

Human Rights in Times of Terrorism

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I. Introduction

Following 11 September 2001, the international legal and political community witnessed the rise of the new concept of the “global war on terror”. The United States of America (US) responded with the use of force against Afghanistan first and Iraq afterwards, intending to find those responsible and to eradicate the phenomenon in so-called “rogue states”. High numbers of suspects were jailed, very often without being granted basic procedural guarantees like the right to know the charges against them or to have a legal counsel, as enshrined in international human rights instruments and international humanitarian law (IHL).¹ These two branches of law were misused in order to argue that although the detainees were “combatants” in the sense of IHL, thereby not qualifying for rights attached to civilians, due to their “unlawful” participation in combat, they were not eligible for prisoner of war (POW) status under the Third Geneva Convention (GC) of 1949. They were simply “terrorists” to be kept in a legal limbo, for an undetermined period of time, at least until the “war on terror” would be over.

Those captured in Afghanistan were taken to a US military detention facility in Guantanamo Bay, Cuba. According to the United Nations High Commission of Human Rights report on the situation of detainees at Guantanamo Bay, and information provided thereto by the US as of 21 October 2005, approximately 520 detainees were held in Guantanamo Bay. From the establishment of the detention centre in January 2002 until 26 September 2005, 264 persons were transferred from Guantanamo, of whom 68 were transferred to the custody of other Governments, including those of Pakistan, the Russian Federation, Morocco, the United Kingdom, France and Saudi Arabia. As of 21 October 2005, President Bush had designated 17 detainees eligible for trial by a military commission. Of those, the United States has since transferred three to their country of origin, where they have been

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¹ On this problem see C. Walter/S. Vönelky/V. Rößen/F. Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty*, Heidelberg 2004, and the Report of the Working Group on Arbitrary Detention of the UN Commission for Human Rights of 16 December 2002, UN Doc. E/CN.4/2003/8, 19ss.

released. As of the end of December 2005, a total of nine detainees had been referred to a military commission.²

Those captured in Iraq, occupied with the argument that it was a rogue state in which Saddam Hussein was hiding weapons of mass destruction, were kept in even worse conditions, as proven by the pictures of Abu Ghraib. Perhaps an improvement with respect to Guantanamo Bay was the recognition of the applicability of the four Geneva Conventions of 1949 to the Abu Ghraib case, where there had been a clear breach of the prohibition of torture. This was indeed an improvement, since a major debate that arose in the aftermath of 9/11 revolved around the applicable legal regime to this type of situation. The aim of this paper is to discuss the human rights implications of this new approach, which holds that terrorism is a phenomenon to be fought with military strategies rather than traditional criminal law mechanisms. According to the path chosen there may be serious differences in relation to the rights applicable to the law enforcement agencies, the jurisdiction of the courts, the status of the detainees and even the mechanisms a state may resort to in defending itself. According to whether it takes place in a situation tantamount to a state of "war" (or armed conflict, a technical term preferred in international law), or in peacetime, an act may qualify as a legitimate act of warfare or as a terrorist act. A legal assessment also very much depends on the nature of the target – military or civilian – and the status of the attacker. Within the framework of an ongoing armed conflict, if an attacker fulfils the combatant criteria under Art. 4(A)(2) of the III Geneva Convention and aims at a military target, the attack will constitute a legitimate act of warfare, no matter whether it was launched by a member of the regular armed forces of a state or a guerrilla group. A highly debated issue in this regard, for instance, was the qualification of the attack on the Italian Carabinieri in Nassirya in November 2003. The personnel involved were members of the Italian armed forces. Under the laws of war, in fact, only attacks which are primarily aimed at civilian targets or the side effects of which (collateral damages) are disproportionate are unlawful. Thus, only those attacks which are primarily aimed at terrorising the civilian population qualify as acts of terrorism under IHL.³ In peacetime, instead, every attack, whether it is launched against a military or civilian installation, if aimed at forcing a government or an international organisation to meet specific political demands, constitutes terrorism in the ordinary sense. Thus, the standards differ. Moreover, in wartime, attackers who are not eligible for combatant – and POW – status, by default are to be considered civilians to be charged not only for unlawful methods of warfare, but also for the mere fact of having participated in combat. Unlike combatants, in fact, civilians, under IHL, are not allowed to engage in war and for this they may be tried

² Report of the UN Commission for Human Rights on the Status of Detainees at Guantanamo, UN Doc. E.CN.4.2006.120, 15 February 2006, at 6, available at <http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf>.

³ See Art. 51(2) of Additional Protocol I to the four Geneva Conventions of 1949, Art. 4 and 13 of Additional Protocol II or Art. 33 IV GC. The details are discussed in Arnold, *supra*, note *.

according to ordinary criminal law applicable to civilians in peacetime, rather than IHL.⁴ Nevertheless, in both cases – peacetime and wartime – human rights play a crucial role. The aim of this paper is to discuss to what measure, according to whether the repression of terrorism shall be viewed as an armed conflict subject to IHL or as the repression of an ordinary crime occurring in peacetime, their scope of application may differ.

In the lengthy “dispute” between the United Kingdom and the Irish Republican Army in Northern Ireland, for instance, the solution was to declare a “state of emergency”, rather than an armed conflict, thereby maintaining the laws applicable in peacetime and, at the same time, having the possibility, according to international standards, to limit or suspend the application of specific human rights. A state of war was never declared, as this would have implied the application of IHL and the recognition of combatant status of the IRA, granting its members more privileges, particularly in relation to detention, interrogation, etc., as will be discussed later. A similar approach was followed by Germany and Italy with regard to the Red Brigades and the Red Army Faction in the 1970s-1980s. Their members were tried according to the applicable substantive and procedural criminal law standards. The Bush administration, instead, decided to resort to military force to apprehend and repress those suspected of membership in Al-Qaeda, the international criminal organisation that has allegedly orchestrated the 11 September and other terror attacks.⁵

As it will be discussed later, the reason was probably dictated by the lack in the US – contrary to the UK – of applicable emergency laws, due to constitutional limitations. Faced with the impossibility of detaining suspects of terrorism without specific charges for an undetermined period of time, the ideal solution seemed to be offered by IHL, which permits retaining enemy combatants until the end of the hostilities, without a specific charge. However, their detention as POWs would have implied too many privileges, so it was decided to label them “unlawful combatants”, thwarting their right to invoke POW status.

The Guantanamo Bay situation provides a good overview of the restrictions on the substantive and procedural rights of suspects of terrorism following 9/11, which is partly derived from the confusion about the applicable regime. Related to that, as highlighted by the Abu Ghraib scandal, is the issue of the legitimacy to resort to torture during interrogations.⁶

In order to discuss the application of human rights to suspects of terrorism, Part II will first define who the terrorists are and the legal regime applicable to them. Part III will discuss the “state of emergency”, during which some human rights

⁴ This aspect is also discussed in R. Arnold, *The Liability of Civilians under IHL’s War Crimes Provisions*, in: A. McDonald & Others (eds.), *5 Yearbook of International Humanitarian Law* 344 (2002).

⁵ See more recently the terror attack in Amman, Jordan, at <<http://edition.cnn.com/2005/WORLD/meast/11/10/jordan.blasts/index.html>>.

