (and dissuasive) role to the full only if it is understood and accepted by the detaining authority and is followed up by regular visits to the persons thus registered.

In several conflicts, the ICRC has encouraged and actively participated in the implementation of mechanisms to facilitate dialogue with and between the relevant authorities and to speed up resolution of the distressing problem of missing persons. In so doing, it has constantly stood by the families of those reported missing by helping them to search for the truth, attempting to respond to their legitimate expectations and giving material and psychological support.

Efforts to combat torture and other forms of ill-treatment

Despite the outlawing of torture and other acts of cruel, inhuman or degrading treatment or punishment, such practices are very widespread. Torture has been the subject of lively debate in recent years, especially in the media. Regular attempts are being made to narrow down the notion of torture, omit the fact that cruel, inhuman and degrading treatments are also prohibited and justify the use of "special" methods in certain situations, giving the impression that in actual fact protection in this domain is being eroded in many parts of the world.

The ICRC firmly rejects any recourse whatsoever to torture and other forms of ill-treatment.[57] It considers that respect for human dignity far outweighs any justification of torture and that the prohibition contained in international law is absolute and allows for no exceptions of any kind. Whilst being fully aware that States have legitimate concerns for their security, it deems that human dignity prevails over the interests of a State and that it is impossible to decree that torture and other forms of ill-treatment are an evil that is regrettable, of course, but nonetheless necessary. In particular, methods of interrogation and investigation which respect human dignity must be employed, even in the case of people accused of the worst crimes, such as acts of terrorism.

57 See in particular "The International Committee of the Red Cross and the torture", *International Review of the Red Cross*, December 1976, No. 189, pp. 610-617. See also Philippe Sinner and Hernan Reyes, "Activités du CICR en matière de visites aux personnes privées de liberté: Une contribution à la lutte contre la torture", in Antonio Cassese (ed.), *La lutte internationale contre le terrorisme*, Nomos Verlagsgesellschaft, Baden-Baden, 1991, pp. 153-171.

Definitions

International law absolutely prohibits torture and other acts of cruel, inhuman or degrading treatment or punishment.[58] Equally, international humanitarian law in particular rules that persons not or no longer taking part in hostilities shall in all circumstances be treated humanely.[59] Article 3 common to the Geneva Conventions applicable to non-international armed conflicts, but which contains elementary considerations of humanity, reaffirms the same and stipulates that not only "cruel treatment and torture", but also "outrages upon personal dignity" and degrading treatment are prohibited at any time and in any place whatsoever.[60] Acts of torture and of cruel, inhuman or degrading treatment have been established as international crimes, and those who perpetrate them must be prosecuted or extradited.[61]

The definition of torture specified in the United Nations' Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is widely accepted. In its Article 1 the term "torture" is defined thus as:

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

Article 12 of this Convention also prohibits "other acts of cruel, inhuman or degrading treatment or punishment" as do the Geneva Conventions and the Additional Protocols thereto. However, none of these notions is defined in them. On the other hand, the jurisprudence of the International Tribunals for the former Yugoslavia and for Rwanda, the Rome Statute of the International

58 Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits "torture". Article 16 also imposes an obligation to "undertake to prevent…other acts of cruel, inhuman or degrading treatment or punishment….which do not amount to torture." While the Convention bans torture absolutely ("No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" (Article 2), the "no exceptional circumstances" rule does not explicitly apply to cruel, inhuman or degrading treatment. However, the International Covenant on Civil and Political Rights (ICCPR) explicitly states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (Article 7). The prohibition of any derogation applies to both torture and cruel, inhuman or degrading treatment (Article 4 (2) ICCPR).

59 Article 13 (1) GC III (referring to prisoners of war) and Article 27 (1) GC IV (referring to protected civilians). See. also Article 31 and/ 32 GC IV (prohibition of coercion respectively of corporal punishment and torture) and Articles 11 and 75 AP I GC.

60 Article 3 common GC (1) (1) lit. a and d. See also Article 4 AP II GC.

61 Provided for in particular in Articles 5 to 9 of the United Nations Convention against Torture, Articles 49 and 50 GC I of the First Geneva Convention, Articles 50 and 51 GC II of the Second Geneva Convention, Articles 129 and 130 GC of the Third Geneva Convention III, Articles 146 and 147 GC IV of the Fourth Geneva Convention and Article 85 AP I.

Criminal Court (1998) and the elements of war crimes recently specified under this Statute[62] do give some definitions. These definitions tally with those elaborated by the various bodies established by the human rights treaties, regional tribunals and various national jurisdictions.

For the purpose of international humanitarian law, the definition of torture is the same as the one spelled out in the Convention against Torture, except that the involvement of a public official or other person acting in an official capacity is not considered to be a prerequisite. For the other forms of ill-treatment, a significant level of pain or mental or physical suffering is required.[63] One element becomes clear throughout: it is practically impossible to establish precisely, whether technically or legally, the threshold of suffering or degree of pain "required" for each category has been met, given that each individual will feel and react differently when subjected to the same methods. The impact will vary appreciably depending on factors such as his or her mental health, physical resistance, past history, age, sex, social origins, level of political motivation, cultural aspects and immediate environment. The duration or accrual of different forms of ill-treatment also has to be considered. Sometimes, torture can be a single act. On other occasions, it is necessary to take into account the accumulation of several practices over a certain period of time, whereas these same practices would appear harmless if they had occurred in an isolated manner or outside the context in question.[64] Torture also has a strong cultural connotation. The meaning it has in a given social order and the intention behind it are very important. Some forms of behaviour may be considered "benign" in one culture, whereas they infringe a religious interdict, for example, in another.

Torture and other forms of ill treatment always have two components, the physical and the psychological, and these are inextricably interlinked. According to most victims, the psychological element is much more traumatizing than the physical element.[65] It is also distinctly more difficult to identify, or indeed to quantify. Thus, for example, witnessing the torture of loved ones, of

62 See Knut Doermann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, ICRC*/Cambridge, 2003, pp. 44-70.

63 Thus, the difference between the various notions lies mainly in the intensity of the pain and suffering and the absence of any specific underlying intent, unlike torture. To be categorized as inhuman or cruel treatment (the terms are considered synonymous), an act must result in a significant level of pain or suffering, at times described as serious. Outrages upon personal dignity are acts which entail a significant level of humiliation or debasement and express contempt for human dignity.

64 See for instance the jurisprudence of the European Court of Human Rights: "The five techniques [wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink] were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (…). The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"; *Ireland* v. *the United Kingdom*, ECHR, 18 January 1978, para. 167.

65 See in particular Hernan Reyes, "Torture and its consequences", in *Torture*, Vol. 5, No. 4, 1995, pp. 72-76.

one's children or even a third party, can be far more traumatic than undergoing physical torture oneself. The view that there cannot be torture unless there are physical after-effects is wrong.

The ICRC does not have its own particular definition of torture or of other forms of ill-treatment. It does not in fact desire to get embroiled in legalistic discussions or theoretical debates (for example, on the extent to which the suffering experienced is a result of "legitimate" or "acceptable" pressure) at the expense of meaningful dialogue concerning the treatment and the conditions of detention. For the ICRC, what matters most is not so much whether a particular form of behaviour may be labelled torture or constitutes another form of ill-treatment, but to put an end to those practices, irrespective of definitions, that cause detainees to suffer. It accordingly describes in a factual manner what has happened, to whom, in what circumstances, who was responsible and, above all, the consequences for the victim. Rather than employing the term "torture" or other qualifications of treatment the ICRC thus prefers as a general rule to employ the generic term "ill-treatment", which is not defined in law and covers all types of pressure, whether physical or psychological, that may be used against a detainee.[66]

The ICRC's priorities and methods of combating torture and other forms of ill treatment

Particularly in situations of conflict or internal violence, all persons deprived of their liberty risk undergoing torture or ill-treatment at each phase of their detention. Torture is usually carried out in secret, away from the public eye. It is therefore extremely rare for ICRC delegates to be direct witnesses of acts of torture or other forms of ill treatment, even when they have authorization to visit detainees during the interrogation period.

The ICRC's work to prevent or to put an end to torture and other forms of ill-treatment is essentially based on corresponding accounts given by detainees to ICRC delegates during private talks. The findings of ICRC doctors with regard to possible physical and psychological after-effects are also taken into consideration. This information is then analysed, compared and evaluated in the light of other accounts and other sources so as to determine its intrinsic consistency and its authenticity and to avoid distortions or half-truths.

The documentation of torture and other forms of ill-treatment is a delicate task. This documentation requires diplomatic skill, a marked empathy with the victims, a considerable amount of time in order to establish a relationship of trust with the detainee, patience and common sense, as well as sound detention-

66 In practice, the ICRC may nevertheless come to use the term "torture" when:
- the methods used indisputably amount to torture, especially when the level of physical and psychological suffering was undeniably intense;
- the cumulative effects of difficult conditions of detention and treatment have or could have major psychological consequences (for example a combination of factors over a certain length of time, such as keeping detainees in total uncertainty as to their fate, "manipulation" of their surroundings and living conditions, and the use of special interrogation techniques).

related experience of the personnel involved, in particular doctors.[67] Simply listing the methods used on an individual is often insufficient to determine whether there has been ill-treatment. Nor is it enough to confine the documentation to searching for marks as evidence; this can even be totally counter-productive. First and foremost, it is necessary to evaluate all the circumstances surrounding the treatment in question — including the impact of the different methods on the person concerned.

The ICRC is not a judicial or investigative body, it does not seek to prove that acts of torture or other forms of ill-treatment have been perpetrated. With the consent of the detainees concerned, it brings what are essentially alleged facts to the knowledge of the authorities, together with its own observations and conclusions. It is then incumbent upon these authorities to conduct their own enquiry and, if the information reported by the ICRC turns out to be correct, to take all necessary steps, whether organizational, administrative, disciplinary, or even penal.

The purpose of torture is the debasement and total submission of the person concerned to the whims and arbitrary power of the torturer.[68] Because it leaves such deep psychological scars, its consequences are long-lasting. Prevention is therefore of paramount importance and the ICRC places particular emphasis on it. When a person is being subjected to torture or other forms of ill-treatment, all its efforts are centred on putting a stop to that treatment. It also insists that victims of torture be given the care and attention demanded by their condition. Indirectly, it does what it can to lessen the after-effects (through an ICRC delegate or doctor lending a sympathetic ear, helping to restore contact between the detainee and his or her family, etc.), but it has neither the knowledge nor the capacity to continue therapeutic activities in the long term, especially after the detainee has been released. This delicate task is best undertaken by specialized institutions, with which the ICRC is in regular contact and which it can even support to some extent.[69]

When it suspects or knows of the occurrence of torture and other forms of ill-treatment, the ICRC tries to identify and speak in private with the detainee concerned as quickly as possible. In such cases it is very important to register the detainee and repeat the visits, with the same considerations as those mentioned above for persons at risk of forcible disappearance.

67 See *The Istanbul Protocol, op. cit*. (note 47), a basic reference text in terms of the documentation of torture. On the same or other closely related issues, see also Camille Giffard, *The Torture Reporting Handbook*, Human Rights Centre, University of Essex, Colchester, 2000, p. 159; Michael Peel and Vincent Iacopino (eds.), *The Medical Documentation of Torture*, London and San Francisco, 2002, p. 227; F. Sironi, *Bourreaux et victimes: Psychologie de la torture*", Odile Jacob, Paris, 1999; Hernan Reyes, "ICRC visits to prisoners", in *Torture*, Vol. 3, No. 2, 1993, p. 58, "Visits to prisoners by the ICRC", in *Torture Supplementum* No. 1, 1997, pp. 28-30, and "The role of the physician in ICRC visits to prisoners"; Marina Staiff, "Visits to detained torture victims by the ICRC (1): Management, documentation, and follow-up", Torture, Vol. 10, No. 1, 2000, pp. 4-7 and "Visits to detained torture victims by the ICRC (II): The psychological impact of visits and interviews with detained torture victims", in *Torture*, Vol. 10, No. 2, 2000, pp. 41-44.

68 See Amnesty International, *Combating Torture: A Manual for Action*, London, 2003; Walter Kälin, "The struggle against torture", *International Review of the Red Cross*, No. 324, 1998, pp. 433-444.

69 As it is doing, for instance, with the Algerian Red Crescent Society.

The ICRC's main course of action is to approach the authorities. The approach will be adapted in form and content to the particular circumstances in order to achieve the best possible results, while always bearing in mind that the interest of the detainees concerned comes first. For example, if the ICRC fears that its intervention may lead to reprisals, it will take a different line. Similarly, it will approach different authorities depending on the seriousness of the torture and other forms of ill-treatment, the causes and the underlying motives, the place where they occurred. The ICRC can request and recommend a very wide range of measures, from the institution of an enquiry to the adoption of sanctions, and including such elements as supervising and training personnel, improving the chain of command, adapting the organization and the coordination of various State bodies, or stepping up internal inspections.

The list of arguments used by the ICRC varies perceptibly depending on the environment in question and those with whom it has to speak. The main arguments used are of a legal or moral nature. It may also have recourse to arguments based on the medical consequences of torture and other forms of ill-treatment, the authorities' international reputation, aspects of internal politics (e.g. the risk of triggering an outbreak and increase of violence) or structural considerations (e.g. the risk that such practices could become generalized).

Efforts to ensure decent conditions of detention

Detainees must be able to have decent living conditions compatible with their dignity and their physical and psychological well-being. In very many countries this is not the case: sometimes out of political ill-will, but more often for lack of resources, the material conditions of detention become so catastrophic that the detainees' physical integrity and even their very lives are in jeopardy.

Clearly, the custodial authorities in many countries can count only on pathetically low funding. The priorities of governments are elsewhere, as evidenced by the admitted inability of certain authorities to maintain proper conditions of detention. The lack of resources is often exacerbated by endemic overcrowding, which makes it even more difficult to maintain satisfactory conditions and run the places of detention properly. These factors end up by undermining the motivation and goodwill of those responsible for the well-being of detainees and provide a breeding ground for neglect and corruption.

Situations of conflict or internal violence accentuate these phenomena still further. They have considerable and long-lasting economic repercussions on all systems and basic facilities, including the penitentiary system. While people arrested in connection with a situation of violence are exposed to a number of specific risks, such a situation does undeniably aggravate the conditions of detention of the entire prison population.

In many contexts, detainees survive only because of their own ingenuity, their ability to organize and the material support they may receive from their families. Time after time, there are truly critical situations in which the survival of the most vulnerable detainees is no longer guaranteed (for example,

a high incidence of severe malnutrition, a cholera epidemic, etc.) and depends on emergency assistance from outside.

International law, including international humanitarian law, contains specific requirements for conditions of detention. The conditions are further elaborated in "soft law" texts (mainly the *Standard Minimum Rules for the Treatment of Prisoners*) and are supplemented by regional norms, such as the European penitentiary norms[70] and numerous national laws and regulations. International standards often remain fairly generalized because their implementation depends on local conditions, the environment and many interdependent factors. For instance, the estimated occupancy rate (or the surface area available for each detainee in a cell) will depend on such elements as the number of hours spent outside the cell, the sleeping conditions (on the floor, benches, beds or bunk beds), the ventilation, lighting, available recreational and other activities, access to water and to the sanitary facilities, etc.

During its visits, the ICRC evaluates the material conditions of detention by examining all the parameters relating to:

- the infrastructure of the place of detention (buildings, dormitories, beds, sanitary facilities, waste water disposal, ventilation, exercise areas, etc.);
- the detainees' access to the facilities available (e.g. the frequency of access to the showers or to medical care). The existence of a facility does not necessarily mean that the detainees are allowed to use it;
- internal administration and regulations (timetables, family visits, correspondence, leisure activities, etc.);
- the management of detainees, and discipline (relations between the detainees and the authorities, possibility of talking to the prison authorities, recreational and training activities, social rehabilitation programmes, the duration and conditions of solitary confinement, etc.);
- the detainees' internal organization (political disputes, gangs, internal reprisals, cooperation with the authorities, etc.).

With the authorities' agreement, the ICRC may decide to act partially or completely as a substitute for them by providing direct help itself, starting with what is known as "light" assistance such as cleaning materials, bedding or even recreational items. When the needs are more substantial, work will be financed or carried out to improve the living conditions (installation or renovation of toilets, septic tanks, washbasins, showers, kitchens, etc.) or health care facilities (construction and equipment of clinics, provision of medical supplies for them, etc.). In emergency situations the ICRC may go even further and set up a therapeutic feeding programme or provide food as a whole. Mindful of the potential negative effects and the risk of creating dependency or disrupting the

70 European Prison rules adopted by the Committee of Ministers of the Council of Europe on 12 February 1987 available at: <http://www.uncjin.org/Laws/prisrul.htm> (last visited 29 March 2005).

normal supply system, the ICRC is wary of engaging in such programmes and decides to do so only after careful consideration and in accordance with precise conditions agreed with the authorities, especially when a long-term commitment is envisaged. Except in extreme cases when many human lives need to be saved, as in Rwanda shortly after the genocide, the ICRC does not engage in such works where there is a risk that they may serve to increase prison capacity and thus be conducive to a policy of repression, whether that policy is legitimate or not.

The ICRC often takes up contact with third parties, alerts them to the seriousness of the situation and encourages them to support the authorities by strengthening their capacity and providing them with greater financial or material resources. Sometimes, with the authorities' consent, the ICRC may go so far as to pass on descriptive documents to the donors. It did so for instance in the case of Malawi, where it had made a technical evaluation of the conditions of detention conditions; it addressed its report to the authorities, and then made it available to donors.

Efforts to avoid the disruption of family links

For detainees, isolation is a major concern. International humanitarian law contains several clauses on maintaining contact between detainees and their families.[71] The basic idea is that, other than in absolutely exceptional circumstances, the authorities must allow and even arrange for the exchange of family news within a reasonable lapse of time. The same principle holds true outside situations of armed conflict.[72]

In some situations the authorities are reluctant or refuse to give information to the detainees' families. If they also refuse to let the detainees correspond directly with their families, the ICRC becomes the only source of information and means of passing on family news (through Red Cross Messages).

In international conflicts in which postal and telecommunication links between the belligerents are severed, the ICRC, via its Central Tracing Agency, is *de facto* the sole means of communication across the front lines. The same applies in internal conflicts in which the rebel faction controls a part of the territory.

While reminding the authorities of their obligations with regard to establishing and maintaining family contact, the ICRC often simultaneously gives detainees the possibility, after censorship by the detaining authority, to exchange news of a strictly private and family nature, sometimes after years of silence. When necessary, the ICRC also tries to trace detainees' families and may decide to facilitate family visits by organizing the logistics for them, as it does for the families of Palestinian detainees imprisoned in Israel and the occupied territories. This service provided by the ICRC is often the only link with the outside world.

71 Notably Article 71 GC III and Articles 25, 107 and 116 GC IV.

72 In particular, Principle 19 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment and Rule 37 Standard Minimun Rules for the Treatment of Prisoners.

Efforts to ensure respect for essential judicial guarantees

Uncertainty about their fate is regularly a main source of anxiety for detainees. Where judicial guarantees are concerned, the problems are often inextricably linked (for instance, overcrowding is increased by procedural delays or the absence of any trial or verdict, the extortion of confessions is the main cause for ill-treatment, etc.). As mentioned several times above, the ICRC's intervention has the greatest impact when it consists of comprehensive action to deal with all the causes.

While careful not to comment on the reasons for imprisonment, the ICRC nevertheless ascertains that persons who are the subject of criminal proceedings are benefiting from the judicial guarantees laid down by international humanitarian law and other international norms. Its efforts with regard to judicial guarantees are centered primarily on ensuring respect for personal dignity before, during and after the trial. Its role is not to ensure that the trial is conducted in an equitable manner.

It must be stressed in particular that the ICRC takes no interest in the content of an interrogation carried out by the authorities. It does not matter to the ICRC whether a prisoner is guilty or not, or has made a confession. Its sole objective is to ensure that detainees are treated correctly during interrogation. The subject of confessions may nevertheless be raised in order to determine whether a detainee has been forced to sign a statement, whether he or she was able to read through the text they were signing, whether the language was understood, etc. The ICRC will make sure the detainee realizes that in so doing it is interested only in understanding the system and procedures work, and not in the content of the interrogation or the detainee's guilt.

Besides giving priority to improving the humanitarian situation of the detainees and ensuring that their dignity is respected, the ICRC also looks to the legal and practical consequences of violations of judicial guarantees (procedural delays, incomplete files, no trial, etc.). Lastly, the ICRC also seeks to bring about full compliance with international humanitarian law in situations of armed conflict, in accordance with its mandate to work for the faithful application thereof.

International humanitarian law does contain a number of rules relating to judicial guarantees: for prisoners of war who have committed an offence against the laws or regulations during their internment, or a war crime prior to their capture;[73] civilians in an occupied territory who are protected by the Fourth Convention and are undergoing prosecution, or civilian internees who have committed an offence;[74] all persons who are in the power of a party to an international conflict;[75] and persons detained in connection with an internal conflict.[76]

73 Articles 82 to 88 and 99 to 107 GC III.
74 Articles 31, 33, 66 to 75 and 117, 118 and 126 respectively GC IV.
75 Article 75 of Additional Protocol I.
76 Article 3 common to the Geneva Conventions and Article 6 AP II.

The provisions of international humanitarian law on this subject, and especially those of the two Protocols, largely echo the more elaborate provisions contained in the instruments of human rights law, in particular the Covenant on Civil and Political Rights of 1966.

The said guarantees apply, either alternatively or cumulatively, to the various stages of the procedure – arrest, investigation, trial and sentencing, and the appeal phase.

The ICRC focuses as a priority on detained persons who come within its sphere of interest, those it considers to be at risk. As in the case of material conditions of detention, it is often difficult, however, if not impossible to distinguish in practice between different categories of detainees when addressing the question of judicial guarantees.

Before the ICRC decides to take action in that regard, several parameters which have been carefully analysed in advance must come together. Four standard situations, based on the condition of the large majority of judicial systems in countries where the ICRC works, can be identified as follows:

- *absence or breakdown of the judicial system* (an "anarchic" situation with severe dysfunction or even disintegration of governmental structures, or a "destructured" situation in which governmental bodies, though still in existence, no longer function): as it is pointless to invoke judicial guarantees in a non-existent or inoperable system, the approach will be based on humanitarian arguments;
- *existence of a system based on custom or ancestral values* (regulatory system and settlement of disputes/conflicts that derive from custom or tradition – council of elders, arbitration by a sage – or from religion): the approach will draw, by analogy, on the general principles contained in judicial guarantees, but the arguments used will be mostly humanitarian;
- *an ailing judicial system* (the judicial system exists formally in name but is unable to function correctly for various reasons such as insufficient resources and judges or systematic involvement of the executive): depending on the respective circumstances, the approach will be based as much on legal as on humanitarian arguments;
- *a functioning judicial system* (possible abuses affecting specific categories of persons, or isolated dysfunctioning): the interventions will take place in a targeted manner within a well-established legal framework, with well-founded legal arguments.

After having decided that it is appropriate to invoke judicial guarantees in the standard situation in question, the ICRC then analyses several factors, above all the detainee's situation (general identification of the judicial guarantees which have not been respected, legal and humanitarian consequences) and his or her interest in having the judicial guarantees invoked (determination of the detainee's wishes, assessment of risks or potential negative effects).

To gather targeted information, it is also necessary to pinpoint the judicial guarantees which the ICRC wishes to examine closely or underscore: these generally include the right not to testify against oneself and compliance with certain procedural time limits.

The information required for steps to be taken can be obtained in several ways: when registering the detainee's identity, during private interviews specifically on legal matters, during a sample survey, etc. At times (mainly in situations of international armed conflict), the ICRC decides to attend trials as an observer and is thus able to see for itself how part of the procedure works.[77]

The ICRC's interventions may be comprehensive (to address a generalized phenomenon) or on an individual basis; they may be made by name or not, relate to a specific issue or period of time, be the subject of an *ad hoc* approach (which may also take the form of a report) or be part of a general approach that covers all aspects of detention; they may single out certain groups of detainees (those condemned to death, those who have been forgotten, those who have been given the heaviest sentences, etc.) or be backed up by handing over lists (e.g. of all detainees who have been awaiting trial for a certain length of time).

The requests and recommendations made to the authorities differ according to the various judicial guarantees and usually relate to such matters as instituting an enquiry to verify the allegations presented by the ICRC and take steps to ensure that such incidents do not recur; improving the way in which the courts function; requesting transfers; seeing that time limits and other procedural rules in force are respected; speeding up proceedings; allowing the benefit of conditional release or amnesty; and very exceptionally quashing or reviewing sentences, etc.

The persons to be approached must be carefully identified, since respect or non-respect for judicial guarantees is above all attributable to the judicial power and its agents. In general, they are not the same authorities as those dealing with other detention-related problems. This consideration must be taken into particular account for a general approach encompassing various aspects of detention.

International efforts and international cooperation

A number of organizations and bodies are working in the field of detention, and consultation and coordination between them is necessary. Within the limits imposed by confidentiality, the ICRC takes part in this consultation. It is particularly reticent where information about ill-treatment is concerned, but very open to seeking complementarity of activities.

The ICRC is therefore in principle in favour of holding periodical coordination meetings, especially within the framework of support activities and

77 It did so, for example, in Iraq at trials of Iranian POWs during the Iran-Iraq war, in Kuwait after the Gulf War and the reinstatement of the Kuwaiti government in 1991, and in Ethiopia after 1994 at the trials of the Derg dignitaries.

preferably in the presence of the authorities, with the aim of drawing up a list of needs that are being met and those that are not, of getting to know and understand the options chosen by the other intervening bodies, and establishing possible complementary courses of action so as best to meet needs and share experiences. Coordination also enables common standards to be promoted.

Emergence of new organizations visiting places of detention

In view of the distinctive features and closed nature of the places of detention, the presence of other intervening parties gives rise to additional questions. The ICRC has *a priori* a positive attitude towards the intervention of other bodies since it may lead to improving the impact of humanitarian action in the widest sense and to ensuring that international standards are respected. However, it is important to remain vigilant so as to avoid the risk of too many parties becoming involved, as well as that of the application of different standards.

The ICRC has limited interaction with mechanisms such as the Special Rapporteurs of the Commission on Human Rights, owing to the very occasional presence of the latter in places of detention and the obligation they generally have to obtain the express agreement of the authorities for each visit or group of visits. The procedures for visits are not explicit, and can in theory vary from one mechanism to another. However, one practice has progressively gained favour, namely to follow the same procedures as the ICRC, except with regard to the repetition of visits.

The adoption of the European Committee for the Prevention of Torture (CPT) a few years ago and, in the near future, of bodies set up by the Optional Protocol to the Convention against Torture (OPCAT) offer very interesting prospects. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has, for instance, instituted the same principal procedures for visits as those followed by the ICRC. It furthermore stipulates that the CPT "shall not visit places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977 thereto."[78] In practice, this clause has been applied in a flexible manner, taking into account the distinctive features of each context. In Russia, for instance, the ICRC and the CPT together came to the conclusion that it was illogical to exclude Chechnya from places that the CPT visits in Russia on the grounds that the ICRC was already visiting certain places of detention there. In short, it was agreed that the CPT should inform the ICRC when it intends making a visit so as to avoid the risk of the two institutions being in the same place at the same time. This exchange of information has been extended in parallel to encompass the geographical extent of the Council of Europe towards the east of the continent, particularly in the Balkans and in the southern Caucasus, where the ICRC also visits detainees. The ICRC

78 Article 17 (3).

and the CPT organize periodical meetings in which matters of common interest are discussed, while respecting the commitment to confidentiality which each institution has given to the authorities in question.

OPCAT, which has not yet entered into force, establishes as visiting bodies a Subcommittee on Prevention of Torture (its secretariat will be the Office of the High Commissioner for Human Rights) and national preventive mechanisms. A key factor with regard to the system envisaged will be the extent to which these national preventive mechanisms will have the necessary resources and independence to carry out effective work. OPCAT stipulates that its provisions "shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law."[79] When this Protocol comes into force in countries where the ICRC also visits detainees, a system for carrying out periodical consultations similar to the one that exists with the CPT will have to be discussed.

Conclusion

The ICRC is making considerable efforts to bring a minimum level of humanity to places of detention and ensure that the dignity of detainees is respected. This task is complex and requires unfailing determination and a well-developed ability to adapt to circumstances. The ICRC cannot expect that one day its mission in the field of detention will be completed; there is always a new crisis or detainees in need who await its presence. The involvement of the ICRC is part of an extensive process and is complementary to the efforts of the authorities, other organizations and mechanisms, as well as the international community as a whole. Nevertheless, the ICRC's approach, which it has sought to adapt over the years, in many ways remains unique.

The practices developed by the ICRC, based on the specific role conferred upon it by international humanitarian law and on the experience it has gained in tense internal situations, are now widely emulated throughout the world. The effectiveness of its approach, particularly its visits to detainees, is bound up with respect for consistent and rigorous working methods which include the conditions and procedures for visits and the confidentiality of the steps it takes. The deployment of appropriate material and human resources is also of great importance.

The protective effect of the ICRC's activities will depend above all on its ability to intervene on behalf of detainees by approaching the responsible authorities and, more generally, to overcome indifference. Indeed, the lack of media

79 Article 32 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

interest in the suffering of detainees, apart from a few exceptions, and political indifference or lack of will all help to weaken the universal principles of humanity enshrined in international humanitarian law and other bodies of law.

The ICRC has regularly to explain its work on behalf of detainees. They often voice their frustration to it. Certain authorities question its objectivity or cooperate only partially with it. The public or other intervening parties often fail to understand the ICRC's self-imposed reserve and the confidentiality that governs its actions. Nonetheless, the *leitmotiv* of the ICRC remains the deep conviction that it has given maximum consideration to its method of intervention and the reasons for it, that it has done its utmost, and that it has taken every conceivable step to improve the conditions of detention and the treatment of detained persons in a given situation.

