Collegium

N° 39, Autumn/Automne 2009

Proceedings of the Bruges Colloquium

Transfers of Persons in Situations of Armed Conflict

9th Bruges Colloquium
16-17 October 2008

Actes du Colloque de Bruges

Le transfert des personnes en situation de conflits armés

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Brugge

College of Europe
Collège d'Europe

Natolin

CICR

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CONCLUDING REMARKS
WELCOME ADDRESS

Prof. Paul Demaret
Rector of the College of Europe

Madame, la Chef de Délégation, chers Collègues, chers Participants,

C'est un honneur et un plaisir pour le Collège d'Europe de vous accueillir ce matin ici au Collège et ici à Bruges. Je suis désolé que de ne pas pouvoir vous accueillir avec le soleil, mais si cela peut vous réconforter, je pense que la ville de Bruges est la ville belge où il est le plus facile de supporter un temps pluvieux. Le thème choisi, « Les Transferts des personnes en situations de conflit armé » sera présenté par une spécialiste du Droit international humanitaire, Madame Françoise Krill, Chef de la Délégation du Comité international de la Croix-Rouge (ci-après dénommé le CICR) auprès de l'Union européenne et l'OTAN à Bruxelles. Je ne m'y aventurerai donc pas.

What I would like to do during my short address, is first to say a few words concerning the College of Europe, followed by a few words concerning our cooperation with the International Committee of the Red Cross (hereafter the ICRC) and the reasons why we value very much that cooperation.

The College of Europe was created almost 60 years ago, just in the wake of the Second World War. It was created back in 1949, at the same time as the Council of Europe and the European Court of Human Rights. Therefore, the College of Europe predates the establishment of the first European Economic Communities. Its intellectual founder was a Spanish intellectual, Salvador de Madariaga. The idea behind the creation of the College of Europe was to bring together, after the World Wars, young European graduates and professors from all over Europe in one same place. Together, they would study European issues, not from a national, or even worse, a nationalistic perspective, but from a truly European perspective. Moreover, the idea was that those people would also live together during a year in order to get to know each other and the different European cultures.

Of course, the College of Europe has evolved since 1949. At the start, we were something like thirty, thirty-five or forty students, but now we have much more students. Here in Bruges we run four specialised European Master Programmes. One dealing with European Law, another with European Politics and Administration, a third one with European Economics and since 2006 we have started a fully fledged programme dealing with the EU International Relations and Diplomacy which has proven to be very successful.

Around the early 90s, the College again reacted to a major event in European history, namely the fall of communism in Central and Eastern Europe. With the support of the Polish authorities and of the European Commission, the College set up its second campus in Natolin, Warsaw. In Natolin, our graduate students study the European integration process, not from a specialised perspective, but from a multi-disciplinary perspective. That means that we can also attract young graduates who do not have a degree in law, politics or economics but in history, philosophy or linguistics. In Natolin, we put the emphasis on the relations between the EU and its neighbours. By neighbours we understand more than what is understood by the EU's Neighbourhood Policy since we also include countries like Russia and, for the time being, Turkey, as they are in fact the EU's two largest neighbours.

Why are we interested in the cooperation with the ICRC? First, the College engages, in addition to the academic programmes, in various projects, training sessions, summer programmes and specific conferences, and among our best partners, we find the ICRC. Our cooperation goes back to the year 2000 when the first Bruges Colloquium took place. Today we are at the 9th Colloquium organised by the ICRC in cooperation with the College of Europe. Next year we will have the 10th Colloquium and that will be a special event. Besides that yearly international conference, our cooperation has known a new feature now for five or six years: each year at the end of the winter period, or early in the spring period, we organise together a workshop, which lasts two days and a half or three days, where we try to introduce young students to International Humanitarian Law. Prof. Sandoz initiated these workshops with the support of the Heads of the ICRC Delegation to the EU and NATO in Brussels, first Mr. Thierry Germond, then Ms. Sylvie Junod, and now Ms. Françoise Krill. This workshop has met with much success, because we open it, not only to the students of the College but also to students of neighbouring regions and countries (the Netherlands, Western Germany, Northern France, Southern England, also Eastern France…). Thanks to the ICRC, we are able to organise this workshop in Warsaw as well, where it is open to students of various Polish universities. We hope that some of the young people attending these introductory workshops will feel called on to work in the field of International Humanitarian Law. We also hope that, through the support of the ICRC, we will be able to continue to organise such workshops.

Quelles sont les raisons pour lesquelles le Collège d'Europe est à ce point intéressé à coopérer avec le CICR ? Tout d'abord parce que le DIH, le produit des guerres européennes au 19ème siècle, a montré son utilité dans des circonstances tragiques ultérieures. Une autre raison est évidemment que le DIH est un domaine qui est de plus en plus important pour l'UE et ses États membres puisqu'ils (pas toujours tous ses États membres, mais souvent plusieurs de ses États membres) sont impliqués de plus en plus souvent dans des opérations de maintien ou de rétablissement de la paix et de la sécurité, non seulement en Europe mais dans de différentes

parties du monde. Enfin, une raison particulière, est que le DIH est d'une certaine manière le produit du développement de la culture européenne au 18ème siècle avec son accent sur la protection de l'individu et sur la dignité de la personne humaine et nous pensons qu'au Collège nous devons également promouvoir ce type de valeur.

I would like to add that, thanks to the ICRC, each year many specialists in the field of international law, and International Humanitarian Law more precisely, come to the College for the first time and we hope that those conferences would induce them to come back to the College of Europe.

Nous espérons donc que cette coopération continuera dans les années à venir. We all, the ICRC and the College of Europe, hope that many of you will want to come back next year in order to attend our 10th Bruges Colloquium.

Thank you for being here, and I wish you a very successful conference.

OPENING ADDRESS

Francoise Krill
Head of Delegation, ICRC Brussels

Excellences, Monsieur le Recteur, Mesdames et Messieurs,

J'ai l'honneur et le plaisir, au nom du Comité international de la Croix-Rouge (CICR), de vous accueillir pour ce 9ème Colloque de Bruges, qui est, cette année, dédié à l'étude de certains aspects juridiques liés au transfert de personnes en situation de conflit armé.

Le Professeur Demaret vous a rappelé l'étendue de la collaboration académique que le Collège d'Europe et le CICR ont initiée dès 1999. Cette collaboration se base sur un intérêt commun au Collège et au CICR de promouvoir la connaissance du droit international humanitaire et de favoriser le débat portant sur des sujets d'actualité et d'importance dans le cadre du développement des institutions européennes et atlantiques.

Outre des échanges d'idées et de points de vue de grande qualité, le Colloque a pu fournir de solides bases de réflexion tant pour le Collège, que pour le CICR, mais aussi pour les institutions aujourd'hui représentées. L'an dernier, j'ai rappelé que la substance des lignes directrices adoptées par l'Union européenne en décembre 2005 sur l'amélioration du respect du droit international humanitaire fut le thème du Colloque de Bruges en 2003. J'ajouterai cette année que sur la base de différentes initiatives des institutions européennes, nous travaillons aujourd'hui avec l'aide des Gouvernements qui ont initié ou contribué à leur adoption, à identifier la meilleure manière d'opérationnaliser ces lignes directrices. L'idée est de les rendre plus concrètes et de protéger plus efficacement les victimes des conflits armés et de faire rapport à l'occasion de la célébration du 60ème anniversaire des Conventions de Genève de 1949.

Au vu des thèmes qui seront abordés pendant les deux jours à venir, je n'ai aucun doute sur le fait que les discussions que nous allons avoir permettront d'avancer dans différents dossiers juridiques liés au transfert de personnes.

Même si la problématique des transferts de personnes en situation de conflit armé n'est pas nouvelle, on observe aujourd'hui, principalement dans les opérations à caractère multinational, que de nombreuses questions restent encore sans réponse. En effet, comment concilier les réalités du terrain avec l'accomplissement de leur mandat et bien entendu le respect de leurs obligations en droit international humanitaire et en droits de l'homme? Il s'agit certes là d'un défi majeur pour nombre d'opérations en cours et à venir.

Détenir quelqu'un, même pour un temps très bref, signifie accepter des obligations à son égard y compris lorsque cette personne n'est plus sous le contrôle direct de l'autorité initialement détentrice. Le programme du Colloque nous permettra d'examiner les préoccupations humanitaires liées au transfert, de même que les obligations juridiques qui pèsent sur l'autorité qui procède au transfert. Ces questions sont éminemment importantes pour le CICR qui œuvre à la protection des victimes des conflits armés et d'autres situations de violence dans plus de 80 pays.

Dans la pratique certaines tentatives de solution ont été esquissées telles que la conclusion d'accords de transfert ou le recours à des « assurances diplomatiques » qui peuvent avoir un certain intérêt mais ne dégagent certainement pas leurs auteurs de toute responsabilité. Des initiatives plus globales, telles que le « processus de Copenhague sur la gestion (« *handling* ») des détenus », sont également en cours et offrent un cadre intéressant de réflexion et de discussion sur ces difficiles problématiques. Ce sont autant de sujets qui seront présentés, discutés, débattus dans le cadre de ce Colloque avant de terminer par une session plus prospective sur l'opérationnalisation des obligations juridiques qui encadrent les questions de transfert.

Fort de 164 années d'expérience sur de nombreux terrains de conflits armés, le CICR a acquis une grande expertise pratique et opérationnelle en droit international humanitaire. Il a mené, au début de cette décennie, une étude portant sur la pertinence et l'adéquation du droit international humanitaire aux situations actuelles de conflits. Même si certaines règles méritent d'être précisées, même si une évolution naturelle du droit, basée sur des règles fondamentales existantes, est nécessaire, le droit international humanitaire reste indispensable pour assurer un minimum de protection de la personne humaine en situation de conflit armé, et sans aucun doute pertinent et adéquat dans les situations que l'on rencontre aujourd'hui, à condition qu'il soit correctement compris et appliqué.

C'est à cette tâche là que nous nous appliquons dans le cadre de ce Colloque, mais également dans tous les pays où le CICR est actif.

Le CICR est particulièrement heureux de voir d'une part l'intérêt que porte le Collège d'Europe à ces questions et d'autre part l'importance qu'il attache à la formation de ses étudiants dans ces matières et à la promotion du débat académique sur le droit humanitaire.

Je ne saurais terminer sans remercier les participants d'avoir été si nombreux à répondre favorablement à notre invitation à participer à ce Colloque.

Je me réjouis d'avance des débats que nous allons avoir pendant ces deux jours qui s'annoncent stimulants et fructueux.

Je vous remercie de votre attention.

Session 1
Setting the Scene: Transfers and Humanitarian Concerns

Chair person: **Knut Doermann,** *Head of the Legal Division, ICRC*

NEW LEGAL AND OPERATIONAL ISSUES: A NATO PERSPECTIVE

Lt. Col. Darren Stewart[1]
Legal Advisor, NATO

De nos jours, la majorité des conflits armés peuvent être catégorisés comme conflits de faible intensité. Pourtant, ceci ne signifie pas que d'importantes opérations de combat entraînant la détention de personnes n'ont pas lieu.

Dans le cadre d'une opération de l'OTAN, les forces ne procèderont pas à la détention sans l'autorisation spécifique du Conseil de l'Atlantique Nord, l'organe suprême de prise de décisions politiques à l'OTAN. La base légale permettant la détention, se trouve dans des résolutions du Conseil de sécurité des Nations unies, autorisant les États membres à « prendre toutes les mesures nécessaires ». Ces résolutions fixent aussi un but précis : dans le cas de l'Afghanistan, la Force internationale d'assistance à la sécurité (ISAF) reçoit de tels pouvoirs dans le but de soutenir le Gouvernement afghan. Bien sûr, une personne ne peut être détenue que si des nécessités opérationnelles l'exigent. Ainsi, au Kosovo, l'OTAN ne détiendra que dans le cas où les personnes arrêtées ne peuvent pas être transférées directement à la police de la Mission d'administration intérimaire des Nations unies au Kosovo (UNMIK). En Afghanistan au contraire, la situation sécuritaire et opérationnelle rend inévitable une détention à court terme par l'OTAN.

Les standards minimaux qui sont appliqués sont influencés par la question de la qualification des conflits. Les différents États membres de l'OTAN feront souvent des interprétations divergentes d'une situation spécifique. Afin de garantir aux détenus une protection minimale analogue, tous les membres de l'OTAN ont accepté l'application des règles coutumières de la Troisième et de la Quatrième Convention de Genève : traitement humain des individus, l'interdiction de la torture ou du traitement inhumain à l'égard des détenus. Pourtant, même si chaque État applique ces standards minimaux, en fin de compte chaque État considère les détenus et leurs transferts comme relevant de sa propre responsabilité. Il appliquera les normes du droit international humanitaire et des droits de l'homme conformément à sa propre évaluation d'applicabilité.

1 Chief Legal Adviser, Headquarters Allied Rapid Reaction Corps. The views expressed in this presentation are those of the author and do not represent official NATO or United Kingdom policy.

Si on utilise une dernière fois l'exemple de l'Afghanistan, la catégorisation divergente du conflit par les États membres de l'OTAN rend une application uniforme des règles de détention difficile, surtout concernant les obligations vis-à-vis des détenus après un transfert aux autorités afghanes. Souvent les États membres, notamment les États européens, concluent séparément des accords avec le gouvernement afghan sur cette question, en particulier quant à la non-application de la peine de mort. Une solution partielle d'uniformité est néanmoins trouvée par les Procédures opérationnelles permanentes (SOP) qui traitent de la manipulation, du traitement et du transfert des détenus. En règle générale, un individu n'est pas détenu plus de 96 heures, après quoi il est soit libéré, soit transféré aux autorités compétentes.

Le défi reste pour l'OTAN et ses États membres d'harmoniser les différentes approches nationales et de trouver des solutions pratiques au niveau tactique sans mettre en danger le consensus obtenu au niveau stratégique. Il est, par ailleurs, important de souligner les relations entre l'OTAN et le Comité internationale de la Croix-Rouge (CICR) concernant les questions de détention. Ces relations se traduisent par des contacts réguliers entre les deux institutions, par exemple, entre le SACEUR (Supreme Allied Commander Europe) et la délégation du CICR auprès de l'OTAN, ou sur le terrain entre les chefs de délégation du CICR et les commandants de l'ISAF. En Afghanistan, par exemple, les relations ont été formalisées par un Memorandum of Understanding qui permet au CICR de visiter les centres de détention de l'OTAN.

Good morning Ladies and Gentlemen,

I speak to you today as a NATO staff officer who is currently the Chief Legal Adviser of one of NATO's High Readiness Forces; the Allied Command Europe Rapid Reaction Corps. My perspective is one based upon practical experience gained as a legal adviser both on NATO operations in Kosovo (99/00) and Afghanistan (06/07) as well as a NATO Staff officer having been the Assistant Legal Adviser (United Kingdom) at Supreme Headquarters Allied Powers Europe (SHAPE) during 2003/04. I therefore have some firsthand knowledge of how the Alliance deals with detention at the operational level, as well as the challenges facing those at the tactical level having to deal with detention issues on a day to day basis. Indeed it is interesting to note the manner in which NATO policy has evolved from 1999 in Kosovo to today in Afghanistan in the way detention is handled. In both of those conflicts NATO has and is in the business of taking detainees; where 'in the business of' refers to the fact that NATO forces will take detainees as a consequence of the conduct of its operations.

I have been asked briefly, to outline NATO's approach to detention in its operational theatres and the practical aspects associated with this. I will also offer some observations based on my own personal experiences.

As Ms. Krill said in her opening comments, detention or the transfer of persons in armed conflict is not a new concept. It has been happening for as long as armed conflict has existed. The treatment of those detained has of course been subject to a significant number of treaties and juridical texts outlining the obligations that states party to those agreements have in relation to the treatment and transfer of persons coming into the power of a states party. Of course the context in which we view detention has evolved just as our understanding of armed conflict has. No longer is it the case that armed conflict is viewed through the paradigm of interstate industrial war manifested through state on state conflict. The majority of modern conflict, certainly from a NATO perspective, can best be categorised as 'low intensity' and far removed from that for which NATO was formed. That is not to say that low intensity (or counter-insurgency) conflict, such as Afghanistan, cannot on occasions involve, at the tactical level, significant combat operations the consequence of which will be that persons are captured or detained. Of course the difficulty of these counter-insurgency operations is that nations will have differing views as to the categorisation of those people who come into their power. I do not propose dwelling in detail on the process of categorisation of detainees as this will be a matter for nations to form their own views on based on their respective understandings of the nature of the conflict. Unsurprisingly there is not always universal agreement amongst NATO members on this issue.

NATO Approach to Detention

I do not seek here to debate the substantive *ius ad bellum* concepts associated with the use of force in operations involving the detention of persons, except to say that from a NATO perspective as an alliance based on consensus, unless there is a consensus on the Alliances' ability to use force and in that I include an implicit authority to take detainees, then the Alliance will not participate in that operation. Where it does take part, detention, through the Rules of Engagement (ROE) approved at the highest political level within the Alliance[2], is specifically authorised.

As the majority of NATO missions are underpinned by United Nations Security Council Resolutions, the legal basis relied upon to establish the authority to detain is derived from the provisions of the relevant UNSCR. This will usually include the phrase 'all necessary means' and as in the case of Afghanistan, provide a purpose; 'to provide support and assistance to

2 The North Atlantic Council (NAC).

the Government of Afghanistan'. There must also, however, be an operational requirement to detain which will depend on the particular operational theatre.

For example in Kosovo, NATO[3] is now focused on support to UN Mission in Kosovo (UNMIK) and the Kosovo authorities in a peace enforcement action, not dissimilar to that the British Army under took in supporting the law enforcement authorities in Northern Ireland during the troubles there, although of course the threat in Kosovo is of a more nascent form. This support manifests itself through the provision of a security presence and support to the police in dealing within public order incidents. Individuals who come into Kosovo Force's (KFOR) custody in this context find themselves immediately transferred into the custody of the civilian authorities; UNMIK Police. Detention is only for so long as is necessary to transfer them to the custody of the civil police.

Afghanistan on the other hand is a different case. The difficulty in physically transferring detainees to the relevant Afghan authorities and certain other operational considerations means that NATO forces are in the position of having to hold detainees for a period of time. I shall turn in a moment to the specific guidance issued as a result of this to International Security Assistance Force (ISAF) on timelines and treatment of detainees. The reality, however, is that the nature of the operational environment in Afghanistan means that NATO must engage in short term detention.

More problematic in its nature is the case of maritime interdiction operations where it is difficult for NATO to have a detailed position on detention due to the unique position of national warships in those circumstances (in that they carry with them their own national sovereignty). This means that matters of detention arising from the interdiction of piracy, slave trade or enforcement of embargoes as part of a NATO operation will be dealt with by individual flag states. The Alliance in these circumstances confines itself to providing a broad statement of principles and relies upon individual states acting in accordance with their respective obligations.

In addition to there being an operational requirement for detention, it must also be in accordance with the Alliance mission – they clearly go hand in hand. In the examples of Kosovo and Afghanistan, as was previously the case in Bosnia, this is relatively self evident in that if you are providing support to say UNMIK or the Government of Afghanistan the extent to which individuals can be detained will be governed by the extent of the mandate as set out in the relevant UN Security Council Resolutions as interpreted by the North Atlantic Council (NAC).

What then are the minimum standards we would seek to apply? Although I will not cover it here, the issue of categorisation will to a certain extent impact upon or influence the

3 Through its leadership of the UN mandated Kosovo Force (KFOR).

applicable minimum standards; whether the conflict is an international armed conflict, a non-international armed conflict or an internal armed conflict. Therefore the Alliance finds it easiest to speak in terms of those standards which have passed into customary international law; such as those found in Geneva Convention (GC) III in respect of combatants and GC IV in respect of civilians. Of course there is considerable debate and no great consensus within the Alliance as to whether insurgents captured in Afghanistan might be defined as combatants and therefore subject to treatment under GC III. However, it is accepted within NATO that these conventions apply in terms of setting out the minimum standards applicable to detainees; humane treatment of individuals, not exposing detainees to torture or degrading treatment. Of course nations will take these basic principles and enhance upon them based upon their respective views of their obligations under broader IHL and Human Rights Law.

As I have mentioned detention is seen within NATO as a mix of national and Alliance business, with the preponderance of responsibility lying with individual nations. The Alliance will set as a matter of consensus the minimum standards which will apply to people detained and their transfer, although the obligations of nations post transfer makes a more proscriptive approach addressing this aspect somewhat problematic. For example, if a nation takes the view that its obligations to detainees in its custody is governed by GC III then it will take a much greater interest in the treatment of those detainees post transfer, than a nation who took a differing view with respect to the application of GC III to its detainees. At the end of the day nations do regard the handling of detainees and their subsequent transfer as being very much their business and whilst adhering to the minimum standards set down by NATO policy, they will act in accordance with their view as which category a particular detainee might fall into and the impact this has on any transfer.

Of course such differing views raise a number of Alliance friction points; with the emphasis very much being on the keen desire to maintain Alliance cohesion. Part of maintaining cohesion is the recognition of the differences of each nations and looking for pragmatic ways to harmonise these. For EU Member States the case of *Bankovic*[4] would appear to have settled the question of jurisdiction of a state over a detainee and the applicability of the European Court of Human Rights (ECHR) when an individual is within the power of a state party to the ECHR. Although of course in terms of broader extra-territorial application of the ECHR there would appear to still be some debate as amongst EU Member States. Of course non-ECHR states will have their own views based on their respective regional arrangements for example. Inter-American Convention on Human Rights and of course the over-arching International Covenant on Civil and Political Rights (ICCPR). Even here, though, it is not always easy to

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

obtain consensus as nations will take differing views on the extra-territorial applicability of their ICCPR obligations.

It is of importance here to mention the relationship NATO has with the International Committee of the Red Cross (ICRC) and the importance with which NATO regards this interaction. NATO's relationship with the ICRC concerning detainees ranges from formal contacts between Supreme Allied Commander Europe (SACEUR) and the ICRC delegation to NATO through to interaction and cooperation with ICRC offices in operational theatres and Theatre commanders relationships with ICRC Heads of Delegation.

This latter contact is manifested through regular informal meetings between legal staff and protection officers or Heads of Delegation designed to afford opportunities to give assurances as to treatment and to explain NATO approaches to detention and issues of transfer. In some cases such contact is formalised (as was the case in Afghanistan in January 2007) by way of Memorandum of Understanding concerning the agreement to allow access to NATO detention facilities.

Practical Aspects

Turning then to a few practical aspects. The nature and categorisation of a conflict is important to the way in which detention is dealt with. In Afghanistan the conflict is seen by the military as a counter-insurgency. However from a legal perspective there is considerable debate as to whether it is a non-international armed conflict, an internal armed conflict or an internationalised non-international armed conflict. This of course means that nations will have differing views on the categorisation of the armed conflict and their subsequent obligations including the treatment of detainees. As a result a number of nations see need to enter into agreements with the receiving state in order to satisfy what they believe are obligations for detainees post transfer. These nations are not only from within the Alliance, but include those nations participating in ISAF and who are not in NATO. One of the principle concerns for EU Member States is the application of the death penalty which is covered in those agreements entered into by EU states. Within ISAF the details of these agreements are not always shared by those states entering into them and this can on occasions cause some frustration and friction when dealing with the Afghan authorities who will not surprisingly take advantage of the differing and often nuanced arrangements with Member States. But such frankly is the reality of operating within an alliance.

How then does the Alliance try to give effect to the implementation of the minimum standards agreed as between Member States? This is primarily done through Standard Operating Procedures (SOPs). In Afghanistan and in Kosovo, we have SOPs which cover the handling,

treatment and transfer of detainees. I use the phrase detainee simply because of the need for consensus at the tactical level. These SOPs cover, generally speaking, the procedures for handling detainees, their handover and release, review of detention, commanders responsibility in ensuring that these procedures are applied and the investigation of any complaint or abuse.

The general rule of thumb is that NATO will not detain individuals for longer than 96 hours.[5] Therefore NATO will either release or transfer detainees to the sovereign/host nation within 96 hours. For example, in Afghanistan this would be either the Afghan National Police of the Afghan National Directorate of Security.

Conclusion

A few final thoughts by way of conclusion. The biggest challenge which faces any alliance based on consensus is setting out the highest possible minimum standards. Where nations have differing views as to their obligations based upon categorisation of the conflict and detainees taken in such a conflict, this challenge should not be underestimated. Of course where nations differ at the outset on these critical issues, then the impact on setting out minimum standards becomes all the more problematic; not merely from a diplomatic perspective, but also in terms of harmonising and economising effort of military forces deployed on the ground. Notwithstanding this the Alliance does try to grasp this nettle and articulate minimum standards which are seen as reflecting customary international law; not a particularly neat fit as these standards are ones which are applicable generally in an armed conflict which may or may not be present as a matter of fact and therefore triggering de jure application. Hence the friction which often arises with International Human Rights lawyers criticising those minimum standards applied. Articulating these standards in SOPs and then monitoring their application, relying as it does on nations accepting external oversight (even if only by the Alliance) of activity which is seen as 'national business' can prove to cause great friction. Therefore the harmonisation of these differing national approaches, providing practical solutions at the tactical level whilst not undermining the broad consensus achieved at the strategic level, continues to be one of the greatest challenges facing NATO Commanders and their staff.

5 The specific figure of 96 hours is derived from EU Member States' concerns with respect to European Court of Human Rights obligations.

SETTING THE SCENE: TRANSFERS AND HUMANITARIAN CONCERNS – AN EU PERSPECTIVE

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Sur la base de l'article 17 du Traité sur l'Union européenne (UE), l'UE a développé la Politique européenne de sécurité et de défense (PESD), faisant apparaître un large échantillon d'opérations européennes civiles et militaires de gestion de crise. Ces opérations peuvent s'adapter à des situations et des nécessités différentes, aussi variés que des missions d'État de droit, des missions d'assistance aux frontières ainsi que des missions d'observations et des missions de maintien de la paix et d'imposition de la paix. Cette diversité d'opérations implique que le droit international humanitaire ne s'applique pas dans la plupart des missions PESD de l'UE, les droits de l'homme étant le cadre légal de référence.

En ce qui concerne la spécificité des opérations militaires européennes par rapport aux opérations de l'OTAN, les premières sont généralement plus courtes, ce qui ne leur permet pas, en général, de construire et de diriger leurs propres prisons. Concernant le cadre légal applicable, il existe une spécificité européenne, vu l'impact de la jurisprudence de la Cour européenne des droits de l'homme. Bien que les obligations des États membres de l'UE soient ainsi très similaires, elles ne sont pas toujours interprétées de la même manière. Afin de surmonter ces difficultés, on essaie, au sein des institutions européennes, d'atteindre un point de vue commun, au moins comme position de principe. On peut également se référer à l'article 6 du Traité sur l'UE qui oblige les institutions européennes et les États membres à respecter les droits de l'homme dans le cadre de la mise en œuvre du droit européen. En ce qui concerne la détention, les États membres se sont engagés, durant la 30ème Conférence internationale de la Croix-Rouge et du Croissant-Rouge, à respecter les garanties fondamentales.

Deux exemples pratiques des opérations PESD, pertinents pour le sujet de la détention et des transferts des détenus, sont l'opération EUFOR Tchad/République centre africaine et l'opération militaire Atalanta. Concernant cette première opération militaire, le Commandant de la Force devait négocier un accord commun de transfert des détenus avec les autorités tchadiennes. En ce qui concerne l'opération militaire Atalanta, une opération en vue d'une contribution à la dissuasion, à la prévention et à la répression des actes de piraterie au large des côtes de la Somalie, une action commune concernant les possibles transferts a été

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adoptée obligeant les États membres, participant à l'opération militaire, à respecter le droit international applicable afin de garantir qu'aucun détenu transféré ne souffrira d'un traitement inhumain. Les discussions afin de conclure les accords nécessaires pour mettre en œuvre cette action commune sont en cours. En conclusion, dans le cadre des opérations PESD, les États membres essaient d'atteindre un certain degré de consensus quant à la détention et au transfert. Il y a également des tentatives de conclure des accords de transfert pour toute opération.

In this short contribution, I would like to address three points: first, the similarities with NATO on the one hand and the specificity of Europe and the European Union (EU) on the other hand; second, the need to comply with our obligations without imposing them on others; and third, two examples from the practice of EU-led operations. I will focus on the EU's Security and Defence Policy.

Preliminary Remark: the Nature of ESDP Operations and Applicable Law

I first wish to briefly mention the nature of the EU's crisis management operations. On the basis of Article 17 of the Treaty on European Union (TEU), the EU has developed a European Security and Defence Policy (ESDP) which comprises a wide array of civilian and military crisis management operations ('ESDP operations').[2] These operations can be tailored to the specific situation and vary greatly, ranging from consensual rule of law, border assistance or monitoring missions, to peacekeeping and even 'tasks of combat forces in crisis management, including peacemaking'. The latter means peace enforcement and hence potentially high intensity operations. This wide range of missions and operations has an impact on the applicable law.[3]

The EU and its Member States accept that if EU-led forces are party to an armed conflict, International Humanitarian Law (IHL) will fully apply to them. However, given the wide range of ESDP operations described above and the fact that most of them have clearly not been war fighting in nature, IHL is not likely to be applicable in many ESDP operations. On this basis, EU policy is that IHL does not necessarily apply in all ESDP operations, although obviously it may be relevant to the relations between the parties to the conflict. Neverthe-

2 See generally http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=268&lang=EN&mode=g. For a discussion from a legal perspective, see F. Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations', in M. Trybus & N. White (eds.), *European Security Law* (Oxford: Oxford University Press, 2007), pp. 61-101.

