

**EXPERT MEETING ON THE SUPERVISION OF THE
LAWFULNESS OF DETENTION DURING ARMED
CONFLICT**

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Abbreviations

API, Protocol I: Additional Protocol I of 1977 to the 1949 Geneva Conventions

APII, Protocol II: Additional Protocol II of 1977 to the 1949 Geneva Conventions

CAT: United Nations Convention against Torture

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

GC: Geneva Conventions of 1949

GCIII: Geneva Convention relative to the Treatment of Prisoners of War

GCIV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War

HRC: United Nations Human Rights Committee

ICCPR: International Covenant on Civil and Political Rights

ICJ: International Court of Justice

ICRC: International Committee of the Red Cross

ICTY: International Criminal Tribunal for the former Yugoslavia

IHL: International Humanitarian Law

POW: Prisoner of War

UN: United Nations

A. Introduction

The purpose of the meeting was to analyse the inconsistencies between the two different fields of international humanitarian law and international human rights law on the rights of detainees to have the lawfulness of their detention determined during times of armed conflict, occupations or during peacekeeping operations. The aim was to try to find ways for any gaps to be filled or inconsistencies resolved. For this purpose, a review of applicable law was undertaken, practical aspects considered and a set of suggestions made on how the present legal situation could be improved. This report reproduces the background paper sent to participants before the start of the meeting, papers presented and presentations made during the meeting, as well as a summary of the main points that emerged during the discussions.

The meeting was confined to the issue of the review of the lawfulness of detention during armed conflicts – other issues such as treatment in detention and trial procedures were excluded.

The meeting comprised experts in international humanitarian law, international human rights law and international criminal law, all attending in their personal capacity.

The University Centre for International Humanitarian Law (UCIHL) thanks the Directorate of International Law of the Swiss Federal Department of Foreign Affairs (DFA) for the funds provided that enabled the meeting to take place.

1. Background Paper by Louise Doswald-Beck.

The purpose of this paper is to question the extent to which humanitarian law effectively provides against arbitrary detention and whether human rights law applicable in states of emergency can counteract any shortcoming in this regard. This paper excludes procedures relating to any criminal or disciplinary proceedings.

International armed conflicts

Humanitarian law aims at preventing arbitrary detention by two main means:

1. *Providing for permissible grounds of detention based on military necessity* i.e. persons are detained on the basis of grounds determined by international law and these grounds have been chosen by custom and the drafters of the Geneva Conventions on the basis of what is necessary. Conversely what is unnecessary is not or no longer allowed.

The major grounds are:

- a. Prisoners of war: the *categories* of persons that are POWs are carefully defined¹; and *length of detention* limited to what is really necessary.² Both the types of persons chosen and the time of detention allowed are based on *reasonableness* i.e. because the persons are still a potential threat if they join their army again.
- b. Civilian detainees: the *categories* are aliens in enemy territory and civilians in occupied territory. The *grounds, including length of detention*, are respectively “if the security of the Detaining Power makes it absolutely necessary”³ and “for imperative reasons of security”.⁴

2. *Providing for some supervision of the fact of detention*

The major weaknesses of the system reside here as the provisions are not as stringent as human rights law.

- a) Prisoners of war: the fact of internment is to be immediately communicated to Protecting Powers,⁵ a national Information Bureau and the Central Tracing Agency, and this information then communicated to the Power on which the POW depends and the next of kin.⁶

The provisions of the Third Geneva Convention are to be applied “with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict”.⁷ Protecting Powers are non-belligerent States that are to be named by belligerent States. However, it is not explicitly indicated that Protecting Powers have the right to question the fact of internment and, far more seriously, such Powers are rarely appointed, in particular, the US and UK did not do so with regard to Kosovo, Afghanistan or Iraq.

¹ GCIII, Article 4; API, Articles 43 and 44.

² Until the end of active hostilities unless the prisoner is no longer a threat because of illness, severity of wounds, or in case of parole.

³ GCIV Article 42.

⁴ GCIV Article 78.

⁵ See below.

⁶ Third Geneva Convention Articles 69 and 122-123.

⁷ Article 8.

b. Civilian internees: like POWs, the fact of internment is to be communicated, as soon as possible, to the Protecting Powers, the national Information Bureau, the Central Tracing Agency and the Power on which the persons depend or in whose territory they resided. The same provisions as those in the Third Convention relating to Protecting Powers are to be found in the Fourth Convention⁸, but the same problems apply also.

In addition to these provisions, some direct supervision of the need for such detention is provided for in the Fourth Geneva Convention. In the case of “*enemy aliens*”, they are entitled to have their detention “reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose” and this is to be repeated at least twice yearly. The Protecting Power is to be kept informed.⁹

In the case of *persons detained in occupied territory*, decisions on detention shall be made “according to a regular procedure to be prescribed by the Occupying Power”. The procedure includes the right to appeal “with the least possible delay” and if the decision is upheld, it is to be reviewed “if possible” every six months “by a competent body” set up by the Occupying Power.¹⁰

The *weakness* of these provisions is that there is no indication that the court, administrative board, regular procedure or appeal is to be a body independent of the officials that decided on the detention to begin with. Nor is it explicitly indicated that these bodies are to have the nature of a tribunal i.e. that they can make binding decisions.

Access to a lawyer

There is also no indication that persons held in detention are entitled to a lawyer to help them contest the lawfulness/need for continued detention. The only *independent* body provided for is that of a Protecting Power but the extent of its rights is not clearly defined and such Powers are usually not appointed.

Non-international armed conflicts

The grounds and procedure of detention are not regulated by international humanitarian law with regard to such conflicts. The law is limited to procedures relating to criminal offences. Therefore, only national law is relevant, as well as international human rights law.

Peace support operations

There remains a degree of uncertainty as to the law applicable to these operations which can occur in a context of international or internal armed conflict. Often they can be in practice a sort of occupation force but without this official designation.

As far as the law relating to detention is concerned, the only specifically applicable written provision is Article 8 of the UN Secretary-General’s Bulletin, 1999, which states that *detained members of the armed forces and other persons who no longer take part in military operations by reason of detention* shall be treated in accordance with the relevant provisions of the Third Geneva Convention, in particular, their capture and detention shall be notified without delay to the party on which they depend and the Central Tracing Agency, in particular

⁸ Article 9.

⁹ Article 43.

¹⁰ GCIV Article 78.

in order to inform their families. There is no other supervision provided for, although the ICRC is given the right to visit. Nothing related to the fact of detention is provided for *civilian detainees*.

International human rights law

The fact that international human rights law applies at all times is clear and therefore there is no need to question this. The relevant questions are the following:

1. Is there is a need to derogate from human rights law in order to use the grounds and special procedures provided by humanitarian law for detaining persons in international armed conflicts?
2. Does the right of *habeas corpus* apply at all times?
3. Should *habeas corpus* apply even when the systems provided by humanitarian law function correctly i.e. Protecting Powers are named and undertake their function and/or detainees are visited by the ICRC?
4. If *habeas corpus* applies during international armed conflict, which court should have jurisdiction and would this remedy be realistic and effective?
5. Should detained persons in any event have access to a lawyer?

1. Is there is a need to derogate from human rights law in order to invoke the grounds and special procedures provided by humanitarian law for detaining persons in international armed conflicts?

As far as *grounds* are concerned, the only problem would seem to be with the European Convention on Human Rights, Article 5 of which provides an exhaustive list. This list does not include detention as a prisoner of war nor as a civilian internee during an international armed conflict. The United Kingdom has detained persons on these grounds without derogation and other States party to the Convention have not objected to this. The other human rights treaties do not have this problem as they simply provide that the grounds of detention must not be “arbitrary”.

As far as *procedures* are concerned, all the texts, except the African Charter, specify that all detained persons have the right to take proceedings to decide on the lawfulness of detention (*habeas corpus*). This is not provided for in the Third and Fourth Geneva Conventions and, in principle, in order for governments to use the lesser protections of these Conventions, it would appear necessary to derogate. However, once again, this has not been done by the US or the UK in relation to civilian detainees from Iraq and Afghanistan.¹¹

If the US had derogated from the ICCPR, would it have made any difference to the Supreme Court’s judgment in the case of *Rasul et al. v. Bush*?

Would a State always be able to prove the need for derogation in an armed conflict and also the need to detain in the way permitted by humanitarian law? According to UN Human Rights Committee General Comment 29, such proof would need to be shown. Is this why States do not try to derogate?

¹¹ Whether detained in the detaining power’s territory or not.

2. Under international law, does the right of *habeas corpus* apply at all times?

Both the UN Human Rights Committee and the Inter-American Court on Human Rights have indicated that the right of *habeas corpus* must not be derogated from during a state of emergency.

In interpreting Article 4 of the ICCPR, the UN Committee in its General Comment 29 stressed the importance of the rule of law and the fact that as derogations must be limited to what is strictly required by the exigencies of the situation, there is no reason to derogate from rights that are provided for by humanitarian law. However, when specifying the non-derogability of the right to *habeas corpus* proceedings, the Comment specifies that this is in order to protect non-derogable rights.¹² These are, in Article 4 of the ICCPR, the right to life; the prohibition of torture or of cruel, inhuman or treatment or punishment or of medical or scientific experimentation without consent; the prohibition of slavery, slave trade and servitude; imprisonment for debt; non-retroactive application of criminal law; recognition of everyone before the law; freedom of thought, conscience and religion. General Comment 29 itself then adds a series of others (e.g. prohibition of hostage taking, right to humane treatment.)

The Inter-American Convention on Human Rights, in its Article 27, provides a list of non-derogable rights similar to those in the ICCPR with the addition of the following: rights of the family, right to a name, rights of the child, right to nationality, right to participate in government and “judicial guarantees essential for the protection of such rights”. In two Advisory Opinions of the Inter-American Court of Human Rights,¹³ the Court stressed the importance of the judicial remedy of *habeas corpus* because of its vital role in ensuring that a detainee’s life and physical integrity are respected, in preventing secret detention and in protecting a detainee against torture or other cruel, inhuman or degrading treatment or punishment. It added that, like *amparo*, it serves to preserve legality in a democratic society.

The European Court of Human Rights has not specified, in such clear terms, the non-derogability of *habeas corpus* proceedings, but has stressed the need for safeguards when administrative detention occurs. These safeguards include reviewing the need for continued detention by an independent body.¹⁴ More recently, the case of *Brannigan and McBride v United Kingdom*¹⁵ found detention for up to 7 days without presentation to a judicial officer to be acceptable in an emergency situation *inter alia* because *habeas corpus* was still available. More significantly, in the case of *Aksoy v. Turkey*,¹⁶ the Court stated that it could not accept the holding of a terrorist suspect for 14 days without judicial intervention which left the detainee vulnerable to arbitrary interference with his right to liberty and also to torture.

The African Charter on Human and Peoples’ Rights does not allow for derogations, and this has been confirmed by the African Commission.¹⁷ In the case of *Constitutional Rights Project et al. v. Nigeria*,¹⁸ the Commission indicated that only limitations are possible under Article

¹² Para.16.

¹³ OC-8/87, 30 January 1987; and OC-9/87, 6 October 1987.

¹⁴ Cases of *Lawless v. Ireland (Merits)* Judgment of 1 July 1961); *Ireland v. United Kingdom*, Judgment of 18 January 1978.

¹⁵ Judgment of 26 May 1993.

¹⁶ Judgment 18 December 1996.

¹⁷ E.g. *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, communication no. 74/92, report of 11 October 1995.

¹⁸ Communication nos. 140/94 *et al.*, report of 5 November 1999.

27(2) but that these must be strictly proportionate with and necessary for the purposes provided. In particular, the limitation must not erode a right to such a degree that the right itself becomes illusory. The African Charter only protects against “arbitrary” detention, and does not specify the right to *habeas corpus*. However, a resolution on “The right to recourse and to a fair trial” adopted by the Commission in 1982 provides that “all persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”. As far as the specific writ of *habeas corpus* is concerned, the Commission, in the case of *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*,¹⁹ stated that it is essential in circumstances where there appears to be a widespread violation of the right to liberty and security of person.

All four human rights systems stress the need for the judicial review to be undertaken by an independent and impartial tribunal.

Finally, mention needs to be made of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.²⁰ These Principles are drafted as applying at all times. Principle 32 provides for the right of any detained person or his counsel to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay if it is unlawful.