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The policy context of torture: A social-psychological analysis

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Abstract

Acts of torture are conceptualized as crimes of obedience, which are inevitably linked to crimes at higher levels of the hierarchy, where orders are issued, policy is formulated, and the atmosphere conducive to acts of torture is created. The present analysis suggests several conditions under which torture becomes an instrument of State policy and the authority structure of the State is fully utilized to implement that policy: the perception by State authorities that the security of the State is under severe threat — which, at the macro-level, can justify torture and, at the micro-level, contribute to its authorization; the existence of an elaborate and powerful apparatus charged with protecting the security of the State — which, at the macro-level, may lead to the recruitment and training of professional torturers as part of that apparatus and, at the micro-level, contribute to the routinization of torture; and the existence of disaffected ethnic, religious, political, or other groups within (or under the control) of the State that do not enjoy full citizenship rights — which, at the macro-level, may lead to their designation as enemies of the State and appropriate targets for torture and, at the micro-level, their dehumanization.

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The abuses of Iraqi prisoners by US soldiers at Abu Ghraib that came to light in the spring of 2004 have brought the issue of torture — particularly in the context of armed conflict or in the fight against terrorism — again to the centre of the international agenda. It is quite legitimate to consider these events as part of an assessment of the Iraq war and of US policy in the region, but it would be a serious mistake to assume that torture is a peculiarly American phenomenon or that it can be adequately understood as a consequence of the special features of the Iraq war. Abu Ghraib is hardly the only or even the most extreme case of torture in the world. To the contrary, torture is widely practiced in many parts of the world; moreover, it is endemic to autocratic States and is far less prevalent in democratic ones. Abu Ghraib serves as a reminder, however, that even democratic States may resort to torture when a particular set of social conditions is in place. The purpose of this article is to explore the general social conditions conducive to torture, wherever it may occur.

Central to my argument is the view that an adequate explanation of torture requires going beyond the characteristics of the individual perpetrators or even of the situations in which the torture is practiced, and focusing attention on the larger policy context in which the practice of torture is embedded. In the case of Abu Ghraib, for example, the findings of the investigative reporter, Seymour Hersh[1] — the same man, incidentally, who broke the story of the My Lai massacre and its cover-up,[2] which was the starting point of the work by Lee Hamilton and myself on crimes of obedience in the early 1970s[3] — make it evident that the abuses were part of a systematic process. They took place in the context of interrogation and were apparently designed to "soften up" prisoners for questioning by intelligence officers. No doubt, some of the perpetrators engaged in these actions with a greater degree of initiative and sadistic enjoyment than others, but they were operating in an atmosphere of pressure to produce intelligence information from prisoners presumed to be guilty. Whether or not some of the specific abuses and acts of torture were directly ordered, indications are that they were expected, condoned, and encouraged by higher officers. Commanding officers along the different tiers of the hierarchy have been accused, at the least, of exercising insufficient oversight of the conditions of detention and procedures of interrogation that prevailed in Abu Ghraib and other military prisons for suspected terrorists.

In the months following the exposure of the Abu Ghraib abuses, it has become increasingly evident that the treatment of the Abu Ghraib prisoners

1 Seymour Hersh, "Torture at Abu Ghraib", *The New Yorker,* Vol. 80, No. 11, 2004, pp. 42-47; Seymour Hersh, "Chain of command", *The New Yorker,* Vol. 80, No. 12, 2004, p. 38-43.

2 See Seymour Hersh, *My Lai 4*: *A Report on the Massacre and its Aftermath*, Vintage Books, New York, 1970; Seymour Hersh, *Cover-up*, Random House, New York, 1972.

3 Herbert C. Kelman and Lee H. Lawrence [V. Lee Hamilton], "Assignment of responsibility in the case of Lt. Calley: Preliminary report on a national survey", *Journal of Social Issues*, Vol. 28, No. 1, 1972, pp. 177-212; Herbert C. Kelman and V. Lee Hamilton, "Availability for violence: A study of U.S. public reactions to the trial of Lt. Calley" in: Joseph D. Ben-Dak (ed.), *The Future of Collective Violence: Societal and International Perspectives*, Studentlitteratur, Lund, Sweden, 1974, pp. 125-142.

was not an isolated occurrence, nor was it simply the product of decisions and actions (or inaction) at the local level. Similar patterns of abuse, linked to aggressive interrogation techniques, occurred in prisons elsewhere in Iraq, and — going back to 2002 — in Afghanistan and Guantánamo Bay. Numerous documents show that the techniques and practices revealed in Abu Ghraib had "migrated" from Guantánamo and Afghanistan and that they were authorized or justified at various points by high-ranking officials in the Pentagon and the White House.[4] For example, memos circulating in upper echelons of the administration authorized harsh interrogation techniques; defined torture so narrowly that many forms of painful, debilitating, and degrading treatment became permissible; and suggested that the Geneva Conventions did not apply to "unlawful combatants."[5] The mistreatment of prisoners revealed by the various reports, particularly given the context in which it occurred, has all the earmarks of physical and mental torture. And, indeed, the accounts presented in these reports are highly reminiscent of what is known about the conditions that have given rise to torture so often in the past anywhere in the world.

The crime of torture

Despite the fact that torture is a crime under the UN Convention against Torture, adopted by the General Assembly in 1984,[6] and other relevant international frameworks, and is similarly defined in the national legal codes of many of the UN's member States, it is a practice that is widespread throughout the world. Some instances of torture constitute "ordinary" crimes, i.e., crimes committed in violation of the expectations and instructions of authority. Torture would be an ordinary crime in this sense if it were carried out by individual officials at their own initiative and in disregard of the policies and orders under which they function. Similarly, officials could be charged with torture as an ordinary crime if they used means of pressure in excess of what was legally permitted.

The essential phenomenon of torture, however, is that it is not an ordinary crime, but a crime of obedience: a crime that takes place, not in opposition to the authorities, but under explicit instructions from the authorities to

4 For relevant documentation, see Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, New York Review Books, New York, 2004; and Steven Strasser, *The Abu Ghraib Investigations: The Official Independent Panel and Pentagon Reports on the Shocking Prisoner Abuse in Iraq*, PublicAffairs, New York, 2004.

5 The most recent disclosures were in documents obtained and released by the American Civil Liberties Union, including FBI reports that describe severe abuses of prisoners and highly coercive methods of interrogation, going back to Guantánamo Bay in 2002. Some of the FBI agents submitting these field reports expressed the belief that the tactics they observed (and considered both objectionable and unproductive) had high-level approval, coming from the Pentagon and/or the White House. Cf. Kate Zernike, "Newly released reports show early concern on prison abuse", *New York Times,* 6 January 2005, pp. A1 and A18.

6 J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1988, pp. 177-8.

engage in acts of torture, or in an environment in which such acts are implicitly sponsored, expected or at least tolerated by the authorities. Lee Hamilton and I have defined a crime of obedience as "an act performed in response to orders from authority that is considered illegal or immoral by the larger community."[7] Torture is clearly considered illegal and immoral by the international community; it is prohibited by international declarations and conventions that have been unanimously adopted by member States of the United Nations. Yet it is the authorities of these very States that order, encourage or tolerate systematic policies or sporadic acts of torture.

When does an ordinary crime become a crime of *obedience*? It is often the case — in acts of torture as much as in other gross violations of human rights — that the perpetrators engage in the action willingly, enthusiastically and with varying degrees of innovation. But "the fact that a criminal action serves various personal motives or is carried out with a high degree of initiative and personal involvement does not necessarily remove it from the category of crimes of obedience,"[8] as long as the action is supported by the authority structure: as long as the perpetrators believe and have good reason to believe that the action is authorized, expected, at least tolerated, and probably approved by the authorities – that it conforms with official policy and reflects what their superiors would want them to do.

Recognizing torture as a crime of obedience immediately directs our attention to the other side of the coin: to the crimes of authority that invariably accompany crimes of obedience. For every subordinate who performs acts of torture under official orders or with the encouragement or toleration of the authorities, there is a superior — or typically an entire hierarchy of superiors — who issue the orders and who formulate the policies that require or permit these acts of torture. Higher-level superiors may in fact not have issued specific orders to engage in torture, but they are the ones who formulate the policies, create the atmosphere and establish the framework within which officials at intermediate levels of the hierarchy translate general policy directives into specific acts of torture.

The fact that crimes of obedience take place within a hierarchical structure makes it especially difficult to pinpoint responsibility for them. The question, however, is not "who is responsible?" — the actual perpetrator or the authority — but "who is responsible for *what*?" When the question is framed that way, it becomes clear that both ought to be held responsible.

The torturers themselves are properly held responsible for the actions they perform and the harm they cause, even if they are acting under superior orders. Since the adoption of the Nuremberg Principles after World War II, which have been incorporated into the military codes of all Western States, superior orders cannot be used as an absolute defence for criminal actions on the part

7 Herbert C. Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility*, Yale University Press, New Haven and London, 1989, p. 46.

8 *Ibid.*, p. 50.

of subordinates. The UN Convention against Torture specifically applies this principle to torturers when it states that: "An order from a superior officer or a public authority may not be invoked as a justification of torture."[9] Subordinates have the obligation to evaluate the legality of orders and to disobey those orders that they know or should have known to be illegal.

Superiors, for their part, have the obligation to consider the consequences of the policies they set and to oversee the ways in which those policies are translated into specific orders and actions as they move down the ladder. The authorities' obligation of oversight makes the defence of ignorance of or lack of control over the actions of subordinates generally unacceptable, since they are expected to know and to control what their subordinates are doing. Of course, more often than not, torture does not result from negligence at the top, but from deliberate policy — or perhaps deliberate inattention at the top to the way in which policy is carried out below.

The policy context of torture

Conceptualizing torture as a crime of obedience implies that it must be understood in the context of the policy process that gives rise to it and of the authority structure within which this policy is carried out. I thus look to the policy process and the authority structure to identify the major determinants of acts of torture as well as the major correctives against these practices. In doing so, I do not minimize the role of individual and cultural differences.

With respect to individual differences, I am sure there is a certain degree of self-selection of individuals who gravitate to the role of torturer. Moreover, those operating within the role vary in the amount of enthusiasm, diligence and innovativeness that they bring to the task. Differences in personality and background doubtless play an important part in determining who becomes a torturer and who acts out that role eagerly and with evident enjoyment. But a focus on structural factors helps us understand why many, perhaps most, torturers are not sadists but ordinary people, doing what they understand to be their jobs. I might add that individual differences in readiness to engage in torture may be related as much to people's orientation toward authority as they are to their propensity toward aggression or their sense of compassion.[10]

Cultural differences, particularly differences in political culture, certainly also play an important role. Thus, Berto Jongman[11] shows that human rights violations, including torture, are much more likely to occur in non-democratic than in democratic societies, and in countries at low levels rather than high levels of development. Democratic countries are less likely to practice torture precisely because of the nature of their policy process and authority structure. But torture does occur

9 Burgers and Danelius, *op. cit.* (note 6), p. 178.
10 See Kelman and Hamilton, 1989, *op. cit.* (note 7), chs. 11 and 12.
11 Berto Jongman, "Why some States kill and torture while others do not", *PIOOM Newsletter*, 1991, Vol. 3, No. 1, pp. 8-11.

even in highly developed democratic societies, usually in the context of counter-terrorist activities or armed conflict, as the experiences of Guantánamo Bay and Abu Ghraib well illustrate. There are social conditions under which democratic cultures that ordinarily respect human rights may sanction torture, just as there are social conditions under which ordinary, decent individuals may be induced to take part in it. Thus, while individual and cultural factors are important determinants of torture, they operate in interaction with the policy process and the authority structure that ultimately give rise to the practice.

The use of torture as an instrument of policy

Torture has been practiced by non-State entities or agents, such as guerrilla groups or liberation movements, but it is primarily a phenomenon linked to the State. The emergence or reemergence of torture as an instrument of policy in the twentieth century is directly related to the nature of the modern State. In particular, as Edward Peters[12] argues in his historical study, torture arises from the combination of two features of the modern State: its vast power and its enormous vulnerability to State enemies, internal and external. The power of the modern State rests in the extent to which it affects all aspects of the life of its citizens and the resources that it can mobilize to control its population. The vulnerability of the modern State stems from the high degree of interdependence of the political, economic, and social institutions required to run a modern society and the resulting ease with which social order can disintegrate and the political authorities can lose control when their legitimacy declines in the eyes of their population, or when they confront terrorism and insurgency.

The conditions conducive to the rise of torture as an instrument of State policy are the authorities' perception of an active threat to the security of the State from internal and external sources; the availability of a security apparatus, which enables the authorities to use the vast power at their disposal to counter that threat by repressive means; and the presence within the society of groups defined as enemies of or potential threats to the State (see adjoining table).

The Policy Context of Torture

CONDITIONS CONDUCIVE TO THE USE OF TORTURE AS AN INSTRUMENT OF POLICY	SOCIAL PROCESSES FACILITATING TORTURE	
	At Level of Policy Formation	*At Level of Implementation*
Perception of a Security Threat	Justification of a policy of torture	Authorization of acts of torture
Existence of a Security Apparatus	Development of professional torture cadres	Routinization of torture practices
Presence of Groups Defined as Enemies of the State	Exclusion of target groups from protection of the State	Dehumanization of targets of torture

12 Edward Peters, *Torture*, Basil Blackwell, New York and London, 1985.

The recourse to repression is particularly likely in situations in which opposition represents a challenge to the legitimacy of those in power and thus a fundamental threat to their continued ability to maintain power, such as States in which the rulers' *legitimacy* rests on a unitary, unchangeable ideology (political or religious), or States run by a ruling clique with an extremely narrow population base (in socio-economic and/or ethnic terms) but with the support of military forces. However, torture may also be used, sporadically or sometimes systematically, by democratic regimes that find themselves in charge of ethnically distinct populations or subpopulations that do not accept their rule — such as Israel in the occupied territories or Britain in Northern Ireland.

When State authorities resort to torture, they can often point to a history of violence directed against the State: in the form of insurgency, guerrilla operations, or terrorist acts. To be sure, torture may at times be applied to individuals whose only crime is political or religious dissent, or even mere membership in a religious or ethnic community that does not fit into the ruling group's scheme of things. Still, the occurrence or perceived threat of violence against the State is central to the rationale for a policy of torture.[13]

Given the centrality of the threat of violence in the rationale for a policy of torture in modern times, it is not surprising that torture is particularly likely to occur in the context of war or armed conflict. Although my analysis so far has focused on torture within the State, aimed at repressing domestic groups or populations whom the authorities perceive as internal threats to the security of the State or as agents and allies of external enemies of the State, it is equally applicable to situations of war and occupation, in which torture may be used against members or suspected supporters of the enemy camp. The use of torture in war situations — often directed at civilians, as well as at military personnel — has become more probable as war has moved from the classical clash between organized armed forces to a clash between whole populations, in which civilian groups are often specifically targeted.[14] Torture in this context may be used as part of State policy of control and repression of the population and as an instrument of interrogation or psychological warfare. The conditions conducive to the use of torture in situations of armed conflict are identical to those outlined in the table. Once again, democratic regimes are not immune to the use of torture under these conditions, as the US actions in Afghanistan and Iraq so clearly illustrate.

Social processes facilitating a policy of torture

At the level of policy formation, there are three important points at which the perceived threat to the security of the State provides the rationale for a policy of

13 Wolfgang S. Heinz, "The military, torture and human rights: Experiences from Argentina, Brazil, Chile and Uruguay", in Ronald D. Crelinsten and Alex P. Schmid (eds.), *The Politics of Pain: Torturers and their Masters*, COMT, University of Leiden, Leiden, The Netherlands, 1993, pp. 73-108.

14 Martin Shaw, *War and Genocide: Organized Killing in Modern Society,* Polity Press, Cambridge, UK, 2003.

torture and the power of the State enables it to implement that policy: in establishing the purpose and justification of the torture; in recruiting the agents or perpetrators of the torture; and in defining the targets of the torture (see table).

First, the essential justification of torture, as has already been proposed, is the protection of the State against internal and external threats to its security — which often means the maintenance in power of those more or less narrow elements of the population that have gained control of the State apparatus. The practice of torture is justified by reference to the particular doctrine of the State's legitimization: maintaining law and order or stability, or the rule of "the people" whom the State claims to embody, or the rule of God, or the survival of Western civilization, or the integrity of national institutions. In war situations, of course, the justification for taking up arms, generally couched in terms of defence against threats to national security and to the vital interests of the State, also covers whatever steps are deemed necessary — including torture — to achieve the military objectives.

Second, the agents of torture are defined as a professional force with a significant role in protecting the State against internal threats to its security. The power of the State allows it to mobilize the necessary resources to establish a torture apparatus. A central component of that mobilization process is the recruitment of a cadre of torture practitioners through the development of what is in effect an organized profession — a profession that is wholly owned by the State, operates within the State's internal security framework and is dedicated to the service and protection of the State. Like other professionals, torturers undergo a rigorous process of professional training, socialization and indoctrination to prepare them for their roles.[15] Typically, this process includes torture resistance training, which acclimatizes them to cruelty.[16] (In war situations, it might be noted here, acclimatization to violence and cruelty is a daily occurrence, requiring no specialized training.) Another element of the professionalization of torture is that it has become an international enterprise. Torturers from different parts of the world come together in international meetings at which they share information about training procedures and torture techniques.

Third, the targets of torture are defined as enemies of the State who constitute serious threats to the State's security and survival. For that, as well as for other reasons, such as their ethnicity or ideology, they are placed outside the protection of the State. In the modern State, individual rights in effect derive from the State. Thus, to be excluded from the State — to be denied the rights of citizenship — is tantamount to becoming a non-person vulnerable to arbitrary treatment, to torture, and ultimately to extermination. Targets of torture in the

15 H. Radtke, "Torture as an illegal means of control", in Franz Bockle and Jacques Pohier (eds.), *The Death Penalty and Torture*, Seabury Press, New York, 1979, pp. 3-15; Janice T. Gibson, "Factors contributing to the creation of a torturer", in Peter Suedfeld (ed.), *Psychology and Torture*, Hemisphere Publishing Corporation, New York, 1990, pp. 77-88.

16 Radtke, *op. cit.* (note 15); see also Ronald D. Crelinsten, "In their own words: The world of the torturer", in Ronald D. Crelinsten and Alex P. Schmid (eds.), *The Politics of Pain: Torturers and their Masters*. COMT, University of Leiden, Leiden, The Netherlands, 1993, pp. 39-72.

context of armed conflict are, by definition, placed in the category of enemies, who are not entitled to the protection of the State. In principle, enemy combatants and civilian populations are protected against torture and other violations of their human rights by the Geneva Conventions.[17] In practice, people categorized as enemies in a war situation are vulnerable to being targeted for torture.

Social processes facilitating participation in torture

The three points at which the security concerns and power of the State contribute to a policy of torture at the *macro-level* — i.e., the justification for torture, the agents of torture, and the targets of torture — can be linked to three social processes that facilitate participation in torture at the *micro-level*: the processes of authorization, routinization and dehumanization, which I distinguished in my earlier analysis of sanctioned massacres and other crimes of obedience.[18] The justification of torture as a means of protecting the State against threats to its security helps to *authorize* the practice; the development of a profession of torturers as part of the State's security apparatus helps to *routinize* the administration of torture; and the designation of the targets of torture as enemies of the State who are excluded from the State's protection helps to *dehumanize* the victims (see table, right-hand column). These three social processes contribute to weakening the moral restraints against engaging in torture and other gross violations of human rights: authorization absolves individuals of the responsibility to make personal moral choices on the basis of standard moral principles; routinization enables them to ignore the overall meaning of the tasks they are performing and eliminates the opportunity to raise moral questions; dehumanization excludes the victims from the perpetrators' moral community, making it unnecessary to relate to them in moral terms. These three processes are mediated to a significant degree by the torturers' relationship to the State.

The role of authorization is strengthened by the fact that torturers, typically, are not just acting within a hierarchy in which they are expected to obey — and have indeed been trained to obey without question[19] — but are participating in an action that represents a *transcendent mission*. They have come to share the view of the authorities that the task they are engaged in serves a high purpose that transcends any moral scruples they might bring to the situation. They have come to see themselves as playing an important part in an effort to protect the State: to ensure its security and continued integrity, to maintain law and order, or to keep alive the fundamental values of the State that are being subjected to a merciless onslaught by ruthless enemies who are intent on destroying

17 *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949.

18 Herbert C. Kelman, "Violence without moral restraints: Reflections on the dehumanization of victims and victimizers", *Journal of Social Issues*, Vol. 29, No. 4, 1973, pp. 25-61; Kelman and Hamilton, 1989, *op. cit.* (note 7).

19 Gibson, *op. cit.* (note 15).

it. This view of the purpose of the proposed torture as part of a noble effort, in which the perpetrators are prepared to play their role despite any moral reservations and feelings of repugnance they might have, greatly enhances the legitimacy of the enterprise.

An additional element of the torture situation that contributes to its perceived legitimacy is the participation of medical professionals, who often play an active role by evaluating victims' physical capacity to go through the process, by making sure that the torture does not go beyond the point of causing the victim to die, and by performing other functions.[20] Incidentally, the role of physicians in interrogations that are tantamount to torture has also been noted in connection with Abu Ghraib.[21] The justification of torture as a necessary means of ferreting out "the truth" also helps to surround it with an aura of legitimacy, as does the legal context in which it often takes place. One of the common uses of torture is as an adjunct to judicial proceedings, where it is designed to obtain evidence to be introduced into trials. This practice goes back to the early uses of torture — in the Roman period and in the Middle Ages — as a central part of the process of producing a confession, which was deemed necessary to establish the guilt of the accused.[22]

The routinization of torture is enhanced by the establishment of torturers as a professional group, which contributes to normalizing and ennobling their work. Torturers come to see themselves as performing a job, as doing their duty. It is a job that often involves hard work, that can lead to promotion and other rewards, that may offer opportunities to demonstrate innovativeness, that one can excel in and become expert at. Above all, it is a job that one can be proud of, because it provides a significant service to the State and often carries with it membership in an elite corps.

The torture process itself also shows signs of considerable routinization. It usually involves a series of steps, clearly identified and following each other in regular sequence. The different torture techniques, as well as the different torture chambers, are typically designated by special names, often with a euphemistic or ironic quality. These names are not so much designed to hide the reality of what is actually taking place as to give expression to a professional culture with its own rituals and language.[23] The procedures used by torture organizations — including a variety of psychological techniques – are often quite sophisticated. All of this helps to give the work an aura of professionalism, which allows the torturer to perceive it not as an act of cruelty against another human being, but as the routine application of specialized knowledge and skills.

20 Stephen V. Faraone, "Psychology's role in the campaign to abolish torture: Can individuals and organizations make a difference?", in Peter Suedfeld (ed.), *Psychology and Torture*, Hemisphere Publishing Corporation, New York, 1990, pp. 185-193. See also Jean Maria Arrigo, "A utilitarian argument against torture interrogation of terrorists", *Science and Engineering Ethics,* Vol. 10, No. 3, 2004, pp. 543-572.

21 See, for example, M. Gregg Bloche and Jonathan H. Marks, "When doctors go to war", *The New England Journal of Medicine*, Vol. 29, No. 1, 6 January 2005, pp. 3-6.

22 Peters, *op. cit.* (note 12).

23 Radtke, *op. cit.* (note 15).

In dehumanization, too, the State is an important part of the equation, going back, in fact, to the early history of torture. In the Roman legal system, torture — as a means of obtaining confessions — was originally applied only to slaves and foreigners, but not to citizens.[24] In contemporary practice torture victims are, or are treated as, non-citizens. The main source of their dehumanization is their designation as enemies of the State, who have placed themselves outside the moral community shared by the rest of the population. They are described as terrorists, insurgents or dissidents who endanger the State and are bent on undermining law and order and destroying the community. The view of torture victims as non-citizens who are not entitled to the protection of the State was evident in interviews that Heinz[25] conducted with "masters of torture" in Latin America: once they identified guerrillas as Communists, they saw them as foreign agents and thus, in effect, as "denaturalized." Furthermore, torture increased when guerrillas began killing military officers and their families, because they came to be seen not only as outsiders who are not entitled to the community's protection, but also as dangerous elements against whom the community had a right to protect itself.

A central assumption in the contemporary practice of torture — just as in the early days, when it was used as a systematic part of criminal legal procedures — is that the victims are guilty. The torture apparatus operates on the assumption that those who are brought in for torture are guerrillas, insurgents or terrorists who have committed and/or are about to commit dangerous crimes against the State. Thus, torture is designed only to punish the guilty, to warn their accomplices and, most important, to elicit the truth from them. Indeed, torture is often justified on the grounds that it is the only way to elicit information necessary for the protection of the State and its citizens — such as information about the identity and whereabouts of terrorist leaders or about planned terrorist operations — that the torture victims are presumed to have in their possession.

A contributing factor to the dehumanization of torture victims is the fact that, even when they are citizens of the State that tortures them, they often do not belong to the ethnic or religious community of the torturers and the dominant segment of society. This has been the case for Kurds in Iraq, for Bahais in Iran, for Palestinians in Kuwait and in the Israeli-occupied territories, for Irish Catholics in Northern Ireland or for Bosnian Muslims in the former Yugoslavia, to mention only a few. In many cases the victims' ethnic or religious identity is itself the primary reason for their vulnerability to torture. In other cases, ethnic or religious identity is a factor in dissent or insurgency. In all cases, it facilitates exclusion and dehumanization, thus removing one of the constraints against torture and other serious violations of human rights.

24 Peters, *op. cit.* (note 12).
25 Heinz, *op. cit.* (note 13).

Conclusion

The conditions conducive to the use of torture are endemic to the autocratic security State. Part of the answer to torture thus clearly points in the direction of democratization: torture is much less likely to take place in States governed with the consent of the governed and accountable for their policies and actions. However, even Western democratic societies are not invulnerable to the conditions that tempt State authorities to adopt torture as a policy instrument and enable them to implement a policy of torture: the perception of fundamental threats to the security and integrity of the State; the existence of bureaucratic organizations charged with ensuring State security, staffed by professionally trained security specialists and allowed to operate with greater secrecy and less accountability than is customary in democratic societies; and the presence of foreign, poorly integrated or non-citizen elements within the population that can easily be seen as outside the contract that obligates citizens and State to one another in a democratic polity. The said conditions are particularly likely to arise in the context of armed conflict — whether civil or international — in which the threat to the State is readily personified in an internal or external enemy bent on violence and destruction; when combined, they can override the constraints and bypass the scrutiny, imposed by democratic values and institutions, that usually stand in the way of gross violations of human rights in democratic societies. These, then, are the conditions that must be addressed, wherever they manifest themselves, as we struggle against the practice of torture and develop approaches to bring about its worldwide abolition.

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A haunting figure: The hostage through the ages

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Abstract:

Despite the recurrence of hostage-taking through the ages, the subject of hostages themselves has thus far received little analysis. Classically, there are two distinct types of hostages: voluntary hostages, as was common practice during the Ancien Régime of pre-Revolution France, when high-ranking individuals handed themselves over to benevolent jailers as guarantors for the proper execution of treaties; and involuntary hostages, whose seizure is a typical procedure in all-out war where individuals are held indiscriminately and without consideration, like living pawns, to gain a decisive military upper hand. Today the status of "hostage" is a combination of both categories taken to extremes. Though chosen for pecuniary, symbolic or political reasons, hostages are generally mistreated. They are in fact both the reflection and the favoured instrument of a major moral dichotomy: that of the increasing globalization of European and American principles and the resultant opposition to it — an opposition that plays precisely on the western adherence to human and democratic values. In the eyes of his countrymen, the hostage thus becomes the very personification of the innocent victim, a troubling and haunting image.

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In the annals of the victims of war, hostages occupy a special place. First, they account for only a very small number of the persons affected by armed violence.[1] Although as many as several hundred people may be taken hostage — as occurred, for instance, during the 1991 Gulf War, or in the Japanese Embassy in

* The original version of this article is available in French at: <http://www.cicr.org/fre/revue>.

Lima in 1996/1997, or more recently at a school in North Ossetia in September 2004 — this is an exception; in most cases they can be counted in single figures. Secondly, the interest aroused by them is in inverse proportion to their number, for even a single hostage becomes the focus of attention and mobilizes public opinion. Is this because hostage-taking, by its very brutality, holds some sort of strange fascination? Is it because of the high degree of innocence of the victim, often accentuated by factors such as age, nationality or profession that underscore their non-involvement in the events that motivated their capture? Or is it because the injustice done to the individual weighs upon the collective subconscious like a latent threat to one and all? Or could it even be because of the tragic end that unfortunately awaits some hostages and gives them the status of martyrs?

Whatever the answer, despite the attention he attracts the hostage himself remains a little-known figure. This can be seen in the legal field, where it is a paradoxical result of the wealth of descriptions of hostage-taking that are found in national legislation and international instruments but fail to give any definition of a hostage *stricto sensu*.[2] As a cause or as an effect of the above, the history of the hostage as such has largely remained untraced. Indeed, this category of victims, which has been recorded from time immemorial, has given rise to only very rare monographs. Those which do exist are basically centred on ancient history and the Middle Ages; there appears to be no historical study of the problem over the long term.[3]

Perhaps this lack of precise definition should be attributed to a semantic ambiguity leading to differing interpretations, for whereas some linguists see the term "hostage" as directly derived from the Latin word *hospes*,[4] meaning "host", others hold that it stems from the term *obses*, related to the verb *obsidere* — "to besiege" — and thus literally to mean "the one who is kept in sight". These two origins confer different if not divergent connotations on the

1 This article discusses hostage-taking only in situations of armed conflict. It distinguishes hostage-taking from kidnapping, the latter being motivated solely by private and financial considerations.