3 See generally F. Naert, 'International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights', Doctoral thesis, KU Leuven, 2008 (a slightly revised version will be published by Intersentia in 2009).

less, the EU and its Member States remain fully aware of the potential obligations of EU-led forces under IHL.[4]

When international humanitarian law does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct of ESDP operations. Admittedly, the applicability of human rights *de jure* remains controversial in some respects, such as the extra-territorial application of the European Convention on Human Rights (ECHR), the question of derogation in times of emergencies and its applicability to peace operations, the relationship between human rights and IHL[5] and the impact of UN Security Council mandates on human rights.[6] Nevertheless, at least as a matter of policy, human rights provide significant guidance in ESDP operations. In practice therefore, EU operational planning and rules of engagement take into account internationally recognised standards of human rights law.[7]

Therefore I will go somewhat beyond the confines of the topic and will not limit myself to situations of armed conflict.

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4 On IHL and ESDP operations, see Ibid., pp. 299-352; M. Zwanenburg, 'Toward a more Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations', in: S. Blockmans (ed.), *The European Union and Crisis Management: Legal and Policy Aspects* (The Hague: TMC Asser Press, 2008), pp. 395-415; N. Ronzitti, 'L'applicabilità del diritto internazionale umanitario', in: N. Ronzitti (ed.), *Le forze di pace dell'Unione Europea* (Soveria Mannelli: Rubbettino, 2005), pp. 165-194 (English summary at pp. 19-20) and G.-J. Van Hegelsom, 'Relevance of IHL in the Conduct of Petersberg Tasks', in the proceedings of the 2nd Bruges Colloquium (Collegium No. 25, available online at http://www.coleurop.be/template.asp?pagename=pub_collegium), pp. 109-120.

5 For a partial EU perspective, see paragraph 12 of the European Union Guidelines on promoting compliance with international humanitarian law (IHL), Official Journal of the European Union C 327, 23 December 2005, p. 4 (see also http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1001&lang=EN&mode=g).

6 See on this e.g. M. Wood, 'Detention during International Military Operations: Article 103 of the UN Charter and the Al-Jedda Case', forthcoming in 47 *Military Law & the Law of War Review* 2008.

7 On human rights and ESDP operations, see F. Naert 2008, op. cit., pp. 353-433; F. Naert, 'Accountability for Violations of Human Rights Law by EU Forces', in: S. Blockmans (ed.), op. cit., pp. 375-393; N. Ronzitti, op. cit., pp. 171-172 and 174-178 (English summary at pp. 19-20); H. Hazelzet, 'Human Rights Aspects of EU Crisis Management Operations: From Nuisance to Necessity', in: *International Peacekeeping*, Vol. 13, No. 4, 2006, pp. 564-581 and J. Arloth & F. Seidensticker, 'The ESDP Crisis Management Operations of the European Union and Human Rights', April 2007 (http://files.institut-fuer-menschenrechte.de/488/d65_v1_file_4649796b19cd6_Studie%20ESDP%20pdf%20version%2005-2007.pdf). See also the compilation of documents on mainstreaming human rights and gender into the ESDP, available at the Council's website at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news144.pdf.

Similarities with NATO and Specificity of Europe and the EU

When it comes to the concerns and dilemmas that arise in operations, the EU and NATO have much in common, although obviously each operation poses its own particular challenges. However, the generally smaller scale of ESDP military operations so far may make it practically more difficult to establish and run a detention facility (obviously, this does not mean the operation may disregard applicable law).

As to the legal framework, it is possible to identify a European flavour. I say a European flavour and not just an EU one because of the special significance of the ECHR as the primary European human rights instrument not limited to the EU's Member States. As the impact of the ECHR is discussed in other contributions, I will not dwell on it here.

Looking more specifically at the EU, it must be noted that the human rights and IHL treaty obligations of its Member States converge very strongly, more than in NATO. For example, all EU Member States are party to the ECHR, all but four of them are party to Protocol 13 to the ECHR (on the death penalty), and there is a fairly strong EU position on the death penalty.[8] However, this does not necessarily mean that these obligations are always interpreted in the same way by all Member States (or even within Member States). On the other hand, policy choices may overcome different legal views. For instance, in the framework of the ESDP, there are efforts to reach a common view on some issues, at least as a matter of policy. To facilitate this, the EU Military Committee Working Group[9] can meet in a format reinforced by legal experts when necessary (e.g. in the process of the ongoing revision of the EU's concept for the use of force and Rules of Engagement in its military operations, which covers a number of legal issues).

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8 See Article 2(2) Charter of Fundamental Rights of the European Union (Official Journal of the European Union C 364, 18 December 2000, p. 1). This Charter was solemnly proclaimed in Nice on 7 December 2000 but its legal nature as such has not yet been determined (see para 2 of the Presidency Conclusions of the 7-9 December 2000 Nice European Council, available at http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=432&lang=EN&mode=g). The Lisbon Treaty (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, Official Journal of the European Union, 17 December 2007) would incorporate the Charter in the Treaty on European Union, subject to some modifications, and would make it legally binding: see Article 6(1) TEU as it would be amended (the consolidated version of the Treaty on European Union as it would be amended by the Lisbon Treaty is published in Official Journal of the European Union C 115, 9 May 2008) in conjunction with the amended Charter (adopted in Strasbourg on 12 December 2007, Official Journal of the European Union C 305, 14 December 2007). See also the EU guidelines on the death penalty available on the Council's website at http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=822&lang=EN&mode=g (and the other human rights guidelines available there).

9 A preparatory body of the Council of the EU. The Council is the key decision-making body in the ESDP.

Moreover, Article 6 TEU, as interpreted by the European Court of Justice, binds the EU institutions and the Member States, when implementing EU law, to human rights (which are also general principles of EU law).[10] This is reflected in the Charter of Fundamental Rights of the European Union.[11] However, the continuing reluctance, notably on the part of a number of Member States, to recognise the EU's international legal personality,[12] means that it is uncertain to what extent the EU itself has any obligations. It seems that the obligations in EU-led operations have so far been primarily conceived as resting on the participating states. Thus, the Presidency Conclusions of the 19-20 June 2003 Thessaloniki European Council stated that 'The European Council stresses the importance of *national armed forces* observing applicable humanitarian law' (emphasis added).[13] The 2002 Salamanca Presidency Declaration similarly stressed participating state obligations.[14]

Furthermore, the attribution of conduct and the division of the responsibility of international organisations and that of their Member States remains a complex issue that is being examined by the International Law Commission.

Specifically with regard to detention, it is worth mentioning that the EU Member States made a Joint Pledge at the 30th International Conferences of the Red Cross and Red Crescent concerning fundamental procedural safeguards (pledge P091[15]). The pledge includes commitments by the Member States and by the EU and states that:

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10 For the importance of human rights under EU law, see for example European Court of Justice, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 September 2008.

11 Article 51(1) of both the 2000 and the 2007 versions, op. cit.

12 In contrast to the European Communities, the European Union has not yet been explicitly accorded international legal personality. While the EU's treaty-making power under Article 24 TEU, as exercised in practice, including in the area of the ESDP, has led most commentators to consider that the EU has implicitly acquired such personality under international law, it would appear that some Member States still do not recognise this, or at least are unwilling to accept the consequences of this personality, in particular as regards responsibility. Compare J.-C. Piris, *The Constitution for Europe: a Legal Analysis* (Cambridge: Cambridge University Press, 2006), pp. 60-61, especially note 9, and R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', in: *Common Market Law Review*, Vol. 43, No. 2, 2006, pp. 353-357. In any event, Articles 6 and 11 TEU clearly entail obligations for the EU and its institutions, including with regard to human rights and arguably also IHL. The EU's legal status would be resolved if the Lisbon Treaty (op. cit.) would enter into force.

13 These conclusions are available at http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=432&lang=EN&mode=g.

14 The outcome of the international humanitarian law European seminar of 22-24 April 2002 in Salamanca, Doc. DIH/Rev.01.Corr1, on file with the author.

15 Available online at http://www.icrc.org/APPLIC/P130e.nsf/pbk/PCOE-79CKFC?openDocument§ion=PBP.

The EU Member States reaffirm their determination to respect fundamental procedural guarantees for al[l] persons detained in relation with [...] an armed conflict or other situation of violence as enshrined in relevant IHL and/or international human rights law, as applicable.

The EU therefore pledges to promote respect of fundamental procedural guarantees through a wide range of measures including:

- Training for staff participating in EU military and civilian crisis management operations in fundamental procedural guarantees.
- Ensuring implementation of those standards by third parties involved in EU operations.
- Supporting dissemination and training sessions on implementation of fundamental procedural guarantees.
- Recalling the importance of respecting fundamental procedural guarantees in its dialogue with other States.

The EU Member States also commit themselves to promoting the understanding of the provisions of Article 13 of the Third Geneva Convention relating to protection of the prisoners of war from public curiosity.

Complying with Our Obligations without Imposing Them on Others

It is important to point out that European states do not attempt to impose European and/or EU standards on others – except when they participate in EU-led operations (in that case, they are subject to EU agreed rules and policies). However, there are cases in which complying with our own obligations requires us to make demands of others to some extent. This is not a new element and has become common practice in other areas, notably extradition. For instance, the EU-US extradition agreement contains a clause on the death penalty.[16]

16 Agreement on extradition between the European Union and the United States of America, Official Journal of the European Union L 181, 19 July 2003, p. 27 (not yet in force), Article 13 ('Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or ..., on condition that the death penalty if imposed shall not be carried out. ... If the requesting State does not accept the conditions, the request for extradition may be denied').

Two Examples from the Practice of ESDP Operations

A first example is the operation EUFOR Chad/CAR.[17] With regard to this operation, there were the usual contacts with the International Committee of the Red Cross (ICRC) in the planning of the operation and in its conduct, both in Brussels and in the field, including on issues of detention and transfer. Detention in this operation is governed by provisions in the Operation Plan (OPLAN) and an operation specific directive, both based on relevant EU concepts.

Specifically as regards transfer, two elements may be of interest. First, the Force Commander was to negotiate a transfer arrangement with the Chadian authorities, so there was an attempt to have a common approach rather than a multiplication of bilateral arrangements. The proposed arrangement inter alia included a number of safeguards and also upheld the role of the ICRC. Second, there were internal arrangements between some contingents (e.g. between the Dutch and the Irish contingents).[18]

A second example is the EU's military operation Atalanta,[19] in support of various United Nations Security Council (UNSC) Resolutions concerning Somalia and piracy off its coasts,[20] to contribute to 'the protection of vessels of the WFP [World Food Programme] delivering food aid to displaced persons in Somalia, in accordance with the mandate laid down in UNSC Resolution 1814 (2008)' and to 'the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UNSC Resolution 1816 (2008)', in 'a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea ...'.[21]

17 See generally http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1366&lang=EN&mode=g.

18 See the Dutch Kamerbrief inzake de voortgang van de militaire EU-missie in Tsjaad en de Centraal Afrikaanse Republiek (EUFOR Tchad/RCA), dated 29 September 2008.

19 See generally http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1518&lang=EN&mode=g. This follows a military Coordination Action in support of UN Security Council Resolution 1816 ('EU NAVCO').

20 The Joint Action (infra next note) refers to Resolutions 1816 (2 June 2008), 1814 (15 May 2008) and 1838 (7 October 2008). Subsequent relevant Resolutions include Resolutions 1846 (2 December 2008, extending the mandate of 1816 for 12 months) and 1851 (16 December 2008, also covering the land territory of Somalia).

21 Article 1 Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 301, 12 November 2008, p. 33 (see also the more detailed mandate in Article 2).

From the early stages of planning, several preparatory bodies within the Council of the EU paid significant attention to legal issues.[22] These issues included what to do with any suspected pirates or armed robbers that might be captured and also involved questions of competences of the Member States and the EU (any prosecution would have to be undertaken by Member States as the EU has no competences in this area). In this context, transfer of such persons to third states and international law issues in this respect were discussed at some length.

The Joint Action setting up the operation *inter alia* lists in its Article 2 as aspects of the mandate to '(d) take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present' and '(e) in view of prosecutions potentially being brought by the relevant States under the conditions in Article 12, arrest, detain *and transfer* persons who have committed, or are suspected of having committed, acts of piracy or armed robbery in the areas where it is present and seize the vessels of the pirates or armed robbers or the vessels caught following an act of piracy or an armed robbery and which are in the hands of the pirates, as well as the goods on board' (emphasis added).

Furthermore, Article 12 of this Joint Action (on 'Transfer of persons arrested and detained with a view to their prosecution') reads as follows:

"**1** "On the basis of Somalia's acceptance of the exercise of jurisdiction by Member States or by third States, on the one hand, and Article 105 of the United Nations Convention on the Law of the Sea, on the other hand, persons having committed, or suspected of having committed, acts of piracy or armed robbery in Somali territorial waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred:

- to the competent authorities of the flag Member State or of the third State participating in the operation, of the vessel which took them captive, or
- if this State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.

2 No persons referred to in paragraphs 1 and 2 may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights,

22 See, for example, some aspects set out in Council Doc. 14491/1/08 (21 October 2008).

> in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment."

At the time of writing, discussions and negotiations are ongoing with a view to concluding the necessary arrangements to implement this provision. If possible, there will be an overarching arrangement with the third state(s) concerned at EU or operation level. However, there may also be supplementary bilateral arrangements and any decision on transfer will most likely remain a national responsibility, even if made pursuant to an agreement concluded by the EU or the operation.[23]

Conclusion

Legal issues concerning transfers of persons have arisen in the framework of some ESDP operations, although primarily from a human rights perspective rather than from an IHL one. On the one hand, Member States' obligations in this field are largely similar. On the other hand, they may be subject to differing interpretations and questions as to the legal personality of the EU, and the obligations and responsibility of Member States versus that of the EU complicate the matter. Nevertheless, Member States try to achieve some degree of shared view on these issues in the framework of the ESDP and there are attempts to conclude EU- or operation-wide transfer arrangements for ESDP operations.

Post Script

On 6 March 2009, an 'Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer' was signed in Nairobi. This agreement is published in the Official Journal of the European Union, No. L 79 of 25 March 2009, p. 49 and the Council decision relating to the agreement at ibid., p. 47.

Pursuant to this agreement, nine suspected pirates captured by the German warship Rheinland Pfalz, which operated in the framework of the EU's Operation ATALANTA, were handed over to Kenya mid-March 2009. See for example a press release dated 4 March 2009 (available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/106500.pdf) and a 13 March 2009 news item available at http://ue.eu.int/showPage.aspx?id=1567&lang=EN.

23 See, for example, the 'Dutch Kamerbrief inzake Nederlandse bijdrage aan de maritieme EVDB-operatie Atalanta in de wateren rond Somalië', dated 19 December 2008.

TRANSFERS AND HUMANITARIAN CONCERNS: A UNITED STATES PERSPECTIVE[1]

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En ce qui concerne les États-Unis et le transfert des détenus, un des sujets les plus controversés est le transfert des détenus du centre de détention sur la base navale de la baie de Guantánamo vers leur pays d'origine ou un pays tiers. Les États-Unis, comme cela a été affirmé à de nombreuses occasions, ne sont pas désireux de détenir une personne plus longtemps que nécessaire. Une fois déterminé qu'un détenu ne répond pas aux critères d'un combattant ennemi ou qu'il ne pose plus de menace pour la sécurité américaine, il sera transféré.

Lorsqu'elle envisage le transfert d'un détenu, le traitement post-transfert lui étant réservé est une question préoccupant l'administration américaine. L'administration souhaitant se conformer aux obligations légales de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants et du Protocole relatif au statut des réfugiés, ne pourrait pas envoyer une personne vers des territoires où elle serait susceptible de subir des traitements cruels, inhumains ou dégradants. Les États-Unis tenteront d'obtenir les assurances diplomatiques jugées nécessaires et adéquates. Dans le cas où la personne transférée risque d'être détenue dans le pays recevant ou de subir d'autres mesures de sécurité, les États-Unis essaient d'obtenir les assurances d'un traitement humain du détenu transféré.

Au moment de l'évaluation de ces assurances, l'identité, la position et d'autres informations relevantes, relatives au fonctionnaire transmettant les assurances, sont prises en considération ainsi que les développements politiques ou juridiques dans le pays recevant. L'administration américaine peut également tenter d'obtenir l'accès aux lieux de détention du pays concerné afin d'évaluer les conditions de détention de la personne transférée elle-même.

S'il y a raison de croire que ces assurances ne seront pas honorées, l'administration américaine s'opposera au transfert. Certains détenus de Guantánamo Bay ne peuvent pas, pour cette raison, être transférés vers leur pays d'origine. Les États-Unis tentent de transférer des détenus vers des pays tiers, mais jusqu'à présent le seul pays à en avoir acceptés est l'Albanie.

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1 These written comments summarise, and provides additional context for, remarks presented by Mr. Shin at the Bruges Colloquium. As with those remarks, the opinions and characterisations in this article are those of the author and do not necessarily represent official positions of the United States government.

D'autres États dans le contexte de la Force internationale d'assistance à la sécurité (ISAF) et dans le contexte des opérations contre la piraterie ainsi que des tribunaux internationaux comme le Tribunal Pénal International pour le Rwanda sont confrontés à des défis analogues. Une large approche de ces défis pourrait offrir des opportunités pour le renforcement des capacités institutionnelles et pour une meilleure protection des droits de l'homme dans différents pays. Les États-Unis poursuivront leurs efforts pour trouver des pays tiers en mesure d'accepter, dans de bonnes conditions, les anciens détenus de Guantánamo.

The detention facility at the Guantánamo Bay Naval Base has generated significant discussion over the past several years on a vast array of complex legal and policy issues. These comments will focus on only a very limited and narrow issue relating to detainees at Guantánamo Bay – the transfer of an individual from Guantánamo to either that person's country of origin or to a third country. A critical consideration in such transfers is the humane treatment of a former detainee after transfer. These comments, first, set out in brief the steps that the United States government takes to assure humane treatment. These points draw from filings made by the United States in various detainee litigations before the US courts; the reader is directed to those filings for further details. Second, these comments make some observations on challenges that are common to transfers in differing contexts.

As the United States has stated on many occasions, it has no interest in detaining enemy combatants longer than necessary. Between 2002 and mid-2008, approximately 500 detainees were transferred from Guantánamo to some thirty different countries, significantly reducing the population at the detention facility there. In general, detainees have been transferred when it was determined that they do not meet the criteria of enemy combatants or when they no longer pose a continuing threat to US security interests.

A particular concern for the US Department of State in making recommendations on transfers is the question of whether the receiving government will treat the detainee in question humanely, in a manner consistent with that country's international obligations, and will not persecute the individual on the basis of his race, religion, nationality, membership in a social group or political opinion. In assessing humane treatment concerns, the United States has taken an approach consistent with its implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Protocol Relating to the Status of Refugees. Accordingly, the United States determines whether it is more likely than not that the individual will be mistreated or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from protection on criminal or security-related grounds.

As a part of the process in which a detainee is transferred out of Guantánamo, the United States seeks certain diplomatic assurances that it considers necessary and appropriate for the country in question. Where it is foreseeable that a receiving government might detain the transferred individual or take other security measures, the US seeks also assurances of humane treatment. Any assurances from a potential receiving country are taken into consideration in making the ultimate assessment of humane treatment concerns. When evaluating the adequacy of any assurances, State Department officials consider the identity, position and other relevant information concerning the official relaying the assurances, as well as the political or legal developments in the country that may provide context for the assurances. In seeking assurances, the State Department may also seek access by governmental or non-governmental entities in the country concerned in order to monitor the condition of the individual after his transfer; the Department may also specifically seek US access to the individual for such purposes.

In instances in which the United States transfers an individual subject to diplomatic assurances, it pursues any credible report if it has reason to believe that the humane treatment assurances would not be, or were not, honoured. Should any concerns arise as a result, the US has and will take appropriate action. In any instance in which specific concerns about the treatment an individual may receive cannot be resolved satisfactorily, the State Department has and will recommend against transfers.

There are a number of detainees whom the United States designated for transfer, but who have not been transferred due to the inability to resolve humane treatment concerns. In these cases, the United States has sought third country resettlement possibilities. As of mid-2008, the US had approached more than 60 countries in efforts to resettle such individuals, but the only country where the US has had success is Albania.

It will be a challenge for the United States to find solutions to such cases – where an individual has either been assessed for transfer by the government or has been ordered released under a court order, but originates from a country where humane treatment concerns bar transfer to that country. While this is certainly a challenge specifically arising from the transfer of certain individuals from the detention facility at Guantánamo, it is one that may well relate to a broader set of problems that face a number of countries, involving persons held in custody in contexts that vary greatly.

Detaining states face similar challenges, whether an individual is facing deportation, extradition or other transfer. The difficulties, for example, involved in transferring persons held in custody by the International Security Assistance Force to Afghan authorities have been addressed by others at this Colloquium. Such challenges go well beyond the context of hos-

tilities and counter-terrorism operations. Recent decisions by the Appeals Chamber at the International Criminal Tribunal for Rwanda (ICTR) affirming trial chamber rulings that blocked the transfer of cases from the ICTR to the national courts of Rwanda may well raise similar dilemmas for countries facing extradition requests from Rwanda. Even the recent rise of piracy highlights this problem: if a state detains a suspected pirate, what options remain for resolving the status of that individual? Where the suspected pirate cannot be prosecuted by the holding state, cannot be extradited or transferred to a state capable of conducting a prosecution, and cannot be otherwise held by the holding state – what result should apply where that individual hails from a state where humane treatment concerns would prevent his repatriation? Potential solutions to such questions may be more complex than many in the international community recognise; however, a broad approach to developing responses to these challenges could also highlight opportunities for capacity-building efforts to further human rights protections in a number of countries.

Assurances from a receiving government, where seriously and rigorously applied, can allay some humane treatment concerns in providing protection for an individual subject to transfer. For certain countries of return, the assurances provided may be adequate; for other countries, however, assurances may simply not be viable. In such cases, the international community should recognise the broad nature of the legal and policy challenges facing the United States in seeking solutions. In the case of certain detainees assessed for transfer by the government or ordered released by the courts, the United States will continue its efforts to find a third country for resettlement. Given the difficulty of such efforts, the transfer of these individuals who cannot return to their home countries due to humane treatment concerns is a problem that will likely transcend the change of administration in the United States.

Would it not be advisable to try to break down the issue of transfers of detainees in three different categories, each with its own applicable obligations and solutions?

All present experts seemed to favour such a distinction. The first category, namely the transfers between members of an alliance or a coalition, will in general entail the least difficulties. For instance, in the case of possible transfers between European Union (EU) Member States participating in an operation, no problems should be encountered: the Member States are supposed to respect their human rights obligations, notably under the Article 6 of the Maastricht Treaty. However, arrangements can still be made; reference was made to the Dutch-Irish agreement in the Chad context. In the ISAF context (International Security Assistance Force, the United Nations (UN)-mandated, NATO-led international force in Afghanistan) such transfers also prove to be very useful. For instance, the United Kingdom has agreements with other smaller members of the Alliance who contribute in its area of responsibility in Afghanistan by accessing the British temporary holding facilities. Simply according to the economy of scale, it would not have been possible for these small states to conduct their own adequate detention facilities. The second category refers to the possible transfers of detainees to the host state or the state in which the international force is operating. This can be much more problematic in view of the different human rights obligations that states have to observe, be it obligations under regional treaties (as for instance the European Convention for the Protection of Human Rights and Fundamental Freedoms), or universal obligations under the International Covenant on Civil and Political Rights. The question that has to be raised is whether these treaties also apply extraterritorially or not. Regarding transfers, the central question is whether the host state will be able to satisfy the relevant obligations, even the most basic ones in terms of treatment, or not. For the third category, namely the transfers to third states from your own territory or the territory under your control, not many examples could be mentioned.

What is the link between the transfer of detainees in armed conflicts and the piracy operation in Somalia?

One participant stated that this third category of transfer of detainees, namely the transfers to third states from your own territory or the territory under your control, could become more important in the context of the piracy operation in the Somali waters. For instance, pirates could attack a vessel sailing under the flag of a state that is not participating in the operations. Once captured, the state represented on that flag might be interested in suing these pirates, and then arrangements to transfer the detainees to this third state would be

necessary. Several participants warned not to let the piracy issue distract from the problem of transferring detainees. The piracy issue is first and foremost a national legal problem. The basis to detain pirates under international law is quite clear and for the Somali territorial waters there is a further international tool in the UN Security Council's resolution 1816 of 2 June 2008. However, in terms of jurisdiction and trial, it remains very much a national affair and often those national jurisdictions lack adequate criminal laws on piracy. Only because of these limited options for trial, the transfer issue comes into play. As such, when last month the Danish government detained ten suspected pirates, captured in Somali waters, they contacted many close allies in order to find a country where they could be put on trial. No such state was found, and in the end the ten suspects were released.

Often there is no choice whether we want to transfer detainees or not. The rules of engagement often specifically demand states to do so, and, since the operations take place in sovereign states, not transferring them would amount to a breach of the respect for the State's sovereignty, especially when the host state demands the transfer. Would the EU or NATO consider trying the detainees themselves as a possible solution?

All participants agreed that it would be close to impossible for the international force to try the detainees on its own. Firstly, it would probably not be compatible with the host state's sovereignty, and would be as good as impossible when the host state demands the transfer of the detainee. As most countries will be on the host state's territory only with the consent of the latter, they could in theory even be thrown out after such a refusal. Secondly, it would create a very confusing situation where it is not clear which law one should apply. One participant pointed out that even if a criminal was sued instead of transferred to the host state, this would not solve the ultimate difficulties: A criminal prosecution could lead to a conviction or an acquittal; when the prosecution lead to a conviction, the person would have to serve a sentence for a certain amount of time and then the question would arise once more if he or she could be sent back to the original host state. Even the International Criminal Tribunal for Rwanda (ICTR) would be facing this difficulty for persons who have served a sentence or have been acquitted. In Rwanda, for example, it would be unlikely that these people can be handed over to the national authorities and it would be very difficult to find another home for the main responsibles for the massive genocide (in the case of a conviction). The American model of detention is also being tested right now, as the first convicts of the military commissions will be released after having served their sentence. One participant mentioned the case of Salim Hamdan, Osama bin Laden's former driver, and wondered if he would move from criminal sentenced detention to detention as an enemy combatant or even another sort of detention.

What about the release of detainees as another option?

Another possibility with regards to detainees is the option of releasing them (instead of transferring them to other countries), but all participants agreed this approach is far from perfect. Detention is a legitimate and a necessary mean to conduct military operations, to keep criminals from the street, and to eliminate possible security threats. One participant feared that some countries could afraid of detention especially in countries like Afghanistan where legal obscurities influence the military efficiency of operations. All agreed that these kinds of situations would have to be avoided at all costs.

Regarding the transfers of detainees in situations of armed conflicts, does International Humanitarian Law (IHL) or International Human Rights Law (IHRL) apply, or do they both apply?

One participant underlined that this would remain a difficult issue in Afghanistan. Some Member States of the Alliance view these two bodies of law as strictly separated, others are convinced that a complementary view is possible. Consequently, it becomes difficult to form common standards. This is a problem for the lawyers on the ground when trying to implement legal obligations. The numerous bilateral agreements between the Afghan government and some participating states make it even more difficult to know which state applies which rule. Another participant said that countries often had different views on that question and that case law was still missing. The International Court of Justice (ICJ) seems to give a more prominent role to IHL, while the European Court of Human Rights (ECHR) plays down the role of IHL, especially in non-international armed conflicts.

Some harsh reactions followed. Several participants underlined that, regardless of the position of the countries, so far the position of the Human Rights mechanisms and the ICJ (reference was made to the ICJ Congo decision of December 2005) had been that IHL and IHRL could be applied at the same time. In the European context, one just had to look at the European Union's Guidelines on Promoting Compliance with IHL of December 2005, where it says: "Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them". One would have to consider if both bodies of law will apply on a practical case-by-case basis.

Linked to the question of applicability of IHL and IHRL, is the question of categorisation of armed conflicts. Again, participants underlined that different countries had different views, which has consequences for the categorisation of individuals, applicable law to this individuals. One participant underlined that in many situations these differences of approaches would just have to be accepted.

Regarding the simultaneous applicability of IHL and IHRL, is there a difference in ease of this compatibility depending on what right is being attacked or depending on the context in which this right is being attacked?

One speaker declared that, in the area of transfers of detainees the distinction between IHL and IHRL was less important as one can perfectly combine the obligations of both bodies of law in this context. Another participant underlined that this compatibility was held in terms of basic human treatment (prohibition of torture and other cruel, inhuman and degrading treatment or punishment). In the context of Afghanistan, the countries involved in the operations with detainees, have assured this respect for basic human treatment (whether resulting from IHL or IHRL) through bilateral agreements with the Afghan government. A participant stated that these transfer arrangements could also allow the countries to refuse a transfer to the host state, even if the host state does not respect the obligations accepted in this transfer agreement. However, in terms of judicial proceedings or the Article 6 rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms, this perfect combination of the two bodies of law would be unrealistic. He stated that exactly on these rights, IHL remained largely silent, or it certainly did not provide the degree of detail as IHRL would. Exactly in this area, there would be quite a significant degree of friction and disagreement between countries in terms of what they perceive to be their responsibilities. While agreeing that in terms of judicial proceedings this combination might be more difficult, the first speaker claimed that in the context of an international armed conflict this would not cause many problems. An international armed conflict would allow for clear IHL rules and less margin for IHRL. For instance, the aim of a detention of a prisoner of war was not the criminal prosecution. Therefore, one would not be confronted with the issue of the rights in Article 6. Thus, the problem of compatibility would most likely occur in circumstances where one is not dealing with the traditional international armed conflict, but with circumstances that approach an armed conflict, and, probably, on the subject of fair trial or other more nuanced concepts of IHRL as opposed to basic human treatment.

