



INTERDISCIPLINARY JOURNAL OF HUMAN RIGHTS LAW

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ISOLATIONISM EXPOSED:
THE EVOLUTION OF THE CRUEL, INHUMAN, AND DEGRADING
TREATMENT STANDARD IN THE UNITED STATES SINCE 2001

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The lack of awareness about the International Criminal Court in the United States is alarming. We hope that you, the reader, will join us in our efforts to educate the American public about the importance of the Court. Our goal is to keep the United States engaged in the work of the Court.

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FROM THE EDITOR:

I am pleased to have played the leading role in this Second Volume of *The Interdisciplinary Journal of Human Rights Law*. Human Rights both national and international are of outstanding importance as a serious violation of a human right is not only an offense against an immediate human being, but an offense against all human beings. Since the end of World War Two beginning with the International Military Tribunal at Nuremberg, the human rights movement has been strong, however, not strong enough. Since Nuremberg, there have been numerous systematic human rights violations, including Joseph Stalin in the former Soviet Union, Pol Pot in Cambodia, Pinochet in Chile, and Saddam Hussein in Iraq, just to name a few. Since the fall of communism in Eastern Europe, the doors have opened and international criminal courts similar to Nuremberg have emerged to hold perpetrators who violate international humanitarian and human rights law on a mass scale, individually accountable for their crimes against the international community. Without these tribunals perhaps the history of these tragic events may be forgotten. However, it takes more than just a trial. It takes excellent writing from academic scholars, who take human rights to heart, to write about specific issues so that future generations will know and understand what took place and how the international community responded in each instance.

The first volume of the *Interdisciplinary Journal of Human Rights Law* was quite successful. It was among the 10 most popular human rights journals on ExpressO, the most popular online submission service, and our ability to be selective as a result is easy to see from the quality of the articles. The results are tremendously rewarding to all of us here at the Journal and at CASIN; there have been few more important times for Americans of all ages to think seriously about how to promote human rights and international law in an ever more complicated world. We sincerely hope we've advanced that mission.

This issue is the result of the dedication and sweat of many people. In this case, I'd be remiss not to thank the Journal's Managing Editor, Alice Lawrence, the Board of Editors, M. Cherif Bassiouni, Roger S. Clark, Mary J. Gallant, Jordan Paust, Leila Sadat, and William A. Schabas. Also, I would like to thank Theodore Lechterman, the Editor-in-Chief of *Eyes on the ICC*, for his invaluable technical assistance, and the previous Editor-in-Chief of the *Interdisciplinary of Human Rights Law*, Arthur Traldi for his guidance and the success of Volume 1 Issue 1 of 2006.

We welcome all proposed manuscripts from the social sciences and law concerning human rights issues. Also, we are always welcoming scholars who are willing to review manuscripts for the Journal. You can send resumes to

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Harry M. Rhea
Haddonfield, NJ

ISOLATIONISM EXPOSED: THE EVOLUTION OF THE CRUEL, INHUMAN, AND DEGRADING TREATMENT STANDARD IN THE UNITED STATES SINCE 2001

*William Vidal**

I. INTRODUCTION

A policy storm has hovered over the standard of torture since Congress declared the “war on terror.”¹ The series of bills, amendments, and revisions prompted by the Administration of President Bush have left the public and the academic community in disarray and has cast a veil on the international norm of torture. The international community did not agree on a definition of torture until the adoption of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture) on December 10, 1984.² Following the adoption of the Convention Against Torture, the policy debate shifted from defining torture to implementing and interpreting the Convention. With the “war on terror” and the departure from conventional warfare arose a need to set the boundaries of intelligence interrogations.³ This need brought another shift in the policy debate on torture and presented the first major challenge to the Convention Against Torture by a Western democracy. The debate on the scope of permissible interrogation techniques does not focus on what constitutes torture but on what is cruel, inhuman, and degrading treatment. Throughout the “war on terror,” the Bush Administration has readily admonished torture. What is at issue is the relatively unexplored and vague parameters of Article 16 of the Convention Against Torture, which bans cruel, inhuman, and degrading treatment.⁴ Within this new debate, the central issues are: what constitutes cruel, inhuman, and degrading treatment; what is the threshold difference between torture and cruel, inhuman, and degrading treatment; and is the United States bound by Article 16 of the Convention Against Torture.

This paper traces the evolution of the United States’ definition of cruel, inhuman, and degrading treatment and demonstrates that fueling the policy storm hovering over the standard of torture since 2001 is an intent by the Bush Administration to repudiate the international safeguards against cruel,

* J.D., New York Law School, 2007; B.A., Franklin and Marshall College, 2002. I would like to thank Professor Ruti Teitel for supervising my research and her guidance in writing this paper. Thank you also to Denise Small and Judy Stewart Vidal for kindly reviewing the paper.

¹ Authorization for Use of Military Force, 115 Stat. 224 (2001). The Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) confirmed Congress’ authorization as a declaration of war that triggered the President’s war powers.

² 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk). The United Nations General Assembly adopted unanimously the Convention Against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment on December 10, 1984.

³ President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sep. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984), at Art. 16.

inhuman, and degrading treatment. The impetus for the policy changes stems from the ban on cruel, inhuman, and degrading treatment in the Geneva Convention relative to the Treatment of Prisoners of War⁵ and the Convention Against Torture. The first part of this paper examines the norms established by these two treaties and the resulting restrictions. Having presented the international norms governing cruel, inhuman, and degrading treatment, the second part of the paper provides a chronological examination of how the Bush Administration repudiated these norms. Prior to 2001, the United States had an absolute stance against torture and cruel, inhuman, and degrading treatment.⁶ With the declaration of the “war on terror” and the invasion in Afghanistan, the absolute stance against cruel, inhuman, and degrading treatment eroded. In the months following the attacks of September 11, 2001, the Bush Administration requested a series of memoranda on the threshold of torture.⁷ To provide the intelligence and military community with more discretion during interrogations, the first memorandum adopted a very narrow definition of torture and exploited Congress’ refusal to criminalize cruel, inhuman, and degrading treatment.⁸ Upon the public outcry to the memorandum and the abuse of detainees at Abu Ghraib, the Bush Administration rescinded the 2002 memorandum⁹ and Congress enacted the Detainee Treatment Act.¹⁰ In contrast to the Convention Against Torture the Detainee Treatment Act does not criminalize cruel, inhuman, and degrading treatment nor does the Act adopt international norms. Though the standards delineated in the Detainee Treatment Act successfully isolated the United States from the Convention Against Torture, looming in the background were the protections extended to detainees under the Geneva Convention relative to the Treatment of Prisoners of War. The Supreme Court in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), confirmed that the United States’ treatment of detainees had to conform to the Geneva Conventions. The last section of Part II examines how the Military Commissions Act of 2006 redefined Common Article III of the Geneva Conventions and revoked the last international restriction on the use of cruel, inhuman, and degrading treatment.

The paper concludes by asking where the United States now stands on the issue of cruel, inhuman, and degrading treatment. Though the bout of legislative action since 2001 has isolated the United States from the international bans on cruel, inhuman, and degrading treatment, domestic legislation does uphold a constitutional ban against such treatment. The question re-

⁵ Geneva Convention relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135, Aug. 12, 1949.

⁶ *E.g.*, Comm. Against Torture, United States Report submitted under Article 19 of the Convention Against Torture and Other, Cruel or Degrading Treatment or Punishment, CAT/C/28/Add.5 (Feb. 9, 2000).

⁷ *E.g.*, Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Deputy Attorney General (Dec. 30, 2004).

⁸ *Id.*

⁹ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Deputy Attorney General (Dec. 30, 2004).

¹⁰ Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.).

mains whether the domestic ban on cruel, inhuman, and degrading treatment protects the value of human dignity recognized in international norms.

II. INTERNATIONAL NORMS

To assess the impact of the policy changes prompted by the Bush Administration (“Administration”), it is necessary to first settle what was the object of change. The debates since 2001 on interrogation techniques do not tread on uncharted ground. The international community has regulated the treatment of detainees since the Hague Convention in 1899.¹¹ The Hague Convention established that the detaining power must treat prisoners of war humanely.¹² Following the Hague Convention, the international community elaborated on this general concept of humane treatment in a series of treaties. With the ratification of the Geneva Conventions, the Convention Against Torture, and the International Convention of Culture and Political Rights, the United States became bound by the international norms regulating the treatment of detainees. These three treaties and their respective norms are the focus of the policy changes since 2001. If the United States was to honor its international commitments, the intelligence and military communities’ palette of interrogation techniques would have been severely limited. As Part II of this paper will present, the Administration found that the restrictions placed by international norms on interrogation techniques were unacceptable. The following sections present the repudiated international norms.

A. Geneva Convention relative to the Treatment of Prisoners of War

Within the framework of the Geneva Conventions,¹³ the international community first encoded the rights of prisoners of war in 1929 with the Convention relative to the Treatment of Prisoners of War (“Geneva Convention for POWs”).¹⁴ In reaction to World War II, the international community expanded the Geneva Conventions.¹⁵ When the United States ratified the

¹¹ Hague Convention (II) with Respect to the Laws and Customs of War on Land and Annex: Regulation concerning the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803.

¹² *Id.*, at Chap. ii of the Annex.

¹³ The Geneva Conventions consist of four conventions: 1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted in 1864; 2) Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted in 1907; 3) Convention relative to the Treatment of Prisoners of War, adopted in 1929; and 4) Convention relative to the Protection of Civilian Persons in Time of War, adopted in 1949. In 1949, the international community revised the three existing conventions and adopted the fourth. The four conventions are referred to as the Geneva Conventions of 1949. In the United States, the Geneva Conventions of 1949 entered into force on February 2, 1956.

¹⁴ Geneva Convention relative to the Treatment of Prisoners of War, 47 Stat. 2021, 75 U.N.T.S. 135, Jul. 27, 1929.

¹⁵ Lawfulness of Interrogation Techniques under the Geneva Conventions, CRS Report for Congress, Sep. 8, 2004, at 2.

amended Geneva Conventions in 1955,¹⁶ the Geneva Convention for POWs now provided more defined protections under Article 13 and 17 and included Common Article 3.

Common Article 3 was a compromise on whether to accord all insurgents the protections extended to prisoners of war.¹⁷ In light of the compromise Common Article 3 represents, the Article must be interpreted in relation to the rights accorded to prisoners of war. Article 13 and Article 17 of the Geneva Convention for POWs encode the fundamental principles that underlie the Geneva Conventions for POWs. Beginning with Article 13, the Geneva Convention for POWs provides a broad protection against the physical and psychological abuse of prisoners of war. Article 13 directs that:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.¹⁸

The first sentence of Article 13 provides the objective of the Article, to elaborate on the amorphous concept of humane treatment provided in the Hague Convention of 1899.¹⁹ The widespread abuses of detainees in World War II had just occurred, and it was clear to the international community that broadly worded precepts were not sufficient.²⁰ Article 13 ensures the bodily integrity and survival of prisoners of war by adopting a result and not a cause approach. Article 13 does not attempt to provide the universe of actions a detaining power may not take. Rather, Article 13 directs the detaining power to maintain the health of prisoners of war. Under this approach, both affirmative acts and omissions are held illegal if they endanger a detainee's health. Beyond maintaining the health of prisoners of war, Article 13 protects the physical and mental integrity of prisoners of war. Regardless of the medical harm, the detaining power cannot perform physical experiments on a prisoner of war.²¹ Article 13 also obliges the detaining power to protect a prisoner of war against

¹⁶ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5.

¹⁷ Lawfulness of Interrogation Techniques under the Geneva Conventions, *supra* note 15, at 7.

¹⁸ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5.

¹⁹ Hague Convention (II) with Respect to the Laws and Customs of War on Land and Annex: Regulation concerning the Laws and Customs of War on Land, *supra* note 11.

²⁰ Lawfulness of Interrogation Techniques under the Geneva Conventions, CRS Report for Congress, Sep. 8, 2004, at 2.

²¹ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 13.

all acts of violence and intimidation.²² When taken in their totality, the obligations imposed by Article 13 enshroud prisoners of war in an inviolable physical and mental cloak.

The norms for interrogating prisoners of war delineated in Article 17 reinforce the notion that the Geneva Convention for POWs creates a set of inviolable rights.²³ Article 17 provides that:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.²⁴

The restrictions of Article 17 stemmed from the signatories' desire to balance the need to extract information and the need to protect one's own soldiers and information.²⁵ By including the right not to answer, Article 17 extends the protection on mental integrity to include free will.

When read in conjunction, Article 13 and 17 oblige the detaining power to maintain the health of prisoners of war, protect them from physical and psychological abuse, and respect their free will.²⁶ Instead of creating a ceiling detaining powers may not breach, these conditions create a floor threshold detaining powers must respect. What emerges from this floor threshold is a notion of human dignity comprised of a physical, psychological, and mental component. Article 13 and 17 of the Geneva Convention for POWs protect this notion of human dignity by going as far as prohibiting the use of insults, intimidation, and coercion. Stemming from this threshold, the following issues arise: what level of conduct constitutes coercion and intimidation; to what extent is the manipulation of environmental variables in the cells permissible; and can a detaining power place a prisoner of war in physical positions that cause pain only indirectly.

The protections created by Article 13 and 17 are constrained to detainees deemed prisoners of war. The Administration has taken the position that Al Qaeda and Taliban members do not qualify as prisoners of war.²⁷ In order to qualify as a prisoner of war, a detainee must satisfy the conditions of Article 4

²² *Id.*

²³ *Id.*, at Art. 17.

²⁴ *Id.*

²⁵ Lawfulness of Interrogation Techniques under the Geneva Conventions, CRS Report for Congress, Sep. 8, 2004, at 1.

²⁶ In addition, Article 14 provides that “[p]risoners of war are entitled in all circumstances to respect for their persons and their honor;” Article 16 provides that prisoners shall be treated equally; and Article 25 ensures a minimum level of living conditions.

²⁷ See, U.S. Dep’t of Def., Guantanamo Detainees (Mar. 16, 2004), <http://usinfo.state.gov/dhr/Archive/2004/Mar/17-718401.html> (last visited Nov. 24, 2006) (the controversy concerning prisoner of war status is limited to Taliban fighters, as there is a general consensus that Al Qaeda fighters do not qualify as prisoners of war).

of the Geneva Convention for POWs.²⁸ The Administration asserts that because Taliban and Al Qaeda fighters do not abide by the laws and customs of war, target civilians, and do not wear a fix distinctive sign recognizable at a distance they are not entitled to the protections under Article 13 and 17.²⁹ Though Article 13 and 17 are only applicable to prisoners of war, Common Article 3 rights apply to all detainees.

Common Article 3, present in the four Geneva Conventions, provides a set of rights that transcends the classification of persons involved in armed conflicts and that protects the inherent dignity of all humans recognized in Article 13 and 17.³⁰ Common Article 3 stemmed from a compromise between the signatories that wanted to extend the protections of the Geneva Convention for POWs to all insurgents in an armed conflict and those that wanted to limit the protections to soldiers of a state.³¹ The compromise extended protections to all insurgents but only within a subset of conflicts. Common Article 3 governs all detainees in an “armed conflict not of an international character occurring in the territory of one of the high Contracting Parties.”³² The United States Supreme Court in *Hamdan v. Rumsfeld*, 126 S.Ct. 2795 (2006), interpreted “armed conflict not of an international character” to signify armed conflicts between a state actor and a non-state actor.

Insurgents in an armed conflict that falls within the jurisdiction of Common Article 3 are accorded the following protections:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

²⁸ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 4.

²⁹ See, U.S. Dep’t of Def., Guantanamo Detainees (Mar. 16, 2004), <http://usinfo.state.gov/dhr/Archive/2004/Mar/17-718401.html> (last visited Nov. 24, 2006).

³⁰ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 13.

³¹ Lawfulness of Interrogation Techniques under the Geneva Conventions, CRS Report for Congress, Sep. 8, 2004, at 8. “Soldiers of a state” refers to fighters fighting of the behalf of a recognized state, either as part of a standing army or militia.

³² Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 3.

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.³³

The two relevant protections regarding the treatment of detainees during interrogations are clauses (1)(a) and (1)(c). Clause (1)(a) prohibits “violence to life and person,”³⁴ which includes torture and cruel treatment. Clause (1)(a) does not specify what constitutes torture or cruel treatment. Issues such as the threshold of pain required for an act to constitute torture remain open. Beyond the absence of a pain threshold, the clause also does not provide any contextual parameters. Is the intent to extract information and the intentional causing of pain necessary for an act to constitute torture or cruel treatment? The lack of specificity of Clause (1)(a) provides signatories with ample discretion in their selection of interrogation techniques. On the other hand, the expansiveness of clause (1)(c) is a liability to signatories. Clause (1)(c) prohibits acts that constitute “outrages upon personal dignity, in particular, humiliating and degrading treatment.”³⁵ Based on a literal reading, this prohibition creates a very low threshold for the range of acceptable interrogation techniques. The concept of personal dignity potentially includes far reaching rights. The Universal Declaration of Human Rights sets out an expansive view of human dignity that is rooted in the concepts of freedom and equality.³⁶ Based on Article 13 and Article 17, upholding dignity entails preserving a detainee’s free will and protecting the detainee against coercion. In view of the compromise nature of Common Article 3, there is a strong argument that the Article, while not according all the privileges given to prisoners of war or the rights in the Universal of Declaration of Human Rights, protects the mental and physical integrity of a detainee. Under this view, Common Article 3 prohibits a detaining power from using coercive interrogation techniques.

Beyond observing the thresholds set in Common Article 3, a signatory has to enact criminal penalties in order to satisfy its obligations under the Geneva Conventions.³⁷ When the United States ratified the Geneva Conventions in 1955, it agreed to criminalize the commission of grave breaches.³⁸ Congress did not satisfy this obligation until 1996, when it enacted 18 U.S.C. §2441.³⁹ Section 2441(a) states, “[w]hoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Universal Declaration of Human Rights, U.N. Doc A/810 at 71 (1948).

³⁷ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 129.

³⁸ H.R. Rep. No. 104-698, at 3 (1996).

³⁹ *Id.*

penalty of death.”⁴⁰ Subsection (b) of section 2441 defines war crimes. Among the crimes listed is a grave breach of Common Article 3.⁴¹

B. Convention Against Torture

The United Nations General Assembly adopted unanimously the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment in 1984.⁴² The United States signed the treaty in 1988, and the Senate consented to the Convention Against Torture in 1990.⁴³ However, the United States could not ratify the Convention Against Torture until the Senate criminalized torture in 1994.⁴⁴ The Senate made the ratification of the Convention Against Torture contingent on several understandings and reservations.⁴⁵ The international community contested these understandings and reservations, which significantly limited the United States’ obligations under the Convention Against Torture.⁴⁶ The United States prevailed and adopted both a narrow definition of torture and a standard of cruel, inhuman, and degrading treatment confined to domestic jurisprudence.⁴⁷

The significance of the Convention Against Torture lies in its definition of torture and obligation to prosecute torturers.⁴⁸ In relation to torture, the Convention provides the leading international norms governing the use of force against detainees. Article 1 of Convention Against Torture states:

[T]he term "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

⁴⁰ War Crimes Act of 1996, 18 U.S.C.A. § 2441.

⁴¹ *Id.*

⁴² 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

⁴³ *Id.*

⁴⁴ S. Rep. No. 103-107 (1993).

⁴⁵ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

⁴⁶ Sanford Levinson, “*Precommitment*” and “*Postcommitment*”: *the ban on torture in the wake of September 11*, 81 TEX. L. REV. 2013, 2037 (2003) (the Netherlands contested the United States reservations and understandings, alleging that they fundamentally altered the character of the Convention).

⁴⁷ *Id.*

⁴⁸ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (Sen. Pell).

not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴⁹

In consenting to the Convention Against Torture, the Senate passed the following understanding concerning Article 1:

[I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁵⁰

As explicitly stated by the understanding, torture according to the Senate requires a specific intent. Such a requirement is not present in Article 1. Article 1 requires the alleged torturer to only have intentionally performed the condoned act. In contrast, the Senate's understanding requires that the alleged torturer had the intent to inflict "severe physical pain or suffering." The specific intent requirement narrows the definition of torture and places the United States at odds with the definition adopted by the 141 other signatories.⁵¹ Because the standard set in Article 1 is the foundation for the subsequent articles, the Senate's understanding essentially created a parallel convention.

The Senate's reservation to Article 16 further supports that the Senate drafted a new convention. Article 16 of the Convention Against Torture states that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at

⁴⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 1.

⁵⁰ *Id.*

⁵¹ Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited on Dec. 31, 2006).

the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁵²

Beyond outlawing torture, the Convention Against Torture in Article 16 bans cruel, inhuman, and degrading treatment. Though Article 16 does not provide a definition of cruel, inhuman, and degrading treatment, it does instruct that the threshold for the ban on cruel, inhuman, and degrading treatment is to be lower than torture.⁵³ Given that Article 1 encapsulates the most egregious breaches to the human body, the Convention Against Torture through Article 16 seeks to ban more than sheer brutality. Article 16 instills and protects the concept of human dignity. Article 16 and Common Article 3 recognize a set of intrinsic values and rights that stem from the mere fact of being human and that belong to a person regardless of the status assigned by the detaining power.

The Senate's reservation to Article 16 unilaterally sets the threshold on cruel, inhuman, and degrading treatment. The reservation asserts that an action violates Article 16 only if the action violates the 5th, 8th, or 14th Amendments of the United States' Constitution.⁵⁴ Beyond the lack of international consensus, the reservation raises several issues. What threshold do the 5th, 8th, and 14th Amendments create? There is precedent involving domestic police enforcement,⁵⁵ but is this precedent applicable? Would the Supreme Court apply the same thresholds in the context of war and terrorism? Further complicating the issue is the non-categorical nature of the ban on cruel, inhuman, and degrading treatment. In Article 2, the Convention Against Torture explicitly 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."⁵⁶ There is no comparable clause concerning the ban on cruel, inhuman, and degrading treatment. Does this imply that a war or emergency may justify cruel, inhuman, and degrading treatment? Would the war on terrorism qualify or could the ongoing threat of terrorism constitute an emergency? Do the 5th, 8th, and 14th Amendments recognize such a justification?

Lastly, in consenting to the ratification of the Convention Against Torture, the Senate declared that Articles 1 through 16 were not self-executing (implying that without further legislation, the Convention Against Torture has no legal teeth against an American citizen).⁵⁷ By making Article 1 through 16 not self-executing, Congress was able to pick and choose which sections of the Convention Against Torture to implement and further limit the liability

⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 16.

⁵³ The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens, CRS Report for Congress, Mar. 11, 2004, at 4.

⁵⁴ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

⁵⁵ *E.g.*, *Rochin v. California*, 342 U.S. 165 (1952).

⁵⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 2.

⁵⁷ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

of the intelligence community. The Convention Against Torture only obliges signatories to criminalize torture.⁵⁸ So, Congress enacted 18 U.S.C. §2340-2340B and did not criminalize cruel, inhuman, and degrading treatment. The definition of torture adopted by section 2340 mirrors the definition provided by the Senate in the understanding to Article 1. The Department of Justice would come to rely on the disparate treatment between cruel, inhuman, and degrading treatment and torture to stretch the boundaries of permissible interrogation techniques.⁵⁹ Through understandings, reservations, and declarations, Congress created a shadow Convention Against Torture that differed fundamentally from the international norm.

C. Other Relevant Treaties and Declarations

The Universal Declaration of Human Rights (“Declaration”) and the International Covenant on Civil and Political Rights (“Covenant”) are the other two primary international texts outlawing torture and cruel, inhuman, and degrading treatment. The Declaration emerged from the international community’s belief that peace could only be achieved if the world strived to respect a basic set of rights and values.⁶⁰ The Declaration is the embodiment of these rights and the recognition of all human beings’ inherent dignity.⁶¹ Article 5 of the Declaration states, “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” Though the Declaration is not legally binding on the signatories, Article 5 reflects the international community’s consensus on cruel, inhuman, and degrading treatment.