2 Thus no definition of "hostage" (nor in fact of "hostage-taking") is given by the four Geneva Conventions of 1949, nor by their two Additional Protocols of 1977. The International Convention Against the Taking of Hostages, signed in New York on 18 December 1979, defines the hostage-taker as "§1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage." However, it should be noted that by virtue of its Article 12, the Convention does not apply to acts of hostage-taking committed in time of armed conflict, for which the Geneva Conventions make it an obligation for the States Parties to extradite or prosecute the alleged perpetrator.

3 A gap in historical literature which even historians themselves point out (see Philippe Contamine, *Autobiographie d'un prisonnier-otage : Philippe de Vigneulles au château de Chauvency*, Sylvie Caucanas, Rémy Cazals, Pascal Payen (dir.), *Contacts entre peuples et cultures. Les prisonniers de guerre dans l'Histoire*, Éditions Privat, Toulouse, 2003, p. 39).

4 In old French, the word "*hostage*"meant lodging or dwelling place; and the expression "*prendre en ostage*" originally meant to take into the house the person who is to serve as surety for the execution of a contract. It later came to mean the person himself, the "guest" that one keeps, Paul Robert, *Dictionnaire alphabétique et analogique de la langue française*, Vol. VI, Le Robert, Paris, 1990, p. 1012.

concept of "hostage", which mirrors the classic dichotomy between *voluntary* and *involuntary* hostages.[5]

This distinction is not necessarily rigid: the two categories of hostages are often superimposed, both in actual fact and in time. Nonetheless, it offers a valuable analytical framework for anyone seeking to retrace the history of hostage status, its function, usage and evolution over the centuries. Above all, the distinction helps to shed light on the changes in the status of hostages since the end of the twentieth century, when hostage-taking seems to be characterized by preposterous motivations and demands, in contrast to the more reasonable approach followed since ancient times.

Voluntary hostages

The concept of "hostage", as understood in the French language since the eleventh century,[6] originally had a specific narrow interpretation. The hostage was essentially conceived of as a guarantee *offered* to a victorious enemy — or even an ally — as surety for the execution of a promise or treaty, or as a symbol of submission on the part of the vanquished. This practice was already customary in ancient Egypt, where high-ranking hostages served as pledges of the loyalty of vassal kingdoms.[7] Throughout history, membership of the highest social classes was *conditio sine qua non* for acceptance as the guarantee for a pact. The procedure was adopted and developed by the Greeks, for whom recourse to hostage-taking also served to impose political views on others. This is demonstrated by the case of Philip II of Macedonia, whose presence as a hostage in Thebes was intended to prevent the Macedonians from taking up hostile positions against that city.[8] The Romans too later used this method, both to their benefit and to their detriment. Moreover, the case of the Roman general Aetius, who was given as a hostage in his youth first to the Visigoths and then to the Huns, shows how this practice transcended the division between "civilized" and "barbarian" cultures.

The Middle Ages is not lacking in famous examples of this continuing custom, beginning with the burghers of Calais who, in 1347, offered themselves as hostages to Edward III in exchange for sparing their city from destruction. Count Jean d'Angoulême, delivered into the hands of the English in 1412 by the Treaty of Buzançais, was to spend thirty-three years held hostage by them. In

5 See, for example, H. Wayne Elliott, "Hostages or prisoners of war: War crimes at dinner", *Military Law Review*, No. 149, 1995 (the author speaks of "True Hostages" for voluntary hostages and of "Indirect Hostages" for involuntary ones); Claude Pilloud, "La question des otages et les Conventions de Genève", *Revue internationale de la Croix-Rouge*, No. 378, June 1950; Adam J. Kosto, "L'otage comme vecteur d'échange culturel du IVe au XVe siècle", Sylvie Caucanas, Rémy Cazals, Pascal Payen (dir.), *op. cit.* (note 3).

6 The word appears in 1081 in the epic poem *La Chanson de Roland*.

7 Jonathan F. Vance (ed.), *Encyclopedia of Prisoners of War and Internment*, ABC-Clio, Santa Barbara, Denver, Oxford, 2000, p. 81.

8 Pierre Ducrey, *Guerre et guerriers dans la Grèce antique*, Office du Livre, Fribourg, 1985, p. 242.

eastern Europe as well, the giving of hostages was a traditional phenomenon, as evidenced by the life of Jean Kastrioti (known as "Skanderbeg"). Of royal blood, Skanderbeg was handed over at a very young age to the Turks to demonstrate the loyalty of his people vis-à-vis the Sublime Porte, the government of Ottoman Turkey. Raised in the Islamic tradition, Skanderbeg placed his military valour at the service of Sultan Murad II, whose favourite he was until he turned against his former master and became the hero of the fight for Albanian independence.[9]

The practice of voluntary hostages persisted until the eighteenth century. At the end of the War of the Austrian Succession and under the terms of the 1748 Treaty of Aix-la-Chapelle, hostages from the English nobility accordingly stayed in Paris, on their word of honour, pending the restitution to France of certain of her North American possessions.

The position of the voluntary hostage was often quite similar to that of a guest, true to the meaning of the word "hospes". Like a guest, voluntary hostages generally enjoyed a pleasant enough life-style similar to that which they had left behind (and sometimes even with considerable freedom of movement), in keeping with their social rank. The fact that most of them came from the nobility explains their often princely treatment. Furthermore, such hostages never really feared for their lives since the very fact that they were handed over voluntarily, according to the code of chivalry, served as sufficient guarantee that the terms would be respected. It is therefore not surprising that bonds were formed between hostages and their captors that could even take the form of friendly relationships over and above cultural differences.[10]

From the end of the *Ancien Régime*, the custom of giving voluntary hostages declined, and the few cases that have occurred since are found in colonial history, such as that of the leaders of Haute-Casamance who handed over four of their sons as surety for a peace treaty concluded with France in 1861.[11] Since then, the guarantees offered by a vanquished State for the execution of a treaty have generally taken the form of territory rather than voluntary hostages from the high ranks of power. Thus the Treaty of Frankfurt of 10 May 1871 provided for the temporary occupation by Prussian troops of several departments in the north of France pending indemnification for the costs of the war. Similar action had previously been taken both by the Swiss federal army after the Sonderbund War of 1847 and by the Northern troops after the American Civil War of 1861-1865, who occupied territory to ensure compliance with the peace terms imposed upon the vanquished. In all such cases, the resident populations were perceived by themselves and by others as hostages at the mercy of the occupying forces.

9 Writing in the form of a romantic novel, Ismail Kadare portrayed this episode in his work, *Les tambours de la pluie*, Gallimard, Paris, 1979 (in French translation).

10 Franco Cardini, "I captivi cristiani frutto di guerra santa 'crociata'; nei luoghi santi", in Giulio Cipollone (ed.), *La Liberazione dei 'captivi' tra cristianità e islam. Oltre la crociata e il Gihad. Tolleranza e servizio umanitario*, Archivio Segreto Vaticano, Vatican City, 2000, p. 326. This type of relationship differs moreover from the famous Stockholm syndrome experienced after a relatively long period of captivity.

11 Christian Roche, *Histoire de la Casamance. Conquête et résistance: 1850-1920*, Éditions Karthala, Paris, 1985, p. 112.

From *hospes* to *obses*

The emergence of increasingly defined territories, and consequently of (potential) hostage populations, after the end of the *Ancien Régime* signalled a fundamental change in the practice of holding hostages, itself influenced by major transformations. From the turn of the eighteenth century, a fragmented notion of sovereignty as being vested in individual people was superseded by a more collective and unified concept. With the advent of the nation-State, sovereignty was no longer symbolized by a few isolated individuals but by the citizens as a whole. In those conditions, the *giving* of hostages based on mutual recognition — by both the giver and the taker — of the chosen hostage's intrinsic and particular value had outlived its *raison d'être*, for in a nation-State all individuals are theoretically equal and as such have identical and interchangeable value. Conversely, the *taking* of hostages was henceforth held to be fully justified on the grounds that anyone at all could "play" this role.

Conflict itself also evolved. After a brief lull,[12] battles again became more extreme, first during the French Revolution and then under the Napoleon Empire, gradually reaching the intensity of all-out war.[13] In the course of ever fiercer confrontations, where hostility is the only possible relationship between the adversaries, the voluntary offering of hostages as a guarantee of mutual respect was no longer appropriate. The belligerents themselves recognized the futility of such a practice. Thus the American lawyer Francis Lieber stated in his famous Code prepared during one of the first all-out wars of the modern era, the American Civil War, that: "A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. *Hostages are rare in the present age*."[14]

In this context, it is not difficult to understand why the hostage is generally no longer offered but instead is taken: this evolution corresponds with the development of the law of war[15] and with the affirmation of the ideals deriving from human rights. This means, for one thing, that the status of hostage no longer depends on the consequences of the hostilities, but on the conflict itself. Also and above all, it is no longer a matter of *hospes*, but of *obses*, in other words, of a person under surveillance whose position is often the result of unilateral or peremptory decisions and whose retention fundamentally differs little, in purely material terms, from captivity. Psychologically, the change is just as brutal: whereas the status of *hospes* is characterized, as we have seen, by an absence of danger, that of *obses* is, in contrast, marked by the very real

12 Irène Herrmann, Daniel Palmieri, "Les nouveaux conflits: une modernité archaïque?", *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 37 ff.

13 Jean-Yves Guiomar, *L'invention de la guerre totale XVIIIe —XXe siècle*, Le Félin, Paris, 2004.

14 US War Department, *General Orders No. 100. Instructions for the Government of the Armies of the United States in the Field*, Washington, D.C., 1863, Art. 54 (emphasis added).

15 Until the entry into force of the Geneva Conventions of 1949 formally prohibiting the practice, international law did not preclude this method, especially if it served a military advantage (e.g. the *Hostages Case, United States* v. *Wilhelm List*, 1950 (see H. Wayne Elliot, *op. cit.* (note 5)). Today the taking of hostages counts as one of the grave breaches of the Fourth Geneva Convention (Art. 147).

threat that hangs over the existence of the person held captive. Moreover, that very danger is what gives purpose to the perilous position of the hostage, who is consequently liable to be cruelly treated or even put to death, as was long the case for any other person taken prisoner during hostilities.[16]

Involuntary hostages

Involuntary hostages are subject essentially to the same living conditions as prisoners of war; yet two fundamental characteristics distinguish them from other captive compatriots and are discernable in a multitude of practices.

The first difference is the particular value that these individuals represent in the eyes of their captors. Like the voluntary hostage, the involuntary hostage can serve as a strategic asset in forcing an adversary to make concessions. The Spartans taken prisoner after the Battle of Sphacteria (425 B. C.), at the time of the second Peloponnesian War (431 to 404 B.C.) were used by Athens to neutralize the military superiority of the Lacedemonian city during the four years of their detention.[17] The value to the abductor may, on the other hand, be purely monetary.[18] In this case the involuntary hostage is valuable merchandise for which the abductor hopes to obtain a good price, and is therefore usually well cared for while awaiting the payment of ransom.[19] What's more, such treatment is adapted to the lineage of the hostage: the higher his station, the more he will be honoured and well-treated. This qualitative distinction, which tends to give the *obses* a closer resemblance to the *hospes*, was recognized very early on. Thus it was that Guy de Lusignan, King of Jerusalem captured by the Arabs during the Battle of Hattin (1187), was treated by Saladin as the sovereign that he was.[20]

The second difference lies in the gradual elimination of the distinction between combatants and non-combatants, because involuntary hostages are always more likely to be taken from among the civilian population. The practice

16 Certainly the status of voluntary hostage does need to be qualified because, as Adam J. Kosto points out, the act of giving is generally made under duress. But, "so that this giving of hostages might serve to guarantee an agreement, the two parties had to recognize the hostage as such. Therefore, [voluntary] hostages differ from captives and prisoners of war." Adam J. Kosto, "L'otage comme vecteur d'échange culturel...", *op. cit*. (note 5), p. 172; for a similar viewpoint, see also Franco Cardini, "I captivi cristiani frutto di guerra santa 'crociata'...", *op. cit*. (note 10), p. 328.

17 This method was also widely used during the American Civil War (see Webb B. Garrison, *Civil War Hostages: Hostage Taking in the Civil War*, White Mane Publishing Company, Shippensburg, PA, 2000). More recently, the detention of the crew of the American ship the USS *Pueblo*, a vessel boarded and seized by the North Korean navy in January 1968, served as leverage and a means of propaganda against the US government at the height of the Vietnam War, until the vessel and crew were released eleven months later.

18 In this case nothing distinguishes a situation of war from a situation of peace in which the same sort of transaction is practised (see e.g. the article of Philippe Contamine, "Autobiographie d'un prisonnier-otage: Philippe de Vigneulles au château de Chauvency", *loc. cit*. (note 3)).

19 This observation moreover prompted the famous international lawyer, Hugo Grotius, to advocate — in a modern State respectful of the law of nations — that all prisoners be systematically treated as hostages and thus held to ransom.

20 Giuseppe Ligato, "Saladino e i prigionieri di guerra", Giulio Cipollone (ed.), *op. cit*. (note 10), p. 650.

generally goes hand in hand with the occupation or annexation of territory and is used to guarantee law and order and thus the security of the occupying troops. A variety of methods, which take into account the hostages' value in personal terms, as a financial asset or as a means of exerting pressure, may be applied and often end up by neutralizing each other and leading to spiralling demands and counter-demands.

Normally, the hostage is held in his home town or village and symbolizes the threat that hangs over the whole community. Alternatively, he may be deported as Napoleon I did when he entered Vienna in 1809, seizing several of the city's dignitaries as hostages and dispatching them forcibly to France.[21] Hostages may be seized in order to guarantee the lives of other hostages held by the adversary. One of the best known examples took place during the Commune of Paris, an insurrection of Paris against the French government. On 5 April 1871, the Commune decreed that persons accused of complicity with the Versailles government would be considered hostages of the people of Paris and could be shot by firing squad if a prisoner of war or a supporter of the Commune government were executed. Seventy-four hostages, in particular members of the clergy — including the Archbishop of Paris — were held in this way. After proposals for an exchange of prisoners failed, and in face of massacres of wounded and prisoners by supporters of the Versailles government, the Commune executed six of the hostages during *la semaine sanglante* or "bloody week."[22]

Involuntary hostages may also serve as a "human shield" to protect enemy military convoys on the move. The Germans were the innovators of this method when for the first time, in the war of 1870-1871, they used so-called "escort" hostages. This means of pressure was afterward copied by British troops during the Boer War (1899-1902) for rail transports, and was frequently resorted to during the two world wars. For example, during the First World War (1914-1918), the English made hostages (military this time) taken from among naval officers of the Reich go aboard their vessels in order to discourage torpedoing and bombing by the Germans.

Lastly, hostages have also become a means of repression, used to punish those who have sought to disrupt the established regime and, in the most serious cases, have made attacks on the lives of the occupying forces. The hostage's fate then depends on the "guilty" being handed over in a mutual exchange determining the life or death of the main protagonists. During the Second World War

21 Charles-Otto Zieseniss, "A Vienne en 1809: extraits du Journal du comte Eugen von Czernin und Chudenic à propos de l'occupation française", *Revue du souvenir napoléonien*, No. 376, April 1991, pp. 2-18. During World War I, Germany once again resorted to this method, deporting hundreds of civilians from the occupied zones in northern France to German territory and even into Russia (see Annette Becker, *Oubliés de la Grande Guerre. Humanitaire et culture de guerre*, Éditions Noêsis, Paris, 1998, especially pp. 27-88). The tsarist armies did the same at the outset of the conflict in East Prussia: the German hostages were sent off to Siberia. Needless to say, the deportation of hostages was just as widely used during World War II.

22 This procedure was revived during World War II by the German authorities, who arrested Dutch nationals in Holland in retaliation against the internment of German nationals in the Dutch East Indies. See Claude Pilloud, *op. cit*. (note 5), p. 433.

(1939-1945) there are all too many tragic examples underlining the inequality of this procedure, for instance the massacre of the *Fosse ardeatine* in March 1944, where 325 Italian hostages were shot by German troops in retaliation against the assassination of a Nazi officer.[23]

Between *hospes* and *obses*

The end of the Second World War and the renunciation of total war did not mark the end of hostage-taking but only its imperceptible transformation.[24] Since the bipolarity of the Cold War world collapsed in the late 1980s and early 1990s, there has been a proliferation of different forms of warfare throughout the planet. Grouped under the generic term "new conflicts", the various manifestations of this new belligerence are characterized by a clear asymmetry of the forces involved and by the extraordinary violence unleashed against civilian populations.[25] That disparity and aggressiveness are also evidenced in hostage-taking.

In certain wars today, be they active conflicts (Chechnya) or suspended hostilities (Nagorno-Karabakh), the capture of hostages, far from being the exception, appears instead to be highly customary. Some people do not even hesitate to consider it a legal activity similar to trading in raw materials. In connection with the Iraq war, for example, is not reference often made to the "abduction industry"?[26] If the terminology used is somewhat provocative, it at least tends to highlight the scale and frequency of the phenomenon while also suggesting the dual evolution it has recently undergone.

The term would in fact seem to imply that, consistent with *hospes*, today's hostage has regained his or her value as an individual. The truth is that the position of contemporary hostages differs from that prevailing at a time when all-out war was common, because they are no longer seized indiscriminately during a raid. As in the Middle Ages, they sometimes serve as currency to be exchanged for a ransom. This is a common practice in countries such as Iraq and Colombia and generally concerns their own nationals. In less frequent but more publicized cases, their value may be more symbolic than monetary. They are then generally considered as a means of exerting pressure on an external "enemy".

In that particular context, however, a radical change can be seen precisely in the perception of the hostages' value, which in turn changes their status, for the very asymmetry of today's battles means that contemporary hostages are no

23 Alessandro Portelli, *L'ordine è già stato eseguito. Roma, le fosse ardeatine, la memoria, la storia*, Donzelli, Rome, 2001 (*English edition: The Order Has Been Carried Out: History, Memory and the Meaning of a Nazi Massacre in Rome*, Palgrave Macmillan, London, 2004).

24 The civil war in Colombia unquestionably stands out in this latter category, with several hundred hostages in the hands of the armed opposition, the most famous being the politician Ingrid Betancourt kidnapped by the Revolutionary Armed Forces of Colombia (FARC) in February 2002.

25 Irène Herrmann, Daniel Palmieri, "Les nouveaux conflits…", *op. cit*. (note 12), pp. 25ff.

26 Cécile Hennion, "L'industrie du rapt, 'nouveau fléau de l'Irak', est en pleine expansion", *Le Monde*, 28 September 2004.

longer the "guests" of their captors. At the psychological level, there is therefore a loss of reciprocity, the "new" hostage no longer being viewed as equal in value to what is wanted or must be given in exchange. At the material level there is a standardization, irrespective of social standing, of the conditions of captivity, which are often more severe the higher the rank of the hostage.

Nevertheless, despite the similarities, the "new" hostages likewise do not come within the category of *obsess*, for they do not strictly speaking belong to the "enemy". On the contrary, such people as Arjan Erkel, head of mission of *Médecins Sans Frontières* (Doctors without Borders — MSF) in Daghestan, or Margaret Hassan, head of the charitable organization CARE's office in Iraq, could be considered more as "allies" of their kidnappers. The very nationality of others — for instance the French journalists Christian Chesnot and Georges Malbrunot, whose native country had been one of the fiercest opponents of an armed intervention in Iraq — could have served to gain them safe conduct. Above all, their captors showed them no moral recognition whatsoever.

So hostage-taking today seems to be an extreme and unbalanced combination of the *hospes* and *obses* approach. Once again, hostages are being taken selectively, yet they are mistreated. The fact is that hostages no longer represent any value to their abductors except perhaps the value their own world places on them. In other words, the hostage's value is determined through the perverse interaction whereby his fundamental insignificance for his captors is offset by the price that his own people are willing to pay and that is consequently attributed to him by his abductors. This triangular relationship explains targeted kidnapping as well as the ill-treatment inflicted on those who fall victim to it.

From *obses* to object

Insofar as the abductors play on the values and principles of the adversary, they plan their operations solely in terms of the interest they expect to arouse among the hostage's own people. So when the antagonist is the West, they concentrate on exploiting two basic factors: the worth of the individual in western society, and the influence of the mass media which, as an added source of pressure on the democratically elected government — itself dependant on the voters thus informed — accentuates even further the value of the individual.

It is thus easy to understand why the choice of "new" hostages is no longer based on criteria of political or military power, as in the days of the *Ancien Régime*, but depends instead on the impact it will have on adverse public opinion. This means that the selected targets are individuals most likely to evoke considerable public sympathy, owing to the positive images associated with their profession (humanitarian workers, war reporters, scientists) or their complete innocence with regard to the events of which they are victims. Worse still, it is because they are so essentially innocent that such persons become hostages, for it is that very innocence — in various and often cumulative

forms, each adding a further degree of innocence[27] — which through the media[28] mobilizes such a ground swell of support.[29]

Public reaction, informed in this way, is not limited to anger or consternation. It may go so far as identification with the event, giving rise to real fear. This chain reaction was quickly recognized, and terrorist groups have known since the 1970s how to play on those fears so as to increase the pressure gained through the taking of hostages itself. This practice became even more extensive in the 1990s, along with the spread of the democratic model of government and above all its transformation into a western political campaign programme. The latter undoubtedly helped to "refine" the said method, already broadly applied,[30] by favouring the addition of a further component.

The much vaunted dissemination of human rights ideals and political mechanisms to uphold them has in fact propagated the idea of the value of the individual and — as an indirect result — the fear of seeing that same value flouted. At the same time it has stirred up the hatred of all those who see this trend as a new form of colonialism. It is hardly surprising that some of them consequently decide to fight by exploiting "the weapons of the enemy".

To do this, the abductors take pains to destroy the individuality of the victim and henceforth regard him or her only as the personification of a reality or principles they are combating. Whether it is a matter of symbols (western culture, capitalism, Christianity, etc.) or of ideals (democracy, liberty, charity, knowledge, etc.), and whether these symbols or ideals find expression in the hostage's origin, citizenship or work, they are viewed as threats that must be eradicated for the sake of a radically opposed world view. Thus disembodied, stripped of any personal or human attributes, hostages ultimately no longer count as enemies or even as human beings.

This dehumanization of hostages leads logically to their reification: they become a thing (*res*) that is used, bought, sold,[31] or "disposed of" at any moment like an object that has become useless — and all the more readily because today's pool of potential hostages seems inexhaustible. This attitude is not necessarily a manifestation of a merchandizing or commercialization of conflict, as portrayed by the German political scientist Herfried Münkler.[32]

27 An example of this was the British hostage, Margaret Hassan, both a woman and a humanitarian worker whose activities included helping children who, moreover, were Iraqi.

28 As per this revealing title, Robert Fisk, "What price innocence in the anarchy of Iraq?", *The Independent*, 17 November 2004.

29 However, this tactic can backfire on the abductors, as happened in the case of the Beslan school. Although all the ingredients seemed to be there (the innocence of the victims, most of whom were children, the presence and interest of the media, mainly western), the most important ingredient was missing: the value that is placed on an individual life — a philosophy which, historically speaking, is not customary in Russian society.

30 This method of hostage-taking started on a very wide scale during the war in Lebanon in the 1980s, especially with the abduction of several French journalists and two ICRC staff members.

31 The buying and selling of hostages between groups of abductors is a current practice in certain crisis contexts (for example, in Irak).

32 Herfried Münkler, *Die neuen Kriege*, Rowohlt, Reinbek bei Hamburg, 2002; the author published a summarized version under the title "The wars of the 21st century", *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 7-22.

The brutal treatment meted out to hostages, in Iraq for example, clearly shows that they no longer have any intrinsic value for their captors — not even to exert pressure. Hostage-taking no longer even serves as "the most barbarous of all weapons against the American 'occupiers'", as commented by a recent weekly news magazine,[33] for the purpose of any weapon is to gain the upper hand and thereby force an adversary to surrender, or at least to make some concessions. This does not appear to have been the objective sought by the kidnappers of Margaret Hassan and other western hostages. The intention here is none other than to terrorize the target populations, as evidenced by the gruesome staging and filming of the victims' executions. In this context terror is the ammunition, the hostages being no more than the unfortunate instruments of that terror.

Conclusion

Perceived as merely a *res*, after having been a *hospes* or an *obses*, the hostage has now reached the final stage in the deterioration of an already unenviable condition. This deterioration is not only due to the aggressors themselves but also reflects the current asymmetry in conflicts and is, even more, the result of a cruel irony of history. In the West, the passage of time has been conducive to a general and continuous blossoming of the belief in the value of the individual. This particular evolution lays claim to being a universal model and thus gives rise to resentment in societies which, out of faithfulness to their identity or because of their structural weakness, are stubbornly hostile to the example thus imposed. As a backlash, that same societal development triggers antagonism and the invention of new weapons, the most effective being those for which it has itself supplied the ammunition. No wonder that westerners, with their personal conscience, their democratic ideals, their information sources and their political rights can themselves become the instruments of attacks of which they are the object. The deterioration in the role of hostages is thus not only in inverse proportion to, but closely associated with, the betterment of their status as individuals. It is by reason of the dignity they believe is their due that their captors debase them. It is also the hostage's connotation of innocence and suffering that turns him or her into such a haunting, troubling figure.

33 Alain Louyot, "La stratégie de l'innommable", *L'Express*, 27 September 2004.

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Asymmetrical warfare from the perspective of humanitarian law and humanitarian action

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Abstract

Warring parties are increasingly unequal and the principle of equality of arms does not apply to them. This asymmetry in warfare has many ramifications. The militarily weaker party is tempted to have recourse to unlawful methods of warfare in order to overcome the adversaries' strength. The expectation of reciprocity as a fundamental motivation for respecting the law is often illusory and replaced instead with perfidious behaviour; covert operations substitute for open battles, "special rules" are made for "special situations". The fight against international terrorism seems to constitute the epitome of this kind of warfare. "Elementary considerations of humanity" as enshrined in article 3 common to the 1949 Geneva Conventions however constitute universally binding rules for all — even unequal and asymmetrical — parties to any situation of armed violence. Furthermore, attacks on humanitarian organizations have showed that humanitarian relief may be contrary to belligerents' interests, or, even worse, that attacks on humanitarian workers may be part of their agenda. Humanitarian actors must be aware of these facts and adapt their working methods so as to be able to continue to provide impartial assistance, based solely on the needs of the victims of armed violence.

* The article reflects the views of the author alone and not necessarily those of the International Committee of the Red Cross.

The attack on the World Trade Center in New York and the Pentagon in Washington drastically altered the geopolitical set-up. It also constituted a challenge to the International Committee of the Red Cross (ICRC) and in many respects has affected the very nature of its field of activity throughout the world.

The fateful events of 11 September 2001 epitomized a situation that confronts the ICRC in its work in many conflict zones all over the world, namely asymmetrical warfare. A handful of men armed with box-cutters humiliated the sole great power with all its highly sophisticated weaponry in front of live cameras, killed thousands of people in next to no time and graphically demonstrated the vulnerability of the United States and the entire western world.

The series of terrorist strikes in Russia in the second half of 2004 were as great a traumatic experience for the Russians as the 9-11 attacks were for the Americans. The hostage-taking and ensuing massacre in the North Ossetian town of Beslan by Chechen suicide attackers demonstrated that militarily weaker opponents want to influence confrontations, this time with a diabolic target choice in a marginal war zone, potentially drawing other areas into a spiral of violence.

This article deals with the phenomenon of asymmetrical warfare. In asymmetrical wars the parties are unequal and the principle of equality of arms no longer holds true. The belligerents have disparate aims and employ dissimilar means and methods to pursue their tactics and strategies.

The aforesaid terrorist attacks are only one exceptional, albeit extremely brutal, epoch-making variant of such warfare. Violent acts of terrorism designed to achieve political ends by spreading horror are nothing new. Suicide bombings have been carried out in all wars. Terrorist acts have been perpetrated by State bodies and individuals and have often triggered war, or have left their mark on a country even in peacetime.

A new phenomenon?

The Old Testament[1] recounts how King Saul's army, terrified of fighting the great and seemingly invincible Philistine armies with their thundering giants, had been unable to beat them. Since no soldier was willing to face the Philistine champion, the giant Goliath, the young shepherd David took up the challenge. Raising his sling, he threw a smooth stone at the giant's forehead and Goliath fell face down onto the ground. David ran over to him, drew the giant's sword from its sheath, stabbed him with it and then lopped off his head, whereupon the Philistine soldiers fled in panic.

The biblical story shows that asymmetrical warfare is not new. The equality of warriors was called into question, a civilian — a youngster — engaged in combat and the shocking act of beheading the adversary spread panic and allowed victory to be won. Asymmetrical warfare favours certain behaviour, but

1 Old Testament, *The story of David and Goliath*, 1 Samuel, Chapters 16–18.

contrary to the story of David and Goliath, the apparently weaker warrior does not necessarily win the battle, much less the war.

Today the really new and essentially different factor is that acts of terror are an integral part of asymmetrical warfare.[2] In extreme cases, like that of al-Qaeda, this type of action becomes the main war strategy. It has three salient features. First, traditional military and legally accepted methods of fighting are deliberately rejected in favour, for example, of the hijacking of airliners and their perfidious deployment against civilian objects and civilians. Secondly, the probable future aim of this strategy will be to cause even greater loss of human life and to inflict non-military and above all economic damage, possibly through the use of prohibited devices, in other words biological and chemical weapons.[3] Thirdly, the strategy is no longer confined to a particular territory, for terrorist acts can be committed anywhere and at any time.

The fundamental aim of asymmetrical warfare is to find a way round the adversary's military strength by discovering and exploiting, in the extreme, its weaknesses. Weaker parties have realized that, particularly in modern societies, to strike "soft targets" causes the greatest damage. Consequently, civilian targets frequently replace military ones.

Nor have the United Nations and humanitarian organizations been left unscathed: the deliberate bombing in Baghdad of the UN headquarters in August and of the ICRC office at the end of October 2003 showed that they too were part of the "soft under-belly", to paraphrase Churchill's term.[4]

These unprecedented attacks make it necessary to analyse the environment in which they were carried out. In doing so, I will attempt to outline some of the effects that asymmetrical warfare is having on international humanitarian law and the activities of the ICRC.