Concerning the fair trial rights problematic, what does NATO do, in the context of a non-international armed conflict, when it is considering transferring detainees and it finds itself confronted with a dysfunctional judicial system?

A participant underlined, that in the Afghan context there was clearly no universal satisfaction as to the standards of the local criminal justice system. Should the European standards articulated in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the similar standards of the International Covenant on Civil and Political Rights apply? The participant believed that countries should apply these standards when

considering transfers. However, the question was also, whether the Afghan system was capable of supporting such standards and actually implementing them. This troubling concern was the reason for the significant investment by the international community in the reform of the rule of law within Afghanistan and other countries. In accordance with the UN Security Council's resolution 1776 of 19 September 2007 ("Stressing in this context the importance of further progress in the reconstruction and reform of the Afghan prison sector, in order to improve the respect for the rule of law and human rights therein"), countries such as the Netherlands would be specifically investing in prison facilities.

Does the US consider having any other legal obligations than the obligations of UN Convention against Torture and 1951 Refugee Convention when considering a transfer of Guantanamo detainees, more specifically obligations in the area of unfair trial?

One participant responded that as a matter of policy the US would apply the standards of the UN Convention against Torture and 1951 Refugee Convention, but as a practical matter, they would look at the full circumstances that an individual might face. However, this would be a very difficult issue, even in a less contentious context, as for instance that of the international tribunals. As such, the Appeals Chamber of the ICTR had recently upheld decisions blocking transfers on the basis that these people would not receive a fair trial in Rwanda. He asked what one should one do with the assassinators. One might prosecute them but there would be no country to receive them.

What about the responsibility of the transferring state in relation to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the similar standards of the International Covenant on Civil and Political Rights?

One participant underlined that under a fair trial and if the transfer of an individual to another state lead to a breach of the International Covenant on Civil and Political Rights, the Human Rights Committee would have its say and could hold the sending state liable. Linked to this responsibility argument, another participant mentioned the judgement of the ECHR in the Behrami and Saramati cases of 2007, where responsibility was not attributed to the KFOR (the UN-mandated NATO peacekeeping mission in Kosovo), but to the UN Security Council. The ECHR said that it could not scrutinise the acts and omissions of Member States that are covered by UN Security Council's resolutions and occur prior to or in the course of UN missions to secure international peace and security. Eventually, such reasoning would create a situation where the law suffers, said the participant.

What are the possible reactions of the transferring state when after the transfer the detainee is subject to some kind of harmful treatment?

One participant stated that the transferring state could seize further transfers in this context. To avoid the detainee being subject to some kind of harmful treatment, diplomatic assurances could constitute a good tool. Several speakers agreed that a legally binding instrument was not necessarily more adequate than diplomatic assurances; the confidence, that the receiving state would respect the arrangement and its obligations towards the detainee was more important than its legal nature. The time, the pace, and the nature of the negotiations leading up to the diplomatic assurances could themselves already be factors that a state could consider when making an overall assessment of the trustworthiness of the receiving state.

Session 2
Transfers, International Law and Non-refoulement Principle

Chair person: **Knut Doermann,** *Head of the Legal Division, ICRC*

NON-REFOULEMENT UNDER HUMAN RIGHTS LAW

Clive Baldwin
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Bien que l'application de la plupart des droits de l'homme soit flexible, et des dérogations à leurs applications admissibles, l'interdiction de la torture et des traitements cruels, inhumains et dégradants est cependant une interdiction absolue. Afin de bien comprendre le régime légal applicable aux transferts des détenus, cette interdiction doit être liée au principe de non-refoulement. Ce principe, provenant du droit des réfugiés, interdit à un État d'expulser ou de refouler un individu vers des territoires où sa vie ou sa liberté serait menacée. La Convention des Nations unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants a introduit ce principe de non-refoulement pour la première fois dans les droits de l'homme en 1984, en déclarant dans son article 3 que « Aucun État partie [...] n'extradera une personne vers un autre État où il y a des motifs sérieux de croire qu'elle risque d'être soumise à la torture ».

En 1989, la Cour européenne des droits de l'homme a accepté le lien entre le principe de non-refoulement et l'interdiction de la torture et des peines ou traitements inhumains ou dégradants ; ceci, en jugeant l'extradition aux États-Unis par le Royaume-Uni d'un Allemand, Jens Soering, incompatible avec les valeurs sous-jacentes à la Convention européenne des droits de l'homme et son article 3 contenant l'interdiction de la torture et des peines ou traitements inhumains ou dégradants. Aux États-Unis, M. Soering, accusé d'un meurtre brutal, risquait de se voir condamner à la peine capitale et donc être exposé au « syndrome du couloir de la mort ». La Cour, argumentant que le « syndrome du couloir de la mort » constitue un traitement dégradant, a conclu préventivement qu'il y aurait violation de l'article 3 si la décision britannique de l'extrader vers les États-Unis recevait exécution.

Depuis lors, ces principes de base ont été développés afin d'inclure d'autres formes de transferts et de mauvais traitements. La Cour européenne des droits de l'homme réaffirme de temps en temps l'absolue interdiction de transférer une personne vers un autre État où elle risque d'être torturée ou traitée inhumainement, comme elle l'a notamment fait en 2008 dans l'arrêt de Saadi c. Italie. À travers la jurisprudence européenne, il a également été clarifié qu'un État doit non

seulement considérer le risque de mauvais traitement dans l'État vers lequel il transfère une personne, mais aussi dans les États tiers vers lesquels la personne pourrait ensuite être envoyée. La Cour a fourni une définition de ce qui constitue un risque réel ou substantiel de torture et, en ce qui concerne un risque de torture avéré, la Cour n'a jamais accepté que des assurances diplomatiques pallient à ce risque.

Concernant le risque de violation d'autres droits de l'homme au moment d'un transfert d'un détenu, il faut chercher à concilier les intérêts étatiques et les intérêts personnels de l'individu. Plus spécifiquement, s'il s'agit du droit à un procès équitable, un dernier point reste à souligner : les forces de maintien de la paix, arrêtant quelqu'un pour un acte criminel, doivent s'assurer de l'établissement des preuves pour permettre la poursuite de ces délinquants.

I am going to be very precise about what I will talk about, which is not just non-refoulement under Human Rights Law (HRL), but, slightly more broadly, any aspect of the transfer of persons from the authority of one country to another as has been developed in International Human Rights Law (IHRL) over the last 20 years.

Before we get into that, I want to say a few short words about some basic principles of HRL, particularly as we started to get into that discussion at the end of the first session and some important points were made. Firstly, there was some discussion about state practice. I'm going to be talking about treaty law essentially, and, of course, treaty law in Human Rights (HR) terms is largely governed and understood and interpreted by the custodians of the HR treaties: the HR treaty bodies and international tribunals, so it is to them we should first look, rather than to state practice.

Secondly, as both these tribunals and the International Court of Justice (ICJ) have stated, HRL applies in all circumstances and certainly in times of conflict. It has a relationship with other types of International Law (IL), including international humanitarian law (the law that we are talking about here), international refugee law, international criminal law, and even the law of the sea and trade law. Those relationships are often close. In some cases, they are in the process of being developed. But the basic issue is that HRL can apply anywhere, at any time. HRL is primarily a question of holding states accountable because IHRL is about states' responsibility for action or inaction.

Finally, it is important to understand two basic principles concerning the rights themselves: the basic issue to understand about HRL is that it is a flexible law. HRL sets out basic rights but then most of the rights themselves, in each of the treaties, have inbuilt reservations,

which permit some restriction of these rights, of course within certain limits. An example is the freedom of expression, which can be limited in certain circumstances: famously states can prohibit shouting “fire” in a crowded theatre. In times of emergency – and emergency is a critical concept in HRL – many rights can be limited further. Nevertheless, this requires a formal declaration of a state of emergency and then the declaration of certain derogations, which are strictly necessary for the situation. It is important to know that a derogation is not the abandonment or the removal of a right, but it does allow a certain degree of flexibility to meet the necessities of the emergency. An example being the right of freedom from arbitrary detention: the European Court of Human Rights (ECHR) has found that a state of emergency can justify the use of preventive detention, a form of detention that is not allowed under normal circumstances, and the state of emergency may permit the extension of the times between judicial reviews by independent bodies. However, no state of emergency can abolish the right to judicial review of detention, which must still eventually take place.

I will spend most of my time on one particular right which is the most important in terms of the transfer between countries, and that is the freedom from torture and cruel and inhuman and degrading treatment. That, of course, is the right that has no exception. It is the only right that is absolute and applies in all circumstances and cannot be derogated from. So how is it being applied in HRL regarding transfers?

The non-refoulement idea and principle originated in refugee law as set out in the Refugee Convention. It came into HRL 20 years ago, essentially through one treaty and one case. That treaty is the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force in 1987. This is a very short treaty, one of the most straightforward ones. As it sets out very clearly in Article 3.1:

> “No State shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

The case was one that we have already heard about, which was ruled on in 1989 at the ECHR called *Soering*. Soering was a German national accused of a very brutal killing in Virginia. The Commonwealth of Virginia made a request through the United States (US) government to the United Kingdom (UK) for his extradition, because he had shown up in the UK and been detained there. He faced a real risk of the death penalty in Virginia, despite an assurance made by the US government. This case came to the ECHR which was dealing with the issue of transfer to a third country essentially for the first time. There were many parts of the judgement that broke new legal ground, including that it was dealing with an issue before there

had been an actual violation, i.e. it was effectively taking pre-emptive action to prevent a violation. Taking into account the new Torture Convention, the ECHR found that there would be a violation of the European Convention on Human Rights if the UK transferred (in this case extradited) Soering to the US. It was not, in this case, because of the risk of the death penalty itself, but because they found the 'death row phenomenon', the time he would spend on death row, was degrading treatment. And it was the risk of his suffering if extradited by the UK to the US, which they found in violation of Article 3 of the European Convention, which prohibits inhuman and degrading treatment. There are two key parts of the judgment, the parts which have resonated ever since.

> "88. Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments, such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights, and is generally recognised as an internationally accepted standard.
>
> The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art. 3). That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State

> by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)."

In Paragraph 88, the Court says it would hardly be compatible with the underlying values of the Convention, were a Contracting Party knowingly to surrender a fugitive to another state where there are substantial grounds for believing he would be in danger of being subjected to torture, inhuman or degrading treatment or punishment. Therefore, although the substantial grounds for prohibiting transfer as set out by the Court are similar to the Convention against Torture, the Court extended the prohibition from a risk of torture to also situations where there is a real risk of inhuman and degrading treatment. The words 'however heinous the crime' shows that it is an absolute standard to be applied to everyone.

> "91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."

Paragraph 91 sets out clearly the liability issue, remembering that HRL is essentially about states' liability. The Court said that they were not dealing with any liability of the US; the US is not a party to the European Convention. The Court addresses a potential liability incurred by the UK. The extraditing state would be liable for an action, which would have, as a direct consequence, the exposure of an individual to proscribed ill-treatment. So by the act, in this case, of extraditing Soering, there would be a risk of ill-treatment. That has been the law ever since. Everything that has developed since, on this particular part of HRL, has just been filling in the gaps and confirming these basic points.

What happened to Soering himself, is that the Court in this case also found that the assurance then made by the US government would not have removed the risk of ill-treatment. Subsequently, the Virginia authorities dropped the death penalty threat, and Soering was extradited and convicted, but did not face the death penalty.

What has happened since on implementing and developing these basic principles preventing transfer to the risk of torture or inhuman and degrading treatment? There has been every so often a need to confirm the point that this prohibition is an absolute rule. This year it was confirmed again in the case called *Saadi v. Italy*, where the ECHR gave another ringing declaration that it was an absolute right. There can be no balancing exercise, so you cannot balance how 'bad' a person is, or what they are charged with, against the risk of torture. If there is a real risk of torture, that is enough to prevent transfer. The prohibition has also been extended to other forms of transfers as well, not just extradition as in the *Soering* case. And this prohibition does not only exist when the risk is of deliberate torture, or inhuman and degrading treatment. Even in the *Soering* case the 'death row phenomenon' was not a deliberate punishment, but there was a real risk of degrading treatment according to the Court This logic was taken to perhaps its limits in a case called *D v. UK* in 1997, when the European Court found a violation of the rights of someone who risked being deported to St. Kitts from a prison in the UK where he had been convicted and served a sentence for drugs offences. He was suffering from AIDS. The Court found evidence that if the UK would transport him to St. Kitts, the lack of any care and support meant he would die very painfully of AIDS. This, they determined, meant he would suffer such degrading treatment as to amount to a violation of Article 3 by the UK if they did deport him. Subsequent case law on similar cases, which have found no violations, has shown that this judgement was the limit of the Court's approach, but the judgement shows that this form of prohibition of transfer can apply even when the risk of ill-treatment is not about detention or punishment of any kind.

There are two basic points that have been important, which have been gradually clarified over the years with regard to this prohibition on transfers.

Firstly, the duty of the states is not just to determine the risk of someone suffering ill-treatment in the first state he will be sent to. If there is a risk that that state will then send him to a third state where he would face torture, the state may be prohibited from deporting him in the first instance. The Committee against Torture, which is responsible for the Convention, has said as much. And it was made clear in a case I was involved with nearly a decade ago, called *TI v. UK*. In that case, our client was a Sri Lankan. He was at real risk, we believed, of ill-treatment by the Tamils, a non-state group that controlled part of Sri Lanka. The UK law and practice at that time would not allow him to be sent back because of this risk. But the UK authorities planned to send him to Germany. We argued that the German law and practice at that time would not take into account the risk of ill-treatment by non-state groups. So there would be a real risk of his being sent back to Sri Lanka by the German authorities to face ill-treatment. When the case finally came before the European Court, the Germans put in a lot of effort to show that they would take into account the risk of a threat to him from the

Tamil Tigers. Based on this evidence, the Court found no violation by the United Kingdom in proposing to send him to Germany. As much as you can be happy about losing a case, it was a good case to lose because a new principle was made clear. The Court said that the British in this case did need to consider whether Germany, the country they were sending TI to, would then put him at risk of being sent to a third country.

The other critical issue has been how to assess the risk of torture or ill-treatment in the country to which the person will be sent. The Committee against Torture, in its first general comment dealing with this issue of transfer to another country, said 'the risk of torture must be assessed on grounds that go beyond mere theory or suspicion, but that risk does not have to meet the test of being highly probable'. The ECHR in its case law has clarified this in a fairly similar way. In its words: 'are there substantial grounds for believing there is a real risk of the person suffering torture or inhumane and degrading treatment?' The Court has further clarified the words 'the substantial grounds' as meaning effectively whether there is a proper evidential basis of the claim for concluding that a risk exists. In the *Saadi* case from this year, the Court found a substantial risk, a real risk of torture in Tunisia. For that finding, they used as evidence Amnesty International reports, US State Department reports, UNHCR reports and Human Rights Watch reports.

The key issue is actually what the definition of 'real risk' is. The Court has found it to be somewhere between a mere possibility and a balance of probabilities, so less than a 50% chance. So, producing substantive evidence of risk generally in the country, or individually to the person concerned, will be enough to trigger this prohibition.

The other issue that I am just going to mention briefly is the issue of assurances and how the law addresses them. As I mentioned, in *Soering*, the death penalty case, the Court rejected an assurance given by the US government not to impose the death penalty. The UK eventually deported Soering only when the actual risk of him receiving the death penalty had been totally removed. Assurances to prevent someone from receiving the death penalty are different than assurances to prevent torture. Concerning assurances to try to prevent the risk of torture that have come before the ECHR, the Court has always ruled, with one exception (concerning someone already in the US where there clearly was no longer any risk), that this does not remove the risk of torture, if that risk already existed. There was a case called *Chahal* ten years ago, and three cases have been judged this year: *Saadi*, *Ismoilov* and *Ryabikin*. In each case, some form of assurance by the states to where the persons would be sent that they would not torture or cause someone to suffer inhuman of degrading treatment were not considered to remove the risk. Therefore, the states proposing to deport them were still prohibited from doing so.

That is how the laws developed in HR concerning torture and inhuman and degrading treatment on the prohibition of transferring persons. Other prohibitions within HR have been less developed. There is one special exception: that is, the death penalty, which has moved on from the times of *Soering*. Essentially, the basic rule is that states that have abolished the death penalty (they may have their own domestic laws) and certainly those that have ratified the additional protocol of the Covenant of Civil and Political Rights or the European Convention, which abolishes the death penalty completely, cannot send someone where they would be at risk of the death penalty. The concerned states have nearly always applied this basic rule. There have been some problems with Canada at times over the years, but this prohibition is one that in many ways is much clearer than others.

What was raised earlier was the risk of other HR violations, if you are going to transfer someone and they risk a violation of fair trial or any other HR. These have come up, but more as potential issues rather than reality. In any case, when the risk of any violation of any other HR has come up, it was a balancing exercise, and not the application of Article 3 with its absolute prohibition of torture. Therefore, the balancing exercise will come in. It has only really come up, especially in Europe, regarding the impact of deportation on family life. Someone with a family life in one country is about to be deported to another and then one has to look at the whole picture. So, if they have very few connections with the country they are being sent to and a strong family life at home and have not committed a serious offence, those issues will come up. That is where the balancing comes in. But, of course, some of the more major violations may end up in degrading treatment, so you can have violations of arbitrary detention, but extreme violations such as detaining someone incommunicado for years would be very likely to amount to degrading treatment, so there would be an absolute ban in those cases.

Finally, I want to raise another issue, which I think is important, namely, that fair trial goes several ways, in particular when we are talking about transfers within countries and peacekeeping forces dealing with fledging criminal justice systems and rule of law. What I propose has not been dealt with yet, namely, that in those cases the right to a fair trial is much more important. If you are detaining someone for criminal justice reasons, you are part of the trial system. Therefore, it would have to be looked at as a whole: will someone experience fair trial? Will the detention continue to be legitimate and according to the national criminal law? And also it runs the risk of various violations of fair trial: violations of fair trial for the defendant, but also violations of fair trial for the victims of violations of the right to life, for whom it needs to be assured that the state takes enough action to identify and prosecute perpetrators. So, forces which are party of or choose to become part of the criminal justice system and are arresting people need to ensure, for example, that evidence is given. When you are detaining

people you cannot just hand them over, you have to give evidence in some shape or form so that they will go to trial and it creates a fair trial.

Finally, coming from Human Rights Watch, there remains a case where there is a duty on international forces to detain and arrest, and that is valid for persons indicted by international tribunals. So, for international forces who happen to come across Mladić, it needs to be clear that they just do not only have the power to detain, they also have the duty to detain and to transfer to The Hague, where I have to say we do not find any risk of torture currently.

NON-REFOULEMENT: ASPECTS OF REFUGEE LAW AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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L'article 33, paragraphe 1 de la Convention de 1951 relative au statut des réfugiés consacre le principe de non-refoulement dans le droit international des réfugiés. Ce principe interdit l'État contractant d'expulser ou refouler un réfugié vers des territoires « où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques ». Il s'applique que la personne concernée ait ou non été officiellement reconnue comme réfugié. Quelques exceptions légitimes sont toutefois possibles. L'acceptation très large, quasi universelle, de ce principe a amené le Haut Commissariat des Nations unies pour les réfugiés à considérer que celui-ci relève du droit international coutumier et qu'il est également applicable aux États non contractants. On retrouve également le principe de non-refoulement dans les droits de l'homme, comme souligné dans la présentation de M. Baldwin.

De nombreux arguments favorisent une application extraterritoriale du principe de non-refoulement. Ainsi l'articulation de l'article 33, paragraphe 1 de la Convention de 1951 selon laquelle « Aucun des États contractants n'expulsera ou ne refoulera, de quelque manière que ce soit… » permet de croire en une application large et inclusive du principe. L'objectif humanitaire de la Convention de 1951 et ses travaux préparatoires nous permettent également de présumer que le principe de non-refoulement oblige les États contractants à protéger les personnes sous leur contrôle effectif craignant une persécution bien qu'elles ne soient pas présentes sur le territoire de ces États. La jurisprudence de la Cour internationale de justice et les travaux des Comités des droits de l'homme et contre la torture des Nations unies confirment cette tendance. La jurisprudence de la Cour européenne des droits de l'homme n'a pourtant pas toujours été complètement conforme à cette tendance. Une lecture approfondie des arrêts de la Cour démontre que celle-ci, afin d'appliquer le principe de non-refoulement, exige parfois un lien territorial plus ou moins fort et se contente, à d'autres moments, d'un contrôle effectif de l'État sur la personne concernée. Finalement, la détention par des forces multinationales à l'étranger remplirait, dans la plupart des cas, tous les critères de la jurisprudence européenne qui a interprété ce lien territorial comme étant établi sur la base de l'exercice des pouvoirs publics sur le terrain.

Concernant les forces multinationales et leur éventuel non-respect du principe de non-refoulement, une dernière question mérite d'être posée. Celle-ci concerne la responsabilité des États. Dans les affaires Behrami et Saramati de 2007, la Cour européenne des droits de l'homme n'a pas

tenu responsables les fonctionnaires d'un État européen participant à une opération onusienne, en jugeant que les actes en question restaient des actes commis dans le cadre de cette opération que la Cour ne pouvait pas revoir faute de compétence ratione personae. *Cette approche, liée aux circonstances particulières du cas, est difficile à concilier avec l'approche générale de la Cour qui exige des États contractants l'assurance d'un niveau de protection des droits de l'homme conforme à la Convention européenne des droits de l'homme, même quand ils délèguent des pouvoirs à une organisation internationale.*

A la lumière de ceci, nous pouvons conclure que le principe de non-refoulement s'applique aux transferts des détenus dans les contextes de conflits armés et qu'une responsabilité pourrait être attribuée aux États participants à une opération militaire multinationale comme à l'organisation internationale qui mandate cette opération.

In my presentation, I am going to provide an overview of the non-refoulement principle under International Refugee Law and, briefly, under human rights law. I will then share some considerations regarding the question of extraterritorial application of the respective obligations which will constitute the decisive question in determining whether or not the actors are bound by the non-refoulement principle in the context of the situations dealt with at the present conference.

The principle of non-refoulement in international refugee law is set out in Article 33, Paragraph 1 of the 1951 Convention which reads: 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.' Similar provisions form part of regional instruments such as the 1961 OAU Convention Governing Specific Aspects of Refugee Problems in Africa or the 1969 American Convention on Human Rights.

The provision cited from the 1951 Convention applies only in favour of refugees. Accordingly, the first condition for someone to fall within the scope of protection of the 1951 Convention is that he or she is outside the country of origin or habitual residence. Other inclusion criteria are a well-founded fear of a serious violation of basic human rights for reasons of the person's religion, race, nationality, membership of a particular social group or political opinion.

It is important to bear in mind that, in addition to recognised refugees, asylum-seekers also benefit from the non-refoulement principle, i.e. persons seeking international protection whose status has yet to be determined. The reason for including asylum-seekers in the scope

of protection against non-refoulement is that a recognition decision is only declaratory, not constitutive. Therefore, only an extension of the non-refoulement principle to asylum-seekers guarantees that the respective state does not send back to their country of origin any refugees under the terms of the 1951 Convention. This qualification is necessary in order to define the relevance of the provision for situations addressed in the framework of the present conference. In the case of an asylum-seeker, it would be sufficient that the person concerned asks for protection because of a fear of persecution.

Other aspects of the refugee criteria are of particular relevance in the context under examination here. In particular, in application of the exclusion grounds of Article 1F of the 1951 Convention, a person may fall outside the protection of the 1951 Convention despite a well-founded fear of persecution. The respective clauses take up the idea that certain persons are unworthy of international refugee protection if there are serious reasons to believe that someone has committed crimes against humanity or war crimes, a serious non-political crime or acts contrary to the purposes and principles of the United Nations. However, due to their far-reaching consequences, the exclusion clauses should not be applied without the necessary procedural guarantees, including, in particular, an opportunity for the asylum-seeker or refugee to provide arguments in his or her favour. The same observations apply with a view to persons qualifying as refugees under the 1951 Convention regarding whom an exception to the obligation of non-refoulement could exist in line with Article 33 Paragraph 2 of the 1951 Convention due to a need to protect the security of the asylum state. Irrespective of whether the material criteria apply at all in a specific case, the practical relevance of these provisions in a situation of capture in the course of a military operation may be limited because of the need for a thorough review with sufficient procedural guarantees.

Beyond international treaty law, the principle of non-refoulement of refugees forms part of customary international law, in the UNHCR's understanding. This conclusion is drawn from a consistent application in State practice also in cases where the respective states are not parties to the 1951 Convention. In particular, in mass influx situations states have lived up to the principle of non-refoulement by hosting large numbers of refugees even if they were not state parties to the 1951 Convention. This is also confirmed by the UNHCR's experience in carrying out its supervisory function: the *opinio juris* to consider the non-refoulement principle as binding was demonstrated by states when providing explanations and justifications upon intervention by the UNHCR in cases of actual or intended refoulement.

The situation under human rights law has already been explored by the previous speaker, Clive Baldwin. I would like to add one observation on the scope of dangers against which protection must be granted: under human rights treaties, not only a danger of torture, inhuman or

degrading treatment may constitute an obstacle to returning or deporting a person to another state, but also other aspects like the right to fair trial may come into play. Under customary international law, at least torture and arbitrary deprivation of life would constitute dangers prompting the non-refoulement obligation. Regarding a threat of inhuman or degrading treatment, the UNHCR has expressed the opinion that an obligation of non-refoulement is in *status nascendi* as a rule of customary international law.

As a consequence of that, it is necessary to differentiate clearly between obligations applying to a specific actor in a certain situation. In particular, an international organisation may not be bound by treaty law on human rights or refugees, but they are bound by customary international law.

The next question is whether the principle of non-refoulement applies extraterritorially. Most arguments speak in favour of an application; the criteria for prompting the respective responsibility of a certain state are still very much under discussion. However, most situations discussed here would fulfil also the stricter criteria.

The wording of Article 33, Paragraph 1 of the 1951 Convention very strongly speaks in favour of an extraterritorial scope: 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever …' So the wording, in particular the words 'return, or 'refouler', in any manner whatsoever', is very broad and inclusive. It makes it very difficult to conceive that it would only apply to refugees who have already entered state territory.

Moreover, the territorial scope of various provisions of the 1951 Convention is made explicit in the Convention. So there is a strict distinction between provisions requiring simple presence on the territory, those provisions requiring that the refugee is 'lawfully on the territory' or 'lawfully staying' in the host country. No such scope or no such territorial element is mentioned in Article 33 Paragraph 1.

In addition, the humanitarian object and purpose of the refugee convention – to provide protection to persons in fear of persecution – also speaks strongly in favour of an extraterritorial obligation. This interpretation is also confirmed by the *travaux préparatoires* from which it becomes clear that the drafters saw the aim of the Convention as preventing refugees from being pushed back into the arms of their persecutors.

Consequently, the decisive question is not whether a person is on the territory or not, but whether a person is subject to the effective control and authority of a certain State. This latter question is to be defined by taking into account the standards under human rights law. The

human rights bodies have frequently taken up the question of extraterritorial application and interpreted the term of a state party's jurisdiction in such a way as to also apply beyond the state's national boundaries. Drawing on the object and purpose of the ICCPR, also the ICJ, in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, confirmed that states are bound by the Covenant when exercising jurisdiction outside their national territory. In dealing with this concept, both the Human Rights Committee in its General Comment 31 as well as the Committee against Torture in some conclusions on state party's reports emphasised the idea of *de facto* effective control.

However, the most differentiated and also the most confusing jurisprudence exists on the part of the European Court of Human Rights. As will be seen, the degree of territorial link required by the Court varies between different cases.

The starting point was in 1995 when in the case of *Louizidou v. Turkey*, the Court decided that the action of Turkish troops outside Turkish territory in Northern Cyprus constituted an exercise of jurisdiction in the sense of Article 1 of the European Convention of Human Rights. The Court expressly said, 'in this respect the Court recalls that although Article 1 [...] sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. [...] [T]he responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory [...].'

In this citation, the Court very much emphasised the effects prompted by the activities in question. Moreover, it referred to Turkish control of the northern part of the island of Cyprus due to the presence of large numbers of troops. This was reemphasised again in the *Cyprus v. Turkey* case in 2001 where the presence of Turkish troops on the northern part of the island was considered sufficient for establishing Turkish responsibility for the acts done by the Northern Cyprus authorities, because the continued existence of those local authorities depended on Turkish support.

A similar approach can be found in the case of *Ilascu v. Moldova and Russia* where the Court in 2004 ruled that also the financial, economical and political support provided by Russia to the separatist movement or 'government' in Transnistria, a small part of Moldova which tried to separate from Moldova, was sufficient to establish Russian jurisdiction and responsibility in that area.

The next element in defining the scope of extraterritorial jurisdiction is established in the *Bankovic* case of 2001, which concerned air strikes on the territory of former Yugoslavia. In

this case, the Court required a rather strong territorial link. In particular, it stated that such jurisdiction may be assumed where 'the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.' Having reiterated the exceptional character of extraterritorial jurisdiction, the Court requires a territorial element or link in the respective activities of the state party in the form of exercising public powers.

The Court added considerations by differentiating whether a territory forms part of the *espace juridique* of the contracting states of the European Convention of Human Rights. The situation in the *Bankovic* case is contrasted with the *Cyprus* case: the people in Northern Cyrus should have been protected either as being part of the Republic of Cyprus by that government or by Turkey. It was not acceptable that they would fall in between the cracks because the territory as such had formed part of the European Convention area. In the *Bankovic* case, in contrast, these considerations did not apply and the court ruled that just exerting power by air strikes was not enough to establish jurisdiction under the Convention. However, it remains unclear whether the Court in fact intended to establish the *espace juridique* element as a criterion or whether this was rather done in countering one of the arguments presented by the parties.

