

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

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

Abstract

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

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

“Detention abroad” may be very broadly defined as any deprivation of liberty of an individual against his or her will² by agents acting outside the sovereign territory of the State on behalf of which they act. For the purposes of this paper, it is also to be understood to cover the exceptional situation where an individual is held by a third State at the request of, and under the effective control of, the agents of another State.

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

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

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

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

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

Regardless of whether and to what extent these arguments may be sound as a matter of domestic law, it is indisputable that, as a matter of international law, they are inherently flawed. The position that, by keeping individuals detained during the “war on terror” outside the national territory of the State, State authorities can bypass some or all of the guarantees and limits on State action enshrined in international humanitarian law (IHL)³ and/or in international human rights law⁴ is not justified.

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

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

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

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

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

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

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

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

The phenomenon of extraterritorial detentions in the “war on terror”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The international legal framework

Preliminary considerations: The multifaceted nature of the “war on terror”

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

However appealing it is to the mass media or as a rhetorical device used for the purposes of political discourse, the concept of a “war on terror” — i.e. an armed conflict²⁴ waged against a loosely organized transnational terrorist network — does not stand up when analysed from the viewpoint of international law.²⁵

- 22 The principal motivation for transferring prisoners to Guantánamo Bay was apparently that it was “the legal equivalent of outer space”; see Barry, Hirsh and Isikoff, *op. cit.* (note 16) (quoting an administration official). An internal memorandum dated 28 December 2001 from the Office of the Legal Counsel of the Justice Department expressed the view that the US domestic courts had no jurisdiction to review the legality of detention of prisoners held at Guantánamo Bay, or to hear complaints relating to their ill-treatment (*ibid.*). There have also been news reports to the effect that other unreleased memoranda exist which advised that if “government officials (...) are contemplating procedures that may put them in violation of American statutes that prohibit torture, degrading treatment or the Geneva Conventions, they will not be responsible if it can be argued that the detainees are formally in the custody of another country.” The apparent basis for this advice was that “it would be the responsibility of the other country”: see J. Risen, D. Johnston and N.A. Lewis, “Harsh CIA methods cited in top al Qaeda interrogations”, *New York Times*, 13 May 2004.
- 23 The question of the legal character of the “war on terror” has been the object of much debate in the academic community: see e.g. J. Fitzpatrick, “Jurisdiction of military commissions and the ambiguous war on terrorism”, *American Journal of International Law*, Vol. 96, 2002, p. 345, in particular pp. 346-350; C. D. Greenwood, “International law and the ‘war against terrorism’”, *International Affairs*, Vol. 78, 2002, p. 301; G. Abi-Saab, “Introduction: The proper role of international law in combating terrorism” in A. Bianchi (ed.), *Enforcing International Law Norms Against International Terrorism*, Hart Publishing, Oxford, 2004, p. xiii.
- 24 The concept of “war” has been abandoned for some time in the context of IHL, being replaced by the concept of “armed conflict”, whether internal or international. See Article 2 common to the Geneva Conventions, and C.D. Greenwood, “The concept of war in modern international law”, *International and Comparative Law Quarterly*, Vol. 36, 1987, p. 283.
- 25 The renewed efforts against international terrorism which started after 9/11 cannot be characterized as a whole as an armed conflict within the meaning that contemporary international law gives to that concept: the transnational nature of the operations carried out in the context of the global “war on terror”, coupled with the fact that an international coalition is currently involved in those operations, directly excludes the possibility of qualifying that “war” as an internal armed conflict. Nor can it be characterized as an international armed conflict, since it is generally accepted that international law does not recognize the possibility of an international armed conflict arising between a State (or group of States) and a private non-State organization. see e.g. Greenwood, *op. cit.* (note 23), and G. Abi-Saab, *op. cit.* (note 23), p. xvi: “‘War’ or ‘armed conflict’, in the sense of international law, necessarily involves internationally recognisable entities which are capable of being territorially defined...”. See also A. Cassese “Terrorism is also disrupting some crucial legal categories of international law”, *European Journal of International Law*, Vol. 12, 2001, p. 993.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recent evidence indicates a shift in the position of the United States: a draft legal opinion produced by the Department of Justice in March 2004⁴⁰ expressed the view that whilst Iraqi citizens in the hands of Coalition forces are to be considered POWs, some non-Iraqi prisoners captured by American forces in Iraq are not entitled to the protections of the Geneva Conventions and can therefore be removed from the occupied territory and transferred abroad for interrogation, and further that detained Iraqi citizens could be removed from Iraq for “a brief but not indefinite period, to facilitate interrogation”. The conclusions of that draft were adopted by the administration.⁴¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

for the sake of argument, that the conditions relating to what could be termed “voluntary militias” in Article 4A(2) apply to other categories of combatants, it is clear from the text of Article 4 that in any case, in order to deprive a prisoner of his POW status, it is necessary to prove that *the individual personally* has failed to respect the laws of war. The general determination that no Taliban prisoner is entitled to POW status because of the Taliban’s “alliance” with a terrorist organization is thus based on a misinterpretation of Article 4.⁴⁵