⁶ On this problem see also the Report of the Working Group on Arbitrary Detention (note 1), 19ss.

may be derogated from, after which Part IV will examine the prohibition on the use of torture and its scope. Part V will discuss the US attitude towards the status of the suspected terrorists, whereas Part VI will consider the European position. Conclusions will be drawn in Part VII.

II. What Is Terrorism?

1. A Working Definition

There is no universally accepted legal definition of terrorism, yet.⁷ In some people's view, terrorism is a subjective notion, which "exists in the mind of the beholder, depending upon one's political views and national origins".⁸ However, the media and the average man, when using this term, seem to think of violent and intimidating acts – usually directed against innocent targets – aimed at coercing a government or a community to comply with the perpetrators' political requests. May this common understanding provide the basis for a universal legal definition of "terrorism"? Perhaps⁹ international humanitarian law (IHL) may provide a solution. "Acts of terrorism" are referred to in Art. 33, IV Geneva Convention of 1949, Art. 51(2), Additional Protocol I of 1977 and Art. 3 and 14, Additional Protocol II of 1977. These provisions refer to an act of violence in breach of the principles of military necessity, proportionality and distinction, which is primarily aimed at spreading fear among the civilian population.¹⁰ This definition contains the same elements as those of the definition commonly used: innocent victims (civilians) as targets, a violent act as conduct and a political end as a triggering reason which, however, in contrast with the Machiavellian motto, does not justify the means. One of the core principles of IHL, in fact, is proportionality.¹¹ The four Geneva Conventions of 1949 amount to customary law and have been universally accepted. Therefore, it could be argued that the meaning of "terror" under IHL may provide the basis for a universal legal definition. Since it is beyond the scope of this paper to discuss the legal definition of terrorism, the one previously referred to will be used as a "working" definition in this paper.

⁷ E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, The Hague 1996, at 2; A. Zimmermann, *Commentary to Article 5: Crimes Within the Jurisdiction of the Court*, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden 1999, 1st ed., 97-106, at 99.

⁸ R.A. Friedlander, *Terrorism*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 9, Amsterdam 1981, 371-376, 372.

⁹ Arnold (note *), at 69 et seq.

¹⁰ *Ibid.*, at 71ss.

¹¹ *Ibid.*

2. The Fight *vs.* Terrorism *vs.* the War on Terror

According to whether we qualify the repression of terrorist acts as a “fight” or a “war”, the application of different legal regimes may be implied.

The first expression recalls the criminal and procedural law mechanisms employed by the German, Italian and British regimes in the 1970s-1980s to eradicate terrorist movements like the Red Army Faction (RAF), the Red Brigades or the IRA. In fact, terrorism is not a new phenomenon. To overcome the problem of the lack of a universal definition of terrorism, a piecemeal approach was adopted by the international legal community.¹² This strategy resulted in the enacting of numerous anti-terrorism conventions since 1963.¹³ These, however, have several deficiencies, such as their limited scope of application, their failure to provide for universal jurisdiction, their blurring of terrorist acts with political offences, their subjection to extradition law rules, their failure to address state terrorism and their lack of control mechanisms.¹⁴ Some of these problems were evidenced, for instance, in the *Lockerbie Case*,¹⁵ when Libya refused to extradite to the US and the UK two suspects on the basis of the extradition law rule that a state cannot be compelled to extradite its own citizens.

Some of these problems, however, may be overcome by considering terrorist acts as means and methods of warfare subject to IHL. As long as they are primarily aimed at civilian targets, such acts are considered war crimes under Article 33 of the 1949 IV Geneva Convention (IV GC), Article 51(2) of the 1977 Additional Protocol I (AP I) and Articles 4 and 13 of the 1977 Additional Protocol II (AP II).¹⁶ These provisions, however, have a limited scope of application: a) they only apply in times of armed conflict, i.e. situations which have a higher intensity of violence than mere riots and internal disturbances; b) they generally address civilians as protected persons.¹⁷ Under IHL, acts of terror are *per se* legitimate, as long as they do not primarily target civilians and do produce a military advantage. The political motivation, on the other hand, is not directly relevant. Thus, according to

¹² See the info provided by UNDOC (United Nations Office on Drugs and Crime), at <<http://www.unodc.org/unodc/en/terrorism.html>>; S. O h m, Die Instrumentalisierung des Völkerrechts zur Bekämpfung des internationalen Terrorismus, in: 4 Humanitäres Völkerrecht 164, 170 (1999). For a list of the conventions, see Extract from the Report of the Secretary-General on Measures to Eliminate International Terrorism (DOC. A/57/183), as updated on 10 December 2002, at <http://www.un.org/law/terrorism/terrorism_table_update_12-2002.pdf>.

¹³ In the sense that they have a global – rather than a regional – geographical scope of application. This term, however, does not imply that they are universally binding.

¹⁴ For details see A r n o l d, *supra*, note *.

¹⁵ See R. A r n o l d, Terrorism and IHL: A Common Denominator?, in: R. Arnold/P.A. Hildbrand (eds.), International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges, Bern/Lausanne/Lugano 2005, 5-24, at 9.

¹⁶ The four 1949 GCs and the 1977 AP I apply to international conflicts (the latter including self-determination wars). The 1977 AP II only applies to non-international conflicts between a state and the insurgents and Art. 3 common to the four GCs applies to all types of non-international conflicts.

¹⁷ A r n o l d, *supra*, note *, at 18.

the circumstances, the qualification of an act and the status of the perpetrator and the victim may change. Consequently, the applicable human rights may also vary. As it will be discussed later, in fact, there are some human rights that may be restricted in a state of emergency. However, the latter is not to be confused – or abused – to label what in reality is a permanent state of “war”. Moreover, there are some human rights which are better protected in times of war, under IHL, than in peacetime, under human rights instruments. The aim of the following section is to discuss the relationship between these two legal branches with regard to the protection of human rights of detainees in particular and to analyse in what measure their scope of protection differs.

3. Human Rights and International Humanitarian Law: Two Different Applicable Legal Regimes?

Human rights and IHL have long been regarded as two distinct branches of law. Only in 1968, at the Tehran Conference on Human Rights, was their relationship raised for the first time. Three theories emerged. According to the integrationist theory, the two are merged in a unique body of law, whereas under the separatist theory they are totally unrelated. The complementarist theory, on the other hand, the one accepted universally and supported by the International Committee of the Red Cross (ICRC), maintains that they are distinct and separate, but nevertheless complementary to each other.¹⁸ The rationale of the complementarists is that IHL was specifically drafted to take into consideration the reality and brutality of war. In times of armed conflict, it becomes a soldier’s duty to kill the enemy, therefore requiring a derogation from the protection of the general right to life, enshrined in human rights instruments. For the same reason a combatant, unlike a civilian, cannot be considered a criminal for having engaged in combat or having killed an enemy. The same approach cannot be shared under human rights law, which was specifically drafted for times of peace. It is for this reason that when a situation escalates into an armed conflict, without reaching that threshold, yet, a state of emergency may be declared under which some human rights standards may be derogated from. IHL, in contrast, shall apply only once a certain intensity of the fighting has been reached, normally requiring the intervention of the armed forces. In times of war, it would also be inconceivable to grant to everyone, in particular to members of the armed forces, the same rights, such as freedom of expression. At the same time, however, there are some human rights which are so fundamental as to find application under all circumstances, including times of armed conflict. As such, these rights are restated in the four Geneva Conventions of 1949 and their

¹⁸ On this see also ICJ Advisory Opinion of 9 July 2004, General List No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 104ss, at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwframe.htm>> and the Report of the UN Commission for Human Rights (note 2), at 12.

two Additional Protocols of 1977, which have the status of *lex specialis* in relation to human rights instruments. In this sense, the two branches are complementary to each other.