The Covenant stemmed from the international community’s effort to elaborate on the rights in the Declaration and make the rights legally binding. The United States signed the Covenant in 1977; but, the Senate did not ratify it until 1992 and made the Covenant non-self-executing.⁶² Article 7 of the Covenant provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”⁶³ In Article 10, the Covenant further provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁶⁴ Article 7 of the Covenant parallels the ban on torture in the Convention Against Torture; while, Article 10 reflects the no-

⁵⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 4.

⁵⁹ “Torture is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture.” Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), at 7.

⁶⁰ Eleanor Roosevelt, <http://www.udhr.org/history/ergeas48.htm> (last visited Dec. 31, 2006).

⁶¹ Universal Declaration of Human Rights, U.N. Doc A/810 at 71 (1948).

⁶² *See*, Sen. Comm. on Foreign Relations Report on the International Covenant on Civil and Political Rights (Comm. Print 1992).

⁶³ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1976).

⁶⁴ *Id.*, at Art. 7.

tion embodied by Common Article 3 that, beyond not committing acts of torture, a detaining power has an affirmative duty to respect a detainee's mental and physical integrity.

The central issue with the Covenant is that it does not present a liability threat to United States' officials because the Covenant is not self-executing and Congress did not enact Article 7 or 10. In addition, the Covenant contains a derogation clause. Article 4 of the Covenant allows a signatory to derogate from the obligations under the treaty "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."⁶⁵ Though there is strong argument that Congress' declaration of the "war on terror" triggered the derogation clause, the clause gave the Administration little respite. The rights under Article 7 and 10 of the Covenant and the rights in the Declaration are embodied in the Geneva Convention for POWs and the Convention Against Torture, which were legally binding on the United States.

III. THE POLICY STORM

The unconventional nature and tactics of terrorists has posed the intelligence community⁶⁶ and the Department of Defense a thorny dilemma. How do you extract information from combatants who believe martyrs are rewarded in the afterlife? Aggravating the problem is the pressing need for information. There is little debate that Al Qaeda and terrorists pose a serious threat to the United States; yet, terrorists present no clear targets to attack, their leadership is not accessible, and their operations are covert.⁶⁷ If the intelligence community and the military are to protect the United States, they need information and targets.⁶⁸ Shortly after the attacks on September 11, 2001, the Administration realized that standing in the way of obtaining information was the Convention Against Torture and Common Article 3. The policy storm surrounding the standard of torture and cruel, inhuman, and degrading treatment since 2001 has centered on dismantling the barriers raised by these international norms. The policy changes instigated by the Administration came in two waves. The first series of policy activity were aimed at the Convention Against Torture and involved the torture memoranda, Abu Ghraib, and the resulting Detainee Treatment Act. The Supreme Court's decision in *Hamdan* prompted the second series of policy changes, which centered on shielding the United States from Common Article 3. The following sections trace the evolution of the United States' standard on cruel, inhuman, and degrading treatment in these two waves of policy changes.

⁶⁵ *Id.*, at Art. 10.

⁶⁶ For the purposes of this paper, the term "intelligence community" refers to the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation. A distinction is made between the Department of Defense and intelligence community because they are subject to different standards. *See*, Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.).

⁶⁷ President Discusses Creation of Military Commissions to Try Suspected Terrorists on Sep. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (last visited Dec. 12, 2006).

⁶⁸ *Id.*

A. Before 9/11

Prior to 2001, the United States supported an absolute stance against torture and cruel, inhuman, and degrading treatment. Beginning in 1984, in the midst of United Nations' adoption of the Convention Against Torture, Congress declared:

[I]t is the continuing policy of the United States Government to oppose the practice of torture by foreign governments through public and private diplomacy and, when necessary and appropriate, through the enactment and vigorous implementation of laws intended to reinforce United States policies with respect to torture.⁶⁹

Six years later, in consenting to the Convention Against Torture, Senator Kassebaum stated, “[t]orture is simply not accepted in this country, and never will be.”⁷⁰ The United States reaffirmed its position against torture and cruel, inhuman, and degrading treatment in the Report to the Commission Against Torture in 1999. In the Report, the United States declared that “[t]orture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority.”⁷¹ Concerning cruel, inhuman, and degrading treatment, the Report noted that the United States' laws do not permit cruel, inhuman, and degrading treatment even in times of emergency.⁷²

The Military perpetuated Congress' zero-tolerance policy in the Field Manual on Intelligence Interrogation (“Field Manual I”).⁷³ Field Manual I extended to prisoners of war, captured insurgents, and “other captured, detained, or retained persons” the protections under the Geneva Conventions.⁷⁴ This grant of protections by the Military was quite broad. Notably, Field Manual I did not differentiate between lawful and unlawful enemy combatants.

In discussing the extent to which Military interrogators were to respect the bodily integrity of detainees, Field Manual I stated that “.... US policy expressly prohibit[s] acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhuman treatment as a means of or aid to interrogation.”⁷⁵ Not satisfied with simply making a policy statement,

⁶⁹ H.R.J. Res. 605, 98th Cong. (1984).

⁷⁰ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Sen. Kassebaum); in further a condemnation of torture Senator Pell in consenting to CAT's resolution for ratification states, “By ratifying this convention, the United States will demonstrate that it is determined to take concrete steps to eradicate this evil and inhumane practice.” 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Sen. Pell).

⁷¹ Comm. Against Torture, United States Report submitted under Article 19 of the Convention Against Torture and Other, Cruel or Degrading Treatment or Punishment, *supra* note 5, at 4.

⁷² *Id.*, at 5.

⁷³ U.S. Dep't. of the Army, Field Manual 34-52: Intelligence Interrogation, Headquarters (Sep. 28, 1992).

⁷⁴ *Id.*, at 1-7.

⁷⁵ *Id.*, at 1-8.

Field Manual I supported its stance against torture and cruel, inhuman, and degrading treatment with the following reasoning:

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear. Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also may place US and allied personnel in enemy hand at a greater risk of abuse by their captors.⁷⁶

Because the Geneva Conventions did not provide a definition of torture or cruel, inhuman, and degrading treatment and the United States had not yet ratified the Convention Against Torture, the Military adopted a two-prong strategy to define the scope of permissible interrogation techniques. First, the Military defined the parameters of torture and cruel, inhuman, and degrading treatment. Field Manual I provided:

Physical or mental torture and coercion revolve around eliminating the source's free will, and are expressly prohibited by GWS [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field], Article 13; GPW [Geneva Convention relating to the Treatment of Prisoners of War], Articles 13 and 17; and GC [Geneva Conventions relative to the Protection of Civilian Persons During Times of War], Articles 31 and 32. Torture is defined as the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure....Coercion is defined as actions designed to unlawfully induce another to compel an act against one's will.⁷⁷

The second prong of the strategy centered on providing examples of torture and coercion. Under the examples of physical torture, the Military included bondage inflicting excessive pain, stress positions, and any form of beating.⁷⁸ Within the examples of mental torture, the Military included abnormal sleep deprivation.⁷⁹ By not differentiating acts of abuse according to how much pain they inflict, Field Manual I set a low threshold for torture that incorporated the Convention Against Torture's ban on cruel, inhuman, and degrading treatment. Pre-2001, the Military adhered to a standard of torture that indisputably protected the bodily integrity of all detainees. This standard would come to pose unwelcomed limitations after 9/11.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

B. Immediately following 9/11

The attacks of September 11, 2001, and the declaration of the “war on terror” by Congress altered the operational theater of the intelligence community and the Military. The United States was suddenly at war with a faceless enemy that had a different set of values and did not abide by international norms. The looming domestic threat and the invasion of Afghanistan created a pressing need for information and the Administration demanded results.⁸⁰ However, unlike a conventional enemy, Al Qaeda did not have identifiable troops, headquarters, weapons, and most importantly, Al Qaeda did not fight its war in the open.⁸¹ The only sources of information available were captured Taliban and Al Qaeda members.⁸² Inevitably, the issue arose of which techniques interrogators could use to extract information from detainees. Given Congress’ approval to use all necessary and appropriate force⁸³ and the need for information, the intelligence community and the Military were confronted with a new set of demands and challenges compared to pre-9/11.

Pressure to loosen the restrictions on interrogation techniques arose from frustrated federal agents shortly after September 11, 2001.⁸⁴ An article published in the *Washington Post* on October 21, 2001, documents that within a month of the attacks, federal officials began concluding that traditional interrogation techniques were not effective.⁸⁵ Offers of reduced sentences, money, and witness protection programs were being rebuffed by detainees, who the Federal Bureau of Investigation (“FBI”) believed possessed valuable information. The article quotes one FBI agent as stating “[w]e’re into this thing for 35 days and nobody is talking....[and] frustration has begun to appear.”⁸⁶ Another senior FBI official was quoted as stating, “[u]sually there is some incentive, some angle to play, what you can do for them. But it could get to that spot where we could go to pressure....where we don’t have a choice, and we are probably getting there.”⁸⁷ Beyond the domestic realm, testimony by a Central Intelligence Agency (“CIA”) official indicates that harsher interrogation techniques were resorted to immediately after the September 11, 2001 attacks. While testifying to a joint hearing of the House and Senate intelligence committees on September 26, 2001, Coffer Black, then head of the CIA coun-

⁸⁰ President Discusses Creation of Military Commissions to Try Suspected Terrorists on Sep. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (last visited Dec. 12, 2006).

⁸¹ *Id.*

⁸² Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, at A6.

⁸³ Authorization for Use of Military Force, 115 Stat. 224 (2001).

⁸⁴ Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, at A6. Article is further discussed by Sanford Levinson, “Precommitment” and “Postcommitment”: the ban on torture in the wake of Sep. 11, 81 TEX. L. REV. 2013, 2037 (2003).

⁸⁵ Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, at A6.

⁸⁶ *Id.*

⁸⁷ *Id.*

terterrorism center, stated, “[a]ll I want to say is that there was ‘before 9/11’ and ‘after 9/11.’ After 9/11 the gloves came off.”⁸⁸

Aggravating the frustration of the interrogators and the absolute need for information was Congress’ broad authorization of force. The Authorization for Use of Military Force (“Authorization”) states,

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁸⁹

Beyond authorizing the use of force against a nation, the Authorization permits the use of all necessary and appropriate force against persons.⁹⁰ The lack of meaningful limitations on this consent of force against persons presented a departure from Congress’ past stance on interrogation techniques. Prior to 9/11, Congress and the Military had made it clear that torture and cruel, inhuman, and degrading treatment were not permissible.⁹¹ One explanation for this authorization is that Congress completely reversed its policy. Another interpretation is that because the threat of terrorism arises from individuals and not nations, Congress needed to allow the intelligence community and the Military to kill or capture individuals. Regardless of the interpretation, the specific authorization to use force immediately shed doubts on the zero-tolerance policy Congress supported prior to 9/11.

Turning to the wording of the Authorization, Congress conditioned the use of force against persons to “necessary and appropriate” situations. What is appropriate at a given point in time depends on context. The attacks on September 11, 2001, drastically changed the operating context. Therefore, what may have been inappropriate before 9/11, such as the use of force against detainees, could now be appropriate. Faced with the FBI’s inability to lure information from detainees, the need for information, and a broad delegation of power, justifying the use of force against detainees became an irresistible solution.

C. Memoranda on Torture

The Administration had secured a broad declaration of war and now it needed information to wage a successful “war on terror.” Standing in the way was the Convention Against Torture. When the United States ratified the Convention Against Torture, Congress criminalized torture.⁹² A primary con-

⁸⁸ J. Trevor Ulbrick, *Tortured Logic: the (il)legality of United States interrogation practices in the war on terror*, 4 Nw. U. J. INT’L HUM. RTS. 210, para. 21 (2005) (discussing the Department of Justice memoranda on torture between 2001 and 2003).

⁸⁹ Authorization for Use of Military Force, 115 Stat. 224 (2001).

⁹⁰ *Id.*

⁹¹ See, *supra* note 73 and 76.

⁹² 18 U.S.C. §2340-2340A.

cern of the Administration was that a court may qualify certain interrogation techniques as torture and subject interrogators to criminal sanctions.⁹³ Other international norms were not of concern because procedural guards were available. The Administration had already taken the position that the Geneva Conventions did not apply to illegal enemy combatants;⁹⁴ while, the non-self-executing nature of the International Covenant for Political and Civil Rights and its derogation clause made any obligations arising from the treaty moot.⁹⁵ The Department of Justice took the first stab at the Convention Against Torture on August 1, 2002, in a memorandum interfering the definition of torture.⁹⁶ The memorandum supported a shockingly narrow definition and a blanket immunity for interrogators.⁹⁷ Following the memorandum came the public outcry over the treatment of detainees at Abu Ghraib, and the Department of Justice rescinded its 2002 position in a new memorandum.⁹⁸ While the 2004 memorandum adopted a definition of torture that was more aligned with the Convention Against Torture, the memorandum remained silent on cruel, inhuman, and degrading treatment.⁹⁹ By the end of 2004, though the Administration had not succeeded in watering down the definition of torture, it had successfully defended the use of cruel, inhuman, and degrading treatment.

The Office of Legal Counsel drafted the first memorandum entitled, “Standards of Conduct for Interrogation under 18 U.S.C. § 2340-2340A” (Memorandum I), at the request of the President.¹⁰⁰ To expand the scope of permissible interrogation techniques, the memorandum drew several tenuous conclusions. 18 U.S.C. §2340A criminalizes acts of torture performed outside the United States, regardless of the victim’s nationality. Therefore, the majority of the memorandum centered on narrowing the definition of torture and determining which interrogation techniques were beyond the definition. Memorandum I first affirmed the specific intent requirement created by the Senate’s understanding to Article I of the Convention Against Torture and reflected in 18 U.S.C. §2340.¹⁰¹ Section 2340 requires that the defendant specifically intended to inflict severe pain, instead of Article 1’s general intent requirement that the defendant only have knowledge of the forbidden act’s consequences.¹⁰²

Not satisfied with the already narrow definition established by the Senate’s reservation, Memorandum I provided a contentious interpretation of “severe pain.” According to both Article 1 of the Convention Against Torture and section 2340, an act to constitute torture must cause “severe physical or

⁹³ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) at 1.

⁹⁴ *Id.*

⁹⁵ *Supra* note 64.

⁹⁶ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*, at 2.

¹⁰⁰ *Id.*, at 1.

¹⁰¹ *Id.*

¹⁰² *Id.*, at 4.

mental pain or suffering.”¹⁰³ To interpret the condition of “severe pain” Memorandum I turned to domestic statutes on emergency medical conditions.¹⁰⁴ Based on these statutes, Memorandum I established that “severe pain” does not correspond to a victim’s experience of pain but to the severity of the ailment causing the pain.¹⁰⁵ Using this interpretation, Memorandum I concluded that a victim only experiences severe pain if the victim dies, suffers from organ failure, or suffers the permanent impairment of a significant body function.¹⁰⁶ With regard to mental harm, Memorandum I opted for a less disingenuous approach. The additional requirement adopted by the Senate that the mental harm be prolonged¹⁰⁷ does not appear in United States Code.¹⁰⁸ As a result, Memorandum I confined its interpretation of “prolonged” to “some lasting, though not necessarily permanent damage.”¹⁰⁹ However, Memorandum I’s use of permanent is misleading. To illustrate the lasting but not permanent threshold Memorandum I cited chronic depression and post-traumatic stress disorder. Post-traumatic stress disorder is documented to last years,¹¹⁰ suggesting the Administration’s interpretation of “prolonged” was as radical as its interpretation of “severe pain.” In addition to establishing a prohibitive temporal requirement, Memorandum I limited the recognized causes of mental harm to the four sources provided in Section 2340.¹¹¹ When combined, the Senate’s intent requirement and Memorandum I’s interpretation of “severe” and “prolonged” created a threshold of torture that outlawed only the most heinous of acts.

¹⁰³ *Id.*, at 5.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, at 6.

¹⁰⁶ *Id.*

¹⁰⁷ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

¹⁰⁸ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) at 7.

¹⁰⁹ *Id.*

¹¹⁰ The epistemological facts about Post Traumatic Stress Disorder (PTSD) provided by the National Center for PTSD state that “PTSD is a highly prevalent lifetime disorder that often persists for years.” The Center is part of the United States department of Veterans Affairs. United States Department of Veterans Affairs, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_epidemiological.html (last visited on Mar. 4, 2007). Chronic depression refers to a less severe form of depression that lasts for a prolonged period of time and for which the average recovery time is 4 years. Harvard Mental Health Letter (Feb. 2005), <http://www.health.harvard.edu/news/week/Dysthymia.htm>.

¹¹¹ Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.) (Section 2340 recognizes causes of mental harm from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality).

Beyond making extremely brutal acts legal, Memorandum I differentiated with little impunity cruel, inhuman, and degrading treatment from torture.¹¹² Memorandum I stated that “certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the prerequisite intensity to fall within 2340A’s proscription against torture.”¹¹³ In illustrating its dismissal of cruel, inhuman, and degrading treatment, Memorandum I found that simply kicking the detainee in the stomach did not violate section 2340.¹¹⁴ Memorandum I completed its analysis of section 2340 with a very contentious declaration that the section could be held unconstitutional if it prevented the Commander-in-Chief from gaining intelligence.¹¹⁵ This argument is beyond the scope of this paper and as such is not further discussed.

Two years passed before the public became aware of the intelligence community and the Military’s mistreatment of detainees. The public outcry over the treatment of detainees at Abu Ghraib arose in the spring of 2004¹¹⁶ and led to the Department of Justice rescinding Memorandum I.¹¹⁷ In a memorandum to the Deputy Attorney General entitled, “Legal Standards Applicable under 18 U.S.C. §2340-2340A” (Memorandum II), the Administration adopted a more neutral interpretation of section 2340.¹¹⁸ Released on December 22, 2004, Memorandum II began by confirming American law and values’ admonishment of torture, a position that Memorandum I did not iterate.¹¹⁹ Memorandum II then used the plain meaning rule of construction in conjunction with the Convention Against Torture to determine the meaning of “severe pain” in section 2340.¹²⁰ According to the dictionaries severe means “extremely violent or intense.”¹²¹ Memorandum II placed the dictionary definition in the context of the Convention Against Torture and determined that torture is an extreme form of cruel, inhuman, and degrading treatment.¹²² In qualifying extreme, Memorandum II explicitly stated that torture is not confined to excruciating and agonizing levels of pain or suffering.¹²³ To provide parameters of “severe pain,” Memorandum II turned to cases under the Torture Victims Protection Act.¹²⁴ By focusing on the pain felt by the victim, in-

¹¹² See, Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002).

¹¹³ *Id.*, at 1.

¹¹⁴ *Id.*, at 27.

¹¹⁵ *Id.*, at 31.

¹¹⁶ Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 *IND. L.J.* 1255, 1282 (Fall 2006) (analyzing the factors that lead to the abuse of detainees at Abu Ghraib).

¹¹⁷ Press Briefing by White House Counsel Judge Alberto Gonzales et al. on Jun. 22, 2004, at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (last visited Mar. 5, 2007).

¹¹⁸ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Deputy Attorney General (Dec. 30, 2004).

¹¹⁹ *Id.*, at 1.

¹²⁰ *Id.*, at 2.

¹²¹ *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1653 (3rd ed. 1992); see also *supra* note 119, at 3.

¹²² *Id.*, at 3.

¹²³ *Id.*, at 4.

¹²⁴ *Id.*, at 5.

stead of the source of the pain, Memorandum II realigned the United States' interpretation of "severe pain" with the Convention Against Torture.

As to "prolonged mental harm," Memorandum II found that section 2340 predicates the harm on two requirements. The first requirement is that the mental pain arise from one of the four sources delineated in section 2340.¹²⁵ The second requirement centers on the durational requirement inserted by the Senate. In interpreting this durational requirement, Memorandum II also resorted to a plain meaning construction and referred to cases under the Torture Victims Protection Act.¹²⁶ Other than finding that the harm must have some lasting duration,¹²⁷ Memorandum II shied away from providing concrete parameters. Memorandum II concluded by casting doubt on the requisite intent a person must have to commit torture and whether knowledge may satisfy the intent requirement.¹²⁸

The significance of Memorandum II does not lie in the standards it sets but in its interpretation of Article 1 of the Convention Against Torture. By restating the issues and parameters associated with Article 1 as they were expressed during the ratification of the Convention Against Torture,¹²⁹ Memorandum II signaled the United States had reverted to its pre-9/11 position on torture.¹³⁰ Though Memorandum II realigned the United States' position on torture, it did not reestablish the ban on cruel, inhuman, and degrading treatment. By the end of 2004, the Administration had successfully provided interrogators with a wider palette of permissible techniques. In contrast to the 2000 Report to the Committee Against Torture,¹³¹ the Administration was no longer explicitly prohibiting cruel, inhuman, and degrading treatment. The Administration's silence on the issue amounted to a grant of discretion. The decision to use cruel, inhuman, and degrading treatment now rested in an interrogator's personal assessment and not on a binding legal standard.

D. Detainee Treatment Act of 2005

The first phase of the policy storm ended with the enactment of the Detainee Treatment Act of 2005.¹³² Other than a rescinded attempt to narrow the definition, the Administration had maintained the United States' stance against torture in the post-9/11 period.¹³³ What the Administration had ex-

¹²⁵ *Id.*, at 7.

¹²⁶ *Id.*, at 8.

¹²⁷ *Id.*

¹²⁸ *Id.*, at 9.

¹²⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 1.

¹³⁰ See, Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, to Deputy Attorney General (Dec. 30, 2004).

¹³¹ Comm. Against Torture, United States Report submitted under Article 19 of the Convention Against Torture and Other, Cruel or Degrading Treatment or Punishment, *supra* note 5, at 4.

¹³² Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.).

¹³³ In a 2000 report, President Clinton's Administration took the position that "Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority." Comm. Against Tor-

ploited since 2001 is the loophole the Senate created in 1994 by not criminalizing cruel, inhuman, and degrading treatment.¹³⁴ In reaction to the abuse of detainees at Abu Ghraib and the torture memoranda, the need for a binding policy on cruel, inhuman, and degrading treatment became evident. In the fall of 2005, Congress enacted the Detainee Treatment Act to address the legal vacuum surrounding cruel, inhuman, and degrading treatment.¹³⁵ Though it is undisputable that some form of policy is better than no regulation, the Detainee Treatment Act furthered the Administration's objective of isolating the United States from international norms.

The Detainee Treatment Act delineates a general standard prohibiting cruel, inhuman, and degrading treatment and a specific standard governing the conduct of Department of Defense officials. Section 1003 prohibits cruel, inhuman, and degrading treatment by asserting, "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."¹³⁶ Section 1003's prohibition is expansive and conveys an absolute stance against cruel, inhuman, and degrading treatment. The prohibition applies regardless of where the public official is located and regardless of the detainee's status.¹³⁷ Further, section 1003 creates a legally binding norm on all public officials.¹³⁸ By enacting such an expansive and legally binding norm, it appeared Congress had closed the loophole the Senate created in 1994.¹³⁹

In light of section 1003's broad ban and application, the lurking question remains how did Congress define cruel, inhuman, and degrading treatment. The Detainee Treatment Act defines cruel, inhuman, and degrading treat-

ture, United States Report submitted under Article 19 of the Convention Against Torture and Other, Cruel or Degrading Treatment or Punishment, *supra* note 5, at 4. In June 2004, White House Counsel Judge Alberto Gonzales stated, "President Bush knows his most important job is to protect this nation. At the same time, he's made it clear, in the war against al Qaeda and its supporters, the United States will follow its treaty obligations and U.S. law, both of which prohibit the use of torture." Press Briefing by White House Counsel Judge Alberto Gonzales, et al. on June 22, 2004, at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>. In September 2006, President Bush stated, "I want to be absolutely clear with our people, and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it -- and I will not authorize it." President Discusses Creation of Military Commissions to Try Suspected Terrorists on Sept. 26, 2006, at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

¹³⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 1. Because the Senate declared that the Convention Against Torture was not a self-executing treaty, a legal obligation did not arise from the Convention's ban on cruel, inhuman, and degrading treatment.

