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THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

By Yoram Dinstein[*]

A. INTRODUCTION

It is impossible to overestimate the contribution of the International Military Tribunal (IMT) at Nuremberg to the development of international criminal law. In almost every respect, the seminal trial of the major German war criminals of World War II has blazed the trail: remarkably, the signposts have been left standing for the past sixty years. Indeed, the Nuremberg trial of 1945/1946 has set the stage for the establishment of the permanent International Criminal Court (ICC) in the Rome Statute of 1998.[1]

Notwithstanding the adjective "Military" appearing in the name of the Nuremberg Tribunal, the IMT was a far cry from a military court. It was composed of four Judges and four Alternates: one from each of the four Big Allied Powers (the United States, the United Kingdom, the USSR and France). The four Judges were Sir Geoffrey Lawrence (Lord Justice of Appeal, later elevated to the House of Lords, taking the title Lord Oaksey), President, from the UK; Francis Biddle (prior to joining the IMT, the Attorney-General) from the US; Professor Henri Donnedieu de Vabres (a well-known scholar in the field of international criminal law) from France; and Major General I.T. Nikitchenko (Vice-President of the Soviet Supreme Court) from the USSR. The four Alternates – who sat on the bench together with their colleagues and took a full part in judicial consultations without voting – were Sir Norman Birkett (a High Court Judge) from the UK; John J. Parker (a Circuit Court of Appeals Judge) from the US; Robert Falco (formerly a member of the Cour de Cassation) from France; and Lt. Colonel A.F. Volchkov (Judge of the Moscow District Court) from the USSR. Thus, all the Western Judges and Alternates were civilians. Only the Soviet Judge and Alternate held military ranks, and they alone wore military uniforms on the bench, to the regret of their Western colleagues (who were enrobed in traditional black gowns).[2]

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1 Rome Statute of the International Criminal Court, 37 *I.L.M.* 999 (1998).

2 For the dress code dispute among the Judges, *see* T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* 122 (1992).

The crimes over which the IMT had jurisdiction were crimes against peace, war crimes and crimes against humanity (examined below, E). The prosecution was conducted by teams from the four Big Powers, but the leading person – and driving spirit – was, undeniably, the US Chief of Counsel, Justice Robert H. Jackson (Justice of the Supreme Court on leave and former Attorney-General). The other Chief Prosecutors were Sir Hartley Shawcross (the Attorney-General) from the UK; François de Menthon from France, and General R.A. Rudenko from the USSR.

Pursuant to Articles 16(d) of the London Charter that governed the proceedings, the defendants had the right to conduct their own defence or to have the assistance of counsel.[3] In accordance with Article 23 (Second Paragraph),[4] defence counsel were either chosen by the defendants themselves or – as in the case of Martin Bormann (see below, C) – were appointed by the IMT.[5] Expenses were covered by the IMT.[6]

B. A SUMMARY

The path leading to the Nuremberg trial was not particularly promising. The Moscow Declaration of 30 October 1943 – issued by the UK, the US and the USSR – unequivocally warned that German perpetrators of atrocities would be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished"; but the Declaration was "without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies".[7] As for the latter, there was no assurance of a trial prior to punishment.

Serious high-level consultations among the leading Allies on the fate of the major Nazi criminals commenced only late in 1944. On 4 September 1944, the British Lord Chancellor, Viscount Simon, expressed a strong opinion that judicial proceedings were "inappropriate" for the major criminals: their fate was political and did not rest with judges.[8] Half a year

3 Charter of the International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 14 November 1945 – 1 October 1946),* Vol. 1: *Official Documents* 10, 14 (1947) [hereinafter: *Official Documents*].

4 *Ibid*., 15.

5 Judgment, *ibid*., 171, 172.

6 *See* R.E. Conot, *Justice at Nuremberg* 83 (1983).

7 Great Britain-Soviet Union-United States, Tripartite Conference in Moscow, Declaration of German Atrocities (30 October 1943), 38 *A.J.I.L.*, Supp., 7, 8 (1944).

8 Viscount Simon, Memorandum on Major War Criminals (4 September 1944), *The American Road to Nuremberg: The Documentary Record 1944-1945* 31, 32 (B.F. Smith ed., 1982).

later, on 16 April 1945, Simon reiterated the UK that "execution without trial is the preferable course".[9] However, most of the major criminals ended up in the hands of the Americans. The US policy stand gradually crystallized in favour of a trial, and – once (at the end of April 1945) Justice Jackson was appointed by President Truman to the post of Chief of Counsel – he managed to overcome all objections emanating from the reluctant Allies.[10]

On 8 August 1945, in London, an Agreement was concluded by the four Big Powers, annexed to which was the IMT Charter.[11] Subsequently, nineteen additional States adhered to the Agreement, but it must be stressed that "they did not in any way participate in the Nuremberg Trial".[12]

On 18 October 1945, the Indictment of 24 major German war criminals was lodged in Berlin.[13] The trial itself started in Nuremberg on 20 November 1945, and the hearings lasted until 31 August 1946.[14] The Judgment (including the verdicts) was delivered on 30 September/1 October 1946. There was no appeal: under Article 29 of the London Charter, the Control Council for Germany had the power to reduce sentences,[15] but all pleas for clemency were rejected.[16] Executions of ten defendants (see below, C) were carried out on 16 October 1946.[17]

Thus, from start (Indictment) to finish (executions), the entire ordeal lasted from one October (1945) to the next (1946), an amazing feat by any standard. During that period, no less than 403 open sessions were held by the IMT, and more than a hundred witnesses gave oral evidence in court; numerous other witnesses testified either before specially appointed Commissioners or in writing.[18] The proceedings (including written documents submitted in evidence) were later published in a series comprising no less than 42 volumes.

The chain of events traced in the IMT's Judgment (supported by the massive evidence) has become the definitive narrative of the horrors of World War II. The Judgment brought to light the Führer's systematic plan of conquest, openly revealed to his close confederates as early as 5 November

9 Viscount Simon, The Argument for Summary Process against Hitler and Co. (16 April 1945), *ibid*., 155, 156.

10 *See* Conot, *supra* note 6, at 14-16.

11 London Agreement of 8 August 1945, *Official Documents*, *supra* note 3, at 8.

12 L. Gross, "The Punishment of War Criminals in the Nuremberg Trial", I *Essays on International Law and Organization* 329, 333 (1984).

13 Indictment, *supra* note 3, at 27.

14 Judgment, *supra* note 3, at 172.

15 Charter, *supra* note 3, at 16.

16 *See* Conot, *supra* note 6, at 501.

17 *See* R.K. Woetzel, *The Nuremberg Trials in International Law* 15 (Rev. ed., 1962).

18 Judgment, *supra* note 3, at 172.

1937 (and recorded for posterity by a note-taker, Lt. Colonel Hossbach).[19] The IMT described the mass murder of prisoners of war (especially, albeit not exclusively, Soviet prisoners of war);[20] the unprecedented brutalities committed in the occupied territories;[21] the systematic pillage and plunder;[22] and the slave labour policy.[23] Above all, perhaps, the Judgment revealed to the world the full dimensions of the Holocaust, based on the evil "final solution" that the Nazi regime strove to accomplish.[24] The overall picture of "the killing of 6 million Jews, of which 4 million were killed in the extermination institutions"[25] was certainly not grasped by the public until the Nuremberg proceedings.

C. THE INDIVIDUAL DEFENDANTS

The list of the individuals prosecuted in Nuremberg is unique. Taking into account that Adolf Hitler (the Führer) and Josef Goebbels (the Minister of Propaganda) committed suicide shortly before the termination of hostilities – as did Heinrich Himmler (Head of the SS) after capture – the Nuremberg roster of defendants reflected the top surviving leadership of the Nazi regime. It included, among others, the most senior Ministers; the chiefs of the armed forces and the Security Police; the economic leaders; as well as several governors of key areas in the occupied territories. When the specific list is studied closely, the uniqueness of the trial is self-evident.

Not all the 24 defendants indicted in Berlin were present at the dock in Nuremberg. The net figure was a little smaller:

(i) Hitler's all-powerful Secretary, Martin Bormann, could not be found and was tried – and sentenced to death – *in absentia* (as the IMT was authorized to do under Article 12 of the London Charter[26]). The concept of a criminal trial *in absentia* is problematic and excluded under the Rome Statute.[27] It must be noted, however, that the IMT affirmed that, should Bormann be apprehended later, the Control Council for Germany (in conformity with the aforementioned Article 29 of the Charter) could "consider any facts in mitigation,

19 Judgment, *supra* note 3, at 188-92.
20 *Ibid*., 228-32.
21 *Ibid*., 232-38.
22 *Ibid*., 238-43.
23 *Ibid*., 243-47.
24 *Ibid*., 247-53.
25 *Ibid*., 253.
26 Charter, *supra* note 3, at 12.
27 *See* W.A. Schabas, *An Introduction to the International Criminal Court* 119-21 (2001).

and alter or reduce his sentence, if deemed proper".[28] In the event, Bormann's remains were identified in 1972 near the Führer's bunker, and the assumption is that he died while trying to escape.[29]

(ii) The leader of the German Labour Front, Robert Ley, committed suicide in prison – after the Indictment – on 25 October 1945,[30] and thus avoided trial.

(iii) The top industrialist, Gustav Krupp von Bohlen und Halbach, suffered from degenerative senility and on 15 November 1945, on a motion by defence counsel, the IMT ruled that he could not stand trial at that time due to his "physical and mental condition".[31] A Prosecution attempt to replace him in the dock by his son, Alfried Krupp von Bohlen und Halbach, failed.[32] The latter was nevertheless brought to justice as the key defendant in one of the "Subsequent Proceedings" (see below), and – having been convicted – was sentenced to 12 years of imprisonment and forfeiture of all his property.[33]

Of the remaining 21 defendants in the dock, the IMT acquitted three: Franz von Papen (early on, Hitler's Vice-Chancellor), Hjalmar Schacht (the former President of the Reichsbank) and Hans Fritsche (the head of the radio division of the Ministry of Propaganda).[34] Eighteen defendants (plus Bormann) were found guilty on one or more Counts of the Indictment.[35] The sentences were as follows.[36] Eleven defendants (in addition to Bormann) were sentenced to death: Hermann Göring (Reichsmarschall, Commander-in-Chief of the Luftwaffe and, after Hitler, the most prominent man in the Nazi regime), Joachim von Ribbentrop (Foreign Minister), Wilhelm Keitel (Field Marshal, Chief of the German Armed Forces High Command (OKW)), Ernst Kaltenbrunner (Chief of the Security Police), Alfred Rosenberg (the Nazi party's top ideologist and Minister for the Occupied

28 Judgment, *supra* note 3, at 341.

29 *See* "Bormann, Martin", *The Oxford Companion to World War II* 152, 153 (I.C.B. Dear ed., 1995).

30 Judgment, *supra* note 3, at 171.

31 *Official Documents*, *supra* note 3, at 124-43. Defence counsel also tried to halt the proceedings against Julius Streicher and Rudolf Hess, on grounds of incapacity to stand trial, but upon medical advice the motions did not carry. *Ibid*., 148-67.

32 *Ibid*., 145-46.

33 USA v. Alfried Krupp von Bohlen und Halbach *et al*. ("The Krupp Case", 1948), 9 *Trials of War Criminals before the Nuernberg Military Tribunals* 1327, 1449-50 (1950).

34 Judgment, *supra* note 3, at 310, 327, 338.

35 *Ibid*., 282, 285, 288, 291, 293, 296, 298, 301, 304, 307, 315, 317, 320, 322, 325, 330, 333, 336, 341.

36 *Ibid*., 365-66.

Eastern Territories), Hans Frank (Governor General of occupied Poland), Wilhelm Frick (Minister of the Interior and supreme authority in Bohemia/Moravia), Julius Streicher (known as "Jew-Baiter Number One"), Fritz Sauckel (in charge of the slave labour program), Alfred Jodl (General, Chief of Operations of the OKW), and Arthur Seyss-Inquart (Deputy Governor General of occupied Poland and later Commissioner of the Netherlands). Three defendants were sentenced to life imprisonment: Rudolf Hess (the Führer's Deputy), Walter Funk (the Minister of Economics and President of the Reichsbank), and Erich Raeder (Grand Admiral). Four were sentenced to prescribed periods of imprisonment: Baldur von Schirach (Gauleiter of Vienna) (20 years), Albert Speer (Minister for Armaments and War Production) (20 years), Konstantin von Neurath (former Foreign Minister) (15 years), and Karl Dönitz (Grand Admiral, Commander-in-Chief of the German Navy, and Hitler's successor as Head of State) (10 years).

While eleven defendants (apart from Bormann) were sentenced to death, only ten were actually executed, since Göring managed to beat the gallows by committing suicide a few hours earlier.[37] Of the seven defendants sentenced to imprisonment, one committed suicide in jail, having spent more than four decades there (Hess); three were released after they had served their sentence in full (Dönitz, Schirach and Speer); and three were released before their term due to ill health (Neurath in 1954, Raeder in 1955, Funk in 1957).[38] Among the imprisoned persons, the most famous case was that of Speer who – having served his 20-year sentence in full – was released in 1966 and went on to write two best-selling memoirs.[39] The most notorious case was that of Hess who – between 1966 and 1987 – remained the sole inmate in the four-Powers Spandau prison in Berlin, because of Soviet implacable opposition to the idea of commuting his sentence (immediately after his death, the Spandau prison was razed to the ground so that it would not become an attraction to visitors).[40]

The London Charter opened the door for more than one trial by the IMT (not necessarily in Nuremberg).[41] Still, only one international trial of major German war criminals took place. It may as well be noted that other major

37 *See* W.L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* 1143 (1960).

38 *See* Taylor, *supra* note 2, at 616-18.

39 *See* A. Speer, *Inside the Third Reich* (1970); A. Speer, *Spandau: The Secret Diaries* (1976).

40 *See* Taylor, *supra* note 2, at 616, 618. The Soviet Government always believed that there was more to the story of the solo flight by Hess to Scotland in May 1941 (shortly before the invasion of the USSR) than the British Government was letting on. For an interesting anecdote on the subject, *see* W. Churchill, III *The Second World War* 49 (1950).

41 Charter, *supra* note 3, at 15 (Art. 22).

German war criminals captured by the Americans – not qualifying for the "A-list" facing the IMT – were prosecuted later, also in Nuremberg, in a series of 12 trials by US military courts.[42] Although the "Subsequent Proceedings" at Nuremberg are of great significance, they must not be confused with the single international trial preceding them.

D. CONSPIRACY AND ORGANIZATIONS

The last paragraph of Article 6 of the London Charter (after listing the three crimes coming within the jurisdiction of the IMT) promulgated:

> Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[43]

The Prosecution took the Common Plan/Conspiracy charge very seriously and turned it into Count One of the Indictment (Counts Two to Four covering the three substantive crimes).[44]

The IMT found on the evidence that there was indeed a Common Plan/Conspiracy to commit aggressive war, in which some of the defendants (by no means all) participated, but –

(i) It disregarded the charges that the defendants conspired to commit war crimes or crimes against humanity, and the only Common Plan established was the one "to prepare, initiate and wage aggressive war".[45]

(ii) It insisted that no "new and separate crime" was added to the three substantive crimes listed in the Charter.[46] The record shows that all eight defendants convicted of conspiracy (Count One of the Indictment) – Göring, Hess, Ribbentrop, Keitel, Rosenberg, Raeder, Jodl and Neurath – were also convicted of the actual perpetration of crimes against peace (Count 2).[47]

In addition to the individual defendants, Article 9 of the London Charter allowed for the declaration as criminal of connected groups and

42 *See* H.-H. Jescheck, "Nuremberg Trials", 3 *E.P.I.L.* 747, 750-52 (R. Bernhardt ed., 1997).
43 Charter, *supra* note 3, at 11.
44 Indictment, *supra* note 3, at 29 *ff.*
45 Judgment, *supra* note 3, at 226.
46 *Id.*
47 *See* Tabulation *ibid.*, 366-67.

organizations.[48] Six organizations were actually indicted: the Reich Cabinet, the Leadership Corps of the Nazi Party, the SS (including the SD), the Gestapo, the SA, and the General Staff and High Command of the German Armed Forces.[49] No declaration of criminality was issued by the IMT as regards three of those: the Reich Cabinet, the SA, and the General Staff and High Command of the German Armed Forces.[50] Yet, subject to certain qualifications relating to the scope of the declaration, the IMT criminalized the other three: the Leadership Corps of the Nazi Party, the SS, and the Gestapo (jointly with the SD).[51]

The IMT was cognizant of the fact that the criminalization of groups or organizations constitutes "a far reaching and novel procedure", and that one of the "well-settled legal principles" is that "criminal guilt is personal".[52] To surmount the legal difficulty which it was facing, the IMT stated:

> A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.[53]

The IMT was not unmindful of the weak link in this logical chain – namely, that the issuance of a declaration of criminality of an organization or a group would "fix the criminality of its members" individually – and it therefore stipulated that "persons who had no knowledge of the criminal purposes or acts of the organization", and were not "personally implicated in the commission of the" crimes, would not be detrimentally affected.[54]

The issues of conspiracy and criminalization of organizations have given rise to much acrimonious debate.[55] In both respects, the Rome Statute does not follow in the footsteps of Nuremberg. Conspiracy is not mentioned in the Statute.[56] Furthermore, Article 25(1) makes it clear that the Statute is based

48 Charter, *supra* note 3, at 12.
49 Indictment, *supra* note 3, at 28.
50 Judgment, *supra* note 3, at 275-79.
51 *Ibid*., 261-62, 267-68, 273. In the presentation of the cases by the prosecution, the SD was moved from its linkage to the SS to a nexus to the Gestapo because of the closer working relationship (*ibid*., 262).
52 *Ibid*., 256.
53 *Id.*
54 *Id.*
55 *See* S. Pomorski, "Conspiracy and Criminal Organization", *The Nuremberg Trial and International Law* 213-48 (G. Ginsburgs and V.N. Kudriavtsev eds., 1990).
56 *See* Schabas, *supra* note 27, at 82-83.

on individual criminal responsibility.[57] A proposal to extend the ICC's jurisdiction to organizations was dropped in the absence of support.[58]

E. THE CRIMES

The crimes coming within the jurisdiction of the IMT were defined in Article 6 of the London Charter:

> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;
> (b) WAR CRIMES: namely, violations of the laws or customs of war.
> Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
> (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war,* or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not inviolation of domestic law of the country where perpetrated.[59]

We shall examine these three crimes separately:

Crimes against Peace

The IMT determined that Article 6(a) of the London Charter is declaratory of modern international law, which regards a war of aggression as a grave crime.[60] Hence, the Tribunal rejected the argument that the provision of the Article amounted to *ex post facto* criminalization of the acts of the

57 Rome Statute, *supra* note 1, at 1016.
58 *See* M.H. Arsanjani, "The Rome Statute of the International Criminal Court", 93 *A.J.I.L.* 22, 36 (1999).
59 Charter, *supra* note 3, at 11.
60 Judgment, *supra* note 3, at 219-23.

defendants, in breach of the *nullum crimen sine lege* principle.[61] The Judgment proclaimed:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[62]

The IMT's position on this subject was hotly debated in the late 1940s.[63] However, it may as well be emphasized that the sole defendant convicted exclusively of crimes against peace was Hess (sentenced to life imprisonment); the other eleven defendants convicted of these crimes (Göring, Ribbentrop, Keitel, Rosenberg, Frick, Funk, Dönitz, Raeder, Jodl, Seyss-Inquart and Neurath) were all convicted also of traditional war crimes,[64] so that arguably they would have paid the price anyhow.

In any event, the issue is no longer disputed in principle at the present juncture. It is virtually unassailable that current international law reflects the Judgment. As for the Rome Statute, the "crime of aggression" is recognized in Article 5(1)(d) as coming within the jurisdiction of the ICC.[65] Admittedly, the crime of aggression has not yet been defined, and (in accordance with Article 5(2)[66]) the ICC can exercise its jurisdiction with respect to this crime only after an amending provision is adopted following a review of the Statute seven years after its entry into force (as per Articles 121 and 123[67]). The Rome decision to postpone the definition of the crime of aggression reflects a divergence of opinions as to its precise range.[68] Above all, the Rome Conference was unable to reach an agreement as to whether the ICC would be empowered to exercise jurisdiction in the absence of a Security Council determination that an act of aggression has occurred.[69] The controversies attending the formulation of the Rome Statute must not be minimized. One may even conclude that, pending the entry into force of the

61 *Ibid*., 219. The *nullum crimen sine lege* principle is explicitly recognized in Article 22 of the Rome Statute, *supra* note 1, at 1015.

62 Judgment, *supra* note 3, at 223.

63 *See*, e.g., G.A. Finch, "The Nuremberg Trial and International Law", 41 *A.J.I.L.* 20, 25-36 (1947).

64 *See* Tabulation in Judgment, *supra* note 3, at 366-67.

65 Rome Statute, *supra* note 1, at 1004.

66 *Id*.

67 *Ibid*., 1067-68.

68 *See* H. von Hebel and D. Robinson, "Crimes within the Jurisdiction of the Court", *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* 79, 82-85 (R.S. Lee ed., 1999).

69 *See* Arsanjani, *supra* note 58, at 29-30.

projected amendment, "the crime of aggression is *de facto* not included in the Statute".[70] All the same, there is no indication whatever that States regard as anachronistic the concept of wars of aggression as a crime under international law.

An important question that may arise from the language of the Rome Statute is whether the crime contemplated is really that of aggression. If so, the definition will encompass not merely crimes against peace – which, as formulated in the London Charter and applied by the IMT, are confined to wars of aggression – but also other acts of aggression "short of war".[71] It remains to be seen whether such will indeed be the outcome of the eventual progress of events.

War Crimes

Unlike Article 6(a) of the London Charter, Article 6(b) has never been seriously challenged. As the IMT pointed out:

> With respect to War Crimes, ..., the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.[72]

Neither the Regulations annexed to Hague Convention (IV) of 1907,[73] nor the Geneva Prisoners of War Convention of 1929[74] (the precursor of present-day Geneva Convention (III) of 1949[75]) were completely innovative. War

70 A. Zimmermann, "Article 5", *Commentary on the Rome Statute of the International Criminal Court* 97, 102 (O. Triffterer ed., 1999).

71 *See* Y. Dinstein, *War, Aggression and Self-Defence* 125 (4rd ed., 2005).

72 Judgment, *supra* note 3, at 253.

73 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* 55, 66 (D. Schindler and J. Toman eds., 4th ed., 2004). The provisions cited by the Tribunal appear *ibid*., 78-81.

74 Geneva Convention Relative to the Treatment of Prisoners of War, 1929, *The Laws of Armed Conflict*s, *ibid*., 421. The provisions cited by the Tribunal appear *ibid*., 425, 432-33.

75 Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *ibid*., 507.

crimes trials have been held long before the instruments' entry into force.[76] To quote the IMT again:

> The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention.[77]

As accentuated in the text of Article 6(b), the list of war crimes appearing therein is not exhaustive. Nevertheless, it must be understood that not every single violation of the *jus in bello* constitutes a war crime.[78] The Rome Statute enumerates war crimes in much greater detail in Article 8(2)(a)-(b), but it is specifically confined to "serious violations" or "grave breaches" of the laws of war.[79]

No less than sixteen of the defendants in the Nuremberg trial (Göring, Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Funk, Dönitz, Raeder, Sauckel, Jodl, Seyss-Inquart, Speer, Neurath and Bormann) were convicted of traditional war crimes.[80]

Crimes against Humanity

Article 6(c) of the London Charter constitutes a veritable landmark, representing the "first technical use" and definition of the specific phrase "crimes against humanity" in a legally binding international treaty, although there were earlier usages of the term in non-binding declarations and statements (let alone literary and journalistic writings).[81] In the IMT's

[76] For a well-known example, *see* the Trial of Captain Henry Wirtz (the Andersonville trial) of 1865, I *The Law of War: a Documentary History* 783 (L. Friedman ed., 1972).

[77] Judgment, *supra* note 3, at 220-21.

[78] *See* Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 229 (2004).

[79] Rome Statute, *supra* note 1, at 1006-1008.

[80] *See* Tabulation in Judgment, *supra* note 3, at 366-67.

[81] *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former

Judgment, the theme of crimes against humanity was somewhat de-emphasized, as compared to crimes against peace or ordinary war crimes.[82] Nevertheless, what is of singular import is that two of the defendants – Streicher and Schirach – were convicted exclusively of crimes against humanity (having been found not guilty on other Counts of the Indictment), and were sentenced, respectively, to death and to 20 years imprisonment.[83]

In the original English version of Article 6(c), a semicolon – rather than a comma – appeared at the point marked in the quoted text by an asterisk. It consequently looked as if only persecutions – but not murder, extermination, etc. – are subject to the caveat of a connection with any (other) crime within the jurisdiction of the Tribunal. But in a special Protocol, done in Berlin on 6 October 1945 (in advance of the Indictment), Paragraph (c) was amended: the semicolon was replaced by a comma.[84] The thrust of the amendment was that crimes against humanity of all types must be connected with (other) crimes within the jurisdiction of the Tribunal, *i.e.*, crimes against peace or war crimes.

By setting forth that crimes against humanity can only be committed in connection with crimes against peace or war crimes – hence with war – the framers of amended Article 6(c) introduced a critical rider on the proposition in the text that crimes against humanity may be committed "before or during the war" (that is to say, in peacetime). Not surprisingly, the IMT arrived at the conclusion that the Nazi persecution of Jews (as well as political opponents) inside Germany prior to the outbreak of World War II on 1 September 1939 – revolting and horrible as it was – was not deemed a crime against humanity, because it had not been connected with crimes against peace or war crimes.[85] In some special instances the Tribunal did admit a linkage between concrete acts performed before September 1939 and crimes against peace or war crimes,[86] but that was exceptional. The upshot is that, although at a cursory glance it seems not to matter – under Article 6(c) – whether crimes against humanity are committed before or during war, in principle the Nuremberg precedent unequivocally requires that these crimes be committed in wartime.[87]

Yugoslavia since 1991, Trial Chamber, Prosecutor v. Tadic, No. IT-94-1-T (Merits) (7 May 1997), 36 *I.L.M.* 908, 935 (1997).

82 *See* R.S. Clark, "Crimes against Humanity at Nuremberg", *The Nuremberg Trial and International Law*, *supra* note 55, at 177, 194-98.

83 *See* Tabulation in Judgment, *supra* note 3, at 366-67.

84 Berlin Protocol, *Official Documents*, *supra* note 3, at 17.

85 Judgment, *supra* note 3, at 254.

86 *See* A. Goldstein, "Crimes against Humanity: Some Jewish Aspects", [1948] *Jewish Y.B. Int'l L.* 206, 221.

87 *See* E. Schwelb, "Crimes against Humanity", 23 *Brit. Y.B. Int'l L.* 178, 204 (1946).

In the Rome Statute, crimes against humanity are defined in Article 7.[88] This definition is much broader than the one incorporated in Article 6(c) of the London Charter.[89] The most significant feature of the Rome version is that it severs the Nuremberg nexus between crimes against humanity and war.[90]

F. DEFENCES

The defendants in Nuremberg sought to rely on a number of legal defences, with a view to justifying their nefarious acts and relieving themselves of criminal responsibility. The two most important defences (both anticipated and rejected in the London Charter) were predicated on the official position of the defendants and on their obedience to the Führer's superior orders.

The Official Position of the Defendants

Article 7 of the London Charter lays down:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[91]

In response to an argument by defence counsel that (notwithstanding the lucid language of Article 7) accountability for the crimes should be attributed to the German State, rather than the accused in the dock, the IMT pronounced:

> The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. ... He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.[92]

88 Rome Statute, *supra* note 1, at 1004-1005.

89 For a comparison between the two definitions, *see* Y. Dinstein, "Crimes against Humanity after Tadić", 13 *Leiden J. Int'l L.* 373, 382 (2000).

90 *See ibid*., 387-88.

91 Charter, *supra* note 3, at 12.

92 Judgment, *supra* note 3, at 223.

Article 27(1) of the Rome Statute essentially tows the line of the Nuremberg precedent in this regard.[93]

Obedience to Superior Orders

Article 8 of the London Charter enunciates:

> The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[94]

The proper meaning of this provision – when analyzed against the backdrop of its *travaux préparatoires* – is that the fact of obedience to superior orders must not play any part at all in the evaluation of criminal responsibility (in connection with any defence whatsoever), and it is relevant only for purposes of extenuation of punishment.[95] The IMT gave its imprimatur to the provision of Article 8, while adding that "the true test … is not the existence of the order, but whether moral choice was in fact possible".[96]

Article 33 of the Rome Statute departs from the Nuremberg precedent in establishing that obedience to superior orders may relieve a defendant of responsibility when certain cumulative conditions are fulfilled.[97] This solution to the problem is quite unsatisfactory.[98]

G. DUE PROCESS OF LAW

In the final analysis, the preponderant question relating to any trial is whether it was fair or, in other words, whether the defendants benefited from due process of law. In that crucial respect, there is no doubt that the Nuremberg trial passed muster.

Granted, the composition of the IMT was flawed because of the – inescapable – inclusion of the Soviet Judge, Nikitchenko. This was a surprising choice (by the Soviet Government) in the first place, in light of

93 Rome Statute, *supra* note 1, at 1017.
94 Charter, *supra* note 3, at 12.
95 *See* Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* 117 (1965).
96 Judgment, *supra* note 3, at 224.
97 Rome Statute, *supra* note 1, at 1019.
98 *See* Y. Dinstein, "Defences", I *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* 371, 381-82 (G.K. McDonald and O. Swaak-Goldman eds., 2000).

the fact that Nikitchenko had served as one of the negotiators of the text of the London Agreement – the only drafter of the Charter later returning as a Judge – and, in the course of the negotiations, he expressed his opinion that the major war criminals had "already been convicted" (before the trial started).[99] True to form, Nikitchenko ultimately dissented from all acquittals (either of individual defendants or of organizations) by the IMT, as well as from the non-imposition of the death sentence on Hess.[100] However, as his need to dissent indicates, Nikitchenko's views did not carry the day. The IMT resolved that all convictions required the minimum support of three out of the four Judges (meaning that all charges were dropped in case of a 2:2 tie vote),[101] and a Western consensus was basically the determining factor in the Nuremberg process.

Possibly the best illustration of the fair trial granted to the defendants was the unsuccessful cross-examination of Göring by Jackson. When Jackson made a tactical blunder, and tried to prevent Göring from offering full explanations (in a defiant and even sarcastic style) in response to questions posed in the cross-examination, the IMT gave the American Chief of Counsel no backing at all.[102] It was only when the British Deputy Chief Prosecutor, Sir David Maxwell-Fyfe, and the Soviet Chief Prosecutor, Rudenko, took over the cross-examination that the foundation was plainly established for Göring's eventual conviction.[103]

The fact that the IMT was not prepared to be a mere rubber stamp was underscored in the matter of the Katyn Forest massacre. The story is as follows.[104] In 1940, some 15,000 Polish officers – captured by the Red Army during the Nazi-Soviet partition of the year before – were executed by NKVD guards. In 1943, the Germans discovered mass graves of the Polish officers in the Katyn Forest (near Smolensk) and accused the Soviets of being the perpetrators of the crime (other mass graves were discovered decades later). Moscow claimed that the Polish officers were actually executed by the Nazis themselves in 1941, after the invasion of the USSR. There is no doubt today about the Soviet responsibility for the crime: in 1992 the Russian President, Boris Yeltsin, released documents proving that the

99 For the full statement, *see* W.R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946* 16-17 (rev. ed., 1999).

100 Judgment, *supra* note 3, at 342-64.

101 *See* Conot, *supra* note 6, at 488. A tie vote actually resulted in the acquittals of Papen and Schacht; the Fritzsche acquittal was secured by the votes of all 3 Western Judges. *See ibid*., 491-92.

102 For a detailed analysis of this famous episode, *see* Taylor, *supra* note 2, at 335-43.

103 *See ibid*., 344-46.

104 *See* "Katyn massacre", *The Oxford Companion*, *supra* note 29, at 644-46.

executions had been carried out under Stalin's direct orders. However, at the time when the Nuremberg trial was conducted (and long after), the Soviets still maintained the fiction of the Katyn Forest massacre being a German atrocity. At the Soviets' insistence,[105] the Indictment explicitly mentioned the mass-murder, placing it in September 1941.[106] Afterwards, evidence was submitted in order to support the thesis of German responsibility for the crime.[107] When defence counsel expressed his wish to call on witnesses to refute the charge, the Soviets objected, but the IMT allowed the testimonies (by a 3:1 vote).[108] Most pointedly, after all the altercations, the Judgment did not refer to the Katyn Forest massacre in a single word: "a silence which was, in its own way, thunderously loud".[109]

The Katyn Forest issue was essentially a factual bone of contention. There were equally legal issues resonating around the world on which the IMT was not willing to make any concession to Allied public opinion. The prime example is that of unrestricted submarine warfare, denounced as criminal throughout the War. The Indictment of the two German Admirals, Dönitz and Raeder, was grounded in part on "crimes against persons and property on the High Seas" or "war crimes arising out of sea warfare".[110]

In its Judgment, the IMT had this to say about Dönitz:

> In the actual circumstances of this case, the Tribunal is not prepared to hold Dönitz guilty for his conduct of submarine warfare against British armed merchant ships.[111]

The IMT did find that Dönitz's order to sink neutral ships without warning in certain maritime zones constituted a violation of international law; but, inasmuch as both the US and the UK had also conducted unrestricted submarine warfare, it elucidated that "the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare".[112] Of all the defendants, Dönitz drew the lightest sentence (10 years), and in fact one Judge (the American, Biddle) was in favour of his acquittal.[113] As for Raeder, the IMT made the same ruling about him in

[105] *See* Taylor, *supra* note 2, at 117, 124.
[106] Indictment, *supra* note 3, at 54.
[107] *See* Taylor, *supra* note 2, at 312-13, 467-68.
[108] *See ibid*., 468-69.
[109] "Nuremberg trials", *The Oxford Companion*, *supra* note 29, at 824, 827.
[110] Indictment, *supra* note 3, at 79-78.
[111] Judgment, *supra* note 3, at 312.
[112] *Ibid*., 313.
[113] *See* Conot, *supra* note 6, at 488-89.

connection with submarine warfare,[114] and his heavier sentence (life) is due to his guilt concerning other crimes.

H. CONCLUSION

Bearing in mind that the Nuremberg trial was almost an afterthought, that it was prepared in a hurry, and that it was concluded in record time (see above, B) – the degree to which the IMT's fundamental factual findings and legal conclusions have withstood the test of time is astonishing. It is true that, in certain respects, the state of the law has undergone some important changes in the Rome Statute (see above, C-F). However, these revisions do not detract from the immense achievement at Nuremberg. Some of them have yet to prove that they constitute an improvement upon the preexisting law. In one central respect (war of aggression), the framers of the ICC Statute failed to emulate the drafters of the London Charter in agreeing upon a working applicable definition.

It must be fully appreciated that, had it not been for the Nuremberg trial, it is unlikely that the ICC would have been set up. And it is a safe prognosis that it is going to take the ICC a long time before it merits the respect gained by the IMT in a single year of activity.

[114] Judgment, *supra* note 3, at 317.

THREATS FROM THE GLOBAL COMMONS: PROBLEMS OF JURISDICTION AND ENFORCEMENT

By Stewart Kaye *

I. INTRODUCTION

Oceans cover approximately 70 percent of the surface of the Earth. For international lawyers, this has long been an area which lay beyond the control of States. Prior to the advent of jurisdiction based on the continental shelf and the exclusive economic zone (EEZ), almost all of this area was beyond national jurisdiction. Only a tiny belt of sea of usually 3 to 4 nautical miles was subject to the direct control of a coastal State.[1] Even today under the 1982 United Nations Convention on the Law of the Sea[2] [hereinafter: Law of the Sea Convention] where coastal States can extend their jurisdiction to the seabed and waters around their littoral out to 200 nautical miles, and the seabed in limited circumstances to as much as 350 nautical miles,[3] two thirds of the world's oceans are beyond any national jurisdiction.

This paper considers the challenges facing coastal States attempting to combat threats to their security that pass through this vast area of high seas, in areas where the coastal State has no jurisdiction. It will consider the nature of the threats posed in these areas, and what tools international law provides States in order to respond to these threats. It will conclude by positing areas where further development may assist in improving the coastal State's ability to react in a timely and effective fashion to a threat in the global commons. However, before doing so, it is necessary to consider the limits of the global commons for the purposes of the paper.

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1 The United States, the British Empire and France all maintained 3 nautical mile territorial seas until after World War II. The Scandinavian countries asserted 4 nautical mile territorial seas from the late eighteenth century until after the War: *see* D.P. O'Connell, 1 *The International Law of the Sea* 131-38 (I.A. Shearer ed., 1982).

2 United Nations Convention on the Law of the Sea, 1982, 1834 *U.N.T.S.* 396. [hereinafter: Law of the Sea Convention].

3 Art. 76 of the Law of the Sea Convention (*ibid.*) deals with the limits of the continental shelf.

II. THE GLOBAL COMMONS

There are a number of different definitions possible for the extent of the oceanic global commons. One would be to limit the commons to areas entirely beyond national jurisdiction and control. This would include the deep seabed, referred to in the Law of the Sea Convention as the Area, consisting of all of the seabed outside the continental shelf of any State, and the waters beyond the EEZ of any State.[4] These are commons as jurisdiction is vested, in the case of the Area, in the International Seabed Authority as part of the common heritage of mankind,[5] and in the case of the high seas, jurisdiction by States is limited to vessels flying their flag, except in very specific and limited circumstances.

Yet in a number of ways, restricting the global commons to these areas does not adequately indicate the freedom from State jurisdiction that is available even in the waters of the EEZ. The EEZ only gives a coastal State jurisdiction over economic activity, marine scientific research and environmental matters.[6] It does not give a coastal State jurisdiction to interfere with freedom of navigation, the laying of submarine cables or pipelines, or to stop and board vessels unless they infringe coastal State laws concerned with the EEZ.[7] This means that even if a foreign vessel had individuals aboard who had committed serious crimes against the coastal State, it would not be open for the coastal State to apply its law to the vessel. In some respects then the EEZ remains an area of commons, even though the coastal State may still be able to regulate economic activities such as mining and fishing. A similar situation is reflected for aerial navigation, as the airspace over the EEZ and high seas is international airspace, where there is a right of freedom of aerial navigation.[8]

In the context of this paper, the global commons will be treated as areas where the activities of vessels not subject to a flag State cannot, for the most part, be regulated. This will certainly include the high seas, but would also encompass the EEZ, where although the coastal State would possess the right to protect economic activities, it would lack the jurisdiction to regulate most other actors and activities, from whence a threat may come.

4 *Ibid*., Art. Art. 1(1).
5 *Ibid*., Art. 136.
6 *Ibid*., Art. 54.
7 *Ibid*., Art. 58(1).
8 *Ibid*., Art. 58(1).

III. THREATS FROM THE GLOBAL COMMONS

There are two distinct areas of threat posed that come from the high seas. The first comes from threats against the ports and territory of a coastal State that originates from the sea. Such threats might be through the shipment of WMD or related delivery systems through to a port for use against a State or its allies, or the use of a vessel in a direct attack. In the latter case, this could be from a naval vessel, or could be accomplished using a commercial vessel which has been chartered, commandeered or hijacked and which is destroyed in the port of a State to cause damage to facilities or human life.

The first type of attack has yet to occur in the West, although it has occurred in the Middle East against Western interests.[9] Even so, threats from shipping have been the focus of a tremendous amount of planning and cooperative effort internationally. The Proliferation Security Initiative[10] and the ISPS Code[11] at an international level, or the United States' Container Security Initiative[12] internally, are excellent examples of responses to this direct threat from the sea. States have moved cooperatively to put in place legal measures designed to protect shipping and maritime infrastructure from terrorist threats, and to better cooperate in sharing data and intelligence.[13] Significant progress in these areas has been made in a relatively short space of time, especially considering the scale and reach of the measures within the ISPS Code, and that they were adopted and functioning well inside of five years from the 9/11 attacks.[14]

The first type of threat in some ways is relatively easily dealt with from a legal point of view. Once a vessel enters the port of a State, unless it is

9 For example, the separate attacks in Aden harbour against the French flagged tanker MV Limburg and the destroyer USS Cole would fall into this category: *see* J. Romero, "Prevention of Maritime Terrorism: The Container Security Initiative", 4 *Chi. J. Int'l L.* 597, 598 (2003).

10 *See* S. Kaye, "Proliferation Security Initiative in the Maritime Domain", 35 *Israel Y.B. Hum. Rts.* 205 (2005).

11 R.B. Bralliar, "Protecting U.S. Ports with Layered Security Measures for Container Ships", 185 *Mil. L. Rev*. 1, 23-35 (2005).

12 *See* Romero, *supra* note 9; M. Noortmann, "The US Container Security Initiative: A Maritime Transport Security Measure or an (inter)National Public Security Measure?", 10 *Ius Gentium* 139 (2004).

13 *See* M.A. Becker, "The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea", 46 *Harv. Int'l L.J.* 131 (2005); Justin S.C. Mellor, "Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism", 18 *Am. U. Int'l L. Rev.* 341 (2002).

14 *See generally* R. Balkin, "The International Maritime Organization and Maritime Security", 30 *Tul. Mar. L. J.* 1 (2006); T.J. Schoenbaum & J.C. Langston, "An All Hands Evolution: Port Security in the Wake of September 11th", 77 *Tul. L. Rev.* 1333 (2003).

sovereign immune, it becomes subject to the regulation of the port State, whose criminal laws can be applied to activities taking place on board.[15] An attempt to ship WMD into a port would attract the jurisdiction of the port State, and enforcement action against the ship could be taken inside the port by local authorities. Even if the offending vessel is sovereign immune, it can be asked to vacate the port and the territorial waters of the port State, and must comply in an expeditious fashion, and giving rise to a valid claim for damages against the flag State for any breaches of the law of the port State committed by the vessel.[16]

Port States can also close the port to international traffic, or refuse vessels entry for failure to comply with entry requirements. For example, the Australian Maritime Identification System requires vessels to provide data to Australian authorities of the vessel's crew, cargo, route and previously visited ports. This data is sought when the vessel is within 1000 nautical miles of the Australian continent. Although there is no territorial jurisdiction to enforce such a measure, it has been effective because failure to provide the data may see the vessel refused entry to the port, and subsequent arrest if it enters the territorial sea with an intention to proceed to its intended port. The right of entry becomes tied to additional conditions, which can be used to improve security, and give operators a clearer picture of the maritime security environment in adjacent waters. [17]

The second type of threat is one directed at activities in the global commons. Activities in the commons include transportation, fishing, oil and gas exploitation and communications via submarine cable. Each of these activities is vulnerable to attack from ships and aircraft on a range of levels, and it is appropriate to consider each in turn.

Attacks on ships at sea have been a feature of maritime transportation since ancient times. The legal concept of piracy is of great antiquity, and the ability of States to deal with piratical acts against their shipping is quite extensive.[18] The Law of the Sea Convention, codifying existing customary international law, provides for universal jurisdiction over vessels engaged in piracy, provided that enforcement action takes places by marked government vessels in areas outside the territorial sea of third States.[19] This potentially

15 *See* Wildenhus' Case, 120 *U.S.* 1, 12 (1887).

16 Law of the Sea Convention, *supra* note 2, Art. 31.

17 N. Klein, "Legal Implications of Australia's Maritime Identification System", 55 *Int'l & Comp. L.Q*. 337 (2006); C. Moore, "Turning King Canute into Lord Neptune: Australia's New Offshore Protection Measures", 3 *U. New Eng. L. Rev*. 1 (2006).

18 I.A. Shearer, *Starke's International Law* 247-50 (1994) H. Lauterpacht, 1 *International Law: A Treatise* 557-67 (1948).

19 Law of the Sea Convention, *supra* note 2, Art. 107 and Art.110.

gives great freedom of action to flag States to use their armed forces to protect their shipping from pirate activity.

In practice, the availability of universal jurisdiction to deal with piracy has been limited by two key factors. Firstly, universal jurisdiction over piracy is limited to incidents taking place outside the territorial sea. The Law of the Sea Convention retains the paramountcy of the coastal State's sovereignty within the territorial sea, and consistent with the regime of innocent passage, third State vessels lack the power to effect an arrest of a pirate vessel in these waters.

The second factor is of greater relevance to recent concerns over security. The traditional definition of piracy is the attacking of a vessel in pursuit of personal profit.[20] This motivation for profit distinguishes piratical acts from activities with a purely political motivation. Since terrorists are generally not motivated in their attacks by the possibility of personal profit, but rather the advancement of a political cause or the desire to frighten and disrupt lawful activities, it has been accepted that terrorist acts at sea do not fall under the umbrella of piracy.

While attacks on shipping present a threat from the global commons, there are other different threats posed to other activities taking place in the world's oceans. Oil and gas exploitation of offshore fields means that there are large and expensive facilities permanently moored in areas remote from coastal areas. These platforms, loading facilities and pipelines are extremely vulnerable to hostile action. They are exploiting and storing quantities of flammable gases or liquids, which could be set alight by terrorist action, or alternatively could be the source of significant environmental harm.

Terrorist attacks against oil and gas platforms have not taken place, although the occupation of Brent Spar by Greenpeace in 1995[21] demonstrated the relative ease with which terrorists could occupy an offshore platform and the difficulties inherent in their removal. Attacks against oil and gas facilities have taken place in the context of armed conflicts, and the facilities are particularly vulnerable. The lack of a terrorist attack has not prevented international concern over the potential threat, and has led to international law providing coastal States and others having greater powers to provide protection for such facilities.

Submarine cables and pipelines are also an example of vulnerable assets in the global commons. All States have the right to lay cables and pipelines along the sea floor outside the territorial sea. These cables and pipelines cannot be restricted by the coastal State, although there is a right for coastal

20 *Ibid.*, Art. 101.

21 *See*: http://www.greenpeace.org/international/about/history/the-brent-spar.

States to be consulted with respect to the route such cables or pipelines might take. As with oil and gas platforms, a concrete terrorist threat against these facilities has yet to occur, but the possibility of damage and disruption is not insignificant. Terrestrial attacks against pipelines in Iraq and Nigeria have caused rises, albeit temporary, in world oil prices.[22] Attacks against submarine pipelines would have the added difficulties of causing widespread environmental harm, possibly to the EEZ of another State, and be far more expensive and difficult to repair. Submarine cables, especially fibre optic cables, still carry the bulk of the world's telephonic and electronic data, and their disruption could harm world communication in some areas for an extended period.[23]

In both cases, the risk of harm from attack is not insubstantial. The locations of pipelines and cables are marked on commercially available charts, and the coordinates of cables can be downloaded from the Internet without cost. This is because both pipelines and submarine cables are vulnerable to accidental damage, and there is a concern that mariners should avoid causing this harm. The practical upshot of this legitimate and sensible precaution is to make the targeting of such facilities much easier for those engaged in potential terrorist activities against them.

IV. RESPONSES

International law has for many years permitted ships and flag States to protect themselves from attack. The fact that piracy attracts universal jurisdiction in areas beyond the territorial sea emphasises this fact. Any ship that is subjected to an attack by pirates outside the territorial sea can receive assistance and the pirates are taken into custody by the warships of any other State.

In the context of responding to attacks on its nationals or ships flying its flag, a flag State has a right of self-defence, and can take steps to protect individuals and ships. This would permit naval escort of ships by the flag State and a right to take action to protect the ship from attack. Difficulties

[22] *For example see* J. Wilson, "Iraq hit by Fresh Attack on Oil Pipeline", *The Guardian* (London), Aug. 18, 2003, *available at:* http://www.guardian.co.uk/Iraq/Story/0,,1020878,00.html;
E. Harris, "Nigerian Militants attack Oil Pipeline, Boat, Deseret Times (Salt Lake City)", Feb. 21, 2006 *available at:* http://www.findarticles.com/p/articles/mi_qn4188/is_20060221/ai_n16162905.

[23] *For example*, the value of submarine cables to Australia alone has been estimated at just under US $4 billion per year to the national economy; *see*: http://www.acma.gov.au/acmainterwr/_assets/main/lib100668/information%20sheet.pdf.

may arise where a State's nationals are aboard vessels that are flagged to another State. This makes efforts at protection problematic, and would require the flag State to consent to warships of another State providing protection. However the provision of protection to other flagged vessels is by no means impossible with such consent, and there is ample precedent for it during times of armed conflict.[24] Such difficulties were avoided during the Iran-Iraq War when, after tankers entering the Persian Gulf had come under fire from Iran, the United States Navy provided escort protection to Kuwaiti-flagged vessels.

In the context of protecting shipping from terrorist attack, a separate instrument was negotiated under the auspices of the IMO to facilitate a response. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation[25] [SUA Convention] was negotiated as a direct result of the 1985 hijacking of the Italian liner *Achille Lauro*.[26] The necessity for an international response was manifested in part because of differences within the international community as to whether the attack constituted piracy. This was because of the requirement that piracy be for "private" ends, and the fact that the group that attacked the vessel, the Palestinian Liberation Front, staged the attack for political purposes. Other States, including the United States, considered the attack amounted to piracy, and were concerned that responses to an incident of this type might be undermined if it were not considered a piratical act.[27] Obviously, with this difference of view, it was necessary to create an international instrument to clarify the response to what was still manifestly an illegal act.

In 1988, the response adopted was the SUA Convention. It dealt with certain acts against shipping, including seizing a ship, acts of violence against individuals on a ship, damage to a ship or its cargo so as to endanger its safe navigation, endangerment of the safety of a ship by interfering with maritime navigational facilities or sending a false signal.[28] The purpose motivating the acts is not relevant, and therefore there would be some overlap with piracy, although the scope of the SUA Convention is

24 For example, Allied convoys during both World War I and World War II were escorted by a range of Allied warships and contained a variety of Allied merchant shipping.

25 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 *U.N.T.S.* 201 [hereinafter: SUA Convention].

26 M. Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety", 82 *A.J.I.L.* 347, 349 (1985). The IMO adopted in 1985 Int'l Maritime Org. [IMO] G.A. Res. A. 584(14) to encourage States to take measures to combat terrorist activity against ships.

27 S.P. Menefee, "Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity", 5 *ILSA J Int'l & Comp. L.* 309, 310-13 (1999); Haberstam, *supra* note 26, at 270-91.

28 SUA Convention, Art. 3, *supra* note 25.

necessarily much wider. The SUA Convention applies to ships that have journeyed outside the territorial sea of a single State, or are scheduled to pass outside the territorial sea.[29] Parties to the SUA Convention have jurisdiction to deal with such offences, based on the ship's presence in their territorial sea, possession of their flag or other means.[30] However, the SUA Convention did not deal directly with the boarding of vessels where jurisdiction might be asserted by another State. The Preamble of the SUA Convention provides "matters not regulated by this Convention continue to be governed by the rules and principles of general international law", which would limit non-flag State intervention to acts covered under Article 110 of the Law of the Sea Convention, in this context, acts of piracy.[31] There are also provisions to allow for either prosecution or extradition of individuals believed to have committed offences.[32]

In 2005, the SUA Convention was amended, with a new protocol pertaining to maritime terrorism against shipping.[33] The focus of the 2005 SUA Convention amendments is weapons of mass destruction (WMD) and their non-proliferation.[34] New offences were created, including using a ship as a platform for terrorist activities,[35] and the transportation of a person who has committed offences under the SUA Convention,[36] or any of another nine listed anti-terrorism conventions.[37] The 2005 SUA Convention amendments also widen the scope for third party boarding of ships, although flag State authorization is still required for such a boarding.[38]

States also were of the view that maritime terrorism need not be limited to ships, but could also be directed at offshore oil and gas installations. This

29 *Ibid*., Art. 4.

30 The SUA Convention also contemplates jurisdiction based on passive personality, or attempted coercion of the State concerned: SUA Convention, *supra* note 25, Art. 6.

31 The deficiency was to some extent addressed by Art. 8 of the SUA Convention, which provided a mechanism for the master of a vessel to hand individuals over to a "receiving State", other than the flag State: *ibid*., Art. 8.

32 *Ibid*., Art. 10.

33 Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Feb. 14, 2006, IMO Doc. LEG/CONF. 15/21. [hereinafter: 2005 SUA Convention Amendments].

34 *Ibid*., Art. 3*bis*.

35 *Ibid*., Art. 3*bis*(1)(a)(3).

36 *Ibid*., Art. 3*ter*.

37 *Ibid*., Annex.

38 *Ibid*., Art 8. *See* the discussion in T.L. McDorman, "Maritime Terrorism and the International Law of Boarding Vessels at Sea: Assessing the New Developments", *Paper Presented at the Law of the Sea Symposium, UC Berkeley* (Feb.10, 2006).

led to the adoption of the Protocol to the SUA Convention[39] which dealt with similar acts against offshore petroleum installations at the same time as the SUA Convention.[40]

The SUA Protocol applies to "fixed platforms" which is liberally defined to include all petroleum producing structures.[41] It also limits application to facilities on the continental shelf, and this excludes the application of the Protocol to installations in the territorial sea of a coastal State, in the ordinary course of events.[42] The offences under the SUA Protocol are analogous to those under the SUA Convention. These include seizing a platform by force, destruction or damage threatening the safety of a platform, the placing of a device designed to damage or destroy or endanger safety of a platform, or threats, intimidation, or acts of violence against persons aboard a platform.[43]

States under the SUA Protocol have a similar jurisdictional envelope as under the SUA Convention. The Law of the Sea Convention makes it clear that States have jurisdiction over offences taking place on fixed platforms on their continental shelf, and this is confirmed in the SUA Protocol.[44] Under the SUA Protocol, States also have jurisdiction based on the nationality of an offender, or a victim, by stateless individuals, or if it is intended to coerce the State concerned.[45]

The 1988 SUA Protocol does not deal with the issue of boarding of fixed platforms, and as with the SUA Convention, the Preamble reiterates “that matters not regulated by this Protocol continue to be governed by the rules and principles of general international law”, limiting apparently direct unilateral intervention against acts against platforms to the coastal State. This was to ensure that a coastal State would retain sole jurisdiction over activities on its platforms, and another State could not assert it had a right to board a platform, based on having jurisdiction over an offence. The absence

39 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, 1678 *U.N.T.S.* 304 [hereinafter: SUA Protocol].

40 H. Esmaeli, *The Legal Regime of Offshore Oil Rigs in International Law* 132 (2001).

41 The definition includes artificial islands, installations and structures engaged in exploration or exploitation of the seabed or some other economic purpose: SUA Protocol, *supra* note 39, Art. 1,.

42 *Ibid*., Art. 1(2).

43 *Ibid*., Art. 2(1). The offences include attempting, abetting and threatening to commit an offence. *Ibid*., Art. 2(2).

44 Given Art. 60 of the Law of the Sea Convention (*supra* note 2) gives a coastal State exclusive jurisdiction to regulate the operation and use of an installation, and the Protocol does not displace general international law upon matters to which it does not address itself: *Ibid*., Preamble.

45 *Ibid*., Art. 3.

of a provision would not prevent a coastal State giving a third State an *ad hoc* authorization to board its installation.

The SUA Protocol was also amended by Protocol in 2005,[46] with amendments similar in nature to the 2005 SUA Convention amendments. New offences including using explosives or radioactive material or a BCN weapon to cause death, serious injury or damage to an installation,[47] releasing oil or gas from an installation in a manner calculated to cause death, serious injury or damage,[48] or the threat to commit such offences,[49] are created.[50] State party must apply their jurisdiction to its nationals and fixed platforms on its continental shelf in respect of these offences.[51] Much of the rest of the SUA Convention and 2005 amendments in relation to extradition, cooperation concerning data and evidence and domestic implementation are applied by the 2005 Protocol *mutatis mutandis*.[52]

The 2005 SUA Convention amendments and Protocol amendments will enter into force after the twelfth ratification without reservation[53] for the Convention amendments[54] and ninety days after the third ratification without reservation[55] for the Protocol amendments.[56] Given the current wide participation in the SUA Convention and SUA Protocol, both the Convention amendments and Protocol amendments are likely to enter into force relatively quickly.

Responses in relation to the protection of submarine cables and pipelines have been less forthcoming. The Law of the Sea Convention does provide that a coastal State must be consulted over the route a cable or pipeline on its continental shelf may take, but not that the coastal State has jurisdiction over the cable or pipeline.[57] If a cable or pipeline owned by a coastal State or its nationals were damaged, the Law of the Sea Convention provides that the

46 Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, Feb. 14, 2006, IMO Doc. LEG/CONF. 15/22 [hereinafter: 2005 SUA Protocol Amendments].

47 *Ibid*., Art. 2*bis* (a).

48 *Ibid*., Art. 2*bis* (b).

49 *Ibid*., Art. 2*bis* (c).

50 *Ibid*., Art. 2*ter*.

51 *Ibid*., Art. 3 (1).

52 *Ibid*., Art. 1.

53 2005 SUA Convention Amendments, Art. 18, *supra* note 33.

54 Only State Parties to the SUA Convention who have made no reservations to the application of that Protocol can become parties to the 2005 SUA Convention Amendments: *ibid*., Art. 17.

55 2005 SUA Protocol Amendments, Art. 9, *supra* note 46.

56 Only State Parties to the SUA Protocol who have made no reservations to the application of that Protocol can become parties to the 2005 SUA Protocol amendments: *Ibid*., Art. 8.

57 Law of the Sea Convention, *supra* note 2, Art. 79.

flag State of the vessel or the nationality of the offender responsible gives a State jurisdiction to deal with the harm caused.[58] A coastal State could only assert jurisdiction in the event the damage to the cable or pipeline also caused harm to the environment, on the basis of the coastal State's EEZ jurisdiction.

A coastal State asserting jurisdiction over an attack on a pipeline presents more options than the situation for submarine cables. An attack on an oil pipeline would probably cause environmental damage, and therefore provide a basis for a coastal State to assert its jurisdiction.[59] Article 79(4) of the Law of the Sea Convention creates an implication that a coastal State can make laws dealing with leaks from pipelines.[60]

A coastal State might also respond to an attack on a cable or pipeline on the basis of self-defence. To do so it would need to demonstrate the importance of the threatened infrastructure to itself, and that use of force is proportionate in the circumstances. This will always be a question of fact, and would be dependent upon the cable being vital telecommunications infrastructure, or a pipeline carrying essential oil or gas for the national economy.[61] Even in those circumstances, an isolated attack, not immediately detected by the coastal State, or indeed other States using the cable or pipeline might make it difficult to justify a response involving the use of force.

One way to increase the ability of States to respond to attacks on pipelines and submarine cables might be to base an argument upon Article 3*bis*(1)(a)(iii) of the 2005 SUA Convention amendments. This provision creates an offence where an individual "uses a ship" to cause damage.[62] If the employment of a ship to aid terrorists in attacking a cable or a pipeline could be described as a "use" of a ship in the context of Article 3*bis,* then there could be jurisdiction. It is submitted that such a wide definition is almost certainly beyond the anticipated scope of the offence. If the definition could sustain such stretching, the consent of the flag State would still be required to affect a boarding,[63] and the flag State be a party to the 2005 SUA Convention amendments.

58 *Ibid*., Art. 113.

59 *Ibid*., Art. 79(4).

60 *See* discussion in 2 *United Nations Convention on the Law of the Sea: A Commentary* 909-17 (M. H. Nordquist ed., 1993).

61 *For example see* W.M. Reisman, "International Legal Responses to Terrorism", 22 *Hous. J. Int'l L.* 3, 55-58 (1999); D. Brown, "Use of Force Against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses", 11 *Cardozo J. Int'l & Comp. L.* 1, 40-41 (2003).

62 2005 SUA Convention Amendments, *supra* note 33, Art. 3*bis*(1).

63 *Ibid*., Art. 8*bis*(5)(b).

Placing jurisdiction over pipelines and submarine cables outside the territorial sea under the Law of the Sea Convention in the control of the flag State of the offending vessel is problematic. If terrorists attacked a pipeline or cable with a chartered vessel, perhaps a fishing trawler, the vessel may well be flagged in a State with an open registry. This would substantially undermine the prospects of enforcement action, as it is clear that a number of States with open registries that have attracted fishing vessels, such as Georgia, Togo or Equatorial Guinea,[64] have no capacity to deal with attacks even close to their coasts.

The reliance on flag State jurisdiction in the context of cables and pipelines serves to highlight a broader problem, that is, the limitations of flag State jurisdiction over vessels. While the jurisdiction of a flag State remains the paramount mechanism to determine the applicable law aboard a vessel, and the connection to flag States can be so diffuse as to be meaningless in the case of States with open registries, it is difficult to see that effective enforcement at sea can take. Flag of convenience States have no capacity to enforce their laws on ships flying their flag around the world, and may have little incentive to cooperate with other States to remedy the deficiency. The United States has sought to tackle the problem in the context of the PSI with boarding agreements with a number of States with open registries, including Liberia and Panama,[65] these fall short of permitting boarding in a wider range of circumstances.

V. CONCLUSION

The international community has shown great energy in tackling threats in the global commons. The SUA Convention and Protocol in their 2005

64 These States were identified by the Commission on the Conservation of Antarctic Marine Living Resources as "flags of non-compliance" in 2005. *See* CCAMLR Annual Report, Annex 5: *available at:* http://www.ccamlr.org/pu/e/e_pubs/cr/05/a5.pdf.

65 Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea, done at Washington DC on 11 February 2004; provisionally applied from 11 Feb. 2004: *repr. at*: http://www.state.gov/t/np/trty/32403.htm.
Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, done at Washington DC on 12 May 2004; provisionally applied from 12 May 2004; *repr. at*:
http://www.state.gov/t/np/trty/32858.htm.

iterations represent a substantial and positive step forward in the legal protection of ships and platforms in the global commons beyond the territorial sea. However, it is apparent that States have yet to create protection for the totality of activities that take place beyond the territorial sea. Adequate jurisdictional mechanisms to ensure an effective response to attacks on submarine cables and undersea pipelines do not exist, nor does it appear there are international efforts in progress to remedy the situation. It can only be hoped that it is not the reality of an attack that acts as the catalyst to produce positive change in these areas.

THE UNITED STATES SUPREME COURT AND DETAINEES IN THE WAR ON TERROR

By Michael N. Schmitt[*]

INTRODUCTION

Internationally, few issues have so divided the United States and other nations, including many of its closest allies, as US detainee policies.[1] Domestically, especially with military commission trials now underway, the controversy is a growing *cause célèbre.* Proponents of the Bush administration's detention policies claim that tough measures are essential in the face of shadowy transnational terrorists who embrace surprise attacks on the innocent as both a tactic and strategy. Opponents decry the policies as blatant violations of domestic civil liberties, international human rights law, and the law of war. For them, the baby is being thrown out with the bathwater.

The truth usually lies between the extremes in such highly charged matters. In a democracy, it is the judicial branch of government which typically serves to ensure an appropriate balance between societal security concerns and individual rights. Since the watershed events of September 11th, the US judiciary has been actively involved in monitoring that balance. On four occasions, the United States Supreme Court has entered the fray. In three, it rendered a decision that limited, albeit cautiously, the Bush Administration's policies and upheld, somewhat tentatively, the rights of detainees to question their detention. This willingness to interject itself into national security matters is striking for a court which typically defers to the Executive Branch in international affairs.[2] It is made all the more remarkable

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Current as of 2 Apr. 2007. The views expressed herein are those of the author in his personal capacity and should not be interpreted as necessarily representing those of the United States government.

1 For a useful overview of the law of war and the historical treatment of wartime detainees, *see* J.K. Elsea, "Treatment of 'Battlefield Detainees' in the War on Terrorism", CRS Report for Congress (updated Nov. 14, 2006).

2 Deference to the other branches derives from the "political question doctrine". Such questions are deemed nonjusticiable. The Supreme Court has explained the doctrine as follows:

by the conservative composition of the Court – seven of the nine were nominated by Republican Presidents, two of them by President George W. Bush.[3]

This extended case(s) note surveys the four cases – *Hamdi*, *Rasul, Padilla* and *Hamdan*.[4] The issues were legally challenging and politically emotive. Two of the cases involved the detention of US citizens as enemy combatants. They differed in that Hamdi was captured abroad while allegedly serving with the Taliban, whereas Padilla was detained in the United States for intending to engage in domestic terrorism. The other two cases revolved around the detention of aliens at US Naval Station Guantanamo Bay in Cuba. *Rasul* considered their rights to review of their detention. The most recent case, *Hamdan*, assessed the legality of the military commissions convened to try a handful of the Guantanamo detainees, primarily for law of war violations. Interestingly, Congress twice reacted to the Supreme Court detainee decisions by passing purportedly curative legislation – the 2005 Detainee Treatment Act and the 2006 Military Commissions Act.[5] The former has already been the subject of limited Supreme Court review; the latter is likely to be so in the near future.

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Baker v. Carr (1962), 369 *U.S.* 186, 217.
>
> For a discussion of deference to the Executive Branch co-authored by one of the architects of the Administration's detainee policies, *see* J. Ku & J. Yoo, "Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch", 23 *Constitutional Commentary* 179 (2006).

3 Chief Justice Rehnquist (deceased) and Justice O'Conner (retired) participated in the early decisions here under consideration. They were replaced by Chief Justice Roberts and Justice Alito respectively. Both Rehnquist and O'Connor were nominated by Republican Presidents.

4 Hamdi v. Rumsfeld (2004), 542 *U.S.* 507; Rasul v. Bush (2004), 542 *U.S.* 466; Rumsfeld v. Padilla (2004), 542 *U.S.* 426; Hamdan v. Rumsfeld (2006), 126 *S. Ct.* 2749.

5 Detainee Treatment Act, Pub. L. No. 109-148, 119 *Stat.* 2739 (2005) [hereinafter: DTA]; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 *Stat.* 2600 (2006) [hereinafter: MCA].

What will become immediately apparent is that the Supreme Court sat in these cases as a distinctly US tribunal interpreting and applying US law. To the extent it considered international law, it did so as that law was incorporated into US legislation, referenced in US legislative standards, or interpreted by the Bush administration. In none of the four cases did the Court ever directly refer to international law on the merits absent some direct nexus to US law. The markedly US-centric approach of the Court will disturb some as exemplifying US exceptionalism; others will reply that this is precisely how the highest court in the land should have approached the cases.[6] In any event, those hoping the Court would address international law in a robust fashion, as, for instance, the Israeli Supreme Court often does, will be disappointed.[7] On the other hand, those interested in observing how a democracy's high court can play a "restrained restraining" role in maintaining a delicate separation of power schema are sure to be fascinated.

Hamdi v. Rumsfeld
(Detention of a US Citizen Captured Abroad as an Enemy Combatant[8])

In June 2004, the Supreme Court addressed two questions: the legality of detaining a US citizen as an enemy combatant within the United States and the degree of "due process" to which such an individual is entitled.[9] Yasar Ermin Hamdi was born in the United States as a US citizen, but soon thereafter moved to Saudi Arabia, where he grew up. In 2001 he was captured by the Northern Alliance in Afghanistan and turned over to US forces. He was subsequently transferred to the detention facility at the US Naval Station Guantanamo Bay, Cuba. Upon discovering that Hamdi was a

6 Pursuant to the U.S. Constitution, the federal judiciary exercises power over "all cases, in law and equity, arising under this Constitution, the laws of the United States, *and treaties* made, or which shall be made, under their authority…" (emphasis added); Art. III, § 2.

7 *For example*, *see* the robust discussion of direct participation in H.C. 796/02, The Public Committee Against Torture in Israel v. Government of Israel (2005), or the discussion of occupation law (and the Court's case-law thereon) in H.C. 7957/04, Mara'abe v. Government of Israel (Alfei Menashe Case) (2005). English translations of the decisions are available on the Court's website at: http://elyon1.court.gov.il/eng/home/index.html.

8 For an overview of this topic, including historical background, *see* Elsea, *supra* note 1 (updated Mar. 31, 2005).

9 Due process is the requirement to conduct legal proceedings according to the principles and laws which protect individual rights. Constitutional due process in federal courts derives from the mandate that: "No person shall be … deprived of life, liberty, or property, without due process of law…."; U.S. Const. Amend. V.

US citizen, authorities transferred him, first to a military confinement facility (brig) in Norfolk, Virginia, and later to one in Charleston, South Carolina.

Hamdi's father filed a petition for a writ of *habeas corpus* in the federal District Court for the Eastern District of Virginia on behalf of his son, alleging that Hamdi's detention violated the due process clauses of the US Constitution's Fifth Amendment.[10] Claiming that Hamdi had been in Afghanistan for less than two months at the time of his capture, and that he had been doing "relief work", the petition asserted that it was unconstitutional to hold a US citizen without charges, trial, or access to counsel. Other grounds for challenge included alleged violation of the Non-Detention Act,[11] an assertion that the law of war required release because the international armed conflict with Afghanistan had ended with the installation of Hamid Karzai as President,[12] and that, even if the war was not over, Article 5 of the Third Geneva Convention required that Hamdi be treated as a prisoner of war until a competent tribunal determined otherwise.[13] In response, the Government argued that Hamdi's status as an "enemy combatant" justified indefinite detention in the United States without trial.

The District Court appointed counsel for Hamdi and ordered that he be allowed to meet with his client. The Fourth Circuit Court of Appeals reversed and remanded the case to the District Court with instructions to be deferential to the Government's security and intelligence interests. Upon

[10] A writ of *habeas corpus* is a legal action by which a detainee is ordered brought before the issuing court to assess (most typically) the lawfulness of his or her detention. The detainee seeks the writ by means of a petition to the court. The petition in *Hamdi* was filed in the Eastern District of Virginia because the District Court there has jurisdiction over Arlington, Virginia, where the Pentagon is located and where Secretary Rumsfeld works.

[11] The act provides that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress". Non-Detention Act, 18 *U.S.C.* §4001(a) (2000). *See* discussion *infra*.

[12] Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, 75 *U.N.T.S.* 135, Art. 118 ("released and repatriated without delay after the cessation of hostilities") [hereinafter: GC III]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *U.N.T.S.* 287, Arts. 132 and 133 ("as soon as the reasons which necessitated his internment no longer exist"… "as soon as possible after the close of hostilities") [hereinafter: GC IV]. *See also* I *Customary International Humanitarian Law Study*, Rule 128 (ICRC, J.-M. Henckaerts & L. Doswald-Beck eds., Cambridge U.P., 2005) [hereinafter: CIHLS].

[13] GC III, *supra* note 12, Art. 5:

> Should 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.

remand, the Government, in evidentiary support of its position, produced a statement by Michael Mobbs, the Special Advisor to the Under Secretary of Defense for Policy. Such a statement has since become known as a "Mobbs Declaration".

Mobbs stated that he was familiar with the procedures governing Al Qaeda and Taliban detainees and, having reviewed the relevant records, was aware of the circumstances of Hamdi's capture and detention. In the only evidence of Hamdi's activities made available to the Court, Mobbs alleged that Hamdi went to Afghanistan, joined a Taliban unit, received training, remained in Afghanistan with the unit after hostilities commenced, and was armed when he surrendered to the Northern Alliance. The District Court rejected the Mobbs Declaration as overly generic and as hearsay. It then ordered the production of specified evidence for *in camera* examination.

On appeal, the Fourth Circuit reversed, holding that there was no need to conduct further factual inquiry because it was undisputed that Hamdi was "captured in a zone of active combat in a foreign theatre of conflict".[14] According to the appellate court, the Mobbs Declaration contained sufficient information on which to find that the President had detained Hamdi constitutionally; therefore, it directed dismissal of the *habeas* petition. The Supreme Court granted certiorari.[15]

Justice O'Conner authored the plurality opinion for the Court, which was joined by Chief Justice Rehnquist and Justices Kennedy and Bryer. She began by framing the issue as "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants'".[16] Noting that the Government had never provided the courts with the criteria it used to classify individuals as enemy combatants, the plurality adopted, for the purposes of this case, the definition proffered by the Government: "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in armed conflict against the United States'".[17]

The Government argued for Executive authority to detain US citizen enemy combatants on two bases. First, it insisted that Article II of the US

14 Hamdi v. Rumsfeld, 316 *F 3d* 450, 475 (4th Cir. 2003).

15 Certiorari is a writ issued by an appellate court directing a lower court to deliver its record in the case for review. The U.S. Supreme Court generally issues writs of certiorari when it accepts cases for review.

16 Hamdi v. Rumsfeld, *supra* note 4, at 516. The United States government consists of the Executive, Legislative, and Judicial Branches. The Executive Branch administers the government and carries out laws passed by the Legislative Branch. The President heads the Executive Branch, which consists, *inter alia*, of the various departments. The Department of Defense and the armed forces fall within this Branch.

17 *Id.*

Constitution, which sets out the powers of the President and designates him Commander-in-Chief, inherently includes the power to detain enemy combatants.[18] The Court avoided ruling on that assertion, since, applying the doctrine of "judicial restraint", it was able to dispose of the case on the second, non-constitutional, basis. In its eyes, Congress had "explicitly" authorized detentions in the September 2001 Authorization for Use of Military Force (AUMF), the legislation by which it granted the President authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" (of September 11th) or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States".[19] For the Court, "detention of individuals falling into the limited category [it was] considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted as an incident of war as to be an exercise of the 'necessary and appropriate' force Congress authorized the President to use" in the AUMF.[20] This finding put to rest Hamdi's primary argument that his detention violated a provision of US law providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress".[21]

In arriving at its conclusion, the Court pointed to the well-accepted precept of the law of war that the purpose of capture and detention of combatants is to prevent them from returning to the battlefield. It further noted that Hamdi's US citizenship did not bar holding an individual as an "enemy belligerent". After all, "such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict" as would a non-citizen detainee.[22] The Court also pointed to the landmark case of *Ex parte Quirin*, which involved the capture of eight German saboteurs in the United States during the Second World War, noting that one of them had alleged, without effect, that he was a naturalized US citizen.[23]

18 "The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States"; U.S. Const. Art II, §2. Congress has explicit Constitutional authority over certain matters related to armed conflict. For instance, it may "declare War … and make Rules concerning Captures on Land and Water", "define and punish … Offences against the Law of Nations", and "make Rules for the Government and Regulation of the land and naval forces". U.S. Const. Art. I, § 8, cls. 10, 11, 14.

19 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 *Stat*. 224 (2001).

20 Hamdi v. Rumsfeld, *supra* note 4, at 518.

21 Non-Detention Act, *supra* note 11.

22 Hamdi v. Rumsfeld, *supra* note 4, at 519.

23 *Ex parte* Quirin *et al*. (1942), 317 *U.S.* 1.

But if Hamdi could be held as an enemy combatant, was it permissible to hold him indefinitely? Accurately, the Court pointed out that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities".[24] As support, it cited Geneva Convention (III) Relative to the Treatment of Prisoners of War (Article 118); the annexed Regulations to 1899 Hague Convention (II) and 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (Article 20); and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (Article 75).[25]

It failed to note, however, that each of the cited provisions deals with *prisoners of war*, a status that the Government argued (and the Court did not dispute) did not apply to Hamdi. Perhaps the Court was accepting the premise that detention for the purpose of keeping an "illegal enemy combatant" off the battlefield is permitted until the termination of active hostilities, thereby rejecting the characterization of such individuals by many commentators as civilians directly participating in hostilities who must, pursuant to the Geneva Convention (IV) Relative to the Protection of Civilian Persons, be released once the reasons for their detention no longer exist.[26] A kinder reading of the decision would be that the Court was simply identifying the maximum period of detention for any detainee (absent criminal proceedings), since beyond the obligation to release civilians as soon as there is no longer a reason to hold them, there is a further requirement that, in any event, they be released "as soon as possible after the close of hostilities".[27]

Of course, this position begs the question of when active hostilities end in a war on terrorism. Unfortunately, the Court saw no need to address the point because active combat operations against the Taliban were still underway in Afghanistan. The Court also did not inquire into the character of the conflict, that is, whether it was international or non-international in nature. Given its treaty references, however, which apply primarily in international armed conflict, the Court seemed to have assumed the conflict qualified as international in character. This is a somewhat controversial assumption, for the International Committee of the Red Cross, as well as numerous commentators, have suggested that the conflict's character shifted

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24 Hamdi v. Rumsfeld, *supra* note 4, at 520.

25 GC III, *supra* note 12; Convention with Respect to the Laws and Customs of War on Land, with Annex of Regulations, 1899, *T.S.* 403; Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, 1907, *T.S.* 539; Convention Relative to the Treatment of Prisoners of War, 1929, 118 *L.N.T.S.* 343.

26 GC IV, *supra* note 12, Art. 132.

27 *Ibid.,* Art. 133.

to non-international once President Hamid Karzai took power in June 2002.[28] The distinction makes a substantive difference with regard to detainees, for if the conflict is non-international, customary international humanitarian law arguably only permits detention for such time as the reasons for the deprivation of liberty (generally security) persist (absent pending prosecution).[29] Clearly, the Court was beyond its comfort zone in law of war matters, missing some of the finer nuances in that body of law.

But the Government's good fortune faded as the Court turned to the issue of Hamdi's entitlement to constitutional due process. Both sides in the case agreed that Hamdi was constitutionally entitled to file a *habeas* petition,[30] and that US legislation required some opportunity to present and rebut facts offered by the Government in support of the detention.[31] However, the government asserted that the Mobbs Declaration sufficed as a factual exposition. The Court did not agree.

It first rejected the Fourth Circuit's holding that because Hamdi was seized on the battlefield, there need be no further hearing or fact-finding. On the contrary, factual disputes remained, specifically over the issue of whether Hamdi met the government's definition of an enemy combatant.

The Court paid greater attention to the government's second position, that "further factual exploration is unwarranted and inappropriate" in light of both the constitutional separation of powers (as between the Executive, Legislative, and Judicial Branches) and the somewhat limited ability and expertise of courts to engage in what is more appropriately military decision-making.[32] The Government argued that such considerations required courts to accept the accuracy of a Mobbs Declaration, inquiring only into whether the asserted basis for detention was legitimate.

Unwilling to afford the Executive branch such broad deference, the Court embraced the balancing test it had employed earlier in *Mathews v. Eldridge,*[33] a weighing of "'the private interest that will be affected by the official action' against the Government's asserted interests, 'including the function involved' and the burdens the Government would face in providing greater process".[34] Hamdi's interest comprised "the most elemental of liberty

28 Afghanistan: 25 Years of Humanitarian Action, Interview with Reto Stocker, ICRC Head of Delegation in Afghanistan, May 4, 2006, at: http://www.cicr.org/Web/eng/siteeng0.nsf/html/afghanistan-interview-040506.

29 CIHLS, *supra* note 12, Rule 128.

30 Because it had not been suspended "in cases of rebellion or invasion" pursuant to the "Suspension Clause"; U.S. Const. Art. I, § 9.

31 28 *U.S.C.* §§ 2241, 2243, 2246.

32 Hamdi v. Rumsfeld, *supra* note 4, at 527.

33 Mathews v. Eldridge, 424 *U.S.* 319 (1976).

34 Hamdi v. Rumsfeld, *supra* note 4, at 529, citing Mathews, *supra* note 33, at 335.

interests – the interest in being free from physical detention",[35] constitutionally protected by the due process clause of the Fifth Amendment.[36] The countervailing Government interest was also substantial, that of keeping those who have fought against the nation from returning to the battlefield. Moreover, the Court accepted the premises that "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for them", specifically members of the Executive Branch (Department of Defense, military, etc.),[37] and that any requisite "process" should not unduly distract military officers engaged in operations.

Concluding that it is "during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested",[38] the Court held that Hamdi is entitled to more process than suggested by the Fourth Circuit. On one hand, a fair balancing of interests would allow for the consideration of hearsay evidence and a presumption, albeit rebuttable, in favour of the Government's evidence. On the other, the detainee must have the opportunity to prove military error, although that opportunity need not occur immediately upon battlefield capture. Rather, the right ripens upon a decision to continue detaining the individual following initial capture. The requisite detention review must amount to "independent" fact finding.

In so holding, the Court sought to maintain a delicate constitutional balance of power between the three branches. Responding to arguments that periods of conflict require deference to the Executive Branch, the Court stated:

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[39]

In other words, writs of *habeas corpus* allow the Judicial Branch to police the balance, thereby serving as a check on abuse of Executive Branch discretion.

35 Hamdi v. Rumsfeld, *supra* note 4, at 529.
36 *See* text *supra* note 9.
37 Hamdi v. Rumsfeld, *supra* note 4, at 531.
38 *Ibid.,* at 532.
39 *Ibid.,* at 536.

The Court concluded by suggesting that an "appropriately authorized and properly constituted military tribunal" might meet the standards it set forth in the opinion, pointing analogously to the Article 5 tribunals that determine prisoner of war status, for which Army Regulations already provide.[40] However, since such tribunals had not been convened for Guantanamo detainees, the Court sanctioned the practice of federal courts ensuring that the "minimum requirements of due process are achieved" through *habeas* proceedings.[41]

Justice Souter, joined by Justice Ginsburg, concurred in the judgement, but dissented in part from the O'Connor opinion, specifically the finding that the AUMF authorized Hamdi's detention. In their view, the Non-Detention Act's prohibition on detaining US citizens absent Congressional authorization could only be overcome through express statutory approval. Interestingly, Souter paid the greatest attention to the Government's argument (which the plurality accepted) that the AUMF authorized detention "according to the treaties and customs known collectively as the laws of war".[42] He noted that the laws of war required detainees to be treated as prisoners of war until their status was determined to be otherwise. In case of doubt, the Third Geneva Convention required convening an Article 5 Tribunal. That had not been done in Hamdi's case. Thus, Souter concluded that while he could not definitively determine whether the Government had violated the Third Geneva Convention or the customary law of war, "the Government has not made out its claim that in detaining Hamdi in the manner described, it is acting in accord with the laws of war authorized to be applied against citizens by the Force Resolution".[43] Despite his hesitancy, the clear tenor of his comments suggest that he believed Hamdi should have been processed through an Article 5 proceeding.

Although Souter and Ginsburg would have held that the Government lacked the authority to hold Hamdi as an enemy combatant, they concurred with the plurality's finding that he was entitled to counsel and to a hearing; thus, a majority existed on due process issues. It must be noted, however, that the two rejected the plurality's contention that the hearings in question could include a presumption in favour of the Government's evidence or that military tribunals might suffice as the requisite hearings.

Most interesting, and certainly most linear, is the dissent of Justice Scalia, joined by Justice Stevens. For them, matters were simple. Citizens who wage

40 U.S. Army Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, AR 190-8, Oct. 1, 1997, at para. 1-6.

41 Hamdi v. Rumsfeld, *supra* note 4, at 538.

42 *Ibid.*, at 548 (Souter J., dissenting in part).

43 *Ibid.*, at 551.

war against the United States are traditionally (and pursuant to the Constitution[44]) prosecuted for treason or other offences. If armed conflict renders prosecution impossible or impractical, Congress may suspend the oversight attendant in the writ of *habeas corpus*.[45] Since the AUMF did not amount to a suspension, and because mere military exigency is insufficient to justify detention without charge, they would have reversed. As to the plurality's crafting of detention review procedures, Scalia opined:

> There is a certain harmony of approach in the plurality's making up for Congress' failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures – an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions… . The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.[46]

Finally, Justice Thomas would have deferred almost absolutely to the Executive Branch. He believed the *habeas* petition should have failed altogether because the Executive Branch was acting pursuant to its war powers and with explicit Congressional approval in the form of the AUMF. But even had he adopted the balancing approach embraced in the plurality opinion, Thomas would still have found that the plurality failed to account adequately for the Government's compelling interests in detaining Hamdi or for the Court's "institutional inability to weigh competing concerns correctly" in such matters.[47]

Although the *Hamdi* decision represented a rebuke to the Administration's aggressive detainee policies in the global war on terror (GWOT), it left open any number of questions. What is the full scope of the concept of "enemy combatant?" How long can they be held in the GWOT? What should the hearings look like and to what extent must hearings for non-citizens reflect the same procedural safeguards?

With regard to the law of war, the decision is a bit sketchy. The Supreme Court clearly relied on that body of law, as, for example, in its embrace of

44 U.S. Const., Art. IV, § 3.
45 *Ibid.,* Art. II, § 9, cl 2.
46 Hamdi v. Rumsfeld, *supra* note 4, at 576 (Scalia J., dissenting).
47 *Ibid*., at 579 (Thomas J., dissenting).

the notion that detention must end with the termination of active hostilities. The Court also appeared to rely indirectly on law of war notions in its acceptance of the category of enemy combatants (although no treaty refers to "enemy combatants" as such). On the other hand, the Court failed to address such law of war issues as the Article 5 tribunal requirement of the Third Geneva Convention. Similarly, its discussion of the character of the conflict, is far from robust.

The result has been criticism of the Court's handling of the law of war. As one scholar has noted:

> Instead of confronting international humanitarian law, with all its limitations, the Supreme Court appears in *Hamdi* to have embarked on a questionable path towards creating its own, new constitutional common law of war, ungrounded either in international humanitarian law or in any specific legislation enacted by the U.S. Congress. It may be that international humanitarian law should be modified to respond to the changing factual circumstances of contemporary armed conflict, but the U.S. Supreme Court seems a body particularly ill-suited by institutional competence to be the principal author of this new regime.[48]

Although she may be overstating her case, it is evident that the Court seemed uncomfortable with the law of war, uneasy in determining how and when to apply it to the case at hand, and somewhat conclusory when doing so.

Rasul v. Bush
(Right of Review for Guantanano Detainees)

Rasul v. Bush, decided the same day as *Hamdi*, addressed the question of whether US courts may exercise jurisdiction over challenges by foreign nationals captured overseas and detained at Naval Station Guantanamo. The majority opinion, delivered by Justice Stevens, was joined by Justices Souter, O'Conner, Ginsberg, and Beyer.

The petitioners in the case were 2 Australians and 12 Kuwaitis who had been captured abroad. Since early 2002, the US military had held them at the Guantanamo.[49] In February 2002, President Bush issued a memorandum stating that while detainees would be treated "humanely", neither domestic nor international law, including the 1949 Geneva Conventions, governed the

48 J.S. Martinez, "International Decisions: Hamdi v. Rumsfeld", 98 *A.J.I.L.* 782, 787 (2004).
49 The release of two UK citizens mooted a petition on their behalf.

detention.[50] Al Qaeda detainees were not entitled to the protections of the Conventions because the organization was "an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, were not covered by the Geneva Convention, and are not entitled to POW status under the [Third Geneva Convention]".[51] Nor did they qualify as civilians (Fourth Convention) because they had engaged in combatant activities. Similarly, captured Taliban fighters did not qualify because they failed to meet the criteria of lawful combatants set forth in Article 4 of the Third Convention.[52] In particular, they did not wear distinctive clothing or emblems identifying them as combatants and they failed to comply with the laws of war.[53] Although Article 5 of the Third Convention provides for a tribunal to determine status in cases of doubt, the US military had convened no tribunals on the basis that the President's determinations resolved any doubt as to status.[54]

Guantanamo's status proved a pivotal issue in the case. The Government had selected the naval base to house the detention facilities because it was

50 Memorandum from President Bush to the Vice President and other officials, Humane Treatment of al Qaeda and Taliban Detainees, Feb. 7, 2002, repr. in *The Torture Papers: The Road to Abu Ghraib* 134 (K.J. Greenberg & J.L. Dratel eds., 2005).

51 White House, Statement by the Press Secretary on the Geneva Conventions, May 7, 2003, at http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html.

52 GC III, *supra* note 12. In relevant part, Art. 4 provides:

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> (1) 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.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.
> ….

The four requirements of paragraph (2) are generally deemed implicit criteria in qualifying as a member of the armed forces under paragraph (1). *See, e.g.*, the discussion in Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 36 (2004).

53 Statement by White House Press Secretary, *supra* note 51.

54 GC III, *supra* note 12, Art. 5.

believed to be beyond the reach of US judicial review.[55] Guantanamo Bay is operated pursuant to the 1903 "Lease Agreement" between the United States and Cuba, which won its independence in the aftermath of the 1898 Spanish-American War. Article III of that agreement provides that although Cuba retains sovereignty over the leased territory, the country "consents that during the period of the occupation by the United States … the United States shall exercise complete jurisdiction and control over and within said areas".[56] A subsequent agreement provides that the lease will remain effective so long as the US maintains its presence at Guantanamo Bay.[57]

In 2002, the 14 filed a number of petitions in the US District Court for the District of Columbia. The Australians sought a writ of *habeas corpus,* arguing, *inter alia*, that they should be released and provided access to counsel. On various grounds, including *habeas corpus*, the Kuwaitis sought to be informed of the charges against them, have access to counsel, and have the opportunity for a hearing in court or before some other impartial tribunal.

The District Court construed all the actions as *habeas* petitions, and promptly dismissed them based on lack of jurisdiction.[58] In doing so, it relied on the Supreme Court's 1950 decision in *Johnson v. Eisentrager.*[59] The Court of Appeals for the District of Columbia affirmed on the same basis, but then went a step further by rejecting any other form of litigation by the detainees: "The holding in *Eisentrager* – that 'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign' – dooms these additional causes of action, even if they deal only with conditions of confinement and do not sound in habeas".[60]

On appeal, the Supreme Court reversed the decision. The Court framed the issue as "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the

55 Memorandum from J. Yoo and P. Philbin, Dept. of Justice, to W.J. Haynes, II, General Counsel, Department of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, Dec. 28, 2001, repr. in *The Torture Papers, supra* note 50, at 29.

56 Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S. Cuba, Art. III, *T.S.* No. 418. The annual rent was $2,000.

57 Treaty Defining Relations with Cuba, May 29, 1934, U.S. Cuba, Art. III, *T.S.* No. 866.

58 Rasul v. Bush, 215 *F. Supp. 2d* 55 (D.D.C. 2002). The cases were filed by family members as "next friends", a traditional means of filing on behalf of detainees who do not have access to the courts for some reason, such as mental capacity. In these cases, the Guantanamo detainees had no access to the outside world at all. Indeed, they were unaware litigation was underway on their behalf.

59 Johnson v. Eisentrager, 339 *U.S.* 763 (1950).

60 Al Odah v. United States, 321 *F. 3d* 1134, 1144 (C.A.D.C. 2003) (quoting Eisentrager, *supra* note 59, at 777-78).

United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty'".[61] It began by considering whether *Eisentrager* was a binding precedent. *Eisentrager* had involved a *habeas* petition filed by 21 German citizens captured by the US military in China during World War II. A military commission sitting in China convicted them of war crimes, following which they were returned to occupied Germany and incarcerated.

In *Eisentrager*, the Supreme Court found no right to a writ for a military prisoner who: 1) was an enemy alien; 2) had never been to, or resided in, the US; 3) was captured and held outside the US; 4) was convicted by a military commission sitting overseas; 5) committed the war crimes abroad; and 6) was imprisoned in Germany. By contrast, in *Rasul* the detainees were citizens of States cooperating with the US, denied having acted unlawfully in any way, had never been before any type of tribunal whatsoever, had not been charged with any crimes, and had been imprisoned at a location over which US exclusive jurisdiction lies and which the United States totally controls. Further, while the *Eisentrager* Court had dealt with the constitutional reach of the *habeas* right, in *Rasul* the *habeas* statute was (primarily) at issue. The difference was potentially determinative, as statutes may expand (but not limit) rights originating in the Constitution. For these and other reasons, the Court deemed *Eisentrager* distinguishable from the case at hand; it did not constitute binding precedent.

Having dispensed with *Eisentrager*, the Supreme Court held that the *habeas* statute applied in the circumstances of the *Rasul* detainees. According to the Court, not only does the statute make no distinction between citizens and aliens, but there is no textual basis therein (or even in historical application of *habeas* rights) for finding it inapplicable to territory which, albeit not US territory, is under the exclusive US jurisdiction and control.

The Court pointed out that *Eisenstrager* paid scant attention to the *habeas* statute because it understood the statute as requiring territorial jurisdiction by a court over the location of detention.[62] Since the petitioners were in Germany, no such federal court existed. However, in *Braden*, the Court later reinterpreted the statute as turning on the location of the individual exercising custody over the detainee, not the detainee himself.[63] Thus, because *Braden* superseded *Eisentrager* on this point, no statutory jurisdictional limits barred *Rasul*.

61 Rasul v. Bush, *supra* note 4, at 475. The Habeas Statute is at 28 *U.S.C* § 2441.

62 Based on Ahrens v. Clark (1948), 35 *U.S.* 188.

63 Braden v. 30th Judicial Circuit Court of Kentucky (1973), 410 *U.S.* 484.

Finally, some of the petitioners invoked federal jurisdiction on the basis of the Federal Question and the Alien Tort Statutes.[64] Recall that the Circuit Court had affirmed the dismissal of these claims because the petitioners lacked the "privilege of litigation".[65] This finding was summarily rejected by the Supreme Court, which held that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation'".[66]

Justice Kennedy concurred in the judgement, but wrote a separate opinion contending that the Court reached the right result for the wrong reason. Kennedy believed his brethren had misinterpreted *Eisentrager*, which, in his view, was based on the premise that the matter was within the exclusive domain of the Executive Branch. The six *Eisentrager* factors bore on the "'ascending scale of rights that courts have recognized for individuals depending on their connection to the United States".[67] All the factors diminished those rights in the circumstances of *Eisentrager*. Moreover, Kennedy noted, the *Eisentrager* Court considered the extent to which legal action would "hamper the war effort and bring aid and comfort to the enemy".[68] In other words, he viewed *Eisentrager* as a separation of powers decision.

That said, Kennedy was quick to point out that different facts could yield a different result. That was the case in *Rasul*. First, Guantanamo is effectively de facto US territory beyond the battlefield; the Lease is indefinite and US control over the area absolute. Second, the Guantanamo detainees are being held indefinitely with no recourse to the courts or other legal process. While there might be a military necessity to hold battlefield detainees for a limited time without trial, "as the period of detention stretches from months to years, the case for continued detention becomes weaker".[69] Thus, Kennedy supported a right to petition for a writ of *habeas corpus* on the *Rasul* facts, but would not go so far as to create "automatic

64 The Federal Question Statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"; 28 *U.S.C.S.* § 1331. The Alien Tort Statute provides: "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"; 28 *U.S.C.S.* § 1350.