3. Should *habeas corpus* apply even when the systems provided by humanitarian law function correctly i.e. Protecting Powers are named and undertake their function and/or detainees are visited by the ICRC?

If the answer to question 2 is affirmative, this question is, strictly speaking, irrelevant. In particular, the obligation to appoint Protecting Powers does not exist in non-international armed conflicts nor in peace-support operations. The right of the ICRC to visit detainees only exists, under the Geneva Conventions, in relation to POWs and civilian internees in international conflicts. In non-international conflicts it may offer its services, but acceptance is not compulsory.

Would it therefore be correct to assume that the right to *habeas corpus* must always be available in situations that are not international armed conflicts?

In the case of international conflicts, Protecting Powers are meant to supervise the correct implementation of the Conventions and to protect the interests of the belligerent Powers. In principle this should, therefore, include the possibility of complaint (by the Protecting Power and by the opposing State) if persons are detained on grounds or in ways that do not conform to the Conventions. However, the relevant provisions²¹ indicate that Protecting Powers must not exceed the mission provided for them and that they must take into account the security needs of the detaining Power. Many rights and duties for Protecting Powers are specifically included in the Conventions, but the right to take proceedings to decide on the lawfulness of detention is not one of them.

Visits by the ICRC, provided by Article 126 of the Third Geneva Convention and Article 143 of the Fourth Geneva Convention, could, in principle, allow the organisation to contest the

¹⁹ Communication nos. 143/95 and 150/96, report of 15 November 1999.

²⁰ Resolution adopted by consensus by the UN General Assembly on 9 December 1988.

²¹ Article 8 GC III and Article 9 GC IV.

grounds on which certain persons are held. However, this is not the main function of ICRC visits, nor is this required by the Conventions. In practice this happens only occasionally, most usually in cases where prisoners of war continue to be held long after the cessation of active hostilities or in the case of the automatic internment of all “enemy aliens”. It is uncertain the extent to which the ICRC contests the lack of supervision provided for in the Fourth Geneva Convention for the continued detention of civilian internees. As mentioned above, such supervision does not necessarily have to be independent and impartial.

The most important function of ICRC visits is to register detainees (thereby preventing disappearances), interviewing them in order to try to ensure humane treatment, and to facilitate contact with their families. However, the ICRC does not provide internees with lawyers nor does it itself take cases to court in order to provide remedies for torture or other inhuman treatment.

4. If *habeas corpus* applies during international armed conflict, which court should have jurisdiction and would this remedy be realistic and effective?

According to the recently-decided case of *Rasul et al. v. Bush*,²² the majority decision found that the internees at Guantanamo had the right to petition for *habeas corpus* in the United States. The reasons given include the following: the writ of *habeas corpus* serves as a means of reviewing the legality of Executive detention; it applies in wartime as well as in peacetime;²³ it is not limited to US nationals; it should be served against the person who holds him in what is alleged to be unlawful custody; it can include persons held overseas in “exempt jurisdictions” and “all other dominions under the sovereign’s control”.

On this basis, the writ should be served on the Detaining Power via that Power’s courts. If the person is in the State concerned, or in territory clearly under its control, then proceedings would be possible.

How effective would such a remedy be in reality? It would surely depend on the independence and impartiality of the courts in question as well as the extent to which the Executive Power respects the courts’ decisions.

How realistic is such a remedy in a conflict situation? Given that in most cases national security is concerned, the Executive Power would need to be assured that the courts are fully conversant with international law, so as to avoid errors, and also that it is not unduly distracted by defending itself against frivolous claims. On the other hand, this should not be a problem in clear cases of detention of POWs after the end of active hostilities.

Could the detainee bring a claim before a court of its own nationality? This is unlikely to be effective and such courts would probably not have jurisdiction because of sovereign immunity.

5. Should detained persons in any event have access to a lawyer?

Access to a lawyer is fundamental in systems that respect the rule of law and this right is stressed in human rights law. This includes the right to access to the legal system for persons

²² US Supreme Court, June 28, 2004

²³ Examples given were from the American Civil War and also enemy aliens convicted of war crimes and held in the USA.

held in detention. The US Supreme Court in the *Rasul* case stated that “nothing in [US case-law] categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts”. The European Court of Human Rights affirmed the right of access of prisoners to the courts in the case of *Golder v. United Kingdom*.²⁴

The right of access to a lawyer is provided for in the Geneva Conventions and Protocols in order to prepare an accused person’s defence in both international and non-international armed conflicts.

However, human rights law does not limit the right of access to a lawyer to criminal proceedings but extends it to all detainees. This general right to access is included in Principles 17 and 18 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The African Commission, in the case of *Civil Liberties Organisation v. Nigeria*, stated that “being deprived of access to one’s lawyer, even after trial and conviction, is a violation of Article 7(1)(c) of the Charter”.²⁵ In the case of *Aksoy v. Turkey*, the European Court of Human Rights found that “the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that [the applicant] was left completely at the mercy of those holding him”.²⁶ The Inter-American Commission has, on several occasions, stressed the need to maintain “due process” during states of emergency which could well be interpreted as including the right to a lawyer.²⁷

Early access to a lawyer has also been stressed as a particularly effective way of preventing abusive treatment by the detaining authorities. The UN Human Rights Committee stated, in its General Comment 20 on Article 7 ICCPR, that “the protection of the detainee also requires that prompt and regular access be given to...lawyers...”.²⁸ The UN Committee against Torture made the same point in its report on the situation in Turkey,²⁹ as has on many occasions the European Committee for the Prevention of Torture.³⁰

In which situations is access to a lawyer likely to be most necessary during armed conflicts?

1. When civilians are detained on grounds that are not limited to those provided for by the Geneva Conventions and/or are not lawful under national law;
2. When prisoners of war are detained after the end of the cessation of hostilities;
3. When the procedures provided for in the Geneva Conventions are not respected by the Executive detaining authority and/or there is no regular review of detention by an independent body;
4. When there is no or only delayed access by a Protecting Power or the ICRC;
5. When the ICRC has access but when its reports of inhumane treatment remain confidential and/or ineffective.

²⁴ Judgment of 21 February 1975.

²⁵ Communication no. 151/96, report of 15 November 1999, paragraph 26.

²⁶ Paragraph 83.

²⁷ E.g. Commission resolution adopted at its 18th session, 1968; Commission doctrine concerning judicial guarantees and the right to personal liberty and security, 1982.

²⁸ Paragraph 11.

²⁹ 15 November 1993, paragraph 48.

³⁰ E.g. Public statement on Turkey, 1992; Report to the government of France, 1996.

A lawyer would be able to claim redress and compensation and the knowledge that this is possible may well have a preventive effect on governmental behaviour.

Conclusion

When drafted in 1949, the Geneva Conventions provided by far the most advanced legal protection against arbitrary detention in armed conflict. However, later developments in human rights law, in particular through treaty body interpretation of minimum guarantees applicable at all times, have become more protective of the individual than humanitarian law. A certain amount of humanitarian law reflects military tradition, in particular the holding of prisoners of war without access to a lawyer. However, the question should now be asked whether certain people should have less protection against possibly unlawful detention merely because of tradition. For example, why should prisoners of war, who are not suspected of a crime, have less protection than suspected criminals? The need for liberty and security of person should not be underestimated – many held at Guantanamo, although visited by the ICRC, suffer from extreme depression because of the uncertainty of their fate caused by lack of legal supervision. Rather than being locked in sterile arguments over whether humanitarian law is the *lex specialis* for armed conflict, a more constructive approach is to examine the way to ensure the proper balance between security/military needs and individual liberty in the light of modern standards.

B. To What Extent Does International Humanitarian Law provide for the Supervision of the Lawfulness of Detention?

1. Presentation by Knut Dörmann.

The purpose of this short introduction is to describe the general framework that international humanitarian law (IHL) provides with regard to the detention of persons. Questions related to the treatment of persons deprived of their liberty will not be touched upon nor procedures relating to any criminal or disciplinary proceedings. I will build upon the sections on IHL that have already been presented in the background paper.

INTERNATIONAL ARMED CONFLICTS

As far as the detention/internment regime in international armed conflicts is concerned we have to distinguish essentially three categories of persons:

- prisoners of war,
- protected persons under Geneva Convention IV (GC IV) and
- other persons who do not fall under the personal field of application of GC III and GC IV (as further developed by Additional Protocol I).

a) Detained Persons Protected by the Third and Fourth Geneva Conventions

I will not address the specific situation of enemy military medical and religious personnel who may be retained by a party to an international armed conflict in accordance with specific provisions contained in GC I and GC II.

The deprivation of liberty of POWs and protected persons under GC IV ensures that captured combatants do not resume fighting and that interned/detained persons do not pose a security risk.

(i) Prisoners of War

The *categories* of persons that are POWs are defined in Art. 4 of GC III and Arts. 43 and 44 of Additional Protocol I (AP I) – essentially members of the regular and irregular armed forces party to an international armed conflict. The *length of detention* is limited to what is necessary (until the end of active hostilities, unless the prisoner is no longer a threat because of illness, severity of wounds [Art. 109 GC III], parole).

A POW may only be kept in detention beyond active hostilities in case of criminal proceedings (Art. 119 GC III)

(ii) Civilian detainees/internees under GC IV

The categories are aliens in enemy territory and civilians in occupied territory. These individuals have to fulfil certain nationality criteria (Art. 4 GC IV). The grounds for detention are respectively, including length of detention; “if the security of the Detaining Power makes it absolutely necessary” (Art. 42 GC IV) or “for imperative reasons of security” (Art. 78 GC IV). These rules are based on Art. 27(4) GC IV, which permits ‘*such measures of control and security as may be necessary as the result of war*’.

As the notion of ‘security’ remains vague in the above-mentioned provisions, and, according to the ICTY, it is not susceptible of being more precisely defined, the Tribunal concluded that:

The measure of activity deemed prejudicial to the internal or external security of the State which justifies internment or assigned residence is left largely to the authorities of that State itself.¹

The ICTY defined the general limitation in the following terms:

Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.²

Release is required at the latest at the close of hostilities (or if reasons for detention no longer exist). After this time, internment is only lawful in case of criminal proceedings (Art. 132, 133, 134 GC IV).

(iii) Other Civilian Detainees

What about the situation of persons, who fulfil the conditions of protected persons under GC IV, but who are not aliens in enemy territory or civilians in occupied territory. This may concern, for example, persons captured by invading armed forces at a moment, which does not yet constitute an occupation.

If one takes the interpretation given by Pictet in his commentary to Article 6 GC IV, such a situation probably does not exist:

*So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 [1907 Hague Regulations]. **The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the [fourth Geneva] Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.***³

If, however, one takes the view expressed in most military manuals as to when the law of occupation starts to apply, the problem arises. Take the example of Afghanistan – to my knowledge – no state official from coalition forces or from states not party to the international armed conflict ever asserted – rightly or wrongly – that there was an occupation when coalition ground forces were deployed in the country. Nevertheless persons fulfilling the nationality criteria of GC IV have been deprived of their liberty in Afghan territory and kept there. To such a situation arguably only the provisions of Art. 27-34 GC IV apply (leaving aside Art. 75 AP I). These do not contain any rules on the lawfulness of internment or

¹ ICTY, Judgment, *The Prosecutor v. Zejnir Delalic and Others*, IT-96-21-T, para. 574.

² *Ibid.*, para. 576.

³ J. Pictet (ed.), *Commentary Geneva Convention IV 1949*, ICRC, Geneva, 1958, p.60

detention. Probably in order to avoid this problem Pictet defends a more functional interpretation of the law of occupation.

But leaving the Pictet approach aside, and remaining in the Afghan context: if Afghan nationals, who do not qualify as POWs, are captured and transferred from the battlefield to the territory of coalition forces, logic would demand that the rules applicable to aliens in enemy territory apply. That means that their internment would be subject to the provisions of Art. 42 and 43 GC IV, namely internment is only justified if they pose a security risk and this would be subject to periodic review.

If people interned remain in the territory and that territory becomes occupied, Art. 78 GC IV would be the standard for their continued internment

b) Persons not fulfilling the nationality criteria of GC IV nor Prisoners of War under GC III

Last but not least, we have the group of people, who do not fall under the personal scope of application of GC III and IV, in particular civilians who are nationals of the Detaining Power, of a co-belligerent or of a neutral country without diplomatic representation.