¹³⁵ RS Report for Congress, Interrogation of Detainees: Overview of the McCain Amendment, Jan. 24, 2006, at CRS-2.

¹³⁶ Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.) at sec. 1003.

¹³⁷ CRS Report for Congress, Interrogation of Detainees: Overview of the McCain Amendment, Jan. 24, 2006, at CRS-4.

¹³⁸ *Id.*, at CRS-3.

¹³⁹ *See*, Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.).

ment as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.”¹⁴⁰ By creating a standard of cruel, inhuman, and degrading treatment exclusively grounded in the United States Constitution, the Detainee Treatment Act’s ban played directly in the Administration’s hand. The Detainee Treatment Act’s definition isolated the United States. An integral aspect of the Convention Against Torture is that it represents an international consensus.¹⁴¹ With the enactment of the Detainee Treatment Act, Congress opted to ignore the international norm on cruel, inhuman, and degrading treatment in the Convention Against Torture and adopt the Senate’s understanding to Article 16. This benefited the Administration because problematic decisions by the European Court of Human Rights (European Court) concerning which techniques constitute inhuman and degrading treatment now bared little to no weight. In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (1978), the European Court found that stress-positions, hooding, subjection to noise, sleep deprivation, and deprivation of food and water were impermissible interrogation techniques that amounted to inhuman and degrading treatment.¹⁴² The Administration has sanctioned the use of all these interrogation techniques.¹⁴³

The second standard in the Detainee Treatment Act regulates the conduct of Department of Defense officials. Section 1002 states:

No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.¹⁴⁴

In addition to respecting the ban against cruel, inhuman, and degrading treatment in section 1003, Section 1002 requires that Department of Defense officials abide by the Army Field Manual on Intelligence Interrogation. When Congress enacted the Detainee Treatment Act, the Army Field Manual on Intelligence Interrogation (Field Manual I) provided detainees with broad protections under the Geneva Conventions and forbid interrogators from physi-

¹⁴⁰ Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.) at sec. 1002.

¹⁴¹ See, Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited on Dec. 31, 2006).

¹⁴² See also, CRS Report for Congress, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, Sep. 8, 2004, at CRS-21.

¹⁴³ See, Dep’t of the Army, Field Manual 2-22.3: Human Intelligence Collector Operations, Sep. 6, 2006, at 5-75 (in contrast to Field Manual I, Field Manual II does not categorize hooding, water boarding, or sleep deprivation as torture or cruel, inhuman, and degrading treatment).

¹⁴⁴ See, Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.), at sec. 1002.

cally abusing detainees.¹⁴⁵ Contrary to the Administration's stance that the Geneva Conventions did not apply to unlawful enemy combatants, Section 1002 through its reference to Field Manual I raised the possibility that detainees' had rights under the Geneva Convention for POWs. Therefore, prior to Congress' enactment of the Detainee Treatment Act, Secretary of Defense Rumsfeld announced that the Military would revise Field Manual I.¹⁴⁶

Not surprisingly, the revised version of Field Manual I¹⁴⁷ (Field Manual II) restricted the protections accorded to unlawful enemy combatants. Other than reaffirming the United States' ban on torture,¹⁴⁸ Field Manual II contrasts sharply with Field Manual I. Field Manual II does not refer to the Geneva Conventions to delineate the minimum set of protections granted to detainees.¹⁴⁹ Instead, Field Manual II directs army officials to treat all detainees in accordance with the Detainee Treatment Act.¹⁵⁰ To the advantage of the Administration, the Detainee Treatment Act does not provide the safeguards on dignity that are stated in the Geneva Conventions. Such safeguards may flow from the 5th, 8th, and 14th Amendments, but they have yet to be established in the context of cruel, inhuman, and degrading treatment. Further indicating that the Administration shifted the emphasis away from the mental and physical integrity of a detainee, Field Manual II removed the definition of coercion and only refers to a detainee's free will when discussing the treatment of lawful enemy combatants.¹⁵¹ In an attempt to make the Detainee Treatment Act more concrete to military officers, Field Manual II also provides examples that violate the Act. In contrast to Field Manual I, the examples do not include stress positions and sleep deprivation.¹⁵² One of the examples does provide, "applying beatings, electric shock, burns, or other forms of physical pain."¹⁵³ However, the cause of pain between "beatings, electric shocks, and burns" and stress positions differs. With stress position, the actions of the interrogator do not inflict the pain.¹⁵⁴ As a result of the revisions, Field Manual II striped the protections accorded by international norms to unlawful enemy combatants and left interrogators with an abstract standard.

The liability threat that the Administration perceived under 18 U.S.C. §2430 instigated the first phase of the policy storm. To satisfy the need for in-

¹⁴⁵ See, U.S. Dep't. of the Army, Field Manual 34-52: Intelligence Interrogation, Headquarters (Sep. 28, 1992); see also, *supra* note 71.

¹⁴⁶ Human Rights First Press Release, Torture: Proposed New Army Field Manual Is a First Step but Must Apply to Everyone, http://www.humanrightsfirst.org/media/2005_alerts/etn_0428_manual.htm (last visited Dec. 8, 2006).

¹⁴⁷ Dep't of the Army, Field Manual 2-22.3: Human Intelligence Collector Operations, Sep. 6, 2006.

¹⁴⁸ *Id.* at 5-89. Consistent with Field Manual I, Field Manual II asserts that "[a]cts of violence or intimidation, including physical or mental torture, or exposure to inhumane treatment as a means of or aid to interrogation are expressly prohibited" and declares torture inefficient."

¹⁴⁹ *Id.* at 5-74.

¹⁵⁰ *Id.* at 5-74.

¹⁵¹ *Id.* at 5-89.

¹⁵² *Id.* at 5-75 (for a complete list of prohibited actions).

¹⁵³ *Id.* at 5-75.

¹⁵⁴ CRS Report for Congress, Lawfulness of Interrogation Techniques Under the Geneva Conventions, Sep. 8, 2004, at CRS-38.

formation and ensure that interrogators did not breach section 2340's torture ban, the Administration adopted a very narrow view of torture. The lack of legally binding norms on cruel, inhuman, and degrading treatment and ambiguous guidance by commanders resulted in the abuses at Abu Ghraib.¹⁵⁵ In response, the Administration revised its narrow definition of torture and Congress enacted the Detainee Treatment Act. Where did this leave the United States on the issue of torture and cruel, inhuman, and degrading treatment? Concerning the standard of torture, the United States reverted to the Senate's interpretation of torture made in 1992. As for cruel, inhuman, and degrading treatment, Congress did create a legally binding standard; but, the Administration succeeded in ensuring that the international norms on cruel, inhuman, and degrading treatment did not govern American interrogators. By the end of the policy storm's first phase, the administration had isolated the United States from the ban on cruel, inhuman, and degrading treatment in the Convention Against Torture and had fully revoked the protections of unlawful enemy combatants under the Geneva Conventions.

E. Military Commissions Act of 2006

The Supreme Court spurred the second phase of the policy storm by breathing life back into the Geneva Conventions. As a result of the policy storm's first phase, the Administration's policy on the treatment of detainees was only constrained by domestic norms. On June 29, 2006, the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), shattered the Administration carefully constructed isolationism. In *Hamdan*, the Supreme Court made it clear that Common Article 3 of the Geneva Conventions applied to all detainees, including unlawful enemy combatants.¹⁵⁶ The Supreme Court's recognition of Common Article 3 threatened interrogators with civil lawsuits and criminal charges. The Administration responded by urging Congress to enact the Military Commissions Act.¹⁵⁷ On October 17, 2006, the Military Commissions Act became law¹⁵⁸ and stripped once again unlawful enemy combatants of their rights under the Geneva Conventions.¹⁵⁹

Salim Ahmed Hamdan (Hamdan) was Osama bin Laden's bodyguard and personal driver.¹⁶⁰ As a member of Al Qaeda, Hamdan was subject to the presidential order of November 13, 2001, and to be tried by a military commission.¹⁶¹ The government charged Hamdan of conspiracy to commit the at-

¹⁵⁵ Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 *IND. L.J.* 1255, 1259 (Fall 2006) (analyzing the factors that lead to the abuse of detainees at Abu Ghraib).

¹⁵⁶ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2796 (2006).

¹⁵⁷ Military Commissions Act of 2006, H.R. 6166, 109TH Cong. (2nd Sess. 2006).

¹⁵⁸ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.).

¹⁵⁹ *Id.*

¹⁶⁰ *Hamdan*, 126 S.Ct. at 2761.

¹⁶¹ On November 13, 2001, President Bush issued a presidential order that stated that any member of Al Qaeda or any detainee engaged in terrorist activities against the United States shall be tried by military commission. Presidential Order, "detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism," 66 *Fed. Reg.* 57833, Nov. 13, 2001.

tacks of September 11, 2001, and prior terrorist attacks.¹⁶² Hamdan filed a writ of habeas corpus, and on November 8, 2004, the United States District Court for the District of Columbia granted Hamdan's petition.¹⁶³ The District Court found that conspiracy was not a triable offense under the law of war and that Hamdan was entitled to the full protections under Common Article 3.¹⁶⁴ The Court of Appeals for the District of Columbia reversed, finding that a military commission could not try Hamdan for the charge of conspiracy and that the Geneva Conventions did not apply to Hamdan.¹⁶⁵ On November 7, 2005, the Supreme Court granted certiorari to determine whether a military commission could try a charge of conspiracy and whether the Geneva Conventions applied to Hamdan.¹⁶⁶

Focusing on the Supreme Court's discussion of the Geneva Conventions, the Supreme Court provided a concise argument for enforcing the Geneva Conventions. Dismissing the precedent relied on by the Court of Appeals as not controlling,¹⁶⁷ the Supreme Court found that the Geneva Conventions were indisputably part of the law of war.¹⁶⁸ Based on the premise that a reference to the law of war entailed the application of the Geneva Conventions, the Supreme Court observed that Article 21 of the United Code of Military Justice (Military Justice Code) limited the jurisdiction of military commissions to offenses recognized by statute or the law of war.¹⁶⁹ The Court therefore concluded that military commissions had to apply the Geneva Conventions.¹⁷⁰

The thornier issue was whether the Geneva Conventions applied to Hamdan, a member of a terrorist organization. The Supreme Court turned to Common Article 3. The jurisdictional clause of Common Article 3 states, "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions."¹⁷¹ The issue was whether the conflict in Afghanistan constituted an "armed conflict not of an international character." To interpret the meaning of "armed conflict not of an international character" the Supreme Court compared Common Article 2 and 3. The Supreme Court found that Common Article 2 addressed conflicts between two or more nations, while Common Article 3 addressed conflicts between a nation and individuals.¹⁷² Because the conflict with al Qaeda involved a nation against a group of individuals, the Supreme Court held that

¹⁶² *Hamdan*, 126 S.Ct. at 2759.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2760.

¹⁶⁵ *Id.* at 2762.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, at 2794.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*, at 2774.

¹⁷⁰ *Id.*

¹⁷¹ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 3.

¹⁷² *Hamdan*, 126 S.Ct. at 2796 (in reaching its interpretation of Common Article 3, the Supreme applied the literal meaning of "not of an international character," not between nations).

the protections of Common Article 3 extended to Hamdan, an unlawful enemy combatant.¹⁷³

The Supreme Court's finding that Common Article 3 extended to unlawful enemy combatants shattered the Administration's policy on interrogation techniques. Field Manual II references the law of war under the list of laws and policies that govern the conduct of interrogations.¹⁷⁴ Because it was the appeal to the law of war in the Military Justice Code that triggered the Court's application of Common Article 3 in Hamdan, Field Manual II now opened the door for detainees to challenge the Administration's interrogation techniques as violations of Common Article 3. Further threatening the Administration's stance on interrogation techniques was the liability *Hamdan* created under the War Crimes Act.¹⁷⁵ The Administration's interrogation techniques now potentially constituted war crimes.

The Administration had refused to apply the Geneva Conventions to illegal enemy combatants because Common Article 3 sets a low threshold. Common Article 3 protects detainees against "outrages upon personal dignity, in particular, humiliating and degrading treatment."¹⁷⁶ As discussed in Part I, the concept of "personal dignity" implies potentially far-reaching protections, and at a minimum, protects the mental and physical integrity of a detainee. The threshold created by Common Article 3 stood completely at odds with the Administration's stance on interrogations. As of June 2006, the Administration firmly believed that terrorism was still a serious threat to the United States and that physical pressure was a legitimate interrogation technique when a detainee with valuable information refused to cooperate.¹⁷⁷ In view of the Administration's interrogation policy, it was a matter of time before the Supreme Court held that recourse to physical pressure violated Common Article 3. The Administration's answer to the liability threat created by *Hamdan* was the Military Commissions Act of 2006.

The Military Commissions Act strips unlawful enemy combatants of all rights under the Geneva Conventions and amends the War Crimes Act.¹⁷⁸

¹⁷³ *Id.* (for Common Article 3 to apply there is the added condition that the armed conflict take place within the territory of a High Contracting Parties, which Afghanistan was).

¹⁷⁴ *Id.*, at 5-68.

¹⁷⁵ War Crimes Act, 18 U.S.C. § 2441 (1997).

¹⁷⁶ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 3.

¹⁷⁷ "I cannot describe the specific methods used -- I think you understand why -- if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary." President Discusses Creation of Military Commissions to Try Suspected Terrorists, Sep. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (last visited Dec. 12, 2006).

¹⁷⁸ The Military Commissions Act of 2006 has broad repercussions on the legal rights of detainees classified as unlawful enemy combatants. Besides the Act's amendment of Common Article 3, other prominent repercussions not discussed in this paper are the mandating of trials by military commission and the revoking of habeas corpus. *See*, Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.).

Beginning with the status of a detainee, the Military Commissions Act defines a lawful enemy combatant as either:

- a) A member of a state's regular forces.
- b) A member of a militia group affiliated with a state who wears a distinctive and observable sign and that abides by the law of war.
- c) A member of a regular armed force whose allegiance is to a government the United States does not recognize.¹⁷⁹

These definitions parallel the criteria set by the Geneva Convention for POWs to determine whether a detainee qualifies as a prisoner of war.¹⁸⁰ Anyone who does not meet one of the above criteria is an unlawful enemy combatant under the Military Commissions Act.¹⁸¹

Upon providing an expansive definition of an unlawful enemy combatant, the Military Commissions Act proceeds to revoke the rights of unlawful enemy combatants under the Geneva Conventions. The revocation is indirect. First, the Military Commissions Act states that all unlawful enemy combatants are subject to trial by military commission.¹⁸² Then, the Military Commissions Act states that military commissions will not enforce the rights of unlawful enemy combatants under the Geneva Conventions.¹⁸³ Therefore, technically, the Military Commissions Act does not repeal rights; the Act only revokes the remedy to any violation of the Geneva Conventions. In analyzing the relationship between a right and a remedy, Justice Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803) stated, “[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”¹⁸⁴ By refusing to recognize the Geneva Conventions, the Military Commissions Act renders the rights of unlawful enemy combatants under the Geneva Conventions legally unenforceable. A legally unenforceable right is a right without a remedy, and based on Justice Marshall's invariable principle, a right without a remedy is not a right. Therefore, the Military Commissions Act's refusal to recognize the Geneva Conventions did, in effect repeal the rights of unlawful enemy combatants under the Geneva Conventions.

Simply preventing unlawful enemy combatants from invoking their rights under the Geneva Conventions was not sufficient to address the liability threat created by *Hamdan*. The refusal to recognize the Geneva Conventions only prevented detainees from suing the Administration. Criminal liability still threatened the interrogators. When the Supreme Court issued its judgment in *Hamdan*, grave breaches of Common Article 3 was a punishable of-

¹⁷⁹ *Id.*, at 948a.

¹⁸⁰ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 4.

¹⁸¹ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at 948a.

¹⁸² *Id.*, at 948c.

¹⁸³ *Id.*, at 948b(f).

¹⁸⁴ *Marbury v. Madison*, 5 U.S. 137, 147 (1803)

fense under the War Crimes Act.¹⁸⁵ In view of the broad ban on cruel, inhuman, and degrading treatment in Common Article 3, it was a distinct possibility that the use of physical pressure on a detainee could constitute a grave breach. To shield interrogators from criminal liability, the Administration amended the War Crimes Act.

In 1996, the United States enacted the War Crimes Act to comply with Article 129 of the Geneva Convention for POWs.¹⁸⁶ Article 129 requires signatories to criminalize grave breaches of the Geneva Convention for POWs.¹⁸⁷ The War Crimes Act declared a grave breach of Common Article 3 as one of the several punishable offenses. By not specifying which violations of Common Article 3 constituted a grave breach, the War Crimes Act bound the United States to the totality of Common Article 3. To shield interrogators from criminal liability, the Military Commissions Act confined “grave breaches” of Common Article 3 to torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages.¹⁸⁸

In stark contrast to Common Article 3, the list of grave breaches detailed by the Military Commission Act does not refer to human dignity and degrading or humiliating treatment. Though the list does include “cruel and inhuman treatment” and “intentionally causing serious bodily injury,” these violations have a very high threshold. The Military Commissions Act limits “cruel and inhuman treatment” to severe or serious physical or mental pain or suffering,¹⁸⁹ which is nothing less than the threshold for torture.¹⁹⁰ While for “causing serious bodily injury,” the Military Commissions Act requires either a substantial risk of death, extreme physical pain, disfigurement, or significant loss or impairment of a bodily part.¹⁹¹ The threshold for “causing serious bodily injury” is arguably higher than the threshold for torture set in 18 U.S.C. §2340.¹⁹² As a result, by limiting grave breaches to extremely violent acts, the Military Commissions Act rendered breaches of Common Article 3 moot.

In a clear indication of the Administration’s intent, the Military Commissions Act directs the Supreme Court not to rely on foreign or international sources of law to interpret grave breaches of Common Article 3¹⁹³ and entrusts the President with the authority to interpret the Geneva Conven-

¹⁸⁵ War Crimes Act, 18 U.S.C. § 2441 (1997), at (a)(3).

¹⁸⁶ War Crimes Act, 18 U.S.C. § 2441 (1997).

¹⁸⁷ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 4.

¹⁸⁸ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at sec. 8.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (the Military Commissions Act refers to 18 USC §2430 to define “severe and serious.” 18 USC §2430 is the statute Congress enacted to criminalize torture, as mandated by the Convention Against Torture.).

¹⁹¹ *Id.*

¹⁹² For a discussion on the interpretation of “severe” refer to Part II(C) of this paper.

¹⁹³ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at sect. 8(a) (subsection (d) of 18 U.S.C. §2441 enumerates the list of actions constituting grave breaches of Common Article 3 under the War Crimes Act.).

tions.¹⁹⁴ The intent of the Administration in drafting the Military Commissions Act was to shield interrogators and military commissions from the international norms embodied in the Geneva Conventions. The Administration achieved this objective by revoking the protections of unlawful enemy combatants under the Geneva Conventions and essentially redrafting Common Article 3. The purpose of Common Article 3 was to create a basic set of protections for all individuals involved in armed conflict, including insurgents. To this end, Common Article provided a list of prohibited actions.¹⁹⁵ By altering the list of prohibited actions, the Military Commissions Act changed the essence of Common Article 3. The second phase of the policy storm ended with the Administration successfully revoking the last international safeguard against cruel, inhuman, and degrading treatment and changing the law of war. The international precepts of war no longer protected the physical and mental integrity of illegal enemy combatants.

IV. CONCLUSION

Everyone prizes information, but when does the price for the information become unacceptable? The attacks of September 11, 2001, made it clear that terrorism is a serious threat to the United States and that terrorists are not the traditional enemy. The tactical tools of terrorists are secrecy and the disregard of the law.¹⁹⁶ Piercing terrorists' covert networks is necessary to defend the United States.¹⁹⁷ However, how do you extract information from individuals for whom dying in the name of their cause constitutes an honor? This problem plagued the Administration in the aftermath of September 11, 2001, and so, the Administration resorted to physical force.¹⁹⁸ Besides the questionable efficiency of forceful interrogation techniques,¹⁹⁹ the international community has raised two central safeguards against torture and cruel, inhuman, and degrading treatment. The Convention Against Torture and the Geneva Convention for POWs both ban the use of physical pressure during interrogations and uphold the mental and physical integrity of all detainees, regardless of their status as unlawful or lawful enemy combatants. As a result of the Detainee Treatment Act and the Military Commissions Act, the international norms governing cruel, inhuman, and degrading treatment no longer apply. Interrogators in their treatment of unlawful enemy combatants only have to abide by the constitutional standards set in the 5TH, 8TH, and 14TH Amendments.

Two salient questions that arise from the Administration's actions to liberalize interrogation techniques are whether the President can make a binding

¹⁹⁴ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at sect. 8(a).

¹⁹⁵ *Hamdan*, 126 S.Ct. at 2796 n63.

¹⁹⁶ President Discusses Creation of Military Commissions to Try Suspected Terrorists on Sep. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ U.S. Dep't. of the Army, Field Manual 34-52: Intelligence Interrogation, Headquarters (Sep. 28, 1992), at 1-8.

interpretation of a treaty without the prior consent of two-thirds of the Senate, and what standards do the 5TH, 8TH, and 14TH Amendments of the United States Constitution set? Concerning the latter issue, Prof. Kreimer's analysis of the 13th Amendment poses an important obstacle to the Administration's stance that the use of physical pressure is legal.²⁰⁰ Before the 13th Amendment abolished slavery, the law recognized a master's absolute authority over a slave.²⁰¹ Whether to respect a slave's bodily integrity was at the master's discretion.²⁰² By enacting the 13TH Amendment, Congress extended the legal protection against assaults on the body to all persons and recognized bodily integrity as a fundamental value.²⁰³ Given this recognition of bodily integrity, the sanctioning of the cruel, inhuman, and degrading treatment does not seem reconcilable with the 13TH Amendment. Reflecting on fundamental values, Deputy Under Secretary of State Robert Murphy stated about the Geneva Conventions that,

They reflect enlightened practices as carried out by the United States and other civilized countries and they represent largely what the United States would do whether or not a party to the conventions. Our own conduct has served to establish higher standards and we can only benefit by having them incorporated in a stronger body of conventional war-time law.²⁰⁴

Given the supremacy of the Constitution and the enlightened norms prescribed in the Geneva Conventions, it is far from clear that intelligence gathering should come at the expense of the 13TH Amendment or Common Article 3.

Since this paper was written, the Administration has confirmed its attempt to exploit the ambiguity surrounding the cruel, inhuman, and degrading standard and has partially reversed its policy. On July 20, 2007, President Bush signed an executive order that sought to realign the United States' policy with the Geneva Conventions.²⁰⁵ When Congress enacted the Military Commissions Act, it limited which crimes constituted grave breaches of the Geneva Conventions and gave the President the authority to specify which

²⁰⁰ Seth F. Kreimer, "Torture lite," *full bodied* Torture, and the Insulation of Legal Conscience, 1 J. NAT'L SECURITY L. & POL'Y 187, 210 (2005) (analyzing the standards the Supreme Court discussed in relation to detainee's constitutional protections against physical abuse and discussing possible constitutional arguments against the use of cruel, inhuman, and degrading treatment).

²⁰¹ *Id.*, at 210.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ S. Rep. No. 103-107 (1993).

²⁰⁵ Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007, <http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html>.

acts would constitute non-grave breaches.²⁰⁶ As a result of the Military Commissions Act, the United States found itself only outlawing the most egregious of acts. Recognizing that such a position undermined the essence of the Geneva Conventions and fundamental values embodied in the Constitution, the President used his authority under the Military Commissions Act to lower the threshold on acceptable interrogation techniques.