65 Al Odah v. United States, *supra* note 60, at 1144.

66 Rasul v. Bush, *supra* note 4, at 484.

67 *Ibid.,* at 486 (Kennedy J., concurring), citing Johnson v. Eisentrager, *supra* note 59, at 770.

68 *Ibid.,* at 779.

69 Rasul v. Bush, *supra* note 4, at 488 (Kennedy J., concurring).

statutory authority to adjudicate the claims of persons located outside the United States".[70]

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented. He began by noting that since the petitioners did not claim that jurisdiction lies on constitutional grounds, the case turned on the *habeas* statute. Scalia argued that the statute, on its face, extends *habeas* jurisdiction only to federal district courts having *territorial* jurisdiction over the complaining detainee.[71] There being no federal district court with jurisdiction over Guantanamo, Scalia would have stopped there by denying a statutory right to petition.

Scalia also disputed the majority's suggestion that *Braden* overruled earlier case law interpreting the statute as referring to the location where the custodian of the detainee was located.[72] Scalia argued that the case was not on point, as it had involved a prisoner in Alabama challenging an action taken by Kentucky that was unrelated to his physical detention. In *Rasul*, the challenge was to physical detention. As such, *Eisenstrager*, requiring jurisdiction of a court over the location of detention, continued to control. Thus, for Scalia, "[t]oday the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction – and thus making it a foolish place to have housed alien wartime detainees".[73]

He also mercilessly dispatched the majority's other holdings. For instance, he accurately pointed out that the majority failed to explain how "complete jurisdiction and control" without sovereignty leads to the extension of US domestic law over an area. If that were the case, at times part of Afghanistan and Iraq would have qualified. Indeed, so too would have Landsberg Prison in the *Eisenstrager* case.

In classic Scalian fashion, he ultimately objected:

> Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect on the Nation's conduct of a war….For this Court to create such a monstrous scheme in time of war, and in

70 *Id.*

71 28 *U.S.C.* § 2241(a) provides: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*" (emphasis added). Scalia points to other language in the statute that likewise suggests a territorial nexus to applicant's place of detention.

72 Or, more precisely, was subject to judicial service.

73 Rasul v. Bush, *supr*a note 4, at 497 (Scalia J., dissenting).

> frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort.[74]

To summarize, in *Rasul* the Supreme Court held that the federal *habeas* statute and the common law history of the writ of *habeas corpus* requires an opportunity for judicial review over Guantanamo detentions. Jurisdiction exists based on the reach of the courts over the respondent and the nature of US control over the location where the detainees in question are held.

But the *Rasul* decision left a number of issues unaddressed. For instance, it is not clear how the six *Eisentrager*/*Rasul* factors might apply to a different factual situation. Are the factors of differing normative weight? And how does *Rasul* bear on individuals detained in locations where the US lacks the degree of jurisdiction and control it exercises over Guantanamo? It is also essential to note that since *Rasul* was not a decision on the merits, it left to the lower courts such questions as whether Congress authorized (or could subsequently authorize) the detentions, what evidentiary standard applies when considering enemy combatant status, who may lawfully be detained, and whether international law, particularly the 1949 Geneva Conventions, provides substantive protection to detainees.[75]

Applying the Court's holding, the District Court subsequently ordered the Government to grant *habeas* attorneys access to their Guantanamo clients.[76] A flood of new *habeas* petitions resulted as attorney visits to Guantanamo commenced.

Unsurprisingly, the Government moved quickly to temper the *Rasul* fallout. Less than two weeks after the Supreme Court issued its decision, the Department of Defense established "Combatant Status Review Tribunals" to assess the status of detainees as "enemy combatants".[77] Modelled on the

74 *Ibid.,* at 506.

75 *See* discussion in J.K. Elsea & K. Thomas, "Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court", CRS Report for Congress (updated Sept. 26, 2007).

76 Al Odah v. U.S., 346 *F. Supp. 2d* 1 (D.D.C. 2004).

77 Deputy Secretary of Defense P. Wolfowitz, Order Establishing Combatant Status Review Tribunal (July 7, 2004), at:
http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.
The POW tribunals occur pursuant to AR 190-8, *supra* note 40. Commissioned officers, who need not be judge advocates, represent detainees. Any evidence "relevant and helpful to the resolution of the issue before it", in other words, any probative evidence, must be presented to the panel, including exculpatory evidence. Unclassified summaries of classified evidence are provided to the detainee; and his officer representative is entitled to review and comment on classified evidence considered by the panel. There is a "rebuttable presumption in favour of the Government's evidence". *Ibid.,* at paras. G(9) and G(12).

tribunals used by the US Army to determine POW status in accordance with Article 5 of the Third Geneva Convention, the three-officer CSRT panels conduct administrative, rather than judicial, review.

The Order establishing the CSRTs expands the definition of enemy combatant beyond that used by the Supreme Court. Whereas the Court had treated the term as referring merely to those who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there",[78] the Order extends the designation to anyone who "was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces".[79] There is no requirement of a direct nexus to hostilities in Afghanistan. Perhaps somewhat predictably, CSRTs have found most detainees qualified as enemy combatants; of the 558 hearings conducted between July 2004 and March 2005, 520 determined the detainee to be an enemy combatant.[80]

78 Hamdi v. Rumsfeld, *supra* note 4, at 516.

79 Order Establishing Combatant Status Review Tribunal, *supra* note 77*,* para. a.

80 Department of Defense, Combatant Status Review Tribunal Summary, at: http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf.
CSRTs continue. In September 2006, 14 high-value detainees were transferred from CIA custody to Guantanamo. By late March, nine, including Khalid Sheik Mohamed, the alleged mastermind of the September 11, 2001 terrorist attacks, were brought before CSRTs. The remainder will presumably also face CSRTs. Results are pending. Transcripts (and updates) are available at Department of Defense, Combatant Status Review Tribunals/Administrative Review Boards, at: http://www.defenselink.mil/news/Combatant_Tribunals.html.
In addition to CSRTs, in May 2004, the Department of Defense ordered the creation of Administrative Review Boards, which annually determine whether detainees designated as enemy combatants (except those determined subject to Military Commission prosecution) should be released, transferred, or remain in detention. Deputy Secretary of Defense Order 06942-04, Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba, May 11, 2004, at: http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf.
In 2005, 463 ARB recommendations resulted in 14 releases, 119 transfers, and 330 continue-to-detain decisions. Of the 328 boards conducted in 2006, 55 detainees were determined eligible for transfer, while 273 will continue to be detained. As of March 6, 2007, approximately 385 detainees remained at Guantanamo, of which more than 80 were designated for release or transfer, pending discussions with other nations or resolution of litigation in U.S. courts. Dept. of Defense Background Briefing, "Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo", Mar. 6, 2007, at: www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902.

Following *Rasul*, *habeas* litigation led to conflicting lower court decisions.[81] As a result, further proceedings were stayed pending resolution by the federal appellate courts. Before the matter could be judicially resolved, Congress intervened through passage of the Detainee Treatment Act (DTA) of 2005.[82] The DTA eliminated *habeas* jurisdiction over challenges by the Guantanamo detainees, supplanting it with Court of Appeals for the District of Columbia review of CSRT decisions. Review encompassed whether the proceeding in question comported with the legislative CSRT requirements and whether said requirements complied with the Constitution and US law. The Supreme Court dealt with the DTA in *Hamdan v. Rumsfeld*, a case involving military commissions. Before turning to *Hamdan*, it is useful briefly to review a third detainee case the Court decided in 2004. Despite generating much press attention, its jurisprudential import is limited, for it amounted to little more than a choice of forum decision.

Rumsfeld v. Padilla
(Detention of a US Citizen Captured in the United States)

The third detainee case decided by the Supreme Court involved Jose Padilla, a US citizen arrested at Chicago's O'Hare airport upon arrival from Pakistan in May 2002. US authorities seized Padilla pursuant to a material witness warrant issued by a grand jury investigating the September 11, 2001, terrorist attacks. He was taken to New York and held in federal custody.

In early June, after Padilla had filed a motion challenging the warrant, President Bush designated him an "enemy combatant",[83] and he was transferred to the Naval Brig at Charleston, South Carolina. In response, Padilla filed a petition for a writ of *habeas corpus* in the US District Court for the Southern District of New York. The petition named the President, Secretary of Defense, and Brig Commander as respondents. The Government argued that only the Commander was a proper respondent, since only she had physical control of Padilla; therefore, the District Court sitting in New York should dismiss the case because it lacked jurisdiction over individuals in South Carolina.

81 *E.g., cf.* Khalid v. Bush, 355 *F. Supp. 2d* 311 (D.D.C 2005), with *In re* Guantanamo Detainee Cases, 355 *F. Supp. 2d* 443 (D.D.C. 2005).

82 DTA, *supra* note 5.

83 Memo from the President to Secretary of Defense Designating J. Padilla an Enemy Combatant, June 9, 2002, at: http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf.

The District Court found the Secretary of Defense to be a proper respondent and held that the President possessed the authority to classify US citizens captured in the United States during time of war as enemy combatants, and treat them accordingly. However, Padilla had a right to controvert alleged facts upon which that determination had been made.[84] On appeal, the Court of Appeals for the Second Circuit disagreed, holding that the President lacked the power to detain Padilla, either pursuant to his Constitutional Commander-in-Chief power or the AUMF. It further found a strong presumption against military detention of US citizens absent express Congressional authorization.[85] The Supreme Court granted *certiorari.*

Ultimately, the case was resolved on jurisdictional grounds, thereby avoiding the more interesting issue of whether the military could hold Padilla as an enemy combatant. In an opinion delivered by Chief Justice Rehnquist, the Supreme Court held that the proper respondent to a *habeas* action, as noted in the *habeas* statute itself, was "the person who has custody over [the respondent]" – the "immediate custodian".[86] In that Padilla's immediate custodian was the Brig Commander, only she qualified as a proper respondent.

This finding raised the question of whether the District Court sitting in New York had jurisdiction. On this issue, the Supreme Court found, based upon case law and statutory analysis, and having identified no applicable express exception, that only a court exercising jurisdiction over the place of confinement could issue a writ of *habeas corpus*. Since the New York-based court did not enjoy said jurisdiction, the Supreme Court did not have to reach the question of the President's authority to detain Padilla. Justice Kennedy, joined by Justice O'Connor, filed a concurring opinion, reaching the same conclusion through slightly different reasoning (that no exception to the general rule applied).

Four Justices (Stevens, joined by Souter, Ginsberg and Beyer) dissented. Labelling the majority's approach one of "slavish application", Stevens argued that the immediate custodian rule was "riddled with exceptions fashioned to protect the Great Writ" and that "[t]his is an exceptional case that we clearly have jurisdiction to decide".[87] In light of the importance of the case, the dissenters would have crafted an exception on the ground that when jurisdiction is appropriate at the time of filing the original petition, it

84 Padilla v. Bush, 233 *F. Supp. 2d* 564 (D.N.Y. 2002).

85 Padilla v. Rumsfeld, 352 *F. 3d* 695 (2d Cir. 2003). The Court pointed to both case law and legislation, in particular the Non-Detention Act discussed in Hamdi v. Rumsfeld, *supra* note 4.

86 Rumsfeld v. Padilla, *supra* note 4, at 439.

87 *Ibid.,* at 455 (Stevens J., dissenting).

cannot be defeated by transferring the prisoner. They would also have found the Secretary of Defense to be a proper respondent, both because he had control over those executing the transfer and because he set the confinement location. Although not addressing the merits of whether Padilla should have been immediately released, the dissent closed with an ominous warning: "for if this Nation is to remain true to the ideas symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny".[88]

Despite *Padilla's* status as a technical decision on jurisdictional issues, it is important to note that the four dissenters clearly opposed incommunicado detention of a US citizen on US soil. In that Scalia had expressed similar views in his *Hamdi* dissent, it would appear that, had the Court reached the merits, five justices, a majority, might well have demanded that Padilla be tried in a federal, non-military court. The point was apparently not lost on the Government.

On remand in February 2005, the federal District Court in South Carolina held that the Government could not hold Padilla indefinitely. The Non-Detention Act barred Padilla's detention, the AUMF did not constitute remedial Congressional authorization, and the President had no inherent authority to detain Padilla as an enemy combatant.[89] In September, the Court of Appeals for the Fourth Circuit overturned that decision on the basis that Congress had granted the President such authority in the AUMF.[90] Padilla then filed a petition for a writ of certiorari with the Supreme Court. Before the Supreme Court could consider the petition, the Government criminally indicted Padilla in Miami for conspiracy to murder, kidnap, and maim people abroad.[91] Interestingly, none of the charges against Padilla related to terrorism in the United States, although the Government had earlier accused him of involvement in domestic terrorist plots, including one to detonate a dirty bomb. The decision to indict was widely viewed as a subterfuge intended to avoid Supreme Court review of the case. If that was the intent, it proved successful.

Following indictment, the President ordered Padilla's release from military custody and his transfer to the custody of the Attorney General.[92] In

88 *Ibid.,* at 465.

89 Padilla v. Hanft, 389 *F. Supp. 2d* 678 (D.S.C. 2005).

90 Padilla v. Hanft, 423 *F. 3d* 386 (4th Cir. 2005).

91 Indictment, US District Court, Southern District of Florida, US v. Hassoun *et al.*, Case No. 04-60001-CR-Crooke, Nov. 9, 2005.

92 President G. Bush, Memorandum for the Secretary of Defense, Transfer of Detainee to Control of the Attorney General, Nov. 20, 2005. The Court of Appeals for the Fourth Circuit rejected a Government motion for approval of Padilla's transfer, but the Supreme Court subsequently approved it in January 2006. Hanft v. Padilla, Supreme Court Order in Pending Case, Jan. 4, 2006.

April 2006, the Supreme Court denied certiorari in a six-three vote. Justice Kennedy authored a concurring opinion, joined by Chief Justice Roberts and Justice Stevens.[93] For them, the filing of criminal charges and transfer of Padilla from military custody rendered the case moot. But Kennedy cautioned that if Padilla were to be returned to military custody as an enemy combatant, the "court would be in a position to rule quickly on any responsive filings submitted by Padilla. In such an event, the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of *habeas corpus* are not compromised".[94] Justice Ginsburg dissented on the basis that the case was not moot because there was a "reasonable expectation that the wrong will be repeated".[95] Although not joining in her dissenting opinion, Justices Souter and Breyer would have granted certiorari. Padilla's federal criminal case was underway as of April 2007. It has proven highly complicated, involving challenges based on "speedy trial" and mental competency, and allegations of torture.

Hamdan v. Rumsfeld (Military Commissions)

The most recent foray by the Supreme Court into the Government detainee practices came with *Hamdan v. Rumsfeld*, decided in June 2006. The case proved divisive for the Court, which issued six separate opinions. It was further complicated by the non-participation of the new Chief Justice, John Roberts, who recused himself because he had sat on the case at the Court of Appeals level.[96]

Salim Ahmed Hamdan, a Yemeni, was captured by the Northern Alliance in November 2001. The Alliance turned him over to US forces, who, in June 2002, sent him to Guantanamo Bay. In July 2003, the President designated him as eligible for trial by military commission.[97] Hamdan filed a petition

93 Padilla v. Hanft, 126 *S. Ct.* 1649 (2006).

94 *Ibid.,* at 1650.

95 *Ibid.,* at 1651 (Ginsburg, J., dissenting).

96 The opinions included a majority opinion by Stevens J., joined by Justices Kennedy, Souter, Ginsberg and Breyer, but Kennedy did not join in parts of the judgment; a one page concurrence by Breyer, Souter, Kennedy, and Ginsburg; a concurrence by Kennedy, parts of which were joined by Souter, Ginsburg, and Breyer; a dissent by Scalia on jurisdiction and abstention issues; a dissent by Thomas, joined by Scalia and joined in part by Alito; and a dissent by Alito, joined by Thomas and Scalia.

97 Dept. of Defense News Release No. 405-03, President Determines Enemy Combatants Subject to His Military Order, July 3, 2003, at: http://www.defenselink.mil/releases/release.aspx?releaseid=5511.

for a writ of *habeas corpus* in April 2004.[98] Three months later, while the petition was pending before the District of Columbia District Court, the Government charged Hamdan in a military commission proceeding with "conspiracy", specifically that he "wilfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of Al Qaeda] to commit the following offences triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism".[99] The formal charge sheet accused Hamdan of serving as Osama bin Laden's bodyguard and driver while knowing that he and his associates were terrorists involved, *inter alia*, in the September 11th attacks. Further, it alleged that Hamdan transported weapons for Al Qaeda and received weapons training at Al Qaeda-sponsored camps.

As the case was pending before the District Court, a Combatant Status Review Tribunal determined that Hamdan qualified as an enemy combatant. Additionally, military commission proceedings began. In November 2004, the District Court granted Hamdan's petition and stayed those proceedings.[100] It concluded that the President possessed no authority to create military commissions beyond that contained in US legislation, and that the commissions deviated from the relevant statutory requirements. For instance, a military commission's ability to convict based on evidence unavailable to the accused violated both the Uniform Code of Military Justice (UCMJ)[101] and Common Article 3 of the 1949 Geneva Conventions.[102] Moreover, Hamdan was entitled to the protections of the

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The determination was pursuant to his Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, Nov. 13, 2001, 66 *Fed. Reg.* 57,833. Others were subsequently determined eligible. Of these, 10 have been charged.

98 More precisely, a petition for a writ of *mandamus*, or, in the alternative, *habeas corpus*.

99 USA v. Hamdan, Charge Sheet, at: http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf.

100 Hamdan v. Rumsfeld, 344 *F. Supp. 2d* 152 (D.D.C. 2004).

101 Legislatively enacted military law. Uniform Code of Military Justice, 10 *U.S.C.* §§ 801-946 (2005) [hereinafter: UCMJ].

102 Common Art. 3 appears in all four of the 1949 Geneva Conventions. It provides, in relevant part (GC III, *supra* note 12):

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War, at least until such time as a body acting in accordance with Article 5 of that Convention found otherwise.

The Court of Appeals for the District of Columbia reversed the lower court's decision, and held the Geneva Conventions to be judicially unenforceable.[103] Two of the panel's three judges found that even if the Conventions were judicially enforceable, they did not apply to Hamdan.[104] The Court of Appeals identified no separation of powers bar to the military commissions, nor did it find an objection to them based on the UCMJ or US military regulations implementing the Geneva Conventions.

In November 2005, the Supreme Court granted certiorari to consider two issues: whether the military commissions had the authority to try Hamdan, and whether Hamdan benefited from application of the 1949 Geneva Conventions. However, the following month, the President signed the Detainee Treatment Act (DTA) into law.[105] The DTA was Congress' reaction to the Supreme Court's *Rasul* holding that federal law, specifically the *habeas* statute, allowed Guantanamo detainees to seek *habeas* relief.[106] In relevant part, the DTA provided:

> *(e) Judicial Review of Detention of Enemy Combatants*
> *(1) IN GENERAL - Section 2241 of title 28, United States Code, is amended by adding at the end the following:*
>
> *…*
>
> *(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—*

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> …
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> …

103 Hamdan v. Rumsfeld, 415 *F. 3d* 33 (D.C. Cir. 2005).

104 One of the judges was J. Roberts, who would, before the case reached the Supreme Court, become Chief Justice of the Supreme Court.

105 DTA, *supra* note 5.

106 The legislation also addressed interrogation of detainees, a response to revelations of abuse by US military personnel at Abu Ghraib prison in Iraq and elsewhere.

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.'.

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION

(A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

...

(C) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of –

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States….

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS

(A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW- Review under this paragraph –

> *(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or*
> *(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.*
> *...*
> *(D) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—*
> > *(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and*
> > *(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.*

Ultimately, *Hamdan* turned in great part on the DTA's effective date provision:

> *(1) IN GENERAL - This section shall take effect on the date of the enactment of this Act.*
> *(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS-*
> *Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.*

Relying on the DTA, the Government moved in February 2006 to dismiss the writ of certiorari. Its argument was simple – Congress had unambiguously barred such cases from being heard. Hamdan responded that the DTA constituted an unconstitutional Congressional infringement on the Court's appellate jurisdiction and that the statute amounted to an unconstitutional suspension of the writ of *habeas corpus* in violation of the Suspension Clause.[107] The Court quickly dispensed with the Government's

[107] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"; U.S. Const. Art. I, § 9, cl. 2.

assertions. It pointed out that the reference to "pending" in the effective date clause only applied to paragraphs 2 and 3 of subsection (e), not paragraph 1, which addresses *habeas*. Therefore, the DTA did not bar this "pending" *habeas* action.[108]

The Government next contended that even if statutory jurisdiction existed, the Court should nevertheless defer objections to military proceedings until their completion. It had done so in prior cases involving military trials, holding that, as a matter of comity, federal courts should not intervene in military proceedings.[109] Military discipline's centrality to an effective fighting force, as well as respect for Congress' balancing of military requirements with the need to ensure fairness in the military justice system, merited such comity.

But, as the Court pointed out, since Hamdan was not a member of the military, there were no military discipline concerns. Further, the fact that military commissions were not integrated into the military justice system (with its independent appeals and other safeguards) negated the second comity factor.[110] In rejecting the Government's position on these bases, the Court also cited *Ex Parte Quirin* as an example of federal *habeas* jurisdiction over trials of foreign nationals by military commissions (although *habeas* was not granted).

Jurisdiction found, the Court turned to the merits. The seminal issue was whether the military commissions established to try Hamdan and his fellow detainees were lawful.[111] Congress had originally sanctioned military

[108] The Court cited the "familiar principle of statutory construction…that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute". Hamdan v. Rumsfeld, *supra* note 4, at 2765. It additionally pointed out that with regard to the DTA, Congress had considered and rejected inclusion of paragraph 1 in the "pending" reference.

[109] The lead case is Schlesinger v. Councilman (1975), 420 *U.S.* 738. Comity is a doctrine of recognition of the acts of other nations, branches of government, or courts of different jurisdictions.

[110] A review of the facts, law, and appropriateness of the sentence by a service specific (*e.g.*, Army, Air Force, Navy-Marine) Military Courts of Criminal Appeals is automatic in all cases resulting in a punitive discharge or confinement for a year. Discretionary review (for legal error) is possible by the Court of Appeals for the Armed Forces (civilian judges) and the Supreme Court (*see* 10 *U.S.C.* § 867a (2000)). On the issue of review, *see* R.O. Everett, "The Role of Military Tribunals under the Law of War", 24 *Boston U. Int'l L. J.* 1, 11-14 (2006). Robinson perceptively suggests that courts-martial might be best placed to hear cases involving violation of the law of war.

[111] For an excellent historical survey of the use of military commissions, with particular emphasis on the issue of separation of powers, *see* L. Fischer, "Military Commissions: Problems of Authority and Practice", 24 *Boston Univ. Int'l L. J.* 15 (2006). *See* also L. Fisher, *Military Tribunals & Presidential Power* (2005).

commissions in Article 15 of the Articles of War.[112] In language identical to that currently appearing in Article 21 of the Uniform Code of Military Justice (which replaced the Articles of War in 1951), Article 15 provided that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals".[113] The *Quirin* Court had interpreted this text as mandating compliance with the law of war. So too did the *Hamdan* Court, rejecting the Government's arguments that Congress, in the AUMF and/or DTA, had implicitly enhanced the President's authority to convene and conduct military commissions beyond that resident in Article 21. Article 21 was determinative, for "[w]hether or not the President has independent power, absent congressional authorization to convene military commissions, he may not disregard those limitations that Congress has, in proper exercise of its own war powers, placed on his powers".[114]

Relying on Colonel William Winthrop's classic 1920 work, *Military Law and Precedents*, the Court read four conditions into Congress' acceptance of

[112] *See also* In re Yamashita (1946), 327 *U.S.* 1, involving trial by a military commission sitting in the Philippines of Japanese General Yamashita, who was sentenced to death. There, the Court upheld the principle in *Ex parte* Quirin (*supra* note 23) that the U.S. Constitution (Art. I, § 8, cl.10) provides authority for using military commissions to try law of war violations as "offences against the law of nations". That clause empowers Congress "to define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations", *i.e.*, international law, including the law of war.

[113] Articles of War, Act of June 4, 1920, 10 *U.S.C.A.* §§ 1471-1593 (repealed by UCMJ).

[114] Hamdan v. Rumsfeld, *supra* note 4, at 2774, citing Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case) (1952), 343 *U.S.* 579, 637 (Jackson J., concurring).
The Court delineated military commissions into: a) those acting in lieu of civilian courts when martial law has been declared; b) those established to try civilians in occupied areas as part of temporary military government (or in areas freed from enemy occupation where the civilian courts are not operating); and 3) those necessary during wartime "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war". Hamdan v. Rumsfeld, *supra* note 4, at 2776, citing *Ex parte* Quirin, *supra* note 23, at 28-29.
Other provisions of the UCMJ referencing military commissions include: Art. 28 (appointment of interpreters and reporters); Art. 36 (authorizing the President to prescribe rules of procedure and rules of evidence); Art. 47 (punishment of subpoenaed witnesses); Art. 48 (punishment for contempt); Art. 49 (reading of depositions); Art. 104 (imposition of the death penalty on those aiding the enemy); Art. 106 (trial of spies and imposition of the death penalty). Art. 18 provides that general courts-martial have "jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by law".

military commissions in Article 21.[115] First, the offenses in question must be committed in the field of command of the commander convening the commission. Second, they must occur during wartime. Third, commissions may only try members of the enemy forces who engage in "illegitimate warfare or other offenses in violation of the laws of war". Fourth, offenses triable by commissions must involve either "violations of the laws and usages of war cognizable by military tribunals" or "breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of War". Both sides in *Hamdan* agreed with these conditions, as well as the premise that Article 21 incorporated them as jurisdictional limitations.

Hamdan's proposed trial before a commission did not comply with the Winthrop requirements. To begin with, the alleged conspiracy extended from 1996 through November 2001; nearly all of this period predated both the 9/11 attacks and promulgation of the AUMF, on which the Government based its claim of authority to create military commissions. Further, neither the alleged agreement to commit war crimes, nor any overt act alleged in fulfillment thereof, took place either in a theater of war or on any specified date after September 11.

A further bar to Hamdan's prosecution was the Court's (plurality) finding on the charge of conspiracy. The Government argued that *Quirin* had involved conspiracy charges, that Winthrop identified conspiracy as an offense that had been tried by military commissions, and that US Army Judge Advocate records refer to trials for conspiracy to "violate the laws of war by destroying life or property in aid of the enemy" during the American Civil War.[116]

Rejecting these assertions, the plurality held that conspiracy is not a law of war offence.[117] It quickly dispensed with the three Government points. First, the Court correctly recalled that *Quirin* never reached the conspiracy issue (which was raised) because the Court there found that the separate "violations of the law of war", together with the overt act of entering the US to conduct the sabotage, sufficed to meet the requirement of an offence triable by commission. As to the Winthrop comment, the Court noted that

[115] Hamdan v. Rumsfeld, *supra* note 4, at 2777, citing W. Winthrop, *Military Law and Precedents* 836-39 (War Dept., rev. 2nd ed., 1920). For a contemporary historical survey of the use of military tribunals by the United States, *see* L. Fisher, "Military Tribunals: Historical Patterns and Lessons", CRS Report for Congress, July 9, 2004.

[116] Hamdan v. Rumsfeld, *supra* note 4, at 2781, citing C. Howland, *Digest of Opinions of the Judge Advocates General of the Army* 1071 (1912).

[117] Kennedy J. did not join this part of the opinion, believing it not to have been necessary to the decision. Thus, it represents a plurality, not majority, view.

the Civil War military commissions served as military government tribunals in addition to law of war commissions. That being so, they dealt with both ordinary criminal offenses and war crimes. Conspiracy has the former status. Finally, the Court's review of the cited Judge Advocate records revealed they did not support characterization of conspiracy as a law of war violation.

More to the point, core law of war treaties such as the 1907 Hague and 1949 Geneva Conventions make no mention of conspiracy. For that matter, the Government failed to cite any law of war treaty setting forth the offense of conspiracy. The Court also pointed to Winthrop's assertion that "the jurisdiction of the military commissions should be restricted to cases of offence consisting in overt acts, *i.e.,* in unlawful commissions or actual attempts to commit, and not in intentions merely".[118]

The Supreme Court's finding on conspiracy is a logical construct. As the Stevens opinion pointed out, there is a basic incongruity between the charge of conspiracy and the conditions in which commissions are to be convened:

> That limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: The need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield. See S. Rep. No. 130, 64th Cong., 1st Sess., p. 40 (1916) (testimony of Brig. Gen. Enoch H. Crowder) (observing that Article of War 15 preserves the power of "the military commander *in the field in time of war*" to use military commissions (emphasis added)). The same urgency would not have been felt vis-à-vis enemies who had done little more than agree to violate the laws of war.[119]

Additionally, although the various defendants tried by the International Military Tribunal (IMT) at Nurnberg were charged with conspiracy, there were no convictions for conspiracy to commit war crimes, and of the eight defendants convicted of conspiracy to commit crimes against peace, none were convicted on that charge alone. Telford Taylor, one of the US prosecutors for the IMT, has recalled that the Tribunal was uneasy with the offense of conspiracy, in part because "[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of internationally recognized laws of war".[120]

Curiously, the Supreme Court failed to explore the general rejection of conspiracy as an offense by civil law countries (a factor that bears negatively on any assertion of its customary law status). Nor did it adequately highlight

[118] Hamdan v. Rumsfeld, *supra* note 4, at 2781; Winthrop, *supra* note 115, at 841.
[119] Hamdan v. Rumsfeld, *supra* note 4, at 2782.
[120] T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* 36 (1992).

the fact that no contemporary war crimes tribunal recognizes the offense.[121] It did, in a passing footnote reference, acknowledge the ICTY's adoption of a "joint criminal enterprise" theory of liability.[122] However, the Court correctly noted that a theory of liability, like aiding and abetting, does not constitute a substantive crime in its own right.

The refutation of conspiracy as a law of war offense proved fatal to the Government's case. As the Court concluded, "[b]ecause the charge does not support the commission's jurisdiction, the commission lacks the authority to try Hamdan".[123] It went on to condemn commissions on the basis of lack of military necessity. A military commander on or near the battlefield did not create the commissions, nor was Hamdan captured committing a particular hostile act. Rather, a retired Major General far from the hostilities appointed the commissions,[124] and the alleged offense consisted of an "agreement" stretching back years before the conflict began. Moreover, it took nearly three years following capture for Hamdan to be charged, a fact that refutes any claim that military expediency demanded trial by commission. The Court therefore determined that "[t]hese simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment".[125]

Yet another ground on which the Supreme Court found the commissions unlawful was the procedure to be employed. For the Court, commission procedures violated both the UCMJ and the law of war.

With regard to the former, the Court noted that it is generally accepted that military commission and court-martial procedures should be uniform. Congress codified this understanding in Article 36 of the UCMJ:

[121] *See*, *e.g.,* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, UN Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, UN Doc. S/RES/955 (Nov. 8, 1994); Statute of the Special Court for Sierra Leone, UN Doc. S/2002/246, app. II (Aug. 14, 2000); Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9* (July 17, 998).

[122] Prosecutor v. Tadic, Judgment, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999); Prosecutor v. Milutinovic, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, Case No. IT-99-37-AR72, P 26 (ICTY App. Chamber, May 21, 2003).

[123] Hamdan v. Rumsfeld, *supra* note 4, at 2785.

[124] J.D. Altenberg, Jr., who had retired as the Assistant Judge Advocate General for the US Army. He was selected for the position by Secretary of Defense D. Rumsfeld.

[125] Hamdan v. Rumsfeld, *supra* note 4, at 2786.

(a) Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Paragraph (a) grants the President discretion to determine that procedures and evidentiary rules applicable in federal courts are impractical in the context of military proceedings. This is a subjective determination that the Court may not question (absent, presumably, an abuse of discretion). However, the Court found that paragraph (b) requires uniformity between commission and court-martial procedures and evidentiary standards. Uniformity is an objective standard, not one subject to the subjective exercise of Presidential discretion.

The Court found the deviation from courts-martial procedures in Section 6(B)(3) of Military Commission Order 1 particularly "glaring".[126] That provision required that the commission:

Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an ex parte, in camera presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not

[126] *Id.*

disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof....[127]

By contrast, in courts-martial, all proceedings, except deliberations and voting, are "conducted in the presence of the accused, the defense counsel, and the trial counsel".[128]

In addition, commission evidentiary standards varied widely from the Military Rules of Evidence governing courts-martial.[129] For instance, Military Commission Order 1 allowed the admission of any evidence that the presiding officer finds probative.[130] Included would be unsworn live or written testimony, coerced statements, and hearsay – all usually inadmissible in a court-martial. And, as noted, a commission could even consider evidence to which the accused and his counsel are not privy. The Court concluded that Article 36 "not having been complied with here, the rules specified for Hamdan's trial are illegal".[131]

They were also unlawful as violative of the Geneva Conventions, with which Article 21 requires compliance. Recall that the Court of Appeals had dismissed Hamdan's Geneva Conventions challenge by finding them judicially unenforceable; in any event, it had held, Hamdan was not entitled to their protection. The Supreme Court disagreed, holding that whether or not the Conventions are independently enforceable, Congress made them so in military commissions by means of Article 21. They are components of the law of war and compliance therewith is a condition precedent to the existence and activities of commissions.

The Court of Appeals had also found the Geneva Conventions inapplicable to the conflict during which Hamdan was captured. Since the war with Al Qaeda, as distinct from that with the Taliban, was not "between two or more High Contracting Parties", it did not qualify as an "international armed conflict" to which the 1949 Geneva Conventions applied pursuant to Common Article 2 thereof.[132] On the other hand, it did not qualify as a "non-

[127] Dept. of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Mar. 21, 2002, at para. 6B (3).

[128] UCMJ, *supra* note 101, Art 39.

[129] The Military Rules of Evidence are contained in the Manual for Courts-Martial (promulgated by the President) and are largely patterned after the Federal Rules of Evidence used in federal civilian courts.

[130] Military Commission Order No. 1, *supra* note 127, para. 6D (1).

[131] Hamdan v. Rumsfeld, *supra* note 4, at 2793.

[132] Art. 2, which appears in all four 1949 Geneva Conventions, provides, in relevant part, "[T]he present Convention shall apply to all cases of declared war or of any other armed

international armed conflict" under Common Article 3, the sole provision of the Geneva Conventions applicable to such conflicts, because the conflict with Al Qaeda was international in scope, that is, it crossed borders and took place in multiple countries.

The Supreme Court correctly accepted the premise that the conflict with Al Qaeda is not international.[133] It also characterized the war with terrorism as an "armed conflict", a term of art in the law of war.[134] The Court then held that such "armed conflicts" qualify as "not of an international character" for the purposes of Common Article 3 of the 1949 Geneva Conventions.[135] In other words, the "conflict" with Al Qaeda is, for the Supreme Court, a non-international armed conflict.

This approach departs from traditional notions of non-international armed conflict. The Court acknowledged this departure to some extent when it noted that the official ICRC *Commentary* to the Article highlights the need to protect rebel forces. In fact, the *Commentary* is much clearer on the subject than the Court suggests. It is replete with references to revolt, rebellion, insurgents, internal conflict, and civil war. The *Commentary* also sets out "convenient criteria" for non-international armed conflict. They are worth repeating, as they differ dramatically from the typical characteristics of hostilities with a transnational terrorist group like Al Qaeda:

> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> (3) (a) That the de jure Government has recognized the insurgents as belligerents; or
> (b) That it has claimed for itself the rights of a belligerent; or

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conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". GC III, *supra* note 12.

133 Although it failed to explore the possibility that aspects might have become international once the armed conflict between the Coalition States and Afghanistan began on October 7, 2001. For instance, if al Qaeda fighters joined or otherwise supported Taliban forces in opposing the Coalition, those actions would have occurred in the context of international armed conflict. That said, the Hamdan charge sheet alleged no facts that might support this theoretical possibility.

134 In other words, more than mere criminal activity. An "armed conflict" is the condition precedent for applicability of the law of war.

135 *See* text at note 103.

(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.

(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[136]

In fairness, the Commentary emphasizes that the criteria are not preconditions to application of Common Article 3 and "that the scope of application of the Article must be as wide as possible".[137] But it is quite a leap to suggest transnational terrorism qualifies, especially given the Commentary's final observation on the matter: "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities' – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country".[138]

The Court generally ignored the geographical element to non-international armed conflict. This is curious because Common Article 3 defines the conflict as "not of an international character *occurring in the territory of one of the High Contracting Parties*" (emphasis added). And a recent restatement of the law of non-international armed conflict sponsored by the International Institute of Humanitarian Law adopted a similarly geographically restrictive approach to defining non-international armed conflict: "Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government".[139]

[136] *Commentary, III Geneva Convention* 36 (ICRC, J. De Preux ed., 1960).

[137] *Id.*

[138] *Ibid.,* at 37.

[139] M.N. Schmitt, C.H.B. Garraway, & Y. Dinstein, *The Manual on the Law of Non-International Armed Conflict (with Commentary),* at para. 1.1.1. (International Institute of Humanitarian Law, San Remo, 2006), repr. in 36 *Israel Y.B. Hum. Rts.* (2006) (Special

Be that as it may, and in light of the growing recognition that the Article contains requirements applicable in *international* armed conflict,[140] Common Article 3 seems on an unalterable trajectory to becoming a universal base-line applicable in any situation of violence rising above classic criminality.[141] One must wonder what criteria will be employed to assess whether the violence in question in a particular case qualifies or not. Scope? Scale? Purpose? *Hamdan* provides little help, for the Supreme Court neglected to explain how it arrived at the determination that the "war" with Al Qaeda qualified as an "armed conflict", a term of art in the law of war.

For the purposes of US jurisprudence, however, the Supreme Court has spoken. Common Article 3 applies in the "war" with transnational terrorism. With regard to detainees, its substantive relevance lies in the prohibition of "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".[142]

In its appraisal of compliance with this standard, the Court began by assessing whether a commission qualified as a "regularly constituted tribunal".[143] To discern the meaning of the phrase, it looked to the official ICRC *Commentary* on the Geneva Convention IV requirements for military

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Supplement). Be that as it may, the Israeli Supreme Court also recently applied Common Art. 3 in a conflict that transcends borders, albeit certainly not to the extent or in the manner of transnational terrorism. The Public Committee Against Torture in Israel, *supra* note 7.

140 The ICJ and the ICTY had interpreted Common Art. 3 as articulating a minimum customary standard of conduct applicable in all armed conflict, whether non-international or international in nature. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, [1986] *I.C.J. Rep*. 4, at para. 218 ("There is no doubt that, in the event of international armed conflicts, these rules [of Common Art. 3] 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"); Prosecutor v. Dusko Tadic, International Tribunal for the former Yugoslavia, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), at paras. 89, 98 & 102.

141 The United States Department of Defense has adopted this position. *See*, *e.g.*, Memorandum, Office of the Secretary of Defense, to Secretaries of the Military Departments *et al.*, Subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (July 7, 2006), at: http://www.fas.org/sgp/othergov/dod/geneva070606.pdf.

142 GC III, *supra* note 12, Art. 3(1)(d).

143 For an argument that commissions qualify, *see* D.B. Rivkin & L.A. Casey, "The Use of Military Commissions in the War on Terror", 24 *Boston Univ. Int'l L. J.* 123 (2006).

occupation courts.[144] Article 66 allows for ordinary military courts, but bars "special tribunals".[145] Assuming, *arguendo*, that the cross-reference to occupation courts during an international armed conflict is analytically defensible vis-à-vis commissions, the reference still begs the question of what constitutes a "special tribunal".

The Supreme Court tread on sounder ground when it pointed to the discussion of Common Article 3 in the ICRC's Customary International Humanitarian Law Study (CIHLS). There the phrase "regularly constituted" is defined as "established and organized in accordance with the laws and procedures already in force in the country".[146] The Court concluded that commissions were not regularly constituted because their procedures unnecessarily deviated from those applicable in courts-marital. As such, they violated, as the Court concluded earlier, the requirements of UCMJ Article 21.

The *Hamdan* Court also explored whether commission procedures afforded all the judicial guarantees "recognized as indispensable by civilized people". Although the Article's text leaves the phrase undefined, the Court could have looked for guidance to the ICRC *Commentary*'s description of the Article 3 requirements, which clearly articulates its intent:

> All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. We must be very clear about one point: it is only "summary" justice which it is intended to prohibit. No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law.[147]

In other words, the reference to civilized nations in Common Article 3 was meant to prohibit summary justice.

But what is summary justice? The Court might have referred to CIHLS Rule 100. Applicable equally in international and non-international armed conflict, the rule provides that "No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees".[148]

144 *Commentary, IV Geneva Convention* 340 (ICRC, O.M. Uhler & H. Coursier, eds., 1960).
145 GC IV, *supra* note 12, Art. 66.
146 CIHLS, *supra* note 12, at 355.
147 *Commentary, supra* note 144, at 39.
148 CIHLS, *supra* note 12, Rule 100.

In commentary, it suggests features that bear directly on the Court's concerns, such as examination of witnesses, presence of the accused at trial, and public proceedings.[149]

Interestingly, the Court turned instead to Article 75 of Protocol I Additional to the Geneva Conventions to expound on the judicial guarantees required by Common Article 3.[150] This is somewhat counterintuitive, both because Protocol I Additional applies only to international armed conflict (which the war on terror is not) and because the United States is not a Party thereto in any event. Moreover, the companion treaty on non-international armed conflict, Protocol II Additional, is of greater relevance to Common Article 3 since it addresses non-international armed conflict. Protocol II imposes numerous express requirements as to "prosecution and punishment of criminal offences related to the armed conflict",[151] including the right to be present at trial.[152]

To bolster its use of Article 75, the Court cited a *Yale Journal of International Law* article by the then State Department Legal Adviser, who opined that Article 75 reflects customary international law.[153] Since that Article provides for the right to be tried in one's presence, the Court read that requirement into Common Article 3. In fairness, this is a common position among law of war scholars, one which is sound. But it must be noted that the Court was basing its holding on a journal article which treated the conflict as essentially international and which referenced a treaty which also was limited to international armed conflict.

The Court found that the procedures by which military commissions could consider evidence unavailable to the accused and his counsel violated Common Article 3. Ultimately it held: "that the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him".[154]

[149] *Ibid.,* at 352-69.

[150] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I], 1977, Art. 75, 1125 *U.N.T.S.* 3. Kennedy J. did not join in this part of the opinion, believing it not to have been necessary to the decision. Thus, it represents a plurality, not majority, view.

[151] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], 1977, Art. 6, 1125 *U.N.T.S.* 609.

[152] *Ibid.,* Art. 6.2(e). The United States is not a Party to Protocol II.

[153] W.H. Taft, IV, "The Law of Armed Conflict After 9/11: Some Salient Features", 28 *Yale J. Int'l L.* 319, 321-22 (2003).

[154] Hamdan v. Rumsfeld, *supra* note 4, at 2798.

In a short one page concurring opinion, Justice Breyer, joined by Justices Kennedy, Souter, and Ginsburg, noted that the Court had in essence found that the President lacked the legislative authority to create the military commissions. However, they opined that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary".[155] That is exactly what occurred, as discussed below, following issuance of the *Hamdan* decision.

Justice Kennedy also wrote a concurring opinion, with which Justices Souter, Ginsberg and Breyer concurred in part. The four agreed that military commissions fall short of Congress' dual mandate of practicable uniformity with courts-martial and compliance with the law of war. No special circumstances justified deviation from these requirements, especially since Hamdan had been detained for nearly four years.

However, Kennedy departs from the Stevens opinion in a number of regards, depriving those aspects of "majority opinion" status. First, he would not have addressed the issue of the accused's presence throughout trial because it was not ripe for adjudication. In that the trial had not occurred, Hamdan had not yet been excluded from any part thereof. Kennedy also believed it unnecessary to address whether Article 75 of Protocol I Additional is binding (noting that the US is not a Party), and would likewise not have addressed the conspiracy charge. Doing so was, in his view, superfluous in light of the military commissions' illegality *ab initio* on other grounds. Justice Scalia wrote one of three dissents, joined by Justices Thomas and Alito. He argued that the Detainee Treatment Act plainly prohibited any exercise of jurisdiction over *habeas* cases. But even if it had not, the courts should still have abstained from hearing the case out of considerations of inter-branch governmental comity. In his view, there were "unique military exigencies" that justified the commissions.[156] Moreover, the DTA provided for judicial review, albeit limited, of commission decisions.

Whereas Justice Scalia's dissent was based on jurisdictional and abstention grounds, Justice Thomas', which was joined by Justices Scalia and, in part, Alito, focused on the merits. For them, the Court failed to defer sufficiently to the Executive Branch's prerogatives in national security affairs. In particular, it should have interpreted the AUMF grant of authority to the President as including the right to create military commissions, for "in these domains, the fact that Congress has provided the President with broad authorities does not imply – and the Judicial Branch should not infer – that

[155] *Ibid*., at 2799 (Breyer, J., concurring).

[156] Hamdan v. Rumsfeld, *supra* note 4, at 2819 (Scalia, J., dissenting). As precedent he points to Schlesinger v. Councilman, *supra* note 109.

Congress intended to deprive him of particular powers not specifically enumerated".[157]

With respect to military commissions more generally, Thomas accepted Winthrop's four conditions, but argued that they had been fulfilled. The Executive Branch's position, set forth in its submissions to the Court, was that the conflict began in (at least) 1996 and extended to "Afghanistan, Pakistan and other countries where al Qaeda has established training camps".[158] For Thomas, these were matters for the President to decide. "[T]he plurality's unsupportable contrary determination merely confirms that 'the Judiciary has neither aptitude, facilities nor responsibility' for making military or foreign affairs judgments".[159] Additionally, jurisdiction over Hamdan existed because he was an "unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war".[160]

Lastly, Thomas turned to the final Winthrop criterion, whether conspiracy constituted a "violation of the laws and usages of war cognizable by military tribunals". In his view, there were essentially two charges at hand – membership in a criminal enterprise and conspiracy to commit war crimes. As to the first, Thomas cited numerous examples of prosecution based on membership, including at Nuremberg. While Thomas' argument is colorable, the charge sheet clearly contained but a single charge – conspiracy.[161] Indeed, it was titled as such. Justice Thomas appears to have been "perfecting the charges", usually an inappropriate activity for a trial level court, and certainly one in which appellate courts should not engage.

Regarding conspiracy, Thomas cited numerous cases from the American Civil War involving such charges. He also cited conspiracy charges in post-WWII trials. However, Thomas failed to demonstrate that the former were based on the law of war, as opposed to US domestic law, nor did he address the actual handling of the latter by international tribunals (it is one thing to charge, quite another to convict).

As to uniformity with courts-martial, Thomas read Article 36 of the UCMJ as expressly allowing the President to set commission procedures that deviate from those of courts-martial by granting him the discretion to deem it impracticable to follow them. Thomas would not have distinguished, as did the majority, between Article 36(a) and (b), but would instead have read presidential discretion into both provisions.

[157] Hamdan v. Rumsfeld, *supra* note 4, at 2823 (Thomas, J., dissenting).
[158] *Ibid.,* at 2826.
[159] *Ibid.,* at 2828.
[160] *Ibid.,* at 2829.
[161] Hamdan Charge Sheet, *supra* note 99.

Turning to the Court's treatment of the 1949 Geneva Conventions, Thomas averred that they were not judicially enforceable treaties, but rather relied for enforcement on diplomacy.[162] While this assertion may be accurate as a general matter, in *Hamdan* the Court simply stated that Congress had incorporated the law of war (thus Common Article 3) by reference into US legislation to set US standards for US military commissions. In other words, the Article was not being directly enforced as such. Moreover, although Thomas cited *Eisentrager*'s finding of authorization for military commissions in Article 15 of the Articles of War (the predecessor to UCMJ Article 21), he failed to mention that *Eisentrager* predated the 1949 Geneva Conventions, and that there was no then existing equivalent to Common Article 3 in treaty law of war.

A somewhat sounder argument by Thomas was linked to Article 21's text: "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions…of concurrent jurisdiction with respect to *offenders or offenses* that by statute or *by the law of war* may be tried by military commissions" (emphasis added). He contended that the reference to the law of war was designed to establish jurisdiction over particular offenders or offenses. In contrast, the Common Article 3 text relied on by the Court dealt with the characteristics of tribunals, not the individuals who were subject to trial or the offenses for which they were liable to be tried.

Thomas also offered a status of conflict retort to the Court's position. Noting that the Executive branch has characterized the conflict as international, he cited US precedent that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight".[163] In this case, the President was acting pursuant to his Constitutional authority as Commander in Chief, thereby enhancing the argument for such deference.

Although characterizing conflict with a transnational terrorist group as international is questionable, Thomas pointed out that, on its face, Common Article 3 applies only to conflicts "occurring in the territory of one of the High Contracting Parties", and that the "war" with transnational terrorism was taking place in many countries. Thomas did concede that the Court's

[162] Citing as precedent the Court's decision in *Eisentrager*, *supra* note 59, which considered application of the 1929 Geneva Convention, *supra* note 25.

[163] Hamdan v. Rumsfeld, *supra* note 4, at 2846 (Thomas J., dissenting), citing Sumitomo Shoji America, Inc. v. Avagliano (1982), 457 *U.S.* 176, 184-85; United States v. Stuart (1989), 489 *U.S.* 353, 369.

interpretation was "admittedly plausible", but urged that where ambiguity exists, the judiciary had to defer to the Executive.[164]

Lastly, Thomas asserted that, in any event, the claim was not ripe for adjudication because the Common Article 3 provision in question applied only to "the passing of sentences and the carrying out of executions".[165] That had not occurred in Hamdan's case. One could only speculate, therefore, whether he would be denied any of the protections inherent in either the notion "regularly constituted" or, more generally, those applicable in standard courts-martial.

The final dissent was by Justice Alito, joined by Justices Scalia and Thomas. Alito began by suggesting military commissions must meet the requirements of Common Article 3, specifically, in his view, that the tribunal be a "court", that it be "regularly constituted", and that it afford "all the judicial guarantees which are recognized as indispensable by civilized peoples". Compliance with the first, he urged, was self-evident. The second requirement was that on which the Court relied when striking down commissions. For Alito, however, a regularly constituted court is one set up in accordance with the domestic laws of the country establishing it; there is no internationally accepted standard for how courts are to be created. This was a standard that he believed had been met.

Alito rejected the suggestion that a military commission must resemble a regular military court in structure and composition. On the contrary, courts that were both regularly and properly constituted often differed. Consider, he suggested, the difference between a municipal court and the International Criminal Tribunal for the Former Yugoslavia. He also contested the Court's concerns regarding commission procedures, suggesting instead that when procedures are improper, the appropriate remedy is to bar said procedures rather than deem them fatal to the existence of commissions.

Having dispensed with the issue of regular constitution, Alito next addressed that of universally recognized fundamental rights, singling out the admission of evidence with any probative value. Although this prospect had troubled the Court, Alito correctly noted that in many countries, particularly those of the civil law tradition, the practice was common in criminal trials. He also dismissed the Court's concern over the Secretary of Defence's power to change procedural rules from time to time, pointing out that if such a change was made during a proceeding and the accused was found guilty, the procedural change could be assessed upon review. In other words, the issue was not yet ripe for adjudication.

[164] Hamdan v. Rumsfeld, *supra* note 4, at 2846 (Thomas, J., dissenting).
[165] GC III, *supra* note 12, Art. 3(1)(d).

The final ramifications of *Hamdan* remain to be seen. True, the Supreme Court displayed a clear willingness to involve itself in important national security issues. But it did so with notable restraint; after all, the case turned on statutory construction of Article 21 of the UCMJ; it was only through that Article that the law of war was reached. And while the Court elected not to defer to the other branches on the basis of comity or by interpreting the DTA in a manner to bar jurisdiction, its narrow holding left open the possibility of Congress passing curative legislation.[166] Even the dissenters implicitly rejected the Government's early assertions that Congressional involvement in detainee affairs constituted an unconstitutional intrusion into Executive competence.

Congress acted in late 2006 to salvage the military commissions through passage of the Military Commissions Act.[167] The MCA directly addresses the flaws the Court identified in the commissions. For instance, it exempts military commissions from the UCMJ Article 36 requirement that the rules prescribed by the President be uniform to the extent practicable. Specifically, it states that the UCMJ "does not, by its terms, apply to trial by military commissions except as specifically provided" in the Act.[168] Moreover, the MCA explicitly shields military commissions from such UCMJ requirement as speedy trials (Article 10) and that mandating self-incrimination warnings (Article 31).

The MCA's jurisdictional parameters are broad. Under the legislation, military commissions may try "any offense punishable by [the MCA] or the law of war when committed by an alien unlawful enemy combatant".[169] An "unlawful enemy combatant" is:

> *(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or*
> *(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an*

[166] Recall how the Court abstained from reaching the merits in Padilla based on a minor procedural flaw.

[167] Military Commissions Act, PL 109-336, 120 *Stat.* 2600, Oct. 17, 2006 [hereinafter: MCA]. For a useful comparison of General Courts-Martial, Military Commission Order No. 1 (the original procedural guidance), and the MCA, *see* J.K. Elsea, "The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice", CRS Report for Congress, Oct. 12, 2006, at Table 1.

[168] MCA, *supra* note 167, § 948b (c).

[169] *Ibid.,* § 948d (a).

> *unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.*[170]

Its list of offenses is comparably extensive, ranging from perfidy and mistreating bodies to providing material support for terrorism and conspiracy. No requirement exists that the act be committed in a combat zone, or, indeed, even abroad, and temporal jurisdiction includes periods "before, on, or after September 11, 2001".[171]

A number of issues immediately suggest themselves. For instance, there is no indication as to what constitutes hostilities or support thereof *vis-à-vis* the definition of unlawful enemy combatants. And jurisdiction would appear to extend to aliens who commit offences in the United States that are not classic war crimes.[172] It will be telling to see how the courts apply *Ex parte Milligan*'s longstanding rule by which civilians may not be tried in military courts when civilian courts are available.[173] *Hamdi* and *Hamdan* suggest that the application of *Milligan* in MCA cases will likely turn on the extent to

[170] *Ibid.*, § 948a (1).

[171] *Id.*

[172] Recall that *Quirin* (*supra* note 23) involved classic acts of war.

[173] Ex Parte Milligan (1866), 71 *U.S.* (4 Wall.) 2 (1866). Milligan involved the trial by military commission set up by the commander for the military district of Indiana, and the sentence to death, of a US citizen civilian during the American Civil War for disloyal activities. Milligan sought a writ of *habeas corpus* under the 1863 *habeas* statute. The Supreme Court determined that he could not be prosecuted before a commission while the civilian courts were open and available for prosecution of a citizen:

> But it is said that the jurisdiction is complete under the 'laws and usages of war.' It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Ibid., at 121-22. The *Quirin* Court distinguished Milligan on the grounds that the Nazi saboteurs, despite the fact that one was a US citizen, were enemy belligerents (*supra* note 23, at 45.

which the accused is affiliated with an armed group conducting organized and sustained hostilities against the United States.

Moreover, the MCA includes a number of offences that do not appear to be traditional war crimes. Most notable in this regard is conspiracy,[174] which the *Hamdan* plurality specifically found not to be a war crime. The legislation also includes the offences of "intentionally causing serious bodily injury" and "murder" "in violation of the law of war".[175] While it is self-evident that intentionally killing a civilian is a war crime, the statute also criminalizes the act when the victim is a lawful combatant. Of course, the law of war provides immunity to combatants who kill enemy combatants.[176] This unassailable exception aside, it remains far from settled that the killing of a combatant by an unprivileged belligerent amounts to a war crime (although it may be murder under domestic law).[177] On the contrary, the International Criminal Tribunal for the Former Yugoslavia has repeatedly interpreted Common Article 3 violations as requiring that victims of deadly force be civilians.[178] Moreover, none of the statutes of existing international criminal tribunals, including that of the International Criminal Court, contain any of the aforementioned offences.

Of equal concern is the broad reach of MCA. Although Military Commission Instruction Number 2 had required that an alleged offence "took place in the context of and was associated with armed conflict" such that there was a "nexus between the conduct and armed hostilities",[179] an analogous express requirement does not appear in the MCA. True, the legislation does seem to envisage armed conflict in its references to enemy combatants, discussions of the status of commissions under Common Article 3, and occasional mention of the law of war. Additionally, the provision on terrorism (and by extension that on "providing material support for

174 MCA, *supra* note 5, § 950v(b)(28).

175 *Ibid.,* § 950v(b)(13) & (15).

176 *See*, *e.g.*, Protocol I Additional, *supra* note 150, Art. 43.2 ("…combatants … have the right to participate directly in the conflict").

177 *See*, *e.g.*, discussion in Dinstein, *supra* note 52, at 30-31.

178 *See, e.g.*, Prosecutor v. Kvocka *et al.*, Case No. IT-98-30/1 (Trial Chamber), Nov. 2, 2001, para. 124; Prosecutor v. Jelisic, Case No. IT-95-10 (Trial Chamber), Dec. 14, 1999, para 34; Prosecutor v. Blaskic, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para.180).

179 Dept. of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commissions, Apr. 30, 2003, at para. 5C and enumerated elements of the various offenses.

terrorism") requires that victims be "protected persons",[180] who are defined by reference to the Geneva Conventions.[181]

It will be interesting to see whether either commissions or the courts find such a nexus implicit in the MCA. In great part, their treatment of the issue will depend on how they characterize "armed conflict". The MCA, the administration, and the Supreme Court (as discussed above) have taken a markedly liberal approach to the concept, one that runs somewhat counter to traditional understandings; hence the criticism that the MCA's notion of "armed conflict" unacceptably extends military commission jurisdiction over international and domestic criminals.[182]

Also noteworthy is the Act's treatment of the Geneva Conventions. Although Congress specifically provided that a military commission is a "regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for the purposes of common Article 3", it provided that those subject to trial may not "invoke the Geneva Conventions as a source of rights".[183] Despite the general US doctrine that subsequently enacted statutes control if in conflict with treaty law, it remains to be seen how willing the judiciary will be to unquestioningly accept conclusory Congressional pronouncements regarding

[180] MCA, *supra* note 5, § 9v(b)(24) & (25).

[181] *Ibid.,* § 9v(a)(2).

[182] *E.g.*, the MCA establishes jurisdiction over "hijacking or hazarding a vessel or aircraft". *Ibid.,* § 950v(b)(23).

[183] *Ibid.,* §948b(F) & (g). Under the MCA, a military judge presides on panels of at least five officers, 12 in capital cases. Provisions are in place to guard against undue command influence over the members, the accused may only be excluded from proceedings to protect individuals or if he becomes disruptive, and evidence unavailable to the accused is inadmissible. As a general matter, all probative evidence is admissible as long as it was not obtained by torture. Hearsay evidence that would not be admissible in a court-martial may only be admitted if "the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence". If coercion other than torture was involved, a statement of the accused may nevertheless be admitted if the totality of the circumstances make it reliable (and of sufficient probative value") and the "interests of justice" would be served by admission. However, statements obtained after the enactment of the Detainee Treatment Act of 2005 are subject to the further requirement that the interrogation technique employed "not amount to cruel, inhuman, or degrading treatment". Conviction requires a 2/3 vote. Three quarters of the members must concur in a sentence of more than 10 years and death sentences must be unanimous. Finally, the MCA establishes new review procedures through creation of the Court of Military Commission Review (CMCR). Review is on issues of law (not fact) and is conducted by a panel of not less than three military judges. The accused may subsequently appeal to the Court of Appeals for the District of Columbia and is entitled to seek a writ of certiorari from the Supreme Court.

treaty interpretation and application. The cases discussed herein demonstrate that it has not blindly done so vis-à-vis the Executive Branch, arguably the branch entitled to greatest deference over interpretation of international agreements.

As of March 2007, trials have commenced under the revised commission rules against three of the 10 detainees originally charged: Hamdan, David Hicks (the "Australian Taliban", charged, *inter alia*, with conspiracy), and Omar Kadhr (a Canadian accused of using improvised explosive devises in Afghanistan).[184] Charges against a further 14 were in various stages of preparation. Reportedly, the Government eventually hopes to prosecute 60-80 of the roughly 400 detainees currently at Guantanamo.[185]

On March 30, 2007, following a guilty plea, a military commission convicted David Hicks of providing material support to terrorism.[186] Before Hicks pleaded guilty, the conspiracy charge and a charge of attempted murder in violation of the law of war were dropped. The commission sentenced Hicks to seven years imprisonment; all except nine months was suspended. In a very curious twist, Hicks agreed to withdraw claims that he was abused by US authorities while detained as part of the plea agreement. In all likelihood, the Australia-United States agreement that Hicks would serve his sentence in Australia motivated his decision to plead guilty, especially since the US Government had previously taken the position that convicted detainees who have served their military commission sentences remained liable to detention because of their status as enemy combatants in an ongoing armed conflict. The transfer of custody to Australia effectively negates that possibility for Hicks.

CONCLUDING THOUGHTS

There is no doubt that the Supreme Court detainee cases represent some of the most significant judicial involvement in US national security matters in recent decades. Clearly, the Supreme Court is unwilling to blindly defer to Executive, and to some extent Legislative, Branch activity in this sensitive

[184] Charges against the three are available on the Military Commissions website at: http://www.defenselink.mil/news/commissionspress.html.
Original charges against the ten are at:
http://www.defenselink.mil/news/commissionsarchives.html.

[185] K. Shrader, The Slow Pace of Detainees' Justice: 1 Courtroom, Thousands of Documents, Associated Press, Feb. 20, 2007, at: http://www.ap.org/FOI/foi_022007c.html, citing Brigadier General Hemingway, Legal Adviser to the Appointing Authority of the Commissions.

[186] The plea was accepted on 30 March.

area. It has rebuked the Bush Administration in three of the cases – *Hamdi, Rasul*, and *Hamdan* – and might well have done so in the fourth, *Padilla*, but for the Government's decision to criminally indict Padilla in federal District Court.

The Supreme Court is certain to yet again address the detainee issue. Following *Hamdan,* federal courts were inundated with petitions for writs of *habeas corpus* by Guantanamo detainees. The allegations ranged from violations of the Constitution to breaches of US legislation, the common law, and/or international law. Further, detainees filed numerous non-*habeas* claims under the Federal Question and Alien Tort Statutes.[187]

On appeal, many of the cases were consolidated in *Boumediene v. Bush*, a Court of Appeals for the District of Columbia case.[188] In February 2007, that court held, in a two-one decision, that the Military Commissions Act precluded federal jurisdiction. In doing so, it addressed two questions – whether the MCA applied to the detainees' *habeas* petitions and, if so, whether the MCA amounted to an unconstitutional suspension of the writ of *habeas corpus*. The Court quickly dispensed with the former on the grounds that the statute was unambiguous – it expressly barred federal jurisdiction over actions involving detention or trial, including *habeas* writs, "without exception, pending on or after the date of enactment".[189]

This left the Suspension Clause claim. Recall that Article I of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it".[190] The Court of Appeals began by citing a 2001 Supreme Court decision which held that the Suspension Clause "protects the writ 'as it existed in 1789' when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus".[191] Following a brief historical survey of the use of writs, including reliance on *Eisentrager*, the two majority judges concluded that they were "convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government".[192] They further urged, again relying on *Eisentrager,* that "the Constitution does not confer rights on aliens without property or presence in the United States".[193] Since

[187] *Supra* note 64.
[188] Boumediene v. Bush, 476 *F. 3d* 981 (D.C. Cir. 2007).
[189] MCA, *supra* note 5, § 950j.
[190] U.S. Const., Art. I, § 9, cl. 2.
[191] INS v. St. Cyr, 533 *U.S.* 289, 301 (2001).
[192] Boumediene v. Bush, *supra* note 188, at 991.
[193] *Id.* Also citing U.S. v. Verdugo-Urquidez (1990), 494 *U.S.* 259 (Fourth Amendment prohibition of unreasonable searches and seizures not extraterritorially applied).

Guantanamo is sovereign Cuban territory, it lies beyond constitutional reach. By this reasoning, the military would presumably be entitled to incarcerate Guatanamo detainees indefinitely based solely on CSRT procedures.

However, as the Supreme Court noted in *Rasul*, Guanatanamo is no ordinary overseas military base. Will the Court accept the intermediate court's somewhat conclusory approach on this matter in the now-ripe *constitutional* context, or, instead, extend the logic it employed in *Rasul* when addressing the *habeas* statute.

The Supreme Court will also have to consider Judge Rogers' well-reasoned dissenting opinion, which argued that the Suspension Clause is a limitation on Congress which does not confer an "individual right that might pertain only to persons substantially connected to the United States".[194] Because Rogers believed that the detainees would have had access to the writ of *habeas corpus* at common law, he further opined that Congress violated the clause when enacting the MCA. Finally, he perceptively distinguished the circumstances of the Guantanamo detainees from those of Germans involved in *Eisentrager*.[195] In the latter, a trial had been conducted prior to the confinement; in the former the detainees had been charged with no crimes at the time of their detention. Thus, the extent of review "differs by orders of magnitude".[196]

The battle continues. On April 2, 2007, the Supreme Court denied petitions for expedited *habeas corpus* review of the case.[197] However, the decision was hardly an indication that the Court found no merit in the petitioners' positions. Three of the Justices – Breyer, Ginsburg, and Souter – would have granted expedited certiorari, one short of the number required to hear the case. Moreover, two of the Justices who voted for denial – Stevens and Kennedy – made clear that they were doing so only on procedural grounds, specifically the exhaustion of remedies doctrine. In their view, the detainees first had to challenge their detention using the review process set out in the Detainee Treatment Act.[198] But they cautioned that "[w]ere the Government to take additional steps to prejudice the position of petitioners in seeking review in this Court, courts of competent jurisdiction, including this Court, should act promptly to ensure that the office and purposes of the writ of *habeas corpus* are not compromised. And as always, denial of

194 Boumediene v. Bush, *supra* note 188, at 994-95 (Rogers, dissenting).

195 As well as *Yamashita*, *supra* note 112, and *Quiri*n, *supra* note 23.

196 (Rogers, dissenting). Boumediene v. Bush, *supra* note 188, at 1010 (Rogers, dissenting).

197 Boumediene v. Bush, 2007 U.S. LEXIS 3783 (2007); *see also* the denial of (expedited) certiorari on Mar. 5, 2007, in Hamdan v. Gates, 2007 U.S. LEXIS 2840 (2007).

198 Review by the Circuit Court for the District of Columbia of the decision to continue detention made in the CSRT.

certiorari does not constitute an expression of any opinion on the merits".[199] When the case is heard, the holding will be of enormous import, for the Supreme Court may be forced to finally face the Constitutional issues head on, rather than relying primarily on statutory interpretation to resolve the cases at hand. With commissions underway in Guantanamo, time is of the essence. David Hick's guilty plea in the first commission trial may have given the Government a bit of breathing room, but with further proceedings on the merits imminent in other cases, matters are fast coming to a head. Meanwhile, some members of Congress have begun to push back against the Administration's handling of detainees. Most notably, the "Restoring the Constitution Act of 2007" has been introduced in Congress to restore *habeas* rights, bar evidence gained through torture or coercion, and reinstate US adherence to the Geneva Conventions.[200] The Act, were it to pass, would certainly face Presidential veto. Nevertheless, with the Democratic Party now in control of Congress, such legislation foreshadows a shift in the legislature's perspective regarding the detainee issue.

Many other issues remain judicially unaddressed and ripe for litigation. For instance, there have been no rulings on the treatment and handling of prisoners held at CIA-run prisons abroad or at US military bases, such as that at Bagram Air Base in Afghanistan.[201] Nor have the courts had the opportunity to fully address the transfer of Guantanamo detainees to other countries. Such transfers drew particular attention in mid-2005 when the media reported a Department of Defense plan to relocate roughly half of the Guantanamo detainees to states such as Afghanistan, Saudi Arabia, and Yemen.[202]

[199] Boumediene v. Bush (2007), 127 *S. Ct.* 1478 (statement of Stevens & Kennedy).

[200] Restoring the Constitution Act of 2007, S. 567, Feb. 13, 2007 (status as of 1 Apr.: Referred to Committee on Armed Services).

[201] *See*, *e.g.*, D. Johnston, "C.I.A. Tells of Bush's Directive on the Handling of Detainees", *N.Y. Times*, Nov. 15, 2006, at A14 (citing a classified directive signed by President Bush allowing the CIA to establish such facilities abroad); T. Golden & E. Schmitt, "A Growing Afghan Prison Rivals Bleak Guantanamo", *N.Y. Times*, Feb. 26, 2006, at A1.

[202] D. Jehl, "Pentagon Seeks to Shift Inmates from Cuba Base", *N.Y. Times*, Mar. 11, 2005, at A1. Numerous emergency motions were filed insisting that review over pending habeas petitions be preserved in the event of transfer and that advance notice be provided of pending transfers. Most courts considering the motions ruled that advance notice had to be provided both because of the risk that the detainees' habeas claims would be extinguished and due to the risk of torture following transfer. Yet, a number of courts ruled that habeas only reaches detention, not transfer, and that *habeas* claims become moot upon transfer. On this issue, *see* R.M. Chesney, "Guantanamo: The Law of International Transfers", 40 *U. Richmond L. Rev*. 657 (2004). The legality of such transfers may ultimately turn on the legality of MTA provisions purporting to extinguish habeas review procedures. On issues left unresolved by the decisions of the Supreme

Ultimately, it cannot be denied that the entire detainee conundrum has dramatically diminished, rightly or wrongly, the US reputation for commitment to the rule of law. That is tragic – for both sides of the US political fence. But what the extensive litigation and resulting Supreme Court decisions have demonstrated is that, in a democracy, an independent judiciary can be an effective, albeit sometimes reticent, constraint on excessive actions by the other branches of government, even during a highly emotive and politically charged armed conflict.

Court, *see* J. Hafetz, "Secret Evidence and the Courts in the Age of National Security: Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantanamo", 5 *Cardozo Pub. L. Pol'y & Ethics J.* 127, 141-69 (2006).

SHOULD NATIONAL SECURITY TRUMP HUMAN RIGHTS IN THE FIGHT AGAINST TERRORISM?

By Robert P. Barnidge, Jr.[*]

I. INTRODUCTION

It is unsurprising that the role of human rights in the counterterrorism discourse has become an issue of major concern to those broadly associated with human rights. In securing the right to life in their fight against non-State terrorists, States cannot act in a vacuum. International human rights law, involving as it does positive and negative State obligations, requires a delicate juggling act by States when fighting terrorism.[1]

This paper addresses some important issues in the context of human rights and counterterrorism. It begins by exploring the applicable legal framework in the current counterterrorism context, with particular emphasis on the United States' engagement with Al Qaeda. Arguing that an armed conflict model is the most convincing approach, it then asks how international human rights law applies during armed conflicts and looks at how international actors have attempted to frame human rights in a way that appeals to States' self-interest. This paper then critically engages in the debate by exploring whether human rights observance is necessary, in an empirical sense, to effectively fight terrorism.[2] It concludes with a sobering assessment of the legal landscape in light of the perilous reality of human rights and counterterrorism.

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[1] For a discussion of international human rights law in the context of terrorism, *see* H. Duffy, *The 'War on Terror' and the Framework of International Law* 301-32 (2005).

[2] For similar concerns, *see* B. Dunér, "Disregard for Security: The Human Rights Movement and 9/11", 17(1-2) *Terrorism & Pol. Violence* 89, 91 (2005) (assessing the "question of a *trade-off* between security and human rights … and … the *instrumentality* of human rights for security").

II. THE APPLICABLE LEGAL FRAMEWORK

Given that the law acts as an overarching framework that provides a reference point for judgment, human rights analysis must begin by identifying the applicable legal framework. Once this is done, the identified regime can be applied to particular facts and circumstances, and conclusions can be drawn as to the legality or illegality of a State's actions or omissions. This, of course, presumes that the relevant legal framework can be identified with some degree of predictability and certainty. This section focuses in particular on the United States' engagement with Al Qaeda.

Taft sketches as potentially applicable to the United States' engagement with Al Qaeda the legal regimes that have historically applied during wartime and peacetime, or, respectively, international humanitarian law and criminal law, yet argues that the preferred approach would involve a "new system whose rules are well understood and take account of both the need to protect our citizens and assure that we accurately identify, effectively deter, and appropriately punish those who pose threats to our society or have committed criminal acts".[3] As a non-State terrorist organisation, he notes that Al Qaeda cannot be considered to be bound by the Geneva Conventions as a matter of treaty law because it does not have the capacity to enter into such agreements.[4] However, given the gravity of the terrorist threat and the inherently political nature of Al Qaeda's agenda and choice of means, Taft argues for a framework rooted in the "law of armed conflict modified to adapt to those unconventional aspects".[5]

Posner's argument broadly resembles Taft's.[6] The former's approach, however, acknowledges a greater number of legal permutations potentially applicable in the current counterterrorism context, namely international humanitarian law, criminal law, a *lacuna* in which international humanitarian law does not apply, and an altered international humanitarian law.[7] According to Posner, applying the laws of war completely to Al Qaeda could potentially mean granting its captured combatants widespread protection.[8] He is critical of another potentially applicable legal framework,

3 W.H. Taft, "Keynote Address", 21(2) *Am. U. Int'l L. Rev.* 149, *id.* (2005).

4 *Ibid.,* 154. Of the Geneva Conventions, Judge Higgins of the ICJ has said that "[i]t does remain an area where some of the provisions sit very awkwardly with non-state actors and with actors who even if states are not parties". A Conversation with Secretary of State Condoleezza Rice, Centennial Annual Meeting of the American Society of International Law, *available at:* http://www.state.gov/secretary/rm/2006/63855.htm (29 Mar. 2006).

5 Taft, *supra* note 3, at 150.

6 E.A. Posner, "Terrorism and the Laws of War", 5(2) *Chi. J. Int'l L.* 423 (2005).

7 *Id.*

8 *Ibid.,* 431.

criminal law, because it ignores the inherently political *raison d'être* of Al Qaeda and its ability to act coherently and strategically.[9] At the same time, Posner recognises that two philosophical underpinnings of the laws of war, namely symmetry and reciprocity, which he defines, respectively, as the "condition [that] requires that the laws of war generate military advantages for neither belligerent … [and t]he … condition [that] requires that each belligerent have the ability to retaliate when the other belligerent violates the laws of war",[10] sit uneasily in the current environment, which Pfanner describes as asymmetrical warfare,[11] and thus, Posner favours an approach that appreciates this dynamic.[12] Casey and Rivkin pick up on the reciprocity issue and argue that a wilful blindness to its place in the current environment can be likened to "sending a gambler to the tables with an ironclad guarantee that he's 'covered'".[13]

Across the Atlantic Ocean, Greenwood, writing in 2002, sits uncomfortably with the characterisation as mere crime, however serious, of the threat posed by Al Qaeda terrorism.[14] He cites the Security Council's

9 *Ibid.,* 431-32. Osama bin Laden coherently laid out Al Qaeda's political manifesto in his "Letter to America", in which, to name a few of his demands, he insisted upon conversion to Islam, criticised the notion of secular politics, gambling, homosexuality, and interest on investments, and blamed the United States for the spread of AIDS. *See* Full Text: Bin Laden's "Letter to America", *Observer,* (Q2)(1)-(7), *available at:* http://observer.guardian.co.uk/worldview/story/0,11581,845725,00.html (24 Nov. 2002). Egyptian militant Islamist Sayyid Qutb saw in usury an "aim … [to ensure] that all the wealth of mankind end up in the hands of Jewish financial institutions which run on interest". S. Qutb, *Milestones* 111 (2005).

10 Posner, *supra* note 6, at 424. *See* T. Pfanner, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action", 87(857) *Int'l Rev. Red Cross* 149, 161 (2005).

11 Pfanner, *supra* note 10, at 150 (defining asymmetrical warfare as that in which "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").

12 *See* Posner, *supra* note 6, at 427-34.

13 L.A. Casey & D.B. Rivkin, Jr., "Rethinking the Geneva Conventions", in *The Torture Debate in America* 203, 205 (K.J. Greenberg ed., 2006). Casey and Rivkin also assert that "[o]ne potential solution, both in terms of applying the Geneva Conventions in instances where the United States engages a noncompliant Geneva party and vis-à-vis al Qaeda, would be adoption of a reciprocity rule. This need not involve resort to tit-for-tat reprisals, but could be a flexible approach whereby the United States takes account of its opponent's compliance record in its own interpretation and application of the treaties". *Ibid.,* 204. For another discussion of reciprocity, *see* G.L. Neuman, "Humanitarian Law and Counterterrorist Force", 14(2) *E.J.I.L.* 283, 283-87 (2003).

14 C. Greenwood, "International Law and the 'War Against Terrorism'", 78(2) *Int'l Aff.* 301 (2002).

classification of terrorism as a threat to international peace and security,[15] something which with regard to non-State actors International Court of Justice [ICJ] Judge Kooijmans recognised in his Separate Opinion during the summer of 2004 in the *Wall Advisory Opinion* as a "completely new element … the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence".[16] Greenwood asserts a need for international law to appreciate in its threat perception that modern terrorism in the form of Al Qaeda involves a "terrorist organization operating outside the control of any state [that] is capable of causing death and destruction on a scale comparable with that of regular military action by a state".[17] The classical notion of a power hierarchy between States and non-State actors, with the former in a horizontal relationship with each other and in an overbearing vertical relationship with the latter, Greenwood argues, may be outdated and in need of adaptation.[18]

These arguments favouring an international humanitarian law perspective toward Al Qaeda broadly resemble the United States' position since 11 September 2001.[19] According to the Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba, there exists an armed conflict, as international humanitarian law understands that legally-loaded term, between the United States and Al Qaeda, the applicable legal framework existing outside treaty law in the realm of customary international humanitarian law.[20] The key point is "the existence of an armed conflict[,] … determined *inter alia* by the intensity, and scope and duration of hostilities, not by whether the situation is afforded Geneva Convention

15 *Ibid.,* 306-07. *See also* Y. Dinstein, "*Ius ad Bellum* Aspects of the 'War on Terrorism'", in *Terrorism and the Military: International Legal Implications* 13, 15-16 (W.P. Heere ed., 2003).

16 Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] *I.C.J. Rep*., para. 35 (Kooijmans J., Separate Opinion).

17 Greenwood, *supra* note 14, at 307. *See also* R. Wedgwood, "Al Qaeda, Terrorism, and Military Commissions", 96(2) *A.J.I.L.* 328, *id.* (2002).

18 Greenwood, *supra* note 14, at 301. According to Pfanner, "[a]symmetrical wars fit in neither with Clausewitz's concept of war nor with the traditional concept of international humanitarian law"; *supra* note 10, at 173.

19 The United States' position can be contrasted with the European approach. *See* A. Kroeger, "New Challenges Strain EU-US Ties", BBC News, 1 June 2006, *available at:* http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/5036282.stm.

20 Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba, 45(3) *I.L.M.* 742, 748 (2006).

protection".[21] While it is true that the United States Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld* held that Common Article 3 of the Geneva Conventions applies to the United States' engagement with Al Qaeda,[22] it should be stressed that, since Common Article 3 itself only operates within an armed conflict paradigm, this decision, while disappointing to the executive branch,[23] does not fundamentally question the applicability of international humanitarian law and an armed conflict paradigm.

It should be noted that an international humanitarian law framework brings with it a number of strategic advantages to the United States in combating Al Qaeda, including combatant detention, non-coercive interrogation and intelligence gathering, and a clear set of guidelines for combatants.[24] It can also be pointed out that the United States' peacetime criminal justice system failed to stymie Al Qaeda's ambitions and avert 11 September.[25] Referring to the United States' attack on Al Qaeda operatives in Yemen in 2002, Pejic argues that a non-armed conflict paradigm could have sufficed in that example, although she concedes that such a framework would have required individualised evidence of an imminent and serious threat to life, the attack having been done as a last resort and with the consent of the target State, and that there have been an investigation with review provision after the fact.[26] Furthermore, again referring to the same example, Pejic asserts that "the suspects' mere 'membership' in al-Qaeda (whatever that may mean) would clearly not have been a sufficient reason to

21 *Ibid.*, 749. This argument is strengthened by the fact that Al Qaeda's Osama bin Laden has clearly recognised an armed conflict posture. Over three and a half years before 11 September, for example, he publicly stated that "[a]ll these crimes and sins committed by the Americans are a clear declaration of war on God, his messenger, and Muslims". Shaykh Usamah Bin-Muhammad Bin-Ladin *et al*., "Jihad Against Jews and Crusaders: World Islamic Front Statement", *Wash. Post,* 23 Feb. 1998, *available at:* http://www.washingtonpost.com/ac2/wp-dyn/A4993-2001Sep21?language=printer (2001). *See also* Pfanner, *supra* note 10, at 155-56.

22 Hamdan v. Rumsfeld, No. 05-184, slip op. at 66-69 (*U.S. S. Ct.,* 29 June 2006).

23 Rivkin and Casey call the decision "a setback with a sterling silver lining … Together with the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld* – directly affirming the government's right to capture and detain, without criminal charge or trial, al Qaeda and allied operatives until hostilities are concluded – *Hamdan* vindicates the basic legal architecture relied upon by the administration in prosecuting this war". D.B. Rivkin, Jr., & L.A. Casey, "Hamdan: What the Ruling Says – And What It Doesn't Say", *Wall St. J.*, 3 July 2006, *available at:* http://www.opinionjournal.com/extra/?id=110008599.

24 *See* Taft, *supra* note 3, at 150-52.

25 *See* Casey & Rivkin, *supra* note 13, at 210; Wedgwood, *supra* note 17, at 329-30.

26 J. Pejic, "Terrorist Acts and Groups: A Role for International Law?", 75 *B.Y.B.I.L.* 71, 90-91 (2004).

kill them".[27] Outside of armed conflict, she is generally correct, but within an armed conflict framework, "mere 'membership'" suffices to ensure a legitimate military target on the battlefield. If one were to apply Pejic's criteria to the fatal bombing by air of Al Qaeda's Abu Musab al-Zarqawi,[28] a strong case can be made that several of her criteria would not have been met. This suggests the strategic advantages of an international humanitarian law framework.

A fundamentally contrasting perspective to the question of the applicable legal framework in the current counterterrorism context is that a war mentality does not apply.[29] According to Paust, the very fact that Al Qaeda cannot be considered a State, belligerent nation, or insurgency means that, *ipso facto*, international humanitarian law does not apply to its engagement with States, including its engagement with the United States.[30] Nonetheless, although he argues that the non-State, non-belligerent, non-nation, and non-insurgency nature of Al Qaeda generally precludes the triggering of international humanitarian law, Paust distinguishes those situations in which Al Qaeda is involved in a conflict in which States are on opposing sides, such as Afghanistan post-11 September and Iraq after the United States-led invasion of March 2003.[31] In a statement issued just days after 11 September, Schabas also reflected a State-centric understanding of international law, stating that, "according to [… it], we must know what State committed it. A group of individuals, even numbering in the hundreds, cannot commit an 'act of war'".[32]

Pejic also generally rejects the applicability of international humanitarian law to States' engagements with Al Qaeda: "[n]ot only is the violence not inter-state, it is also clear that states would never 'legitimise' the non-state 'adversary' by granting groups perpetrating terrorist acts … status and rights

27 *Ibid.,* 91.

28 On this incident, *see* "How Zarqawi Was Found and Killed", BBC News, *available at*: http://news.bbc.co.uk/2/hi/middle_east/5060468.stm (last updated 9 June 2006).

29 *See* International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Excerpt of the Report Prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, Geneva, Dec. 2003, 86(853) *Int'l Rev. Red Cross* 213, 232-33 (2004).

30 *See* J.J. Paust, "Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions", 79(4) *Notre Dame L. Rev*. 1335, 1340-42 (2004).

31 *Id.*

32 W.A. Schabas, "Statement of 17 September 2001", *available at:* http://www.nuigalway.ie/human_rights/Docs/Press%20Releases/170901%20PR.doc (2001).

in combat and upon capture".[33] According to her, because Al Qaeda is not sufficiently cohesive as a non-State organisation and because the actions taken against it do not trigger the law of armed conflict, a criminal law framework, not an armed conflict framework, applies.[34]

While the International Committee of the Red Cross [ICRC] is clearly correct in noting that "international humanitarian law is applicable when the 'fight against terrorism' amounts to, or involves, armed conflict",[35] the fundamental disagreement between those who argue that a customary international humanitarian law framework governs the relationship between the United States and Al Qaeda and those who prefer a criminal law model relates to whether it can legally be said that an armed conflict exists between the United States and Al Qaeda.[36] Rona concedes the definitionally problematic and indeterminate nature of the legal concept of armed conflict[37] but suggests that any armed conflict properly so called must have identifiable parties, take place in a particular geographical space, be distinguishable from unrelated acts of violence, have a defined start and finish, and involve hostilities of a certain minimal intensity.[38] After assessing these five criteria, he concludes that there does not exist an armed conflict between the United States and Al Qaeda, thus precluding the application of international humanitarian law.[39]

This conclusion, however, whether by Rona or other like-minded individuals, does not, and cannot, definitively settle the matter. To deal with each of Rona's five criteria in turn, for example, one could argue that: while Rona is undoubtedly correct that "'[t]error' or 'terrorism' cannot be a party to the conflict",[40] it could be said that Al Qaeda's history of intense and

33 Pejic, *supra* note 26, at 81.

34 *Ibid.,* 87-88, 90.

35 International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 233.

36 *See* Pejic, *supra* note 26, at 76; International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 231. Related questions follow if it can legally be said that an armed conflict exists between the United States and Al Qaeda, namely whether customary international humanitarian law applies and, if so, its content and application to particular facts and circumstances. For critical perspectives on recourse to customary international humanitarian law, *see* G. Rona, "Interesting Times for International Humanitarian Law: Challenges from the "War on Terror", 27(2) *Fletcher Forum World Aff.* 55, 68-69 (2003).

37 *Ibid*., 62-63, 74.

38 *Ibid.,* 60-63. *See also* International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 234-35.

39 *See* Rona, *supra* note 36, at 60-63.

40 *Ibid.,* 60. *See* Pejic, *supra* note 26, at 88 (stating that "'[t]errorism' is a phenomenon. Both practically and as a matter of law, war cannot be waged against a phenomenon");

frequent acts of violence and the concerted international effort, particularly in the Security Council, that has been directed at it has imposed upon it some degree of international status, thereby meaning that there are identifiable parties to a conflict;[41] the requirement that the conflict take place in a particular geographical space has yielded in an era in which a non-State actor such as Al Qaeda can pose a global threat and in which States open themselves to attacks on their own territory if they fail to act with due diligence as required by international law;[42] admittedly, disparate acts of violence by Al Qaeda across the world make the task of distinguishing the conflict from unrelated acts of violence a more taxing exercise, but this blurring along the edges should not lead one to ignore Al Qaeda's proud and public claims of responsibility after its violent engagements; Rona is correct to highlight difficulties related to the start and finish of an armed conflict with Al Qaeda,[43] but presumably, one could look at the first Al Qaeda-acknowledged attack or the first attack that could be attributed to the group and proceed from there; and finally, as to the last criterion, hostilities of a certain minimal intensity, the thousands of casualties, in dozens of countries but particularly in Afghanistan and Iraq, that have resulted from the engagement between the United States and Al Qaeda suggest the inappropriateness of a peacetime paradigm.

Furthermore, the argument that the mere failure of the United States to have formally derogated from its non-derogable obligations under international human rights law means that, *ipso facto*, an armed conflict, and a corresponding international humanitarian law framework, cannot be said to exist, as rapporteurs of the United Nations Human Rights Commission

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Dinstein, *supra* note 15, at 22 (asserting that "[t]he expression 'war on terrorism' by itself is a figure of speech or a metaphor").

41 *But see* Pejic, *supra* note 26, at 87 (stating that, "[w]hile all the terrorist acts that have occurred since September 11th have been labelled as being in some way 'linked' to al-Qaeda, very little about the exact nature of such a 'link' is ever provided, except that the suspects are usually Muslim men").

42 Dinstein alludes to this (*supra* note 15, at 20-21). On the due diligence obligation and non-State terrorist organisations, *see* R.P. Barnidge, Jr., "States' Due Diligence Obligations with Regard to International Non-State Terrorist Organisations Post-11 September 2001: The Heavy Burden That States Must Bear", 16 *Ir. Stud. Int'l Aff.* 103 (2005).

43 Taft discusses this in the context of detainees (*supra* note 3, at 153). Dinstein interprets the law of international armed conflict as allowing the detention of Al Qaeda unlawful combatants at Guantánamo Bay until the cessation of hostilities with that non-State actor, but he leaves unaddressed attendant dilemmas associated with the end of what he terms "hostilities in which Al Qaeda is involved". Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 50 (2004).

[UNHRC] seemed to imply in February 2006,[44] is equally problematic and unsustainable, preferring as it does form over substance.[45] While it is technically required that States issue official derogations under international human rights law, an armed conflict is an armed conflict, with or without a formal derogation, when the facts and circumstances suggest as much, and armed conflict necessarily triggers international humanitarian law. Bassiouni is correct to note, albeit in the context of torture, that semantics only go so far and that "a rose by any other name is still a rose".[46]

Unlike a judgment of, for example, the United States Supreme Court, which has an acknowledged authority as a legally binding and definitive interpretation of the law as applied to particular facts and circumstances under the municipal law of the United States, international law has yet to conclusively determine whether an armed conflict exists between the United States and Al Qaeda.[47] According to the ICRC, "there is no uniform answer",[48] as "international opinion – both governmental and expert, as well as public opinion – remains largely divided on how to deal with new forms of violence, primarily acts of transnational terrorism, in legal terms".[49]

Having said that, it should be noted that the present author's approach to the relationship between the United States and Al Qaeda is largely influenced by international humanitarian law, draws heavily on the insights and justifications of Taft and others with similar perspectives, and favours a description, however inartfully, of the relationship between the two actors, the United States and Al Qaeda, as a transnational international armed conflict.[50] The ICRC's concern that "[i]t is doubtful, absent further factual

44 *See* Situation of Detainees at Guantánamo Bay, *UN ESCOR*, at 36, UN Doc. Future E/CN.4/2006/120 (2006).

45 Wedgwood argues along comparable lines with regard to formal declarations of war (*supra* note 17, at 335).

46 M.C. Bassiouni, "Great Nations and Torture", in *The Torture Debate*, *supra* note 13, at 256, 259: "[t]he position of the United States is that torture called by another name is permissible and that torture which does not cause the risk of death is considered only coercive - ignoring the obvious conclusion that a rose by any other name is still a rose. In this case, torture by any other name is still torture".

47 Rona makes a similar point with regard to aggression (*supra* note 36, at 67).

48 International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 231.

49 *Ibid.,* 214.

50 The concept of a "transnational international armed conflict" seeks to convey by its use of "transnational" the armed conflict's cross-border nature and involvement of a non-State actor, Al Qaeda, and by its use of "international" the involvement of a State actor, the United States, as an opposing party in the conflict. On the interplay between the transnational and the international and the argument that an armed conflict paradigm applies, *see ibid.,* 231-32. For a theoretical discussion, *see* A. Roberts, "Righting Wrongs

evidence, whether the totality of the violence taking place between States and transnational networks can be deemed to be armed conflict in the legal sense"[51] should be acknowledged, but recent events, it is asserted, have provided the necessary "further factual evidence". At the same time, Neuman's point that all State uses of force against terrorists may not amount to armed conflict in the international humanitarian law sense[52] remains, in principle, valid and unassailable.

III. APPLYING INTERNATIONAL HUMAN RIGHTS LAW

Thus, while international law has yet to definitively settle the question whether an armed conflict exists between the United States and Al Qaeda, reasonable arguments being able to be made in favour of and against an armed conflict paradigm, this paper proceeds taking for granted the applicability of international humanitarian law. What role, if any, then, does international human rights law play in such a context?

The emerging consensus is that international human rights law continues to have legal effect, *mutatis mutandis*, during situations of armed conflict.[53] As the ICJ stated in the *Wall Advisory Opinion*, "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".[54] The ICJ went on in the same paragraph of that advisory opinion to say that the reality of armed conflict requires that, with respect to the *lex specialis derogat legis generalis* maxim, international human rights law be considered the *legis generalis* and international humanitarian law be treated as the *lex specialis*.[55] In late-2005, the ICJ, although failing to expressly mention the *lex specialis derogat legis generalis* rule, substantially reiterated this

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or Wronging Rights? The United States and Human Rights Post-September 11", 15(4) *E.J.I.L.* 721, 741, 746-48 (2004).

51 International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 234.

52 *See* Neuman, *supra* note 13, at 290-91.

53 *See* N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", 87(860) *Int'l Rev. Red Cross* 737, 737-39 (2005). *See also* Dinstein, *supra* note 43, at 20-25.

54 Wall Advisory Opinion, *supra* note 16, at para. 106.

55 *Id. See also* H.-J. Heintze, "On the Relationship Between Human Rights Law Protection and International Humanitarian Law", 86(856) *Int'l Rev. Red Cross* 789, 793 (2004) (making a similar point by stating that "the law of peace and the law of war overlap but also that, when examining which duties are incumbent on a State in times of armed conflict, it is not possible to avoid taking international human rights law into consideration").

position in *Armed Activities on the Territory of the Congo*.[56] Rapporteurs of the UNHRC, after the ICJ had rendered its decisions in the *Wall* and *Congo* cases, described the relationship between the two regimes as "not mutually exclusive, but … complementary".[57] In this sense, the ICJ and these rapporteurs clearly reject the position to these two areas of law, a stance advanced by the United States, which would see them as hermetically sealed from one another.[58]

While clarity that the *lex specialis derogat legis generalis* rule applies in situations of armed conflict is helpful in allowing State and non-State actors to adjust their actions accordingly, it is the interaction between international humanitarian law and international human rights law on particular facts and circumstances that poses the most difficulties in practice.[59] Complexities arise, and there is a pressing need for practical guidance and precision. If one accepts, for example, Heintze's assertion that the trend is toward more "than mere complementarity and aims at providing the greatest effective protection of the human being through the cumulative application of both bodies of law"[60] and that the ICJ "regard[s] the *protection* granted by international humanitarian law and human rights law as a single unit and [appreciates a need] to harmonize the two sets of international rules",[61] serious, and crippling, questions still remain, such as the meaning of and standard against which "greatest effective protection" is to be interpreted and the nature of the mechanism through which harmonisation is to occur, this harmonisation presumably occurring without simultaneously undermining the integrity and effectiveness of international humanitarian law and international human rights law. Dinstein categorises international humanitarian law as containing rights that operate to the benefit of States and individuals, although he acknowledges that the provisions of this area of law are not always clear as to whether they benefit States or individuals,[62] and argues that international humanitarian law may provide greater protections to individuals in certain cases than international human rights law.[63] With this borne in mind, adjudicating on the basis of "greatest effective protection" is particularly problematic.