Asymmetrical warfare

In a sense, all warfare is asymmetrical as there are never identical belligerents. Asymmetric warfare can be fought at different levels and can take different forms. There is an operational level (including ruses, covert operations, perfidy, terrorism, etc.), a military strategic level (guerrilla warfare, massive retaliation, Blitzkrieg, etc.) and a political strategic level (moral or religious war, clash of cultures).[5] The different forms include asymmetry of power, means, methods, organization, values and time.[6]

2 See Herfried Münkler, *Die neuen Kriege*, 6th ed., Rowohlt Verlag, Reinbeck bei Hamburg, 2003, pp. 63ff.

3 See Walter Laqueur, *Krieg dem Westen. Terrorismus im 21. Jahrhundert*. Propyläen-Verlag, Berlin 2003.

4 At the Casablanca Conference (14-24 January 1943) Winston Churchill and Theodore Roosevelt decided to continue with operations in the Mediterranean once they had driven the Germans and Italians out of North Africa. This decision was in accordance with Churchill's preference for an attack through the "under-belly of the Axis" instead of a more direct approach through northwest Europe into Germany in 1943 (often misquoted as: "the soft under-belly of the Axis").

5 See Steven Metz, "La guerre asymétrique et l'avenir de l'Occident", *Politique Étrangère*, 1/2003, pp. 26–40, p. 30.

6 Metz, ibid., pp. 31–33.

The term "symmetrical warfare" is generally understood to mean classic armed conflict between States of roughly equal military strength.[7] The wars that took place in the eighteenth and nineteenth centuries — i.e. after the Peace of Westphalia — in which evenly matched government troops confronted and fought each other in open battles have sometimes been called a thing of the past, for in the twentieth century wars became more complex and more unequal. Furthermore, most wars nowadays are internal, although they frequently have international ramifications. They are as diverse as they are numerous and the way in which they are conducted varies according to the type of conflict.

International wars

Symmetrical wars between States are risky, as it is impossible to anticipate which party will be victorious and the costs usually outweigh the anticipated benefits. Conflicts closely approximating this model, such as the war between Argentina and Great Britain over the Falkland/Malvinas Islands, the war between Iraq and Iran in the eighties or the conflict between Eritrea and Ethiopia just before the turn of the century, have become rare. Threatening scenarios, like those staged by the atomic powers India and Pakistan, are reminders of a potentially destructive symmetry that still exists at the strategic level. Yet even here, enormous resources have to be invested in an endeavour to create asymmetry so that, if need be, a war could be fought and if at all possible won.

Even international armed conflicts are generally asymmetrical. When a great military power (today this term applies especially to the USA) goes to war, asymmetry is virtually inevitable, because the stronger military power's opponent is less well armed.[8] The Gulf War in the early nineties was an example of

7 See especially a series of articles on asymmetrical warfare with regard to the idea of a revolution in military affairs (RMA) in the US post-Cold War policy debate. *Asymmetric Warfare* (RMA Debate in Project on Defense Alternatives), available online at: <http://www.comw.org/rma/fulltext/asymmetric.html> (visited on 6 July 2004). From the abundant (US) literature on the subject see in particular: Roger W. Barnett, *Asymmetrical Warfare: Today's Challenge to US Military Power*, Brassey's Inc., Virginia, 2003; Barthélemy Courmont and Darko Ribnikar, *Les guerres asymétriques*, Presse Universitaire de France, Paris, 2002; Jacques Baud, *La Guerre asymétrique ou la défaite du vainqueur*, Ed. du Rocher, Paris, 2003; Anthony H. Cordesman, *Terrorism, Asymmetric Warfare, and Weapons of Mass Destruction; Defending the U.S. Homeland*. Praeger, Westport, 2002; *The Four Thrusts Meet Asymmetric Threat, Attack Database, Achieve Interoperability, Revitalize Work Force*, Defense Intelligence Agency, Washington, 2001, available online at: <http://www.dia.mil/This/Fourthrusts/index.html> (visited on 6 July 2004); *The First War of the 21st Century: Asymmetric Hostilities and the Norms of Conduct*, Strategic and Defence Studies Centre, Working Paper No. 364, Australian National University, Canberra, 2001; Paul Rogers, *Political Violence and Asymmetric Warfare*, Brookings Institution, Washington, 2001, available online at: <http://www.brook.edu/dybdocroot/fp/projects/europe/forumpapers/rogers.htm> (visited on 6 July 2004); Josef Schröfl and Thomas Pankratz (eds), *Asymmetrische Kriegführung — ein neues Phänomen der Internationalen Politik?*, Nomos Verlagsgesellschaft, Baden-Baden, 2003; Laurent Muraviec, *La guerre au XXIe siècle*, Paris 2001; Pierre Conesa (éd.), "La sécurité internationale sans les Etats", *Revue internationale et stratégique*, No. 51, Autumn 2003.

8 Even Chinese military officers are trying "to propose tactics for developing countries, in particular China, to compensate for their military inferiority vis-à-vis the United States during a high-tech war". Qiao/Liang/WangXiangsui, *Unrestricted Warfare*, Bejing, 1999 (cited in Herfried Münkler, *op. cit.* (note 2), p. 276, in footnote 21). On the same subject see also Arthur Bruzzone, "Asymmetrical warfare cuts both ways", *American Daily*, 3 January 2004, available on line at: <http://www.americandaily.com/article/1837> (visited on 6 July 2004).

this. Since Iraq did not shun open confrontation, it suffered devastating defeat by the US-led Coalition.

Many aspects of the hostilities in the new Iraq war are a particularly impressive illustration of asymmetry. While the stronger military side strives to secure a rapid, decisive victory on the battlefield through the massive use of force, the weaker party, recognizing the military superiority of its opponent, will avoid open confrontation that is bound to lead to the annihilation of its troops and to defeat. Instead it will tend to compensate for its inadequate arsenal by employing unconventional means and methods and prolonging the conflict through an undercover war of attrition against its well-equipped enemy.[9]

The purpose of the frequent recourse to acts of terrorism is to wage war on the television screens and in the homes of the mightier State, rather than on the battlefield. The weaker party's weapons, namely spectacular terrorist attacks and acts that are regarded as treacherous and "below the belt", enable the weaker opponent to conduct an offensive war by going for the militarily stronger State's "soft underbelly".

Striking at the ICRC demonstrated that no mercy would be shown even to neutral relief organizations. The aim of such aggression is probably not so much to hinder relief operations as deliberately to shock and to wage a savage war where no concessions are made to neutrality. Random attacks in civilian populated areas also showed that, in contrast to guerrilla warfare, those responsible for these bombings did not need the population's approval to continue their fight.

In order to offset comparative disadvantages resulting from its cumbersome military apparatus, the stronger adversary is likewise tempted to employ asymmetrical tactics and unconventional means and methods.

The dividing line between combatants and civilians in asymmetrical wars of this kind is consciously blurred and at times erased. During the latest war in Iraq, the Iraqi army retreated whenever it could before the overwhelming strength of the enemy. Even in the earliest phase of the war, the Iraqi army — understandably — did not want to expose itself to bombardment. For this reason, its members — impermissibly — mingled with the civilian population and ultimately took off their uniforms, thus calling into question the most important principle of the law of war, namely that a distinction must be drawn between combatants and civilians.

Internal wars

Asymmetry usually exists in internal armed conflicts, owing to the fact that governments are mostly fighting a non-governmental armed group. In this type of conflict, which is to be found in most of the areas where the ICRC works, inequality between the belligerents and their weaponry is the rule rather than the

9 See also "Asymmetric Warfare", The USS Cole, and the Intifada, *The Estimate*, Vol. XII, Number 22, 3 November 2000, available at <http://www.theestimate.com/public/110300.html> (visited on 30 January 2005).

exception. The conflicts in Chechnya[10] (Russian Federation), Aceh (Indonesia), Darfur (Sudan) and many other African regions fall into this category.

The context of conflicts has altered, especially since the end of the Cold War and the "proxy wars" in which the adversaries were supported symmetrically by the United States and the former Soviet Union. The government side is usually fairly well organized and has more firepower at its disposal than the rebel movements, although it may be unable to retain control of the whole country and to neutralize the armed opposition groups. In such a situation, rebel movements will tend to resort to the same means as those employed in the aforesaid international asymmetrical wars and, in particular, to guerrilla tactics, where fighters melt into the civilian population and rebels disclose their identity as combatants merely by the fact that they engage in offensive operations.

Ironically, in internal wars where the rules of war are least heeded, there may be a certain amount of symmetry. Wars between organized armed groups are taking place with increasing frequency in countries where there has been a partial or complete breakdown of law and order and government structures. An example of this is Somalia, a State without a government where the fighting in the early nineties sometimes lapsed into anarchy and at other times followed rigid clan rules.

There has been a perceptible increase in the privatization of war in many parts of Africa, for example in Sierra Leone and Liberia, but the same phenomenon is also seen in Afghanistan, Chechnya, Myanmar and Columbia. Such wars are driven not so much by politics as by economics.[11] The belligerents become war enterprises. The motives for war are economic and links with organized crime, illegal trade and drug trafficking often make them even more lucrative. Furthermore, many of these conflicts transcend national borders.

Transnational wars and international terrorism

Private wars frequently overlap with new forms of transnational violence and international terrorism in particular aimed not necessarily at securing military victory, but above all at politically undermining or defeating the enemy by destroying capital, making it unsafe to exploit resources or forcing economic players to withdraw from areas which become increasingly dangerous.

Such wars are of a special nature. They are asymmetrical because a group of armed individuals linked to varying degrees and sharing vaguely

10 Ivan Safranchuk, *Chechnya: Russia's Experience of Asymmetrical Warfare*, available online at <http://www.saag.org/papers7/paper619.html> (visited on 6 July 2004).

11 Paul Collier and Hanke Hoeffer (Greeds and Grievances in Civil War, 2001, published in *Oxford Economic Papers*, Vol. 56, 2004, pp. 563–595) examine the distinction between greed and grievance as the two main motivations for civil wars. The grievance aspect (including inequality, lack of political rights, and ethnic or religious divisions) is well known and is covered in numerous political science studies. In Collier and Hoeffler's statistical investigation of civil wars from 1960 to 1999, they find that greed-related explanations (access to finance, including the scope for extortion of natural resources, but also other opportunity factors such as geography) have a greater explanatory power than grievance and economic viability appears to them to be the predominant systematic explanation of rebellion.

similar ideas face powerful military structures. The means and methods of the State party and the non-State armed groups differ widely. Open armed battles rarely break out, for it is clearly not in the strategic interests of the non-State actor to allow matters to come to such a pass — it would lose. Instead spectacular, horrific and perfidious isolated acts, often countered by covert operations coupled with repressive measures, replace continual hostilities. The scene of action shifts constantly, for an attack can take place at any time and in any country. There is no geographically circumscribed battlefield. Wars of this kind transcend State borders, although they are not wars between States. The worldwide network of terrorist organizations' supporters is secret and shrouded in mystery.

Unlike classic guerrilla movements, such terrorist organizations do not even tactically depend on the population's support, tacit or otherwise, because many of their acts are carried out with the utmost secrecy in the adversary's hinterland. The struggle against such groups is therefore more reminiscent of the battle against organized crime than of a classic war.

After the first bloody assassinations carried out by organizations like al-Qaeda, nobody immediately thought of a "war" and no connection was made between attacks in various countries.[12] Geopolitically and strategically speaking, but not necessarily legally, one can argue that a state of war exists since organizations operating globally can threaten and shatter the foundations of the world order through the sheer scale and the effects of their violent acts. The potential use of weapons of mass destruction, which could claim thousands or hundreds of thousands of lives, is a strategy as well as a crime.[13] The United Nations Security Council also deemed the events of 11 September 2001 to be armed attacks threatening world peace, thereby implying the existence of a situation similar to a war.[14]

Moreover, both the attackers of the World Trade Center and the Pentagon and the attacked United States spoke of war and perceived it as such. On both sides there is an *animus belligerendi*, an intention to create a state of war between itself and its opponents. The US National Commission asserted

12 See in particular *The 9-11 Commission Report. Final Report of the National Commission on Terrorist Attacks upon the United States*, official government edition, available online at <http://www.gpoaccess.gov/911/> (visited on 27 July 2004) (*The 9-11 Commission Report*), especially Chapter 2 ("The foundations of new terrorism"), pp. 48–70.

13 In an annual report on threats to the United States, Porter Goss, director of central intelligence, told the Senate intelligence committee: "It may be only a matter of time before al-Qaeda or other groups attempt to use chemical, biological, radiological or nuclear weapons." *International Herald Tribune*, 17 February 2005.

14 See United Nations Security Council Resolution 1373 of 28 September 2001, UN Doc. S/RES/1373 (2001); Christopher Greenwood, War, Terrorism, and International Law, pp. 505–530, in: *Current Legal Problems* 2003 Volume 56, February 2004, agreeing with the resolution (pp. 516–518). The argument can also be made from an effects perspective ("gravity", "significant scale"), like that adopted by the International Court of Justice (ICJ) Military and Paramilitary Activities in and against Nicaragua (*Nicaragua*. v. *United States*.), Merits, 27 June 1986, ICJ Reports 1986, para. 195. The attacks by non-state actors can trigger the right to self-defense under the Charter, but do not create a state of war in a legal sense (see Jordan J. Paust, "Use of armed force against terrorists in Afghanistan, Iraq and beyond", *Cornell International Law Journal*, Vol. 35, No. 3, 2002, sections 534–539).

that there was a war going on which should be treated as such and that it was not primarily a criminal conspiracy.[15]

From al-Qaeda to al-Qaedaism?

One of the characteristic features of transnational wars and international terrorism is that they are unpredictable and that it is generally difficult to discern the beginning and the end of these hostilities. Only when separate acts of violence form part of a series of massive attacks that can be attributed to a well-structured organization can they be termed armed conflicts.[16] At least before the attacks on the United States in New York and Washington, al-Qaeda was a well structured organization. In the words of the 9-11 Commission of the United States it was "a hierarchical top-down group with defined positions, tasks and salaries."[17] The organization of al-Qaeda has certainly been affected by post September 11 counter-terrorism measures, although it is probably only dispersed and driven underground rather than defeated. Following the armed conflicts in Afghanistan and Iraq and in the framework of anti-terrorist measures, the operational bases of al-Qaeda are more difficult to maintain. Many protagonists of al-Qaeda have been arrested or have had their movements restricted, financial transactions blocked and communication supervised.

The al-Qaeda structure was not only a centralised organization, but it also encouraged bottom-up initiatives and decentralisation. The organization has promoted a global "*jihad*", seeking to motivate individuals and cells or existing groups worldwide to join its "just war" and to define their local "*jihad*" as part of a universal fight. Groups, such as the Algerian "Groupe salafiste pour la prédication et le combat" are publicly claiming to be part of the organization. Cells operating secretly in Muslim and non-Muslim countries fighting for the advent of the caliphate were sponsored by al-Qaeda and/or were acting under the umbrella of al-Qaeda when launching spectacular terrorist attacks in all corners of the world, in the United States, Indonesia, Kenya, Tunisia, Pakistan, Turkey, Spain, Saudi Arabia and Russia, to name only the most well-known cases. Iraq has become a point of crystallisation of Islamic terrorism. Even

15 "Calling this struggle a war accurately describes the use of American and allied armed forces to find and destroy terrorist groups and their allies in the field, notably in Afghanistan. The language of war *also* (emphasis added) evokes the mobilization for a national effort." (*The 9-11 Commission Report* (footnote 12), p. 363).

16 Art. 1(2) Protocol II Additional to the Geneva Conventions (applicable to non-international armed conflicts) defines "isolated and sporadic acts of violence and other acts of similar nature" "as not being armed conflicts". Difficulties to determine the threshold of applicability of humanitarian law apply in many other situations. Covert operations in international armed conflicts are difficult to attribute to a State in international armed conflicts and in non-international armed conflicts according to Art. 3 of the Geneva Conventions, the organisational level of the parties to a conflict may widely vary in time and there is rarely a single event which indicates the beginning or end of hostilities.

17 *The 9-11 Commission Report*, (footnote 12), p. 67: "Most in the core group swore fealty (or bayat) to bin Laden. Other operatives were committed to Bin Laden or to his goals and would take assignments for him." See also p. 55 (on recruitment of new adherents) and pp. 145 ff. (on the enterprising al-Qaeda). The German Bundeskriminalamt estimated that around 70,000 fighters were trained and educated in al-Qaeda camps in Afghanistan (cf. Case against *Munir al-Motassadeq,* cf. *Reuters*, 4 January 2005).

individual fighters claim to be operating under the leadership of Osama bin Laden and his organization.[18]

The way al-Qaeda established itself in Afghanistan was an exception which gave it a territorial context. Today, its supporters are scattered throughout the world and try to hide among the multitudes in order to strike the militarily stronger opponent through carefully targeted action.

However, most of the Islamic militant groups had and still have a territorial approach, mostly with the objective of replacing a secular regime in their country and establishing a State based on Islamic prescriptions. Indeed, most current conflicts in the world, including those taking place in Arab and Muslim countries, have their own roots dating back long before the so-called "global war on terror". Nevertheless, many of those conflicts now present a global dimension that supplements, but does not replace their local and historical dimension. Suicide attacks by Palestinians on civilians in Israel as well as the hostage taking in Beslan in Russia ended in tragedies which were influenced by the new paradigm inaugurated by al-Qaeda: martyrdom operations seeking to inflict mass civilian casualty.

Conversely, States often describe insurrections as part of terrorist endeavours, readily labelling all opponents as terrorists. Additionally, the "global war on terror" insinuates that the international community as a whole is engaged in a war-like situation. Seen from this perspective, a global confrontation is taking place between the international community of States and both a network of transnational as well as local organizations resorting to terror. Nationalistic armed opposition groups are seen or portrayed as part of a wider network which gives the impression of an enhanced potential threat and allows for an ever stronger repression of their activities.

The mixing of different types of war and violence

In most of the more recent wars, changing combinations and amalgamations of players have interacted in a bewildering mosaic of all types of warfare. The present phase of the hostilities in Iraq offers a graphic lesson in international networking, as local activists join forces with groups pursuing totally different interests. It would seem from investigations conducted by the Iraqi police that, in many of the car bomb attacks on American targets, it was probable that supporters of Saddam Hussein picked each target, al-Qaeda related groups planned the operation meticulously in the light of its experience with suicide bombings in Africa and Saudi Arabia, Ba'athists took charge of the financial and logistical side and procured vehicles, weapons and explosives, and then mercenaries or Arab "*jihadis*" who were prepared to commit suicide were entrusted with the actual implementation.[19] The

18 E.g. the Jordanian Abu Mussab al-Zarqawi fighting with the Tawhid wal-Jihad Group in Iraq has pledged allegiance to Osama bin Laden and al-Qaeda (see Reuters, *Iraq-Phantom Zarqawi in marriage of infamy with bin Laden*, 18 October 2004).

19 George Tenet who headed the US-Central Intelligence Agency testified in April 2004 that militant *jihadi* groups operate in no fewer than 68 countries (up from 40 in 2001). In Iraq alone may pursue what they consider as *jihad*, see <http://fpc.state.gov/fpc/31428.htm> (visited on 15 November 2004). According

growing involvement of Shiite groups in the Iraq war also suggests that the already complex spiral of violence could take another twist.

Asymmetrical war and international humanitarian law

Asymmetrical wars do not fit in with either Clausewitz's concept of war between basically equal parties or the traditional concept of international humanitarian law. It is debatable whether the challenges of asymmetrical war can be met with the current law of war. If wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well. An even more fundamental consideration, which could be raised in view of the growing privatization of wars today, is whether the State-based model enshrined in the Peace of Westphalia, which was designed to put an end to the privatization of wars in the seventeenth century, is not losing its relevance. On a more modest level I am trying to compare certain basic tenets of international humanitarian law, to which the martial term the "law of war" is again being applied with greater frequency, alongside current trends in warfare.

Asymmetry in the legality of war

International law basically premises a distinction between the reasons for waging war and warfare itself. This distinction was made in the late Middle Ages and the two areas of law were called *jus ad bellum*, the right to wage war, and *jus in bello*, the law governing the conduct of war. Today this distinction is still a crucial and decisive factor, without which there would be no chance of securing respect for international humanitarian law.[20]

The United Nations Charter and customary international law[21] lay down the rules regarding the first series of questions. The current debates about the legitimacy of self-defence in the case of Afghanistan (2001) and the lack of UN Security Council legitimization for the use of force against Iraq (2003) are still fresh in our memories.[22]

to *The Economist* (8 July 2004, quoting Adnan Karim), there are some 36 different Sunni groups owing alliance to the Salafis, Suffis, Muslim Brothers or tribal sheiks and a half a dozen Shia rebel groups operating ion Iraq.

20 See François Bugnion, "Guerre juste, guerre d'agression et droit international humanitaire", *International Review of the Red Cross*, Vol. 84, No. 847, September 2002, pp. 523–546.

21 See ICJ Nicaragua cases (Merits), *op.cit* (footnote 14), para. 73.

22 See e.g. Madeleine K. Albreight, "United Nations", *Foreign Policy*, September/October 2003, pp. 16–24; Mats Berdal, "The UN Security Council: Ineffective but indispensable", *Survival: The IISS Quarterly*, Vol. 45 No. 2, Summer 2003, pp. 7–30; Michael Bothe, "Terrorism and the legality of pre-emptive force", *European Journal of International Law*, Vol. 14, 2003, pp. 227–240; Terry D. Gill, "The eleventh of September and the right of self-defense", in: Wybo P. Here (ed.), *Terrorism and the Military, International Legal Implications*, TMC Asser Press, The Hague, 2003, pp. 23–37; Christopher Greenwood, "War, terrorism and international law", *op.cit*., pp. 515–523; Albrecht Randelzhofer, "Article 51", in: Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford University Press, Oxford, 2002, p. 802; Abraham Sofaer, "On the necessity of pre-emption", *European Journal of International Law*, Vol. 14, 2003, pp. 209–226; Philippe Sands, Lawless World: America and the Making and Breaking of Global Rules, Penguin 2005; Michael N. Schmitt,

In purely factual terms, the greater the inequality of the warring parties, the more asymmetrical the lawfulness of having recourse to armed force naturally becomes. The higher the legal standing of one party is, the more it will be able to plead legal grounds justifying the use of force. A permanent Security Council member has greater weight when determining the lawfulness of recourse to arms than an ordinary State. In an internal armed conflict, a State will deny that national groups are entitled to engage in an armed struggle and will aver that it is the State structures that have the monopoly over force against individuals. Therefore, the militarily stronger party's entitlement to use force will usually be recognized.

In parallel, the concept of a "just war" with no holds barred is returning, underpinned by moral arguments.[23] The weaker party will search for extra-legal legitimation and proclaim that it has moral or religious motives for waging war, thus also engaging in a "just war" discourse. It is symptomatic that concepts of "crusade" and "*jihad*" are increasingly used.

However, the rules of the law of armed conflicts should apply to any armed conflict, irrespective of whether it is lawful or not.[24] The purpose of this sharp distinction between the reasons to make war and rules governing the war is to avoid any warring party being permitted on legal, moral or religious grounds to flout agreed minimum humanitarian rules and wage all-out war in order to achieve what it considers lofty aims.

Asymmetrical legitimacy of the belligerents

Until now the Rousseau-Portalis doctrine has governed the law of war. Its conclusion, imbued as it is with the spirit of Rousseau's work *Du Contrat Social*, maintains that "(War) is not (…) a relationship between man and man, but between State and State."[25]

The idea that it is the sovereign's prerogative to wage war still pervades almost all international treaties concerned with war. The relationship between States rests essentially on equality between them. In principle, the opponents acknowledge their similarity and this recognition forms the basis of the current international law on war that potential adversaries have worked out and adopted.

Whereas in wars between States the opponent is deemed to possess lawfulness and legitimacy, in internal conflicts, and particularly in the "war" on terror, non-State parties are said not to have these attributes. Be this as it may,

"Deconstructing October 7th: A case study in the lawfulness of counterterrorist military operations", in: *Terrorism and International Law, Challenges and Responses*, International Institute of Humanitarian Law, and George C. Marshall, European Center for Security Studies, 2003, pp. 39–49; Shashi Tharoor, "Why America still needs the United Nations", *Foreign Affairs*, September/October 2003.

23 See for example Michael Novak, *Asymmetrical Warfare & Just War: A Moral Obligation*, February 2003, available online at <http://nationalreview.com/novak/novak021003.asp> (visited on 6 July 2004).

24 See paragraph 5 of the preamble to 1977 Additional Protocol I to the Geneva Conventions of 1949.

25 Jean-Jacques Rousseau, *The Social Contract*, translated by Christopher Betts, Oxford University Press, Oxford and New York, 1994, Book I, ch. IV, p. 51 (original French edition, *Du Contrat Social*, 1762).

the rules of international humanitarian law on non-international armed conflicts draw attention to the fact that compliance with these rules should have no bearing on the legal status of the parties to the conflict.[26]

The non-State party's desire to acquire political and even legal legitimacy is, however, one motive behind its often only ostensible promotion of respect for international humanitarian law. Major non-governmental parties to internal wars, such as the ANC in South Africa, the PKK in Turkey, UNITA in Angola, the *Mujahedin* in Afghanistan or the Maoist in Nepal, have given unilateral undertakings that they will abide by international humanitarian law, and the parties to the wars in the former Yugoslavia did likewise in multilateral agreements. The belligerents' innumerable pledges of compliance with the law, even in wars like that in Liberia in 2003, often contrast sharply with actual practice and in many cases are aimed solely at becoming "respectable".

The ICRC must, however, grasp these opportunities to improve the plight of war victims and endeavour to ensure that the promises made do not remain mere lip service. Especially towards the end of wars, when both sides are growing weary, such promises can and may smooth the path towards peace negotiations and the legitimation of the non-State party.

The less equal the belligerents are, the less they will be prepared to treat the adversary as legitimate. Groups classified as "terrorists" will probably be denied any legitimacy and will be considered criminals. The opposite side is not regarded as an equal; the epithets "uncivilized", "criminal" or "terrorist" indicate that it should be denied equality at all costs. Its members will be treated as outlaws and will be ruthlessly pursued, if necessary by unconventional or illegal means.

Extending the principles of international humanitarian law enshrined in Article 3 common to the Geneva Conventions, which relates to armed conflicts not of an international character, to the non-State parties to a war can easily be misunderstood as an attempt to legitimize them. Yet its provisions are purely humane. It stipulates that all parties to an armed conflict must distinguish between persons engaging in hostilities and persons who are not, or no longer, taking part in them. The latter must be dealt with humanely and, in particular, they must not be maltreated, taken hostage or summarily sentenced or executed. The sick and wounded must be cared for.

Asymmetrical interests in the application of international humanitarian law

International humanitarian law rests on a balance of humanitarian and military interests.[27] In order to prevent the parties sliding into an all-out war ending with

26 See Article 3 (4) common to the Geneva Conventions of 1949.

27 On the balance between freedom and security, see Michael Ignatieff, *The Lesser Evil. Political Ethics in an age of Terror*, Princeton University Press 2004 and Philip B. Heymann, Juliette N. Kayyem, *Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism*, National Memorial Institute for the Prevention of Terrorism (MIPT), December 2004, <http://www.mipt.org/Long-Term-Legal-Strategy.asp> (visited on 30 January 2005).

the complete destruction of the enemy, their choice of the means and methods of warfare is restricted. In particular, persons not or no longer taking part in hostilities, such as civilians or wounded or captured soldiers, must be spared.

Humanitarian and military interests do not necessarily clash. It is undoubtedly in the interests of an army to treat prisoners of war well and to expect the enemy to do the same. Similarly it may be advisable to refrain from bombing towns so as not to expose one's own population to a similar fate. Like most legal rules, both precepts have grown out of custom and the conviction that this practice ought to be legally valid. For this reason many rules of international humanitarian law are essentially designed to cover the belligerents' own best interests, so they should really be keen to comply with them. At the same time, the adversary is expected to have the same basic interests. Customary law and the whole body of treaty law contained in the Geneva Conventions protecting war victims have developed from the concurrence of these interests.

Reciprocity is of paramount importance in political terms and even the bulk of international humanitarian law thus rests on the expectation of reciprocity.[28] In international armed conflicts this is reflected, for example, in the traditional definition of armed forces and in the demand that their members respect the laws and customs of war when fighting.[29] It is therefore assumed that the enemy, that is to say the members of the enemy's armed forces, will behave in the same or at least a similar manner. In Lauterpacht's terms "it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from them without being bound by them."[30]

The resemblance to a classic duel or tournament in which both sides had an equal chance of winning or survival is not fortuitous. The concomitant chivalry in battle is in fact still demanded by many provisions of international humanitarian law.

In asymmetrical wars, the expectation of reciprocity is basically betrayed and the chivalrous ethos is frequently replaced by treachery.[31]

Open confrontation between armed forces is avoided and generally never takes place. Sham civilians illegally using protected emblems and uniforms abuse the trust of the other side. By definition, suicide bombers do not expect reciprocity. In the extreme case of international terrorism, al-Qaeda has never promised to adhere to the law of war, but on the contrary rejects it. In his "Letter

28 However, reciprocity invoked as an argument not to fulfil the obligations of international humanitarian law is prohibited.

29 See Article 4.A.2 (d) of the Third Geneva Convention of 1949, and also Toni Pfanner, "Military uniforms and the law of war", *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, p. 109.

30 Hersch Lauterpacht, The Limits of Operation of the Laws of War, *British Yearbook of International Law*, Vol. 30 (1953), p. 212.