For example, IHL, in particular Art. 13 and common Art. 3 of the III GC, provides for the right to life of protected persons like detainees or sick and wounded combatants. According to these two provisions, POWs must be treated humanely at all times. Any act by the “Detaining Power” causing their death is a serious breach. A prisoner who, for operational reasons, cannot be held, must be released. The judicial guarantees for detainees are provided for in Arts. 99-100. *Incommunicado* detention is a breach of a POW’s right to stay in touch with the external world (Arts. 69-77). POWs shall further be enabled to write to their families and to the Central Prisoners of War Agency (Art. 70 in conjunction with Art. 123). They shall be allowed to send and receive letters, cards (Article 71) and parcels (Art. 72). To withhold a POW as a “bargaining chip” is further a serious violation of Art. 118. Another fundamental provision, which draws from human rights law, is Art. 75 of Additional Protocol I, which has customary law status. It contains fundamental guarantees such as the prohibition of violence to life and health (physical and mental), including in particular murder and torture, humiliating and degrading treatment, the taking of hostages, collective punishments, and unjustified delayed release. All these rights are to be protected at all times, under all circumstances.

A comparative table can be drawn showing the rights of detainees provided by IHL and international human rights instruments:¹⁹

	ECHR	ICCPR	III GC	API	Art. 3	AP II
Right to Life	Art. 2	Art. 6	Art. 13	Art. 75(2)	Para.1	Art. 4(2)
Torture and Inhumane Treatment	Art. 3	Art. 7	Art. 13-14	Art. 75(2)	Para. 2	Art. 4(2)
Hostage Taking	Art. 3	Art. 7	Art. 13-14	Art. 75(2)	Para. 1	Art.4
Legality, Non-retroactivity	Art. 7	Art. 15	Art. 99	Art. 75(4)	Para. 1	Art. 6(2)
Right to Fair Trial	Art. 6	Art. 14	Art. 99-108	Art. 75(4)	Para. 1	Art. 6(1-5)
Freedom of Thought, Conscience, Religion	Art. 9	Art. 18	Art. 33-37/120			

¹⁹ For details see R. Arnold, Human Rights in Times of War: The Protection of POWs and the Case of Ron Arad, Vol. 5(1) Human Rights Law Review 8 (2000). ICCPR = International Covenant on Civil and Political Rights; ECHR = European Convention on Human Rights; GC = Geneva Convention; AP = Additional Protocol.

Unlike IHL, which provides for non-derogable and universal rights with customary status and applicable at all times, when there is an armed conflict, Art. 4, ICCPR provides for the possibility of derogating from some of the Covenant's provisions. In a state of emergency, which will be discussed in the next paragraph, only Arts. 6, 7, 8, 11, 15, 16 and 18²⁰ are excluded from the right of derogation (Art. 10, however, which deals with detainees, is not exempt). Under IHL, for example, unlike under human rights law, family rights are non-derogable.²¹

A further advantage of IHL is that, whereas human rights violations can only be invoked against a state, IHL violations can be charged against individuals, as shown by the numerous cases brought before international tribunals like the ICTY, the ICTR and, more recently, the ICC.²²

III. The State of Emergency

According to the dictionary,²³ a state of emergency is a:

“governmental declaration that may suspend certain normal functions of government, may work to alert citizens to alter their normal behaviors, or may order government agencies to implement emergency preparedness plans. It can also be used as a rationale for suspending civil liberties. Such declarations usually come during a time of natural disaster, during periods of *civil unrest*, or following a declaration of war. In some countries, the state of emergency and its effects on civil liberties and governmental procedure are regulated by the constitution or a law that limits the powers that may be invoked during an emergency or rights suspended (e.g. Art. 2-B Executive Law of New York state). It is also frequently illegal to modify the emergency law or Constitution during the emergency (e.g. Basic Law of the Federal Republic of Germany, Chapter Xa, Article 115e, section 2).”

A state of emergency is fairly uncommon in democracies. Rather, it is frequently used by dictatorial regimes and prolonged indefinitely as long as the regime lasts. In some circumstances, martial law is also declared, allowing the military greater powers. It is generally declared at times of overwhelming danger, when certain normal standards of procedure need to be abrogated and replaced by others. For instance, it may be declared in cases of disturbances and demonstrations, including violent ones, or natural catastrophes, or internal or international armed conflict.

²⁰ No derogation is allowed to Article 6 (Right to Life), Article 7 (Torture), Article 8(1) and 8(2) (Slavery), Article 11 (Imprisonment for Inability to Fulfil a Contractual Obligation), Article 15 (No Retroactivity of Penal Provisions), Article 16 (Right to Recognition as a Person before the Law) and Article 18 (Right to Freedom of Thought, Conscience and Religion).

²¹ International Committee of the Red Cross, Human Rights and the ICRC: International Humanitarian Law, Geneva 1993, at 3. However, it will be discussed later that according to the UN Human Rights Committee also those provisions which are not enlisted under Art. 4 contain some elements considered to be non-derogable.

²² Respectively the International Tribunals for the Former Yugoslavia, Rwanda and the International Criminal Court.

²³ Wikipedia (Answers.com): <<http://www.answers.com/%22state%20of%20emergency%22>>.

Not every disturbance or catastrophe, however, qualifies as a public emergency that threatens the life of the nation. In exceptional cases, measures can be declared which may derogate from certain human rights treaty provisions. This requires that: a) the situation must amount to a public emergency threatening the life of the nation and b) the state party must have officially proclaimed a state of emergency. The derogating measures must be limited to the period of time which is strictly required by the situation, and the state which declares an emergency must provide for a well-considered justification both of the declaration of a state of emergency and of the specific measures which have been taken on this basis.

In order to limit the authority to derogate from human rights, certain guarantees have been declared as non-derogable. These include the right to life, the prohibition of torture, the principle of legality in the field of criminal law, and the freedom of thought, conscience, and religion. For example, in relation to Article 4 of the ICCPR, the UN Human Rights Committee recognized that those provisions of the Covenant that are not listed in Article 4(2) also contain certain elements that cannot be subject to lawful derogation. These include the following: the treatment of all persons deprived of their liberty with humanity and with respect for the inherent dignity of the human person; the prohibitions against hostage-taking, abductions and unacknowledged detention; the international protection of minority rights; the prohibition of propaganda for war or in advocacy of national, racial, or religious hatred that would constitute incitement to discrimination, hostility or violence; and procedural guarantees and safeguards related to, for example, fair trial.²⁴

Similarly, at the Conference on the Human Dimension of the CSCE in Copenhagen in 1990, the participating OSCE member states adopted a document reaffirming that any derogation from human rights obligations during a state of emergency must remain strictly within the limits provided for by international law.²⁵

More recently, in its 2006 report on the status of detainees held in Guantanamo Bay, the UN High Commission for Human Rights observed that:

“Derogations are exceptional and temporary measures: The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the Nation ... Following the events of 11 September 2001, the United States has not notified any official derogation from ICCPR, as requested under article 4 (3) of the Covenant, or from any other international human rights treaty.”²⁶

Moreover:

“Not all rights can be derogated from, even during a public emergency or armed conflict threatening the life of a nation. Article 4(2) of ICCPR stipulates which rights cannot

²⁴ On this aspect see the Report of the UN Commission for Human Rights (note 2), at 18.