While reaffirming that unlawful enemy combatants are not entitled to the protections accorded under the Geneva Conventions, the executive order extends Common Article 3 protections to all detainees. Section 3 of the executive order begins with the President asserting, “I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency.”²⁰⁷ The executive order then enumerates which thresholds the Central Intelligence Agency (“CIA”) must respect in order to comply with Common Article 3. Beyond torture and the acts listed in 18 U.S.C. §2241, the executive order prohibits:

(E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield

(F) acts intended to denigrate the religion, religious practices, or religious objects of the individual²⁰⁸

In a marked contrast to Field Manual II and the Military Commissions Act, the executive order includes humiliating and degrading acts. However, similarly to the Senate’s understanding on torture,²⁰⁹ the President added an intent requirement that is not present in Common Article 3. Under the executive order, a humiliating or degrading act is forbidden only if the actor acts with the specific intent of humiliating or degrading a detainee. In comparison, Common Article 3 outlaws all humiliating or degrading acts regardless of the actor’s intent.

Though the executive order is a clear attempt by the Administration to reconcile the Military Commissions Act with the Geneva Conventions and acknowledges the value of outlawing humiliating and degrading treatment, the executive order may be just a façade. As noted by P.X. Kelley and Robert F. Turner, both appointees of President Reagan and staunch advocates of the

²⁰⁶ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at sec. 8.

²⁰⁷ Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007, <http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html>, sec. 3(a).

²⁰⁸ *Id.*, at sec. 3(b)(i)(C).

²⁰⁹ See, *supra* note 51.

Administration's war time measures, "[i]t is clear to us that the language in the executive order cannot even arguably be reconciled with America's clear duty under Common Article 3 to treat all detainees humanely and to avoid any acts of violence against their person."²¹⁰ Supporting the notion that the executive order is little more than window dressing is its unilaterally setting of a specific intent requirement and its omission of any reference to human dignity. Moreover, the executive order shields interrogators from liability by indirectly applying Common Article 3 and does not ban the use of stress positions, sleep deprivation, or water boarding. These discrepancies suggest that the Administration has understood the political value of recognizing the dignity of all humans but cannot resist the expediency of violence.

²¹⁰ P.X. Kelley and Robert F. Turner, *War Crimes and the White House*, WASH. POST, July 26, 2007, at A21.

FUNDAMENTAL RIGHTS IN MULTI-LEVEL LEGAL SYSTEMS: RECENT DEVELOPMENTS IN EUROPEAN HUMAN RIGHTS PRACTICE

*Clemens A. Müller**

I. INTRODUCTION

As long as the European Union (EU) Constitution Treaty is not in force, the interaction between courts within the European System still remains a challenge. However, it is not only the relationship between the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) which raises questions. The role which national states have to play in a world of globalisation and international constitutionalism¹ seems more and more important. Many State acts are performed in compliance with international regulations and therefore often without discretion. Delegation of sovereign rights from states to supra-national organisations like the EU or international organisations like the World Trade Organisation (WTO) causes new interrelations and fragmentation in international law.² As a consequence, the legislation of these institutions affects each other and often individuals are the real addressees of adopted decisions. Particularly when it comes to human rights interferences, individuals are often without a remedy at all or—if available—the proper judicial institution remains uncertain.

The sanction regime by the United Nations (UN) Security Council exposes this assumption particularly well: Going from the general to the particular, the Council acts visibly in some disputes as a ‘world legislature’.³ The adoption of the resolution 1267 for example imposes, *inter alia*, upon member states to freeze the assets of persons suspected of being involved in terrorist activity. At international level, affected persons cannot invoke the International Court of Justice (ICJ) to assess the lawfulness of this act.⁴ At regional level, like the European Community (EC), UN resolutions dealing with economic sanctions are implemented by EC Regulations and therefore individuals could call on the ECtHR or ECJ. While the access to the latter is very re-

* Dipl. iur. (University of Hamburg, Germany), LL.M. candidate (National University of Ireland, Galway), Scholarship holder by the German Academic Exchange Service (DAAD). The author is grateful to Shane Brown for the correction of language shortcomings and to Dr. Ray Murphy for supervision. The manuscript of this paper was finished in spring 2007.

¹ See, e.g., L. Wildhaber, *A Constitutional Future for the European Court of Human Rights*, 23 HRLJ (2002), p. 161; D. Chalmers et al. (ed.), *EUROPEAN UNION LAW* (2006), chapter 2, p. 44 et seq.; J.P. Trachtman, *The Constitutions of the WTO*, 17 EJIL 2006, p. 623; A. Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LJIL (2006), p. 579.

² See Report of the Study Group of International Law, ‘Fragmentation of international law’, UN Doc. A/CN.4/L.682, 16 April 2006. See for the WTO & EC Relationship: S. Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice*, in G. de Búrca & J. Scott, *THE EU AND THE WTO* (2003), p. 111; see further Cases: C-149/96, Portugal v. Council; C-392/98 Christian Dior and Lhayher; C-111/99 Léon van Parys. All Judgements of the ECJ and Court of First Instance (CFI) are available at <http://curia.europa.eu/>.

³ See S. Talmon, *The Security Council as World Legislature*, 99 AJIL (2005), p. 175.

⁴ Art. 34 ICJ Statute.

strictive for individuals⁵, the ECtHR can not examine EU/EC acts, as the EU/EC is not a member of the European Convention of Human Rights (ECHR or "Convention"). The only possibility which remains is an indirect control of the implementation through considering the state act itself.

This example shows that as long as an "International Court of Human Rights" is not in place and as long as the EU is not a member of the ECHR, great uncertainty and a lack of judicial remedy could remain. It also points out the judicial interaction between the international, national and regional level with regard to the protection of human rights. All in all, within the European system four levels of interrelation can be assumed: first, the relationship between the UN legal order and the Community legal order and second, the legal order set forth in the ECHR and the Community legal order. Furthermore, the national legal order and the Community legal order as well as the national legal order and the ECtHR.

The only relationship which seems to be somewhat clear in that muddle is that between the national and EC legislation.⁶ The EC legal order claimed direct effect and supremacy.⁷ The ECJ has also created a doctrine of protection of human rights. Starting with the *Stauder*⁸ case in 1969, the Court revisited its protection of fundamental rights in the case of *Internationale Handelsgesellschaft*⁹ and later in the cases *Nold*¹⁰ and *Hauer*¹¹ in 1974 and 1979 made its first references to the ECHR. After the creation of the EU at Maastricht in 1992 and the adoption of the treaties of Amsterdam and Nizza, the protection of human rights is set forth in Article 6 (2) TEU and the (not yet binding) Charter of Fundamental Rights of the European Union¹², which is incorporated in the EU Constitution Treaty in part II. However, the ECJ's ad hoc treatment of human rights through a doctrine of principles of fundamental rights seems to take into account concerns which member states have regarding their constitutional rights and their loss of competence. Indeed, it is also an unavoidable way to save the principle of supremacy. A recent development in the ECJ jurisprudence is the application of ECtHR case-law to the Third-Pillar of the EU (Police and Judicial Co-Operation in Criminal Matter).¹³ Here, a new conflict between national courts and Luxembourg seems to evolve. The German Federal Constitutional Court had declared the national

⁵ Art. 230 TEC.

⁶ See on this well discussed topic P. Alston (ed.), *THE EU UND HUMAN RIGHTS* (1999); A. von Bogdandy, *The EU as a Human Rights Organisation? Human rights and the Core of the European Union*, 37 CMLR 2000, p. 1307. R. Ahmed & I. de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EJIL (2006) p. 771; S. Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution?*, 6 HRLR (2006), p. 323.

⁷ Case 16/64 *Costa v. Enel* [1964] ECR 585. *Further*: P. Craig & G. de Búrca, *EU Law*, Chapter 6, p. 255.

⁸ Case 26/29 *Stauder v. City of Ulm* [1969] ECR 419.

⁹ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁰ Case 4/73 *Nold v. Commission* [1974] ECR 491.

¹¹ Case 44/79 *Hauer v. Rheinland-Pfalz* [1979] ECR 3740.

¹² See EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm.

¹³ Case 105/03 *Pupino*, [2005] ECR I-5285. See 26 HRLJ (2005), p. 75.

EU Arrest Warrant Act as contrary to the German Basic Law, without mentioning the ECJ findings in the *Pupino* Case.¹⁴

The relationship between the ECtHR and the national legal order is varied among the member states, as the ECHR itself does not make provision for the methods of its incorporation into national law. The status of the Convention in the member states of the Council of Europe can be divided in several different types: First, states where the Convention has the Status of the Constitution¹⁵, second, states where the Convention has the same rank as domestic law¹⁶, and third, states where the Convention has a rank between the constitution and the domestic law¹⁷. This causes more for some member than for others as far as the relationship to the ECtHR is concerned.¹⁸ E.g. in Austria, belonging to the first group of member states, the rights enshrined in the ECHR are applicable in the Austrian Constitutional Court in the same way as those set forth in the Austrian Bill of Rights. Therefore the human rights standard in Austria is at a very high level as individuals, administrative authorities and legislature are aware of their Convention rights. On the contrary Germany, belonging to the second group, the status of the ECHR and the role of the ECtHR is not yet very clear. In the recent *Görgülü* case the German Federal Constitutional Court made an ambiguous statement with regard to the execution and effects of the decisions of the ECtHR.¹⁹ In the aftermath many statements by those responsible were made in an effort to avert further damage, while the anxiety not to lose legal competence is unmistakable. Indeed, most of the German judges consider the rights enshrined in the ECHR as less

¹⁴ See Bundesverfassungsgericht Case No. 2 BvR 2236/04 Judgement 18. July 2005. See further: H. Satzger & T. Pohl, *The German Constitutional Court and the European Arrest Warrant*, 4 JICJ (2006), p. 585; C. Tomuschat, *Ungereimtes – Zum Urteil des Bundesverfassungsgerichts vom 18. Juli 2005 über den Europäischen Haftbefehl*, 32 EuGRZ (2005), p. 453.

¹⁵ This is the case for Austria. In the Netherlands, the Convention has even primacy to the domestic constitution. See in particular: H. Tretter, *Austria*, in R. Blackburn & J. Polakiewicz (ed.), *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES* (2001), p. 103; L. F. Zwaak, *Netherlands, ibid.*, p. 595.

¹⁶ This is the case, e.g., in Germany, Italy, Norway, Sweden, Finland, San Marino and Denmark.

¹⁷ E.g., Belgium, Cyprus, Croatia, Eastland, France, Great Britain, Greece, Ireland, Luxemburg, Malta, Portugal, Slovakia, Slovenia, Spain.

¹⁸ See J. Polakiewicz, *The Status of the Convention in National Law*, in R. Blackburn & J. Polakiewicz (Ed.), *supra* note 14, p. 31.

¹⁹ BVerfG 74, 358. Translation in: 25 HRLJ (2004), p. 99. See further: Cremer, *Zur Bindungswirkung von EGMR-Urteilen*, EuGRZ 2004, p. 683. The Court states: "Within the German legal system, the European Convention on Human Rights and its protocols, to the extent that they have come into force for the Federal Republic of Germany, have the status of a federal statute. This classification means that German Courts must observe and apply the Convention *within the limits of the canons of justifiable interpretation* like other statute law of the Federal Government [...] (para. 32, emphasis added)." In taking into account decisions of the ECtHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular with regard to a partial system of domestic law whose legal consequences are balanced and that is intended to achieve an equilibrium between differing fundamental rights." (para. 57).

important and the approach of the Federal Constitutional Court does not really clarify the matter for them.

The two remaining relationships mentioned above are between the European Communities and the UN legal order and the ECJ in Luxembourg and the ECtHR in Strasbourg. The latter nearly seemed clarified until the ECtHR came up with the *Bosphorus*²⁰ case in June 2005, where it had to consider a national act based on an EC regulation implementing a UN resolution. The change the court made in the relationship is worth analysing as the decision can be seen as a new “leading case”²¹. It involves assessing whether the court’s findings are appropriate for a sustainable individual human rights strengthening within the European system.

The interaction between the UN and the European legal order was unsettled up to now, as both European courts were silent in regard to that.²² The example of freezing assets of suspected terrorists was decided by the Court of First Instance (CFI) in the cases of *Yusuf, Kadi*²³ in 2005 and *Hassan, Ayadi*²⁴ in 2006. Here, the CFI had to answer the question of which legal rule—EC or UN—prevails, and whether Community courts are authorized to rule on the lawfulness of UN resolutions.

The following article will illuminate these two relationships on the basis of the recent cases and give a prospect for a coherent human rights framework within the regional European system.

II. THE BOSPHORUS CASE AND THE RELATIONSHIP BETWEEN THE EUROPEAN COMMUNITY AND THE ECTHR

1. Previous cases

The Bosphorus case has to be considered in light of the previous case-law concerning the relationship between the ECtHR and the European Community. As the EC/EU is not a member of the ECHR, the issue is whether member states can be held responsible for violations of Convention rights when implementing EC/EU regulations. The first decision considering that problem was made by the European Commission of Human Rights in its *Melchers*²⁵ case. The Court had to examine an executive act by the German Minister of Justice who was implementing a decision by the EC Commission

²⁰ *Bosphorus Hava yollari Turizm Ve Ticaret AS v. Ireland*, App. No. 45036/98, Judgement 30 June 2005 (hereinafter “Bosphorus”). All ECtHR Judgements are available at HUDOC, <http://cmiskp.echr.coe.int/tkp107/search.asp?skin=hudoc-en>.

²¹ S. Douglas-Scott, *A tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 CMLR (2006) p. 629, 637.

²² See Case T-184/95, *Dorsch Consult v. Council and Commission*, [1998] ECR II-667; *Bosphorus Case*, *supra* note 20.

²³ Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Judgement 21 September 2005. (hereinafter “Yusuf”); Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, Judgement 21 September 2005. (hereinafter “Kadi”)

²⁴ Case T-49/04, *Faraj Hassan v. Council and Commission*, Judgement 12 July 2006. (hereinafter “Hassan”); Case T.253/02, *Chafiq Ayadi v. Council and Commission*, Judgement 12 July 2006. (hereinafter “Ayadi”)

²⁵ M & Co. 64 Decisions Reports, p. 138.

concerning fines. The Commission of Human Rights stated that member states cannot evade their responsibility under the Convention by transferring powers to international organisations and that acts of national authorities remain under the obligations of the ECHR and the control of the ECtHR if implementing EU obligations.²⁶ However, the complaint was declared inadmissible, as the human rights standard provided within the European Community is equivalent to that provided under the ECHR and further scrutiny is not compatible with the sovereignty of supranational organisations. This “equal protection” doctrine was later compared by scholars to the *Solange* cases the German Federal Constitutional Court delivered with regard to its relationship to the ECJ and the EC legal order.²⁷ In similar cases the European Commission for Human Rights reiterated its findings,²⁸ while the ECtHR was more restrained²⁹. The Strasbourg Court made a change in its *Matthews* case were it has to review the *EC Act on Direct Elections of 1976* which was akin to EC primary law but without jurisdiction to the ECJ.³⁰ *Matthews*, a citizen of Gibraltar, alleged a violation of her right to participate in elections set forth in Article 3 First Additional Protocol, as Gibraltar, not belonging to the British Territory, was excluded by the Act on Direct Elections. The Court found the complaint admissible based on the assumption that the member states had took part in the negotiation and adoption of the Election Act and the Maastricht treaty. By doing so, the member states had used their jurisdiction enshrined in Article 1 of the Convention. The Court reiterated the Melchers finding that the member states remain responsible under the ECHR if transferring powers to supra-national organisations, but did not make a constraint based on “equal protection”. Rather the “practical and effective” guarantee of the Convention rights is determined. Therefore, for the first time Strasbourg found a violation of the Convention by a member state acting within the framework of the EC.

In the aftermath of the *Matthews* decision the Court missed several opportunities to clarify the inherent ambiguity left in the term “equivalent protection”. Many applicants approached the Court on the issue of Article 6, al-

²⁶ See at 145: “The Convention does not prohibit a Member State from transferring powers to international organisations. Nonetheless a transfer of powers does not necessarily exclude a State’s responsibility under the Convention with regard to the exercise of transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or exclude and thus be deprived of their preemptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that provisions be interpreted so as to make its safeguards practical and effective. Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.”

²⁷ See BVerfGE 73, 339 (*Solange II*) translated in 3 CMLR (1987), p. 225; BVerfGE 89, 155 (*Maastricht*); BVerfGE 102, 147 (*Bananenmarktordnung*).

²⁸ *Heinz v. Contracting States also Parties to the European Convention* (1994) 76A Decisions Reports 125.

²⁹ *Pafitis v. Greece* 1998-I 436 (1999) 27 EHRR 566.

³⁰ See *Matthews v. United Kingdom*, Application No. 24833/94, Judgement 18 February 1999; J. Kokott & R. Schölch, *Denise Matthews v. The United Kingdom*, 93 AJIL (1999), p. 682; H. G. Schermers, *Matthews v. United Kingdom*, 36 CMLR (1999) p. 673.

leging a breach in the context of competition law proceedings before the ECJ.³¹ In the *Emesa Sugar* case the applicants complained of a breach of Article 6 in proceedings before the ECJ as the right to respond to the Advocate General's Opinion was refused. The Court considered the application inadmissible, as the claimed right is not applicable to all, but rather to criminal proceedings and some civil rights.³² Considering the application illogically inadmissible on the matter *ratione materiae* and not *ratione personae*, the Court avoided strengthening its *Matthews* reasoning based on accession to supra-national organisations and not on national implementation acts as such.³³

2. The Bosphorus case

2.1 *The facts*

Bosphorus was a long pending case, starting in 1993 before the Irish national courts and ending in 2005 before Strasbourg. The applicant is a Turkish airline charter company ("Bosphorus Airways") which leased two airplanes from Yugoslav Airlines in 1992 and registered them in Turkey. One of the applicants' aircraft was seized in May 1993 by Irish authorities in Dublin airport were it had been for maintenance work with the state-controlled company TEAM Aer Lingus. The impoundment was disposed by a decision of the Irish Minister for Transport based on Article 8 EC Regulation 990/93³⁴. This EC Regulation came into force in April 1993 and implemented UN Security Council Resolution 820 (1993)³⁵ imposing sanctions against former Yugoslavia. The Minister's decision was considered before the Irish High Court and Irish Supreme Court after Bosphorus Airway challenged its lawfulness. The Irish High Court held in 1994 that the EC Regulation was not applicable to the aircraft, whereas the Irish Supreme Court, invoked on appeal by the Minister for Transport, referred a question under Article 249 EC Treaty to the ECJ, asking whether Article 8 EC Regulation applied. The ECJ ruled that the aircraft was covered by the Regulation and therefore the Supreme Court held the Minister's appeal successful.³⁶

³¹ See e.g. *Kress v. France*, App. No. 39954/98, Judgement 7 June 2001.

³² *Emesa Sugar BV v. Netherlands*, Application No. 62032/00, Admissibility Decision of 13 January 2005.

³³ See J. Bröhmer, *Die Bosphorus Entscheidung des Europäischen Gerichtshofs für Menschenrechte—Der Schutz der Grund—und Menschenrechte in der EU und das Verhältnis zur EMRK*, EuZW 2006, p.71, 75.

³⁴ Council regulation 990/93 of 26 April 1993 Concerning Trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro). Article 8 is worded as follows: "All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States."

³⁵ UN Doc. S/RES/820, 17 April 1993.

³⁶ Case 84/95 *Bosphorus Airways* [1996] ECR I-3953. The ECJ ruled that neither the right to peaceful enjoyment of property nor the fundamental right to pursue a commercial activity was absolute. It reiterates the fundamental rights standard within the EC legal order and found the interference proportionate. See hereunto: I. Connor,

Bosphorus Airways filed a complaint before the European Commission on Human rights alleging a breach of Article 1 Protocol No. 1 through a loss of three years of its four-year lease.³⁷ The case was referred to the ECtHR and relinquished to the Grand Chamber.

2.2 *The decision*

The Chamber first considered the admissibility of the case and obtained several third party submissions by the European Commission, the Italian Government, the Government of the United Kingdom and the Institut de Formation en Droits de l'Homme du Barreau de Paris ("Institut"). The admissibility was challenged by the Irish Government and the third party interveners, except the Institut. They argued that the impugned act by the Minister was not an exercise of discretion and also to appeal the judgment of the High Court and to make a reference pursuant to Article 234 TEC to the ECJ was obliged under Article 10 TEC and the duty of loyal-cooperation. In emphasising the *Melchers* and *Matthews* cases they maintained that the protection under the EC and the UN was equivalent to that under the ECHR, hence the application was inadmissible, as the ECtHR could not consider acts of the EU. The European Commission further stressed that "to require a state to review for Convention compliance an act of the EC before implementing would pose an incalculable threat to the very foundations of the EC" and also "subjecting individual EC acts to Convention scrutiny would amount to making the EC a respondent in Convention proceedings whiteout any of the procedural rights and safeguards of a contracting state to the Convention".³⁸ On the contrary, the applicant and the Institut argued that the equivalent protection doctrine is not applicable as the matter in dispute is not the EC Regulation or the sanction regime per se and that the Irish government had "a real and reviewable" discretion. The applicant further noted that to follow the *Melchers* case law would mean "that any member state of the EC could escape its Convention responsibility once its courts referred a question and implemented an ECJ ruling" and "to accept that any state act implementing an EC obligation does not fall within the state's Convention responsibility would create an unacceptable lacuna of human rights protection in Europe".³⁹

In considering Article 1 of the Convention the court held briefly that the notion of "jurisdiction" is defined territorially under International Law and "presumed to be exercised throughout the states territory".⁴⁰ As the impoundment took place on the Irish territory the applicant fell within the juris-

Can Two walk Together, Except They Be Agreed?, 35 CMLR (1998), p. 137; P. Koutrakos, EU INTERNATIONAL RELATIONS LAW (2006), pp. 433.

³⁷ After the lease of the aircraft had expired and the UN sanctions against Yugoslavia were suspended, the aircraft was directly returned to Yugoslav Airlines.

³⁸ *Bosphorus case*, *supra* note 20, para. 124.

³⁹ *Ibid.*, para. 117. The Applicant argued further, in citing Article 234 TEC, that the EC did not offer "equivalent protection" as individuals have no right to an reference under Article 234 TEC (para. 118).

⁴⁰ *Ibid.*, para. 135. Cf. *Case Bankovic et al. v. Belgium and 16 other states*, App. No. 52207/99, Decision of 12. December 2001; *Ilascu et al. v. Moldavia and Russia*, App. No. 48787/99, Judgement of 8 July 2004.

diction, hence the complaint is *ratione loci, personae* and *materiae* admissible.⁴¹ Therefore the Court went on to examine the submissions under the merits of the complaint.

While there was an issue between the parties on the applicable rule and the legal basis for the impugned measure, the Court held that the interference amounted to a “control on the use of property” according to Article 1 § 2 Protocol No. 1. The legal basis for the impugned interference, the court found, was Article 8 EC Regulation, as directly applicable and with full effect in Ireland. The court also states, in following the EC Commissions submission, that the Irish authorities did not have discretion when implementing the Regulation and appealing the High Court judgment. Regarding to the UN resolution, the Court held that it was pertinent to the interpretation of the Regulation but did not form part of the Irish domestic law.⁴²

The Court proceeded to assess if the impugned impoundment was justified under the requirements of Article 1 § 3 Optional Protocol No. 1. Here it found that the required “general interest” was the compliance with legal obligations flowing from Ireland’s membership of the EC⁴³ and examined whether this compliance can justify the interference with the applicant’s rights. Here, in this most important part of the judgment, the court reiterates its findings in *Melchers* and *Matthews* that the Convention does not prohibit the transference of sovereignty to an international/supra-national organisation and that such organisations are not responsible under the Convention as long as they are not a party to it.⁴⁴ Otherwise, the contracting state could be held responsible under Article 1 for all acts or omissions of its organs, including those arising from compliance with international obligations. In reconciling these conflicting findings, the Court mentioned the equivalent protection doctrine and stated:

However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a “constitutional instrument of public order“ in the field of human rights protection. It remains the case that a state would be fully responsible under the

⁴¹ *Bosphorus case*, *supra* note 20, para. 138.