31 This is valid especially for the so-called "Hague Law", see W. Michael Reisman, "Aftershocks: Reflections on the implications of September 11", *Yale Human Rights & Development Law Journal*, Vol. 6, 2003, p. 97: "The implicit ethic of the Hague law is that conflict should be symmetrical and that an adversary that does not fight accordingly is not entitled to the protection of the laws of war".

to America", published in 2002, Osama bin Laden declared that the American people are guilty of not seizing the opportunity to engineer a change in policy through democratic means and of paying taxes to finance repressive policy in Palestine and the occupation of Arab countries in the Gulf. "The American army is part of the American people (…) the American people are the ones who employ both their men and their women in the American forces which attack us. That is why the American people cannot be innocent of all the crimes committed by the Americans and the Jews against us. Allah, the Almighty, legislated the permission and the option to take revenge. (…) And whoever has killed our civilians, then we have the right to kill theirs."[32] Not only is the fundamental distinction not made between combatants and civilians, but it is systematically used for the very purpose of placing the adversary at a disadvantage.

In such cases, the other side begins to feel that it might be more in its interest not to consider itself bound by the law of war. In international armed conflicts, this is reflected first and foremost by the withholding of prisoner-of-war status, which, as a matter of principle, provides members of the armed forces with immunity from prosecution for participating in hostilities. This issue is of acute importance for all the internees in Guantánamo who are denied that status, although no detailed examination has yet been carried out to determine, for example, the status of members of the Taliban armed forces. It was not until the recent decision of the Supreme Court of the United States in the *Hamdi case*[33] that the Department of Defense issued an "Order establishing combatant status review tribunal."[34] However, a federal judge declared the special trials not to be in accordance with the Geneva Conventions and unlawful.[35]

Not only is the status of captives being called into question, but it is claimed that members of government forces are being unduly fettered in a war against opponents who do not comply with or who do not consider themselves bound by any of the legal rules.[36] To level the battlefield, the military-wise

32 See "*A letter from Osama bin Laden to the American people*". The letter appeared first on the Internet in Arabic on 17 November 2002 and was subsequently translated into English. Available online at <http://observer.guardian.co.uk/worldview/story/0,11581,845725,00.html> (visited on 6 July 2004).

33 US Supreme Court, *Hamdi* v. *Rumsfeld* 124 S. Ct. 2633 (28 June 2004), available on-line <http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-6696.pdf> (visited on 15 November 2004) and Jenny S. Martinez, Hamdi v. Rumsfeld, *American Journal of International Law*, Vol. 98 No. 4, October 2004, pp. 782–788. See also the Supreme Court's decision Rasul v. Bush 124 S. Ct. 2686 (28 June 2004) (cf. David L. Sloss, *American Journal of International Law*, Vol. 98 No. 4, October 2004, pp. 788-798).

34 See <http://www.defenselink.mil/releases/2004/nr20040707-0992.html> (visited on 15 November 2004).

35 The federal judge ruled that the military commissions set up to try detainees at the US naval base in Guantánamo are not in accordance with the Geneva Conventions and should be stopped, "unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of- war under Article 4 of the Geneva Convention (..)", see *Hamdan* v. *Rumsfeld*, Civil Action No. 04-1519, US District Court, District of Columbia, 8 November 2004, available at <http://www.dcd.uscourts.gov/04-1519.pdf> (visited on 15 November 2004). According to the *Washington Post* (9 November 2004), military officers halted commission proceedings in the light of the ruling. The administration announced that it will ask a higher court for an emergency stay and reversal of the decision.

36 See as examples the papers on the laws of war by David B. Rivkin Jr., Lee A. Casey and Darin R. Bartram, available at <http://www.fed-soc.org/lawsofwar> (visited on 15 November 2004), Alan Dershowitz, "The laws of war weren't written for this war", *Wall Street Journal*, 12 February 2004.

stronger party is tempted to resort as well to unconventional warfare and covert operations.[37]

Asymmetry can indeed place a warring party at a disadvantage if it, unlike the other side, abides by the rules of the law of war. It might then at least entertain the thought that the use of torture just might yield information about the adversary and its intentions, that it would be quicker and easier to take an alleged civilian terrorist out of circulation by deliberately killing him than by putting him on trial and, similarly, that a huge military strike which also hits the civilian population indiscriminately, wiping out not only combatants but also their families and other possible sympathizers, might undermine the morale of a movement.[38]

But despite their origin and evolution, most rules of international humanitarian law are now provisions which, because of their fundamentally humanitarian character, are binding on all parties of an armed conflict. One of the civilizing achievements of the nineteenth century was that legal norms which were formerly only utilitarian came to demand a minimum level of humanity irrespective of reciprocity.

The ban on reciprocity in international humanitarian law, as codified in the Vienna Convention on the Law of Treaties,[39] is rooted in this way of thinking. In our context, this means in practice that the response to torture cannot be torture and bloody attacks on the civilian population, or that terrorist raids cannot be answered in kind. Nevertheless, traces of reciprocity do still exist in today's humanitarian law, in that the ban on reprisals against civilians or the civilian population has not yet gained full acceptance in customary law.

Universally valid rules for asymmetrical parties to conflict

The International Court of Justice highlighted the legal trend away from reciprocity when, in the well-known "Nicaragua Judgment",[40] it called the precepts contained in Article 3 of the Geneva Conventions — which apply to

37 E.g. a new organization, called the Strategic Support Branch, designed to operate without detection and under the defense secretary's direct control, deploys small teams of case officers, linguists, interrogators and technical specialists alongside newly empowered special operations forces (cf. "The Secret Unit Expands Rumsfeld's Domain", *Washington Post*, 23 January 2005). The creation of a new unit was confirmed in a statement from Pentagon spokesman Lawrence DiRita (on Intelligence Activities of the Defense Department), 23 January 2005, cf. <http://www.defenselink.mil/releases/2005/nr20050123-2000.html> (visited on 30 January 2005). On counterterrorism, see also Jonathan Stevenson, Counter-terrorism: Containment and Beyond, *Adelphi Paper* 367, International Institute for Strategic Studies, 2004.

38 See e.g. Anthony Dworkin, *Law and the campaign against terrorism*: *The view from the Pentagon*, 16 December 2002, <http://www.crimesofwar.org/print/onnews/pentagon-print.html> (visited on 6 July 2004).

39 Article 60.5 of the 1969 Vienna Convention on the Law of Treaties.

40 See ICJ, *Nicaragua* v. *United States*, Merits, *op.cit*. (footnote 14), para. 218. ("Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (ICJ, Corfu Channel, Merits, *ICJ Reports 1949*, p. 22; paragraph 215 above".)). See also the confirmation in ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para. 157.

internal conflicts — a "mini convention" applicable in all situations of armed violence, and likewise qualified the principles of international humanitarian law as "elementary considerations of humanity". The detailed rules applicable to international conflicts are generally considered as constituting *ius cogens*, binding on all parties to a conflict.

For the ICRC, these binding humanitarian rules and principles are of primary importance when it is faced with asymmetrical warfare, since they offer an alternative to reciprocity based arguments which in such situations often result in events taking a turn for the worse, rather than the better, and in no one feeling any further obligation to abide by the rules.

Humanitarian law already has built-in barriers to such developments, because a balance between humanitarian, military and security interests has already been struck in the Conventions and a framework for waging war is provided. In particular, threats to State security may not be used as an opportunity to tear up the very rules created for dealing with such an eventuality.

Especially in wars between States, the rules on warfare and the protection of victims generally still offer an adequate response to contemporary events in theatres of war, even in conflicts where there is no equality of arms. The overlapping of the aforementioned types of war in one and the same theatre does not, however, make it any easier for legal experts to find simple solutions. In the more recent international wars in Afghanistan and Iraq, international, internal, private and transnational armed confrontations often take place simultaneously. Despite that, they all follow different legal rules.

Restricted area of applicability

In internal armed conflicts, we must start our search for solutions by trying to identify the fundamental area of application of international humanitarian law. It applies only when a conflict occurs between "armed parties". This presupposes a certain amount of hierarchical organization.[41] If the area of applicability is interpreted in a relatively restrictive manner and if the parties are more or less equal or symmetrical, the law of war offers realistic solutions. Conversely, the rules of those conventions will be rather fictitious and most will be violated if every conceivable violent act is regarded as being subject to the law on armed conflicts.

In particular, the law of war cannot take effect if one party is absolutely unable or unwilling to comply with its basic tenets. In the first instance, the operative prerequisites for applicability (it must be an organized armed group and thereby able to enforce compliance) are probably lacking. In the second instance, the party's actual aim is systematically to infringe the rules

41 The International Criminal Tribunal for the former Yugoslavia (ICTY), has defined "armed conflict" as existing "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state." *Prosecutor* v. *Tadic*, No. IT-94-1, Decision on the Defense, Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

of international humanitarian law and to do away with the essential distinction between combatants and civilians. By analogy with treaty law, it could be argued that a party cannot accede to a treaty if it does not agree with its basic object or purpose.

The scope of application of international humanitarian law should not be overstretched. Even when, strategically and geopolitically speaking, certain acts must be treated as acts of war on account of their scale and nature, they do not necessarily amount to an "armed conflict" within the meaning of the law of armed conflicts.[42] This is particularly true of international terrorism whose hazy beginning, unforeseeable end and worldwide territorial context, coupled with controversy surrounding the attribution of responsibility for given acts to any one party, can result in the whole world being placed on a war footing, at any moment, indefinitely. "To speak of a war on terrorism in this *jus in bello* sense, is to distort the whole meaning and purpose of the laws of war by trying to make them applicable to a situation to which they were never intended."[43]

The content of the international law of armed conflicts may provide some answers to what happens in the most markedly asymmetrical wars. But they are only partial answers and the reply as a whole may be wrong. And partial answers are an invitation to abuse through pick-and-choose tactics, especially when the issue is not addressed in its entirety.[44]

International humanitarian law therefore has to walk a tightrope between overuse, misuse or irrelevance, either because it is not applicable to many of today's asymmetrical confrontations, or because it is inconsistent with the perceived interests of the warring parties. In particular, the terrorist acts being perpetrated, outside situations of armed conflict, in various parts of the world are criminal acts that should, *inter alia*, be dealt with by applying domestic and international human rights law.[45] In practice, that is primarily the legal framework being relied on. On the other hand, international humanitarian law continues to offer suitable answers to most international and internal armed conflicts, which still account for the majority of wars today.[46]

42 Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Manchester University Press, — Manchester, 1999, p. 70. See also Kenneth Roth, "The law of war in the war on terror, Washington's abuse of enemy combatants", *Foreign Affairs*, January/February 2004, p. 2; Gabor Rona, "Interesting times for international humanitarian law: Challenges from the 'war on terror'", *Fletcher Forum of World Affairs*, Vol. 27, 2003, p. 57.

43 Christopher Greenwood, *op.cit*. (footnote 14), p. 529.

44 See also Anthea Roberts, Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11, *European Journal of International Law*, Vol. 15, September 2004, pp. 742.

45 See Marco Sassòli, Use and Abuse of the Laws of War in the "War on Terror", *Law & Inequality: A Journal of Theory and Practice*, Vol. XXII No. 2, Summer 2004, pp. 195–221, and Kenneth Watkin, "Controlling the use of force: A role for human rights norms in contemporary armed conflict", *American Journal of International Law*, Vol. 98, No. 1, January 2004, pp. 1–34.

46 For an institutional view of the ICRC on related issues see the ICRC's report on "International humanitarian law and the challenges of contemporary armed conflicts", submitted to the 28th International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 2003, published in *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, pp. 213–244.

Humanitarian action in an asymmetrical war

In times of war, the ICRC is concerned not only with the observance of international humanitarian law, but also and above all with protecting and assisting the victims of such situations.[47] As it is present in the midst of the fighting, it must take a critical look at the various aims and forms of warfare so that it can gain access to the victims and carry out its humanitarian activities as effectively as possible.

The diversity of asymmetrical wars makes it impossible to deal with all the issues linked to specific forms of war. Tellingly, considerations similar to those relating to international humanitarian law, which is closely connected with the operational activities of the ICRC, hold good. The fact that certain new manifestations of war-like situations are barely covered by international humanitarian law does not mean that the institution must look on idly.

The mission of the ICRC is to help and protect victims of war and of similar acts of violence as far as possible. The organization has in particular to face the main humanitarian consequences of asymmetrical warfare, namely the fate of civilians affected by indiscriminate or even targeted attacks and the threat to dignity and integrity of persons detained in such contexts. "Elementary considerations of humanity" have to be respected and the legal standards upheld even in the worst circumstances.

It is crucial for the institution's planning to determine whether, in asymmetrical wars, it can perform those tasks in keeping with the basic principles governing humanitarian relief, according to which its good offices must be available impartially and without discrimination to all the victims of hostilities. Humanitarian action is affected by the global trends in warfare in that it has an impact on the ways that risks and potential dangers are managed and communication is carried out in order to preserve humanitarian space in the interest of the victims. The analysis of the local situation must go hand in hand with a broader analysis at a regional and global level. It implies therefore the adage "think globally and act locally."[48]

The difficulty and necessity of establishing contact with all parties

In order to gain access to war victims, the ICRC must negotiate with the various warring parties. Although the Geneva Conventions give the ICRC the right to carry out certain activities in international armed conflicts,[49] such as visiting prisoners of war, in practice it has to obtain the respective party's consent to do so.

47 See Toni Pfanner, Le rôle du CICR dans la mise en oeuvre du droit international humanitaire, *Law in Humanitarian Crises*, Official Publications of the European Communities, 1995, Vol. I, pp. 177–248.

48 See Jean-Luc Blondel, La globalisation : approche du phénomène et ses incidences sur l'action humanitaire, *International Review of the Red Cross*, Vol. 86 No. 855, Septembre 2004, p. 502.

49 See in particular Article 126 of the Third Geneva Convention (visits to prisoners of war) and Article 143 of the Fourth Geneva Convention of 1949 (visits to civilian internees).

Whereas it is relatively easy to make contact with established government bodies, it is harder to reach non-governmental entities. Indeed, some people even find it suspicious that in such cases the ICRC has to hold talks with prohibited or "criminal" organizations. Contacts with rebel movements may be prevented in order to avoid any form of recognition. But in giving this order the party doing so, which is usually the government side, relinquishes the opportunity to start talks or reach an understanding with the rebels, at least on humanitarian matters. Such contact has often to be sought in a roundabout way or through intermediaries before closer relations can be established in conflict areas.

With increasing asymmetry, the lack of lawfulness and legitimation make it all the more difficult to establish contact.[50] If groups or movements are classified as downright criminal and without any right to engage in armed conflict, such as is the case in the "fight against terrorism", contact with them is not only often illegal but can jeopardize a delegation's safety. Yet contacts with all actors are essential in order to be able to operate in such areas unimpinged. The ICRC can at best obtain an indirect hearing through general public relations or cautious contacts with sympathizers, as the possible perpetrators tend to be shadowy figures. It frequently has access to them only once they have been captured, in other words when visiting prisoners.

In asymmetrical situations the ICRC therefore frequently has to guess from indirect contacts and incomplete information whether it has the assent of the belligerents and fairly safe access to the victims of hostilities. It cannot carry out humanitarian action without such minimum assurances and access to the victims.[51] By its very nature, humanitarian relief cannot be forced upon a belligerent against its will without the humanitarian organization itself becoming part of the war machinery.

Humanitarian action at odds with the aims of war

Humanitarian organizations can offer help and protection only if this is compatible with the aims of the warring parties or at least does not conflict with them. As already mentioned above, *de jure* and *de facto* consent has to be obtained. The belligerents mostly withhold it when a given operation does not square with the parties' stated or real purposes. At worst, the murder of a delegate or

50 See Kenneth Anderson, Humanitarian Inviolability in Crisis: The meaning of Impartiality and Neutrality for U.N. and Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts, *Harvard Human Rights Journal*, Vol. 17 (2004), pp. 41–74, especially on contacts with organizations classified as terrorist organizations. No peace or accommodation, but "the hard won practical wisdom" imposes such contacts (pp. 63–66). A possible strategy to negotiate with or at least to bind in organizations such as al-Qaeda is outlined by Helmuth Fallschellel, *Soll man mit al Quaida verhandeln? Anmerkungen zu einem Tabu*, available online at <http://www.freitag.de/2003/07/03071601.php> (visited on 6 July 2004); see also Bruno S. Frei, *Dealing with Terrorism — Stick or Carrot*, Edward Elgar, Cheltenham (UK) and Northhampton (USA) 2004.

51 Pierre Krähenbühl, The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action, *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 505-514, in particular p. 508.

pillaging of a delegation makes it crystal clear that consent does not exist or has been withdrawn at least by one conflict party. A tragic example of this was the murder of six of ICRC staff in eastern Congo in 2002.

In an all-out war or in "identity wars" of an ethnic or religious nature aimed at expelling or exterminating the enemy, humanitarian action will have little prospect of success. The situation is even more dangerous when delegates engaged in humanitarian operations are seen as "soft targets" and become the object of attacks, as has happened, for example, in Iraq. In such cases even humanitarian organizations are regarded as enemy civilians.

Belligerents' interest in humanitarian action

Often the militarily stronger party's consent to the protective activities of the ICRC has nothing to do with reciprocity and is not necessarily contingent upon it. The target audience is that party's own nation and the international community. The message is that this consent is humanitarian in nature and that even the enemy is going to be given humane treatment, sometimes also in the hope that the enemy and its sympathizers might ultimately be convinced that it is worth respecting fundamental humanitarian norms.

In asymmetrical wars, the ICRC is often allowed to act only for humanitarian and not for legal reasons, so that no legitimacy can seem to be conferred on the adversary. The weaker parties to a conflict usually welcome humanitarian relief, as long as they do not perceive it as an instrument of the opposite, generally governmental party. Nevertheless humanitarian assistance can be instrumentalized by the weaker party, too, or become essential to their survival. On the one hand, a relief operation provides the needy civilian population with hope that the international community is not completely indifferent to its fate and that there is light at the end of the tunnel; on the other, insurgents try to elicit legitimation from the presence of foreign staff members in international aid agency teams. Lastly, not even the best possible supervision during the handing out of relief supplies can guarantee that warring parties do not benefit, at least indirectly, from those supplies.

The time-frame for humanitarian action

Humanitarian relief in asymmetrical conflicts is subject to the same laws as in all other conflicts; depending on the background, purpose and point in time, this relief may be seen as desirable, undesirable or somewhere in between. Assistance that fails to take the victims' interests into account can also prove to be counterproductive. Protection of victims must be closely allied with relief operations if effective assistance is to be provided in a war.

In any conflict, humanitarian relief activities can sometimes be incompatible with tactical war aims or with safety considerations regarding humanitarian staff. Hostilities are seldom fully or partly suspended in order to permit humanitarian action. Moreover, such cease-fires are fundamentally different from the situation encountered in highly asymmetrical wars.

To a great extent, the art of asymmetrical warfare lies in the dissimilar speed at which the parties wage war on one another.[52] Asymmetry arising from strength is usually aiming at accelerating hostilities and outpacing the adversary. Weaker parties tend to slow the war and protract it.

Consequently the time-frame for humanitarian action can also vary. In the short early phase of a war, the massive deployment of weapons and rapidly altering needs make it difficult to provide such relief, as for example in the initial phase of the Iraq war. Although there was a great necessity for ICRC action, the heavy bombardment meant that the organization's ability to deliver it was limited for security reasons. In the seemingly interminable second phase, the open conflict has turned into a covert war and a war of occupation. At the same time, reconstruction of the widely destroyed infrastructure has begun. For now at least, such reconstruction seems inconsistent with the aims of what is so far the militarily inferior party. This again shows that war aims extend beyond military action and that the purely military notion of war is beginning to unravel. For this reason, humanitarian relief operations can sometimes be incompatible with the political aims of one of the parties and therefore practically impossible to carry out.[53]

Humanitarian protection and especially the visiting of prisoners of war and internees are the ICRC's main task at this stage. Naturally, it is focused on the militarily stronger party that has the necessary facilities. Reciprocity can scarcely be expected in asymmetrical wars, as the weaker party is usually neither able nor willing to take prisoners.

In the delicate and often very difficult transition period following the end of an open armed conflict or the actual or official end of an occupation, the situation of the most vulnerable members of the population often deteriorates and the need for security in view of the threats posed by former combatants and generally hazardous conditions increases. Addressing the manifold needs of the population after such a conflict raises a variety of questions at the policy level.[54] The uncertainty or the absence of agreement as to a clear legal framework does not facilitate protection activities, even less so if a regime change is being effected at the same time. Humanitarian work is confronted by the continuing problem of security, the lines between short and longer term aid become even more blurred and the already difficult transition from emergency aid to development work is impeded.

Emphasis on independence

Because, and even despite, the fact that the ICRC must be in close dialogue with the militarily more powerful party to a conflict, it must take care to remain

52 See Herfried Münkler, "The wars of the 21st century", *International Review of the Red Cross*, Vol. 85 No. 849, March 2002, pp. 7–22.

53 Similarly Kenneth Anderson, *op. cit.* (footnote 50), on reconstruction and neutrality (p. 58), Anderson makes a distinction from immediate relief (p. 74).

54 See Marion Harroff-Tavel, "Do wars ever end? The work of the International Committee of the Red Cross when the guns fall silent", *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 465–496.

visibly independent. Such independence is vital to ensure that humanitarian action is not used by the stronger adversary as an instrument to promote its own interests.[55] The sole obligation of the ICRC is towards the victims of hostilities, and the sole purpose of its cooperation with all parties to the conflict is to get humanitarian relief through to victims in an impartial and non-discriminatory manner.

The increasing militarization of humanitarian activity and the combining of military and humanitarian assistance constitute big problems for relief organizations, because these trends threaten the independence of their action — or at least the perception of its independence.[56] If humanitarian organizations are associated with military forces, there is a great risk that they will no longer be perceived as being impartial and independent of political control, and if the dividing line between humanitarian and military action is blurred, the very idea of humanitarian action — of impartial help to the victims — may be undermined. This is perhaps the institution's main concern, for it can dilute the concept of humanitarian action in the eyes of the belligerents, and can appear to compromise the independence of its activities and threaten the security of humanitarian workers if associated with the enemy.[57] This concern is due less to the limits of military humanitarian action per se than to the "contagious" impact it may have on civilian humanitarian action and for the victims of armed confrontations.[58]

As a matter of principle, the ICRC therefore excludes recourse to armed protection of its humanitarian operations.[59] Only in very exceptional circumstances and when it is considered indispensable to defend its staff or its infrastructure against common law criminality is armed protection allowed. The imposition of humanitarian services against the will of a party to conflict is, however, not accepted by the ICRC. Furthermore, the ICRC always insists on

55 Contrary to governmental humanitarian action or so-called "NGO's of Wilsonian tradition" with close identification with the policy of the respective government, see Abby Stoddard, Humanitarian NGO's: challenges and trends, *Humanitarian Policy Group Report*, No. 14 July 2003 (Joanna Macrae and Adele Harmer, Eds.), pp. 25–35.

56 Beat Schweizer, Moral dilemmas for humanitarianism in the era of "humanitarian" military interventions, *International Review of the Red Cross*, Vol. 86 No. 855, September 2004, pp. 547-564. Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action*, Cornell University Press, Ithaca NY, 2002 rejects "the traditional concept of neutrality as on the one hand morally repugnant and on the other hand unachievable in the complex political emergencies of the post-Cold War period", (pp. 20–23).

57 See Raj Rana, Contemporary challenges in the civil-military relationship: Complementarity or incompatibility?, *International Review of the Red Cross*, Vol. 86 No. 855, September 2004, pp. 565-587, and Meinrad Studer, The ICRC and civil-military relations in armed conflict, *International Review of the Red Cross*, Vol. 83, No. 842, June 2001, pp. 367–391.

58 On the integration of politics and humanitarian action see in particular Nicolas de Torrente, Humanitarian Action Under Attack: Reflections on the Iraq War, *Harvard Human Rights Journal*, Vol. 17 (2004), pp. 1–29 (warning of the dangers of co-opting humanitarian action by States) and Paul O'Brian, Politicized Humanitarianism: A Response to Nicolas de Torrente, *Harvard Human Rights Journal*, Vol. 17 (2004), pp. 31–37, who doubts about the apolitical character of humanitarian action.

59 See Resolution 4 adopted by the 26th International Conference of the Red Cross and Red Crescent "Principles and actions in international humanitarian assistance and protection", in particular para. G.2 (c), published in: *International Review of the Red Cross*, Vol. 36, No. 310, January/February 1996, pp. 74–75.

complete logistic independence from all parties to a conflict, thereby emphasizing that it has its own distinctive identity.

Neutrality as operational instrument

In international law, the neutrality of States means not interfering in a war (principle of non-intervention), not giving one adversary a military advantage over another (principle of prevention) and treating all adversaries equally (principle of impartiality). Already reduced by the United Nations Charter, neutrality has largely continued to lose its significance owing to the rising number of internal conflicts, although it is still important in classic international humanitarian law.

For the ICRC, the neutrality of humanitarian organizations however is every bit as important as their independence from political actors. In order to gain the trust of parties to conflict, this principle requires not only that the ICRC should not take part in hostilities, but also that it should not intervene in political, religious or ideological controversies.[60] Neutrality is therefore not to equate with neutrality of States under international law: for the ICRC it is neither an end in itself, nor a philosophical principle, but rather an operative means of reaching those in need. Humanitarian organizations do not necessarily have to be neutral, nor did the International Court of Justice demand in the above-mentioned Nicaragua Judgment that humanitarian assistance must be neutral in all circumstances. Under the Statutes of the Red Cross and Red Crescent Movement,[61] the ICRC is, however, obliged to abide by the principle of neutrality as understood by the Red Cross and Red Crescent Movement.

For the ICRC and international humanitarian law, the questions of lawfulness and, more generally, of the reason for an actual war do not influence the action of the ICRC on behalf of the persons affected by the conflict and the applicability of the law. The aim is solely to protect and assist war victims, regardless of the political, religious or ideological reasons for the war or whether a resolution of the United Nations Security Council allowed it.

Naturally, delegates in the field must closely analyse the reasons for a war in order to tailor their humanitarian action to local circumstances, if only to ensure their own safety by not consciously or unconsciously thwarting the aims and intentions of the warring parties. In the interests of war victims, the ICRC and its delegates must insist that a clear conceptual distinction be drawn between the lawfulness of a war and the law governing the conduct of hostilities.

In asymmetrical wars, the ICRC struggles to have its neutrality and independence accepted by the parties.[62] The frequent tendency in such conflicts to

60 See Denise Plattner, "The neutrality of the ICRC and the neutrality in humanitarian assistance", *International Revue of the Red Cross*, Vol. 36, No. 311, March-April 1996, pp. 161–180, and Larry Minear, The theory and practice of neutrality: Some thoughts on the tensions, *International Review of the Red Cross*, Vol. 81 No. 833 March 1999, pp. 63–71.

61 See the preamble and Article 1.2 of the Statutes of the International Red Cross and Red Crescent Movement.

62 See Chris Johnson, Afghanistan and the war on terror, *Humanitarian Policy Group Report*, No. 14 July 2003 (Joanna Macrae and Adele Harmer, Eds.), pp. 49–62; Larry Minear, *The Humanitarian Enterprise*, Kumarian, Bloomfield, CT, 2002, pp. 189 ff. (on terrorism and humanitarian action).

proclaim a just (or holy) war and deny the adversary any legitimation whatsoever does not facilitate the task of the ICRC to provide humanitarian assistance for all victims, regardless of which side they belong to. It is hard to reconcile neutrality with the demand usually made in such situations by both parties that the organization should take sides. Moreover, neutrality is seen by some as morally reprehensible because no decision is taken as to the lawfulness or unlawfulness of the war.

In glaringly asymmetrical situations the notion of neutrality is usually scorned, especially when the adversary is treated as a criminal. On the contrary, merely taking up contact with the enemy is regarded as approval of, or even branded as complicity in, its aims and deeds. The very idea of the ICRC having a role as a neutral intermediary under international humanitarian law, albeit only in humanitarian matters, is more easily dismissed.

If any acts by the parties are criticized or denounced as violations of international humanitarian law, this too is seen as a breach of neutrality. If the weaker adversary seriously infringes international law and even resorts to acts of terrorism, any criticism of the militarily stronger party's acts will very readily be viewed in that light. Conversely, the weaker party will quickly take criticism as indicating bias in favour of the stronger party. As the militarily weaker party must turn to internationally outlawed means of countering military asymmetry, it will soon suspect that criticism is designed to rob it of its last chance of standing up to its more powerful enemy.

Nonetheless, the ICRC considers that in the interests of victims it is duty bound to make contact with all parties, even when it disapproves of means or methods of warfare and has to make this plain. The chief purpose of neutrality is to enable the ICRC to assist war victims.[63] In the various conflict situations action must be planned in such a way that in a given context it is — and is seen to be — as neutral as possible. Thus the ICRC may be required to adopt different strategies in various conflict scenarios and cultural contexts, without harming its overall identity.

Perception of neutrality

Neutrality could have the passive connotation of doing nothing or standing on the sidelines; the above-mentioned vital trust of the warring parties must be earned actively not only through deeds, but also through perceptions. It rests on a whole range of measures, phenomena and symbols and on endeavours to convince and negotiate with all parties to a conflict.

The parties to asymmetrical conflicts often belong to a variety of political, religious or ethnic groups, and if they think that the ICRC is taking sides, this will not only impede or prevent humanitarian action, but will cause security problems. In some contexts, the ICRC must also bear in mind its delegates'

63 Jakob Kellenberger, Speaking out or remaining silent in humanitarian work, *International Review of the Red Cross*, Vol. 86 No. 855, September 2004, pp. 600-601 calls the access to the victims the ICRC's top priority.

nationality, religion or ethnic origins when deciding on the area to which they are to be assigned, in order to reduce the security risk to its staff and ensure that it can reach the victims.