56 *See* Armed Activities on the Territory of the Congo (Congo v. Uganda), [2005] *I.C.J. Rep*., para. 216.
57 Situation of Detainees*, supra* note 44, at 10.
58 On the United States' position in this regard, *see* Heintze, *supra* note 55, at 789-93.
59 *See* Lubell, *supra* note 53, at 738.
60 Heintze, *supra* note 55, at 794.
61 *Ibid.,* 797.
62 *See* Dinstein, *supra* note 43, at 20-22.
63 *Ibid.,* 24-25.

The ICJ did little to resolve these complexities in noting that a particular legal question during armed conflict may involve international humanitarian law alone, international human rights law alone, or a combination of both areas of law.[64] It probably would have been unrealistic to have expected a more unambiguous, nuanced approach, however. The United States' fears expressed to the UNCHR in March 2006 that a legal perspective that would allow international human rights law to be considered during armed conflict would necessarily mean that captured enemy combatants would be entitled to the full panalopy of legal rights afforded criminal defendants under international human rights law[65] is an alarming and extreme interpretation that may be unwarranted, but at the same time, ICJ Judge Weeramantry's statement in his Dissenting Opinion in the 1996 *Legality of the Threat or Use of Nuclear Weapons* case that, "[i]ndeed, so well are human rights norms and standards ingrained today in global consciousness, that they flood through into every corner of humanitarian law"[66] provides little in the way of practical interpretative assistance. In this context, Lubell's encouragement of sensitivity to the distinct legal languages of international humanitarian law and international human rights law as a way to negotiate impasses that may arise may be a useful and promising approach.[67]

That having been said, the Security Council has clearly stressed a role for international human rights law in its Resolutions related to terrorism. In an annexed declaration in January 2003, for example, it expressly stated that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".[68] In its Resolution dealing with incitement of terrorism, which was adopted in September 2005, the Security Council again stressed the necessity of States' compliance with "all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law".[69]

The Security Council has been far from alone within the United Nations system in emphasising the necessary role of human rights in counterterrorism, as this focus has been the thrust of the United Nations

64 *See* Wall Advisory Opinion, *supra* note 16, at para. 106.
65 *See* Reply, *supra* note 20, at 752.
66 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35(4) *I.L.M.* 809, 901 (1996) (Weeramantry J., dissenting).
67 *See* Lubell, *supra* note 53, at 744-46.
68 S.C. Res. 1456, *UN SCOR*, Annex, at 3, UN Doc. S/RES/1456 (2003).
69 S.C. Res. 1624, *UN SCOR*, at 3, UN Doc. S/RES/1624 (2005).

generally.[70] The General Assembly, for example, has used language similar to that used by the Security Council in highlighting human rights. In a Resolution adopted in December 2002, it affirmed that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law".[71] The General Assembly used virtually identical language in adopting the 2005 World Summit Outcome.[72]

United Nations Secretary-General Kofi Annan has also made similar arguments. To consider but one of his remarks on the subject, Annan stressed at the International Summit on Democracy, Terrorism, and Security in Madrid in March 2005 that "human rights and the rule of law must always be respected … [and that u]pholding human rights is not merely compatible with [a] successful counter-terrorism strategy. It is an essential element".[73] Annan would likely have agreed with the holistic strategy advocated by Sri Lankan President Chandrika Bandaranaike Kumaratunga in her address at the 2005 World Summit.[74]

The activities of the United Nations treaty bodies related to human rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, and the Inter-American Court on Human Rights [IACtHR] also evidence a human rights imperative.[75] For example, the IACtHR's jurisprudence recognises the unquestionable right of States to security but says that the means to be used are necessarily limited by legal and moral considerations.[76]

70 *See* A.P. Schmid, "Terrorism and Human Rights: A Perspective from the United Nations", 17(1-2) *Terrorism & Pol. Violence* 25, 29 (2005); Situation of Detainees, *supra* note 44, at 7.

71 G.A. Res. 57/219, *UN GAOR*, at 2, UN Doc. A/RES/57/219 (2002).

72 G.A. Res. 60/1, *UN GAOR*, at 22, UN Doc. A/RES/60/1 (2005).

73 K. Annan, "A Global Strategy for Fighting Terrorism: Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism, and Security" (10 Mar. 2005), *available at:* http://www.un.org/apps/sg/printsgstats.asp?nid=1345.

74 *See* C. Bandaranaike Kumaratunga, "Address by Her Excellency Chandrika Bandaranaike Kumaratunga, President of the Democratic Socialist Republic of Sri Lanka, at the High-Level Plenary Meeting of the General Assembly of the United Nations" 5 (15 Sept. 2005), *available at:* http://www.un.org/webcast/summit2005/statements15/sri05091515eng.pdf (stating that, "[i]f we are to fight global terrorism, poverty and disease, we must take an integrated approach to security, human rights and development, both nationally and internationally").

75 *See* Office of the United Nations High Commissioner for Human Rights, *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights While Countering Terrorism*, UN Sales No. HR/PUB/03/1 (2003).

76 *See* Velásquez Rodríguez, [1988] *Inter-Am. Ct. Hum. Rts*. (Ser. C), No. 4, para. 154.

IV. MARKETING HUMAN RIGHTS TO STATES FIGHTING TERRORISM

While international law does not permit States to blind themselves to human rights when confronting terrorist threats from non-State actors, reality demonstrates that they often subject international legal considerations to a calculus that favours expediency and stability during times of crisis.[77] Ewing, for example, decries the lack of judicial activism in defence of individual human rights, both historically and specifically since the Human Rights Act 1998, when national security concerns have been raised in the United Kingdom.[78] States often ignore, if not purposely and disdainfully reject, what they perceive to be the legal platitudes of external actors in such situations. This is perhaps especially the case given that international human rights law imposes obligations upon States that it does not, and cannot, impose upon non-State terrorist organisations.[79]

State practice with regard to counterterrorism and human rights, as Annan has recently stated, supports this submission of human rights.[80] The Office of the United Nations High Commissioner for Refugees has expressed its

77 *See* Roberts, *supra* note 50, at 730-35. On this since 11 September, with particular emphasis on the United States, *see* M.C. Bassiouni, "The Regression of the Rule of Law Under the Guise of Combating Terrorism", 76(1-2) *Rev. Int'l Droit Pénal* 17 (2005). According to Bassiouni, "[i]t is truly extraordinary to have witnessed in a relatively short period of three years, and as a result of an incident that pales in comparison to the many tragedies the world has suffered over the last half century, the transformation of the international rule of law and human rights into a trend of repressiveness and regression from the rule of law". *Ibid.,* 24.

78 *See* K.D. Ewing, "The Futility of the Human Rights Act", *Pub. L.* 829 (Winter 2004). He describes the post-11 September era as "in effect the sixth cycle of restraint". *Ibid.,* 851.

79 On this disparity in obligations, *see* J. Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights", 14(2) *E.J.I.L.* 241, 243 (2003).

80 According to him, "international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms"; Annan, *supra* note 73. Also of relevance are R. Goldstone, "The Tension Between Combating Terrorism and Protecting Civil Liberties", in *Human Rights in the "War on Terror"* 157, 165-66 (R.A. Wilson ed., 2005) (making Annan's point with reference to the United States, the United Kingdom, India, South Africa, Zimbabwe, Liberia, and Indonesia); M. Robinson, "Connecting Human Rights, Human Development, and Human Security", in *Human Rights, ibid.*, 308, 310 (noting a "subtle - or not so subtle - change of emphasis in many parts of the world: order and security have become priorities that trump all other concerns"); Protecting Human Rights and Fundamental Freedoms While Countering Terrorism: Report of the Secretary-General, *UN GAOR*, at 8, UN Doc. A/60/374 (2005); Promotion and Protection of Human Rights: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Report of the High Commissioner for Human Rights, *UN ESCOR*, at 6, UN Doc. E/CN.4/2005/100 (2004). The disparity

the United Nations High Commissioner for Refugees has expressed its concern at the possible victimisation of asylum seekers and has argued that counterterrorism efforts may jeopardise the prohibition on *refoulement* and the basic right to seek asylum.[81] Similar fears have been raised about human rights generally by the Office of the United Nations High Commissioner for Human Rights [OHCHR][82] and the then UNHRC.[83] High Commissioner for Human Rights Louise Arbour, who heads the OHCHR, recently referred to some counterterrorism tactics as forming part of a "vicious circle of illegality".[84] Judge Higgins of the ICJ, referring to the 1966 International Covenant on Civil and Political Rights [ICCPR] and the 1966 International Covenant on Economic, Social, and Cultural Rights [ICESCR], should be commended for her candour in noting that "many, many States are not in compliance with their obligations under the two Covenants".[85]

Amnesty International and Human Rights Watch have also documented this State practice.[86] Bassiouni describes what he perceives to be the new reality, a "no-man's land approach where law and due process of law

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between human rights rhetoric and action is common to human rights generally. *See* V.S. Mani, "Centrifugal and Centripetal Tendencies in the International System: Some Reflections", in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 241, 251 (R. St. J. Macdonald & D.M. Johnston eds., 2005).

81 *See* Letter Dated 3 Feb. 2005 from the Chairman of the Security Council Committee Established Pursuant to Res. 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council, *UN SCOR*, Annex, at 94, UN Doc. S/2005/87 (2005).

82 *See ibid.,* Annex, at 95; R. Mani, "The Root Causes of Terrorism and Conflict Prevention", in *Terrorism and the UN: Before and After September 11* 219, 233 (J. Boulden & T.G. Weiss eds., 2004).

83 *See* Mani, *supra* note 82, at 233.

84 Address by Louise Arbour, UN High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law (16 Feb. 2006), *available at:* http://www.unhchr.ch/huricane/huricane.nsf/view01/E60AF3995B87D7EDC1257117005711E8?opendocument.

85 Wall Advisory Opinion, *supra* note 16, at para. 27 (Higgins J., Separate Opinion).

86 *See* I. Khan, *Amnesty International,* Foreword, *available at:* http://web.amnesty.org/web/web.nsf/print/4C6D9C974BE73CA880256FE7005A49C7 (last visited 22 Jan. 2006) (stating that, "[f]rom Israel to Uzbekistan, Egypt to Nepal, governments have openly defied human rights and international humanitarian law in the name of national security and 'counter-terrorism'"); Human Rights Watch, *Human Rights Watch World Report 2006: U.S. Policy of Abuse Undermines Rights Worldwide,* 18 Jan. 2006, *available at:* http://hrw.org/english/docs/2006/01/13/global12428_txt.htm.

guaranteed by judicial scrutiny have become marginally relevant",[87] and implies that this may tend toward dictatorship.[88]

The United Nations, to its credit, has recognised this reality, although it has also been criticised for a bias towards human rights over security in cases of terrorist attacks by non-State actors.[89] It has responded by framing the human rights debate so that States can perceive human rights to be in their best interest when countering terrorism. Far from being mere legal niceties, according to the United Nations, human rights play an essential role in the effective combating of terrorism.[90]

To give some examples, Annan has argued that States that compromise human rights actually help terrorists.[91] The OHCHR has stressed that State fidelity to human rights when fighting terrorism means that "terrorism can be effectively countered without infringing on fundamental freedoms".[92] According to Arbour, "respect for human rights is – not an obstacle – but rather an essential element in effective counter-terrorism strategies".[93] Mary Robinson and Sergio Vieire de Mello, two of Arbour's predecessors, also made such arguments,[94] as did Annan in his 2006 *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy:*

87 Bassiouni, *supra* note 77, at 21.

88 *Ibid.,* 24. He also notes that "[t]he disparity between proclamations of adherence to the international rule of law, due process and human rights, and the actions of certain governments is widening"; *ibid.,* 25.

89 *See* G.M. Steinberg, "The UN, the ICJ and the Separation Barrier: War by Other Means", 38(1-2) *Israel L. Rev*. 331, 337 (2005) (stating that, "[w]hen terror attacks are conducted or supported by non-state actors, and the defensive response of the state under attack encroaches on civil liberties and human rights, the existing international legal framework is more likely to condemn the defensive actions than the perpetrators of the violence, particularly given the anti-state bias that permeates post-modern ideology").

90 *See* E.J. Flynn, "Counter-Terrorism and Human Rights: The View from the United Nations", 1 *Eur. Hum. Rts. L. Rev*. 29, 30 (2005).

91 *See* Annan, *supra* note 73 (stating that "compromising human rights … facilitates achievement of the terrorist's objective – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits").

92 *Digest of Jurisprudence*, *supra* note 75, at 1.

93 Letter Dated 3 Feb. 2005, *supra* note 81, Annex, at 95. *See* L. Arbour, "Security Under the Rule of Law, Address of Louise Arbour UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists" (Berlin) (27 Aug. 2004), *available at:* http://www.unhchr.ch/huricane/huricane.nsf/view01/3485B28EDDA173F0C1256EFD0035373C?opendocument.

94 *See* Flynn, *supra* note 90, at 49.

Report of the Secretary-General (*Uniting Against Terrorism*).[95] Higgins has referred to States' fidelity to the related field of international humanitarian law as "the price of our hopes for the future".[96]

Outside the United Nations, the Council of Europe (CE) has argued that satisfying human rights law while fighting terrorism is both "possible … [and] absolutely necessary".[97] CE Secretary-General Terry Davis asserted in March 2005 that States need not fear that the effectiveness of counterterrorism will be compromised by incorporating human rights because "the need to respect human rights is not an obstacle to the effective fight against terrorism".[98]

President of the Supreme Court of Israel Aharon Barak, Irish Minister for Foreign Affairs Dermot Ahern, and India's National Human Rights Commission have also argued that upholding human rights while countering terrorism serves a crucial instrumental value.[99] In agreement with this are many scholars, such as Gearty.[100] Non-governmental organisations have also generally "maintained … that there is in reality no goal conflict between

95 Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy: Report of the Secretary-General, *UN GAOR*, at 2, UN Doc. A/60/825 (2006) (arguing that "[e]ffective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones. Accordingly, the defence of human rights is essential to the fulfilment of all aspects of a counter-terrorism strategy").

96 Wall Advisory Opinion, *supra* note 16, at para. 14 (Higgins J., Separate Opinion).

97 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism,* adopted 11 July 2002, in Council of Europe, *Human Rights and the Fight Against Terrorism: The Council of Europe Guidelines* 7, 7, Preamble (d) (2005). On this, *see* C.A. Gearty, "Terrorism and Human Rights"*,* 1 *Eur. Hum. Rts. L. Rev.* 1, 4 (2005).

98 T. Davis, "Preface", in *Guidelines*, *supra* note 97, at 5, 5.

99 *See* A. Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy"*,* 116(1) *Harv. L. Rev.* 16, 148 (2002) (citing H.C. 5100/94, Public Committee Against Torture in Israel v. Government of Israel, 53(4) *P.D*. 817, 845, stating that, "[s]ometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand"). *See also* D. Ahern, "Address by the Minister for Foreign Affairs to the Royal Irish Academy Marking 50 Years of UN Participation" (18 Nov. 2005), *available at:* http://foreignaffairs.gov.ie/Press_Releases/20051118/1915.htm (asserting that the "violation of such norms is not only wrong in itself but it is also counterproductive as it can be used to justify further atrocities"); V. Vijayakumar, "Legal and Institutional Responses to Terrorism in India", in *Global Anti-Terrorism Law and Policy* 351, 356 (V.V. Ramraj *et al*. eds., 2005).

100 *See* Gearty, *supra* note 97, at 6 (asserting that, without an "overarching human rights dimension, counterterrorism law is not only immoral and subversive of the values which it purports to defend, but it is also certain to fail").

security and human rights – even that human rights fulfil a considerable instrumental function with respect to freedom from terrorism".[101]

To assert, as Annan does in *Uniting Against Terrorism*, that "in the fight against terrorism, we must never sacrifice our values and lower our standards to those of the terrorists"[102] presumes both that international standards are sufficient to effectively fight terrorism and that, even if they are not, "our values and … standards" must not yield. Whether a State can simultaneously ensure human rights for all of those within its jurisdiction and provide effective security from terrorism, however, remains an open question.

To that end, the following section explores whether human rights observance is necessary, in an empirical sense, to effectively fight terrorism. Essentially, this involves evaluating whether what Posner concludes about international humanitarian law, that "[t]he laws may make war more humane by depriving soldiers of destructive weapons and tactics; but they may make war less humane by prolonging it, and they may make the world less secure by making war more attractive",[103] extends to international human rights law in the context of non-State terrorism.

V. IS HUMAN RIGHTS OBSERVANCE NECESSARY TO EFFECTIVELY FIGHT TERRORISM?

History is replete with examples of States that have effectively destroyed their political opposition through an overwhelming show of force that has relegated human rights to, at best, a matter of secondary importance.[104]

[101] Dunér, *supra* note 2, at 97. *See* Roberts, *supra* note 50, at 738 (asserting that "[h]uman rights NGOs often argue that trade-offs between human rights and national security will result in more rather than less terrorism and that terrorism can be effectively countered without restricting human rights").

[102] Uniting Against Terrorism, *supra* note 95, at 22.

[103] Posner, *supra* note 6, at 427. *See* T. Sowell, "Pacifists Versus Peace", *Jewish World Rev*., 21 July 2006, *available at:* http://jewishworldreview.com/cols/sowell072106.asp. According to Lindley-French, "[t]he Israeli military was put in an untenable position: It was not permitted to take risks with its personnel, and it had the wrong equipment, training and way of doing things to win such a conflict. Consequently, Israel could only attack Hezbollah indirectly, increasing the risk to Lebanese civilians and decreasing any chance of success"; J. Lindley-French, "The Use of Force: Western Military Power Is in Crisis", *Int'l Herald Trib*., 26-27 Aug. 2006, at 4.

[104] *See* A.M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 105-30 (2002); Goldstone, *supra* note 80, at 161 (stating that "oppressive societies which, by definition, do not respect the civil rights of their citizens … have all the machinery they might need to put down attacks from within and outside their borders"). Lindley-French, adopting a realist perspective, rhetorically asks "[w]hy … the

While some of these State responses have amounted to State terrorism, this has not always been the case. As the following historical examples suggest, States that prioritise military success over individual human rights in confronting dissident elements frequently achieve their objectives.

To give an example, the United States, preferring a swift end to the Second World War, got it when the Enola Gay emptied its atomic payload on Hiroshima and when Nagasaki was hit soon thereafter. Although there is continuing debate on the subject, a strong case can be made that the nuclear bombings of Hiroshima and Nagasaki, while obviously killing and maiming tens of thousands of Japanese people, civilians included, avoided what would have been an even larger bloodbath had Allied forces had to invade Japan as they did at Normandy.[105] Hiroshima and Nagasaki demonstrate that overwhelming force can bring a State's enemies to their knees.

States need not necessarily observe human rights, at least not completely, to effectively fight terrorism and maintain their control. There is also evidence to the contrary, to the effect that "a little repression increases instability whereas a great deal of it has the opposite effect".[106] Essentially, these latter types of regimes are those which Feinstein and Slaughter refer to as those which are governed by "rulers whose power over their own people and territory is so absolute that no matter how brutal, aggressive, or irrational they become, no force within their own society can stop them".[107]

Contrasting the experiences of Czechoslovakia, Albania, and Algeria with those of Spain, Italy, and West Germany on the question of human rights and the incidence of terrorism, for example, supports this.[108] Furthermore, the lack of significant non-State terrorism in China, Cuba, North Korea, and the communist States of the former Soviet Union and central and eastern Europe can be contrasted with experiences in

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best armies in the world [are] in difficulty against adversaries that 19th-century colonial officers would have defeated[.] … Israel has been much criticized for using excessive force in trying to defeat Hezbollah. In fact, military logic would have suggested not only a far more ruthless use of military force to defeat such an enemy, but a very different use. Israel had the power, but used it in the wrong way. … Western military power must be sharper at the point of contact with the likes of the Taliban and Hezbollah, and yet deeper if it is thereafter to create the security space in which peace can truly be established"; *supra* note 103, at 4.

105 *See* Posner, *supra* note 6, at 426.

106 H.B. Mishra, *Terrorism: Threat to Peace and Harmony* 27 (1999); *ibid.,* 31 (stating that, "[w]herever the means of repression have been most complete and perfected, there has been no terrorism at all. These facts are not in dispute, but there is psychological resistance to accepting the obvious. Seldom has it been admitted that virtue in politics is not always rewarded").

107 L. Feinstein & A.-M. Slaughter, "A Duty to Prevent", 83(1) *Foreign Aff.* 136, 143 (2004).

108 *See* Mishra, *supra* note 106, at 44.

democracies, defining democracies broadly, such as Greece, Argentina, Canada, the United States, the United Kingdom, Turkey, Mexico, the Philippines, Israel, India, France, Japan, Italy, Russia, Spain, Indonesia, and Sri Lanka.[109] In this sense, Falk's contention that "there is no evidence to support the claim that the abridgement of human rights and the abuse of detainees and suspects enhances security"[110] is misleading because it is empirically contradictory.

It is useful here to refer to the ICJ's recent jurisprudence, particularly the *Wall Advisory Opinion*. That case was decided in the context of the Second Intifada and a seemingly intractable level of violence between Israelis and Palestinians that, by the admission of Fatah's Ziyad Abu´Ein, was in part facilitated by the Oslo Accords.[111] Israeli historian Benny Morris expressed the frustration and anger of many of his compatriots in stating about the Palestinians, "something like a cage has to be built for them. I know that sounds terrible. It is really cruel. But there is no choice. There is a wild animal there that has to be locked up in one way or another".[112]

In the *Wall Advisory Opinion*, the ICJ considered public international law in its broadest sense.[113] In particular, it regarded as binding law the Hague Regulations,[114] the 1949 Fourth Geneva Convention,[115] the ICCPR,[116] the ICESCR,[117] and the 1989 Convention on the Rights of the Child.[118]

[109] *See* Dunér, *supra* note 2, at 91-92.

[110] R. Falk, "Human Rights: A Descending Spiral", in *Human Rights*, *supra* note 80, at 225, 236.

[111] According to Abu´Ein, "there would have been no resistance in Palestine if not for Oslo. It was Oslo that strongly embraced the Palestinian resistance. All the occupied territories – and I was one of the activists in the first and second Intifadas, and I was arrested by Israel several times[.] … If not for Oslo, there would have been no resistance. Throughout the occupied territories, we could not move a single pistol from one place to another. If not for Oslo, the weapons we got through Oslo, and if not for the 'A' areas of the Palestinian Authority, if not for the training, the camps, the protection provided by Oslo, and if not for the release of thousands of Palestinian prisoners through Oslo – this Palestinian resistance could not have carried out this great Palestinian Intifada, with which we confronted the Israeli occupation". Interview on Al-Alam TV with Ziyad Abu´Ein, "If Not for the Oslo Accords, There Would Have Been No Intifada", MEMRI, 4 July 2006, *available at* http://www.memritv.org/Transcript.asp?P1=1205.

[112] A. Shavit, "Survival of the Fittest", *Haaretz*, *available at:* http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=380984 (last updated 1 Sept. 2004).

[113] *See* Wall Advisory Opinion, *supra* note 16, at para. 86.

[114] *Ibid.,* para. 89.

[115] *Ibid.,* para. 101.

[116] *Ibid.,* para. 111.

[117] *Ibid.,* para. 112.

[118] *Ibid.,* para. 113.

In concluding that the separation barrier was "contrary to international law",[119] the ICJ cited "substantial restrictions on … freedom of movement[,] … serious repercussions for agricultural production [and] … increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water".[120] The ICJ was clear in its condemnation, expressly declaring Israel's actions with regard to it to be "breaches … of various of its obligations under the applicable international humanitarian law and human rights instruments".[121]

Given that international actors have, as referred to above, asserted a necessarily symbiotic relationship between human rights and effective counterterrorism, one might naturally be led to believe that the separation barrier has been no more effective in frustrating terrorism than a sieve is in preventing an inevitable breach and torrent of water. One might be particularly led to believe this given Palestine's assertion in its written statement to the ICJ in the *Wall Advisory Opinion* that Israel's motives were actually nothing more than "bald assertions of its security interest".[122] The evidence suggests, however, that what the ICJ essentially regarded as a human rights monstrosity has been effective in combating terrorism.

Israel argues that the separation barrier is an integral part of its counterterrorism strategy, that it is a "temporary and non-violent measure to counter a murderous threat directed at the softest of targets"[123] and that it "enable[s] it effectively to combat terrorist attacks launched from the West Bank".[124] In its written statement to the ICJ in the *Wall Advisory Opinion*, Israel cited fewer attacks, although acknowledging that the number of attempts remained consistent at approximately fifty each week, and credited the separation barrier as being "a significant factor in this respect".[125]

[119] *Ibid.,* para. 142.

[120] *Ibid.,* para. 133.

[121] *Ibid.,* paras. 137, 134.

[122] Written Statement Submitted by Palestine, Wall Advisory Opinion, *supra* note 16, at para. 460.

[123] Written Statement of the Government of Israel on Jurisdiction and Propriety, Wall Advisory Opinion, *supra* note 16, at para. 3.74.

[124] Wall Advisory Opinion, *supra* note 16, at para. 116. For critical positions on this justification, *see* Palestinian Centre for Human Rights, Securing the Wall from International Law: An Initial Response to the Israeli State Authority 6-7, *available at:* http://www.pchrgaza.org/Interventions/Securing%20the%20Wall.pdf (2005); Bimkom & B'Tselem, Under the Guise of Security: Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank 9-18, *available at:* http://www.btselem.org/Download/200512_Under_the_Guise_of_Security_eng.pdf (2005).

[125] Written Statement of the Government of Israel, *supra* note 123, at para. 3.66. "Statistical data indicates a *30% drop in the number of terrorist attacks* that took place in 2003

Comparing an area in the West Bank with the separation barrier with one without it also supports this conclusion.[126] Higgins, in her Separate Opinion, also acknowledged the effectiveness of the separation barrier, stating that it "does seem to have resulted in a diminution on attacks on Israeli civilians".[127] The separation barrier between Israel and Gaza, furthermore, has shown its effectiveness: no Palestinian suicide bombers have crossed into Israel from Gaza because of it.[128]

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compared to 2002. Similarly, there has been a 50% decrease in the number of victims murdered by terrorists in 2003 compared to the previous year". Israel Ministry of Foreign Affairs, *Saving Lives: Israel's Anti-Terrorist Fence - Answers to Questions*, *available at* http://www.mfa.gov.il/mfa/mfaarchive/2000_2009/2003/11/saving%20lives-%20israel-s%20anti-terrorist%20fence%20-%20answ (1 Jan. 2004). *See* Israel Ministry of Foreign Affairs, *2005 Terrorism Review*, *available at:* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/2005+Terrorism+Review.htm (2 Jan. 2006) (stating that, "during the 34 months of confrontation (beginning on 29 September 2000) up until the establishment of the security fence in July 2003, operational infrastructures in Samaria perpetrated 73 deadly large-scale terrorist attacks (suicide attacks and/or car bombs) inside Israel, in which 293 Israelis were murdered and 1,950 were wounded. In the 28 months following August 2003 and up to December 2005, they succeeded in perpetrating 11 such attacks inside Israel, in which 54 Israelis were murdered and 358 were wounded"). According to Krauthammer, "[t]he success of this fence plus unilateral-withdrawal strategy is easily seen in the collapse of the intifada. Palestinian terror attacks are down 90 percent". C. Krauthammer, "The Legacy of Ariel Sharon: What's Ahead for the State of Israel?: Sharon Put Israel on a Strategic Path out of the Wreckage of the Post-Oslo World", *Chi. Trib.*, 9 Jan. 2006, § 1, at 17. *See* T. Kafala & M. Asser, "Analysis: Palestinian Suicide Attacks", BBC News, *available at:* http://news.bbc.co.uk/2/hi/middle_east/3256858.stm (last updated 17 Apr. 2006) (stating that "[t]he number of attacks fell as Israel besieged Palestinian towns and pressed ahead with its barrier in and around the occupied West Bank."); I. Manji, "How I Learned to Love the Wall", *N.Y. Times*, 18 Mar. 2006, §A, at 15 (noting that, "[s]ince the barrier went up, suicide attacks have plunged, which means innocent Arab lives have been spared along with Jewish ones").

126 *See* Israel Ministry of Foreign Affairs, *Israel's Anti-Terrorist Fence: The Anti-Terrorist Fence – An Overview*, *available at:* http://securityfence.mfa.gov.il/mfm/Data/48152.doc (last visited 27 Nov. 2005). For similar evidence, *see* Ministry of Defence, *Israel's Security Fence: Questions and Answers*, *available at:* http://www.securityfence.mod.gov.il/Pages/ENG/questions.htm (last updated 22 Feb. 2004) (stating that "[t]he first stage of the Security Fence (from Salem to Elkana) which has been operational since July 2003, is already proving itself as an effective defensive deterrent which prevents the repeated attempts to enter Israel and carry out terror attacks").

127 Wall Advisory Opinion, *supra* note 16, at para. 35 (Higgins J., Separate Opinion).

128 *See* Israel Ministry of Foreign Affairs, *Israel's Anti-Terrorist Fence, supra* note 126. Israel has also cited a less categorical statistic, *see* Ministry of Defence, *Israel's Security*

Gearty usefully notes that the apologists of counterterrorism and those who prioritise human rights couch their agendas in moral terms.[129] Who is to judge which morality should be given greater weight? States have shown themselves quite capable of carpet bombing their opposition into submission with sufficient political will and when committed to using "both … [their] hands, … fingernails, … teeth, and … feet, without following the Marquess of Queensberry rules".[130] This suggests that human rights observance may not be necessary, at least not always, to effectively fight terrorism.

VI. ASSESSMENT

It should be reiterated at this point that international law does not permit States to blind themselves to human rights when fighting terrorism. States that do so, particularly when they do so egregiously, violate international law. The substance of international law may or may not be reasonable, but that human rights considerations must be taken on board should be acknowledged as part of the *lex lata*.

That there may sometimes be a trade-off between the effective fighting of terrorism and individual human rights should not necessarily come as a surprise because the law is rife with conflicts of norms and competing objectives.[131] In the context of self-determination, for example, Klabbers recognises "the law's inability to decide whether the right of self-

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Fence, supra note 126 (stating that "the security fence between Israel and the Gaza Strip that has existed since 1996 has proven its effectiveness and [that] the vast majority of terrorist attempts have been discovered and thwarted"), but the point is still convincingly made.

[129] *See* Gearty, *supra* note 97, at 1. *See also* Fitzpatrick, *supra* note 79, at 246 (describing this as a "clash of moral absolutes").

[130] Dershowitz, *supra* note 104, at 3. According to Ethiopian Emperor Haile Sellassie I, Italy's mustard gassing of Ethiopia just prior to the Second World War achieved its objective of domination and conquest, but the means used were immoral. *See* Haile Sellassie I, *My Life and Ethiopia's Progress: Volume One: 1892-1937: The Autobiography of Emperor Haile Sellassie I: King of Kings and Lord of Lords* 263 (E. Ullendorff trans., 2003) (stating that, "[a]lthough they may destroy the Ethiopian army with this instrument of poison, yet when it is reported in future history that they wiped out with poison a defenceless people, it is not to be doubted that this will forever be a burden of shame and humiliation for Fascist Italy"). For a disturbing description, *see ibid.,* 263-64.

[131] For an illuminating interview with Lord Chancellor Charles Falconer in which he discusses trade-offs between individuals human rights and public safety, *see* Human Rights, BBC Sunday AM, BBC News, *available at:* http://news.bbc.co.uk/2/hi/programmes/how_euro_are_you/4769979.stm (last updated 14 May 2006).

determination of group X should result in the breakup of state Y and whether it should possibly override competing claims from groups residing on territory where X happens to be in the majority (Serbs in Bosnia, for instance)".[132]

State practice demonstrates that States use a balancing test when negotiating between the sometimes conflicting norms of national security and human rights.[133] This is particularly necessary in the United States, where Al Qaeda has historically benefited from divisions of governmental authority in a federal republic and privacy rights.[134] Freedoms in the globalised era, such as the freedom of movement, open opportunities and benefit those who choose to abuse seemingly benign rights.[135] As Wedgwood argues, "[i]n its adaptive style of warfare, Al-Qaeda is willing to use the scientific fruits of a free society and harness them, in a dangerous syncretism, to the purposes of destruction".[136]

Given that State practice forms one of the two components of customary international law and that customary international law divorced from State practice is unsustainable, it might be supposed that the reality of widespread human rights abuses by States in the context of counterterrorism would inform an evolution of the law related to national security and human rights in situations of terrorism to the "benefit" of the former.[137] Higgins, however, addressing the issue of torture and acknowledging that more States than not engage in it, argues that customary international law continues to so clearly prohibit torture "because *opinio juris* as to its normative status continues to exist. No state, not even a state that tortures, believes that the international law prohibition is undesirable and that it is not bound by the prohibition".[138]

[132] J. Klabbers, "The Right to Be Taken Seriously: Self-Determination in International Law", 28(1) *Hum. Rts. Q.* 186, 199 (2006).

[133] The fact that States negotiate at all between these sometimes conflicting norms suggests that the necessarily symbiotic relationship between them that international law posits, at least in the sense of utility, may be exaggerated.

[134] *See* R. Wedgwood, "Countering Catastrophic Terrorism: An American View", in *Enforcing International Law Norms Against Terrorism* 103, 103-04 (A. Bianchi ed., 2004).

[135] *Ibid.,* 104-105.

[136] *Id.*

[137] On the evolutionary nature of customary international law, *see* A. D'Amato, "Trashing Customary International Law", 81 *A.J.I.L.* 101, 104 (1987) (stating that "[c]ustomary rules … are not static. They change in content depending upon the amplitude of new vectors (state interests). … [T]he customary rules that survive the legal evolutionary process are those that are best adapted to serve the mutual self-interest of all states").

[138] R. Higgins, "Sources of International Law: Provenance and Problems", in *Problems and Process: International Law and How We Use It* 17, 22 (1994). *See* Roberts, *supra* note 50, at 737 (asserting in the context of human rights generally responses that resemble

This question of belief by States is absolutely essential because, as D'Amato notes, without ascertaining it, international legal analysis "would amount, to the extent of its deviation from actual belief, only to a natural-law prescription of what states ought to believe".[139]

The ICJ's jurisprudence provides some practical guidelines for assessing customary international law. In *Military and Paramilitary Activities in and Against Nicaragua*, for example, it stated that State practice with regard to a particular customary international law norm, in that case, the prohibition on the use of force and the non-intervention rule, does not have to be "perfect",[140] nor "in absolutely rigorous conformity with the rule".[141] Indeed, the ICJ went on to say that contrary State practice could be "not infrequent".[142]

Despite the fact that State practice does not have to unyieldingly conform to a particular customary international law norm, Higgins' view for a number of reasons seems to be too confident in its insistence that dispositive and conclusive support for a customary international law prohibition on torture can be found in what she presumably refers to, declarations by State representatives in multilateral fora.[143] First, it necessarily downplays, by not addressing, Anderson's argument that "it is not clear whether a statement, the same statement, can be both State practice and *opinio juris*".[144] Second, Higgins' view overlooks Roberts' point that States generally since 11 September have turned a blind eye to human rights abuses and even publicly

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Higgins', namely "(a) while some states violate human rights some of the time, most states respect human rights most of the time; (b) even when states breach human rights standards, they often deny these breaches rather than endorsing them as official policy; and (c) human rights violations are often met with protest from other states, so they represent breaches of existing law rather than the beginnings of a new or modified law").

139 A. D'Amato, "On Consensus", 8 *Can. Y.B. Int'l L*. 104, 105 (1970).

140 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), [1986] *I.C.J. Rep*. 14, 98.

141 *Id.*

142 *Ibid.,* 106.

143 "Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law"; *Customary International Humanitarian Law*: *Volume 1: Rules* XXXII (ICRC, J.-M. Henckaerts & L. Doswald-Beck eds., 2005).

144 S. Anderson, "When the Law Breaker Becomes the Law Maker", in *The Challenge of Conflict: International Law Responds* 413, 428 (U. Dolgopol & J. Gardam eds., 2006). *See ibid.,* 415 (maintaining that "how one goes about determining whether *opinio juris* is present is not altogether clear"). As Koskenniemi insightfully notes, "[t]here are no independently applicable criteria for ascertaining the presence of the *opinio juris*[, and] … [c]ustomary law doctrine remains indeterminate because it is circular". M. Koskenniemi, "The Politics of International Law", 1(1-2) *E.J.I.L*. 4, 26 (1990); *see ibid.*, 25-27.

declared a bias in favour of national security over human rights.[145] Higgins' view also does not speak to D'Amato's critique that relying on United Nations Resolutions as evidence of *opinio juris* results in the hollowing out of State practice and the creation of self-fulfilling rules: "All we need is the original alleged rule and the empty theory that any practice inconsistent with it does not count".[146] As ICJ Judge Schwebel stated in his Dissenting Opinion in the *Nuclear Weapons Advisory Opinion*, "[i]f a [General Assembly] resolution purports to be declaratory of international law, if it is adopted unanimously (or virtually so, qualitatively as well as quantitively) or by consensus, and *if it corresponds to State practice*, it may be declaratory of international law".[147] To suggest that mere words as to legal obligation on torture speak louder than an international State practice that too often reflects an on-the-ground reality of State recourse to torture in its various grisly guises, furthermore, implies that international law can, and should, take refuge in the insincere platitudes of States that publicly insist by their words that international law prohibits torture but who by their actions and omissions suggest that they do not really believe that it does. Arguably, it is more reasonable to concede that customary international law on this and other norms related to national security and human rights in situations of terrorism in light of widespread State violations is complex, stratified, and varied.[148]

It should be stressed that States, particularly liberal democracies, should not completely disregard human rights when fighting terrorism.[149] Such a contention, however, is rooted in values and politics and not necessarily, or at least not always, in an overriding concern for utility.[150] The perspective advanced by Nobel Laureate Milton Friedman regarding government intervention in society, as a "balance sheet, listing separately the advantages and disadvantages. Our principles tell us what items to put on the one side and what items on the other and they give us some basis for attaching

[145] *See* Roberts, *supra* note 50, at 737-38.

[146] D'Amato, *supra* note 137, at 102. On D'Amato on statements versus actions as State practice, *see* Anderson, *supra* note 144, at 416, 434.

[147] Nuclear Weapons Advisory Opinion, *supra* note 66, at 839 (Schwebel J., dissenting) (emphasis added).

[148] According to Roberts, "[w]hile it is too early to tell what impact the US actions post-September 11 will ultimately have on human rights, it is clear that these actions have provided conceptual challenges to the structure of international human rights law". Roberts, *supra* note 50, at 748-49.

[149] For Dershowitz's perspective on where the balance should be struck, *see supra* note 104, at 165-222.

[150] Equating values and politics, *see* Klabbers, *supra* note 132, at 203.

importance to the different items",[151] goes to the core of the human rights issue and provides a useful template for considerations of policy prerogatives.

The best approach to Friedman's concept of a balance sheet in this context may be that which Vijayakumar articulates as relates to India, "an acceptable course between giving too little power to the government so that it is unable to deal with terrorism, and too much power so that an intolerable violation of human rights is risked".[152] These balanced interests naturally open themselves to interpretation, but phrasing the exercise in this way ensures that neither the community's right to security nor individuals' human rights can straightjacket the other. This approach also avoids the dangerous argument put forward by ICJ Judge Owada in his Separate Opinion in the *Wall Advisory Opinion*, according to which argument, as a matter of principle and based on the proportionality rule, military exigencies could never, even, presumably, on a scale of certain national annihilation, justify the human rights violations engendered by Israel's separation barrier.[153]

What An-Na´im says about interpretations of the Shari´a, that, "[w]hen all is said and done, the ultimate question would be a moral one, namely what *ought* to be the principle in the particular case or situation",[154] applies generally in this context.[155] Falk's assumption for the sake of argument that breaching human rights could increase national security but that this "would not … alone justify official behavior violative of basic rights"[156] is certainly a legitimate position, but it must be seen as an essentially moral choice.[157] It

[151] M. Friedman, *Capitalism and Freedom* 32 (1967).

[152] Vijayakumar, *supra* note 99, at 351. Brooks describes this as a "sweet spot that satisfies both the demands of power and of principle". D. Brooks, "Savagery's Stranglehold", *N.Y. Times*, 8 June 2006.

[153] *See* Wall Advisory Opinion, *supra* note 16, at para. 24 (Owada J., Separate Opinion).

[154] A.A. An-Na´im, "Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism", 31 *Germ. Y.B. Int'l L.* 307, 334 (1988).

[155] According to Gearty, "[t]he twin narratives of counter-terrorism and human rights share an important common feature: they each present themselves as being rooted in morality, as being concerned with either the procurement (human rights) or the defence (counterterrorism) of an objective good". Gearty, *supra* note 97, at 1.

[156] Falk, *supra* note 110, at 236.

[157] This resembles Koskenniemi's argument about the political nature of legal interpretation: "A court's decision or a lawyer's opinion is always a genuinely political act, a choice between alternatives not fully dictated by external criteria". M. Koskenniemi, "What Is International Law For?", in *International Law* 89, 105 (M.D. Evans ed., 2003).

is unclear why his morality, as much as anyone else's, should be considered inherently dispositive on the issue.[158]

It is with this in mind that one can approach, for example, Dershowitz's "ticking bomb" hypothetical on torture and the moral dilemmas involved.[159] On the whole, the human rights establishment has dismissed this hypothetical almost outright,[160] the United Nations Committee Against Torture, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture, and Arbour jointly stating on United Nations International Day in Support of Victims of Torture on 26 June 2006 that the very idea itself of arguments that seek to justify torture, regardless of context, is "anathema",[161] as if to suggest that the mere discussion of the appropriateness of a currently-accepted international legal norm, the absolute prohibition of torture, lies outside the boundaries of legitimate discourse.

Likewise, Bassiouni argues that "[t]orture, or torture by any other name, is legally, morally, and ethically reprehensible".[162] Unfortunately, this statement presents itself as an unassailable truism, as something that is sacrosanct and beyond reasoned debate and, in so doing, positions those who might disagree as necessarily supporting a reprehensible sense of legality, morality, and ethics. This is unfortunate, and it is a posture that installs what Fallaci would describe as "fear",[163] a type of thinking that she would refer to

[158] This is particularly the case given the fluid nature of rights. On the fluid nature of rights, *see* Klabbers, *supra* note 132, at 199-200.

[159] *See* Dershowitz, *supra* note 104, at 131-63. For a brief criticism of this hypothetical, *see* Bassiouni, *supra* note 46, at 259.

[160] As examples, *see* Bassiouni, *supra* note 46, at 259; Pejic, *supra* note 26, at 99-100.

[161] United Nations Committee Against Torture, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture, and the United Nations High Commissioner for Human Rights, Joint Statement on the Occasion of the United Nations International Day in Support of Victims of Torture, 26 June 2006, *available at:* http://www.ohchr.org/english/about/funds/torture/docs/JointStatement26.06.06.pdf.

[162] Bassiouni, *supra* note 46, at 259. One can compare this with Hirsi Ali's description of Muslims who thoughtfully criticise the theological *status quo*. *See* A.H. Ali, *The Caged Virgin: An Emancipation Proclamation for Women and Islam* XII (2006) (stating that "any Muslim who asks critical questions about Islam is immediately branded a 'deserter.' A Muslim who advocates the exploration of sources for morality, in addition to those of the Prophet Muhammad, will be threatened with death, and a woman who withdraws from the virgins' cage is branded a whore").

[163] O. Fallaci, *The Force of Reason* 257-58 (2006) (describing this as "[f]ear of thinking and, in thinking, of reaching conclusions which do not match those of the formulas imposed by the others. Fear of speaking and, in speaking, of reaching a judgement which is different

as "intellectual terrorism".[164] One must constantly bear in mind Tomuschat's position that "the philosophical ought must be distinguished from the legal ought".[165]

It should at least be acknowledged that international law, as a construction of world politics and power,[166] may or may not coincide with one's morality and ethics, the content of the latter two elements of which has been debated for millennia.[167] Few, hopefully none, would today agree with United States Supreme Court Chief Justice Taney's analogy of a black slave in the United States to "an ordinary article of merchandise and property",[168] yet the legal authority as a matter of positive law of *Dred Scott v. Sandford* under the United States' constitutional system at the time was clear.[169] This is not to suggest that international law's current posture on torture is or is not justified: it may or may not be. Rather, there exists a need for reasoned debate on the issue that proceeds from acceptance of the assumption, however contentious, that "[m]en's freedoms can conflict, and when they do, one man's freedom must be limited to preserve another's".[170] It serves neither security nor human rights to deny this.

VII. CONCLUSION

United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967 John Dugard has said that the

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from the judgement accepted by most. Fear of not being sufficiently aligned, obedient, servile, and therefore of being condemned to the civil death with which inert or rather inanimate democracies blackmail the citizens. Fear of being free, in short. Of taking risks, of having courage").

164 *Ibid.,* 209.

165 C. Tomuschat, *Human Rights: Between Idealism and Realism* 2 (2003).

166 According to Krisch, "acknowledging that power plays a large role does not necessarily have any bearing on the justification *vel non* of an action or development. But it may give us some greater distance in assessing them". N. Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order", 16(3) *E.J.I.L.* 369, 408 (2005).

167 On a related point, *see* R.H. Bork, *The Tempting of America: The Political Seduction of the Law* 176 (1990) (asserting that "[i]t is essential to bear in mind the distinction between the reality of judicial power and the legitimacy or morality of the use of that power. … Power alone is not sufficient to produce legitimate authority").

168 Dred Scott v. Sandford, 60 *U.S.* 393, 451 (1857).

169 For a commentary by Bork on the case, *see* Bork, *supra* note 167, at 28-34.

170 Friedman, *supra* note 151, at 26. *See* Koskenniemi, *supra* note 157, at 99 (discussing assessments of security and freedom in the context of the European Convention on Human Rights).

very question of terrorism involves an "intense conflict in perception".[171] To a large extent, the questions which legal framework applies in the current counterterrorism context and where the balance should be struck between national security and human rights on particular facts and circumstances likewise trigger fundamental issues of perception. Such issues also demonstrate the interplay between the legal and the political and challenge the idea that these realms can be hermetically sealed from one another. Put bluntly, one's legal conclusions on these questions largely reflect whether she agrees with Lord Hoffmann in the House of Lords that Al Qaeda "do[es] not threaten the life of the nation[,] … does not threaten our institutions of government or our existence as a civil community"[172] or with Orwell, who, chastising his leftist comrades at the time of the Second World War, recognised that, "[h]owever little we may like it, toughness is the price of survival".[173]

[171] J. Dugard, "The Problem of the Definition of Terrorism in International Law", in *September 11, 2001: A Turning Point in International and Domestic Law?* 187, 189 (P. Eden & T. O'Donnell eds., 2005).

[172] A. & Others v. Secretary of State for the Home Department, [2004] *U.K.H.L.* 56, para. 96.

[173] G. Orwell, "The Lion and the Unicorn", in *Why I Write* 11, 85 (2004).

A RIGHT TO LIFE IN ARMED CONFLICTS? THE CONTRIBUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS

By Gloria Gaggioli and Robert Kolb***

INTRODUCTION

The right to life during armed conflicts is an important testing field for the relationship between international human rights law [HRL] and international humanitarian law [IHL]. In most areas, both branches of the law are said to converge; but with regard to the right to life and in particular to the use of lethal force concerning persons not in the power or in the actual control of the State,[1] they are often held to contradict each other. To be more precise, IHL is often considered hardly to grant any right to life in its part related to combat situations, where the law seems to be predicated upon the license to kill. On the other hand, HRL is presented as protecting in a quasi-absolute manner the life of persons under the jurisdiction of a State. Upon analysis, these clear-cut and binary positions seem excessive. HRL and IHL are both applicable and complementary in times of armed conflicts, generally and with respect to the right to life (I); moreover, in this area as in others they very much converge, leading most times to compatible results (II). The dense and dynamic case-law of the European Court of Human Rights [ECtHR] provides a proper illustration of these propositions and shows how HRL can contribute to developing IHL (III). It shows that HRL has a proper and effective contribution to the protection of life in situations of armed conflicts. It should be underlined that even if the case-law of the ECtHR is purely regional and could not, as such, give rise to universal HRL standards, it is particularly relevant due to the fact that most of the other HRL bodies

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1 Like persons killed in the conduct of hostilities. In fact, in this article, we will not look at the right to life of persons in the power of the State (e.g., a person under arrest) but we will rather concentrate on the right to life of persons killed while not in the power of the State (e.g., in armed clashes) because it is in these situations that HRL and IHL are often held to be contradictory.

are inspired by the European case-law.[2] Moreover, the case-law of the ECtHR is particularly detailed and innovative and thus warrants some attention. In that sense, this case-law is interesting for assessing whether HRL is really different from IHL on the right to life in armed conflicts and for seeing how HRL could contribute to a better protection of that right.

I. LEGAL RÉGIMES APPLICABLE IN ARMED CONFLICTS

A. The Principle of Simultaneous Application of HRL and IHL

In times of armed conflict – international and non-international – the main body of applicable law is IHL. HRL was initially conceived as being applicable in peacetime.[3] Its applicability to wartime was hardly considered. Since the 1960s, that position was reversed.[4] It is today generally accepted that HRL applies also in situations of armed conflict.[5] Nothing in the HRL treaties excludes their applicability to such situations.[6] The derogation clauses contained in most of these instruments,[7] allowing States to put aside

2 *See* B. Conforti, "L'Interaction des Normes Internationales Relatives à la Protection des Droits de l'Homme", in Société Française Pour le Droit International, Colloque de Strasbourg, *La Protection des Droits de l'Homme et l'Évolution du Droit International* 124 (1998); P. Wachsmann, "Les Méthodes d'Interprétation des Conventions Internationales Relatives à la Protection des Droits de l'Homme"; *ibid.,*168.
For the American system, *see* H. Tigoudja, "L'Autonomie du Droit Applicable par la Cour Interaméricaine des Droits de l'Homme: en Marge d'Arrêts et Avis Consultatifs Récents", 13/49 *Rev. Trimestrielle des Droits de l'Homme* 84 (2002).
For the African system, *see* A.D. Olinga, "Les Emprunts Normatifs de la Commission Africaine des Droits de l'Homme et des Peuples aux Systèmes Européen et Interaméricain de Garantie des Droits de l'Homme", 16/62 *ibid.,* 503 (2005).

3 *See* R. Kolb, "Aspects Historiques de la Relation Entre le Droit International Humanitaire et les Droits de l'Homme", 37 *Canadian Y.B. Int'l L.* 67-69 (1999).

4 *Ibid.,* at 75 *et seq*.

5 It is not necessary here to draw up a list of the innumerable authors accepting that HRL applies in time of armed conflict. It is however interesting to note that Volume 1 of the *Israel Yearbook on Human Rights*, which dates back to 1971, was indeed partially devoted to the applicability of HRL in warfare.

6 *See* M. Sassòli, "La Cour Européenne des Droits de l'Homme et les Conflits Armés", in *Human Rights, Democracy and the Rule of Law* 710 (2007).

7 Art. 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 *U.N.T.S.* 211 [ECHR]; Art. 4 of the International Covenant on Civil and Political Rights, 1966, 999 *U.N.T.S.* 171 [ICCPR]; Art. 27 of the American Convention on Human Rights, 1969, 1144 *U.N.T.S.* 123 [ACHR].
However, the African Charter on Human and Peoples Rights, 1981, 21 *I.L.M.* 58 [ACHPR] does not include such a provision. The African Commission on Human and Peoples' Rights [ACommHPR] held that therefore no derogation was possible. *See*

some of their HRL obligations in times of public emergency or of armed conflicts, implicitly attest to the fact that the HRL obligations continue to apply in these situations: otherwise, the derogation clauses would be superfluous.[8] This argument certainly holds true for non-international armed conflicts [NIAC]. It is not necessarily decisive for international armed conflicts [IAC]. Indeed, in cases of warfare involving action beyond national borders, it could be held that the ordinary jurisdiction of the State over its territory or any equivalent control, which forms the basis for application of HRL, is generally lacking.[9] However, international practice has acknowledged that HRL applies even in cases of IAC. The ICJ has recently had many opportunities to reaffirm this applicability, namely in the *Legality of the Threat or Use of Nuclear Weapons* or in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinions.[10] Moreover, almost all the HRL supervisory organs have explicitly or implicitly (by deciding cases) considered that HRL applies in situations of armed conflict, non-international or international.[11] Finally, political organs such as the Security Council[12] or the General Assembly[13] of

Commission Nationale des Droits de l'Homme et des Libertés v. Chad, ACommHPR, No. 74/92, *9th Annual Activity Report 1995-1996*, para. 21.

8 *See* J. Frowein, "The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation", 28 *Israel Y.B. Hum. Rts.* 2 (1998). *See also* General Comment No. 29 on States of Emergency, Human Rights Committee (HRC), CCPR/C/21/Rev.1/Add.11 (2001), para. 3.

9 In fact, most of the HRL treaties contain a jurisdictional limitation. *See* Art. 2(1) ICCPR; Art. 1 ECHR; Art. 1(1) ACHR. On that point, *see* the famous case Banković *et al.* v. Belgium and 16 other States, [2001] *European Court of Human Rights [ECtHR]* (decision as to the admissibility).

10 *See* Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, [1996] *I.C.J. Rep.,* para. 25; Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] *I.C.J. Rep.*, para. 106.

11 *See* General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, HRC, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 11*; Concluding Observations: Israel,* HRC, 2003, UN Doc. CCPR/CO/78/ISR, para. 11. *See also*: App. No. 6789/74 and 6950/75, Cyprus v. Turkey, [1975] *European Commission of Human Rights* (*EComHR*); App. No. 6780/74 & 6950/75, Cyprus v. Turkey*,* [1976] *EComHR*; Ergi v. Turkey, [1998] *ECtHR*; Isayeva, Yusupova and Bazayeva v. Russia, [2005] *ECtHR* [hereinafter: *Isayeva I*]; Isayeva v. Russia, [2005] *ECtHR* [hereinafter: *Isayeva II*]; Disabled Peoples' International *et al.* v. United States of America*,* [1987] *Inter-American Commission on Human Rights* [*IAComHR*], Decision as to the Admissibility; Coard *et al.* v. United States of America*,* [1999] *IAComHR*, Rep. No.109/99, Case 10.95; Alejandre *at al.* v. Cuba, [1999] *IAComHR*, Rep. No. 86/99, Case 11.589; Bámaca Velásquez v. Guatemala, [2000] *Inter-American Court of Human Rights* (*IACtHR*), Ser. C, No. 70; *Commission Nationale des Droits de l'Homme et des Libertés, supra* note 7. *See also* W. Kälin, UN Special Rapporteur on the Situation of Human Rights in Kuwait Under Iraqi Occupation, *Report 1992,* UN Doc. E/CN.4/1992/26.

such as the Security Council[12] or the General Assembly[13] of the UN also took action on the basis of that understanding. Thus, the jurisdictional limitations contained in the HRL instruments have not been interpreted in a way contrary to an extraterritorial application of the rights they enshrine.[14] On the contrary, it is generally accepted that HRL and IHL will apply simultaneously namely in situations of NIAC, of occupations in IAC and of individuals being in the hands of an adverse party to a conflict in IAC or NIAC.[15]

B. A Challenge to the Principle of Parallel Application: IHL as a Lex Specialis?

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* the ICJ crafted the current position on simultaneous applicability of HRL and IHL.[16] Having to respond to the question if HRL in general, and the right to life in particular, could be said to prohibit the use of nuclear weapons in armed conflicts, the Court held that the correct reference was IHL as an expression of a *lex specialis*.[17] In its *Wall Opinion* of 2004,[18] the Court reproduced that reasoning in the context of the law applicable to occupied territories, adding the following:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights

12 The Security Council often called upon States to respect HRL and IHL in times of armed conflicts. It did so in resolutions concerning conflicts (*see e.g.,* S/RES/1565 (2004), para. 19 on the situation in the Democratic Republic of the Congo; S/RES/1297 (2000), para. 8 on the situation between Eritrea and Ethiopia), and also in thematic resolutions dedicated to the protection of civilians in armed conflicts (*see e.g.,* S/RES/1265 (1999), para. 7 of the Preamble and para. 4).

13 *See e.g.*, G.A. Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 1970.

14 *See* Lopez Burgos v. Uruguay, [1981] *Human Rights Committee [HRC]*, No. 59/79; Lilian Celiberti de Casariego v. Uruguay, [1981] *HRC*, No. 56/79; Montero v. Uruguay, [1983] *HRC*, No. 106/81; General Comment No. 31, *supra* note 11; Concluding Observations: Israel, *supra* note 11; Cyprus v. Turkey, 1975, *supra* note 11; Cyprus v. Turkey, [1978] *EComHR*, App. No. 8007/77; Loizidou v. Turkey, [1995] *ECtHR*; Loizidou v. Turkey, [1996] *ECtHR*; Cyprus v. Turkey, [2001] *ECtHR*; *Disabled Peoples' International, supra* note 11; Coard, *supra* note 11; *Alejandre, supra* note 11.

15 *See* K. Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", 98 *Am. J. Int'l L.* 24 (2004).

16 *Supra* note 10.

17 *Ibid.*, para. 25.

18 *Supra* note 10.

> may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law ; yet, others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[19]

This *lex specialis*-approach remains however shrouded in some ambiguity.[20] The most obvious uncertainty pertains to the level at which the *lex specialis* rule operates: is it at the level of the branches as a whole (HRL versus IHL) or is it at the level of single (conflicting) norms on a case-by-case basis? If it is the latter, can one then speak at all of a general rule of *lex specialis* instead of saying that the point is one of contextual interpretation?

The advisory opinions of the Court have often been understood as implying that IHL as a whole is the more special law with respect to HRL.[21] This construction is however difficult to accept. *First*, as Lindroos pointed out, "an abstract determination of an entire area of law as being more specific towards another area of law is not, in effect, realistic".[22] Indeed, the concrete relations between the branches are much more multifaceted and complex than such a simple formula can express. It is not proper to hold that IHL is always more specific than HRL simply because it is designed to

19 *Ibid.,* para. 106.

20 *Id.,* Separate Opinions of Judges Higgins (para. 24-25) and Kooijmans (para. 29). *See also* A. Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*", 74 *Nordic J. Int'l. L.* 42 (2005); R. O'Keefe, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary", 37 *Rev. Belge de Droit Int'l* 135 (2004); *Report of the Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation,* organised by the University Centre for International Humanitarian Law (UCIHL), Geneva, 1-2 Sept. 2005, at 10 and 19.

21 *See* M.J. Dennis, "Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", 99 *A.J.I.L.* 139 (2005); H.-J. Heintze, "On the Relationship Between Human Rights Law Protection and International Humanitarian Law", 856 *Int'l Rev. Red Cross* 796 *et seq.* (2004); W. Karl, "Treaties, Conflicts Between", IV *Encyclopaedia of Public International Law* 937 (Elsevier, 2000). *See also International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence*, Summary Report Prepared by the ICRC of the XXVIIth Round Table on Current Problems of International Humanitarian Law organised by the International Institute of Humanitarian Law, San Remo, Italy in Cooperation with the International Committee of the Red Cross, Geneva, Switzerland , Nov. 2003, at 9.

22 *See* Lindroos, *supra* note 20, at 44.

address situations of armed conflict.[23] The concept of "speciality" of the law certainly draws on a richer equation than just the original destination of its norms. *Second*, the point is not to apply the *lex specialis* maxim in order to operate a derogation of a legal régime by the other, as would be the case with the traditional maxim which entirely reads *lex specialis "derogat" legi generali*. Otherwise, the simultaneous application of both branches of the law would be negated, contrary to firmly established international practice,[24] and the contribution of HRL in armed conflicts would be nullified.[25] The objective is rather to co-ordinate the two levels of protection of HRL and of IHL. But this supposes a particular *lex specialis* maxim, situated on the level of interpretation rather than on that of conflict of norms, which could be better defined, if at all, as *lex specialis "compleat" legi generali*.

It seems that the Court did indeed not have in mind an operation of the *lex specialis* rule resulting in mutual exclusiveness, since it clearly accepted the simultaneous application of HRL and IHL. In its *Legality Opinion*, the Court applied Article 6 of the 1966 International Covenant on Civil and Political Rights [ICCPR] interpreted in light of IHL; both branches were applied, none derogated the other.[26] Later, in the *Wall Opinion*, the Court

23 *See Report of the Expert Meeting on the Right to Life, supra* note 20, at 20.

24 *See* discussion above.

25 The contribution of HRL in armed conflicts is moreover already recognized by IHL treaties. *See* Art. 75(8) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 *U.N.T.S.* 3 [hereinafter: API]; and para. 2 of the Preamble of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 *U.N.T.S.* 609 [hereinafter: APII].

Furthermore, some IHL rules require HRL to be correctly interpreted. For example, IHL prohibits torture but does not define it. The definition must be sought in HRL. The same could be said for the right to a fair trial, which is guaranteed but not fully defined by IHL.

26 The ICJ rightly considered that "the test of what is an arbitrary deprivation of life, however, then (in French: "*en pareil cas*") falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict" because it is "designed to regulate the conduct of hostilities" and because it includes specific prohibitions concerning "the use of a certain weapon in warfare". *See supra* note 10, para. 25. This means that the Court used IHL in order to interpret what is an "arbitrary deprivation of life" under HRL (Art. 6 of the ICCPR) because IHL contains specific rules concerning the use of weapons in warfare which are complementary to HRL. *See* similarly *Report of the Expert Meeting on the Right to Life, supra* note 20, at 20:

> A number of experts disagreed with the proposition that IHL displaces the applicability of HRL entirely with respect to the right to life. One of these experts pointed out that the ICJ's holding in the Nuclear Weapons case was limited to the context of the use of nuclear weapons; the ICJ did not hold that the right to life in armed conflicts was always governed by reference to IHL as *lex specialis*.

held Israel responsible for a series of HRL violations in a situation of hostile occupation notwithstanding the *lex specialis* approach.[27] Thus, certain authors claimed that the Court never really put into operation the *lex specialis*-approach taken in the sense of derogation ("derogat").[28] It rather seems that the Court used the maxim of *lex specialis* in a somewhat larger and improper sense in order to designate the fact that IHL is a body of law specifically dealing with armed conflicts which may thus, in areas of common concern to both branches of the law, complement the general protection offered by HRL.[29]

The traditional "*lex specialis derogat*" maxim has a proper place in this area only to the extent that two, or more than two, *norms* of IHL and/or of HRL bearing on the same subject-matter are in conflict in such a way that a simultaneous application of both is impossible under the principle of non-contradiction.[30] The main scope of that rule has thus been spelled out correctly by Vierdag: it is relevant "if an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results".[31] This incompatibility can be of three types: (1) either rule X and rule Y lead to a direct contradiction (e.g., a person must be prosecuted for a certain act and the same person may not be prosecuted for the same act); (2) or rule X and rule Y lead to different but still incompatible results (e.g., a detention

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See also M. Koskenniemi, *The ILC Report, Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes'*, 4 *ILC* (7 May 2004), ILC (LVI) SG/FIL/CRD.1(2004), para. 76. "[In this advisory opinion,] the use of the *lex specialis* maxim did not intend to suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an aspect of the pragmatics of the Court's reasoning".

27 *Supra* note 10, para. 123 *et seq.*

28 *See* F. Hampson & I. Salama, "Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law", UN Doc. E/CN.4/Sub.2/2005/14, para. 57; W. Schabas, "*Lex specialis?* Belt and suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*", for presentation at a conference on the Parallel Application of International Human Rights Law and International Humanitarian Law, Hebrew University, Jerusalem, 21-22 May 2006, at 5.

29 *See* Schabas, *supra* note 28, at 4: "In effect, then, the Court did not address a possible conflict between the two systems, or suggest that violations of international human rights law would be examined through the prism of international humanitarian law. Rather, it treated them as two complementary systems, parts of a whole".

30 *See* Lindroos, *supra* note 20, at 42, 44; M. Sassòli, "Le Droit International Humanitaire, une *Lex Specialis* par Rapport aux Droits Humains?", *Mélanges Malinverni* (forthcoming).

31 *See* B. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Art. 30 of the Vienna Convention on the Law of Treaties and Related Provisions", LIX *B.Y.B.I.L.* 100 (1998).

must be confirmed by a judgment, but in one case a judicial body is required whereas in the other an administrative body is sufficient); (3) there can also be a conflict of norms if one of the two branches of the law does not contain a norm on a subject matter whereas the other does, but only if the absence of regulation corresponds to an intentional omission, *i.e.*, a "qualified silence". Finally, there is no incompatibility – but still a difference to be processed – when one norm X includes all the content of norm Y but goes further than the latter: for example, if one rule is that detention must be confirmed by a judgment and the other is that detention must be confirmed by a judgment within a time-span of 3 months.

If there is a conflict of norms, it must be solved by recourse to all the usual – and also some special – arguments of interpretation, in full context and on a case-by-case basis. It is not possible to affirm *a priori* that the IHL rule or that the HRL rule shall automatically prevail.[32] In determining the "speciality" of a rule, many elements will concur: the precision/clarity of the rule,[33] its adaptation to the particular circumstances of the case[34] and the degree of protection it offers.[35] The Inter-American Commission on Human Rights often favored the criterion of the higher degree of protection.[36] It is to some extent logical that if two provisions apply simultaneously and provide for protection of the individual in such a way that norm X contains all protection of norm Y but also goes beyond, the one that offers the greater degree of protection, namely norm X, should prevail.[37] If both norms apply,

[32] *See Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* International Law Commission, Fifty-sixth Session, Geneva, 3 May-4 June 2004 and 5 July-6 Aug. 2004, 28 July 2004 (A/CN.4/L.663/Rev.1), para. 9. *See also* Lindroos, *supra* note 20, at 44; Sassòli, *supra* note 30.

[33] The precision/clarity of the rules has to be assessed taking into consideration their customary and conventional content. Moreover, the interpretation of the rules in case-law should also be taken into account. It is too often contended that HRL rules are less detailed than IHL norms. This kind of statement overlooks the fact that the case law of the HRL implementation bodies very much adds flesh to the bones of the vague HRL rules.

[34] *See* Sassòli, *supra* note 30.

[35] *See Report of the Expert Meeting on the Right to Life, supra* note 20, at 20:

> This expert sought to clarify what exactly the *lex specialis* concept means under general international law. In the view of this expert, there can only be a *lex specialis* where there is body of law with provisions which are more detailed, more specific and, most importantly, clearer than are the provisions in the law generally, or the *lex generalis*.

[36] *See* Juan Carlos Abella v. Argentina (la Tablada), [1977] *IAComHR*, Rep. No. 55/97, Case 11.137, para. 166-67; *Coard, supra* note 11, para. 42.

[37] This argument is related to the "most favorable to the individual clause" which is found in most of the HRL treaties. *See* Art. 53 ECHR; Art. 29(b) ACHR; Art. 5(2) ICCPR; Art.

ex hypothesi, the fact of not offering the greater degree of protection would automatically mean that the State violates one of its legal commitments, that which is enshrined in norm X. By doing so, the State would violate norm X and therefore incur international responsibility. Thus, if a State grants more extensive rights to individuals by ratifying or acceding to different "humanitarian" treaties (or by virtue of customary law), it cannot flout them *ex post* by arguing that one of these treaties does not provide for them. Each treaty is autonomous and must be respected in itself; the reverse argument would be a *non sequitur*. It would purport to use one treaty obligation (or other) in order to defeat an obligation contained in another, autonomous, treaty.

This construction naturally supposes that both (or more) legal régimes apply simultaneously; otherwise, *cadit quaestio*. Thus, there remains a point for preliminary interpretation: whether these two norms truly apply to the particular set of facts at stake. Moreover, the "degree of protection" criterion is not absolute, insofar as the less protective rule may have been intended to derogate from the rule which is the most favorable to the individual.[38]

The result of the aforementioned is that in some cases the IHL rule will appear as being more "special" in the complex legal sense previously discussed. That means that it will be given priority, but not necessarily by derogation, since it could operate also by complementation, as the *Legality Opinion* of the ICJ has shown.[39] In other cases, an HRL rule and the body of

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5(2) International Covenant on Econimic, Social and Cultural Rights, 1966, 993 *U.N.T.S.* 3 [ICESCR]; Art. 23 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, [1979] *U.N. Juridical Y.B.* 115; Art. 41 Convention on the Rights of the Child, 1990, 28 *I.L.M.* 1457; Art. 36 of the European Social Charter, 1961, *E.T.S.* 35; Art. 10 of the UNESCO Convention Against Discrimination in Education, 1960, 429 *U.N.T.S.* 93. On the opposite, the ACHPR does not include such a provision. However, Arts. 60 and 61 of the ACHPR complement this gap.

38 Thus, a "less favorable" IHL rule could intend to derogate from a "more favorable" HRL norm. Prof. Sassòli underlines that one cannot automatically give priority to the most favorable rule because "*cette approche néglige le fait que le DIH fait précisément un compromis entre exigences d'humanité et donc de protection de l'individu, d'une part, et nécessité militaire de l'autre*". *See* Sassòli, *supra* note 30.

For example, under the ECHR, States may not detain persons for other purposes than those listed in Article 5. These do not contain the possibility to detain prisoners of war (POW) during an IAC. Theoretically, this would imply that States could not detain POWs under the ECHR without derogating from Article 5. However, it is clear that IHL rules authorizing to detain POWs are here the *lex specialis* because the law of armed conflicts was intended to derogate from the usual regime of detention.

39 *Supra* note 10.

law obtained through its interpretation by the supervisory organs may appear to be the more "special" rule and may be given priority.[40] In summary, the *lex specialis* maxim cannot offer a standard answer to solve conflicts of norms. It should rather be seen as an overall descriptive tool of contextual and teleological interpretation.[41]

C. The Ivory Tower Approach of the ECtHR

The ECtHR has been far from applying IHL as a *lex specialis* in cases of an armed conflict. It has rather resisted any explicit reference to IHL[42] and avoided applying provisions of this branch of the law in its case-law. One may understand that the Court eschews a *direct application* of a body of law,[43] which is not, according to its constitutive instrument, the European Convention on Human Rights, in the material scope of its jurisdiction. The Court has only the competence to interpret and to apply the European Convention.[44] What is more surprising is that the Court also avoids *taking account* of IHL provisions in order to interpret and apply the HRL guarantees of the European Convention in times of armed conflicts. There is a general rule of interpretation – and the ECtHR often refers to it[45] – according to which account must be taken in terms of "any relevant rules of international law applicable in the relations between the parties".[46] Consequently, there seems to be no reason why the Court could not consider IHL rules in order to give more precise legal clothing to some of its

40 *See infra* at 43 (concerning the obligation to investigate). *See also* Sassòli, *supra* note 30.

41 *See* Lindroos, *supra* note 20, at 36, 40 and 44; Report of the Study Group on Fragmentation of International Law, *supra* note 32, para. 10; E. Vranes, "*Lex Superior, Lex Specialis, Lex Posterior* – Zur Rechtsnatur der 'Konfliktlösungsregeln'", 65 *ZaöRV* 404 (2005).

42 Sometimes the Court is implicitly inspired by IHL. *See Ergi, supra* note 11.

43 If the Court directly applied IHL, this would mean *stricto sensu* that it could declare that a State is internationally responsible for its IHL violations. *See Bámaca Velásquez*, *supra* note 11, para. 208.

44 *See* Art. 32(1) ECHR. *See also* F. Hampson, "Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts", 31 *Rev. de Droit Pénal Militaire et de Droit de la Guerre* 127 (1992).

45 *See Loizidou v. Turkey,* 1996, *supra* note 14, para. 43; *Banković, supra* note 9, para. 57.

46 *See* Art. 31(3)(c) of the Vienna Convention on the Law of Treaties, 1969, 1155 *U.N.T.S.* 331 [hereinafter: VCLT]. This rule is considered as customary. *See* Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] *I.C.J. Rep.* para. 53; Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), [2003] *I.C.J. Rep,* para. 41.

arguments, to confirm its holdings or to bridge legal gaps, exactly as other HRL supervisory organs do.[47]

An "implied powers-approach" also sustains this conclusion. If it is "necessary" for the Court to refer to IHL to be able to correctly apply the European Convention, then it must be considered to possess the implied power to do so.[48] The concept of "renvoi matériel" may also allow – and indeed force the Court – to incorporate an IHL notion into the European Convention in order to correctly apply the latter.[49] The concept of material *renvoi* normally applies between legal orders (international law/municipal law).[50] It means that one legal order avoids regulating a certain subject matter or avoids regulating it in detail. It rather makes reference to the normative formula of another legal order, which it takes over in case of need for a full or partial extent. Thus, the law of a federal State may avoid setting out rules on the delimitation of territory between its federated entities; in case of a dispute on that subject matter it may take over *en bloc* the rules international law has developed for the delimitation between States. Such a *renvoi* is normally implicit. It is thus to be gathered by interpretation. Applied to the regional (European: ECtHR) and the international (universal: IHL) legal orders, this idea of *renvoi* could be taken to mean that if the European Convention is today increasingly applied to situations of armed conflicts, and if the "special" law for such conflicts as it has developed since 1950 is to be found in IHL, then the proper interpretation of the European Convention is that some form of reference to IHL must be implied. Otherwise the proper application of the law would not be guaranteed. The results obtained would remain legally doubtful and consequently open to challenge. This would jeopardize the authority of the Court.

47 *See* General Comment No. 31, *supra* note 11, para. 11; *Concluding Observations: United States of America,* HRC, 2006, UN Doc. CCPR/C/USA/CO/3, para. 5 and 20. In the past, the IAComHR directly applied IHL. *See Juan Carlos Abella, supra* note 36, at paras. 157-71. But the IACtHR considered that this was going too far. However, the IACtHR admitted that the relevant provisions of IHL may be taken into consideration as elements for the interpretation of the American Convention. *See* Las Palmeras v. Colombia*,* [2000] *IACtHR*, Preliminary Objections, Ser. C, No. 67, at paras. 32-34; *Bámaca Velásquez, supra* note 11, paras. 203-14; Amnesty International v. Sudan, AComHPR, No. 48/90, *13th Annual Activity Report 1999-2000*, para. 50.

48 *See* F. Martin, "Application du Droit International Humanitaire par la Cour Interaméricaine des Droits de l'Homme", 844 *Rev. Internationale de la Croix Rouge* 1051 (2001).

49 *See* F. Martin, "Le Droit International Humanitaire Devant les Organes de Contrôle des Droits de l'Homme", 1 *Droits Fondamentaux* 139-44 (2001).

50 *See* F. Capotorti, "Cours Général de Droit International Public", 248 *Recueil des Cours* 221 (1994-IV).

It can be added that the European Convention contains some indirect references to IHL. Thus, Article 15(1) requests the Court to control the compatibility of measures of derogation of a State with its other international law obligations.[51] This includes IHL.[52] Article 15(2), prohibits any derogation to the right to life "except in respect of deaths resulting from lawful acts of war", a formula which seems an invitation to refer to IHL. These references however suppose that a State invokes the derogation clause contained in Article 15.[53]

How may one explain this Ivory Tower practice of the ECtHR? Issues of legal policy seem to be crucial. By the course chosen, the Court avoids entanglement in the diplomatically sensitive question as to the existence and character of an armed conflict.[54] It also avoids analyzing complex sets of IHL rules with which its judges may not have perfect confidence.[55] Finally, the Court may seek to establish an autonomous régime[56] more protective than IHL rules.[57] For example, by applying HRL alone, the Court shielded from potential challenge a legal régime on the use of lethal force which is sometimes more protective than under IHL[58] (but this could probably also have been secured through the approach of the "more protective rule"). This Ivory Tower approach also has its drawbacks. It precludes a global and coherent construction of the protective rules in times of armed conflict while favoring fragmentation.[59] The Court could improve the protections and the progressive development of the law if it took account of IHL rules and attempted to clarify its multiple relationships to HRL. The result reached in

51 *See* Art. 15(1) ECHR:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

52 *See* S. Vité, *Les Procédures Internationalles d'Établissement des Faits dans la Mise en Oeuvre du Droit International Humanitaire* 74 (1999).

53 *See* Cyprus v. Turkey*,* 1976, *supra* note 11, para. 527.

54 The European States which faced internal conflicts (United Kingdom, Turkey and Russia) always negated the existence of an armed conflict to which IHL would apply. *See Report of the Expert Meeting on the Right to Life, supra* note 20, at 13. *See also* W. Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya", 16/4 *E.J.I.L.* 754-55 (2005).

55 In fact, IHL is a special and complex field of international law which does not follow the same logic as HRL and which, therefore, requires a very specific expertise.

56 *See* Tigoudja, *supra* note 2, at 76.

57 *See* Abresch, *supra* note 54, at 746-48; Hampson, *supra* note 44, at 127.

58 *See* below.

59 *See* Martin, *supra* note 48, at 1048.

single cases will be enriched and better tailored if the spectrum of applicable rules is diversified as a function of differing circumstances. In some situations, moreover, it is difficult to make abstraction from IHL rules, since they clearly constitute a "lex specialis" necessary to a proper application of the law in full context. This is the case, for example, in the field of the conduct of hostilities.[60]

II. THE PROTECTION OF THE RIGHT TO LIFE

A. International Human Rights Law

The right to life is often considered to be a sort of "primary right" or "supreme right", placed at the apex of the hierarchy of HRL.[61] The ECtHR once qualified it as "the supreme value in the hierarchy of human rights".[62] It is not only guaranteed by the main HRL treaties[63] but also by general international law.[64] However, notwithstanding its fundamental importance, the right to life is not absolutely protected. Capital punishment, where admitted, constitutes a first recognized exception.[65] Moreover, most HRL instruments prohibit only "arbitrary" deprivations of life.[66] The European Convention goes further by providing an exhaustive list – to be interpreted restrictively – of recognized reasons for lethal interventions.[67] These are in

60 *See* below.

61 *See* Y. Dinstein, "The Right to Life, Physical Integrity, and Liberty", in *The International Bill of Rights: The Covenant on Civil and Political Rights* 114 (L. Henkin ed., 1981); M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* 121 (2005) ; F. Sudre *et al., Les Grands Arrêts de la Cour Européenne des Droits de l'Homme* 85 (2003).

62 *See* McCann *et al*. v. United Kingdom, [1995] *ECtHR*, para. 147; Streletz, Kessler and Krenz v. Germany, [2001] *ECtHR*, para. 94; Pretty v. United Kingdom, [2002] *ECtHR*, para. 37. The HRC also qualified the right to life as a "supreme right". *See* General Comment No. 6 on the Right to Life, HRC, Sixteenth session, (1982), para. 1. The AComHPR says that it is the "fulcrum of all other rights". *See* Forum of Conscience v. Sierra Leone, AComHPR, No. 223/98, *14th Annual Activity Report 2000-2001*, para. 20.

63 *See* Art. 6 ICCPR; Art. 2 ECHR; Art. 4 IACHR; Art. 4 ACHPR.

64 *See* Dinstein, *supra* note 61, at 115.

65 *See* Art. 6(2) ICCPR; Art. 4(2) IACHR; Art. 4 ACHPR. Art. 2(1) ECHR also contains an exception to the death penalty but the latter tends to disappear in Europe as it has been prohibited by Protocol 6 in times of peace and by Protocol 13 at all times. In the *Öcalan* case (Öcalan v. Turke*y*, [2003] *ECtHR*, para. 196), the Court let understand that the prohibition of the death penalty may be a european customary rule.

66 *See* Art. 6(1) ICCPR; Art. 4(1) ACHR; Art. 4 ACHPR.

67 *See McCann, supra* note 62, para. 146-48. It should be noted that the exceptions delineated in Art. 2(2) indicate that this provision extends to, but is not concerned exclusively with, intentional killing.

defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection.[68] Furthermore, the recourse to lethal force must be considered a last resort (principle of necessity); and it must be strictly proportional to the aim to be achieved.[69] According to the European Commission of Human Rights, "in assessing whether the use of force is strictly proportionate, regard must be had to the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of the risk that the force employed might result in loss of life".[70] Contrary to other HRL instruments,[71] the right to life in the European Convention is not only subject to exceptions, but also to derogation in time of armed conflicts.[72] This aspect has not yet had any practical bearing, since no State ever used this power in the context of the right to life. Consequently, the ECtHR only had opportunity to control the exceptions under Article 2(2).[73]

The supervisory organs under HRL instruments had recourse to the device of "positive obligations" in order to further strengthen the reach of the right to life.[74] Thus, it has been held that the States must not only refrain from arbitrary killings but must also adopt positive action in order to safeguard the life of persons present or placed under their jurisdiction.[75]

68 In light of the case law of the ECtHR, it can be concluded that, in fact, each of these legitimate aims could be subsumed under the generic term of "self-defence" in a wide sense insofar as the Court admitted the recourse to lethal force in cases of lawful arrest or for quelling a riot only if the persons against whom the force was used represented a risk more or less immediate for the life of others. Concerning Art. 2(2)(b), *see, e.g.:* Makaratzis v. Greece, [2004] *ECtHR*; Nachova *et al*. v. Bulgaria, [2005] *ECtHR*; Kakoulli v. Turkey, [2005] *ECtHR*. Concerning Art. 2(2)(c), *see, e.g.,* Stewart v. United Kingdom, [1984] *EComHR*, DR 39; Güleç v. Turkey, [1998] *ECtHR*.

69 *See McCann*, *supra* note 62, para. 149. *See also* Code of Conduct for Law Enforcement Officials, A/RES/34/169, 1979, Art.3; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, para. 4-5.

70 *See Stewart, supra* note 68, para. 19 .

71 Art. 4(2) ICCPR; Art. 27(2) ACHR. The ACHPR does not include a provision allowing derogations.

72 As underlined before, Art. 15(2) ECHR prohibits any derogation to the right to life "except in respect of deaths resulting from lawful acts of war".

73 It should be underlined that the ECtHR had to deal with the right to life only in situations of NIAC.

74 *See* A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); Nowak, *supra* note 61, at 122. *See also* General Comment No. 31, *supra* note 11, para. 8.

75 *See* L.C.B. v. United Kingdom, [1998] *ECtHR*, para. 36; General Comment No. 6, *supra* note 62, para. 5.

These positive obligations comprise several aspects; the most important are: (i) the duty to enact legislation to protect the right to life;[76] (ii) the duty to take all feasible precautions and to control police action so that the eventuality of recourse to lethal force is minimized;[77] (iii) the duty to prevent persons under the jurisdiction of a State to attack the physical integrity of others;[78] (iv) and the duty to conduct a thorough and meaningful enquiry any time a person has been killed.[79] These particular rules developed by the HRL case-law can be flexibly applied, adapted and developed for situations of armed conflicts.[80]

[76] This obligation is already stated in the treaty provisions. *See* Art. 6(1) ICCPR; Art. 2(1) ECHR; Art. 4(1) ACHR; Art. 1 ACHPR. *See also*, General Comment No. 6, *supra* note 62, para. 3. *See also Makaratzis, supra* note 68, paras 56-72; Suárez de Guerrero v. Colombia, [1982] *HRC*, No. 45/1979, para. 13.3.

[77] *See McCann, supra* note 62, paras. 150 and 194; *Ergi, supra* note 11. *See also* P. Alston, Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, *Report to the Human Rights Commission,* 2006, UN Doc. E/CN.4/2006/53, paras. 53-54. *See* also Neira Alegria *et al.* v. Peru, [1996] *IACtHR*, Ser. C, No. 29, paras. 62 and 76 ; Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso, ACommHPR, No. 204/97, *14th Annual Activity Report 2000-2001*, para. 43.

[78] It corresponds to what is called "Drittwirkung". *See* Osman v. United Kingdom, [1998] *ECtHR,* para. 115; Jiménez Vaca v. Colombia, HRC, No. 859/1999, para. 7.3; Velásquez Rodríguez v. Honduras*,* [1988] *IACtHR*, paras. 172-77; *Commission Nationale des Droits de l'Homme et des Libertés, supra* note 7, para. 22; Amnesty International v. Sudan, *supra* note 47, para. 50; *Mouvement Burkinabé des Droits de l'Homme et des Peuples, supra* note 77, para. 42.

[79] *See McCann, supra* note 62, para. 161; Kaya v. Turkey*,* [1998] *ECtHR*, para. 87; General Comment No. 29, *supra* note 8, para. 15; Baboeram v. Suriname, [1985] *HRC*, No. 146, 148-154/1983, para. 13.1; Herrera Rubio v. Colombia*,* [1987] *HRC*, No. 161/1983, para. 10.3; Velasquez Rodriguez v. Honduras, [1988] *IACtHR*, Ser. C, No. 4, paras. 174-77; Humberto Sánchez v. Honduras, [2003] *IACtHR*, Ser. C, No. 102, para. 112; Myrna Mack Chang v. Guatemala, [2003] *IACtHR*, Ser. C, No. 101, para. 157; Amnesty International v. Sudan, *supra* note 47, para. 51; *Commission Nationale des Droits de l'Homme et des Libertés, supra* note 7, para. 22.

[80] The HRL bodies can always create new positive obligations incumbent to the State, also in the context of an armed conflict. For example, HRL bodies require the State to search for and collect the wounded and sick after an engagement, like IHL does (in NIAC: Art. 3 Common of the 1949 Four Geneva Conventions and Art. 7-8 of APII, *supra* note 25). *See* Ahmet Özkan, [2004] *ECtHR*, paras. 307-308; *Neira Alegria, supra* note 77, para. 74. Another example, in a recent case where a child lost his leg because of a landmine, the ECtHR held Turkey responsible for a violation of Art. 2 because it took insufficient security measures around the area mined by the military and used by villagers as pasture land. *See* Paşa and Erkan Erol v. Turkey*,* [2006] *ECtHR*.

B. International Humanitarian Law

It may be asked whether IHL can truly protect the right to life: is it not based on the very opposite idea of a license of combatants to kill?[81] However, that license applies only to a particular segment of persons, situations and of moments during an armed conflict. Apart from it, there are many provisions protecting the life of combatants and civilians.[82]

Article 48 of 1977 Additional Protocol I to the 1949 Geneva Conventions [API] – which is considered to reflect customary international law[83] – enunciates the following fundamental rule for IAC: "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives". This principle of distinction is crucial.

The extent of the right to life guaranteed in armed conflict thus depends on its reach: it will vary with respect to the status of the person (combatant / civilian).[84]

The right to life of *combatants* is limited according to the moment and activity at stake (combat situations / combatants *hors de combat*).[85] During hostilities in which they are engaged, they are legitimate targets; if *hors de combat*, their protection against killings is aligned to that of civilians.[86] Even

81 *See* General Comment No. 6, *supra* note 62, para. 2: "The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life". *See also* T. Hadden & C. Harvey, "The Law of Internal Crisis and Conflict", 833 *Int'l Rev. Red Cross* 120 (1999).

82 Some authors already contended that the right to life exists in IHL. *See* A. Calogeropoulos-Stratis, *Droit humanitaire et Droits de l'Homme: la Protection de la Personne en Période de Conflit Armé* 141 (1980); M. El-Kouhene, *Les Garanties Fondamentales de la Personne en droit Humanitaire et Droits de l'Homme*, 113-16 (1986).

83 *See Customary International Humanitarian Law* (Vol. 1: Rules) (ICRC, J.-M. Henckaerts & L. Doswald-Beck eds., 2005), Rule 1, at 3.

84 *See* J.-F. Quéguiner, *Le Principe de Distinction Dans la Conduite des Hostilités* 296 (Thèse Université de Genève/IUHEI, 2006).

85 *See* El Kouhene, *supra* note 82, at 113.

86 *See* Art. 41(1) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 47 at 164 and Rule 89 at 311. Once combatants are hors de combat, their life must be protected. *See* Art. 12 and Art. 50 of the 1949 (First) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 *U.N.T.S.* 31 [GC I]; Art. 12 and 51 of the 1949 (Second) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 *U.N.T.S.* 85 (GC II); Art. 13 and 130 of the 1949 (Third) Geneva Convention Relative to the Treatment of Prisoners of War 75 *U.N.T.S.* 135 (GC

during hostilities, it should however be recalled that "the only legitimate object which States should endeavor to accomplish [...] is to weaken the military forces of the enemy".[87] Thus, if it were possible to injure (putting thus *hors de combat*) rather than to kill, the principle of necessity would legally impose the first to the detriment of the second.[88] There are moreover certain specific IHL limitations indirectly relevant to the right to life during combat situations.[89] Thus, the taking of life will be qualified as illegal under IHL if it flows from refusal of quarter,[90] recourse to perfidy[91] or a use of weapons causing unnecessary suffering.[92] The illegality of the means and methods of combat here entails the illegality of the result.

Civilians enjoy a greater degree of protection of their life than combatants. The parties to the conflict must not only abstain from killing civilians under their control,[93] but also adopt some positive measures geared

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III); Art. 10 and Art. 75(2)(a) API (*supra* note 25). Moreover, many rules protecting the wounded, sick and shipwrecked and prisoners of war can be considered as indirectly protecting the right to life of these persons. *(e.g.*, Art. 15 GC I and 18 GC II: Search for Casualties. Evacuation; Art. 19 GC III: Evacuation of Prisoners).

87 Preamble of St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868, repr. in *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* 101 (D. Schindler and J. Toman eds., 3rd ed., 1988).

88 *See* Calogeropoulos-Stratis, *supra* note 82, at 144; R. Kolb, *Ius in bello: Le Droit International des Conflits Armés. Précis,* para. 108-15 (2003).

89 Saint Petersburg Declaration, *supra* note 87, Preamble para. 3; Art. 22 of the Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (IV) of 1907, repr. in *The laws of Armed Conflicts*, *supra* note 87, at 75; API, *supra* note 25, Art. 35: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited".

90 Art. 23(c) of the 1907 Hague Regulations, *supra* note 89; Art. 12 GC I, *supra* note 86; Art. 12 GC II, *supra* note 86; Art. 40 API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 46, at 161.

91 Art. 23 (b)(e)(f) and 24 of the 1907 Hague Regulations, *supra* note 89; Art. 37 and 5(3)(f) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 65, at 221.

92 Saint Petersburg Declaration, *supra* note 87, Preamble, para. 5; Art. 23(e) of the 1907 Hague Regulations, *supra* note 89; 35(2) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 70, at 237.

93 Art. 32 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *U.N.T.S.* 287 [GC IV]; Art. 75(2)(a) API. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 89, at 311.

at protecting the life of civilians under their jurisdiction.[94] In the context of hostilities, the civilians are granted general immunity:[95] they cannot be made the object of direct attacks[96] (except if they participate in the hostilities and only during the time-span of this direct participation[97]) and they are protected against indiscriminate attacks.[98] Every collateral civilian death in an armed conflict does obviously not automatically entail a violation of IHL. Collateral civilian casualties are accepted by the rules of warfare to the extent the losses are not excessive in relation to the concrete and direct military advantage anticipated by a military operation.[99] Furthermore, the principle of precaution – requiring that military operations always be conducted with an effort of sparing, to the extent feasible, civilian populations – contains several protective rules for civilians.[100] One of them is the principle that the "least possible damage" should be inflicted implying that the States shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects".[101]

94 *E.g.*, the obligation to protect and to assist wounded, sick and shipwrecked: Art. 16 GC IV, *supra* note 93; Art. 10 API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 109-11, at 396 *et seq.* The prohibition to use starvation of civilians as a method of warfare can also be cited: Art. 23, Art. 55 and Art. 59 GC IV, *supra* note 93; Art. 54(1) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 53, at 186.

95 Art. 51(1) API, *supra* note 25: "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations".

96 This derives from the principle of distinction (Art. 48 API, *supra* note 25). *See* also Art. 51(2) API, *id.*) This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 6, at 19.

97 Art. 51(3) API, *supra* note 25.

98 Art. 51(4) and Art. 51(5) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 11-13, at 37 *et seq.*

99 This is the principle of proportionality. *See* Art. 51(5)(b) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 14, at 46.

100 Art. 57 API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rules 15-21, at 51 *et seq.*

101 Art. 57(2)(a)(ii) API, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 17, at 56.

The equivalent rules for NIAC are much less precise and developed, especially concerning the protection in combat.[102] Common Article 3 to the 1949 Geneva Conventions does not deal with action during hostilities. APII, when it applies,[103] only contains the general rule according to which "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations".[104] Many weapons have been prohibited by instruments applying formally to IAC; but only few weapons have been prohibited by instruments applying formally also to NIAC.[105] The right to life would thus seem to be protected more poorly in NIAC than it is in IAC. However, as the ICRC study on customary humanitarian law showed, the majority of rules relating to the conduct of hostilities applicable during an IAC are customarily also applicable to NIAC.[106] This holds true, for example, of the principle of distinction and its derivatives, e.g., the immunity of the civilian population, the prohibition of indiscriminate attacks, the principles of proportionality and of necessity, the principle of precaution.[107] The equation holds increasingly true also in the area of weapons law: legal writings and jurisprudence generally conclude that weapons prohibited in IAC are prohibited also in NIAC.[108] Moreover, a

[102] *See* Abresch, *supra* note 54, at 746-48; Hampson, *supra* note 44, at 127.

[103] To be applicable APII (*supra* note 25) must have been ratified by the State on which the armed conflict is taking place and, contrary to the 1949 Geneva Conventions, APII is not universally ratified. Then, APII deals only with situations in which there is a NIAC between governmental: "armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". *See* Art. 1 APII, *supra* note 25.

[104] Art. 13 APII, *supra* note 25. There is also Art. 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, 249 *U.N.T.S.* 240.

[105] However, the treaties prohibitions are more and more extended to weapons in NIAC. *See* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as Amended on 3 May 1996), 35 *I.L.M.* 1507 (1997); Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, 36 *I.L.M.* 1507; Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980, 1342 *U.N.T.S.* 137. Amendment Art. 1, 21 Dec. 2001.