⁴² *Ibid.* para. 145.

⁴³ *Ibid.* para. 150.

⁴⁴ *Ibid.* para. 152.

Convention for all acts falling outside its strict international obligations.⁴⁵

In applying this standard, the Court mentioned Article 6 (2) TEU as well as the jurisprudence of the ECJ and the Charter of Fundamental Rights, and found that the EC legal order contains equivalent protection for individuals, hence Convention compliance at the relevant time was assumed.⁴⁶ The last question the Court had to answer was if the presumption of compliance by the Irish Government could be rebutted in the present case. Here, it found that “there was no dysfunction in the mechanisms of control of the observance of Convention rights”, therefore the protection of the applicants rights was not manifestly deficient and the presumption has not been rebutted. In conclusion the Court could not find a breach of Article 1 Protocol No. 1.

2.3 Appraisal

The recent case clarifies the indirect review of EC law by the ECtHR. The EC act itself may not be, but implementing acts of member states are judicable. The Bosphorus ruling is an obvious departure from the approach taken in the *Melchers* case. Hereby, Strasbourg filled a remaining gap in considering the legal nature of EC Regulations in the national legal order and the national implementation act within the ECHR.⁴⁷ The admissibility is based on Article 1 ECHR, except the defendant is the Community itself or their organs. The Court’s reasoning with regard to Article 1 is straightforward and appropriate. In considering the admissibility *ratione personae* the Court should have clarified that the impugned measure was an implementation act, hence a claim against the Community was inadmissible. Therefore, it is not clear whether the EC or the member state is responsible for the implementing act.⁴⁸ Arguing that the Irish authorities never had discretion, the Court also missed an opportunity to expand on the nature of Article 10 TEC and the related ECJ jurisprudence.⁴⁹ The ECJ defined the additional obligations under Art. 10 TEC broadly.⁵⁰

⁴⁵ Bosphorus case, *supra* note 20, para. 155-157.

⁴⁶ *Ibid.*, para. 159-165

⁴⁷ In the case *Cantoni v. France*, App. No. 17862/91, Judgement 15. November 1999, the Court reviewed a French law, implementing an EC directive.

⁴⁸ F. Hoffmeister, *Bosphorus v. Ireland*, 100 AJIL (2006), p. 442, 446. Hoffmeister emphasized Article 299 ECT, and mentioned that EC law does also apply on the territory of the member states. The Court had already considered this issue in the case *CFDT v. European Commission* (1978), 13 Decisions Reports, p. 231.

⁴⁹ See *Bosphorus case*, *supra* note 20, Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garliki. In regard to article 234 TEC the Judges emphasizing (para. 3): “Although the interpretation of Community law given by the Court of Justice of the European Communities is binding on the court which made the referral, the latter retains full discretion in deciding how to apply that ruling *in concreto* when resolving the dispute before it.”

⁵⁰ See C. Costello, *The Bosphorus ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HRLR (2006), p. 87, 109. Costello referred to the *Schmidberger* case where the ECJ held that member states have a broad discretion when acting under Article 10 TEC obligations.

It is also noteworthy that the ruling will have an impact on the ongoing codification of the rules for responsibility of international organisations undertaken by the International Law Commission.⁵¹ A clarification of the responsibility of International Organisations for implementing acts of their member states seems necessary, as the Articles on Responsibility of States for Wrongful Acts do not cover this particular case.⁵² A more “functional” reading of the term “jurisdiction” to such an extent that the implementing acts of member states are acts of the EC, having “distinct legal personality”, appears inappropriate.⁵³ Such an approach was made by Panels within the Dispute Settlement Understanding of the WTO, as the EC is, pursuant to Article IX WTO-Agreement, a member of the WTO. This is untenable in the framework of the ECHR considering the fact that the EC is not a member of the ECHR.

Another possibility in the recent case would have been to declare the application inadmissible according to Article 35 (2) lit. b ECHR. Therefore, the Court should have interpreted the term “another procedure of international investigation or settlement” as encompassing ECJ proceedings, like it is the case for complaints considered by the UN Human Rights Committee.⁵⁴ Instead, without even mentioning Article 35, Strasbourg ruled for the possibility to consider cases as the last Court in the European system. It placed itself in a superior position to the ECJ where it comes to human rights issues within the EC legal order. Although the Court reserved its right to rule in a last instance, it accepted the human rights standard within the EC and placed a high barrier for an assessment. In modifying the equivalent protection doctrine with a “manifest deficiency” test, Strasbourg devolved the *Solange* jurisprudence of the German Federal Constitutional Court into the relationship between the ECtHR and the ECJ. But as President Wildhaber stated, there are some decisive differences between the two approaches. The *Solange* jurisprudence requires the rebuttal of the presumption of equivalence protection a general decrease of the human rights standard within the EC. On the contrary, the Bosphorus jurisprudence is working on a case-by-case basis as the presumption can be rebutted in each individual case, hence applications are not in principle inadmissible *ratione materiae*.⁵⁵ However, the ambiguity of the notion of equivalent protection still remains, and the fact that a new manifestly deficient test was established does not make the challenges for individual complaints much clearer. Therefore, closer attention should be paid to both terms.

⁵¹ See Third Report of Special Rapporteur G. Gaja on Responsibility of International Organisations, UN Doc. A/CN.4/553, 13 May 2005, para. 25-44 (evaluating Bosphorus in para. 33). See *further* draft article 15, UN Doc. A/CN.4/L.666/Rev.1, 1 June 2005.

⁵² A. Cassese, *International Law* (2005), pp. 241.

⁵³ F. Hoffmeister, *supra* note 48, p. 446,447.

⁵⁴ See *Pauger v. Austria*, App. No. 16717/90, Judgement of 28 May 1997; F. Jacobs/R. White, *The European Convention on Human Rights* (2006), p. 488.

⁵⁵ See Address by L. Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe*, 8. September 2005.

2.3.1 The “equivalent protection” doctrine and the “manifest deficiency” test

As the “equivalent protection” doctrine was criticized after its establishment in the *Melchers* case and in *Matthews*, now the Court seems to have taken such criticism into account. The general approach, which would declare International or supra-national organisations immune from any supervision by the ECtHR was abandoned in favour of a more particular form of scrutiny through a mechanism of “rebuttable presumption”. However, in ruling that “equivalent protection” does not mean “identical” but rather “comparable” Strasbourg consequently permitted a lower standard within the compared legal system. The argument that an identical protection could run counter to the interest of international cooperation fails to respect the ECHR as a minimum standard of fundamental rights.

Trying to assess the meaning of the term equivalent protection, it is worth noting that the scope of application of the doctrine is only relevant in the context of actions of international or supra-national organizations like the EC, and where member states of those organisations are implementing acts without discretion.⁵⁶ The amount of equivalent protection requires “protection of fundamental rights both in the substantive guarantees provided and in the mechanisms controlling their observance”.⁵⁷ The question which therefore arises and the Court affirmed is whether the EC legal order comprises a human rights standard equivalent to that set forth in the ECHR. As the ECJ cannot rely on statutory norms containing human rights protection within the EC, one has to look to the Luxembourg jurisprudence citing the ECHR or findings of the ECtHR. Spielmann concluded in an analysis published in 1999, that “divergent interpretation is possible in certain areas such as European competition law, although the ECJ, in recent cases, seems to have taken a similar line to the European Court of Human Rights, referring not only to the Convention as the minimum standard, but taking into account the Strasbourg jurisprudence”⁵⁸. A similar conclusion was made by Douglas-Scott in 2006, stating that the ECJ is more and more willing to refer to the ECHR and the ECtHR jurisprudence.⁵⁹ Also, Wildhaber has stated that the interrelation between both European courts’ jurisprudence is “demonstrating a clear commitment to ensure harmony”.⁶⁰ The danger of human rights double standards between Strasbourg and Luxembourg seems thus to be unlikely.

Considering the equivalent protection of fundamental rights between the ECHR and the EC, attention should be paid to the right of individual application. As the Court itself emphasises in its reasoning “it is true that access of

⁵⁶ C. Costello, *supra* note 50, p. 107.

⁵⁷ *Ibid.*, p. 111.

⁵⁸ See D. Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities* in P. Alston (ed.), *THE EU AND HUMAN RIGHTS*, p. 757, 777.

⁵⁹ See S. Douglas-Scott, *supra* note 21, p. 650. See, e.g., the cases: 36/78 *Rutili v. Minister for the Interior* [1975] ECR 1219; C-185/95 *Baustahlgewerbe v. Commission* [1988] ECR I-8417; C-13/94 *P v. S & Cornwall County Council* [1996] ECR I-2143; C-112/00 *Schmidberger v. Austria* [2003] ECR-I 5659.

⁶⁰ See L. Wildhaber, *supra* note 55, p. 5 highlighting the recent decision of the ECJ in the case *Pupino*.

individuals to the ECJ is limited”.⁶¹ However, after mentioning the indirect benefits for individuals by acts of member states pursuant to their complementary role, the ECtHR concluded that, despite the lack of individual remedy, the protection of fundamental rights of the EC law is equivalent to that of the Convention. This reasoning was criticized by concurring opinions. The joint concurring Judges were not “entirely convinced” and stated that the “right of individual application is one of the basic obligations assumed by the States on ratifying the Convention. It is therefore difficult to accept that they should have been able to reduce the effectiveness of this right for persons within their jurisdiction on the ground that they have transferred certain powers to the European Communities”.⁶² Concurring Judge Ress also expressed his concerns regarding individual remedies and said that Art. 230 TEC should be interpreted in the lights of Article 6 § 1 ECHR more extensively.⁶³ Both objections are well founded considering the fact that the absence of a direct individual control within the EC is indeed a challenge for the protection of human rights. It is therefore crucial how the “manifest deficiency” test will be practised by the Court in the future. Insufficient access to the ECJ remains a challenge where the Court may consider cases admissible.⁶⁴

An assessment of the mechanism of “manifest deficiency” leads to the assumption that the standard for the protection of fundamental rights within the compared legal order can be lower than that set forth in the ECHR because the presumption of equivalent protection is only rebutted by a manifest deficiency and not a deficiency as such. Also, the threshold for rebutting the presumption of equivalence is vague, and the Court gives neither a definition nor any hint. At first glance three possible cases can be assumed: first, when there is no adequate review in the particular case because the ECJ has no competence, second when the ECJ has been too restrictive in its interpretation of individual access to it, or third, where there has been an obvious misinterpretation or misapplication by the ECJ of the guarantees of the Convention right.⁶⁵ Another case could be the ECJ aberrance from the settled case-law of the ECtHR. All this examples seems in fact likely to occur.⁶⁶ As the manifest deficiency test is held to work on a cases-by-case basis a general definition of its application is inappropriate with its purpose. It relies on Strasbourg to show that it is more than a catch phrase.

2.3.2 *Conclusion and perspective*

In conclusion, the Bosphorus case can be assessed as strengthening the human rights protection within the European system. Although the Court could not find a violation in the present case it is not to deny that the obvious

⁶¹ Bosphorus case, *supra* note 20, para. 162.

⁶² Bosphorus case, Joint Concurring Opinion, *supra* note 20, para. 3.

⁶³ Bosphorus case, Concurring Opinion Judge Ress, *supra* note 20, para. 3.

⁶⁴ See C. Costello, *supra* note 50, p. 150.

⁶⁵ See Bosphorus case, Concurring Opinion Judge Ress, *supra* note 20, para. 3. See similar C. Costello, *supra* note 50, p. 115-118. Costello sees the inadequate access to the ECJ in the case of primary law, the IV Title of the TEC, the third pillar and the common foreign and security policy under of the EU.

⁶⁶ See for discussion on the accession, H.C. Krüger & J. Polakiewicz, *Proposals for a Coherent Human Rights Protection System in Europe*, 22 HRLJ (2001), p. 1, 3.

departure from the *Melchers* case is welcomed from a human rights aspect. One should also consider the time frame in which the Court delivered its judgement. It was at the time when the ratification of the EU Constitutional Treaty was still doubtful as France (in May) and the Netherlands (in June 2005) rejected the Constitution by referendum. As the Constitutional Treaty provides accession for the EU to the ECHR, the Court's reasoning in *Bosphorus* can be interpreted as strengthening its role regardless of the ratification and a possible accession.

It is not yet clear whether or not the Constitutional treaty will come into force and it is rather unlikely that it will happen without a significant change in its provisions. The accession of the EU to the ECHR is set forth in Article I-9 (2) and Article 17 of the (not yet into forth) Additional Protocol No. 14, which will amend Article 59 ECHR. These provisions overcome the lack of competence declared by the ECJ in its Advisory Opinion.⁶⁷ Nevertheless, an EU accession to the ECHR does not tackle all the problems regarding the relationship between the two, but nearly all of them. New questions, like the relationship between the ECHR and the Charter of Fundamental Freedoms as well as technical and legal issues of an accession will arise.⁶⁸ Under a new constitutional framework two solutions for the relationship between the ECJ and the ECtHR are proposed: first, a procedure whereby the ECJ invokes a preliminary ruling of the ECtHR and second, an ex-post control procedure where the ECtHR controls the ECJ pursuant to Article 34 ECHR.

III. THE *JUSUF* CASE AND THE RELATIONSHIP BETWEEN THE EUROPEAN COMMUNITY AND THE UN LEGAL ORDER

The relationship between the EC and the UN legal order was, until the recent judgments of the European Court of first Instance (CFI), unclear. Both the ECJ and the ECtHR had, in earlier decisions avoided making statements on this complex interrelationship.⁶⁹ The first time the ECJ was confronted with implementation of UN Security Council resolutions was the *Bosphorus* case. Here, the ECJ did not consider the UN Security Council resolution when reviewing the actions of the Irish authorities by the yardstick of the EC's fundamental rights because the authorities had a margin of interpretation. The ECtHR mentioned the UN sanction regime in the same case only insofar as the resolution was pertinent to the interpretation of the EC Regulation as ruled by the ECJ.⁷⁰ In the *Dorsch* case, where the Iraqi sanction regime adopted by the UN Security Council caused financial damage to the applicant, Luxembourg did not have to rule on the lawfulness of the sanctions re-

⁶⁷ With this provisions the Treaty overcomes the lack of competence which were declared by the ECJ in its Advisory Opinio. See: Opinion 2/49 on accession by the Community to the European Convention on Human Rights and Fundamental Freedoms [1996] ECR-I-1759; J. Kokott & F. Hoffmeister, Case report: Opinion 2/94, 90 AJIL (1996), p. 664.

⁶⁸ See for the relationship between both Article II-112 and Article II-113 of the Constitutional Treaty.

⁶⁹ See M.-G. Ketvel, *The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy*, 55 ICLQ (2006), p. 77.

⁷⁰ See *Bosphorus* case, *supra* note 20, para. 145.

gime, as this was not at issue. The ECJ also referred to its Bosphorus reasoning.⁷¹

In the *Jusuf* and *Kadi* cases the CFI had to answer the questions of which legal order, UN or EC, prevails and if the Court has competence to review the lawfulness of Security Council resolutions.⁷²

1. The facts

Although the attacks of 11 September 2001 boosted anti-terror activities, global terrorism is not a new phenomenon and counter terrorism measures at UN level were installed before this date. Among these counter terrorism measures are financial sanctions regimes which form part of so called “smart sanctions”, intended to be directed at individuals, companies and organizations, or restrict trade with key commodities.⁷³ Established by the UN Security Council under Chapter VII of the UN Charter they aim to avoid negative humanitarian consequences for the civilian population or third countries by calling on member states, *inter alia*, to freeze funds or financial assets of suspected terrorists.

Recently two different types of financial sanctions regimes can be distinguished. The first one, the UN financial sanctions regime against persons and entities associated with Al-Qaida and the Taliban, is established by Security Council resolution 1267 of 15 October 1999. Secondly, a general UN financial sanctions regime against terrorism, created by resolution 1373 of September 2001. The regimes differ insofar as the latter resolution does not list persons or entities and instead allows member states to decide who is falling under the resolution. Resolution 1373 is accompanied by a Counter Terrorism Committee, a subsidiary-body pursuant to Article 29 UN Charter, which monitors the implementation by considering state reports.⁷⁴

The regime the CFI had to examine was that established under resolution 1267 of October 1999. It is a very complex regime expanded after the attacks of the 11 September 2001 by Security Council resolutions 1333, 1390, 1452, 1526 and 1617.⁷⁵ A so called “Committee 1267”⁷⁶—flanked by a monitoring group—determines which persons are to be listed. Therefore, UN member states have to give relevant information to the Committee on persons suspected to be associated with Usama bin Laden, Taliban or Al-Qaida, and the Committee updates its list on a periodic basis. Additional guidelines for the conduct of the Committee’s work were adopted in November 2002 contain-

⁷¹ See Dorsch case, *supra* note 22, para. 88.

⁷² The following review is only considering the *Jusuf* case as both judgements, *Jusuf* and *Kadi*, were delivered by the Court at the same day and contain the same reasoning.

⁷³ Other forms of targeted sanctions are, *e.g.*, trade restrictions on particular goods or services, travel restrictions, diplomatic constraints, cultural and sport or air traffic restrictions.

⁷⁴ See <http://www.un.org/sc/ctc/>.

⁷⁵ UN Doc. S/RES/1333, 1 December 2000; UN Doc. S/RES/1390, 16 January 2002; UN Doc. S/RES/1452, 20 December 2002; UN Doc. S/RES/1526, 30 January 2004; UN Doc. S/RES/1617, 29 July 2005. All UN documents are available at <http://documents.un.org/default.asp>.

⁷⁶ See <http://www.un.org/Docs/sc/committees/1267Template.htm>.

ing instructions for listing and de-listing of suspected persons.⁷⁷ General criticism of the Committee's work is directed at its decision making and de-listing procedure.⁷⁸ The criteria for getting listed are vague and decisive information is not always disclosed. Furthermore, the de-listing process is not a judicial but rather a political one as individuals or entities have to petition the government of residence to review the case. The government can make a request for de-listing to the Committee, which reach decision by consensus of its fifteen members. Since the adoption of Resolution 1452 in December 2002, exemptions to the freezing of funds and assets are possible for covering basic expenses like food, rent or medicine.⁷⁹

The resolutions described above were put into effect in the EU by Common Positions⁸⁰ under the second pillar and by Council regulations⁸¹ ordering the freezing of the funds of the persons and entities concerned under the first pillar. The EC regulations have direct effect in the member states pursuant to article 249 TEC and according to article 46 TEU the ECJ or CFI cannot review acts under the second pillar. Hence, the only possibility for individuals or entities to challenge the lawfulness of infringements caused by the implementation of the UN resolutions sanction list is an application of annulment of the regulation pursuant to article 230 (4) TEU.

Ahmed Ali Jusuf, residing in Sweden and *Al Barakaat International Foundation*, established in Sweden, are listed in the UN sanctions list and the annex list of the implementing EC regulation. Both lodged an application to the CFI, claiming that the CFI should annul the regulations on the grounds of the Council's incompetence to adopt the regulation. They also alleged a breach of their fundamental rights.

2. The decision

The Courts' reasoning can be divided into three main parts: First, the issue of whether the Council had competence to impose economic sanctions on individuals, second the status of UN law in EC law and third, the scope of the review of lawfulness and infringements of fundamental rights.

The applicants challenged the competence of the Council to adopt the regulation on the basis of article 60 and 301 TEC as the wording of both pro-

⁷⁷ See Guidelines of the Committee for the conduct of its work, adopted on 7 November 2002 amended on 10 April 2003 and revised on 21 December 2005, available at: http://www.un.org/Docs/sc/committees/1267/126_guidelines.pdf.

⁷⁸ See Report of the Special Rapporteur M. Scheinin on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/61/267, 16 August 2006, para. 30-41; M. Bultermann, *Fundamental Rights and the United Nations Financial sanction Regime: The Kadi and Jusuf Judgements of the Court of First Instance of the European Communities*, 19 LJIL (2006), p. 753, 756.

⁷⁹ See Un Doc. SR/RES/1454 at § 1(a), 20 December 2002; Section 9 (a) of the Guidelines, *supra* note 76.

⁸⁰ See Common Positions: 1999/727/CFSP, 15 November 1999; 2001/154/CFSP, 26 February 2001; 2002/402/CFSP, 27 May 2002; 2003/140/CFSP, 27 February 2003.

⁸¹ See EC Regulation No. 337/2000, 14 February 2000; EC Regulation No. 467/2001, 6. March 2001; EC Regulation 881/2002, 27 May 2002; EC Regulation No. 1580/2002, 4 September 2002; EC Regulation 561/2003, 27 March 2003; EC Regulation 881/2002, 19 May 2003.

visions only authorised the imposition of measures against third states and not individuals. In its rejoinder the Council argued that the regulation was adopted on the grounds of article 60, 301 and also 308 TEC—hence in accordance with the principle of attribution of powers pursuant to article 5 TEC. The Court primarily clarified that measures based on article 60 and 310 TEC can be directed against individuals within the community as long as the core of the measures seek to reduce economic relations with a third state. As the impugned regulation implemented a UN Security Resolution not directed on a regime or a third party but against terrorism as such, the Court held that the EC regulation can not be based on articles 60, 301 TEC. Also article 308 TEC as such is not sufficient as this provision requires action by the community in the course of the operation of the common market objectives mentioned in article 2 and 3 TEC, whereas the impugned regulation adjusts aims of the Common Foreign and Security Policy under the second pillar of the EU (article 11 TEU). It then considered articles 60, 301 and 308 in combination—the legal basis relied upon by the Council. The Court reasoned that the requirement of consistency as laid down in article 3 TEU and the nature of articles 60, 301 as a bridge between the third and the second pillar as well as the fact that “states are not longer the only source of threats to international peace and security”, justifies a recourse to article 308 TEC.⁸² Therefore, articles 60, 301, 308 TEC empower the EC to impose economic and financial sanctions against individuals and gave the Council competence to adopt the impugned regulation.

Before considering an alleged breach of fundamental rights, the Court had to consider the relationship between the UN and the EC legal order as the determination of the latter directly affects the scope of review of lawfulness. The CFI first clarified the relationship between the Charter of the UN and the domestic law of the UN member states. It deduced the primacy of the UN legal order on the one hand from article 27 Vienna Convention on the Law of Treaties (VCLT) as having the status of customary international law and, on the other hand, from article 103 UN Charter and article 30 VCLT as the decisive international treaty law. This primacy extends, pursuant to article 25 and the jurisprudence of the ICJ with regard to article 103 UN Charter, also to UN Security Council resolutions. Within the EC legal framework the primacy of UN law is ensured by articles 307 (1) and 297 TEC. Pursuant to article 307 TEC the rights and obligations arising for EC member states from agreements before the establishment of the EC are not affected by the ECT.