The western origins of the ICRC, its financial structure based on substantial contributions from developped countries including the United States, and its resources which, though vital, often seem lavish in comparison with local circumstances, all undoubtedly combine to give the impression of a western, Christian, organization, an impression accentuated by the Red Cross emblem. Although the ICRC, like other humanitarian organizations, does not allow these attributes to influence its work, many people probably have a sneaking suspicion that in certain situations the institution is not neutral. Such perceptions are hard to overcome. The ICRC must strive to be classified on the whole as neutral in its activities throughout the world. This requires consistency, patience, stamina and a lot of hard work, especially to convince those parties which reject the ICRC. The aim is to win acceptance of the ICRC and above all acceptance of its impartial humanitarian relief in these new war situations.

Conclusion

Asymmetrical wars fit in neither with Clausewitz's concept of war nor with the traditional concept of international humanitarian law. As the warring parties are increasingly unequal and the principle of equality of arms does not apply to them, they have disparate aims and employ dissimilar means and methods to achieve their goals. Whereas classic international armed conflicts between States of roughly equal military strength are becoming the exception, internal wars are mostly fought between adversaries that are unequal in many respects. The militarily weaker party to such an asymmetrical war may be tempted to employ unlawful methods in order to overcome the adversary's strength and exploit its weaknesses. International terrorism — which can amount to a warlike situation since it disrupts societies and even the world order — epitomizes this kind of asymmetrical warfare.

Asymmetry has ramifications with regard to the legality of war, the legitimacy of the belligerents and the interests at stake in the application of international humanitarian law. "Just war" considerations are again gaining ground, enemies are being criminalized and sometimes labelled "terrorists" — even if such qualification is not always justified — and denied equality even under international humanitarian law. The expectation of reciprocity as a fundamental motivation for respecting the law is often misplaced and honourable fighting is replaced by perfidious behaviour; covert operations are becoming the substitute for open battles.

International humanitarian law should not be overstretched. It cannot be extended to situations other than those it is intended to cover without giving wrong directives. This is particularly relevant for the fight against international terrorism, which despite many warlike aspects does not necessarily amount to an "armed conflict" in the current sense of the law of war.

This does not mean, however, that the most marked asymmetrical confrontations take place in a lawless international domain. Apart from the possible applicability of international human rights law and international criminal law, the "elementary considerations of humanity" as enshrined in Article 3 common to all four Geneva Conventions of 1949 remain the yardstick for all situations of armed violence, as they constitute universally binding rules for all, even unequal and asymmetrical, parties to any situation of armed violence.

Similarly, humanitarian action is often challenged in asymmetrical warfare. Recent attacks on humanitarian organizations, including the ICRC, both in Iraq and in Afghanistan have shown that humanitarian relief may be contrary to the belligerents' interests or, even worse, that attacks on humanitarian workers may foster their agenda. A humanitarian organization such as the ICRC can only strive to ensure that it strictly adheres to and, equally important, is seen to adhere to, its principles of independence from political and military protagonists and neutrality with regard to the cause or outcome of the conflict. It must remain focused on one objective alone: to provide impartial assistance, without discrimination and based solely on the needs of the victims of armed violence.

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CUSTOMARY LAW

Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict

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Abstract

This article explains the rationale behind a study on customary international humanitarian law recently undertaken by the ICRC at the request of the International Conference of the Red Cross and Red Crescent. It describes the methodology used and how the study was organized and summarizes some major findings. It does not, however, purport to provide a complete overview or analysis of these findings.

Introduction

In the 50 years or so since the adoption of the Geneva Conventions of 1949, mankind has experienced an alarming number of armed conflicts affecting almost every continent. During this time, the four Geneva Conventions and

* The author would like to thank Eric Mongelard for the assistance in preparing this article, as well as Louise Doswald-Beck and colleagues of the Legal Division for the many insightful comments they offered. The views in this article are those of the author and do not necessarily reflect those of the International Committee of the Red Cross.

their Additional Protocols of 1977 have provided legal protection to persons not or no longer participating directly in hostilities (the wounded, sick and shipwrecked, persons deprived of their liberty for reasons related to an armed conflict, and civilians). Even so, there have been numerous violations of these treaties, resulting in suffering and death which might have been avoided had international humanitarian law been better respected.

The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.

The International Conference for the Protection of War Victims, convened in Geneva in August–September 1993, discussed in particular ways to address violations of international humanitarian law but did not propose the adoption of new treaty provisions. Instead, in its Final Declaration adopted by consensus, the Conference reaffirmed "the necessity to make the implementation of humanitarian law more effective" and called upon the Swiss government "to convene an open-ended intergovernmental group of experts to study practical means of promoting full respect for and compliance with that law, and to prepare a report for submission to the States and to the next session of the International Conference of the Red Cross and Red Crescent."[1]

The Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and adopted a series of recommendations aimed at enhancing respect for international humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law. Recommendation II of the Intergovernmental Group of Experts proposed that:

The ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.[2]

In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.[3] Nearly ten

1 International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, *International Review of the Red Cross*, No. 296, 1993, p. 381.

2 Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995, Recommendation II, *International Review of the Red Cross*, No. 310, 1996, p. 84.

3 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1, International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims, *International Review of the Red Cross*, No. 310, 1996, p. 58.

years later, in 2005, after extensive research and widespread consultation with experts, this report, now referred to as the study on customary international humanitarian law, has been published.[4]

Purpose

The purpose of the study on customary international humanitarian law was to overcome some of the problems related to the application of international humanitarian treaty law. Treaty law is well developed and covers many aspects of warfare, affording protection to a range of persons during wartime and limiting permissible means and methods of warfare. The Geneva Conventions and their Additional Protocols provide an extensive regime for the protection of persons not or no longer participating directly in hostilities. The regulation of means and methods of warfare in treaty law goes back to the 1868 St. Petersburg Declaration, the 1899 and 1907 Hague Regulations and the 1925 Geneva Gas Protocol and has most recently been addressed in the 1972 Biological Weapons Convention, the 1977 Additional Protocols, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention on the Prohibition of Anti-personnel Mines. The protection of cultural property in the event of armed conflict is regulated in detail in the 1954 Hague Convention and its two Protocols. The 1998 Statute of the International Criminal Court contains, *inter alia*, a list of war crimes subject to the jurisdiction of the Court.

There are, however, two serious impediments to the application of these treaties in current armed conflicts which explain why a study on customary international humanitarian law is necessary and useful. First, treaties apply only to the States that have ratified them. This means that different treaties of international humanitarian law apply in different armed conflicts depending on which treaties the States involved have ratified. While the four Geneva Conventions of 1949 have been universally ratified, the same is not true for other treaties of humanitarian law, for example the Additional Protocols. Even though Additional Protocol I has been ratified by more than 160 States, its efficacy today is limited because several States that have been involved in international armed conflicts are not party to it. Similarly, while nearly 160 States have ratified Additional Protocol II, several States in which non-international armed conflicts are taking place have not done so. In these non-international armed conflicts, common Article 3 of the four Geneva Conventions often remains the only applicable humanitarian treaty provision. The first purpose of the study was therefore to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules.

4 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press, 2005.

Second, humanitarian treaty law does not regulate in sufficient detail a large proportion of today's armed conflicts, that is non-international armed conflicts, because these conflicts are subject to far fewer treaty rules than are international conflicts. Only a limited number of treaties apply to non-international armed conflicts, namely the Convention on Certain Conventional Weapons as amended, the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol and, as already mentioned, Additional Protocol II and Article 3 common to the four Geneva Conventions. While common Article 3 is of fundamental importance, it only provides a rudimentary framework of minimum standards. Additional Protocol II usefully supplements common Article 3, but it is still less detailed than the rules governing international armed conflicts in the Geneva Conventions and Additional Protocol I.

Additional Protocol II contains a mere 15 substantive articles, whereas Additional Protocol I has more than 80. While numbers alone do not tell the full story, they are an indication of a significant disparity in regulation by treaty law between international and non-international armed conflicts, particularly when it comes to detailed rules and definitions. The second purpose of the study was therefore to determine whether customary international law regulates non-international armed conflict in more detail than does treaty law and if so, to what extent.

Methodology

The Statute of the International Court of Justice describes customary international law as "a general practice accepted as law."[5] It is widely agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*). As the International Court of Justice stated in the *Continental Shelf case*: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."[6] The exact meaning and content of these two elements have been the subject of much academic writing. The approach taken in the study to determine whether a rule of general customary international law exists was a classic one, set out by the International Court of Justice, in particular in the *North Sea Continental Shelf cases*.[7]

5 Statute of the International Court of Justice, Article 38(1)(b).

6 International Court of Justice, *Continental Shelf case (Libyan Arab Jamahiriya* v. *Malta*), Judgment, 3 June 1985, *ICJ Reports 1985*, pp. 29–30, § 27.

7 International Court of Justice, *North Sea Continental Shelf cases*, Judgment, 20 February 1969, *ICJ Reports 1969*, p. 3.

State practice

State practice must be looked at from two angles: firstly, what practice contributes to the creation of customary international law (selection of State practice); and secondly whether this practice establishes a rule of customary international law (assessment of State practice).

Selection of State practice

Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. Physical acts include, for example, battlefield behaviour, the use of certain weapons and the treatment afforded to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations. This list shows that the practice of the executive, legislative and judicial organs of a State can contribute to the formation of customary international law.

The negotiation and adoption of resolutions by international organizations or conferences, together with the explanations of vote, are acts of the States involved. It is recognized that, with a few exceptions, resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution in the assessment of the formation of a rule of customary international law depends on its content, its degree of acceptance and the consistency of related State practice.[8] The greater the support for the resolution, the more importance it is to be accorded.

Although decisions of international courts are subsidiary sources of international law,[9] they do not constitute State practice. This is because, unlike national courts, international courts are not State organs. Decisions of international courts are nevertheless significant because a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect. In addition, because of the precedential value of their decisions, international courts can also contribute to the emergence of a rule of customary international law by influencing the subsequent practice of States and international organizations.

The practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements, does not constitute State practice as such. While such practice

8 The importance of these conditions was stressed by the International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, pp. 254–255, §§ 70–73.

9 Statute of the International Court of Justice, Article 38(1)(d).

may contain evidence of the acceptance of certain rules in non-international armed conflicts, its legal significance is unclear and, as a result, was not relied upon to prove the existence of customary international law. Examples of such practice were listed under "other practice" in Volume II of the study.

Assessment of State practice

State practice has to be weighed to assess whether it is sufficiently "dense" to create a rule of customary international law.[10] To establish a rule of customary international law, State practice has to be virtually uniform, extensive and representative.[11] Let us look more closely at what this means.

First, for State practice to create a rule of customary international law, it must be *virtually uniform*. Different States must not have engaged in substantially different conduct. The jurisprudence of the International Court of Justice shows that contrary practice which, at first sight, appears to undermine the uniformity of the practice concerned, does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other States or denied by the government itself. Through such condemnation or denial, the rule in question is actually confirmed.[12]

This is particularly relevant for a number of rules of international humanitarian law for which there is overwhelming evidence of State practice in support of a rule, alongside repeated evidence of violations of that rule. Where violations have been accompanied by excuses or justifications by the party concerned and/or condemnation by other States, they are not of a nature to challenge the existence of the rule in question. States wishing to change an existing rule of customary international law have to do so through their official practice and claim to be acting as of right.

Second, for a rule of general customary international law to come into existence, the State practice concerned must be both *extensive and representative*. It does not, however, need to be universal; a "general" practice suffices.[13] No precise number or percentage of States is required. One reason it is impossible to put an exact figure on the extent of participation required is that the criterion is in a sense *qualitative* rather than quantitative. That is to say, it is not simply a question of how many States participate in the practice, but also which States.[14] In the words of the International Court of Justice in the *North Sea Continental Shelf cases*, the practice must "include that of States whose interests are specially affected."[15]

10 The expression "dense" in this context comes from Sir Humphrey Waldock, "General Course on Public International Law", *Collected Courses of the Hague Academy of International Law*, Vol. 106, 1962, p. 44.

11 International Court of Justice, *North Sea Continental Shelf cases*, *op. cit.* (note 7), p. 43, § 74.

12 See International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), Merits, Judgment, 27 June 1986, ICJ Reports 1986, p. 98, § 186.

13 International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Principle 14, p. 734 (hereinafter "ILA Report").

14 *Ibid*., commentary (d) and (e) to Principle 14, pp. 736–737.

15 International Court of Justice, *North Sea Continental Shelf cases*, *op. cit.* (note 7), p. 43, § 74.

This consideration has two implications: (1) if all "specially affected States" are represented, it is not essential for a majority of States to have actively participated, but they must have at least acquiesced in the practice of "specially affected States"; and (2) if "specially affected States" do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required as explained.[16] Who is "specially affected" under international humanitarian law may vary according to circumstances. Concerning the legality of the use of blinding laser weapons, for example, "specially affected States" include those identified as having been in the process of developing such weapons, even though other States could potentially suffer from their use. Similarly, States whose population is in need of humanitarian aid are "specially affected" just as are States which frequently provide such aid. With respect to any rule of international humanitarian law, countries that participated in an armed conflict are "specially affected" when their practice examined for a certain rule was relevant to that armed conflict. Although there may be specially affected States in certain areas of international humanitarian law, it is also true that all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict.[17] In addition, all States can suffer from means or methods of warfare deployed by other States. As a result, the practice of all States must be considered, whether or not they are "specially affected" in the strict sense of that term.

The study took no view on whether it is legally possible to be a "persistent objector" in relation to customary rules of international humanitarian law. While many commentators believe that it is not possible to be a persistent objector in the case of rules of *jus cogens*, there are others who doubt the continued validity of the persistent objector concept altogether.[18] If one accepts that it is legally possible to be a persistent objector, the State concerned must have objected to the emergence of a new norm during its formation and continue to object persistently afterwards; it is not possible to be a "subsequent objector."[19]

While some time will normally elapse before a rule of customary international law emerges, there is no specified timeframe. Rather, it is the accumulation of a practice of sufficient density, in terms of uniformity, extent and representativeness, which is the determining factor.[20]

Opinio juris

The requirement of *opinio juris* in establishing the existence of a rule of customary international law refers to the legal conviction that a particular practice is carried out "as of right". The form in which the practice and the legal conviction

16 ILA Report, *op. cit.* (note 13), commentary (e) to Principle 14, p. 737.
17 See *Customary International Humanitarian Law*, *op. cit.* (note 4), Vol. I, commentary to Rule 144.
18 For an in-depth discussion of this issue, see Maurice H. Mendelson, "The Formation of Customary International Law", *Collected Courses of the Hague Academy of International Law*, Vol. 272, 1998, pp. 227–244.
19 ILA Report, *op. cit.* (note 13), commentary (b) to Principle 15, p. 738.
20 *Ibid.*, commentary (b) to Principle 12, p. 731.

are expressed may well differ depending on whether the rule concerned contains a prohibition, an obligation or merely a right to behave in a certain manner.

During work on the study, it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. Often, the same act reflects both practice and legal conviction. As the International Law Association pointed out, the International Court of Justice "has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements."[21] This is particularly so because verbal acts, such as military manuals, count as State practice and often reflect the legal conviction of the State involved at the same time.

When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*. In situations where practice is ambiguous, however, *opinio juris* plays an important role in determining whether or not that practice counts towards the formation of custom. This is often the case with omissions, when States do not act or react but it is not clear why. It is in such cases that both the International Court of Justice and its predecessor, the Permanent Court of International Justice, have sought to establish the separate existence of an *opinio juris* in order to determine whether instances of ambiguous practice counted towards the establishment of customary international law.[22]

In the area of international humanitarian law, where many rules require abstention from certain conduct, omissions pose a particular problem in the assessment of *opinio juris* because it has to be proved that the abstention is not a coincidence but based on a legitimate expectation. When such a requirement of abstention is indicated in international instruments and official statements, the existence of a legal requirement to abstain from the conduct in question can usually be proved. In addition, such abstentions may occur after the behaviour in question created a certain controversy, which also helps to show that the abstention was not coincidental, although it is not always easy to prove that the abstention occurred out of a sense of legal obligation.

Impact of treaty law

Treaties are also relevant in determining the existence of customary international law because they help shed light on how States view certain rules of

21 *Ibid*., p. 718, § 10(c). For an in-depth analysis of this question, see Peter Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", *Revue générale de droit international public*, Vol. 90, 1986, p. 5.

22 See, e.g., Permanent Court of International Justice, *Lotus case* (*France* v. *Turkey*), Judgment, 7 September 1927, *PCIJ Ser*. A, No. 10, p. 28 (the Court found that States had not abstained from prosecuting wrongful acts aboard ships because they felt prohibited from doing so); International Court of Justice, *North Sea Continental Shelf cases, op. cit.* (note 7), pp. 43–44, §§ 76–77 (the Court found that States that had delimited their continental shelf on the basis of the equidistance principle had not done so because they felt obliged to); ILA Report, *op. cit.* (note 13), Principle 17(iv) and commentary.

international law. Hence, the ratification, interpretation and implementation of a treaty, including reservations and statements of interpretation made upon ratification, were included in the study. In the *North Sea Continental Shelf* cases, the International Court of Justice clearly considered the degree of ratification of a treaty to be relevant to the assessment of customary international law. In that case, the Court stated that "the number of ratifications and accessions so far secured [39] is, though respectable, hardly sufficient", especially in a context where practice outside the treaty was contradictory.[23] Conversely, in the *Nicaragua case*, the Court placed a great deal of weight, when assessing the customary status of the non-intervention rule, on the fact that the Charter of the United Nations was almost universally ratified.[24] It can even be the case that a treaty provision reflects customary law, even though the treaty is not yet in force, provided that there is sufficiently similar practice, including by specially affected States, so that there remains little likelihood of significant opposition to the rule in question.[25]

In practice, the drafting of treaty norms helps to focus world legal opinion and has an undeniable influence on the subsequent behaviour and legal conviction of States. The International Court of Justice recognized this in its judgment in the *Continental Shelf* case in which it stated that "multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."[26] The Court thus confirmed that treaties may codify pre-existing customary international law but may also lay the foundation for the development of new customs based on the norms contained in those treaties. The Court has even gone so far as to state that "it might be that … a very widespread and representative participation in [a] convention might suffice of itself, provided it included that of States whose interests were specially affected."[27]

The study took the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question. Consistent practice of States not party was considered as important positive evidence. Contrary practice of States not party, however, was considered as important negative evidence. The practice of States party to a treaty vis-à-vis States not party is also particularly relevant.

23 International Court of Justice, *North Sea Continental Shelf cases*, *op. cit.* (note 7), p. 42, § 73.

24 International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 12), pp. 99–100, § 188. Another important factor in the decision of the Court was that relevant UN General Assembly resolutions had been widely approved, in particular Resolution 2625 (XXV) on friendly relations between States, which was adopted without a vote.

25 International Court of Justice, *Continental Shelf case, op. cit.* (note 6), p. 33, § 34. (The Court considered that the concept of an exclusive economic zone had become part of customary international law, even though the United Nations Convention on the Law of the Sea had not yet entered into force, because the number of claims to an exclusive economic zone had risen to 56, which included several specially affected States.)

26 International Court of Justice, *Continental Shelf case*, *op. cit.* (note 6), pp. 29–30, § 27.

27 International Court of Justice, *North Sea Continental Shelf cases*, *op. cit.* (note 7), p. 42, § 73; see also ILA Report, *op. cit.* (note 13), Principles 20–21, 24, 26 and 27, pp. 754–765.

Thus, the study did not limit itself to the practice of States not party to the relevant treaties of international humanitarian law. To limit the study to a consideration of the practice of only the 30-odd States that have not ratified the Additional Protocols, for example, would not comply with the requirement that customary international law be based on widespread and representative practice. Therefore, the assessment of the existence of customary law took into account that, at the time the study was published, Additional Protocol I had been ratified by 162 States and Additional Protocol II by 157 States.

It should be stressed that the study did not seek to determine the customary nature of each treaty rule of international humanitarian law and, as a result, did not necessarily follow the structure of existing treaties. Rather, it sought to analyse issues in order to establish what rules of customary international law can be found inductively on the basis of State practice in relation to these issues. As the approach chosen does not analyse each treaty provision with a view to establishing whether or not it is customary, it cannot be concluded that any particular treaty rule is not customary merely because it does not appear as such in the study.

Organization of the study

To determine the best way of fulfilling the mandate entrusted to the ICRC, the authors consulted a group of academic experts in international humanitarian law, who formed the Steering Committee of the study.[28] The Steering Committee adopted a plan of action in June 1996, and research started the following October. Research was conducted using both national and international sources reflecting State practice and focused on the six parts of the study identified in the plan of action:

- Principle of distinction
- Specifically protected persons and objects
- Specific methods of warfare
- Weapons
- Treatment of civilians and persons *hors de combat*
- Implementation

Research in national sources

Since national sources are more easily accessible from within a country, it was decided to seek the cooperation of national researchers. To this end, a researcher or group of researchers was identified in nearly 50 States (9 in Africa, 11 in the Americas, 15 in Asia, 1 in Australasia and 11 in Europe) and asked to produce a

28 The Steering Committee consisted of Professors Georges Abi-Saab, Salah El-Din Amer, Ove Bring, Eric David, John Dugard, Florentino Feliciano, Horst Fischer, Françoise Hampson, Theodor Meron, Djamchid Momtaz, Milan Šahović and Raúl Emilio Vinuesa.

report on their respective State's practice.[29] Countries were selected on the basis of geographic representation, as well as recent experience of different kinds of armed conflict in which a variety of methods of warfare had been used.

The military manuals and national legislation of countries not covered by the reports on State practice were also researched and collected. This work was facilitated by the network of ICRC delegations around the world and the extensive collection of national legislation gathered by the ICRC Advisory Service on International Humanitarian Law.

Research in international sources

State practice gleaned from international sources was collected by six teams, each of which concentrated on one part of the study.[30] These teams researched practice in the framework of the United Nations and other international organizations, including the African Union (formerly the Organization of African Unity), the Council of Europe, the Gulf Cooperation Council, the European Union, the League of Arab States, the Organization of American States, the Organization of the Islamic Conference and the Organization for Security and Co-operation in Europe. International case-law was also collected to the extent that it provides evidence of the existence of rules of customary international law.

Research in International Committee of the Red Cross archives

To complement the research carried out in national and international sources, the ICRC looked into its own archives relating to nearly 40 recent armed conflicts (21 in Africa, 2 in the Americas, 8 in Asia and 8 in Europe).[31] In general,

29 Africa: Algeria, Angola, Botswana, Egypt, Ethiopia, Nigeria, Rwanda, South Africa and Zimbabwe; Americas: Argentina, Brazil, Canada, Chile, Colombia, Cuba, El Salvador, Nicaragua, Peru, United States of America and Uruguay; Asia: China, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Republic of Korea, Kuwait, Lebanon, Malaysia, Pakistan, Philippines and Syria; Australasia: Australia; Europe: Belgium, Bosnia and Herzegovina, Croatia, France, Germany, Italy, Netherlands, Russian Federation, Spain, United Kingdom and Yugoslavia.

30 Principle of distinction: Professor Georges Abi-Saab (rapporteur) and Jean-François Quéguiner (researcher); Specifically protected persons and objects: Professor Horst Fischer (rapporteur) and Gregor Schotten and Heike Spieker (researchers); Specific methods of warfare: Professor Theodor Meron (rapporteur) and Richard Desgagné (researcher); Weapons: Professor Ove Bring (rapporteur) and Gustaf Lind (researcher); Treatment of civilians and persons *hors de combat*: Françoise Hampson (rapporteur) and Camille Giffard (researcher); Implementation: Eric David (rapporteur) and Richard Desgagné (researcher).

31 Africa: Angola, Burundi, Chad, Chad–Libya, Democratic Republic of the Congo, Djibouti, Eritrea–Yemen, Ethiopia (1973–1994), Liberia, Mozambique, Namibia, Nigeria–Cameroon, Rwanda, Senegal, Senegal–Mauritania, Sierra Leone, Somalia, Somalia–Ethiopia, Sudan, Uganda and Western Sahara; Americas: Guatemala and Mexico; Asia: Afghanistan, Cambodia, India (Jammu and Kashmir), Papua New Guinea, Sri Lanka, Tajikistan, Yemen and Yemen–Eritrea (also under Africa); Europe: Armenia–Azerbaijan (Nagorno-Karabakh), Cyprus, Former Yugoslavia (conflict in Yugoslavia (1991–1992), conflict in Bosnia and Herzegovina (1992–1996), conflict in Croatia (Krajinas) (1992–1995)), Georgia (Abkhazia), Russian Federation (Chechnya) and Turkey.

these conflicts were selected so that countries and conflicts not dealt with by a report on State practice would also be covered.

The result of this three-pronged approach — research in national, international and ICRC sources — is that practice from all parts of the world is cited. In the nature of things, however, this research cannot purport to be complete. The study focused in particular on practice from the last 30 years to ensure that the result would be a restatement of contemporary customary international law, but, where still relevant, older practice was also cited.

Expert consultations

In a first round of consultations, the ICRC invited the international research teams to produce an executive summary containing a preliminary assessment of customary international humanitarian law on the basis of the practice collected. These executive summaries were discussed within the Steering Committee at three meetings in Geneva in 1998. The executive summaries were duly revised and, during a second round of consultations, submitted to a group of academic and governmental experts from all regions of the world. These experts were invited in their personal capacity by the ICRC to attend two meetings with the Steering Committee in Geneva in 1999, during which they helped to evaluate the practice collected and indicated particular practice that had been missed.[32]

Writing of the report

The assessment by the Steering Committee, as reviewed by the group of academic and governmental experts, served as a basis for the writing of the final report. The authors of the study re-examined the practice, reassessed the existence of custom, reviewed the formulation and the order of the rules and drafted the commentaries. These draft texts were submitted to the Steering Committee, the group of academic and governmental experts and the ICRC Legal Division for comment. The text was further updated and finalized, taking into account the comments received.

32 The following academic and governmental experts participated in their personal capacity in this consultation: Abdallah Ad-Douri (Iraq), Paul Berman (United Kingdom), Sadi Çaycý (Turkey), Michael Cowling (South Africa), Edward Cummings (United States of America), Antonio de Icaza (Mexico), Yoram Dinstein (Israel), Jean-Michel Favre (France), William Fenrick (Canada), Dieter Fleck (Germany), Juan Carlos Gómez Ramírez (Colombia), Jamshed A. Hamid (Pakistan), Arturo Hernández-Basave (Mexico), Ibrahim Idriss (Ethiopia), Hassan Kassem Jouni (Lebanon), Kenneth Keith (New Zealand), Githu Muigai (Kenya), Rein Müllerson (Estonia), Bara Niang (Senegal), Mohamed Olwan (Jordan), Raul C. Pangalangan (Philippines), Stelios Perrakis (Greece), Paulo Sergio Pinheiro (Brazil), Arpád Prandler (Hungary), Pemmaraju Sreenivasa Rao (India), Camilo Reyes Rodríguez (Colombia), Itse E. Sagay (Nigeria), Harold Sandoval (Colombia), Somboon Sangianbut (Thailand), Marat A. Sarsembayev (Kazakhstan), Muhammad Aziz Shukri (Syria), Parlaungan Sihombing (Indonesia), Geoffrey James Skillen (Australia), Guoshun Sun (China), Bakhtyar Tuzmukhamedov (Russia) and Karol Wolfke (Poland).

Summary of Findings

The great majority of the provisions of the Geneva Conventions, including common Article 3, are considered to be part of customary international law.[33] Furthermore, given that there are now 192 parties to the Geneva Conventions, they are binding on nearly all States as a matter of treaty law. Therefore, the customary nature of the provisions of the Conventions was not the subject as such of the study. Rather, the study focused on issues regulated by treaties that have not been universally ratified, in particular the Additional Protocols, the Hague Convention for the Protection of Cultural Property and a number of specific conventions regulating the use of weapons.

The description below of rules of customary international law does not seek to explain why these rules were found to be customary, nor does it present the practice on the basis of which this conclusion was reached. The explanation of why a rule is considered customary can be found in Volume I of the study, while the corresponding practice can be found in Volume II.

International armed conflicts

Additional Protocol I codified pre-existing rules of customary international law but also laid the foundation for the formation of new customary rules. The practice collected in the framework of the study bears witness to the profound impact of Additional Protocol I on the practice of States, not only in international but also in non-international armed conflicts (see below). In particular, the study found that the basic principles of Additional Protocol I have been very widely accepted, more widely than the ratification record of Additional Protocol I would suggest.

Even though the study did not seek to determine the customary nature of specific treaty provisions, in the end it became clear that there are many customary rules which are identical or similar to those found in treaty law. Examples of rules found to be customary and which have corresponding provisions in Additional Protocol I include: the principle of distinction between civilians and combatants and between civilian objects and military objectives;[34] the prohibition of indiscriminate attacks;[35] the principle of proportionality in attack;[36] the obligation to take feasible precautions in attack and against the effects of attack;[37] the obligation to respect and protect medical and religious personnel, medical units and transports,[38] humanitarian relief personnel and

33 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 8), pp. 257–258, §§ 79 and 82 (with respect to the Geneva Conventions) and *Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note12), p. 114, § 218 (with respect to common Article 3).

34 See *Customary International Humanitarian Law*, *op. cit.* (note 4), Vol. I, Rules 1 and 7.

35 *Ibid*., Rules 11–13.

36 *Ibid*., Rule 14.

37 *Ibid*., Rules 15–24.

38 *Ibid*., Rules 25 and 27–30.