When in the hands of the enemy, they are protected by Art. 75 AP I (this provision is generally seen as reflecting customary international law). It contains specific provisions on treatment in detention and in case of penal proceedings some judicial guarantees. However, this provision does not contain any rules on permissible grounds for detention or review of the lawfulness of detention. It only states in paragraph 3 that:

"Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."

Two obligations may thus be derived, i.e.

- Prompt information on the reasons of arrest, detention or internment, and
- Obligation to release at latest as soon as circumstances justifying arrest, detention or internment have ceased to exist.

It should however be recalled that in accordance with Art 72 AP I

"The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict."

Thus, the protections contained in Art. 75 AP I are only minimum standards, which may be supplemented *inter alia* by applicable human rights law.⁴

⁴ See Claude Pilloud/Jean S. Pictet, in Yves Sandoz/Christophe Swinarski/Bruno Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, Geneva, 1987, nos. 2927 *et seq.*

c) Supervision of the fact of detention

(i) Prisoners of war:

IHL does not provide for any type of *habeas corpus* with regard to detention. As members of the armed forces, in an ongoing armed conflict, POWs will - due to their allegiance to the power on which they depend – in all likelihood resume fighting once they are free again. This fact in a way precludes the necessity of challenging the lawfulness of their internment (if they truly fulfil the conditions of POWs).

What are the obligations of the detaining power?

- The fact of internment is to be immediately communicated to Protecting Powers, a national Information Bureau and the Central Tracing Agency, and this information then communicated to the Power on which the POW depends and the next of kin (Art. 122-123 and 69 GC III). These provisions aim more at ensuring that captured members of the armed forces do not disappear and to maintain family contact.
- Access to detainees is to be given to Protecting Powers and to the ICRC (Art. 126 GC III). The supervisory role of the ICRC foreseen by the GC is primarily focused on conditions of detention and repatriation at the end of active hostilities or in case of serious injury/sickness of POWs.
- In case of doubt whether a person is entitled to POW status, this is to be established by a tribunal under Art. 5 GC III: such tribunals are not designed to assess the lawfulness of detention. Their primary objective is to ensure that the entitlement of POW status of persons, who committed a belligerent act, is assessed. A finding that no such entitlement exists may lead to placing these persons into a different legal framework, for example the one of a civilian internee, or possibly even release if the person was just at the wrong place at a wrong time.

There is in addition a form of supervision via international criminal law: delay in repatriation is a grave breach under AP I, subject to universal jurisdiction.

(ii) Civilian internees

Some direct supervision of the need for their detention is provided for in the Fourth Geneva Convention. In the case of “*enemy aliens*”, they are entitled to have their detention “reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose” and this is to be repeated at least twice yearly. The Protecting Power is to be kept informed (Article 43).

In the case of *persons detained in occupied territory*, decisions on detention shall be made “according to a regular procedure to be prescribed by the Occupying Power” in accordance with the provisions of GC IV. The procedure includes the right to appeal “with the least possible delay” and if the decision is upheld, it is to be reviewed “if possible” every six months “by a competent body” set up by the Occupying Power.

Confinement remains lawful only if the procedural rights to be found in Art. 43 GC IV are granted to the persons detained. Since GC IV leaves a great deal to the discretion of the party in the matter of the initiation of such measures, the ICTY stated:

The Appeals Chamber recalls that Article 43 of Geneva Convention IV provides that the decision to take measures of detention against civilians must be ‘reconsidered as soon as possible by an appropriate

court or administrative board.’ Read in this light, the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk must be the minimum time necessary to make enquiries to determine whether a view that they pose a security risk has any objective foundation such that it would found a ‘definite suspicion’ of the nature referred to in Article 5 of Geneva Convention IV.⁵

The Trial Chamber added that the judicial or administrative body must bear in mind that such measures of detention should only be taken if absolutely necessary for security reasons. If this was initially not the case, the body would be bound to vacate them. The Tribunal concluded in *Delalic* that:

The fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires.⁶

This position was confirmed by the Appeals Chamber:

“an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GC IV”⁷

The same reasoning essentially also applies to Art. 78 GC IV relative to the confinement of civilians in occupied territory.

As to the court or administrative board and the procedure no further clarification is given in the GC. The ICTY Appeals Chamber however defined the requirements that the court or board must meet under Art. 43 GC IV:

- it must have ‘the necessary power to decide finally on the release of prisoners whose detention could not be considered as justified for any serious reason’;
- as to the onus of justifying detention of civilians, it ‘is upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view’⁸

There is also no indication in GC IV that persons held in detention are entitled to a *lawyer* to help them contest the lawfulness/need for continued detention. The only *independent* body provided for is that of a Protecting Power but such Powers are usually not appointed. In practice it is essentially the ICRC which intervenes.

Like in the case of POWs, the fact of internment is to be communicated, as soon as possible, to the Protecting Powers, the national Information Bureau, the Central Tracing Agency and the Power on which the persons depend or in whose territory they resided.

There is some supervision via international criminal law: unlawful confinement is a grave breach under GC IV, subject to universal jurisdiction.

⁵ ICTY, Appeals Chamber, Judgment, *The Prosecutor v. Zejnil Delalic and Others*, IT-96-21-A, para. 328.

⁶ ICTY, Judgment, *The Prosecutor v. Zejnil Delalic and Others*, IT-96-21-T, para. 581.

⁷ *Ibid.*, para. 583. This view was confirmed by the ICTY, Appeals Chamber, Judgment, *The Prosecutor v. Zejnil Delalic and Others*, IT-96-21-A, para. 322.

⁸ ICTY, Appeals Chamber, Judgment, *The Prosecutor v. Zejnil Delalic and Others*, IT-96-21-A, paras 328, 329.

NON-INTERNATIONAL ARMED CONFLICTS

International humanitarian law applicable to non-international armed conflicts contains no provisions requiring certain grounds for detention/internment nor are there any procedures defined to check the need for such detention (there are only some rules on the treatment of persons detained, including the right to receive and send letters and rules to ensure a fair trial).

There are no specific supervisory mechanisms provided for non-international armed conflicts except that the ICRC is allowed to offer its services. Therefore, only national law is relevant, as well as international human rights law. The need to clarify the exact interplay between IHL and national law, as well as international human rights law is one of the most pressing issues.

2. Discussion: Adequacy of international humanitarian law

a) Shortcomings of review procedures provided by the Geneva Conventions

i. Prisoners of War

The experts observed that during an armed conflict all persons who are captured on the battlefield are assumed to have POW status unless their status is to be determined in accordance with a tribunal set up in accordance with Article 5 Geneva Convention III. This Article provides that:

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.

It was pointed out by some experts that Article 5 only requires a tribunal to be set up. The Article does not specify that the tribunal needs to be an independent impartial judicial body and therefore it may be an extension of the executive or military power; further it does not state that a lawyer is required to be present. Some experts observed that as the decision to set up an Article 5 review remains at the discretion of the captors, the individual would appear to be barred from an Article 5 review if the State claims that there is no doubt as to the initial determination of status. It was remarked therefore that Article 5 procedures can be unfair and may leave individuals indefinitely confined. The fact that no lawyer need be present was seen as further compounding the lack of satisfactory procedural guarantees.

Some experts stated that it has always been assumed that individuals would want to be POWs owing to the favourable conditions provided for them. However several experts indicated that there have been examples where individuals did not want to be considered as POWs, such as the confinement of all Iraqi reservists in the UK during the 1991-2 Gulf war¹ and the case of several thousand captured in Iraq during the 2003 conflict.² In the latter case at least one of these groups had contracted an arrangement with the authorities as to their particular status, although another expert observed that such an arrangement is illegal under the Geneva Conventions as it is not permitted for individuals to contract away their rights. (Articles 7 GC III, Article 8 GC IV).

The experts also observed that IHL provides no procedures for POWs to contest their continued detention after the end of hostilities or when they are otherwise entitled to repatriation because of serious illness or wounds.

ii. Civilians

It was highlighted that under Article 43 GCIV, a civilian alien who is in the territory of a party to a conflict may have his internment “reconsidered as soon as possible” by a “court or administrative board”. Article 43 requires that a review be carried out every six months of the internment. It was also mentioned that Article 78 in relation to occupied territories provides

¹ See F. Hampson, “The Geneva Conventions and the Detention of Civilians and alleged Prisoners of War” Public Law, Winter 1991, p. 507, at pp. 514-516.

² The problem arose throughout 2003-4 until the US accepted that they were civilians protected by the GCIV, which happened in July 2004.

that the initial decision to intern is subject to “appeal...with the least possible delay” but does not stipulate the type of body to carry out the process. Article 78 provides that a periodic review of status should be carried out every six months by a “competent body”.

The experts noted that Articles 43 and 78 left unclear the precise nature of the bodies to carry out the reviews. In particular, no specification is made that such bodies are to be independent and impartial. The six month period between reviews under both Articles was said to be inadequate by most. The fact that there is no mention of a need for a lawyer under each article was also a major flaw.

Most experts noted with concern the suspension of rights of communication for spies and saboteurs under Article 5 GC IV. Although the lack of POW status for spies was introduced in the past to dissuade an activity that is dangerous for the adversary, an expert pointed out that today spies help ensure the correct application of the principle of distinction by their intelligence-gathering on military objectives. An expert noted that the situation of saboteurs under Article 5 GC IV has been modified by Article 45(3) of Additional Protocol I. The legal situation of spies, however, remains that of Article 5 GCIV and most experts were of the view that the possibility of keeping spies in the very dangerous condition of indefinite *incommunicado* detention is unjustified.

iii. Protecting Powers

The Geneva Conventions provide that their provisions are to be applied under the scrutiny of a Protecting Power (a non-belligerent State to ensure the correct application of the Conventions). However, almost without exception, Protecting Powers have not been nominated in the conflicts of the last few decades. It was noted by an expert that on the rare occasion that a Protecting Power was nominated, it was merely in order to protect commercial interests, as in the case of the Argentine - UK war in 1982. It was felt, therefore, that the supervision of a Protecting Power cannot be seriously relied upon given this history.

b) Situations where IHL does not provide any review procedures or where it is unclear.

i. Non-international armed conflict

The experts noted that there are no provisions requiring certain reasons for detention, nor any procedures to prevent unnecessary detention. It was further observed that there are no specific supervisory mechanisms other than the minimal requirement that the ICRC be allowed to offer its services. It was stated, therefore, that only national law is relevant, as well as international human rights law.

ii. Internationalised non-international armed conflict

The experts observed that during internationalised non-international armed conflict, where the foreign power is assisting on the side of the government, the legal situation is no better than for non-international conflicts.

iii. Peace support operations

It was observed that there is no reference in the Conventions to peace support operations and their particular duties and obligations. The experts noted that peace keeping operations such as those in Kosovo are marked by some uncertainty. Although the situation is covered by the ICCPR, the HRC does not have formal jurisdiction over the United Nations as such, although it does over individual member States.³ As regards the mandate of the United Nations presence in Kosovo, Security Council resolution 1244 states that the civilian operations are to protect and promote human rights but does not provide for the security operation to be bound by human rights.

iv. Transition period between invasion and occupation

The experts recognised that there are significant problems surrounding the transition from the status of being an invading force to being an occupying force. In such situations it may be uncertain what the status of the foreign power is and therefore the law that is applicable is unclear. It was observed, for example, that the vast majority of States did not consider Bagram airbase to be occupied territory.

It was noted although an invading force must protect civilians according to Geneva Convention IV Articles 27 to 34 and Article 75 of Protocol I (which reflects customary international law), these Articles do not provide for the supervision of the lawfulness of detention.

v. Transfer to the authorities of another State

The experts stated that despite Article 12 GCIII and Article 45 GCIV, which only allow transfer of POWs and “enemy aliens” to another State when the transferor has satisfied itself that the receiving State will respect the Conventions, the receiving State might not provide effective guarantees against arbitrary detention, and may not respect human rights.

vi. So-called “unlawful combatants”

The experts observed that the position of Pictet in the commentary to the Geneva Conventions, that whoever is not a POW is covered automatically by the Fourth Geneva Convention, providing that they fulfill the nationality criteria in Article 4 of the Convention, will probably never be accepted by the United States. It was feared that the US use of the term

³ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). Para 10; see also, Concluding Observations of the Human Rights Committee, Serbia and Montenegro, U.N. Doc. CCPR/CO/81/SEMO (2004). “*The Committee considers that the Covenant continues to remain applicable in Kosovo. It welcomes the offer made by the State party to facilitate the consideration of the situation of human rights in Kosovo and encourages UNMIK, in cooperation with the Provisional Institutions of Self-Government (PISG), to provide, without prejudice to the legal status of Kosovo, a report on the situation of human rights in Kosovo since June 1999.*” ; see also R. Kolb, G. Porretto, S. Vité, *L’application du droit international humanitaire et des droits de l’homme aux organisations internationales : Forces de paix et administrations civiles transitoires*, Brussels, Bruylant (2005 forthcoming) Chapter 5, section 2.4.