[106] *See Customary International Humanitarian Law*, *supra* note 83, at xxix: "the gaps in the regulation of the conduct of hostilities in Additional Protocol II have 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".

[107] *Ibid.,* Rules 1, 11-14, 15-21.

[108] *See* Prosecutor v. Dusko Tadić a/k/a "Dule", ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 119; Declaration on

certain number of conventional and customary rules relating to the protection of the right to life of persons in the hands of the enemy have been developed for NIAC.[109] Overall, the fundamental protections offered by IHL do not differ greatly in IAC and NIAC, albeit certain differences remain.

C. A Comparison

As could be seen in the passages above, the right to life is protected by different legal constructions in IHL and HRL. The reasoning adopted in order to determine if a killing (or a violation of physical integrity[110]) is illegal follows different paths in both branches.

Simplifying, it can be said that in HRL four signposts will distinguish the path. *First*: does the use of force respect the conditions of municipal law protecting the life of persons? *Second*: if the death results from action of State agents, did the use of lethal force pursue a legitimate aim and was it absolutely necessary to achieve that aim? If the casualty was the result of private action, did the competent State agents take appropriate preventive action? *Third*: did the State, during the planning and control phase of the envisaged police action, take all the feasible measures to minimize the eventuality of the use of force and of civilian casualties? *Fourth*: did the State thoroughly and effectively inquire into the causes of the casualty?

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the Protection of Women and Children in Emergency and Armed Conflict, A/RES/3318 (XXIV), 1974, Art. 2; *Déclaration sur les règles du droit international humanitaire relatives à la conduite des hostilités dans les conflits armés non internationaux,* Conseil de l'Institut international de Droit Humanitaire, 1990, Part B; *Customary International Humanitarian Law*, *supra* note 83, at 237 *et seq*.; E. David, *Principes de Droit des Conflits Armés* 407 (2002); Kolb, *supra* note 88, at 214 ; M. Sassòli & A. Bouvier, 1 *How Does Law Protect in War: Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* 161, at 260 (ICRC, 2006).

109 Common Art. 3 of the 1949 GC, *supra* note 86 and 93; Art. 4(2)(a) APII, *supra* note 25. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 89, at 311. There are also some rules indirectly protecting the right to life of persons affected by a NIAC. *E.g.* Art. 7 and 8 APII, *supra* note 25: protection and care for wounded, sick and shipwrecked. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rules 109-111, at 396 *et seq. See also* Art. 14 APII, *supra* note 25: protection of objects indispensable to the survival of the civilian population. This rule can be considered as a norm of customary international law. *See Customary International Humanitarian Law*, *supra* note 83, Rule 53, at 187.

110 The positive obligation to protect life implies that States should also abstain from actions capable of endangering life, even if the victim did not actually die. *See* Hampson, *supra* note 44, at 131. *See also* Berktay v. Turkey, [2001] *ECtHR*, para. 153; Chongwe v. Zambia, [2000] *HRC*, No. 821/1998, at 5.2.

In IHL, the signposts of the path are rather the following three. *First*: did the killing take place in the context of an IAC or in the context of a NIAC (the rules not being identical)? *Second*: what was the status of the person killed, a combatant or a civilian (or a civilian participating irregularly in hostilities)? *Third*: were the means and methods used in the military action lawful, in general (e.g., prohibited weapons) and in particular (e.g., necessity in context, excessive collateral damages with respect to a concrete military advantage, etc.). If the victim was a civilian, the issue will often concentrate on the questions as to whether the attack was indiscriminate or launched without proper precautions.[111]

Some of these conceptual differences between the protections of IHL and HRL need further clarification. They will allow us to formulate a judgement on the degree of compatibility of both approaches.

1. In IHL the protection of life varies according to the qualification of the conflict as an IAC or a NIAC.[112] In HRL, the protection of life does not differ according to the situation on the ground. Hence, HRL seem at first sight more protective. However, the extent of the difference is not to be exaggerated. First, the distinction in the reach of IHL protections in IAC and NIAC is constantly reduced under the powerful and progressive influence of customary international law.[113] Second, under the European Convention, the right to life cannot be derogated from "except in respect of deaths resulting from lawful acts of war".[114] This allowance means that a potentially different standard of protection is accepted for situations of armed conflict as compared with situations under ordinary peacetime. Moreover, the ECtHR may take account of the particular situation of warfare when interpreting the right to life in a particular context. Thus, in the *Isayeva, Yusupova, Bazayeva v. Russia* case, it presumed that the use of lethal force pursued a legitimate military aim because of the situation of conflict Russia had to face.[115] The true extent of this first difference seems thus practically quite reduced.

2. In IHL (at least in IAC) the protection of life further depends on the status of the person, *i.e.*, on the combatant or civilian status. If a combatant may be directly targeted and killed, a civilian cannot be directly targeted except if he participates in the hostilities and only during that participation.

[111] *See* Hampson, *supra* note 44, at 128.

[112] In case of a NIAC, it should also be distinguished between those where only Common Art. 3 applies and those where APII is also applicable.

[113] *See* above.

[114] Art. 15(2) ECHR.

[115] *See Isayeva I, supra* note 11, para.181.

In HRL, there is no distinction as to status.[116] Every person equally enjoys the right to life. Recourse to lethal force is only allowed if there is an absolute necessity in order to essentially safeguard the lives of other persons.[117] Here again, it would seem that HRL grants a greater degree of protection by failing to distinguish between categories of persons and by holding that nobody can be attacked just because of his status or even criminal activities. This distinction does, however, fade away if one compares HRL with IHL under NIAC. In internal conflicts, there is, at least explicitly, no combatant status.[118] Even under IAC it could be argued that IHL is not attached to status in the first place, since even civilians may be killed in certain circumstances.[119] The true question would rather be if a person participates in hostilities or if he must suffer a collateral injury measured in relation to a military advantage. Moreover, one can consider that even a combatant may not be killed if he could be captured or injured.[120] This flows from the prohibitive aspect of the principle of military necessity which is inherent to IHL.[121] The Preamble of the Saint Petersburg Declaration previously enounced is an illustration of this principle.[122] The question of status would thus dissolve into one of context. Here again, the

[116] *See* Report of the Expert meeting on the right to life in armed conflicts and situations of occupation, *supra* note 20, at 6: "this HRL legal regime addresses how a State can respond to the threat posed by rebels without creating categories of people who can be targeted and killed on sight as under the IHL of IAC". *See also* Abresch, *supra* note 54, at 757; Hampson, *supra* note 44, at 135.

[117] *See* McCann, *supra* note 62; Oğur v. Turkey, [1999] *ECtHR*; Gül v. Turkey, [2000] *ECtHR*.

[118] Some authors contend that in NIAC, the status of combatant implicitly exists. *See infra* note 180.

[119] *See* Calogeropoulos-Stratis, *supra* note 82, at 141:

> *...le droit à la vie est aussi un droit fondamental du droit humanitaire applicable dans les conflits armés en ce que tout acte de guerre contre des non-combattants ou des combattants mis hors de combat est interdit. Cette protection n'a rien à voir avec le statut de la personne intéressée, mais uniquement avec le point de savoir si elle prend part aux combats ou non. Cela vaut aussi bien pour les conflits armés internationaux ou non internationaux.*

[120] *See* above.

[121] On the prohibitive aspect of the principle of military necessity, *see* G. Venturini, *Necessità e Proporzionalità Nell'uso Della Forza Militare in Diritto Internazionale* 127 (1988). On the relevance of military necessity concerning the targeting of combatants, *see* the expert meeting convened by the ICRC in 2005 on the Direct Participation in Hostilities under International Humanitarian Law, at 45.
Available at: http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205 (last accessed 02.04.07).

[122] *Supra* note 87.

distinction between IHL and HRL may at the end of the day appear more formal than material.

3. The principles of necessity and proportionality are common to IHL and HRL, but they seem to operate in slightly different settings. In HRL, the principle of necessity implies that the use of lethal force must represent the *ultima ratio* (*i.e.*, it must appear that non-, or less, violent means are inappropriate or have proved to be such) to attain a legitimate aim (most notably self-defence). In IHL, necessity is not applied to the lawfulness of the recourse to force (*jus ad bellum* issue).[123] However, it remains applicable to the military actions taken as such. In this context, the principle of necessity operates at different levels, e.g., in the definition of the "military objective", which supposes a "concrete and direct military advantage",[124] or in the rule requiring that when a choice is possible between several military objectives offering the same military advantage, the objective to be selected shall be that which may be expected to cause the least danger to civilian lives and objects.[125] Actually, the only true difference between HRL and IHL with respect to the principle of necessity seems to be the criterion according to which it is measured. In HRL the measuring rod seems to be the legitimate aim; whereas in IHL it appears to be the "concrete and direct military advantage anticipated". In times of armed conflict, both concepts may perfectly converge.

It has also been said that the principle of proportionality is stricter in HRL where it requires scrutiny into measures avoiding at a maximum any casualties, whereas in IHL only a manifest disproportion would be unlawful.[126] In fact, in IHL, an attack would be disproportionate only if it 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.[127] But once more this difference seems at once relative and rather of means than of result. Thus, strict HRL proportionality does not imply that "collateral damages" are not acceptable.[128] The case-law accepts

[123] This does not mean that necessity under HRL includes *jus ad bellum* issues as has been contended. *See* Schabas, *supra* note 28, at 14. It only means that under HRL the recourse to lethal force must be necessary to attain a legitimate aim (not in the war in general but in a concrete attack). Instead, under IHL, the lawfulness of the recourse to lethal force against military objectives is presumed.

[124] Art. 52(2) API, *supra* note 25.

[125] Art. 57(3) API, *id.*

[126] *See* Hampson, *supra* note 44, at 134.

[127] Art. 51(5)(b) API, *supra* note 25.

[128] It is sometimes erroneously contended that collateral damages are not accepted in HRL. *See e.g.,* T. Meron, "The Humanization of Humanitarian Law", 94 *A.J.I.L.* 240 (2000):

that innocent third persons could be lawfully killed incidentally to a legitimate recourse to lethal force.[129] Moreover, the principle of proportionality under IHL is complemented by the principle of the "least possible damage" requiring explicitly that the belligerents shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to *minimizing*, incidental loss of civilian life, injury to civilians and damage to civilian objects".[130] Hence, at the end of the day, the concrete operation of the principle of proportionality seems broadly equivalent in both branches. There could be a second difference insofar as the IHL principle of proportionality – as set out in Article 51(5)(b) API – covers only incidental civilian damage, to the exclusion of combatant or military injuries. Conversely, HRL is based on an aggregate notion of proportionality, without any such distinction. However, as underlined above (point 2), necessity and proportionality are also general principles inherent to IHL and applying beyond the special situation of Article 51 API. In this broader area, they imply that one should take into consideration the possibility to injure or capture the target of the attack if this is realistically possible. In this perspective, the differences to HRL tend to be reduced.

The overall result is that the differences of tools and reasoning that exist between HRL and IHL do not lead to substantive divergences or even to incompatibilities. Affirming that IHL is based on the principle of freedom to kill whereas HRL is based on the principle of protection of life is at best a gross overstatement. Indeed, both branches of the law are predicated, in our area, on the principle of minimum use of force. Both thus protect the right to life and both do so realistically with some exceptions. If HRL tends to go further in protection (since it is based on the peacetime paradigm), the existing differences are only of degree. One may even say that the differences are fading progressively away as HRL bodies develop an increasing branch of wartime human rights, sensitive to the peculiar characteristics of that type of situation.

"Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage".

[129] *See e.g.*, *Ahmet Özkan*, *supra* note 80, para. 305. In time of peace also, the ECtHR accepted that the incidental death of a person who was not the target of the use of force may be lawful if the recourse to lethal force was absolutely necessary. *See* Andronicou and Constantinou v. Cyprus, [1997] *ECtHR*.

[130] Art. 57(2)(a)(ii) API, *supra* note 25.

III. THE CONTRIBUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE RIGHT TO LIFE IN SITUATIONS OF ARMED CONFLICT

A. The Interpretation and Development of IHL Rules

The Principle of Precaution

In the famous *McCann v. United Kingdom* case the ECtHR considered that a breach of the right to life could result not only from recourse to lethal force on the spot but also from previous planning deficiencies or failure of proper control over the action.[131] The Court held that States were obliged to take all feasible precautions with a view to reducing at a minimum the risk of recourse to lethal force. The context of this case was not an armed conflict.[132] However, it allowed the Court to enunciate the quoted principle of precaution, which was later exported towards the case-law dealing with warfare situations.[133]

The *Güleç* case concerned the accidental death of a 15 years old young man caused by security forces involved in the suppression of a riot[134] in the context of the NIAC in Turkey during the 1990's.[135] The Court considered that the right to life had been breached, in particular because the use of machine-guns in this context was held to be disproportionate.[136] The Court considered that Turkey should have put at the disposal of its armed forces

131 *See McCann, supra* note 62, paras. 202-14.

132 It was rather a fight against terrorism in peacetime. In fact the level of intensity required by Common Art. 3 (armed clash) was not reached. *See* Watkin, *supra* note 15, at 20. *Contra :* Abresch, *supra* note 54, at 756.

133 As underlined by Reidy: "(…) the test laid down by the Court in McCann and others v. UK – that the planning and control of an operation must be so as to minimize, to the greatest extent possible, recourse to lethal force (…) – provides a secure framework for assessing whether killings are illegal under the laws of armed conflict". *See* A. Reidy, "The Approach of the European Commission and Court of Human Rights to International Humanitarian Law", 324 *Int'l Rev. Red Cross* 526 (1998).

134 *See Güleç, supra* note 68, paras. 69-73.

135 No matter what the Government contended, in South-East Turkey, in the 1990's, there was a NIAC to which Common Art. 3 was applicable. The armed clashes between Turkish forces and members of the Workers Party of Kurdistan (PKK) were frequent and the PKK was an organised armed group under responsible command. On the other hand, this armed conflict was not covered by APII because Turkey did not ratify this treaty and, in any case, the PKK probably did not have a sufficient territorial control. *See* Abresch, *supra* note 54, at 755. The ECtHR also admitted the presence of an armed conflict. *See Güleç*, *supra* note 68, para. 81.

136 *Ibid*., paras. 69-73.

non-lethal weapons (such as truncheons, riot shields, water cannons, rubber bullets or tear gas) in order to confront ordinary and expected disturbances in a region subjected to the state of emergency.[137] One may notice that the principle of precaution was interpreted identically as in IHL, where the State is required to use weapons minimizing civilian casualties.[138] This is all the more noticeable as the *Güleç* case does not concern the conduct of hostilities but rather a police action.[139] It is sometimes suggested that, in this case, the ECtHR implicitly borrowed the principle of precaution from IHL.[140] This is however speculative but one can safely affirm at least that this case shows that the principle of precaution is common to IHL and HRL and that it appears to be applicable in many different situations of violence.[141]

The *Ergi* case is the high-water mark of a HRL principle of precaution aligned on its cousin in the realm of IHL.[142] The facts of the case were that a civilian woman had been killed in her village of origin in an ambush of Turkish military forces against members of the Workers Party of Kurdistan (PKK).[143] The Court held that the responsibility of the State could also be engaged if "agents of the State (…) fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life".[144] It becomes apparent that the Court draws on its case-law under the *McCann* case,[145] but that it further develops the law by leaning heavily on the principle of the "least possible damage" as it exists in IHL.[146] This reference to a principle of precaution currently used in IHL has not escaped the attention of legal writings.[147] They insisted on an important evolution in the readiness of the Court to take account of IHL. The

137 *Id.* Similarly, *see* Şimşek *et al.* v. Turkey, [2005] *ECtHR*.

138 Art. 57(2)(a)(ii) API, *supra* note 25.

139 Thus, IHL rules regulating the conduct of hostilities are not as such applicable. *See* Reidy, *supra* note 133, at 528.

140 *See* Heintze, *supra* note 21, at 811; Martin, *supra* note 48, at 1059-60; Reidy, *supra* note 133, at 528.

141 *See* Abresch, *supra* note 54, at 746.

142 *See Ergi, supra* note 11. This case also takes place during the NIAC opposing the Turkish Governement and the PKK. The Court admitted the existence of a conflict. *See* para. 85.

143 In this case, contrary to the *Güleç* case, we are in the conduct of hostilities because Ms. Ergi was incidentally killed during an armed clash. *See Ergi, supra* note 11, para. 77-78. Therefore, the IHL principle of precaution would be applicable.

144 *Ibid.,* para. 79.

145 In fact, it is in the ambit of the planning of the operation that the Court finds a deficiency because the State did not avoid the confrontation from happening next to the village.

146 Art. 57(2)(a)(ii) API, *supra* note 25.

147 *See* Heintze, *supra* note 21, at 809-10; Martin, *supra* note 48, at 1059; Meron, *supra* note 128, at 272; Reidy, *supra* note 133, at 527;Watkin, *supra* note 15, at 24.

Court remained, however, quite prudent and continued to refer to IHL at best implicitly.[148] The *Ergi* case remains to date the promontory of IHL influence on the Court's case-law.

In 2005, the Court has again had opportunity to apply the principle of precaution in the context of the NIAC opposing Russia to the Chechen separatists.[149] In the *Isayeva, Yusupova and Bazayeva* case [*Isayeva I*] the Court had to deal with a manifestly intentional bombardment of a civilian convoy by Russian armed forces.[150] It held that even assuming that these armed forces were facing an attack or a risk of attack by the rebels, the numerous deficiencies in planning and execution, in particular with respect to the principle of precaution, resulted in a violation of the right to life.[151] Thereafter, the *Isayeva* case [*Isayeva II*] proposed with even more clarity the same analysis.[152] In this latter case, Russian military forces had indiscriminately bombarded a village in Chechnya where a considerable number of rebel combatants had searched for shelter. The Court held that the use of "indiscriminate weapons"[153] in an inhabited area, without any attempt at previous evacuation of civilians, was incompatible with the principle of precaution.[154]

By their jurisprudence, HRL bodies,[155] and in particular the ECtHR, can give more precision and develop the principle of precaution also under IHL.[156] The *Ergi* and *Isayeva* II cases show that States must avoid hostilities in proximity of inhabited areas, refrain from directing rebels towards villages

[148] As underlined by Martin, *supra* note 48, at 1060: "[le] droit humanitaire demeure une 'ombre chinoise'".

[149] The Court did not qualify the situation as a NIAC but referred to "hostilities". *See Isayeva I, supra* note 11, para. 13. On a purely factual basis it is clear that the situation amounted to a NIAC to which both Common Art. 3 and APII were applicable. In fact, Russia had ratified APII and the Chechen rebels, as required by Art. 1 of APII, belonged to an organised armed group (the Chechen Republic of Ichkeria) under responsible command (Aslan Maskhadov) and they exercised sufficient territorial control. *See* Abresch, *supra* note 54, at 754.

[150] *See Isayeva I*, *supra* note 11, para. 168-200.

[151] *Id.*

[152] *See Isayeva II*, *supra* note 11.

[153] *Ibid.,* para. 189. This is the term used by the Court. However, it was probably not the weapons in themselves which could be considered as indiscriminate but rather the way they were used.

[154] *Ibid.,* para. 172-201.

[155] Other HRL bodies also used the idea of precautionary measures, but in a much less detailed fashion than the ECtHR. *See supra* note 77.

[156] *See* L. Vierucci, "Sulla Nozione di Obiettivo Militare Nella Guerra Area: Recenti Sviluppi della Giurisprudenza Internazionale", 3 *Rivista di Diritto Internazionale* 733 (2006).

to be attacked[157] and alert the civilian population of the arrival of rebels if necessary.[158] The *Isayeva I and II* cases show, for example, that States must respect the principle of precaution by organizing an efficient system of information transmission so as to be able to brief at any moment its pilots or air controllers of the presence of civilians or of the existence of a humanitarian corridor.[159] The Court also requires that forward air controllers be instructed to proceed to an independent evaluation of targets.[160]

Some of these holdings can legally be analyzed as developments of customary IHL applicable in NIAC.[161] Thus, in the *Ergi* case the Court applied the principle of the "least possible damage" transferred from API to NIAC. This principle had not been inserted in APII in 1977.[162] It was uncertain if at the date of the facts of the case (1993) it could undoubtedly be held to apply to a NIAC. Meanwhile, the principle is considered to apply in NIAC[163] and the *Ergi* case-law is sometimes quoted – among other sources – as support for this position.[164] Not only did the Court extend the principle to NIAC, but it also developed its reach and contents. This process is part and parcel of progressive development of the law as is inherent in the jurisprudence of judicial organs. First, one may notice that the Court held the principle to be applicable in NIAC with most of its corollaries as formulated in Article 57 of AP I.[165] Moreover, in the *Ergi* and *Isayeva* I and II cases, the

157 *See Ergi*, *supra* note 11, para. 79-80; *Isayeva II*, *supra* note 11, para. 187.

158 *See Isayeva II*, *supra* note 11, para. 187.

159 *See Isayeva I*, *supra* note 11, para. 187.

160 *Ibid.,* para. 188.

161 As rightly underlined by Prof. Sassòli, *supra* note 30:

> *Par rapport au même problème, il ne peut pas y avoir une coutume 'droits humains' et une coutume 'droit humanitaire'. On s'oriente toujours vers la pratique et l'opinio juris manifestées par rapport à des problèmes aussi similaires que possible à celui qu'on doit résoudre.*

162 Commentaries of APII of Bothe, Partsch & Solf underline that Art. 13 of APII does not include the principle of precaution. *See New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* 677 (M. Bothe, K.J. Partsch & W. A. Solf eds., 1982). On the opposite, the commentaries of Sandoz, Swinarski & Zimmermann contend that the principle of precaution flows from the general protection offered to the civilian population by Art. 13(1) APII (*supra* note 25). *See Commentaire des Protocoles Additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949* para. 4772 (ICRC, Y. Sandoz, C. Swinarski & B. Zimmermann eds., 1986).

163 *See* Kupreskic*,* ICTY, Trial Chamber, Judgment, 2000, paras. 524-25. *See also Customary International Humanitarian Law*, *supra* note 83, at 58.

164 *Id.*

165 By applying the principle of precaution in the Chechen cases, the Court implicitly confirmed the existence of the obligations to: do everything feasible to verify that the objectives are military; choose means and methods of attacks with a view to avoiding

Court went beyond the traditional contents of the precautionary principle. Thus, in *Ergi* the Court considered that the Turkish government should have taken appropriate precautions in order to "avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush".[166] This is tantamount to saying that the State has a positive duty to protect as much as possible its civilian population even against the attacks of the rebels. In IHL, such an obligation is hardly formulated as clearly. IHL seems to limit itself to require from States that they take, "to the maximum extent feasible"[167] precautions against the effects of attacks, such as "endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives"[168] or "avoid locating military objectives within or near densely populated areas".[169] These are duties related to the action of the State itself and not to the action of rebels. Another example of a development of the law is to be found in *Isayeva II* where the court affirmed that Russia should have warned the local population of the probable arrival of rebels in their village.[170] In IHL an obligation of warning exists only with respect to military attacks.[171] Moreover, this obligation is due only "unless circumstances do not permit".[172]

If these developments are transferred into IHL, the Court will have contributed to a strengthening of the protections for civilians in IHL in

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collateral damages; refrain from deciding to launch an attack which may be expected to be disproportionate; cancel or suspend an attack if it becomes apparent that the objective is not military or that the attack may be expected to be disproportionate; give an advance warning if the civilian population is endangered. *See Isayeva I*, *supra* note 11, paras. 182-200; *Isayeva II, supra* note 11, paras. 181-201. Moreover, the Chechen cases, *Isayeva I* (*supra* note 11, para. 195) and especially *Isayeva II* (*supra* note 11, para. 191), can be cited to confirm the customary character of the prohibition of indiscriminate attacks. However, the Court did not, regrettably, enounce these rules clearly. They must therefore be deduced from the facts described by the Court as State's deficiencies.

166 *See Ergi, supra* note 11, para. 79. To reach this conclusion, the Court invoked Art. 2 combined with Art. 1 of the ECHR which requires States to secure to everyone within their jurisdiction the rights and freedoms defined by the ECHR.

167 Art. 58 API, *supra* note 25. Moreover, this rule does not exist in treaty-law for NIAC but it could be considered as implicitly included in the general protection against the dangers arising from military operations (Art. 13(1) APII, *supra* note 25) and in the customary principle of distinction. This rule can also be considered as customary and applicable to NIAC. *See Kupreskic, supra* note 163, at paras. 524-25. *See also Customary International Humanitarian Law*, *supra* note 83, at 69.

168 Art. 58 (a) API, *supra* note 25.

169 Art. 58 (b) API, *id.*

170 *See Isayeva II*, *supra* note 11, para. 187.

171 *See* Art. 57(2)(c) API, *supra* note 25. *See also* Sassòli, *supra* note 6, at 724.

172 *Id.*

general and in IHL applicable to NIAC in particular. HRL would not contradict IHL but reinforce its contents.

B. The Interpretation to be given to the Concept of "Direct Participation in Hostilities"

In IHL the term "direct participation in hostilities" is used in IAC as well as in NIAC.[173] However, it remains controversial and uncertain.[174] This lack of precision of the law is problematic. The result is that it remains often unclear in what circumstances irregular combatants[175] (in IAC) or insurgents/fighters (in NIAC) are legitimate targets.[176] In a nutshell, one can distinguish two (or even three) basic ways of approaching the question of "direct participation in hostilities".

According to certain authors, as soon as a civilian participates in a group of irregular combatants (e.g., Al Qaeda) or of insurgency (e.g., PKK) he is liable to be attacked.[177] In other words, the participation of a person in a

[173] For NIAC, *see* Common Art. 3 of GC, *supra* note 86 and 93; Art. 4(1) and 13(3) of APII, *supra* note 25. For IAC, *see* Art. 51(3) of API, *supra* note 25.

[174] *See New Rules for Victims of Armed Conflicts, supra* note 162, at 302; *See also* the summary reports of the experts meetings organised by the ICRC in 2003, 2004, and 2005 on the Direct Participation in Hostilities under International Humanitarian Law. Available at: http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205 (last accessed: 2.4.07).

[175] These are persons taking a direct part in hostilities without having the right to do so and who therefore will not be entitled to the rights and privileges of combatants. Baxter qualifies them as "unprivileged combatants". *See* R. Baxter, "So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs", 28 *B.Y.B.I.L.* 323 (1951).

[176] In fact, a person (not being a regular combatant) cannot be targeted unless and at such time as he takes direct part in hostilities. It is usually accepted that "hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces". *See Commentaire des Protocoles Additionnels, supra* note 162, at 618. However the controversy remains concerning the words "direct" and "for such time". *See Customary International Humanitarian Law*, *supra* note 83, at 23. Therefore, it is diffult to know exactly when these persons may be targeted.

[177] *See* M. Schmitt," State-Sponsored Assassination in International and Domestic Law", 17 *Yale J Int'l L.* 649 (1992); D. Statman, "Targeted Killing", 5 *Theoretical Inquiries in Law* 179, 195 (2004); Watkin, *supra* note 15, at 16-17. The Supreme Court of Israel adopted this point of view in its recent judgment on the targeted killing practice of the State of Israel. *See* H.C. 769/02, The Public Committee Against Torture in Israel v. Government of Israel (2006). According to the Supreme Court "a civilian who has joined a terrorist organization and commits a chain of hostilities, with a short period of rest between them, loses his immunity from attack *for the entire time of his activity* (italics added). For such a civilian, the rest between hostilities is nothing other than preparation for the next act of hostilities". (Official Summary of Judgment, at 2.)

group suffices *eo ipso* to establish his "direct participation in hostilities". This is called the "membership approach".[178] Some States and authors further refine this classification by holding that, what they call "unlawful combatants" in IAC, are no longer civilians but belong to a distinct category,[179] or that in NIAC the insurgents are a class of combatants deprived of the ordinary combatant privileges (right to participate in hostilities, right to a prisoner of war status if captured).[180] This could be called the "third category approach". Concerning targeting issues, these two approaches lead to very similar results, at least concerning irregular combatants belonging to an organized group.[181] The *affiliation to such a group/belonging to such a category* labels that person as an individual susceptible to always be targeted and attacked. These approaches seem to have significant favors in the modern "war against terrorism". They have

[178] *See* the summary report of the experts meetings organised by the ICRC in 2003 on the Direct Participation in Hostilities under International Humanitarian Law, *supra* note 174, at 6.

[179] In *The Public Committee Against Torture in Israel* case (*supra* note 177, para. 11), the Respondent contended that "a third category of persons – the category of unlawful combatants – should be recognized. Persons in that category are combatants, and thus they constitute legitimate targets of attack". However, this point of view has been rejected by the Supreme Court of Israel (para. 28). In a slightly different manner, Prof. Dinstein considers that the term "combatant" should be understood in a wider sense as including both regular combatants and irregulars. *See* Y. Dinstein, "Unlawful Combatancy", 32 *Israel Y.B. Hum. Rts.,* 247, 249-52 (2002). Thus, "a person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy": Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts* 29 (2004).

[180] *See* D. Kretzmer, "Targeted Killing of Suspected Terrorists : Extra-Judicial Executions or Legitimate Means of Defence ?", 16(2) *E.J.I.L.* 197-198 (2005). The ICRC *Commentary* of Art. 13 of APII (*supra* note 25) seems also to admit that there is an implicit status of combatant for insurgents in NIAC. *See supra* note 162, para. 4789: "Those who belong to armed forces or armed groups may be attacked at any time". *See also New Rules for Victims of Armed Conflicts*, *supra* note 162, at 671-72.

[181] Differences may remain concerning *unorganised civilians participating in hostilities*. A "membership approach" would not automatically imply that these persons can always be targeted insofar as they do not belong to a "terrorist" group. Thus, for unorganised civilians the "revolving door approach" could still be applied. *See* the summary report of the experts meetings organised by the ICRC in 2005 on the Direct Participation in Hostilities under International Humanitarian Law, *supra* note 174, at 49. Instead a "third category approach" leads to the conclusion that as soon as a person regularly participates in hostilities (with or without belonging to a "terrorist" group), this person is no longer a civilian but an "unlawful combatant" who can be targeted for the entire duration of his/her active involvement in the conflict.

been used to justify the practice of targeted killings to which certain States like Israel[182] and the US have had recourse.[183]

Other authors limit the "direct participation in hostilities" to situations where the civilian is by its *conduct posing an immediate threat,* usually during the preparation (on the spot), participation or return from combat action.[184] During those phases, a civilian could be targeted. Once resuming civilian activities, the individual would enjoy civilian immunity against direct attacks (but he could obviously be arrested and tried for unlawful combat action). Moreover, a person participating only at the planning stage of combat actions could not be attacked but only arrested.[185] This is the so-called "revolving door" approach.[186]

The case-law of the HRL supervisory bodies seems to follow the revolving door approach. Under HRL, it is indeed clear that a person cannot be attacked simply for her participation in criminal activities. The ECtHR had opportunity to stress that point in the *McCann* case where it held that the use of lethal force against terrorists (who were on a reconnaissance mission

[182] Israel began this practice of targeted killings against Palestinians suspected of belonging to terrorist groups in 2000 with the attack on Hussein Abayat. *See* Kretzmer, *supra* note 180, at 172.

[183] *See* the famous Yemeni incident where a car carrying six suspected members of Al Qaeda was destroyed by a US missile fired from an unmanned drone. For an analysis of this incident, *see* A. Dworkin, "The Yemen Strike: The War On Terrorism Goes Global", *Crimes of War Project*, 14 Nov. 2002. *Available at:* http://www.crimesofwar.org/onnews/news-yemen.html (last accessed 2 Apr. 2007).

[184] *See* O. Ben-Naftali & K.R. Michaeli, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings", 36 *Cornell Int'l L. J.* 269 (2003); A. Cassese, "Expert Opinion on whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law", 8-10. *Available at*: http://www.stoptorture.org.il/eng/publications.asp?menu=7&submenu=1 (last accessed 2 Apr. 2007).
K. Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'", 849 *Int'l Rev. Red Cross* 72 (2003); Quéguiner, *supra* note 84, at 336 and 338; S. Zachary, "Between the Geneva Conventions: Where Does the Unlawful Combatant belong?", 38 *Israel L. Rev.* 393 (2005). *See also New Rules for Victims of Armed Conflicts*, *supra* note 162, at 301, which says that a civilian is directly participating in hostilities when posing an "immediate threat"; *Commentaire des Protocoles Additionnels, supra* note 162, *Commentary* of Art. 51(3) API, para. 1944 and of Art. 13(3) APII, at paras. 4787-4789.
However, the *Commentary* of Art. 13(3) APII suggests that a distinction should be made between "armed groups (which) may be attacked at any time" and civilians directly participating in hostilities, thus implying that the status of "combatants" is implicit for the insurgents' group.

[185] *See* Cassese, *supra* note 184, at 8.

[186] *See* the summary report of the experts meetings organised by the ICRC in 2003 on the Direct Participation in Hostilities under International Humanitarian Law, *supra* note 174, at 6.

with the aim of perpetrating a bomb attack) was not "absolutely necessary" under the law since they could have been arrested beforehand.[187] The Court since reiterated that reasoning in cases dealing with armed conflicts.[188] In the *Oğur* case, for example, the applicant's son, who worked at the mine as a night-watchman, was killed by the Turkish security forces who believed they were facing a terrorist.[189] The Court held that the security agents should at least have attempted an arrest, given a prior warning and appropriate warning shots before using lethal force.[190] Similarly, in the *Gül* case, the Court held that the use of lethal force by the Turkish agents against a presumptive terrorist sitting at home with his family was grossly disproportionate in view of the fact that he did not attack them.[191]

Other HRL supervisory organs have followed the same line of reasoning. In the *Suárez Guerrero* case, concerning the killing of seven suspected members of a guerrilla organization in the context of the war waged by Colombia against the rebel M-19 Movement, a NIAC meeting the threshold set out in Common Article 3 of the Geneva Conventions,[192] the UN Human Rights Committee held that the deprivation of life had been "arbitrary" in the sense of the ICCPR in view of the fact that the presumptive terrorists had been shot when they arrived at their house whereas they could have been arrested.[193] The same Committee has moreover often condemned Israel for targeted extra-judicial killings in occupied territory stressing that "before resorting to the use of deadly force, all measures to arrest a person suspected

[187] *See McCann, supra* note 62. *See also* Erdoğan *et al*. v. Turkey, [2006] *ECtHR* (police raid on four buildings in Istanbul against members of *Dev-Sol,* an extreme left-wing armed movement classified as a terrorist organisation by the Turkish judicial authorities).

[188] For the time being, the ECtHR reiterated that reasoning only in the context of NIAC. However, if the Court had to deal with a similar situation in IAC (supposing that the Court would be competent and that the acts would have happened within the State's jurisdiction) it would most probably adopt the same reasoning because, as underlined above, the Court does not change its reasoning according to the situation of peace or armed conflict, international or not. Moreover, in IHL, the terms employed are perfectly similar in the context of IAC and NIAC. In both situations, civilians may not be attacked "unless and for such time as they take a direct part in hostilities". This seems to indicate that the meaning of those words is identical for IAC and NIAC.

[189] *See* Oğur*, supra* note 117. This case takes place in the context of the NIAC between the Turkish Government and the PKK. *See supra* note 135.

[190] *Ibid.,* paras. 76-84.

[191] *See Gül, supra* note 117, paras. 80-83. This case also takes place in the context of the NIAC between the Turkish Government and the PKK. *See supra* note 135. *See also* a similar case: Hamiyet Kaplan *et al*. v. Turkey*,* [2005] *ECtHR*.

[192] *See Report of the Expert Meeting on the Right to Life, supra* note 20, at 9.

[193] *See Suárez Guerrero*, *supra* note 76, para. 13.3.

of being in the process of committing acts of terror must be exhausted".[194] The Inter-American Commission on Human Rights, which is more inspired by IHL, seems however more reluctant to fully adopt the revolving door approach.[195]

As this case-law shows, under HRL an "irregular combatant", a "terrorist" or an "insurgent" in an armed conflict cannot be attacked with lethal force if he does not pose any immediate threat rendering an arrest impossible. The revolving door interpretation (and not the membership approach) has thus been applied as the correct legal construction by the HRL case-law. By this course, the HRL bodies gave a definition to the terms "direct participation in hostilities". If HRL and IHL apply simultaneously in times of armed conflict, it becomes clear that the term "direct participation in hostilities" cannot be interpreted in IHL without taking HRL into account. Some would say that HRL provides in this area a *lex specialis*, since its rule

[194] *See* Concluding Observations: Israel, *supra* note 11, para. 15. The Commission on Human Rights also criticized the Israeli targeted killings. *See* Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the Human Rights Inquiry Commission, 2001, (E/CN.4/2001/121), at paras. 53-64. More generally, the Report of the Special Rapporteur, Philip Alston, on extrajudicial, summary or arbitrary executions to the Human Rights Commission condemned "shoot-to-kill policies" employed against alleged terrorists. *See supra* note 77, paras. 44-54. It should be noted that the recent decision of the Supreme Court of Israel on targeted killings (*supra* note 177) does not necessarily contradict the HRC conclusions because, even if the Supreme Court of Israel adopted the "membership approach", it nevertheless added that, by virtue of HRL, a terrorist cannot be attacked (para. 40) "if a less harmful mean can be employed". The Court continued by saying that "if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed". Finally, its conclusion is similar to the one of the HRC, except that the reasoning is inverted. For the Supreme Court of Israel, one can have recourse to lethal force against so-called terrorists unless it is possible to arrest them. For the HRC, one cannot have recourse to lethal force, even against so-called terrorist, unless this is absolutely necessary.

[195] The Commission admits that a civilian cannot be considered as directly participating in hostilities if he does not pose any immediate threat of harm to the adversary. However, it also notes that, at least in the context of NIAC, when direct participation in hostilities of irregular combatants becomes their principal daily activity, they thereby divest themselves of their civilian status and effectively become combatants subject to direct attack to the same extent as members of regular armed forces. *See* IACHR, *Third Report on Human Rights in Colombia* (Ch. IVa), paras. 43-66 (1999). *See also* IACHR, *Report on Terrorism and Human Rights,* para. 69 (2000): "(...) once a person qualifies as a combatant, whether regular or irregular, privileged or unprivileged, he or she cannot revert back to civilian status or otherwise alternate between combatant and civilian status". *Available at:* http://www.cidh.oas.org/Terrorism/Eng/exe.htm (last accessed 2 Apr. 2007).

seems clearer and more precise.[196] But the true point is to provide an interpretation that harmonizes the two sets of applicable rules rather than one opposing them.[197] However, any harmonizing interpretation must perforce be based on the principle of the revolving door (otherwise the applicable HRL standard would be violated), even if some room is left for appreciating in context what is feasible and what is not (principle of necessity).[198] The HRL case-law could here prove an invaluable reference for IHL.

C. The Creation of Obligations Complementary to International Humanitarian Law

HRL not only allows interpreting and developing IHL rules. It also allows filling its gaps by creating entirely new obligations for States.

1) The Obligation to Submit the Military Operation's Reports and the Presumption of Responsibility

It is not uncommon that States are extremely reluctant, during armed conflict in particular, to submit to open scrutiny documents concerning military operations having led to civilian casualties. This fact considerably hampers the work of the ECtHR. Moreover, it is difficult for the plaintiffs to discharge in such circumstances their burden of proof by establishing to the satisfaction of the Court that the right to life has been violated beyond reasonable doubt. Most of the time, the Court in such situations deplores the lack of proper information on the part of the Government[199] and / or engages its responsibility by the procedural device of Article 2, holding that the State did not live up to its duty of a thorough and effective inquiry.[200]

In the *Akkum v. Turkey* case – dealing with the suspected death of three civilians during a military operation against the PKK – the Court decided to develop its jurisprudence.[201] In order to establish the international

196 *See Report of the Expert Meeting on the Right to Life, supra* note 20, at 39.

197 *See* Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission – Finalized by M. Koskenniemi, 2006 (Doc. UN A/CN.4/L.682), para. 37. *See also* Sassòli, *supra* note 30.

198 *See Report of the Expert Meeting on the Right to Life, supra* note 20, at 42.

199 *See*, *e.g.,* the Chechen cases: *Isayeva I, supra* note 11, at paras.175-76; *Isayeva II*, *supra* note 11, para. 182.

200 *See e.g.,* Şirin Yilmaz v. Turkey, [2004] *ECtHR*; Ağdaş v. Turkey, [2004] *ECtHR*; Zengin v. Turkey, [2004] *ECtHR*; Menteşe *et al*. v. Turkey, [2005] *ECtHR*.

201 *See* Akkum *et al.* v. Turkey*,* [2005] *ECtHR*. This case also takes place in the context of the NIAC between the Turkish Government and the PKK. *See supra* note 135.

responsibility of Turkey it adopted a new two-tier approach. *First*, it held that Turkey was under obligation to submit to the Court all necessary documents allowing it to discharge its judicial function. In the concrete case, this enclosed the internal reports on the incriminated military operations. Failing such cooperation, Turkey's responsibility would, as the Court explains, be engaged on the basis of Article 38(1)(a) of the Convention[202] and "give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations".[203] Faced with contradictory statements by the Government, the Court decided that the death of at least one of the civilians was imputable to the State according to the claim made by the plaintiffs as eyewitnesses.[204] *Second*, the Court postulated a presumption of responsibility of the State when individuals are killed in an area within the exclusive control of the authorities of the State, as in the present case where two civilians had last been seen alive on a mountainside with a large number of soldiers.[205] It relied on its older jurisprudence on detention cases.[206] There it had repeatedly held that if detainees arrested in good state of health are later found dead or mistreated while in custody of the State, there arises a presumption of responsibility of the State. This presumption is tantamount to shift the burden of proof to the State by making it incumbent upon it to provide a plausible explanation for the events. The reason for this equitable reversal of the burden of proof flows from the fact that "the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities".[207] It should be noted that other HRL bodies sometimes adopted a similar reasoning.[208]

[202] Art. 38(1)(a) ECHR reads as follows:

> If the Court declares the application admissible, it shall: pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities.

[203] *See Akkum, supra* note 201, at 185 *et seq*. *See similarly* Estamirov *et al*. v. Russia, [2006] *ECtHR*, paras. 102-105.

[204] *Ibid.,* at paras. 191-204. *See also* paras. 234-40.

[205] *Ibid.,* at paras. 205-32. *See also* para. 243.

[206] *Ibid.,* para. 210. The Court cites the following cases concerning Art. 3: Tomasi v. France*,* [1992] *ECtHR*, paras. 108-11; Ribitsch v. Austria*,* [1995] *ECtHR*, para. 34; Selmouni v. France, [1999] *ECtHR*, para. 87; Salman v. Turkey, [2000] *ECtHR*, para. 100. *See also* concerning enforced disappearances: Çakici v. Turkey, [1999] *ECtHR*, para. 87.

[207] *Ibid.,* para. 211. *See* similarly *Estamirov, supra* note 203, paras. 110-14.

[208] In the *Baboeram* case (*supra* note 79, para. 14.2), for example, the HRC also held that:

> In cases where the allegations are corroborated by evidence submitted by the authors and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the authors' allegations as

This new case-law develops both indirectly and directly on the application of the right to life during armed conflicts. *First*, indirectly, it shows that the refusal to submit the reports of the military operations (or other crucial documents) does not entail directly a violation of Article 2 of the Convention, but is in breach of Article 38 and allows the Court to infer that the arguments of the applicants are well-founded. In any event, an insufficiently motivated refusal to submit documentation allows the Court to hold that the Convention has been violated.[209] This jurisprudence creates a duty of the States to keep on record their military operations, a duty that does not exist in any clear terms in IHL. Such a record may obviously prove invaluable in order to assess, *ex post*, the lawfulness of a particular action.[210] *Second*, directly, the Court affirms the equation whereby any casualties may be imputed to the State by way of presumption when they occurred in an area under its exclusive military control, at least if the State does not explain plausibly that the death was due to other causes than its own action.[211] By this reasoning, the Court divests itself from the old "absolutely necessary" test for the use of lethal force: the violation of Article 2 is now presumed and hence the Court may not need to inquire into what truly happened. This bold

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substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.

Moreover, in cases of enforced disappearances, where it was difficult to prove that the person concerned had been killed or even abducted by States' organs, the HRC still held the State reponsible on the basis that the burden of proof cannot rest alone on the author of the communication. *See e.g.,* Bleier v. Uruguay, [1982] *HRC*, No. 30/1978, paras. 13.3 and 13.4. In the *Neira Alegria* case (*supra* note 77, para. 65), the IACtHR also considered that the burden of proof rested on the defendant State because the events took place in a prison under the exclusive control of the Government. The AComHPR also considered that: "If the Government provides no evidence to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at least probable or plausible". *See Amnesty International* case, *supra* note 47, para. 52. More generally, the AComHPR considers that, in cases of HRL violations, the burden of proof rests on the Government. *See e.g.,* the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93.

209 Certainly, security considerations can be taken into account and the State can refuse to submit some documents but it has to explain this refusal.

210 *See* M. Sassòli and L. Cameron, "The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*", in N. Ronzitti & G. Venturini (eds.), *Essential Air and Space Law. The Law of Air Warfare. Contemporary Issues* 64 and 71 (2006). *See* also Alston, Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions *supra* note 77, para. 43. The Special Rapporteur invites States to keep records of their military operations to facilitate the *ex post facto* monitoring.

211 It seems that the Court has partly borrowed the ideas developed in the Dissenting Opinion of Bonello J. (followed by Tulkens) in the case *Şirin Yilmaz, supra* note 200. *See also* the Concurring Opinion of Bonello J. in the case Tahsin Acar v. Turkey, [2004] *ECtHR*.

presumption may arouse some doubts under three angles. In the first place, although it is known how difficult the establishment of the facts can be for events taking place in the troubled circumstances of warfare, one may question whether it represents an elegant and yet too easy way for the Court to get out of the duty to establish properly and meticulously the facts. In the second place, it may be asked if the construction is not geared at least partially to the end of avoiding any closer analysis of the right to life in the context of armed conflicts, where some IHL could be needed. In the third place, it may appear that the Court is going too far by automatically holding States responsible for extremely grave charges, which at the end of the day may be insufficiently proved.

However, the obligation to submit reports and the presumption of responsibility allow strengthening the protections of the right to life by improving the accountability of the State. The *lex specialis* rule in its derogatory sense has no room in this context, since there is no true conflict between a rule of HRL and of IHL. There are simply no rules on these aspects in IHL. Nothing allows concluding that the silence of IHL is a qualified one, *i.e.,* that there is an absence of rules voluntarily excluding any regulation. Thus, to the extent HRL imposes on States further obligations not contradicted by IHL, these obligations would apply.

2) The Obligation to Investigate

Article 2 of the European Convention on Human Rights does not dispose that a State is bound to investigate any time a person has been killed.[212] However, the Court, in its case-law, has affirmed such an obligation as an inherent obligation of the right to life enshrined in that provision. In the *McCann* case it held that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities.[213] This obligation to investigate had been deduced by the Court from a joint reading of Articles 2 and 1 of the Convention, which imposes on States parties the duty to "secure" to all individuals under their jurisdiction the rights enshrined in the Convention.[214] In later cases, the Court transposed that obligation to uses of lethal force in the context of armed conflicts. In the *Kaya* case[215] – dealing again with the NIAC in Turkey[216] and concerning the

[212] By the same token, Art. 6 of the ICCPR, Art. 4 of the ACHR and Art. 4 of the ACHPR do not provide for a State obligation to investigate each time a person has been killed.

[213] *See McCann, supra* note 62, para. 161.

[214] *Id.*

[215] *See Kaya, supra* note 79.

killing of a person accused of being a terrorist during a military operation – the Court pointed out that:

> (…) loss of life is a tragic and frequent occurrence in view of the security situation in south-east Turkey. However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.[217]

It appears that the procedural duty to investigate is systematically analyzed by the Court, *i.e*., as much in times of peace as of armed conflict; in cases where the State is absolved from violations of substantive obligations;[218] or where the exhaustion of local remedies is not secured.[219] One may even regret that sometimes the Court avoids going into the substantive obligations, preferring to hold the State responsible for a breach of the procedural obligation under Article 2.[220]

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216 *Supra* note 135.

217 *See Kaya, supra* note 79, para. 91. This assertion will be repeated many times by the Court. *See Güleç, supra* note 68, para. 81; *Ergi, supra* note 11, para. 85; *Ahmet Özkan, supra* note 80, at para. 319; *Şirin Yilmaz, supra* note 200, para. 85; *Menteşe, supra* note 200, at para 56; Akpinar and Altun v. Turkey*,* [2007] *ECtHR*, para. 59.

218 *See*, *e.g*., Halit Çelebi v. Turkey, [2006] *ECtHR*. In this case, the Court admitted that the recourse of lethal force was absolutely necessary because the applicant's son died while he was shooting at security forces. However the Court found a violation of Art. 2 because of the investigation's deficiencies. *See also* Perk *et al*. v. Turkey*,* [2006] *ECtHR*; *Akpinar and Altun, supra* note 217.

219 *See*, *e.g*., Kanlibaş v. Turkey*,* [2005] *ECtHR*. In this case, a PKK local leader died during an armed clash with the Turkish security forces. The Court did not analyze the substantive obligations of the right to life because the applicant did not exhaust local remedies. However, the Court underlined that "*cela n'a guère d'incidence quant à l'appréciation du présent grief, qui porte sur des obligations positives, au titre desquelles les autorités sont tenues d'agir d'office, sans laisser aux proches du défunt l'initiative d'assumer la responsabilité d'une procédure d'enquête*" (para. 42).

220 *See Ağdaş, supra* note 200; *Şirin Yilmaz, supra* note 200; *Zengin* case, *supra* note 200; *Menteşe, supra* note 200. For a critical analysis of this approach, *see* the partly dissenting opinions of judges Tulkens (para. 5) and Bonello (paras. 5-6) in the *Şirin Yilmaz* case*. See also* the partly Dissenting Opinion of Bratza J. (para. 5) in the *Ağdaş* case*.*
Moreover in many cases occuring in Northern Ireland, the Court preferred to examine the investigation's (in)efficiency rather than to proceed to the difficult task of analyzing the facts (action/planning) leading to the recourse to lethal force insofar as the domestic proceedings were not terminated. *See* Hugh Jordan v. United Kingdom, [2001] *ECtHR*; McKerr v. United Kingdom, [2001] *ECtHR*; Kelly *et al*. v. United Kingdom, [2001]

The duty of States to effectively investigate any use of lethal force is quite far-reaching. First, in times of armed conflict, the duty is not confined to police operations similar to those in the *Kaya* case. It extends to situations of open hostilities as those in Chechnya.[221] Second, on the basis of the principle of due diligence, the Court imposes the duty of investigation also if lethal force was used by private actors (the insurgents, for example).[222] Such a duty exists also if the person killed by State agents was a rebel or an armed terrorist.[223] The duty is moreover not dependent on a complaint or action on the part of the family of the deceased: it is sufficient that the State authorities are put on notice of the casualty.[224] The requirements for the investigation are also quite high. Many criteria will be taken into account by the Court to assess if the investigation can be considered as "effective":

– Existence of an independent and public investigation capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances and capable of leading to the identification and punishment of those responsible.[225]
– Independence and impartiality of the persons conducting the investigation.[226]
– Need to collect evidence at the scene and to make a reconstruction of the events.[227]

ECtHR; Shanaghan v. United Kingdom, [2001] *ECtHR*; McShane v. United Kingdom, [2002] *ECtHR*.

221 *See Isayeva I, supra* note 11, at paras. 208-25; *Isayeva II*, *supra* note 11, at paras. 209-24.

222 *See Ergi, supra* note 11, para. 82.

223 *See e.g., Kanlibaş, supra* note 219; *Halit Çelebi, supra* note 218; *Akpinar and Altun, supra* note 217.

224 *See Ergi, supra* note 11, para. 82; *Hugh Jordan, supra* note 220, para. 105 (*see also* the other cases concerning Northern Ireland, *supra* note 220) *Ahmet Özkan, supra* note 80, para. 310; *Şirin Yilmaz, supra* note 200, para. 77; *Isayeva I, supra* note 11, para. 209, 210.

225 *Kaya, supra* note 79, para. 87; *Oğur*, *supra* note 117, para. 88; *Hugh Jordan, supra* note 220, para. 107, 130 and 142 (*see also* the other cases concerning Northern Ireland, *supra* note 220); *Ahmet Özkan, supra* note 80, para. 312; *Şirin Yilmaz, supra* note 200, para. 78; *Isayeva I*, *supra* note 11, para. 211; *Isayeva II, supra* note 11, para. 10; *Zengin, supra* note 200, para. 52.

226 *See Güleç, supra* note 68, para. 79-80; *Ergi, supra* note 11, para. 83; *Kaya*, *supra* note 79, para. 89; *Oğur, supra* note 117, para. 91; *Gül, supra* note 117, para. 91-94; *Hugh Jordan, supra* note 220, para. 106, 120 and 142 (*see also* the other cases concerning Northern Ireland, *supra* note 220); *Isayeva I, supra* note 11, para. 210; *Isayeva II, supra* note 11, para. 210 ; *Kanlibaş, supra* note 219, para. 46; *Akpinar and Altun, supra* note 217, para. 60.

227 *See Kaya, supra* note 79, para. 89; *Güleç, supra* note 68, para. 78; *Gül, supra* note 117, para. 89; *Menteşe, supra* note 200, para. 54; *Hamiyet Kaplan, supra* note 191, para. 61; *Perk, supra* note 218, para. 80.

– Need to take from the scene the weapons and ammunitions for ballistic and other examination.[228]
– Need of a post-mortem and forensic examination/autopsy to find out the cause of death.[229]
– Need to proceed to the hearing of witnesses including eyewitnesses.[230]
– Accountability of the officers for the use of their weapons and ammunition (existence of procedures requiring that the State agents guns be checked and a record made of the amount of ammunition expended*)*.[231]
– There must be a sufficient element of public scrutiny of the investigation or its results and the victim's next-of-kin must be involved in the procedure.[232]
– Requirement to act with reasonable expediency and diligence.[233]

Overall, it may be asked if the sum of these requirements is not excessive and unrealistic in times of armed conflict. How could States discharge such a heavy lot of duties in situations where, due to the conflict, the number of casualties may be high and where the services of the State may be on the

[228] *See Kaya, supra* note 79*,* para. 89; *Güleç, supra* note 68*,* para. 79; *Oğur, supra* note 117*,* para. 89; *Gül, supra* note 117*,* para. 89; *Şirin Yilmaz, supra* note 200*,* para. 83; *Ağdaş, supra* note 200*,* para. 101; *Zengin, supra* note 200*,* para. 51; *Menteşe, supra* note 200*,* para. 54; *Kanlibaş, supra* note 219*,* para. 45; *Halit Çelebi, supra* note 218*,* para. 61; *Hamiyet Kaplan, supra* note 191*,* para. 62.

[229] *See Kaya, supra* note 79*,* para. 89; *Oğur, supra* note 117*,* para. 89; *Gül, supra* note 117*,* para. 89; *Ahmet Özkan, supra* note 80*,* para. 312; *Şirin Yilmaz, supra* note 200*,* para. 83; *Isayeva I*, *supra* note 11*,* para. 211; *Isayeva II*, *supra* note 11*,* para. 212; *Estamirov, supra* note 203, para. 91.

[230] *See Kaya, supra* note 79*,* para. 89; *Güleç, supra* note 68*,* para. 79; *Oğur, supra* note 117*,* para. 89; *Gül, supra* note 117*,* paras. 90 and 93; *Hugh Jordan, supra* note 220*,* para. 127 and 142 (*see also* the other cases concerning Northern Ireland, *supra* note 220); *Ahmet Özkan, supra* note 80*,* para. 312 and 316-17; *Şirin Yilmaz, supra* note 200*,* para. 82; *Isayeva II, supra* note 11*,* para. 212 and 221-22; *Zengin, supra* note 200*,* para. 51; *Kanlibaş, supra* note 219*,* para. 47; *Halit Çelebi, supra* note 218*,* para. 59 *et seq*.

[231] *See Gül, supra* note 117*,* para. 90.

[232] *See Güleç, supra* note 68*,* para. 82; *Oğur, supra* note 117*,* para. 92; *Gül, supra* note 117*,* para. 93; *Hugh Jordan, supra* note 220*,* para. 109, 124, 134 and 142 (*see also* the other cases concerning Northern Ireland, *supra* note 220); *Ahmet Özkan, supra* note 80*,* para. 314; *Isayeva I, supra* note 11*,* para. 213; *Isayeva II, supra* note 11*,* para. 214 and 222; *Estamirov, supra* note 203, para. 92.

[233] *See Hugh Jordan, supra* note 220*,* paras. 108 and 136-40 (*see also* the other cases concerning Northern Ireland, *supra* note 220); *Ahmet Özkan, supra* note 80*,* para. 313; *Şirin Yilmaz, supra* note 200*,* paras. 84-85; *Isayeva I, supra* note 11*,* para. 212 and 218; *Isayeva II, supra* note 11*,* paras. 213 and 217; *Ağdaş, supra* note 200*,* para. 103 *et seq*.; *Menteşe supra* note 200*,* para. 56; *Kanlibaş supra* note 219*,* para. 44 *et seq.*; *Estamirov, supra* note 203, para. 89.

verge of collapse? If it is indisputable that the situation of armed conflict imposes supplementary constraints on the State, it is difficult to do away altogether with the duty of investigation, lest the right to life be deprived of much of its practical substance.[234] However, if the principle must be maintained and affirmed also in wartime, certain adaptations are possible.[235] As the Court itself points out, the "effectiveness" requirements for the investigation vary according to the circumstances.[236] The legal rule *ad impossibile nemo tenetur* obviously applies. Moreover, the State cannot be expected to perform unreasonable efforts or go beyond the prescriptions of due diligence. Thus, the State cannot be required to proceed to an autopsy if the body of the deceased person is located in the area controlled by the rebels.[237] Furthermore, the allowed time-span may be more relaxed in times of armed conflict than it is in times of peace. On the other hand, it cannot be said that requesting States to establish impartial and independent organs for *bona fide* and efficacious investigations is *a priori* impossible in times of armed conflict.[238] Thus, adapted to the surrounding circumstances, the obligation of investigating is at once practical and necessary even in armed conflicts. It is moreover well established in the case-law of all the HRL supervisory organs.[239]

There is no IHL equivalent to this HRL device. Under IHL, there exists a duty of investigation in specific contexts, i.e., when prisoners of war or

234 In a recent case (*Kanlibaş, supra* note 219) concerning the death of a PKK local leader in an armed clash with security forces, the Court underlined that "*eu égard notamment au climat d'alors, marqué par des actions terroristes qui faisaient rage dans le Sud-Est de la Turquie (...) la Cour comprend (...) que les autorités militaires puissent s'être laissées guider par des considérations d'ordre plus général en matière de lutte contre le terrorisme et qu'elles aient été quelque peu réticentes à collaborer avec la justice pénale aux fins de l'instruction d'un cas parmi tant d'autres. La Cour ne sous-estime donc pas les difficultés auxquelles les procureurs devaient autrefois faire face dans cette région de la Turquie*" (para. 46). However the Court still considered that the investigation was not effective because the domestic authorities conducting the investigation were neither independent nor impartial.

235 *See* Alston, Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, *supra* note 77, para. 36.

236 *See Hugh Jordan*, *supra* note 220, para. 105 (*see also* the similar cases concerning Northern Ireland, *supra* note 220); *Ahmet Özkan, supra* note 80, para. 310; *Şirin Yilmaz, supra* note 200, para. 77; *Isayeva I, supra* note 11, para. 209; *Isayeva II, supra* note 11, para. 210; *Perk, supra* note 218, para. 75.

237 *See* Alston, Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, *supra* note 77, para. 36.

238 *Ibid.,* para. 36 *et seq.*

239 *Supra* note 79.

civilians detained by an adverse party are found dead.[240] Moreover, the Geneva Conventions and Additional Protocol I institute certain general inquiry proceedings, but these are all subjected to the consent of the concerned States.[241] One could deduce an obligation to investigate from the obligation of States to "search for persons alleged to have committed, or to have ordered to be committed"[242] grave breaches of the Conventions, such as willful killing of one of the protected persons.[243] Other deaths than willful killings are, however, not covered by this provision. Moreover, nothing at all on investigations is to be found in the context of NIAC. Finally, there is no precise standard as to the "efficacy" of the investigation. As can be seen, the system of IHL presents gaps on the aspect of investigation.[244] The question arises if the drafters of the IHL texts voluntarily accepted these gaps. Did the drafters want to limit compulsory investigations to cases of suspect death of prisoners of war and civilians detained by the adverse party? If this was the case the "gap" in IHL would legally rather consist of a "qualified silence". However, even assuming the existence of qualified silence it would be possible to hold that the HRL obligation of investigation prevails, simply because it represents the later law (*lex posterior derogat legi priori*) and the more protective régime (*lex specialis derogat legi generali*). By ratifying or acceding to HRL instruments after the conclusion of the Geneva Conventions of 1949, States accepted being bound potentially beyond the régime of 1949.

If the foregoing is accepted, HRL has a crucial impact on IHL in this area. It allows for great improvement of the protection of individuals under the right to life in periods of armed conflict. The accountability of the State thus is increased.[245] Thereby, the application of IHL itself can be facilitated. If States systematically investigate war casualties, this would allow for the determination of a breach of IHL. If this is the case, useful elements for criminal prosecution of war crimes could be gathered and brought to light. But such aspects may also be a reason why States may fear to engage in such a course.

[240] Art. 121 GC III, *supra* note 86; Art. 131 GC IV, *supra* note 93. *See also* Sassòli, *supra* note 30.

[241] Arts. 52/53/132/149 of the GC, *supra* notes 86 and 93; Art. 90 of API, *supra* note 25.

[242] Arts. 49/50/129/146 of the GC, *supra* notes 86 and 93; Art. 86 of API, *supra* note 25.

[243] Arts. 50/51/130/147 of the GC, *supra* notes 86 and 93; Art. 11 and Art. 85 of API, *supra* note 25.

[244] *See* Alston, Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, *supra* note 77, para. 34.

[245] *See* Reidy, *supra* note 133, at 529; Watkin, *supra* note 15, at 2 and 34.

D. The Transposition of the "Law Enforcement Model" to Armed Conflicts

HRL developed a whole series of obligations in the context of the use of lethal force by State's agents. That area of the law is often called the "law enforcement model".[246] Thus, it is said that State's agents (i) must to all extent feasible arrest criminals by non-violent means; (ii) have recourse as much as possible to non-lethal arms and ammunitions; (iii) use lethal force only after having summoned the criminals if possible and eventually firing warning shots.[247] These obligations are direct corollaries of the HRL principle of absolute necessity previously enounced.[248] They can only be enforced if there is a legal and administrative framework clearly defining in which circumstances the agents of the State may use lethal force.[249] Moreover, the State must put at the disposal of its police forces different types of arms, including non-lethal ones (such as water-canons).[250] The aim is to allow "a differentiated use of force and firearms".[251] The State must also deliver self-defensive equipment minimizing potential necessities to use force.[252] Finally, the State shall correctly train its police forces, especially in techniques of non-violent arrest.[253] The ECtHR attaches increasing importance to these aspects in its recent case-law.[254]

246 *See* Watkin, *supra* note 15, at 2.

247 The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (*supra* note 69) enounce very clearly the requirements of the law enforcement model. *See* in particular paras. 4, 5, 9 and 10; *See also* Art. 3 of the *Code of Conduct for Law Enforcement Officials*, *supra* note 69.

248 *See* above.

249 *See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *supra* note 69, paras. 1 and 11. The treaty provisions ensuring the right to life always specify that this right shall be protected by law. Art. 6 ICCPR; Art. 2(1) ECHR; Art. 4(1) ACHR; Art. 4 combined with Art. 1 of the ACHPR.

250 *See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *supra* note 69, paras. 2-3.

251 *Ibid.,* para. 2.

252 *Id.*

253 *Ibid*., paras. 18-21.

254 The Court seems ready to find a violation of the right to life just because the Government did not establish an appropriate legal and administrative framework, because it did not provide its agents with non-lethal weapons or because it did not correctly train them, especially for techniques of non-violent arrest. The Court seems to give more and more importance to the general law enforcement framework. Thus, the Court analyses the general "implementation" of the right to life, or in other words it checks whether the State correctly "secured" or "ensured" this right. *See Makaratzis, supra* note 68; *Şimşek, supra* note 137; *Hamiyet Kaplan, supra* note 191; *Kakoulli, supra* note 68; *Erdoğan, supra* note 187; *İhsan Bilgin,* [2006] *ECtHR*.

The restrictions on the freedom to use lethal force and the amount of positive measures of prevention required from governments explain that it can be doubted whether such a model is applicable in times of armed conflicts.[255] The "law enforcement model" of HRL, applicable in times of peace, is thus opposed to the "conduct of hostilities" model in times of armed conflict, as regulated by IHL.[256] The gist of the argument may be correct, but its absolute formulation seems excessively simplifying. The law enforcement model does not completely disappear in times of armed conflict.[257] This is obviously true for the ordinary criminality continuing alongside the armed conflict.[258] But it is true to some extent also for the belligerent parties.[259] In effect, the ECtHR tends to apply the law enforcement model to "warfare relationships" during an armed conflict, at least for NIAC. Thus, in the *Oğur* and in the *Gül* cases discussed above, the Court applied the law enforcement model when charging Turkey with not having attempted to arrest the persons killed, not having summoned them to surrender and not having proceeded to firing warning shots.[260] True, in both cases the presumptive "terrorists" did not directly participate in hostilities,[261] but this aspect of the cases does not seem essential. Indeed, in the *Hamiyet Kaplan et al. v. Turkey* case, a number of civilian persons and PKK members were killed during an operation degenerating in hostilities.[262] Yet, the Court held that the right to life had been violated since the police forces did not carry non-lethal arms and had not been trained in non-violent methods of arrest – even if the insurgents shot at the police forces and did thus participate in the hostilities.[263]

255 "According to several experts, as long as the threshold of armed conflict was reached, there was no legal basis in IHL to claim that parties had (…) to operate against each other under a law enforcement paradigm". Third Expert Meeting on the Notion of Direct Participation in Hostilities (2005), *supra* note 174, at 46.

256 *See e.g.,* the petitioners' arguments (para. 4) and the respondents' response (para. 10) in *The Public Committee against Torture in Israel, supra* note 177.

257 *See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *supra* note 69, para. 8: "Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles".

258 *See* Sassòli, *supra* note 30.

259 *See* Watkin, *supra* note 15, at 1 *et seq.*

260 *See Oğur*, *supra* note 117; *Gül*, *supra* note 117.

261 They were not posing an immediate threat. *See* above.

262 *See Hamiyet Kaplan, supra* note 191, paras. 51-55.

263 It should be underlined that the violation of the right to life took place at the level of the planning and not at the level of the execution. Turkey did not violate Art. 2 because of the acts of its security forces but because it did not correctly train them to effect non-violent arrests and because it did not provide them with non-lethal weapons. Compare with *Perk*

Would the Court apply the same reasoning to an IAC? Nothing allows us to think that it would not. Thus, for example, if an Occupying Power proceeds to neutralize a resistant, it would first have to try to arrest him. It would not seem open to the Occupying Power to immediately have recourse to violent raids.[264] By the same token, if a prisoner of war or an interned civilian attempts to escape from the camp, the detaining power will first have to try an arrest, a summoning and warning shots before using lethal force.[265] The situation may however be different in combat situations on the battlefield. There may be no room in such situations for the refined "arrest rather than shooting" reasoning. The context will therefore determine whether the law enforcement model can reasonably be applied or not. The law enforcement model does thus not replace the conduct of hostilities model. Rather, it is aimed at accompanying the latter.[266] Each will apply in the sets of circumstances where it is appropriate.

The question that remains to be elucidated is when there is a shift from the "law enforcement model" to the "conduct of hostilities" model.[267] It may be possible to consider the law enforcement model as the ordinary legal régime, applicable by default,[268] whereas the conduct of hostilities model would be a *lex specialis* applicable if three conditions were fulfilled:

(*supra* note 218) where, in a similar situation, the Court considered that the use of deadly force was absolutely necessary because the suspects began shooting at security forces and because they were on the verge of committing a terrorist attack.

264 In that sense, *see* the concluding observations of the Human Rights Committee on the targeted killings practice of Israel, *supra* note 11, para. 15.

265 In IHL, there is a rule (Art. 42 GC III, *supra* note 86) concerning the use of lethal force against prisoners of war escaping or attempting to escape which is in conformity with the requirements of HRL. However, no similar provision exists for civilian internees. *See* Sassòli, *supra* note 30.

266 *See Interplay in Situations of Violence*, *supra* note 21:

> The participants distinguished two models traditionally governing the use of force by the agents of the State. The first model, relating to activities of law enforcement, is capable of being used in time of peace as well as in time of war, depending on the circumstances. (…) The second model, which applies exclusively to conduct of hostilities in armed conflicts (international or non-international), is based on the premise that, at this stage, it is too late to prevent the use of armed violence between the various parties to the conflict. Thus, the aim of this model is to restrict the use of violence by the belligerents – to the extent possible – by maintaining a balance between military necessities on the one hand and humanitarian imperatives on the other.

267 *Ibid.*, at 14. *See also Report of the Expert Meeting on the Right to Life*, *supra* note 20, at 41.

268 *See ibid.,* at 19:

> One expert described the state of the law as one in which both IHL and HRL apply in parallel in situations of occupation, NIAC and with respect to targeted killings. Given

1. *The use of lethal force is directed against combatants or civilians directly participating in hostilities*. This criterion is however not sufficient, as the above mentioned case-law of the ECtHR shows: sometimes, the law enforcement model is applied even to civilians participating directly in hostilities. On the other hand, it is clear that the conduct of hostilities model cannot be applied to ordinary criminals even during an armed conflict.
2. *The State is deprived of sufficient control over the person to enable an arrest.* What is at stake is not territorial control. In an occupied territory the Occupying Power has by definition territorial control, but the conduct of hostilities model can still be applied if hostilities erupt.[269] Conversely, it may sometimes be possible to proceed to an arrest in a territory not controlled by a belligerent.[270] The control at stake is thus rather a factual control over the individual, determining if it is materially feasible to proceed to an arrest.
3. *The degree of violence involved is high, the State must be prepared to face an armed clash of certain intensity*.[271] This condition applies for both types of armed conflicts, IAC and NIAC. Even in an IAC, there are a series of situations in which the "minimum force" paradigm should apply, for example in occupied territories in the context of keeping law and order.[272]

In a NIAC, it is not essential that the State agents using lethal force are members of the armed forces to apply the conduct of hostilities model; they may be "security forces". In the same vein, the recourse to military personnel does not necessarily imply that the law enforcement model is not

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the parallel applicability of IHL and HRL in these contexts, according to this expert, the HRL and the law enforcement model constitute the default legal régime. Where this model becomes unworkable in these situations, given the level of organized violence and lack of control exercised by the State in the relevant territory, the IHL rules on conduct of hostilities govern.

269 *Ibid.,* at 26: "In this respect, the experts all agreed with the suggestion of one expert that where the OP [*i.e*., Occupying Power] undertakes combat operations, the OP is clearly operating under IHL rather than HRL rules".

270 *See e.g*., the petitioners' arguments in *The Public Committee against Torture in Israel* case, *supra* note 177, para. 8:

> Petitioners point out that the security forces made hundreds of arrests in 'area A' [not under Israeli control] in Judea, Samaria, and the Gaza Strip during the second *intifada*. Those figures show that the security forces have the operational ability to arrest suspects even in 'area A', and to bring them to detention and interrogation centers. In those circumstances, targeted killing is not to be done.

271 Here, reference could be made to the level of intensity required by Common Art. 3 of the GC, *supra* note 86 and 93.

272 *See* Art. 43 of the 1907 Hague Regulations, *supra* note 89.

applicable.[273] However, the recourse to military personnel by the State may indicate the expected degree of violence.

If the aforementioned conditions are met, the law enforcement model as *lex generalis* gives way to the conduct of hostilities model as *lex specialis*.[274] In these situations we consider that the HRL supervisory organs should refer to IHL norms and, if they cannot apply them directly,[275] at least take account of them when interpreting HRL norms. In the Chechen cases previously discussed, the ECtHR had the opportunity to decide on a situation where the conduct of hostilities model applied.[276] However, it did not refer to IHL, at least explicitly,[277] whereas the pleadings of the parties and written observations of third parties drew greatly on that body of the law.[278] Nor did the Court apply completely the law enforcement model, since it admitted that the situation of armed conflict in Chechnya allowed *eo ipso* the use of combat weapons.[279] The Court seems thus to imply that some other legal régime applies, without going further in its analysis. The concrete results reached by the Court may be held to be satisfactory, even from the standpoint of IHL.[280] Notwithstanding that fact, one cannot but be disappointed by its analysis which is somewhat poor and more factual than legal.[281] The detailed rules of IHL concerning the conduct of hostilities, far

[273] *See* the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra* note 69, which underline that:

> … the term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest and detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

[274] Another way of analyzing this phenomenon would be to consider that, in time of armed conflict, when lethal force is used to fight against ordinary criminality or when the degree of violence is low and the State has sufficient control over the person to arrest him/her, HRL is the *lex specialis.* In that sense, *see* Sassòli, *supra* note 30.

[275] On the question of whether HRL implementation bodies can apply IHL, *see* above.

[276] *See Isayeva I, supra* note 11; *Isayeva II, supra* note 11.

[277] In the Chechen cases, in particular in the *Isayeva II* case (*supra* note 11), one could wonder if the Court implicitly referred to IHL insofar as it used IHL vocabulary (e.g., "indiscriminate weapons", para. 189).

[278] *See Isayeva I, supra* note 11, paras. 102-104, 157 and 161-67; *Isayeva II, supra* note 11, paras. 113-15 and 167.

[279] *See Isayeva I, supra* note 11, para. 181; *Isayeva II, supra* note 11, para. 180.

[280] *See* Vierucci, *supra* note 156, at 725.

[281] The Court mentions the relevant facts as, for example, that there were no forward-air controllers (*Isayeva I, supra* note 11, para. 188) or that the military used an "extremely powerful weapon" (*Isayeva I*, *supra* note 11, para. 195) but as the Court does not link these facts with precise rules, its conclusions do not seem to be grounded.

from contradicting the reasoning of the Court, would have helped to strengthen it and to eliminate certain imprecisions.[282]

IV. CONCLUSION

In times of armed conflict, HRL applies simultaneously to IHL. The latter should not be considered as a *lex specialis* derogating from HRL in its entirety. It should rather be considered as a complementary body of law allowing in many cases the strengthening of the general protection offered by HRL. In cases of a conflict or unconformity between a HRL norm and an IHL norm, the maxim *lex specialis* requires deciding which rule is more appropriate, protective or adapted to the circumstances of the case. Even in areas such as the use of lethal force, HRL and IHL are closer to one another than it may appear at first sight. Open contradictions between both branches of the law are quite a rare occurrence. Conversely, there are many potential or actual mutual grants and transfers from one branch to the other.

The case-law of the ECtHR shows plastically how the protection of the right to life during an armed conflict can be improved by HRL, thereby catalyzing some form of development in the corresponding rules of IHL. The influence of HRL on IHL may be manifold: (i) it may bear on the interpretation of the law; (ii) it may contribute to the development of new rules establishing a greater degree of accountability of States; (iii) it may strive to establish a general framework for the use of lethal force (law enforcement model) which will be reversed only under certain narrowly described conditions. Conversely, however, the HRL supervisory organs, and the European Court in particular, should be aware of the fact that when IHL provides a more detailed or adapted rule, it is necessary at least to take account of it in order to give a convincing and realistic construction to HRL rules. A global and integrative outlook over both HRL and IHL is therefore called for to guarantee an adequate protection of individuals in times of armed conflict.

[282] One remains perplexed when reading that, according to the Court, "using this kind of weapon [*i.e.*, indiscriminate weapons] in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law enforcement body in a democratic society". *See Isayeva II*, *supra* note 11, para. 191. Actually, indiscriminate weapons (and indiscriminate methods of warfare, to which the Court probably wanted to make reference) are prohibited in time of peace as well as in time of armed conflict. Moreover, even if it is true that the situation in Chechnya was not a "war" in the traditional sense of that word, it was nevertheless a NIAC.

MAY PRIVATE CLAIMS BE ADVANCED THROUGH THE EUROPEAN COURT OF HUMAN RIGHTS? – A STUDY OF CROSS-BORDER PROCEDURAL LAW BASED ON A CASE OF INTERNATIONAL CHILD ABDUCTION

By Alberto M. Aronovitz[*]

1. INTRODUCTION

An Israeli entrepreneur eats his breakfast in Tel-Aviv, then flies to Istanbul in order to sign a contract and is back home for dinner? Nothing unusual about that, given modern means of international transport.

A person sits in front of her computer in London and gambles at a cyber-casino located in Belize, Costa Rica or Vanuatu?[1] Nothing is easier than that, in light of the rapid developments of the Internet and other cyber-technologies.

A Swiss businessman executes a trans-border bank transaction or purchases shares on a stock exchange located thousands of miles away? Nothing is simpler than that since the advent of e-banking services.

These examples illustrate that the cliché "it's a small world" has never been more exact than at present, when the extraterritorial expansion of private human activities is making a quantum leap forward.

At the same time, the saying "science runs whilst law walks", has never been more accurate than in the 21st Century. This applies especially to the field of private cross-border activities where, in many cases, the accelerated developments of science, technology have left – and continue to leave – the developments in legislation far behind.

One of the legal areas affected by cross-border private activities is procedural law. Never before have procedural issues – especially matters concerning the international jurisdiction of domestic courts – been more pertinent than today.

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The author thanks A. Nantel for the useful documentation relating the case standing at the core of this paper; E. Lein and A. Dreyzin de Klor for their useful remarks, and A. Sebeni, for his precisions on Romanian procedural law.

1 *See Cross-Border Gambling on the Internet, Challenging National and International Law* 47 (Publications of the Swiss Institute of Comparative Law, 2004).

Indeed, whenever the cross-border actions of private parties give rise to a legal dispute, questions related to the jurisdiction of courts are inevitably raised.

2. THE AIMS OF THE PRESENT STUDY

The idea for this study emerged after a discussion held with a number of Israeli scholars and attorneys who manifested their astonishment at the fact that – on certain occasions – a party involved in a private dispute may seek reparation and obtain relief by seizing an *international* tribunal that:

- is located outside of Israel,
- does not belong to the ordinary judiciary system of Israel,
- was constituted on the basis of a treaty that was not (and cannot) be ratified by Israel, and
- operates within the framework of an international organization of which Israel is not a member.

The European Court of Human Rights [ECHR] is such a judicial example: individuals and corporate bodies from any country in the world – provided that certain conditions (which will be explained in this study) are fulfilled – have standing to bring an action before it.

This paper is therefore not only addressed to academics, but also to legal practitioners from all domestic jurisdictions, especially those from countries such as Israel, the USA or Brazil, who are not members of the Council of Europe.

In that perspective, the first objective is to draw the reader's attention – especially that of lawyers and jurists accustomed to practicing exclusively at the national level through their domestic courts – to the fact that the *isolated treatment* of domestic law without reference to foreign, international, regional, supranational and/or transnational laws, is an attitude that is becoming increasingly obsolete. Indeed, in modern times, one very frequently comes across disputes that – involving the same parties and facts – relate to the law and courts of more than one single legal system.[2]

The second aim of this study is to demonstrate that, in some circumstances, a private claim may be advanced by seizing not a national,

[2] One author classifies the different courts and tribunals that enter into account for the settlement of commercial disputes involving a private party as: domestic (such as the internal courts of some State), private (such as domestic and transnational arbitration), supranational (such as the Court of Justice of the European Union), and regional (such as the tribunal of NAFTA). N. de Araujo, "Controvérsias Comerciais Internacionais: Os Princípios do DCI e os Laudos do Mercosul", *Jornadas De Direito Internacional Público* 17 (2006); also in *Direito Internacional da Concorrência* 471 (2006).

but an international court, such as the ECHR. This may happen, for example, when the remedies in domestic courts are nonexistent, have been exhausted, or have proven ineffective. In this sense, the idea is to show that – besides the traditional formal and recognized channels of "international judicial cooperation" – there is a trend moving towards a process of "informal globalization of jurisdictions", wherein jurisdictional boundaries become more and more porous.

Consequently, it will be submitted that national lawyers and jurists must begin to change their habits to take into consideration "as a matter of reflex", that the final resolution of a case does not always rest within the domain of the judiciary of one single domestic system. In this sense, the present study often "crosses the borders" between different legal systems.

The Ariadne's thread running through the entire study is a recent case dealing with a question of international child abduction. This case is illustrative because it triggered the intervention of the domestic courts in two States, and has the potential of involving other jurisdictions as well.
On the top of that, the case was also brought before the ECHR.

3. THE CROSS-BORDER DIMENSIONS OF PRIVATE LEGAL RELATIONSHIPS

3.1. The Role of Private International Law

Whenever a dispute between two private parties involves a cross-border element, the prime point of reference in matters of jurisdiction is Private International Law ["PIL" - also known as "conflict of laws" and/or "conflicts of jurisdiction"[3]]. In other words, PIL – which is part of the internal law of each State in the world – enters into the picture whenever a case before a national court presents a *foreign element.*

In such circumstances, the role of PIL is to establish:

a) which courts shall be competent to deal with the matter,
b) which law will be applied by these courts,
c) in which ways the decisions of these courts can be enforced in other States.[4]

[3] Concerning the conceptual differences with respect to PIL in Europe and the USA *see* P. Volken, "How Common Are the General Principles of Private International Law? America and Europe Compared", 1 *Y.B. Priv. Int'l L.* 85, 87 *et seq*. (1999).

[4] *See* E.C. Ritaine, "Harmonising European Private International Law: A Replay of Hannibal's Crossing the Alps?", 34(2) *Int'l J. Legal Inf.* 419 (2006):

> Private Law in general tends to organise social relationships between private citizens or non-State organisations. Private international law is made up of mechanisms that

Since this present paper concentrates on cross-border jurisdiction, it will mainly deal with the first and last of these elements.

Thus, referring to the examples set forth above in the Introduction, questions related to cross-border jurisdiction of courts may emerge:

– with respect to the first example: whenever the contract concluded by the Israeli entrepreneur in Turkey is breached,
– with respect to the second example: whenever the British gambler bets and wins in a virtual casino located abroad, and the latter refuses to pay the winnings,
– with respect to the third example: whenever the Swiss businessman's order to purchase shares abroad is incorrectly executed by his foreign bank.

Problems related to cross-border courts' jurisdiction may concern almost every field of law. This may include (without limitation):

– Individuals dying abroad (regarding the courts that may be competent to deal with the allocation and distribution of the estate to the successors),
– Foreign couples wishing to divorce (or to dissolve their matrimonial economic relations) in a third country,
– Breaches of contracts for the supply of goods or services to foreign buyers,
– Bankruptcies having repercussions (for example, creditors or assets) in several foreign countries,
– Damages having cross-border consequences,
– International abduction of children.

As stated in the Introduction, it is precisely a case of this last kind that inspired the present study. Indeed, the current relative ease of human mobility facilitates the creation of situations in which, following a dispute, one of the parents removes a child from his usual place of residence into another State.[5]

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facilitate the settlement of international disputes between the same. It answers three questions: 1. Which country's courts have jurisdiction in a dispute (i.e., conflicts of jurisdiction)? 2. Which country's substantive law is to be applied by the court hearing the case (i.e., conflict of laws)? 3. Can the decision given by the court which declared that it had jurisdiction be recognised and, if necessary, enforced?

5 *See* A.D. de Klor, *La Protección Internacional de Menores (*1996), at 5:

El incesante incremento de los medios de comunicación internacional, así como una paralela flexibilización de las fronteras nacionales y la incidencia de variables políticas sociales, culturales y económicas, son algunos de los factores que han contribuido a acrecentar en las últimas décadas, los desplazamientos transnacionales. Como consecuencia de este fenómeno, aparecieron nuevas figuras jurídicas, producto de la internacionalización de la familia, a la vez que de un cada vez mayor deterioro de la unidad familiar.

3.2. Prorogation of Jurisdiction

Another field in which questions of courts' cross-border jurisdiction emerge is that of agreements in which the parties (usually located in different countries), establish by themselves which court shall have jurisdiction in the event of present or future disputes.

This is possible whenever the PIL of a State allows private parties to make a choice of forum. Many domestic systems allow the conclusion of such choice in matters related to property rights – such as international commercial contracts.[6]

An example of this possibility is Article 5 of the Swiss Private International Law:[7]

> In patrimonial matters, the parties may agree on the Court that shall decide in case of a dispute that has emerged or will emerge from their specific legal relation.[8]

At the level of the European Union, Article 23 of Council Regulation No. 44/2001[9] on Jurisdiction and the Recognition and Enforcement of Judgments

6 For details concerning the law of international commercial contracts *see* the recent book: *The UNIDROIT Principles 2004, Their Impact on Contractual Practice, Jurisprudence and Codification* (56 Publications of the Swiss Institute of Comparative Law, E.C. Ritaine & E. Lein eds., 2007).

7 Loi Fédérale sur le Droit International Privé du 18 Déc. 1987 (updated as of 18 Apr. 2006), RS 291, *at*: http://www.admin.ch/ch/f/rs/291/index.html.

8 *Ibid*., Art. 5:

IV. Election de for.

1. En matière patrimoniale, les parties peuvent convenir du tribunal appelé à trancher un différend né ou à naître à l'occasion d'un rapport de droit déterminé. La convention peut être passée par écrit, télégramme, télex, télécopieur ou tout autre moyen de communication qui permet d'en établir la preuve par un texte. Sauf stipulation contraire, l'élection de for est exclusive.

2. L'élection de for est sans effet si elle conduit à priver d'une manière abusive une partie de la protection que lui assure un for prévu par le droit suisse. 3 Le tribunal élu ne peut décliner sa compétence: a) si une partie est domiciliée, a sa résidence habituelle ou un établissement dans le canton où il siège, ou b) si, en vertu de la présente loi, le droit suisse est applicable au litige.

Efforts have been made at the level of the Hague Conference on Private International Law, *available at:*
http://www.hcch.net/index_en.php?act=conventions.text&cid=77&zoek=Election%20de%20.
Additional steps were taken in 2004 with the publication of a Preliminary Draft Convention on Exclusive Choice of Court Agreements: Draft Report (drawn up by M. Dogauchi and T.C. Hartley), *available at:*
http://www.hcch.net/upload/wop/jdgm_pd25e.pdf.

in Civil and Commercial matters, expressly allows the parties to establish a prorogation of jurisdiction:

> 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.[10]

At the global level, it is a common practice in the field of international contracts to include a clause such as the following:

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9 Council Reg. (EC) No. 44/2001 of 22.12.2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, *Off. J.* L 012 , 16/01/2001 P. 0001 – 0023, in: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML

10 The full text of quoted Art. 23 is as follows:

> Art. 23 - Prorogation of Jurisdiction
>
> 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing; or
>
> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
>
> 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".
>
> 3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.
>
> 4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.
>
> 5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

> The parties agree that any dispute between them concerning the interpretation or implementation of this agreement shall be exclusively judged by the court of first instance of the City of London, [optional: which shall apply English law].

3.3. Transnational Arbitration

Another example raising questions related to cross-border jurisdiction is that where the parties, instead of selecting the courts of a certain State, agree to refer their disputes to transnational arbitration [TA].

TA is arbitration before a special tribunal that is not part of a State's ordinary court system. This type of clause is normally included in contracts concluded between a private investor and a foreign State, the aim being – for obvious reasons – to extract the dispute from the orbit of the domestic courts of the latter. In this type of arbitration, the parties may decide (in the arbitration agreement, known as a "*compromis*"), the place where the arbitral tribunal will be established, its composition and the procedural and substantive law that it will apply.

The parties may agree, for example, on the constitution of a tribunal composed of three arbitrators that will apply public international law; on a single arbitrator that will apply French law, or on any other configuration.

Finally, nothing seems to prevent the parties from agreeing on the establishment of a second instance, competent to review the award rendered by the arbitrators of the first instance.

One should not forget, however, that the agreement to establish a tribunal of TA is always concluded under the umbrella of some domestic legal system. Thus, if the law of that State requires exclusive jurisdiction for certain matters (some countries require such exclusive jurisdiction with respect to rights *in rem* over immovable property located within their territories), the parties will not be able to depart from that rule.

3.4. An International Court Dealing with Private Law Matters?

All the situations described above refer to cross-border cases in which the competent judicial instances are either the domestic courts of some State, or a tribunal constituted under the legal umbrella of some national system.

Less well known is the fact that, in order to advance a private claim, one of the parties to a dispute may have the possibility of *crossing the borders between legal systems* in order to seize, not a national or a transnational court or tribunal, but an international one. This strategy can be useful whenever the domestic courts that have dealt, or are dealing, with a dispute are incompetent, incapable, unable or unwilling to provide an effective remedy.

Hence, it is important for domestic lawyers to be aware of the possibility of seizing a court that is not part of their domestic legal system. Of course, the allusion to an "international court" does not concern the International Court of Justice [ICJ]. Indeed, it is well known that, according to Article 34(1) of the Statute of the ICJ,[11] the doors of that Court are closed to private claimants:

> Only states may be parties in cases before the Court.

Aside from certain specific exceptions,[12] this was the traditional rule in public international law. In modern times, however, following the development of the legal doctrine of International Human Rights, the situation has changed dramatically, and private claimants lacking *jus standi* in The Hague enjoy procedural rights in Strasbourg, before the ECHR.[13]

11 Statute of the ICJ, in: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

12 On some occasions, mainly in cases where numerous injuries are caused by one State to nationals of another State, both sovereigns may agree to create a Claims Commission [CC]. CCs are International tribunals, in the framework of which private individuals are given the legal capacity to introduce claims against one of the States having signed the treaty establishing the CC. Examples are the CCs instituted by the USA and Mexico at the beginning of the 20th Century, following massive violations of individual rights (especially of American nationals in Mexico). *See* A.H. Feller, "The Mexican Claims Commissions, 1923-1934", [1935] *Rep*. 1971; F.S. Dunn, "Diplomatic Protection of Americans in Mexico", [1931] *Rep*. 1971), and the Iran-United States Claims Tribunal, instituted in the Hague in order to settle claims emerging from the detention of 52 US nationals at the US Embassy in Tehran in November 1979, and the subsequent freeze of Iranian assets by the USA. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981), *at:* http://www.iusct.org/general-declaration.pdf

13 *See* European Court of Human Rights: http://www.echr.coe.int/ECHR/.
There also exists an Inter-American Commission and Inter-American Court of Human Rights operating in San José de Costa Rica, where private individuals and corporations may introduce applications against the member States: http://www.corteidh.or.cr/.
In specific cases, the Court of the European Union sitting in Luxembourg also affords procedural rights to private parties. Art. 230 (ex Art. 173) of the Treaty establishing the EU states that "… Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former", and Art. 232 (ex Art. 175) states: "Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion", at: http://curia.europa.eu/en/instit/txtdocfr/index_tpi.htm.

4. ADVANCEMENT OF PRIVATE CLAIMS WITHIN THE FRAMEWORK OF THE ECHR

4.1. Legal Background of the ECHR

The ECHR was instituted by the Member States of the Council of Europe, through the conclusion in 1950 of the European Convention on Human Rights [EconHR].[14]

The EConHR is an international treaty, concluded under the auspices of the Council of Europe.[15] Today, 46 European States[16] have ratified the EConHR.

The EConHR has established a revolutionary system for the protection of human rights.[17] This system is composed of two concentric circles: one circle representing the substantive rights, and the other the procedural ones. From the substantive point of view, the EConHR instituted a real *catalogue of human rights* that all the member States undertake to respect and enforce in their national systems.

In addition to some very fundamental rights, such as the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery

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It should be noted that this instance is a Court belonging to a *supranational* organization. Supranational organizations are those in which the Member States transfer to the organization a part of their legislative powers; *see* B. Cottier, "Essai de Synthèse", in *Conséquences Institutionnelles de L'Appartenance aux Communautés Européennes* 411, 413 (Publication of the Swiss Institute of Comparative Law, 1991).

With this respect, Art. 93 of the Spanish Constitution states: "An Organic Law may authorize the conclusion of treaties attributing to an International organization or institution the exercise of competences deriving from the Constitution. According to the case, the Parliament (*Cortes Generales*) or the Government shall guarantee the execution of the mentioned treaties, as well as the resolutions of international or supranational organizations benefiting from the transfer of competences"; *see* A.M. Aronovitz, "Spain", in *Conséquences Institutionnelles de L'Appartenance aux Communautés Européennes*, *ibid.*, at 189.

14 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 *U.N.T.S.* 211 [EconHR].

15 http://www.coe.int/.

16 Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.

17 *See* Ch. Shachor-Landau, "Reflections on the Two European Courts of Justice", in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 771 (Y. Dinstein ed., 1989).

and forced labor (Article 4), and the right to liberty and security (Article 5), the EConHR provides protection in other fields. This is the case for the right to a fair trial (Article 6), the right to respect of private and family life (Article 8) and the right to the enjoyment of one's private property (Article 1 of the First Protocol). As will be shown below (*see* point 4.3 *et seq.*), these last three provisions were invoked in the case standing at the center of this paper.

In contrast to other International instruments dealing with the protection of human rights, the drafters of the EConHR were not satisfied with the establishment of a catalogue of substantive rights; they also created an enforcement mechanism through which individuals are allowed to appear as parties and denounce violations of their substantive rights.

At the core of this enforcement mechanism stands the ECHR, where natural persons and corporate bodies are authorized to file applications against any member State suspected of breaching its obligations under the EConHR.

4.2. The Procedural Status of Individuals within the Framework of the ECHR

One of the specifics of the ECHR is the fact that this instance is *permanent*, and not temporary or *ad hoc*, as has been the case of other tribunals throughout the history of international law.

Another interesting feature of the ECHR is the fact that in proceedings before it private individuals and corporate bodies enjoy complete *jus standi,* allowing them not only to introduce applications against a State having signed the EConHR, but also to conduct the proceedings in the manner of their choice. Consequently:

a) The system established by the EConHR is special because, contrary to other known systems (such as "Diplomatic Protection",[18] whereby only nationals of one State having been injured by another State may benefit from protection), it allows *everyone* – regardless of his nationality – to have access to the ECHR in order to file an application against a member State.[19]

[18] A.M. Aronovitz, "The Procedural Status of Individuals in Diplomatic Protection and in the European Convention on Human Rights: A Comparative Study", XXVIII(4) *Comp.L. Rev*. 15 (The Institute of Comparative Law, Japan, 1995).