The next example is the *Öcalan* case decided in 2003 and 2005 where the Court found it sufficient that Mr. Öcalan was detained by Turkish forces in Kenya after being handed over by Kenyan officials to Turkish authorities. However, also in this context the Court made a certain territorial argument by taking into account that the person concerned was not only arrested abroad by the Turkish authorities, but then forcefully returned to Turkey and therefore subsequently under the full control of the Turkish authorities.

In contrast to all these approaches relying on a more-or-less strong territorial link, the Court very clearly took a different approach in the case *Issa et al. v Turkey* in 2004: '[A] state may also be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State [...]. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory [...].'

According to this approach, activities carried out by a state abroad are subject to the same human rights obligations as if they were carried out on its own territory.

Applying these criteria to the situations we are talking about means that multinational forces detaining someone while acting abroad would always meet the criteria of the *Issa* case. In most circumstances, such action would also meet the stricter criteria of the *Bankovic* test since a territorial link is established by the exercise of power on the ground.

Regarding multilateral action, additional considerations need to be taken into account concerning the responsibility of an international organisation on the one hand and the national contingencies on the other. In the *Behrami and Saramati* case in 2007, the European Court of Human Rights stated that if the action in question is carried out by state officials as part of a UN operation, where the UN or its subsidiary organs are in ultimate control of the chain of command, the acts in question are acts of the United Nations. Consequently, the Court did not consider itself to have any competence *ratione personae* for ruling on such acts.

Let me make a couple of remarks on that. First of all, I think it is important to emphasise that the case concerns a very particular situation. Consequently, the Court went through all the details of the command structure, the mandate given, etc. The result therefore cannot be easily transferred to other operations authorised by the UN Security Council.

Secondly, the European Court of Human Rights seeks to differentiate this case from the *Bosphorus* case, a case in which the execution of binding norms under EC law by the Irish authorities was reviewed in 2005. The Court had stated in that case that when power is deferred to an international organisation, this must be done in a way that it provides for an equivalent level of material guarantees and procedural opportunities to enforce those material guarantees, and, in the situation of the EU, it applies a presumption that this is the case. The differentiation which is made between the *Behramati* case and the *Bosphorus* case is that in the latter case there was clearly an act on part of the state party when the Irish authorities confiscated a plane. This obvious act of a state party was subject to review. The Court seemed to assume that in the *Behramati* case there was no such act attributable to public authorities, including military forces. The same differentiation between the situations addressed in the two cases is also made by the ECJ in the recent case of *Kadi*. In the Grand Chamber judgement of 3 September 2008, the ECJ reviewed the legality of putting persons or organisations on terrorist lists in compliance with UN Security Council resolutions.

This approach cannot easily be reconciled with the general approach of the European Court of Human Rights requiring state parties to the European Convention on Human Rights to ensure a level of human rights protection equivalent to those of the Convention in material and procedural terms when deferring powers to an international organisation. The only way to reconcile this in situations such as those addressed in the *Behrami and Saramati* case is

to assume at least a dual responsibility, not only of the United Nations but also of the states actually involved in the operation. The consideration that the question of jurisdiction and extraterritorial human rights obligations is one of effective control would also speak in favour of this approach. Effective control is a question of the facts, not primarily of the legal framework including complicated command structures. As the European Court of Human Rights emphasised, the question whether state agents are acting legally or illegally does not impact on the question of the State's responsibility. If a state through its agents is infringing human rights abroad in a way which would constitute a violation of human rights if carried out on its own territory, the state would be responsible under the European Convention. These considerations on responsibility should also define the setting regarding non-refoulement obligations under international human rights law and international refugee law generally.

AN ICRC PERSPECTIVE

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De nos jours, les transferts de personnes en situation de conflit armé ont surtout lieu en situation de conflit armé non-international impliquant des forces multinationales. Ces forces multinationales, présentes dans un État à la demande de cet État même, comme c'est le cas en Irak, en Afghanistan ou en République démocratique de Congo, doivent respecter le principe de non-refoulement quand elles transfèrent des détenus aux autorités de l'État hôte. Ce principe absolu, issu du droit des réfugiés, des droits de l'homme et du droit international humanitaire, doit être respecté conformément à ces trois corps légaux et à leur application respective.

En pratique, le principe de non-refoulement oblige les États à évaluer si un individu risque de se voir confronté à une violation de ses droits fondamentaux après le transfert, que cet individu ait lui-même exprimé une crainte ou non. Afin d'assurer que le principe de non-refoulement fournisse une protection effective, des obligations procédurales sont essentielles, y compris le droit à un recours effectif et à un procès équitable.

Des assurances diplomatiques, ou des accords étatiques contenant une promesse d'un État à un autre de s'engager à traiter le détenu humainement, ne libèrent pas l'État transférant de ses obligations sous le principe de non-refoulement. Elles peuvent constituer un des éléments à considérer afin d'évaluer le risque pour le détenu sur le point d'être transféré, mais ne pourront pas être le facteur décisif et doivent être utilisées avec précaution. La politique du Comité international de la Croix-Rouge (CICR) concernant les assurances diplomatiques est par conséquent une politique de prudence. Vu le risque d'être perçu comme un outil de l'État transférant et vu sa méthode de travail indépendant et confidentiel, le CICR n'accepte pas de contrôler l'exécution d'un arrangement de transferts contenant des assurances.

Quand il s'agit de forces multinationales, la question de l'attribution de responsabilité pour les transferts mérite également d'être posée. Celle-ci se base généralement sur le critère du contrôle effectif. Dans les affaires Behrami et Saramati de 2007, la Cour européenne des droits de l'homme a ainsi tenu les Nations unies responsables, jugeant qu'elles avaient le contrôle effectif ultime sur l'opération KFOR au Kosovo, ce qui peut par contre être vu comme une interprétation trop large du rôle des Nations unies dans ce cas spécifique. Si la diversité d'obligations légales entre les différents États participants à une opération multinationale peut créer des difficultés pratiques, les règles doivent néanmoins être respectées, les États ne pouvant pas échapper à celles-ci en adhérant aux organisations internationales ou en contribuant aux opérations multinationales.

Finalement, sans préjudice au principe de non-refoulement, il existe également des responsabilités post-transfert. Le droit international humanitaire oblige l'État transférant à contrôler le traitement des personnes transférées et à prendre action si leur traitement n'est pas satisfaisant, voire à demander, si nécessaire, le retour des personnes concernées. Bien que ces obligations valent pour les conflits armés internationaux, les considérations humanitaires, à la base de ces obligations, devraient aussi être prises en compte en situation de conflits armés non-internationaux. Sur la base de l'article 1, commun aux Conventions de Genève, qui oblige tous les États à respecter et à faire respecter le droit international humanitaire, ces considérations humanitaires devraient être protégées encore davantage.

Traditionally, transfers of persons are considered under the angle of immigrants or refugees being sent back to their country of origin, or people being extradited for the purposes of criminal prosecution.

In armed conflict situations, which are the focus of this Colloquium, the most important issue of protection against violations arise in the context of the transfer of detainees. This has long been a concern of the International Committee of the Red Cross (ICRC) with respect to prisoners of war.[1] Nowadays, a new form of transfer is becoming more and more frequent, that is, the transfer of detainees in non-international armed conflict involving multinational troops: the transfer of persons from the multinational forces in Iraq to the host country; from American or NATO forces in Afghanistan to the host country; transfers of persons in the hands of peacekeeping forces in the Democratic Republic of Congo, Chad or the Central African Republic to local authorities.

The following brief overview therefore tries to recall the main principles of International law that apply to such transfers and the obligations that they imply in practice.[2] It then looks more closely at some of the more complex challenges raised by modern multinational operations.

Legal Framework

Any transfer of a person is subject to international law obligations. An important principle to recall in this context is the principle of non-refoulement. The term is used here to refer to legal obstacles to transfer not only in refugee law, but also in human rights and humanitarian law.

1 See the background in Jean Pictet (ed.), Commentary on the Geneva Conventions of 12 August 1949, Vol. III, *Geneva Convention relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, Geneva, 1960, p. 542.

2 For a more detailed analysis, please refer to Cordula Droege, *Transfers of detainees – legal framework, non-refoulement and contemporary challenges*, International Review of the Red Cross, Vol. 90, No. 871, September 2008.

For refugees and asylum-seekers, the principle of non-refoulement is enshrined in refugee law, as set out in Article 33 of the 1951 Refugee Convention, but also accepted as customary international law.[3]

International humanitarian law contains a refoulement prohibition in Article 45(4) of the Fourth Geneva Convention, which provides that:

> "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.[4]"

Furthermore, the Geneva Conventions contain a restriction on the transfer of prisoners of war or civilian internees in international armed conflict. Article 12(2) of the Third Geneva Convention stipulates that:

> "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."

Article 45(3) of the Fourth Geneva Convention contains an identical clause for protected persons in the territory of a party to an international armed conflict. These clauses have a very broad reach in two respects: first, they prohibit transfers of detainees not only in the case of specific risks, but in any situation where the Conventions would not be observed by the receiving state; secondly, they refer not only to the receiving state's formal adherence to the Geneva Conventions, but also to its willingness and ability to respect them.

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3 For the customary nature of non-refoulement, see Sir Elihu Lauterpacht and Daniel Bethlehem, *The scope and content of the principle of non-refoulement: Opinion*, in Erika Feller, Volker Türk and Frances Nicolson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2003; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., p. 345-355 (2007); UNHCR, "The principle of non-refoulement as a norm of customary international law: Response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93", 31 January 1994.

4 While the term persecution is not defined in humanitarian law, it refers, as a minimum, to serious violations of human rights (right to life, freedom, security) on such grounds as mentioned in Article 45(4). See Article 1 of the 1951 Refugee Convention; *UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, re-edited January 1992, paras 51-53; Article 7(2)g of the 1998 Statute of the International Criminal Court. See also Emanuela-Chiara Gillard, *There's no place like home: States' obligations in relation to transfers of persons*, International Review of the Red Cross, Vol. 90, No. 871, September 2008,with further references.

In addition, Article 3 common to the four Geneva Conventions absolutely prohibits torture, cruel treatment or outrages upon personal dignity, in particular humiliating and degrading treatment. Taken together with Article 1 common to the four Geneva Convention, this implies an obligation of states not only to respect these prohibitions, but also to ensure respect for them. Among others, parties to a conflict have a responsibility not to encourage or in any way contribute to violations of common Article 3. A transfer to a situation where there is a substantive risk that a person will be subjected to such treatment would amount to a violation of these obligations. A parallel can also be made to the provisions prohibiting ill-treatment in human rights law, as explained below. Indeed, the absolute human rights law prohibition of torture and other forms of ill-treatment has been consistently interpreted to preclude the transfer of a person at risk of such treatment.

Another provision that is relevant in the context of transfers and release is Article 5(4) of Additional Protocol II to the Geneva Conventions:

> "If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding."

While this provision does not contemplate the transfer of persons from one state to another, it nonetheless contains the important humanitarian principle that detaining authorities bear certain responsibilities for the detainees when they release them.

Lastly, non-refoulement is an essential component of some fundamental and absolute human rights, namely the prohibition of torture or any other form of ill-treatment and the prohibition of arbitrary deprivation of life. This is explicitly foreseen in Article 3 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment and implicitly in the prohibition of ill-treatment and arbitrary deprivation of life in other treaties, such as the International Covenant on Civil and Political Rights[5] and the European Convention on Human Rights.[6] Some other treaties and declarations contain non-refoulement obligations, for instance the International Convention for the Protection of All

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5 Human Rights Committee, *General Comment No. 20, Prohibition of torture and cruel treatment or punishment*, UN Doc HRI/GEN/1/Rev.1, 28 July 1994, p. 31, para 9; *General Comment No. 31, Nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add 13, 26 May 2004, para 12; *Maksudov and others v Kyrgyzstan*, views of 31 July 2008, UN Doc CCPR/C/93/D/1461, 1462, 1476&1477/2006, para 12.4.

6 See only European Court of Human Rights (ECtHR), *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A No. 69, para 91.

Persons from Enforced Disappearance (Article 16) and the European Charter of Fundamental Rights (Article 19(2)).

In situations of armed conflict, all of these bodies of law apply, within their respective spheres of application. While “International Humanitarian Law (IHC)” is the specific body of law for armed conflict situations, the limited scope and content of IHL norms concerning transfers and release is not to be understood as a qualified silence in the sense that the drafters consciously eliminated the possibility of more protective norms. There is nothing in the drafting history of the Geneva Conventions and Protocols to indicate that the drafters considered *all* situations in which transfers might take place and deliberately rejected application of the non-refoulement principle arising from other sources of law. Nor is there any conflict between the existing set of rules in humanitarian law on the one hand and human rights or refugee law on the other. Rather, the norms of humanitarian law and those of human rights or refugee law are complementary.

This Colloquium focuses particularly on armed conflict situations, which nowadays often take the form of non-international armed conflicts in which multinational troops are present at the invitation of the host country. In those situations, persons might be captured on their own territory by foreign military or police forces; these forces will then transfer the person either to the authorities of the host country or to a third country. The question is whether non-refoulement applies in such situations. This is indeed the case. Humanitarian Law applies to persons protected in the categories foreseen in the respective provisions. Under human rights law, the principle of non-refoulement applies, simply put, to anyone within the effective control of the authorities, including within the effective control of the authorities abroad.[7] Thus, a person in the power of foreign troops abroad benefits from the protection of non-refoulement under human rights law.

A second question that has been controversially discussed is whether the prohibition of refoulement also applies to the transfer of persons who, as they are being transferred from foreign forces to the authorities of the host country, do not, in fact, cross an international border. The answer must be affirmative as far as humanitarian and human rights law are concerned.[8] Indeed, nothing in the wording of the norms explicitly bars transfers in “IHL” or Convention

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7 A detailed description of the extraterritorial application of human rights would go beyond the scope of this short overview; for a more detailed analysis, see Cordula Droege, *The umbrella and the sewing machine – dissecting the chance encounter of human rights and humanitarian law*, International Review of the Red Cross, Vol. 90, No. 871, September 2008.

8 For the extraterritorial application of refugee law and its application to situations where the persons finds refuge in an embassy, see Lauterpacht/Bethlehem, *op. cit.* note 3, paras 112-114; Goodwin-Gill/McAdam, *op. cit.* note 3, pp. 244-253.

against Torture (CAT) mention the crossing of a border. Nor can this be read into these norms or into the non-refoulement principle as a fundamental component of the prohibitions of ill-treatment or arbitrary deprivation of life.[9] As Bethlehem and Lauterpacht succinctly formulate it, "any measure which has the effect of putting an individual at risk by removing them from a place of safety to a place of threat will thus come within the purview of the principle."[10]

Lastly, it must be recalled that the principle of non-refoulement under human rights law and humanitarian law is absolute and overrides other obligations of the state, since it seeks to prevent violations of the most fundamental rights of the person. Thus, it protects persons even in situations where countries are faced with serious security challenges, such as terrorism.[11] It also overrides obligations that the sending state might have towards the receiving state on the basis of bilateral agreements, such as extradition treaties.

To sum up, when persons are transferred from the jurisdiction or effective control of one state to another, the transferring state must abide by its obligations of non-refoulement under refugee law, humanitarian law and/or human rights law, within their respective spheres of application.

What Non-Refoulement Obligations Require in Practice

In practice, the principle of non-refoulement requires states to assess whether the person may face a risk or not. The procedural obligations flowing from the principle of non-refoulement are particularly important in this regard.

The state that is planning to transfer a person to another state must assess whether there is a risk of violation of his or her fundamental rights, regardless of whether the person has expressed a fear or not, on an individual basis. If a risk is considered to exist, the person must not be transferred.

To ensure that the principle of non-refoulement provides an effective protection in practice, procedural obligations are essential.[12] Such procedural obligations flow from general principles

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9 UN Doc CAT/C/CR/33/3, para 5(e); Manfred Nowak, Commentary to CAT, Article 3, para 181 (2008).

10 Lauterpacht/Bethlehem, *op. cit.* note 3, para 159.

11 This was recently reaffirmed by the European Court of Human Rights in *Saadi v. Italy*, Grand Chamber Judgment of 28 February 2008, para 138.

12 The procedural dimension is especially emphasised in Lauterpacht/Bethlehem, *op. cit.* note 3, para 159f; Gillard, *op. cit.* note 4. In national jurisprudence, similar requirements have been imposed in: *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R.3, 2002 SCC 1, paras 121-122; and *Khouzam v. Attorney General of the United States and others*, Decision of the United States Court of Appeals for the Third Circuit, 5 December 2008.

of human rights law, including the right to a remedy and the requirement of a fair hearing.[13] If the authorities decide to transfer:

- The authorities must inform the person concerned in a timely manner of the intended transfer;
- The person must have a right to challenge the decision before an impartial body that is independent from the one that took the decision to transfer;
- The person must have an opportunity to make representations to the appropriate body in order to express any fears that he or she may face persecution or threats to life and limb after the transfer;
- He or she should be assisted through legal counsel;
- During the review, the transfer must be suspended, since otherwise the principle of non-refoulement would essentially be undermined, given the irreversible nature of the harm.

Transfer Agreements

Increasingly, states rely on so-called diplomatic assurances in order to be able to transfer persons to states where they might otherwise be at risk of ill-treatment or other violations. Such diplomatic assurances are transfer agreements in which the receiving country gives assurances that are more-or-less precise in nature, for instance that they will abide by their international obligations towards the transferee, that they will not subject him or her to ill-treatment or that they will not impose or execute the death penalty.

Such assurances do not relieve the sending state of its obligations under the non-refoulement principle, in particular of the individual risk assessment and of the possibility for the individual to have the decision reviewed by an independent and impartial body. They are one of the factors to be taken into account when assessing the risk for the transferee. The risk assessment must take into account all circumstances, including the overall situation in the receiving country (in particular, whether a systematic practice of torture exists in

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13 See ICCPR, Articles 2(3), 13; ECHR, Article 13; ACHR, Article 27; Article 1 of Protocol No. 7 to the ECHR; Human Rights Committee, *Mansour Ahani v. Canada*, Communication No. 1051/2002, 15 June 2004, UN Doc CCPR/C/80/D/1051/2002, paras 10.6-10.8; Committee against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, 20 May 2005, UN Doc CAT/C/34/D/233/2003, para 13.7; Committee against Torture, *Concluding observations: Australia*, UN Doc CAT/C/AUS/CO/3, 22 May 2008, para 17; Committee against Torture, *Conclusions and recommendations: United States of America*, UN Doc CAT/C/USA/CO/2, 25 July 2006, para 20; ECtHR, *Chahal v.United Kingdom*, Judgment of 15 November 1996, Reports 1996-V, paras 151-152; Inter-American Commission on Human Rights, Decision of 28 October 2002, "Extension of precautionary measures (N. 259) regarding detainees in Guantánamo Bay, Cuba", and Resolution No. 1/06 on "Guantánamo Bay precautionary measures" of 28 July 2006, para 4; see also Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 2002, para 394.

it), the specificity of the assurances and whether they will be effectively monitored by an independent body.

Beyond these legal considerations, transfer agreements to obtain assurances against ill-treatment or other violations should, if at all, be used cautiously and with circumspection. While they cannot be qualified in absolute terms as necessarily unreliable, since the political and diplomatic pressure created by single cases may – in certain circumstances, and if followed up with strong post-return mechanisms – protect the individual, experience in some cases has shown that assurances have been disregarded.[14]

As far as the ICRC is concerned, the institution cannot monitor any transfer agreements. Indeed, any involvement of the ICRC in post-transfer monitoring could subject it to the risk of being perceived as an 'implementing agency or agent' of the transferring state. Also, the ICRC visits persons according to an agreement with the receiving state and, in principle, engages in a confidential dialogue of a humanitarian nature with the detaining authorities. While the ICRC might share its findings on violations with third states when the confidential humanitarian dialogue does not bear fruit, this is not its privileged method of work, and it would only do so according to its own modalities of work,[15] not on the basis of an agreement between the transferring and the receiving state.

Some Legal Aspects Relating to Multinational Operations

As clarified above, the principle of non-refoulement also applies, according to the respective applicable bodies of law, to the transfer of persons from foreign troops to the host country or among each other. But in multinational operations, the issue is made more complicated by virtue of the different entities that might be involved in the transfer.

Indeed, in order to invoke non-refoulement, one must first decide to whom the transfer can be attributed: to the force contributing country or to the organisation under whose umbrella the multinational force is present in the country? The answer depends on the distribution of powers and tasks between the different entities. Attribution is generally based on the criterion

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14 See for example, Committee against Torture, *Agiza*, above note 32; ECtHR, *Shamayev and 12 others v. Georgia and Russia*, Application No. 36378/02, Judgment of 12 April 2005; see also the redacted report of the Department of Homeland Security, Office of the Inspector General, on the case of Maher Arar: "The removal of a Canadian citizen to Syria", OIG-08-08, March 2008, p. 5, 22, 27.

15 On the ICRC's terms and conditions for its work, see *Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of the other fundamental rules protecting persons in situations of violence*, International Review of the Red Cross, Vol. 87, No. 858, 2005, p. 393.

of effective control: the entity that has effective control over the action is also responsible for it under international law.[16] In multinational operations, effective control usually rests with the entity that has operational command and control.[17] In operation under the umbrella of the United Nations, it is likely that command and control will largely remain with troop contributing countries, whereas acts of UN administrations such as UNMIK in Kosovo will generally be attributable to the United Nations. In the recent decision in the cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the European Court of Human Rights attributed the detention of persons by national contingents within the framework of KFOR operations to the UN, because it found that ultimate effective control lay with the UN.[18] The European Court follows the approach that the conduct in a multinational operation is attributable to the organisation or state which has effective control and command; on the facts of the case, however, its conclusion seems rather stretched: attribution to the United Nations of a detention by a troop contributing country on the basis of the overall responsibility for KFOR by the Security Council does not fit easily with the reality of day-to-day decision-making on the ground.

As far as the Multinational Force in Iraq is concerned, Security Council Resolution 1546 expressly authorises the Member States of the coalition to carry out "internment where this is necessary for imperative reasons of security". Detainees are under the exclusive control not of the United Nations, but of the United States and the United Kingdom, which decide on detention, release and transfer.[19] In the case of the International Security Assistance Force in Afghanistan, the decision to transfer lies exclusively with the troop contributing countries and not with NATO or the UN. This is borne out by the fact that many of these countries have concluded separate bilateral agreements on transfers with the government of Afghanistan which

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16 *Response of the UN Secretariat to the International Law Commission*, Un Doc A/CN.4/545, 25 June 2004, pp. 17-18. See also the statements of states in the *Behrami* case, which mainly argued that the relevant criterion was "effective overall control", ECtHR, *Behrami v. France and Saramati v. France, Germany and Norway*, Applications No. 71412/01 and 78166/01, Decision as to Admissibility [GC], paras 82, 98, 104, 113.

17 *Report of the Secretary-General on the administrative and budgetary aspects of the financing of the United Nations peacekeeping operations*, UN Doc A/51/389, 20 September 1996, paras 17-18; *Response of the UN Secretariat to the International Law Commission*, UN Doc A/CN.4/545, 25 June 2004, p. 17-18; *Response of the UN Secretariat to the International Law Commission*, UN Doc A/CN.4/556, 12 May 2005, p. 4.

18 ECtHR, *Behrami*, *op. cit.* note 16, paras 133-141.

19 *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL, para. 23; see also the judgments in *R (on the application of Al-Saadoon and another) v. Secretary of State for Defence*, [2008] EWHC 3098 (Admin) and [2009] EWCA Civ 7, in which the courts do not put into question the responsibility of the United Kingdom, as opposed to the United Nations, for the transfer of their detainees to the Iraqi authorities.

contain guarantees for the treatment of detainees.[20] In such situations, the force contributing countries are responsible to respect their obligations under the non-refoulement principle.

Lastly, it is sometimes argued that the non-refoulement principle with its various legal bases cannot apply to multinational operations since it relies on too many different bodies of law, that it would be impracticable if different contributing countries had different obligations, especially under regional human rights treaties.

It is true that the diversity of legal obligations may give rise to a number of practical problems and result in the somewhat incongruous situation that different persons in a same host nation might be protected by different legal obligations. But this consideration cannot put into question the legal rules. The legal position remains that states cannot absolve themselves from their obligations under international law by adhering to international organisations or by contributing to multinational operations. To the extent that states have effective control by virtue of the transfer, the obligations flowing from such control are incumbent upon them. This legal position is not unrealistic in view of the existing practice in multinational operations; on the contrary, it is common practice of contributing nations in multinational operations to abide by rules that are above the common denominator, either out of legal or policy considerations. For instance, European countries or the United Nations follow a policy not to transfer people to a country where they would face the death penalty, even though other nations might do so. Another example is the decision by the Canadian government to suspend transfers of its detainees in Afghanistan to the host authorities for a period of time, out of concern for the treatment of individuals upon transfer.[21] Nonetheless, practical considerations of consistency evidently make it desirable from the point of view of contributing countries to have a uniform standard, and clarity as to that standard.

Post-transfer Responsibilities

Without prejudice to the non-refoulement principle, states that transfer individuals in the context of multinational operations may also have some post-transfer responsibilities.

Firstly, international humanitarian law contains specific provisions on responsibilities after transfers between allied powers. Article 12 of the Third Geneva Convention stipulates that:

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20 See statement by Colonel Stephen P. Noonan in the case before the Federal Court of Canada of, *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney-General of Canada*, Judgment of 12 March 2008, 2008 FC 336, para 33.

21 See Canada's suspension of its transfers to the Afghan government as mentioned in *Amnesty International Canada*, *op. cit*. note 20, para 61.

> [I]f that Power [*viz* the receiving Power] fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Article 45(3) of the Fourth Geneva Convention imposes identical obligations in an international armed conflict with regard to protected persons. In other words, if the sending state learns that detainees are being subjected to grave breaches of the Geneva Conventions or that their basic needs or the requirements concerning conditions of detention are not being met, such as accommodation, food, hygiene, or labour, it must take steps to provide direct assistance.[22] Thus, international humanitarian law imposes significant post-transfer responsibilities on the sending state, requiring it to follow up on the treatment of transferred persons and to take action if their treatment is not satisfactory; such action can include requesting the return of the persons concerned. While the mentioned provisions only apply to international armed conflicts, the humanitarian considerations underlying these provisions, i.e. to ensure that if a person is transferred the sending power continues to be responsible for the well-being of detainees, should also be taken into account in respect of transfers between powers in a non-international armed conflict. Indeed, while it was traditionally assumed in international armed conflicts that repatriated persons would not be vulnerable anymore, this is not the case in non-international armed conflicts when the person is transferred to the host country which he or she is fighting against.

Furthermore, as already pointed out, Article 5(4) of Additional Protocol II requires states releasing detainees in a non-international armed conflict to take all necessary measures to ensure their safety.

Secondly, in situations of armed conflict, states have an obligation not only to respect international humanitarian law, but also to ensure respect for it (Common Article 1 to the four Geneva Conventions). This means that states must, among other things, abstain from encouraging or even contributing to violations of IHL. A transfer might constitute a direct or indirect contribution to a violation of IHL if the sending state knew or had substantial grounds to believe that such a violation would occur. Also, the obligation to ensure respect implies a responsibility to take feasible and appropriate measures and to exert its influence, to the degree possible, to ensure that the rules of humanitarian law are respected by the parties to

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22 Pictet, *op. cit.* note 1, p. 138.

that conflict.[23] When foreign forces are present in a country at the invitation of and in close collaboration with the host government, the state that transfers detainees to the host country is in a particularly privileged position to exert its influence and exhort the receiving state to comply with humanitarian law.

A number of states and international organisations have recently chosen to give host nations greater support in increasing their capacity to receive transferred persons in satisfactory conditions of detention and to try them according to international standards. Such states are in a particularly favourable position to ensure respect for humanitarian law standards by the host nation and, accordingly, bear a particular responsibility in that regard.

Thirdly, it is a customary rule of the law of state responsibility that a state is responsible for a violation of international law if its aids or assists another state in that violation.[24] The threshold for such a responsibility is, of course, relatively high, since not every support given by another state will entail its international responsibility for a violation. But in the close relationship that a transfer during an armed conflict implies between the concerned states, the sending state must not cooperate with the receiving state in any violation of international law; for instance, it must be careful not to knowingly lend any substantial assistance to the receiving state if the receiving state subjects the transferee to a trial in violation of fundamental judicial guarantees.

Some Concluding Remarks

Transfers arising in multinational operations abroad are only now drawing attention to legal and practical issues. The real challenge will be to find practical solutions to accommodate the object and purpose of those operations and their inherent restrictions as operations carried out at the invitation of the host government and often under the auspices or even under the command and control of the United Nations. Solutions will have to take into account the very

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23 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para 158.

24 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, para 420; See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 151, 2002, paras 7-9, with references to state practice. The principle has been summarised in Article 16 of the Draft Articles on State Responsibility in the following manner:
"A State which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that State".

limited capacity and political will to detain persons who should normally be detained by the host country, while at the same time respecting the principle of non-refoulement. But practical solutions can and have been found in many cases. They can encompass, among others, prolongation of temporary detention, transfers to third states, transfers to specific places where there is no risk or close monitoring or even joint administration of detention places to monitor transferred persons.

The case law of the European Court of Human Rights (ECHR) concerns transfers of persons away from a country's own territory. What about an automatic extension of that case law when transferring a person, to the authorities of a country in which one is operating?

All present experts agreed that, generally speaking, the European case law on the extraterritorial application of the European Convention on Human Rights was very confusing. One participant referred to the judgment of the British House of Lords in the *Al-Skeini* case of 2007, which he summarised as follows: the Convention could apply when forces of a European Country detain a person outside of Europe, but not when these same forces to shoot a person in the street. The *Al-Skeini* case has gone to the ECHR now, which is hoped to issue a more consistent judgment. However, in almost every case, where the ECHR has addressed extraterritorial detention by European forces, it has found them bound by the Convention. For instance, in 2005, the ECHR found Turkey responsible for the action of its forces seizing Öcalan in Kenya. The one exception is the judgement of the ECHR in the *Behrami and Saramati* cases of 2007, which has been widely criticised.