“unlawful combatants” in the context of the armed conflict with Afghanistan may have had the effect of creating a whole new category of protagonist that does not exist under IHL.

c) Additional Issues

i. Registration and notification

An expert observed that the US had not provided the UN with lists of the people who were detained in Iraq; as a result the number and location of detained people was not known. It was noted that during international armed conflict Article 122 of GCIII and Articles 136-137 GCIV only require the Information Bureau of a detaining State to receive information on prisoners of war and civilian internees and that this information must then be transmitted to the belligerent States concerned and to the Central Tracing Agency. Therefore the notification and registration of detained persons during international armed conflicts is limited to the States which are detaining, the States on which the captives depend, and the Central Tracing Agency of the ICRC, but this does not include the UN nor human rights bodies.

In the case of non-international armed conflict, experts pointed out that Common Article 3 of the Geneva Conventions and Protocol II contain no provision requiring registration. One expert suggested that the guarantees individuals receive under Protocol II, in particular the right to send and receive letters, may mean they have to be placed on a register. However there is no clear articulation of such a requirement. Further concern was expressed about the fact that there is no requirement under IHL to notify any outside authority of persons detained in non-international armed conflicts.

ii. Criminality during occupations

The experts raised the issue of ordinary criminals during times of conflict. They observed that banditry may be considered as threatening the security of an occupying State in occupied territory and therefore such criminal elements may legitimately be interned. However ordinary crimes, such as random acts of domestic violence or non-organised larceny, may not be controlled appropriately in this manner. However the experts noted that often domestic legal systems may have collapsed so there may be no appropriate mechanisms available to deal with such sporadic criminal incidents.

C. Some practical obstacles to the right to contest the lawfulness of detention in armed conflict and the ICRC approach to the question of unlawful detention

1. Notes on a presentation by Sarah Noetzi

1. Introduction

The ICRC was asked to address the extent to which, in practice, persons detained in the context of armed conflict find themselves unable to contest the lawfulness of their detention (where international law provides such a right) and the extent to which the ICRC can protect persons against unlawful detention.

In answer to this, the presentation will examine from a practical viewpoint some of the obstacles to the respect of procedural guarantees including the right to have the lawfulness of one's detention reviewed, in armed conflict (I am replacing "judicial guarantees" and "legal process" with "procedural guarantees" throughout this presentation as the process involved in review of lawfulness of detention does not always have to be judicial in nature. Also, "judicial guarantees" refers to procedural rights of persons charged with crimes and therefore does not cover persons interned or administratively detained). The presentation will also give an overview of the ICRC's approach to issues dealing with procedural guarantees, including the review of lawfulness of detention. Specific legal issues will not be addressed as they are the subject of further discussions during the meeting. The presentation of this practical point of view is intended to root these discussions in the reality faced by persons deprived of liberty in the context of armed conflict today.

Note that the principle of confidentiality is key to the ICRC's ability to gain access to places of detention and to the quality and sustainability of its dialogue with detaining authorities. For this reason, the presentation will be limited to general themes and will not refer to specific examples drawn from particular contexts.

2. Some obstacles to the right to contest the lawfulness of detention in armed conflict

In practice, persons deprived of liberty in the context of armed conflict, whether international or internal, may face tremendous obstacles to their right to contest the lawfulness of their detention (and their right to other procedural guarantees):

- Detainees are often not aware of their rights. Reasons for this lack of awareness may be related to other points listed below.
- Domestic laws in situations of armed conflict often do not exist to give the person the right to contest lawfulness of detention or to define the procedure for such contest.
- Even if domestic laws provide for the right and elucidate the procedure to be followed, armed conflict ruptures the social and institutional fabric of a society. As systems break down, the training and education of legal professionals suffer, contributing to the loss of knowledge of the law. The very buildings and legal texts that provide the physical foundation of a functioning justice system may be destroyed. Corruption rises, and the financial and other resources necessary for the proper administration of justice become scarce.

- Legal professionals may find themselves under threat and therefore unwilling or unable to properly execute the duties of their profession. There may also be a lack of legal professionals due to the conflict.
- Filling the void of ruptured legal and institutional systems, authorities may resort to other dispute resolution mechanisms (cultural, traditional, religious) that are not necessarily compatible with the international legal standards and therefore do not safeguard the right to the review of lawfulness of detention.
- Security constraints may limit the ability to travel between places of detention and courts or other institutions.
- Detaining authorities (whether ruling party or opposition) may not be motivated to evaluate the lawfulness of the detention of their "enemies".
- Authorities may prefer to intern or administratively detain persons thought to be a security threat without appropriate review procedures.
- International law is weaker in cases of internment in non-international armed conflict than international armed conflict when it comes to procedural safeguards.

As a result of these elements, either individually or in combination, detainees are often unable to contest the lawfulness of their detention in armed conflict.

3. ICRC's approach to addressing the question of unlawful detention

Given such a situation, to what extent can the ICRC protect persons against unlawful detention?

- The ICRC reminds authorities of their obligations under applicable international law at the start of the conflict.
- The ICRC visits persons deprived of liberty in the context of armed conflict:
 - The purpose of ICRC detention visits is to promote the humane treatment of all persons deprived of liberty in situations of armed conflict or other situations of violence falling below the level of armed conflict. The ICRC does this by regularly visiting places of detention, having access to the entire premises of the place, and speaking privately with detainees in order to evaluate their conditions of detention and their treatment. The ICRC does not focus on the reasons behind a person's detention, but rather focuses on conditions and treatment, including the respect of procedural guarantees. Regular and confidential dialogue is established with the concerned authorities during which the ICRC makes concrete recommendations to address the problems the ICRC identifies in the course of its visits. Where necessary and appropriate, the ICRC may also provide detaining authorities with material or other support in order to assist them in meeting their responsibilities (e.g., provision of basic items for detainees or training of detaining authorities on minimum conditions of detention and humane treatment of detainees).
 - The extent to which procedural guarantees are respected form a part of the ICRC's assessment of conditions of detention and treatment of detainees. The evaluation of the respect of procedural guarantees is done not only through visiting detainees but also through an analysis of the state of the legal system, including an evaluation of the obstacles to the proper administration of justice, in the given context.

- Disrespect of procedural guarantees is not only a problem *per se*, but also a problem that has further effects on other conditions and treatment. For example, disrespect of procedural guarantees often contributes to overcrowding, which in turn can cause poor hygiene, putting the health of detainees at risk.
- As such, in addition to requesting the respect of procedural guarantees as a matter of law, the ICRC uses the legal obligation to respect these guarantees as a way to urge authorities to address related problems in places of detention. For example, in calling for the respect of the right to trial within reasonable time (for persons charged with crimes) and the right to challenge lawfulness of detention the ICRC also hopes to contribute to alleviating overcrowding and the problems associated with it. Similarly, respect of the right not to be compelled to testify against oneself or to confess guilt may contribute to addressing problems of ill-treatment.
- Depending on the evaluation of problems made at the time of the detention visit, issues are raised with responsible authorities regarding procedural guarantees, often including the control of lawfulness of detention. Overall, the ICRC aims to make practical, context-specific recommendations that take into account the obstacles highlighted above. These recommendations are made based primarily on the legal requirements under IHL. Where IHL does not apply or is silent, the ICRC may rely on customary international law and human rights law. The ICRC may also refer to applicable domestic laws. In addition to legal arguments, the ICRC also uses purely humanitarian ones, particularly in cases where the law is weak.
- Other ways in which the ICRC addresses the issue of respect of procedural guarantees include: participation in seminars on penal reform, cooperation with other organisations engaged in institutional capacity building, commentary on the development of law and policy (for example, making comments on new legislation or policy affecting the rights of detainees).

What the ICRC does *not* do: The ICRC does not provide detainees with its own lawyers or take cases to court or other bodies that review cases of ill-treatment, disrespect of procedural guarantees, or other violations of international or domestic law. The ICRC has a policy of not making public statements about conditions of detention or treatment of detainees except when certain strict criteria are met.

Effectiveness of the ICRC: It is difficult to tell when the ICRC's interventions are the cause of changes or developments in a person's right to contest the lawfulness of his/her detention. Often it is more than the pressure of the ICRC alone that leads to change (pressure from other organisations, media, international pressure). Concretely, the ICRC has been able to push responsible authorities to process cases or review the files of persons who may be unlawfully detained. Remedial action has been taken in some cases, and awareness of the problem of unlawful detention has certainly been raised in contexts where the ICRC has focused on the issue.

4. Opportunities

As disrespect of fundamental procedural guarantees is often the underlying cause of many of the problems related to conditions of detention and the treatment of detainees, the ICRC is increasingly focusing on the issue of unlawful detention and respect for procedural guarantees. This requires training of ICRC delegates in how to identify and address procedural problems and requires careful examination of the laws and legal institutions in the contexts where the ICRC works.

The fact that the question of unlawful detention in armed conflict is now the subject of much public debate will hopefully create a favourable climate in which the ICRC can continue to address this issue in the context of a more global awareness and understanding of the problem.

2. Expert comments on the role of the ICRC

A few experts were of the view that the use of human rights law by the ICRC would seem to depend on the Head of Delegation during a conflict situation; only if he or she deems it appropriate and useful is human rights law referred to.

Some experts were of the view that the confidentiality of the ICRC may be counterproductive in some contexts. In particular they found it difficult to understand why the ICRC appears to strongly discourage the publishing of reports by the States themselves. They referred to the positive effect of the publication in the United States of a leaked ICRC report on conditions in Abu Graib prison in Baghdad and questioned the ICRC's resistance when the Algerian Government wished to publish their report. The experts felt the ICRC's impartiality and confidentiality would not be affected if the State itself wishes to publish a report. Experts from the ICRC replied that the publication of a report by a State could lead to a lack of trust by other States and the ICRC's dialogue with detaining authorities. Furthermore, publication of a single report out of context may yield a wrong or only partial impression of the work and concerns of the ICRC in any given context.

Some experts commented that the ICRC's most influential tools against a State are publicity and exposure and they questioned the extent to which confidentiality should always be paramount in cases where detainees are being tortured and subjected to inhuman treatment. Further an expert stated where dissident bands, which are not party to human rights conventions, are maltreating individuals, there may be an overwhelming duty to publicise owing to the lack of alternative means to remedy the situation.

Experts from the ICRC reiterated the reasons for the institution's reliance on confidentiality as a method of communication with governments. They pointed to the fact that confidentiality in practice allows for access to victims, which is the ICRC's primary concern and that *ad hoc* publication of ICRC reports could eventually complicate or render access impossible, both in countries where ICRC protection activities are being carried out and with respect to countries where access is being negotiated. They also specified that the ICRC has a policy regarding situations in which it will make public statements about violations; it has done so when certain specific conditions are met¹ and they added that representations to Governments are made. They stressed that there are other organisations with a specific mandate to go public, which is not the case with the ICRC, and they highlighted the complementary nature of the various modes of action employed by different organisations.

Some experts also suggested that given that the system of Protecting Powers does not function in practice, the ICRC ought to fully undertake this task. However it was observed the ICRC is not a human rights organisation but a humanitarian one and that human rights work is carried out by other organisations. The participants from the ICRC confirmed that the ICRC has no intention of becoming a human rights organisation but that it may refer to human rights when necessary and when in the interest of the people it is trying to protect and assist. The other experts stated that even when it uses human rights law, the ICRC should not become the principal mechanism for human rights discourse during conflict situations given its particular method of work.

¹ Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law, *International Review of the Red Cross*, March-April, 1981, 8 pp. See also Speaking Out or Remaining Silent in Humanitarian Work, *International Review of the Red Cross*, September 2004.