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Protection of detainees under international human rights law

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

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

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

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

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

56 See above, text accompanying note 35.

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

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

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

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

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

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

Applicability of international human rights law during armed conflict

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

“The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”⁶³

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The extraterritorial applicability of international human rights law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

87 See e.g. *Precautionary Measures in Guantánamo Bay*, *op. cit.* (note 85), where the Inter-American Commission granted precautionary measures on the basis that the detainees at Guantánamo Bay “remain wholly within the authority and control of the United States government”, and affirmed that “determination of a state’s responsibility for violations of the international human rights of a particular individual turns not on that individual’s nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state’s authority and control” (*ibid.*, fn. 7).

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

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

90 *Banković*, *op. cit.* (note 76).

91 *Ibid.*, para. 79.

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

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

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

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

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

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

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

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

93 *Ibid.*, para. 80.

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

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

96 *Ibid.*, para. 74.

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

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

“Article 2(1) of the Covenant places an obligation upon a State Party to respect and to ensure rights ‘to all individuals within its territory and subject to its jurisdiction’, but it does not imply that the State Party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. (...) it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”⁹⁸

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

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

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

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

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

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

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

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

The principle of non-refoulement

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

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

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

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

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

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

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

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

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

The principle that in some cases is referred to as the principle of *non-refoulement*¹⁰⁹ is expressly stated in several instruments for the protection of human rights¹¹⁰ and is generally considered to be a rule of international customary law, binding on all States whether or not they have acceded to any of the treaties governing international refugee law and international human rights law. Although a number of treaties, including the ICCPR, the ACHR and the ECHR, do not contain corresponding express provisions, the monitoring bodies of such treaties have consistently recognized that States Parties would be acting in a manner incompatible with the underlying values of those treaties if they were to transfer in such circumstances an individual who is subject to their jurisdiction.¹¹¹ With respect to the ICCPR, the Human Rights Committee has stated that:

“...the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, (...) either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”¹¹²

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

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

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

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

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

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

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

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

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

This principle applies to every case in which an individual subject to the jurisdiction of the State (whether or not within its territory) is transferred from its jurisdiction. The formal characterization of the act through which the individual is actually transferred to the jurisdiction of another State is without relevance for the applicability of the principle of *non-refoulement*, as that principle applies equally to extradition, deportation, expulsion of illegal immigrants¹¹⁴ and irregular renditions. Furthermore, the principle of *non-refoulement* applies to every person, whatever his or her past crimes or the danger he or she is perceived to pose to the State in the custody of which he or she is held.¹¹⁵

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

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

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

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

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

116 This logical corollary of the principle of *non-refoulement* has been clearly recognized by the Committee against Torture in the following terms: “the phrase ‘another State’ in article 3 refers to the State to which the individual in question is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited” (Committee against Torture, *General Comment No. 1, Implementation of Article 3 of the Convention in the Context of Article 22* (1996), UN Doc. A/53/44, annex IX, para. 2). See also: *Mutombo v. Switzerland*, *op. cit.* (note 105), para. 10; *Korban v. Sweden* (Comm. No. 88/1997), UN Doc. CAT/C/21/D/88/1997 (1998), para. 7. See also Human Rights Committee, *General Comment No. 31*, *op. cit.* (note 66), para. 12 (quoted above, note 112).

Iraq or Afghanistan throughout. There is therefore no question of extradition or expulsion.”¹¹⁷

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

Recent developments: Reaffirmation of the applicable legal framework?

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

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

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

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

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

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

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

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

121 *Ibid.*, p. 15.

122 *Ibid.*, p. 18.

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

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

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

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

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

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

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

126 *Ibid.*, para. 286.

127 *Ibid.*, para. 281.

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

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

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

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

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

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

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

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

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

134 *Ibid.*, p. 19.

Concluding remarks

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

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