²⁵ Copenhagen Document, Paragraph 25. Further considerations for the conditions for the justifiability of any derogation include that measures not involve discrimination solely on the grounds of race, colour, sex, language, religion, social origin, or of belonging to a minority (Copenhagen Document, Paragraph 25.4).

²⁶ Report of the UN Commission for Human Rights (note 2), at 9.

be subject to derogation. Although article 9 of the Covenant, enshrining the right to liberty and its corresponding procedural safeguards, and article 14, providing for the right to a fair trial, are not among the non-derogable rights enumerated in article 4, the Human Rights Committee has indicated in its general comment No. 29 (2001) that ‘procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights’. Thus, the main elements of articles 9 and 14, such as *habeas corpus*, the presumption of innocence and minimum fair trial rights, must be fully respected even during states of emergency.²⁷

The authority to declare a state of emergency depends on a country’s domestic legislation. In the UK this is usually vested in the monarch or a senior minister. According to the Civil Contingencies Act 2004, this is allowed if there is a serious threat to human welfare or the environment, or in case of war or terrorism. The emergency may last for seven days unless confirmed by Parliament.

In other systems emergency authority may be vested in the parliament or the head of State.²⁸ For example in the US, it is the chief executive who is typically empowered with it. The President, a governor of a state, or even a local mayor may declare a state of emergency within his/her jurisdiction. This seems to be relatively rare at the federal level, but quite common at the state level, in response, for example, to natural disasters. Under these circumstances, people may be arrested without cause, private places may be searched without warrant, or private property may be seized without immediate compensation or a chance of prior appeal. US courts seem to be rather lenient in allowing almost any action to be taken if it is reasonably related to such a declared emergency. With regard to *habeas corpus*, the right to challenge an arrest in court, the US Constitution says: “The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

In Canada, the state of emergency is defined in the National Emergencies Act as “an urgent and critical situation of a temporary nature that exceeds a province’s ability to cope and that threatens the welfare of Canadians and the ability of the Canadian government to preserve the sovereignty, security and territorial integrity of Canada”. It can be declared by the Prime Minister and the Cabinet. A state of emergency can last up to 90 days, at which point it can be extended.²⁹

Review of a state of emergency may be undertaken by the UN Human Rights Committee.³⁰ In fact, international human rights instruments often provide for

²⁷ Ibid., at 10.

²⁸ See at <http://encyclopedia.laborlawtalk.com/State_of_Emergency>.

²⁹ Info available at <<http://www.cbc.ca/news/background/stateofemergency/>>. In this case the government may, at its discretion: regulate or prohibit travel when it is deemed necessary for health and safety reasons; remove people and their possessions from their homes; use or dispose of non-government property at its discretion; authorize and pay persons to provide essential services that are deemed necessary; ration and control essential goods, services and resources; authorize emergency payments; establish emergency shelters and hospitals; assess and repair damaged infrastructure; convict or indict those who contradict any of the above.

³⁰ Concluding Observations of the Human Rights Committee: Ireland, 3 August 93, CCPR/C/79/Add.21. (Concluding Observations/Comments), para. 11, at <<http://www.unhcr.ch/tbs/doc.nsf/0/>>

control mechanisms (e.g. the Human Rights Committee in relation to the ICCPR, and the Committee on Torture in relation to the Convention Against Torture). At the political level, pressure may be also exercised by organisations like the OSCE³¹ or the European Union. OSCE participating States, for example, committed themselves to inform the OSCE Secretariat of a decision to declare or lift a state of emergency.³² With respect to this, the 1992 Concluding Document of Helsinki assigns an important task to the ODIHR to act as a clearing house regarding information on states of emergency.³³ This commitment also requires a participating State to inform the OSCE of any derogation made from international human rights obligations.

According to Para. 28.1. of the Moscow Document, a state of public emergency may not be used to subvert the democratic constitutional order or to destruct internationally recognized human rights and fundamental freedoms. Moreover, citizens of the concerned states must be promptly informed of the measures taken (Para. 28.3). These must also ensure that the normal functioning of legislative bodies will be guaranteed to the highest possible extent (Para. 28.5).

Another option may be the intervention of the UN Security Council (SC). Should a state abuse its right to declare the state of emergency, and thereby pose a threat to international peace and security, the SC may intervene on the basis of Chapter VII of the UN Charter. Internal crisis and human rights abuses have long been considered an internal matter not allowing external interferences on the basis of the principle of state sovereignty. However, if this situation may pose a threat to international stability, an intervention may be justified, as in the case of the Rwandese genocide. In some cases, should a state of emergency lead to gross human rights violations and crimes against humanity, it is conceivable that a case may also be referred to the International Criminal Court by the Security Council.

The information on states of emergency is also very important to determine whether we are still acting within the framework of peacetime or wartime. According to the four GCs of 1949, IHL shall not apply to isolated and sporadic acts of violence such as riots. There is a minimal threshold that needs to be achieved, requiring a specific intensity of the violent activities. The state of emergency is nor-

10cef6e66dedc39e41256324003c32cc?Opendocument>: The Committee expresses special concern over the continuation of the state of emergency declared with the adoption of the Emergency Powers Act in 1976. The Committee notes with concern that the Emergency Powers Act, particularly section 2 thereof, provides excessive powers to law enforcement officials. The Committee also expresses its concern with respect to the Special Court established under the Offences against the State Act of 1939. It does not consider that the continued existence of that Court is justified in the present circumstances. The measures referred to above are of a character that normally fall to be notified under article 4 of the Covenant. The Committee notes, however, that the State party has failed to inform other States parties of any state of emergency through the Secretary-General of the United Nations, as required under article 4, paragraph 3, of the Covenant.

³¹ See Office for Democratic Institutions and Human Rights, at <<http://www1.osce.org/odihhr/13485.html>>.

³² 1991 Moscow Meeting of the Conference on the Human Dimension, Paragraph 28.10.

³³ Helsinki Document, Paragraph 5b.

mally declared within the framework of peacetime when, however, urgent provisions need to be enacted. This, however, does not bring into play IHL, yet. Those caught committing acts of urban guerrilla “warfare”, therefore, may be labelled as terrorists to be subjected to ordinary criminal law provisions, including, as it will be discussed later, emergency law provisions and administrative detention provisions.