The Court then considered whether the EC itself is bound by UN decisions. This is not the case, as the EC itself is not a member of the UN. However, the Court draw an analogy to international trade law and its jurisprudence with regard to the former General Agreement on Tariffs and Trades of 1947 (GATT 1947). The EC is a member of the WTO but wasn't member of the GATT 1947. As the EC member states were members of the GATT 1947 but, according to article 133 TEC, did not have important competence in international trade law, the ECJ held in the *International Fruit Company* case that

⁸² Jusuf case, *supra* note 23, para. 164-170.

the EC is the successor to the rights and obligations of the member states.⁸³ Conferred this reasoning on the UN legal order, the Court stated that “in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community”.⁸⁴

As a consequence of the primacy of the UN legal order with regard to the EC legal order the Court concluded that the review of UN Security Council resolutions fell, in principle, outside its competence. A competence for an indirect review of UN Security Council resolutions can, according to articles 25, 48 and 103 UN Charter and article 27 VCLT, neither be justified from a perspective of international law nor, pursuant articles 5, 10, 297 and 307 (1) TEC and article 5 TEU, from a perspective of EC law.⁸⁵

Here, the court could have stopped its scrutiny of the case, but instead, and in by far the most dramatic part of the reasoning, it went on to an indirect review of the UN Security Council Resolution on the yardstick of *jus cogens*. The CFI considered *jus cogens* “as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”. It refers to Article 53 and 64 of the VCLT, the Preamble of the UN Charter and the Advisory Opinion of the ICJ from 1996 on the Legality of the Threat or Use of Nuclear Weapons. The fact, that *jus cogens* norms have a binding effect on the bodies of the UN and especially the UN Security Council, concluded the Court from article 24 (2) UN Charter. But what is missing is a reasoning why the Court considered itself competent to review Security Council resolutions on the yardstick of *jus cogens*. However, in the last part of its reasoning, the Court examines whether fundamental rights within the ambit of *jus cogens* were infringed.

The applicants alleged a breach of three fundamental rights: the right to property, the right to a fair hearing and the right to an effective judicial remedy.

The Court first assessed whether the freezing of funds infringed the right to property.⁸⁶ Its reasoning is somewhat confusing as it omits a detailed examination of whether the right to property has the status of *jus cogens*. Instead, the Court mentioned article 17 of the Universal Declaration of Human Rights and hypothetical determined that even if the right to property can be considered *jus cogens* it is only “an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*”.⁸⁷ However, the Court did not find an arbitrary deprivation as the freezing of funds was enacted by a Security Council Resolution to condemn international terrorism and the fight against terrorism is of significant importance. Also the freezing of funds does not effect the substance of the right to property but rather the use. Further, the Court paid attention to the several derogations and exemptions which the EC

⁸³ Cases 21/72 to 24/72 International Fruit Company and Others, [1972] ECR 1219, para. 18.

⁸⁴ Jusuf case, *supra* note 23, para. 253.

⁸⁵ *Ibid.*, para. 260-276.

⁸⁶ Jusuf case, *supra* note 23, para. 285-303.

⁸⁷ *Ibid.* para. 293.

regulation provides under the Sanctions Committee in some circumstances. Therefore, the Court could not find that the right of property was infringed.

With regard to the right to be heard, the applicants alleged a breach in so far as they were not heard before the imposition of the sanctions and did not have the opportunity to defend themselves. The Court first distinguished between the right to be heard before the Sanctions Committee and the right to be heard by EC institutions before the adoption of the regulations. The Court dismissed the former by stating that this right is not provided by the UN Security Council Resolutions and the Court could also not find a norm of *jus cogens* which contains a right under these circumstances. Apart from that, the Court based its argument on the surprise effect which is inherent in such measures and the general procedure before the Sanctions Committee for delisting. Although the procedure before the Sanctions Committee is, as individuals have to call for a state's petition, a diplomatic one, the Court could not find that this restriction violates any fundamental right having status of *jus cogens*. The Court also dismissed the right to be heard before the adoption of the EC regulation by applying the jurisprudence of the ECJ. It reiterates its findings that the EC institutions had no discretion and therefore no power to install any mechanism when implementing the legally binding UN Security Council resolution.

Considering the right to judicial review⁸⁸ the Court stressed the fact that the applicants had invoked the CFI on the legal basis of article 230 TEC. However, as it is not the role of the Court to control the political assessment of the Security Council's measures taken in responsibility for the maintenance of international peace and security, the Court stated that there existed a lack of judicial remedy as the Security Council had not established an international court reviewing individual complaints against decisions by the Sanction Committee. This lacuna is, in the opinion of the CFI, not a breach of *jus cogens* as those higher rules of international law are not absolute in regard to the right of judicial review. Here, the Court mentioned article 8 of the Universal declaration of Human Rights and article 14 of the International Covenant of Civil and Political Rights (ICCPR) and the possibility of derogation at a time of public emergency set forth in article 4 ICCPR. The Court also refers to the doctrine of state immunity and the immunity of international organisations as an inherent restriction of the right to judicial review. In the context of the decision made by the Security Council, such a immunity follows in the view of the court from article 25 and 103 UN Charter. In conclusion, as none of the pleas were successful, the Court dismissed the application.

3. Appraisal

In the Jusuf case a European court, for the first time, ruled on the relationship between the UN legal order and the EC. It is a courageous decision and the fact that the CFI even considered the applicants fundamental rights on the yardstick of *jus cogens* is remarkable from a human rights perspective. Nevertheless, the reasoning remains in some parts unclear or sometimes silent about important aspects of human rights as well as EC law. Therefore, a critical examination follows, whereby the focus will be on four aspects: first, the

⁸⁸ *Ibid.*, para. 332-347.

recourse the Court made in respect to article 308 TEC for justifying the imposition of individual sanctions, second the UN/EC relationship, third the way the Court ruled on the meaning of *jus cogens* and fourth, the survey of the applicant's fundamental rights.

3.1 *The legal basis*

The legal basis for the implementation of economic sanctions is, from a fundamental rights perspective, of great concern. Article 52 (1) of the Charter of Fundamental Rights of the European Union codifies, that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms." As the Court itself stated, the imposition of economic sanctions on individuals under the present circumstances interferes at least with the right of property, the right to be heard and the right of judicial review. Not, perhaps, at the level of *jus cogens* but on a level the European system provides within the legal framework of the ECHR and the ECJ jurisprudence. The doctrine of reservation of statutory powers is a fundamental legal maxim.

The combination of articles 60, 301, 308 TEC for the legal justification of the economic sanctions on individuals overstretched the wording of these norms. Although the Court held the same in respect to articles 60, 301 and 308 alone, it justified the combination as a legal basis on the grounds of the threat of international terrorism and the role of non-state actors thereby. An act of EC institutions must be in compliance with the principle of attribution of powers pursuant to article 5 TEC. The EC is to large extent an economic community and has no power in the area of the fight against terrorism. The fight against terrorism is an objective of the Common Foreign and Security Policy and not part of the objectives of the EC as laid down in articles 2, 3 and 4. The reference the Court made to article 3 TEU is not fully convincing as it blurs the pillar construction of the EU.⁸⁹ The Court therefore should have paid more attention to the relationship between the EC and the EU. As the TEC does not contain a binding provision with regard to the requirement of consistency pursuant to article 3 TEU, one can argue that article 3 (2) TEU has abandoned the TEC implicitly, like article 6 (2) TEU did with regard to fundamental rights and therefore binds the EC.⁹⁰ As a result of the Jusuf decision, the strict distinction between EC law and EU law has, relatively speak-

⁸⁹ Particularly in disagreement with the Courts reasoning is A. Garde, *Is it really for the European Community to implement anti-terrorism UN Security Council resolutions?*, 56 CLJ 2006, p. 281, 282.

⁹⁰ See S. Steinbarth, *INDIVIDUALRECHTSSCHUTZ GEGEN MASSNAHMEN*. The legal basis for the implementation of economic sanctions is, from a fundamental rights perspective, of great concern. Article 52 (1) of the Charter of Fundamental Rights of the European Union codifies, that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms." As the Court itself stated, the imposition of economic sanctions on individuals under the present circumstances interferes at least with the right of property, the right to be heard and the right of judicial review. Not, perhaps der EG zur Bekämpfung des internationalen Terrorismus, *Zeitschrift für Europäische Studien* 2/2006, p. 269, 276.

ing, become more similar to the Judgement the ECJ delivered in the *Pupino case*.⁹¹

Consent is the basis of its conclusion as it takes into account recent developments which the drafters of the treaties could not have foreseen. The fact that individuals can threaten international peace and security was also recognized by the Security Council when interpreting article 39 UN Charter.⁹² The EC has to be in accordance with those findings. Furthermore, the ECJ had already expanded the economic sanctions regime on non-state actors as long as they are in control of a part of a country.⁹³ The last factor – the link to a third country—was now renounced.

It should also be mentioned that the CFI anticipates the European Constitution Treaty.⁹⁴ Article III-322 (1) of the Constitution Treaty adopts articles 60, 301 and 308 as it requires a link to a third country, whereas article III-322 (2) provides for economic and financial sanctions against individuals.⁹⁵

3.2 *The relationship between EC/UN*

The distinction the Court made in its judgement between the legally binding effect of the Security Council resolution on member states and the EC itself is important because it clarifies the relationship within this multi-level framework.

Assessing the legally binding effect of Security Council resolutions on member states of the EC was not too difficult for the CFI and its appraisal of paramountcy pursuant to article 25 and 103 UN Charter is correct. Although the wording of article 103 UN Charter is ambiguous regarding to “obligations”, it is a stable opinion that this obligation encompasses Security Council resolutions.⁹⁶ It is also worth noting that Security Council resolutions are not,

⁹¹ There the ECJ ruled that third pillar legislation is definitely binding and that Member States are held to implement it correctly. The Case T-105/03, *Maria Pupino*, Judgement 16 June 2005.

⁹² See, e.g., Un Doc. S/RES/748, 31. March 1992.

⁹³ See, e.g., the sanctions against União Nacional para a Independência Total de Angola (UNITA) in 1988, EC regulation No. 1294/1988, 28 July 1988.

⁹⁴ See M.-G. Ketvel, *The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy*, 55 ICLQ (2006), p. 77, 107.

⁹⁵ Article III-322 (1) and (2) is worded as follows:

(1) Where a European decision is adopted in accordance with Chapter II, provides for interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the Union Minister of Foreign Affairs and the Commission, shall adopt the necessary European regulations or decisions. It shall inform the European Parliament thereof.

(2) Where a European decision adopted in accordance with Chapter II so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph I against natural or legal persons and groups or non-state entities.

⁹⁶ See R. Bernhardt, in B. Simma (ed.), *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, Vol. II, Article 103, para. 9. For a different opinion see D. Bowett, *The Impact of Security Council Decisions to Dispute Settlement Procedures*, 5 EJIL (1994), p. 92.

unlike EC acts, “directly applicable” within the domestic legal order, but have to be implemented by an incorporating national act.⁹⁷

This situation differs for the EC as it is not a member of the UN and can not be one pursuant to article 4 (1) UN Charter.⁹⁸ However, the analogy the CFI made in respect to its findings on international trade law leads to a subjugation of the EC legal order under the UN legal order in cases of binding acts of the UN Security Council.⁹⁹ The assumption that the EC is indirectly bound through its member states has to be distinguished from the question of whether the EC was held to implement the Security Council resolution by an EC regulation. This is to negate the fact that the EC has the competence to adopt an implementing regulation does not mean that the EC has to act.¹⁰⁰ But once the EC decided to act, it is bound by the Security Council resolution, because an abandonment of the resolution in the framework of a directly applicable EC regulation would violate the principle pursuant to article 10 TEC and obligations which the member states have in respect to the UN Charter. As a consequence of the judgment the CFI delivered, EC member states lose sovereignty once more, here in the field of the UN and economic sanctions. With regard to fundamental rights, such transfer of powers is of concern if the human rights standard within the two legal systems is not alike. It can lead to an erosion if the legal order which prevails rules on a lower standard. This aspect has to be borne in mind by considering the EC legal order and the national legal order as well as the UN legal order and the EC legal order.

3.3 *Jus cogens and the scope of review*

The Court concluded from the paramountcy of the UN Security Council resolution that it has no authority to review those acts directly. It drew the same conclusion with regard to a review of the EC implementation act as this would mean an indirect review of the Security Council resolution on the standard of the fundamental rights acknowledged in the EC. Here, the Court obviously differs from the *Bosphorus* findings of the ECJ on the ground that the EC institutions had no discretion when transferring the resolution into the EC legal order, as this was not the case in *Bosphorus*.

The most doubtful part of the decision is the fact that the Court found itself authorised to review the Security Council resolution on the yardstick of *jus cogens*. This right of review was derived by the CFI from the doctrine of *jus cogens* itself but without giving a reasonable argumentation. The assumption that the Security Council is bound by *jus cogens* does not answer the question of who has the power to control the compliance. Although this assumption

⁹⁷ See A. Cassese, *INTERNATIONAL LAW*, p. 232-234.

⁹⁸ In some resolutions the Security Council also addressed non-member states and international organisations to act in accordance with the provisions of the resolution. See S. Bohr, *Sanctions by the United Nations Security Council and the European Community*, 4 EJIL (1993), p. 256, 262.

⁹⁹ See for an detailed comparison between the reasoning in the *International Fruit Company* case on GATT 1947 and the UN system already P. Eeckhout, *EXTERNAL RELATIONS OF THE EUROPEAN UNION* (2004), pp. 437-439.

¹⁰⁰ See K. Schmalenbach, *Terrorismus vs. Normenbeorie: der Vorrang des UN-Rechts vor EU-Recht*, JURISTISCHE ZEITUNG 7/2006, p. 349, 352.

convinces as a conclusion, the reasoning the Court used in getting there is not. Therefore, it is worth focusing on the concept of *jus cogens* in general and on the question of whether Security Council acts are subject to judicial review.

3.3.1 *The concept of jus cogens*

The Report on fragmentation of international law of the Study Group of the International Law Commission (ILC) states that although the international legal system has a “horizontal” nature, “there is an important practice that gives effect to the informal sense that some norms are more important than other norms and that in cases of conflict, those important norms should be given effect to”.¹⁰¹ To this “informal hierarchy of international law” belongs the concept of *jus cogens*, obligations *erga omnes* and article 103 UN Charter. In recent international law disputes the notion of *jus cogens* has been one of the most controversial issues along scholars and although it is not really a new concept, the scope of application and content is still unclear.¹⁰² The CFI refers in its decision to article 53 and 64 of the Vienna Convention of the Law of Treaties. The UN Charter is a simple multilateral treaty and was adopted before the VCLT, thus the effect which the VCLT set forth in its provisions in regard to *jus cogens* are irrelevant in terms of the relationship to the UN Charter.¹⁰³ Therefore, the Court rightly confers in its judgement to the UN Charter itself and the status of the VCLT as customary international law.¹⁰⁴ The definition set forth in the VCLT on *jus cogens* is also contested and partially described as “very defective”.¹⁰⁵ Trying to determine the content of *jus cogens* one can neither find a general and abstract definition nor a list of appropriate examples.¹⁰⁶ The difficulties the CFI had while assessing whether the applicants right have such a status were obvious, and even the Court often fails to undertake such an attempt. However, the concept of *jus cogens* attracts wide interest along national and international Courts, particularly on the topic of state and head of state immunity in regard to universal jurisdiction.¹⁰⁷ Nev-

¹⁰¹ See Report of the Study Group of the ILC, *supra* note 2, para. 327.

¹⁰² See on the concept of *jus cogens* in general: L. Hannikainen, PEREMPTORY NORMS (*Jus Cogens*) IN INTERNATIONAL LAW (1988); A. Orakelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006); S. Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms*, in C. Tomuschat and J.-M. Thouvenin (eds.), THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER; *Jus Cogens and Obligations Erga Omnes* (2006).

¹⁰³ See Report of the Study Group of the ILC, *supra* note 2, para. 367.

¹⁰⁴ Jusuf case, *supra* note 23, para 278, 279.

¹⁰⁵ See A. Cassese, INTERNATIONAL LAW, p. 201, citing J. de Aréchaga.

¹⁰⁶ See Kadelbach, *supra* note 102; D. Shelton, *Normative Hierarchy in International Law*, 10 AJIL (2006), p. 291, 302. See further: Draft Articles on State Responsibility and Commentary, article 40, para. 3; Draft on the Law of Treaties of the ILC, ILCY 1966, vol. II, p. 248. The Report of the Study Group of the ILC, *supra* note 2, para 375, confers the status of *jus cogens* to the following rights: prohibition of aggression; right to self-defence; prohibition of genocide; crimes against humanity; prohibition of slavery; prohibition of piracy; prohibition of racial discrimination and apartheid; basic rules of international humanitarian law.

¹⁰⁷ See for examples D. Shelton, *supra* note 106, p. 291, 305.

ertheless the ICJ, to which the Court referred to in its decision, was very reluctant in mentioning *jus cogens*. As ad hoc Judge Dugard states in his separate opinion in the case *Congo v. Rwanda* of February 2006: “this is the first occasion on which the ICJ has given support to the notion of *jus cogens*”.¹⁰⁸ So far, the ICJ ruled on obligation *erga omnes* but implied the existence of *jus cogens*.¹⁰⁹ The most famous decision regarding obligations *erga omnes* is the *Barcelona Traction* case, where the ICJ held: “Such obligations [*erga omnes*] derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”¹¹⁰ Therefore it would have been possible for the CFI to confer it to other regional and international courts using the concept of *jus cogens*—quite frequently as far as human rights were concerned.¹¹¹ It could have conferred, for instance, on the ECtHR and its judgement in the case *Al-Adsani*. One may also wonder why the Court cited the phrase “intransgressible principles of international customary law” which the ICJ used in its Advisory Opinion of the Legality of the Threat or Use of Nuclear Weapons of 1996 considering international humanitarian law and not “elementary considerations of humanity”, the ICJ used in its Corfu Channel case in 1949.¹¹² The latter term fits better in terms of fundamental rights, which were at issue.

In sum it can be said that the way the CFI used the term *jus cogens* was too broad or, as Bultermann states “the Court seems to mix up international human rights, international humanitarian law, *jus cogens* and customary international law”.¹¹³ It would have been desirable, if the CFI had explained its perception of the concept of *jus cogens* in a more detailed manner, especially with regard to international human rights. Such an attempt might have prevented the decision’s shortcomings regarding to the scrutiny of the applicants fundamental rights.

3.3.2 Security Council resolutions and the right to indirect review on its lawfulness

The CFI concluded that it is authorised to an indirect review of UN Security Council resolutions on the yardstick of *jus cogens* as the Security Council itself is bound. This reasoning is not fully convincing.

First, the court’s finding that the Security Council itself is bound by norms of *jus cogens* is in accordance with the accepted opinion along scholars

¹⁰⁸ Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), separate opinion of Judge ad hoc Dugard, para. 4

¹⁰⁹ The difference between *jus cogens* and obligations *erga omnes* is that latter determines only the scope of application to the “international community as a whole” whereas *jus cogens* norms have hierarchical superiority in a case of norm conflict. See Report of the Study Group of the ILC, *supra* note 2, para. 380.

¹¹⁰ Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ Reports 1970, p. 33, para. 33.

¹¹¹ For an overview see case Congo v. Rwanda, separate opinion of Judge Dugard, *supra* note 108, para 5.

¹¹² Corfu Channel case (UK v. Albania), ICJ Reports 1949, p. 22.

¹¹³ See M. Bultermann, *supra* note 78, p. 753, 769.

and international courts.¹¹⁴ Here, the wording of Article 24 (2) UN Charter is a good starting point but the Court could have enforced its argument by referring to existing case law. For instance, Judge Lauterpacht had drawn the same conclusion in a separate opinion in the ICJ case concerning the *Application of the Genocide Convention between Bosnia Herzegovina and Yugoslavia*.¹¹⁵

However, this conclusion does not solve the problem of who has the power to review the compliance with *jus cogens*. As Shelton stressed: “One may suppose that each state, each Court and each international institution may determine whether or not this violation has occurred.” It is not inherent in the concept of *jus cogens*, that a breach is subject to judicial review.¹¹⁶ This is especially true of the right to review the lawfulness of Security Council resolutions, as this organ has, pursuant to article 24 (1) UN Charter the primary responsibility for the maintenance of peace and security. It is often stated that a judicial review would jeopardize this important role and would run counter to the Council’s margin of appreciation. A detailed analysis of this issue would go beyond the scope of this essay, but two arguments are worth mentioning. First, the likelihood that the Security Council imposes obligations on its member states contrary to *jus cogens* norms is almost impossible. But even if it does, a judicial assessment of incompatibility would not jeopardize the authority of the Security Council as the norms of *jus cogens* “give legal form to the most fundamental policies or goals of the international community”¹¹⁷. Secondly, the fact that the Security Council appears increasingly as a “world legislator” calls for a comprehensive balance on the international community level. Therefore, the CFI approach is welcomed from a human rights perspective and one may wish it could rule similarly to the *Solange* jurisprudence of the German Constitution Court.¹¹⁸ As such an attempt is incompatible with the paramountcy of the UN legal order, the decision of the CFI, however, clearly showed the lack of a fully-fledged human-rights review within the UN structure. This gap can obviously not be filled within the European legal order and therefore the yardstick of *jus cogens*, applied by the CFI, was a blunt sword. The role for a comprehensive judicial review is at the UN level itself, for instance, by the ICJ or—in future—an International Court of Human Rights.¹¹⁹ As long as such a mechanism is not in force, the CFI decision serves to strengthen the recognition of international human rights and pays tribute to a concept of constitutionalism in international law. But the Court should

¹¹⁴ See, e.g., A. Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EJIL (2006), p. 59, 63.

¹¹⁵ See case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Bosnia and Herzegovina v. Yugoslavia*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 440, para. 100. See also case *Congo v. Rwanda*, separate opinion of Judge Dugard, *supra* note 108, para. 8.

¹¹⁶ See M. Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte*, 66 ZaöRV (2006), p. 41, 57.

¹¹⁷ See also case *Congo v. Rwanda*, separate opinion of Judge Dugard, *supra* note 108, para. 10.

¹¹⁸ For a comparison see: A. Arnold, *UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz*, Die „Soweit-Rechtsprechung“ des Europäischen Gerichts erster Instanz, 44 AVR (2006), p. 201.

¹¹⁹ For proposing the ICJ, see: A. Wessel, *The UN, the EU and Jus Cogens*, 3 IOLR 2006, p. 1, p. 5.

not have argued on the concept of *jus cogens* as this is too vulnerable and subverts the Courts authority. Rather, a reasoning along international law as such and a derivation of its competence to an indirect review of the resolution from the deficiency of the UN system and the importance of international human rights within the UN would have been consistent. As the UN Special Rapporteur on globalisation and its impact on the full enjoyment of human rights stated: “the primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from.”¹²⁰

3.3.3 *Fundamental rights protected by jus cogens*

As a consequence of the application of the yardstick of *jus cogens* the Court could not find any infringement of the fundamental rights of the applicants. Neither the right to property, nor the right to a defence nor the right to effective judicial review were violated. As pointed out above, the Courts’ reasoning in regard to the fundamental rights is not persuasive as no detailed subsumption whether the right is part of *jus cogens* or not took place.

Considering first the right to property, the Court only mentioned article 17 (2) of the Universal Declaration of Human Rights. The Universal declaration of Human Rights is a resolution of the UN General Assembly, hence a non legally binding document. Here, the Court should have scrutinized whether the right to property has the status of customary international law.¹²¹ It should have looked at the two Covenants and—as neither of the two acknowledge the right of property, to the Additional Protocol No. 1 of the ECHR and the jurisprudence of the ECtHR, the American Convention of Human Rights and the African Charter of Human and Peoples’ Rights. The freezing of funds and assets does also have a serious impact on human dignity, the right to food and the right to life. Instead, the Court relied on the assumption that the impugned measures were not inhuman and degrading treatment or an arbitrary deprivation of the right to property. The former term, inhuman and degrading treatment, is part of the definition enshrined in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition of torture is part of *jus cogens*.¹²² The ECtHR also found that the destruction of possessions can constituted inhuman and degrading treatment.¹²³ While the CFI were right in concluding that the possible exemptions and derogations set forth in the guidelines of the UN Sanc-

¹²⁰ See Sub-commission on the promotion and protection of human rights, UN Doc. E/CN.4/Sub.2/2000/13, 15 June 2000, para. 63, cited in D. Shelton, *supra* note 106, p. 291, 294.