39 *Ibid*., Rules 31–32.

objects,[39] and civilian journalists;[40] the obligation to protect medical duties;[41] the prohibition of attacks on non-defended localities and demilitarized zones;[42] the obligation to provide quarter and to safeguard an enemy *hors de combat*;[43] the prohibition of starvation;[44] the prohibition of attacks on objects indispensable to the survival of the civilian population;[45] the prohibition of improper use of emblems and perfidy;[46] the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*;[47] the obligation to account for missing persons;[48] and the specific protections afforded to women and children.[49]

Non-international armed conflicts

Over the last few decades, there has been a considerable amount of practice insisting on the protection of international humanitarian law in this type of conflicts. This body of practice has had a significant influence on the formation of customary law applicable in non-international armed conflicts. Like Additional Protocol I, Additional Protocol II has had a far-reaching effect on this practice and, as a result, many of its provisions are now considered to be part of customary international law. Examples of rules found to be customary and which have corresponding provisions in Additional Protocol II include: the prohibition of attacks on civilians;[50] the obligation to respect and protect medical and religious personnel, medical units and transports;[51] the obligation to protect medical duties;[52] the prohibition of starvation;[53] the prohibition of attacks on objects indispensable to the survival of the civilian population;[54] the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*;[55] the obligation to search for and respect and protect the wounded, sick and shipwrecked;[56] the obligation to search for and protect the dead;[57] the obligation to protect persons deprived of their liberty;[58] the prohibition of forced movement of civilians;[59] and the specific protections afforded to women and children.[60]

40 *Ibid*., Rule 34.
41 *Ibid*., Rule 26.
42 *Ibid*., Rules 36–37.
43 *Ibid*., Rules 46–48.
44 *Ibid*., Rule 53.
45 *Ibid*., Rule 54.
46 *Ibid*., Rules 57–65.
47 *Ibid*., Rules 87–105.
48 *Ibid*., Rule 117.
49 *Ibid*., Rules 134–137.
50 *Ibid*., Rule 1.
51 *Ibid*., Rules 25 and 27–30.
52 *Ibid*., Rule 26.
53 *Ibid*., Rule 53.
54 *Ibid*., Rule 54.
55 *Ibid*., Rules 87–105.
56 *Ibid*., Rules 109–111.
57 *Ibid*.,Rules 112–113.
58 *Ibid*., Rules 118–119, 121 and 125.
59 *Ibid*., Rule 129.
60 *Ibid*., Rules 134–137.

However, the most significant contribution of customary international humanitarian law to the regulation of internal armed conflicts is that it goes beyond the provisions of Additional Protocol II. Indeed, practice has created a substantial number of customary rules that are more detailed than the often rudimentary provisions in Additional Protocol II and has thus filled important gaps in the regulation of internal conflicts.

For example, Additional Protocol II contains only a rudimentary regulation of the conduct of hostilities. Article 13 provides that "the civilian population as such, as well as individual civilians, shall not be the object of attack … unless and for such time as they take a direct part in hostilities". Unlike Additional Protocol I, Additional Protocol II does not contain specific rules and definitions with respect to the principles of distinction and proportionality.

The gaps in the regulation of the conduct of hostilities in Additional Protocol II have, however, largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts. This covers the basic principles on the conduct of hostilities and includes rules on specifically protected persons and objects and specific methods of warfare.[61]

Similarly, Additional Protocol II contains only a very general provision on humanitarian relief for civilian populations in need. Article 18(2) provides that "if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival … relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken". Unlike Additional Protocol I, Additional Protocol II does not contain specific provisions requiring respect for and protection of humanitarian relief personnel and objects and obliging parties to the conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need and to ensure the freedom of movement of authorized humanitarian relief personnel, although it can be argued that such requirements are implicit in Article 18(2) of the Protocol. These requirements have crystallized, however, into customary international law applicable in both international and non-international armed conflicts as a result of widespread, representative and virtually uniform practice to that effect.

In this respect it should be noted that while both Additional Protocols I and II require the consent of the parties concerned for relief actions to take place,[62] most of the practice collected does not mention this requirement. It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not

61 See, e.g., *ibid*., Rules 7–10 (distinction between civilian objects and military objectives), Rules 11–13 (indiscriminate attacks), Rule 14 (proportionality in attack), Rules 15–21 (precautions in attack); Rules 22–24 (precautions against the effects of attack); Rules 31–32 (humanitarian relief personnel and objects); Rule 34 (civilian journalists); Rules 35–37 (protected zones); Rules 46–48 (denial of quarter); Rules 55–56 (access to humanitarian relief) and Rules 57–65 (deception).

62 See Additional Protocol I, Article 70(1) and Additional Protocol II, Article 18(2).

be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent.[63] While consent may not be withheld for arbitrary reasons, practice recognizes that the party concerned may exercise control over the relief action and that humanitarian relief personnel must respect domestic law on access to territory and security requirements in force.

Issues requiring further clarification

The study also revealed a number of areas where practice is not clear. For example, while the terms "combatants" and "civilians" are clearly defined in international armed conflicts,[64] in non-international armed conflicts practice is ambiguous as to whether, for purposes of the conduct of hostilities, members of armed opposition groups are considered members of armed forces or civilians. In particular, it is not clear whether members of armed opposition groups are civilians who lose their protection from attack when directly participating in hostilities or whether members of such groups are liable to attack as such. This lack of clarity is also reflected in treaty law. Additional Protocol II, for example, does not contain a definition of civilians or of the civilian population even though these terms are used in several provisions.[65] Subsequent treaties, applicable in non-international armed conflicts, similarly use the terms civilians and civilian population without defining them.[66]

A related area of uncertainty affecting the regulation of both international and non-international armed conflicts is the absence of a precise definition of the term "direct participation in hostilities". Loss of protection against attack is clear and uncontested when a civilian uses weapons or other means to commit acts of violence against human or material enemy forces. But there is also considerable practice which gives little or no guidance on the interpretation of the term "direct participation", stating, for example, that an assessment has to be made on a case-by-case basis or simply repeating the general rule that direct participation in hostilities causes civilians to lose protection against attack. Related to this issue is the question of how to qualify a person in case of doubt. Because of these uncertainties, the ICRC is seeking to clarify the notion of direct participation by means of a series of expert meetings that began in 2003.[67]

63 See Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4885; see also § 2805.

64 See *Customary International Humanitarian Law, op. cit.* (note 4), Vol. I, Rule 3 (combatants), Rule 4 (armed forces) and Rule 5 (civilians and civilian population).

65 Additional Protocol II, Articles 13–15 and 17–18.

66 See, e.g., Amended Protocol II to the Convention on Certain Conventional Weapons, Article 3(7)–(11); Protocol III to the Convention on Certain Conventional Weapons, Article 2; Ottawa Convention on the Prohibition of Anti-personnel Mines, preamble; Statute of the International Criminal Court, Article 8(2)(e)(i), (iii) and (viii).

67 See, e.g., Direct Participation in Hostilities under International Humanitarian Law, Report prepared by the International Committee of the Red Cross, Geneva, September 2003, available on www.icrc.org.

Another issue still open to question is the exact scope and application of the principle of proportionality in attack. While the study revealed widespread support for this principle, it does not provide more clarification than that contained in treaty law as to how to balance military advantage against incidental civilian losses.

Selected issues on the conduct of hostilities

Additional Protocols I and II introduced a new rule prohibiting attacks on works and installations containing dangerous forces, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.[68] While it is not clear whether these specific rules have become part of customary law, practice shows that States are conscious of the high risk of severe incidental losses which can result from attacks against such works and installations when they constitute military objectives. Consequently, they recognize that in any armed conflict particular care must be taken in case of attack in order to avoid the release of dangerous forces and consequent severe losses among the civilian population, and this requirement was found to be part of customary international law applicable in any armed conflict.

Another new rule introduced in Additional Protocol I is the prohibition of the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Since the adoption of Additional Protocol I, this prohibition has received such extensive support in State practice that it has crystallized into customary law, even though some States have persistently maintained that the rule does not apply to nuclear weapons and that they may, therefore, not be bound by it in respect of nuclear weapons.[69] Beyond this specific rule, the study found that the natural environment is considered to be a civilian object and as such it is protected by the same principles and rules that protect other civilian objects, in particular the principles of distinction and proportionality and the requirement to take precautions in attack. This means that no part of the natural environment may be made the object of attack, unless it is a military objective, and that an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited. In its advisory opinion in the *Nuclear Weapons case*, for example, the International Court of Justice stated that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives."[70] In addition, parties to a conflict are required to take all

68 Additional Protocol I, Article 56(1) (followed, however, by exceptions in paragraph 2) and Additional Protocol II, Article 15 (with no exceptions).

69 See *Customary International Humanitarian Law, op. cit.* (note 4), Vol. I, Rule 45.

70 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 8), § 30.

feasible precautions in the conduct of hostilities to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.[71]

There are also issues that are not as such addressed in the Additional Protocols. For example, the Additional Protocols do not contain any specific provision concerning the protection of personnel and objects involved in a peacekeeping mission. In practice, however, such personnel and objects were given protection against attack equivalent to that of civilians and civilian objects respectively. As a result, a rule prohibiting attacks against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, developed in State practice and was included in the Statute of the International Criminal Court. It is now part of customary international law applicable in any type of armed conflict.[72]

A number of issues related to the conduct of hostilities are regulated by the Hague Regulations. These regulations have long been considered customary in international armed conflict.[73] Some of their rules, however, are now also accepted as customary in non-international armed conflict. For example, the long-standing rules of customary international law that prohibit (1) destruction or seizure of the property of an adversary, unless required by imperative military necessity, and (2) pillage apply equally in non-international armed conflicts. Pillage is the forcible taking of private property from the enemy's subjects for private or personal use.[74] Both prohibitions do not affect the customary practice of seizing as war booty military equipment belonging to an adverse party.

Under customary international law, commanders may enter into non-hostile contact through any means of communication, but such contact must be based on good faith. Practice indicates that communication may be carried out via intermediaries known as *parlementaires* but also by various other means, such as telephone and radio. A *parlementaire* is a person belonging to a party to the conflict who has been authorized to enter into communication with another party to the conflict and who is, as a result, inviolable. The traditional method of making oneself known as a *parlementaire* by advancing bearing a white flag has been found to be still valid. In addition, it is recognized practice that the parties may appeal to a third party to facilitate communication, for example a protecting power or an impartial and neutral humanitarian organization acting as a substitute, in particular the ICRC, but also an international organization or a peacekeeping force. Collected practice shows that various institutions and organizations have acted as intermediaries in negotiations in both international

71 See *Customary International Humanitarian Law, op. cit.* (note 4), Vol. I, Rule 44.

72 *Ibid*., Rule 33.

73 See, e.g., International Military Tribunal at Nuremberg, *Case of the Major War Criminals*, Judgment, 1 October 1946, *Official Documents*, Vol. I, pp. 253–254.

74 See Elements of Crimes for the International Criminal Court, Pillage as a war crime (Article 8(2)(b)(xvi) and (e)(v) of the Statute of the International Criminal Court).

and non-international armed conflicts, and that this is generally accepted. The rules governing *parlementaires* go back to the Hague Regulations and have long been considered customary in international armed conflict. On the basis of practice in the last 50 years or so, they have become customary in non-international armed conflicts as well.[75]

Practice reveals two strains of law that protect cultural property. A first strain dates back to the Hague Regulations and requires that special care be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments, unless they are military objectives. It also prohibits seizure of or destruction or wilful damage to such buildings and monuments. While these rules have long been considered customary in international armed conflicts, they are now also accepted as customary in non-international armed conflicts.

A second strain is based on the specific provisions of the 1954 Hague Convention for the Protection of Cultural Property, which protects "property of great importance to the cultural heritage of every people" and introduces a specific distinctive sign to identify such property. Customary law today requires that such objects not be attacked nor used for purposes which are likely to expose them to destruction or damage, unless imperatively required by military necessity. It also prohibits any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, such property. These prohibitions correspond to provisions set forth in the Hague Convention and are evidence of the influence the Convention has had on State practice concerning the protection of important cultural property.

Weapons

The general principles prohibiting the use of weapons that cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate were found to be customary in any armed conflict. In addition, and largely on the basis of these principles, State practice has prohibited the use (or certain types of use) of a number of specific weapons under customary international law: poison or poisoned weapons; biological weapons; chemical weapons; riot-control agents as a method of warfare; herbicides as a method of warfare;[76] bullets which expand or flatten easily in the human body; anti-personnel use of bullets which explode within the human body; weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body; booby-traps which are in any way attached to or associated with objects

75 See *Customary International Humanitarian Law, op. cit.* (note 4), Vol. I, Rules 67–69.

76 This rule incorporates a reference to a number of other rules of customary international law, namely the prohibition of biological and chemical weapons; the prohibition of attacks against vegetation that is not a military objective; the prohibition of attacks that would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; and the prohibition on causing widespread, long-term and severe damage to the natural environment. See *ibid*., Rule 76.

or persons entitled to special protection under international humanitarian law or objects that are likely to attract civilians; and laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision.

Some weapons which are not prohibited as such by customary law are nevertheless subject to restrictions. This is the case, for example, for landmines and incendiary weapons.

Particular care must be taken to minimize the indiscriminate effects of landmines. This includes, for example, the principle that a party to the conflict using landmines must record their placement, as far as possible. Also, at the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.

With over 140 ratifications of the Ottawa Convention, and others on the way, the majority of States are treaty-bound no longer to use, produce, stockpile and transfer anti-personnel landmines. While this prohibition is not currently part of customary international law because of significant contrary practice of States not party to the Convention, almost all States, including those that are not party to the Ottawa Convention and are not in favour of their immediate ban, have recognized the need to work towards the eventual elimination of anti-personnel landmines.

The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*. In addition, if they are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Most of these rules correspond to treaty provisions that originally applied only to international armed conflicts. That trend has gradually been reversed, for example by the amendment of Protocol II to the Convention on Certain Conventional Weapons in 1996, which also applies to non-international armed conflicts and, most recently, by the amendment of the Convention on Certain Conventional Weapons in 2001 to extend the scope of application of Protocols I–IV to non-international armed conflicts. The customary prohibitions and restrictions referred to above apply in any armed conflict.

When the ICRC received the mandate to undertake the study on customary international humanitarian law, the International Court of Justice was considering the legality of the threat or use of nuclear weapons, following a request for an advisory opinion on the issue from the UN General Assembly. The ICRC decided therefore not to embark on its own analysis of this question. In its advisory opinion, the International Court of Justice held unanimously that "a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law."[77]

77 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 8), p. 226.

This finding is significant given that a number of States undertook the negotiation of Additional Protocol I on the understanding that the Protocol would not apply to the use of nuclear weapons. The opinion of the Court, however, means that the rules on the conduct of hostilities and the general principles on the use of weapons apply to the use of nuclear weapons. In application of these principles and rules, the Court concluded that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[78]

Fundamental guarantees

Fundamental guarantees apply to all civilians in the power of a party to the conflict and who do not or have ceased to take a direct part in hostilities, as well as to all persons who are *hors de combat*. Because fundamental guarantees are overarching rules that apply to all persons, they were not sub-divided in the study into specific rules relating to different types of persons.

These fundamental guarantees all have a firm basis in international humanitarian law applicable in both international and non-international armed conflicts. In the study, most of the rules relating to fundamental guarantees are couched in traditional humanitarian law language, because this best reflected the substance of the corresponding customary rule.[79] Some rules, however, were drafted so as to capture the essence of a range of detailed provisions relating to a specific subject, in particular the rules prohibiting uncompensated or abusive forced labour, enforced disappearances and arbitrary detention and the rule requiring respect for family life.[80]

Where relevant, practice under international human rights law was included in the study and in particular in the chapter on fundamental guarantees. This was done because international human rights law continues to apply during armed conflicts, as expressly stated in the human rights treaties themselves, although some provisions may, subject to certain conditions, be derogated from in time of public emergency. The continued applicability of human rights law during armed conflict has been confirmed on numerous

78 *Ibid*.; see also United Nations General Assembly, 51st session, First Committee, Statement by the *International Committee of the Red Cross*, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 10, reproduced in International Review of the Red Cross, No. 316, 1997, pp. 118–119 ("the ICRC finds it difficult to envisage how a use of nuclear weapons could be compatible with the rules of international law").

79 These rules include the fundamental guarantees that civilians and persons *hors de combat* be treated humanely and without adverse distinction; the prohibition of murder; the prohibition of torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment; the prohibition of corporal punishment; the prohibition of mutilation, medical or scientific experiments; the prohibition of rape and other forms of sexual violence; the prohibition of slavery and the slave trade in all their forms; the prohibition of hostage-taking; the prohibition of the use of human shields; fair trial guarantees; the prohibition of collective punishments; and the requirement to respect the convictions and religious practices of civilians and persons *hors de combat*. See *Customary International Humanitarian Law, supra* note 4, Vol. I, Rules 87–94, 96–97 and 100–104.

80 *Ibid*., Rules 95, 98–99 and 105.

occasions in State practice and by human rights bodies and the International Court of Justice.[81] Most recently, the Court, in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territories, confirmed that "the protection offered by human rights conventions does not cease in case of armed conflict" and that while there may be rights that are exclusively matters of international humanitarian law or of human rights law, there are others that "may be matters of both these branches of international law."[82] The study does not set out, however, to provide an assessment of customary human rights law. Instead, practice under human rights law has been included in order to support, strengthen and clarify analogous principles of international humanitarian law.

Implementation

A number of rules on the implementation of international humanitarian law have become part of customary international law. In particular, each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions or under its direction or control. As a result, each party to the conflict, including armed opposition groups, must provide instruction in international humanitarian law to its armed forces. Beyond these general obligations, it is less clear to what extent other specific implementation mechanisms that are binding upon States are also binding upon armed opposition groups. For example, the obligation to issue orders and instructions to the armed forces which ensure respect for international humanitarian law is clearly set forth in international law for States but not so for armed opposition groups. Similarly, there is an obligation on States to make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law, but not on armed opposition groups.

Furthermore, a State is responsible for violations of international humanitarian law attributable to it and is required to make full reparation for the loss or injury caused by such violations. It is unclear whether armed opposition groups incur an equivalent responsibility for violations committed by their members and what the consequences of such responsibility would be. As stated above, armed opposition groups must respect international humanitarian law and they must operate under a "responsible command."[83] As a result, it can be argued that armed opposition groups incur responsibility for acts committed by persons forming part of such groups. The consequences of such responsibility, however, are not clear. In particular, it is unclear to what extent armed opposition groups are under an obligation to make full reparation, even though in many countries victims can bring a civil suit for damages against the offenders.

81 See *ibid*., Introduction to Chapter 32, Fundamental Guarantees.
82 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, § 106.
83 Additional Protocol II, Article 1(1).

When it comes to individual responsibility, customary international humanitarian law places criminal responsibility on all persons who commit, who order the commission of or who are otherwise responsible as commanders or superiors for the commission of war crimes. The implementation of the war crimes regime, that is, the investigation of war crimes and the prosecution of the suspects, is an obligation incumbent upon States. States may discharge this obligation by setting up international or mixed tribunals to that effect.

Conclusion

The study did not attempt to determine the customary nature of each treaty rule of international humanitarian law but sought to analyse issues in order to establish what rules of customary international law can be found inductively on the basis of State practice in relation to these issues. A brief overview of some of the findings of the study nevertheless shows that the principles and rules contained in treaty law have received widespread acceptance in practice and have greatly influenced the formation of customary international law. Many of these principles and rules are now part of customary international law. As such, they are binding on all States regardless of ratification of treaties and also on armed opposition groups in case of rules applicable to all parties to a non-international armed conflict.

The study also indicates that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. The regulation of the conduct of hostilities and the treatment of persons in internal armed conflicts is thus more detailed and complete than that which exists under treaty law. It remains to be explored to what extent, from a humanitarian and military perspective, this more detailed and complete regulation is sufficient or whether further developments in the law are required.

As is the case for treaty law, effective implementation of the rules of customary international humanitarian law is required through dissemination, training and enforcement. These rules should be incorporated into military manuals and national legislation, wherever this is not already the case.

The study also reveals areas where the law is not clear and points to issues which require further clarification, such as the definition of civilians in non-international armed conflicts, the concept of direct participation in hostilities and the scope and application of the principle of proportionality.

In the light of the achievements to date and the work that remains to be done, the study should not be seen as the end but rather as the beginning of a new process aimed at improving understanding of and agreement on the principles and rules of international humanitarian law. In this process, the study can form the basis of a rich discussion and dialogue on the implementation, clarification and possible development of the law.

Annex. List of Customary Rules of International Humanitarian Law

This list is based on the conclusions set out in Volume I of the study on customary international humanitarian law. As the study did not seek to determine the customary nature of each treaty rule of international humanitarian law, it does not necessarily follow the structure of existing treaties. The scope of application of the rules is indicated in square brackets. The abbreviation IAC refers to customary rules applicable in international armed conflicts and the abbreviation NIAC to customary rules applicable in non-international armed conflicts. In the latter case, some rules are indicated as being "arguably" applicable because practice generally pointed in that direction but was less extensive.

The Principle of Distinction

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]
Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. [IAC/NIAC]
Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]
Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. [IAC]
Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. [IAC/NIAC]
Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. [IAC/NIAC]

Distinction between Civilian Objects and Military Objectives

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects. [IAC/NIAC]
Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. [IAC/NIAC]
Rule 9. Civilian objects are all objects that are not military objectives. [IAC/NIAC]
Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives. [IAC/NIAC]

Indiscriminate Attacks

Rule 11. Indiscriminate attacks are prohibited. [IAC/NIAC]
Rule 12. Indiscriminate attacks are those:

(a) which are not directed at a specific military objective;
(b) which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. [IAC/NIAC]
Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited. [IAC/NIAC]

Proportionality in Attack

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. [IAC/NIAC]

Precautions in Attack

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]
Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives. [IAC/NIAC]
Rule 17. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]
Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]
Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. [IAC/NIAC]
Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. [IAC/arguably NIAC]

Precautions against the Effects of Attacks

Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. [IAC/NIAC]
Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. [IAC/arguably NIAC]
Rule 24. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives. [IAC/arguably NIAC]

Specifically Protected Persons and Objects

Medical and Religious Personnel and Objects

Rule 25. Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]
Rule 26. Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited. [IAC/NIAC]
Rule 27. Religious personnel exclusively assigned to religious duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]
Rule 28. Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]
Rule 29. Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]
Rule 30. Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited. [IAC/NIAC]

Humanitarian Relief Personnel and Objects

Rule 31. Humanitarian relief personnel must be respected and protected. [IAC/NIAC]
Rule 32. Objects used for humanitarian relief operations must be respected and protected. [IAC/NIAC]

Personnel and Objects Involved in a Peacekeeping Mission

Rule 33. Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. [IAC/NIAC]

Journalists

Rule 34. Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities. [IAC/NIAC]

Protected Zones

Rule 35. Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited. [IAC/NIAC]
Rule 36. Directing an attack against a demilitarized zone agreed upon between the parties to the conflict is prohibited. [IAC/NIAC]
Rule 37. Directing an attack against a non-defended locality is prohibited. [IAC/NIAC]

Cultural Property

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.
B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

[IAC/NIAC]
Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity. [IAC/NIAC]

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.
B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

[IAC/NIAC]

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory. [IAC]

Works and Installations Containing Dangerous Forces

Rule 42. Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population. [IAC/NIAC]

The Natural Environment

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.
B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

[IAC/NIAC]

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions. [IAC/arguably NIAC]

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon. [IAC/arguably NIAC]

Specific Methods of Warfare

Denial of Quarter

Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited. [IAC/NIAC]
Rule 47. Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:

(a) anyone who is in the power of an adverse party;
(b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
(c) anyone who clearly expresses an intention to surrender;

provided he or she abstains from any hostile act and does not attempt to escape. [IAC/NIAC]
Rule 48. Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited. [IAC/NIAC]

Destruction and Seizure of Property

Rule 49. The parties to the conflict may seize military equipment belonging to an adverse party as war booty. [IAC]
Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity. [IAC/NIAC]
Rule 51. In occupied territory:

(a) movable public property that can be used for military operations may be confiscated;
(b) immovable public property must be administered according to the rule of usufruct; and
(c) private property must be respected and may not be confiscated;

except where destruction or seizure of such property is required by imperative military necessity. [IAC]
Rule 52. Pillage is prohibited. [IAC/NIAC]

Starvation and Access to Humanitarian Relief

Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited. [IAC/NIAC]
Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited. [IAC/NIAC]
Rule 55. The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. [IAC/NIAC]
Rule 56. The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their

functions. Only in case of imperative military necessity may their movements be temporarily restricted. [IAC/NIAC]

Deception

Rule 57. Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law. [IAC/NIAC]
Rule 58. The improper use of the white flag of truce is prohibited. [IAC/NIAC]
Rule 59. The improper use of the distinctive emblems of the Geneva Conventions is prohibited. [IAC/NIAC]
Rule 60. The use of the United Nations emblem and uniform is prohibited, except as authorized by the organization. [IAC/NIAC]
Rule 61. The improper use of other internationally recognized emblems is prohibited. [IAC/NIAC]
Rule 62. Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited. [IAC/arguably NIAC]
Rule 63. Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited. [IAC/arguably NIAC]
Rule 64. Concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement is prohibited. [IAC/NIAC]
Rule 65. Killing, injuring or capturing an adversary by resort to perfidy is prohibited. [IAC/NIAC]

Communication with the Enemy

Rule 66. Commanders may enter into non-hostile contact through any means of communication. Such contact must be based on good faith. [IAC/NIAC]
Rule 67. *Parlementaires* are inviolable. [IAC/NIAC]
Rule 68. Commanders may take the necessary precautions to prevent the presence of a *parlementaire* from being prejudicial. [IAC/NIAC]
Rule 69. *Parlementaires* taking advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary lose their inviolability. [IAC/NIAC]

Weapons

General Principles on the Use of Weapons

Rule 70. The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited. [IAC/NIAC]
Rule 71. The use of weapons which are by nature indiscriminate is prohibited. [IAC/NIAC]

Poison

Rule 72. The use of poison or poisoned weapons is prohibited. [IAC/NIAC]

Biological Weapons

Rule 73. The use of biological weapons is prohibited. [IAC/NIAC]

Chemical Weapons

Rule 74. The use of chemical weapons is prohibited. [IAC/NIAC]
Rule 75. The use of riot-control agents as a method of warfare is prohibited. [IAC/NIAC]
Rule 76. The use of herbicides as a method of warfare is prohibited if they:

(a) are of a nature to be prohibited chemical weapons;
(b) are of a nature to be prohibited biological weapons;
(c) are aimed at vegetation that is not a military objective;
(d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or
(e) would cause widespread, long-term and severe damage to the natural environment.

[IAC/NIAC]

Expanding Bullets

Rule 77. The use of bullets which expand or flatten easily in the human body is prohibited. [IAC/NIAC]

Exploding Bullets

Rule 78. The anti-personnel use of bullets which explode within the human body is prohibited. [IAC/NIAC]

Weapons Primarily Injuring by Non-detectable Fragments

Rule 79. The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited. [IAC/NIAC]

Booby-traps

Rule 80. The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited. [IAC/NIAC]

Landmines

Rule 81. When landmines are used, particular care must be taken to minimize their indiscriminate effects. [IAC/NIAC]
Rule 82. A party to the conflict using landmines must record their placement, as far as possible. [IAC/arguably NIAC]
Rule 83. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal. [IAC/NIAC]

Incendiary Weapons

Rule 84. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]
Rule 85. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*. [IAC/NIAC]

Blinding Laser Weapons

Rule 86. The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited. [IAC/NIAC]

Treatment of Civilians and Persons Hors de Combat

Fundamental Guarantees

Rule 87. Civilians and persons *hors de combat* must be treated humanely. [IAC/NIAC]
Rule 88. Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited. [IAC/NIAC]
Rule 89. Murder is prohibited. [IAC/NIAC]
Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited. [IAC/NIAC]
Rule 91. Corporal punishment is prohibited. [IAC/NIAC]
Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited. [IAC/NIAC]
Rule 93. Rape and other forms of sexual violence are prohibited. [IAC/NIAC]
Rule 94. Slavery and the slave trade in all their forms are prohibited. [IAC/NIAC]

Rule 95. Uncompensated or abusive forced labour is prohibited. [IAC/NIAC]
Rule 96. The taking of hostages is prohibited. [IAC/NIAC]
Rule 97. The use of human shields is prohibited. [IAC/NIAC]
Rule 98. Enforced disappearance is prohibited. [IAC/NIAC]
Rule 99. Arbitrary deprivation of liberty is prohibited. [IAC/NIAC]
Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. [IAC/NIAC]
Rule 101. No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. [IAC/NIAC]
Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility. [IAC/NIAC]
Rule 103. Collective punishments are prohibited. [IAC/NIAC]
Rule 104. The convictions and religious practices of civilians and persons *hors de combat* must be respected. [IAC/NIAC]
Rule 105. Family life must be respected as far as possible. [IAC/NIAC]

Combatants and Prisoner-of-War Status

Rule 106. Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status. [IAC]
Rule 107. Combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]
Rule 108. Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]

The Wounded, Sick and Shipwrecked

Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction. [IAC/NIAC]
Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones. [IAC/NIAC]
Rule 111. Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property. [IAC/NIAC]

The Dead

Rule 112. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction. [IAC/NIAC]
Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. [IAC/NIAC]
Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them. [IAC]
Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained. [IAC/NIAC]
Rule 116. With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves. [IAC/NIAC]

Missing Persons

Rule 117. Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. [IAC/NIAC]

Persons Deprived of Their Liberty

Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention. [IAC/NIAC]
Rule 119. Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women. [IAC/NIAC]
Rule 120. Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units. [IAC/NIAC]
Rule 121. Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene. [IAC/NIAC]
Rule 122. Pillage of the personal belongings of persons deprived of their liberty is prohibited. [IAC/NIAC]
Rule 123. The personal details of persons deprived of their liberty must be recorded. [IAC/NIAC]
Rule 124.

A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the

conditions of their detention and to restore contacts between those persons and their families. [IAC]

B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families. [NIAC]

Rule 125. Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. [IAC/NIAC]

Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable. [IAC/NIAC]

Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected. [IAC/NIAC]

Rule 128.

A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. [IAC]

B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities. [IAC]

C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. [NIAC]

The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.

Displacement and Displaced Persons

Rule 129.