IV. Torture as a Special Case

Torture captured the public opinion’s attention particularly after the disclosure of the images of the Iraqi prisoners abused by US privates at the Abu Ghraib detention facility in Baghdad. Pursuant to the Taguba Report,³⁴ between October and December 2003 “numerous incidents of sadistic, blatant, and wanton criminal abuses” were inflicted on several detainees. Since then, the question has arisen whether torture, in extreme cases, should be allowed to extrapolate important information from terrorist suspects, which may save hundreds of lives. Granting the executive the authority to decide what may constitute torture and to set the limits, however, carries with it a high risk of arbitrariness, which, in relation to a breach as serious as torture cannot be accepted. For this reason, several important international instruments ban torture under all circumstances. Among these are the Geneva Conventions of 1949, their Additional Protocols of 1977 and the 1985 UN Convention against Torture. The latter established the UN Committee against Torture as a control mechanism. It defines torture in Art. 1³⁵ and declares that no state of emergency, other external threats, nor orders from a superior officer or authority may be invoked to justify its use. Each state is obliged to provide training to law enforcement personnel and the military on torture prevention, to keep its interrogation methods under review, and to promptly investigate any allegations that its officials have committed torture during official duties. At present sixty-five nations have ratified the Convention against torture and six-

³⁴ A report prepared by Maj.Gen. Antonio M. Taguba on alleged abuse of prisoners by members of the 800th Military Police Brigade at the Abu Ghraib Prison, Baghdad. It was ordered by Lt. Gen. Ricardo Sanchez, commander of Joint Task Force 7, the senior US military official in Iraq, following persistent allegations of human rights abuses at the prison. Available at <<http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html#ThR1.3>>.

³⁵ For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

teen more have signed but not yet ratified it.³⁶ The prohibition of torture has acquired customary law status³⁷ and breaches thereof may also constitute – given the circumstances – a war crime or a crime against humanity under Arts. 7³⁸ and 8 of the ICC Statute. Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) confirmed in *Furundzija*³⁹ that the prohibition of torture is an absolute right which can never be derogated from, even in times of emergency. In Israel, there has been a period in which the “ticking bomb theory” was supported, holding that lighter forms of torture, such as shaking, were allowed during the interrogation of suspects of terrorism if this was going to prevent foreseeable attacks planned in the near future. However, this procedure was ruled out as being unlawful by Israel’s High Court of Justice on 6 September 1999.⁴⁰

V. The Attitude of the Bush Administration and the American Courts

With the “global war on terror”, the Bush administration seems to have preferred the military to traditional law enforcement mechanisms to identify, locate and arrest suspects of terrorism.⁴¹ This approach has not been particularly efficient. Osama Bin Laden, along with other key players in the realm of terror, are still free. The military is not adequately trained and structured to deal with a phenomenon which has traditionally belonged to competences of the police. By trying to repress terrorism with the occupation of so-called rogue states, not only has the US acted in breach of several public international law principles (e.g. state sovereignty), but it has also brought into play the laws of armed conflict to regulate a

³⁶ The US have ratified it on 21 October 1994, but on 3 June 1994, the UN Secretary-General received a communication from the US Government requesting, in compliance with a condition set forth by the US Senate, in giving advice and consent to the ratification of the Convention, and in contemplation of the deposit of an instrument of ratification of the Convention by the US Government, that a notification should be made to all present and prospective ratifying Parties to the Convention to the effect that: “... nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” Further details can be found at the OHCHR Website, <<http://www.ohchr.org/english/countries/ratification/9.htm#N11>>.

³⁷ See the *Furundzija* Judgement of the ICTY, (IT-95-17/1) “Lasva Valley”, Judgement of 10 December 1998, para. 137ss.

³⁸ Under Art. 7 ICC Statute “‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

³⁹ *Furundzija* Judgement of the ICTY (note 37), para. 144ss.

⁴⁰ For a report on the case see J. Kessel, Israel Supreme Court Bans Interrogation Abuse of Palestinians, 6 September 1999, CNN, at <<http://edition.cnn.com/WORLD/meast/9909/06/israel.torture/>>.

⁴¹ On the problem of counterterrorist methods and their impact on national and international law, see Walter/Vönelky/Röben/Schorckopf (note 1).

situation for which these were not foreseen. Although the 9/11 attack should have been met with traditional mechanisms of international cooperation in criminal matters, by virtue of the occupation of Afghanistan and Iraq, the US armed forces are now engaged in a conflict where the adversaries are a mixture of terrorists from the pre-invasion phase (e.g. Al Qaeda) and regular combatants who have come into play to respond to the invasion. This means that those apprehended after the occupation of Iraq and Afghanistan, who have been fighting in conformity with IHL, in fulfilment of the combatant status criteria under Art. 4(A)(2), III GC, should be granted POW status. The problem, however, is that POWs enjoy several privileges. For instance they cannot be compelled, when questioned, to give information other than surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information (Art. 17, III GC). POWs, in fact, are not criminals. They can only be charged with breaches of the laws of war, not with mere participation in combat. The latter is considered a crime only if committed by civilians, who are not allowed to engage in the hostilities. Another difference is that POWs facing a trial for war crimes retain their status.⁴² The reason for the US to label the Guantanamo detainees as “unlawful combatants” seems to be due to the fact that, according to general criminal procedural law, a suspect against whom no specific charges can be brought, shall be released within 48 hours. This would have obviously constituted a problem in relation to the detainees held in Guantanamo. POWs, however, may be retained until the end of the hostilities even if no specific charge is brought against them, since their detention is not aimed at punishing them for criminal conduct, but at preventing them from re-joining the enemy forces.⁴³ In the Guantanamo case, therefore, the attempt is to consider the “war on terror” a conflict under common Art. 2 of the Geneva Conventions of 1949, permitting the detention of suspects of terrorism until its end. The *en bloc* qualification of the Guantanamo detainees as combatants, therefore, without making distinctions between those belonging to Al Qaeda and those to the Taliban, permits the US Administration to circumvent the 48 hours problem. However, recognition of combatant status for these detainees pursuant to Art. 4(A)(2), III GC would imply their eligibility for POW status, which is not in the interest of the US. For this reason the new term “unlawful combatant” was coined in order to grant those detained neither POW rights, nor those applicable to civilians under traditional criminal law and criminal procedural law.

This situation was carefully examined from the point of view of both IHL and the International Covenant on Civil and Political Rights by the Working Group on Arbitrary Detention of the UN Commission for Human Rights which, in its 2003 Report, began by noting:

⁴² It should be noted, however, that abidance by the laws of war is a constitutional criterion for POW status in relation to members of irregular armed groups, whereas it is simply a declaratory criterion for members of regular armed forces. More on this can be found in Arnold (note *), in the chapter on terrorism as a war crime.

⁴³ This was, in fact, the argument brought forward by the US. See the Report of the UN Commission for Human Rights (note 2), at 12, para. 19.

“... the interpretation given by the American authorities, whereby these belligerents belonged to the *sui generis* category known as ‘enemy combatants’ and that as such ‘they are not covered by the Geneva Convention and are not entitled to prisoner-of-war (POW) status under treaty’ (statement made by the United States Press Secretary on 2 February 2002). Besides the fact that this interpretation is open to debate, the Working Group recalls that the authority which is competent to determine prisoner-of-war status is not the executive power but the judicial power ... so long as a ‘competent tribunal’ ... has not issued a ruling ... detainees enjoy ‘the protection of the ... Convention’, as provided in paragraph 2, whence it may be argued that they enjoy firstly the protection afforded by its article 13 (‘Prisoners of war must at all times be humanely treated’), and secondly the right to have the lawfulness of their detention reviewed and the right to a fair trial provided under articles 105 and Convention (notification of charges, assistance of counsel, interpretation, etc.), absence of such rights may render the detention of the prisoners arbitrary.”⁴⁴

With respect to the International Covenant on Civil and Political Rights, the Working Group observed that:

“Since the United States is party to the Covenant, in the case where the benefit of prisoner-of-war status should not be recognized by a competent tribunal, the situation of detainees would be governed by the relevant provisions of the Covenant and in particular by articles 9 and 14 thereof, the first of which guarantees that the lawfulness of a detention shall be reviewed by a competent court, and the second of which guarantees the right to a fair trial. ... so long as a ‘competent tribunal’ has not declared whether the status of prisoner of war may be considered applicable or not, the persons detained in Guantanamo Bay provisionally enjoy the guarantees stipulated in articles 105 and 106 of the third Geneva Convention. On the other hand, should such a court issue a ruling on the matter:

- either it rules in favour of a prisoner-of-war status and the persons concerned are definitely entitled to the guarantees provided by the third Geneva Convention;
- or it invalidates the prisoner-of-war status, in which case the above-mentioned guarantees of the Covenant (under articles 9 and 14) take over from those of articles 105 and 106 of the third Geneva Convention, which no longer apply.”⁴⁵

In conclusion, the Working Group recalled that, in its decision of 12 March 2002, the Inter-American Court of Human Rights had requested the United States to take urgent measures to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.