¹²¹ Cf. C. Tomuschat, *Primacy of United Nations Law: Innovative features in the Community Legal Order*, 43 CMLR (2006), p. 537, 547.

¹²² See, e.g., S. Marks & A. Clapham, *INTERNATIONAL HUMAN RIGHTS LEXICON* (2005), p. 363; Judgement of the International Tribunal for the former Yugoslavia, Prosecutor v. Furundzija (Case IT-95-17/I-T), 10 December 1998, para. 153.

¹²³ The ECtHR had to rule on the destruction of houses during operations by security forces in Turkey and Romania. See *Belgin v. Turkey*, App. No. 23819/04, Judgement of 16 November 2000. See further F. Jacobs & R. White, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2006), p. 488.

tions Committee don't allow such an assumption, one might briefly consider the right to property.

The Courts' examination of the right to be heard lacks again to clarify the status of *jus cogens*. Instead, it widely applied the ECJ jurisprudence and left the yardstick of *jus cogens* it had imposed for the review of the applicants fundamental rights. In conclusion, the Court reconciled with the idea of diplomatic protection of the Sanctions Committee procedure.

In regard to the right to an effective judicial review it is conspicuous that the Court had difficulties to justify the infringement. First, it clearly stressed the existence of a lack of judicial remedy, as the Security Council had not established an international court reviewing individual complaints against decisions by the Sanction Committee. Afterwards, it undertook an attempt to justify this shortcoming in emphasising that this right is neither in the Universal Declaration of Human Rights nor in the ICCPR absolute guaranteed. Also some restrictions to that right are inherent in respect to the doctrine of state immunity and immunity of international organisations as recognized by the ECtHR in the case *Waite and Kennedy*.¹²⁴ In regard to UN Security Council resolutions, the Court rules, such jurisdictional immunity is based on article 25 and 103 UN Charter.

This reasoning is not maintainable. Again, the reference to the non legal binding Universal Declaration of Human Rights is in respect to *jus cogens* fruitless. The jurisdictional immunity of the UN is not based on article 25 and 103 UN Charter but article 105.¹²⁵ But more than that, the situation in the case *Waite and Kennedy*, the Court referred to, is not comparable with the present case.¹²⁶ In *Waite and Kennedy* the ECtHR ruled that there was no breach of the right to access to the court pursuant to article 6 ECHR as it granted an international organisation (European Space Agency) immunity from domestic jurisdictions because under their Convention the applicants had "reasonable alternatives" to protect effectively their rights under the ECHR. In the present case, such reasonable alternatives are not available for the applicants. The diplomatic procedure before the Sanctions Committee is far away from the right to effective judicial review as it depends on the willingness of the states to bring a complaint before the Sanctions Committee. It is not a "reasonable alternative" to individual complaints before an international court. Considering the political listing of terrorist groups, the Special Rapporteur on Human Rights while countering terrorism, M. Scheinin, stressed in his latest report of 2006: "If there is no proper or adequate international review available, national review procedures—even for international lists—are necessary".¹²⁷ Also the September 2005 World Summit Outcome adopted a resolution calling on the Security Council "to ensure that fair and clear procedures exist for placing

¹²⁴ Case *Waite and Kennedy v. Germany*, App. No. 26083/94, Judgement of 18 February 1999.

¹²⁵ See also C. Tomuschat, *supra* note 121, p. 537, 550.

¹²⁶ Similar M. Bultermann, *supra* note 78, p. 753, 771.

¹²⁷ See Report of the Special Rapporteur M. Scheinin on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/61/267, 16 August 2006, para. 39.

individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions".¹²⁸

3.4 Conclusion

The *Jusuf* case disclosed many shortcomings in both the UN and the EC legal order. If the Security Council wants to be accepted as a guardian for the maintenance of peace and security in the world, an adequate human rights protection within its own system seems necessary. The shift by the Security Council from abstract to concrete resolutions—through imposing economic sanctions on individuals reveals the necessity for a judicial control. As the UN legal order prevails, such a control should take hold on the UN level itself, e.g. in the Sanctions Committee. The case also raises the old debate about the judicial control of the Security Council.¹²⁹ During the UN reform process, such an approach was even not on the agenda.¹³⁰ Here, the only fitting institution seems to be the ICJ.

The CFI judgement is to be welcomed from a human rights perspective. This becomes obvious by comparing it to a similar judgment the High Court in England delivered in 2005.¹³¹ In the same way, the High Court had to rule on the superiority of Security Council resolutions adopted under chapter VII. The High Court found the primacy of the resolution over Britain's human rights obligations but without considering a possible breach of *jus cogens*. Sure, as the *Jusuf* judgement disclosed, the concept of *jus cogens* is a idling cycle for a effective human rights control as the standard set fourth in this concept is very high. However, it is a useful concept to expand the scrutiny. In the *Jusuf* case, the CFI applied international human rights in general or fundamental rights acknowledged in the EC, both far away from being subject to the concept of *jus cogens*. In this way it strengthens the protection of human rights.

The most important question is whether the concept of *jus cogens* encompasses a right to judicial review. The CFI assumed such an inherent right, but without giving a detailed reasoning. Therefore, this approach seems untenable and the Court should have given a reasoned argument.

With regard to the protection of fundamental rights within the EC, the judgment sparked a discussion about whether the principle of succession can be extended to human rights treaty obligations of the EC member states. It is proposed that insofar as EC member states have transferred powers to the EC, the latter is bound by the member states obligations.¹³² For the EC/UN relationship, however, such an extension is irrelevant as article 103 UN Charter also applies to human rights treaties like the ICCPR or the ECHR.

¹²⁸ UN Doc. A/RES/60/1, 16 May 2005, para. 109.

¹²⁹ See, e.g., B. Fassbender, *Quis judicabit? The Security Council, its powers and its legal control*, 11 EJIL (2005), p. 219.

¹³⁰ See N. Blokker et al., *UN-Reform Symposium*, 2 IOLR (2005), p. 361-436.

¹³¹ The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State of Defence, Judgement of 12 August 2005, [2005] EWHC 1809.

¹³² See R. Ahmed & I. de Jesús Butler, *supra* note 6, p. 788. The authors pointed out that under an international law perspective the principle of succession is broader than this one accepted under the ECJ jurisprudence as it does not require a exclusive competence by the EC/EU.

IV. PROSPECTIVE AND CONCLUDING REMARKS

A comparison of both cases analysed above implies two similarities. Firstly, both decisions anticipate regulations set forth in the European Constitution Treaty. The CFI, when relying upon the legal basis for the imposition of economic sanctions on individuals and the ECtHR by an indirect examination of EC acts regardless of accession. While the latter is welcomed from a fundamental rights perspective, legitimacy questions arise as the ratification process is still stagnating. Secondly, the ECtHR and the CFI both examined the judicial interactions critically and were not reluctant to strengthen the respective role they have to play. The ECtHR, by developing a manifest deficiency test and the CFI by confidently applying *jus cogens*. Both concepts are installed to ensure a non-erosion of fundamental rights within the legal order in question and have a similarity of structure to the *Solange* jurisprudence of the German Constitutional Court. In *Solange II*, the German Constitutional Court conditionally accepted the primacy of community law as long as the ECJ protects fundamental rights within the EC. This case was preceded by *Solange I* where it held the contrary. It is well accepted among speakers that this jurisprudence has strengthened the development of fundamental rights within the EC legal order. Regarding the cases mentioned in this article, the same conclusion can be made. The manifest deficiency test demands the EC Courts be more aware of the ECHR. Regarding the UN legal order, a direct comparison to the *Solange* jurisprudence fails because of the clearly regulated primacy. The CFI ruling, however, pointed out the obligations of the Security Council and drew a line to limits the Court will accept.

In regard to the UN legal order, the CFI called for an independent international court.¹³³ Such an “International Human Rights Court” seems necessary if the Security Council is adopting resolution directly against individuals. An effective judicial review within the UN Sanctions Committee can only be a provisional measure. Early this year a Unified Standing Treaty Body was proposed by the Inter-Committee Meeting.¹³⁴ Considering the individual complaints mechanism, the establishment of an International Human Rights Court could also encompass the possibility to resolve the ongoing problems within the UN Human Rights Monitoring System.

The *Jusuf* case is now on appeal before the ECJ and one might well be curious if the same conclusion will be drawn. In the event that the ECJ concluded no breach of the applicants fundamental rights, it might be presumed that the ECtHR will be invoked by the applicants on the same issue. Here, Strasbourg can hardly refer to its *Bosphorus* ruling but rather hold the EU member states collectively responsible.¹³⁵ It has to answer the remaining question on the relationship between the ECHR and the UN legal order. The moment of truth will also come for the “manifest deficiency test”, if the ECJ likewise avoids a full-fledged scrutiny of the applicants fundamental rights.

¹³³ Jusuf case, *supra* note 23, para. 340.

¹³⁴ See Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2, 22 March 2006.

¹³⁵ See F. Hoffmeister, *supra* note 48, p. 442, 448.

COMMAND RESPONSIBILITY FOR OMISSION WHEN THE MILITARY COMMANDER “SHOULD HAVE KNOWN”

*Andrea Mateus-Rugeles**

I. INTRODUCTION

The Rome Statute of the International Criminal Court establishes in its article 28 (a) the responsibility of the military commander *de jure* or *de facto*, regarding the crimes under the jurisdiction of the Court, when s/he knew or should have known about the crimes perpetrated by her/his forces, and did not act according to her/his duty of vigilance by not taking the necessary and reasonable measures to prevent, repress, or, report the crimes committed by her/his troops.

Unlike from the Statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, the Rome Statute uses the expression “should have known,” as the second situation in which the military commander would be held responsible for the crimes committed by her/his troops. This formula differs from the expression “had reason to know” contained in the former Statutes.

What does this “new” expression mean? Which *mens rea* does it encompass? Is there any difference between “should have known” and “had reasons to know”?

This paper pretends to answer these questions in a brief way, by analyzing the two figures and by reminding criminal concepts of *mens rea*.

II. ANALYSIS OF ARTICLE 28 (A)

Article 28 (a) states:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

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- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹

This provision states two different circumstances: the first one refers to the situation when the military commander or the person effectively acting as a military commander, “knew,” this means, had a real knowledge of the behavior of the forces under her/his effective command or authority (depending on the case) and control; and in spite of it, s/he did not take the necessary and reasonable measures within her/his power to prevent or repress the commission of the crimes.² In this case it is clear that the military commander with knowledge omits to prevent or repress the crimes. S/he may commit her/his omission with intent to, or, at least “foreseeing that her/his action is likely to produce its prohibited consequences, and nevertheless takes the risk of so acting.”³ That is, the military commander recklessly omits to take any necessary, reasonable and feasible measure.

In civil law countries, this figure will perfectly fit into the concept of *dolus*, where—depending on the theory adopted by the country—generally knowledge and intent are necessary to consider that a conduct was committed with *dolus*. Now, this encompasses the different categories of *dolus*, namely, direct *dolus*, indirect *dolus*, or *dolus eventualis*. In this last sense the two legal systems coincide since recklessness is the same *dolus eventualis*.⁴

In conclusion, it may be said that this situation of omission in spite of having knowledge, requires real knowledge, and may be committed with *dolus*, with knowledge, or with *dolus eventualis*.

The second situation that the article states is that the military commander or the person effectively acting as such, “should have known” of the misconducts of the forces under her/his effective command or authority (respectively) and control. This paper will focus on this hypothesis.

In order to understand the situation that this hypothesis presents, first it is necessary to establish the meaning of that expression. “Should have known” means that having the duty to know, the person did not know due to her/his lack of diligence. The *de jure* or *de facto* military commander was not sufficiently diligent as to be informed in an appropriate way—according to her/his commander position—of the conducts that her/his forces were going to commit or were committing. This lack of attention may be thought as committed with the knowledge and maybe the intention to avoid her/his duty, or when in spite of foreseeing that criminal consequences may arise for her/his omission, s/he still did not act. In that case, it would be clear that the hypothesis here corresponds to a situation in which the military commander (or the person effectively acting as such), has the knowledge of what is occurring inside her/his forces, and, intentionally or recklessly ignored the facts of which

¹ Rome Statute art. 28 (a), *opened for signature* July 17, 1998.

² *See id.*

³ Antonio Cassese, *INTERNATIONAL CRIMINAL LAW* 169 (Oxford University Press 2003).

⁴ *See id.*

s/he has knowledge. If this is the case, then it would be repeating the same *mens rea* necessary to be before the first figure expressed in the article (“knew”) and there would be no reason to establish a second category (“should have known.”)

For this, it is clear that the “should have known” cannot be understood neither as knowledge or intent as stated in article 30 of the Rome Statute, nor as *dolus*, in any of its categories, namely, direct, indirect and *dolus eventualis*. This last category, although is the closest to the concept of negligence—more exactly to the culpable negligence (in common law) or *negligence consciente*, or with representation (in the civil law system)—is also excluded from the figure that we are analyzing, as stated above.

Article 30 of the Rome Statute, establishes an exception of the intent and knowledge categories of *mens rea*, as the mental element required for the commission of the crimes contemplated in articles 5 to 8 of the Rome Statute. When the Statute expressly establishes a provision containing this exception, the negligence will be admitted as the *mens rea* required for the commission of a crime or the omission that results in a crime. Professor Kai Ambos recognizes this exception.⁵ Granados Peña⁶ goes further in the analysis of this provision. He considers that the phrase “unless otherwise provided” not only refers to the possibility of the Rome Statute to have jurisdiction over a crime—those within its competence—committed with negligence; but that this provision states the adoption of the *Numerus Clausus* system for the negligence. This means that the general rule is that “intent and knowledge” is the *mens rea* required for the crimes within the competence of the International Criminal Court, unless there is a provision that expressly admits the negligence as the mental element required to commit the illegal conduct.⁷

According to this analysis and to the fact that “should have known” is an example of this exception, it must be concluded that this figure entails a negligent omission, since it is for the negligence or the carelessness of the military commander that the omission in her/his duty to supervise and control her/his forces, occurred. S/he infringes the duty of care, incurring therefore, in an element of the negligence.⁸

⁵ Kai Ambos, Chair of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität, Address at the Seminary Criminal Responsibility and Colombian Study at the Univ. Javeriana of Colombia (Mar. 25, 2004).

⁶ Jaime Enrique Granados Peña, *La responsabilidad de los jefes y otros superiores en la Corte Penal Internacional y el conflicto Colombiano* (The Responsibility of the military commanders and others superiors in the International Criminal Court and the Colombian Conflict), *Derecho Penal Contemporáneo – Revista internacional*, 179, 179-217.

⁷ Although Professor Granados does not make any mention in his article regarding the *Numerus Clausus* system, he does refer to the definition of this system.

⁸ I Claus Roxin, *Derecho Penal, Parte General*, (Criminal Law, General Part) 999 (Diego Manuel Luzón Peña, Miguel Díaz y García Conlledo, Javier de Vicente Remesal trans., Civitas, 1997).

III. SUBJECTIVE ELEMENT THAT ENCOMPASSES THE TERM “SHOULD HAVE KNOWN”

Having this clear is necessary to precise which type of negligence does this figure encompasses. Is the “should have known” a *negligence consciente* or *negligence inconsciente*? To answer this question a reminder of the concept of these figures is important. The *negligence consciente*, or negligence with representation of the civil law, and the culpable negligence or gross negligence of the common law, has been defined as the situation in which the actor foresees the occurrence of a criminal consequence, as a result of the infraction to duty of care but negligently has confidence on being able to avoid it.⁹

According to Roxin,¹⁰ in spite of the relevance of the risk created, the *negligence consciente* is present only when the actor has had anticipated the possibility of the criminal consequences; it is not enough that s/he should have anticipated this possibility.

On the other hand, the *negligence inconsciente*, or negligence without representation of the civil law, and the inadvertent negligence of the common law, occurs when the actor did not anticipate the criminal consequence, due to her/his lack of awareness to the general accepted standards of conduct.¹¹ In words of Muñoz Conde, the actor “should have foreseen the criminal consequences, if s/he should have behaved with the required diligence.”¹²

Although the delimitation of these two terms is blurry in the practice, “should have known” is a concept that fits better into the definition of *negligence inconsciente* of the civil law, since according with what has been stated by Roxin, the *negligence consciente* does not allow that the anticipation of the criminal consequence should have been done by the actor, but that s/he actually has done it; while the *negligence inconsciente* occurs precisely when should having foreseen the criminal consequence, s/he did not do it due to her/his lack of diligence.

IV. FACTUAL SITUATION THAT ARTICLE 28 (A) ENCOMPASSES

Having stated this, it is relevant now to define the situation that article 28 (a) encompasses when the *de jure* or *de facto* military commander “owing to the circumstances at the time, should have known that the forces were committing or about to commit” the crimes established in articles 5 to 8 of the Rome Statute.

Theory of Command Responsibility

This article establishes the criminal responsibility of the military commander or the person effectively acting as such, for the crimes within the jurisdiction of the Court; in other words, the commander, whether *de jure* or *de facto*, is responsible for the crimes committed with intention or/and knowl-

⁹ *Id* at 426, 1019.

¹⁰ *See id.*

¹¹ *See id.* (citing German Criminal Code section 18 I).

¹² Francisco Muñoz Conde, *TEORÍA GENERAL DEL DELITO* (General Theory of the Crime) 182 (Temis 2d ed. 2002).

edge¹³ by her/his troops under her/his effective command or authority (respectively) and control, due to her/his negligent omission of vigilance and control. This means that even though the commander had not committed by action the crimes, according to the theory of responsibility of the superiors, s/he is responsible for those crimes since her/his omission can be equated to the commission of the crime.

This theory implemented by the criminal international tribunals in their decisions, establishes that the military commander is criminally responsible for the criminal conducts committed by her/his forces.

That responsibility has its origin in the positive acts of the military commander or in her/his negligent omissions when “failing to take measures to prevent or repress the unlawful conduct of his subordinates.”¹⁴

The responsibility for omission occurs only when there is a duty to act.¹⁵ According to what has been stated by the Tribunal for the Former Yugoslavia, article 87 of Additional Protocol I to the Geneva Conventions of 1949 (AP. I) imposes for the military commanders “an affirmative duty . . . to prevent persons under their control from committing violations of international humanitarian law . . .” It is precisely this obligation the basis to establish and define the command responsibility stated in the statutes for the international criminal tribunals; such as the Statute for the Former Yugoslavia in its article 7 (3), the Statute for Rwanda in its article 6 (3), and the Rome Statute in its article 28 (a).¹⁶

This affirmation was also stated in the trial of the Admiral Toyoda, in which the Tokyo Tribunal asserted:

...this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has

¹³ Although article 30 of the Rome Statute establishes that the mental element required for the crimes within the jurisdiction of the Court is the intent *and* knowledge, Cassese affirmed that: “in international law the standard of construction applies that a purely grammatical construction must yield to a logical interpretation whenever this is dictated by the principle of effectiveness . . . and is consonant with the object and purpose of the rule. It is therefore admissible to construe the word ‘and’ as also including the word ‘or’ when this is logically required.” Cassese, *supra* note 4, at 176-7.

¹⁴ Prosecutor v. Delalic et al, Case No. IT-96-2 I, II, Judgment, ¶ 333 (Nov. 16, 1998).

¹⁵ See Juan Carlos Forero, *EL DELITO DE OMISIÓN EN EL NUEVO CÓDIGO PENAL (The Crime of Omission in the New Criminal Code)* (Legis, 2002).

¹⁶ In article 28 of the Rome Statute, this theory is applicable to the military commanders, *de jure* and *de facto*, as well as the other superiors. However the “should have known” figure is pertinent only to the former.

failed in his performance of his duty as a commander and must be punished.¹⁷

As a conclusion, the Tribunal for the Former Yugoslavia affirmed that “the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.”¹⁸

Having stated these general enunciations regarding the theory of the superior responsibility, it is important to go further and study the description of the elements of this theory, in order to decipher the right meaning of the figure “should have known.”

According to the Prosecutor in the judgment that is being analyzed in this paper, the elements of the theory of command responsibility are the following:

The existence of a superior-subordinate relationship, where the superior exercises “direct and/or indirect command or control whether *de jure* and/or *de facto*, over the subordinates who commit serious violations of international humanitarian law . . .¹⁹

The superior must know or have reason to know, which includes ignorance resulting from the superior’s failure to properly supervise his subordinates, that these acts were about to be committed, or had been committed, even before he assumed command and control.²⁰

The superior must fail to take the reasonable and necessary measures, that are within his power, or at his disposal in the circumstances, to prevent or punish these subordinates for these offences.²¹

Although the Defence for the accused Delalic and Delic proposed other elements to establish a superior responsibility,²² the Trial Chamber agreed with the elements presented by the Prosecutor and concluded that from Article 7(3) of the Statute for the Tribunal for the Former Yugoslavia the elements that compose the theory of superior responsibility when s/he did not act, are the following:

The existence of a superior-subordinate relationship.

The superior knew or had reason to know that the criminal act was about to be or had been committed.

¹⁷ Delalic et al, *supra* note 15, ¶ 339 (citing, *United States v. Soemu Toyoda*.)

¹⁸ *Id.* ¶ 343.

¹⁹ *Id.* ¶ 344.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* ¶ 345.

The superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.”²³

Although this last enunciation stated in general terms the elements extracted from Article 7(3) from the Statute for the Tribunal for the Former Yugoslavia, and did not establish expressly two important issues stated by the Prosecutor, the Trial Chamber recognized in the following paragraphs that the *de jure* and *de facto* superior can be responsible under the theory of superior responsibility,²⁴ which is one of the issues the Prosecutor refers to, and, the other one, is related to the fact that “have reason to know. . . includes ignorance resulting from the superior’s failure to properly supervise his subordinates.”²⁵

Making the same analysis—that has been done with article 7 (3), with article 28 (a) of the Rome Statute, the elements of the superior responsibility, extracted from this article, are the following:

The existence of a superior-subordinate relationship.

The military commander *de jure* or *de facto* knew, or owing to the circumstances at the time, “should have known” that her/his subordinates “were committing or about to commit the crimes under the jurisdiction of the International Criminal Court;”²⁶

The military commander *de jure* or *de facto* failed to take the necessary and reasonable measures at her/his disposal to prevent or repress the criminal conducts, or to submit the matter to the competent authorities.²⁷

The second element is the one that directly deals with the topic of this paper. It should be noticed that it presents a difference with the way it is enunciated in the first case, namely in the Statute of the International Tribunal for the Former Yugoslavia, and in the Rome Statute. In the case of the Statute of the International Tribunal for Rwanda, article 6 (3) contains the same formula of the former. Then the following question arises: is there any essential difference, of meaning, among these enunciations? In other words, does “had reason to know” has the same meaning as “should have known” owing to the circumstances at the time?²⁸

²³ *Id.* ¶ 346.

²⁴ *Id.* ¶ 354.

²⁵ *Id.* ¶ 344.

²⁶ Rome Statute, *supra* note 1, (see *supra* note 17).

²⁷ *Id.*

²⁸ Here I am not referring to the difference between “superior” and “military commander,” since in the Statutes of the Former Yugoslavia and of Rwanda, the word superior refers to the military commander. Although when the *de jure* and *de facto* categories were recognized, the Trial Chamber, for instance in the Judgment analyzed in this paper, established that the *de facto* superior refers to a civilian. In the case of the Rome Statute, article 28 establishes the responsibility of military commanders *de jure* or *de facto* in part a, and the responsibility of superiors, namely, civilians, in part b; with different degree of responsibility.

In order to answer this question, is necessary to make an analysis of each of the concepts to arrive to a conclusion.