A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand. [IAC]

B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. [NIAC]

Rule 130. States may not deport or transfer parts of their own civilian population into a territory they occupy. [IAC]

Rule 131. In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated. [IAC/NIAC]

Rule 132. Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. [IAC/NIAC]
Rule 133. The property rights of displaced persons must be respected. [IAC/NIAC]

Other Persons Afforded Specific Protection

Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected. [IAC/NIAC]
Rule 135. Children affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]
Rule 136. Children must not be recruited into armed forces or armed groups. [IAC/NIAC]
Rule 137. Children must not be allowed to take part in hostilities. [IAC/NIAC]
Rule 138. The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

Implementation

Compliance with International Humanitarian Law

Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. [IAC/NIAC]
Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity. [IAC/NIAC]
Rule 141. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law. [IAC/NIAC]
Rule 142. States and parties to the conflict must provide instruction in international humanitarian law to their armed forces. [IAC/NIAC]
Rule 143. States must encourage the teaching of international humanitarian law to the civilian population. [IAC/NIAC]

Enforcement of International Humanitarian Law

Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law. [IAC/NIAC]
Rule 145. Where not prohibited by international law, belligerent reprisals are subject to stringent conditions. [IAC]
Rule 146. Belligerent reprisals against persons protected by the Geneva Conventions are prohibited. [IAC]

Rule 147. Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited. [IAC]
Rule 148. Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited. [NIAC]

Responsibility and Reparation

Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:

(a) violations committed by its organs, including its armed forces;
(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.

[IAC/NIAC]
Rule 150. A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused. [IAC/NIAC]

Individual Responsibility

Rule 151. Individuals are criminally responsible for war crimes they commit. [IAC/NIAC]
Rule 152. Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders. [IAC/NIAC]
Rule 153. Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. [IAC/NIAC]
Rule 154. Every combatant has a duty to disobey a manifestly unlawful order. [IAC/NIAC]
Rule 155. Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered. [IAC/NIAC]

War Crimes

Rule 156. Serious violations of international humanitarian law constitute war crimes. [IAC/NIAC]

Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]
Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]
Rule 159. At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes. [NIAC]
Rule 160. Statutes of limitation may not apply to war crimes. [IAC/NIAC]
Rule 161. States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects. [IAC/NIAC]

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INTERNATIONAL REVIEW of the Red Cross

REPORTS AND DOCUMENTS

61st Session of the United Nations Commission on Human Rights, 16 March 2005

Statement by the President of the International Committee of the Red Cross, Jakob Kellenberger

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Utmost vigilance and care remain important in responding to the needs of those affected by armed conflict and other situations of violence. It is in remembering the many people affected by such situations that I wish to talk to you today about the protection of these persons. As you know, protection in such situations lies at the core of the mandate of the International Committee of the Red Cross.

International humanitarian law requires that parties to a conflict protect all persons who do not or no longer actively participate in hostilities or acts of violence — civilians, the wounded, and the detained. It is on the duty to protect this last group of individuals — persons deprived of liberty — that I will focus my address today. However, we must keep in the forefront of our mind the plight of the hundreds of thousands, not to say millions, of civilians affected by armed conflicts or internal violence who are all too often subjected to indiscriminate attacks, forced displacement, sexual violence, and looting, and who do not benefit from the basic protections to which they are entitled.

The ICRC has broad experience in visits to detainees, experience not limited to some specific places. Indeed, in 2004 ICRC delegates visited 571,503 detainees held in 2,435 places of detention in about 80 countries.

Last year, I spoke of the complementarity of international humanitarian law and international human rights law, and how both are guided by the principle that by virtue of their humanity, individuals are entitled to protection from abuse. Today, I wish to address how both bodies of law protect persons deprived of liberty in the context of any armed conflict or other situation of violence.

Of the many people affected by armed conflict and other situations of violence every year, it is often those who are deprived of liberty that are at a

particular risk of physical or mental abuse, disappearance, and whose immediate needs such as food, water and medical care are often not adequately met.

There is no question that States are entitled to detain people on a number of grounds, including for reasons related to security. With this right, however, comes the obligation to treat with humanity those who have been deprived of their liberty — an obligation found in both international humanitarian and human rights law. These laws recognize the need to strike a balance between a State's legitimate security interests and the need to respect the rights of persons deprived of liberty.

What do these laws say?

Three important elements serve to ensure that detainees are treated with humanity, namely the prohibition of torture and other forms of ill-treatment, the obligation to ensure acceptable conditions of detention, and the respect of procedural safeguards. I will address each of these three elements in turn.

The prohibition of torture and other forms of ill-treatment is absolute. Both international humanitarian and human rights law prohibit the use of torture and other forms of cruel, inhuman or degrading treatment or punishment, whether physical or mental, at all times. The Geneva Conventions and international human rights law also prohibit coercion, whether physical or moral, measures of intimidation, humiliation, brutality, indecent assault, and sexual violence such as enforced prostitution and rape.

Detaining authorities must abide by the prohibition of torture and other forms of ill-treatment not only because it is unlawful under international law (and most domestic law, for that matter), but because such treatment violates the most basic principles of humanity to such an extent that it can never be morally justified. Even the slightest acceptance of such practice risks to lead down the slippery slope of proliferation.

Based on ICRC experience and from a policy perspective, very often ill-treatment further alienates the population of which the detained person is a member, creating potential for an escalation in violence and opposition. When a party to a conflict resorts to ill-treatment, an opposing party may be tempted to use this as an excuse to do the same. Ill-treatment thus becomes more widespread. The threat of the spread of torture and other forms of ill-treatment and the erosion of its prohibition outweighs any justification for its use. A further protection against the use of ill-treatment is the obligation of States to respect the principle of non-refoulement — meaning that a person may not be transferred to a place where he or she risks being subjected to prohibited treatment.

States must also adopt national laws to ensure that ill-treatment is prohibited, that information obtained as a result of ill-treatment is not admissible as evidence in legal proceedings, that persons who resort to ill-treatment are punished, and that victims of ill-treatment receive assistance and compensation. It also is essential that civilian and military law enforcement personnel receive proper training and resources to ensure compliance with the requirement to treat detainees with humanity and respect.

States must also take measures to ensure that those who are deprived of liberty do not disappear - that they do not become missing persons. As such, all persons deprived of liberty must be registered and held in officially recognized places of detention under the supervision of higher or judicial authorities. They must also be given the opportunity to communicate and remain in regular contact with family members.

The very conditions in which a person is detained may determine whether she or he is being treated humanely. Persons deprived of liberty must benefit from adequate conditions of detention, including sufficient provision of food, adequate access to clean water, acceptable levels of hygiene, regular access to quality medical care and sufficient access to open air. Conditions of detention in many parts of the world are unacceptably poor, not to say life-threatening. The ICRC has noted the deterioration of this situation in recent years. The responsible authorities may lack the capacity or political will to ensure satisfactory conditions of detention. States must urgently commit themselves to addressing these serious problems, and the international community, development organizations and financial institutions should provide them with adequate support.

There are groups of detained persons who have special needs, who are particularly vulnerable to abuse, and who therefore require special care. States must take measures to ensure that detained women are protected from the dangers to which they are most prone - rape, enforced prostitution and other acts of sexual violence. Special care should be taken to meet the nutritional and health care needs of expectant mothers as well as children accompanying their mothers in detention. The particular needs of juveniles and other vulnerable groups such as members of ethnic minorities, the elderly, and the infirm, must also be addressed.

States must also ensure that all detained persons, whether charged with a crime or interned, are able to avail themselves of procedural guarantees. The procedural safeguards of persons deprived of liberty include the right to be informed of the reasons for detention and to have the lawfulness of detention reviewed by an independent and impartial body. A legal framework must also govern all forms of detention. Ensuring the application of a legal framework and respect of procedural safeguards is a necessary protection against disappearance, arbitrary detention, and ill-treatment.

The sum of the requirements I have highlighted — the prohibition of ill-treatment, the provision of satisfactory conditions of detention, and the respect of procedural guarantees — serve to ensure that all persons deprived of liberty are treated humanely.

We continue to hear some people claim that there are persons who do not deserve humane treatment because of the horrific nature of the acts of which they are suspected or the crimes for which they have been convicted. Such reasoning must be rejected. Humane treatment does not preclude the prosecution and punishment of persons accused of criminal acts. When international humanitarian law is applicable it requires the prosecution of those who violate it. However, by virtue of being human, all people have certain rights

— rights that the international community has codified in international law and that States uphold in national legislation. Denying persons deprived of liberty the right to be humanely treated risks placing such persons outside the protection of the law. This would be unacceptable. The very principle behind the rule of law is that no one can be beyond the protection of the law.

I will briefly highlight the ICRC's role in the protection of persons deprived of liberty in the context of armed conflict and other situations of violence. But before doing so it is important to mention that the ICRC's offer to visit such persons has not been accepted by a good number of countries on various grounds, including that the countries concerned were not legally bound to accept such visits. There are still many places where the ICRC cannot play its role in the protection of persons deprived of liberty.

The aim of the ICRC's visits is to help authorities live up to the obligations and to meet the challenges I have referred to. The ICRC visits detained persons in order to assess conditions and treatment and to make recommendations for improvements, where necessary. The ICRC may also provide authorities with support in meeting the objectives of its recommendations through, for example, direct assistance to detainees, training of prison and law enforcement personnel, or through providing commentary on draft regulations or legislation affecting the treatment of detainees.

The ICRC aims to establish a constructive dialogue with detaining authorities in order to discuss the problems observed and to make recommendations. To do so, the ICRC relies on confidentiality. Confidentiality is important to the ICRC's access to persons deprived of liberty and to its ability to create the environment in which open discussion with authorities can take place. In certain exceptional instances, when all other avenues have been exhausted, when the humanitarian situation remains grave, the ICRC may decide to render public some of its concerns. However, having said that, the ICRC remains committed to the use of confidentiality as a working method and has no intention to change its practice in this regard.

The ICRC's work in places of detention is complementary to the important work of other national and international bodies and organizations working to ensure respect for international law. I conclude by urging all States to continue to uphold the laws and principles that reflect the years of progress the community of States has made in upholding the respect of the humanity and dignity of individuals.

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INTERNATIONAL REVIEW of the Red Cross

National implementation of international humanitarian law

Biannual update on national legislation and case law

July–December 2004

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A. Legislation

Argentina

Decree 1430/2004[1] *creating the National Information Bureau* was adopted on October 19, 2004 and published on October 21, 2004. The Decree entered into force on October 29, 2004, eight days after its publication.

According to the Decree, the Legal Department of the Ministry of Foreign Relations, International Trade and Worship of the Argentine Republic will act as National Information Bureau upon the outbreak of an armed conflict, as foreseen under article 122 of the Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War.

The Ministry will propose measures, actions and reforms to comply with its obligations under article 122 of the Third Convention and may gather any useful information from official bodies, in order to accomplish its duties.

Benin

The *Law No. 2004-06 on the use and protection of the emblem and name of the Red Cross and Red Crescent in the Republic of Benin*[2] was adopted by the National Assembly on 11 May 2004.

This Law lays down the terms and conditions governing the use of, and the rules of protection for, the emblem and name of the Red Cross and Red Crescent in peacetime and in times of armed conflict. It restricts the use of the emblem and name to the National Red Cross Society of Benin, the International Committee of the Red Cross, the International Federation of Red Cross and

Red Crescent Societies and the recognized National Societies of other countries, incorporates the principles and definitions laid down by the Geneva Conventions, and provides for sanctions in the event of violation of the rules it sets. In times of armed conflict, the Minister of Defence authorizes the protective use of the emblem.

Bosnia and Herzegovina

The *Law on the Red Cross Society of Bosnia and Herzegovina*[3] was adopted on 21 October 2004 and published on 2 November 2004. The Law entered into force on 10 November 2004, the eighth day following the date of publication.

This Law establishes the Red Cross Society of Bosnia and Herzegovina and regulates its legal status, structure, competence and other related matters, and allows for the use by the National Society of the Red Cross emblem.

The National Society has legal personality and is the only National Red Cross Society in Bosnia and Herzegovina. The Ministry for Human Rights and Refugees of Bosnia and Herzegovina is entrusted with supervising the work of the National Society.

This Law abolishes the Law on the Status and Authorities of the Red Cross of the Republic of Bosnia and Herzegovina.[4]

The *Law on Missing Persons of Bosnia and Herzegovina* was adopted on 21 October 2004 and published on 9 November 2004.[5] The Law entered into force on 17 November, the eighth day after its publication.

Its purpose is to revise the definition of a missing person, to improve the process of tracing of missing persons, the exchange of information, the keeping of central records and the realization of social and other rights of family members, as well as to address other issues related to missing persons in Bosnia and Herzegovina.

The Law furthermore establishes the *Institute for Missing Persons of Bosnia and Herzegovina*, which is assigned the task of tracing missing persons in and from Bosnia and Herzegovina. The Law also creates the *Central Records of Missing Persons*, stipulating that the latter shall include all records of missing persons kept at local and entity levels by associations of families of missing persons, by other associations of citizens and by the Tracing Agencies of the Red Cross Society of Bosnia and Herzegovina, in accordance with their respective mandates.

1 Decreto 1430/2004: Asígnanse a la Dirección General de Consejería Legal del mencionado Ministerio las funciones de Oficina Nacional de Información en caso de producirse un conflicto armado, de acuerdo con lo previsto en el artículo 122 del Convenio Relativo al Trato Debido a los Prisioneros de Guerra, suscripto en Ginebra, Confederación Suiza, el 12 de agosto de 1949.

2 Loi no. 2004-06 Portant usage et protection en république de Bénin de l'emblème et du nom de la Croix-Rouge et de Croissant-Rouge, adopté par l'Assemblée Nationale le 11 mai 2004.

3 Law of 21 October 2004, published in the Official Gazette of Bosnia and Herzegovina, No. 49/04 on 2 November 2004.

4 Official Gazette of RBiH no. 21/92 i 13/94.

5 Official Gazette of RBiH no. 50 of 9 November 2004.

The Ministry for Human Rights and Refugees of Bosnia and Herzegovina supervises the implementation of this Law.

The *Law on Changes to the Criminal Code of BiH*, implementing Article 9 of the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, was adopted on 30 September 2004 and published in the Official Gazette on 29 December 2004[6] and entered into force on 6 January 2005.

The Law introduces a new Article 193a into the Criminal Code entitled "Prohibited Weapons and other Combat Means", which prohibits all use, production, stockpiling or transfer of any weapons prohibited by international law.

Cambodia

The *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Cambodia* was promulgated on 27 October 2004.[7] The Law amends the 2001 Cambodian Khmer Rouge Extraordinary Chambers' Law in order to bring it into conformity with the Agreement signed between the Kingdom of Cambodia and the United Nations on 6 June 2003.[8]

Under the new Law, the Extraordinary Chambers (hereafter "the Chambers") are to be established in the courts of Cambodia. The Chambers will have temporal jurisdiction over crimes committed from 17 April 1975 to 6 January 1979, and their personal jurisdiction will be limited to "senior leaders of Democratic Kampuchea" and those who were "most responsible" for the crimes and serious violations falling within the jurisdiction of the Chambers.

The subject matter jurisdiction of the Chambers covers:

— crimes under international law (including genocide, crimes against humanity and grave breaches of the Geneva Conventions, as well as the destruction of cultural property as defined by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and offences against internationally protected persons under the 1961 Vienna Convention on Diplomatic Relations), and

— crimes under Cambodian law (including murder, torture and religious persecution as defined under the 1956 Cambodian Penal Code). The sentences of the Extraordinary Chambers are limited to life imprisonment.

The Law also defines the composition of the Extraordinary Chambers to include a Trial and Supreme Court Chamber. It provides for a two-tiered system

6 Official Gazette no. 61/04 of 29 December 2004.

7 NS/RKM/1004/006.

8 Resolution AG A/RES/228 B of 6 June 2003. The Law approving the Agreement between the United Nations and the Royal government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Cambodia (hereinafter *the Agreement*) was promulgated on 19 October 2004 (NS/RKM/1004/004) <http://www.cambodia.gov.kh/krt/english/image%20.doc.htm>.

ensuring a majority of Cambodian judges over international judges in the composition of the Chambers, while requiring an affirmative vote of at least one international judge before any decision or sentence may be taken.[9]

Japan

Following the enactment in June 2003 of the basic laws defining the scope of Japan's emergency legislation, the Japanese Diet further adopted in June 2004 seven individual acts related to contingency response and approved Japan's accession to relevant international treaties, including the two 1977 Additional Protocols to the Geneva Conventions of 12 August 1949.

Japan deposited its instruments of accession to the two 1977 Additional Protocols on 31 August 2004 and, on the same date, made a Declaration of Recognition of the Competence of the International Fact-Finding Commission, based on Article 90 of Additional Protocol I. These instruments were published in the Official Gazette on 3 September 2004. The two Additional Protocols entered into force for Japan on 28 February 2005, six months after the deposit of the instruments of accession.

The new implementing laws[10] also cover a range of subjects transposing Japan's international obligations under the Geneva Conventions and their Additional Protocols into domestic law. The new legislation relates in particular to the treatment of prisoners of war, strengthens the protection of the Red Cross and Red Crescent emblems and introduces a new criminal law on the repression of certain grave breaches of the Geneva Conventions and their first Additional Protocol.

Niger

The *Law No. 2004-044 implementing the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*[11] was adopted on 8 June 2004 and promulgated by the President of the Republic on the same day. It was published on 15 June 2004.

The Law implements Article 9 of the Ottawa Convention of 3 December 1997[12] and foresees prison sentences and fines in the event of violation of the Act ratifying that Convention.

9 By the end of the year 2004, the Secretary General of the United Nations and the Royal Government of Cambodia had appealed for funds and are awaiting sufficient Pledges to commence the establishment of the Extraordinary Chambers.

10 Law concerning the Protection of the Civilian Population, adopted on 14 June 2004, published on 18 June 2004 and entered into force on 17 September 2004; Law concerning the Treatment of Prisoners of War, adopted on 14 June 2004, published on 18 June 2004 and entered into force on 28 February 2005; Law concerning the Punishment of Grave Breaches of IHL, adopted on 14 June 2004, published on 18 June 2004 and entered into force on 28 February 2005.

11 Loi no. 2004-044 du 8 juin 2004 Portant mise en œuvre de la Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction.

12 Ratified by the Republic of Niger by Act no. 99-01 of 24 January 1999.

Peru

Decree No. 957, adopting the new Criminal Procedure Code[13], was adopted on 22 July 2004, and published on 29 July 2004. According to Section 1 of the Code's Final Provisions, the Code will enter into force in successive phases in the different judicial districts following an official schedule to be approved by Decree.

The Criminal Procedure Code comprises 566 articles. Book 7 entitled "*International Judicial Cooperation*" contains Section VII on "Cooperation with the International Criminal Court", which covers in particular "Arrest and surrender of persons and provisional arrest", "Other forms of cooperation" and "Enforcement of sentences". Section VII of Book 7 will enter into force on 1 February 2006, and will allow Peru to cooperate with the ICC in accordance with Part 9 of the Rome Statute.

Portugal

The *Law adapting Portuguese criminal legislation to the Statute of the International Criminal Court, defining Conduct constituting Crimes against International Humanitarian Law*[14] was adopted on 22 July 2004 and published on the same day. The Law provides for its entry into force 30 days after its publication, except for Article 3, revoking certain articles of the Criminal Code, which entered into force on 14 September 2004.

The first four articles of the Law revoke and modify certain articles of the Criminal Code. Article 2 notably modifies Article 246 of the Criminal Code, which now reads that anyone found guilty of a crime specified by the Law shall be barred for a period of 2 to 10 years from electing the President of the Republic, members of the Legislative Assembly or of a local authority, members of the European Parliament, as well as from being elected or sworn in to such offices.

The appendix defines the crimes inserted in the Criminal Code: the crime of genocide; crimes against humanity; war crimes against persons; war crimes through the use of prohibited methods and means of warfare; war crimes against property protected by distinctive signs or emblems; improper use of distinctive signs or emblems; war crimes against property and war crimes against other rights. It also lists as other crimes incitement to war and recruitment of mercenaries.

The provisions of the law also apply to crimes committed outside the territory of Portugal, when the perpetrator is found in Portugal and cannot be extradited or when it has been decided not to hand him over to the International Criminal Court.

Military commanders and other superiors who are or should be aware of these crimes being committed by forces under their effective command or responsibility and control, and who fail to react or prevent or bring these crimes

13 Decreto legislativo no. 957 - Código Procesal Penal, El Peruano Diario Official, no. 8804, 29 de Julio de 2004.

14 Lei no. 31/2004 de 22 de Julho Adapta a legislação penal portuguesa ao Estatuto do Tribunal Penal Internacional, tipificando as condutas que constituem crimes de violação do direito internacional humanitário – 17 alteração ao Código Penal.

to the attention of competent authorities, will be punished under this Law with the same penalty as the actual perpetrator(s). No statute of limitations will apply to the crimes under the Law.

This Law will apply simultaneously with the Code of Military Justice, when military interests or other interests of the Portuguese State are at stake.

Rwanda

Organic Law No. 16/2004 establishing the Organisation, Competence and Functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the Crime of Genocide and other Crimes against Humanity, committed between October 1, 1990 and December 31, 1994 was adopted and published on 19 June 2004 and entered into force on the same day.[15]

The Law comprises four Titles, concerning the applicability of the Law (Title 1), the setting up, organisation and competence of the Gacaca courts and their relationship with other institutions (Title 2), the prosecution of offences and proceedings (Title 3) and miscellaneous, transitional and final provisions (Title 4).

The persons or their accomplices to be prosecuted are described in the Law's Article 51, which classifies the accused persons into three categories. The first category includes persons who were planners, organisers, imitators, supervisors and ringleaders of the genocide or crimes against humanity, as well as persons in various political or religious offices who took part in these acts or encouraged others to commit them. Category 1 also includes those who committed acts of torture against others even though these acts did not result in death, those who committed acts of rape or acts of torture against sexual organs and those who committed dehumanizing acts on dead bodies. The second category is made up of those persons who killed or committed acts or serious attacks against others causing death, those persons who injured or committed serious attacks against others with the intent to kill them but without having attained this objective, and persons who committed or aided to commit other offences against others without the intent to kill them. The third category of perpetrators subject to prosecution concerns persons who only committed offences against property, unless the author of the offence and the victim have agreed on an amicable settlement. Persons falling under category 1 are to be tried before the ordinary courts, while persons falling under category 2 and 3 are to be tried before the Gacaca courts.

B. National Committees on International Humanitarian Law

Costa Rica

The *Decree creating a National Commission for International Humanitarian Law* was adopted on 21 May 2004 and published on 4 November 2004. It entered into force on the day of its publication.

15 Journal Officiel numéro spécial 19/06/2004.

The Commission is to be composed of representatives of various ministries, the legislative and the judiciary authorities, as well as of universities and of the Costa Rica Red Cross.

It is mandated to assist the government with the implementation of existing legislation in the field of international humanitarian law and the development of draft laws and decrees enabling Costa Rica to fulfil its obligations under international humanitarian law.

The Commission will promote the dissemination of international humanitarian law, take part in meetings, seminars and conferences and encourage academic circles to include that law into education programmes. It will also suggest activities aimed at promoting the implementation of and respect for international humanitarian law.

The Commission is incorporated in the Ministry of Foreign Affairs. The Ministry will fulfil the roles of the Presidency and Secretariat. The Commission may consult the International Committee of the Red Cross in matters related to international humanitarian law.

Senegal

Decree No. 2004-657 relating to the Creation, the Organisation and the Functions of the High Commission for Human Rights and the Promotion of Peace was adopted on 2 June 2004.

The Commission has competence in relation to human rights and international humanitarian law. It is attached to the Presidency of the Republic and its main responsibilities are to receive and conduct investigations into complaints made by corporate bodies, persons and organisations working in the field of human rights and international humanitarian law; to promote the reception, integration and implementation into domestic law of international treaties relating to human rights law or international humanitarian law and to contribute to the dissemination of these bodies of law.

In order to fulfil its tasks, the Commission is composed of a human rights' office, a unit for the follow-up of international law, and a unit for the documentation and promotion of human rights law and international humanitarian law.

The Commission has its own budget and is headed by a high commissioner enjoying the rank of minister.

Serbia and Montenegro

The *Commission for International Humanitarian Law of Serbia and Montenegro*[16] was established by Decision of the Council of Ministers of Serbia and Montenegro on 9 September 2004, which was published in the Official Gazette No. 43/2004 the following day and came into force the eighth day after publication.

16 Odluka o obrazovanju Komisije za međunarodno humanitarno pravo, ("Službeni List SCG", br. 43/2004).

Its mandate is to follow the development and implementation of international humanitarian law and to propose measures for its national implementation, to promote dissemination and training, as well as to cooperate with the ICRC and other bodies. It is required to submit reports to the Council of Ministers.

The Commission's membership reflects the federal structures of Serbia and Montenegro. It includes representatives of the Federal Ministries of Foreign Affairs and Defence of Serbia and Montenegro, the Ministries of the Interior and Justice of Serbia and the Ministries of the Interior and Justice of Montenegro. It also includes a representative of the Serbia and Montenegro Red Cross Society and of the International Law Association, plus three experts in their personal capacity. Other government bodies or other organizations such as the ICRC can be consulted when needed.

This governmental Commission will complement the International Humanitarian Law Commission of the Serbia and Montenegro Red Cross Society. The latter, which was created by the Yugoslav Red Cross Society and dates back to 1970, has played an important role in the development of IHL at the national and international levels.

C. Case Law

Armenia

On 13 August 2004, the Constitutional Court of Armenia[17] ruled on the issue of the compatibility of the provisions of the 1998 Statute of the International Criminal Court with the Constitution of the Republic of Armenia.

The Court considered that most provisions of the Rome Statute were in conformity with the Constitution, with the exception of paragraph 10 of the Preamble and Article 1 of the Statute, which provide that the jurisdiction of the ICC shall be complementary to national criminal jurisdictions.

The Court decided that Chapter 9 of the Armenian Constitution, which includes provisions organizing the system of the judiciary of the Republic of Armenia, does not provide for the possibility to complement the domestic system of criminal jurisdictions with an international judicial body, be it through an international treaty.

The Constitutional Court concluded that an amendment to the Constitution, acknowledging the obligations provided for under the Rome Statute or recognizing the jurisdiction of the International Criminal Court as a body complementing the system of national courts, would be required before accession to the Statute.

17 Decision of the Constitutional Court of Armenia on the issue of compatibility of the provisions, stipulated by the Statute of the International Criminal Court, signed in Rome on 17 July 1998 with the Constitution of the Republic of Armenia, Yerevan, 13 August 2004.

United States

On November 8, 2004, the United States District Court of Columbia issued a decision regarding the rights of persons detained at the US Naval Base in Guantánamo Bay, and the legality of the use of military commissions to try them.[18]

The case involved a Yemeni national detained in Guantánamo as an "enemy combatant" and designated by the United States' President as eligible for trial by military commission under Military Order[19] dated November 13, 2001. The detainee was charged with "conspiracy to attacking civilians and civilian objects, to commit murder and destruction of property by an unprivileged belligerent, and to commit acts of terrorism".

The Military Defence Counsel assigned to represent the detainee before the Military Commission filed a lawsuit in the US District Court of Columbia, challenging the legitimacy of military commissions under both national and international law. In so doing, the lawyers for the Defence based their argumentation on the US Supreme Court Decision in the Hamdi case of June 28, 2004[20], in which the Supreme Court ruled that detainees have the right to challenge their detention in a process provided for by the detaining authority and to use the federal courts to file a challenge to either the conclusions of that process, or the inadequacy of that process.

In its ruling of 8 November 2004, the District Court of Columbia referred to Article 5 of the Third Geneva Convention as implemented by US Army Regulation, (which requires a "competent tribunal" to determine entitlement to prisoner-of-war — POW — status) and to Article 102 of the Third Geneva Convention (which states that POWs may only be tried by the same mechanisms that the detaining authority uses to try its own military personnel — in this case, court martial under the US Uniform Code of Military Justice).

The court ruled that military commissions, which differ in important respects from courts martial under the US Uniform Code, constituted a violation of the detainee's rights, so long as he had not had his claim to POW status rejected by a competent tribunal. The determinations by the US President or by a Combatant Status Review Tribunal that the detainee is not a POW were also insufficient to satisfy the requirements of the Third Geneva Convention.

18 United States District Court for the District of Columbia, Civil Action no. 04-1519 (JR), 8 November 2004.

19 Military Order of November 13, 2001, Federal Register, November 16, 2001 (Volume 66, Number 222), Presidential Documents, pp. 57831-57836.

20 Supreme Court, *Hamdi et al.* v. *Rumsfeld, Secretary of Defence, et. al.*, no. 03-6696, 28 June 2004, see also "National Implementation of International Humanitarian Law – biannual update on national legislation and case law, January–June 2004", *International Review of the Red Cross*, no. 855, p. 705.

The Court also rejected the US Government's claim that the Geneva Conventions do not apply to the conflict against al Qaeda and held that the detention had occurred in the context of the international armed conflict between the US and Afghanistan.

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BOOKS AND ARTICLES

Recent acquisitions of the Library & Research Service, ICRC

Africa – books

Au cœur des crises nationales au Rwanda et au Burundi : la lutte pour les ressources / Marc Rwabahungu; Paris: L'Harmattan, 2004 – 215 pp.; Etudes africaines.
Worlds of power: religious thought and political practice in Africa / Stephen Ellis, Gerrie Ter Haar; New York [et. al]: Oxford University Press, 2004 – VIII, 263 pp.; Series in contemporary history and world affairs.

Africa – articles

Darfour: racines anciennes, nouvelles virulences / Victor Tanner; Hiver 2004–2005 – pp. 715–728; In: Politique étrangère.
Darfur and the genocide debate / Scott Straus; January – February 2005 – pp. 123–133; In: Foreign Affairs; Vol. 84, No. 1.
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