[19] The diplomatic protection system is based in Vattel's doctrine of injuries caused to the home State through one of its nationals. The logical consequence of this doctrine is that only the State of nationality is competent to implement the protection. In this sense, the bond of nationality is a necessary link in order to legitimate the ius standii of the protecting State. *See* Aronovitz, *supra* note 18, Ch. 2.1.1. *See also* A. Vermeer-Künzli, "A

Thus, a Swedish national claiming that his property rights were encroached upon by the Swedish State in violation of Article 1 to the First Protocol EConHR, may seize the ECHR against his own State.[20] Also a Belgian subject, who underwent a successful sex-change operation, has the procedural right to apply against Belgium, if that State refuses to correct the inscription in his identity papers.[21]

Of course, a Member State may be brought before the ECHR by the national of another Member State who suffered an injury at the hands of the former.

b) Perhaps a more interesting possibility is the one open to nationals of States that are not signatories of the EConHR (and even to stateless persons[22]), to introduce applications against one or several Member States. Thus, an individual from an African, Asian or American State arriving in Europe and being kept in the "transit" zone of an airport for lack of an entry visa may file an application against the host State if he argues, for instance, that his rights were breached by the local police authorities.

c) In the cases illustrated in a) and b), the main condition of success for the applicant is to prove that the respondent State breached the EConHR with respect to his person or property. This happens, of course, when, at the time of the injury, the applicant was physically present within the territorial borders of the respondent State. According to Article 1 EConHR:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*", 56(3) *I.C.L.Q.* 553 (July 2007), and the Panevezys-Saldutiskis Railway Case (1939), *P.C.I.J. Rep*. (Ser. AB/76) 16.

20 *See, for example*, the Case of Sporrong and Lönnroth, 52 *Eur. Ct. H.R.* (Ser. A), No. 24. In the diplomatic protection system, the nationals of the State that caused the injury cannot benefit from the protection of any other State. D. Carreau, P. Juillard, T. Flory, *Droit International Économique* 691 (1990).

21 Van Oösterwijk Case, 12(3) *Eur. Hum. Rts. Rep*. 557 (1980).

22 Stateless persons are individuals not holding the nationality of any State. Such persons have been described as being like vessels sailing in the open sea without the protection of any flag, since no State is competent to implement diplomatic protection on their behalf. In such cases it is not possible to apply the doctrine of damage caused to a State through one of its nationals, and no State is entitled to apply diplomatic protection. L. Oppenheim, 1 *International Law, A Treatise* 668 (H. Lauterpacht ed., 8th ed., 1955).

However, from the point of view of private cross-border activities, the most interesting option is the possibility of seizing the ECHR, *even when the applicant is not physically present in the territory of the respondent State*:
– at the moment when the violation of the EConHR is committed,
– at the moment when the application is filed,
– at the moment of the hearing before the ECHR,
– at the moment when the final judgment is rendered.
All these circumstances were cumulatively present in the case of *Iosub Caras v. Romania*.

4.3. The Case of Iosub Caras v. Romania[23]

The case of *Iosub Caras v. Romania* [hereinafter: Application No. 7198/04], is what in French is called "*un cas d'école*", because it presents a significant amount of facts, arguments and rulings fitting perfectly into the present study's framework.

It may not, however, be easy to understand the facts of this case, due to the multiplicity of proceedings and developments that occurred either before, in parallel with or subsequent to the filing of the Application before the ECHR. In order to facilitate the comprehension of the particulars of this case, a short introductory explanation of the main facts is provided in the following paragraphs.

At the core of the dispute lies the retention of an Israeli child [hereinafter: "the second Applicant"] in Romania, carried out by the mother. At the request of her husband (the father of the child, hereinafter: "the first Applicant"), the Israeli Ministry of Justice requested the Romanian authorities to take all the necessary steps in order to return the second Applicant to Israel, her State of usual residence, on the basis of a binding international convention.

While the case concerning the return of the second Applicant to Israel was pending before Romanian courts (the first instance rejected the return of the child, the second instance court reversed the decision and the Court of Appeals reinstated the first instance's decision), another Romanian court – seized almost in parallel by the mother – granted divorce to the couple. This was done in the absence of the first Applicant, who was not correctly summoned. The same court granted the custody of the second Applicant to

[23] App. No. 7198/04, Case of Iosub Caras v. Romania, Judgment Strasbourg, 27 July 2006 [hereinafter: "App. No. 7198/04"], *available at*: http://www.ius-software.si/EUII/EUCHR/dokumenti/2006/07/CASE_OF_IOSUB_CARAS_v._ROMANIA_27_07_2006.html and http://vlex.com/vid/26768615.

the mother and imposed on the first Applicant the obligation to pay a high amount of child support.

4.3.1. The Facts of the Case

The first Applicant and his wife are both Romanian and Israeli citizens, having married and established their permanent residence in Israel in 1997. In 2001, a daughter (the second Applicant) was born to the couple. She has had Israeli citizenship from birth and her permanent place of residence is Israel.[24]

In September 2001, the three traveled to Romania for a family visit with intention of spending their holidays in that country.

On October 11, 2001, the date scheduled for the return of the family to Israel, only the first Applicant left. The wife and the second Applicant stayed in Romania. According to the first Applicant, they remained behind with the common understanding that they would be returning to Israel a short time later.

4.3.1.1. The Problem of Child Abduction

As time wore on and the wife did not return to Israel, the first Applicant realized that she had no intention of returning to Israel or of sending the second Applicant back.

Facing this situation, the first Applicant filed a request for the return of the second Applicant, arguing that she was wrongfully abducted by her mother. He did so in Israel, on the basis of the procedure established by the 1980 Hague Convention on Civil Aspects of International Child Abduction[25] [Hague Convention].

Article 1 of the Hague Convention states that the aims of this instrument are:

> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

[24] *Ibid*., para. 6.

[25] Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction, 1980 [The Hague Convention], *available at:* http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

Both, Romania (the country where the child was retained) and Israel (the country of habitual residence of the family) are signatories to this Convention.[26]

The official request for the child's return was submitted to the Romanian Ministry of Justice on November 26, 2001, through the Israeli Ministry of Justice. Both Ministries acted as "Central Authorities" for the purpose of the Hague Convention.

On January 11, 2002, proceedings were instituted on behalf of the first Applicant before the Bucharest District Court. This Court found that the retention of the second Applicant in Romania was illegal under Article 3 of the Hague Convention.[27] However, it considered that, due to the political situation in Israel, which had worsened constantly since September 2000, there was a great risk that the return would expose the child to physical or psychological harm.[28] Therefore, in a judgment of April 15, 2002, the District Court rejected the request for the return of the second Applicant to Israel, under Article 13(b) of the Hague Convention. This provision establishes an exception to the obligation of return of an abducted child in cases where the return would expose him to a grave risk of physical or psychological harm, or place him in an intolerable situation.[29]

26 The Hague Convention (*id.*) entered into force with respect to Israel on Dec. 1, 1991 and with respect to Romania on Feb. 1, 1993.

27 The Hague Convention, *supra* note 25, Art. 3:

> The removal or the retention of a child is to be considered wrongful where: a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

28 App. No. 7198/04, *supra* note 23, para. 10.

29 The Hague Convention, *supra* note 25, Art. 13:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that: a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances

On December 17, 2002, the Bucharest County Court reversed the District Court's decision and ordered the return of the second Applicant to Israel, on the grounds that the retention was illegal and that the mother had not proved the grave risk that the second Applicant would be exposed to if returned to her country of residence before the abduction.[30]

On February 21, 2003, the mother filed an appeal against this decision before the Bucharest Court of Appeals. This court rejected the request for return of the second Applicant to Israel on the grounds that, since the date of the commencement of the proceedings under the Hague Convention, another Romanian court had ruled on the divorce of the parents in a final decision of September 18, 2002, granting custody of the second Applicant to the mother. It also considered that, bearing in mind the child's age, namely two years and four months, her return would be against her interests insofar as she had effectively been living in Romania with her mother, since she was seven months old.[31] Lastly, on the basis of witness testimony, the Court of Appeals found that the mother had proven that the first Applicant had consented initially to the mother and child remaining in Romania and establishing there the domicile for the whole family.

Therefore, the Court found that the second Applicant had legally resided in Romania since September 12, 2001.[32]

4.3.1.2. The Problem of Divorce and Custody Proceedings

It is interesting to point out that, while the proceedings under the Hague Convention for the return to Israel of the (abducted) second Applicant were still pending, another Romanian court (the Bucharest District Court) ruled on several issues related to the same case.

This happened within the framework of a claim filed by the mother in which she requested the aforementioned Court to adjudicate her divorce from the first Applicant. She also asked the Court to deal with the merits of

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referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

The Israeli Central Authority contested this finding and, in a letter sent on 28 May 2002 to the Romanian Central Authority, it included a statement and a comparative law case report showing that in the overwhelming majority of cases where the abducting parent raised the argument of "Israel's security situation being a danger for the child", the domestic courts rejected it. One of these cases is Freier v. Freier (969 *F. Supp*. 436, E.D. Mich. 1996) in which the Court held that Israel is not a war zone; it is a country where schools and businesses are open and citizens can enter and exit the country freely.

30 App. No. 7198/04, *supra* note 23, para. 11.

31 *Ibid.,* para. 12.

32 *Id.*

the attribution of the custody of the second Applicant to her. Finally, she requested that the first Applicant be obliged to pay child support to the second Applicant.

In a judgment rendered on September 18, 2002 (rectified on November 6, 2002), the District Court ruled favorably on the request filed by the wife, granted the divorce *ex parte*, awarded custody of the child to her, and ordered the first Applicant to pay monthly child support for the daughter amounting to 824 US dollars.[33]

All this occurred without hearing the first Applicant. In this regard, the Romanian Court found that, with the exception of the first hearing, the first Applicant had been correctly summoned by certified letter to his address in Israel, as required by the Romanian Code of Civil Procedure. Thus, the first Applicant – who claims that he was never duly summoned by the Romanian courts – was not present at any of the hearings held in this case. In the absence of an appeal within the prescribed deadline, the judgment became final.

According to the first Applicant, the Romanian courts placed him in an extremely precarious situation at the personal, family and economic levels. A summary of the father's arguments at this point reveals the following picture:

a) He was "divorced" *ex parte* from his wife by a court located in a country other than that of his usual residence, and which failed to correctly summon him and execute due process of law. This decision has far-reaching consequences on his personal status. Indeed, following this decision, the first Applicant is "divorced" in Romania but still "married" in Israel. As a result, he is unable to rebuild his life in Israel, not to mention the problems related to the uncertainty of his personal status with respect to third countries.

b) He was deprived *ex parte* of his guardianship of the second Applicant by a court located hundreds of kilometers away from his country of residence, in breach of the Hague Convention. According to this instrument, the State where the abducted child is kept (in this case Romania) is obliged:

– to *prevent* its courts from dealing with the merits of the attribution of parental rights,[34] and,

[33] *Ibid.,* para. 15.

[34] The Hague Convention, *supra* note 25, Art. 16*:*

> After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

– to act expeditiously and take all measures to return the abducted second Applicant *immediately* to her country of usual residence. *Only the courts of the State of residence of the child* are competent to decide on the merits of matters of custody and guardianship.[35]

c) The Romanian judgment does not provide him with any visitation rights.

d) He was condemned *ex parte* by a foreign (Romanian) court to pay child support in an amount judged by him exorbitant and unreasonable. The Court failed to duly summon him, and to execute due process of law of the trial writs.

e) From a practical point of view, the consequence of the Romanian courts decisions is that the first Applicant remains prevented from traveling to that country because, if he travels to Romania, he risks being arrested for failure to pay the (according to him, excessively high) child support fixed by the Romanian courts.

At this stage of the case, the first Applicant's counsel felt that his client was approaching a procedural deadlock.[36]

A. Shapira, "Private International Law Aspects of Child Custody and Child Kidnapping Cases", [1989/II] *Recueil des Cours* 130, 197: "To that end, the requested State's authorities are directed not to conduct an examination of the merits of the custody dispute at hand".

35 Para. 121 of the Explanatory Report on the Hague Convention (*supra* note 25) comments on Art. 16 of the Hague Convention as follows: "This article, so as to promote the realisation of the Convention's objectives regarding the return of the child, seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge".

36 *See* Doc. 9476 of the Council of Europe (3 June 2002), *at:* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc02/EDOC9476.htm expressing:

> Parents are helpless, particularly when faced with the complex nature of the court system and the length of proceedings. The period following the abduction seems to be a veritable obstacle course. Parents have to deal with a large number of ministries, whose work is completely uncoordinated. They are confronted with both national and foreign legislation, of which they have absolutely no knowledge. Judges and police officers, in particular border police, are very poorly informed. Regulations are not complied with and there are no effective controls with regard to under-age children crossing borders. Very little use seems to be made of international arrest warrants.
>
> Cultures and family law vary greatly from one country to the next, even within Europe. In some countries there is no legislation concerning shared custody (Germany, for example, introduced such legislation only in 1998). The interpretation of the concept of the best interests of the child greatly differs from one country to the other.

4.4. An Unconventional Procedural Venue?

What can a private person such as the first Applicant – with limited economic resources and who resides hundreds of kilometers away from Romania – do in order to seek (even partial) reparation?

An assessment of the situation shows that, from a factual perspective, it is true that the child was prevented from returning to her country of usual residence by a private person: the mother. But it is no less true that other wrongful acts in this case were perpetrated by a *foreign sovereign State* (Romania), acting through its judicial and administrative organs.

On the one hand, in light of the chain of decisions made by the Romanian courts and the attitude of that country's Central Authority, it seems that the first Applicant cannot expect to obtain an effective legal remedy in that State's jurisdictions. On the other hand, the possibility of filing claims in Israel does not seem realistic, since the mother and the second Applicant are in Romania, with no apparent intention to return to Israel.

The chances of escaping from this stalemate seemed slim – until the first Applicant's attorney in Israel consulted an expert in International Human Rights. The expert suggested attacking the problem from a completely different angle, namely to introduce an application against Romania before the ECHR.

4.4.1. The Proceedings Before the ECHR

Following the expert's advice, the first Applicant filed Application No. 7198/04 with the ECHR.

In this application, the second Applicant (the abducted daughter) was represented by the first Applicant, who maintained – and the ECHR accepted this position[37] – that he has the right to represent the former, because he contests the way in which the Romanian courts deprived him of his custody rights.

[37] In its final judgment (paras. 21 and 22), the ECHR stated that:

> …a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person. In particular, minors can apply to the Court even, or indeed especially, if they are represented by a parent who is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention. In such cases, the standing as the natural parent suffices to afford him or her the necessary power to apply to the Court on the child's behalf, too, in order to protect the child's interests … This principle applies in the present case, especially as the first Applicant also contested the way in which the Romanian courts had decided on the custody rights, which, in his view, had violated his Article 8 rights" (bold in the source).

The Applicants claimed, *inter alia*, that Romania violated Article 8 EConHR (right to a family life)[38] and Article 6 EConHR (right to a fair trial),[39] along with Article 1 of the 1952 First Protocol EConHR (right to enjoyment of one's possessions).[40]

4.4.2. The Arguments Raised by the Applicants Before the ECHR

For the purposes of the present study, it is important to describe in detail the allegations raised by the first and second Applicants against the Romanian State in the proceedings before the ECHR. This is necessary in order to illustrate the types of arguments that can be raised at the level of the ECHR, and the chances of obtaining reparation.

4.4.2.1. The Violations Claimed to Have Been Committed with Respect to the First Applicant

The violations claimed to have been committed with respect to the first Applicant concern the following fields:

a) the illegal dissolution of his marriage,

[38] Art. 8 EconHR (*supra* note 14):

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[39] Art. 6 EconHR (*supra* note 14):

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice (…).

[40] Art. 1 of Protocol (No. 1) to the European Convention for the Protection of Human Rights and Fundamental Freeedoms, 1952:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

b) the illegal deprivation of his parental rights,
c) the illegal imposition of unreasonable amounts of child support, and,
d) the violation of the right to enjoyment of fair legal proceedings amounting to a denial of justice.

a) Dissolution of marriage

The first Applicant's marriage was dissolved by a Romanian court without his knowledge and consent. He argued that he was not duly served with court documents, he was not duly summoned or convoked to appear in court and he was not duly notified of any pending proceeding or court decisions. Consequently, he was divorced *in absentia*, without being given the opportunity to participate in a fair hearing in the framework of which he could present his arguments and points of view. Because of the fact that the first Applicant's marriage was dissolved *ex parte*, he was forced into an ambiguous civil status (divorced in Romania, married in Israel), and he is in danger of being criminally charged with bigamy, if he were to remarry.

b) Deprivation of parental rights

The first Applicant's parental rights were withdrawn from him *ex parte* by a Romanian court without his knowledge and consent, in violation of the Hague Convention. He argued that he was not duly served with court documents, he was not duly summoned or ordered to appear in court and he was not duly notified of any pending proceeding. He was not entitled to participate in a fair hearing in the framework of which he could present his arguments and points of view. Thus, he remained deprived of his right to take part in the decision making process with respect to the way his daughter should be educated and raised. He was not afforded any visitation rights, which is a basic measure normally adopted on behalf of the parent who does not have custody.

c) Imposition of unreasonable amounts of child support

The Court condemned the father *in absentia* to pay a high amount of child support (US$ 824 per month),[41] without allowing him to participate in a fair hearing in the framework of which he could present his arguments and points of view. Moreover, adds the first Applicant, since an arrest order for

[41] According to the first Applicant, in Romania, the average salary is less than US$ 150 per month. Whenever both parents work, the cumulated average income of a family does not ordinarily exceed US$ 300. If, in such a family, there is only one child, the needs of the minor are covered by an amount of about US$ 100 (his "Written Observations on Admission and Merits" sent to the ECHR on Sept. 4, 2005).

non-payment of child support may be pending against him in Romania for the non-payment of the child support decided by the Romanian courts, he is *de facto* prevented not only from taking care of his daughter, but also from visiting his own father, who lives in Romania and who is terminally ill. This is also an interference with the first Applicant's family life with respect to his father and his mother, the first Applicant being their only son.

d) Violation of the right to fair legal proceedings amounting to a denial of justice

i) At the level of the Romanian judiciary:

Under the Hague Convention, Romanian courts should not have decided the *merits* of the question of parental rights and were obliged to endeavor to return the child to the State of his usual residence. By agreeing to decide on the merits and by attributing the parental rights to the mother, the Romanian courts breached the Hague Convention. Indeed, claims the first Applicant, if the mother wishes to remain in Romania with her daughter permanently, the lawful procedure is for her to return to Israel and to submit such a request to the competent Family Court in Israel, the State of usual residence of the family. In addition, the fact that throughout the proceedings, the first Applicant was not duly summoned or served with the courts' writs is a violation of the right to enjoy a fair hearing.

ii) At the level of the Romanian administrative authorities:

It was stressed that throughout the proceedings in this case, the Romanian Ministry of Justice acted in its position as Central Authority for the purposes of the Hague Convention. In so doing, it is under obligation to take all appropriate measures in order to secure the prompt return of abducted children to the State of their usual residence (Article 7 Hague Convention). The first Applicant claimed that the Romanian Central Authority acted improperly, allowing the Romanian judiciary to generate an illegal *de facto* situation impossible to reverse: the permanence of the abducted child in Romania for a long period of time.[42] Furthermore, argued the first Applicant,

[42] In his "Written Observations on Admission and Merits" sent to the ECHR on Sept. 4, 2005, the first Applicant summarized some of these allegations arguing, *inter alia*, that "the Romanian Central Authority acted in a non-professional and/or reckless and/or intentional manner […] the Romanian courts did not honor […] the obligations undertaken by Romania under the Hague Convention, which are part of the Romanian legal system. All this caused that a relatively simple procedure, by which an abducted child must be returned to his country of residence under the oiled system of the Hague Convention, was transformed into a chaotic Gordian knot by the successive intervention

the Romanian authorities acted with a total lack of cooperation. According to his allegation, the four lawyers appointed by the Romanian Government to handle the proceedings under the Hague Convention never met with him, nor tried to contact him in order to ask for his observations in order to better defend his position.

4.4.2.2. Reparation Claimed by the First Applicant

The first Applicant claimed EUR 1,355,000 in respect to non-pecuniary damage, for violation of his civil status, for the impossibility to exercise his parental rights and duties, for failure of the Romanian courts to grant him visitation rights, for the impossibility for him to preserve normal contact with his own parents in Romania, for the abduction of his child, for the need to reconstruct his father-daughter relationship, and for his anguish, distress and depression.

4.4.2.3. The Violations Claimed to Have Been Committed with Respect to the Second Applicant

The violations claimed to have been committed with respect to the second Applicant concern the following areas:

a) the breach of her family rights,
b) the breach of her property rights

a) Breach of family rights

1) The second Applicant's right to be raised close to her father was impaired. The respondent State created an illegal *de facto* situation when it allowed its domestic courts to deal with the merits of the question of attribution of parental rights, with the consequence that she is today prevented from enjoying the presence and guardianship of her legitimate father.

2) The second Applicant was deprived of any visitation rights by her father (the first Applicant).

3) The decision handed down by the Romanian courts deprives the second Applicant of her right to see her grandparents (the parents of the first Applicant), who live in Romania and are not allowed to visit her.

b) Breach of property rights

1) Based on her status as an Israeli citizen domiciled in Israel, the second Applicant had the right to receive a monthly payment from National Social

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of the Romanian authorities in […] violation of the mentioned instrument and of the European Convention of Human Rights".

Security in Israel. These amounts were lost when she was abducted and removed from her usual place of residence.
2) The practical consequence of the breaches of the Hague Convention and the ECHR by the Respondent State's authorities is that the second Applicant is not receiving any child support from the first Applicant.

4.4.2.4. Reparation Claimed by the Second Applicant
Being represented by the first Applicant, the second Applicant requested damages in the amount of EUR 1,364,382 for the infringement of the right to enjoy family life, for failure of the Romanian courts to establish visitation rights for her father, for the impossibility to see her paternal grandparents, for psychological damages, for the anguish, distress, depression, loss of joy of life and faith in family life, for loss of Israeli medical care, and for loss of the monthly allowances that she should have received from the State of Israel.

4.5. The Decision of the ECHR

After reviewing the facts of the case, and following Romania's refusal to reach a negotiated settlement,[43] the ECHR found a violation of the right to family life as specified in Article 8 of the EConHR.

According to the ECHR, under the Hague Convention, the Romanian authorities were under a positive duty to take all necessary measures to prevent further harm to the second Applicant or prejudice to the interested parties.

> However [stated the ECHR], in the present case, although the authorities had knowledge of the existence of the divorce proceedings before the

[43] EconHR (*supra* note 14), Art. 38 – Examination of the Case and Friendly Settlement Proceedings
1. If the Court declares the application admissible, it shall:
a. pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation for the effective conduct of which the States concerned shall furnish all necessary facilities;
b. place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.
2. Proceedings conducted under paragraph 1.b. shall be confidential.
Art. 39 – Finding of a Friendly Settlement
If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

> Romanian courts, they did nothing to defer the judgment until the Hague proceedings would be finalized, contrary to Article 16 of the Hague Convention.[44]

The ECHR added that it was reasonable for the first Applicant to expect the Romanian Ministry to take action according to the Hague Convention for the following reasons:

– the Ministry was deemed to take all measures, including extra judicial ones, on his behalf, to secure the respect of the Hague Convention,
– the first Applicant expressly asked the Ministry to take the necessary steps for a stay of the divorce proceedings.[45]

As a result, based on Article 16 of the Hague Convention, the ECHR stated:

> By failing to inform the divorce courts of the existence of the Hague proceedings, the authorities, in particular the Ministry, deprived the Hague Convention of its very purpose, that is to prevent a decision on the merits of the right to custody being taken in the State of refuge.[46]

In this context, the ECHR expressed its concern that the Romanian courts' ruling on Hague Convention proceedings based their judgment, *inter alia*, on the fact that the matter of parental rights had been decided on the merits by other Romanian courts, while the proceedings under the Hague Convention were still pending.[47]

In so doing, the ECHR seemed to have impliedly accepted the first Applicant's allegation, that Romania must respect the universally recognized principle of international law that a State cannot hide behind its own internal law in order to escape from its international obligations.[48] In the present case, the international obligations of Romania were to implement the Hague Convention and to respect the human right of the Applicants to have a normal family life and to enjoy the benefit of fair proceedings in the Romanian judiciary. Romania cannot escape from this obligation by invoking the fact that another Romanian domestic court attributed the parental rights to the mother.

In the same line, the ECHR recalled that the Romanian Ministry acted both as a Central Authority under the Hague Convention and as the authority responsible for the international summons procedure in the divorce claim. It

44 App. No. 7198/04 (*supra* note 25), para. 34.
45 *Ibid*., para. 35.
46 *Ibid*., para. 36.
47 *Ibid*., para. 37.
48 App. writ, Ch. "B. Violations by the Executive, lett. a)".

therefore had knowledge of, and to a certain extent participated in both sets of proceedings.

Furthermore, the ECHR stressed that, in the present case, the proceedings under the Hague Convention were protracted for more than 18 months, in contrast with the 6-week period established by Article 11 of the Hague Convention:

> In matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, *as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them.*[49] (Italics added.)

The Court endorsed the Applicant's argument that the Romanian authorities and courts created a *de facto* illegal situation, and concluded that the time it took for the Romanian courts to adopt the final decision in the present case failed to meet the urgency of the situation.[50]

In other words, the ECHR criticized the Respondent State's attitude, stating that the protracted period of time that lapsed in contravention of the Hague Convention generated a *de facto* situation, harming the first Applicant. Such a *fait accompli* is very difficult to reverse.

As a result, the Court concluded that the Romanian authorities breached their obligations under Article 8 of the ECHR with respect to the first and second Applicants.[51]

4.6. The Remedies Available Within the Framework of the ECHR

Since the ECHR is *not* part of the national judicial system of the signatory States of the EConHR, but an international tribunal, it cannot act as a "court

[49] App. No. 7198/04 (*supra* note 23), para. 38. According to a Commission that met in The Hague as early as 1989 with the purpose of evaluating the implementation of the Hague Convention, one of the more serious problems related to the proceedings under the Hague Convention is the passing of excessively long periods of time before abducted children are returned to their States of usual residence. A.S. Dreyzin de Klor, "La Restitución Internacional de Menores", in *La Protección Internacional de Menores*, *supra* note 5, at 11, 54.

[50] App. No. 7198/04 (*supra* note 23), para. 39.

[51] With regard to its finding on the violation of Art. 8 EConHR and in view of the fact that the alleged violation of Art. 1 of Protocol No. 1 is the direct outcome of the proceedings that gave rise to the breach of Art. 8 of the Convention, the Court considered that it was not necessary to examine whether, in the present case, there had also been a violation of Art. 1 or Art. 6 EConHR (App. No. 7198/04, *ibid.*, para. 54).

of appeals" for the internal judiciary. Moreover, the ECHR cannot substitute its own assessment of the facts of a case for that of the internal courts of the respondent State.[52]

Consequently, the ECHR is *not* competent to revise and/or modify an internal judgment, or to instruct the national authorities of any Member State to act in a certain way. The function of the ECHR is restrained to ascertaining whether, in a given situation, the respondent State violated one or several rights consecrated in the EConHR.

This being the case, is the seizing of the ECHR only an academic exercise, with no operative consequences? Not at all. Article 41 of the EConHR states:

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Basically, the ECHR can provide two types of reparation: one can be described as "non-pecuniary" and the other as "pecuniary".

a) "Non-pecuniary" reparation is the mere finding by the ECHR that the respondent State has violated the EConHR with respect to the Applicant.

b) On the other hand, when affording "p*ecuniary*" reparation, the Court orders the Respondent State to pay an amount of money to the injured individual.

In Application No. 7198/04, the ECHR awarded both types of reparation.

4.6.1. Non-pecuniary Reparation

Based on the case *Sylvester v. Austria,*[53] and after stating that there is "no reason to doubt that the applicants suffered distress as a result of the impossibility of enjoying each other's company",[54] the ECHR nonetheless found that the second Applicant was not entitled to receive from Romania – the State found responsible for the disruption of her family life – even one single EUR in damages.

[52] App. No. 7198/04 (*ibid.*), para. 37 in fine: "With the Government, the Court recalls that it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them".

[53] Apps. Nos. 36812/97 and 40104/98 (joined), Case of Sylvester v. Austria (dec.), Apr. 24, 2003, *available at*: http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[54] App. No. 7198/04 (*supra* note 23), para. 62.

Indeed, the ECHR found that the fact that a violation of Article 8 EConHR was asserted constituted sufficient reparation:

> As to the second applicant, the Court considers that the finding of a violation provides sufficient just satisfaction for any non-pecuniary damage she may have suffered as a result of the violation of her Article 8 rights.[55]

There is reason to ask a certain number of questions with reference to this decision. Indeed, in this case a child was:
- illegally taken from her State of permanent residence and displaced to another State,
- kept hidden from her father and paternal grandparents,
- prevented from receiving messages and gifts from her father and paternal grandparents, forced to grow up, be raised, educated and develop far away from her father, and,
- deprived of all the love and protection that a father can provide to his daughter, along with the natural psychological consequences of such deprivation.

According to the ECHR, all these injuries are sufficiently satisfied by the mere "finding" that Romania committed a violation of the EConHR.

In principle, it is true that the finding of a violation of the EConHR may have a certain impact in the eyes of European (or international) public opinion. In international relations, "public opinion" is an element whose relative weight cannot be disregarded.[56] For example, since the entering into force of the EConHR, the overwhelming majority of the decisions of the ECHR were respected by the Member States,[57] and this is – in part – due to the pressure of European public opinion.

However, in recent years, certain Member States have been condemned several times for the breach of the same provision of the EConHR. Thus, the "moral sanction" of "finding a violation of the EConHR" seems to have lost some of its dissuasive value.

55 *Ibid*., para. 62.

56 Y. Dinstein, *International Claims* 56 (Hebrew, 1978).

57 EConHR (*supra* note 14):

> Art. 46 – Binding force and execution of judgments.
>
> 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

The "finding of a violation of the EConHR" by a respondent State is a sort of general sanction, perhaps addressed at preventing the commission of similar violations in the future; but it is doubtful whether – in the eyes of the victim of a breach of the EConHR – this would be seen as sufficient or satisfactory.

In the specific case of child abduction, the subject of discussion is whether or not the mere "finding of a violation of the EConHR" is a sufficient or "just" satisfaction in light of the fact that:

– the victim was illegally removed from her country of residence,
– the victim was illegally kept in another State,
– an illegal *de facto* situation was created with the participation of the Respondent State's authorities and courts,
– the illegal *de facto* situation will have serious repercussions for the rest of the child's life.

4.6.2. Pecuniary Reparation

Contrary to the case of the second Applicant, in the operative part of the decision, the ECHR did not accept Romania's argument that, in the case of the first Applicant as well, the sole finding of a violation of the EConHR would be sufficient satisfaction.

> …[The ECHR] considers that, in so far as the first Applicant is concerned, sufficient just satisfaction would not be provided solely by a finding of a violation.[58]

It is regrettable that the ECHR did not take this opportunity to explain why the case of the first Applicant is to be treated differently from the case of the second Applicant.

The first Applicant claimed satisfaction in the amount of EUR 1,355,000 with respect to non-pecuniary damage. After declaring that the remainder of the claims for compensation was unsubstantiated, the Court – having regard to the sums awarded in "comparable cases"[59] and making an assessment on an equitable basis – awarded the first Applicant satisfaction in an amount of EUR 20,000.[60]

58 App. No. 7198/04 (*supra* note 23), para. 36.

59 The Court referred, *inter alia*, to the cases of App. No. 31679/96, Ignaccolo-Zenide v. Romania, Jan. 25, 2000; App. No. 56673/00, Iglesias Gil and A.U.I. v. Spain, July 29, 2003.

60 App. No. 7198/04 (*supra* note 23), para. 62.

4.6.3. Attorney's Fees

The subject of attorney's fees [AF] is often neglected by authors of legal articles. Within the framework of the proceedings before the ECHR, however, this item can be of utmost importance because applicants are obliged to confront States having much stronger economic power than private persons. The issue, of course, is also important for legal practitioners.

Historically, the intention of the founding fathers of the EConHR was to build a system in which every single person, irrespective of such person's economic situation and wealth, would be able to request the protection of the EconHR's enforcement mechanisms.

Thus, contrary to the situation in domestic courts, the filing of an application with the ECHR is free of charge.[61] There are no court fees and, in the case of applicants residing outside Europe, no *cautio iudicatum solvi.*[62] An applicant lacking financial means may be afforded legal aid.[63]

61 The Application forms and other documentation can be consulted on the official site of the ECHR: http://www.echr.coe.int/ECHR.

62 *Cautio Iudicatum Solvi* is a deposit or guarantee requested by some States from foreign plaintiffs in order to insure the payment of costs, expenses and eventual damages. M.C. Feuillade, *Competencia Internacional Civil y Comercial* 70 (2004).

63 Rules of Procedure of the ECHR (Ch. X):
Rule 91
1. The President of the Chamber may, either at the request of an applicant having lodged an application under Article 34 of the Convention or on his or her own motion, grant free legal aid to the applicant in connection with the presentation of the case from the moment when observations in writing on the admissibility of that application are received from the respondent Contracting Party in accordance with Rule 54 § 2 (b), or where the time-limit for their submission has expired.
2. Subject to Rule 96, where the applicant has been granted legal aid in connection with the presentation of his or her case before the Chamber, that grant shall continue in force for the purposes of his or her representation before the Grand Chamber.
Rule 92
Legal aid shall be granted only where the President of the Chamber is satisfied
(a) that it is necessary for the proper conduct of the case before the Chamber;
(b) that the applicant has insufficient means to meet all or part of the costs entailed.
Rule 93
1. In order to determine whether or not applicants have sufficient means to meet all or part of the costs entailed, they shall be required to complete a form of declaration stating their income, capital assets and any financial commitments in respect of dependants, or any other financial obligations. The declaration shall be certified by the appropriate domestic authority or authorities.
2. The President of the Chamber may invite the Contracting Party concerned to submit its comments in writing.
3. After receiving the information mentioned in paragraph 1 of this Rule, the President of the Chamber shall decide whether or not to grant legal aid. The Registrar shall inform the parties accordingly. (As amended by the Court on May 29, 2006).

In its case-law, the enforcement mechanism of the ECHR has gone even further. Indeed, attorneys were requested not to set exaggerated fees, since high AF may deter applicants from enforcing their rights:

> In the case of *Silver and others v. the United Kingdom*,[64] the Court held that: "[...] high costs of litigation may themselves constitute a serious impediment to the effective protection of human rights (…) *It is important that applicants should not encounter undue financial difficulties in bringing complaints under the Convention and the Court considers that it may expect that lawyers in Contracting States will co-operate to this end in the fixing of their fees.*[65] (Italics added.)

Does this mean that the situation of "not-wealthy applicants" is ideal? Not really.

Going against its own suggestion to the attorneys in the Application of *Silver and others v. United Kingdom* (*i.e.*, to co-operate with Applicants in the fixing of their fees*)* the ECHR adopted the rigid position of only accepting *formal invoices* as justification of the amounts of AF.[66]

Rule 94

1. Fees shall be payable to the advocates or other persons appointed in accordance with Rule 36 § 4. Fees may, where appropriate, be paid to more than one such representative.
2. Legal aid may be granted to cover not only representatives' fees but also travelling and subsistence expenses and other necessary expenses incurred by the applicant or appointed representative.

Rule 95

On a decision to grant legal aid, the Registrar shall fix

(a) the rate of fees to be paid in accordance with the legal-aid scales in force;

(b) the level of expenses to be paid. Rule 96, The President of the Chamber may, if satisfied that the conditions stated in Rule 92 are no longer fulfilled, revoke or vary a grant of legal aid at any time.

64 App. No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Silver and others v. United Kingdom, Mar. 25, 1983.

65 *Ibid*., para. 18.

66 This attitude does not seem to be consistent with Rule 60.2 of the Rules of the Court. This Rule states that, in claims for just satisfaction: "the applicant must submit itemized particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise".

According to the clear wording of this Rule, applicants are required to furnish "any relevant documents". Any may mean "some", "several", "a few", "whichever", "every" etc., but in no case does it mean only "exclusively", as the Court seems to state in its judgment. Such is also the case for the word "documents" in the aforementioned Rule 60.2.

The problem may emerge with respect to States in which attorneys are allowed to fix their fees on the basis of the results of the trial. It can also be a problem for attorneys who – in compliance with the ECHR's advice – co-operate with applicants and agree to be paid after the latter receive the satisfaction money from the respondent State.

Indeed, taking into account the long periods of time that are expected to have passed from the moment when an application is filed until the publication of the final decision by the Court, and the uncertainty – normal in every legal procedure – of the result, an attorney may agree to wait for the decision of the Court before fixing or collecting the AF.

Since, according to the Rules of Procedure of the ECHR[67] applicants are obliged to substantiate the expenses related to AF *before* the Court renders its judgment, attorneys in the above-described situations run the risk of not yet have issued their official invoices prior to that time.[68] The reason for the attorneys avoiding billing until the payment is received is simple: if an attorney issues an invoice, he becomes immediately liable to pay taxes, including VAT, on those amounts. If, at a later stage, the ECHR dismisses the applicant's claim, the attorney runs the risk not only of not being paid, but, in addition, of remaining liable to pay the aforementioned taxes or, at least, of not being able to request a refund of such taxes until the following period of taxation.

"Documents" does not mean exclusively "formal invoice". Under no method of legal or literary interpretation, can the terms "any relevant supporting documents" be construed as meaning: "exclusively an invoice". It is submitted that the word "relevant" means: "having some reasonable connection with, and in regard to evidence in trial, having some value or tendency to prove a matter of fact significant to the case". Commonly, an objection to testimony or physical evidence is that it is "irrelevant". *See*: http://dictionary.law.com/.

67 Rules of Procedure of the ECHR:
Rule 60 - Claims for just satisfaction
1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.
2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise. (1. As amended by the Court on 17 June and 8 July 2002). (2. As amended by the Court on 13 December 2004).
3. If the applicant fails to comply with the requirements set out in the preceding paragraphs, the Chamber may reject the claims in their entirety or in part.
4. The applicant's claims shall be transmitted to the respondent Government for comment.

68 The aforementioned Rule 60 leaves open the possibility for the President of the Chamber to direct otherwise.

Since the ECHR does not accept other supporting documents proving the amounts of AF, applicants lacking the economic means to settle their AF immediately and who have obtained their attorneys' accord to postpone the payment until a judgment of the ECHR is issued and paid, risk falling into the same uncomfortable situation of the first Applicant in Application No. 7198/04.

In the present case, the first Applicant produced a letter sent to him by his attorney (an Israeli lawyer who was authorized by the ECHR to represent the first Applicant). In his letter, the attorney partially itemizes the services rendered to the first Applicant with respect to his application, and requests settlement. In so doing, the first Applicant's attorney "co-operated" with his client exactly in the spirit of *Silver and others v. United Kingdom.* And what would happen if, in such circumstances, the ECHR rejects the application and awards no fees on behalf of the first Applicant? Nothing serious would happen, whereas, in the other situation (*i.e.*, if the applicant's attorney were to issue a formal invoice), the attorney would be obliged to pay taxes in Israel for the amount invoiced, without having received the income from his client.

In its rejection of the first Applicant's request for payment of AF, the ECHR stated:

> In … a letter … the first Applicant [is asked to] to pay EUR 47,000 and 6,750 Swiss francs [as attorney's fees] in respect of the application submitted to the Court. However, no bill was submitted to the Court concerning these sums or any other sum that the first applicant might have paid or has to pay. Therefore the full claim cannot be awarded.[69]

In the final analysis, the ECHR only awarded EUR 1,500 for legal costs. Taking into consideration the time invested in such a case, this amount does not even cover the costs of the work done by the first Applicant's attorney's paralegal.

5. THE IMPACT OF A DECISION OF THE ECHR ON DOMESTIC SYSTEMS

Once the ECHR renders a judgment, the question of the practical value of such a judgment is naturally raised.

Article 46 EConHR refers to the binding force and execution of judgments of the ECHR:

[69] App. No. 7198/04 (*supra* note 23), para. 65.

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

A private party may still take advantage of judgments of the ECHR both as an offensive weapon and as a defense shield.

5.1. The Use of a Judgment of the ECHR as an "Offensive Weapon"

This possibility can be implemented in the following way: whenever a State is found responsible for having breached the EConHR, the injured applicant may produce the judgment of the ECHR before the domestic courts of that State, in an attempt to obtain the annulment of the irregular proceedings. However, since the ECHR is not part of the internal judiciary of any State, the effectiveness of such a move will depend on the availability, in the national law of the condemned State, of a procedure allowing such actions.

In the specific case of Romania, Article 322.9 of the Code of Civil Procedure (CCP)[70] concerning the "revision of decisions" states that a final decision may be revised:

> Whenever the ECHR establishes that a violation of fundamental rights and liberties was caused by the decision of a court and the serious consequences of the violation continue to exist and cannot be repaired unless the decision is revised.

The CCP establishes a three-month period for filing the request for revision. This period begins to run on the date of publication of the judgment in the Romanian Official Journal (Article 324 CCP). The request must be addressed to the court that issued the final decision (Article 323 CCP). If the court decides to accept the request for revision, it will modify the decision questioned, completely or partially (Article 327.1 CCP).

Of course, even if such a possibility exists, there is no guarantee that the judiciary of a State that was held responsible for miscarriage of justice by the ECHR will subsequently act according to the rule of law and correct the situation.

70 *Codul civil, codul de procedură civilă: contencios administrativ, executorii judecătoreşti: cu modificările pînă la data de 14 februarie 2005* (ed. by C. Crişu)*, Curtea de Arges: Juris Argessis, 2005.*

5.2. A Second Possibility is to Exploit the Judgment of the ECHR as a "Defensive Shield"

Taking as an example once again Application nº 7198/04, it can be assumed that if, in that case, the wife wishes to make recognize or execute (R/E) the Romanian judgments (of divorce, custody and child support) in Israel, the first Applicant could oppose the request by interposing a judgment of the ECHR declaring that the Romanian courts acted in violation of the Applicant's rights. In this context, the judgment of the ECHR could be exploited in at least three ways:

– First, the judgment could be used as a *means of proof* before the Israeli court before which is pending the request of R/E. For example: if Israeli law, as a condition for R/E, requires that the defendant have been given a reasonable opportunity to present his arguments and/or evidence prior to the granting of the foreign judgment, and the decision of the ECHR declares that such opportunity was not given to him, the decision could be used as evidence before the Israeli courts supporting a rejection of the request on that ground. The same goes for the verification by the ECHR that the foreign court failed to correctly summon the defendant. A similar use of the decision can be made when the judgment of the ECHR declares that the foreign domestic courts acted without jurisdiction.[71]
– Second, the judgment of the ECHR could be brought forth as evidence supporting other arguments made in order to prevent the R/E of a foreign judgment. For instance, if the ECHR established that a certain human right was flagrantly violated by the respondent State, and the violation of such right is in conflict with the public order of the State in which the R/E is requested, this might be sufficient to prevent R/E.
– Third, if the judgment of the ECHR establishes that the respondent State acted in violation of an international treaty, the judgment could be presented as supporting evidence of that fact. In Application No. 7198/04, for instance, the ECHR established that Romania acted in violation of the Hague Convention.

Finally, the judgment of the ECHR may also be brought as a defense before the courts and administrative authorities of a *third* State. This could happen if, for instance, in a case similar to the one that gave rise to Application No. 7198/04, the wife, producing the Romanian judgment on child support,

[71] With respect to recognition of foreign divorces in Israel and the question of jurisdiction of the foreign courts *see* A. Chen, "Registration and Recognition of Foreign Divorce Decrees", in *Essays in Memory of Professor Menashe Shava* 593 (Hebrew, 2006). Regarding E/R in Israel *see* L. Garb, "Israel", in *Enforcement of Foreign Judgments* 7 (1994).

wished to attach an asset belonging to the first Applicant that is located in the USA, Uruguay or any other country.

In the specific case of Application No. 7198/04, the mother filed with the Tel Aviv Family Court [TAFC] a request for the R/E of the Romanian court's decision on child support rendered against the father.

As of the writing of this article, the TAFC has not yet rendered its decision on this matter.[72] It will be interesting to see what value the Israeli court will attribute to the judgment of the ECHR.

In order to complete the picture, this section concludes with the prediction that, in the future, the member States may need to consider the possibility of affording the ECHR the power to issue temporary remedies and/or to propose a "fast track" procedure.[73] This may be necessary in order to avoid illegal *de facto* situations that consolidate with the lapsing of time and cannot be retroactively repaired. This happens when a child is illegally abducted into the territory of a State signatory of the EConHR and kept there for several years. In the case of Application No. 7198/04, the first Applicant first seized the ECHR on November 28, 2003, whereas the decision of the ECHR was rendered on July 26, 2006. During this relatively long period of time, the abducted second Applicant was illegally kept in Romania, far away from her place of residence, with all the implications that this will have with respect to her present and future existence.

The creation of illicit *de facto* situations may also emerge with respect to other fields of law. For instance: a person illegally retains an object or an asset and, with the complicity or connivance of the State's administrative and/or judicial authorities, the legitimate owner residing abroad is prevented from reacquiring possession. With the passage of time, an illicit *de facto* situation will be solidified.

72 Tel Aviv Family Court File No. 05/58420. Here, before the ECHR rendered its judgment in App. No. 7198/04 (*supra* note 23), the wife requested the enforcement of the Romanian decision on child support in Israel. Among the arguments based on Israeli internal law made against such execution, the husband's attorney informed the Israeli judge that a decision of the ECHR on App. No. 7198/04 was expected in the near future. When the decision was issued, it was introduced to the file of the TAFC.

73 Rule 41 of the Rules of Procedure of the ECHR provides that "Applications shall be dealt with in the order in which they become ready for examination. The Chamber or its President may, however, decide to give priority to a particular application". However this is only a possibility to establish a "priority within a line" in certain specific/exceptional cases and has nothing to do with "fast track" procedures.

6. EVALUATION OF THE PROPOSED VENUE

Application No. 7198/04 is an excellent example of a case demonstrating that, whenever the possibilities offered by domestic courts are exhausted or ineffective and other procedural venues seem to be non-existent, the filing of an application to the ECHR may bring some relief – even when the case is one concerning a *private* dispute.

This is done in a rather "oblique" form, by taking advantage of a system (the ECHR) that was not originally created for settling private disputes, but for protecting human rights from State interference.

This strategy may not only be applicable to family law disputes or to cases concerning the Hague Convention. On the contrary, seizing the ECHR can be useful in cases of breach of contracts, of torts and of disputes in several other areas of law. In order to do so, individuals wishing to advance private claims through application to the ECHR must verify the existence of two elements:

– first, they must *identify a "right",* protected by the ECHR, that may have been breached by a member State, and,
– second, they should verify whether the breached right overlaps (or is connected to) the dispute that they have with the other private party.

Only if both conditions are simultaneously present may the injured person have a chance of success, as was the case in Application No. 7198/04. In that case, the breach by Romania of Article 8 EConHR had a direct influence on the dispute between the first Applicant and his wife, following the abduction of their daughter.

7. FINAL REMARKS

The situation that gave rise to Application No. 7198/04 illustrates how, in modern times, a dispute between two private parties may "expand" across the boundaries of one domestic jurisdiction into another, "gain access" to the province of an international regional court, and subsequently "return" and deploy effects in one or several domestic jurisdictions.

a) For legal practitioners of States that are *not* signatories of the EConHR, being aware of the "unusual" possibility of seizing the ECHR in order to advance private claims is certainly a professional asset. Such expertise can be exploited in the two main fields of the legal profession: legal advising and representation of clients.

With respect to legal consultancy: non-European attorneys can provide legal advice to non-European clients, for instance, concerning the contents of the EConHR and the possible rights that a given member State may have breached with respect to the latter on the procedural features and

implications of that system, on the rights and duties of applicants, on the preliminary conditions that must be fulfilled before an application may be filed, and on the impact that a decision of the ECHR may have with respect to a private claim.

With respect to legal representation: in principle, only advocates authorised to practise in one of the States that are signatories of the EConHR and residing in the territory of one of such States are authorized to represent applicants in the proceedings before the ECHR.[74] However, the President of the Chamber has a relatively large discretionary power to authorize foreign lawyers to represent applicants before the ECHR. The aforementioned justifications may include the fact that the attorney has followed the case from the beginning and/or that he understands the language spoken by the applicant and the language of the respondent State, as was the case of the Israeli attorney who represented the first Applicant before the ECHR in Application No. 7198/04. The request must be filed in the form of a letter addressed to the President of the ECHR.

74 Rules of Procedure of the ECHR:
Rule 36 - Representation of applicants (as amended by the Court on July 7, 2003):
1. Persons, non-governmental organisations or groups of individuals may initially present applications under Art. 34 of the Convention themselves or through a representative.
2. Following notification of the application to the respondent Contracting Party under Rule 54 § 2 (b), the applicant should be represented in accordance with paragraph 4 of this Rule, unless the President of the Chamber decides otherwise.
3. The applicant must be so represented at any hearing decided on by the Chamber, unless the President of the Chamber exceptionally grants leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative".
4. (a) The representative acting on behalf of the applicant pursuant to paragraphs 2 and 3 of this Rule shall be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber.
(b) In exceptional circumstances and at any stage of the procedure, the President of the Chamber may, where he or she considers that the circumstances or the conduct of the advocate or other person appointed under the preceding sub-paragraph so warrant, direct that the latter may no longer represent or assist the applicant and that the applicant should seek alternative representation.
5. (a) The advocate or other approved representative, or the applicant in person who seeks leave to present his or her own case, must even if leave is granted under the following sub-paragraph, have an adequate understanding of one of the Court's official languages.
(b) If he or she does not have sufficient proficiency to express himself or herself in one of the Court's official languages, leave to use one of the official languages of the Contracting Parties may be given by the President of the Chamber under Rule 34 § 3.

b) In order to create, among future lawyers, the spontaneous *reflex* of taking into account the existence of extra-domestic jurisdictions where their clients could seek a legal remedy, it appears to be necessary to modify the way in which law is taught. This applies both at the level of *legal systems* and *law subjects*.

– Regarding *legal systems*, the isolated treatment of domestic law with respect to foreign, international, regional, supranational or transnational laws is becoming increasingly obsolete. In effect, in practical daily life, some (or all) of these systems may play a role with respect to the same parties and the same facts. In this sense, it does not seem exaggerated to foresee a further development of the trend (mentioned in the Introduction) towards a certain "informal globalization of jurisdictions". In this light, to ignore or omit references to the *interfaces* between the different legal systems may well render the teaching incomplete.
– The same reasoning applies with respect to *law subjects*. Many law schools will need to adapt their curricula in order to offer to future practitioners a panorama of the implications of private cross-border activities within each legal subject. Concretely, they should give to future jurists, judges and legislators the tools necessary to cope with the challenges posed by the sophistication and increase of private international activities. In other words, the academic "separation" between legal subjects (*matières*) traditionally applied in law schools (contract law, tort law, family law, succession law, procedural law, etc.) will soon become outdated if each one of these courses lack indications and references to trans-border activities.

c) The final part of this Section is devoted to emphasizing the increasing role played by comparative law; this last term being used in the sense of learning and being acquainted with the functioning and the contents of the relevant foreign domestic systems.

For instance, according to Article 35 EconHR,[75] the ECHR may only hear the matter after the applicant has exhausted all domestic remedies offered by the respondent State.[76] The main reason for the establishment of the rule of exhaustion of local remedies was the necessity of affording host

[75] Art. 35 EconHR (*supra* note 14):

> The [ECHR] may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

[76] Exhaustion of local remedies is one of the conditions of admissibility of applications. The rule is of utmost importance. Indeed, the lack of exhaustion by applicants is one of the most common grounds for rejection of applications.

States an *opportunity* to repair the damage through their own courts, before the claim is brought to the international level.[77]

According to the rule, the means to be exhausted include the remedies obtainable from the primary tribunal (such as invoking a certain article of the law or using a certain procedural means prescribed by local law), as well as inter-tribunal remedies (such as appealing against negative decisions).

However, since the objective of the rule is not to oblige applicants to undertake academic exercises, there are many exceptions. For example, an applicant is not obliged to exhaust domestic remedies that are ineffective (such as appealing to a court that is not competent to modify the original judgment), that are *ex gratia*, or that are not *essential* to win the case.[78]

This requires legal practitioners to have (at least an elementary) knowledge of the respondent State's legal system, for example, in order to evaluate whether a client is obliged to invest his time, effort and money in exhausting a certain domestic remedy in the respondent State.

[77] App. No. 788/60, 4 *Y.B. Eur. Con. Hum. Rts.* 177, 179 (1961); App. No. 343/57, 2 *Y.B. Eur. Con. Hum. Rts.* 412, 436-38 (1958-59).

[78] *See* A.M. Aronovitz, "Notes on the Current Status of the Rule of Exhaustion of Local Remedies in the European Convention of Human Rights", 25 *Israel Y.B. Hum. Rts.* 73, Ch. 2.3.2 (1995).

GAZA, IRAQ, LEBANON:
THREE OCCUPATIONS UNDER INTERNATIONAL LAW

*By Nicholas Rostow**

INTRODUCTION

United States and British military operations against, and occupation of, Iraq in 2003-04 and Israel's withdrawal from the Gaza Strip in 2005 highlighted the international law of belligerent occupation.[1] While not discussed as an end to an occupation, Syria's withdrawal of military personnel from Lebanon, also in 2005, in fact sheds additional light on this body of law.

In connection with Iraq and Israel, occupation law has provided a theme for deliberations at international institutions such as the UN General Assembly, the Security Council, the International Court of Justice, and the UN Secretariat. Such deliberations reflect international political positions and strategies rather than reasoned application of the law to the facts.[2] Each of

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1 Hitherto, interest in occupation law in the main had been confined to Israel's occupation of territory since 1967. The international law of occupation was not and has not been a theme of debates about Turkey's presence in Cyprus since 1974, North Vietnam's occupation of Cambodia, 1978-89, the Soviet Union's occupation of Afghanistan, 1979-89, and the Moroccan occupation of the Western Sahara since 1975. In contrast, Israeli adherence to the Fourth Geneva Convention of 1949 has been on the diplomatic agenda, at least at the United Nations, in regard to Israeli practices, particularly settlement construction. And, of course, the International Court of Justice in 2004 ruled that Israeli settlements in territory occupied as a result of the 1967 war are unlawful under international law. *See* ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004), para. 120, at: http://icj-cij.org [hereinafter: ICJ Wall Opinion]. *See generally* A. Roberts, "Prolonged Military Occupation: The Israeli Occupied Territories Since 1967", 84 *A.J.I.L.* 44 (1990), in *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* 25-85 (E. Playfair ed., 1992); hereinafter: *International Law and the Administration of Occupied Territories.*

2 In this connection, *cf.* the legal craftsmanship of H.C. 2056/04, Beit Sourik Village Council v. Government of Israel (2004), *available at:*

these episodes calls for a close examination of legal texts and facts because each has made the language of relevant international conventions the subject of political concern. None of the occupations occurred in a political vacuum.

Syria's introduction of armed forces into Lebanon took place in the context of civil war and by invitation of the Lebanese government. They were withdrawn under international political pressure, represented by UN Security Council Resolution 1559 (2004). The relevance of the law of occupation to Lebanon has not been the subject of public debate. Despite the apparent lack of interest in the relevance of occupation law to Lebanon, non-Lebanese military presence in, and alleged control of, parts of Lebanon, in addition to political influence, raise the question of the applicability of this body of international law.

When occupation begins, what an occupier may do in lawfully exercising its rights and discharging its duties, and when an occupation ends are practical as well as theoretical questions. For example, did Israel's withdrawal from the Gaza Strip in 2005 end the occupation there as a legal matter? Can removing a government be a permissible goal of the lawful use of force under international law and, therefore, may facilitating the creation of a new political regime be a lawful goal of a belligerent occupation? Is there a substantive distinction between regime creation or change and regime manipulation under occupation? What is the power of the UN Security Council to change the law of belligerent occupation or to expand the legal authorities of an occupier in a particular case? And who or what determines the answers to these questions and for what purposes?[3]

I. THE SUBSTANTIVE LAW OF BELLIGERENT OCCUPATION

The international law of belligerent occupation forms part of the laws of war or international humanitarian law:[4] the customary law of war and the 1949 Geneva Conventions.[5] It applies to territories falling under foreign control as

http://62.90.71.124/eng/verdict/framesetSrch.html, with the ICJ Wall Opinion, *supra* note 1.

3 *See*, *e.g.*, A. Roberts, "What is Military Occupation?", 1984 *B.Y.B.I.L.* 249 (1985).

4 The "laws of war" or the "law of armed conflict" or "international humanitarian law" are essentially interchangeable terms for the same body of customary and conventional law. I prefer the older terms than "international humanitarian law" because, for some, the latter includes all or part of international human rights conventions and other treaties, thus raising doubts as to the content of this body of law.

5 *See*, *e.g.*, E. Benvenisti, *The International Law of Occupation* 99-100 (1993) (contrasting reach of the Hague and Geneva Conventions).

a result of military operations.[6] "Control" determines whether the law of belligerent occupation applies.[7]

One must apply the international law of belligerent occupation whatever the circumstances lying behind the occupation. The law dictates when an occupation begins and when it ends. It is axiomatic that belligerent occupation and the law of belligerent occupation do not depend on, or affect, title, sovereignty, the validity of claims, and other ownership issues.[8]

This control may be of any duration;[9] at the same time, duration is not inconsequential, politically or legally. The longer the occupation, the more courts and other decision-makers are likely to criticize the occupation as wrong *per se* and sympathize with arguments that human rights norms, not part of the laws of war, should be applied to the occupation.[10] In addition, of course, prolonged occupation has a corrosive effect on morale and behavior of the occupying forces and the occupied population alike.[11]

The international law of belligerent occupation principally concerns relations among States and the occupier's relations with the population in the territory occupied.[12] The Regulations annexed to the Second Hague

6 *See, e.g.,* M.S. McDougal & F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* 732-35 (1961) (occupation and effective control of territory achieved by force of arms).

7 *See* Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", 8 *Israel Y.B. Hum. Rts.* 104, at 104-105 (1978).

8 McDougal & Feliciano, *supra* note 6, at 752 ("Fundamental in the law of belligerent occupation is the limitation that an occupant is not regarded as having acquired 'sovereignty' over the territory brought under its effective control"); L. Oppenhiem, II *International Law: A Treatise* 618 (H. Lauterpacht ed., 7th ed., 1952) ("Although a territory, and the individuals thereon, come through military occupation in war under the actual authority of the enemy, neither it nor they, according to the rules of International Law of our times, fall under the *sovereignty* of the invader").

9 Dinstein, *supra* note 7, at 105 ("Belligerent occupation continues as long as the occupant remains in the area and the war goes on").

10 *See*, *e.g.*, Hamdan v. Rumsfeld, 126 *S.Ct.* 2749 (2006), where the U.S. Supreme Court hinted that duration is an issue. Hamdan was taken prisoner in Afghanistan in the Fall of 2001: "Not until July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government finally charge him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission". *See also generally* Roberts, *supra* note 1.

11 *See*, *e.g.*, U. Savir, *The Process: 1,100 Days that Changed the Middle East* 140 (1998).

12 *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 [Geneva Convention IV], Art. 47 (protections of Convention continue in force as long as occupation continues under Art. 6), in *Documents on the Laws of War* 317 (A. Roberts & R. Guelff, eds., 3rd ed., 2000); hereinafter: *Documents on the Laws of War*. *See also Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, J.S. Pictet ed., 1958) (if existing rules had been applied in good faith

Convention of 1899 contain the first international statement of the international law governing belligerent occupation, a statement recodified in the Regulations annexed to the Hague Convention IV of 1907.[13] By World War II, the international community, acting through the Nuremberg Tribunal, had accepted the Regulations as accurately stating customary international law, binding on all States.[14] The International Court of Justice subsequently affirmed this determination.[15] The 1907 Hague Regulations provide that occupation is a question of fact:

during World War II, much suffering would have been avoided (*ibid.*, 3); main point of Geneva Convention IV is that changes in government instituted by occupier must not deprive protected persons of rights and safeguards under the Convention (*ibid.*, 274).

There is little in the 1949 Geneva Conventions or the 1977 Additional Protocol I pertaining to the obligations of persons in occupied territory. Art. 5 of Geneva Convention IV contains a derogation:

"Where in occupied territory an individual protected person [persons "in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (Art. 4)] is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such a person shall be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of a fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be". *Documents on the Laws of War*, *supra*, at 303.

On the reach of international law more generally, *see* I *Oppenheim's International Law* 41 (R. Jennings & A. Watts eds., 9th ed., 1992). *See also* A. Pellet, "The Trojan War Will Not Take Place", in *International Law and the Administration of Occupied Territories*, *supra* note 1, at 169-201, *passim*; Y. Dinstein, "Legislation Under Article 43 of the Hague Regulations and Peacebuilding", *Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper No. 1* (2004).

13 Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Convention (IV) of 1907, *Documents on the Laws of War*, *supra* note 12, at 67-68.

14 I *Trial of the Major War Criminals Before the International Military Tribunal* 221 (1947), quoted in *The Laws of War* (W.M. Reisman & C. Antoniou eds., 1994) at xix ("the customs and practices of states which gradually obtained universal recognition"). Customary law is "international custom, as evidence of a general practice accepted as law". ICJ Statute, Art. 38(1)(b). It is the unwritten international law obeyed because governments believe that they are legally obligated to do so. *See also Oppenheim's International Law*, *supra* note 12, at 26, n. 6 (conduct in question "dictated by a sense of legal obligation in the sphere of international law").

15 ICJ Wall Opinion, *supra* note 1, at para. 89. Some 35 States were parties to the 1907 Hague Regulations in 1939 (*Documents on the Laws of War, supra* note 12, at 83-84). There were 48 delegations to the League of Nations at the beginning of 1939, including some not-yet-independent States such as India. A number of States either had withdrawn from the League (Germany, Italy, Japan; the League expelled the Soviet Union in 1939),

> Article 42: Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.
> Article 43: The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[16]

If, under the Hague Regulations, occupation is a question of fact, then it follows that the end of occupation also is a question of fact.

All four Geneva Conventions of 1949, of course, elaborate the laws governing international armed conflict, and all four contain the same language about geographical and temporal applicability. Common Article 2 thus provides that:

had never been members (*e.g.*, the United States), or had been annexed (*e.g.*, Ethiopia). And a number of these were parties to the Convention, *at:*
http://www.indiana.edu/~league/nationalmember.htm
It is now a matter of historical curiosity and jurisprudential development that the 1907 Hague Convention IV specified that its provisions, including the Regulations, applied only to "contracting Powers, and then only if all the belligerents are parties to the Convention"; Convention (IV) Respecting the Laws and Customs of War on Land, 1907, Art. 2, *Documents on the Laws of War*, *supra* note 12*,* at 301.
On whether one should treat the Four Geneva Conventions of 1949 as part of customary international law, *see* T. Meron, "The Geneva Conventions as Customary Law", 81 *A.J.I.L.* 348 (1987) (almost universal ratification of Conventions suggests they have become part of customary law) and Y. Dinstein, "The Israeli Supreme Court and the Law of Belligerent Occupation: Deportations", 23 *Israel Y.B. Hum. Rts.* 1-26, at 13 (1994) (Fourth Geneva Convention "constitutive in nature" and not in its entirety declarative of customary international law).

16 *Documents on the Laws of War*, *supra* note 12, at 80-81. The *U.S. Army Field Manual* states that "[m]ilitary occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded"; U.S. Dept. of the Army, *Field Manual, FM 27—10, The Law of Land Warfare*, para. 355 (1956). "Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress"; *ibid*., para. 358.

> … The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[17]

The threshold for applying the Geneva Conventions is low: a "Power" – a "State" in common usage[18] – that agrees to and follows the Convention. According to the text, being a State Party is not a prerequisite to the applicability of the Convention, although existence as a State would seem to be, and hostilities are not required. Control, therefore, determines applicability.[19]

17 *Documents on the Laws of War*, *supra* note 12, at 301.

18 "[I]n late use, a state or nation regarded from the point of view of its international authority or influence"; VII *Oxford English Dictionary* 1213 B (6)(b) (1933).

19 *See* Dinstein, *supra* note 6, at 107 (". . . the Fourth Geneva Convention does not make its applicability conditional on recognition of titles"). The *U.S. Army Field Manual*, for example, specifies that "belligerent occupation must be both actual and effective, that is, the organized resistance must have been overcome and the force in possession must have taken measures to establish its authority. It is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district. . . . [T]he mere existence of local resistance groups does not render the occupation ineffective"; *U.S. Army Field Manual*, *supra* note 16, at para. 356.
The International Court of Justice (ICJ) takes this position in its Wall Advisory Opinion of 2004:

> In view of the foregoing, the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of these territories.

Supra note 1, at para. 101. In this paragraph, the ICJ has adopted the view, contained in the UN General Assembly request for an advisory opinion, that the "Palestinians" have title to the West Bank, and by implication the Gaza Strip. UN General Assembly Resolution ES-10/14 (Dec. 8, 2003) requested the ICJ "to urgently render an advisory opinion on the following question: What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, …". The ICJ takes as relevant that "Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland as a depositary State, considered that unilateral undertaking valid. It concluded, however, that it '[was] not – as a depositary – in a position to decide whether' 'the request [dated 14 June 1989] from the Palestine

If "effective" control – the language of the U.S. Army *Field Manual*[20] – is the test, then what does "effective" control mean? The texts and practice are reasonably clear. As World War II demonstrated, especially in the case of occupied and unoccupied France but also elsewhere,[21] and Common Article 2 of the Geneva Conventions confirmed, occupation may be partial; that is, occupation of part of a territory may occur without thereby making the entire territory subject to occupation.[22] The quarantine of Cuba and the blockade of the Falkland Islands are two examples since World War II that perimeter control itself does not imply occupation. If a part of a territory is under belligerent occupation, moreover, sovereignty is unaffected both in the occupied and unoccupied territory.[23]

Awkward language in Article 6 of the Fourth Geneva Convention suggests that terminating an occupation is complicated:

> The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2. In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however the Occupying Power shall be bound, for the duration of the occupation, to the extent that such

Liberation Movement in the name of the 'State of Palestine' to accede' *inter alia* to the Fourth Geneva Convention 'can be considered as an instrument of accession"; *ibid.,* at para. 91. The 1949 Israeli boundaries were Armistice Lines, except for the Israeli-Lebanese boundary, which followed the international boundary between Lebanon and the League of Nations Mandate for Palestine. General Armistice Agreement between Israel and Lebanon, 1949, Art. V, in III *The Arab-Israeli Conflict* 393 (J.N. Moore, ed., 1974). While it is possible to read "territory of a High Contracting Party" to mean "territory over which a High Contracting Party has sovereignty" or to which it has title, *see* J. Stone, *Israel and Palestine: Assault on the Law of Nations* 53, 191 n. 24 (1981), it is not the only possible reading of the provision. Moreover, although this argument may appear to be dispositive, it seems inconsistent with the overarching purpose of the Geneva Conventions, which is to extend as far as possible legal protections to those swept into the maelstrom of war. *See, e.g., Commentary, IV Geneva Convention, supra* note 12, at 62-64; *Documents on the Laws of War*, *supra* note 12, at 195 (concern to protect as far as possible persons caught up in war); Benvenisti, *supra* note 5, at 109-10.

20 *U.S. Army Field Manual*, *supra* note 16, at para. 356.

21 Including partial occupation by the Soviet Union. *See generally* S.E. Ambrose, *A New History of World War II* 72-74 (rev. ed. 1997).

22 *See* discussion of Syria in Lebanon, *infra*.

23 *See, e.g.,* McDougal & Feliciano, *supra* note 6, at 732-39 (transitory character of occupation; disposition of territory).

> Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: … . [24]

The commentator on the Convention quotes the Rapporteur of Committee III of the Geneva negotiations that "the general close of military operations" means "when the last shot has been fired".[25] In the absence of an agreement ending Israel-Palestinian hostilities and marking the "last shot" in legal terms, applying this test to Israeli-Palestinian relations is not likely to lead to any useful conclusions about the applicability of the law of occupation in the foreseeable future.

II. ISRAEL'S WITHDRAWAL FROM THE GAZA STRIP, 2005

Israel's occupation of territory seized as a result of the Six Day War of June 5-10, 1967 has raised such questions as the rights of the occupier with respect to actions to maintain security and to advance territorial or other claims. From inception to withdrawal, the occupation and partial withdrawals have been controversial politically and legally. All sides have invoked the law in stating their cases. Protagonists and commentators often speak or write without recalling how Israel became a belligerent occupant.[26] This history forms part of the context in which to assess the application of the law of belligerent occupation and is relevant to determining legal outcomes.[27]

As a result of the Six Day War,[28] Israel occupied territories previously under Arab control: the Sinai Peninsula and the Gaza Strip (Egypt), the West

24 *Documents on the Laws of War*, *supra* note 12, at 303-304.

25 *Commentary, IV Geneva Convention*, *supra* note 12, at 62.

26 *See*, *e.g.*, Roberts, *supra* note 1, at 58; Roberts, *supra* note 3, at 281.

27 *See*, *e.g.*, S.M. Schwebel, "What Right to Conquest?", in *The Arab-Israeli Conflict*, *supra* note 19, Vol. II, at 315-18 (the fact that Israel acquired territory in lawful use of force in self-defense gives it superior claim to those who previously held the same territory by virtue of the unlawful use of force).

28 For an account of the war, *see* M.B. Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East* (2002). D. Ross summarized the run-up to, and unfolding of, the War as follows:

> Nasser [President of Egypt], after being taunted by the Syrians and the Jordanians for not doing enough to protect Syria in the face of escalating tensions and military engagements with Israel, demanded that UN Secretary-General U Thant pull the UNEF [United Nations Emergency Force established in 1956 to separate Egypt and Israel] out of the Sinai. U Thant complied. Nasser moved Egyptian forces back into the Sinai. While probably not originally intending to do so, he acted to reimpose the blockade on the Israeli port of Eilat when he declared on May 22 that the Straits of Tiran were mined. In addition, he moved six Egyptian divisions to the Israeli border, threatening to inflict a final defeat on Israel once and for all. Israel, with no strategic

> depth and facing six divisions on its borders, mobilized its forces. It also asked the United States to fulfill the Eisenhower commitments of 1957 [to prevent any reimposition of a blockade of Eilat]. Being bogged down in Vietnam, the Johnson administration offered only to try to put together an international flotilla to open the Straits of Tiran to Israeli shipping from Eilat. The United States did not address the Egyptian threat in the Sinai, and in any case showed little capability or will to break the blockade of Eilat. After nearly two weeks of uncertainty - with bloodcurdling threats about the destruction of Israel coming from Egypt and ineffectual U.S. efforts still under way - Israel launched a pre-emptive attack against the Egyptian air force, destroying it the first three hours of the war. In six days Israel went on to defeat Egypt, Jordan, and Syria, seizing considerable territory from all three: the Sinai desert and the Gaza Strip from Egypt; the West Bank from Jordan; and the Golan Heights from Syria.

D. Ross, *The Missing Peace* 21-22 (2004).

See also R. Schifter's review of J. Carter, "Palestine: Peace, Not Apartheid", in *Mediterranean Q. Rev.* (forthcoming, 2006) (rebutting charge that Israel attacked Jordan; in fact, Jordan entered the war on the side of Egypt despite Israeli assurances that Israel would not attack). *Also* Ross, *supra*, at 166. In May 1967, the U.S. Embassy in Cairo reported that:

> ...over the past ten years we have comforted ourselves with a number of myths regarding Egypt's relative indifference to Palestine problem as a factor in our relations and have proceeded on assumption Nasser wished keep issue in ice box. It is now clear how much it has rankled and how important it has been to Nasser. He is ready to risk everything for it. He has bided his time and has planned well. His only area of miscalculation may be his estimate of Egyptian military capabilities vis-a-vis Israel.

American Embassy Cairo 5080, May 27, 1967. LBJ Library, University of Texas.

Oren quotes another part of this cable; *supra,* at 95. A mid-level Soviet official told an American source that:

> ...the Soviets overestimated the Arabs' ability to employ their substantial military strength against the Israelis while the Arabs overrated their own strength and underrated the Israeli military capability and determination to win. When a source asked if that meant that the Soviets had encouraged the Arabs in their hostile attitude toward Israel, the Soviet replied affirmatively, stating that the USSR had wanted to create another trouble spot for the United States in addition to that already existing in Vietnam. The Soviet aim was to create a situation in which the US would become seriously involved, economically, politically, and possibly even militarily and in which the US would suffer serious political reverses as a result of its siding against the Arabs. This grand design, which envisaged a long war in the Middle East, misfired because the Arabs failed completely and the Israeli blitzkrieg was so decisive. Faced with this situation, the Soviets had no alternative but to back down as quickly and gracefully as possible so as not to appear the villains of the conflict.

CIA to White House Situation Room, June 1967, LBJ Library, University of Texas, Doc. 84, sanitized 5-3-1984.

As Ross points out, a school of thought holds that Israel *per se* is a belligerent occupant, with no right to any territory of the former Palestine Mandate. *Supra,* at 29-33 (rise of Arab nationalism and call for repudiation of Balfour Declaration and Sykes-Picot

Bank and East Jerusalem (Jordan), and the Golan Heights (Syria). Unlike the Gaza Strip, the Sinai Peninsula had been an integral part of Egypt.[29] During the period 1948-1967 of Egyptian military government of the Gaza Strip, Egypt neither annexed nor asserted territorial claims to the area. While governing the Gaza Strip, stated Egyptian policy was that it formed part of "the great Arab homeland", in the words of the Gaza Constitution of 1962, and administered by the Egyptian government.[30]

Jordan, not only occupied the West Bank and East Jerusalem during the same period, but also annexed and governed them as part of Jordan.[31] No State, and certainly no UN body, insisted that the law of belligerent occupation applied to Egypt's administration of Gaza or Jordan's government of the West Bank and East Jerusalem and that Egypt and Jordan were obliged to obey it.[32]

Agreement). That school of thought supports international law insofar as it favors Arab or Palestinian Arab self-determination, but not Jewish self-determination. Each side of the argument looks to the same international law for support.

Cf. also T.L. Friedman, *From Beirut to Jerusalem* 15-16 (Anchor ed., 1990) ("In June 1967, Israel launched a preemptive strike against Egypt, Syria, and Jordan, after Nasser had declared his intention to annihilate the Jewish state and forged military alliances with Syria and Jordan for that purpose, building up troop concentrations along his border with Israel and blockading shipping to the Israeli port of Eilat"). How one places emphasis is all important to how one understands the facts and the law. The ICJ wrote only that "In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under the British Mandate (including those known as the West Bank, lying to the east of the Green Line)". ICJ Wall Opinion, *supra* note 1, at para. 73.

29 *See*, *e.g.*, M. Rosenne, "Development of Oil Resources in Sinai", *in* I *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects* 335-36 (M. Shamgar, ed., 1982) (hereinafter: *Military Government*) (Egypt and Israel assume Egyptian sovereignty over Sinai).

30 *See* C. Farhi, "On the Legal Status of the Gaza Strip", in *Military Government, supra* note 29, at 77-78. *See also* Benvenisti, *supra* note 5, at 112 (lack of change in legal status of occupied territories). The 1949 Israel-Egypt Armistice Agreement, provided that the Agreement was concluded without prejudice to "rights, claims and positions" on the ultimate disposition of Palestine. General Armistice Agreement between Israel and Egypt, 1949, Art. V, para. 2. Repr. in *The Arab-Israeli Conflict*, *supra* note 19, Vol. III, at 383.

31 Benvenisti, *supra* note 5, at 108; A. Gerson, *Israel, The West Bank, and International Law* 78 (1978).

32 It is difficult, of course, to prove a negative. *See, e.g.,* I *Documents on Palestine* 185-206 (M.F. Abdul Hadi, ed., 1997); E. Playfair, "Legal Aspects of Israel's Occupation of the West Bank and Gaza: Theory and Practice", in *Occupation: Israel over Palestine* 101-26 (N. Aruri, ed., 2nd ed., 1989). Neither of these studies suggests that anyone raised the point during Egyptian or Jordanian rule over the Gaza Strip or the West Bank and East Jerusalem, respectively. Nor did anyone insist on the application of that law to Syria's occupation of the Bekaa Valley, which Syria entered in the 1970s.

The Golan Heights had been within the French Mandate and French protectorate of Syria since 1923, and independent Syria since 1943.[33]

The application of the law of belligerent occupation to these occupied territories only became an international political and diplomatic issue once Israel came to control them as a result of the Six Day War of 1967 because Israel asserted territorial claims as of right in Jerusalem and the West Bank; Israeli actions in the Gaza Strip, such as building settlements, never seemed to signify more than the creation of bargaining chips.[34]

[33] Y. Meron, "The Golan Heights: 1918-1967", in *Military Government*, *supra* note 29, at 85-107. *See also* F.C. Hof, "The Line of June 4, 1967", 14(5) *Middle East Insight,* at 17-23 (Sept.-Oct. 1999) (1949 Armistice Demarcation Line between Israel and Syria did not track 1923 international boundary, which Syria has never accepted, and Golan Heights have been on Syrian side of 1923 boundary).

[34] Almost from the moment Israel established its control over the territories, legal arguments became part of the tapestry of regional and international politics and war. Partly, this phenomenon reflected the intentional imprecision of the UN Security Council. The UN Security Council in Nov. 1967 adopted Res. 242 (1967), establishing a framework for Arab-Israeli peace, which the authors hoped was at hand:

> The Security Council . . . 1. Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles: (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force; 2. Affirms further the necessity (a) For guaranteeing freedom of navigation through international waterways in the area; (b) For achieving a just settlement of the refugee problem; (c) For guaranteeing the territorial inviolability and political independence of every state in the area, through measures including the establishment of demilitarized zones; . . ..

The authors of this Resolution believed that an Arab-Israeli settlement had to reflect two points in particular. First, in order not to repeat what they believed to have been a mistake after the 1956 Suez crisis, Israel would not have to withdraw from territories occupied without peace agreements with its neighbors. *See* E.V. Rostow, *UN Security UN Security Council Resolution 242: The Building Block of Peacemaking* 115 (1993); Gerson, *supra* note 31, at 76 and 104, n. 179 (1978); Stone, *supra* note 19, at 53, 191 n. 24. Second, they believed that Israel was entitled to secure and recognized boundaries as part of the establishment of peace. That would necessitate boundary adjustments in Israel's favor and an end to the rejection of the creation of Israel by Arab and other States. The absence of "the" before "territories" in the English version of Res. 242 (the French version uses "des territoires" because of linguistic necessity) fueled a disagreement about whether the Resolution requires a withdrawal from every inch of the occupied territories. *See*, *e.g.,* A.J. Goldberg, "United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East", 12 *Colum. J. Int'l L.,* at 133 (1973), as well as the contrasting view of N. Elaraby in *UN Security Council Resolution 242*, *supra*, at 35-44, who also argues that Israel did not act in self-defense. *See also* M. Rosenne in *UN Security Council*

The withdrawal of Israeli forces and citizens from the Gaza Strip in September 2005 put termination of belligerent occupation on the agenda. Did this action end the partial Israeli occupation of the Gaza Strip that had existed since the beginning of the implementation of the Oslo Accords? The view that belligerent occupation ceases to exist at "the general close of military operations" defined as "when the last shot is fired" leads to the conclusion that the 1979 Israel-Egypt Peace Treaty and the 1994 Israel-Jordan Peace Treaty marked the formal, general close of military operations, although in both cases there had not been shooting between the parties for many years.[35] In the cases of the territories over which Israel has exercised control since "the general close of military operations", termination of occupation as a matter of law depends on control under the 1907 Hague Regulations and "functions of government" under the 1949 Fourth Geneva Convention.[36] And

Resolution 242, *supra*, at 30-31 (inadmissibility of acquisition of territory by use of force does not preclude occupation). The premise of the Resolution, articulated or not articulated, was that Israel had used force in a lawful exercise of the inherent right of self-defense under the UN Charter (Art. 51). In 2002, the Security Council endorsed the view that creation of an independent State of Palestine, side-by-side with Israel "within secure and recognized borders", would bring an end to the Israeli-Palestinian conflict and would contribute to Middle East peace and stability; S.C. Res. 1397 (2002). Implicitly, this State would be "a just settlement of the refugee problem", affirmed as a necessary goal in Res. 242, para. 2(b).

Forty years after the adoption of Res. 242, during which war alternated with Arab-Israeli negotiations and execution of agreements, Arabs and Israelis still find themselves unable or unwilling to reach agreement on peace terms. The 1979 Egypt-Israel Peace Treaty, the 1993 Oslo Accords between Israel and the Palestine Liberation Organization and subsequent agreements between Israel and the Palestine Authority, and the 1994 Jordan-Israel Peace Treaty have narrowed the number of controversies (if one puts aside continued opposition to the establishment of Israel). *See also* Schifter, *supra* note 28 (Clinton-Barak plan for transferring 90% of West Bank and 100% of Gaza to Palestinian Authority).

35 I am indebted here as elsewhere to Y. Dinstein, "Palestinian Autonomy and Its Legal Status", 26 *Security Dialogue* 185 (1995). *See also* M. Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage", in *Military Government*, *supra* note 29, at 31-43 (Israel's application of customary and conventional international law while reserving its claims to title; disagreement with the International Committee of the Red Cross and others on the applicable international law). Israel and Syria have not engaged in military operations in many years. At the same time, there has been no "general close of military operations" marked by a peace treaty between the two States. *But see* Roberts, *supra* note 1, at 55.

36 Art. 6 of Geneva Convention IV specifies the continued applicability of certain provisions of the Convention "to the extent that such Power [the Occupying Power] exercises the functions of government in such territory". *Documents on the Laws of War*, *supra* note 12, at 304.

so we are left with questions of fact as to when Israel ceased to exercise "effective control" over the Gaza Strip.

Prior to the withdrawal, Israel's occupation of the Gaza Strip was confined to some twenty percent of the territory over which it exercised governmental control.[37] Israel's "effective control" of the Gaza Strip did not extend beyond that approximately twenty percent. The Palestinian government had been in place since 1994, exercising governmental functions in the unoccupied eighty percent of the Gaza Strip. When Israel withdrew, it turned over all government authority everywhere inside the Gaza Strip to the Palestinian Authority, the internationally recognized Palestinian government,[38] and the Palestinian Authority has exercised such government authority since that time. Israel controls the air-space, access by sea, and the borders between the Gaza Strip and Israel. The original withdrawal plan envisaged Israeli control of the Egyptian-Gaza border as well.[39] Israel gave up that part of the plan in part because it agreed with the U.S. (and others') view that controlling this border was not compatible with an end to the occupation, and in part because leaving a force on that border was not practicable.[40] Once Israel withdrew its armed forces and citizens from the Gaza Strip, therefore, it ceased to exercise any governmental function as ordinarily understood.

Israel's presence in the Gaza Strip ended on September 12, 2005. Contrary to Israel's hopes, as expressed by Prime Minister Sharon,[41] the withdrawal has not ended hostilities. Gazans fire rockets at Israel. Israel has conducted military operations in Gaza in an effort to halt the rocket attacks. Gaza is not the peaceful neighboring territory Israel hoped it would be.[42] The

37 *See* "Disengagement - Profiling the Settlements", Americans for Peace Now, Settlements in Focus, Vol. I, Issue 5, July 8, 2005: http://www.peacenow.org/hot.asp?cid=1048. *See also* G.R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* 43 (2000).

38 *See, e.g.,* "Mideast Accord: Framework for Peace", *N.Y. Times*, May 5, 1994, at A18; D. Hoffman, "Israel and PLO Reach Historic Accord", *Wash. Post*, Sept. 10, 1993; M. Parks, "Winners Say Peace Prize Points to Future", *LA Times*, Dec. 11, 1994, at A1.

39 D. Makovsky, *Engagement through Disengagement: Gaza and the Potenital for Renewed Israeli-Palestinian Peacemaking* 41 (2005).

40 *See* M. Herzog, "A New Reality on the Egypt-Gaza Border (Part II): Analysis of the New Israel-Egypt Agreement", Washington Institute for Near East Policy Peace Watch #520 (Sept. 21, 2005): http://www.washingtoninstitute.org; Agreed Documents on Movement and Access from and to Gaza, Nov. 15, 2005. http://www.mfa.gov.il

41 *See, e.g.,* Speech by P. M. Sharon, May 24, 2005, at: http//www.mfa.gov.il/MFA/Peace+Process/ Guide+to+the+Peace+Process/Israeli+Disengagement+Plan+20-Jan-2005.htm#aipac

42 *See* "Baby Among Four Israelis Hurt in Palestinian Rocket Attack", Agence France Presse, Feb. 3, 2006; S. Erlanger, "Rockets and Border Attacks Add to the Strife in

withdrawal did not fulfill expectations on the Palestinian side either, because Israel has maintained perimeter control and has used force in the area. Before the withdrawal, a member of a Palestinian non-governmental organization wrote that: "the only thing the government [of Israel] is relinquishing direct control over is the people. This is not the end of occupation".[43] Is this statement accurate as a matter of law; does Israel's activity constitute occupation as a legal matter?[44]

The written law defines occupation in terms of effective control and the substitution of the Occupying Power's authority for the authority of the legitimate Power.[45] As the Fourth Geneva Convention states, the authority in question is governmental.[46] The Convention elaborated this thought in terms of treatment of civilians.[47]

The continuation of legal belligerent occupation of Gaza would mean the continuation of Israeli obligations under the Fourth Geneva Convention to

Gaza", *N.Y. Times*, Jan. 5, 2006, at A10; speech by P. M. Sharon at the UN General Assembly, Sept. 15, 2005. UNGA 2005 World Summit, High Level Plenary Meeting.

43 L. Hourani, "Withdrawal from Gaza Won't End the Occupation", *Charlotte Observer*, Aug. 13, 2005.

44 J. Dugard, Special Rapporteur of the Commission on Human Rights, believes it does. *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, Commission on Human Rights, 62nd Session, Item 8 of the Provisional Agenda, E/CN.4/2006/29, Para. 8. C. Bruderlein of the International Committee of the Red Cross comes close to saying the occupation continues. C. Bruderlein, "Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law", *Harvard University Program on Humanitarian Policy and Conflict Research* (Aug. 2004), Sec. IV ("To conclude, the end of occupation is a legal determination based on facts. It has to be made by each of the High Contracting Parties to the Fourth Geneva Convention. … To successfully bring the occupation of the Gaza Strip to an end, one may argue that Israel will need at a minimum to withdraw the entirety of its troops and installations from the Gaza Strip, in particular from the 'Philadelphia Road', transferring full and sovereign control of the border of the Gaza Strip with Egypt to the Palestinian Authority").
Both of these studies ignore the realities of Arab-Israeli hostilities and the implications of these realities on the application of international law. It is not clear what Bruderlein means by asserting that each of the High Contacting Parties has to determine whether occupation continues. Does he mean that each has to decide for itself what status it will accept or recognize? Or does he mean that occupation continues until each of the High Contracting Parties decides otherwise?

45 *See* Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), (2005), [2005] *I.C.J. Rep.* para. 59 (substitution of authority test).

46 Geneva Convention IV, Art. 6, *Documents on the Laws of War*, *supra* note 12, at 303-304.

47 *See* Arts. 1-12, 27, 29-34, 47, 51-53, 59, 61-77, 143 of Geneva Convention IV that bind a Power exercising "the functions of Government" in the occupied territory; *Documents on the Laws of War*, *supra* note 12, at 301-306, 311-13, 317-19, 321-27, 351 (occupier's obligations *vis-a-vis* inhabitants).

provide for the security and minimal well-being of the inhabitants. This condition would mean that Israel would be responsible, not only for agreeing "to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal",[48] but also for cooperating with and supervising distribution.[49] While it is true that this latter obligation is delegable,[50] it is difficult to conceive of an agreement between Israel and the Hamas-led Palestinian government on such an arrangement. The fact that there is a Palestinian entity exercising "the functions of government" indicates the paradoxical nature of the proposition that the occupation continues. The conclusion that the occupation continues would appear to reflect a number of *agendae* having nothing to do with occupation and everything to do with Palestinian-Israeli politics: a grave breach of the Fourth Geneva Convention carries with it the obligation on the part of States Parties to prosecute or extradite persons alleged to have committed such grave breaches. Discussions of the Arab-Israeli conflict at the United Nations, for example, contain a substantial number of accusations and counter-accusations of grave breaches.[51] National courts as well as international criminal tribunals have taken these charges from the worlds of diplomatic theatre, academic debate, and mock trials to affect individual, day-to-day decisions.[52] Treating the occupation of the Gaza Strip as ended recognizes the congruence of law and practicality: it is not foreseeable that Israeli armed forces will enter the Gaza Strip in order to protect Palestinians against the actions of their own government, or to ensure that that government fulfills its humanitarian obligations, or to put an end to violent conflict among Palestinian factions. And it would be absurd to allow the legitimate Palestinian government to determine when the occupation ends. In present circumstances, doing so would empower a government with the stated

48 Geneva Convention IV, Art. 59, *Documents on the Laws of War*, *supra* note 12, at 321.

49 Geneva Convention IV, Art. 61, *ibid*., at 321-22.

50 *Id.*

51 *See, e.g.,* A/ES-10/PV.21, UNGA Emergency Special Session, 21st mtg., Oct. 20, 2003, at 20 ("Israel, the occupying Power, is committing a terrible war crime against the Palestinian people – of the scope of a crime against humanity – by building an expansionist wall in the occupied Palestinian territory, including East Jerusalem". Nasser al-Kidwa, then-Permanent Observer of Palestine to the United Nations). *See also* D. Izenberg, "Obligations to Gaza at Heart of Latest High Court Petition", *The Jerusalem Post*, Mar. 12, 2006, *available on:* http://www.jpost.com/serviet/Satellite?cid=1139395584248pagename=JPost%2FJPArticle%2FShowFull (petition to High Court regarding movement from Gaza to West Bank).

52 *See, e.g.,* A. Harel, "Fearing Arrest, IDF Officer Cancels Studies in U.K.", *Haaretz*. com, Mar. 3, 2006.

program of destroying Israel to determine when Israel's belligerent occupation would end.

The international law of belligerent occupation has applied to the territories Israel has controlled as a result of the Six Day War of June 1967.[53] This conclusion flows from the fact that the belligerents – Israel, Egypt, Jordan, and Syria – were independent States under international law and parties to the Fourth Geneva Convention of 1949. Under that law, it is difficult to conclude that Israel remains a belligerent occupant in the Gaza Strip. An end to occupation is just that: another government, not of a foreign power, takes up the reins. The end of occupation does not mean that there is peace. Nor does it mean that the end of occupation in the Gaza Strip means that Israel has ceased to be a belligerent occupant elsewhere.

The Special Rapporteur of the Human Rights Commission argues that the Israeli occupation of Gaza continues, pointing to such Israeli acts as sonic booms over the Gaza Strip and other acts, such as the targeted killing of those whom Israel considers to be in the chain of command of armed attacks against it.[54] Such argumentation suggests that the controversy, if there is one, over whether Israel remains a belligerent occupier in the Gaza Strip is about Israeli-Palestinian and Arab politics and rights, and not about occupation.

The confusion of the law of occupation with the rights and wrongs of the Arab-Israeli conflict neither strengthens respect for the law nor assists in bringing this conflict to an end. It weakens the usefulness of the law as a common language in efforts to resolve the conflict. A reader of the report of the Special Rapporteur of the Human Rights Commission or the ICJ Advisory Opinion on the Israeli wall,[55] for example, will not find out how

53 This statement does not enjoy universal acceptance. On the disagreement, *see* Benvenisti, *supra* note 5, at 107-12 (summarizing UN, International Committee of the Red Cross, and Israeli Supreme Court and government views).

54 Dugard, *supra* note 44, at para. 8. Dugard does not subject the measures he criticizes to analysis in terms of necessity and proportionality, which are integral to analysis of the use of force under international law.

55 To avoid confusion, I have followed the usage of the Advisory Opinion. Israelis refer to the "wall" as a "security fence". *See, e.g.,* Beit Sourik Case, *supra* note 2. The Secretary-General's report on the subject uses the term "barrier" in the hope that it is a neutral term. UNGA, Report of the Secretary-General prepared pursuant to G.A. Res. ES-10/13, UN Doc. A/ES-10/248, at 2 (Nov. 24, 2003). The wall includes concrete walls, barbed-wire and chain link fence barriers, anti-vehicle trenches, sensors, etc. In light of the Beit Sourik decision (*supra* note 2), in late Feb. 2005, the Israeli government approved modified routing of the wall that would place 8 percent of occupied territory in the West Bank west of the fence. D. Makovsky & A. Hartman, "Israel's Newly Approved Security Fence Route: Geography and Demography", Washington Institute for Near East Policy Monograph No. 495 (Mar. 3, 2005), *available on:* http://www.washingtoninstitute.org/templateC05.php?CID=2268.

Israel came to be an Occupying Power, why it has remained an Occupying Power for so long, or why it has been so difficult to achieve a diplomatic settlement of the conflict. In this respect, both institutions reflect their political connection to the UN General Assembly.[56] And their views reflect the statements made so often in the United Nations to the effect that how one uses the law of occupation affects the legal status of the Gaza Strip and the West Bank; that status is and will continue to be determined in other ways. It appears that one cannot say too often that the international law of belligerent occupation deals only with the fact of control; it does not affect sovereignty. And perimeter control does not constitute belligerent occupation although it may constitute, legally, another condition.

The need to find a balance between Israeli and Palestinian rights is obvious; it has been stated explicitly or implicitly in the UN Security Council's framework documents for Arab-Israeli peace and in Israel's agreements with Egypt and the Palestine Liberation Organization and Palestine Authority.[57] Arab-Israeli peace is not going to be achieved so long as there is any doubt about the fact that both sides possess legal rights under international law.