An alternative solution for the US would have been to consider detained members of Al Qaeda as civilians to be tried according to domestic and international anti-terrorism legislation. In these circumstances an option permitting to circumvent the above-mentioned problem of the 48-hours deadline for bringing specific charges would have been to resort to administrative detention, as done in the United Kingdom or Israel. Although criticised by international human rights law-

⁴⁴ See Report of the Working Group on Arbitrary Detention (note 1), 19ss.

⁴⁵ See *ibid.*

yers, this type of detention is not outlawed under international law.⁴⁶ However, due to constitutional limitations, this option was not available in the US. Administrative detention, as described by the Israeli NGO “B’tselem”, is:

“detention without charge or trial, authorized by administrative order rather than by judicial decree. It is allowed under international law, but, because of the serious injury to due process rights inherent in this measure and the obvious danger of abuse, international law has placed rigid restrictions on its application. Administrative detention is intended to prevent the danger posed to state security by a particular individual. However, Israel has never defined the criteria for what constitutes ‘state security’.”⁴⁷

Administrative detention, is true, poses several human rights questions, but at least it is allowed under international law. One could question the “least evil”: to keep detainees in a legal vacuum, with no rights at all, or to hold them in administrative detention, with derogation only from some rights?

With respect to Guantanamo Bay, the US Supreme Court made an important ruling in *Rasul v. Bush*⁴⁸ on 28 June 2004. Reference was made to the law authorising President George W. Bush to use:

“all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks ... or harbored such organisations or persons”,

on the basis of which the detention facility of Guantanamo Bay was established.⁴⁹ The case concerned two Australian detainees (Mamdouh Habib and David Hicks), who had filed petitions in US federal courts for writs of *habeas corpus*, requesting, among others, release from custody, access to counsel and freedom from interrogation. The petitions were dismissed by the US District Court for want of jurisdiction, on the basis of a precedent holding that:

“[a]liens detained outside the sovereign territory of the United States [may not] invoke a petition for a writ of *habeas corpus*.”⁵⁰

The decision was reversed by the Supreme Court, which remitted the case to the federal courts. By rejecting the argument that the US executive cannot be held answerable in courts for the detention off-shore of alleged terrorists, the Supreme Court upheld the rule of law and avoided the creation of a legal vacuum in Guantanamo Bay.⁵¹

Another important ruling was released on 19 January 2005 by the US District Court for the Court of Columbia in *Khalid v. Bush*. The Petitioners in *Khalid*, seven foreign nationals, five Algerian-Bosnians, one Algerian, and one Frenchman,

⁴⁶ Office of the High Commissioner for Human Rights in cooperation with the international bar association, Human Rights in the Administration of Justice, A Manual on Human Rights for Judges, Prosecutors and Lawyers, Professional training series No. 9, 2003, at 175.

⁴⁷ <<http://www.btselem.org/English/Administrative%5FDetention/>>.

⁴⁸ 542 US 1 (2004); 72 USLW 4596 (2004).

⁴⁹ Authorisation for the Use of Military Force, Public Law 107-40, 1-2, US Stat 224.

⁵⁰ *Johnson v. Eisentrager*, 339 US 763 (1950).

⁵¹ For a comment on the consequences, at administrative level, of the *Rasul* Judgement, see the Report of the UN Commission for Human Rights (note 2).

were captured outside Afghanistan (six in Bosnia and one in Pakistan). They challenged their detention under US and international law and asked the court to issue a writ of *habeas corpus*. The Court concluded that “[...] no viable legal theory exists by which it could issue a writ of *habeas corpus* under these circumstances”, recalling the US Supreme Court’s decision in *Rasul*. It further stated that:

“[...] the petitioners are asking this court to do something no federal court has done before: evaluate the legality of the Executive’s capture and detention of non-resident aliens, outside the U.S. during a time of armed conflict”,

suggesting ignorance of the ruling in *Rasul*.⁵² Regarding non-US nationals held in Guantanamo, the *Rasul* court found that US courts have jurisdiction to hear the detainees’ petition. Yet, in *Khalid*, the Court seems to have come to a different conclusion.

On 8 November 2004, in *Hamdan*, the same District Court had come to a diametrically opposed outcome. The dispute may have been solved by the US District Court for the District of Columbia *In re Guantanamo Detainees Cases*, held on 31 January 2005. As mentioned, the first case, decided by Judge Robertson (*Hamdan*, 8 November 2004) found in favour of the detainees. The second, decided by Judge Leon (*Khalid*, 19 January 2005) found in favour of the government. The third, instead, found in favour of the detainees.⁵³ The Court analysed the “due process clause” of the 5th Amendment to the US Constitution, adopting the reasoning of the Supreme Court in *Rasul*, i.e. that the Guantanamo base is to be considered as part of US sovereign territory where the 5th Amendment applies to all the detainees kept there, be these US or non-US nationals. The Court followed also the Supreme Court’s reasoning in *Hamdi*. It found that the US government’s argument that the detainees could be held as long as the “war against terrorism” continued, could amount to a life sentence, providing sufficient interest for the detainees to litigate their detention and to be given notice of the reasons thereof. The Court also found that the CSRT (Combatant Status Review Tribunal) did not grant the detainees a fair opportunity to review their status because: 1. they were not provided assistance of counsel; 2. they were not provided with sufficient notice of the factual basis for their detention because certain evidence was not disclosed to them; and 3. some of the evidence against them may have been obtained by torture or other coercion.

In this ruling, specific attention was given to the III GC of 1949, particularly Arts. 4 and 5,⁵⁴ according to which, in case of doubt, someone shall be treated as a

⁵² For an analysis see B. Dougherty, Severe Setback in the Battle for Rights of Guantanamo Detainees, Bofaxe No. 290E, 18 February 2005, at <<http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe/x290E.pdf>>.

⁵³ B. Dougherty, Unnamed Detainees at Guantanamo; Decision for the Detainees. Score before the District Court now: 2-1 in Favour of the Detainees, Bofaxe No. 292E 1.03.2005, at <<http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe/x292E.pdf>>.

⁵⁴ Of particular relevance is Art. 5, stating that “The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4,

POW until a decision on the status is made by a competent tribunal. In agreement with *Hamdan*, the Court found that the GCs are self-executing and that President Bush's early determination that there is no doubt that the detainees are not entitled to POW status did not qualify as a judgement by a competent tribunal under Art. 5.