D. Human rights law relating to arbitrary detention during armed conflict.

1. The Covenant on Civil and Political Rights and its relationship with international humanitarian law: Presentation by Walter Kälin*

Article 9, paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR) guarantees to everyone “the right to liberty and security of person”, prohibits “arbitrary arrest or detention” and states that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Paragraphs 2 – 4 contain procedural guarantees for persons deprived of their liberty making sure that arrests and detention are supervised by courts and violations of these guarantees can be stopped. Paragraph 4, in particular, entitles anyone “deprived of his liberty by arrest or detention [...] to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

The case of Guantanamo, allegations of secret places of detention used by some states within the framework of the “war against terrorism”, and the practice of prolonged administrative detention in countries involved in armed conflict show the relevance of supervision of detention during armed conflict and the importance of Article 9 during such situations. This background paper explores first whether Article 9 is applicable in times of armed conflict and to what extent it can be derogated from. It then looks at the relationship between human rights law, including Article 9 and international humanitarian law (IHL), and ends with an examination of the important issue of extraterritorial application of the Covenant.

This examination can be only rather tentative as the Human Rights Committee has not yet had the occasion to explore in depth the meaning of Article 9 ICCPR for administrative and similar detention during armed conflict and its relation to international humanitarian law. While the Committee had to decide on individual communications from countries with internal armed conflicts, the applicability of IHL and its consequences on the Covenant was never an issue.

1. Temporal/Situational Scope of Application and the Issue of Derogation

1.1 APPLICABILITY OF HUMAN RIGHTS LAW IN TIMES OF ARMED CONFLICT

According to a traditional concept, human rights are part of the Law of Peace and IHL of the Law of War. In this view, human rights law including the guarantees of Article 9 ICCPR cease to apply as soon as an international armed conflict triggering the application of IHL starts.¹ Although this view is still defended by some States today², it cannot be based on the Covenant. Article 2 ICCPR obliges States to respect the rights recognized in the Covenant unequivocally without any reference to temporal or situational limitations. Article 4 on derogation sets out in plain terms that in time of public emergency threatening the life of the nation, States Parties “may” take derogation measures, implying that the Covenant continues

* This paper expresses the personal views of the author.

¹ E.g. H. Meyrowitz; *Le droit de la guerre et les droits de l'homme*, in: *Revue du droit public et de la science politique en France et à l'étranger* 1972, p. 1095. Jean Pictet, *Le droit humanitaire et la protection des victimes de la guerre*, Leiden 1973, p. 13.

² This was, e.g. the position taken by the Israeli delegation vis-à-vis the Human Rights Committee during the dialogue on Israel's state report in July 2003.

to fully apply if States do not take such measures. Furthermore, some rights, in particular³ those listed in Article 4, paragraph 2, are non-derogable even in times of public emergency including war.

For these reasons, the Human Rights Committee, in its recent General Comment on Article 2, stressed that “the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable”.⁴ Before the adoption of this General Comment in 2004, the Committee, in its Concluding Observations on Israel had expressed its view “that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including Article 4 which covers situations of public emergency which threaten the life of the nation”.⁵

The International Court of Justice (ICJ) has confirmed the Committee’s opinion on two occasions: In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stressed that “the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.⁶ This was confirmed in its Advisory Opinion of 9 July 2004 on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁷

Thus, regarding the situational applicability of human rights law and in international humanitarian law, the following situations can be distinguished:

- *International armed conflict* including situations of occupation: full applicability of relevant provisions of IHL and of the Covenant with the exception of guarantees derogated from, provided such derogations have been declared by the State Party concerned in accordance with Article 4 ICCPR.
- *Internal armed conflict*: full applicability of relevant provisions of IHL and of the Covenant with the exception of guarantees derogated from, provided such derogations have been declared by the State Party concerned in accordance with Article 4 ICCPR.
- *Post-conflict situations after the end of hostilities and/or occupation*: full applicability of the Covenant after IHL has ceased to apply. In exceptional cases, certain Covenant rights may be derogated from in accordance with Article 4 ICCPR.
- *Situations of tensions and disturbances* below the threshold of applicability of the norms regulating internal armed conflict: full applicability of the Covenant. In exceptional cases, certain Covenant rights may be derogated from in accordance with Article 4 ICCPR.

1.2 DEROGATION OF HUMAN RIGHTS GUARANTEES DURING TIMES OF EMERGENCY

In order to have free hands to fight terrorism during wartime, States sometimes resort to measures that derogate from Article 9 ICCPR. To what extent and under which conditions is this possible?

³ For other rights, see below at 1.2.

⁴ General Comment No 32(80) on Article 2 (2004), para. 10.

⁵ Concluding observations on Israel’s second periodic report, CCPR/CO/78/ISR, 21 August 2003, para. 11, referring to paragraph 10 of its concluding observations on Israel’s initial report (CCPR/C/79/Add.93 of 18 August 1998).

⁶ I.C.J. Reports 1996(I), p. 239, para. 24.

⁷ I.C.J. Reports 2004, p. **, para. 105.

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,” States Parties may, according to Article 4 para. 1 ICCPR, take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”. Even in such cases, derogations from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 of the Covenant are never permitted (Article 4, paragraph 2). A State party applying this provision must “immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated” (para. 3).

The text of Article 4 makes clear that derogation does not automatically occur when an armed conflict breaks out. In fact, a series of conditions must be in place before a State party to the Covenant can derogate from its human rights obligations in such situations:

- (1) The armed conflict must “threaten the life of the nation”. As stated by the Human Rights Committee, the “Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.” According to the Siracusa Principles, such a threat “is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant”.⁸ These elements are usually absent if a State is conducting military operations in foreign lands, be it as an aggressor and occupier or as a participant in a peace-enforcing or peace-keeping mission. They may also lack in the case of a relatively big country faced with foreign aggression or an internal armed conflict if the State is easily controlling the situation because fighting is limited to a relatively small part of the territory and the armed forces of the State concerned are militarily dominating the aggressor or the insurgents.
- (2) The state of emergency justifying the derogation must be “officially proclaimed”. This “requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed”.⁹
- (3) The derogation must be necessary to control the situation, i.e. the State concerned could not control the situation or safeguard and protect legitimate interests without disregarding relevant human rights guarantees. In other words: The derogation must constitute an effective instrument to achieve a legitimate goal.
- (4) The requirement that measures of derogation must be “limited to the extent strictly required by the exigencies of the situation”, “requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation”.¹⁰ Accordingly, only those guarantees can be derogated from only as far as they are an impediment to achieve the legitimate goal to end the threat to the life of the nation, and they have to be restricted to the time

⁸ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, reprinted in Human Rights Quarterly, pp. 3.

⁹ Human Rights Committee, General Comment No. 29(72) on Article 4 (2001), para. 2.

¹⁰ Id., para. 5.

and location of such threat.¹¹ Derogations must also be limited to those parts of the country where the problem exists if the threat does not affect the whole territory.

- (5) Derogation measures must be consistent with the States Parties' "other obligations under international law". This very important and often underestimated requirement should be interpreted as prohibiting States to derogate – for persons protected by relevant IHL guarantees - from human rights that have their equivalent in international human rights guarantees¹². This means in practical terms that particularly States bound by the human rights catalogues of Article 75 of the first and Articles 4 – 6 of the second Additional Protocol to the Geneva Conventions are severely restricted in their possibilities to adopt derogation measures. The same is true for human rights guarantees whose violation would amount to a war crime or a crime against humanity¹³. E.g., Art. 12 Covenant cannot be derogated from as to allow acts that would constitute "deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present".¹⁴
- (6) It is prohibited to derogate from the non-derogable guarantees listed in Article 4, paragraph 2 Covenant, i.e. from the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation, the prohibition of retroactive criminal law, the right of everyone to recognition everywhere as a person before the law, and the freedom of thought, conscience and religion. As the Human Rights Committee has correctly pointed out, this list is not exhaustive, either as a consequence of other obligations of States under international law or because of their intrinsic relationship of some rights not mentioned in the list with non-derogable rights¹⁵. Besides the prohibition of deportation mentioned above, the "taking of hostages, abductions or unacknowledged detention" as especially serious violations of Article 9 Covenant, or racial and political persecution as core violations of Articles 19 and 26 would be covered by the first category, and the obligation to treat persons deprived of their liberty with humanity¹⁶ or the fair trial guarantees of Article 14 in the case of trials leading to the imposition of the death penalty¹⁷ by the second.
- (7) Finally, derogations measures must not be discriminatory, and (8) they must be communicated to the UN Secretary General. Failure to do so, however, does not affect their validity if they are otherwise in conformity with the requirements.¹⁸

1.3 CONCLUSIONS REGARDING ARTICLE 9 ICCPR

All these requirements demonstrate that even in times of armed conflict derogation measures can be taken only exceptionally, reinforcing the above conclusion that, in principle, Article 9 ICCPR continues to be applicable in such situations. Regarding measures derogating from this provision, two conclusions can be drawn:

¹¹ Id., para. 4.

¹² See id., para. 16 regarding fair trial guarantees.

¹³ Id., para. 12.

¹⁴ Id., para. 13 (d), referring to Id. article 7 (1) (d) and 7 (2) (d) of the Rome Statute.

¹⁵ See id., paras. 13 - 15.

¹⁶ Id., para. 13 (a), referring to the close connection between articles 7 and 10.

¹⁷ Id., para. 15. The non-derogable Art. 6, paragraph 2 protects against the imposition of the death penalty in a way that is "contrary to the provisions of the present Covenant" including the fair trial guarantees of Article 14.

¹⁸ See id., para. 17.

1. While there is no full-fledged prohibition to derogate from Article 9 Covenant, disappearances and similar acts of unacknowledged detention can never be tolerated, as acts of disappearance are not only violations of Article 9 but also of the non-derogable Articles 6 and 7 and may even amount to crimes against humanity. Therefore, they “are not subject to derogation”.¹⁹
2. In order to protect non-derogable rights that may be violated during arbitrary detention, “the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant”.²⁰ In this sense the Committee expressed recently its concern

“about the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclose of full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under Article 7 and derogating from Article 9 more extensively than what in the Committee's view is permissible pursuant to Article 4. In this regard, the Committee refers to its earlier concluding observations on Israel and to its general comment No. 29.”²¹

It was also concerned “that the use of prolonged detention without any access to a lawyer or other persons of the outside world violates Articles the Covenant (Arts. 7, 9, 10 and 14, para. 3 (b))”.²²

The position taken by the Committee regarding the non-derogable character of Article 9 para. 4 ICCPR may be open to criticism. The list of non-derogable human rights in Article 4 ICCPR entails (at least primarily) obligations to respect, i.e. to abstain from actively violating a specific guarantee. To refrain from doing something is always possible, even in times of emergency. In contrast, judicial supervision of detention necessarily requires the existence and functioning of courts, and one can imagine situations where an armed conflict causes the total collapse of the judiciary. However, situations of factual impossibility to fulfill a legal obligation must be distinguished from cases where a state “cannot afford” to respect certain human rights as their exercise would either further exacerbate the threat or considerably increase the difficulties to contain it. While “*force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation” belongs to the circumstances precluding wrongfulness of an illegal act²³,

¹⁹ Human Rights Committee, General Comment No. 29(72) on Article 4: Derogations during a state of emergency (2001), para. 13 (b).

²⁰ Id., para. 16. In its concluding observations on Israel (1998) (CCPR/C/79/Add.93), paragraph 21, the Committee considered the “application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency The Committee stresses [...] that a State party may not depart from the requirement of effective judicial review of detention.” In its recommendation to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant the Committee stated: “The Committee is satisfied that States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole” (*Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40)*, vol. I, annex XI, paragraph 2).

²¹ Concluding observations on Israel’s second periodic report, CCPR/CO/78/ISR, 21 August 2003, para. 12.

²² Concluding observations on Israel’s second periodic report, CCPR/CO/78/ISR, 21 August 2003, para. 13.

²³ See Article 23, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), UN Doc A/56/10.

may also exist in situations where the Article 9 para. 4 obligation of judicial supervision of detention would apply, the Committee seems to doubt if the exclusion of judicial review of the deprivation of liberty and of access to counsel – at least for prolonged periods of time - can really be necessary in times of emergency.

2. Material Scope of Application: The Relationship between IHL and Human Rights Law

2.1 THE RELATIONSHIP IN GENERAL

If, during armed conflict, Article 9 ICCPR can be derogated from only in exceptional circumstances and even then only in part, the question arises as to whether and how it relates to provisions of international humanitarian law addressing the issue of deprivation of liberty during armed conflict.