A participant stated that once this extraterritorial application of the Convention concerning detention by European forces was accepted, one would have to look at what the Convention then actually requires these forces to do. Given the ECHR's very strong and consistent language on the subject, the forces would always be prohibited from transferring a person if there was a real risk of transfer leading to torture. If the transfer risked another type of human rights violation, then a balancing exercise would be required, which would take into account the particular situation and circumstances as well as the nature and the extent of the human rights violation.

Has the ECHR never accepted the use of diplomatic assurances?

One speaker stated that in the most recent cases that concerned assurances in different forms and with different contents, the ECHR had always found that assurances did not remove the risk of torture or inhuman and degrading treatment. Nevertheless, one case, *Mamatkulov and Askarov v. Turkey* of 2005, remains a bit unclear as to whether an assurance was given, and whether the court rules on assurances or not. The only clear example where the ECHR found no violation of the European Convention on Human Rights after an assurances was given, is the case of *Al-Moayad v. Germany* of 2007. In this case, the 'victim' had already been transferred by Germany to the United States' mainland (and not to the prison at Guantánamo Bay), and as such there was clearly no longer risk of torture or inhuman and degrading treatment.

While a clear ban exists on transferring persons to situations of torture and inhuman and degrading treatment, does such a ban also exist concerning prison conditions? Extensive case law by the ECHR concerns the size of cells, overcrowding, the right to vote for prisoners, etc. Is there not a danger that applying these same standards would make transfers impossible in practice? Alternatively, should we first spend 20 years on constructing new prisons in order to meet the ECHR standards?

One participant stated that he was convinced that a ban also existed on a transfer to situations where unacceptable prison conditions prevail: If one agreed on the extraterritorial application of the European Convention on Human Rights, one should apply the full scope of its Article 3 (prohibition of torture and inhuman or degrading treatment of punishment), including prison conditions. Another speaker stressed the possibility of a broad interpretation of degrading treatment, as it had been shown in the case of *D v. the United Kingdom* of 1997. In this case, the ECHR found that the possible deportation by the British authorities of an Aids patient convicted for drug offences to St. Kitts would amount to degrading treatment, since the lack of care and support in St. Kitts would mean a very painful death for the applicant. However, subsequent case law on similar cases concerning health or general living conditions has found no violations, showing that the Court will only rule in this manner when extreme situations are at hand. The absence of the prisoners' right to vote, the participant concluded, would as such not oblige a country to abandon an envisaged transfer.

How will the International Committee of the Red Cross (ICRC) render its somewhat nuanced position on diplomatic assurances operational? Will the ICRC not agree to participate in the monitoring of diplomatic assurances?

A participant answered that the ICRC could not speak of specific contexts because of its confidential approach. However, in general, one could state that the ICRC's legal position regarding diplomatic assurances was that, whether or not diplomatic assurances are present, an individual risk assessment on a case-by-case basis remains necessary, as well as a review by an impartial and independent body. In view of the risk of being seen as an implementing agency of the transferring state and in view of the ICRC's own specific work methods, the ICRC would not wish to monitor the implementation of diplomatic assurances. The ICRC had always made it clear that the mere fact that the ICRC visits a place certainly does not mean that there is no ill-treatment in such a place, so an ICRC monitoring of assurances would not be an effective enough measure to eradicate torture. In this regard, the participant referred to the ECHR *Saadi* case where the Italian government argued that, since the ICRC visited prisons in Tunisia, there was no problem with transferring people to that country. The ECHR ruled rightly that ICRC visits to the Tunisian prisons would not be enough evidence to rule out completely

the risk of ill-treatment. In any case, the ICRC could not transmit any concerns about the treatment of detainees in the receiving state because of its confidential relationship with that receiving state, which again excludes the ICRC from being an implementing partner of diplomatic assurances.

Would a possible transfer of a person to a specific location in the receiving country where the risk is lower be helpful? However, how can one be sure that the receiving country will respect the alternative relocation?

A participant answered this question by referring to the above mentioned ECHR case of *Al-Moayad v. Germany* of 2007. The United States thereby assured Germany that the detainee in question would not be transferred to Guantánamo and for the Court this was reason enough to agree that the detainee in question would not be at risk of ill-treatment. Another participant agreed with the possible usefulness of transferring a person to a specific location, He mentioned a case whereby a person was about to be extradited from Germany to a Central American country. Prison conditions in this country were horrible, except for one prison where international standards were observed. Through a diplomatic assurance, both countries settled that this person was to be transferred to the prison with the high standards only, and that the transfer was controlled by the German embassy. Other participants warned that often the situation is that, if a person was at risk in one part of the country, he or she would be at risk everywhere in the country.

Session 3
The Use of Diplomatic Assurances

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USE OF DIPLOMATIC ASSURANCES TO PROTECT DETAINEES

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A la fin de la deuxième guerre mondiale, les États-Unis et la Grande Bretagne ont rapatrié des prisonniers de guerre (PG) vers la Russie contre leur gré et ce malgré les risques de persécutions que ces personnes encouraient dans leur pays d'origine. Grâce au développement du droit international humanitaire, mais surtout grâce au changement d'état d'esprit des États intervenus après la guerre de Corée des années 50, les PG peuvent refuser leur rapatriement vers leur pays d'origine en cas de craintes de persécution.

Dans la plupart des conflits armés actuels (conflits armés non-internationaux) on ne parle pas de PG. Une protection accrue des détenus pour lesquels un transfert est envisagé (vers leur pays d'origine, vers des pays tiers, mais de plus en plus aussi par une force internationale présente dans un pays vers les autorités de ce pays) reste cependant nécessaire. La base légale applicable dans ce cadre ne relève plus que du droit international humanitaire mais également du principe de non-refoulement, principe qui s'enracine principalement dans les droits de l'homme.

Les États sont contraints par le principe de non-refoulement d'évaluer, avant tout transfert, le traitement post-transfert réservé au détenu. En cas de doute, les États tentent d'obtenir les assurances diplomatiques leur permettant d'avoir les garanties du pays accueillant quant à la situation qui sera réservée au détenu transféré. A travers ces assurances, qui peuvent prendre la forme d'une note diplomatique, d'un échange de lettres ou d'un engagement oral, l'État recevant s'engage à réserver un traitement humain au détenu. Ces assurances incorporent parfois des mécanismes de surveillance, pouvant être d'une part limités dans le temps et d'autre part secrètes, conformément à leur caractère diplomatique.

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1 The author wrote this article as an International Affairs Fellow, Council on Foreign Relations, and a Visiting Fellow, Center for Strategic and International Studies. The author was on leave from the legal adviser's office at the United States (US) Department of State. The views expressed herein are those of the author and do not necessarily reflect those of the US Department of State or the US government.

Ces assurances diplomatiques ont par exemple été demandées pour le transfert des détenus de Guantanamo Bay par les États Unis vers leur pays d'origine ou un pays tiers. C'est également le cas dans le contexte afghan où certains États contributeurs de troupes à la Force internationale d'assistance et de sécurité (FIAS) ont conclu des arrangements avec la République islamique d'Afghanistan qui a donné des assurances que les afghans traiteront de façon humaine les détenus transférés, chaque intervenant ayant cependant ses propres exigences.

Les actions judiciaires de plus en plus nombreuses, initiées par des victimes ou des ONG sous le motif de tortures ou traitements inhumains rendent les transferts de plus en plus difficiles. L'utilisation des assurances diplomatiques n'a toutefois pas été exclue par les juges des cours concernées. A ce stade, les États n'envisagent pas de les utiliser. En conclusion, on pourrait dire que toute la discussion démontre l'importance de promouvoir avant tout les droits de l'homme et le traitement humain dans les lieux de détention concernés afin de réduire les craintes concernant les transferts des détenus.

Introduction

Concerns about the welfare of combatants detained by one state and then transferred to another are not new. In conflicts ranging from the Second World War to the Second Gulf War, states have had to grapple with what to do when detainees in their custody express credible fears about being transferred back to their countries of nationality or to third countries. Practice increasingly has taken into account the wishes of detainees, but the types of conflicts states are fighting have evolved as well.

Recently, states transferring custody of detainees during or after armed conflict have begun to rely on 'diplomatic assurances' from receiving states to assure themselves that the detainees they transfer will be treated appropriately. These assurances have been used by the United States in relation to the transfers of detainees from Guantánamo, and by various countries in the conflicts in Afghanistan and in Iraq.

These uses of assurances are not without controversy and risk, but it seems unlikely that states will stop using them any time soon. Indeed, reliance on assurances may become more common during and in the wake of armed conflict, given the growing practice of states in applying the principle of non-refoulement to wartime contexts and to detainee transfers that occur entirely outside of a state's territory.

From Forcible Repatriation to Resettlement: A Brief History

In the wake of World War II, the United States and United Kingdom (UK) held hundreds of thousands of prisoners of war (POWs), including many thousands of Soviet nationals who

fought in German uniform. Some had been impressed into the fight by Germany, while others – such as ethnic minorities, anti-Bolsheviks, and citizens of Baltic regions – chose to fight with the Germans.[2] These POWs feared that Russia would kill them or send them to labour camps if the United States or UK repatriated them to Russia.

Nevertheless, the United States and UK forcibly returned the POWs to Russia, pursuant to secret agreements with the Russians. The Western powers' view was that it was for the Soviet authorities to decide how to handle the returning POWs. The British Foreign Secretary argued, "We cannot afford to be sentimental about this."[3] Some POWs committed suicide rather than be returned to Russian control.

During the subsequent negotiations of the 1949 Geneva Conventions, states debated how to deal with the problem of forced repatriation. The text ultimately remained silent on how to address that problem, with negotiators agreeing to language in the Third Geneva Convention that stated, 'Prisoners of war shall be released and repatriated without delay after cessation of hostilities.'[4]

In the aftermath of the Korean conflict, the United States and the United Nations (UN) Command took a notably different approach than the United States and UK took after World War II. The UN Command held as POWs many Chinese soldiers who previously had fought on the side of the Nationalists and who had been impressed into service in the Chinese army.[5] The Command also held many soldiers who had lived in South Korea before being impressed into the North Korean army. The Command screened 170,000 POWs and determined that as many as 100,000 would forcibly resist repatriation to their home countries.

The United States argued that there was nothing in the Third Geneva Convention that required forced repatriation, and France asserted that it would defeat the purpose of the Convention – which was crafted primarily to benefit POWs – to use force or violence to repatriate POWs against their will.[6] The Korean Armistice Agreement established a Neutral Nations Repatria-

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2 *Christiane Shields Delessert, Release and Repatriation of Prisoners of War at the End of Active Hostilities* (Zurich : Schulthess Polygraphischer Verlag, 1977), p. 146.

3 Ibid., p. 150, n. 25.

4 Third Geneva Convention, Article 118. Article 45 of the Fourth Geneva Convention states, 'In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.' Article 45 contemplates, though, that a lawful extradition request would trump any persecution concerns a protected person might raise.

5 William Stueck, *The Korean War: An International History* (Princeton: Princeton University Press, 1995), p. 22.

6 Delessert, op. cit., pp. 162-63.

tion Commission (NNRC), which received those detainees that had not yet been repatriated, permitted the POWs' states of nationality to talk to them, and after 120 days relieved the remaining individuals of their POW status and assisted with resettlement.[7] By the time the NNRC stopped its screening, 628 Chinese and North Koreans had willingly returned home, while 21,839 returned to the UN Command's control. Most of those who were not repatriated were eventually settled in South Korea and Taiwan.[8]

Other examples of increased attention by states to the concerns of POWs include the Iran-Iraq war (where, with the help of the International Committee of the Red Cross (ICRC), some POWs remained in the country that had detained them) and the Gulf War, where Iraqi POWs who feared repatriation received amnesty in Saudi Arabia.[9]

When pursuing resettlement or amnesty options, detaining states that wished to transfer POWs to a third state sometimes concluded POW transfer agreements pursuant to Article 12 of the Third Geneva Convention.[10] Article 12 provides, 'Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.' These transfer agreements often set forth the type of treatment the transferred POW will receive (i.e., treatment consistent with the Third Geneva Convention), grant the transferring state and the ICRC access to the transferred detainee, and contain provisions governing the detainee's repatriation or further transfer.[11] As will become apparent, states address some of these same concerns in the diplomatic assurances they use today.

Today's Conflicts

In some important ways, most of the detainee transfers that have taken place in the last seven years look different from the historical detainee transfers described above. There are several reasons why this is the case.

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7 *Ibid*. at 165.

8 Encyclopedia Britannica, 'Korean War', available at http://britannica.com/ebc/article-229866. See also Delessert, op. cit., p. 203 n.127 (noting that as late as 1960, the NNRC still had under its control 88 ex-North Korean POWs whom it was unable to resettle).

9 Theodor Meron, 'The Humanization of Humanitarian Law', in: *American Journal of International Law*, Vol. 94, pp. 239, 256 (2000).

10 States do not appear ever to have used Article 12 agreements when transferring POWs back to their states of nationality.

11 In a modern use of an Article 12-like agreement, in 2007 the United States sought assurances from France before it extradited General Manuel Noriega to France to stand trial for money laundering. A US court previously had determined that Noriega was a POW, so the United States obtained assurances that France would treat Noriega consistent with the Third Geneva Convention.

First, the detainee transfers taking place as a result of the conflict in Iraq, as well as those transfers taking place as a result of the conflict with al-Qaeda, the Taliban and associated forces, are not transfers of POWs. Therefore, Article 12 does not apply. Second, some of these transfers – such as those from states participating in the International Security Assistance Force (ISAF) to the Islamic Republic of Afghanistan (IRoA) – are transfers of individuals detained by one country, within the territory of another country, back to that territorial country's control. In other words, these transfers are 'intra-country', rather than the transfer of a person from the territory of one country to the territory of another country. Third, in contrast to many POWs, virtually none of the individuals being detained in Afghanistan, Iraq or in third countries as part of the conflict with al-Qaeda is a member of the armed forces of his country of nationality.[12]

Fourth, although the treatment concerns posed by today's transfers are similar to the types of treatment concerns POWs faced in more traditional, international armed conflicts, the concerns are not identical. The POWs' concerns derived largely from a fear that their home state would be displeased that the POWs had fought for a different country, or from a concern that the POWs were part of an unpopular minority. The concern of many detainees today is that their countries of nationality will, on their return, view them as terrorists or otherwise deem them to pose a national security threat, and thus mistreat them in interrogation or detention. Fifth, it is not clear that today's detainees would always prefer to stay in the hands of the detaining state, although this is certainly true in some cases. In contrast, many of the POWs in World War II and the Korean War clearly preferred to remain in US or UK hands.

Sixth, and perhaps most important, the source of the legal and/or policy concerns that drive states to be concerned about the treatment of detainees post-transfer is different. For POWs, the source of rules (or lack thereof) has historically been the Geneva Conventions, coupled with a vague sense of 'humanitarianism'. For the detainees in the Afghanistan and Iraq conflicts, which many view as non-international conflicts, the guiding principle is the principle of non-refoulement, the roots of which lie primarily in human rights law.[13] As a related matter, states generally perform an independent assessment of the kind of treatment the detainee is likely to

12 Since 2002, the United States has treated the conflict with the Taliban in Afghanistan as distinct from the conflict with al-Qaeda in Afghanistan and other places around the world.

13 The principle of non-refoulement flows from two general sources of law: the 1951 Convention relating to the Status of Refugees (and its Protocol) and the 1984 Convention against Torture. The former treaty imposes an obligation on state parties not to forcibly return a refugee or asylum-seeker to a place where his life or freedom would be threatened because of his race, religion or political opinion, among other reasons. The latter prohibits states parties from expelling, returning or extraditing individuals where there are substantial grounds for believing that the individuals would be subjected to torture. There are of course aspects of the law of war that offer some analogies, including Article 45 of the Fourth Geneva Convention prohibiting transfers where a protected person fears persecution for his or her political opinions or religious beliefs.

receive post-transfer, even if the detainee himself has not affirmatively expressed concerns. (In contrast, POWs seemed to bear primary responsibility for raising treatment concerns, which the state then assessed to determine whether the POWs' concerns were bona fide.)

While it is not clear precisely when states first began to use diplomatic assurances to help regulate the treatment of detainees after transfer, it is clear that their use is becoming more widespread.

What Are Diplomatic Assurances?

At the most basic level, diplomatic assurances are commitments from a state receiving a detainee to a state transferring a detainee about the kind of treatment the receiving state will give the person. A transferring state generally seeks assurances when it believes there is a risk that the receiving state may mistreat the person. In particular, the Convention against Torture (CAT) prohibits states from expelling, returning or extraditing individuals to countries where there are substantial grounds for believing the individuals would be subjected to torture.[14] In some cases, then, when the transferring state assesses that the assurances it receives are reliable, it may overcome its concerns about torture and undertake the transfer.[15]

Assurances take a number of forms, including diplomatic notes, exchanges of letters and oral commitments. They may provide a commitment about where the transferred detainee will be held, and by which officials or agencies of a government. Some assurances build in monitoring mechanisms, which range from guaranteed access to the detention facility at any time by the transferring state, to the selection of an independent body to visit the detainee and monitor his health, to giving the detainee's family contact information for officials of the transferring state. Assurances do not necessarily describe how long the receiving state's commitments continue following transfer, though some recent UK memoranda of understanding contemplate that the monitoring body would visit the detainees for three years.

Assurances can be diplomatically sensitive. Some receiving states may be offended by a request for assurances, because the request indicates that the transferring state does not be-

14 Convention against Torture, Article 3. States hold different views about whether the CAT applies to transfers of people that occur entirely outside a state's territory. The United States does not think it does. In addition, state parties to the European Convention on Human Rights cannot remove people where there is a 'real risk' that the person would face cruel or inhuman treatment, a category of treatment less severe than torture.

15 States also may decide to seek assurances in cases where, even in the absence of the assurances, the transfer could proceed because the risk was below the threshold contained in the CAT. The use of assurances in this context may reduce an already low risk of torture and help the state be responsive to concerns raised by the detainee, even though the state did not, as a legal matter, need to seek such assurances.

lieve that the receiving state necessarily will respect its international legal obligations not to torture the person who is potentially to be transferred. States also may worry that by giving assurances they are conceding that their officials have tortured people in the past, and may resist monitoring requests as an interference with their sovereign right to operate detention facilities in their territory. In the military and extradition contexts, at least, the United States has expressed the view that it is in a better position to obtain assurances if it does not make the assurances public to courts or to the person being transferred. While this may be true, it means that it is difficult to know precisely what types of treatment and monitoring commitments the United States has received in particular cases. In contrast, most European states and Canada make their assurances public.

Use of Assurances to Protect Detainees

The United States, several European states and Canada have used diplomatic assurances in several recent and ongoing conflicts, as a way to protect detainees after transfer.

The United States, for example, relies on diplomatic assurances as it transfers individuals from the detention facility at Guantánamo Bay to their home countries or to third countries. Although the United States interprets CAT Article 3 not to apply as a legal matter to its activities outside its territory, its policy is not to send any detainee to a place where it is more likely than not that he will be tortured. With regard to Guantánamo transfers, the United States has stated, "Among the assurances sought in every transfer case in which continued detention is foreseen is the assurance of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer."[16] The United States pursues more specific assurances where circumstances warrant, including assurances of access to monitor treatment after transfer. The Secretary of Defense or his delegate approves the transfers, in consultation with other US officials, including those from the State Department.

In Afghanistan, certain states contributing troops to ISAF have concluded arrangements with Afghanistan that serve as assurances that the Afghan government will treat humanely wartime detainees transferred from ISAF. In 2005, ISAF states agreed to transfer detainees held by their forces to the IRoA within 96 hours of detention, with certain limited exceptions. Several ISAF states subsequently obtained commitments from the IRoA about how the IRoA would treat those transferred detainees.

According to news reports, the US arrangement with the Afghans states that the IRoA agrees to treat detainees humanely; to refrain from torture; to allow the United States or a third

16 Declaration of Clint Williamson, para 6.

party such as the ICRC to have access to the detainees; to investigate, detain, and prosecute detainees to the greatest extent possible; and to give the US government advance notice if the IRoA decides to release a detainee.[17]

The UK, Canada, Denmark, the Netherlands and Norway also have concluded agreements with the IRoA. These agreements require Afghan authorities to keep records of the transferred detainees, provide that the signatories will treat detainees in accordance with international law, including human rights law and law of war, grant representatives from the transferring state, the ICRC and the Afghan Independent Human Rights Commission (AIHRC) access to the post-transfer detainees and require the IRoA to notify the transferring state before it initiates legal process against the detainee, or releases or transfers him. Some of these elements echo the contents of the Article 12 agreements discussed above. Canada has concluded even more extensive arrangements with the IRoA that permit AIHRC and Canadian officials to conduct private detainee interviews, and require the IRoA to investigate and prosecute those accused of detainee abuse and inform all IRoA prison authorities of the arrangement's contents.[18]

The United States and its ISAF partners concluded a subsequent arrangement with the IRoA that gives ISAF even greater access to transferred detainees. Under that arrangement, officials from each signatory government 'enjoy access to Afghan detention facilities to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan.'[19]

The UK apparently has concluded an arrangement with the Government of Iraq about detainee transfers, although that arrangement is not public.

These arrangements are remarkable in several ways. First, the use of assurances as part of these detainee arrangements has sprung up almost from whole cloth in the past seven years. (The use of diplomatic assurances has a much longer history in the context of extradition and deportations.) Second, the assurances have become very detailed very quickly.

Third, these contemporary detainee-related assurances arise in a complicated context, in particular where they relate to intra-country transfers in Afghanistan and Iraq. There is an impor-

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17 Andrea Koppel & Elise Labott, 'U.S. officials: Gitmo transfer talks active', CNN, August 9, 2005, available at http://www.cnn.com/2005/US/08/09/detainee.release/index.html.

18 Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan, available at http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/agreement_detainees_030507.pdf.

19 ISAF letter, 'Access to detainees Transferred to the Government of Afghanistan,' available at http://canada-afghannistan.gc.ca/cip-pic/Afghanistan/library/docs-en.asp.

tant difference between holding detainees in one's territory while working out arrangements about how to transfer those detainees back home, and holding detainees in another state's territory while working out arrangements about how to transfer those detainees back to the custody of that state. The former provides more flexibility than the latter. In the latter case, to what extent can the detaining state refuse to release people from its custody because of the human rights record of the territorial state? What are the detaining state's options if it cannot become comfortable with a transfer? Can or should it remove the individuals from that territory against the wishes of the territorial sovereign, even when the individuals are citizens of the host state? If so, to where? Although states are applying a non-refoulement policy in these conflict contexts, it is not clear that that policy can – as a practical matter – retain identical contours to a non-refoulement policy applied to detainees held within a state's own territory.

Litigation and Way Ahead

The next speaker will talk about some of the human rights risks associated with the use of diplomatic assurances. But there is another risk worth mentioning: litigation. Canada, the UK and the United States have all faced lawsuits seeking to halt the transfers of certain detainees to foreign governments.

Amnesty International sued the Canadian government in 2007 to prevent Canadian troops in Afghanistan from transferring detainees to the IRoA.[20] Amnesty claimed that the IRoA mistreats detainees and that the transfers therefore violate Canada's constitution. Although a federal judge concluded that the Charter did not apply to those acts of the Canadian forces, Amnesty appealed that decision. If the Canadian courts ultimately prevent the government from transferring detainees to the Afghans, one Canadian general asserted that Canadian troops would be forced to hunker down in secure bases.

The United States has faced similar litigation regarding transfers from Guantánamo, and in Afghanistan and Iraq. Many Guantánamo detainees have asked US courts to require the government to give the detainees thirty days notice before transfer, and some have successfully obtained preliminary injunctions barring the US government from transferring them out of Guantánamo. These cases are the subject of ongoing litigation, with US courts struggling to determine whether they have authority to hear these cases and, if so, what – if any – relief they can grant the detainees.[21]

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20 *Amnesty International Canada v. Attorney General of Canada*, 2008 F.C. 336 (March 12, 2008), available at http://decisions.fct-cf.gc.ca/en/2008/2008fc336/2008fc336.html. See in particular paras 64-74 (discussing Canada's detainee transfer arrangements with the IRoA).

21 See, for example, *Kiyemba v. Bush*, Nos. 05-5487, 05-5489. A letter from the US Department of Justice urging the DC Circuit to resolve the issue quickly is available at http://www.scotusblog.com/wp/wp-content/uploads/2008/09/doj-kiyemba-letter-9-22-08.pdf.

In the conflict in Afghanistan, at least two detainees held at Bagram as enemy combatants sought habeas corpus relief from that detention. A US district court ordered the government to give one of the detainees thirty days notice before transfer, pending the Supreme Court's decision in *Boumediene*.[22] Now that the Court decided that case, the district court must sort through the same types of issues as those posed in the Guantánamo cases.

In Afghanistan, the United States obtained assurances from the host government. In Iraq, that does not seem to be the case. Yet where two detainees alleged torture if transferred to the Iraqi government and the United States lacked formal assurances from the Iraqis, the Supreme Court found it could provide no remedy. In *Munaf v. Geren* and *Geren v. Omar*, a US-Jordanian national and a US-Iraqi national detained by the Multi-National Forces–Iraq filed habeas petitions, seeking to block their transfers to the government of Iraq for trial and execution of sentence. The Court held that, while the US habeas statute extended to the detainees, federal courts could not enjoin the US government from transferring to a foreign sovereign for prosecution individuals accused of committing crimes and detained within the territory of that foreign sovereign.[23] The Court noted that the torture allegations were "a matter of serious concern" but concluded that the concern was to be addressed by the political branches, not the courts.

None of these cases precludes the use of diplomatic assurances in the context of detainee transfers. Indeed, many courts hearing cases about the use of diplomatic assurances in other contexts – including extradition and deportation – have upheld their use. So what does the road ahead look like? What happens in the next conflict?

First, we might expect to see diplomatic assurances used in future international armed conflicts, for cases in which the transferring state is concerned about the kind of treatment detainees will face when sent back to their country of nationality. Second, the UN High Commissioner for Refugees (UNHCR) and the ICRC might see themselves pressed to play a bigger role in helping to resettle detainees in all kinds of conflicts. Third, it seems safe to say that transfers in the face of torture concerns – and transfers where states use assurances to minimise those concerns – will continue to be litigated. Finally, the entire issue casts a spotlight on the importance of promoting human rights and humane treatment practices in foreign detention facilities and prisons, as a way to minimise concerns about detainee transfers in the first place.

22 *Ruzatullah v. Gates*, Memorandum Order (October 2, 2007).
23 *Munaf v. Geren*, 128 S. Ct. 2207, 2218 (2008).

THE RISKS IN USING DIPLOMATIC ASSURANCES IN TRANSFERS OF INDIVIDUALS

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Des assurances diplomatiques, ou des accords étatiques contenant une promesse d'un État à un autre de s'engager à ou de s'abstenir d'une certaine activité à l'égard d'un individu, existent sous différentes formes ayant des contenus différents. Des assurances demandant à un État de ne pas appliquer la peine capitale ou de pourvoir à un procès équitable, ne sont normalement pas la cause de problèmes légaux. Par contre, des assurances, constituant une promesse de s'abstenir de torturer un individu, sont bien problématiques dans le cadre légal des droits de l'homme, du droit des réfugiés et du droit international humanitaire.

Considérant cette dernière sorte d'assurances, on doit tenir compte de plusieurs aspects du droit international. Premièrement, aucune dérogation n'est permise à l'interdiction absolue de la torture, qui est une norme de jus cogens. *Il en va de même pour le principe de non-refoulement qui interdit à un État d'expulser ou de refouler un individu vers des territoires où il pourrait être torturé. Suivant les interprétations du Conseil des Droits de l'homme, ce caractère absolu pourrait même être attribué à l'interdiction d'expulser ou de refouler un individu vers des territoires où il pourrait subir des traitements cruels, inhumains et dégradants. Cette interdiction absolue de non-refoulement a une application extraterritoriale et elle crée également une obligation étatique de prévention, criminalisation, investigation et répression entraînant une responsabilité pour les États contrevenants.*

Plusieurs problèmes ont été constatés par les mécanismes internationaux, régionaux et nationaux des droits de l'homme à propos de ces assurances, qui constituent une promesse d'un État de s'abstenir de torture dans le cadre de la détention. Ces problèmes sont liés au fait que les assurances diplomatiques n'empêchent pas la torture, voire même nuisent au régime des droits de l'homme, bien établi en ce qui concerne la torture. Parmi les critiques, on retrouve un manque de sérieux des assurances; le risque d'affaiblir la protection universelle contre la torture; la création d'un système de protection double parmi les détenus dans l'État accueillant; l'incapacité de créer un système de surveillance adéquat; une absence de sanctions liées aux assurances et l'intérêt pour l'État transférant et l'État accueillant de nier des possibles actes de torture à l'encontre des détenus transférés.

1 Office of the United Nations (UN) High Commissioner for Human Rights. The views expressed do not necessarily reflect the views of the High Commissioner nor the United Nations.

En conclusion, il est clair qu'une évaluation individuelle du risque de torture pour un détenu sur le point d'être transféré est nécessaire. A cette fin, des assurances diplomatiques peuvent constituer un des éléments à considérer, mais ne pourront jamais être le facteur décisif. L'éradication de la torture est nécessaire pour tous les détenus, en non pas seulement pour ceux qui sont protégés grâce aux assurances. Finalement, l'excuse de « problèmes pratiques » rendant « difficile » l'application de l'interdiction absolue de la torture ne devrait pas être acceptée.