However, most recently, on 28 October 2005, the Inter-American Commission on Human Rights, in its ruling on the Extension of Precautionary Measures (N. 259) regarding Detainees in Guantanamo Bay, Cuba, observed, *inter alia*, that, notwithstanding the Supreme Court decision in *Rasul v. Bush*, according to the information available to it:

“nearly half of the Guantanamo detainees have not been given effective access to counsel or otherwise provided with a fair opportunity to pursue a *habeas corpus* proceeding in accordance with the Supreme Court's ruling, despite the fact that the purpose of *habeas* is intended to be a timely remedy aimed at guaranteeing personal liberty and human treatment.”

It concluded that the situation at Guantanamo continues to be of an urgent character, and asked that the US provide information concerning compliance with its precautionary measures, together with the additional information requested, within 30 days.⁵⁵

The Commission further requested that the US:

“1. take the immediate measures necessary to have the legal status of the detainees at Guantanamo Bay effectively determined by a competent tribunal;

2. take all measures necessary to thoroughly and impartially investigate, prosecute and punish all instances of torture and other mistreatment that may be perpetrated against the detainees at Guantanamo Bay, whether through methods of interrogation or otherwise, and to ensure respect for the prohibition against the use in any legal proceeding of statements obtained through torture, except against a person accused of torture as evidence that the statement was made;

3. take the measures necessary to ensure that any detainees who may face a risk of torture or other cruel, inhuman or degrading treatment if transferred, removed or expelled from Guantanamo Bay are provided an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker. Where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other mistreatment, the State should ensure that the detainee is not transferred or removed and that diplomatic assurances are not used to circumvent the State's non-refoulement obligation.”

The US reiterated its position that the Commission's jurisdiction and competence do not extend to the laws and customs of war or to issuing requests for precautionary measures against non-States Parties to the American Convention. It further contended that there was a requirement of exhaustion of domestic remedies and, *inter alia*, that as of 27 September 2005, 160 *habeas* proceedings involving 292

such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

⁵⁵ See <<http://www.asil.org/pdfs/ilibmeasures051115.pdf>>.

detainee petitions had been filed with US courts. It noted that these proceedings included *Hamdan v. Rumsfeld*, 415 F. 3d 33 (DC Cir. 2005) and *In re Guantanamo Detainees*, 355 F. Supp. 2d 311 (D.D.C. 2005), resulting in conflicting conclusions as to whether non-resident aliens have the right to challenge their detention under the US Constitution, under customary international law or under international treaties. It further observed that a consolidated appeal to the US District Court for the District of Columbia is pending and that there have been administrative proceedings at Guantanamo Bay, including proceedings before Combatant Status Review Tribunals, initiated in July 2004, charged with determining whether detainees are properly classified as enemy combatants.

With respect to allegations of torture regarding the Guantanamo detainees, the US observed that its Department of Defense denied these and restated its commitment to treating the prisoners humanely. It submitted that as of December 2004, the US government had documented eight instances of infractions resulting in different actions ranging from admonishment to court-martial. It further contended that the facility at Guantanamo is continually open to the International Committee of the Red Cross (ICRC) and foreign and domestic media.

The petitioners, in their submissions to the Commission, alleged that there are still about 225 detainees who have been denied access to counsel and that the US military has interfered with their right to a confidential attorney-client relationship. They further alleged that the assurances provided by the US government have proven unreliable; reports by the ICRC, statements by US government officials, government memoranda leaked to the media and media reports indicate, on the contrary, that the detainees have been subjected to beatings, sleep deprivation, sensory deprivation, exposure to extreme temperatures and prolonged isolation, and that such treatment has been approved at the highest levels of authority of the US. It was further noted that detainees have also been transferred to countries with deplorable human rights records and no guarantees that these will refrain from torture. In response to the US position that the Commission had no jurisdiction to deal with this case, the Commission concluded that it has the authority to adopt precautionary measures in respect of non-State parties to the American Convention and to consider and apply IHL. It also stated that the principle of exhaustion did not apply to the precautionary measures, for such measures are “intended to reinforce and complement, rather than replace, domestic jurisdiction”.

In sum, the US jurisprudence proves that a distinction needs to be drawn between IHL and human rights law, in that the first has a stronger hold, providing for non-derogable rights under all circumstances with customary status. With human rights it is easier to argue that these may be derogated from for reasons of state emergency. However, by qualifying the fight against the global threat of terrorism as a “war”, the US government is now facing a “boomerang” effect, finding itself bound by more stringent provisions. In this sense, it can be argued that thanks to IHL, core human rights are better anchored and have a stronger chance to be – if not respected – at least upheld if invoked in a court. With the creation of several international tribunals, breaches of core human rights may qualify as war

crimes or crimes against humanity and also be brought as charges against individuals, rather than states. It shall be recalled, in fact, that human rights violations may only be invoked vertically, whereas breaches of IHL or the commission of crimes against humanity can now be invoked also horizontally.

VI. The Attitude of the European Organs and the European Courts

As mentioned in the introduction, terrorism is not a new phenomenon and several instruments, decisions and other measures have already been enacted. For example the UK, faced with the terrorist threat posed by the IRA, enacted several anti-terrorism laws.⁵⁶ In 2000, it passed the Terrorism Act and in 2001 the Criminal Justice and Police Act, extending police powers. It made a derogation to Art. 15 ECHR and adopted more intrusive surveillance measures. Particularly in response to the anti-terrorism policy adopted in Northern Ireland, several cases were brought to the European Court of Human Rights, particularly in relation to the right to derogate from certain human rights. Art. 15 ECHR provides that:

“A country cannot derogate by adopting measures that are inconsistent with other obligations under international law.”⁵⁷ and that “No derogations may be made from rights contained in the Convention Articles.”⁵⁸

For instance in *Lawless v. Republic of Ireland [No 3]*⁵⁹, which concerned the case of an Irish citizen who had been detained without trial by Irish (rather than British) authorities for five months in 1957, on the basis of his alleged activities as a member of the IRA, the court held that the Irish government was justified in declaring a public emergency and acting as it did.⁶⁰

Between 1957 and 1975, the UK gave notice of derogation from Art. 5 ECHR in order to use extra-judicial powers to deprive suspects of liberty for interrogation, detention and as a preventative measure. On a complaint by Ireland, the European Court found various breaches, particularly in relation to the obligation to preserve access to judicial review. Some contraventions were held to be within a permissible derogation. However, in respect of instances of inhuman treatment and torture,

⁵⁶ E.g. the Northern Ireland (Emergency Provisions) Acts 1973-98 (UK), the Criminal Justice (Terrorism and Conspiracy) Act 1998 (UK) and the Prevention of Terrorism (Temporary Provisions) Acts (UK), in continuous use between 1974 and 2001. The Terrorism Act 2000 (UK) which came into force in February 2001.

⁵⁷ Art. 15(1) ECHR.

⁵⁸ Art. 2 (Right to Life); Art 3. (Prohibition on Inhuman Treatment and Torture); Art. 4(1) (Prohibition on Slavery and Servitude); Art. 7 (Retroactive Laws).

⁵⁹ (1961) 1 EHHR 15.