More generally: What is the relationship between the Covenant rights and applicable IHL guarantees in situations where, in principle, both bodies of law are applicable? The Human Rights Committee, in its recent General Comment on Article 2, stated in this regard:

While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”²⁴

This statement follows the I.C.J.’s approach to this issue. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court affirmed with regard to the right to life:

“In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”²⁵

The I.C.J. in its Advisory Opinion of 9 July 2004 on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* stated:

“More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”²⁶

While the first statement is ambivalent in its wording as to the consequences of classifying IHL as *lex specialis*, both opinions make clear that IHL does not derogate human rights law

²⁴ General Comment No 32(80) on Article 2 (2004), para. 11.

²⁵ I.C.J. Reports 1996(I), p. 240, para. 25

²⁶ I.C.J. Reports 2004, , para. 106.

but determines, in situations of armed conflict, the specific meaning of the notion “arbitrary” deprivation of life in Article 6 ICCPR.

The Committee has not developed a full theory regarding the relationship between IHL and human rights law. Nevertheless, this relationship may be systematized in the following way:

- (1) Often, IHL is *lex specialis* in the sense described above in relationship to particular the human rights guarantees. This means that in situations of armed conflict:
 - IHL determines what is “arbitrary” in terms of Covenant rights protecting against arbitrary deprivations of a specific right²⁷. Thus, e.g., deprivations of life permissible under applicable IHL do not violate the right to life of the Covenant;
 - The permissible restrictions of those freedoms of the Covenant that have limitation clauses²⁸ is determined by IHL. Thus, e.g., limitations to Article 12 ICCPR on the liberty of movement may be imposed, in accordance with paragraph 3 of this provision, if, e.g., an Occupying Power is permitted, in accordance with Article 49, paragraph 2 Fourth Geneva Convention, to “undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand”²⁹.
- (2) Sometimes human rights law may *complement* IHL where this body of law does not address an issue or uses open and undefined notions that can be given more concrete meaning in the light of relevant human rights guarantees. Thus, e.g., the prohibition of common Article 3(1)(c) to pass sentences and to carry out “executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples” needs to be interpreted in the light of the core guarantees of Article 14 ICCPR on fair trial. The same is true for the notion of the “essential guarantees of independence and impartiality as generally recognized” that courts trying prisoners of war should offer (Article 84, paragraph 2 Third Geneva Convention).
- (3) Finally, there are situations where the general principle that human rights treaties must not be interpreted as impairing the right of individuals guaranteed to them by other applicable treaties³⁰ requires the *cumulative* application of both bodies of law. Due to the non-derogable nature of the right to life, States Parties to the ICCPR must, e.g., respect all the safeguards of Art. 6 para. 2 of the Covenant when imposing the death penalty on prisoners of war under all circumstances. At the same time, they are under an obligation to respect the six-month waiting period between judgment and execution as provided for in Article 101 Third Geneva Convention, although the Covenant does not have such a requirement.

2.2 CONCLUSIONS REGARDING ARTICLE 9 ICCPR

As regards Article 9 ICCPR, the following observations can be made:

²⁷ Besides Article 6 CCPR, see articles 9 and 17.

²⁸ See Articles 12, 18, 19, 21 and 22 Covenant.

²⁹ Similarly, Article 17 Additional Protocol II.

³⁰ See, e.g., Article 53 ECHR.

1. Detention is not arbitrary if it is permitted by IHL which, as *lex specialis* as defined above, determines which grounds for deprivation of liberty are lawful in times of armed conflict.³¹
2. Detention becomes arbitrary if it is “indefinite and prolonged” and continues “beyond the period for which the State can provide appropriate justification”³².
3. The right to *habeas corpus*, i.e. the right to “take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” must be “real and not merely formal”, i.e. effective. This means that, “court review of the lawfulness of detention under Article 9, paragraph 4 [...] must include the possibility of ordering release, [and] is not limited to mere compliance of the detention with domestic law.”³³ In this regard, the Committee told Columbia that legislation allowing the security forces to carry out arrests without judicial order or to detain them in administrative detention without access to a court would violate Articles 9, 14 and 17³⁴. Sri Lanka was criticized that “the Prevention of Terrorism Act (PTA) remains in force and that several of its provisions are incompatible with the Covenant (Arts. 4, 9 and 14)” including provisions allowing “arrest without a warrant and permit[ing] detention for an initial period of 72 hours without the person being produced before the court [...], and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence”.³⁵
4. The right to have the lawfulness of one’s detention reviewed by a court may entail the right to have access to a lawyer if otherwise this right cannot be exercised effectively.

Regarding deprivation of liberty during armed conflict, many other questions remain to be clarified. While strong arguments can be made that the right to periodic review of detention does not apply to prisoners of war during hostilities, it would seem possible and required to interpret a provision such as Article 75, paragraph 3 Additional Protocol I³⁶ on the guarantees for persons detained for acts in relation to the armed conflict in the light of Article 9 of the Covenant and to apply both provisions cumulatively.

3. Territorial Scope of Application: The Issue of Extraterritoriality

3.1 THE PROBLEM

The main obstacle to the application of Article 9 ICCPR in international armed conflict today is the unwillingness of some States to accept that the Covenant is applicable outside one’s own borders. In fact, according to Article 2, paragraph 1 ICCPR, each State Party has “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”

³¹ For the analogous reasoning of the I.C.J. in the case of the right to life, see *supra* text accompanying footnote 25.

³² Human Rights Committee, *A v Australia*, communication 560/93, views adopted 3 April 1997, para.7.1

³³ *Id.*, para. 9.5.

³⁴ Concluding observations on Columbia’s fifth periodic report, CCPR/CO/80/COL, 25 March 2004, para. 9.

³⁵ Concluding observations on Sri Lanka’s combined fourth and fifth periodic reports, CCPR/CO/79/LKA, 1 December 2003, para. 13.

³⁶ Article 75, paragraph 3 Additional Protocol I, “...Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist...”

The question arises as to whether “within its territory” means that States are not bound when their authorities and agents act outside their own borders. Several States would answer the question affirmatively by referring to the plain language of the Covenant. In the context of international armed conflict, this would mean that States could not be held accountable for human rights violations committed by their troops abroad whether in the course of a military attack on the territory of another State or an occupation of foreign lands, or during peace-keeping missions on behalf of with the authorization of the United Nations.

The Human Rights Committee does not share this view. In its General Comment on Article 2, the Committee stressed that the obligation to respect and ensure the rights of individuals “also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation”.³⁷ In line with this, it stressed the extraterritorial applicability of the Covenant to military and peace-keeping operations abroad in several recent Concluding Observations.³⁸ Outside the military context, it held as far back as 1981 that a State party can “be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State”, when it decided that Uruguay was responsible for violations of the Covenant committed by its security agents who kidnapped and abducted, in Argentina and Brazil, Uruguayan citizens who opposed the military regime.³⁹ Similarly, the Committee held that the confiscation of a passport in the embassy of a State Party could be scrutinized under Article 12 Covenant despite the fact that the act was carried out abroad.⁴⁰

This practice has a sound legal basis despite the seemingly clear wording of Article 2 ICCPR. The text is ambiguous as the words “individuals within its territory and subject to its jurisdiction” can not only be read as cumulative conditions but also as alternatives, if one understands the “and” as an “and/or”. The purpose of the Covenant to protect “the inherent dignity and of the equal and inalienable rights of all members of the human family”⁴¹ and thus to protect human rights universally for everyone regardless of origin, the long-standing and coherent practice of the Committee as well as the unanimous acceptance of the international community of the extraterritorial applicability of the Covenant in the case of Iraqi occupied Kuwait⁴² clearly speak in favor of a reading that includes in Article 2 of the Covenant (first) persons in the territory and under the jurisdiction of the State party concerned, as well as (second) persons not on its territory but under its jurisdiction. This interpretation is confirmed by the drafting history of this provision: The two elements were introduced to make sure that a State would not be responsible for violations of the rights of one of its citizens inflicted

³⁷ General Comment No 32(80) on Article 2 (2004), para. 10.

³⁸ See Concluding observations on Israel’s second periodic report, CCPR/CO/78/ISR, 21 August 2003, para. 11; Concluding observations on Germany’s fifth periodic report, CCPR/CO/80/GER, 30 April 2003, para. 11.

³⁹ Human Rights Committee, *López Burgos v. Uruguay*; communication No. 52/79, para. 12.3; and *Lilian Celiberti de Casariego v. Uruguay*, communication No. 56/79, both views adopted 29 July 1981.

⁴⁰ Human Rights Committee, *Montero v. Uruguay*; communication No. 106/81, view adopted 31 July 1983.

⁴¹ First preambular paragraph of the ICCPR.

⁴² In the case of Kuwait, the General Assembly (Resolutions 45/170, 18 December 1990 and 46/135, 17 December 1991) and the Commission on Human Rights (Resolutions 1991/67, 6 March 1991 and 1992/60, 3 March 1992) explicitly affirmed that Iraq was bound by the Covenant in Kuwait although Kuwait did not belong to “its territory.”

abroad by another State⁴³, and nothing in the *travaux préparatoires* indicates that the extraterritorial applicability of the Covenant should be excluded.

These were the arguments that led the International Court of Justice to conclude that “that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”⁴⁴ and, thus, to confirm the Committee’s view.

3.2 CONCLUSIONS REGARDING ARTICLE 9 ICCPR

To arrest and detain someone by agents of state or by private persons and organizations entrusted with the task of arresting and detaining persons constitutes doubtlessly an exercise of jurisdiction. For the reasons just outlined, Article 9 ICCPR, to the extent that it cannot and has not been derogated from, is binding upon States parties to the Covenant not only on their own territory but also when exercising such jurisdiction abroad.

⁴³ Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 7, para. 109, referring to the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955).

⁴⁴ *Id.*, para. 111. For the reasoning of the Court see paras. 109 and 110.

2. Discussion: Adequacy of human rights law to protect against arbitrary detention during armed conflict

i. Habeas Corpus

The experts noted that the HRC has confirmed that the right to *habeas corpus* "applies to all persons deprived of their liberty by arrest or detention".¹ Further, General Comment 29 of the HRC states that, "[in] order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."²

The Inter-American Court has clearly stated that during emergency situations *habeas corpus* may not be suspended.³ It was further observed that the recently articulated Arab Charter stipulates that *habeas corpus* is non-derogable.

The experts stated that the European Court of Human Rights has not made such an unequivocal statement although several cases seem to imply this. In the case of *Brannigan and McBride v UK*, the court held that as *habeas corpus*, along with several other guarantees (right to access a lawyer, communication with families and friends, and access to a doctor), was available, it was acceptable to detain terrorist suspects during a state of emergency for a period up to seven days before being brought before a judicial authority.⁴ In *Aksoy v Turkey*, the Court stated that a period of fourteen days before being brought before a judicial authority, together with the fact the detainees were not granted access to a lawyer or doctor and did not have the right to communicate with family and friends, meant that the detention was contrary to the Convention despite a derogation by the Turkish government.⁵ Experts felt that this may imply that the European Court considers that individuals should always have prompt access to *habeas corpus*, although it has not expressly stated so.

The experts noted that in the recent decision of *Hamdi v Rumsfeld*, the Supreme Court of the United States held that, even during an emergency situation, the Government may not detain US nationals accused of being enemy combatants without access to *habeas corpus*.⁶ However, the court remarked that under the US Constitution *habeas corpus* may be suspended by the United States Congress through express proclamation of law during emergency situations.⁷ The experts also noted the case of *Rasul v Bush* in which the US Supreme Court held that non-US nationals held outside of the United States at Guantanamo detention centre have the right to have the legality of their detention challenged before a United States court.⁸ They further noted the Court's decision that such individuals have the right to sue the administration under the US Alien Tort Claims Act for violations of the law of nations.

¹ General Comment 8, HRC, (Article 9), (Sixteenth session, 1982), Para 1.

² General Comment 29, HRC, CCPR/C/21/Rev.1/Add.1131 August 2001, Para. 16.

³ Advisory Opinions OC-8/87 of 30 January 1987, and also OC-9/87 6th October 1987. However the clear terms of Art 27 of the American convention on human rights already indicate this; no similar language is found in the ICCPR or ECHR.

⁴ *Brannigan and McBride v UK*, ECtHR Series A 258-B, 26 May 1993.