Introduction

The use of diplomatic assurances in the transfer of individuals entails a number of specific risks. The focus in this paper is on the position under IHL law, as the advantages and disadvantages of the practice of using diplomatic assurances on transfers of detainees are largely identical whether we are talking of a situation of armed conflict or not. Human rights guarantees apply in both times of peace and in times of conflict and everything in between, unless specific permissible derogations have been entered.[2]

When we speak of diplomatic assurances we mean agreements between states under which one state promises the other to engage in or refrain from certain activity in relation to an individual. These are bilateral instruments but there is no reason they could not be used between a number of states. They may take many forms, including letters, *notes verbales*, memoranda of understanding and so forth.

State practice varies in relation to the substance of the promise being made, the form in which assurances are made and sought, their detail and whether or not they are made public or kept secret. Assurances have been used for some time and have typically involved a promise to not torture a transferee, to provide a fair trial and not to seek the death penalty in any trial. Assurances related to the death penalty and – to a degree – observance of internationally recognised fair trial standards are less contentious in human rights terms, for reasons mentioned below. However, those constituting promises to not torture are highly problematic. It is on these assurances that this paper will focus. It will also briefly address the issue of so-called 'security assurances' and their human rights implications.

The International Human Rights Law Context

Diplomatic assurances impact on a specific situation at a number of different levels, including the political, the diplomatic and the legal. The International Human Rights (IHL) framework

2 International Court of Justice, Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Merits (2005), para 216. The specific consequences of transfers of detainees under international humanitarian law (IHL) are covered elsewhere in this volume.

focuses on the impact of the assurance on the individual as a human being, rather than as a criminal suspect, a security risk or some other proven or alleged negative quality. Human rights also focus on the accountability of those under an obligation to the respect, protect and fulfil the rights of that individual.

In considering the risks of using diplomatic assurances, five salient aspects of human rights law need to be borne in mind.

The first is the absolute prohibition on torture and cruel, inhuman and degrading treatment, as set out in the Universal Declaration of Human Rights, the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR). The absolute prohibition on torture is a norm of customary international law[3] and a *jus cogens* norm. No derogations are permitted. The right may not be subject to restriction or limitation anywhere, under any conditions. Indeed by its own terms CAT states that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'[4]

Second, IHL law includes the prohibition on the transfer (or refoulement) of an individual to a state where there are substantial grounds for believing that she or he would be in danger of being subjected to torture.[5] The principle of non-refoulement is also known in refugee law, and IHL and – insofar as it relates to torture – is arguably a customary norm.[6] No derogation is permitted from the obligation of non-refoulement arising under Article 3 of CAT. While the obligation under CAT only applies to torture, Article 7 of the ICCPR has been read by the Human Rights Committee to include "cruel, inhuman or degrading treatment or punishment."[7]

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3 *Prosecutor v. Anto Furundzija*, Case No.: IT-95-17/1-A, Judgement, 21 July 2000.

4 Article 15.

5 Article 3 CAT, Article 7 ICCPR and General Comment 20 HRC.

6 UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para 21.

7 The tests for assessing the risk of torture vary slightly. Article 3 of CAT sets out the rule as being *'substantial grounds for believing that [the individual] would be in danger of being subjected to torture'.* The Committee against Torture has made it clear that this requires both an objective assessment of the conditions in the receiving state and a subjective assessment of the danger particular to the individual. The Committee looks for more than 'mere suspicion', but the likelihood does not have to rise to the level of 'high probability'. Under the ICCPR, the Human Rights Committee has established a higher standard requiring individuals be 'at real risk of' either of torture or cruel, inhuman or degrading treatment or punishment.

Similar protections exist at the regional level.[8] In international armed conflict, the transfer of prisoners of war to states likely to torture or treat inhumanely would be in breach of the Third Geneva Convention of 1949.

Third, the non-refoulement obligations under CAT and the ICCPR (among others) apply beyond the territory of the state party. CAT specifically refers to offences 'committed in any territory under its jurisdiction'. While extraterritoriality is contested by some states, extraterritorial application has been accepted by the human rights treaty bodies, including in General Comments (in General Comment 31 of the Human Rights Committee), by the International Court of Justice (in the Wall Advisory opinion and in *DRC v. Uganda*)[9] and by the General Assembly (in its Resolution 45/170 on Iraqi obligations in Kuwait).

Fourth, under CAT and the ICCPR, states have an obligation to prevent torture, to criminalise the act and investigate and punish instances of torture. Criminalisation includes those complicit in the act of torture. A failure by a state to investigate fully allegations of torture will constitute a breach by the state under both CAT and ICCPR.

Fifth, a defining feature of the human rights regime is that it introduces concrete accountability for violations of obligations. For a state party to the ICCPR, the decision to transfer an individual brings with it responsibility for foreseeable violations, as has been the view of the Human Rights Committee expressed in *Ng v. Canada*.[10]

Key Shortcomings with Diplomatic Assurances from a Human Rights Perspective

The risks of using diplomatic assurances can be shortly stated: (1) under International Humanitarian Law, the risk of transferring a detainee on the basis of a diplomatic assurance is the infliction of torture on the detainee; (2) the consequent breach by the transferring and receiving states of international law obligations relating to torture (among others); (3) individual domestic criminal responsibility for those inflicting and aiding the torture; and (4) the accrual of a right to a remedy from the state of the victim.

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8 Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 12(3) of the African Charter of Human and Peoples' Rights, and Article 3 of the Caracas Convention on Territorial Asylum.

9 See also *Al-Skeini v. Secretary of State for Defense (UK)*, [2007] UKHL 26 (for ECHR obligations in Iraq) and – by analogy – *Bourmediene v. Bush* (2008) 128 S. Ct. 2229.

10 'A State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place'. Communication No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para. 6.2. See also the finding of a violation in *Agiza v. Sweden*, Views adopted on 20 May 2005 (CAT).

The shortcomings of using of diplomatic assurances in respect of treatment of detainees have been widely reported. The shortcomings outlined here are those identified by, among others, the IHL mechanisms which have been mandated by United Nations Member States and which base their views on data and reported experience from the consideration of individual complaints, *in situ* country visits, bilateral discussion with governments and from talking directly to those in detention including those for whom diplomatic assurances did not work.[11] Similar conclusions have been reached by regional bodies,[12] national courts, national human rights institutions and civil society organisations. A number of Member States appear also to have a decision not to transfer detainees where they feel, even with an assurance by the receiving country, the risk of torture is not mitigated sufficiently.

These shortcomings are largely derived from two underlying concerns. The first is that diplomatic assurances do not in practice fulfil their purpose of preventing torture. The second is the concern over the extent of the value-added or damage that assurances bring to the established human rights regime on the prohibition of torture.

The shortcomings fall broadly under ten categories (in no particular order): wilful blindness to risk, reliability of the promise, undermining universality, the pool of the protected, secrecy, the inability to comprehensively monitor, enforcement, *ex post facto* approach, conflict of interest and impunity.

1 Wilful Blindness to Risk

The principle of non-refoulement is based on a risk assessment. If there is no risk, then the assurance is not required (and indeed may well be insulting to the state from which it is demanded). The fact that an assurance is sought indicates that the transferring state is of the opinion that there is some type of risk. The argument that diplomatic assurances of themselves lower this risk is questionable, based on the specific cases of failure. According to the Special Rapporteur on the promotion and protection of human rights while countering terrorism, the existence of an assurance could "at best, be taken into account as one of the several factors to be addressed in the individual assessment of the risk."[13]

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11 At the international level, specific concerns over the use of diplomatic assurances on torture have been voiced by the Human Rights Committee, the Committee against Torture, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Special Rapporteur on extrajudicial, summary or arbitrary executions, and the High Commissioner for Human Rights (see for example A/HRC/4/88).

12 For example, the Council of Europe's Venice Commission and the European Court of Human Rights in a number of judgments, most saliently *Saadi v. Italy*, App. No. 37201/06 (ECHR, 2008).

13 UN Doc. A/62/263 para. 58.

2 Reliability of the Promise

If there is a risk (according to the tests laid down under the various human rights treaties and their supervisory bodies), then the effectiveness of assurances has been called into question. States have an international legal obligation to not torture, which is possibly the gravest of human rights violations. If a receiving state does not comply with this hard legal obligation, what evidence is there that it will comply with a non-binding bilateral promise?

Transferring states also – sometimes erroneously – rely on the reliability of the control structure in the receiving state. Transferring states thus appear to seek assurances from higher level officials in the receiving state in the hope of increasing the reliability of the promise being given. While this may increase this chance in some circumstances, experience has shown that torture is often carried out by rogue elements within the security apparatus over which government control is incomplete. This internal flaw renders assurances useless in some instances, exposing individuals to torture and states to liability. States will generally be responsible for *ultra vires* acts of these rogue individuals.

3 Undermining Universality

By concluding non-binding agreements on an issue such as torture which lies at the heart of the IHL system, states are undermining the universality of human rights protection. A High Commissioner for Human Rights put it thus: "*ad hoc* arrangements, such as assurances, concluded outside the [universal human rights] system threaten to weaken its foundations and retard the progress that has been achieved over more than half a century to extend its ambit and protection to all."[14] This can be apparent where states denounce certain other states for human rights abuses (including torture) in one forum yet at the same time are content to accept diplomatic assurances from the same state on the transfer of a detainee.

4 The Pool of the Protected

Linked to this shortcoming is the risk of creating double standards among detainees. Assurances create a two-class system among detainees in the receiving state, attempting to provide a special bilateral protection and monitoring regime for a selected few and ignoring the systematic torture of other detainees, even though all are entitled to the equal protection of existing UN instruments.

5 Secrecy

Diplomatic assurances are kept secret by some governments, allowing neither the detainees nor the courts nor the public to know their terms. Secrecy makes it difficult, if not impossible, to evaluate

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14 'In our name and on our behalf', address by UN High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law, 15 February 2006.

assurances, monitor their application and – insofar as it is possible – enforce their terms. Secrecy also frustrates the individual, his or her family and legal advisors from understanding the situation, let alone monitoring it effectively. Far from focusing on the individual, diplomatic assurances are state-centric instruments. Where governments take decisions to transfer individuals on the basis of assurances, individuals have the right to know and to challenge the terms of their transfer.

6 The Inability to Comprehensively Monitor

In many instances diplomatic assurances have been given with no agreement on any means to monitor the promise given. Some of these cases have come before national courts and the IHL machinery, where they have been particularly criticised. However, this raises the question of whether effective monitoring is feasible. It is accepted that assurances containing a promise not to seek the death penalty in respect to a transferred individual can – by and large – be effectively monitored. Assurances in relation to fair trial present more challenges. However, experience from the human rights and international humanitarian law spheres has shown that unless there is 24 hours a day, seven days a week surveillance of the detainee, no monitoring system will protect a detainee 100 percent against torture. The reasons for this are well known: torture usually occurs in secret, often leaves no traces, the victims – fearing reprisal – are reluctant to speak about their suffering, and they are often not believed if they do.

Monitoring by independent bodies (such as national human rights institutions or the ICRC) is clearly preferable to monitoring by state representatives. However, it still suffers the basic shortcomings of individual, *ad hoc* monitoring. Regular, professional, institutionalised monitoring of places of detention and of all detainees (as is promoted by the Optional Protocol to CAT) is our best chance at eradicating torture and other forms of ill-treatment in detention. Monitoring must also lead to accountability. A monitoring regime that does not mark the first step towards individuals to be held criminally responsible for acts of torture is unlikely to lead to behaviour change on the part of the police, prison officials and governments.

7 Enforcement

How can diplomatic assurances be enforced? Whether diplomatic assurances are legally binding will depend on the circumstances of the assurance, including the intention of the parties as evinced by – for example – the language used. As the word 'diplomatic' suggests, any attempt at enforcement will be through diplomatic channels and procedures, such as *démarches*. However, as the Special Rapporteur on torture has noted, "in most cases, diplomatic assurances do not contain any sanctions in case they are violated, i.e. there is no accountability of the requested or requesting State, and therefore the perpetrators of torture are not brought to justice."[15]

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15 UN Doc. E/CN.4/2006/6, para 31.

Even if a diplomatic assurance is drafted, negotiated and concluded with a view on behalf of both parties to make it legally binding, enforcement will rely on the legal domestic framework of the receiving state, usually criminal law provisions relating to torture by state officials. However, in many countries, significant legal obstacles are placed in the way of such enforcement, making it very difficult to hold law enforcement officials accountable. For example, in some states, an exception in the criminal law states that no prosecution alleging torture by a state official can be launched without the fiat of the Attorney General.

8 *Ex Post Facto* Approach

The international law regime on refoulement (be it human rights, refugee law or IHL) is based on a preventive approach by assessing risk before a transfer takes place. This is in light of the gravity of the consequences of torture taking place. Assurance regimes generally do not allow for individuals to challenge the assurances provided for them. The only means for challenge and redress is thus after the fact, that is, after torture has been committed (as evidenced by the increasing flow of cases before national courts and IHL mechanisms on diplomatic assurances). By this stage, the individuals in question are often unable to file complaints or if they can, give evidence.[16]

9 Conflict of Interest

The Special Rapporteur on torture has opined that "[b]oth States [i.e. transferring and receiving] have a common interest in denying that returned persons were subjected to torture."[17] To accept the failure of a diplomatic assurance would render states and possibly individuals liable to criminal sanction. This is not to suggest that states routinely wilfully conceal instances of torture. However the interests of state actors can be relevant in the rigor of post-transfer monitoring. The Special Rapporteur has gone further, stating that "where States have identified independent organizations to undertake monitoring functions under the agreement, these interests may translate into undue political pressure upon these monitoring bodies, particularly where one is funded by the sending and/or receiving State."[18]

10 Impunity

Maybe surprisingly, the use of diplomatic assurances could in theory reduce the likelihood of a detainee who is alleged to have committed crimes from being brought to justice. Relying on assurances which turn out to offer no protection against torture will likely render the transfer

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16 We saw examples of this in *Mamatkulov and Askarov v. Turkey* App. no. 46827/99, (ECHR, 2005).

17 E/CN.4/2006/6, para 31. See also the Report of the meeting of the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism, (7 December 2005), para 10 (DH-S-TER(2005)018).

18 Ibid.

illegal. Even if there is no torture, the use of a transfer outside the normal channels (of deportation, extradition, or transfer of sentenced persons) may taint the transfer with illegality. As a High Commissioner for Human Rights has pointed out, "prudence would dictate that the transfer should not be tainted with illegality since in many countries this could lead to the courts declining to exercise jurisdiction."[19]

Some Conclusions

In light of these shortcomings identified by the IHL system (and others), four conclusions might be drawn. The first is that in assessing the risk of torture posed to a detainee by a transfer, the focus must be on the individual and her or his protection from torture. The primary focus cannot be the alleged or presumed wrongdoing or 'dangerousness' of the individual, or on security imperatives, or on public opinion. This is all the more the case in those instances (which are the vast majority) where the allegations of wrongdoing have not been tested by any competent, independent and impartial court. Indeed, this failure to focus on the individual can be seen in the numerous instances where a detainee has been publicly identified with criminal behaviour (for example, labelled as a terrorist), which if anything heightens the risk of torture and ill-treatment on return. This was made clear in the *Chalal* case before the ECHR over a decade ago.[20]

Second, the IHL system has consistently held the view that no matter how sophisticated the monitoring mechanism put in place under a diplomatic assurance, the assurance itself can only ever be one factor in many in assessing the risk of torture, and not a deciding factor.

Third, the harm we are trying to address is torture. Torture cannot be balanced against threats such as terrorism. Such a balance was rejected in the *Saadi* case. Were torture to be eliminated in receiving states, there would be no need for diplomatic assurances. Efforts should thus focus on eradicating torture for all detainees, rather than a chosen few. Thus, for example, where it is clear that a new military operation will lead to the detention of individuals and that at some point these individuals will have to be transferred to a national authority, efforts must be undertaken from the start to ensure that that national authority is in a position to accept the detainees without risk of torture.

The fourth and final point is related to arguments advanced to the effect that the absolute prohibition on torture and the principle of non-refoulement should be interpreted in a flexible 'operational' way because the application of the human rights norm poses practical difficulties.

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19 'In our name and on our behalf', op. cit.
20 *Chalal v. United Kingdom* (1996) 23 EHRR 413.

This argument has been raised in the past in respect to the application of other human rights, such as rape in marriage, corporal punishment of children, 'reasonable accommodation' in respect to disabled persons' right to access buildings and racial segregation. The system of IHL voluntarily created and built by states over the past 60 years contains a high degree of inbuilt flexibility. States may limit or restrict the application of certain rights or enter reservations to their application. They may even derogate from many rights in times of emergency. However, we are dealing here with one of the most basic and immutable rights of individuals as human beings: the right not to be tortured. States and the IHL mechanisms have made it clear that this prohibition is absolute and cannot be watered down owing to practical difficulties of application. Diplomatic assurances have been seen by the IHL system as an attempt to provide a 'quick fix' to a profound problem that has been studied for quite some time.

This is not to deny or underestimate the size of the obstacles to implementation of human rights norms in some cases, particularly in cases of conflict or where states are detaining individuals outside of their territory. However, some solutions present themselves. Thus, the argument of 'practical difficulties' is apparent in the assumption that the individual in question cannot be dealt with in any other way other than continued detention and transfer. If the individual is alleged to have committed a crime, then he or she should be granted due process. If criminal proceedings require the use of classified information, there are means for using this information while maintaining its confidentiality. If the individual is not guilty of a crime and cannot be repatriated for refoulement concerns, then there is precedent for these individuals to be resettled in a third country or settled domestically in the transferring state.

QUESTION TIME

What is the form of diplomatic assurances? What is the legal nature of diplomatic assurances?

One speaker explained that diplomatic assurances would take a number of different forms, from exchange of letters between states to a Memorandum of Understanding (MoU). Another participant added that there would be very minimalist diplomatic assurances, whereby the transferring state asks the receiving state to treat the detainee in a human way. In addition, there are also very detailed diplomatic assurances. According to the participant, this last sort of diplomatic assurances, or so-called 'transfer arrangement', would withstand criticism of inefficiency and lack of protection much better. Regarding the legal nature of diplomatic assurances, no participant seemed to be aware of any legally binding ones. States prefer non-binding instruments because they can usually be concluded faster. Most participants agreed that whether or not the diplomatic assurances were binding would not have a huge impact on their quality. The actual achievements are that, when one is engaging in negotiations on specific issues with a foreign country, one can claim human rights and international humanitarian law concerns. Another achievement is the fact that the receiving state is letting in monitors. Speakers did not see how this could be improved when making it a formal obligation. However, if the detaining (negotiating) state had the impression that the diplomatic assurances would be more effective if binding, then the detaining state should try its best to arrange a binding agreement with the receiving state. One participant added that he could not see what difference it would make if the diplomatic assurances were binding, as under the current form of assurances there are no real enforcement mechanisms. Concerning the legal nature of diplomatic assurances, one should not forget that the purpose of diplomatic assurances is to give countries access to detainees on the territory of sovereign States and to enforce existing international agreements and international law bodies, not to weaken existing obligations. All the MoU's concerning the International Security Assistance Force would confirm this.

One participant stressed the importance of publishing diplomatic assurances, and more specifically the MoU's in the Afghan context.

In the follow-up of diplomatic assurances, how does the transferring state monitor if the receiving state is providing the human treatment for transferred detainees to which it has agreed? Does embassy staff take care of the prison monitoring or are experts hired to do this work? Does the transferring state train these persons in prison monitoring and spotting or preventing torture?

No participant had a clear view on these points. It all seems to depend on different MoU's (whereby the United Kingdom's one with Afghanistan was pointed out as a clear and detailed example) or on separate side letters that would guide these MoU's. One participant referred to the Afghanistan Independent Human Rights Commission as being trained and professional in providing this kind of service.

Monitoring done in the follow-up of diplomatic assurances is often confidential and the transferring state will not have great incentive to publicise the fact that transferred detainees have been ill-treated by the receiving state. The transferring state will have no legal means to enforce the assurances. Do diplomatic assurances actually work in terms of preventing torture or other ill-treatment?

Most participants stressed that there was no all-embracing answer to this question. Diplomatic assurances are often effective and helpful for international forces in foreign countries. At the same time, one can wonder in how far a state, that does not respect international standards enshrined in international law normally, will respect those standards once part of diplomatic assurances. In the end, it all depends on the individual assessment of the real risk of torture of ill-treatment for each individual detainee. If there is a realistic chance for a risk, one cannot transfer a detainee, even if there are diplomatic assurances. One needs to approach this issue creatively: one idea could be to transfer detainees only to a particular part of the country (as suggested during the second session).

If we accept the criticism regarding diplomatic assurances, is there another option to consider?

One participant suggested that a member of an alliance could transfer its detainees to another member and thereby avoid the debate on diplomatic assurances, whether these would be drawn-up in the framework of a memorandum of understanding (MoU) or not.

Transferring detainees to another member of an alliance could also be useful when the receiving state is not interested in having a MoU with this specific detaining state. Participants underlined that this was an actual problem in the Afghan context, where the Afghan authorities no longer sign MoU's with individual Member States of the alliance. One can explain this refusal to sign more bilateral MoU's by the Afghan incapacity to apply to each separate detainee different regulations according to the bilateral MoU signed between Afghanistan and the transferring state. An attempt by NATO to draft one MoU for the whole Afghan country was shamefully disagreed to by two contributing nations. However, on the whole, the proposition met with criticism, as not many states would be interested in receiving even more detainees. Again, participants stressed that simply releasing the detainee would not be a perfect solu-

tion. One person referred to the creation of a revolving door, whereby the same detainee that military forces released the day before because of concerns over his treatment after his transfer, would attack the same soldiers again. If this detainee was released no guarantees, build-in by possible diplomatic assurances, would be in place – even if the local forces would arrest that person later on.

Another possibility would be to construct a detention facility, after the example of camp Bondsteel in Kosovo that would meet minimum standards. However, as the United States has already experienced in Afghanistan where they are the only state that has constructed a detention facility, such an endeavour is often criticised. A detention facility might be necessary to detain persons until the situation was solved. However, this detention should be as short as possible (48 hours if operating in a country where there is no torture concern).

A last option for states that wish to transfer its detainees in humane conditions would be to work with the local government in their detention facilities and organise a proper training. However, this option requires the consent of the local government.

When joint patrolling or joint operations occur between the Afghan National Army or the Afghan National Police and the International Security Assistance Force (ISAF), the Afghan forces and the ISAF will conduct the actual detention. This is a military objective in terms of enabling the indigenous security forces to exercise their responsibilities and functions themselves. Could one attribute responsibility to ISAF when the Afghan forces do not treat these detainees in a human way?

Participants welcomed this suggestion and stressed that the goal in Afghanistan and Iraq would be to start having local forces taking over responsibility for all security activities on their territory. The focus needs to be on institution building and strengthening the state capacity. Torture should be eradicated, not only for those few who happen to fall into the hands of certain international forces, but in the entire system. Concerning the possible attribution of responsibility to ISAF, no participant could give a definite answer. One participant suggested that, if the local government was engaging in serious human rights abuses and ISAF was aware of them, there would be a moral, if not a legal responsibility to follow-up. Another participant stressed that the focus of ISAF support should be that the law enforcement was done in a proper way.

Session 4
Ways Forward

Chair person: **Philip Spoerri,** *Director for International Law, ICRC*

THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS

Thomas Winkler
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L'arrestation, le transfert et le traitement des détenus est devenu un enjeu pratique, légal et politique de plus en plus difficile à aborder pour les États participant aux opérations militaires internationales. Les expériences en Irak et en Afghanistan ont montré la nécessité de trouver des réponses opérationnelles à ces défis. A cette fin, le gouvernement danois, confronté à des nombreuses critiques concernant les transferts des détenus dans le contexte afghan, a mis sur pied le Processus de Copenhague.

Ce Processus cherche à identifier les défis principaux liés aux bases légales applicables à la détention dans des conflits armés internationaux et non internationaux : traitement et conditions de détention, transferts d'un État membre d'une coalition militaire à l'État hôte ou transferts entre les États partenaires de la coalition même. Le Processus essaie de répondre à ces nombreuses questions afin, d'une part, de clarifier les obligations légales pour les soldats sur le terrain – les incertitudes gênant l'efficacité militaire – et d'autre part, assurer la protection des détenus.

Le Processus de Copenhague ne vise certainement pas à affaiblir le cadre légal existant relatif à la protection des détenus à l'intérieur ou à l'extérieur d'un conflit armé, ni à établir de nouvelles règles de droit international fondées sur le plus petit dénominateur commun. Il cherche une meilleure compréhension et une acceptation des principes légaux pertinents et à identifier des solutions pratiques afin de répondre aux défis auxquels les soldats et les détenus sont confrontés. À travers des conférences et des réunions, l'ambition est, premièrement, d'écrire un programme commun pour le traitement des détenus, utilisable dans chaque future opération militaire internationale par les États partenaires de la coalition ainsi que par l'État hôte. Deuxièmement, sur la base de ce programme commun, l'idée serait de développer un autre texte, qui pourrait être utilisé comme annexe à chaque Résolution du Conseil de sécurité mandatant une opération militaire spécifique. En conclusion, le Processus de Copenhague ne doit pas seulement être considéré comme un effort se concentrant uniquement sur le développement des standards communs,

les échanges et discussions lui conférant également un rôle de diffusion du droit international humanitaire.

Good morning Ladies and Gentlemen,

My name is Thomas Winkler. I am the acting legal adviser of the Danish Ministry of Foreign Affairs. One of my tasks is to ensure that Danish military forces operating abroad do so in a legal framework which is both clear and in full conformity with our international obligations. As we heard yesterday detention and transfer is a challenge in this respect. And that – in short – is the reason why the Danish Government has launched the Copenhagen Process, which I will talk about this morning.

I would like to begin by thanking the International Committee of the Red Cross (ICRC) and the College of Europe for this opportunity to brief you on this new initiative on the handling of detainees in international military operations.

This is the fourth time within the last two month that Denmark has been asked to give a presentation of the Copenhagen Process at an international meeting. I of course would like to think that the reason for this is because I give such entertaining and thought-provoking statements. Unfortunately, that would properly not be a correct reading of the situation.

The fact is that the handling, transfer and treatment of detained person have become an increasing difficult practical, legal and political issue to tackle for states contributing to the promotion of international peace and security. Our experiences from Iraq and Afghanistan have shown us that we need to find operational answers to these challenges. The Copenhagen Process is part of this effort.

It was not a coincidence that Denmark decided to launch the Copenhagen Process.

In February 2002 Danish Special Forces in Afghanistan captured 31 Afghan citizens which were handed over to US troops and detained for a brief period before they were released. Years later – in 2006 – a documentary on this episode led to widespread political criticism of the government. Claims were made that Denmark had violated its international obligations vis-á-vis the handling and protection of these detained persons. And one of the Afghan citizens has now sued the Danish government for damages.

The main point, however, is, that at the time of the transfer, nobody thought about the implications of what was taking place on the ground. Nobody foresaw that what seemed as a very

reasonable operational decision to handle the detained with the practical assistance of allied coalition forces could lead to a serious political crisis for the government.

Even today, with all our hard-won experience on the issue, the challenges involved keep hampering the conduction of Danish participation in international military operation.

A very recent illustration of this was the capturing and subsequent release some weeks ago of ten suspected pirates by the Danish Navy in the waters of the Horn of Africa as part of Task Force 150. The most difficult challenge concerning the Danish participation in these operations was from the outset not to identify the legal basis for the operation, to obtain parliamentary approval or to get the necessary armed forces in place many thousands of kilometers away from Denmark. No, the single most difficult legal, political and practical challenge was to firmly and clearly answer questions arising from the potential detention by Danish naval forces of pirates. And when pirates indeed were detained, we found ourselves in a position, where the only solution was to release them. This was obviously not the best solution considering that the main objective of the military operation is to fight piracy.

These examples are illustrations of the day-to-day challenges, which soldiers – and military lawyers – face. And they exemplify the challenges faced by states who – on the one hand – wish to contribute to international military efforts to ensure peace and stability. And who – on the other hand – of course have to respect their international legal obligations. There is no choice between one and the other. We have to do both.

Today, military forces deployed in international operations are often acting in support of governments that need assistance to stabilise their countries. In these operations international military forces may have to perform tasks, which would normally be performed by national authorities. This includes detaining people in the context of both military operations and law enforcement. At the same time the transfer of detainees to local authorities is often not possible as it may contradict the legal commitment of the troop-contributing countries.

This fosters a number of fundamental challenges which take a variety of shapes and forms. What is the legal basis for detention in international military operations? Which regime of treatment and conditions of detention applies to the detainees? What legal standards and procedures apply to transfers between states in a military coalition and the host state or internally between coalition partners? Do we have an alternative to transfer, when we are operating in a sovereign state? What exactly do we mean when we talk about 'detention'? And not the least, do the answers to all these questions change when the situation in which the military operations takes place changes from an international to a non-international conflict or to a situation of no conflict?

The reply from the Danish military to these questions and challenges has been loud and clear: we need clarity. It cannot be for the individual soldier to answer questions like these when he is facing an armed opponent at the battle-field.

Without clarity soldiers will either hesitate. Or make mistakes. Both seriously hamper the efficiency of our military efforts. And thus may prevent us from reaching the goals that we said out to reach.

Some of you may find this a very cynical and calculating approach. And to some extent it is. It is, however, also part of reality. One side of the coin.

The other side – of course – is to provide the required protection of the persons detained. Lack of clarity and unsure soldiers are no benefits for anybody – including for the detainees. And the present situation, where the handling of detainees to a large extent is left to ad hoc solutions thought up by the individual troop-contributing state, is not satisfactory to anybody. It should not be so, that the situation for an individual detainee, depends on who he was detained by. But – unfortunately – it is to a certain extent exactly so.