III. THE OCCUPATION OF IRAQ, 2003-2004

The Iraq war has raised issues across the spectrum of international law. They include the relationship between the right of self-defense and the UN

[56] Neither document faces reality head on: the Special Rapporteur, for example, notes "security reasons" for Israeli suspension of bus convoys between the Gaza Strip and the West Bank as if everyone understands what is meant or even that the words mean the same thing to all readers. Dugard, *supra* note 44, para. 8. The ICJ similarly has difficulty helping its readers: for example, its Advisory Opinion does not use the word "terrorism" except in quotations or in summarizing Israeli arguments. ICJ Wall Opinion, *supra* note 1, at paras. 46, 116, 127, 138. When the Advisory Opinion refers to what Israel (and the United States and other States) regard as Palestinian terrorism against Israel, it uses the words "acts of violence"; *ibid.*, at paras. 63, 141, 162. On some of the flaws in the ICJ's thinking about self-defense, s*ee generally, e.g.,* R. Wedgwood, "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense", 99 *A.J.I.L.* 52 (2005); S.D. Murphy, "Self-Defense and the Israeli *Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?", *ibid.,* at 62.

[57] UN S.C. Res. 242 (1967), 338 (1973), 1397 (2002), 1515 (2003); A Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978, Sec. A, in *The Arab-Israeli Conflict*, *supra* note 18, Vol. 4, at Part 1, 309; Israel-PLO Declaration of Principles, Sept. 13, 1993, Preamble, U.S. State Dept. Dispatch Magazine (1993), at: http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1993/html/Dispatchv4Sup4.html; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Preamble.

Security Council's exercise of powers granted by the UN Charter,[58] the authorization to use force when a claim of self-defense is controversial at best,[59] the powers, actual and legal, of the occupier and the legal regime applicable,[60] and the treatment of prisoners of war[61] and of non-combatants under the law of war.[62] The occupation of Iraq, 2003-04, highlighted the power of the UN Security Council to authorize actions by the belligerent occupant – indeed to define the belligerent occupant – refining the traditionally understood content and limits of the international law of belligerent occupation and in some cases exceeding those limits.[63]

On May 22, 2003, the Security Council unanimously adopted Resolution 1483 (2003) with a sigh of relief.[64] Partly, the relief resulted from the divisions among the UN Permanent Members over whether to agree in 2002 and 2003 to use force against Iraq to compel compliance with UN Security

58 *See* N. Rostow, "The International Use of Force After the Cold War", 32 *Harv. Int'l L. J.* 411 (1991) (right of self-defense exercised in the context of UN Security Council approval).

59 *See, inter alia,* N. Rostow, "Determining the Lawfulness of the 2003 Campaign Against Iraq", 34 *Israel Y.B. Hum.Rts*. 15 (2004) (UN Security Council and self-defense predicates for 2003 invasion of Iraq). A version of this article has been printed in the US Naval War College Blue Book Series, as "International Law and the 2003 Campaign against Iraq", in "Issues in International Law and Military Operations", 80 *Int'l L. Studies* (Naval War College, R.B. Jaques ed., 2006).

60 *See, e.g.,* A. Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", 100 *A.J.I.L.* 580 (2006) (legal and practical complexities of occupation with goal of changing government and/or society); Dinstein, *supra* note 12.

61 *See*, *e.g.*, M. Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (2004); *The Torture Papers: The Road to Abu Ghraib* (K.J. Greenberg & J.L. Dratel, eds., 2005); L.P. Bremer III, *My Year in Iraq* 279-80 (2006).

62 *See*, *e.g.*, M.J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", 99 *A.J.I.L.* 119 (2005); Roberts, *supra* note 60, at 595-601.

63 As Roberts notes, the UN Security Council's authority and power to do the same when it makes the United Nations the occupier is something deserving of study in its own right; Roberts, *supra* note 60, at 619. *See also* G.H. Fox, "The Occupation of Iraq", 36 *Geo. J. Int'l L.* 195, 254-62 (2005) (Security Council did not override occupation law).

64 *See* UN S.C. Mtg. 4761, May 22, 2003 (S/PV.4761) (statements by Negroponte, de la Sabliere, Pleuger ("In this resolution, we have left behind the divisions of the past for the sake of the people of Iraq"); Aguilar Zinser ("The new consensus achieved in the Council with respect to the adoption of the resolution is based precisely on the fact that, over and above our differences, we have an institutional commitment and obligation that derives from the mandate entrusted to this organ by the Charter of the United Nations"); Lavrov ("On the whole, agreement on resolution 1483 (2004) reaffirmed the desire of all members of the Council constructively to find generally acceptable agreements that will genuinely help the Iraqi people to regain full sovereignty as soon as possible").

Council conditions for peace after the 1991 Operation Desert Storm,[65] divisions that characterized the Security Council's treatment of Iraq since at least 1993.[66] Relief thus in part reflected a wish to turn an historical page. And partly it resulted from a desire to restore unity in the Security Council from an understanding that the Security Council is most influential when it is united.[67] The Resolution merits close examination because negotiators recognized that it was a legal as well as a political document[68] and because, together with Security Council Resolution 1546 (2004), it brackets the occupation of Iraq.

Resolution 1483 (2003) is wide-ranging. It had a number of purposes and tried to meet the Iraq *agendae* of a number of States and the Secretary-General as well. First, it placed the United Nations[69] on record in favor of democracy in Iraq, control by Iraqis of their natural resources, and international support for these goals, and "express[ed] resolve that the day when Iraqis govern themselves must come quickly".[70] Second, it supported the idea that "the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative government".[71] In this connection, the Security Council asked the Secretary General to appoint a Special Representative (Sergio Vieira de Mello) and gave him the mandate he, the Secretary-General, and the Security Council membership – in that order – wanted.[72] Third, the Resolution recognized that the United States and Great Britain alone were the Occupying Powers under international law and that other States could act in Iraq under their direction without becoming

65 *See generally*, Rostow, *supra* note 58. At one point in the discussions among Security Council members over whether to authorize the use of force against Iraq, a representative of an elected member said that the Permanent Five should not look to the elected ten to resolve their differences.

66 *See, e.g.,* M.R. Gordon, "Raids on Iraq: Few Choices for Clinton", *N.Y. Times*, Jan. 21, 1993, at A10; P. Lewis, "U.S. is Hardening Its Stand on Iraq", *N.Y. Times*, Dec. 19, 1993, at 11.

67 *See*, *e.g.*, statement by Pleuger (Germany), Oct. 16, 2003 (Germany voted for Res. 1511 (2003) in part because the Council can "contribute to swift stabilization of the conditions in Iraq . . . only when the Security Council appears as unified as possible. We therefore did not want to stand in the way of Council unity". S/PV.4844 at 4).

68 The question of the Security Council's authority to act or authorize action that goes beyond the law of belligerent occupation was raised and answered in the affirmative by the then-Legal Counsel to the United Nations, H. Corell.

69 UN Charter, Art. 24 para. 1 (Security Council acts on behalf of members in regard to maintenance of peace and security).

70 S.C. Res. 1483 (2003), at Pream. para. 4.

71 *Ibid*., Pream., para. 7.

72 *Ibid*., para. 8.

Occupying Powers.[73] At a minimum, the Resolution attempted to refine the law of the Fourth Geneva Convention and the 1907 Hague Regulations in this respect. Neither of these Conventions, for example, had made such distinctions among occupiers.

Finally, the Resolution addressed a substantial number of financial and economic issues. These included the monitoring of Iraqi receipts and disbursements and the winding up of the "Oil-for-Food Programme", which already had become a focal point for investigations and accusations of corruption.[74] The Resolution granted qualified immunity from legal proceedings to Iraqi oil exports and UN-style privileges and immunities to such institutions as the Development Fund for Iraq, which was a creation of the Occupying Powers in cooperation with the Iraq Central Bank.[75] Above all, the Resolution represented the Security Council's acceptance of the transformation of Iraq wrought in the wake of the U.S.-UK led invasion, March 19, 2003.

The Coalition Provisional Authority (CPA), which had become the occupation administration in the April-May 2003 period, looked to the Resolution to support its actions that went beyond what the 1907 Hague Regulations and the Fourth Geneva Convention contemplated in terms of occupation governance. Thus, the first regulation issued over the signature of CPA Administrator, former U.S. Ambassador L. Paul Bremer III, on May 16, 2003, states that "The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war".[76] Pursuant to[77] this assertion of authority, the CPA issued more than 100 regulations, orders, and memoranda.

73 *Ibid*., Pream., paras. 13, 14.

74 *See generally* J.A. Meyer & M.G. Califano, *Good Intentions Corrupted: The Oil-for-Food Program and the Threat to the U.N.* (2006).

75 S.C. Res. 1483 (2003), paras. 12-23. The Coalition Provisional Authority created the Development Fund for Iraq as an account of the Central Bank of Iraq to receive and disburse Iraqi funds, principally revenue from the sale of petroleum products and natural gas.

76 CPA/REG/ 16 May 2004/01 (available on the official website of the Coalition Provisional Authority). Page 2 appears to be an image of the signed page; page 1 prints as a different kind of document. UN Security Council resolutions are numbered at the moment adoption is announced. The first page of this CPA document likely was altered subsequently to May 16, 2007, to reflect UN S.C. Res. 1483 (2003), adopted the following week.

77 CPA Regulations, Order, and Memoranda use the phrase "consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003)" so as not to invite argument about which paragraph of which resolution specifically authorized which action. The phrase is used in U.S. presidential reports "consistent with" the War Powers Resolution. *See*, *e.g.*, Reagan to Wright (Speaker of the House), Stennis (President pro

CPA regulations established government structures, policies, and rules. For example, CPA Order Number 10, signed on June 5, 2003,[78] placed prisons and detention facilities under the Ministry of Justice of Iraq. An 18-page Memorandum, signed on June 8, 2003,[79] elaborated the standards of prison management and treatment of prisoners, including "untried prisoners" (those awaiting trial) and those imprisoned for debt. UN Security Council Resolution 1483 (2003) "calls upon the Authority [the Coalition Provisional Authority], consistent with the Charter of the United Nations and other relevant international law,[80] to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their political future".[81] Whether or not these and other measures fell within the spectrum of lawful actions under the conventional international law of belligerent occupation,[82] Security Council Resolution 1483 (2003) provided authority for the CPA's actions with respect to prison organization and management and modifications of the Iraqi penal code and law governing criminal proceedings to address the attacks on persons, property, and infrastructure bedeviling Iraq at that time (and since).[83] The Resolution also

tempore of the Senate), Oct. 10, 1987, Public Papers of the Presidents: Ronald Reagan 1987, II, 1164-65 (1989) ("In accord with my desire that Congress continue to be fully informed, I am providing this report consistent with the War Powers Resolution. While mindful of the historical differences between the Legislative and Executive branches of government, and the positions taken by me and all my predecessors in office, with respect to the constitutionality of certain provisions of the Resolution, I look forward to cooperating with Congress in pursuit of our mutual, overriding aim of peace and stability in the Persian Gulf region"); Bush to Foley (Speaker), Byrd (President pro tempore), Aug. 9, 1990, *id*., G. Bush, 1990, II, 1116 (1991) ("consistent with the War Powers Resolution"); Clinton to Hastert (Speaker), Thurmond (President pro tempore), Mar, 26, 1999, *id*., W.J. Clinton, 1999, I, 460 (2000) ("consistent with the War Powers Resolution").

78 CPA/ORD/8 June 2003/10.

79 CPA/MEM/ 8 June 2003/02.

80 This phrase included the international law of occupation.

81 S.C. Res. 1483 (2003), para. 4.

82 They arguably fall within the authority of the Occupying Power to protect itself and to take measures to fulfill its obligations under Geneva Convention IV. *See*, *e.g*., Geneva Convention IV, Arts. 47-78, in *Documents on the Laws of War*, *supra* note 12, at 317-27; Dinstein, *supra* note 12.

83 CPA/ORD/ 10 Sep 2003/31 (CPA Order No. 31, Modifications of Penal Code and Criminal Proceedings Law). S.C. Res. 1483 (2003) included in the mandate of the Secretary-General's Special Representative for Iraq "assisting the people of Iraq through: . . . (i) encouraging international efforts to promote legal and judicial reform"; para. 8(i). The UN Office of Legal Counsel resisted efforts to allow judges of the International

provided the CPA's authority to direct the disbursement of funds generated by the sale of Iraqi oil[84] and establish a new Iraqi currency to rationalize commercial transactions.[85]

After adoption of Resolution 1483 (2003), the CPA and the United Nations facilitated the formation of new Iraqi government institutions. The creation on July 13, 2003, of the Governing Council of Iraq was one result of this activity.[86] Security Council members acknowledged this reality in statements responding to the first and, as it turned out, only report of Sergio Vieira de Mello as the Secretary-General's Special Representative to Iraq.[87] The Security Council formally welcomed the Governing Council on August 14, five days before the bombing of the UN headquarters in Baghdad that killed Sergio Vieira de Mello and inevitably sapped optimism about prospects for a democratic, peaceful, and stable Iraq.[88]

Despite the bombing of August 19, 2003, the work of making new Iraqi governmental institutions proceeded with the involvement of UN personnel. The UN Security Council engaged when the United States and others, including the Secretary-General, believed a Council debate, presidential statement, or resolution would contribute to Iraqi political development. The Security Council thus further clarified the legal situation in Iraq with Resolution 1511 (2003):

> The Security Council … 1. Reaffirms the sovereignty and territorial integrity of Iraq, and underscores, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the

Criminal Tribunal for Yugoslavia and an official of the Sierra Leone Special Court, for example, to participate in training sessions for Iraqi judges, prosecutors, and lawyers.

84 S.C. Res. 1483 (2003), para. 13.

85 CPA/ORD/14 Oct. 2003/43 (New Iraqi Dinar banknotes to be issued by Central Bank of Iraq pusuant to 1976 Iraqi law, as amended).

86 *See* Report of the Secretary-General Pursuant to Para. 24 of S.C. Res. 1483 (2003), Jul. 17, 2003 (S/2003/715), paras. 15-27; statement of S.V. de Mello to Security Council, Jul. 22, 2003 (S/PV.4791), at 3-5 (political consultations, including diplomatic consultations with governments of Iraq's neighbors).

87 *See* S/PV.4791, Jul. 22, 2003, esp. statements by Pleuger (Germany), de la Sablière (France).

88 The killing of de Mello and other UN personnel provoked fury within the UN Secretariat that the Secretary-General had not taken adequate measures to protect the staff. The Secretary-General expressed his own anger and anguish in saying that "resolutions kill", meaning S.C. Res. 1483 (2003), which had provided a mandate for the UN Assistance Mission in Iraq, which de Mello headed. On the bombing and the failures to take appropriate security measures, *see* Report of the Independent Panel on the Safety and Security of UN Personnel in Iraq, Oct. 20, 2003, *available at*: www.un.org (Ahtassari report on bombing of UN Headquarters in Iraq, Aug. 19, 2003).

> specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, inter alia through steps envisaged in paragraphs 4 through 7 and 10 below [steps toward Iraqi self-government and the end of the occupation of Iraq];[89]

The Security Council also addressed security conditions by putting its stamp on the existence and actions of the U.S.- and British-led military coalition:

> The Security Council … 13. Determines that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and authorizes a multinational force under unified command[90] to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;
> 14. Urges Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above;[91]

89 Para. 1. Res. 1511 took account of the bombing of UN Headquarters in Baghdad on Aug. 19, 2003. *See ibid.*, at para. 9 ("as circumstances permit" the Secretary-General should pursue program developed by de Mello and reported to the Security Council in July 2003 (S/2003/715, July 17, 2003)) and the statement of Sec.-Gen. Annan, Oct. 16, 2003, S/PV.4844 at 2 (Oct. 16, 2003) (obligation to care for safety and security of UN personnel).

90 The reference to "unified command" meant that the Security Council did not wish to disturb the command arrangements adopted by the U.S./UK-led coalition that had invaded Iraq in March 2003. The Security Council first used the phrase in 1950 in response to the "armed attack" of North Korea against the Republic of Korea. S.C. Res. 84 (1950). Res. 1483 (2003) defined the "unified command" as the "Authority," meaning the Coalition Provisional Authority because that name had begun to be used after the appointment of Ambassador Bremer on May 9, 2003 (*see* Bremer, *supra* note 61, at 12), and the issuance of the first CPA regulation, dated a week earlier. Res. 1483 (2003), Pream., para. 13.

91 S.C. Res. 1511 (2003), paras. 13-14.

Resolution 1511 (2003) provided that the Security Council would review the mission of the multinational force annually and that the mandate for it would expire on completion of the political steps outlined in the Resolution. The Security Council restated this position in June 2004[92] and has reauthorized the multinational force twice since then at the request of the Iraqi Government.[93]

Unlike with respect to the end of the Israeli occupation of the Gaza Strip, the Security Council adopted a resolution marking the end of the occupation of Iraq. Resolution 1546 (2003), adopted on June 8, 2004, "welcome[d] that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty".[94] The Security Council marked that event by reauthorizing the multinational force under U.S. command,[95] taking the binding decision[96] that existing arrangements with respect to international monitoring of Iraqi receipts and expenditures would continue – the International Advisory and Monitoring Board whose existence was noted in Security Council Resolution 1483 (2003)[97] – and handed responsibility for the Oil-for-Food Program to the

92 S.C. Res. 1546 (2004).

93 S.C. Res. 1637 (2005), para. 1; S.C. Res. 1723 (2006), para. 1 (MNF mandate extended to Dec. 31, 2007 unless Iraq requests earlier termination).

94 S.C. Res. 1546 (2004), para. 2. The Interim Government of Iraq took office on June 28, 2004. Bremer left Iraq shortly beforehand, signaling the dissolution of the CPA. Res. 1511 (Oct. 16, 2003) made the philosophical point that "the sovereignty of Iraq resides in the State of Iraq", and determined that "the Governing Council and its ministers [established on July 13, 2003] are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority"; *ibid*., para. 4.

95 *Ibid*., para. 10.

96 The Security Council's use of the word "decides" in this connection created a binding obligation on UN Member States under Art. 25 of the UN Charter ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"). Security Council practice now is to include a determination with respect to a threat to the peace, breach of the peace, or act of aggression and a statement that it is acting under Ch. VII of the UN Charter as predicates for including paragraphs or parts of paragraphs introduced by the word "decides" in order to create binding decisions. In Res. 1546 (2004), the Security Council followed this practice in regard to the receipt, disbursement, and monitoring of proceeds from Iraq's sale of petroleum, petroleum products, and natural gas despite having recognized, in the same Resolution, Iraq's sovereign Interim Government (paras. 1, 24).

97 S.C. Res. 1483 (2003), para. 12. It took months to negotiate the terms of reference for the International Advisory and Monitoring Board of the Development Fund for Iraq. Letter from the Secretary-General to the Security Council, enclosing the terms of reference of

Interim Government of Iraq.[98] The United States marked the end of the occupation as a legal matter by establishing an embassy in Baghdad.

Resolution 1546 (2004), like its predecessor Resolution 1511 (2003), used the phrase "all necessary measures to contribute to the maintenance of security and stability in Iraq"[99] in authorizing the multinational force and describing its authority. The Security Council thus transformed the coalition of the willing, led by the United States and Britain, which had invaded Iraq in March 2003 and constituted the occupation forces since that time, into a non-occupation force deriving its authority from the Security Council and the consent of the "Government of Iraq".[100]

Resolution 1546 (2004) marked the end of the occupation of Iraq as a matter of international law. The multinational force needed the broad authorization granted by the Security Council in order to continue to have legal authority to conduct military and security operations in Iraq, including detention and interrogation of prisoners such as Saddam Hussein, that were in its judgment necessary. Uncertain about the continued applicability of the 1949 Geneva Conventions to military operations in Iraq once the occupation ended and the multinational force began to operate with the consent of the Interim Government of Iraq and as authorized by the Security Council and mindful of the continuing controversy over the treatment of prisoners by U.S. armed forces at the Abu Ghraib prison, the Council took note of "the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations".[101] It thus left to the multinational force, the government of Iraq, and others the responsibility to determine what law applied to activities by the multinational force, especially in the absence of a formal status of forces agreement between the force and the government of Iraq. The multinational force decided to continue to abide by "the law of armed conflict, including the Geneva Conventions".[102]

the International Advisory and Monitoring Board, Oct. 22, 2003, S/2003/1030. The Development Fund for Iraq was the occupation created vehicle, held by the Central Bank of Iraq, which collected Iraqi receipts and disbursed Iraqi payments.

98 *Ibid*., para. 26.

99 S.C. Res. 1511 (2003), para. 13; S.C. Res. 1546 (2004), para. 10.

100 S.C. Res. 1546 (2004), para. 12.

101 *Ibid*., Pream., para. 17.

102 Res. 1546 (2004), 1637 (2005), and 1723 (2006) contain annexed letters from the U.S. Secretary of State and the Prime Minister of Iraq concerning cooperation between Iraq and the multinational force. The first such letter, from Secretary of State Powell, stated that:

The occupation of Iraq occupied a legal spectrum. It began with the conscious application of the Fourth Geneva Convention and its predecessor, the 1907 Hague Regulations. As soon as politically practicable, the occupying States drew the UN Security Council into Iraqi political and socio-economic affairs. Within two months of launching the invasion, the Occupying Powers obtained an expanded legal basis for governing Iraq and made the United Nations a partner in the effort to facilitate Iraq's political transformation.[103] This development had no historical parallel, although the United Nations itself had undertaken national reconstruction efforts in a number of areas in Europe, Africa, and Asia (Bosnia, Kosovo, Liberia, East Timor, for example) involving periods of UN governance. The Iraq experience is an example of self-conscious application of the conventional international law of belligerent occupation and the use of the Security Council's power under the UN Charter to decide on measures needed to maintain or restore international peace and security to expand the occupier's freedom of manoeuvre in regard to governance.[104] The Iraq occupation thus

> In order to contribute to security, the MNF [multinational force] must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.
>
> S.C. Res. 1546 (2004), Annex.
>
> Secretary of State Rice twice has reaffirmed the continued applicability of this letter in Annexes to S.C. Res. 1637 (2005) and 1723 (2006), respectively. Of course, some States contributing to the multinational force are parties to Additional Protocols I and II of 1977 to the 1949 Geneva Conventions. The UK is one such State. The United States is a party to neither Additional Protocol. Just as the North Atlantic Treaty Organization (NATO) has had to develop arrangements so that its member States do not violate their individual international legal obligations with respect to the conduct of military operations, so too did the multinational force operating in Iraq.

103 The UN Secretariat was not an enthusiastic participant, as a careful reading of the Secretary-General's Report of July 17, 2003, reveals (S/2003/715).

104 UN Charter, Art. 39. While some governments have expressed concern about the Security Council's pushing the boundaries of its powers and did so in the context of the occupation of Iraq and the adoption of Res. 1483 (2003) (*see supra* notes 63-64), as well as in other contexts such as the adoption of Res. 1540 (Apr. 28, 2004), *see, e.g.,* statement by Pakistan Permanent Representative Akram, Apr. 22, 2004, S/PV. 4950, at 15 (questions Security Council authority to prescribe "legislative actions by Member States"), the Iraq case seems to stand for the proposition that the Security Council may authorize an occupier to undertake actions that arguably would not be permitted under the conventional and customary international law of occupation. *See also* E. Rosand, "The Security

strengthened the view that the customary and conventional international law of belligerent occupation can contain limited grants of authority to the occupying State. To go beyond those grants and continue to act in accordance with international law, an occupier needs more; in the case of Iraq, the UN Security Council explicitly supplied the additional authorization.

IV. LEBANON

To the outsider, the fragile civilization of Lebanon has long appeared to be a Middle Eastern beacon. In its most peaceful periods, culture and commerce have flowered together. But, for much of the past half century, Lebanon has been a periodic battlefield – torn by its own as well as the region's tribalism and religious conflicts and caught in the violence of Arab-Israeli relations.[105] Syria has been an avaricious as well as more powerful neighbor. Its forces as well as surrogates of Iran and Palestinian forces have made a governmental patchwork quilt of Lebanon's geography: the government of Lebanon's writ simply does not run throughout the country because other entities control territory and exercise governmental functions.[106]

Syria's presence and influence in Lebanon is long-standing and multi-layered. According to reports prepared by the UN Secretariat, the Mission of Inquiry into the Circumstances, Causes and Consequences of the 14 February [2005] Beirut Bombing,[107] and the UN International Independent

Council as 'Global Legislator:' *Ultra Vires* or *Ultra* Innovative?", 28 *Fordham Int'l L.J.* (2005).

105 *See* Friedman, *supra* note 28, at 11-13 (summary of background to Lebanese Civil War).

106 *See*, *e.g.*, Secretary-General's Fourth Semi-annual Report to the Security Council on the implementation of S.C. Res. 1559 (2004) (S/2006/832), paras. 24-27 (what government of Lebanon needs to do to exercise control over all of Lebanon); [First] Report of the Secretary-General pursuant to S.C. Res. 1559 (2004), Oct. 1, 2004 (S/2004/777), paras. 12-21 (Syrian and Lebanese and non-Lebanese militias). On Hezbollah, which the Lebanese Government calls a "national resistance group" with the goal of defending Lebanon from Israel and removing Israeli forces from the Sha'ba Farms (S/2004/777, *supra*, para. 19) (which Lebanon claims and the UN Secretary-General and Security Council have said are Syrian, Statement by the President of the Security Council, Jun. 18, 2000 (S/PRST/2000/21), *see* Friedman, *supra* note 28, at 507-508. *See also* K. Annan's valedictory Report on the Middle East, Dec. 11, 2006 (S/2006/456), para. 36 (role of Iran in Lebanon).

107 Established pursuant to a Security Council Presidential Statement, Feb. 15, 2005, (S/PRST/2005/4). Letter from the Secretary-General to the President of the Security Council, Mar. 24, 2005 (S/2005/203), enclosing the "independently conducted fact-finding report".

Investigative Commission,[108] it has roots in the Ottoman Empire, during which Lebanon was part of an administrative unit governed from Damascus. It involves Syria's armed forces and intelligence services. It is economic as well as political. Since the creation of Lebanon after the First World War, Syria and Lebanon have never had formal diplomatic relations.[109]

Syria played an important part in ending Lebanon's 1976-90 Civil War. In 1976, Lebanon's President, Suleiman Franjieh, invited Syria to send troops to assist the government. Later that year, Libyan, Yemeni, Saudi, Sudanese, and United Arab Emirates forces joined Syrian troops in Lebanon as part of an Arab Deterrent Force of approximately 30,000 men. During the Lebanese civil war, guerrilla attacks on Israel from Lebanese territory persisted. As a result, Israel mounted two substantial incursions into Lebanon and maintained a military presence in the southern part of the country from 1982 until May 2000.

Apart from the invitation of President Franjieh, Syria's military presence in Lebanon was ill-defined. Lebanon and Syria had reached agreements to agree on the terms of Syria's military presence at Taif in 1989 and in the 1991 Treaty of Cooperation. Both accords provided for conclusion of "an agreement to 'determine the strength and duration of the presence of Syrian forces in those areas to define these forces' relationship with the Lebanese State authorities where the forces are present'".[110] Under the Taif Agreement, Syrian forces were to be concentrated in the Bekaa Valley, famous as a site for terrorist training camps and a node in the international narcotics trade, as well as "Syria's economic lifeline".[111] The Taif Agreement put an end to the Lebanese civil war as well.[112] At Taif, Lebanon and Syria also agreed to terms that, in effect, codified a Syrian protectorate over Lebanon:

> Lebanon should not be allowed to constitute a source of threat to Syria's security, and Syria should not be allowed to constitute a source of threat to Lebanon's security under any circumstances. Consequently, Lebanon

[108] S.C. Res. 1595 (2005) established the Commission to investigate the killing on Feb. 14, 2005, of former Lebanese Prime Minister Rafik Hariri and 22 others.

[109] Report of the International Independent Investigation Commission established pursuant to S.C. Res. 1595 (2005) (S/2005/662), para. 23.

[110] Report of the Secretary-General Pursuant to S.C. Res. 1559 (2004) (S/2004/777), para. 8, *supra* note 106.

[111] Strategic Forecasting, Inc., "The Bekaa's Crucial Role in the Israeli-Hizbollah Fight", Aug. 1, 2006, www.strafor.com

[112] Letter dated Apr. 18, 2006, from the Secretary-General to the President of the Security Council, transmitting Third Semi-Annual Report on the Implementation of S.C. Res. 1559 (2004), Apr. 19, 2004 (S/2006/248), para. 22.

> should not allow itself to become a pathway or a base for any force, state, or organization seeking to undermine its security or Syria's security. Syria, which is eager for Lebanon's security, independence and unity and for harmony among its citizens, should not permit any act that poses a threat to Lebanon's security, independence, and sovereignty.[113]

Israel had withdrawn its forces from Lebanon in 2000.[114] As of September 30, 2004, the UN Secretary-General reported to the Security Council that, apart from the United Nations' own force in Lebanon (UNIFIL), "to the best of our ability to ascertain, the only significant foreign forces deployed in Lebanon, as of 30 September 2004, are Syrian".[115] By the end of the following April, Syria had withdrawn its troops from Lebanon.[116]

[113] *Id.* The Taif Agreement was ratified by the Lebanese parliament and endorsed by the UN Security Council. "On 14 April 2006, the General Prosecutor of the Syrian military court disclosed publicly that a decision had been taken to pursue legal proceedings against [Lebanon's] Minister [of Telecommunications] Marwan Hamadeh, members of Parliament Saad Hariri [son of Rafik Hariri] and Walid Jumblatt and journalist Fares Khashan over their statements against the Syrian Arab Republic and for 'inciting foreign countries to be hostile to the Syrian Arab Republic and its leaders'"; S/2006/248, *supra* note 112, at 7, n. 3.

[114] The Secretary-General has affirmed and reaffirmed this fact. *See, e.g.,* S/2004/777, *supra* note 106, para. 9. In June 2000, the Security Council endorsed the Secretary-General's conclusion "that as of 16 June 2000 Israel has withdrawn its forces from Lebanon in accordance with resolution 425 (1978) of 19 March 1978 and met the requirements defined in the Secretary-General's Report of 22 May 2006 (S/2000/460). In this regard, the Council notes that Israel and Lebanon have confirmed to the Secretary-General, as referred to in his report of 16 June 2000 (S/2000/590, that identifying the withdrawal line was solely the responsibility of the United Nations and that they will respect the line as identified"; S/PRST/2000/21, Jun. 18, 2000.

In 2006, the Secretary-General stressed the importance of Syria and Lebanon coming to an agreement, "under international law" to delineate the Lebanese-Syrian border, including determining definitively whether the Sha'ba Farms were Lebanese or Syrian territory. In the absence of such a Lebanese-Syrian agreement, the UN Secretariat would continue to regard the Sha'ba Farms as Syrian territory occupied by Israel (S/2006/248, *supra* note 112, para. 77). The Secretary-General saw border delineation as a step in the formalization of Lebanese-Syrian relations and "an element of crucial importance to a number of explicit operational requirements of Res. 1559 (2004), which places central emphasis on the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon throughout Lebanon"; *ibid*., para. 76.

[115] S/2004/777, *supra* note 106, para. 12.

[116] First Semi-Annual Report of the Secretary-General to the Security Council on the Implementation of Res. 1559 (2004), Apr. 26, 2005 (S/2005/272), at Annex (letter from Syrian Foreign Minister Al-Shara', Apr. 26, 2005, reporting "that the Syrian Arab forces stationed in Lebanon at the request of the Lebanon and under an Arab mandate have fully

Syria's residual influence has remained a question. The 2005 withdrawal, which the United Nations verified as best it could,[117] represented an element in the process of "Lebanon's consolidation as a sovereign and democratic State".[118] The goal was the extension of the authority of the Lebanese government over all Lebanese territory and the achievement by the government of Lebanon of a "monopoly on the use of force throughout its territory".[119] In 2004, the Secretary-General reported the view expressed in Lebanon that Syria's military and non-uniformed intelligence officials constituted a source of "considerable leverage over Lebanese domestic affairs".[120] One manifestation of this influence had been the Lebanese Parliament's extension on September 3, 2004, of President Lahoud's term for three years.[121] While the Secretary-General's report confines itself to relaying

withdrawn all their military and security apparatus and assets to their positions in Syria on 26 April 2005, and as such have completed their successive withdrawals that started years ago").

117 *See*, *e.g.*, Letter, dated May 23, 2005, from the Secretary-General to the President of the Security Council transmitting the Report of the United Nations Mission to Verify the Full and Complete Withdrawal of Syrian Forces from Lebanon Pursuant to Security Council Res. 1559 (2004) – 26 April to 13 May 2005 (S/2005/331) ("The withdrawal of the Syrian intelligence apparatus has been harder to verify because intelligence activities are by nature often clandestine"; *ibid.*, para. 24). S/2006/248, *supra* note 112, para. 19:

> In my last report I noted that the verification mission I dispatched to Lebanon had verified the full and complete withdrawal of Syrian troops and military assets from Lebanon, with the possible exception of the Deir al-Ashayr area [owing to uncertainty as to the Lebanese-Syrian border at that location]. I also noted that the mission had been unable to conclude with certainty that the Syrian intelligence apparatus had been withdrawn entirely. The Government of Lebanon has informed me that it is confident that, by and large, Syrian intelligence has withdrawn, although reports and allegations that there is ongoing Syrian intelligence activity in Lebanon have continued to surface on occasion …. The Government of the Syrian Arab Republic has denied all allegations that it has any intelligence presence or activity in Lebanon.

The UN Documentation Center lists some of the semi-annual reports in its on-line collection of "SG Reports" and some in its on-line collection of "Exchange of Letters". Some Secretary-General Reports are on neither list. This situation creates difficulties for those engaged in research.

118 Fourth Semi-Annual Report of the Secretary-General to the Security Council on the Implementation of S.C. Res. 1559 (2004), Oct. 19, 2006 (S/20006/832), para. 46.

119 S/2006/248, *supra* note 112, para. 43.

120 S/2005/272, *supra* note 116, para. 20.

121 S/2004/777, *supra* note 106, para. 27. On Feb. 20, 2006, fourteen current and former members of the Lebanese Parliament wrote to the Speaker of the Parliament, Nabih Berri, that:

> …in view of the fact that we were subjected to pressures and threats from the Syrian and Lebanese security services to compel us to ratify the draft law extending the term

views heard in Lebanon, the UN International Independent Investigative Commission investigating the assassination in February 2005 of Rafik Hariri reported in October 2005 that:

> It is a well-known fact that Syrian Military Intelligence had a pervasive presence in Lebanon at least until the withdrawal of the Syrian forces pursuant to resolution 1559 (2004). The former senior security officials of Lebanon were their appointees. Given the infiltration of Lebanese institutions and society by the Syrian and Lebanese intelligence services working in tandem, it would be difficult to envisage a scenario whereby such a complex assassination plot could have been carried out without their knowledge.[122]

> of the President of the Republic, Emil Lahoud, and in view of the fact that our vote was thus tarnished by a basic lack of free will that renders not only it but the entire voting process with respect to the constitutional amendment extending the term of the President of the Republic null and void, we officially inform you by this letter that we were opposed to the draft law extending the term of the President of the Republic Emil Lahoud, which was passed by Parliament on 3 September 2004, and that we were subjected to unbearable pressures and threats to induce us to agree to it under duress. This renders our vote null and void, as if it had never taken place, and consequently invalidates Law No. 585/2004 of 4 Sept. 2004 by virtue of it not having received the constitutionally mandated two-thirds majority vote. We request that Your Excellency take our position into consideration and take the necessary constitutional measures to deal with the invalid outcome resulting from it.

S/2006/248, *supra* note 112, Annex II.

See also ibid., at n. 12 ("The vast majority of parliamentarians claimed that they had been told that a decision had been taken that President Lahoud's term was to be extended, and that they had to act in accordance with the decision. They had also been told that failure to comply with the decision might jeopardize Lebanon's security and stability, and that they might put their personal security at risk. A number of parliamentarians further recounted conversations with former Prime Minister Hariri, who had confirmed the instructions and, when doing so, had referred to endangerment of his own life if the extension did not pass successfully in Parliament. The Government of the Syrian Arab Republic has strongly denied all these allegations"). *See also* M. Young, "The Mehlis Report", *Wall St. J*., Oct. 21, 2005, at A14.

[122] S/2005/662, *supra* note 109, at 5. Saad Hariri told the Commission that his father said that, on Aug. 26, 2004, Syrian President Al-Assad said to Rafik Hariri:

> This [the extension of President Lahoud's term as President of Lebanon] is what I want. If you think that President Chirac and you are going to run Lebanon, you are mistaken. It is not going to happen. President Lahoud is me. Whatever I tell him, he follows suit. This extension is to happen or else I will break Lebanon over your head and Walide Jumblat's. … So, you either do as you are told or we will get you and your family wherever you are.

Ibid., para. 27, at 17-18.

Does this degree of influence, including with respect to the Bekaa Valley where Lebanon's writ does not appear to have run while Syrian troops were there, amount to occupation within the meaning of the 1907 Hague and the 1949 Geneva Conventions? What are the consequences of the answer?

Belligerent occupation is a question of fact.[123] Syria and Lebanon have not engaged in armed conflict. Rather, Syria's presence resulted from the 1976 invitation to Syria to send its forces. The long duration of that presence, the lack of precision as to the terms – no status-of-forces agreement appears to exist – the fact that Syria and Lebanon share a border, which, in part, is undemarcated, and the reality that Syria is more powerful than Lebanon all contributed to Syria's exercise of political influence in Lebanon. In addition, other non-Lebanese groups, notably Palestinians, control areas of Lebanon where Lebanese officials do not exercise authority.[124]

The Fourth Geneva Convention provides that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".[125] Thus, by its terms, the Fourth Geneva Convention appears to govern the Syrian military presence in Lebanon, particularly in the Bekaa Valley, where observers assert that Syrian forces exercised control – indeed, governmental control. In the words of the 2005 fact-finding mission:

> The Government of the Syrian Arab Republic clearly exerted influence that went beyond the reasonable exercise of cooperative or neighbourly relations. It interfered with the details of governance in Lebanon in a heavy-handed and inflexible manner that was the primary reason for the political polarization that ensued. Without prejudice to the results of the investigation, it is obvious that this atmosphere provided the backdrop for that assassination of Mr. Hariri.[126]

As the UN Secretary-General noted, this report "raises some very serious and troubling allegations".[127] Palestinian controlled areas of Lebanon raise concerns as well about the reach of Lebanese authority within Lebanon.

Syrian involvement, if proved, in the killing of Rafik Hariri would have political consequences. Allegations of responsibility already have brought about the withdrawal of Syrian armed forces under pressure from the UN Security Council. Assassination does not prove that the Fourth Geneva

123 *See* text accompanying notes 16-17, *supra*.
124 S/2005/331, *supra* note 117, paras. 14, 17.
125 *Documents on the Laws of War*, *supra* note 12, at 301.
126 S/2005/203, *supra* note 107, at 3.
127 Sec.-Gen. to S.C., Mar. 24, 2005 (S/2005/203).

Convention applies. If one reaches the conclusion that Syria held Lebanese territory within the meaning of the Fourth Geneva Convention, then its international legal responsibility has been significant. The implication of governmental responsibility is inescapable. Not only does such responsibility include the security and safety and well-being, within the requirements of military necessity, of the protected population, but the Occupying Power is also responsible for acts of violence from the area occupied against third parties. In the context of the ongoing Syrian-Israeli conflict, this reasoning could make Syria a legitimate target for the lawful use of force in self-defense under the UN Charter in response to attacks against Israel from territory under its control within the meaning of the Fourth Geneva Convention.[128]

CONCLUSION

Gaza, Iraq, and Lebanon provide three examples of the international law of belligerent occupation in action. Each illuminates the limited authorization contained in The Hague and Geneva Conventions and the customary law. Each tells something about the legal impact of duration. For example, Israel's long occupation of territories seized during the June 1967 War has helped make application of occupation law controversial.[129] Like the lengthy incarceration of prisoners of war as a result of the prolonged conflict over the Western Sahara[130] and the prospect of such long incarceration at Guantanamo Bay in the wake of the attacks of September 11, 2001, Israel's forty years as a belligerent occupant have called the black-letter law into question. Yet, it remains the law. The end of Israeli governance in Gaza and the Israeli withdrawal of military and civilian personnel from the Gaza Strip evidence the vitality of the factual tests for belligerent occupation under the Fourth Geneva Convention.

The Iraq example highlights the acceptance of limits in the conventional and customary law of occupation. The Occupying Powers searched for and obtained amplified authority in order to go beyond placeholder governance to facilitate the coming into being of a new Iraqi political order and new political and constitutional institutions. Not only was UN Security Council

[128] *See generally International Law in Contemporary Perspective* 895-907 *et passim* (W.M. Reisman *et al*., eds., 2004) (documents pertaining to responsibility of States under international law).

[129] *See generally* Roberts, *supra* note 1.

[130] *See*, *e.g.*, Report of the Secretary General on the Situation Concerning the Western Sahara, Oct. 16, 2006 (S/2006/817) (cease-fire since 1991; no direct talks between parties). *See also* T. Hodges, *Western Sahara: The Roots of a Desert War* (1983).

and UN institutional involvement in helping Iraqis build a post-Saddam Iraq helpful in terms of the achievement of the occupation's goals in Iraq, but it was also a recognition of the importance of law as a common language of international diplomacy: once the Security Council provided additional underpinning for the Occupying Powers and sketched a political roadmap for Iraqis, the legitimacy of the remaining year of occupation and the developing Iraqi political process, including elections, was established. The invasion of Iraq has remained controversial politically and legally; all governments have paid at least lip service to the goals identified for post-Saddam Iraq.

Syria's (and others') presence in Lebanon raises the question of the reach of the Fourth Geneva Convention. In what circumstances does it apply where the parties have not engaged in armed conflict against each other? It has long been asserted that Syria has controlled the government and much of the territory of Lebanon. The UN investigations into the assassination of Rafik Hariri have opened a window through which one glimpses evidence relevant to such a claim.[131] Belligerent occupation imposes obligations on the Occupying Power with respect to other States as well as to the local population. Thus, Syria's legal responsibility may extend farther than for a political assassination, if the Lebanese special tribunal is established and finds Damascus officials guilty of killing Hariri.[132]

The tissue connecting these examples is not a general rule of interpretation or application, but a caution that each case demands attention to detail – facts on the ground and text of international treaties. Where the UN Security Council plays a role, governments and lawyers confront the always difficult task of appraising UN pronouncements. These are the product of political conversations among governments and, as in the case of Security Council Resolution 1483 (2003), UN officials. Officials at other international institutions may be involved as well. The result can be a text as difficult to parse as a complex poem. In this respect, the text and the reality for which it seeks to prescribe are at one.

[131] *See*, *e.g.*, Second Semi-Annual Report of the Secretary General on the Implementation of S.C. Res. 1559 (2004) under letter from the Secretary-General to the President of the Security Council, Oct. 26, 2005 (S/2005/673), para. 56 ("Taboos of the past have been broken and matters previously too sensitive to discuss openly are now the subject of open debate").

[132] On the special tribunal for Lebanon, *see* S.C. Res. 1757 (May 30, 2007) (establishment of Special Tribunal for Lebanon); letter, Nov. 21, 2006, from the President of the Security Council to the Secretary-General (S/2006/011); and the Secretary-General's Report on the subject, Nov. 15, 2006 (S/2006/893), together with the addendum containing the statement of the UN Legal Counsel, N. Michel, Nov. 20, 2006 (S/2006/893/Add. 1). In private conversation, UN diplomats blame Syria for holding up establishment of the tribunal.

The law of belligerent occupation, like the laws of war more generally, is not meant to provide political answers to international controversies. At the same time, its application is inseparable from such political conflicts. As a result, it can shed light, if only by helping add rigor to contending arguments.

CAN MILITARY MANUALS IMPROVE THE LAW OF WAR? THE SAN REMO MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT CONSIDERED IN RELATION TO HISTORICAL AND CONTEMPORARY TRENDS

By Michael H. Hoffman[*]

I. INTRODUCTION

Law of war instruments, statutes, and tribunals have grown in remarkable numbers over the past decade.[1] The number of civilian and military attorneys working law of war issues as counselors and advocates is also growing rapidly. Law of war compliance, however, is not tracking with these developments and breaches, if anything, are becoming more prevalent. We need to find more effective ways to implement the rules of war.

Military manuals have been sporadically influential in the development and application of the laws of war. Their utility for that purpose is worth another look at a time when law of war treaties and legal precedents grow in quantity but seem to have little influence on the quality of compliance. The recent release of the San Remo International Institute of Humanitarian Law's long anticipated Manual on the Law of Non-International Armed Conflict[2]

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The author participated in the early stages of the development of the *San Remo Manual on the Law of Non-International Armed Conflict (see infra* note 2). His article "The Application of International Humanitarian Law in Sri Lanka: A Compliance Based Case Study on the Rules of War" was published in 30 *Israel Y.B. Hum. Rts.* 209 (2000) as a contribution to the development of the *San Remo Manual.* He is also a member of the San Remo International Institute of Humanitarian Law. The views expressed in this article are those of the author and do not reflect the official policy or position of the Dept. of the Army, Dept. of Defense, or the U.S. Government.

1 In this article the law of armed conflict, rules of war and international humanitarian law are considered to be alternative terminology for law of war. For a review of recent developments in international humanitarian law *see* J.-P. Lavoyer, "International Humanitarian Law: Should It Be Reaffirmed, Clarified Or Developed?", 34 *Israel Y.B. Hum. Rts.* 35, 53, 54 (2004).

2 *The Manual on the Law of Non-International Armed Conflict (with Commentary),* (International Institute of Humanitarian Law, Sanremo, 2006), *repr. in* 36 *Israel Y.B. Hum. Rts.,* Special Supp. (2006); hereinafter: *San Remo Manual.*

[hereinafter: San Remo Manual on Non-International Armed Conflict, or San Remo Manual] provides an opportunity to consider the future utility of such sources as tools to spread knowledge of the rules and improve compliance with them. The members of the Drafting Committee for the Manual are distinguished authorities in the field of international humanitarian law: Professor Michael N. Schmitt of the George C. Marshall Center for Security Studies, Professor Charles H. B. Garraway of the Royal Institute of International Affairs-Catham House, and Professor Yoram Dinstein of Tel Aviv University.

II. LAW OF WAR MANUALS – HISTORICAL TRENDS

The importance of law of war manuals has shifted over time, as has their specific impact relative to other sources of authority. Their likely future contribution to the development and implementation of the law of war is more easily considered when their changing role and impact is taken into account.

If viewed in modern context, the most famous document in the history of the law of war would be considered a military manual or guidebook rather than a legal instrument. The informally-titled "Lieber Code" was a general order promulgated to furnish law of war direction for the U.S. Army during the American Civil War.[3] It has perhaps come to be known as a code because it was characterized as such by its visionary author in 1862 when he wrote to the General-in-Chief of the U.S. Army, Henry Halleck, to present his case for such rules. "My idea is – I give it as a suggestion to you – that the President as Commander in Chief, through the Secretary of War, ought to appoint a committee, say of three, to draw up a code, if you choose to call it so, in which certain acts and offences (under the Law of War) ought to be defined and, where necessary, the punishment be stated".[4]

Though promulgated as a legally binding military regulation, the text is distinctly a guidebook or manual in form.[5] The Lieber Code was promulgated at an early stage in the development of modern military culture,

[3] The Lieber Code is officially referenced as General Orders No. 100, issued by the Adjutant General's Office of the U.S. Army in 1863. For a readily accessible edition of the text, with background notes, *see The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* 3 (D. Schindler and J. Toman eds., 4th ed., 2004).

[4] R. Hartigan, *Lieber's Code and the Law of War* (Letter from Lieber to Halleck, 13 Nov. 1862) 79 (1983).

[5] One definition of a manual is that it is "a book of instructions, especially for operating a machine or learning a subject; a handbook: *a training manual*". *The Oxford Essential Dictionary of the U.S. Military* 253 (2001).

in which manuals were just beginning to emerge as a prevalent form of instruction and guidance on military subjects. However, General-in-Chief Halleck was a pioneer in the development and use of such manuals. He had authored one as a lieutenant in 1845 – *Elements of Military Art and Science* [6] – and had also recently emerged as a recognized expert in international law after publishing his treatise entitled *International Law;* or*, Rules Regulating the Intercourse of States in Peace and War* in 1861.[7]

Given that military manuals didn't fully emerge as a distinct genre for military instruction until later in the 19th century,[8] and given Halleck's own accomplishments as an author of military and legal treatises, he certainly would have considered Lieber's Code a promising tool of instruction as much as a source of rules to regulate conduct. A look at Lieber's targeting instructions shows that the Code was actually a manual in both form and content:

> Art. 15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows for the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.[9]

Manuals soon emerged as an influential form for development of the law of war. While military-produced manuals took on growing importance in other aspects of military art and science, the laws of war were primarily advanced

6 W. Skelton, *An American Profession Of Arms: The Army Officer Corps, 1784-1861* 241 (1992).

7 Hartigan, *supra* note 4, at 13 and 26.

8 For a study on the beginnings of systematic development and use of military manuals, for tactical and logistical instruction and training, *see* P. Jamieson, *Crossing the Deadly Ground: United States Army Tactics, 1865-1899*, at 92-112 (1994).

9 *The Laws of Armed Conflicts*, *supra* note 3, at 6.

through manuals developed in civil society.[10] For a time, these private manuals played a role that would not be replicated again for almost another hundred years. In the absence of treaties furnishing wide reaching guidance on the law of war (the only ratified instrument then extant being the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864[11]), they served as authoritative statements of the rules.

The Oxford Manual on the Laws of War on Land was drafted by the Institute of International Law in 1880 to supplement the Final Protocol of the Brussels Conference of 1874 on the laws and customs of war. Though the Oxford Manual was also a draft code for the conduct of hostilities, it contains commentary (or, in non-scholarly terminology, instruction) of the kind that would be expected in a manual. The drafters explained this objective in the preface. "The Institute, with a view to assisting the authorities in accomplishing this part of their task, has given its work a popular form, attaching thereto statements of the reasons therefor, from which the text of a law may be easily secured when desired".[12] A generation later the Oxford Manual was an influential source used by the drafters of the 1899 and 1907 Hague Conventions.[13]

The Institute again contributed to the development of the law of war in 1913 by drafting the Oxford Manual on the Laws of Naval Warfare Governing the Relations Between Belligerents.[14] This Manual distinctly took

[10] F. Lieber's work, unlike that of the scholars who followed his footsteps at the Institute of International Law, was official in character. He was appointed to a U.S. government convened board, otherwise composed of senior ranking military officers, and those colleagues were also influential in developing the text (Hartigan, *supra* note 4, at 85). "I owe you-and so does the country-some three or four very important additions; the Generals of the Board have added some valuable parts, but there have also a few things been omitted, which I regret": Letter Lieber to Halleck, 20 May 1863 (*supra* note 4, at 108).

This is not to say that there were no official legal manuals issued for armed forces in this period. Germany, England and France all followed the U.S. example in the late nineteenth century and issued military law manuals. *See* H.S. Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge* 130 (1894). Ultimately the most influential of these was the British Manual, which served as the foundation for the *British Manual of Military Law* issued in 1914. It was reissued in revised form in 1936 and in use during World War II and the Korean War. *See* Preface to *The Manual of the Law of Armed Conflict UK Ministry of Defence* (2004.)

[11] 1 *A.J.I.L.*. Supp., 90 (1907).

[12] *Resolutions of the Institute of International Law* 9 (J. Scott ed., 1916).

[13] *The Laws of Armed Conflicts*, *supra* note 3, at 25.

[14] *Ibid*., 857.

the form of a draft code, rather than a book of instruction, but included some operational guidance as well.[15]

Manuals would not play such an influential role in the law of war again until the mid-twentieth century and then they would be official in character. Where they had been an important source in developing basic principles when the treaty-based law of war system was in its formative stages, these publications slipped lower in the hierarchy of international legal authorities as the 1899 and 1907 Hague Conventions displaced them. They played a less conspicuous role during World War I – when they did, however, become an occasional focus for war propaganda.

For example, a monograph comparison of the German Law of War Manual and those of the Allied Powers led one scholar to conclude that: "the German Manual forms a striking contrast to those of the United States, Great Britain, and France. This Manual was framed entirely by a body of high military officers, distinguished alike for their extreme views of military necessity and for their evident contempt for the opinions of civilian jurists and academic writers on international law, to whom they frequently refer as impractical theorists and overzealous humanitarians".[16]

Incidentally, this study also revealed how sharply thinking had shifted on the relative importance of military law manuals since their first appearance some 30 years before. In 1887, Henry Sumner Maine had relied on these fledgling manuals as a crucial source of guidance on the law of war, as international lawyers in his era were otherwise still heavily reliant on custom to identify pertinent rules.[17] So important was custom, in fact, that he also unhesitatingly explored customary rules of war from the Middle-Ages to provide law of war insight for his own time.[18]

[15] A conspicuous example, found in Art. 32, not only sets out rules but also procedures for visit and search:

> The belligerent war-ship, in ordering a vessel to stop, shall fire a charge of powder as a summons and, if that warning is not sufficient, shall fire a projectile across the bow of the vessel. Previously or at the same time, the war-ship shall hoist its flag, above which, at night, a signal light shall be placed. The vessel answers the signal by hoisting its own flag and by stopping at once; whereupon, the war-ship shall send to the stopped vessel a launch manned by an officer and a sufficient number of men, of whom only two or three shall accompany the officer on board the stopped vessel.

Ibid., at 862.

[16] J.W. Garner, *The German War Code* 6 (1918).

[17] H.S. Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge* 129-89 (1894).

[18] *Ibid.*, at 184-85, for his consideration of medieval armistices in relation to 19th century practice.

That old customary rules had, by comparison, moved into eclipse by the early 20th century, thereby diminishing the status of law of war manuals as a source for determining international law, is apparent by 1918 in the view set forth in the study of the German War Manual. Heavy German reliance on custom was denounced. "Whenever possible the practices of remote wars, and especially those of the Napoleonic wars, are invoked and relied upon in support of the extreme views of the General Staff, rather than the more enlightened and humane usages of recent wars".[19]

Manuals were plainly in decline as an influential source for development of international law – but another important use soon followed. They provided a source of evidence in war crimes trials. In the high-profile 1921 *Dover Castle* case, a former German submarine commander was acquitted, by a German court, of charges that he had violated the laws of war by torpedoing a British hospital ship. His lawyers successfully defended by arguing that he had been following superior orders in conducting this attack, relying on evidence of like British practice in the English Manual of Military Law of 1914 to justify his actions.[20]

The defense of superior orders, and the practice of introducing military manuals as evidence for the rules of war, re-emerged in high profile war crimes proceedings after World War II. In the lead-up period before those trials, when war crimes trials were under consideration by the Allied Powers, one commentator in fact identified the important role that British and U.S. manuals might play in shaping the outcome of such trials.

He noted with concern that these sources might lead to exoneration of almost all accused war criminals on a defense of obedience to superior orders, as the rule found in British and U.S. manuals "specifically provides that a soldier has a valid defense if his act was ordered by his government or commander … . A little reflection will show that this provision, if followed literally, would give almost the entire band of Axis war criminals a valid defense".[21] Soon after, these manuals were, in fact, utilized by defense counsel, as a source for evidence of State practice supporting that proposition.

Fairly early in the post-war proceedings, defense counsel in the *German High Command Trial* adopted that same defense, used successfully after World War One in the *Dover Castle* case, and invoked obedience to superior orders as a defense. In rejecting this defense, the Court also discounted seemingly supporting language in U.S. and British manuals, holding that these publications did not constitute authoritative sources on international

19 *Supra* note 16, *id.*

20 2 *Ann. Digest of Pub. Int'l L. Cases* 429-30 (1933).

21 S. Gluek, *War Criminals: Their Prosecution and Punishment* 140 (1944).

law. It held that sources such as manuals and regulations "…are not a competent source of international law when a fundamental rule of justice is concerned".[22] Military manuals were also an important focus in other prominent war crimes trials of that era.

In October 1945 the former commander of a German submarine stood trial before a British Military Court (the *Peleus Trial*[23]) on charges that he had ordered the killing of survivors of a sunken merchant ship. Four of his crew stood trial with him on charges of carrying out his orders. They raised a defense of obedience to superior orders, citing in support the pre-1944 text of the British Manual of Military Law, and the U.S. Army's 1914 Rules of Land Warfare manual (a defense rejected by the court on grounds that only lawful orders could be obeyed).

The centrality of these manuals to the defense case was demonstrated by the careful attention they received in the reporter's notes and analysis. In the course of a lengthy analysis of the manuals, and of legal arguments raised in the *Peleus* case, the reporter made the following observations:

> The fallacy of the opinion expressed in the pre-1944 text (para. 443 of Chapter XIV) of the British Manual and the corresponding rule of the United States *Rules of Land Warfare* (para. 347 of the 1940 text), was demonstrated in an article by Professor Alexander N. Sack in the *Law Quarterly Review* (Vol. 60, January 1944, p.63). The relevance of the plea of superior orders became also the subject of research and critical examination by official and semi-official international bodies which dealt with problems of war crimes during the second world war (United Nations War Crimes Commission; London International Assembly, etc.).
> …
> In April 1944, the British Manual was altered, the sentences just quoted being replaced. A similar though not identical alteration of the American Field Manual has been brought about by "Change No. 1 to the Rules of Land Warfare" dated 15th November, 1944.[24]

[22] 11 *Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10*, 1238 (1950). In its opinion, the tribunal seems to have conceptualized manuals and regulations as being interchangeable in identity and function.

[23] The Peleus Trial (British Military Court, Hamburg, 1946), I *L.R.T.W.C.* 1.

[24] The British Manual was revised in 1944 to reflect "the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity". The Peleus Trial, *supra* note 23, at 8, 9,17, 18.

In 1948 the U.S. Military Tribunal announced its decision in the *Hostages Trial,* an important case involving defendants who had been senior officers in the German Army. They were charged with mass killings of civilians in occupied territory, their actions said to have been carried out to stop guerrilla warfare. The defense again referred to the U.S. Army Rules of Land Warfare, along with the British Military Hand Book, to find evidence that the law of war supported reprisals.

The Tribunal noted that the British Manual of Military Law permitted reprisals against civilians, though without reference to execution, and the U.S. Manual even allowed for execution of hostages. The defenses' use of these manuals was successful to the extent that the Tribunal found such actions not completely prohibited by the laws of war, but in the case at hand nonetheless unlawful for the scope and manner of operations conducted by the German Army. [25]

A military manual also figured in the defense during the well known, though legally less notable trial of Otto Skorzeny. Skorzeny and other former German Army officers were charged with making improper use of American uniforms in order to approach and attack U.S. forces. They were acquitted with no accompanying judgment, but the reporter's notes indicate that defense counsel cited the American Soldier's Handbook for its statement that: "The use of the enemy flag, insignia and uniform is permitted under some circumstances. They are not to be used during actual fighting, and if used in order to approach the enemy without drawing fire, should be thrown away or removed as soon as fighting begins".[26]

[25] Though the Court regretfully found that the law of war as it then stood permitted civilian hostage taking and reprisals against prisoners, it also held that there were proportional limits and that belligerents could not engage in widespread, indiscriminate use of these methods in order to inflict terror. Trial of W. List *et al.* ("The Hostages Trial") (United State Military Tribunal, Nuremburg, 1948), 8 *L.R.T.W.C.* 34, 61-66. The Court also set out the limits on use of military manuals as a statement of international law:

> The fact that the British and American armies may have adopted it for the regulations of its own armies as a matter of policy, does not have the effect of enthroning it as a rule of International Law. We point out that army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions have been put into general practice.

Ibid., at 51. For the reporter's analysis of the law of war and military manuals *see* 77-78 and 84-85.

[26] Trial of Otto Skorzeny *et al*. (General Military Government Court of the U.S. Zone in Germany, 1947), 9 *L.R.T.W.C.* 90, 93.

Military manuals went into decline as a source of evidence for the law of war with the adoption of the Geneva Conventions of 1949. There were fewer gaps in the written law and this reduced the need of inquiry into State practice. There was also a radical drop in war crimes investigations and proceedings where such manuals might have been used for like purpose. Defense counsel would make similar use of law of war manuals in another high profile case – but not until the close of the century[27] (though this may happen more frequently in the future if criminal and civil war crimes cases continue to grow in numbers[28]). Prospects for their renewed importance in war crimes trials remain an open and interesting question.

After phases where military law of war manuals served as a source of international law, a pioneering source of guidance for armed forces, and key evidence for international law at major war crimes trials, their profile diminished. Though some scholars of international law continued to draw attention to their importance, they were almost completely overlooked as other sources of international law grew not only in variety but also in sheer volume.[29] Law of war military manuals remained important sources of State guidance for armed forces during the Cold War, but achieved little attention beyond armed forces immediately concerned with their application.[30]

27 "The ICTY appeals chamber has refused to consider infractions of common Article 3 of the Geneva Conventions as grave breaches, rightly regarding some military manuals and a U.S. brief as insufficient evidence of the existence of customary law". Prosecutor v. Tadic (Jurisdiction) (Appeals Chamber) 105 *I.L.R.* 312 (1997).

28 A suggestion of their potential utility in civil litigation comes from a post-World War II case decided by the Supreme Court of the Republic of the Philippines, which utilized military manuals when it determined that Japanese occupation authorities had had the authority to appoint a bank liquidator that could accept payment on behalf of the liquidated institution. "Such acts are recognized as not repugnant to the provisions of Art. 46 or any other article of The Hague Regulations by well-known writers on International Law, and are authorized in the Army and Navy Manual of Military Government and Civil Affairs not only of the United States, but also in similar manuals of Army and Navy of other civilized countries, as well as in the Trading with the Enemy Act of said countries". Haw Pia v. China Banking Corp. G.R. No. L-554, 13 *Lawyers J.* (Manila), Apr. 13, 1948, at 173 as reported in 43 *A.J.I.L.*, Supp. 821 (1949).

29 For a view of practical considerations in development of military law of war manuals, *see Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the late Professor Colonel G.I.A.D. Draper, OBE.* 115-120 (M. Meyer & H. McCoubrey eds., 1998). For the utility of manuals in modern organizations, with particular attention to law of war manuals and the armed forces, *see* W.M. Reisman & W.K. Leitzau, "Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict", 64 *Int'l L. Studies* 1-18 (1991).

30 The Governments of the United Kingdom and the United States held a pioneering conference in May, 1953 for the purpose of harmonizing their draft law of war manuals. The Cambridge Conference on the Revision of the Law of War, 47 *A.J.I.L.* 702-703

Their diminished status is evident in a description of sources used by the International Committee of the Red Cross, around the turn of the present century, when it evaluated evidence from State practice for its study of customary international humanitarian law:

> Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. Physical acts include, for example, battlefield behavour, the use of certain weapons and the treatment provided 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 organizations and at international conferences and government positions taken with respect to resolutions of international organisations.[31]

However, with the end of the Cold War these manuals began taking new forms and covering new subjects. Today law of war manuals are emerging as a revitalized source for the law of war; being taken up by private institutions and non-governmental organizations to promote compliance among combatants and empower human rights advocates.

III. LAW OF WAR MANUALS – CONTEMPORARY TRENDS

In some respects, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea[32] is a bridge document. Like the manuals developed by the International Law Institute in the late nineteenth and early twentieth centuries, it was developed to fill gaps in treaty law and address modern changes in maritime warfare. It was also a first – a joint effort among civilian and military experts to develop an unofficial law of war manual. It followed an old tradition in addressing uncertainties created by gaps in treaty law, while simultaneously opening new opportunities for civil society involvement in the development of international humanitarian law via State

(1953). This interesting precedent did not take hold. International coordination of law of war manuals has not, to date, become standard State practice.

31 1 *Customary International Humanitarian Law* xxxii (ICRC, J.-M. Henckaerts and L. Doswald-Beck eds., 2005).

32 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* 5 (L. Doswald-Beck ed., 1995).

participation in its development. States encouraged use of this manual, which was the end result of an initiative undertaken by the private International Institute of Humanitarian Law, when developing "manuals and other instructions for their naval forces".[33]

This Manual was influential in the development of the most recent law of war manual issued by the United Kingdom Ministry of Defence.[34] Other notable private sector manuals followed. In 1999, the International Committee of the Red Cross published "Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces". This Manual represented a new phase in the development of the law of war. Where earlier privately drafted manuals had provided guidance in the absence of a well-developed body of treaty law, this one drew upon a growing body of such legal authority to provide practical guidance along with a synopsis of existing rules. The ICRC had already taken a step in this direction in 1987 with publication of its Handbook on the Law of War for Armed Forces by Frederic De Mulinen.

For the first time, law of war related manuals were also developed to assist representatives of non-governmental organizations working in war zones. Minnesota Advocates for Human Rights published its *Handbook on Human Rights in Situations of Conflict* in 1997 "for use in monitoring, reporting, advocating, and acting on human rights situations before, during, or after armed conflict".[35] Doctors Without Borders published the *Practical Guide to Humanitarian Law* in 2002 with the conscious goal of creating a guide for the benefit of an entirely new audience. "This book presents humanitarian law in a new light: from the perspective of relief action carried out for the benefit of victims. It sets forth an interpretation of the rules that defends the interests of the weakest".[36] For the first time, private law of war

[33] Res. 3 of the 26th International Conference of the Red Cross and Red Crescent (1995).

[34] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* 348 (2004):

> When appropriate and possible the text of the *San Remo Manual* has been repeated in this chapter. However, where necessary the wording used in this chapter departs from the precise *San Remo* text either because that text does not reflect United Kingdom practice or because the *San Remo* text requires clarification or amplification.

For a historical survey of the development of State manuals on the law of maritime warfare and their relationship to the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, *see* J.A. Roach, "The Law of Naval Warfare at the Turn of Two Centuries", 94 *A.J.I.L.* 65-66 (2000). For a comprehensive study on the role of the *San Remo Manual* in the development of the UK Manual of the Law of Armed Conflict, *see* S. Haines, "The United Kingdom's Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared", 36 *Israel Y.B. Hum. Rts.* 89 (2006).

[35] J. Diller, *Handbook on Human Rights in Situations of Conflict* 1 (1997).

[36] F. Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* 1 (ed. and trans. by L. Bev, 2002).

manuals are emerging, in parallel to official manuals, as alternative sources for interpretation and application of international humanitarian law.

Though State sponsored military manuals had passed their prime as a source of evidence for the law of war, they began serving new functions around this time. The German Ministry of Defense's Joint Services Regulations (ZDV) 15/2 (which also served in function as a manual on the law of war) were translated and formed the basis for an extensive handbook and commentary that was published for a wider, international audience in 1995.[37] Recent U.S. practice suggests a new trend may be underway to integrate specified law of war guidance in a variety of specialized military manuals.

U.S. Army Field Manual 27-10 (The Law of Land Warfare) has long been a standard reference for operational application of both treaty based and customary rules of war. In recent years, the Judge Advocate General's Legal Center and School has served as the proponent for a specialized legal handbook for "the Soldiers, Marines, Airmen, Sailors, and Coast Guardsmen of the service judge advocate general's corps, who serve alongside their clients in the operational context". This Handbook "is not intended to represent official U.S. policy regarding the binding application of varied sources of law".[38]

However, this Handbook does demonstrate the growing role played by military legal advisors, and is part of an apparent trend toward integration of law of war guidance in manuals on the basis of specialized operational responsibilities and needs. This trend is also evidenced in several recent U.S. military publications. The Manuals on "Human Intelligence Collector Operations" and "Counterinsurgency" incorporate law of war guidance for specific operational settings.[39]

Further evidence of growing sophistication in official manuals comes from the United Kingdom. Joint military operations involving land, air and maritime forces have assumed an important place in the work and doctrine of some armed forces. The UK Ministry of Defence has adopted for this important operational trend by publishing an extensive law of war manual that addresses joint operations along with legally and politically complex

37 *The Handbook of Humanitarian Law in Armed Conflicts* (D. Fleck ed., 1995).

38 *Operational Law Handbook* ii (International and Operational Law Dept., The Judge Advocate General's Legal Center and School; Maj. J. Rawcliffe and Capt. J. Smith eds., Aug. 2006).

39 FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations (2 Sept. 2006), at 5-17 to 5-23, 5-27, App. A; and FM 3-24, MCWP 3-33.5 Counterinsurgency (15 Dec. 2006), at D-3 to D-4.

peace support operations.[40] The San Remo Manual on Non-International Armed Conflict[41] enters circulation against this backdrop of recent developments and intellectual ferment in drafting and utilization of law of war manuals.

IV. THE SAN REMO MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT CONSIDERED IN CONTEMPORARY AND HISTORICAL CONTEXT

Examination of the new San Remo Manual on Non-International Armed Conflict raises interesting issues and possibilities. Along with its predecessor, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, this Manual is unusual in that it develops law of war instruction for the shrinking number of conventional war settings in which significant gaps exist in treaty law.[42] The newer San Remo Manual addresses a field where treaty-based rules exist and have been growing in number, but with a unique twist not found in the law applicable to international armed conflict.

Unlike the law of international armed conflict, in which the rules apply uniformly to all inter-State conflict, the law of non-international armed conflict applies in two tiers with the rules applicable depending on the scope of conflict. Article 3 common to the four Geneva Conventions of 1949 applies in all conflicts internal to a State, but Protocol II Additional to the Geneva Conventions [hereinafter: Additional Protocol II][43] applies in more restrictive circumstances, a "second tier". This peculiarity, stemming from reluctance of some States to accept the more expansive and explicit requirements established in Protocol II, is noted in Chapter I of the Manual:

> There is an important issue of "threshold" relating to non-international armed conflicts. Common Article 3 merely requires that the armed

40 *UK Manual of the Law of Armed Conflict*, *supra* note 34. At this writing, the U.S. Dept. of Defense is also developing a joint service law of war manual.

41 *Supra* note 2.

42 Which is not to say that new forms of conflict, such as cyber warfare and transnational counter-terrorist operations may not over time call for the development of such manuals. The utility of law of war manuals has been suggested in connection with military operations in outer space. *See* R. Ramey, "Armed Conflict on the Final Frontier: The Law of War in Space", 48 *Air Force L. Rev*. 1, 141 (2000).

43 Protocol Additional to the Geneva Conventions of 12 August and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, 1125 *U.N.T.S.* 609.

> conflict not be of "an international character" and occur "in the territory of one of the High Contracting Parties". However, the threshold is higher under Additional Protocol II. By Article 1.1, the Protocol only applies to conflicts between the armed forces of a High Contracting Party "and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations" though it is possible for there to be an inter-connection between two separate conflicts, as in those of Liberia and Sierra Leone. The Article further requires, as does Common Article 3, that the conflict take place "in the territory of a High Contracting Party.[44]

The Manual notes that "express treaty law governing non-international armed conflicts is rather limited" but goes on to identify a number of treaties that do apply.[45] The timing for this Manual is interesting. Non-international armed conflicts are numerous, and sources of treaty-law that apply during such warfare are also growing. However, the detailed procedures for humanitarian protection set out in the Geneva Conventions of 1949 do not apply, insurgents are not entitled to the legal status and privileges accorded the armed forces of States during inter-State conflict, and the more detailed law of war provisions of Additional Protocol II do not apply until a higher threshold of conflict has been reached. The authors thus had to reconcile the need for clarity with a dynamic, emerging but still uncertain legal framework.

Most likely to generate debate, however, is not the Manual's incorporation of Protocol II, but rather the decision to incorporate guidance from the Protocol Additional to the Geneva Conventions of 12 August and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)[46] throughout the Manual.[47] For reasons that will be considered

44 *San Remo Manual*, *supra* note 2, para. 1.1.1 (4).

45 *Ibid.,* para. 1.1.1(2):

> It includes Common Article 3 of the 1949 Geneva Conventions for the Protection of War Victims; the 1977 Protocol Additional (II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict; the 1980 Convention on Certain Conventional Weapons, as amended, and its Protocols; the 1998 Statute of the International Criminal Court; the 1997 Ottawa Convention banning anti-personnel land mines; the 1993 Chemical Weapons Convention; and the 1954 Hague Convention for the Protection of Cultural Property and its 1999 Second Protocol. Numerous other treaties also bear on non-international armed conflict and are cited in this Manual. Of course, unless it is reflective of customary international law, treaty law binds only States Parties thereto.

46 1125 *U.N.T.S.* 3. Protocol I applies, as the title states, to international armed conflicts.

below, this choice may be controversial. However, it could help legal advisors and commanders avoid problems (*i.e.*, war crimes and human rights violations) that may follow if they fail to apply rules along the lines set forth in this Manual.

Careful thought should therefore be given, as well, to the drafter's decision to draw upon Additional Protocol II[48] in this Manual. Though the threshold for application of Protocol II is arguably high, and many internal armed conflicts may not reach a level where its provisions apply,[49] there is still a risk that fundamental protections accorded by the law of war and international human rights law may be difficult or impossible to ensure without recourse to operational rules found in these Protocols.

A legal advisor who seeks to apply a less rigorous set of rules than those of Protocol II during non-international armed conflict may debate the decision to rely on this instrument in the manual (e.g., "our conflict, if there is one, only reaches the threshold for common article three and not Additional Protocol II"). However, they would do so at their own peril. Assuming arguendo that standards lower than those set out in this Manual apply, there is another emerging legal reality that needs to be taken into account.

If an internal conflict has in fact developed and requires a military response, then failure to apply the protections and standards set out in this Manual would likely generate consequences considered criminal under both the law of war and peacetime human rights law. For example, the Manual sets out precautions required in planning and carrying out attacks. It states that:

> Neither Common Article 3 nor Additional Protocol II set forth any requirements for precautions in planning and carrying out attacks. However, such precautions are implicit in the general tenet, outlined in Article 13.1 of Additional Protocol II that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations". This tenet was already recognized by customary international law at the time the Additional Protocols were drafted.[50]

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47 *See* the *San Remo Manual*, *supra* note 2, paras. 1.1.4 (1), 1.2.3 (3), 2.1.1.4 (1), 2.1.2(7), 2.3.10 (1), 3.4 (1), 4.1 (1), 4.2.4 (1), and 4.2.5 (1).

48 *Supra* note 43.

49 *See* analysis on this point in para. 1.1.1 b. 4. of the *San Remo Manual, supra* note 2.

50 *Ibid.*, para. 2.1.2 (1).

Therein lays this Manual's unique contribution. The law of war is developing to fill many gaps in the rules for non-international armed conflict, though there is some room for debate on how far these new rules extend. However, the results attendant if they aren't expansively applied could be dire for belligerents. It would, for instance, be no defense to reckless, indiscriminate attacks on civilians that there was no set rule for precautions taken in the attack. In addition, perpetrators could just as easily find themselves charged with human rights violations as with violations of the law of war.[51]

If there is a functional weakness in this Manual it relates to the availability of legal advice in many non-international armed conflicts. Though public and private sector lawyers alike play a growing role in application and interpretation of international humanitarian law, these professionals are not uniformly distributed either geographically or institutionally. In many settings they will be unavailable. The Manual is lawyer-friendly, but not equally usable for military officers and non-commissioned officers who lack legal training. As the President of the Institute has opened the door for future iterations of the manual, it would therefore be worth considering inclusion, in future editions, of concrete examples illustrating how the law might apply, along with simple draft regulations and orders that can be incorporated into military practice without extensive intermediation by attorneys.[52]

CONCLUSIONS

The San Remo Manual on the Law of Non-International Armed Conflict reflects emerging trends and realities. On one hand, it's organized for efficient field use (breaking subjects down along practical lines-conduct of military operations, persons under special protection and treatment of objects and places). This is in line with an emerging trend to maximize practical utility in law of war manuals. On the other hand, the Manual's Commentary

51 "Although this Manual does not deal with human rights law as such, it should be noted that such law continues to apply, subject to any derogations made under applicable treaties". *Ibid.*, para. 1.1.1 (4).

52 The *San Remo Manual* (*supra* note 2) already takes some steps towards use of explanatory examples. *See, e.g.* para. 2.1.1 on Targeting. Failure to go beyond abstract rules to concrete explanation is a common characteristic of military law of war manuals. The UK Manual also takes some steps towards fuller explanation of legal standards with recommendations and historical examples of application in the field. *See, e.g., UK Manual of the Law of Armed Conflict, supra* note 34, at 325-26.

is weighed towards legal analysis. This is in line with a trend that finds lawyers playing a greater role in warfare than at any other time in history.

The Manual provides some interesting and novel opportunities. It is the first law of war manual ever written that addresses non-State as well as State actors.[53] As such, it can be used by neutral interlocutors to convey expectations to such groups regarding belligerent conduct. Where non-State belligerents are given a pass on law of war compliance by activists who sympathize with their cause, the Manual can be used to raise international expectations and demands for better conduct despite sympathies that may exist for them.

As mentioned, readers are also invited to treat the Manual as a work in progress.[54] The International (San Remo) Institute of Humanitarian Law is uniquely situated to collect input from officers attending its courses, on a continuous basis, from all parts of the world. This professional and educational relationship will accord the Institute remarkable opportunities to continue developing and refining the Manual.

The process of development, focus, and use of law of war manuals has changed over the course of generations. Through these changes, we can track the larger development of the law of war. This is the first international manual on the law of war developed in an era marked by high and sustained expectations for continuing punishment for war crimes. It can improve the law of war as a tool for enhancing compliance and humanitarian protection. It furnishes a roadmap for the well-intentioned – and warning signs for those who are not.

Readers may or may not find that the San Remo Manual on the Law of Non-International Armed Conflict conveys an exact summary of settled, existing law in this field. Unquestionably, it provides guidance that can be used to avoid war crimes, international condemnation, undeserved prosecution for alleged war crimes, tactical and strategic setbacks in winning over civilians, and loss of critical international support. The Manual will be an asset for anyone who needs to confront such prospects, find a way

53 "For purposes of this Manual, fighters are members of armed forces and dissident armed forces or other organized armed groups, or taking an active (direct) part in hostilities". *San Remo Manual, supra* note 2, para. 1.1.2.a.

54 *Ibid.,* Introduction by Prof. J. Patrnogic, President of the International Institute of Humanitarian Law:

> The new Manual will meet the requirements of our military courses, but it will equally be available to other interested institutions and parties. Given the volatile nature of the field, we fully expect users of the Manual to come up with suggestions to further elucidate the law and improve both the black letter rules as well as the commentary in future editions of the text.

forward that ensures security and, in the wake of national tragedy, ensure national reconciliation.

THE ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY – A REJOINDER TO PROFESSOR DINSTEIN

By Jean-Marie Henckaerts[*]

INTRODUCTION

Professor Dinstein's expertise in the areas of international law and international humanitarian law in particular is widely recognized. His article on the ICRC study on customary international humanitarian law in the previous volume of this Yearbook is therefore of particular interest.[1] As one of the co-authors of the study, I have been given an opportunity to comment on his article.

In the light of Professor Dinstein's expertise in the area of international humanitarian law, he was invited not only to report on Israel's practice, but also to participate in the consultations with governmental and academic experts that were organized before the completion of the study. During the first round of consultations in 1999 a draft produced by the six rapporteurs was discussed. On the basis of these discussions, and on the basis of further research into practice, the ICRC produced a second draft which was circulated among the experts for commentary. We were grateful to receive comments from a large number of experts, including from Professor Dinstein. We agreed with many of these comments and took them into consideration for the publication of the study. This is explained in the Introduction of the study.[2] As the ICRC intends to update the study, in particular its Volume II containing the practice,[3] we remain receptive to any further comments and to any further practice the experts may obtain.

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1 *See* Y. Dinstein, "The ICRC Customary International Humanitarian Law Study", 36 *Israel Y.B. Hum. Rts.* 1 (2006).

2 *See Customary International Humanitarian Law, Volume I: Rules* xlviii–li (ICRC, J.-M. Henckaerts and L. Doswald-Beck eds., Cambridge University Press, 2005) [hereinafter: *Volume I*].

3 *See Customary International Humanitarian Law*, *Volume II: Practice* (ICRC, J.-M. Henckaerts and L. Doswald-Beck eds., Cambridge University Press, 2005) [hereinafter: *Volume II*].

There are a number of comments in Professor Dinstein's article with which I do not or do not entirely agree or where I would have preferred a more nuanced explanation of the issue at hand. For ease of reference, the subheadings below refer to the paragraph numbers in Professor Dinstein's article to which my comments refer.

I. METHODOLOGY

Paragraphs 3–4 – Design of the Study

Professor Dinstein's proposal to examine – Article by Article – which provisions of the 1977 Additional Protocol I[4] are customary *lex lata* or uncontroversial rules *de lege ferenda* is worthwhile. However, the authors of the study had to execute the mandate as formulated by the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, January 1995) which 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 organisations, *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 (emphasis added).[5]

In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare such a report.[6] As formulated, this mandate meant that the

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 *U.N.T.S.* 3.

5 Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 Jan. 1995, Recommendation II; *repr. in* 310 *Int'l Rev. Red Cross* 84 (1996).

6 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 Dec. 1995, Res. 1, International Humanitarian Law: From Law to Action; Report on the follow-up to the International Conference for the Protection of War Victims; *ibid*., 58.

report – which is now commonly referred to as a "study" – had to look at areas of international humanitarian law in a wide sense, beyond the subject matter of Additional Protocol I.

While it may be deemed unfortunate that, as a result, the study does not cover all areas of law addressed in Additional Protocol I, this should be somewhat understandable in light of the sheer size of the exercise as it was defined. This lacuna may also be redressed in a possible future update of Volume I which might include other areas of the law, such as civil defense.

Paragraph 7 – Sources of Custom

While it is generally correct, as Professor Dinstein states, that the *fons et origo* of custom is State practice, it is more correct to state that it is the practice of "subjects of international law". It is noteworthy to point out that Article 38(1)(b) of the Statute of the International Court of Justice defines custom as "a general practice accepted as law", without, however, using the term "*State* practice".

The category of "subjects of international law" includes most prominently States, but also international organizations and even the ICRC which has an international legal personality.[7] Some would argue that it also includes armed opposition groups with respect to non-international armed conflicts – in part in light of common Article 3 – but their practice, to the extent that it was collected for the study, was put under "Other Practice" (see below).

Paragraph 9 – ICRC Practice

It should be stressed that the study does not use ICRC memoranda, appeals and press releases as primary sources of evidence for the customary nature of a rule. They are cited to reinforce conclusions that were reached on the basis of State practice alone. Hence, ICRC practice never tipped the balance in favor of a rule being customary. The same is true for resolutions of international organizations and conferences which are not, in principle, binding as such.

It is not disputed that States' reaction to ICRC memoranda or appeals would clearly be a more important source of evidence. To the extent that these reactions were known to the authors, they have been included – both

7 *See, e.g.*, ICTY, The Prosecutor v. Blagoje Simić *et al.*, Case No. IT-95-9-PT, Decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness, 27 July 1999, released as a public document by Order of 1 Oct. 1999, para. 46, and n. 9.

the positive ones (*e.g.*, ICRC appeal to the parties to the conflict in the Middle East in October 1973),[8] as well as the critical ones (*e.g.*, US reply to an ICRC memorandum on the applicability of international humanitarian law in the Gulf region in 1991).[9] Even when these reactions were not known, it was still considered appropriate to report on these memoranda and appeals. The role of ICRC appeals and of States' reaction thereto in the formation of customary international law is also acknowledged by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia [ICTY] in the Interlocutory Appeal on Jurisdiction in the *Tadić* case in 1995:

> As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.[10]

Paragraph 10 – Other Practice

With respect to the category of "Other Practice", it is important to stress that this is a residual category of materials that has not been given any weight in the determination of what is customary. The term "practice" in this context

8 *See, e.g.*, *Volume I, supra* note 2, at 5, 9 and 20–21.

9 *See, e.g.*, *ibid.*, at 67.

10 The Prosecutor v. Duško Tadić aka "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995, Case No. IT-94-1-AR72, para. 109.

was not at all used to denote any form of State (or other) practice that contributes to the formation of customary international law.

Like Volume I, Volume II of the study was shared with the group of experts. The types of practice included in Volume II did not change from the time of the first expert consultations in 1999 until final publication in 2005. There was no objection expressed to the inclusion of such a category in 1999, nor later on.

Hence, only part of the practice collected in Volume II has actually been taken into account in Volume I. In that respect, Volume II may give the wrong impression that everything included in it was somehow considered relevant for the establishment of customary law. This is clearly not the case and the practice in Volume II was assessed on the basis of the methodology as set out in the introduction to the study.[11]

It is important, in this respect, to explain that the methodology described in the introduction was applied for each rule without necessarily repeating the various considerations of that methodology. To do so would have made the study unnecessarily long and not very user-friendly. The purpose was to produce a user-friendly tool for practitioners and this explains much of the format.

Paragraph 12 – Military Manuals and Instructions

Professor Dinstein's comments on the Israeli military manuals comprise three aspects. The first aspect is that the text mentions "a manual used by Israel" but the footnote refers to the Law of War Booklet. The fact that this Booklet is referred to as a "manual" does not imply any legal qualification of the document. This Booklet is referred to as a "manual" in the generic sense of the word and was included in the category of practice referred to as military manuals, which includes official military manuals and other documents such as teaching manuals, instructor guides and pocket cards. Therefore, the text uses the generic term "manual" without a capital "M". It was not meant to refer to the Israeli Manual on the Laws of War but to the Law of War Booklet.

The second aspect is that footnote 152 (at 225) cross-refers to the wrong paragraph in Volume II. The footnote should refer to the Law of War Booklet at § 945 instead of § 946. This kind of mistake can never be excluded in a work of this magnitude. But the most important point to make in this respect, is that mistakes in the cross-references to Volume II have

[11] *See, in particular*, *Volume I*, *supra* note 2, at xxxii–xxxvi.

been corrected in the translated versions and in a 2007 reprint of the English edition of Volume I.[12]

The third aspect is more substantive as Professor Dinstein claims that another Israeli manual, namely the Manual on the Laws of War, is not a genuine manual. The term "Manual on the Laws of War" is a short name used in the Study on the basis of the full title of the document, *i.e.*, "Laws of War in the Battlefield, Manual, Military Advocate General Headquarters, Military School, 1998". However, the short name was in no way meant to imply any particular status of the manual but was included as State practice in the category of military manuals as it is a teaching manual.

It was the authors' view that a teaching manual that has been authorised for use in training represents a form of State practice even though it may not be the "official" military manual. In principle, a State will not allow its armed forces to be taught on the basis of a document whose content it does not endorse. As a result, training manuals, instructor handbooks and pocket cards for soldiers were considered as reflecting State practice. Several such documents were found and incorporated including, for example, those from Germany,[13] the United Kingdom,[14] and the United States.[15] For a complete listing, see the list of military manuals (including teaching manuals and other similar documents) attached to Volume II.[16]

Even though teaching manuals (as other manuals) may contain rules and instructions that – for policy or other reasons – go beyond the strict legal requirements which a State is willing to accept, their content should at least not fall *below* what a State considers to be legally required. The distinction between rules and instructions contained in military manuals based on legal considerations and those based purely on policy (or other non-legal) considerations is not always easy to make and was not explicitly mentioned

12 Translations exist in Arabic (ICRC, Cairo, 2007); Chinese (ICRC & China Law Press, Beijing, 2007); French (ICRC & Editions Bruylant, Brussels, 2006); Russian (ICRC, Moscow, 2006) and Spanish (ICRC, Buenos Aires, 2007).

13 *See, e.g.,* Germany, Publication ZDv 15/1, *Humanitäres Völkerrecht in bewaffneten Konflikten – Grundsätze*, DSK VV230120023, Bundesministerium der Verteidigung, June 1996; and Taschenkarte, *Humanitäres Völkerrecht in bewaffneten Konflikten – Grundsätze, Bearbeitet* nach ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch* (Zentrum Innere Führung, June 1991).

14 *See, e.g.*, UK, *The Law of Armed Conflict*, D/DAT/13/35/66, Army Code 71130 (Rev. 1981), Ministry of Defence, prepared under the Direction of The Chief of the General Staff, 1981 (updated yearly).

15 *See, e.g.*, US, *Your Conduct in Combat under the Law of War*, Pub. No. FM 27-2, Headquarters Department of the Army, Washington, Nov. 1984 and *Instructor's Guide – The Law of War*, (Headquarters Department of the Army, Washington, Apr. 1985).

16 *See Volume II*, *supra* note 3, at 4196–4207.

in the commentaries to the rules in Volume I. Nevertheless, this distinction was taken into consideration in the assessment of the practice, as explained in the introduction.

In this context, Professor Dinstein claims that "Israel does not accept the words 'or capturing' as a reflection of customary international law" in the rule on perfidy (Rule 65) and that the authors "refused to accept this." This statement is misleading because the issue of whether "capturing" is part of customary law is openly discussed in the commentary based on the collected practice.[17] It therefore indicates, for example, that a manual used by the Israel Defence Forces (namely the Law of War Booklet) prohibits resort to perfidy to kill, injure or capture an adversary. This information is based on the report on Israeli practice. As it was decided that only practice that could be attributed to States would be referred to, no references were made to the experts' personal comments as such or to opinions in legal literature. On the basis of their assessment of the collected practice, the authors concluded that capture by resort to perfidy is prohibited under customary international law.

Paragraph 14 – Research into ICRC archives

Professor Dinstein's criticism of the sources gleaned from the ICRC archives misses two important points. First, research into ICRC archives yielded many public documents that might not have been found otherwise and that have been included throughout the study – without mention of the ICRC archives as a source of course. Secondly, as for those documents which have been cited as "ICRC archives", the authors were constrained to treat them "anonymously" because the documents in question are still covered by the confidentiality rule of the ICRC archives. While this may be regrettable, it is also unavoidable.

II. THE RULES

Paragraph 16 – Definition of Civilians

The status of civilians who take a direct part in hostilities is being discussed in the framework of the expert meetings on direct participation in hostilities.[18] It is not disputed that civilians who take a direct part in hostilities may be targeted during military operations and, upon capture, may

[17] *See Volume I*, *supra* note 2, at 225.

[18] For further information, *see*: http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205.

be prosecuted under domestic law for their participation in hostilities, whether they are considered civilians or unlawful combatants.

Paragraph 17 – Armed Forces and Combatants

It should be pointed out that combatants' obligation to distinguish themselves from the civilian population is discussed in Rule 106, next to the status of spies (Rule 107) and mercenaries (Rule 108). The application of Rule 106 leads to a recognition of the validity of the conditions contained in the Third Geneva Convention of 1949 for lawful combatancy. It should be stressed that Rules 1–6 only address issues of targeting, not of status. In this respect, it is difficult to see in which way these rules would lead to results that are not shared by Professor Dinstein, with the possible exception of disagreement about the temporal scope of the concept of direct participation in hostilities in Rule 6 (see below). The issue of status upon capture is addressed in Rule 106.

In addition, the reference in Professor Dinstein's remarks to Article 44 of Additional Protocol I *in toto* may give the wrong impression that the study vouches for the customary status of all the paragraphs of Article 44. But this is not the case. Rule 106 only states a general requirement of distinction but does not indicate the precise manner in which a combatant has to distinguish him or herself. Clearly, the conditions contained in Article 4 of the 1949 Third Geneva Convention (carrying arms openly and wearing a fixed distinctive sign recognisable at a distance) would be sufficient. Whether the limited exception contained in Article 44(3), second sentence, of Additional Protocol I is also customary is discussed in detail in the commentary to Rule 106 and the commentary is inconclusive on this point.[19]

Finally, Professor Dinstein's argument about a so-called "great schism" dividing contracting and non-contracting Parties to Additional Protocol I is not supported by the practice indicated in his article, nor by the practice collected in the framework of the study. In order to prove this point, it seems that it would be required to cite more specific practice from more non-contracting Parties.

Paragraph 18 – Armed Forces and Combatants

The US Operational Law Handbook (2005) states that:

19 *See Volume I*, *supra* note 2, at 387–89.

> The US *specifically objects* to articles: … 44 (expansion of definition of combatants, relaxing of requirement to wear fixed distinctive insignia recognizable at a distance; reducing threshold of lawful combatants status to requirement to carry arms openly during military engagement or in military deployment preceding an attack; when visible to the enemy).

This would imply that the US does not specifically object to Article 43 of Additional Protocol I. This is supported by the Annotated Supplement to the Commander's Handbook on the Law of Naval Operations.[20]

It is true that the additional requirements of a distinctive sign and carrying arms openly are mentioned in the Annotated Supplement to the Commander's Handbook on the Law of Naval Operations but only for irregular forces, as in Article 4(2) of the Third Geneva Convention of 1949.[21] These additional requirements of a distinctive sign and carrying arms openly are the subject of the commentary to Rule 106. In this context, the US and Israeli objection to the relaxing of these requirements for resistance and liberation movements are clearly indicated.[22] The study does not conclude that the relaxing of these requirements is part of customary law.

Paragraph 20 – Civilians' Loss of Protection from Attack

The issue of civilians' loss of protection from attack is determined by application of the concept of direct participation in hostilities. While the concept itself is generally accepted, there is discussion about its substantive scope – which acts constitute direct participation? – and about its temporal scope – when direct participation starts and when it ends?

Professor Dinstein contests the inclusion in Rule 6 of the words "and for such time". These words can also be found in Article 51(3) of Additional Protocol I and in Article 13(3) of Additional Protocol II.[23]

It should be noted that the temporal scope of the concept of direct participation in hostilities is being discussed in the expert meetings on this

[20] *See* US, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* 296 (Oceans Law and Policy Department, Center for Naval Warfare Studies, Naval War College, Newport, Rhode Island, Nov. 1997), text accompanying n. 11 and n. 11 itself, which starts out with a reference to the text of Art. 43 of Additional Protocol I.

[21] *Id.*

[22] *See Volume I*, *supra* note 2, at 389.