⁵ *Aksoy v Turkey*, Judgment of the ECtHR, 18 December 1996 [1996] IIHRL 110.

⁶ *Hamdi et al. v Rumsfeld, Secretary of Defense, et al.*, No. 03-6696. Argued April 28, 2004—Decided June 28, 2004, U.S. 542 (2004).

⁷ *Ibid* Opinion of O'Connor J at p.p. 18, 29, 30.

⁸ *Rasul et al. v. Bush, President of the United States, Et Al.* No. 03-334. Argued April 20, 2004—Decided June 28, 2004, U.S. 542 (2004).

With regard to the period within which the right to challenge the lawfulness of detention must be brought; the individual must be able to challenge “without delay”. If the individual has not already been brought before a judicial authority in the context of a criminal prosecution, this should usually translate as being within a week. It was remarked, however, that no strict time-limit has been set in the treaties nor in case-law. Experts recalled that during a state of emergency a slightly longer period may be allowed, owing to the circumstances of the situation, but no longer than what the situation strictly requires.

Finally, experts observed that although *habeas corpus* should be available to all detainees, the extent to which this is possible in the midst of actual hostilities is not so evident.

ii. Territorial applicability of human rights

Experts referred to General Comment 31 of the UN Human Rights Committee which states that:

States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. As indicated in general comment No. 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation.⁹

It was observed, therefore, that it is not possible to claim that a State does not take its human rights obligations abroad. It was noted that the European Court of Human Rights has similarly used the test of “effective control” in the *Loizidou v. Turkey*¹⁰ case as well as in the *Banković*¹¹ case. In the latter case, however, the Court stressed that the European Convention is a regional one and that extra-territorial jurisdiction is exceptional.¹²

⁹ General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, para 10.

¹⁰ *Loizidou v Turkey (Merits)*, Judgment of the ECtHR, 18 December 1996 [1996] IIHRL 112 (18 December 1996).

¹¹ *Banković and Others v. Belgium and 16 Other Contracting States* (application no. 52207/99).

¹² Since the holding of the expert meeting, the European Court of Human Rights, in the *Issa v. Turkey* case which concerned alleged attacks by Turkish troops in Iraq, reaffirmed the test of effective control, ECHR Judgment, 16 November 2004.

It was pointed out by an expert that *incommunicado detention* may amount to torture or inhuman treatment and as the Convention against Torture (CAT) has no territorial limitation, States operating abroad will take their obligations under CAT with them.¹³

An expert recalled that the Inter-American Commission on Human Rights, in the case of the invasion of Grenada by the United States, applied the standards of the Declaration of the Rights and Duties of Man to persons subject “to the control of another State”. On this basis it held that a detention for a period of 21 days without access to a court contravened the Declaration.¹⁴

One of the experts further commented that the Working Group on Arbitrary Detention decided to take communications concerning US behaviour towards detainees at Guantanamo. The Group based its decision on the fact that there was no other competent authority and the US had effective control over the detainees. This expert stated that the Working Group gave opinions relying on General Comment 29 of the Human Rights Committee. In relation to the 6 communications received relating to Guantanamo, the Working Group stated in its report that it was not up to the executive branch to decide who was a POW but for the judicial branch to decide.

iii. United Nations Security Council and human rights

The experts debated whether the Security Council can overrule human rights law given that Article 103 of the UN Charter would appear to make this possible. The general view was that the ICCPR should be seen as an elaboration of the human rights commitments found within the UN Charter, and therefore in repressing fundamental human rights the Security Council would be in breach of the Charter. The Security Council could arguably expressly declare that certain human rights are to be overruled but it was agreed that the Security Council may not overrule or “trump” non-derogable human rights nor human rights which have become peremptory norms of international law.¹⁵ Experts mentioned Security Council Resolution 1244 which refers to the ICCPR thereby making it clear that human rights apply in Kosovo. It was also observed that, although after the September 11th attacks Security Council resolution 1373 detailed measures to be taken in order to combat terrorism, Security Council resolution 1456 does state 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.*¹⁶

¹³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, Articles 2(1), 16.

¹⁴ *Coard et al. v United States*, Case 10.951, Report No 109/99, September 29, 1999, Inter-Am.C.H.R para 37.

¹⁵ Art 103, Charter of the United Nations, (1945); Arts 53, 64, Vienna Convention on the Law of Treaties, (1969).

¹⁶ S/RES/1456 (2003) Para 6.

iv. Arbitrary detention amounting to inhuman treatment and/or torture.

It was recalled that the UN Human Rights Committee considers that prolonged *incommunicado* detention amounts to cruel and inhuman treatment and in some cases even torture. The Human Rights Committee said in the case of *El-Megreisi v. Libyan Arab Jamahiriya* that:

....Mohammed El-Megreisi was detained incommunicado for more than three years, until April 1992, when he was allowed a visit by his wife, and that after that date he has again been detained incommunicado and in a secret location. Having regard to these facts, the Committee finds that Mr. Mohammed Bashir El- Megreisi, by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.¹⁷

An expert mentioned that the prohibition against torture and other inhuman treatment should therefore be used to monitor not only conditions but also the length of detention, particularly the length of detention before being seen by a judge and the amount of time spent in pre-trial detention. It was remarked that the Committee against Torture can order on-site investigations in relation to systematic practices of torture, analyse State reports and, subject to an Article 22 declaration by a State, receive individual complaints. Therefore CAT can provide a good mechanism to monitor situations of detention.

The problem was raised that under national law certain States may define torture differently and may consider relatively lengthy and perhaps severe treatment not to amount to inhuman or cruel treatment. As an example, the U.S. was cited for its particular definition of what amounts to torture. The U.S. law implementing the Torture Convention states that:

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.¹⁸

¹⁷ *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994). Para 5.4.

¹⁸ 18 U.S.C. §§ 2340.

An expert mentioned the controversial 2002 U.S. Office of Legal Counsel's opinion on the definition of torture. It was observed that the opinion states; "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." It was further noted that for mental pain and suffering to amount to torture, the opinion states, "it must result in significant psychological harm of significant duration, lasting for months or even years." It was mentioned that a defendant is guilty of torture under the statute "only if he acts with the express purpose of inflicting severe pain or suffering." Accordingly, it was observed, that if a defendant's purpose is to obtain information, even though he knows that "severe pain will result from his actions," he will lack the requisite "specific intent".¹⁹ It was stated that this has the affect of distorting the definition of torture under U.S. law.

v. Prompt access to a lawyer

Experts agreed that torture or cruel and inhuman treatment often occurs within the first few days or hours of captivity. With this in mind, several stressed that it is imperative that procedural and judicial guarantees are observed when taking, processing and holding detainees. Without such safeguards in place, it was stated, abuse can easily happen.

Experts recalled that, in relation to in criminal cases, human rights treaties provide that the individual must have the right of access to a lawyer. They added that case-law has confirmed that a lawyer is required not only to formulate an accused person's defence for trial on the merits but also for *habeas corpus* proceedings.

The right of access to a lawyer by any detained person is specified in the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment. Principle 15 states that "counsel shall not be denied for more than a matter of days". Experts recalled that the former Special Rapporteur on Torture stated that an individual should have access to a lawyer within 24/48 hours and that the present Rapporteur states that the time should be strictly limited to a 24 hour period. The UN Committee against Torture has, during the consideration of most State Parties' reports and based on the provisions of Articles 2,10,11 and 15 CAT, stated that detainees should have access to a lawyer in principle from the beginning of detention. It was further stated that a similar approach is taken by the Human Rights Committee as well as by the European Committee for the Prevention of Torture.

Further it was mentioned that in the case of *Brannigan and McBride v. UK* before the ECHR, where terrorist suspects were not brought before a judge for period up to seven days, there was no breach of the Convention because not only *habeas corpus*, but also a lawyer, doctor and family members were available within 48 hours.²⁰

vi. Disparity of legal norms

Experts observed that IHL was drafted before human rights law was prominent and therefore there is a disparity between the two fields. Some experts suggested that as international

¹⁹ Post script. A subsequent memorandum from the U.S. office of Legal Counsel has moved away, to a degree, from its previous interpretation. The 2002 Memo was withdrawn. See: Memorandum for James B. Comey, Deputy Attorney General, December 30, 2004, U.S. Department of Justice, Office of Legal counsel.

²⁰ *Brannigan and McBride v UK*, ECtHR Series A 258-B, 26 May 1993.

human rights law is the most recent area of law and has had many judicial decisions, it should prevail over IHL. Other experts observed, however, that some confusion can arise from the fact that the Inter-American, European, African and UN human rights systems, although quite often referring to each other's case-law, are not co-ordinated and therefore there is some inconsistency as to human rights norms that apply during armed conflict situations.

vii. Transfer of detainees

The experts confirmed that a state may not transfer individuals to face torture or cruel and inhuman treatment which has in certain contexts been interpreted as prohibiting the transfer of an individual to face the death penalty.²¹ According to the ICTY it is prohibited to hand over an individual if a fair trial is not guaranteed. Rule 11 bis of the ICTY Rules of Procedure and Evidence 2004 provides in paragraph B that “the trial chamber may order such referral [of cases to another jurisdiction] *proprio motu* or at the request of the prosecutor... and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out”.²² Similarly such procedural guarantees could be required under human rights law before an individual may be handed over. In the case of *Soering v. United Kingdom*, the ECHR stated that:

*The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.*²³

However, other than cases where there is a risk of torture or inhuman or degrading treatment or punishment, or where such transfer would not be in accordance with the State's law, human rights case-law is not yet clear or consistent as to situations in which transfer would be prohibited.

²¹ *Soering v. the United Kingdom* (14038/88) [1989] ECHR 14 (7 July 1989); *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994).

²² This has been subsequently confirmed by the ICTY. Replying to a delegate of France at the UN Security Council on 23 November 2004, the President of the ICTY said “France made the point that the transfer of cases to national jurisdictions should occur only where we can expect fair trials – trials without intimidation or ethnic or religious bias. I would like to assure the government of France that the leadership of the tribunal shares those views. We have rules of procedure that in fact make the transfer of cases to a particular jurisdiction dependent upon fairness and due process” Verbatim transcript of the UN Security Council, 23 November 2004.

²³ Series A, No. 161 (1989), reproduces in 11 HRLJ 335 (1990) Para 113; Also see General Comment 31, HRC, para 12, “Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as [emphasis added] that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.”

E. Conclusions and suggestions to remedy existing inadequacies in the law

i. Non-international armed conflicts

The experts stated that as IHL does not provide procedural guarantees to persons detained during non-international armed conflict, human rights standards must always apply. It was remarked that although some of these rights are subject to derogation, this is limited to what is strictly required by the situation; measures taken must be legitimate and proportionate to the aim pursued. In addition to the case-law and other human rights practice reviewed earlier in the meeting, it was suggested that the Turku Declaration (1990) may be used as an excellent guide to the protection of human rights during conflict situations; Article 4 provides that:

1. All persons deprived of their liberty shall be held in recognized places of detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information.
2. All persons deprived of their liberty shall be allowed to communicate with the outside world including counsel in accordance with reasonable regulations promulgated by the competent authority.
3. The right to an effective remedy, including habeas corpus, shall be guaranteed as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.
4. All persons deprived of their liberty shall be treated humanely, provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions.

Article 11 Provides also that:

If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review.

The general view was that instead of trying to amend humanitarian law to remedy its failings, the standards applicable to non-international armed conflict should be those of human rights law and subject to human rights remedies.

ii. Internationalised non-international armed conflicts

It was stated that during internationalised non-international armed conflict, where the international assistance falls on the side of the State, the situation is the same as for non-international conflicts. However, as common Article 3 of the Geneva Conventions and Protocol II do not provide for the supervision of the lawfulness of detention, human rights guarantees have to be relied on. As human rights treaties have been interpreted as applying wherever there is effective control by a State, these will be applicable to most cases of detention of persons in the context of an armed conflict.

iii. Detention of civilians in international armed conflicts: Articles 43 and 78 of Geneva Convention IV

Although some experts thought that the six monthly review requirement under both Articles may not be inappropriate, others suggested that such a long period would appear to be unreasonable; an expert cited the British practice of reviewing the continued detention of persons after 6 days, then after 28 days and thereafter at 3-monthly intervals.