It is these challenges that the Copenhagen Process seeks to address. The overall objective is to ensure that the issue is dealt with horizontally and multilaterally. Our ambition is to establish a common framework for all troop-contributing states in a given operation. And – when appropriate – also for the host state. With the Copenhagen Process we aim to bridge the gaps between lack of common understanding and different practices. We also want to bridge the gaps between legal theory and reality on the ground.

It is very important for me and my government to make one thing absolutely clear. The Copenhagen Process seeks in no way to shortcut, devalue or in any other way undermine the already existing legal framework related to the protection of persons detained in – or outside of – an armed conflict. We have heard concerns to this effect. And we have listened. The objective of the Copenhagen Process is exactly the opposite.

We are not seeking to establish new rules of international law based on the lowest common denominator. This would be a contradiction in terms as Denmark is a dedicated state party to all relevant International Humanitarian Law and human rights instruments. What we are seeking is an improved international common understanding and acceptance of the legal considerations involved. And to identify – within this existing legal framework – practical solutions to the challenges which our soldiers and the detainees face.

A key ambition for any future outcome of the Copenhagen Process is to improve the protection of detainees – regardless of the status of the individual and the circumstances of the detention. The Process will not – and cannot – lead to a result which is not in full conformity with existing levels of legal protection.

The Copenhagen Process has been developed through a progressive number of events.

Based on our hard won initial experience with the challenges of the handlings of detainees in Iraq and Afghanistan, Denmark in October 2007 convened the first conference in 'the Copenhagen Process on the Handling of Detainees'. The aim was to identify the key challenges on the handling of detainees in international military operations.

The conference was attended by representatives from 17 states from all regions of the world and international organisations with experiences in international military operations, including the ICRC. It confirmed that detention is a necessary and legitimate mean in the conducting of military operations. But the Copenhagen Conference also confirmed that the handling of detainees is a challenge which all the states and organisations present struggled to tackle.

The discussions during the first Copenhagen Conference clearly underlined that the challenge is not the elaboration of new rules on detention, but to reach common understanding of the specific content of the existing legal framework to make it more comprehensible, well-known and feasible to apply in practice.

The second step in the process was the convening of an international seminar in May of this year in Copenhagen on best practices in a national, regional and international perspective. The intention of the seminar was to identify best practice elements for the development of a common platform and a functional checklist relevant to peace-keeping operations in the broad sense. We are still digesting the outcome of the seminar in particular the very useful contributions related to the African experiences in the field and the general role of teaching of IHL as a very important best practice related to the handling of detainees.

The next step will be a side-event in New York in a couple of week's time, to which all Member States of the United Nations and all relevant international organisations and NGOs will be invited. The aim of this event will be to present to as many interested parties as possible the results of the first two meetings in Copenhagen. This will be followed by a second Copenhagen Conference in the first half of 2009.

Our ambitions for the outcome of the process are threefold. And when I say 'our' I mean Denmark, as the question of the outcome is also a subject under discussions between the participants in the Process. And no decision has been taken yet.

Firstly, we are working on a paper setting out a common platform for the handling of detainees. Our ambition is for this document to be the basis of the actions and cooperation of troop-contributing states and host states with regard to detainees in any future international military operation.

Secondly, on the basis of this common platform we will develop yet another paper which could be used for example as an annex to any Security Council resolution mandating a specific military operation and thereby establishing the needed common platform for the handling of detainees for all states involved in this operation.

Thirdly, it would be a mistake to consider the Copenhagen Process as an effort solely focussed on developing best practice standards. The Process itself is an objective of the Copenhagen Process. The Process is a forum for exchanges of experiences, ideas and best practices. It sharpens our understanding of the legal and practical concerns involved. In turn this shape our national policies to ensure full respect of the fundamental guarantees of detained persons in all situations where military operations are conducted. In this way the Copenhagen Process should also be regarded as an element in the dissemination of IHL.

The Copenhagen Process is an initiative by the Danish government. And we will continue to pursue our objectives. This is, however, not a one-state project. We would never have come as far as we have without the encouragement and support from many other states. And from international organisations, including the UN and NATO. We also greatly appreciate the frank exchanges which we have had – and will continue to have – with the ICRC.

I am personally looking forward to continue working with the Copenhagen Process. And I look forward to continue the cooperation with everybody with an interest in this subject.

The Danish Ministry of Foreign Affairs has produced a non-paper describing the challenges and the Process in greater detail. This paper has recently been published in *The Military Law and the Law of War Review.*

WAYS FORWARD: HOW TO OPERATIONNALISE THE LEGAL OBLIGATIONS?

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En ce qui concerne la détention et le transfert des personnes arrêtées, les forces militaires ont avant tout besoin de règles claires. Elles insisteront sur cette nécessité auprès de leur gouvernement respectif. Pourtant, les États, étant confrontés à la réalité du terrain et étant obligés de respecter la souveraineté des États hôtes, n'abordent pas cette question facilement. Même si cette réticence peut être qualifiée de « politique », on comprend que la réalité sur le terrain a un impact sur la manière dont les États pourront formuler leurs politiques en la matière. Les militaires se retrouvent ainsi dans une position difficile, essayant de trouver une ligne de conduite conforme à leurs obligations juridiques et qui ne gêne pas leur gouvernement respectif.

Les militaires s'occuperont surtout d'un aspect du problème : la détention et le transfert immédiats des détenus. Les pays comme l'Afghanistan, le Congo, le Tchad ou le Soudan, où des forces internationales sont présentes, ont par contre avant tout besoin d'une réforme de leur système judiciaire, d'un respect accru de l'État de droit, bref de renforcement des capacités institutionnelles. Afin de résoudre ce problème à long terme, un effort concerté de la population et du gouvernement local ainsi que de la communauté internationale est nécessaire.

S'agissant de la détention et du transfert immédiats, un des grands défis reste la divergence d'application du principe de non-refoulement par les États constituant des forces internationales. Dans une coalition comme l'OTAN, cette interprétation différente rendra une approche consistante plus difficile, même si des arrangements sur le terrain existent.

Conformément à l'idée du renforcement des capacités locales, 80 % des opérations menées en Afghanistan sont des opérations communes. Ces « joint operations *» permettent aux forces policières afghanes d'accomplir leurs tâches quotidiennes pendant que les forces internationales assurent leur sécurité, une façon de travailler qui est aussi appelée le «* framework patrolling *». Les autres 20 % des opérations sont des opérations de contact, lors desquelles les forces internationales se battent contre les insurgés. Si des insurgés sont arrêtés, ils sont transférés au gouvernement afghan. Souvent le gouvernement les relâche très vite, jugeant qu'ils ne sont pas dangereux (« the 100 dollar a day Taliban fighter »).*

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Seuls les individus jugés très dangereux, les meneurs parmi les insurgés, seront arrêtés lors d' opérations de détention ciblées et pourront également rester plus longtemps entre les mains des forces internationales. Vu la nature des méthodes de renseignements permettant la capture de tels individus, les États sont réticents à accepter un contrôle de leur détention par une instance indépendante. Cependant, une instance indépendante qui reverrait toutes les décisions de détention pourrait aussi prolonger la période de 96 heures : période limite de détention pour les troupes de la Force internationale d'assistance et de sécurité (ISAF) avant de relâcher le détenu ou le transférer au gouvernement afghan.

Le Processus de Copenhague ou l'initiative de Département des opérations de maintien de la paix des Nations unies pourraient faciliter les choses pour les militaires sur le terrain confrontés aux questions de détention et de transfert, mais ces initiatives restent des procédures à court terme. Ce dont tous les Afghans (et les autres populations dans de contextes similaires) ont besoin, c'est d'un système judiciaire équitable pour tous.

Good morning Ladies and Gentlemen,

When it comes to ways forward regarding transfers of persons in situations of armed conflict, I am not in a position to provide you with any great detail as to the NATO position. As you can probably appreciate, NATO must balance what its aspirations are with those of its constituent states. Inevitably this will mean that not every view, progressive or otherwise, held within the Alliance will be realised as it strives towards consensus. I will, however, make some observations based on my experience and some suggestions based on my knowledge of the Alliance's practices.

I shall address first the nature of the problem. Second, I will make some brief observations in terms of the applicability of the law and the difficulties we, being the military, face in that sense in trying to give effect to the law on operations on the ground. Finally, I shall make some observations on some of the initiatives that exist now, such as the Danish Copenhagen Process.

My comments will be focused on the current operating environment and I will only deal with transfers by the military. As such, I will specifically deal with the context of Afghanistan, and to a lesser extent, NATO operations in the Balkans. I shall not discuss maritime operations, where it is difficult for NATO to have a definitive Alliance position on detention due to the unique position national warships have (in that they carry with them their own national sovereignty). In such cases, matters of detention remain in the hands of individual nations.

As has been said before, soldiers require, indeed crave certainty. This is also the case when it comes to detention operations. The military need a clear set of parameters, which are consistent with the mission set by the Alliance and as agreed by our respective governments. The alternative courts confusion, mistakes and at the very least, strategic embarrassment. Therefore, soldiers will constantly press for clarity producing on occasion's considerable friction at the political/military strategic level. This friction is made all the more acute given that nations, being presented with the problem of transfer and having to grapple with realties on the ground, will address this differently to other nations, human rights organisations, the United Nations (UN) or even the International Committee of the Red Cross (ICRC) might do. Nations are confronted with the question of setting clear rules regarding detention whilst at the same time having to respect the sovereignty of host states. This, when many western states try to make a positive contribution to peace operations around the world, at the same time ensuring that they do not alienate their own populations to such an extent that they see withdrawal from such missions as the lesser of two evils. While this of course could, in a somewhat academic sense, easily be dismissed as matters of politics, these realities have a significant impact on the way in which nations formulate its policies in these matters. This often leaves the military in the middle: having to try and to chart ahead a course on how we deal with transfers, obviously seeking guidance from them, whilst not placing our respective nations in difficult positions by our actions.

Of course, there are two aspects to the discussion we are having today. We can look at the Afghan example although we could equally be speaking about Somalia, Congo, Chad, Sudan or many other places. There is the immediate question of a dysfunctional judicial and prison system. The international community will have little confidence in the ability in the host nation government to extend its writ, or indeed to operate as a functional state. This of course creates difficulties in relation to the transfer and hand over of detainees. On the other hand, we do not equally wish to be in the business of conducting our own parallel detention processes. Indeed, it is part of the broader strategic objective to try and facilitate nation-building. I know this is a phrase some nations do not like (Donald Rumsfeld is famously quoted as saying "We don't do nation-building in the military"). However, without such capacity building in the host nations we are operating in, there is no effective long-term end position for us to aim towards. Even more, we will end up with the possibility of long-term detention with all of the associated concerns of might be perceived as prolonged arbitrary detention without trial. Whilst the military might be involved in such actions because of the nature of our duties, we disapprove of this as much as any of our human rights colleagues. Therefore, the longer-term question has to be one of addressing capacities within these nations; reforming the rule of law and improving the local judicial systems, often including its infrastructure. This is not, however, something the military should be in the lead for, whose role will remain limited to

dealing with the short-term issues. Such long-term development will require the cooperation of both the indigenous population and government along with the collaboration and assistance of the international community.

When dealing with the here and now, one of the problems that we (and here I mean the Alliance) constantly face, is the difference between states in terms of the extent to which they apply the non-refoulement principle. Each state will have its own interpretation as to the extent to which international human rights law will govern the strict legal obligations that are had in relation to detainees. In a coalition environment such differences impact greatly on our ability to establish a consistent approach; it remains a constant challenge. However, there are arrangements we put in place on the ground, to try and minimise both risk to states and to the individual. Depending upon which viewpoint you approach it from, the focus on risk management is more in line with that of the respective state as opposed to the individual. I appreciate that this is something which gives rise to considerable debate.

In line with the concept of capacity-building, there is significant emphasis by the military on the conduct of joint operations with the indigenous security forces, particularly in Afghanistan. This concept, called framework patrolling in the British Army and which was developed in Northern Ireland, involves the military creating a 'safe bubble' for the police going about their day-to-day duties. As such, it attempts to maintain the emphasis on the rule of law and the role of the police. This concept, where the military provide only the broader security framework, at the heart of what we are trying to do in respect of the security forces in Afghanistan where probably 80% of the operations are conducted in a joint environment. Of course, the Alliance will probably lead in terms of the technical planning of operations, enabling command and control, and the more sophisticated elements of support, such as air support. Individuals detained in this context, will enter the Afghan justice system from the very start outset. That is not to say that the individual plight of those detained has in any way improved; as every one knows, the Afghan justice system is not good, and it is in a poor state in terms of their prisons and the broader application of the rule of law. However, this really is a much broader issue for the international community to address in order that a fair and equitable solution for all Afghans exists.

The other 20% of our operations are conducted largely in two ways. When encountering insurgents on the ground, the resulting combat operations will often result in the capture of Afghan fighters. These Afghan fighters are the foot soldiers of the insurgency and apart from the obvious risk of them returning to the fight if released, otherwise pose little threat relatively in terms of the broader fight against terrorism and the Afghan insurgency. They are certainly of little, if any, intelligence value. Often the Afghan authorities will release them within a very

short time, as they are simply not concerned that the individual poses a threat. The 100 Dollars a day Taliban fighter who takes up a weapon and fights NATO forces really is an everyday phenomenon in Afghanistan. One day he will be farming and the next day, he will fight NATO, only to go back to farming the day after – should he manage to survive the contact of course. However, there are a few targeted detention operations, which are carried out against individuals upon whom we have credible intelligence and who are assessed as being key leaders and enablers of the insurgency. These are the types of combatants who will be kept in longer-term detention, as for instance the Americans do in their Bagram facility.

This brings me to practical aspects I wanted to comment on. Because of the nature of the intelligence which leads to the capture of these individuals – enablers of the insurgency within Afghanistan – nations will often not be keen for an independent human rights organisation to conduct reviews of their detention and the basis for the capture. The concept of an independent review certainly has merit, but given the context I have just described, it seems very unlikely that it would be accepted. We do, however, have experience in Iraq for example, where the review of internees who have been detained has been conducted by military legal advisers in accordance with the provisions of the Fourth Geneva Convention. Although this is being challenged, the United Kingdom and other nations participating in this campaign have been relatively comfortable with this process. It seems to satisfy our International Human Rights obligations in terms of the review requirements. An alternative in Afghanistan might be a similar review of the long-term detention of individuals and decisions to transfer, while taking the views of the Venice commission into account with respect to the nature of the review. Of course, such considerations must be seen in the context of the current NATO rule of thumb, which sets 96 hours as being the maximum period one can keep an individual detained. Any change to this rule may prove difficult as there seems absolutely little, if any, interest within the Alliance to extend the 96 hour period; so we are almost stuck in that sense. There would need to be some serious soul searching and reconsideration within the Alliance of this principle should arguments for longer-term detention and a more sophisticated regime of review to hold any water. Notwithstanding this and given the concerns over the plight of longer-term detainees within the Afghan system, I believe it is worth further consideration as to whether or not we could agree on a process, which would allow all equities to be considered in addressing concerns over transfer.

Finally, a quick observation in relation to the Danish sponsored Copenhagen Process. I think it is a process, which has significant merits. It is an example of best practice and could easily be signed up to in an Alliance context far easier than say in the United Nations due to the smaller group of like-minded nations involved. Of course in the UN context there is the UN Department of Peacekeeping Operations (DPKO) initiative on dealing with detainees which Bruce Oswald,

a consultant, has been approached on. The policing department within the DPKO initiated it, and although welcome for law enforcement officials, our concern is that it might not address the more difficult scenario we believe the military faces. Of course, there remains the possible dreaded veto within the Security Council, which may potentially militate against the adequate definition of standards and rights, or water these down more than perhaps is the aspiration of the Danes and like-minded co-sponsors. I see this as clearly being a case where expectation management needs to be considered more vigorously rather than an abandonment of this initiative. Because I think that there is some benefit. Indeed, if one considers Iraq, there has been an exchange of letters pursuant to the Security Council resolution dealing with the interment issue in Iraq and which has generally been seen as an acceptable way of dealing with detention issues. Finally, I am often critical in the British system of what I see as fixation on process illustrated by our civil servants colleagues. Whilst I understand that the need for a process to consider these aspects is useful, the fundamental issue which seems to underpin all transfer concerns, is that of the breakdown of the rule of law in the nations you are seeking to transfer people to. This of course returns me to a pet hate of mine; the requirement for a meaningful, coordinated effort on behalf of the international community to deliver rule of law in conjunction with the Afghan authorities. It will yield much greater results in the longer term than what could be described as wringing of hands over the transfer of detainees in the short-term, because it deals with the more fundamental issue of bringing justice to all Afghans.

WAYS FORWARD. HOW TO OPERATIONALISE THE LEGAL OBLIGATIONS

Dr. Frederik Naert[1]
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À travers un renforcement des systèmes judiciaires, policiers et pénitentiaires locaux, les défis, auxquels les opérations de maintien de la paix sont confrontées de nos jours, concernant des détenus et leurs transferts, pourraient être résolus. L'Union européenne (UE) pourrait bien envisager d'accompagner chaque opération militaire de mesures allant dans ce sens.

Pourtant de telles initiatives ne mettront pas fin aux défis à court terme. Dans le cas où la libération des détenus n'est pas souhaitable, pour des raisons de sécurité ou afin d'éviter l'impunité mais également, dans le cas où le transfert aux autorités locales est impossible en raison de possibles violations des droits de l'homme, les forces de paix seront obligées de les détenir elles-mêmes. Généralement, ce type de détention est une solution temporaire, les forces de la paix n'ayant pas la possibilité de poursuivre en justice les détenus. Une résolution du Conseil de sécurité des Nations unies, créant le mandat d'une opération de maintien de la paix, pourrait fournir une base légale pour cette détention. Afin de garantir à ces détenus leurs droits, un mécanisme adéquat de révision de leur détention serait nécessaire. L'UE pourrait envisager un modèle général de mécanisme de révision de détention, applicable à toutes les opérations militaires menées dans le cadre de la Politique européenne de sécurité et de défense (PESD).

Que le transfert d'un détenu soit une option ou une obligation, et qu'il existe en même temps des inquiétudes quant au traitement des détenus dans l'État hôte, le transfert reste néanmoins possible si des garanties appropriées sont données. Dans ce contexte, la confiance que l'on peut accorder à ces garanties fournira une protection effective qui sera plus importante que celle apportée par la nature légale de ces arrangements. L'UE pourrait également envisager d'adopter un modèle d'accord de transfert pour toutes les opérations PESD.

En conclusion, une position commune des États membres participant à une opération militaire serait utile concernant des questions clés comme l'applicabilité des droits de l'homme et du droit international humanitaire. Si les positions juridiques des États participants ne sont pas identiques, l'adoption d'une position commune pourrait être envisagée, non pas comme une obligation légale, mais comme une position de principe.

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1 Member of the Legal Service of the Council of the EU and affiliated senior researcher, Katholieke Universiteit (KU) Leuven. While I have endeavoured to accurately reflect EU practice, the views expressed are solely my own and do not bind the Council or its Legal Service.

In this short contribution, I will address four points: first, the medium to long term perspective; second, the question of a proper detention system in European Union's Security and Defence Policy (ESDP) operations; third, the issue of safeguards in case of transfer; and fourth, the desirability of a common view on key issues in (ESDP) operations. I will focus on the ESDP and operations in this context but my observations are to some extent also relevant for peace operations conducted in other frameworks.

The Medium- to Long-term Perspective

In the medium to long term, the challenges now often facing peace forces with regard to the fate of detainees (identified in other contributions) could be resolved if the local judiciary, police and penitentiary system could be reinforced or reconstructed and brought up to international standards, including in the field of human rights.

Given the variety of ESDP operations (including police and rule of law missions[2]) and other instruments at its disposal, the European Union (EU) is well placed to accompany its military operations by measures in these areas where appropriate. Such measures could also be undertaken by other actors, ideally in close coordination.

A Proper Detention System in (ESDP) Operations

In cases where release of detainees is undesirable, for example for security reasons and/or to avoid impunity for persons suspected to have committed criminal offences, and where transfer to local authorities is ruled out, for example due to human rights concerns, the only alternative in the short term is further detention by the peace force. Such detention would nevertheless remain a temporary measure that would either cease as soon as the reasons for detention cease to exist (in the case of security detainees not suspected of criminal offences) or when the person can be surrendered to a competent authority for prosecution (in the case of detainees suspected of having committed criminal offences). The force itself would not

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2 See for example the EU's Police missions in Bosnia (EUPM); the former Yugoslav Republic of Macedonia (PROXIMA and the follow-on police advisory mission EUPAT); the Palestinian territories (EUPOL COPPS); Afghanistan (EUPOL Afghanistan) and the Democratic Republic of the Congo (EUPOL Kinshasa/ EUPOL RD Congo) and the rule of law missions in Georgia (EUJUST THEMIS); for Iraq (EUJUST LEX) and in Kosovo (EULEX Kosovo). See generally http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=268&lang=EN&mode=g. For a discussion from a legal perspective of a number of these missions, see F. Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations', in M. Trybus & N. White (eds.), *European Security Law*, Oxford University Press, 2007, pp. 61-101.

normally set up courts to try detained persons[3] or otherwise be involved in forms of exercise of jurisdiction by third parties.[4]

In legal terms, two key questions then arise, among others. The first is the requirement of a legal basis for detention. This will often be a United Nation (UN) Security Council Resolution. While there is case law that supports such resolutions as an adequate legal basis for detention, notably *Al-Jedda*[5] and arguably *Saramati & Behrami*,[6] the idea being considered in the Copenhagen process to explicitly and in more detail address detention in UN Security Council resolutions (see the contribution by T. Winkler[7]) is commendable as it could provide a clearer legal basis for detention.[8] Obviously, when applicable, the law of armed conflict, including the law of occupation, may provide a legal basis for detention.[9] The second issue is the need for an adequate review mechanism. This is closely related to the question of the applicable law and includes the question of the applicability of human rights law, in particular where the law of international armed conflict does not apply. It may be noted in this respect that the EU's Member States have made a Joint Pledge at the 30th International Conferences of the Red Cross and Red Crescent, reaffirming "their

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3 Although in some cases this may not be excluded for some offences, notably in an occupation (see Article 66 of the 4th Geneva Convention).

4 However, there may be exceptions where a mandate specifically provides for such involvement, for instance in support of international criminal tribunals.

5 UK, *Al-Jedda, R (on the application of) v Secretary of State for Defence* (([2006] EWCA Civ 327), 29 March 2006 (http://www.bailii.org/ew/cases/EWCA/Civ/2006/327.html); upheld by the House of Lords on 12 December 2007 ([2007] UKHL 58, http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm).

6 See European Court of Human Rights (ECHR), judgment of 31 May 2007 in joined cases *Behrami and Behrami v. France* (No. 71412/01) and *Saramati v. France, Germany and Norway* (No. 78166/01), Paragraph 124 ('Having regard to the MTA (notably Paragraph 2 of Article 1), UNSC Resolution 1244 (Paragraph 9 as well as Paragraph 4 of Annex 2 to the Resolution) as confirmed by FRAGO997 and later COMKFOR Detention Directive 42 (see Paragraph 51 above), the Court considers it evident that KFOR's security mandate included issuing detention orders'), referred to by M. Wood, 'Detention during International Military Operations: Article 103 of the UN Charter and the *Al-Jedda* case', forthcoming in *47 Military Law & the Law of War Review* 2008.

7 For the initial documents concerning the Copenhagen Process on the Handling of Detainees in International Military Operations, see also *46 Military Law & the Law of War Review* 2007, pp. 363-392.

8 While the ECHR does not seem likely to subject a UN Security Council mandate to scrutiny in the light of its decision in *Saramati & Behrami* (supra Note 5), it has been much more demanding with regard to an adequate legal basis for detention in other contexts, including a maritime counter-drug operation, see *Medvedyev and others v. France*, Appl. No. 3394/03, 10 July 2008 (under appeal to the Grand Chamber) and the annotation by G. Breda & J.P. Pierini forthcoming in *47 Military Law & the Law of War Review* 2008.

9 On detention in peace operations generally, see for example F. Naert, 'Detention in Peace Operations: The Legal Framework and Main Categories of Detainees', *45 Military Law & the Law of War Review* 2006, pp. 51-78 and B. Oswald, 'Detention in Military Operations: Some Military, Political and Legal Aspects', *46 Military Law & the Law of War Review* 2007, pp. 341-361.

determination to respect fundamental procedural guarantees for al[l] persons detained in relation with armed an armed conflict or other situation of violence as enshrined in relevant International Humanitarian Law (IHL) and/or international human rights law, as applicable" (pledge P091[10]). Such procedural safeguards are usually considered to include an adequate review mechanism.[11]

It might be worth considering whether a model review mechanism could be drawn up and agreed, for example within the framework of ESDP operations. It could also be examined whether, in cases where ESDP rule of law missions operate in the same country, judges or other judicial officers deployed in such missions could play a role in a review mechanism for detention in a military ESDP operation.[12]

Furthermore, from a practical perspective, any detention mechanism would require the appropriate resources, including qualified personnel.

Safeguards in Case of Transfer

Where transfer is an option or obligation[13] but where there are nonetheless some human rights concerns with regard to treatment of detainees in the host state, it may be possible to permit

10 Available online at http://www.icrc.org/APPLIC/P130e.nsf/pbk/PCOE-79CKFC?openDocument§ion=PBP.

11 See for example J. Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence', 87 Issue 858 I.R.R.C. 2005, pp. 375-391, especially pp. 385-389 (*inter alia* listing as procedural safeguards 'A person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention'; 'Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body' and 'An internee/administrative detainee has the right to periodical review of the lawfulness of continued detention').

12 Compare Opinion No. 280/2004, *Opinion on Human Rights in Kosovo: Possible Establishment on Review Mechanisms*, CDL-AD (2004)033, 11 October 2004 (http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.pdf), Paragraphs 125-133.

13 See for example the *Al-Saadoon* case, which concerned the question of the possible transfer by British forces in Iraq of two Iraqi detainees to the Iraqi authorities for trial before an Iraqi court. The United Kingdom's government considered that it was obliged to transfer the two persons. The High Court, which considered that it was bound by an earlier decision, held that the transfer would not violate the UK's human rights obligations, even though there was a real risk of the death penalty being imposed (it did not find a risk of torture or inhuman or degrading treatment or of an unfair trial). See *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence*, 19 December 2008, [2008] EWHC 3098 (Admin), http://www.judiciary.gov.uk/docs/judgments_guidance/r-al-saadoon-mufdhi-v-ssdefence.pdf. On 30 December 2008, the Court of Appeal upheld the High Court's decision. Later that day, the ECHR issued a Rule 39 order to prevent the hand-over of the two men to the Iraqi authorities. UK forces nevertheless handed them over on 31 December 2008, saying that they had no legal powers to hold them. See BBC News, 'Britain hands suspects to Iraqis', 31 December 2009, http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/7806445.stm and M. Wood, supra note 5.

transfers if appropriate safeguards can be agreed and it is expected in good faith that the agreed safeguards will be respected and applied. It is submitted that the key element is a good faith appreciation of whether an arrangement will provide adequate protection to a transferred person rather than the (legal) nature of the arrangement.

The required content of such safeguards is discussed in other contributions[14] and may depend, at least to some extent, on the specific circumstances of the case. However, from an operational perspective the question may be raised whether it would be possible to develop a model transfer arrangement, which could serve as a basis for negotiating arrangements in specific cases (in fact, while there are currently a series of bilateral arrangements,for example in the International Security Assistance Force (ISAF), contacts between states may have lead or lead to arrangements that are not too divergent on the key points). In the EU context, it could be considered to adopt such a model arrangement, possibly in conjunction with a standing negotiating mandate for ESDP operations, as is the case for status of forces agreements in these operations. Any transfer arrangements might need to include mechanisms to follow up the commitments also after the departure of the operation (many ESDP operations are rather limited in time).

Where other international actors active in the area of the rule of law are present in the theatre of operations, it could be envisaged to give them a role in ensuring respect for agreed safeguards. For example, in Chad and the Central African Republic one could have been envisaged a role for the UN's mission there (MINURCAT).[15]

The Desirability of a Common View on Key Issues in (ESDP) Operations

For a peace force, it would be very helpful if the states participating in the operation would have a shared view on key issues such as the applicability of human rights and of the law of armed conflict, and their interaction where both apply,[16] to the peace force and the implications thereof.

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14 The following elements could, *inter alia*, be included: a reaffirmation of the prohibition to use torture, inhuman or degrading treatment or punishment and of the right to have access to a judge to review the legality of detention and to a fair trial; assurances that the death penalty will not be imposed or executed; monitoring and visit mechanisms (including third parties) and exchange of information and evidence.

15 For the mandate of MINURCAT, see UN Security Council Resolution 1778 (25 September 2007), especially Paragraph 2(e)-(g), and http://www.un.org/Depts/dpko/missions/minurcat/mandate.html.

16 For a partial EU perspective, see Paragraph 12 of the EU Guidelines on promoting compliance with international humanitarian law (IHL), Official Journal of the EU C 327, 23 December 2005, p. 4 (see also http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1001&lang=EN&mode=g), which states that 'while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them'. It is therefore a question of how the two interact and not whether they apply concurrently, and this should be assessed on a case-by-case basis.

Where participating states' legal positions are not identical, attempts could be made to reach a shared position that goes beyond the common denominator of the legal obligations (as interpreted by the participating states) as a matter of policy for a given operation, or even for operations in the framework of a specific international organisation more generally (for example for all military ESDP operations). Obviously, where such a common view would fall short of one state's international (or domestic) obligations, that state would need to ensure that its own forces and personnel apply higher standards that comply with these obligations. Absent such a shared view from the outset of an operation, it will be left largely to the operation's chain of command and its legal advisors to come to terms with divergent views or a lack of guidance in this respect.[17] Given the sensitivity of some of the issues involved, this may not be the best option.