⁶⁰ *Ibid.*, at 32.

which were found, derogation was not permitted by the Convention. To this extent, the complaint by Ireland was upheld.⁶¹

Another issue related to the question of who bore the onus of establishing justification of the reasonableness of the measures adopted by a national government to combat terrorism, as required under Art. 5(1). In *Fox and Ors v. United Kingdom*⁶² the European Court concluded that:

“the respondent government has to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.”

The European Court has recently dealt also with the Basque separatist movement (ETA) in Spain. Following 9/11 the European Union, in December 2001 and June 2003 acceded to Spain's request to proscribe ETA as a terrorist organisation. Batasuna, the political wing of ETA was dissolved by order of Spain's highest civil court. An appeal to the Constitutional Court of Spain was rejected in January 2004. On 17 March 2003, the Spanish Supreme Court unanimously decided to declare Batasuna a terrorist organisation, and therefore illegal. The de-legalization meant that Batasuna, Euskal Herritarrok and Herri Batasuna were erased from the registry of political parties; that they would not be able to participate in any elections; that none of their activities (meetings, publication, propaganda, electoral process) was to be permitted; and that their patrimonial assets were to be sold off and the proceeds used for social or humanitarian activities. In September 2003 the Basque Government initiated a claim against the Spanish Government at the European Court. The claim alleged that the Law of Political Parties, used as a base to de-legalize Batasuna, violates fundamental rights. In November, the ECHR officially received the cases of 221 Batasuna candidates who were not allowed to stand for office.⁶³ On 5 February 2004 the ECHR rejected the claim, saying that the case was “inadmissible” for technical reasons.⁶⁴ However, the European Court, in its jurisprudence, has acknowledged that European States have a “margin of appreciation” when dealing with terrorism.⁶⁵

⁶¹ (1978) 2 EHRR at 107. See also Hon Justice M. Kirby AC CMG, National Europe Centre Canberra, The Australian National University, 11 November 2004, Robert Schuman Lecture on Terrorism and the Democratic Response: A Tribute to the European Court of Human Rights.

⁶² (1990) 13 EHHR 157.

⁶³ Country Reports on Human Rights Practices – 2003, Released by the US Department of State's Bureau of Democracy, Human Rights, and Labor, 25 February 2004, available at <<http://www.state.gov/g/drl/rls/hrrpt/2003/27865.htm>>; BBC News, World Edition, Spain Maintains Basque Party Ban, 17 January 2004, at <<http://news.bbc.co.uk/2/hi/europe/3405211.stm>>.

⁶⁴ On this aspect see also Thomas Ayres, *Batasuna Banned: The Dissolution of Political Parties under the European Convention of Human Rights*, (27) 1 Boston College International & Comparative Law Review 99 (2004); see Information released by the Bureau of Democracy, Human Rights, and Labor, 28 February 2005, at <<http://www.nationbynation.com/Spain/Human.html>>.

⁶⁵ See also Hon Justice M. Kirby AC CMG, National Europe Centre Canberra, The Australian National University, 11 November 2004, Robert Schuman Lecture (note 61) and K. Dobson, *The Spanish Government's Ban of a Political Party: A Violation of Human Rights?*, 9:2 New England Journal of International and Comparative Law 637 at 639 (2003). See Council Regulation 2580/01 of 28 December 2001 on Specific Restrictive Measures Directed Against Persons and Entities with a View

These are just few of the many cases dealing with the issue of the restriction of human rights of detained suspects of terrorism. The debate is still open. The burden will be on international lawyers to act as watchdogs over politicians, who often decide about the laws to be enacted and implemented, and who may be misled in thinking that the end may justify the means, even when dealing with the derogation from fundamental human rights.

VII. Conclusions

With the launching of the “new war on terror” the coalition led by the United States of America seems to have preferred the use of armed force to repress and prevent a crime which, until recently, belonged to the police and law enforcement agencies’ sphere of competences. This attitude, however, may have had a “boomerang” effect. It is not a coincidence that neither the United Kingdom, Israel, nor any other state faced with major terrorist threats in the past has ever attempted to qualify these situations as an “armed conflict”. Spain and Turkey, for instance, have always considered ETA and the PKK as criminal movements to be dealt with internally. Similarly the UK has always considered the IRA as a terrorist group, not as an irregular armed group. The reason is that the qualification of these situations as a non-international armed conflict would have implied the application of international humanitarian law and its cumbersome provisions. IHL provides for very strict rights to detainees. Combatants in enemy hands shall be granted prisoner of war status and not considered criminals. Fighting is their job, and as long as an attack, no matter how terrifying and bloody it may be, is not primarily aimed at terrorising the civilian population, it shall not be considered a criminal act. This is where the “boomerang” effect and the dilemma of the states engaged in the global war on terror emerge, since their aim is not to consider those they are fighting as combatants entitled to POW status, but as common criminals. But to take this approach, it would have been necessary to conduct the fight against terrorism within the framework of international criminal law, resorting to law enforcement agencies like the police and international criminal cooperation mechanisms, like extradition. The problem, however, is that human rights law applicable in peacetime, unlike IHL, provides that those held captive shall be released within 48 hours if no specific charges are brought against them. How could it be determined exactly, whether those held in Guantanamo were members of the Taliban, entitled to POW status, or members of Al Qaeda – i.e. terrorists – individually involved in the planning and commission of the 9/11 attacks and alike, within 48 hours? This was simply impossible. Thus the idea was to resort to IHL and the provision according to which a POW may be retained until the end of the hostilities. But the major mis-

to Combating Terrorism, Article 2(3), 2001 O.J. (L 344) 2, available at <<http://europa.eu.int/>>. See also EU Blacklists Basque Party, BBC News, 5 June 2003, available at <<http://news.bbc.co.uk/1/hi/world/europe/2965260.stm>>.

take was to not distinguish between the detention of a POW, who shall be prevented from rejoining the enemy forces, and the detention of a criminal, who shall be punished for having committed a specific crime. Consequently even the human rights regimes may differ. POWs are obviously entitled to better treatment in terms of contact with the external world, interrogation, visits, etc. This is why the US courts correctly came to the conclusion that to hold a common suspect of terrorist acts in detention until the end of the so-called “war on terror”, when this undertaking is not designated as an armed conflict, was tantamount to a life-long sentence, requiring the application of specific human rights.

The so-called “war on terror” and the related emerging jurisprudence show the strong bond and complementarity of human rights and IHL.⁶⁶ IHL, given the circumstances, may provide for better treatment. Another advantage is that breach of the fundamental human rights enshrined in IHL, such as those mentioned in Art. 75 of AP I and common Art. 3 to the four GCs, constitute grave breaches subject to mandatory universal jurisdiction that may be invoked against individual perpetrators.

To conduct a fight against terrorism as a war in a strict sense of the term, subject to the rules of IHL, turns out to be counterproductive since the rules are not fashioned to deal with prolonged detention of criminal suspects and, on the contrary, impose strict limitations on the interrogation of detainees.

A better solution would have been to improve international criminal law instruments, particularly extradition rules and emergency laws providing, among others, for administrative detention. Although the latter has been the subject of much criticism, it is certainly a better solution than no provision at all, and one which, at least, is subject to review by international control mechanisms like the UN Committee on Human Rights and is accepted under international law.

⁶⁶ On this see e.g. the Report of the UN Commission for Human Rights (note 2), at 10.

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