The experts recommended that the review of detention under both articles should be before an independent and impartial body. It was suggested that it was highly preferable that the body carrying out the review or appeal be a court, which would be in keeping with the view of the HCR and the Inter-American Court of Human Rights that *habeas corpus* is non-derogable. Failing this a properly constituted body, where the detainees receive a fair hearing, should be instituted. It was noted that in the old ECHR case of *Lawless v. Ireland* (1961), the European Court of Human Rights accepted review by an body which was independent of the executive (Parliamentary Committee) but which was not judicial.¹ In later cases relating to terrorism (*Brogan v UK*²; *Brannigan and McBride v. UK*) *habeas corpus* was available and therefore the European Court did not need to reconsider the issue. Experts referred to the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment which provides that a detained or imprisoned person shall be entitled to bring his claim before a “judicial or other authority” (Principles 9 and 11). They emphasised that under Principle 11 the body must be structured in legal manner and that the remedy must be “effective” and “prompt”.

The majority of experts concluded that detainees under both Articles 43 and 78 GC IV should have the right to challenge the lawfulness of their detention before a competent independent and impartial body without undue delay and this should be seen as being correlative with access to *habeas corpus*.

iv. Habeas Corpus for detained military personnel

The majority of experts observed in order to fill the gaps in IHL on the protection from arbitrary detention, the writ of *habeas corpus*, which is generally accepted as a fundamental guarantee with a long legal history, should be available to persons wishing to challenge their status as a POW and therefore their captivity. POWs should also be able to challenge continued detention, in particular, after the end of hostilities or when they are entitled to repatriation owing to wounds or sickness.

Although there are no specific statements by human rights bodies declaring that *habeas corpus* must be available to POWs or persons alleged to be POWs, some experts stated that the nature of the guarantee is so fundamental that it should always apply. It was recalled that the US Supreme Court in the *Rasul* case stated that aliens being held in military custody

¹ *Lawless v. Ireland* (No. 1) (332/57) [1960] ECHR 1 (14 November 1960).

² In the case of *Brogan* no derogation was made by the UK government to the ECHR so that the length of detention before appearing before a judicial authority did in fact breach Article 5 despite the availability of *habeas corpus*.

should have access to this remedy.³ It was also observed by some experts that, for this remedy to have meaning, the POW, or alleged POW, needs to have access to a lawyer.

Several experts stressed that any Article 5 tribunals should be governed by human rights law; therefore they must have guarantees that ensure fairness and impartiality.

v. Transition from an invasion to occupation.

The experts approved of Pictet's approach, to the effect that GC IV applies from the moment of invasion. During actual hostilities there are limits to the practical application of human rights law. Although human rights law formally applies, it will in practice be subject to the realities of the situation on the ground i.e. continued fighting.

vi. End of hostilities or occupation

It was observed that POWs are entitled to be released at the end of active hostilities and after an occupation has ended.⁴ Civilians are to be released as soon as the reasons for internment are no longer present and as soon as possible after the close of hostilities, except for internees against whom criminal proceedings are pending.⁵ As far as those detained in occupied territory are concerned, they are to be handed over to the authorities of the liberated territory.⁶ Article 5(1) GCIII and Article 6(4) GCIV specify that even after the end of hostilities or occupation, detained persons continue to benefit from the Conventions until their release and/or repatriation. It was the view of the experts that those which continue to be detained in the context of criminal procedures must be protected by human rights law. If individuals are not subject to criminal procedures, they also need to be able to challenge their continued detention before a court. It was suggested the jurisprudence on this particular issue should be developed by human rights bodies.

vii. Peace support operations

The experts stated that on territory where the State has previously signed human rights treaties, local authorities are bound by human rights law. United Nations troops should also be bound by human rights law; this should be specified in the mandate given by the Security Council. It was observed also that NATO forces should be bound by the human rights commitments of their sending States.

viii. Registration of persons captured during hostilities

The experts recommended that initial registration should be done at the first stage of taking captives in the field and not several days later. Such an interpretation is possible under the wording of 122 GC III and Article 136 GC IV for international armed conflicts. This can

³ Rasul et al. v Bush, President of the United States, et al. No. 03-334. April 20, 2004 – Decided June 28, 2004, U.S. 542 (2004).

⁴ GCIII Articles 118 and 4 B (1).

⁵ GCIV Articles 132 and 133.

⁶ GCIV, Article 7.

simply mean, it was suggested, that an individual should be responsible for writing down the names and some details of the captives. Most experts were of the view that at this initial stage it would be impractical to require formal access to a lawyer and that if the registration is correctly done there is no immediate need.

Some experts suggested that the State should have put in place beforehand a system for regulating the processing of detention and it should make sure that all members of the armed forces know of this system. It was recommended that domestic law must stipulate who has the responsibility for maintaining the register; an individual should be responsible for its accuracy and should be subject to criminal sanction for any failure. It was also suggested that there should be an independent individual who is responsible for supervising the registration of detainees and the conditions of detention.

It was also the view of the experts that registration should be required in non-international conflicts.

ix. Access to a lawyer

The majority of experts stated that in order to effectively access *habeas corpus*, and therefore be protected from arbitrary treatment, a lawyer, or someone acting in the capacity of a lawyer, should be made available to the detainee as soon as practicably possible. An expert suggested that each division of an army (10,000 – 15,000 soldiers), at a minimum, should have one or more independent lawyers available to monitor the taking of protected persons. In order to illustrate this as not an impossible suggestion, the expert pointed out that in the past it was uncommon for there to be numerous medical personnel available, but this is no longer the case for most modern armies. However the majority of experts were of the view that it would be impracticable for an independent lawyer to be available to monitor all takings of protected persons. The example was cited of Rwanda where after the genocide a mere 16 lawyers were left in the country.

The majority of experts suggested that although in the first phase of captivity during hostilities it will often be impracticable for a lawyer to be present, in the second phase, away from the battle field and when there is secure detention (i.e. in an environment of relative calm) access to a lawyer should be available in order to conform to human rights law. It was observed that the second phase of secure detention is usually attained reasonably quickly after initial capture (Articles 19, 20 GC III).

Regarding which court or other independent body should be used, it was agreed that it has to be a body belonging to the detaining State for any finding to have a legal effect on that State. This will only be of use, of course, if the court or other body is genuinely independent and if the executive organ respects its orders.

x. So-called “unlawful combatants”

It was observed that in the case of the conflict and occupation in Iraq, Iraqi citizens who have been declared as associated with Al-Qaida, and are termed “unlawful combatants” by the US administration, are protected by Geneva Convention IV as they fulfil the nationality criteria therein.

The experts commented that the US administration may, under IHL, legitimately detain people who pose a threat to its security. Therefore there was no need to create a new status and undermine the present system. Persons without POW status are civilians under the Fourth Geneva Convention provided they fulfil the nationality criteria and may be detained because they are a security threat. Both POWs and civilians accused of a crime and prosecuted. The majority of the experts were of the view that if they are held in custody, this should be in accordance with normal human rights and both categories (security detainees and alleged criminals) should be entitled to contest the lawfulness (including continued need) of detention in accordance with the suggestions listed above.

xi. Transfer of detainees

Where a detainee is suspected of being a combatant and such a person is transferred to other authorities, whether belonging to the same armed forces or to any other authorities, the experts stated that the transfer must be recorded separately by both authorities. Persons should not be transferred to another State unless they are to be detained as a POWs subject to protections under GC III, or are to be interned subject to the protections of GC IV⁷ or are to be subject to criminal proceedings satisfying human rights law regarding conditions of detention and due process.

xii. Complementary nature of international human rights law and IHL

Experts stressed that the International Court of Justice confirmed that human rights law continued to apply in armed conflict and that the reference to the *lex specialis* nature of IHL in the Nuclear Weapons Advisory Opinion does not mean that the provisions of human rights law disappear in practice. The experts referred to the recent Advisory Opinion of the ICJ in the Palestinian Wall case which reaffirmed that human rights law continued to apply in armed conflict and then stated as follows:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”⁸

Therefore IHL is *lex specialis complementa* (complementary) and not *derogata* (derogatory) of human rights law.

xiii. Need for lawyers to diversify

It was observed that those working in international human rights law rarely use international humanitarian law and also that human rights discourse is infrequently heard from lawyers specialized in international humanitarian law. Therefore if there is to be more synergy

⁷ Restrictions on possible transfers in Article 45 and 49 GCIV.

⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 1996 (I), p. 239, para. 106.

between the two fields of law, it is necessary that lawyers start to diversify in their domains of work; the two fields of law compliment one another and they are not mutually exclusive fields of practice.

xiv. General principles of international law

It was suggested that general principles of international law may help fill in some gaps in international humanitarian law or human rights law. The example was cited of a case before the ECHR concerning the prosecution of the heirs of a person suspected of tax fraud. The European Court found a violation of the Convention, even though the principle of individual liability is not spelled out in the ECHR, by referring to the general principle of criminal law that criminal liability does not survive the person who has committed the criminal act.⁹

Certain guarantees against arbitrary detention have reached the status of being general principles of international law. It was noted that a statement to this effect was made by the International Court of Justice:

“ Wrongfully to deprive human beings of their freedom and to subject them to physical constraints in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. “¹⁰

An expert suggested the use of an extensive reading of the law: Article 75 of Additional Protocol I and Article 3 of the Geneva Conventions read together with human rights law could provide appropriate protections for detainees. Several experts pointed out that courts frequently identify a rule based on a mixture of sources and that the ICTY does not interpret the law by just using the letter of the law. They concluded, therefore, that humanitarian lawyers need to read general international principles of human rights law into the course of their work.

⁹ Case A.P., M.P., and T.P. v. Switzerland, ECHR, Judgment 29 August 1997, para. 48.

¹⁰ Tehran Hostages Case, ICJ Rep. 1980, 3, at para. 91.

Annex

List of Participants

1. Dr. Knut Dörmann: Deputy Head of the Legal Division, ICRC, Geneva.
2. Professor Louise Doswald-Beck: Director University Centre for International Humanitarian Law, Professor Graduate Institute of International Studies, Geneva.
3. Professor Robert Goldman: Professor American University Washington College of Law ; Former member of the Inter-American Commission on Human Rights.
4. Professor Françoise J. Hampson: Professor University of Essex; Member of the UN Sub-Commission on Human Rights; and Governor of the British Institute of Human Rights.
5. Dr. Marc Henzelin: Barrister, Partner, Lalive & Partners, Geneva, Chargé de Cours, University of Geneva.
6. Major-General Howell: Director of Army Legal Services, United Kingdom.
7. Professor Walter Kälin: Professor University of Bern; Member of the UN Human Rights Committee.
8. Professor Robert Kolb: Professor University of Geneva, Neuchatel and Bern
9. Ambassador Andreas Mavrommatis: Member of the UN Committee on Torture (CAT); Special Rapporteur of the U.N. Human Rights Commission on Violations of Human Rights in Iraq.
10. Judge Theodore Meron: President of the International Criminal Tribunal for the Former Yugoslavia.
11. Ms. Sarah Noetzli: Co-ordinator for Judicial Guarantees, Central Tracing Agency and Protection Division, ICRC, Geneva.
12. Ms. Jelena Pejic: Legal Adviser, ICRC Legal Division, Geneva.
13. Dr. Gabrielle Porretto: Assistant University of Lausanne.
14. Dr. Bertram Ramcharan: Acting UN High Commissioner for Human Rights.
15. Sir Nigel Rodley : Professor University of Essex; Expert Member of the UN Human Rights Committee; former UN Commission on Human Rights Special Rapporteur on the Question of torture and other cruel, inhuman or degrading treatment or punishment.
16. Dr. Sylvain Vité: Head of Research Project, University Centre for International Humanitarian Law.
17. Judge Leïla Zerrougui: Judge in the Court of Appeal of Algeria; President of the UN Working Group on Arbitrary Detention.

Rapporteur: Mr. Matthew Elkins: Teaching Assistant, University of Geneva.
Assistant: Mr. Noboru De Abreu: Student, University Centre for International
Humanitarian Law
Administrator: Ms. Laure Bally Cergneux

The following experts were expected but owing to supervening circumstances were unable to attend.

Mr. Stephane Bourgon: President Association of Defence Counsels practising before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY).

Professor Micheal Schmitt: Director, Leaders of the 21st Century Program and Professor of International Law, College of International Security Studies, George C. Marshall European Centre for Security Studies, Garmisch-Partenkirchen, Germany.