17 For example, the references in operational planning documents to 'applicable human rights law' do not exactly provide much guidance as they leave open whether human rights law applies (and if it does, which human rights instruments apply).

Would training Afghan local police and prison guards as well as monitoring the treatment of transferred detainees be the right approach in order to ensure a better treatment for the detainees?

All present participants and experts seemed to agree that running joint detention facilities, training prison guards, instructing judges, and generally improving the rule of law would be the right approach. However, there are many challenges. Firstly, there is a lack of coordination on behalf of nations on how to help the responsible Afghan authorities. Secondly, while the military has a definite supporting security role regarding nation building, the lead agencies remain the Development Agency and the Department of Justice of each state. These agencies choose their priorities themselves and sometimes do not allocate enough resources in the legal sector. The staff of these agencies would also probably not like to spend several years in a (former) conflict zone because of personal security concerns. Afghanistan and Iraq are good examples. The European Union Rule of Law Mission for Iraq (EUJUST LEX) mostly trains people outside of Iraq because of the above mentioned concerns. Thirdly, the described approach cannot be a long-term project. For instance, the United Kingdom has been working in Iraq, together with the United Nations, the European Union, the United States and other partners, to train staff of all three pillars of the criminal justice system: the police, the courts and the prison structures. This involved training people, equipping people and putting the physical structures in place. However, even if these material changes were fully in place, it would still take many years before a rule of law ‘culture’ had developed. This ‘culture’ needs to be developed from within the country and tailored to its specific circumstances, without imposing a system from outside. For Iraq, even a significant investment in the rule of law in Afghanistan will not exclude the necessity of trying to find a short-term answer to the problems international forces are facing in terms of detention and transfers.

In the Afghan context, what is the military value of handing over detainees only to have them immediately released by the Afghan authorities?

A participant stated that an alternative approach could be to keep the detainees away of combat situations. Yet, he admitted that this was probably impossible in view of International Humanitarian Law obligations. Military forces could also designate more prisoners of war (POWs) and run large POW camps. In this way, military forces would no longer have to bear the inconvenience of having to transfer detainees, outside the Afghan sovereignty, to the Afghan authorities. Another possibility would be to convince the Afghan authorities to keep the de-

tainees in custody for the duration of the conflict. However, it would be difficult to convince the Afghan authorities to do so. One speaker stressed that due to the nature of the conflict, poverty and unemployment the released detainees are inclined to fight again for the Taliban when they pay them to do so.

Regarding military detention for criminal justice reasons, or so-called 'criminal justice detention', to what degree can military officers act as police officers? Can courts use evidence collected by them and can individual military officers testify?

The participants offered several answers to this question. First, the training that military officers receive in their home countries, for instance regarding handling evidence, can help determine to what degree they can act as police officers. One should also take into account the role or authority in terms of criminal justice that military officers or soldiers have in their domestic legal system. Their responsibilities might differ from country to country. It also depends on how the host state handles evidence given by its own military forces. According to participants, nothing would seem to prevent soldiers giving evidence as long as the evidence would not be intelligence-based and would not compromise the intelligence gathering services. Some states include reservations in their Status of Forces Agreements with local governments. However, they fear to deliver their soldiers to the local criminal justice system. In conclusion, no generic answer is possible. But if military forces envisage detainees being prosecuted, they will try to take care of evidence issues and ensure a good chance of having these detainees convicted. At the moment, a lot of brainstorming is done in this regard concerning the EU Piracy Operation, EU NAVFOR Somalia (operation 'Atalanta').

One participant stressed that soldiers would be capable of gathering evidence on a rudimentary basis, which in the context of the indigenous criminal justice system, would be sufficient for providing basic criminal justice. Many military forces and participants referred to the Danish and British forces that have already quite some experience in police work and achieve a standard in criminal justice that is higher than what the local authorities can provide.

How dangerous is it to combine security detention with criminal justice detention?

One speaker stressed that the military would rather not be involved in criminal justice detention but would be confronted with it during insurgencies. Participants seemed to agree that it would be an advantage to have a clearer separation between the two systems, but they also stressed that this was not always possible. There may be cases where military forces hold a person who can be prosecuted but still poses a security threat. In that case, prosecution would be the preferred option, but that might not resolve questions of security. One partici-

pant reminded the audience of the difficulty of facing a person that has served his sentence and still poses a security threat: the question was if a state could keep detaining this person or not. The United Nations Security Council, when giving a mandate for detention in an international military operation, should at least be clear how broad it was, and whether only security detention was allowed (as in Iraq) or also criminal justice detention.

Concerning the Copenhagen process and the plan to create a common platform for the handling of detainees by military forces deployed in international operations, what if participating countries will disagree on the legal standards applicable?

One participant stated that there were still several approaches possible for this common platform, but that a legal approach would render the task more difficult. When focusing on disagreements in law, the gaps and differences in interpretation tend to become yawning gaps. While a policy document could solve this problem, participants viewed this as a worse alternative. The better option would be to have a document on best practice. A participant suggested that one could also use this best practice approach on the issue of the relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) to narrow instead of increasing the different national interpretations.

What rules would the International Committee of the Red Cross (ICRC) think applicable to detainees in non-international armed conflicts and what consequences could this have on the transfer of these persons to third parties? Does the ICRC support the trend whereby norms, applicable to an international armed conflict, are also applied to non-international armed conflicts?

One participant stated that the law of the non-international armed conflicts would of course apply, the minimum being Article 3 of the 1949 Geneva Conventions, and, if applicable, the 1977 Additional Protocol II to the Geneva Conventions. In addition to these rules, some 150 customary rules on non-international armed conflicts exist, as written down in the 2005 ICRC Study on Customary IHL. These are very helpful on issues such as the conduct of hostilities, or, to a lesser extent, on ill-treatment. However, regarding judicial guarantees, and more particularly security detention, neither international humanitarian treaty law, nor customary IHL are very precise. Therefore, the ICRC has issued various policy papers including one on administrative or security detention. These policy papers refer to IHL but also to soft law rules and IHRL obligations.

Concerning the detention by international forces, one of the biggest obstacles remains the reluctance of military forces to have an external review body for detention decisions. And in view of the nature of the chain of command, when the legal advisor to the commander on the

spot will be responsible for the review of detention decisions, it will be neither an impartial nor an independent review. What if there was another possibility, whereby a person from the state administration reviewed the detention decisions, but as a part of an independent military prosecution agency, out of reach of the commander on the scene? One could think of the US example of JAG (Judge Advocate General's Corps). Would such an approach alleviate the ICRC's concerns?

One speaker answered that this might alleviate the ICRC's concerns in an individual case, but it would be dangerous to use this solution in all contexts. Some countries might not be able to satisfy the demands of independence through such a military prosecution agency. Another participant stated that an independent and impartial review body was needed, but that in line with Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or Article 2 Paragraph 3 of the International Covenant on Civil and Political Rights not necessarily a court was necessary – a fact that would allow a bit more flexibility for the states. However, the review body should have the competency to take final decisions (not to be overruled by a commander), should be composed preferably of legally trained people, and a legal counsel should be provided to the detainee. In the EU context, one participant suggested that where an EU rule of law mission would be present in the same theatre as an EU military operation, a prosecutor or a judge from that civilian mission could fulfil the task of the independent review body. Another participant concluded that, as the countries would not start accepting external review of their detention decisions any time soon, it would be smarter to focus the attention on these independent internal review bodies and encourage the application of international standards by them.

A participant stressed that one should not confuse the independent and impartial review of the detention with the independent and impartial review of the risk of torture or inhuman and degrading treatment that a person faces after a transfer. Some participants wondered whether the same review body could be responsible for those two different reviews or whether there should be two different bodies with different rules and procedures. Other participants answered that, in practice, it would be rather difficult to have two different independent and impartial review mechanisms present on the field. Nevertheless, one could envisage different procedures.

Concluding Remarks and Closure

CONCLUDING REMARKS

Philippe Spoerri
Director for International Law, ICRC

I have the task to quickly review the sessions of this very inspiring Colloquium and sum them up.

If I start with the session of today, I think we got a very clear idea of where the Danish initiative on handling detainees in international military operations, the so-called Copenhagen Process, is headed. Many speakers made a similar analysis of why such a process is taking place and why a common platform is a good thing to have. We heard about the challenges the process will encounter. Mr. Thomas Winkler explained very well how the process is based on the idea of best practices, and how it would even try to create policy on the level of the United Nations Security Council for concrete military operations. We wish you good luck with this initiative and are looking forward to its outcome.

One point on which all of you agreed today is the necessity for the soldier operating on the ground to have clear rules. One cannot accept any other situation as this might be dangerous for all involved. However, the catch remains: how does one determine such clear rules?

Quite a big part of the discussion today revolved around the issue of nation-building and conflict. I think it is not only with regard to the Afghan or the Iraqi contexts that such questions should be asked; in many situations today, the issue of nation-building is at the heart of the matter. It is often perceived that not enough is done with regard to nation-building and that progress is made too slowly, but I would not dare to say if this is whether there is actually not enough done or whether it is inherent in the specific task. Nation-building is a complicated and long-term task, for which very often not enough material resources can be found, nor enough human resources. However, what all agreed on is that states should not just focus on security aspects or relief efforts, but should also pay a lot of attention to nation-building.

On the discussions in general, on the issue of transfer, we agreed that it is not a new topic. However, it has in recent years taken on new dimensions and appears in contexts such as Afghanistan and Iraq, but also in Kosovo, Chad or the Democratic Republic of Congo. It has also been very interesting to hear examples from recent maritime operations. In all these cases, transfers can occur, and all have their own particularities. We have also seen the difference

between the types of organisations involved in this matter and their different approaches. These organisations can also have trouble on a different level: for instance, NATO will encounter difficulties with a higher degree of complexity than the EU. One example given was Finland which does not use anti-personnel mines in the framework of EU missions even though it is not a party to the Ottawa Treaty. All these situations will or are already pushing states to reflect on the transfer issue. As such, the EU anti-piracy mission off the coast of Somalia revealed shortcomings in the domestic legislation with regard to transferring detained pirates; as a consequence, the EU and its Member States have started working on this.

When states consider transfers of detainees to their countries of origin or third countries, they often face a dilemma concerning the treatment of the transferred persons in the country on the receiving side. This was also much debated, as for instance in relation to the detention facility in Guantánamo Bay. The discussion revealed that negotiating agreements, in this case diplomatic assurances, can sometimes remind engaging countries of their human rights obligations and enhance the discussion of these issues. One problem in this is that the whole issue of transfers, at least in the situations that we discussed during this Colloquium, is at the crossroads of international humanitarian law and international human rights law. It means that we have to deal not only with different bodies of applicable law, but also with different interpretations by states of the interaction of these bodies of law.

Speakers also stressed that detention is a reality for international military operations and that sometimes it is necessary. Moreover, when an organisation is operating on the territory of a sovereign state, one must take the realities of the context and the material and the legal realities of the whole state into account.

One interesting example that was given when looking at the transfer issue was the recent decision by the International Criminal Tribunal for Rwanda (ICTR) not to transfer back to Rwanda a number of detainees who had served their sentences. The ICTR feared that these known génocidaires might be subjected to an unfair trial and to a potential risk of their lives and their well-being.

At the heart of the discussion on the issue of transfer was the notion of non-refoulement, again a notion at the crossroads of international human rights law, refugee law and international humanitarian law. The evolution of the case law, mainly at the European Court of Human Rights, shows us that there is a growing trend to apply human rights, including the principle of non-refoulement, extraterritorially. We know that there are some states that disagree on this; in any case, not all the contours of this growing trend are yet fully clear.

Discussions have also shown that more and more reflections should be devoted to the issue of the responsibilities of states and of international organisations. Where does the responsibility for transfers lie? Dual responsibility could be the first answer; however, it is not an easy answer to apply in practice. Again, speakers referred to the most recent court decisions in this regard. Another issue addressed as a key question was post-transfer responsibility. Speakers stated that any agreement signed between the detaining and the receiving authorities might decide on a practical approach, but it cannot, and it should never, free states from fulfilling their national and international obligations. The debate clarified the fact that in extreme cases, particularly when speaking of the risk of torture for the transferred persons, states should always halt their transfers. When considering transferring detainees, confronted with a risk of other types of human rights violations, the solution proposed was that states should undertake a careful balancing exercise, taking a number of considerations into account.

It appears from the debates we had that, for some states or some organisations, diplomatic assurances are less problematic, although speakers always stressed that one needs to evaluate the adequacy of the assurances on a case-by-case basis. The debate on these diplomatic assurances also included the debate on their legal status: gentleman's agreements or real binding legal documents? The question was asked as well: when a state always clearly violates its treaty obligations with regard to human rights, to what extent can one expect to obtain contrary practice through diplomatic assurances?

I think with these elements I have covered the core topics that were discussed during this Colloquium. I would like to thank once more all participants for their active involvement, ensuring stimulating debates, as well as our much appreciated panellists. This year was the 9th Bruges Colloquium, and I am looking forward to the next one. With this, I declare this Colloquium closed.

Thank you very much.

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Programme: Transfers of Persons in Situations of Armed Conflict
Programme : Le transfert des personnes en situation de conflits armés

9th Bruges Colloquium / 9ème Colloque de Bruges
16-17 October 2008 / 16-17 octobre 2008

DAY 1: Thursday, 16 October

09.00-09.30 Registration and Coffee

09.30-09.45 *Welcome Address:* **Prof. Paul Demaret**, Rector of the College of Europe

09.45-10.00 *Opening Address:* **Françoise Krill**, Head of Delegation, ICRC Brussels

Session One: Setting the Scene: Transfers and Humanitarian Concerns

Chair person: **Knut Doermann**, Head of the Legal Division, ICRC

10.00-10.20 *New Legal and Operational Issues: a NATO Perspective:* **Lt. Col. Darren Stewart**, Legal Advisor, NATO

10.20-10.40 *An EU Perspective:* **Dr. Frederik Naert**, Legal Advisor, General Secretariat of the Council of the EU

10.40-11.00 *A United States Perspective:* **Milbert Shin**, Senior Advisor to the Ambassador-at-Large for War Crime Issues, U.S. Department of State

11.00-11.30 Coffee Break

11.30-12.30 Question Time

12.30-14.00 Lunch

Session Two: Transfers, International Law and Non-Refoulement Principle

Chair person: **Knut Doermann**, Head of the Legal Division, ICRC

14.00-14.20 *Non-refoulement under Human Rights Law:* **Clive Baldwin**, Senior Legal Adviser, Human Rights Watch

14.20-14.40 *Non-refoulement: Aspects of Refugee Law and the European Convention on Human Rights*, **Roland Bank**, Legal Advisor, UNHCR, Berlin

14.40-15.00 *An ICRC Perspective:* **Cordula Droege**, Legal Adviser, ICRC

15.00-15.30 Question Time

15.30-16.00 Coffee Break

Session Three: The Use of Diplomatic Assurances

16.00-16.20 *Use of Diplomatic Assurances to Protect Detainees:* **Ashley Deeks**, International Affairs Fellow, Council of Foreign Relations

16.20-16.40 *The Risks in Using Diplomatic Assurances:* **James Heenan**, Human Rights Officer, Office of the UN High Commissioner for Human Rights

16.40-17.30 Question Time

19.30-22.30 Dinner at the 'Provinciaal Hof' on Registration

DAY 2: Friday, 17 October

Session Four: Ways Forward

Chair person: **Philip Spoerri**, Director for International Law, ICRC

09.30-10.00 *The Copenhagen Process on the Handling of Detainees:* **Thomas Winkler**, Legal Advisor, Ministry of Foreign Affairs, Denmark

10.00-10.30 *How to Operationalise the Legal Obligations?:* **Lt. Col. Darren Stewart**, Legal Advisor, NATO and **Dr. Frederik Naert**, Legal Advisor, General Secretariat of the Council of the EU

10.30-11.00 Coffee Break

11.00-11.45 Question Time

Concluding remarks

11.45-12.15 *Concluding Remarks and Closure:* **Philip Spoerri**, Director for International Law, ICRC

SPEAKERS' BIOS
CURRICULUM VITAE DES ORATEURS

Paul Demaret

Le Professeur Paul Demaret est Docteur en droit de l'Université de Liège et Licencié en sciences économiques, où il a également obtenu un diplôme d'études spécialisées en droit économique. Il a ensuite poursuivi ses études aux États-Unis, et est titulaire d'un *Master of Law* de l'Université de Columbia et d'un *Doctor of Juridical Science* de l'Université de Californie à Berkeley. Le Professeur Demaret a enseigné des matières juridiques ou économiques dans de nombreuses universités, notamment celles de Genève, Paris II, Pékin et Coimbra, ainsi qu'à l'Académie de droit européen de Florence et au Colegio de México. Il est actuellement Recteur du Collège d'Europe. De 1981 à 2003, il a été Directeur du programme d'études juridiques au Collège d'Europe et Directeur de l'Institut d'études juridiques européennes à l'Université de Liège. Il a enseigné le droit à l'Université de Liège de 1982 à 2006. Spécialiste des aspects juridiques et économiques de l'intégration européenne, Paul Demaret est l'auteur de nombreux ouvrages et articles sur ces questions. Son expertise en matière de commerce international a été sollicitée par diverses institutions, dont l'Organisation mondiale du commerce, où il a servi dans deux panels.

Françoise Krill

Françoise Krill has been Head of the ICRC Delegation to the EU and NATO since June 2007. She holds a law degree as well as a lawyer certificate (*Brevet d'Avocat*). She spent four years in the Swiss diplomatic service (from 1981 to 1984). Ms. Krill has held numerous operational and legal positions at the ICRC, both in the field as in Chad, Lebanon, Peru and South Africa (delegations where she was Delegate, Deputy Head of Delegation and Head of Delegation) and at Headquarters (HQ) where she was, among other posts, Legal Advisor, Head of Unit for the legal advisors to the Operations and Deputy Director of Operations. She has published many articles on humanitarian issues, mainly in the *International Review of the Red Cross*, especially on the protection of women, children and refugees during armed conflicts.

Knut Dörmann

Dr. Knut Dörmann has been the Head of the Legal Division of the ICRC in Geneva since December 2007. He was Deputy Head of the Legal Division between June 2004 and November 2007 and Legal Adviser at the Legal Division between December 1998 and May 2004. He was *inter alia* a member of the ICRC Delegation to the Preparatory Commission of the International Criminal Court. Prior to joining the ICRC, he was a Research Assistant (1988-1993) and Research Associate (1993-1997) at the Institute for International Law of Peace and Armed

Conflict, University of Bochum (Germany), as well as Managing Editor of *Humanitäres Völkerrecht – Informationsschriften* (1991-1997). He holds a Doctor of Laws (Dr. iur.) from the University of Bochum (2001). Dr. Dörmann is and has been a member of several groups of experts working on the current challenges of international humanitarian law (IHL). He has extensively presented and published on international law of peace, international humanitarian law and international criminal law. He received the 2005 Certificate of Merit from the American Society of International Law for his book Elements of War Crimes under the Rome Statute of the International Criminal Court.

Darren Stewart
Lieutenant Colonel Darren Stewart was commissioned into the Royal Regiment of Australian Artillery in 1988 before transferring to the Australian Army Legal Corps in 1991. As a Legal Officer in the Australian Army, he fulfilled a number of staff appointments at Captain and Major level. He was the first legal adviser at the Australian HQ Special Operations when established in 1997. Transferring to the British Army in 1998, he served initially as the Army Legal Services training officer. He deployed to Kosovo in June 1999 for seven months as the legal adviser to the Commander of British Forces, for which he was awarded a UK Joint Commanders Commendation. A tour at the UK Permanent Joint HQ followed where Lt. Colonel Stewart saw further operational duty in Sierra Leone, the Balkans, the Middle East and Afghanistan acting as the legal adviser to Commanders of British Forces in each of these theatres. In March 2003, he was posted to SHAPE (Supreme Headquarters Allies Powers Europe) as the Assistant Legal Adviser (UK). A tour as the Commander Legal, HQ Northern Ireland then followed. In August 2006, he was posted to HQ Allied Rapid Reaction Corps (ARRC) and deployed to Afghanistan as the Chief Legal Adviser, HQ International Security Assistance Force for Afghanistan (ISAF), returning with HQ ARRC to Rheindahlen, Germany in February 2007. Lt. Colonel Stewart holds a postgraduate diploma in legal practice and bachelor's degrees in economics and laws. He is a Barrister of the Supreme Courts of Queensland and New South Wales and the High Court of Australia. He is a Solicitor of the Supreme Court of England and Wales. He was made an OBE (Order of the British Empire) in the 2003 Queen's Birthday Honours List.

Frederik Naert
Dr. Frederik Naert is a member of the Legal Service of the Council of the European Union, which he joined in November 2007. Before this, he was a legal advisor at the Belgian Ministry of Defence/Defence Staff and a research and teaching assistant at the Institute for International Law of the Katholieke Universiteit (KU) of Leuven, Belgium. Dr. Naert is also an affiliated junior researcher at the latter Institute, where he defended his Ph.D. thesis on 'International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights' in November 2008. He has published on European security

organisations, peace operations, international humanitarian and human rights law, terrorism, European and international criminal law and international immunities and is co-editor of *Legal Instruments in the Fight Against International Terrorism. A Transatlantic Dialogue* (Martinus Nijhoff, 2004). Dr. Naert is also Director of the *Military Law & Law of War Review / Revue de droit militaire et de droit de la guerre*, published under the auspices of the International Society for Military Law and the Law of War. He studied law at KU Leuven and the University of Melbourne (Australia) and obtained his law degree at the former university in 1998 (*magna cum laude*).

Milbert Shin

Milbert Shin is Deputy to Ambassador-at-Large for War Crimes Issues Clint Williamson. Mr. Shin worked from 2000 to 2006 in the Office of the Prosecutor (OTP) at the International Criminal Tribunal for the former Yugoslavia, both as a trial attorney and appeals counsel. His cases included *Prosecutor v. Blagojevic et al.* (Srebrenica), *Prosecutor v. Milutinovic et al.* (Kosovo), *Prosecutor v. Limaj et al.* (Kosovo), and *Prosecutor v. Milosevic*. From 1997 to 2000, Mr. Shin served as a legal adviser in UN peacekeeping missions in Croatia, Bosnia and Herzegovina and Kosovo. Prior to joining the United Nations, he worked for Human Rights Watch in New York, where he was the Orville Schell Fellow. A member of the California bar, Mr. Shin began his legal practice with the San Francisco office of Shearman & Sterling. He holds a B.A. from Harvard University and a J.D. from the University of California, Berkeley.

Clive Baldwin

Clive Baldwin is Senior Legal Advisor at Human Rights Watch in New York, where he works on legal and policy issues across the entire range of the organisation's work. He is a British lawyer. Educated at Leeds, Princeton and City (London) universities, he worked for several years for Bindman and Partners, one of the leading human rights law firms in London. Subsequently, he worked on European Court of Human Rights litigation with the AIRE Centre in London, and then spent several years with the OSCE (Organisation for Security and Co-operation in Europe) Mission in Kosovo. His main areas of responsibility there included working on the issue of detention, the setting up of the criminal justice system and drafting of criminal laws, and minority issues. Immediately prior to joining Human Rights Watch, he had worked for five years as Head of Advocacy for Minority Rights Group International (MRG), the London-based NGO, where he also set up MRG's first work in supporting litigation on behalf of minorities in many different courts. Cases in which he has appeared include *Finci v. Bosnia and Herzegovina* at the European Court of Human Rights (challenging exclusionary aspects of the post-conflict settlement) and *Cemiride v. Kenya* at the African Commission on Human and Peoples' Rights (the first indigenous land case at that Commission). He has published on many issues of human rights law and policy, including on the use of international judges in the Kosovo judicial system and on the prevention of ethnic conflict.

Roland Bank

Roland Bank is currently employed as Legal Officer at the UNHCR (United Nations High Commissioner for Refugees) Regional Representation for Austria, the Czech Republic and Germany. He previously worked as a principal legal adviser to a German foundation engaging in compensation for victims of Nazi atrocities between 1933 and 1945. Before that, he was a researcher at many renowned institutes, such as the Max Planck Institute for Comparative Public Law and Public International Law in Heidelberg and the European University Institute in Florence. Mr. Bank holds a Ph.D. in human rights law (thesis on the international mechanism against torture, inhuman or degrading treatment), which he obtained at the University of Freiburg, Germany. He has published on international law and human rights law, in particular on the European Convention on Human Rights and international and European refugee law.

Cordula Droege

Cordula Droege is a legal adviser in the legal division of the ICRC, where her files include among others the interplay between IHL and human rights law and questions of the transfers of detainees. Before joining the ICRC in 2005, Ms. Droege worked as a legal adviser at the International Commission of Jurists. Between 1998 and 2001, she was a research fellow at the Max Planck Institute for International Law in Heidelberg. She was admitted to the bar in 2003. From 2001 to 2004, she was also a lecturer on international human rights law in Berlin. Ms. Droege holds a law degree and doctorate from the University of Heidelberg and an LL.M. from the London School of Economics.

Jeno Czuczai

Jeno Czuczai is currently Principal Jurist of the Council Legal Service. He is responsible for general international law including international humanitarian law. He holds a Doctorate degree in legal and political studies from the ELTE University, Budapest (1991), and pursued postgraduate studies in the US, UK, Russia, Italy, Belgium and Austria. He has been a registered attorney at law in the Hungarian bar since 2001. He started his career as Head of Unit at the Prime Minister's Office, Hungary (1991) and then was Director of the Hungarian Privatisation Agencies (1991-1995). From 1995-2001, he was Legal Adviser at the Delegation of the European Commission in Hungary. From 2001 until 2006, he taught EU law in several universities in Budapest. He was Vice-President of the European Law Academy, Hungary (1999-2006) and President of the Committee on International Relations of the Hungarian Law Society (1999-2003). He was an examiner on public international law in the state exam panel on civil service in the Prime Minister's Office, Budapest (1999-2006). He has been a visiting professor at the College of Europe (Bruges and Natolin) since 1997. He was a visiting lecturer/professor in several European countries. He has published widely, mainly on EU public and constitutional law and on law of EU external relations.

Ashley Deeks
Ashley Deeks was a 2007-2008 Council on Foreign Relations International Affairs Fellow and a Visiting Fellow at the Centre for Strategic and International Studies. During her fellowship, she explored the different approaches by the United States and European states to armed conflict and the laws of war, as well as issues related to detention and the use of diplomatic assurances. Ms. Deeks is on leave from the US Department of State's Office of the Legal Adviser. Most recently, she worked on issues related to the law of armed conflict, including detention, conventional weapons and the legal framework for the conflict with al-Qaeda. In previous positions at the State Department, Ms. Deeks advised on international law enforcement, extradition and diplomatic property questions. From May to December 2005, she served as the Embassy Legal Adviser at the US Embassy in Baghdad. She has written several pieces on the Iraqi constitution and diplomatic assurances, and has served as an adjunct professor at Georgetown Law Centre. Ms. Deeks received her B.A. from Williams College and her J.D. with honours from the University of Chicago Law School. She is a term member of the Council on Foreign Relations.

James Heenan
James Heenan works in the Rule of Law & Democracy Unit of the Office of the UN High Commissioner for Human Rights. He leads the Office's work on human rights and detention, as well as on the judiciary and death penalty issues. He was one of the lead authors of the *amicus curiae* brief submitted by the High Commissioner in the *Bourmediene* proceedings before the US Supreme Court on international human rights obligations in respect of judicial review of detention at the Guantánamo Bay detention facility. Mr. Heenan has previously practised as a lawyer in Australia and the UK, before holding a research fellow position in the Law Department of the European University Institute in Florence.

Philip Spoerri
Philip Spoerri was born in 1963 in Zurich. He was trained as a lawyer in Germany, where he acceded to the bar in 1992. Before commencing as a delegate for the ICRC at the beginning of 1994, he worked as a criminal defence lawyer. In 2000, he was awarded with a Ph.D. for a thesis on international humanitarian law from the University of Bielefeld, Germany. Following a first mission for the ICRC in Israel/Palestine, he served as a delegate in Kuwait and in Yemen. From 1998 to 1999, he worked for the ICRC in Afghanistan as a protection coordinator, in charge of ICRC activities for the protection of detainees, re-establishment of family links and tracing activities in the country. Then, he spent 18 months as the ICRC Head of Mission in the Democratic Republic of Congo. From December 2000 until April 2004, he worked as a lawyer at the ICRC Headquarters in Geneva and headed for two years the legal advisers to the Operations department. He returned to Afghanistan as the ICRC Head of Delegation from May 2004 to

January 2006. Since June 2006, he has been the Director International Law and Cooperation within the Movement at ICRC.

Thomas Winkler

Thomas Winkler graduated in 1988 from the Law Faculty at the University of Copenhagen. After his studies, he worked firstly as a Head of Section in the Danish Ministry of Foreign Affairs (MFA) and then went on to work in several Danish embassies around the world. As such, from 1991 to 1994, he worked as the Embassy Secretary at the Danish Embassy in Moscow; from 1994 until 1996, he was the Deputy Head of Mission in Kiev; and between 1998 and 2002, he acted as the Deputy Head of Mission in Stockholm. In between his missions, he continued his work at the MFA as the Deputy Head of the Department of EU Law (1994-1998) and as the Deputy Head of the Russia/Balkan Department (2002-2004). Since 2004, he has held the position of the Head of the Department of International Law at the MFA in Copenhagen, whereby he has become the Acting Legal Adviser since the first of September 2008. Since 2006, he has also taught international law at the University of Copenhagen in the role of associated professor.

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