[23] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, 1125 *U.N.T.S.* 609.

subject referred to above. The issue is explicitly raised in the commentary and a reference to the expert meetings is provided.[24]

It should also be noted that in a recent judgment the Israeli Supreme Court referred with approval to Rules 1 (principle of distinction between civilians and combatants), Rule 6 (loss of protection against attack), Rule 7 (principle of distinction between civilian objects and military objectives), Rule 11 (indiscriminate attacks) and Rule 14 (proportionality) of the study.[25] On the issue of civilians' loss of protection from attack, the Court explicitly accepted the conclusion of the study that the rule in Article 51(3) of Additional Protocol I, including the words "and for such time as", is part of customary international law.[26]

Paragraph 21 – Hospital and Safety Zones

When the formulation of Rule 35 on the protection of zones established to shelter the wounded, the sick and civilians was discussed, the conclusion was reached that, in general, such zones must not be established by agreement in order to benefit from protection. This is so because the wounded and sick are *hors de combat* and, as such, in principle protected against attack. Of course, an agreement would be a sufficient condition to benefit from protection, but it is not a necessary condition. This conclusion is therefore not in conflict with the fact that the Geneva Conventions provide a model agreement for hospital and safety zones. Also, the conditions provided for in the model agreement are generally comprised within other rules on the conduct of hostilities (in particular rules concerning the loss of protection for combatants *hors de combat*, loss of protection for civilians, and the definition of military objectives). Finally, no expert commented on this issue during the consultations.

Paragraph 22 – Access for humanitarian relief

The issue of consent to a humanitarian relief operation is openly discussed in the commentary to Rule 56 and there was no intention to go beyond the content of the Additional Protocols. The problem was rather to find a formulation of a rule that would cover both international and non-

24 *See Volume I, supra* note 2, at 23, n. 137.

25 H.C. (Israel Supreme Court Sitting as the High Court of Justice) 769/02, The Public Committee against Torture in Israel *et al*., v. The Government of Israel *et al.,* (2006), paras. 23, 29-30, and 41-42; available in English on: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm.

26 *Ibid.,* para. 30.

international armed conflicts. It would have been problematic, in this respect, to use the term "consent from the parties", including consent from armed opposition groups, in a rule that would cover both international and non-international armed conflicts.

This brings me to a general point on the value of the commentary. The study catalogues rules of customary international humanitarian law. As such, only the black letter rules are identified as part of customary international law, and not the commentaries to the rules. The commentaries may, however, contain useful clarifications with respect to the application of the black letter rules and this is sometimes overlooked by commentators.

For example, the commentary to Rule 54 on attacks against objects indispensable to civilian survival indicates that there are exceptions to this rule.[27] The rule should be examined in that light.[28] Similarly, as mentioned above, the commentary to Rule 56 on access for humanitarian aid discusses the requirement of consent.[29]

Paragraphs 23–26 – Long-term, widespread and severe damage to the environment

Professor Dinstein first raised his commentary on the rule concerning long-term, widespread and severe damage to the environment (Rule 45) at a launch conference in The Hague on 30–31 May 2005. At that time, we conceded the point that with respect to the employment of nuclear weapons, the rule of custom has not come into existence as three specially affected States have barred the formation of such a rule. As regards conventional weapons, however, the rule has come into existence but may not actually have much meaning as the threshold of the cumulative conditions of long-term, widespread and severe damage is very high.

27 *See Volume I*, *supra* note 2, at 192–93.

28 Hence, the observation made by the Eritrea-Ethiopia Claims Commission that the study concludes that a broader prohibition than the one stated in Art. 54(2) of Additional Protocol I has become customary law is based on a misreading of the study. *See* Eritrea-Ethiopia Claims Commission, *Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, between The State of Eritrea and The Federal Democratic Republic of Eritrea* (The Hague, 19 Dec. 2005), at 30, n. 23. The authors of the study did not intend Rule 54 to go beyond the content of Art. 54(2) of Additional Protocol I, for State practice would not support such a conclusion. As a result, the study actually confirms the finding of the Commission that Art. 54(2) of Additional Protocol I "may reasonably be considered to have come to reflect customary international humanitarian law". *See ibid.*, at 30.

29 *See Volume I*, *supra*, note 2, at 196–97.

Paragraph 27 – Expanding bullets

It is important to point out that the permissible use of expanding bullets for domestic law-enforcement purposes is dealt with in the commentary.[30] This shows again that the rules have to be read and interpreted in the light of their commentaries.

As far as the use against terrorists and "suicide bombers" is concerned, the question is one of context – does this use take place in armed conflict or not? Practice consistently prohibits the use of expanding bullets in armed conflict and no specific practice to the contrary has been proferred.

CONCLUSION

These brief comments are meant to underline what the study is – a report published at the request of States – and, importantly, what it is not – a handbook which puts forward its own interpretation or interpretations based on academic commentary. The study bears witness to the continuing development of practice and, hence, customary international law. It is important that the rules be examined in the light of the clarifications provided for in their commentaries.

The study has been nearly 10 years in the making and more than 150 governmental and academic experts from every corner of the world have contributed to the research and consultations. We are grateful therefore that Professor Dinstein notes that the study constitutes "an important landmark" and that he does "not take issue with many of the black-letter Rules and much of the commentary, as presented in part 1 of the Study".[31]

30 *See Volume I*, *supra* note 2, at 270.

31 *See* Dinstein, *supra* note 1, at 1 and 8.

SPECIAL SUPPLEMENT

LETTER DATED NOVEMBER 3, 2006, TO DR. JAKOB KELLENBERGER, PRESIDENT OF ICRC, FROM JOHN B. BELLINGER, III, LEGAL ADVISER, U.S. DEPARTMENT OF STATE, AND WILLIAM J. HAYNES, GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE

Text of Letter

We write to provide the U.S. Government's initial reactions to the ICRC's recent study, entitled Customary International Humanitarian Law (the "Study").

We welcome the Study's discussion of this complex and important subject of the customary "international humanitarian law," and we appreciate the major effort that the ICRC and the Study's authors have made to assemble and analyze a substantial amount of material. We share the ICRC's view that knowledge of the rules of customary international law is of use to all parties associated with armed conflict, including governments, those bearing arms, international organizations, and the ICRC. Although the Study uses the term "international humanitarian law," we prefer the "law of war" or the "laws and customs of war."[1]

Given the Study's large scope, we have not yet been able to complete a detailed review of its conclusions. We recognize that a significant number of the rules set forth in the Study are applicable in international armed conflict because they have achieved universal status, either as a matter of treaty law or - as with many provisions derived from the Hague Regulations of 1907 - customary law. Nonetheless, it is important to make clear - both to you and to the greater international community - that, based upon our review thus far, we are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules. Accordingly, the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.

We will continue our review and expect to provide additional comments or otherwise make our views known in due course. In the meantime, we thought it would be constructive to outline some of our basic methodological concerns and, by examining a few of the rules set forth in

the Study, to illustrate how these flaws call into question some of the Study's conclusions.

This is not intended to suggest that each of our methodological concerns applies to each of the Study's rules, or that we disagree with every single rule contained in the study — particular rules or elements of those rules may well be applicable in the context of some categories of armed conflict. Rather, we hope to underline by our analysis the importance of stating rules of customary international law correctly and precisely, and of supporting conclusions that particular rules apply in international armed conflict, internal armed conflict, or both. For this reason, the specific analysis that follows this letter is in certain respects quite technical in its evaluation of both the proffered rule and the evidence that the Study uses to support the rule.

There is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris.* Although it is appropriate for commentators to advance their views concerning particular areas of customary international law, it is ultimately the methodology and the underlying evidence on which commentators rely - which must in all events relate to State practice - that must be assessed in evaluating their conclusions.

State practice. Although the Study's introduction describes what is generally an appropriate approach to assessing State practice, the Study frequently fails to apply this approach in a rigorous way.

- First, for many rules proffered as rising to the level of customary international law, the State practice cited is insufficiently dense to meet the "extensive and virtually uniform" standard generally required to demonstrate the existence of a customary rule.
- Second, we are troubled by the type of practice on which the Study has, in too many places, relied. Our initial review of the State practice volumes suggests that the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris,* they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations. We also are troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing

to do with a belief that the propositions in it reflect customary international law.

- Third, the Study gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.
- Fourth, although the Study acknowledges in principle the significance of negative practice, especially among those States that remain non-parties to relevant treaties,[2] that practice is in important instances given inadequate weight.
- Finally, the Study often fails to pay due regard to the practice of specially affected States.[3] A distinct but related point is that the Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine. The latter category of States, however, has typically contributed a significantly greater quantity and quality of practice.

Opinio juris. We also have concerns about the Study's approach to the *opinio juris* requirement. In examining particular rules, the Study tends to merge the practice and *opinio juris* requirements into a single test. In the Study's own words,

> it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects both practice and legal conviction.... 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.*[4]

We do not believe that this is an appropriate methodological approach. Although the same action may serve as evidence both of State practice and *opinio juris,* we do not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law. For example, Additional Protocols I and II to the Geneva Conventions contain far-reaching provisions, but States did not at the time of their adoption believe that all of those instruments' provisions reflected rules that already had crystallized into customary international law; indeed, many provisions were considered ground-breaking and gap-filling at the time. One

therefore must be cautious in drawing conclusions as to *opinio juris* from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations, particularly *inter se,* and not in contemplation of independently binding customary international law norms.[5] Even if one were to accept the merger of these distinct requirements, the Study fails to articulate or apply any test for determining when state practice is "sufficiently dense" so as to excuse the failure to substantiate *opinio juris,* and offers few examples of evidence that might even conceivably satisfy that burden.

We are troubled by the Study's heavy reliance on military manuals. We do not agree that *opinio juris* has been established when the evidence of a State's sense of legal obligation consists predominately of military manuals. Rather than indicating a position expressed out of a sense of a customary legal obligation, in the sense pertinent to customary international law, a State's military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party. Reliance on provisions of military manuals designed to implement treaty rules provides only weak evidence that those treaty rules apply as a matter of customary international law in non-treaty contexts. Moreover, States often include guidance in their military manuals for policy, rather than legal, reasons. For example, the United States long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts. Finally, the Study often fails to distinguish between military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements. This is notwithstanding the fact that some of the publications cited contain a disclaimer that they do not necessarily represent the official position of the government in question.

A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules. In this regard, the practice volumes generally fall far short of identifying the level of positive evidence of *opinio juris* that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.

Formulation of rules. The Study contains several other flaws in the formulation of the rules and the commentary. Perhaps most important, the Study tends to oversimplify rules that are complex and nuanced. Thus, many

rules are stated in a way that renders them overbroad or unconditional, even though State practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions. Although the Study's commentary purports to explain and expand upon the specifics of binding customary international law, it sometimes does so by drawing upon non-binding recommendations in human rights instruments, without commenting on their non-binding nature, to fill perceived gaps in the customary law and to help interpret terms in the law of war. For this reason, the commentary often compounds rather than resolves the difficulties presented by the rules, and it would have been useful for the Study's authors to articulate the weight they intended readers to give the commentary.

Implications. By focusing in greater detail on several specific rules, the attachment illustrates how the Study's methodological flaws undermine the ability of States to rely, without further independent analysis, on the rules the Study proposes. These flaws also contribute to two more general errors in the Study that are of particular concern to the United States:

- First, the assertion that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all States, including with respect to a significant number of States (including the United States and a number of other States that have been involved in armed conflict since the Protocols entered into force) that have declined to become a party to those Protocols; and
- Second, the assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict, notwithstanding the fact that there is little evidence in support of those propositions.

We would like to reiterate our appreciation for the ICRC's continued efforts in this important area, and hope that the material provided in this letter and in the attachment will initiate a constructive, in-depth dialogue with the ICRC and others on the subject.

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1 As the Study itself indicates, the field has traditionally been called the "laws and customs of war." Accordingly, we will use this term, or the term "law of war," throughout. J.-M. Haenckerts and L. Doswald-Beck, Customary International Humanitarian Law. Vol. 1, p. xxv (Cambridge 2005) (hereinafter, "Study").

2 Study, Vol. I, p. xliv (indicating that contrary practice by States not parties to treaties that contain provisions similar to the rule asserted "has been considered as important negative evidence").

3 As the Study notes (Vol. I, p. xxxviii), the International Court of Justice has observed that "an indispensable requirement" of customary international law is that "State practice, *including that of States whose interests are specially affected,* should have been both

extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark: Federal Republic of Germany v. Netherlands. {1969] I.C.J. 4,43 (emphasis added). In this context, the Study asserts, this principle means that "[w]ith 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." Study, Vol. I, p. xxxix. This rendering dilutes the rule and, furthermore, makes it unduly provisional. Not every State that has participated in an armed conflict is "specially affected"; such States do generate salient practice, but it is those States that have a distinctive history of participation that merit being regarded as "specially affected." Moreover, those States are not simply "specially affected" when their practice has, in fact, been examined and found relevant by the ICRC. Instead, specially affected States generate practice that must be examined in order to reach an informed conclusion regarding the status of a potential rule. As one member of the Study's Steering Committee has written, "The practice of 'specially affected states' - such as nuclear powers, other major military powers, and occupying and occupied states - which have a track record of statements, practice and policy, remains particularly telling." Theodore Meron, The Continuing Role of Custom in the Formation of International Humanitarian Law. 90 Am. J. Int'l L. 238,249 (1996).

4 Study, Vol. I, p. xl.

5 Even universal adherence to a treaty does not necessarily mean that the treaty's provisions have become customary international law, since such adherence may have been motivated by the belief that, absent the treaty, no rule applied.

Appendix to Letter:

Illustrative Comments on Specific Rules in the Customary International Humanitarian Law Study[1]

Rule 31

Rule 31 states: "Humanitarian relief personnel must be respected and protected."

The United States consistently has supported and facilitated relief efforts in armed conflicts around the world, and is keenly aware of the critical role humanitarian relief personnel ("HRP") play in bringing food, clothing, and shelter to civilians suffering from the impact of such conflicts. It is clearly impermissible intentionally to direct attacks against HRP as long as such personnel are entitled to the protection given to civilians under the laws and customs of war.

Rule 31, however, sets forth a much broader proposition without sufficient evidence that it reflects customary international law. The Study fails to adduce a depth of operational State practice to support that rule. Had it examined recent practice, moreover, its discussion might have been more sensitive to the role of State consent regarding the presence of such personnel (absent a UN Security Council decision under Chapter VII of the UN Charter) and the loss of protection if such personnel engage in particular acts outside the terms of their mission. The Study summarily dismisses the role of State consent regarding the presence of HRP but fails to consider whether a number of the oral statements by States and organizations that it cites actually reflected situations in which HRP obtained consent and were acting consistent with their missions.[2] To be clear, these qualifications do not suggest that HRP who have failed to obtain the necessary consent, or who have exceeded their terms of mission short of taking part in hostilities, either in international or internal armed conflicts, may be attacked or abused. Rather, it would be appropriate for States to take measures to ensure that those HRP act to secure the necessary consent, conform their activities to their terms of mission, or withdraw from the State. Nevertheless, a

[1] J.-M. Haenckerts and L. Doswald-Beck, Customary International Humanitarian Law (Cambridge 2005) (hereinafter, "Study").

[2] Indeed, the authors of the Study may have intended to use the phrase "humanitarian relief personnel" as shorthand for "humanitarian relief personnel, when acting as such." However, the rule as written does not say this, even though rule 33, which is closely related to rule 31, reflects the fact that the protection for peacekeepers attaches only as long as they are entitled to the protection given civilians under international humanitarian law.

proposition that fails to recognize these qualifications does not accurately reflect State practice and *opinio juris.*

Relevant treaty provisions. Treaty provisions on the treatment of HRP guide the current practice of many States, and clearly articulate limits to the obligation asserted by rule 31:

- Article 71 (1) of Additional Protocol I (" AP I") requires that HRP obtain the consent of the State in which they intend to operate.[3] Article 71(4) prohibits HRP from exceeding the "terms of their mission" and permits a State to terminate their mission if they do so. Even Article 17(2) of AP I, which the Study cites in support of a State's obligation to protect aid societies, describes a situation in which consent almost certainly would be present, since a State that appeals to an aid society for assistance effectively is providing advance consent for that society to enter its territory.
- The Convention on the Safety of United Nations and Associated Personnel, which places an obligation on States Parties to take appropriate measures to ensure the safety and security of UN and associated personnel, applies to situations in which UN personnel are in the host State with the host State's consent, since Article 4 requires the UN and the host State to conclude an agreement on the status of the UN operation.[4] Article 12 of Amended Protocol II to the Convention on Conventional Weapons ("CCW Amended Protocol II"), which addresses States Parties' obligations to protect certain humanitarian missions from the effects of mines and other devices, states that "this Article applies only to missions which are performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed."[5] The Article continues, "Without prejudice to such privileges and immunities as they may enjoy .. . personnel participating in the forces and missions referred to in this Article shall:... refrain from any action or activity incompatible with the impartial and international nature of their duties."[6]

3 As Yoram Dinstein notes, "In keeping with Article 71(2) of Protocol I, personnel participating in the transportation and distribution of relief consignments must be protected. However, Article 71(1) underscores that the participation of such personnel in the relief action is subject to the approval of the Party in whose territory they carry out their duties." The Conduct of Hostilities under the Law of International Armed Conflict 149 (Cambridge 2004) (hereinafter, "Dinstein").

4 By its terms, the Convention does not apply to enforcement action that the Security Council takes under Chapter VII of the UN Charter.

5 CCW Amended Protocol II, Article 12(l)(a), 35 ILM (1996) 1206-17.

6 Id; at Article l2(7)(b).

- The Fourth Geneva Convention likewise contains both a consent and a "terms of mission" requirement for HRP. Article 10 states that "[t]he provisions of the present Convention constitute no obstacle to the *humanitarian activities* which the [ICRC] or any other *impartial humanitarian organization* may, *subject to the consent of the Parties to the conflict concerned,* undertake for the protection of civilian persons and for their relief."[7] (emphasis added). Article 9 of the First, Second, and Third Geneva Conventions contain virtually identical provisions.
- Additional Protocol II ("APII") does not contain provisions relating directly to the acts of HRP themselves, but Article 18 states that relief actions require the consent of the High Contracting Party in whose territory the HRP may wish to operate and must be limited to actions of an "exclusively humanitarian and impartial nature."
- The Statute of the International Criminal Court ("Rome Statute") includes as a war crime the act of "[i]ntentionally directing attacks against personnel [] involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."[8] The Commentary to the ICC Statute states, with regard to this provision, that "[t]he humanitarian assistance should also receive the *consent* of the parties to the conflict the territory of which it must pass or in which it carries out its tasks."[9]

Despite the fact that these treaties clearly qualify State obligations regarding HRP, rule 31 lacks any such qualifications. Because the practice of States Parties to treaties presumptively tracks their treaty prerogatives and obligations, we would expect that, to justify omission of these qualifications,

7 Pictet's Commentary on the Fourth Geneva Convention notes, "In theory, all humanitarian activities are covered .. . subject to certain conditions with regard to the character of the organization undertaking them, the nature and objects of the activities concerned and, lastly, the will of the Parties to the conflict." Commentary. IV Geneva Convention 96, Pictet, ed. (ICRC 1960) (hereinafter, "Pictet"). It continues, "All these humanitarian activities are subject to one final condition - the consent of the Parties to the conflict. This condition is obviously harsh but it might almost be said to be self-evident." Pictet at 98. As discussed herein, we do not believe that this condition has disappeared since Pictet produced this Commentary.

8 Rome Statute of the International Criminal Court, Article 8(2)(e)(iii), 37 ILM 999, 1008-09 (1998).

9 Michael Cottier, *War Crimes, in* Commentary on the Rome Statute of the International Criminal Court 190, Triffterer, ed. (Nomos Verlagsgesellschaft 1999) (italics in original).

the Study would have provided particularly strong evidence of State practice that was inconsistent with them. However, the Study simply concludes that "the overwhelming majority of practice does not specify this condition [of consent]," even after acknowledging that the protection of HRP under the Additional Protocols "applies only to 'authorised' humanitarian personnel as such."[10]

The role of State consent. Much of the practice on which the Study bases its conclusion that State consent is irrelevant is ambiguous or off-point, and in any event, the Study's analysis lacks sufficient attention to detail and context. For instance, peacekeeping implementation agreements such as those among parties to the conflict in Bosnia and Herzegovina, in which each side undertook to provide security assurances to the ICRC, may be seen as a grant of advance consent for the presence of ICRC personnel in the territory of each party.[11] (If the States objected to the presence of the ICRC, they would not have agreed to provide it with security assurances.) The Study relies on other examples of State discussions of the protection of HRP that specifically allude to the State's support for the Geneva Conventions and their Additional Protocols;[12] as noted above, however, both the Geneva Conventions and the Additional Protocols reflect the need for HRP to obtain State consent.

The Study cites only seven military manuals, all from States Parties to AP I. The cited excerpts from these manuals offer no indication that these States reject the role of consent. Australia's and France's military manuals simply state that HRP are given special protection, but this does not explain the scope of and preconditions for a State's obligations.[13] Only one State's manual (Sweden's) states the view that Article 71(2) has achieved the status of customary international law, and it is not clear from the excerpt whether Sweden believes that other paragraphs of Article 71 (including the consent provision in paragraph (1)) also are customary international law.[14] Indeed, the role of consent may be so commonly understood that States, in discussing this issue, simply assume that HRP will obtain it, particularly given the strong incentives for them to do so. As for many of the UN Security Council resolutions cited as State practice supporting rule 31, almost all of the peacekeeping operations from which these resolutions stem

10 Study, Vol. I, p. 109.

11 Study, Vol. II, p. 589, paras. 5-6.

12 Study, Vol. II, p. 589, para. 8 (citing the Ground Rules for Operation Lifeline Sudan), and p. 593, para. 39 (stating that Zimbabwe regards relevant provisions of the Geneva Conventions "as part of international customary law").

13 Study, Vol. II, pp. 589-90, paras. 13 (Australia) and 15 (France).

14 Study, Vol. II, p. 509, para. 17.

were established with the consent of the host governments or under the Security Council's Chapter VII authority. Thus, although the resolutions may not themselves recite a condition of consent, consent almost always was a condition precedent - save in the case of Security Council action under Chapter VII, which is plainly an exceptional circumstance with respect to state sovereignty.[15]

Significant examples of the operational practice of States in this area - which were not included in the Study - are very different from that described by the Study in that they evidence the critical role of State consent. For example, the Civil Military Operations Center and the Humanitarian Operations Center, employed by U.S. and coalition forces in conflicts that include Bosnia, Kosovo, and Afghanistan, required humanitarian relief organizations to coordinate their movements with the coalition forces, in order for those forces to support the organizations' efforts and to ensure their members' safety.[16] Fuller consideration of operational practice undoubtedly would have provided the Study's authors valuable, necessary information.

Terms of mission limitations. Rule 31 also disregards the obvious fact that HRP who commit acts that amount to direct participation in the conflict are acting inconsistent with their mission and civilian status and thus may forfeit protection. The Geneva Conventions and AP I both recognize, implicitly or explicitly, that during such time as a civilian takes direct part in hostilities, he or she may be targeted. As noted above, to support a rule that ignores the "terms of mission" condition, we would expect the Study to provide strong evidence of State practice that ignores States' prerogatives under relevant treaties to provide protection only for HRP who are providing humanitarian relief. But the Study has not provided such evidence. The Study also fails to provide evidence of *opinio juris* regarding such practice.

Much of the practice cited in the Study actually supports the condition that HRP must work within the terms of their mission. For instance, Canada's cited manual refers to the *work* of HRP themselves as protected, and, with regard to non-governmental organizations, notes that NGOs are to be respected "upon recognition that they are providing care to the sick and wounded."[17] The Dutch manual uses the more precise term

15 See, e^ , Study, Vol. II, p. 593-96, paras. 41-45,47-62.

16 See generally U.S. Joint Publication 3-07.6, Joint Tactics, Techniques, and Procedures for Foreign Humanitarian Assistance.

17 Study, Vol. II, p. 590, para. 14. Furthermore, the manual cited by the Study is in fact a training manual designed to "briefly outline [] the Code of Conduct applicable to all Canadian personnel taking part in all military operations other than Canadian domestic operations." Code of Conduct for Canadian Forces Personnel, Office of the Judge Advocate General, Canadian Ministry of National Defense, B-GG-005-027/AF-023

"personnel engaged in relief activities," which may be read as reflecting the "terms of mission" requirement.[18] The Study cites the fact that India provides relief personnel the same protection as medical and religious personnel,[19] but the latter categories of personnel lose their protection from direct attack if they engage in acts harmful to the enemy or directly participate in hostilities. The Report on the Practice of Jordan states that Jordan has "always assumed [sic] the safety of those who are engaged in humanitarian action."[20] This, too, fails to support the proposed rule, as it focuses on the actual work of HRP and is silent about the protections Jordan gives HRP who act outside their missions' terms. Finally, the Study cites the EU Presidency as saying, "[DJuring armed conflicts, the security of humanitarian personnel was frequently not respected."[21] The only reasonable conclusion to draw from this statement is that State practice is inconsistent with the described rule.

These limitations in treaty provisions, military manuals, and State practice are not inadvertent, but reflect a concerted distinction borne of legitimate State and military security concerns, making it very unlikely that States would acquiesce in the overbroad principle depicted in the rule. For example, during the 1982 Israeli incursion into Lebanon, Israel discovered ambulances marked with the Red Crescent, purportedly representing the Palestinian Red Crescent Society, carrying able-bodied enemy fighters and weapons. This misconduct reportedly was repeated during the 2002 seizure of Bethlehem's Church of the Nativity by members of the terrorist al Aqsa Martyrs Brigade.[22] If the ambulance drivers in these examples were considered to be HRP and actually were helping fighters in a conflict, Israel would be precluded from taking action under rule 31 as written. Military commanders also have had to worry about individuals falsely claiming HRP status, as happened in Afghanistan when some members of Al Qaeda captured while fighting claimed to be working for a humanitarian relief

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(undated), p. 1-1. It is not an official representation of Canada's *opinio juris* concerning the laws and customs of war; instead, it repeatedly stresses that it is a simplification of applicable laws meant to aid in training.

18 Study, Vol. II, p. 590, para. 16.

19 Study, Vol. II, p. 591, para. 27.

20 Study, Vol. II, p. 592, para. 30.

21 Study, Vol. II,p. 602,para. 111.

22 Similarly, on March 27, 2002, Israeli Defense Forces arrested a driver of a Red Crescent ambulance and seized an explosives belt and other explosive charges from the ambulance. The driver admitted that a terrorist leader had given him explosives to transport to terrorist operatives in Ramallah. See: http://www.mfa.gov.il/mfa/government/communiques/2002/apprehension%20of%20ambulance%20harboring%20a %20wanted%20terro.

organization. These examples demonstrate why States, in crafting treaty provisions on this topic, have created a "terms of mission" condition for HRP in a way that rule 31 fails to do.

Opinio juris. According to the Study, a number of States view themselves as having a legal obligation to protect HRP as a matter of customary international law. The meaning and soundness of certain cited examples are at best unclear, however. For instance, the Study cites Nigeria and Rwanda as asserting that they are legally obligated to protect HRP from the effects of military operations, even in the absence of a treaty obligation.[23] Without citations to the actual language, and without context, it is not clear whether these States were asserting that they took this view even in the absence of State consent and in situations in which HRP were acting outside their mission. The Study also quotes Zimbabwe's submission that it regards the Geneva Conventions' guarantees relating to the activities of relief personnel as part of customary international law, but, as noted above, those Conventions reflect the importance of State consent.[24] Finally, with regard to the Report on U.S. Practice stating that the United States believes that *"unjustified* attacks on international relief workers are also violations of international humanitarian law" (emphasis added), nothing in this statement undercuts the fact that matters may be different when HRP are acting as combatants, nor does it speak at all to the question of State consent.[25]

Non-international armed conflicts. Although the Study asserts that rule 31 applies in both international and non-international armed conflict, the Study provides very thin practice to support the extension of rule 31 to non-international armed conflicts, citing only two military manuals of States Parties to APII and several broad statements made by countries such as the United Kingdom and United States to the effect that killing ICRC medical workers in a non-international armed conflict was "barbarous" and contrary to the provisions of the laws and customs of war.[26] The Study contains little discussion of actual operational practice in this area, with citations to a handful of ICRC archive documents in which non-state actors guaranteed the safety of ICRC personnel. Although AP II and customary international law rules that apply to civilians may provide protections for HRP in non-international armed conflicts, the Study offers almost no evidence that rule 31 as such properly describes the customary international law applicable in such conflicts.

23 Study, Vol. II, p. 592, paras. 33 (Nigeria) and 34 (Rwanda).
24 Study, Vol. II, p. 593, para. 39.
25 Study, Vol. II, p. 613, para. 181.
26 See, ff., Study, Vol. II, p. 612, paras. 178 (United Kingdom) and 180 (United States).

Summary. We do not believe that rule 31, as drafted, reflects customary international law applicable to international or non-international armed conflicts. The rule does not reflect the important element of State consent or the fact that States' obligations in this area extend only to HRP who are acting within the terms of their mission - that is, providing humanitarian relief. To the extent that the authors intended to imply a "terms of mission" requirement in the rule, the authors illustrated the difficulty of proposing rules of customary international law that have been simplified as compared to the corresponding treaty rules.

* * *

Rule 45

The first sentence of rule 45 states: "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."

Protection of the environment during armed conflict obviously is desirable as a matter of policy, for reasons that include issues of civilian health, economic welfare, and ecology. The following discussion should not be interpreted as opposing general consideration, when appropriate and as a matter of policy, of the possible environmental implications of an attack. Additionally, it is clear under the principle of discrimination that parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and that parts of the natural environment may not be destroyed unless required by military necessity.

Nevertheless, the Study fails to demonstrate that rule 45, as stated, constitutes customary international law in international or non-international armed conflicts, either with regard to conventional weapons or nuclear weapons.[27] First, the Study fails to assess accurately the practice of specially affected States, which clearly have expressed their view that any obligations akin to those contained in rule 45 flow from treaty commitments, not from customary international law. (We disagree with the Study's conclusion that France, the United Kingdom, and the United States are not among those specially affected with regard to environmental damage flowing from the use of conventional weapons, given the depth of practice of these States as a result of their participation in a significant proportion of major international armed conflicts and peacekeeping operations around the globe during the twentieth century and to the present.) Second, the Study misconstrues or overstates some of the State practice it cites. Third, the Study examines only

[27] This discussion focuses on only the first sentence in rule 45.

limited operational practice in this area and draws flawed conclusions from it.

Specially affected States. The Study recognizes that the practice of specially affected States should weigh more heavily when assessing the density of State practice,[28] but fails to assess that practice carefully. France and the United States repeatedly have declared that Articles 35(3) and 55 of AP I, from which the Study derives the first sentence of rule 45, do not reflect customary international law. In their instruments of ratification of the 1980 CCW, both France and the United States asserted that the preambular paragraph in the CCW treaty, which refers to the substance of Articles 35(3) and 55, applied only to States that have accepted those articles.[29] The U.S. State Department Principal Deputy Legal Adviser stated during a conference in 1987 that the United States considered Articles 35 and 55 to be overly broad and ambiguous and "not a part of customary law."[30] Rather than taking serious account of such submissions, the Study instead places weight on evidence of far less probative value. The U.S. Army JAG Corps Operational Law Handbook, which the Study cites for the proposition that the United States believes that the provision in rule 45 is binding, is simply an

[28] Study, Vol. I, p. xxxviii.

[29] The Study includes these statements in Vol. II, p. 878, paras. 152 and 153.

[30] Remarks of Michael J. Matheson, Principal Deputy Legal Adviser, U.S. Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions. 2 Am. U. J. Int'l L. and Pol'y 424, 436 (1987). One of the U.S. concerns has been that Articles 35(3) and 55 fail to acknowledge that use of such weapons is prohibited only if their use is clearly excessive in relation to the concrete and direct overall military advantage anticipated. The Study purposefully disregards this objection, even as to the contours of the customary rule. As the commentary states, "[T]his rule is absolute. If widespread, long-term and severe damage is inflicted, or the natural environment is used as a weapon, it is not relevant to inquire into whether this behaviour or result could be justified on the basis of military necessity or whether incidental damage was excessive." Study, Vol. I, p. 157.

An example illustrates why States - particularly those not party to AP I — are unlikely to have supported rule 45. Suppose that country A has hidden its chemical and biological weapons arsenal in a large rainforest, and plans imminently to launch the arsenal at country B. Under such a rule, country B could not launch a strike against that arsenal if it expects that such a strike may cause widespread, long-term, and severe damage to the rainforest, even if it has evidence of country A's imminent launch, and knows that such a launch itself would cause environmental devastation. Indeed, one of the Study's authors has recognized elsewhere that the value of the military objective is relevant to an analysis of when an attack that will cause harm to the environment is permitted. See L. Doswald-Beck, International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons. 316 IRRC 35, 52 (1997).

instructional publication and is not and was not intended to be an authoritative statement of U.S. policy and practice.[31] Nor is the U.S. Air Force Commander's Handbook, which the Study also cites as authority.[32]

In addition to maintaining that Articles 35(3) and 55 are not customary international law with regard to the use of weapons generally, specially affected States possessing nuclear weapon capabilities have asserted repeatedly that these articles do not apply to the use of nuclear weapons. For instance, certain specially affected States such as the United States, the United Kingdom, Russia, and France so argued in submissions to the International Court of Justice ("ICJ").[33] The United Kingdom's military manual specifically excepts from the limitation in Article 35(3) the use of nuclear weapons against military objectives.[34] In a report summarizing the Conference that drafted Additional Protocol I, the United States noted:

> During the course of the Conference there was no consideration of the issues raised by the use of nuclear weapons. Although there are several articles that could seem to raise questions with respect to the use of nuclear weapons, most clearly, article 55 on the protection of the natural environment, it was the understanding of the United States Delegation throughout the Conference that the rules to be developed were designed with a view to conventional weapons and their effects and that the new rules established by the Protocol were not intended to have any effects on, and do not regulate or prohibit the use of nuclear weapons. We made this understanding several times during the Conference, and it was also stated explicitly by the British and French Delegations. It was not contradicted by any delegation so far as we are aware.[35]

31 Study, Vol. II, p. 883, para. 186.

32 Study, Vol. II, p. 882-83, para. 185.

33 Letter dated June 20, 1995 from the Acting Legal Adviser of the Department of State, together with the Written Statement of the Government of the United States, p. 25-28; Letter dated June 16, 1995 from the Legal Adviser of the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Statement of the Government of the United Kingdom, p. 40-46; Letter dated June 19, 1995 from the Ambassador of the Russian Federation, together with Written Statement of the Government of Russia, p. 10-11; Lettre en date du 20 juin 1995 du Ministre des affaires etrangeres de la Republique francaise, accompaignee de 1'expose ecrit du Gouvernement de la Republique francaise, p. 31-33.

34 Study, Vol. II, p. 882, para. 184.

35 Digest of U.S. Practice, 1977, p. 919.

The Conference Record from 1974, reflecting earlier work on the text that became AP I, records the United Kingdom's view on the issue: "[The UK] delegation also endorsed the ICRC's view, expressed in the Introduction to the draft Protocols, that they were not intended to broach problems concerned with atomic, bacteriological or chemical warfare.... It was on the assumption that the draft Protocols would not affect those problems that the United Kingdom Government had worked and would continue to work towards final agreement on the Protocols."[36] In acceding to AP I, both France and the United Kingdom stated that it continued to be their understanding that the Protocol did not apply generally to nuclear weapons. For instance, the United Kingdom stated, "It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons ... . In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons."[37]

The Study's summary states: "It appears that the United States is a 'persistent objector' to the first part of this rule. In addition, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to the use of nuclear weapons."[38] However, the weight of the evidence - including the fact that ICRC statements prior to and upon conclusion of the Diplomatic Conference acknowledged this as a limiting condition for promulgation of new rules at the Conference; that specially affected States lodged these objections from the time the rule first was articulated; and that these States have made them consistently since then - clearly indicates that these three States are not simply persistent objectors, but rather that the rule has not formed into a customary rule at all.

General evidence of State practice and opinio juris. Other practice included in the Study fails to support or undercuts the customary nature of rule 45. This includes examples of States consenting to the application of Articles 35(3) and 55;[39] a State expressing a concern that opposing forces were directing attacks against its chemical plants, without asserting that such

[36] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 5-6 (1977), p. 134.

[37] Statement of the United Kingdom, January 28, 1998, revised July 2, 2002. See also statement of France, April 11, 2001.

[38] We note that the Study raises doubts about the continued validity of the "persistent objector" doctrine. Study, Vol. I, p. xxxix. The U.S. Government believes that the doctrine remains valid.

[39] Study, Vol. II, p. 879, paras. 157 and 158.

attacks would be unlawful;[40] the ICJ indicating in 1996 that Article 35(3) constrained those States that subscribed to AP I, and thus indicating that the Article is not customary international law;[41] draft codes and guidelines issued by international organizations and not binding by their terms;[42] and statements that could just as easily be motivated by politics as by a sense of legal obligation. Some cited practice makes specific reference to a treaty as the basis for obligations in this area. In 1992, in a memorandum annexed to a letter to the Chairman of the Sixth Committee of the UN General Assembly, the United States and Jordan stated that Article 55 of AP I requires States Parties to "take care in warfare to protect the natural environment against widespread, long-term and severe damage." That is, the United States and Jordan described the rule as a treaty-based, rather than customary, obligation.[43] Israel's Practice Report, which states that Israeli Defense Forces do not use or condone methods or means of warfare that rule 45 covers, contains no suggestion that Israel has adopted this policy out of a sense of legal obligation.[44] With regard to the twenty State military manuals the Study cites (all but one of which are from States Parties to AP I), the Study offers no evidence that any of these nineteen States Parties included such a provision in their manuals out of a sense of *opinio juris,* rather than on the basis of a treaty obligation. In sum, none of the examples given clearly illustrates unequivocal support for the rule, either in the form of State practice or *of opinio juris.*

Domestic criminal laws. The Study lists various States' domestic criminal laws on environmental damage, but some of those laws flow from the obligation in Article 85 of AP I to repress breaches of the Protocol. Certain other States' laws criminalize a broad crime termed "ecocide," but most of the cited provisions fail to make clear whether this crime would apply to acts taken in connection with the use of military force. As noted above, a number of States (including Australia, Burundi, Canada, Congo, Georgia, Germany, Netherlands, New Zealand, Trinidad, and the United Kingdom) have incorporated ICC Article 8(2)(b)(iv) into their criminal codes, but the ICC provision prohibits the use of the weapons described in rule 45 only in those cases in which their use "would be clearly excessive in

40 Study, Vol. II, p. 887-88, paras. 224 and 225. See also p. 900, para. 280 (CSCE committee drew attention to shelling that could result in harm to the environment, without indicating that such attacks were unlawful).

41 Study, Vol. II, p. 900-01, para. 282.

42 Study, Vol. II, p. 878 (para. 156), p. 879 (para. 160), p. 898 (paras. 273 and 274), p. 898-99 (para. 275), and p. 902 (para. 289).

43 Study, Vol. II, p. 891, para. 244.

44 Study, Vol. II, p. 890, para. 241.

relation to the concrete and direct overall military advantage anticipated."[45] These domestic criminal provisions clearly do not support the broader statement in rule 45, which would preclude States from taking into account the principles of military necessity and proportionality. Finally, the Study offers almost no evidence that any of these States has enacted criminal laws prohibiting this activity out of a sense of *opinio juris.* The fact that a State recently criminalized an act does not necessarily indicate that the act previously was prohibited by customary international law; indeed, a State may have criminalized the act precisely because, prior to its criminalization in domestic law, it either was not banned or was inadequately regulated.

Operational practice. The Study examines only a limited number of recent examples of practice in military operations and draws from these examples the conclusion that "[pjractice, as far as methods of warfare .. . are concerned, shows a widespread, representative and virtually uniform acceptance of the customary law nature of the rule found in Articles 35(3) and 55(1)" of AP I.[46] However, the cited examples are inapposite, as none exhibited the degree of environmental damage that would have brought rule 45 into play. Rather than drawing from that the conclusion that the underlying treaty provisions on which the rule is based are too broad and ambiguous to serve as a useful guideline for States, as the United States long has asserted, the Study assumes that the failure to violate the rule means that States believe it to be customary law. It is notable that, following Iraq's attacks on Kuwait's oil fields, most international criticism focused on the fact that these attacks violated the doctrines of military necessity and proportionality.[47] Most criticism did not assert potential violations of customary rules pertaining to environmental damage along the lines of rule 45.[48] The Committee Established to Review the NATO Bombing Campaign

45 Rome Statute of the International Criminal Court, Article 8(2)(b)(iv).

46 Study, Vol. I, p. 154.

47 See Yoram Dinstein, Protection of the Environment in International Armed Conflict. 5 Max Planck UNYB 523, 543-46 and notes (2001) (discussing the illegality of Iraq's acts but noting that "many scholars have adhered to the view that - while the damage caused by Iraq was undeniably widespread and severe - the 'long term' test (measured in decades) was not satisfied").

48 These attacks, of course, violated provisions of the law of armed conflict, particularly those relating to military necessity. The U.S. Government, in concurring in the opinion of the conference of international experts, convened in Ottawa, Canada from July 9-12, 1991, found that Iraq's actions violated, among other provisions, Article 23(g) of the Annex to the 1907 Hague Convention IV and Article 147 of the Fourth Geneva Convention. See Letter dated March 19, 1993 From the Deputy Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/25441, p. 15.

Against the Federal Republic of Yugoslavia noted that "it would appear extremely difficult to develop a *prima facie* case upon the basis of these provisions [of AP I], even assuming they were applicable."[49] It may be the case that rule 45 as drafted, like the treaty provisions on which it is based, sets such a limited and imprecise boundary on action as not to function as a rule at all.

Non-international armed conflicts. For all of the reasons that the Study fails to offer sufficient evidence that the provision in rule 45 is a customary rule in international armed conflict, the Study fails to make an adequate case that the rule is customary international law applicable to non-international armed conflicts. (The Study itself acknowledges that the case that rule 45 would apply in non-international conflicts is weaker.[50]) The fact that a proposal by
Australia to include a provision like Article 35(3) in APII failed further undercuts the idea that rule 45 represents a rule of customary international law in non-international armed conflicts.[51]

Summary. States have many reasons to condemn environmental destruction, and many reasons to take environmental considerations into account when determining which military objectives to pursue. For the reasons stated, however, the Study has offered insufficient support for the conclusion that rule 45 is a rule of customary international law with regard to conventional or nuclear weapons, in either international or non-international armed conflict.

* * *

Rule 78

Rule 78 states: "The anti-personnel use of bullets which explode within the human body is prohibited."

Although anti-personnel bullets designed specifically to explode within the human body clearly are illegal, and although weapons, including exploding bullets, may not be used to inflict unnecessary suffering, rule 78, as written, indicates a broader and less well-defined prohibition. The rule itself suffers from at least two problems. First, it fails to define which weapons are covered by the phrase "bullets which explode within the human body." To the extent that the Study intends the rule to cover bullets that could, under some circumstances, explode in the human body (but were not

49 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 13, 2000), para. 15.

50 Study, Vol. I, p. 156-57.

51 Study, Vol. II, pp. 877-78, para. 150.

designed to do so), State practice and the ICRC's Commentary on the 1977 Additional Protocol reflect that States have not accepted that broad prohibition. Second, there are two types of exploding bullets. The first is a projectile designed to explode in the human body, which the United States agrees would be prohibited. The second is a high-explosive projectile designed primarily for anti-materiel purposes (not designed to explode in the human body), which may be employed for anti-materiel and anti-personnel purposes. Rule 78 fails to distinguish between the two. If, as the language suggests, the Study is asserting that there is a customary international law prohibition on the anti-personnel use of anti-material exploding bullets, the Study has disregarded key State practice in this area. Third, the Study extrapolates the rule to non-international conflicts without a basis for doing so.

Bullets covered. With regard to which weapons are covered by the phrase "bullets which explode within the human body," the language in rule 78 appears to use an effects-based test, and in doing so fails to distinguish between projectiles that almost always detonate within the human body, including those specifically designed to do so; projectiles that foreseeably could detonate within the human body in their normal use; and projectiles that in isolated or rare instances outside their normal use might detonate within the human body. Although there are important practical differences among these types of munitions - and, more generally, between munitions designed to explode within the human body and those designed for other, lawful purposes - the language of the rule suggests that the Study considers all three categories in applying this effects-based test to be illegal. If so, there is no evidence that States have accepted this standard; if States have accepted a rule in this area, it is only with regard to the first category of projectiles - those designed to explode within the human body. Indeed, the Study concedes, "The military manuals or statements of several States consider only the anti-personnel use of such projectiles to be prohibited or only if they are designed to explode upon impact with the human body."[52] The Study, however, ignores the significance of design in its formulation of rule 78.[53]

The ICRC put forward an effects-based standard at the Second CCW Review Conference in 2001, in proposing that CCW States Parties consider

[52] Study, Vol. I, p. 273.

[53] Germany's military manual recognizes a prohibition on those exploding bullets "which can disable *only* the individual directly concerned but not any other persons." (emphasis added) (Study, Vol. II, p. 1788, para. 13). A U.S. legal review states that "an exploding projectile *designed exclusively for antipersonnel use* would be prohibited, as there is no military purpose for it." (emphasis added) (id at 1791, para. 35).

negotiating a protocol that would prohibit the anti-personnel use of bullets that explode within the human body. Although the Study notes the ICRC's own submission to the Review Conference,[54] it fails to note that States Parties did not choose to pursue a protocol or other instrument on this issue. The ICRC proffered this same standard in the now-withdrawn "superfluous injury or unnecessary suffering" ("SIrUS") project. Because of its use of this "effects-based" (rather than design-based) standard, the Study's commentary also brings into the discussion certain weapons that we do not consider to fall within the category of bullets that explode within the human body. The statement in the commentary to rule 78 that "certain 12.7mm bullets exploded in human tissue stimulant" appears to be an effort to include in the category of bullets that explode within the human body the 12.7mm Raufoss multi-purpose ammunition.[55] The Study's statement refers to a 1998 ICRC test that subsequently proved flawed in its methodology, results, and conclusions in a 1999 re-test at Thun, Switzerland, of which ICRC members were observers.[56] The published conclusions of the participants in the re-test did not support the ICRC conclusion that this ammunition should be considered to be the type that explodes in the human body, yet the Study does not mention this 1999 re-test.

Uses covered. The rule as written suggests a total ban on all instances in which exploding bullets may be used against personnel, but State practice does not support this. Efforts to restrict the use of exploding bullets date back to the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (the "St. Petersburg Declaration").[57] This Declaration banned the use of exploding bullets in international armed conflict between the States Parties. Only seventeen government representatives, however, signed the St. Petersburg Declaration, with two other States, Baden and Brazil, acceding in 1869. Despite the Study's assertion that the St. Petersburg Declaration represented the practice of "most of the States in existence at that time,"[58] it actually

54 Study, Vol. II, p. 1794, para. 47.

55 Study, Vol. I, p. 273.

56 In part, the 1998 test was flawed because it was set up in a way that was contrary to the principle that "in looking at small caliber weaponry, it is necessary to look not just at the bullet but at the entire means of delivery and the context in which the weapon will be used." Christopher Greenwood, "Legal Aspects of Current Regulations." Keynote speech at Third International Workshop on Wound Ballistics, Thun, Switzerland, March 28-29, 2001.

57 I Am. J. Int'l L. (1907) Supp. 95-96.

58 Study, Vol. I, p. 272.

represented that of less than half of the States then in existence.[59] Furthermore, only one State has acceded to the St. Petersburg Declaration since 1869.[60]

Since the St. Petersburg Declaration, there has been considerable State practice involving the anti-personnel use of exploding bullets, despite the ICRC's statement that governments have "adhered" to the Declaration. Two participants in the ICRC-hosted 1974 Lucerne Meeting of Experts on certain weapons conventional weapons concluded:

> At present it is widely held that in view of the development in weapons technology and state practice the St. Petersburg Declaration cannot be interpreted literally, or in any case that it has not as such become declaratory of customary international law.... [T]he prohibition contained in it serves to illustrate the principle prohibiting the causing of unnecessary suffering, at least as it was contemplated in 1868.[61]

U.S. legal reviews have detailed State practice contrary to the ICRC's statement and consistent with the conclusion contained in the above quotation. The ICRC fails to cite this contrary practice in its summary of those U.S. legal reviews.[62] The 1923 Hague Draft Rules of Air Warfare (the "Air Rules"), which explicitly superseded the St. Petersburg Declaration with regard to explosive projectiles, established an exception to the broad ban on explosive bullets for explosive projectiles used "by or against an aircraft."[63] Although the Study refers to the Air Rules, it does not note that this exception to the total ban on use of exploding bullets permits their use by aircraft without categorical target restrictions, i.e., permits such use for anti-material or anti-personnel use. Since States developed the Air Rules, States widely have employed bullets that may detonate on impact with materiel for both anti-materiel and anti-personnel purposes.[64] Such

59 Of all the independent States in the Western Hemisphere, only Brazil acceded to the St. Petersburg Declaration. Additionally, none of the African or East Asian States in existence at the time acceded to the Declaration.

60 Estonia acceded in 1991.

61 Pertti Joenniemi and Allan Rosas, International Law and the Use of Conventional Weapons (1975), at 30.

62 Study, Vol. II, p. 1791, para. 35.

63 Hague Draft Rules of Air Warfare, 17 Am. J. Int'l L. (1923) Supp. 245-60, Ch. IV, Art. 18.

64 The 2000 update of the 1998 U.S. legal review of the 12.7mm Raufoss Multi-purpose ammunition, other sections of which are cited by the Study (Study Vol. II, p. 1791, para. 35), lists widespread use of high-explosive or high-explosive-incendiary projectiles

ammunition was in common use by all States that participated in World War II, and in conflicts thereafter - including in widespread aircraft strafing of enemy forces, a practice common to every conflict since World War I in which aircraft were employed. The considerable State practice involving the use of such anti-materiel weapons against forces are indications that rule 78 's apparently total prohibition on the anti-personnel use of exploding bullets does not reflect customary international law.

The practice the Study cites does not support a rule banning the use of exploding bullets against personnel in all circumstances. The Study includes in Volume II examples from the military manuals of eleven countries, only six of which contain unqualified bans on exploding bullets;[65] the legislation of six countries, only three of which provide additional support for the rule as stated;[66] statements made by several States at diplomatic conferences, most of which are ambiguous;[67] and the reported

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weighing less than 400 grams, many of which may have tended to detonate on impact or within the human body. Although the Study cites this review, it does not provide the full picture of the Study's finding in that it omits this compilation of State practice.

65 The Study cites military manuals of Australia, Belgium, Canada, France, Germany, Italy, New Zealand, Russia, Spain, the United Kingdom, and the United States. (Study, Vol. II, p. 1788-89, paras. 8-20.) Of these, Germany's clearly opposes the rule as written, and France's, Italy's, and the United Kingdom's offer inconclusive support. The U.S. Air Force Pamphlet, also cited for rule 157, bears a disclaimer that states, "This pamphlet is for the information and guidance of judge advocates and others particularly concerned with international law requirements applicable during armed conflict. It furnishes references and suggests solutions to a variety of legal problems but it is not directive in nature. As an Air Force pamphlet, it does not promulgate official U.S. Government policy although it does refer to U.S., DoD and Air Force policies." The U.S. Air Force Pamphlet therefore cannot be considered a useful example of State practice.

66 Legislation of Andorra, Australia, Ecuador, Italy, the Netherlands, and Yugoslavia. Ecuador's legislation bans only the use of exploding bullets by its National Civil Police, and Italy's includes an exception for "air or anti-air systems." The Study notes that the 1945 Australian war crimes act prohibited "exploding bullets." Study, Vol. II, p. 1790, paras. 21-26. The Study makes no reference to a 2001 Australian legal review of the 12.7mm Raufoss Multipurpose projectile, which concluded that munition was legal. Defence Legal Office, Defence Corporate Support, Australian Ministry of Defence, Memorandum CS 97/23/23431 (January 23, 2001), Subject: Legal Review of the 12.7mm Ammunition Produced by NAMMO. The Australian legal review was the subject of a presentation at the ICRC's Expert Meeting on Legal Reviews of Weapons and the SIrUS Project, held at Jongny-sur-Vevey from January 29-31, 2001.

67 Statements made by Brazil and Colombia do not support the assertion that the rule as written is customary, but rather express support for the prohibition of exploding bullets in some context. Study, Vol. II, p. 1790, paras. 28-29. The Study also includes statements by Norway and the UK made at the Second CCW Review Conference (2001) and before the ICJ in the *Nuclear Weapons Case* (1995), respectively. See id. at p. 1791, para. 32-33 (Norway) and para. 34 (UK). The Norwegian statement to the ICRC reflects Norway's

operational practice of only two States.[68] Among all these sources, at most two cite customary international law as the legal basis for regulations on the use of exploding bullets.[69] Even disregarding the existence of contrary State practice, this body of evidence is insufficient to establish the customary nature of the rule as stated.

The examples of operational practice adduced by the Study are particularly questionable. The Report on the Practice of Indonesia states only that exploding bullets are reported as prohibited in Indonesia, an unconfirmed example of State practice.[70] The Report on the Practice of Jordan states only that Jordan "does not use, manufacture or stockpile explosive bullets," but does not state whether it does so out of a sense of legal obligation under customary or treaty law, or whether it simply chooses not to do so due to policy or practical concerns.[71] In general, the Study fails to recognize that different militaries have different requirements, and that a State may decide not to use exploding ammunition for military rather than legal reasons.

The only example of actual battlefield behavior cited by the Study in support of rule 78 is an accusation by the Supreme Command of the Yugoslav People's Army ("JNA") of the Socialist Federal Republic of Yugoslavia that Slovene forces used exploding bullets.[72] It is unclear whether the bullets were used by ground forces against other ground forces, by airplanes against personnel, or in some other way. Most important, due to the use of ellipses in the Study, it is unclear whether the alleged behavior by Slovene forces was criticized as being "prohibited under international law" due to the anti-personnel use of exploding bullets per *se* or, rather, criticized as being used against "members *and their families"* (emphasis added) - allegations that, if true, would state a violation of other tenets of

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view that one must consider a number of factors, including intended use, when assessing the legality of a weapon; the UK statement appears to be a description of what the St. Petersburg Declaration provides.

68 The Study sets forth only three purported examples of operational practice: the Report on the Practice of Indonesia (Vol. II, p. 1791, para. 30); the Report on the Practice of Jordan (id. at para. 31); and a statement by the Yugoslav Army (id. at p. 1792, para. 37). The Report on Indonesia does not actually appear to evidence operational practice; rather, it simply states what applicable law is in Indonesia.

69 These are the military manuals of Germany and, arguably, the Penal Code of Yugoslavia.

70 Study, Vol. II, p. 1791, para. 30.

71 Id, para. 31.

72 The authorities and Armed Forces of the Republic of Slovenia are treating JNA as an occupation army; and are in their ruthless assaults on JNA members and their families going as far as to employ means and methods which were not even used by fascist units and which are prohibited under international law.... They are ... using explosive bullets." Study, Vol. II, p. 1792, para. 37.

international law. It is thus difficult to determine whether this example supports the broad rule postulated by the Study, or a narrower rule restricting certain anti-personnel uses of exploding bullets.

Non-international armed conflict. The Study also asserts that rule 78 is a norm of customary international law applicable in non-international armed conflicts. The Study, however, provides scant evidence to support this assertion. The St. Petersburg Declaration refers only to international armed conflict between States Party to the Declaration; the Declaration does not mention internal conflict. In fact, the Study's only evidence of *opinio juris* in this regard is the failure, in military manuals and legislation cited previously, to distinguish between international and non-international armed conflict. Since governments normally employ, for practical reasons unrelated to legal obligations, the military ammunition available for international armed conflict when engaged in non-international armed conflict, and since there is ample history of the use of exploding bullets in international armed conflict, the Study's claim that there is a customary law prohibition applicable in non-international armed conflict is not supported by examples of State practice. Furthermore, this analysis fails to account for the military manual of the UK, cited in the Study, which prohibits the use of exploding bullets directed solely at personnel *only* in international armed conflict.[73]

Summary. Virtually none of the evidence of practice cited in support of rule 78 represents operational practice; the Study ignores contrary practice; and the Study provides little evidence of relevant *opinio juris.* The evidence in the Study of restrictions on the use of exploding bullets supports various narrower rules, not the broad, unqualified rule proffered by the Study. Thus, the assertion that rule 78 represents customary international law applicable in international and non-international armed conflict is not tenable.

* * *

Rule 157

Rule 157 states: "States have the right to vest universal jurisdiction in their national courts over war crimes."

Impunity for war criminals is a serious problem that the United States consistently has worked to alleviate. From the Second World War to the more recent crises in the former Yugoslavia and Rwanda, the United States has contributed substantially towards ensuring accountability for war crimes and other international crimes. Efforts to address the problem of accountability have, logically, focused on ensuring that there are appropriate fora to exercise jurisdiction over the most serious violations of international

[73] Study, Vol. II, p. 1789, para. 19.

law.[74] One part of this solution is to ensure that those committing such offenses cannot find safe havens, by requiring States Parties to various treaties to reduce jurisdictional hurdles to their prosecution. For example, Article 146 of the Fourth Geneva Convention requires all States Parties to extradite or prosecute an individual suspected of a grave breach, even when a State lacks a direct connection to the crime. The Study, however, does not offer adequate support for the contention that rule 157, which is stated much more broadly, represents customary international law.

Clarity of the asserted rule. If rule 157 is meant to further the overall goal of the Study to "be helpful in reducing the uncertainties and the scope for argument inherent in the concept of customary international law,"[75] it must have a determinate meaning. The phrase "war crimes," however, is an amorphous term used in different contexts to mean different things. The Study's own definition of this term, laid out in rule 156, is unspecific about whether particular acts would fall within the definition. For the purpose of these comments, we assume that the "war crimes" referred to in rule 157 are intended to be those listed in the commentary to rule 156. These acts include grave breaches of the Geneva Conventions and AP I, other crimes prosecuted as "war crimes" after World War II and included in the Rome Statute, serious violations of Common Article 3 of the Geneva Conventions, and several acts deemed "war crimes" by "customary law developed since 1977," some of which are included in the Rome Statute and some of which are not.[76]

Assuming this to be the intended scope of the rule, we believe there are at least three errors in the Study's reasoning regarding its status as customary international law. First, the Study fails to acknowledge that most of the national legislation cited in support of the rule uses different definitions of the term "war crimes," making State practice much more diverse than the Study acknowledges. Second, the State practice cited does not actually support the rule's definition of universal jurisdiction. Whereas rule 157 envisions States claiming jurisdiction over actions with no relation to the State, many of the State laws actually cited invoke the passive or active personality principle, the protective principle, or a territorial connection to the act before that State may assert jurisdiction. Furthermore, the Study cites very little evidence of actual prosecutions of war crimes not connected to the forum state (as opposed to the mere adoption of legislation

74 The Geneva Conventions and AP I incorporate elements that reflect these efforts.
75 Study, Vol. I, p. xxix.
76 Study, Vol. I, p. 574-603.

by the States).[77] Third, the Study conflates actions taken pursuant to treaty obligations with those taken out of a sense of customary legal obligation under customary international law. These errors undermine the Study's conclusion that rule 157 constitutes customary international law.

Diverse understandings of "war crimes." The national legislation cited in the commentary to rule 157 employs a variety of definitions of "war crimes," only a few of which closely parallel the definition apparently employed by the Study, and none that matches it exactly.[78] Much of the legislation cited does not precisely define "war crimes" and therefore cannot be relied on to support the rule. Although the military manuals of Croatia, Hungary, and Switzerland, among others, appear to define "war crimes" as "grave breaches," the lack of specificity leaves the intended meaning ambiguous.[79] Even among the few States that employ a definition of "war crimes" similar to that in rule 156, no State definition mirrors the Study's definition precisely. Canada, for example, includes "grave breaches" of the Geneva Conventions and Additional Protocol I, violations of the Hague Convention, violations of "the customs of war," and possibly certain violations of APII, but, unlike the Study, does not specifically include "serious violations of Common Article 3 of the Geneva Conventions" in its definition. Furthermore, the Study does not assert that Canada's conception

77 "[I]t should be stressed that custom-generating practice has always consisted of actual acts of physical behaviour and not of mere words, which are, at most, only promises of a certain conduct. The frequent confusion seems to result from the fact that verbal acts, such as treaties, resolutions or declaration, are of course also acts of behaviour in the broad sense of the term and they may in certain cases also constitute custom-generating practice, but only as regards the custom of making such verbal acts, not the conduct postulated in them." K. Wolfke, Some Persistent Controversies Regarding Customary International Law. 24 Netherlands Y.B. Int'l L. 1 (1993).

M. Cherif Bassiouni has discussed the limited practice of States invoking universal jurisdiction to prosecute various international crimes. He notes, "No country has universal jurisdiction for all these crimes [genocide, war crimes, crimes against humanity, piracy, slavery, torture, and apartheid]. It is therefore difficult to say anything more than universal jurisdiction exists sparsely in the practice of states and is prosecuted in only a limited way." M. Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice. 42 Va. J. Int'l L. 81, 136 n.195 (2001).

78 Study, Vol. II, p. 3894-3912, paras. 163-245.

79 Study, Vol. II, p. 3858, para. 22 (Croatia), p. 3859, para. 28 (Hungary), and p. 3861, para. 38 (Switzerland). The Study also includes a number of citations to State laws and manuals that do not include law of war offenses, but rather refer to provisions such as "other punishable acts against human rights" (Costa Rica, p. 3899, para. 182); "crimes against humanity, human dignity or collective health or prosecutable under international treaties" (Cuba, p. 3899, para. 184); and the substance of Articles 64 and 66 of GC IV related to the trial of civilians in occupied territory (Argentina, p. 3894, para. 163).

of "violations of the customs of war" matches that of the Study.[80] It is therefore evident, simply by the diversity of definitions of "war crimes" employed by various States, that State practice does not support the contention that States, as a matter of customary international law, have the right to vest universal jurisdiction in their national courts over the full set of actions defined by the Study as "war crimes."

Exercise of universal jurisdiction over only limited acts. Although the Study cites legislation from more than twenty States that supposedly demonstrates the customary nature of rule 157, not one State claims jurisdiction over all the acts cited in rule 156 as "war crimes" in the absence of a State connection to the act, whether it be territorial or based on the active personality, passive personality, or protective principles.[81] The domestic legislation of a number of States, including Australia, Belgium, Colombia, Cyprus, and Zimbabwe, only asserts universal jurisdiction over grave breaches of the Geneva Conventions and AP I.[82] Other domestic legislation is focused even more narrowly: the legislation of Barbados, Botswana, Singapore, and Uganda, for instance, only asserts universal jurisdiction over grave breaches of the Geneva Conventions.[83] Further, many of the military manuals cited (including those of Belgium, France, South Africa, Spain, Sweden, and Switzerland) only refer to universal jurisdiction in the context of "grave breaches," not "war crimes" more generally.[84]

Lack of "pure " universal jurisdiction. Additionally, several of the examples of State practice in the Study are not evidence of States vesting pure universal jurisdiction in their national courts over a set of offenses. Bangladesh's relevant criminal legislation, for instance, only grants jurisdiction over acts occurring in Bangladesh.[85] The Netherlands' military manual states that its law "has not entirely incorporated the principle of universality ... . It requires that the Netherlands be involved in an armed conflict."[86] Other States provide for universal jurisdiction only for a subset

80 Study, Vol. II, p. 3858, para. 20; see also id, p. 3864-65, paras. 51-52.

81 See Study, Vol. I, p. 604 n. 194 (listing states). This discussion is not intended to suggest that the U.S. Government believes that the Study has shown conclusively the customary nature of Rule 156.

82 Study, Vol. II, p. 3895, para. 166 (Australia); p. 3896, para. 172 (Belgium); p. 3898, para. 180 (Colombia); p. 3899, paras. 185-86 (Cyprus); p. 3912, para. 245 (Zimbabwe).

83 Study, Vol. II, p. 3896, para. 170 (Barbados); id, para. 174 (Botswana); p. 3908, para. 227 (Singapore); and p. 3910, para. 236 (Uganda).

84 Study, Vol. II, p. 3888, para. 145 (Belgium); p. 3889, para. 148 (France); p. 3890, para. 153 (South Africa); p. 3890, para. 154 (Spain); p. 3890-91, para. 155 (Sweden); and p. 3891, para. 156 (Switzerland).

85 Study, Vol. II, p. 3959-60, para. 397.

86 Study, Vol. II, p. 3889, para. 150.

of acts within their various definitions of "war crimes." France vests universal jurisdiction in its courts over serious violations of international humanitarian law only in cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and relies on the territoriality, active, and passive personality principles for all other war crimes.[87] Likewise, Australia vests universal jurisdiction in its national courts over "grave breaches" of the Geneva Conventions and Additional Protocol I, but requires active personality in order to exercise jurisdiction over other war crimes.[88] Finally, the Study cites several law of war treaties that do not actually illustrate cases in which States Parties agreed to establish universal jurisdiction. For instance, Amended Protocol II to the CCW and the 1997 Ottawa Convention contemplate a territorial link between the State Party and the wrongful act.[89]

Limited practice of prosecutions. Furthermore, although the Study lists more than twenty States that have enacted or have drafted legislation apparently vesting universal jurisdiction in their national courts over "war crimes," the Study cites a mere nineteen instances in which State courts supposedly have exercised universal jurisdiction over "war crimes."[90] Of these nineteen, two are not on point because the defendants were not accused of "war crimes," but of either genocide or genocide and crimes against humanity, respectively.[91] In another case cited in the Study, the government of Australia claimed jurisdiction based on the protective principle of national interest; the court based its decision on the plain language of a criminal statute and explicitly rejected the need to consider whether universal jurisdiction was applicable.[92] Additionally, in one Dutch case, the victims of

87 Study, Vol. II, p. 3900-01, paras. 192-95.

88 Study, Vol. II, p. 3894-95, paras. 165-66.

89 Study, Vol. II, p. 3885, paras. 132-33.

90 Although Volume II of the Study contains references to twenty-seven cases, the Study does not assert that eight of these cases are examples of States exercising universal jurisdiction over war crimes. For example, the Musema case appears to be a situation in which Switzerland simply determined that dual criminality existed in Switzerland with regard to the offense for which the ICTR sought the defendant.

91 The Munveshvaka case in France and the Demianjuk case in the United States (which subsequently was overturned on unrelated grounds). In the Demjanjuk case, the Israeli arrest warrant on which the extradition request was based charged that Demjanjuk had operated the gas chambers in Treblinka "with the intention of destroying the Jewish people [i.e., genocide] and to commit crimes against humanity." Demianiuk v. Petrovskv, 776 F.2d 571, 578 (6 Cir. 1985). For the Munveshvaka case, see Study, Vol. II, p. 3915, para. 253.

92 The Polvukhovich case. The majority opinion stated, "It is enough that Parliament's judgment is that Australia has an interest or concern. It is inconceivable that the court could overrule Parliament's decision on that question. That Australia has such an interest

the war crimes were Dutch citizens; consequently, the Dutch court based its jurisdiction on the passive personality principle, not on the basis of universal jurisdiction.[93]

If one puts these four inapposite cases aside, the remaining fifteen cases cited by the Study offer only weak evidence in support of rule 157. In six of these cases, States explicitly claimed jurisdiction based not on customary rights but on rights and obligations conferred in treaties, primarily under Article 146 of the Fourth Geneva Convention.[94] The nine cases in which States claimed jurisdiction based on customary rights come from only six States: Belgium, Canada, Israel, the Netherlands, Switzerland, and the United Kingdom.[95] The practice of six States is very weak evidence of the existence of a norm of customary international law. This body of practice is insufficiently dense to evidence a customary right of States to claim jurisdiction over the broad array of actions listed in rule 156, and is further weakened when one examines the facts of those cases. Indeed, in many of these cases, States were prosecuting acts that had been committed before the

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or concern in the subject matter of the legislation here, stemming from Australia's participation in the Second World War, goes virtually without saying ... . It is also unnecessary to deal with the alternative submission that the law is a valid exercise of the power because it facilitates the exercise of universal jurisdiction under international law." 91 ILR 13-14 (1991).

93 The Rohrig and Others case. "Article 4 of the Decree on Special Criminal Law [that the defendants were charged with violating] was, however, in accordance with international law as being based on the principle of 'passive nationality' or 'protection of national interests.'" 17 ILR 393, 396 (1950).

94 See Study, Vol. II, p. 3914, para. 251 (Saric), p. 3914-15, para. 252 (Javor), p. 3915-16, para. 254 (Diane), p. 3916-17, para. 255 (Jorgic), p. 3917, para. 256 (Sokpjovic) and para. 257 (Kusljic). The prosecution in the Sokolovic and Kusljic cases successfully argued that crimes committed by the accused (Bosnian nationals) in Bosnia and Herzegovina were part of an international armed conflict, and that obligations under Article 146 of the Geneva Conventions (relating to grave breaches) therefore were applicable. It follows that this arguably strained reliance on the Geneva Conventions denotes a hesitance to claim a right to universal jurisdiction under customary international law. In addition, the German Penal Code permitted its domestic courts to exercise jurisdiction over grave breaches "if this was provided for in an international treaty binding on Germany." Thus, the German law explicitly looks to the existence of a treaty permitting the exercise of such jurisdiction, and does not rely on any customary international legal "right."

95 These are, from Belgium: Public Prosecutor v. Higaniro (Four from Butare case) and Public Prosecutor v Ndombasi, which led to the Case Concerning the Arrest Warrant of 11 April 2000 (20021.C.J. 3); from Canada: the Finta case; from Israel: the Eichmann case; from the Netherlands: the Knesevic case and the Ahlbrecht case - the latter of which concerned acts committed in occupied Holland and therefore is not a clear example of the invocation of universal jurisdiction; from Switzerland: the Grabez case and the Nivonteze case; and from the United Kingdom: the Sawoniuk case. For the Ahlbrecht case, see 14 ILR 196 (1947).

Geneva Conventions were adopted, but that ultimately were considered grave breaches in the Conventions.[96] Thus, although the prosecuting States were not in a position to rely on their treaty obligations as a basis for their prosecutions, the acts at issue effectively were grave breaches. These cases, therefore, should not be construed as supporting a customary right to claim jurisdiction over most of the acts listed in rule 156 as "war crimes" based on universality.

Opinio juris. Finally, and significantly, the Study fails to demonstrate that sufficient *opinio juris* exists to declare rule 157 customary international law. National legislation vesting universal jurisdiction over particular acts evidences the view of that State that it has the right to exercise such jurisdiction, but does not indicate whether that view is based on customary law or treaty law.[97] Among the evidence cited by the Study, at most nine States express a definitive *opinio juris* as to the customary nature of the right to vest universal jurisdiction (with the majority of those nine having never exercised this jurisdiction).[98] The majority of States that have adopted legislation make explicit in their laws that universal jurisdiction is based on prerogatives gained through treaties, not through customary international law. For example, the Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 ... may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados."[99] The legislation of France, Ireland, and Spain,[100] among others, also makes explicit that claims of universal jurisdiction stem from treaty law. Given the salience of treaty obligations in these and other instances, it is inappropriate to assume that the remaining States - those that do not explicitly state the legal basis for their

96 In the Finta. Ahlbrecht. Sawioniuk. and Eichmann cases, the only "war crimes" of which the defendants were accused would have constituted grave breaches of the Fourth Geneva Convention, including forced deportation and murder of protected persons, if that Convention had been in effect at the time they were committed. See Regina v. Finta. 69 O.R. (2d) 557 (Canadian High Ct. of Justice 1989), 14 ILR 196, 2 Cr App Rep 220 (UK Court of Appeal, Criminal Division 2000), and 36 ILR 5, respectively.

97 The Geneva Conventions, for instance, require States Parties to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." See, ej^ , 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Art. 146.

98 These States are Australia, Azerbaijan, Bangladesh, Belarus, Belgium, Ecuador, Switzerland, Tajikistan, and possibly New Zealand.

99 Study, Vol. II, p. 3896, para. 170.

100 Study, Vol. II, p. 3901, para. 194 (France); p. 3902-03, para. 202 (Ireland); p. 3909, para. 229 (Spain).

legislation - do so out of a sense of entitlement arising from customary international law.

Summary. The State practice cited is insufficient to support a conclusion that the broad proposition suggested by rule 157 has become customary: examples of operational practice are limited to a handful of instances; a significant number of the examples do not support the rule; and the cited practice utilizes definitions of "war crimes" too divergent to be considered "both extensive and virtually uniform."[101] Moreover, the Study offers limited evidence of *opinio juris* to support the claim that rule 157 is customary.

* * *

Closing observation

We have selected these rules from various sections of the Study, in an attempt to review a fair cross-section of the Study and its commentary. Although these rules obviously are of interest to the United States, this selection should not be taken to indicate that these are the rules of greatest import to the United States or that an in-depth consideration of many other rules will not reveal additional concerns.

[101] North Sea Continental Shelf Cases. [1969] I.C.J. Reports at 43.

JUDICIAL DECISIONS

JUDGMENTS OF THE SUPREME COURT OF ISRAEL RELATING TO THE ADMINISTERED TERRITORIES

By Fania Domb[*]

I. H.C. (High Court) 769/02, The Public Committee Against Torture in Israel *et al.* v. Government of Israel *et al.*

Not yet published.

Legality of the policy of preventative strikes (“targeted killings”) against terrorists in the Administered Territories; an international armed conflict between Israel and the various terrorist organizations acting in Judea, Samaria, and the Gaza Strip; international law of armed conflict applicable; basic principle of “distinction” between “combatants” and “military objectives”, on the one hand, and “non-combatants” (“civilians”) and “civilian objectives” on the other; terrorists not fulfilling the conditions of “combatants”; unlawful combatants – not combatants but “civilians”; unprotected and legitimate targets for attack as long as they are taking a direct part in the hostilities; category of “unlawful combatants” not recognized in current international law; Article 51(3) of the 1977 First Protocol; meaning of “taking a direct part in hostilities”; case of civilians serving as a “human shield” for terrorists; meaning of “for such time”; principle of proportionality stricto sensu applicable in cases where an attack on a civilian suspected of taking an active part in hostilities also causes harm to innocent civilians; impossibility of determining in advance whether a preventative strike on a terrorist is always legal or illegal; legality of each act should be individually examined in light of the applicable standards of international law of armed conflict.

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This is a leading unanimous decision of the High Court – delivered by Barak J.P. – on a legal question formulated by him at the outset of his judgment as follows:

> The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, and the Gaza Strip. It

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> fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes sometimes also harm innocent civilians. Does the State act illegally? This is the question posed before us.

Factual background

Barak J.P. opened his comprehensive judgment by describing the factual situation which led to the policy of preventative strikes:

> In February 2000, the second *intifada* began. An intense terrorist attack was directed against the State of Israel and against Israelis. This terrorist attack does not differentiate either between combatants and civilians, or between women, men, and children. The terrorist attacks are carried out in the Judea and Samaria Region, in the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five years, thousands of terrorist acts have been committed against Israel, in the course of which more than one thousand Israeli citizens have been killed, and thousands Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.

Barak J.P. goes on by saying that in its struggle against terrorism, the State of Israel employs various methods, including a policy it calls "targeted frustration" (hereinafter also: "preventive strikes" or "targeted killings"). According to this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel.

According to the data presented by the petitioners, ever since the beginning of the Intifada in 2000 and up until the end of 2005, about 300 members of terrorist organizations have been killed in preventative strikes which have been performed across Judea, Samaria, and the Gaza Strip. Approximately 150 civilians who were proximate to the location of the targeted persons were killed during those acts, and hundreds of others were wounded.

The main legal points in the judgment of Barak J.P. on behalf of the High Court may be presented as follows.

An international armed conflict

1. Starting with the normative framework of the issue, Barak J.P. ruled that the starting point of this framework is that ever since the first *Intifada,* a

continuous situation of "armed conflict" has existed between Israel and the various terrorist organizations acting in Judea, Samaria, and the Gaza Strip (hereinafter: the Region). This situation was confirmed by the Supreme Court in the *Ajuri* case[1] as well as in other rulings;[2] and "it is in line with the definition of armed conflict in the international literature" (according to authorities cited in the judgment).[3]

2. An armed conflict between an Occupying Power in an occupied territory and terrorists coming from that territory, amounts to an international armed conflict,[4] and such is the conflict between Israel and the terrorist organizations acting in the Region. The normative system that applies to the armed conflict between Israel and the terrorist organizations acting in the *area* includes the international law regarding International Armed Conflict [hereinafter: IAC], which applies in any case of an armed conflict of international character.

3. The laws of IAC include the laws of belligerent occupation, but it is not restricted only to them. The laws of armed conflict apply in any case of armed conflict of an international character – one that crosses the borders of the State – whether or not the location in which the armed conflict occurs is subject to belligerent occupation. These laws form part of the laws concerning conduct of warfare (*jus in bello*), and also of the International Humanitarian Law [hereinafter: IHL]. The humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by the International Human Rights Law [hereinafter: IHRL]. Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier "carries in his backpack", may be applicable.[5]

4. Substantial parts of the laws of IAC are of customary character and, consequently, form part of the Israeli legal system.[6] On the contrary, international law embodied in international conventions which do not reflect customary international law (whether Israel is a Contracting Party to them or not) do not form part of the Israeli legal system.[7] As there is no Israeli legislation contradictory to the international law of armed conflict, including

1 H.C. 7015/02, excerpted in 33 *Israel Y.B. Hum. Rts.* 249 (2003).

2 H.C. 9293/01, excerpted in 32 *Israel Y.B. Hum. Rts.* 354 (2002); H.C. 3451/02, excerpted *ibid*., 373; H.C. 7957/04, excerpted below in this Volume.

3 Among others, Y. Dinstein, *War, Aggression and Self-Defence* (4th ed., 2005).

4 A. Cassesse, *International Law* 420 (2nd ed., 2005).

5 H.C. 393/82, excerpted in 14 *Israel Y.B. Hum. Rts.* 301 (1984).

6 According to the Israeli legal doctrine as elaborated in case-law of the Supreme Court, customary international law forms part of the Israeli legal system, unless a contradictory Israeli legislation exists.

7 H.C. 69/81, excerpted in 13 *Israel Y.B. Hum. Rts.* 348 (1983).

armed conflict against terrorist organizations outside of the boundaries of the State, the laws of IAC form part of the Israeli internal law.

5. The international law applicable to the armed conflict between Israel and the terrorist organizations is entrenched in a number of sources,[8] the primary of which are:

a) The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land[9] [hereinafter: Hague Convention), which has the status of customary international law.[10]

b) The 1949 Geneva Convention (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War[11] [hereinafter: Fourth Geneva Convention]. Israel is a Contracting Party to this Convention, but it has not been incorporated into the Israeli domestic legal system. Yet, its customary provisions obviously constitute part of the Israeli legal system. It has been the position of the Government of Israel that while the provisions regarding belligerent occupation embodied in the Fourth Geneva Convention do not apply in regard to the Region, Israel observes its humanitarian provisions.[12] This situation governs the present petition.

c) In addition to these two sources, the laws of armed conflict are entrenched in the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)[13] [hereinafter: First Protocol). Although Israel is not a Party to that Protocol, its customary provisions form part of the Israeli law.

6. As already ruled, the law that applies to the armed conflict between Israel and the terrorist organizations in the Region is the international law of armed conflict. This is so despite the fact that the terrorist organizations and their members do not act in the name of a State. Nowadays, a terrorist organization is likely to have considerable military capabilities, even such that exceed those of States. Confrontation of those dangers cannot be regarded as an internal matter of a State. Hence, the struggle against the dangers of terrorism constitutes an international armed conflict, and not an internal State conflict that is subject to the rules of law enforcement, nor a

8 S*ee* Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 5 (2004).

9 Repr. in *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* 55 (D. Schindler & J. Toman eds., 4th ed., 1988).

10 H.C. 2056/04, excerpted in 35 *Israel Y.B. Hum. Rts.* 340 (2005).

11 1 *Kitvei Amana* (Israel Treaty Series) (No. 30) 559.

12 H.C. 320/80, excerpted in 11 *Israel Y.B. Hum. Rts.* 344 (1981).

13 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *The Laws of Armed Conflicts*, s*upra* note 9, at 711.

conflict of a mixed character (as has been argued by some scholars). Being a conflict of international character, the law that applies to this conflict between Israel and the terrorist organizations is the international law of armed conflicts. It should also be noted that even those who claim that the conflict between Israel and the terrorist organizations is not of international character nevertheless agree that the IHL or the IHRL is applicable to it.[14]

7. The international law of armed conflict is based upon a delicate balance between two contradictory considerations: humanitarian considerations on the one side, and military considerations on the other. Humanitarian considerations concern people affected by the armed conflict, and are based upon the rights of the individual and his dignity; while military considerations are based upon military needs and success. The balance between these considerations is the basis of the international law of armed conflict.

The result of that balance is that human rights are protected by the law of armed conflict, but not in their full scope, and so are also military needs. This balance reflects the relativity of human rights, and the limits of military needs. The balancing point is not a permanent one because in certain issues the emphasis is on the military need, while in others it is on the needs of the civilian population.

8. The central consideration affecting the balancing point between humanitarian considerations and military needs is the identity of the person injured, or the objective harmed in the armed conflict. This is the basic principle of "distinction" between "combatants" and "military objectives", on the one hand, and "non-combatants" ("civilians") and "civilian objectives" on the other, which forms part of the customary international law of an armed conflict.

9. According to this basic principle of distinction, the balancing point between the State's military needs and the other side's combatants and military objectives is not the same as the balancing point between the State's military needs and the other side's civilians and civilian objectives. As a rule, combatants and military objectives are legitimate targets for military attack, so that they can be killed and wounded. Yet, not every act of combat and not every military means against them is permissible. Thus, for example, they can be shot and killed, but "treacherous killing" and "perfidy" are forbidden, as is the use of certain weapons.

On the other side of this distinction stand civilians and civilian objectives. Military attack against them is forbidden and their lives and bodies are

[14] Hamdan v. Rumsfeld, 165 *L. Ed.* 2d 729 (2006); Prosecutor v. Tadic, ICTY, case no. IT-94-1, para. 127.

protected, provided that they do not take a direct part in the combat. This approach – which protects the lives, bodies, and property of civilians who do not take a direct part in the armed conflict – is well-established in the case-law of the Supreme Court.[15] Hence, the question arises as to the status of the terrorist organizations and their members, whether "Combatants" or "Civilians" taking part in the armed conflict.

Combatants

10. The category of "Combatants" obviously includes combatants of the regular Armed Forces of a State. In addition, it also includes people who fulfill the conditions set forth in Article 1 of the Hague Regulations Annexed to the 1907 Hague Convention,[16] which provides as follows:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.

These conditions are repeated in Article 13 of the 1949 First and Second Geneva Conventions and Article 4 of the 1949 Third Geneva Convention.

11. The terrorists and their organizations, with which the State of Israel has an armed conflict of an international character, do not fall into the category of "combatants" as they do not fulfill these conditions – they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war. Moreover, they do not belong to "armed forces", and they do not belong to units to which international law grants status similar to that of combatants. The terrorists and the organizations which send them to carry out attacks are "unlawful combatants". As such, they do not enjoy the status of prisoners of war and they may be sentenced and punished for their participation in hostilities.

[15] H.C. 72/86, excerpted in 19 *Israel Y.B. Hum. Rts.* 371 (1989); H.C. 3278/02, excerpted in 34 *Israel Y.B. Hum. Rts.* 293 (2004); H.C. 5591/02, excerpted *ibid.,* 300; H.C. 3239/02, excerpted *ibid.,* 307; H.C. 10356/02, excerpted in 36 *Israel Y.B. Hum. Rts.* 308 (2006); H.C. 1890/03, excerpted *ibid*., 321; H.C. 3799/03, excerpted below in this Volume.

[16] Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention No. IV, 1907, repr. in *The Laws of Armed Conflicts, supra* note 9, at 75.

12. The Incarceration of Unlawful Combatants Law-2002[17] authorizes the Chief of General Staff of the IDF (Israel Defence Forces) to issue an incarceration order against an "unlawful combatant", who is defined in the Law as "a person who has participated either directly or indirectly in hostile acts against the State of Israel, or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War, and granting prisoner-of-war status under international humanitarian law, do not apply to him". Yet, even unlawful combatants are not beyond the law and are not "outlaws", their human dignity has to be honored and they also enjoy minimal protection by customary international law.

13. If the terrorists were seen as (legal) combatants, Israel would be entitled to harm them just as it is permissible to harm soldiers of an enemy country. But in this case, they would also enjoy the status of prisoners of war and other protections granted to legal combatants. However, since the terrorists acting against Israel are not combatants according to the definition of that term in international law, they are consequently not entitled to the status of prisoners of war and can be sentenced for their membership in terrorist organizations and for their operations against the Israeli army.

Civilians?

14. As to the question of whether the terrorists can be seen as civilians, it should be stressed that customary international law of armed conflict protects "civilians" from harm as a result of the hostilities. This customary principle is also expressed in Article 51(2) of the First Protocol, according to which "the civilian population as such, as well as individual civilians, shall not be the object of attack". From this principle follows also the duty to do everything possible to minimize collateral damage to the civilian population during attacks on "combatants".

15. According to definitions of customary international law, "civilians" are those who are not "combatants" or "persons who are not, or are no longer, members of the armed forces". These definitions are "negative" in nature, defining the concept of "civilian" as the opposite of "combatant". It follows that customary international law views unlawful combatants – namely, those who are not "combatants" – as civilians.

16. However, this does not mean that unlawful combatants are entitled to the same protection to which civilians who are not unlawful combatants are entitled. Customary international law of armed conflicts provides that a

[17] Reproduced in English in 32 *Israel Y.B. Hum. Rts*. 389 (2003).

civilian taking a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities. The result is that an unlawful combatant is not a combatant, but rather a "civilian" who is not protected from attack as long as he is taking a direct part in the hostilities. According to the international law of armed conflicts "civilians" who are "unlawful combatants" are legitimate targets for attack (and thus do not enjoy the rights of civilians who are not unlawful combatants), provided that they are taking a direct part in the hostilities at such time. Nor do they enjoy the rights granted to "combatants", such as the protection afforded to prisoners of war.

A third category: unlawful combatants?

17. The Court will take no stance on the question – advanced by the State – of whether a third category of "unlawful combatants" should be recognized, being that of people who take active and continuous part in an armed conflict, and therefore should be treated as "combatants", in the sense that they are legitimate targets of attack and do not enjoy the protections granted to "civilians". But they also do not enjoy all the rights and protections afforded to "combatants" because they do not distinguish themselves from "civilians", and do not observe the laws of war.

18. In the opinion of the Court, although there is an extensive literature on this question, regarding the existence of this third category, it is still one of a desirable law, rather than the existing one. It is difficult to see how a third category can be recognized by means of interpretation of the 1907 Hague Conventions and the 1949 Geneva Conventions. As far as existing law is concerned, the data before the Court is not sufficient to recognize this third category under the current international treaty-law or customary law.

Civilians who are unlawful combatants

19. The basic principle concerning civilians who are unlawful combatants taking a direct part in hostilities is that they are not protected at such time while doing so. Civilians enjoy comprehensive protection of their lives, liberty, and property, and protection of the lives of the civilian population is a central value in humanitarian law. In contrast to combatants, civilians are not to be harmed, due to their status as civilians. A provision in this spirit is laid down in Article 51(2) of the First Protocol,[18] which reflects customary international law. Moreover, civilians should not be harmed in an

[18] *Supra* note 13. The first part of Art. 51(2) reads as follows:

> The civilian population as such, as well as individual civilians, shall not be the object of attack.

"indiscriminate attack", which is not directed against a particular military objective, as provided in Article 51(4) of the First Protocol. This protection is granted to all civilians, except those civilians taking a direct part in hostilities.

20. The basic principle according to which civilians taking direct part in hostilities are not protected from attack at the time of their doing so is embodied in Article 51(3) of the First Protocol, which provides that:

> Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

Israel is not a Party to the First Protocol and, consequently, it was not incorporated into Israeli internal law. However, the position of the Red Cross is that it is a principle of customary international law, and this position is acceptable to the Court. It is compatible with Common Article 3 of the Geneva Conventions, to which Israel is a Party and in respect of which there is a general consent that it reflects customary international law, granting protection to persons "[t]aking no active part in the hostilities". In contrast to the argument presented by the State, claiming that not all parts of Article 51(30) are customary in nature, it is the position of the Court that all parts of Article 51(3) of the First Protocol reflect customary international law.

21. The basic principle according to which civilians taking direct part in hostilities are not protected from attack at the time of their doing so implies that a civilian – namely, one who does not fall into the category of combatant – must refrain from directly participating in hostilities. A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he takes a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, *e.g.* those granted to a prisoner of war, because he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection from attack granted to a civilian.

That is the law regarding unlawful combatant. As long as he preserves his status as a civilian – namely, as long as he does not become part of the armed forces – but takes part in combat, he ceases to enjoy the protection granted to the civilian, and is subject to the risks of attack just like a combatant, without enjoying the rights of a combatant as a prisoner of war. Consequently, terrorists who take part in hostilities are not entitled to the protection granted to civilians. Indeed, terrorists participating in hostilities do not cease to be civilians, but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack.

They also do not enjoy the rights of combatants, *e.g.,* the status of prisoners of war.

22. The above-cited Article 51(3) of the First Protocol, granting protection to civilians "unless and for such time as they take a direct part in hostilities" is composed of three main parts, being three conditions required for losing the protection granted to civilians. The first part is the condition that civilians take part in "hostilities"; the second part is that civilians take a "direct" part in hostilities; and the third part is that civilians are not protected from attack "for such time" as they take a direct part in hostilities.

"Taking a part in hostilities"

23. As for the first part, providing that civilians lose their protection if they "take . . . part in hostilities", the accepted definition is that "hostilities" are acts which by nature and objective are intended to cause damage to the army of the State and also to the civilian population of the State. According to the accepted view, a civilian takes part in hostilities when using weapons in an armed conflict, when gathering intelligence, or when preparing himself for hostilities. There is no condition that the civilian use his weapon, nor is their a condition that he bear arms (openly or covertly). It is possible to take part in hostilities without using weapons at all.

"Taking a direct part"

24. The second part of Article 51(3), providing that civilians lose their protection if "they take a direct part in hostilities", makes a distinction between civilians taking a direct part in hostilities (from whom the protection from attack is removed) and civilians taking indirect part in hostilities (who continue to enjoy protection from attack). A similar distinction appears in Common Article 3 of the four 1949 Geneva Conventions, which uses the wording "active part in hostilities".

It seems accepted in international literature that there is no agreed definition of the term "direct" in this specific context. Indeed, a civilian bearing arms (openly or covertly) who is on his way to a place where he will use them against the army, at such a place, or on his way back from it, is a civilian taking "active part" in the hostilities. However, a civilian who generally supports the hostilities against the army is not taking a direct part in the hostilities.

25. The term "direct" should be interpreted against two conflicting considerations: one of a restricted approach, leading to extensive protection to innocent civilians on the one hand; and the liberal one, designed to encourage civilians to stay away from the hostilities to the greatest extent possible.

Against the background of these considerations, the term taking a "direct part" in hostilities should also include the following persons: a person who collects intelligence on the army, whether on issues regarding the hostilities, or beyond those issues; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, whatever the distance from the battlefield. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities.

However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, but rather an indirect part in the hostilities. The same is the case regarding a person who aids unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants. If such persons are injured, the State is likely not to be liable for it if it falls into the framework of collateral or incidental damage.

In the international literature there is a debate surrounding the following case: a person driving a truck carrying ammunition. Some are of the opinion that such a person is taking a direct part in the hostilities (and thus that he can be attacked), and some are of the opinion that he is not taking a direct part (and thus cannot be attacked). In the opinion of the Court, if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities.

26. In all that concerns civilians serving as "human shields" for terrorists taking a direct part in hostilities, the rule should be that if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. Rather, they themselves are victims of terrorism. However, if they do so of their own free will, in support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities.

27. As for those who enlist a civilian to take a direct part in the hostilities, and those who send him to commit hostilities (including direct commanders and those responsible for them) – the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack, so that those who sent him are also taking "a direct part". The same applies to the person who decided upon the act, and the person who planned it. Their contribution is direct (and active).

"For such time"

28. According to Article 51(3) of the First Protocol civilians enjoy protection unless "and for such time" as they are taking a direct part in hostilities, meaning that if "such time" has passed, the protection returns. As already ruled, all of the parts of Article 51(3) reflect customary international law, including this time requirement.

There is no consensus in the international literature as to the scope of the wording "and for such time", just as there is no consensus for the wording "takes a direct part" in hostilities. Indeed, both concepts are close to each other, but they are not identical. In the absence of a consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case. Obviously, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack, and should not be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization, which has become his "home", and in the framework of his role in that organization commits a series of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostile action.

29. The "for such time" requirement presents a dilemma. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, one should avoid the "revolving door" phenomenon, by which a terrorist has a "city of refuge" to flee to, which grants him immunity from attack while resting and organizing his next hostile act. In all other "gray" areas, where customary international law has not yet crystallized, there is no escape from examination of each and every case. Such examination should take into account four factors:

a) First, reliable and verified information is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities. The burden of proof lies on the attacking army and is a heavy one. In case of doubt a careful verification is needed before an attack is made.

b) Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. This is required under Israeli internal law by virtue of the principle of proportionality, meaning that among the military means available one must choose the means whose harm to the human rights of the harmed person is the lesser. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed. Trial

is preferable to use of force. A law-abiding State employs, to the greatest extent possible, procedures of law and not procedures of force. Indeed, arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist at all; at times it involves such a great risk to the lives of the soldiers that one cannot expect to use it. Yet, this possibility should always be considered. This possibility might actually be particularly practical in a situation of belligerent occupation, in which the army controls the area where the operation takes place, and in which arrest, investigation, and trial are at times realizable. Moreover, sometimes, the harm to nearby innocent civilians from an attack might be greater than the harm resulting from refraining from one. In that case, the means of attack should not be used.

c) Third, after an attack has been made on a civilian suspected of taking active part, at such time, in hostilities – a thorough and independent investigation regarding the precision of the identification of the target and the circumstances of the attack is to be made (retroactively). In case of injury to an innocent civilian, payment of compensation should be considered.

d) Fourth, in cases where the harm caused as a result of an attack on a civilian suspected of taking an active part in hostilities is not only to the civilian but also to innocent civilians nearby, the harm to them is collateral damage, and this damage has to meet the proportionality test.

Proportionality

30. The principle of proportionality is a general principle in law. It is part of the Israeli legal concept relating to human rights. It is an important element of customary international law. It is an integral part of the law of self-defence. It is an essential element of the protection of civilians in armed conflict. It is a central part of the law of belligerent occupation.

In a long series of judgments, the Supreme Court examined the authority of the military commander in the Region according to the standards of proportionality. It has done so, *inter alia*, regarding restriction of place of residence;[19] regarding encirclement of villages and positioning checkpoints on the access roads to and from them in order to frustrate terrorism; regarding harm to property of protected persons due to army operations; regarding the safeguarding of freedom of worship and the right of access to holy places;[20] regarding demolition of houses due to operational needs;[21] regarding the laying of siege;[22] regarding the erection of the security fence.[23]

19 H.C. 7015/02, *supra* note 1.
20 H.C. 10356/02, *supra* note 15.
21 H.C. 4219/02, excerpted in 32 *Israel Y.B. Hum. Rts.* 379 (2002).
22 H.C. 3451/02, excerpted *ibid.*, 373.

Proportionality in the law of IAC

31. The principle of proportionality is a substantial part of the IAC, which is of a customary character. The principle of proportionality arises when a military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. In the latter case, the rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportional. Civilians might be harmed due to their presence inside a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; sometimes, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack on a military target, and they are harmed as a result. In all these situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, *inter alia,* the requirements of the principle of proportionality.

32. The principle of proportionality applies in every case where civilians not taking a direct part in hostilities are harmed. This customary principle found its expression in Article 51(4) of the First Protocol, which forbids indiscriminate attacks, and in Article 51(5), providing that an attack is to be considered as indiscriminate if it "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".

Proper proportion between benefit and damage

33. The requirement of proportionality in the laws of armed conflict focuses primarily upon proportionality "*stricto senso*", namely, the requirement for a proper proportional relationship between the military objective and the civilian damage. According to this meaning of the principle of proportionality, an attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportional to the military advantage (in protecting combatants and civilians). In other words, an attack is proportional if the benefit stemming from the attainment of the proper military objective is proportional to the damage caused to innocent civilians harmed by it. When the damage to innocent civilians is not proportional to the benefit of the attacking army, the attack is disproportionate and forbidden.

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23 H.C. 2056/04, *supra* note 10.

34. Proportionality "*stricto sensu*" is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might – like a combatant – be the objective of a fatal attack. That killing is permitted. Proportionality is required in a case where an innocent civilian is harmed. The requirement of proportionality *stricto sensu* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportional to the military advantage in harming the combatants and terrorists. Performing that balance is difficult, and one must proceed case by case. One case is that of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportional even if as a result of it an innocent civilian neighbor or passerby is harmed. However, that is not the case if a building is bombed from the air and dozens of its residents and passersby are harmed. Thus, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated. Indeed, in international law, as in internal law, the ends do not justify the means. The State's power is not unlimited. Not all of the means are permitted.

Indeed, when hostilities occur, losses are caused. However, the State's duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists. Although this balance is difficult to attain and raises moral and ethical problems, there's no choice but to achieve it.

From the general to the specific

a) The question of the legality of the "targeted killing – namely, the preventative strikes causing the deaths of terrorists, and sometimes also of innocent civilians – is a complex one.

b) The conclusion is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to international armed conflicts is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities".

c) Harming such civilians, even if the result is death, is permitted, on the condition that there is no other means which harms them less, and on the condition that innocent civilians nearby are not harmed.

d) Harm to the latter must be proportional. Proportionality is determined according to a values based test, intended to balance between military advantage and civilian damage.

e) The Court cannot determine that a preventative strike is always legal, just as it cannot determine that it is always illegal. All depends upon the question of whether the rules of customary international law regarding international armed conflict allow that preventative strike or not.

Conclusion
Concluding his judgment, Barak J.P. made the following statement:

> The State of Israel is fighting severe terrorism, which plagues it from the area. The means at Israel's disposal are limited. The State held that preventative strikes on terrorists in the area which cause their deaths are a necessary means from the military standpoint. These strikes at times cause harm and even death to innocent civilians. These preventative strikes, with all the military importance they entail, must be made within the framework of the law. Every struggle of the State – against terrorism or any other enemy – should be conducted according to the rules of law. There is always a law which the State must comply with. … In this case, the law was set by customary international law regarding conflicts of international character. … We are convinced that at the end of the day, a struggle according to law (and while complying with the law) strengthens democracy and its spirit. There is no security without law. Complying with the law is a component of national security.

The final answer to the question posed before the High Court was formulated by Barak J.P. as follows:

> It cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law regarding targeted killing is laid down in customary international law, and it is in light of this law that the legality of each particular act must be determined.

Rivlin J.D.P. and Beinisch J.P. joined the judgment of Barak J.P. (Emeritus).

II. H.C. 3799/02, Adalah – The Legal Center for Arab Minority Rights in Israel *et al.* v. IDF (Israel Defence Forces) Central Command *et al.*

Not yet published.
Legality of the "Early Warning" procedure; the "Early Warning" Directive issued by the IDF; occupying army in an area under belligerent occupation being permitted to arrest local residents endangering its security; also

permitted to give the wanted person an early warning; not permitted to use local residents as "human shields"; prohibition to obligate a local resident to relay an "early warning" to a wanted person; early warning not to be relayed by a resident if doing so will endanger him; no regulation in international law of the issue of soliciting assistance of a local resident for relaying an "early warning" according to the procedure for doing so, when that resident consents, and no harm will be caused to him by relaying the warning; the issue requiring balancing between conflicting considerations; considerations in favor of forbidding the army from using a local resident prevail; prohibition of use of protected residents as part of military needs of the occupying army; prohibition of use of local residents as a "human shield"; prohibition of use of coercion of protected persons to obtain intelligence; duty of separation between civilian population and military activity; duty of occupant to distance innocent local residents from the zone of hostilities; inequality between the occupying force and the local resident; consent should not be required if obviously not genuine; relaying of a warning likely to cause harm to the local resident; "Early Warning" procedure incompatible with international law.

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This is a leading judgment of the High Court delivered on 6 October 2005 – per Barak J.P. – which responded to the following question put before it:

> According to the "Early Warning" procedure, Israeli soldiers wishing to arrest a Palestinian suspected of terrorist activity may be aided by a local Palestinian resident, who gives the suspect prior warning of possible injury to the suspect or to those with him during the arrest. Is this procedure legal?

The "Early Warning" Procedure

1. The petition was filed with the High Court back in 2002, during Operation Defensive Shield,[24] by seven human rights organizations which complained that according to reports of international human rights organizations such as Amnesty International and Human Rights Watch, and also according to Israeli local media, the IDF (Israel Defence Forces) is using civil Palestinian population for military purposes in a manner contrary to international law.

2. Following the petition, the IDF General Staff formulated and issued orders providing that it is strictly forbidden to use Palestinian civilians as

[24] On Operation Defensive Shield, *see* H.C. 2901/02, excerpted in 32 *Israel Y.B. Hum. Rts*. 358, n. 12 (2002).

"human shields" for protection of soldiers from injury; and to hold Palestinian civilians as "hostages" (to seize and hold civilians as a means to pressure others). The instructions also provided that it is strictly forbidden to use civilians in situations where they might be exposed to danger to life or limb.

3. However, the General Staff did not exclude the possibility of being assisted by the local population, and explained that such assistance is solicited in situations where it will allow avoidance of a military act which may cause great harm to local residents, to soldiers and to property. Consequently, it issued in 2002 an operational directive entitled "Early Warning", which formulated the procedures for soliciting the assistance of local residents in order to arrest wanted persons.

4. The "Early Warning" Directive [hereinafter: the Directive] opens with the following general description stating that:

> "Early Warning" is an operational procedure, employed in operations to arrest wanted persons, allowing solicitation of a local Palestinian resident's assistance in order to minimize the danger of wounding innocent civilians and the wanted persons themselves (allowing their arrest without bloodshed). Assistance by a local resident is intended to grant an early warning to the residents of the house, in order to allow innocent individuals to leave the building and the wanted persons to turn themselves in, before it becomes necessary to use force, which is liable to endanger human life.

The Directive further states that the "Early Warning" procedure must be approved by the brigade commander, his deputy, or by the brigade operations officer. An effort is to be made to find a person such as a relative or neighbor, who is acquainted with the wanted person or with the residents of the house where he is present, or has influence on them. The Directive provides that this procedure is not to be used to solicit the assistance of women, children, the elderly, or the disabled.

5. The Directive also formulated in detail the procedure for approaching a resident in order to receive his consent to provide assistance, as follows:

> *2. Approaching the Local Palestinian Resident in order to Receive Assistance*
> Contact with the local resident is to be made by the commander of the force directly, or via a translator. Contact is to be made in a language understood by the local resident, while strictly preserving human dignity. When contact is made with the resident, it has to be clarified to him that

he is being asked to assist soldiers in order to prevent injury to innocent persons or their property.
Emphases:
A. The civilian population has no obligation to assist the IDF in warning civilians of attack.
B. Contact, and persuasion, shall be exclusively verbal.
C. It is strictly forbidden to use force or violence toward a local resident or others, in order to secure said assistance.
D. It is strictly forbidden to threaten a resident, or other people, that physical violence, arrest, or other means will be used against them.
E. It is strictly forbidden to hold people "hostage" in order to secure the assistance of a local resident.
F. If a local resident refuses – under no circumstances is provision of assistance to be forced [emphases in original].

6. The Directive included instructions regarding the use of the procedure, when the local resident has agreed to assist army forces, as follows:

3. *Assistance by a Local Resident*
Solicitation of a local resident's assistance is intended to allow innocent persons to leave the building and/or allow the wanted persons to turn themselves in before there is a need to use force, which is liable to endanger human life. For that purpose, one may ask a local resident to approach the house, to give notice to those in the house that the army is present and to warn them that if they do not leave the house, the army is liable to use force in order to arrest the wanted persons.
Emphases:
A. It is strictly forbidden to use the local resident in military missions (*e.g.,* locating explosive charges, intelligence gathering).
B. It is strictly forbidden to solicit the assistance of a local resident, when the commander of the force believes that the latter will be in danger – even with his consent.
C. It is strictly forbidden to use a local resident as a "live shield" against attack. Thus, during the advance of the force, if accompanied by the local resident, the latter is not to be positioned at the head of the force.
D. It is strictly forbidden to equip the local resident with military equipment (uniform, weapon, battle vest, *etc.*).
E. "Early Warning" is not to be employed when there is another effective way to achieve the objective, whose results are less severe.
F. It is preferred that the local resident not be asked to enter the building, but rather be asked to relay the warning from the outside (by a knock on the door and a conversation with the persons in the building from the

> outside). He shall be asked to enter the building only in those cases in which there is no other way to relay the warning, and only if the commander of the force believes that the local resident will not be exposed to danger as a result of his entry into the building [emphases in the original].

7. In addition, the operational directive provides that the assistance of a local resident will be terminated as soon as the persons in the house have exited it. It further provides that the assistance of a local resident shall be used only at a specific time and place, and that one may not "adjoin a local resident to a military force". It also determines the duty to terminate assistance prior to attacking the building or undertaking other forceful acts.

It was also decided by the General Staff that IDF military units can make use of the procedure only after having received detailed guidance about the Directive.

The Normative Framework

8. An army in an area under belligerent occupation is permitted to arrest local residents wanted by it, who endanger its security.[25] In this framework – and to the extent that it does not frustrate the military action intended to arrest the wanted person – the army is permitted (and sometimes even required) – to give the wanted person early warning. In this manner, it is possible to ensure the performance of the arrest without injury to the civilian population.[26]

9. Just as it is clear that an army is authorized to arrest a wanted person who endangers security, so is it clear that the army is not permitted to use local residents as a "human shield".[27] Pictet correctly noted that the use of people as a "human shield" is a "cruel and barbaric" act.[28]

10. A general consensus exists that it is prohibited for the army to obligate a local resident to relay an "early warning" to a wanted person in a place besieged by the army, against his will. Indeed, the "early warning" procedure explicitly holds that the assistance of a local Palestinian resident can be required to assist in relaying an early warning only when that resident

25 H.C. 3239/02, excerpted in 34 *Israel Y.B. Hum. Rts*. 307 (2004).

26 *See* Regulation 26 of the 1907 Hague Regulations, *supra* note 16, at 75; Art. 57(2) of the First Protocol, *supra* note 13; *see also* D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* 171, 223 (1995).

27 *See* Art. 28 of Fourth Geneva Convention, *supra* note 11; Art. 51(7) of the First Protocol, *supra* note 13.

28 *See Commentary, Geneva Convention IV* 208 (ICRC, J. Pictet ed., 1958); hereinafter: Pictet.

has consented to provide such assistance. It is also agreed that early warning is not to be relayed by a local resident if doing so will endanger him.

11. There is no explicit regulation of the issue of soliciting assistance of a local resident for relaying an "early warning" according to the procedure for doing so, when that resident consents, and no harm will be caused to him by relaying the warning. Thus, the solution to our question requires balancing between conflicting considerations.

On the one hand stands the value of human life. The "early warning" procedure is intended to prevent the need to arrest a wanted person by use of force, and thereby to prevent damage to the local residents who are in the same place as the wanted person. Indeed, safeguarding the lives of the civilian population is a central value in the humanitarian law applicable to belligerent occupation.[29] The legality of the "early warning" procedure might draw its validity from the general duty of the occupying army to ensure the dignity and security of the civilian population. It is also compatible with the occupying army's obligation to protect the lives and security of its soldiers.

On the other hand stands the occupying army's duty to safeguard the life and dignity of the local civilian sent to relay the warning. That is certainly the case when he does not consent to take upon himself the task, and when its performance is likely to cause him harm. But that is also the case when he gives his consent, and when performance of the task will cause him no harm. This is so not only because he is not allowed to waive the rights granted to him by humanitarian law,[30] but also because *de facto*, it is difficult to determine when his consent is given freely, and when it is the result of overt or concealed pressure.

12. In balancing between these conflicting considerations the considerations in favor of forbidding the army from using a local resident prevail; and this is so for a number of basic reasons:

a) *First*, a basic principle, which passes as a common thread running throughout the law of belligerent occupation, is the prohibition of use of protected residents as part of the war effort of the occupying army. The civilian population is not to be used for the military needs of the occupying army. They are not to be "volunteered" for cooperation with the army.[31] From this general principle the specific prohibitions of use of local residents as a "human shield", and of use of coercion (physical or moral) of protected

[29] Art. 27 of the Fourth Geneva Convention, *supra* note 11; H.C. 4764/04, excerpted in 35 *Israel Y.B. Hum. Rts*. 327 (2005).

[30] Art. 8 of the Fourth Geneva Convention, *supra* note 11; Pictet, *supra* note 28, at 72, 74.

[31] Regulation 23(b) of the Hague Regulations (*supra* note 16), and Art. 51 of the Fourth Geneva Convention (*supra* note 11); *see also* Pictet, *supra* note 28, at 292.

persons in order to obtain intelligence are derived.[32] It seems that prohibiting use of local residents for relaying warnings from the army to those whom the army wishes to arrest should also be derived from this general principle.

b) *Second,* another principle of the humanitarian law holds that all has to be done to separate between the civilian population and military activity. The central application of this rule is the duty to distance innocent local residents from the zone of hostilities. This rule calls for an approach according to which a local resident is not to be brought, even with his consent, into a zone in which combat activity is taking place.

c) *Third,* in light of the inequality between the occupying force and the local resident, it is not to be expected that the local resident will reject the request that he relay a warning to the person whom the army wishes to arrest. A procedure is not to be based upon consent, when in many cases the consent will not be genuine. The situation in which such consent would be requested should be avoided.

d) *Last*, one cannot know in advance whether the relaying of a warning involves danger to the local resident who relays it. The ability to properly estimate the existence of danger is difficult in combat conditions, and a procedure should not be based on the need to assume a lack of danger, when such an assumption is at times unfounded. In this case, one must consider not only the physical danger of injury from gunfire which may take place in the wanted person's location, or from various booby-traps, but also the wider danger to which a local resident who allegedly "collaborates" with the occupying army is exposed.

13. Barak J.P. terminates his judgment by stating as follows:

> These considerations lead to the conclusion that the "early warning" procedure is incompatible with international law. It comes too close to the normative forbidden "nucleus", and lies in the relatively grey area of the improper.

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In light of this conclusion, the High Court turned the *order nisi* issued against the respondents (including the Minister of Defence and the Prime Minister) into an *order absolute*, by declaring that the "Early Warning" procedure is contradictory to international law.

Cheshin J.D.P. and Beinisch J. concurred with the judgment of Barak J.P., thereby turning it into a unanimous decision of the Court.

[32] Art. 31 of the Fourth Geneva Convention *supra* note; Pictet, *supra* note 28, at 219.

III. H.C. 7007/03, Kawasmi v. Military Commander of the Judea and Samaria Region

Not yet published.

Legality of closure of nine Palestinian shops for the protection of Jewish settlers in the Hadassah House in Hebron from terrorist activity; respondent's authority to take measures for protection of every person in the Region, permanent residents and new settlers; use of this authority based on balance between security needs and welfare of local civilian population; duty to adjust the measures to the extent of the anticipated danger and the chance of its actual occurrence; choice between various legitimate security measures at the respondent's absolute discretion; examination of the situation as existing at time of hearing; no alternative for the security means of closure of shops located beneath the Hadassah House; current revision of the measures desirable in light of actual reality.

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The present petition was filed by Palestinian owners of nine shops located in Hebron (on the West Bank), which were closed pursuant to orders issued by the respondent. The respondent reasoned that the Closure Orders were made on the grounds that following the wave of terrorist attacks which had occurred since September 2000, a great security tension exists between the 30 Jewish families settled in the Hadassah House[33] and the surrounding Palestinian population. Therefore, the need exists to take various steps for the protection of the lives of the Jewish families. The petitioners challenged the validity of the Orders on the ground that the closure of their shops harms their livelihood, and demanded that the respondent consider taking less harmful protective measures. Thus, the High Court – per Beinisch J. – defines the question that arises in the petitions as being whether the harm caused to the petitioners is lawful.

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1. The question of proper balance between the need to protect the lives and safety of the inhabitants of the Hadassah House was already discussed in the *Tzalum* case,[34] where the question arose of the legality of constructing a fence around the House and searching every person entering into its area, as well as similar contentions which had been raised by the parties. In that case, the Court – per Barak J. – ruled as follows:

[33] The Hadassah House in Hebron is of historical value as a symbol of the revival of the past Jewish settlement there.

[34] H.C. 72/86, excerpted in 19 *Israel Y.B. Hum. Rts.* 371 (1989).

> No doubt exists that the respondents possess the formal authority to take all necessary steps for the protection of the settlers in the Hadassah House. This authority obviously exists also in regard to settlers forming part of the IDF forces. This authority is extremely extensive, and applies to everyone present in the Region, be he a permanent resident or a new settler. Using this authority, the respondents are bound to consider security needs on the one hand, and the welfare of the civilian population, on the other. They must balance between the various considerations, while adjusting the measures undertaken to the extent of the danger anticipated and the chance of its actual occurrence. If the respondents acted according to this test, we shall not interfere, even if we are of the opinion that other measures might be adopted equally within the framework of this test. The choice between various legitimate measures lies at the respondents' discretion.

In the *Tzalum* case, the Court ultimately determined that the measures taken by the respondent were legal, but it also added that:

> Of course, the various factors creating the proper balance may change, and it is incumbent on the respondents to periodically review their position, while being ready to take steps more favourable to the petitioners (the local Palestinian residents) without impairing security needs.

In that case, the Court endorsed the respondent's reasoning for closing the shops under the Hadassah House in that "existence of shops, into which people enter freely, with articles and bags, creates the possibility for putting explosives inside, which can blow out the whole House". Given this reasoning, the Court reached the conclusion that the danger for the inhabitants of the Hadassah House is a major one, amounting to the risk of human life".

2. The rulings delivered in the *Tzalum* case form the normative framework in the present petition. Hence, it remains for the Court to examine whether under the present circumstances grounds exist for the respondent's contention that there is a real security danger for the inhabitants of the Hadassah House; and whether the means chosen by him adequately balances between the need to protect the inhabitants of the Hadassah House on the one hand, and that of reducing the harm caused by this means to the petitioners, on the other. Thus, the question is whether under the circumstances prevailing today, the closing of shops meets the proper balance between security needs and harm to local residents.

3. While the petitioners claimed that there has recently been a significant calm in the area, the respondent contended that the present security situation prevailing in Hebron is far more severe than the one which existed during the period of the *Tzalum* case (in 1986), because the activity of terrorist organizations at present is far more intensive and the use of explosives has been considerably expanded. In fact, from September 2000, an extraordinarily severe security situation has developed there, characterized by large-scale terrorist and fighting activity. This extraordinary situation creates a day-to-day danger for the Israeli citizens living in Hebron in general, and for the inhabitants of the Hadassah House in particular.

4. There is no doubt that the respondent bears the responsibility for the welfare and safety of the inhabitants of the Hadassah House and that he is bound to take all necessary steps to ensure their protection. But vis-a-vis his duty to be concerned with the safety of the Hadassah House' inhabitants stands his duty to be concerned with the welfare of the local Palestinian population. Therefore, the question to be examined is whether the means chosen by the respondent adequately balance between the need to protect the Hadassah House inhabitants on the one hand, and the need to reduce the harm caused to the petitioners, on the other.

5. The respondent presented to the Court a series of steps and projects carried out in order to minimize the harm to the local Palestinian residents as a result of various security measures taken by him; but he found no alternative to closure of the petitioners' shops located beneath the Hadassah House (despite thorough examinations of the matter performed by the security authorities).

6. Indeed, the petitioners are harmed considerably as a result of the closure of their shops, the more that it was done in absence of any risk emanating from them. Yet, there is no ground to interfere in the respondent's decision because it does not exceed the zone of reasonability of his discretion. Moreover, the Closing Orders are for a limited time and should be periodically revised in light of the situation prevailing. In the meantime, the grant of compensation to the petitioners should be considered.

Rivlin J. and Levi J. joined the judgment of Beinisch J., so that became the unanimous judgment of the Court.

IV. H.C. 9586/03, Salame v. IDF Commander in the Judea and Samaria Region

58(2) *Piskei Din* (Reports of the Supreme Court of Israel) 342.

Assignment of the place of residence under Article 78 of the Fourth Geneva Convention upon evidence of active membership in terrorist organizations; purpose of assignment of residence being not punishment but prevention of

the person whose residence is assigned from being a security danger; legality of broad security considerations, including general deterrence; administrative detention as a more harsh means than assignment of residence; application of Article 39 of the Geneva Convention.

These are 10 united petitions filed to the High Court by residents of the Judea and Samaria Region [hereinafter: the Region], who had been held in administrative detention. Upon termination of their detention period, the respondent issued against them orders of assigned residence (under Article 78 of the Fourth Geneva Convention[35]), requiring them to live for periods varying between 6 months and 2 years in the Gaza Strip. The orders were based on intelligence information tying them to activity in terrorist organizations. The petitioners challenged the legality of the orders of assigned residence on various grounds. The Court – per Chayut J. – upheld the Orders and dismissed the petitions. The main points in the reasoning of the Court may be presented as follows.

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1. According to the ruling delivered in the *Ajuri* case,[36] the Region is subject to belligerent occupation, so that the international humanitarian law is applicable to it, alongside Israeli administrative law.
2. Article 78 of the Fourth Geneva Convention permits the assignment of residence of a protected person in an occupied territory for security reasons, subject to the possibility of appeal against the assignment decision and its periodical review. Therefore, there is no ground for the petitioners' argument concerning lack of authority of the respondent to issue assignment of residence orders.
3. As already ruled in the *Ajuri* case, the Judea and Samaria Region and the Gaza Strip are a single territorial unit, so that there is no room for

35 *Supra* note 11. Art. 78 provides as follows:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.
>
> Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

36 H.C. 7015/02, *supra* note 1.

applicability of Article 49 of the Fourth Geneva Convention, prohibiting deportation of protected persons from the occupied territory.

4. There is no ground for the petitioners' contention that the orders had been issued for unlawful political considerations, for it follows from the classified evidence presented to the Court that each one of the orders is justified by security considerations. The petitioners are operative members of terrorist organizations active in the Region, so that the danger emanating from them, if released, is a real and imminent one.

5. The purpose of assigning of residence is not punishment but prevention of the person whose residence is assigned from being a security danger.

6. When deciding upon assignment of residence, a military commander may take into account not only strict "military" considerations but also broad security considerations, as laid down in Article 78 of the Convention. Such consideration may include the one of deterring others, and this is a relevant consideration in choosing between administrative detention and assignment of residence.

7. In the present case, it is evident that the orders serve as an efficient and important means for ensuring the security of the Region because they both detach the petitioners from the center of their activity, and also possess a deterrent effect.

8. The fact that the orders had been issued for different periods points out that the respondent exercised his discretion in respect of each one of the petitioners individually. The decision about the place of assigned residence, whether in the Region or in the Gaza Strip, lies within the respondent's authority, and it follows from the evidential material that he exercises this discretion properly.

9. As for the petitioners' claim that the respondent should have chosen the means of administrative detention and not that of assignment of residence, it is obvious that administrative detention is a more harsh means because it involves a total denial of the detainee's liberty while assignment of residence only restricts liberty but does not impair the freedom of movement within the area of assigned residence.

10. It should also be borne in mind that according to Article 39 of the Fourth Geneva Convention[37] (mentioned in Article 78), the Occupying State

[37] *Supra* note 11. Art. 39 of the Fourth Geneva Convention provides in its second paragraph as follows:

> Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.

is bound to ensure support to a protected person against whom it applies methods of control, including support to his dependents. Whereas the respondents expressed their commitment to act according to their duty under this Article, the harm to the petitioners flowing from assignment of their residence is thereby considerably mitigated.

After examination of each petition individually on its merits, the Court rejected all of them, thereby confirming the assignment of residence orders issued by the respondent.

V. H.C. 9717/03, Na'ale v. Planning Council for the Judea and Samaria Region *et al.*

48(6) *Piskei Din* 97.
Legality of building a quarry in a territory under belligerent occupation; Article 55 of the Hague Regulations; Occupying State as administrator and usufructuary of estates; sales prohibited, but renting, leasing or cultivation permitted; quarrying permitted if for the benefit of the local population (including Israeli settlers); period of occupation affecting the rules of customary international law applicable.

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The petitioners, representing Israeli settlements in Samaria (on the West Bank) lodged an objection to the respondent for approval of the construction of a quarry in the area.

They based their objection on several grounds, one of them being that establishment of a quarry in an area under belligerent occupation is contrary to Regulation 55 of the 1907 Hague Regulations,[38] which provides as follows:

> The Occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

According to the petitioners' argument, Regulation 55 permits only administration and usufruct, while the quarry is consuming the property.

Responding to this argument, the High Court – per Grunis J. – ruled that:

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38 *Supra* note 16.

> … although the terms of "administration" and "usufruct" do forbid sale, they obviously do not prevent renting, leasing or cultivation.[39] Indeed, a question arises of whether quarrying could be considered as usufructing because it actually extinguishes the capital of the resource. However, even if quarrying cannot be considered as usufructing, no probition of such a kind of use applies in cases where the activity is done for the benefit of the local population or local needs. For example, the paving of roads in occupied territory is permitted if they are used also by local residents.[40]

Grunis J. added, that it was already ruled in the past that the category of "local residents" in an occupied territory includes Israeli settlers there.[41]

Moreover, an additional factor which affects the application of customary international law to the issue relates to the period of belligerent occupation. The commonly accepted rules regarding belligerent occupation were developed against the background of wars in which a belligerent occupation lasted for a relatively short period. However, in cases of long-lasting occupations, there is a justification for recognition of the authorty of the Occupying State to perform even works which would possess a long-lasting effect on the area under belligerent occupation.[42]

Whereas it follows from the material presented to the Court that the production of the quarry will also be used in building projects in Judea and Samaria area itself, the petitioners' arguments insofar as they are based on international law should be rejected.

VI. H.C. 940/04, Abu Tir *et al*. v. Military Commander of the Judea and Samaria Region *et al.*

49(2) *Piskei Din* 320.

Complaint of Palestinian residents about harm resulting from the route of the Separation Fence as causing separation between their homes in the village and their lands and workshops situated outside it; the commander's duty to balance between security needs and humanitarian considerations; duty to exercise the authority in a fair, reasonable and proportional manner; test of proportionality applicable both to the legitimacy of the Fence and to its specific route; duty to choose the route which will cause the least injury

39 H.C. 285/81, excerpted in 13 *Israel Y.B. Hum. Rts.* 368 (1983).

40 H.C. 393/82, *supra* note 5.

41 H.C. 256/72, excerpted in 5 *Israel Y.B. Hum. Rts.* 381 (1975).

42 On this issue *see* E. Benvenisti, *The International Law of Belligerent Occupation* 146-48 (1993).

to local residents; in cases of conflict between interests of various residents – the number of people whose rights are liable to be infringed, and the nature and intensity of the rights infringed should be considered; duty to consider additional relevant factors; importance of agreement with representatives of local residents; petition dismissed mainly because of its unjustified delay.

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This petition concerns the route of the Separation Fence – built by Israel in the Judea and Samaria Region [hereinafter; the Region] in order to prevent penetration of terrorists[43] – in the area of the Palestinian villages Um Tuba and Tsur Baher, which are situated near Jerusalem and subject to the jurisdiction of the Jerusalem Municipality.

The eleven petitioners are inhabitants of the Um Tuba village (petitioners 1 to 4), and the Tsur Baher village (petitioners 5 to 11), who possess workshops and cultivated lands outside these villages, in the area belonging to the Judea and Samaria Region, governed by Israeli military administration. In their petition to the High Court, they ask alteration of the route of the Fence, so that their houses and lands will remain on the west (instead of the east) side of the Fence.

It follows from the background of the petition (as presented on behalf of the Court by Procaccia J.), that according to the original plan of the route of the Fence, most of the workshops and lands belonging to Tsur Baher residents (including those belonging to the petitioners) and situated in the Judea and Samaria Region – were supposed to remain on the east side of the Fence. Pursuant to objection of dozens of Tsur Baher residents to this route, and their petition to the High Court – the planned route of the Fence was altered so that most of the workshops and lands belonging to Tsur Baher residents were left on the west side, as requested by the village's representatives. This alteration was actually the result of an agreement reached between the respondent and the representative body of the Tsur Baher residents. However, as the eleven petitioners did not participate in the negotiations and did not join the agreement with the respondent, their houses and lands were left on the east side of the Fence (as originally planned).

In their petition to the High Court, the petitioners claimed that as a result of the route of the Fence, their workshops and lands situated in the Judea and Samaria Region will be territorially separated from their homes in the villages of Um Tuba, Tsur Baher, where they and most of their family members currently live, and where they enjoy all local services, including

[43] On the background for the erection of the Separation Fence *see* H.C. 2056/04 (the *Beit Sourik* case), *supra* note 10.

health services. They also claimed that their workshops and lands situated outside the villages are a source of their livelihood, and it will take them more than one hour to drive from these houses and lands to the their homes in the villages, not counting the time required to pass through the check-posts that will be established at the Fence. For all these reasons, they request alteration of the route of the Fence, so that their workshops and cultivated lands will not be separated from their homes in the villages. Responding to the petition, the respondent contended that another alteration of the agreed route according to the petitioners' proposal would inevitably result in harm to the rights of other Tsur Baher residents, and four of them even joined the case as respondents 2 to 5.

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Military commander's authority – security needs and humanitarian considerations

1. Israel holds the Judea and Samaria Region in belligerent occupation, which is governed by a military administration and headed by a military commander. The commander exercises his functions according to the authority vested in him by rules of international law and by rules of Israeli public law. According to these rules, the commander is bound to exercise his authority in a fair, reasonable and proportional manner. He bears the responsibility for the order and security of the area under his control, on the one side – and for the welfare of the residents, including protection of their rights, especially their basic rights, on the other. Concern for human rights should be at the center of the commander's humanitarian considerations.

2. According to these principles, and pursuant to the balance required between military and security needs on the one hand, and the needs of the local population, on the other – the commander is entitled to build a fence insofar as it is needed for the security of the area. For this end, he is authorized to take possession of land, if this is necessary for achievement of the security purpose. Yet, while doing so, he is bound to consider – to every possible extent – the needs and interests of the local population. Obviously, the erection of a fence for military-security needs is likely to harm property rights of the local residents. This sole fact does not negate the authority to erect the fence. Yet, when exercising the authority to erect a fence for a security purpose, the commander is bound to consider both the security needs of the area, and the extent of harm to local residents, including harm to their private property, and to balance between these considerations. In the words of Procaccia J.:

> When determining the proper route of the Fence, the commander has to choose a route which balances in the maximal way between these

conflicting interests, and to minimize as far as possible the harm to the individual.

3. The principle of proportionality provides a balancing standard between military and security needs, and those of the local population. According to the elements of the proportionality principles as set in the *Beit Sourik* case,[44] proportionality focuses on the relationship between the objective whose achievement is wished, and the means used to achieve it. Proportionality requires adjustment between the objective and the means used for its achievement. It requires that the means used to achieve the objective will injure the individual to the least extent possible; and that the damage caused to the individual by the means employed be of proper proportion to the advantage gained by that means.

4. In all that concerns the Fence, the test of proportionality defines both the legitimacy of its erection in principle, and its specific route chosen. Both have to meet the test of proportional balancing between the security objective to be achieved, and the humanitarian duty to minimize the damage caused to the individual by the administrative act.

The humanitarian consideration – examination of the essence of harm to local residents.

5. Even if presuming that the very construction of the Fence meets the test of adjustment between the security necessity involved and the harm to individuals which it is likely to cause, there is still a need to determine in every case its optimal route, namely, the one which will achieve the security objective on the one hand, and will cause the least damage to the residents, on the other. In cases where the security objective of the Fence may be attained by several alternative routes, the commander is bound to choose the route which will cause the least injury to local residents.

6. In cases where an internal conflict between interests of various residents arises (as is the present case) – the commander should decide on the premise of considerations regarding both the *number* of people whose rights are liable to be infringed, and the *intensity* of the rights infringed. For example, infringement to the residents' living rights should be considered more intense than infringement to their rights to cultivate agricultural land; and infringement to the residents' right to cultivate agricultural land should, in turn, be considered more intense than infringement to property rights over uncultivated land. Yet, this assessment of the intensity of the rights infringed

44 *Supra* note 10.

should be done simultaneously with the consideration of the number of people liable to be harmed. In the words of Procaccia J.:

> Assessing the proportionality of the proper route … requires consideration of both the number of people whose rights are liable to be infringed, and the nature and intensity of the rights infringed, whether agricultural lands, cultivated or rocky lands, houses or workshops, and the like.

7. Moreover, in choosing the proper route the respondent should take into consideration additional relevant factors such as the impact of the route on existing roads, the location of passage-gates, the distance between the gates and the places of residence and work of the inhabitants, and the impact of the gates on the residents' freedom of movement in the Region. All these factors should receive relative weight in the context of the respondent's obligation to consider the interests of the local residents and to choose a route which would meet the proportionality test.

8. In addition, the stance of the representative bodies acting on behalf of the residents, and allegedly expressing the residents' collective will, is of particular importance and should be taken into consideration as a means for reaching a route that would be based on agreement between all parties involved.

From the general to the specific

9. The petition should be decided according to the question of whether the respondent's refusal to alter the route as required by the petitioners meets the test of proportionality. The respondent reasoned his refusal on the ground that the alteration will cause harm to other land owners, mainly to respondents 2-5, and the question arises of whether this ground may justify dismissal of the petition.

10. *Prima facie*, according to the above-mentioned elements of the proportionality standard, relating to the number of individuals harmed and the intensity of the rights infringed, the infringement of the eleven petitioners' right to live in their houses should prevail over infringement of the rights of the five respondents relating to their agriculture lands. Therefore, were the petitioners to address the Court several months ago when the original route was proposed by the respondent and notified all those concerned – the petitioners would probably have succeeded in their petition.

11. However, the petitioners delayed their petition so as to fall within the doctrine of lashes, according to which a delay in petitioning the Court may justify the refusal of the Court to grant a remedy to the petitioners. The

circumstances of the present petition meet all three elements of the delay doctrine: a subjective delay, an objective delay, and absence of harm to the rule of law (as a result of denial of a remedy because of the delay in the petition). There was a subjective delay in the petition because the petitioners intentionally refused to co-operate with the representatives of the village, and to present their objections to them, despite the fact that they knew that the representatives were negotiating with the respondent about the route of the Fence, and even petitioned the Court on this matter. There was an objective delay because the petitioners' delay caused harm to third parties, including respondents 2 to 5 (who trusted that their rights were protected by the agreement reached by their representatives), and also the first respondent, who already made preparations on the ground for construction of the fence on the agreed route.

12. Dismissal of the petition on the ground of delay does not cause harm to the rule of law (harm that would justify the non-application of the doctrine of lashes) because of several reasons:

a) The petitioners deliberately chose to build heir homes and workshops at a considerable distance from their village (being under Israeli jurisdiction), in an area subject to the full jurisdiction of the Palestinian Authority, so that they actually took the risk of separation between their homes and their houses and lands.

b) The petitioners are not living in the houses the access to which will be separated by the Fence.

c) There will be a crossing gate at the Fence several kilometers from the petitioners' houses, so that they will not have to drive an hour to their homes.

d) The alternative route suggested by the petitioners will split the lands of other inhabitants of the village, and will block the road leading from it to adjacent villages.

In light of the above, Procaccia J. reached the following conclusion:

> The cause of the petitioners does not justify the granting of a remedy to them, and the ignorance of the subjective and objective delay involved in the petition. The present situation is not one where considerations of justice require the extension of a remedy. The standards of proportionality and of fairness require the rejection of the petition on the ground of delay, and the upholding of the new route, as agreed between the respondent and the majority of the residents of the village. The new route reflects a proper balance between the security need and the interests of most of the village residents, and its alteration may harm lawfully acquired expectations.

VII. H.C. 7862/04, Abu Daher v. IDF Commander in the Judea and Samaria Region

49(5) *Piskei Din* 368.

Legality of Order for cutting of trees on a plantation adjacent to the Minister of Defence's house for security purposes; conflict between the right to safe life at home and the right to protection of property; belligerent occupation in the Region; responsibilities of the commander to ensure the legitimate security interests of the occupying State and the needs and rights of the local population; requirement of proper balance; human rights of local residents as including constitutional rights recognized in Israeli law; Protection of safety of life and body integrity being on the top of the commander's responsibility; right to property recognized as a constitutional right in Israeli law; infringement of property rights lawful if required by military and security needs or for protection of other basic constitutional rights prevailing in their weight; legality of an order to cut trees tested against the balancing tests of the "Limitation Clause"; rational connection between the purpose of the Order and the means used for its achievement; proper proportion between the damage caused by the means and the benefit gained from the means; the Order not passing the condition of proportionality requiring that the means taken for achievement of the purpose injure the individual to the least possible extent; amendment of the Order by the Court.

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The petitioning woman is the owner of a plantation of trees located in the Judea and Samaria Region [hereinafter: the Region], at a distance of several hundred meters from the Israeli village Kohav Yair, where the home of the then Minister of Defence, Shaul Mofaz, is located.

Due to the proximity of the plantation to the Minister's house, the respondent decided that the tangle of trees poses a security danger because it enables the carrying out of hostile activity against the Minister and his family. Consequently, the respondent ordered to cut some 60 trees on the plantation (growing at a distance of 80 meters from the Minister's house) to the height of 30 centimeters; and it is against this Order that the petition is directed. It has been proven to the Court that the trees are completely dry because they have not been watered for years and nothing is growing on them.

Procaccia J. defined the question arising in the petition as whether the security danger to the Minister and his family justifies, among other security means undertaken, the cutting some 60 trees, which obviously infringes the petitioner's right to property. Additional questions arising are whether this means was used for a "worthy purpose", and whether it is proportional for the achievement of a worthy purpose.

Procaccia J. started her ruling by expressing her view that the case before her is very hard to decide because it involves a conflict between two values – the right of the Minister and his family to safe life in their home, against the right of a person to secure protection of his property; and this balance is not an easy one. The main points of the judgment delivered by Procaccia J. may be presented as follows:

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The powers of the military commander of the Region – responsibility for security needs and protection of human rights

1. Israel holds the Region in belligerent occupation, and within the framework of the military government the military commander is exercising powers stemming from both international law and from principles of Israeli public law.[45] The belligerent occupation in the Region is subject to the principal norms of customary international law enshrined in the Hague Regulations; while the humanitarian principles of the Fourth Geneva Convention are applied by the State and by the military commander *de facto*.

2. The Hague Regulations authorize the commander of the Region to act in two major spheres: a) ensuring the legitimate security interest of the occupying State, and b) ensuring the needs and rights of the local population of the occupied territory. The first necessity is a military one, while the second is a civil-humanitarian one. Within the first sphere, the military commander is concerned with the security of the military force and with ensuring law and order in the area; while the second consists of responsibility for the welfare of the local inhabitants. Within the second sphere, the commander is responsible not only for order and security but also for protection of the residents' rights, in particular their constitutional human rights. These two responsibilities should be properly balanced. The concern for human rights should be at the center of the commander's humanitarian considerations. In all that concerns the protection of the constitutional human rights of the local residents, the principles of Israeli public law (including the basic principles regarding human rights) are applicable.

Infringement of the right to property for protection of the safety of life – ways of balancing

3. The responsibility of the military commander to ensure the safety of life in the Region extends also to the duty to act against a security danger stemming from the Region while directed against targets in Israel. The duty to ensure security may involve an unavoidable infringement of the right to private propery. The military commander's authority to issue orders for

[45] H.C. 393/82, *supra* note 5.

security matters, including orders affecting private property, is recognized both in international law and in Israeli law.[46] The strain between the duty to protect the interest of security and that of protecting the right to property requires the performance of a proper constitutional balance, that balance being a condition for the legality of the commander's act.

4. Protection of safety of life and body integrity is at the top of the hierarchy of matters placed under the commander's responsibility. This responsibility stems both from international law and from the fact that the human right to protection of life and body integrity is a constitutional right within the Israeli public law as follows from Section 4 of the Basic Law: Human Dignity and Freedom.[47]

5. Alongside this right stands the right to property of the inhabitants of the Region, which is also both protected by international law and recognized as a constitutional right in Israeli constitutional law (by Section 3 of the Basic Law[48]). Infringement of property rights, including rights of immovable property, is prohibited under the international laws of war, unless imperatively demanded by the necessities of war, as provided in Regulation 23(g) of the Hague Regulations.[49] In addition, Regulation 52 provides that requisition of land in an occupied territory may be made only for the needs of the army of occupation.[50] These provisions have been interpreted by the High Court in a liberal manner so as to apply also to seizure of land for establishment of military bases,[51] for paving of roads[52] and the like. Article 53 of the Fourth Geneva Convention prohibits destruction of real or personal property by the Occupying Power, unless such destruction is absolutely necessary for military operations.[53] This clause had been interpreted as granting the military commander the authority to decide about the scope of

46 H.C. 2717/96, excerpted in 30 *Israel Y.B. Hum. Rts.* 330 (2000).

47 Sec. 4 provides that "All persons are entitled to protection of their life, body and dignity".

48 Sec. 3 provides that "There shall be no violation of the property of a person".

49 *Supra* note 16. Regulation 23(g) provides that it is especially forbidden:

> (g) To destroy or to seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; … .

50 *Supra* note 16. The first para. of Regulation 52 reads as follows:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.

51 H.C. 24/91, excerpted in 23 *Israel Y.B. Hum. Rts.* 337 (1993).

52 H.C. 401/88, excerpted *ibid.*, 296.

53 Art. 53 of the Fourth Geneva Convention (*supra* note 11), provides that:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

the military need, and at the same time binding him to interpret this authority in a reasonable manner.[54]

6. Thus, the commander of the Region has to exercise strict and careful discretion before issuing an order affecting property rights of residents in an occupied territory. This duty is incumbent on him both by virtue of the international laws of war and the constitutional law prevailing in Israel, which defines the right to property as a basic constitutional right. He is entitled to infringe property rights when military and security needs require it, or when there is an essential need for protection of conflicting constitutional rights, which prevail in their weight over the right to property; and when the means taken in regard to the property balances properly between the importance of the purpose to be achieved and the intensity of the harm expected from the infringement.

7. It follows that the right to property is a relative constitutional right, which is subject to infringement where a need arises to promote other important purposes, including protection of other basic constitutional rights, prevailing in their weight in given circumstances.

The standard for a proper balance between conflicting values is set in the principles of the "Limitation Clause" of Section 8 of the Basic Law: Human Dignity and Liberty.[55] According to the principles of the "Limitation Clause", an infringement of a constitutional right will pass the test of constitutionality if it is compatible with the values of the State, if it is made for a proper purpose, and if it is made to an extent not greater than is necessary.

According to this standard, an order made for protection of security and infringing a right to property must meet the requirements of a proper purpose and an essential need for its achievement must exist. The substance of the order must be the result of reasonable and proportional discretion, which balances properly between the importance and vitality of the purpose to be achieved, and the scope of the infringement resulting from its achievement.

Standards for examination of the legality of an order to cut trees

8. The examination of the legality of an order to cut trees must be performed on two levels: a) *first*, whether intended to achieve a proper purpose; and, b) *second*, whether the order meets the constitutional balance

[54] Pictet, *supra* note 28, at 302.

[55] Sec. 8 provides as follows:

> There shall be no infringement of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.

tests, namely, those providing that there shall be no infringement of a basic human right, unless it is imperative for achivement of a vital need or value, and the scope of the infringement is not greater than required. The last requirement consists of the proportionality test, which is the balancing standard between military and security needs on the one hand, and private matters on the other.

Proportionality focuses on the relationship between the purpose to be achieved and the means taken for its achievement; it requires adjustment between the purpose and the means; it requires that the means used be the least injurious to the individual for the achievement of the purpose; and that the harm caused by the means be in proper proportion to the benefit gained by that means. An action of public authority is proportional if it meets these cumulative tests.[56]

From the general to the specific

9. The cutting Order was designed to ensure the safety of the Minister and his family in his home. It was also designed to ensure the safety of the people surrounding the Minister and the families residing in the neighborhood.

A constitutional tension arose between the property right of the Mofaz family to reside safely in their home, and the property right of the petitioner to her land and plantation. In the constitutional balance between the human right to safe residence at home and the property right of a plantation, the first prevails.

The human right to residence at home under conditions of safety of life and body prevails in its importance over the right to land and to the plants on it, especially where the property is not a source of livelihood.

10. The Minister is the owner of the property which is his home, where he has been residing with his family for many years. He is entitled to enjoy this right under conditions of safety of life and body, the right to life and body integrity being constitutional rights recognized in Section 4 of the Basic Law.

The human right to residence at home under conditions of safety of life prevails over the property right of the petitioner with regard to the plantation, provided that the infringement of the last right is restricted in scope so that it would be made solely to the extent imperative for achievement of the required purpose.

11. The commander reached the conclusion that ensurance of the safety of the Minister and his family (including his surrounding team), at their place

[56] H.C. 940/04, excerpted above in this Volume.

of residence, requires taking steps for prevention of penetration of potential terrorists. To this end, and after having examined other alternatives, the commander reached the conclusion that the achievement of this purpose requires the cutting of the trees at a distance of 80 meters from the Minister's residence, so as to increase the range of visibility from it, and thereby to create conditions for an adequate military response in case of terrorist penetration. Given these circumstances, there is no doubt that the Order was made for a proper purpose of increasing the safety in the area in view of the exceptional danger to the Minister's personal security stemming from his position and from the information possessed by security authorities, as presented to the Court.

Proportionality of the Order

12. Although the Order was made for a proper purpose – protection of human life – it infringes the property right of the petitioner, for it involves entry into her plantation and the cutting of 60 trees to 30 centimeters. From her point of view, it is an entry of a public authority to her property and harming it for a purpose irrelevant to her. It is also an injury to her and her family in terms of their deep emotional ties to the land and the trees planted many years ago. Hence, the question arises of whether the security purpose underlying the Order is proportional to the means taken for its achievement.

13. First, there is a rational connection between the purpose which the Order is about to achieve and the means used for its achievement. In the given circumstances, the proportionality test does not require the transfer of the residence of the Minister to another home in a more secure area for the period of his term in office in order to avoid taking security measures which involve infringement of propety. The construction of a security fence close to the house would contribute to security in the area, but would not eliminate the danger of terrorist acts. The Court was convinced by the respondent that all other alternatives were considered seriously and in good faith by the security authorities, and had been found unsufficient to meet the desired security purpose. The need for an increase of security over the Minister's home is well-founded given the overall security events which have taken place in the past years, and the topographic position of the house.

14. The condition of proportionality requiring a proper proportion between the damage caused by the means and the benefit gained from the means is also fulfilled in the present case.

The order was designed to increase security means for protection of life. The security purpose – namely, the benefit – cannot be effectively achieved without improvement of the visibility in the area and the possibility for a prompt operative response. Indeed, the benefit gained causes damage to the petitioner's land, but in this context two factors should be taken into

account: a) the trees are dry, have not been cultivated for years, are not bearing fruit and are not serving as any livelihood for the petitioner and her family, and b) the State is ready to compensate the petitioner for the economic injury caused to her by the Order. Given these circumstances, the conclusion is that the harm to the petitioner as result of the Order stands in proper proportion to the benefit which it is designed to gain, namely, protection of human life.

15. But the Court was not convinced that the Order fully responds to the third condition of proportionality, requiring that the means taken for achievement of the purpose will injure the individual to the least possible extent.

The ultimate purpose of the Order is to improve the range of visibility for the security forces to a distance of 80 meters from the house, and thereby to enable a prompt operational response. The limitation of the range of visibility is due to heaps of dry branches, which have not been removed for years, and which block any possibility of movement within the plantation. Given this situation, the security purposes may be achieved by cleaning the area of 80 meters, including removal and cutting off of all dry branches, without cutting the trees, as provided by the Order.

Consequently, the Court partly re-formulated the Order so as to prevent the respondent from cutting the trees, while permitting clearance of the 80 meter area by removal of all obstacles on it in order to improve the visibility and the possibility of movement therein.

Naor J. and Chayut J. joined the judgment of Procaccia J.

VIII. H.C. 7957/04, Mara'abe *et al.* v. Prime Minister of Israel *et al.*

Not yet published.

Legality of a segment of the Separation Fence (constructed by Israel in the Judea and Samaria Region as a means for fighting terror) surrounding the Israeli village Alfei Menashe in the Samaria Region and including therein five Palestinian villages, thereby creating an "enclave" of Palestinian villages on the "Israeli" side of the Fence; Judea and Samaria Region held by Israel in belligerent occupation; authority of a military commander deriving from international law regarding belligerent occupation; applicability of the Hague Regulations and acceptance by Israel of the humanitarian parts of the Fourth Geneva Convention; applicability of basic principles of Israeli administrative law; illegality of building a fence for political reasons, for "annexation" of territories or for drawing a political border; legality of construction of a separation fence for security and military reasons; legality of seizure of land if justified by military needs; the seizure not involving transfer of ownership but only the temporary seizure of

possession, accompanied by payment of compensation; legality of constructing a separation fence for protection of the army, for defence of Israel, for protection of Israelis living in Israeli settlements in the Region, and for protection of any person present there; legality of Israeli settlements irrelevant in this context; constitutional rights under Israeli Basic Laws granted also to Israelis living in a territory under Israeli belligerent occupation, although scope of protection is limited; the issue of applicability of the international law of self-defence; question of applicability to the territories of international human rights conventions; balancing between security considerations and welfare of local residents according to the principle of proportionality; common normative foundation on the issue in the ICJ and the Supreme Court; differences in conclusions stemming from differences in factual data, in the method of the proceedings and in the scope of examination of the issue; effect of the Wall Advisory Opinion on the future approach of the Supreme Court on the issue; the Fence at the Alfei Menashe Enclave erected for security aims of preventing terrorist infiltration into Israel and into the Israeli communities in the Region; reasons for not erecting the Fence on the Green Line; question of proportionality between security considerations and injury to local inhabitants; first subtest on rational connection between objective and means fulfilled; second subtest requiring the use of the less injurious means not fullfiled; duty of respondents to find an alternative route which would ensure security while removing all or part of the five Palestinian villages from the Enclave.

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This is the second comprehensive judgment concerning the legality of the Separation Fence[57] [hereinafter: the Fence] constructed by Israel in the Judea and Samaria Region [hereinafter: the Region], the first being that of the *Beit Sourik Case*.[58]

In the *Beit Sourik Case,* the High Court ruled on the legality of a segment of the Fence constructed west of Jerusalem and east of the Green Line, the length of approximately 40 kilometers.

In the present petition, the legality of a segment of the Fence surrounding the Israeli village Alfei Menashe in the Samaria Region (population approximately 5650), about four kilometers behind the Green Line,[59] was under discussion.

57 On the background for the erection of the Separation Fence and its description *see* the *Beit Sourik Case*, H.C. 2056/04, *supra* note 10.

58 *Id.*

59 The armistice demarcation line established by the 1949 Rhodes Armistice Agreement between Israel and Jordan, 656 *U.N.T.S.* 304.

The Fence surrounded Alfei Menashe on all sides, while leaving a passage to a road connecting the village to Israel. Five Palestinian villages (population about 1200) were included within the Fence, so that the route of the Fence created an enclave of Palestinian villages on the "Israeli" side of the Fence [hereinafter: the Enclave]. As a result of the erection of the Fence on this specific route, the Palestinian villages were cut off from the remaining parts of the Samaria Region, although there is one free crossing point and three agricultural gates in the Fence, which connect the Enclave to the Region.

The present petitioners are residents of the Palestinian villages of the Enclave, who contend that the Fence is illegal. They rely upon the judgment delivered in the *Beit Sourik Case* as well as upon the Advisory Opinion of the International Court of Justice at The Hague on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory[60] delivered on 9 July 2004 [hereinafter: the *Wall Advisory Opinion,* or the *Opinion*].

Thus, in the present petition, the High Court – per Barak J.P. – ruled on the legality of the Fence in the Alfei Menashe area.

The normative framework

1. The Judea and Samaria Region is held by the State of Israel in belligerent occupation. The long arm of the State in the Region is the military commander. He is not the sovereign authority in the territory held in belligerent occupation and derives his authority from the rules of international law regarding belligerent occupation. The legal meaning of this position is twofold: first, Israeli law does not apply to the Region as it has not been "annexed" to Israel. Second, the legal regime which applies to the Region is determined by international law regarding belligerent occupation.

2. The rules of international law relevant to belligerent occupation are mainly those of the 1907 Hague Regulations Concerning the Laws and Customs of War on Land [hereinafter: the Hague Regulations). The Regulations reflect customary international law. The law of belligerent occupation is also laid out in the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 [hereinafter: the Fourth Geneva Convention). The State of Israel has declared that it observes the humanitarian parts of this Convention, and in light of that declaration on the part of the Government of Israel, there is no need to re-examine the Government's position.

The Court stressed that it is aware that "the Advisory Opinion of the International Court of Justice determined that the Fourth Geneva Convention

[60] Reproduced in 43 *I.L.M.* 1009 (2004).

applies to the Judea and Samaria Region, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions". However, due to the position of the Government of Israel as accepting and applying the humanitarian aspects of the Fourth Geneva Convention the Region, there is no need for the Court to take a stand on that issue in the present petition.

In addition to these two sources of international law, the basic principles of Israeli administrative law regarding the use of a governmental authority by a public servant apply to Israel's belligerent occupation.

The Military Commander's Authority to Erect a Security Fence

3. As already ruled in the *Beit Sourik Case,* the military commander in the Region is not authorized to order the construction of a separation fence, if the reason for it is a political goal of "annexing" territories of the Region to the State of Israel and to determine Israel's political border. On the contrary, the military commander is authorized to order the construction of the separation fence if the reason behind its construction is a security and military one.

4. As also ruled in the *Beit Sourik Case*, the military commander is authorized to take possession of land belonging to Palestinian residents if such seizure is necessary for the erection of a separation fence, and justified by military needs. Construction of the Fence does not involve expropriation or confiscation of land, as these are prohibited by Regulation 46 of the Hague Regulations. Construction of the fence does not involve transfer of ownership of the land upon which it is built, but only the taking possession, which is temporary in nature since the seizure order provides its date of termination. The taking of possession is accompanied by payment of compensation for the damage caused, and therefore it is permitted according to the law of belligerent occupation, as follows from Regulation 43 and 52 of the Hague Regulations,[61] and Article 53 of the Fourth Geneva Convention.[62] According to Regulation 52 of the Hague Regulations, the taking of possession must be for "needs of the army of occupation", whereas

[61] *Supra* note 16. Regulation 43 reads as follows:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

The first paragraph of Regulation 52 reads as follows:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.

[62] Cited *supra* note 53.

according to Article 53 of the Fourth Geneva Convention, the taking of possession must be "absolutely necessary by military operation".

5. In the *Beit Sourik Case* and preceding case-law, the Supreme Court held that the authority to take possession of land for military needs is also anchored in Regulation 23(g) of the Hague Regulations.[63] The *Wall Advisory Opinion* determined that the second Part of the Hague Regulations, in which Regulation 23(g) is located, applies only during the time of hostilities, and therefore is not applicable to the construction of the Fence. The ICJ added that only the third Part of the Hague Regulations – which includes Regulations 43 and 52 – is applicable to the Fence because it deals with a military administration. This approach of the ICJ does not affect the ruling of the Court as to the military commander's authority to take possession of land for constructing the Fence because this authority is anchored in Regulations 43 and 52 of the the Hague Regulations and in Article 53 of the Fourth Geneva Convention.

However, responding to the principal approach of the ICJ in this matter, two points may be noted:

a) *first,* there is a view that the scope of application of Regulation 23(g) can be widened, by way of analogy, to cover belligerent occupation as well, and

b) *second,* the situation in the territory under belligerent occupation is often unstable, and periods of tranquility and calm may turn into dynamic periods of combat. In the latter situation, the rules applicable to belligerent occupation, as well as the rules applicable to combat activities, will apply to these activities. Regulation 23(g) of the Hague Regulations will then apply in a territory under belligerent occupation due to the combat activities taking place there.

In the present case, the position of the State is that the construction of the fence is part of Israel's combat activities, namely, a defensive act of erecting fortifications. The Fence is intended to stop the offensive of terrorism; it is a defensive act which serves as an alternative to offensive military activity; it is an act absolutely necessary for the combat effort. However, there is no need to discuss this issue in depth, since as far as construction of the Fence is concerned, the general authority granted to the military commander pursuant to Regulations 43 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention is sufficient.

6. The *rationale* behind the military commander's authority to construct a separation fence for security and military reasons includes, first and foremost, the need to protect the army in the territory under belligerent occupation. It also includes defence of the Occupying State itself. In

63 Cited *supra* note 49.

addition, it includes the authority to construct a separation fence in order to protect the lives and safety of Israelis living in Israeli settlements in the Region. Although Israelis living in the Region are not "protected persons" within the meaning of that term in Article 4 of the Fourth Geneva Convention, the military commander is authorized to protect their lives and safety.

7. The military commander's general authority as set out in Regulation 43 of the Hague Regulations is "to ensure . . . public order and safety". This authority is not restricted only to situations of actual combat and it applies as long as the belligerent occupation continues. Neither is this authority restricted only to the persons protected under international humanitarian law. It is a general authority, covering any person present in the territory held under belligerent occupation, even if this person does not fall into the category of "protected persons".

8. It follows that the military commander is authorized to construct a separation fence in the Region also for the purpose of defending the Israeli settlers there. In this context, it is completely irrelevant whether the settlements are compatible or incompatible with the international law (as determined in the *Wall Advisory Opinion*). Therefore, the Court will express no position regarding this question. The authority to construct a security fence for the purpose of defending the Israeli settlers in the Region is derived from the duty to preserve "public order and safety" (Regulation 43 of the Hague Regulations). It is required in light of the human dignity of every individual, and it is intended to preserve the life of every person created in God's image. Even if a person's presence in the Region is illegal, he is not outlawed.

9. Moreover, even if the military commander acted in violation of the law of belligerent occupation when he gave his consent to the establishment of the settlements (an issue that is not before the Court), that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety, and dignity of every one of the Israeli settlers.

It should also be noted that the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Washington D.C. between the State of Israel and the PLO on 28 September 1995, provided that the question of the Israeli settlements in the *area* will be discussed in the negotiations over the final status [Article 17(a) and 31(5)].[64] The Agreement also provided that "Israel shall . . . carry the responsibility . . . for overall security of Israelis and Settlements, for the purpose of safeguarding their

[64] Israel-PLO, Interim Agreement on the West Bank and the Gaza Strip, 1995, 36 *I.L.M.* 557 (1996).

internal security and public order" [Article 12(1)]. This arrangement applies to all the Israeli settlements in the Region.

10. The constitutional rights which the Basic Laws and the Israeli legal system grant to every person in Israel are also granted to Israelis who are present in a territory under Israeli belligerent occupation and control. Israelis present in the *area* have the rights to life, dignity and honor, property, privacy, and the rest of the rights which anyone present in Israel enjoys. In correlation to these rights stands the State's duty to refrain from impairing them and to protect them. The State's duty to protect its citizens exists even in cases where a citizen is ready to "take the risk" upon himself. This "taking of risk" does not affect the State's obligation toward its citizens, the more that many of the Israelis living in the Region do so with the encouragement and blessing of the Israeli Government.

11. The scope of human rights of an Israeli living in the Region and the extent of protection of these rights, are different from those of an Israeli living in Israel. This is so because the Region is not part of the State of Israel and the Israeli law does not apply there. The Region is under the regime of belligerent occupation, which is inherently temporary. The rights of the Israelis living in the Region are those granted to them by the military commander, and according to the maxim of *nemo dat quod non habet,* they cannot have more than he has. Therefore, in determining the scope of the rights of Israelis living in the Region, one must take into account the status of the Region and the powers of the military commander.

12. In the *Beit Sourik Case,* the Court did not anchor the military commander's authority to erect the separation fence upon the law of self-defence. The *Wall Advisory Opinion* determined that the authority to erect the Fence cannot be based upon the law of self-defence because Article 51 of the United Nations Charter recognizes the natural right of self-defence when one State militarily attacks another State. Since Israel is not claiming that the source of the attack upon her is a foreign State, there is no application of this provision regarding the erection of the Fence. Nor does the right of a State to self-defence against international terrorism authorize Israel to employ the law of self-defence against terrorism coming from the Region, as such terrorism is not international, but rather originates in territory controlled by Israel as an Occupying Power.

This approach of the ICJ is not indubitable and it stirred criticism both from the dissenting judge, Judge Buergenthal, and in the Separate Opinion of Judge Higgins. Conflicting opinions have been voiced in legal literature. There are those who support the ICJ's conclusion regarding self-defence and there are those who criticize the ICJ's views on self-defence.

The Court finds this approach of the ICJ hard to accept. It is not present in the language of Article 51, and it is doubtful whether it fits the needs of

democracy in its struggle against terrorism. From the point of view of a State's right to self-defence, what difference does it make if a terrorist attack against it comes from another country or from territory external to it which is under belligerent occupation? And what shall be the status of international terrorism which penetrates into territory under belligerent occupation, while being launched from that territory by international terrorism's local agents? Since the Court found that Regulation 43 of the Hague Regulations authorizes the military commander to take all necessary actions to preserve security, there is, consequently, no need to thoroughly examine the issue of self-defence in the present case.

The Military Commander's considerations in erecting the Fence and the balance between them

13. In determining the route of the Fence the military commander must take into account the following considerations:

a) security-military considerations, including security of the State, security of the army, and the personal security of all people present in the area; and

b) the welfare and human rights of the local Arab population.

However, the human rights to which the protected residents in the Region are entitled, are not absolute, but rather relative, and they can be restricted by limitations arising from the need to respect the rights of other people or from considerations of public interest. The main legal source from which the protected persons in the Region derive their rights is international humanitarian law, as expressed, *inter alia*, in Regulation 46 of the Hague Regulations[65] and in Article 27 of the Fourth Geneva Convention.[66]

The ICJ determined, in its *Wall Advisory Opinion,* that the 1966 International Covenant on Civil and Political Rights and other human rights conventions to which Israel is a Contracting Party apply in an area under Israeli belligerent occupation. When this question arose in the Court in the past, it was left open, but the Court was ready to rely upon such international

[65] *Supra* note 16. Regulation 46 reads as follows:

> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

[66] *Supra* note 11. Art. 27 provides, in part, as follows:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. . . . the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

conventions. This is the approach adopted by the Court in the present petition.

10. As already ruled, in exercising his authority pursuant to the law of belligerent occupation, the military commander must "ensure public order and safety", and in this framework he must take into account considerations of state security, security of the army, and the personal security of all who are present in the Region, on the one hand, and the human rights, needs and interests of the local Arab population, on the other. These considerations usually conflict with one with another, and this is the case regarding the construction of the Fence. In this situation the Military Commander must create a proper balance between these conflicting considerations.

This balance should be performed according to the principle of proportionality, which balances between a proper and fitting goal and the means for realizing it. This principle is based on three subtests:

a) a correlation between goal and means, namely, a rational link between the means employed and the goal one wishes to accomplish;

b) the means which is employed to accomplish the goal must be the least harmful one;

c) the damage caused to the individual by the means employed must be of appropriate proportion to the advantage stemming from it.

The Wall Advisory Opinion[67]

14. The conclusion of the ICJ in the *Wall Advisory Opinion* was that:

> The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of its various obligations under the applicable international humanitarian law and human rights instruments.[68]

15. The *Opinion* of the ICJ is an Advisory Opinion, which does not bind the party who requested it and does not bind the States. It is also not a *res judicata*. However, the Opinion constitutes an interpretation of international

[67] The Court discussed at length the *Wall Advisory Opinion* (*supra* note 60), including the events which led to it, its proceedings (the dossier of the UN Secretary General, the Reports of the Special Rapporteurs J. Dugard and J. Ziegler), its content and conclusions.

[68] *Ibid.*, para. 137.

law performed by the supreme judicial body in international law, and therefore it should be given full appropriate weight.

16. The basic normative foundation upon which the ICJ and the Supreme Court in *The Beit Sourik Case* based their decisions was a common one. The ICJ held that Israel holds the West Bank Region under the law of belligerent occupation, and this was also the position of the Court in the *Beit Sourik Case*. The ICJ held that an Occupying State is not permitted to annex the occupied territory, and that was also the position of the Court in the *Beit Sourik Case*. The ICJ held that in an occupied territory the Occupying State must act according to the Hague Regulations and the Fourth Geneva Convention. This was also the assumption of the Court in the *Beit Sourik Case* (although the question of the application of the Fourth Geneva Convention in Israeli internal law was not decided, in light of the State's declaration that it shall act in accordance with the humanitarian parts of that Convention). The ICJ determined that in addition to the humanitarian law, the conventions on human rights (to which Israel is a Party) apply in the Occupied Territory. This question did not arise in the *Beit Sourik Case*. In the present case, the Court assumes that these conventions indeed apply. The ICJ held that the legality of the "wall" (the Fence) shall be determined, *inter alia*, by Regulations 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention, and this was also the position of the Court in the *Beit Sourik Case*. The ICJ held that as a result of the construction of the "wall", a number of rights of the Palestinian residents were impeded. The Court in the *Beit Sourik Case* also held that a number of human rights of the Palestinian residents had been impeded by the construction of the fence. Finally, the ICJ held that the harm to the Palestinian residents would not violate international law if the harm were caused as a result of military necessity, national security requirements, or public order; and that was also the approach of the Court in the *Beit Sourik Case.*

17. However, despite this common normative foundation, the two Courts reached different conclusions. The ICJ held that the construction of the Fence, and the regime accompanying it, are contrary to international law. In contrast, the Court in the *Beit Sourik Case* held that it is not to be generally said that any route of the Fence is a breach of international law. Each segment of the route should be examined to clarify whether it impairs the rights of the Palestinian residents, and whether the impairment is proportional. It was according to this approach, that the fence segments discussed in the *Beit Sourik Case* were examined. Regarding some segments of the Fence, it was held that their construction violates international law, while regarding others it was held that it does not.

18. The basis for the difference between the legal conclusions of the ICJ and the judgment in the *Beit Sourik Case* stems from the difference in the factual infrastructure laid before these two Courts.

The ICJ drew the factual basis for its *Advisory Opinion* from the Secretary-General's report, his written statement, the Duggard report, and the Siegler report. The Supreme Court drew the facts from the data brought before it by the Palestinian petitioners on the one hand, and the State on the other. In addition, The Supreme Court received an expert opinion by military experts. The difference between each set of data was deep and great, and it ultimately led to contrary legal conclusions. Such, for example, was the situation in regard to the data concerning the security-military need for erection of the Fence; and to the data concerning the scope of harm caused by the Fence to the rights of the local residents.

19. The difference in the factual bases laid down before the two Courts was caused by the difference in the method of the proceedings which took place in the ICJ and in the *Beit Sourik Case*. In the proceedings before the ICJ, the injured parties did not participate, as Israel was not party to the proceedings. There was no adversarial process, whose purpose was to establish the factual basis through a choice between contradictory factual figures. The ICJ accepted the figures in the Secretary-General's report, and in the reports of the *special rapporteurs*, as objective factual figures. The burden was not cast upon the parties to the proceedings, nor was it examined. In contrast, the parties to the proceedings in the *Beit Sourik Case* stood before the Court, and an adversarial process took place.

20. There was also an important difference in the scope of examination of the issue. Before the ICJ, the entire route of the Fence was up for examination. The factual basis which was laid before the ICJ did not analyze the different segments of the fence in a detailed fashion, except for a few examples. The material submitted to the ICJ contains no specific mention of the injury to the local population at each segment of the route, and no discussion of the security and military considerations behind the selection of the route, or of the process of rejecting various alternatives to it. By contrast, the Supreme Court in the *Sourik Case* ruled that a sweeping answer to the question of the legality of the Fence according to international law should not be given, and that each segment of the Fence route should be examined separately.

21. The effect of the *Opinion* on the future approach of the Supreme Court on the question of the legality of the Fence according to international law is as follows:

a) the Supreme Court of Israel shall give the full appropriate weight to the norms of international law as developed and interpreted by the ICJ;

b) however, the ICJ's conclusion, based upon a factual basis different than the one before the Supreme Court, is not *res judicata*, and does not obligate the Supreme Court of Israel to rule that each and every segment of the Fence violates international law.

The Supreme Court will continue to examine each of the segments of the Fence according to its customary model of proceedings: it will ask itself, regarding each and every segment, whether it is based on a proportional balance between the security-military needs and the rights of the local population. If its answer regarding a particular segment of the fence is positive, it will hold that that segment is legal; and if its answer is negative, it will hold that that segment is not legal. In doing so, the Court will not ignore the entire picture, and its decision will also regard each segment as a part of the whole Fence.

It is against the background of this normative approach – which was set out in the *Beit Sourik Case* – that the legality of the separation fence in the Alfei Menashe Enclave will be examined.

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The Separation Fence at the Alfei Menashe Enclave

22. The point of departure is that the military commander is authorized to order the construction of the Fence in the Region if the reason for it is is a security-military one, and not a political one. On the basis of the data presented to the Court, it reached the conclusion that the reason for construction of the Fence was not a political one, and was convinced that the decision to erect the Fence was made in light of the reality of severe terrorism which has plagued Israel since September 2000. The Fence was erected with the aim of preventing terrorist infiltration into Israel and into the Israeli communities in the Region, and it is a central security component in Israel's fight against Palestinian terrorism.

23. As explained to the Court on behalf of the State, the Fence could not have been erected on the Green Line because of military and security considerations. *First,* the topography of the Green Line does not allow attainment of the Fence's goals by a route which passes only within Israel. Erecting the obstacle exactly on the border of the Judea and Samaria area does not allow for defence of the soldiers patrolling it, nor would it allow surveillance of the Judea and Samaria Region, and it would leave IDF forces in a situation of operational disadvantage, in comparison with terrorists waiting on the other side of the Fence. *Second*, at many segments, Israeli communities inside Israeli territory are in close proximity to the borders of the Region. Construction of the Fence inside Israel would require its placement on the borders of these communities with no alert zone. Such a route would also allow gunfire from beyond the Fence. *Third*, the Fence is

intended to also protect Israelis living in the Region, and other important objects, such as roads and high voltage lines.

24. As for the specific segment of the Fence in the Alfei Menashe Enclave, the Court was convinced on the basis of the data provided to it, that the Fence was erected with the aim of preventing terrorist infiltration into Israel and into the Israeli communities in the Region, and it is a central security component in Israel's fight against Palestinian terrorism. Thus, the Court reached the conclusion that the considerations behind the route in the Enclave are security considerations, and not political. It was erected for the security of both Israelis living in Israel and in Alfei Menashe, as well as those wishing to travel from Alfei Menashe to Israel and *vice versa*.

Given the conclusion that the decision to erect the Fence at the Alfei Menashe Enclave was made within the authority granted to the military commander, the Court will proceed to examine the question of whether this authority has been exercised proportionately.

Proportionality of Injury to the Local Residents

25. According to the case-law of the Court – proportionality is tested according to three subtests (as explained above). The *first* subtest holds that the injury is proportionate only if there is a rational connection between the desired objective and the means being used to achieve that objective (the rational connection test). Whereas the Fence creates a separation between terrorists and Israelis (in Israel and in the Region), a required rational connection exists between the objective and the means for its attainment.

26. The *second* subtest of proportionality holds that the injury is proportionate only if there is no other less injurious means which can achieve the desired objective (the least injurious means test). Applied to the case under discussion, this test poses the question of whether it is possible to ensure the security of Israelis (in Israel and in the Region) through a different route of the Fence, a route whose impingement upon the rights of the local residents would be a lesser one.

The Court cannot accept the argument that it is possible to protect Israelis through a fence constructed on the Green Line, because this would leave Alfei Menashe on the eastern side of the Fence, so that it would be left vulnerable to terrorist attacks from the Region. Movement from Alfei Menashe to Israel and back would be vulnerable to acts of terrorism. Any route of the Fence must take into account the need to provide security for the 5650 Israeli residents of Alfei Menashe.

27. Still in the framework of the *second* subtest, the question arises whether the security objective behind the Fence could not be attained by changing its route so as to encircle Alfei Menashe only, and leave the five villages of the Enclave outside of the Fence. Such a route would create a

natural link between the villages of the Enclave and Qalqiliya and Habla. It would create a link to many civil services which were provided to the residents prior to the construction of the fence. Most of the injuries to the residents of the villages would be avoided. Indeed, the lives of the residents under the present route are difficult. The Enclave creates a chokehold around the villages. It seriously damages the entire fabric of life. An alteration to the route, which would remove the villages from the Enclave, would reduce the injury to the local residents to a large extent.

Based on the factual data presented to it, the Court held that it was not convinced that it is necessary for security-military reasons to preserve the route of the Fence as set, and that there is no possibility that all five villages, or even or part of them, will remain outside of the Fence.

28. Consequently, the Court concluded that it was not convinced that the second subtest of proportionality has been satisfied by the Fence route creating the Alfei Menashe Enclave. It held that it seems "that the possibility of finding an alternative route which would ensure security with lesser injury to the residents of the villages has not been examined". Hence, the respondents must reconsider the existing route, and examine the possibility of removing the villages of the Enclave – some or all of them – from the "Israeli" side of the Fence.

As this alteration requires the dismantling of the existing Fence and the construction of a new Fence, the respondents must examine the preparation of timetables and various sub-phases, which can ensure the changes to the route within a reasonable period.

The second subtest not being satisfied, the Court left open the question whether the Fence's route satisfies the *third* subtest of proportionality (holding that the injury is proportionate only if the damage caused by it is of appropriate proportion to the advantage gained by it, namely, proportionality "in the narrow sense").

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In the operative part of its judgment, the Court ordered the respondents to reconsider (within a reasonable period) security alternatives for the Fence route at Alfei Menashe, which injure the fabric of life of the residents of the villages of the Enclave to a lesser extent. It also ordered the examination of the alternative by which the Enclave would contain only Alfei Menashe and a connecting road to Israel.

The judgment of Barak J.P. was joined by Cheshin J.D.P., Beinisch J., Procaccia J., Levy J., Grunis J., Naor J., Jubran J. and Chayut J.

IX. H.C. 1661/05, Gaza Coast Regional Council *et al.* v. Knesset of Israel *et al.*

49(2) *Piskei Din* 481.

Constitutionality of the Disengagement Plan Implementation Law-2005 adopted by Israeli Parliament (Knesset) pursuant to the Government's decision to withdraw from the Gaza Strip and to evacuate all Israeli settlements there; territories of the West Bank and the Gaza Strip held by Israel under the status of "belligerent occupation"; duration of occupation not affecting the status of a territory as placed under belligerent occupation; political events affecting the Territories; Israeli settlers on the Territories not falling into the category of "protected persons"; motives of the settlers were mainly religious, national, or historic; Disengagement Law regulating matters concerning evacuation of Israelis and their assets from the Gaza Strip and compensation for the evacuating settlers; decision on disengagement falling within the Knesset and Government competence and permitted under the law of belligerent occupation; constitutionality of the Disengagement Law to be examined in light of the requirements provided in the "Limitation Clause" of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation-1992; plea on unconstitutionality of the Disengagement Law dismissed; examination of the constitutionality of the compensation arrangements; annulment of four arrangements not affecting the overall constitutionality of the compensation arrangements in the Disengagement Law.

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This is a comprehensive judgment delivered by an expanded panel of 12 judges of the High Court in 12 petitions filed by representatives of settlers who challenged the constitutionality and legality of the Disengagement Plan Implementation Law adopted by the Israeli Parliament (*Knesset*) in 2005, pursuant to the decision of the Government headed by Prime Minister Sharon to withdraw from the Gaza Strip and from Northern Samaria (on the West Bank), and to evacuate all Israeli settlements established there since 1967.

By a vote of 11 to 1 (Levy J. dissenting), the Court upheld the withdrawal plan. The judgment on behalf of the Court was delivered by Barak J.P.

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Factual background

1. Pursuant to the Six Day War, Israel occupied the territories of: East Jerusalem, the Golan Heights, the Sinai Peninsula, the Judea and Samaria Region, and the Gaza Strip. In respect to these territories, different legal arrangements have been established:

a) In East Jerusalem and the Golan Heights, Israeli law, jurisdiction and administration have been applied by laws enacted by the Knesset.

b) In the Sinai Peninsula, the law of belligerent occupation applied until its evacuation by Israel and return to Egypt following the conclusion of a Peace Treaty between Egypt and Israel in 1979.
c) The territories of the Judea and Samaria Region and the Gaza Strip were held under the status of "belligerent occupation". This status had been constantly declared by Israeli governments over dozens of years, and affirmed in the jurisprudence of the High Court.

2. Since the Territories of the Judea and Samaria Region (the West Bank) and the Gaza Strip [hereinafter: the Territories] were held by Israel under the status of belligerent occupation, Israeli law, jurisdiction and administration have not been applied to them, and the local law was left in force. In addition, the rules of international law concerning belligerent occupation became applicable, together with security legislation by the military commanders of the Territories[69] (permitted under the law of belligerent occupation). Among the rules of international law concerning belligerent occupation which became applicable to the Territories, there was no dispute about applicability of the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land[70] due to the accepted view that they are declaratory of customary international law (a view that was endorsed in the jurisprudence of the Court). By contrast, a dispute arose as to the applicability to these Territories of the 1949 (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[71] However, this dispute is irrelevant to the present petition, as the petitioners (namely, Israeli settlers in the Gaza Strip) do not invoke its terms and are even unable to do so because they are not included in the category of "protected persons" to whom the Convention applies. In addition, Israeli administrative law is applicable to all functions performed by military commanders, who are actually officials in the Israeli administration.

Belligerent occupation in light of the time factor

3. Belligerent occupation evolves around two principal axes: ensuring the legitimate security interests of the occupant on the one hand, and ensuring the needs of persons protected by the laws of belligerent occupation, on the other. The military commander is not a sovereign in the area and he possesses authority only in order to exercise governing functions there. The military commander's duty under Regulation 43 "to restore, and ensure, as far as possible, public order and safety"[72] obliges him to balance

69 Being actually organs (or long-arms) of the Occupying State.
70 *Supra* note 9.
71 *Supra* note 11.
72 Cited *supra* note 61.

between security needs and those of the protected persons. As already ruled by the Court,[73] the more protracted the duration of the occupation, the more the needs of the local population become more valid. However, the duration of the occupation does not affect the status of the territory as placed under belligerent occupation, and does not allow Israel to apply its law, jurisdiction and administration to it.

4. Ever since the Six-Day War, many political events took place which affected the situation in the Territories. The most important to mention were the Framework for Peace in the Middle East concluded in 1978,[74] and the Declaration of Principles on Interim Self-Government Arrangements signed in 1993 by Israel and the Palestine Liberation Organization (PLO) ("Oslo Agreement"),[75] which was followed by the Agreement on the Gaza Strip and the Jericho Area signed by the PLO and Israel in the same year in Cairo.[76] In 1995, an Interim Agreement on the West Bank and the Gaza Strip was signed by Israel and the PLO in Washington.[77] All these documents have been transformed into Israeli internal law by adequate legislation.

Following these arrangements, IDF forces withdrew from major population areas in the Territories, elections were held and self-administration powers have been delegated to the Palestinian Authority in various areas. The wave of terror led to occasional entry of the IDF into the areas it left, and this is the situation prevailing at the present time in the Territories.

All these developments did not affect the status of the Territories as being under IDF belligerent occupation, so that the laws of belligerent occupation are applicable to them.

Israeli Settlement in the Territories

5. Following the Six-Day War, a process of Israeli settlement in the Territories started, and dozens of Israeli settlements were established, most of them on "governmental land", meaning land held by the former government. In 2003, the number of Israeli settlers in the Territories amounted to about 200,000, including 8,000 in the Gaza Strip. Israeli public authorities were to some extent involved in this settlement by way of allocation of budgets. Being Israeli citizens, the settlers do not fall into the category of "protected persons" as defined in Article 4 of the Fourth Geneva Convention.

73 H.C. 393/82, *supra* note 5.
74 17 *I.L.M.* 1466.
75 32 *I.L.M.* 1525 (1993).
76 32 *Kitvei Amana* (Israel Treaty Series) 1.
77 33 *Kitvei Amana* 1.

6. The question of legality of Israeli settlement in the Territories was dealt with by the High Court by way of examination of the authority of the military commander to seize land for the purpose of establishing a settlement according to the laws of belligerent occupation dealing with seizure of property for military needs. Examination of Israeli settlement in the Territories discloses considerable tension between the legal framework and the aspirations of the settlers. While the legal framework of the settlement was governed by the laws of belligerent occupation, the motives of the settlers were mainly religious, national, or historic.

The Disengagement Plan Implementation Law-2005

7. The Disengagement Plan Implementation Law [hereinafter: Disengagement Law or the Law] was adopted in 2005, pursuant to the plan for disengagement of Israel from the Gaza Strip and Northern Samaria [hereinafter: the Areas], which was announced by Prime Minister Sharon in December 2003 as a political-security-national plan [hereinafter: Disengagement Plan].

According to Section 1 of the Law, its purpose is to regulate the matters required for implementation of the Disengagement Plan, namely, evacuation of Israelis and their assets from the Gaza Strip; granting of fair and proper compensation to those entitled to it; assistance to those entitled for relocation of place of living and livelihood; replacement of living accomodations to alternative accomodations. It follows from its purposes that the Law was intended to regulate two principal issues involved in the disengagement plan: evacuation and compensation. In its provisions concerning compensation the Law regulated compensation for homes, for business, and to workers employed in the Areas prior to their evacuation. The Law established for its implementation the Disengagement Authority, which was supplied by adequate budgets required for execution of the compensation provisions.

8. The petitions filed against the Disengagement Law challenged the legality and constitutionality of the withdrawal from the Areas and their evacuation as ordered by the Law, as well as the compensation arrangements provided therein. The petitioners (representatives of settlers) complained that their evacuation amounts to an “expulsion”, “deportation”, or even “ethnic cleansing”; and that it violates their various rights, such as the right to dignity, to liberty, to freedom of employment and to property. They also complained that the Israeli settlement in the Areas to be evacuated had been performed on the basis of the stance of Israeli governments presenting the settlement there as permanent settlement in Israeli territory. In legal terms, the petitioners sought the abolition of the Disengagement Law (and thereby halting execution of the disengagement) on the ground that it violates the Basic Law: Human Dignity and Liberty-1992 [hereinafter: the Basic Law].

The normative framework

9. Thus, neither the Basic Law: The Knesset[78] nor the Basic Law: The Government prevent the Knesset or the Government from adopting a decision on disengagement from the areas to be evacuated. The competence to adopt such a decision is granted to the governmental authorities (Knesset and Government) by Israeli internal law. It is also granted by international law to the Occupying State of an area under belligerent occupation. Therefore, a constitutional problem of the disengagement may arise only if the evacuation of Israelis from these areas according to the Disengagement Law infringes upon their constitutional rights as anchored in the Basic Law: Human Dignity and Liberty-1992 and in the Basic Law: Freedom of Occupation-1992 [hereinafter: Basic Laws] in a way not permitted by these Laws.

10. The examination of the constitutionality of the Disengagement Law should be performed in three stages:

a) Examination of whether the Disengagement Law infringes a human right anchored in the Basic Laws. If the answer to this question is negative, the examination of constitutionality is terminated (*first* stage).

b) If the answer is positive, the examination passes to its *second* stage, where it should be examined whether the infringement is a lawful one, namely, whether it meets the conditions of the "Limitation Clause" of the Basic Law.[79] If the answer to this examination is positive, the examination of constitutionality is terminated (by an answer that the Law is constitutional).

c) If the answer is negative – the examination passes to the *third* stage, where the consequences of the unconstitutionality are examined, namely, the stage of remedy.

a) First stage – the evacuation and its infringement of human rights

11. The human rights protected in the Basic Laws are granted to every Israeli settler in the Territory to be evacuated. This application is a personal one, and derives from Israel's control over the Territory to be evacuated, being under Israel's control by way of belligerent occupation.

The evacuation of Israelis from the Areas (and the Disengagement Law providing for it) severely infringes their human rights as provided in the Basic Laws. It is generally agreed that the evacuation infringes their right to property. It also infringes the freedom of occupation of those who can no longer practise the profession or occupation which they had in the evacuated

78 12 *L.S.I.* (Laws of the State of Israel, English Version) 85.

79 Cited *supra* note 55.

Territory. In addition, the Disengagement Law infringes the human dignity of the evacuating Israelis (as protected in Section 2 of the Basic Law[80]) because it detaches him from their home, their environment, their Synagogue and from the Cemetary where his dead relatives are buried. It hurts his personality. The human right to dignity presumes that a man is free, and that he has the right to develop himself according to his will.

b) Second stage – the "Limitation Clause"

12. A law infringing human rights is constitutional if it fulfills the four requirements laid down in the "Limitation Clause" embodied in Section 8 of the Basic Law, which provides as follows:

> 8. There shall be no infringement of rights under this Basic Law except by a law befitting the values of the Sate of Israel, enacted for a proper purpose, and to an extent no greater than is required.

These four requirements are: 1) by a law; 2) befitting the values of Israel; 3) for a proper purpose; 4) to an extent no greater than is required.

13. Since the infringement of the rights of the Israelis in the Territory to be evacuated is done by the Disengagement Law, the first requirement of the "Limitation Clause" is fulfilled. The infringement must not be an explicit one, and it may be implied. There is no need for the infringing "law" to be adopted in the Knesset by a special majority or to be a Basic Law, but merely be a regular "law", as is the case under discussion.

14. The expression "values of the State of Israel" means values of Israel as a Jewish and democratic State (as stated in Section 1 of the Basic Law). The values of Israel as a Jewish State possess the aspects of both Zionism and Judaism. The Zionist vision is that of settlement all over the country. However, realization of this vision has to take into account considerations inherent to Zionism, such as national, political and security considerations. The Disengagement Plan certainly falls within these considerations.

15. The values of Israel as a democratic State are based on recognition of the sovereignty of the people, as expressing itself in free and equal elections, in recognition of basic human rights (including dignity and equality), separation of authorities, the rule of law and an independent judiciary. The fact that no referendum was held on the Disengagement Plan does not affect the constitutionality of the Disengagement Law. The *Knesset* had at its disposal several democratic options for realization of the will of the people

[80] Sec. 2 provides: "There shall be no violation of the life, body or dignity of any person as such".

as a sovereign, and it chose the way of legislation and not the one of a referendum. Therefore, the Disengagement Law does not infringe upon the values of the State of Israel as a democratic State.

For a proper purpose

16. The question of whether the Disengagement Law is enacted for a "proper purpose" should be answered within the framework of the "Limitation Clause", namely, according to the question of whether the Law is designed to realize a vital social goal which justifies a severe infringement of human rights (mainly the right to dignity and to property) of the Israelis to be evacuated. Although this question is subject to a deep dispute between the parties, it should be answered in the affirmative. The political, national and security purposes underlying the Disengagement Plan are of great importance as designed to realize what seems to the *Knesset* and the Government as a vital social need. The achievement of peace, security, international recognition and similar achievements are at the foundation of the national existence.

To an extent no greater than is required

17. The requirement of the "Limitation Clause" that the infringement of human rights be "to an extent no greater than required" is a requirement for proporionality between the proper purpose and the means chosen by the law for the achievement of this purpose.

The requirement of proportionality is based on three sub-tests:

a) the "rational connection" test – requiring a rational connection between the proper purpose of the Law and the means provided by it for acomplishment of this purpose;

b) the "least injurious means" test – requiring that the means chosen by the Law for accomplishment of the proper purpose should infringe the human right to the least possible extent;

c) the "proportionality in the narrow sense" test – requiring an appropriate proportion between the infringement caused to human rights by the Law (namely, the means taken) and the benefit gained from attainment of its proper purpose (namely, the goal to be achieved).

The "rational connection" test

18. The question of existence of a rational connection between the political, security and national purposes of the Disengagement Plan and the means of evacuation of Israelis from the Areas is connected to the factor of probability of achievement of these purposes, as no certainty on this matter exists. However, existence of probability and uncertainty is inherent in political, security and national decisions. In such a complex matter as the

Disengagement Plan, the Court should assume that the *Knesset* and the Government considered all probabilities, and it is their authority to make decisions, not that of the Court. In the absence of any extraordinary reasons – such as corruption, lack of honesty or *mala fide* – the Court assumes that the competent authorities had properly exercised their discretion.

Examination of the political and security considerations underlying the Disengagement Plan, as presented on behalf of the respondents – who bear the responsibility for the Plan – leads to the conclusion that there is a rational connection between the political, national and security purpose underlying the Disengagement Law and the means of evacuation of Israelis from the Areas.

The "least injurious means" test

19. The question arising in the context of this test is whether there was a possibility for evacuation of the Areas without evacuating the Israelis living there. This question should be answered in the negative, for it is quite obvious that the evacuation of the Areas would create a dangerous situation for the Israeli settlers. The State of Israel is under duty to protect its citizens, and it is not released from this duty even if citizens are willing to take the risk upon themselves.[81] It is not possibile to determine that the purposes of the Disengagement Plan can be achieved by means that are less injurious to the human rights of the Israelis.

The "proportionality in the narrow sense" test

20. The relationship between the scope of the infringement of the right of the Israelis to be evacuated and the realization of the purposes of the disengagement is a proportional one in view of two factors: the prospects of achievement of the purposes of disengagement, on the one hand; and the fact that the evacuated Areas are under belligerent occupation, which is inherently temporary, on the other. Moreover, the evacuating Israelis obtain compensation which should enable them to built a new way of life that would be very similar to the one which they had in the evacuated Area.

At times, a need arises for a State to evacuate a whole population from a certain area for reasons of armed conflict, of nature disasters, of national planing and so on. Insofar as an evacuation serves national, social or security goals, which cannot be achieved in another way, and it is followed by grant of compensation – such evacuation will usually be approved by the Court, which will not prevent the State from achieving its goals. Only in

[81] H.C. 4764/04, excerpted in 35 *Israel Y.B. Hum. Rts.* 327 (2005); H.C. 9293/01, excerpted in 32 *Israel Y.B. Hum. Rts.*354 (2002).

exceptional and extraordinary cases will the Court rule that the acomplishment of national, social and security goals of historical scope and meaning is impossible because of damage caused to the State's citizens to be evacuated from a territory under belligerent occupation. Such exceptions are not present in the case under discussion.

Consequently, the decision is that the infringement of the rights of the evacuating Israelis meets the requirements of the "Limitation Clause" and the petitioners' plea relating to the unconstitutionality of the disengagement was dismissed.

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The compensation issue

21. The constitutionality of the disengagement may be affected by constitutionality of the compensation arrangement because the extent of compensation may, in turn, affect the extent of injury to the right to property of the settlers.

22. The clauses in the Disengagement Law providing for compensation for homes (including associate payments and special grants), for businesses, for farmers and for employees (alongside the mechanism set up for determination of the rates) are quite reasonable and do not justify any intervention by the Court.

23. Four financial arrangements in the Disengagement Law relating to compensation for the future evacuees are unconstitutional because impinging upon the rights of the evacuating Israelis is in an unproportionate manner, and should therefore, be rescinded and/or replaced. These are the following:

a) The clauses which bar recipients of compensation from filing a standard lawsuit for damages should be altered so as to enable settlers to request compensation from both the Disengagement Authority and the local courts.

b) The deadline specified by the law, which allowed settlers 30 days to choose the nature of the compensation plan they preferred, should be altered.

c) The clauses providing the age of 21 as the minimum age for receipt of compensation funds should be replaced as to allow settlers under 21 to receive compensation.

d) The day of actual evacuation should be used as the date for determination of the elements of the compensation package for each family, rather than that of June 4, 2004, as stated by the Law.

Given the fact that the respondents agreed to make the modifications required by the Court, the annulment of these arrangements (by way of their separation from the remaining clauses of the Law) does not affect the overall constitutionality of the Disengagement Plan and the constitutionality of the compensation arrangements as set out in the Disengagement Law. Consequently, the petitions of the representatives of the settlers in the Areas were dismissed and the evacuation took place *de facto*.