Had Reason to Know

The international jurisprudence has stated the scope and definition of the element of the superior responsibility, “had reason to know.” In the *Delalic et al* case, the Trial Chamber arrived to the conclusion that the *mens rea* that the superior must have in order to incur in criminal responsibility, is either to have real knowledge of the situation occurring among her/his subordinates (obviously in relation to the crimes under the jurisdiction of the International Tribunal for the Former Yugoslavia), or to have in her/his possession information of a nature, which at the least, would put her/him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by her/his subordinates.²⁹ The Appeals Chamber affirmed this conclusion of the Trial Chamber.³⁰

This Appeals Chamber also explained that the superior has an international duty of taking the necessary and reasonable measures to prevent and punish, and that when the breach of this duty occurs—for the omission of the superior in spite of having access to information which leads her/him to have knowledge of the behavior or conducts of her/his troops—the superior is responsible for the crimes committed by her/his forces, according to the theory of the superior responsibility.³¹

Taking into account what has been explained, it is clear that the expression “had reason to know” is not an open door for a strict liability, given that only if the superior has—or has access to—information which glimpses the possibility of an illegal situation from or among her/his forces, there can be stated that s/he had reason to know that her/his troops were about to commit, were committing or already committed criminal conducts. And then, depending on the type of information s/he accessed and the result of the study of the specific case, the superior may be held responsible according to the theory of the superior responsibility as recognized by the international criminal tribunals.

It is evident that the superior cannot be held responsible for the crimes committed by her/his troops, under the expression “had reason to know,” merely for the fact of being a superior or for considering that s/he has an absolute duty of information by which if s/he did not know, but “should know or had reasons to know” (due to her/his absolute duty of information) is anyway held responsible for the crimes committed by her/his subordinates; and her/his ignorance of the facts or lack of access to information (for not having the possibility to, in spite of her/his diligence) is not taken into account when holding her/his responsibility. If that would be the case, this responsibility would allow a strict liability; therefore when the International Tribunal for the Former Yugoslavia stated that the expression “had reason to know” does not contemplate this kind of responsibility, it is evident that the latter assump-

²⁹ *Delalic et al.*, *supra* note 15, ¶ 383.

³⁰ *Prosecutor v. Delalic et al*, Case No. IT-96-21, Appeals Chamber, par.241 (Feb. 20, 2001).

³¹ *Id.* ¶¶ 222, 223, 225, 241.

tions are not considered by that expression, but only the former one, namely, had information or access to information which guide the superior to know the illegal situation occurring among or by her/his troops. This is supported by the importance and necessity to respect and recognize the guarantees and limits established by the legal order.

Any legal construction must tend to the existence and respect of minimum guarantees when interpreting and applying the norms of a legal system. This is in accordance with the prescription of the concept of strict liability from the criminal law in both the common law and the civil law systems.

Should Have Known

In the negotiations of the AP. I, the International Committee of the Red Cross (ICRC) recommended that regarding the superior responsibility, the expression "should known" would be included when dealing with the hypothesis in which the superior should be responsible for the crimes committed by her/his forces. That expression was rejected when adopting the criteria "had information which should have enabled them to conclude," which, has been stated, does not presents any substantive difference with the expression used in the Statutes of the International *ad hoc* Tribunals. However, the International Law Commission considers that the latter "enables a more objective evaluation than the expression established in the AP. I."³²

The Pamphlet No. 27-10 of the Armed Forces of the United States, when dealing with the Command Responsibility, incorporates the expression "should have had it" (knowledge.) This is the same expression as the one suggested by the ICRC, and the one incorporated in the Rome Statute. Regarding this expression the Department of the Army of the United States has stated that this concept is too ambiguous.³³

So here we are confronted by the question; what does the Rome Statute mean by "should have known"? Which situation does this expression encompasses?

This question may have one of two possible answers: first, the expression "should have known" is too vague but in the end it has the same meaning as "had reason to know" and then we are just before a change of words but not of meaning; or, second, this expression, besides of its ambiguity, establishes a different or a further meaning than the one contemplated by the expression "had reason to know," establishing a wider responsibility than the one stated with the later expression, and leaving an unclear limit with the strict liability.

The second answer seems to fill better the gaps left by the innovation in the expression and by the rejection of it when proposed by the ICRC. In fact, it has been stated that the expression "had reason to know" which implies that the superior has information or access to information that let her/him conclude the past, present or future commission of a crime by her/his troops, has the same meaning as "had information which should have enabled them to

³² Kai Ambos, TEMAS DEL DERECHO PENAL INTERNACIONAL (Topics of the International Criminal Law) 199 (Fernando del Cacho, Karayán, Oscar Julián Guerrero trans., Universidad Externado de Colombia 2001)

³³ *Id.*, at 152-3 (citing, Pamphlet No. 27-1-1).

conclude.” Now, it also was established that the expression “should know” was rejected and replaced by the former one. Up to this moment, this leads us to think that the “new” expression of the Rome Statute does not have the same meaning of the expression stated on the AP. I, or that, at least, it does not comprehends the same or only that situation. In this sense, one could assume that “should have known” includes not only the situations in which the military commander has information, but also those situations in which s/he has neither information nor access to any information, but based only in his position of military commander,³⁴ “should have known” of the crimes committed by her/his troops. This means that the military commander would be held responsible under that criteria even though s/he did not accessed to any information in spite of her/his diligence, based for instance in the affirmation that her/his position compel her/him to know every circumstance related to her/his forces; this would include situations in which the military commander loses every communication with her/his troops. In more informal language this means: although not knowing, should know. It must be noticed that I have said “not knowing,” and not “having reasons to know,” or “having information that would enable her/him to know.” This, points to a strict liability.

As absurd as the last affirmation may appear, it is clear that the answer regarding the meaning of the expression “should have known” cannot be that this phrase has the same meaning as “had reason to know.” If that is the case, there would be no reason for “innovating” with this formula instead of maintaining the expression contemplated by the Statutes of the *ad hoc* tribunals. Furthermore, there would be no reason for rejecting the “should have known” formula and replace it for “had information which should have enabled them to conclude,” in the AP. I. Another argument in favor of the above conclusion is the expression contained in article 28 (b) of the Rome Statute. This provision establishes the superior responsibility for those superiors not contemplated in section (a), namely military commanders *de jure* or *de facto*. This second section considers the responsibility for those civilians that have a position of superior. Taking into account that the civilian superiors do not have the same structure, professionalism or discipline a military commander and a military organization has; this second section of article 28 of the Rome Statute does not impose the same parameters of responsibility to the civilian superiors, and in a certain degree, makes them lower than those imposed to the military commanders.

Article 28 (b) establishes that this category of superiors shall be criminally responsible for the crimes committed by their subordinates when “[t]he superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; . . .”³⁵

Two things can be concluded from this section: the underlined formula is the same as “had information which should have enabled them to conclude;” and, in case this expression is the same as “should have known” there would

³⁴ For the purpose of this paper, herein whenever the military commander is mentioned, it refers to the *de jure* as well as the *de facto*.

³⁵ Rome Statute, *supra* note 2, art. 28 (b) (i). Emphasis added.

be no reason to use one expression in the first section and different words pretending to mean the same, in the second section.

However, arguing on behalf of the reason and the logic, it is likely that the will of the negotiators of the Rome Statute was not that of establishing a strict liability for the military commanders through the expression “should have known;” it is more probable that what they wanted with this “innovation”—if it was made consciously and it is not merely the product of a mistake—was to include other situations besides that of having information or access to information which should have enabled them to reach conclusions. In this sense, it is clear that only the International Criminal Court with its Judgments can clarify or establish the significance and scope of the expression “should have known.”

What would a military commander be responsible for under Article 28 (a)?

The expression “should have known” contained in article 28 (a) of the Rome Statute, cannot encompass situations as the one explained above, namely, hold that the military commander is responsible only because of her/his position without taking into account the *mens rea* and with any further consideration of, for instance, her/his possibility to access to information that enable her/him to conclude that her/his troops were committing or about to commit the crimes under the jurisdiction of the International Criminal Court.

Stating otherwise would ignore recognized principles of the criminal law accepted by the majority of the domestic criminal law systems, and by the international law, such as the eradication of the strict liability. Therefore, the International Criminal Court has the task of either clarify the truly meaning of the expression that is being analyzed by explaining which situations this figure encompasses, and making its interpretation in accordance with the recognized principles of criminal law; or by replacing that expression—in an implicit or explicit way—with the one contained in the Statutes of the *ad hoc* international tribunals.

Until any interpretation is made by the International Criminal Court, it can be considered that the expression of article 28 (a) includes the concept of the expression used by the Statutes of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda. One can arrive to this affirmation by applying the theory of the superior responsibility and the interpretation established by those tribunals of a figure by which the superior (military commander *de jure* or *de facto*) is held responsible for the crimes committed by her/his forces under effective command or authority (respectively) and control. However, this does not mean that this is the only situation that figure encompasses, because for the reasons stated in previous pages, it has been shown that these two expressions are different, or at least encompass different situations. Therefore, up to this moment, the military commander would held responsible under the Rome Statute, when: (i) not knowing s/he should had reasons to know—of the crimes that her/his troops were committing or about to commit—due to her/his access to information that would enable her/him to create at least a doubt regarding the unlawful behavior of her/his forces, and lead her/him to develop a further investigation; and (ii) did not take the neces-

sary and reasonable measures at her/his disposal to prevent, repress, or submit the matter to the competent authorities.

This means that the military commander would be held responsible for the crimes committed by her/his forces with intent and knowledge—or with intent or with knowledge—³⁶ for her/his negligent omission of not taking the necessary and reasonable measures within her/his power. This is what results from the application of the theory of the superior responsibility and the analysis of article 28 of the Rome Statute. In other words, if her/his forces committed a genocide, the military commander who—should have known³⁷ of those criminal conducts—did not act as it is demanded from her/his duty, would be held responsible for the genocide committed with intention or knowledge, due to her/his negligent omission. This, by no means, signifies that the military commander commits a negligent genocide, which is an absurd affirmation and impossible situation.³⁸

V. CONCLUSIONS

Article 28 of the Rome Statute must be understood and interpreted within the context of the theory of superior responsibility, which has been accepted and applied by the international criminal tribunals. This theory establishes three elements to hold that a military commander *de jure* or *de facto* is responsible for the crimes committed by her/his forces, and determines that s/he has an international duty to act by taking the necessary and reasonable measures before the crimes committed by the troops. Therefore the omission of this duty generates responsibility for the military commander.

Since the theory of the superior responsibility does not accept strict liability in order to hold the military commander responsible for the crimes committed by the troops, s/he must have had reasons to know that the crimes were committed or about to be committed (in the *ad hoc* International Tribunals.) The reasons to know can be derived from the existence or possibility to access to information that enables her/him to fulfill her/his duty.

The parallel expression introduced by the Rome Statute, namely, “should have known” is different from the former contained in the Statutes of the *ad hoc* Tribunals, but may encompass, among others, the situation of accessing to information.

The International Criminal Court must state the correct concept and scope of this figure, in accordance with the principles and guarantees of the criminal international law; in this sense, it cannot establish any situation that implies a strict liability.

Finally, it must be stated that under article 28 (a), the negligent conduct is the omission of the military commander *de jure* or *de facto*, but not the crime committed by her/his forces.

³⁶ If one is to accept the consequence of the rule of construction applied by Cassese in this matter. See *supra* note 14.

³⁷ Assuming that, up to this point the only situation—in accordance with the criminal law principles—we can suggest this figure encompasses is that of having access to information that enable to conclude what is going on with or among her/his forces.

³⁸ Genocidio y Responsabilidad Penal Militar, *supra* note 1.

THE RESPONSIBILITY TO PROTECT: DOES THE AFRICAN STAND-BY FORCE NEED A DOCTRINE FOR PROTECTION OF CIVILIANS?

*Gen. Marko D. Chiziko**

I. INTRODUCTION

The most significant security phenomenon since the end of the overt superpower confrontation as a result of the implosion of the Soviet bloc has been the proliferation of armed intra-state conflicts with odious humanitarian repercussions, especially evident in Africa. The events of September 11, 2001 in the United States (US) have aggravated the scale of contemporary humanitarian tragedies overwhelming civilian resources rendering the military to be increasingly involved in the performance of civilian tasks in the protection of civilians. Given the bitter experiences of World War I (WWI), since its establishment in 1945, the UN has consistently addressed the issue of the protection of civilians. Although safeguarding civilians from the scourges of armed violence is at the very heart of the Charter of the United Nations (UN) and the aspirations of the founders of the UN, the Reports of the UN Secretary-General concerning the protection of civilians in armed conflict paint an ugly picture that no part of the world has been immune from abuse, maiming and killing of innocent civilians. According to the reports, civilians, rather than combatants, continue to be the main casualties of current conflicts, with women and children constituting an unprecedented number of the victims.¹

Historically, men have been the primary victims of military operations because of their predominant role as combatants. This is no longer the case in intra-state conflicts of today. In such struggles, communities become the battlefield, and current figures suggest that civilians account for over 95 per cent of casualties resulting from armed conflict. In the past sixty years more than 250 conflicts have erupted around the world; close to 100 million civilians, mostly women and children, have died; and over 200 million people have been stripped of their rights, their property and their dignity. Unlike conflicts during the Cold War, the level of violence directed at civilians during the latter has been unprecedented. While soldiers constituted the highest percentage of casualties in both the WWI and WWII, approximately 70% of the victims in the post-Cold War era have been civilians. Such a development has serious ramifications for the vulnerable populations of the civilian population.² Yet, one of the greatest contributions to the protection of the rights of victims of

* MSM, osc., Msc., General Officer Commanding Malawi Defence Force; Ph.D. Candidate, Witwatersrand University, The Centre for Defence and Security Management.

¹ See UN Secretary-General's report of 28 May 2004 (S/2004/431) concerning the protection of civilians in armed conflict; see also the 1974 UN General Assembly on the Protection of Women and Children in Emergency and Armed Conflict; cf. the Secretary General's address to the 59th session of the United Nations General Assembly, 21 September 2004.

² See Alhaji MS Bah, *The Dynamics of Civilian Protection in the post-Cold War Era in Festus Aboagye and Alhaji MS Bah, A TORTUOUS ROAD TO PEACE—THE DYNAMICS OF REGIONAL, UN AND INTERVENTIONS IN LIBERIA* (Institute for Security Studies, Pretoria, 2005), pp. 21–49, p. 21: cf. Judith Gardam and Michelle J. Jarvis, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* (The Hague: Kluwer Law International, 2001), p. 20.

conflict was to spell out the norms that should govern armed conflicts. The contemporary conduct of belligerents contravenes the basic principles of warfare as enshrined in the 1949 Geneva Conventions and the Additional Protocols of 1977. The rules of International Humanitarian Law (IHL) are intended to provide protection for civilians and non-combatants in armed conflicts. However, the greatest challenge now is not the creation of new norms, but the enforcement of existing rules. According to Bah, the challenge now is not only to address the complex conflict situations but also to influence the manner in which the conflicts are prosecuted within IHL.³

Against this background, the lessons of the past are clear: the enjoyment of human rights helps secure the peace, deters aggression, promotes the rule of law, combats crime and corruption, strengthens democracies, and prevents humanitarian crises; regimes that violate the human rights of their own citizens are more likely to disrupt the peace and security of countries in their region. The best guarantor of security and prosperity at home and abroad is respect for fundamental freedoms and the protection of human rights through good governance and the rule of law. One of the most significant developments relating to the role of the UN Security Council in the protection of civilians came with the release of Secretary-General Boutros Boutros-Ghali's *An agenda for peace: Preventive diplomacy, peacemaking and peacekeeping*, which addressed issues that confronted the international community at the end of the Cold War.⁴ This was followed by the urgent need to address the question of impunity and saw the establishment of the International Criminal Court (ICC) and the *ad hoc* tribunals for the former Yugoslavia and Rwanda as well as the Special Court for Sierra Leone.

In a positive development, and largely in response to the international community's failures culminating to genocide in Rwanda, all the 192 Nations at the 2005 UN World Summit endorsed a groundbreaking doctrine called the Responsibility to Protect (R2P). The doctrine posits that sovereign States have the primary responsibility to protect their citizens but if a State is unable or unwilling to protect its own citizens, the responsibility falls on the international community. In the same vein the Constitutive Act of the African Union (AU Act) provides for the right of the AU to intervene in a Member State in cases of war crimes, genocide, crimes against humanity and other gross violations under Article 4(h). It is thus reasonable to argue that it is time for AU Member States to consistently, robustly and impartially 'operationalize' Article 4(h) and the concomitant normative commitment of R2P when the need arises.⁵ However, as Angelo Gnaedinger (2007) has pointed out, the effectiveness of humanitarian action could be improved but could never take the place of political action which must prevent conflicts and ultimately stop them. Not only parties to conflicts, but also the entire international community, must enforce IHL, through both punitive and preventive measures. It is for this reason States have an obligation under the 1949 Geneva Conventions to inculcate respect for humanitarian norms to both the military and civilians alike

³ Bah, *supra* note 2, p. 21.

⁴ See *An agenda for peace: Preventive diplomacy, peacemaking and peacekeeping*, Report of the Secretary General A/47/277-S/24111, June 1992.

⁵ General Dallaire's full speech is available <http://allafrica.com/stories/200706041468.html> (1 May 2007)

during peacetime, through teaching in schools and training in military institutions.⁶

In the same vein, efforts to strengthen international commitments towards the protection of civilians has resulted into the broadening of the concept of security horizontally from state security to human security. This includes factors such as political democracy, human rights, social and economic development, and environmental sustainability as much as on military stability. To expand the concept vertically involves the recognition that people should be the primary referent for security. In this way, the focus is on identifying threats to human security that emerge at the sub-national, national and trans-national levels.⁷ On a positive note, in 1991 over 500 African leaders held a conference in Kampala Uganda to discuss the continent's problems. The Kampala Document was issued at the end of the conference and was adopted by the erstwhile Organisation of African Unity (OAU) Assembly of Heads of State and Government in which they articulated that: "[w]hile giving due recognition to the provisions of the [UN] and [OAU] Charters with respect to the principles of good neighborliness and non-interference in the internal affairs of states, [there is] an increasing concern over domestic conditions pertaining to threat to personal and collective security and gross violation of basic human rights."⁸ The Kampala Document called for the establishment of a Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA). The CSSDCA aims at promoting and strengthening the cooperation of African countries in ensuring the security of Africans at all levels.⁹ Later, the 36th Session of the OAU Assembly of Heads of States and Government (AHSG) meeting in Lomé, Togo in July 2000, adopted the CSSDCA Solemn Declaration, which ultimately brought the whole process into the focus of what would become the AU. Considering the broad participation of the Kampala conference, it is safe to conclude that the commitment in the resultant Memorandum of Understanding on the Security, Stability, Development and Cooperation Calabashes, reflects the interests and aspirations of African peoples. It also constitutes for each participating State a present and future responsibility, heightened by experience of the past.

⁶ Secretary-General Tells Security Council Protection of Civilians in Situations of Armed Conflict is Key to Sustainable Peace, Press Release, SC/7591, www.un.org/news/press/docs/2002/Sc7591.doc.htm (7 May 2007).

⁷ Bah, *supra* note 2, p. 33.

⁸ The conference was initiated by the independent African Leadership Forum and was co-sponsored by the OAU and the United Nations Economic Commission for Africa (UNECA). This meeting agreed on a unified strategy for development linking the issues of security, stability, development and cooperation in a comprehensive and integrated fashion recognising that one flows into the other and that it is impossible to tackle any without concern for another; see *The Kampala Document: Towards a Conference on Security, Stability, Development and Cooperation in Africa*, Kampala, Uganda on 19-22 May, 1991, available at: www.africaaction.org/african-initiatives/kampall.htm (2 June 2006).

⁹ The CSSDCA is a policy development process created to function within the framework of the AU. It is one of the two special programmes of the AU, the other being the New Partnership for Africa's Development (NEPAD).

II. THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF CIVILIANS

Since the dawn of the new millennium, there has been a dramatic shift in approach to the protection of human rights to the effect that the military has been called upon to protect civilians in situations of gross human rights violations and grave breaches of IHL by way of ‘humanitarian interventions’ to safeguard innocent civilians. Thus, military forces are declining to be instruments for pursuing power policy, but are increasingly becoming guarantors of foreign policy primarily aimed at stability and peacemaking, which is pursued by States, coalitions such as the African Union (AU) and the UN. Although military personnel have been trained and organised primarily to conduct combat operations, the same expertise has given them a unique capability to undertake many of the functions involved in peace and relief operations. Combat troops are trained to close with and destroy an enemy. Yet, in peace and relief operations, they find themselves trying to maintain a peaceful environment without the use of force. Their mission is essentially to keep, enforce and promote peace and to safeguard the geostrategic changes, hence a transition from an era of confrontation and strategic bipolarity to a more cooperative multipolar world.

Peace and relief operations, therefore, represent a tremendous paradigm shift in military thinking and culture. This indicates that very specific rules and training are required for the military to be in keeping with re-orientation of the paradigmatic change in mission and strategy. Yet, in spite of robust mandates for peacekeeping missions, civilians continue to be targeted, often even where peacekeepers are deployed for example in the Eastern Division of the UN Peacekeeping Mission in the DRC (MONUC). Bah informs “this is largely due to unwillingness on the part of the missions to use force to accomplish their respective mandates and a narrow interpretation of the mandate by individual troop contributing countries, whose national rules of engagement are often out of sync with that of the mission”.¹⁰

A. The Use of the Military for the Protection of Civilians: Is There Need for Paradigm Shift?

Contemporary commentators seem to agree that resort to military force should be the last option exercised only in extreme and exceptional cases. Nevertheless, the practical difficulty lies in determining when, in fact, all non-military options have been explored in good faith and exhausted. The generally expressed view is that exceptional circumstances must be cases of violence which so genuinely ‘shock the conscience of mankind’ or which present such a clear and present danger to international security, that they require military intervention.¹¹ Generally, large-scale loss of life actual or apprehended and

¹⁰ Bah, *supra* note 2, p. 27.

¹¹ See *generally* International Council on Human Rights Policy, *HUMAN RIGHTS CRISES: NGOs RESPONSES TO MILITARY INTERVENTIONS* (Versoix, 2002), p. 18; *see also* the International Commission on Intervention and State Sovereignty, *THE RESPONSIBILITY TO PROTECT* (2001), p. 33. *But see* Gustav Däniker, *THE GUARDIAN SOLDIER* (Geneva: United Nations Institute for Disarmament Research, 1999), p. 93.

large scale 'ethnic cleansing' have been held to justify a military intervention. These include war crimes, situations of state collapse that expose the population to mass starvation or civil war and overwhelming natural catastrophes. The reigning paradigm of R2P emphasizes the need for 'large scale' loss of life in order to justify military intervention with a caveat that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing. The argument goes that without this possibility of anticipatory action, the international community would be placed in a morally untenable position of being required to wait until genocide or such atrocities begin, before taking action to stop them.¹²

Thus, inspired by the theme of building robust African regional capacities for peace operations, the Protocol establishing the Peace and Security Council of the African Union (AU) calls for the development of a rapid reaction capacity – the African Union Standby Force (ASF) – that builds on the military capabilities of African regional organisations. The ASF, which will be developed in two phases by 2010, is intended to address the perennial problems relating to the safety and security of civilian populations in armed conflicts in Africa.¹³ The ASF will operate at three possible levels: as an African Force under the AU; as a Regional Brigade at the level of a Regional Mechanism for conflict prevention, management and resolution; or at the level of a lead nation intervening on behalf of the AU.¹⁴ The regional brigades will be deployed under AU mandates and placed under AU or UN operational control, as applicable. As a consequence, in the operations of the ASF, the militaries of AU Member States will be given new tasks, representing a shift from aggression to human protection and utilise the military's virtues of good organization, courage and willingness to sacrifice. Show of force can be used to prevent aggressiveness, even in places where there has been no open display of violence but good reasons to assume that something may happen.¹⁵ This might include standoff reconnaissance, or a consensual preventative deployment of which the UN Preventative Deployment Force in Macedonia is a textbook example. In extreme cases, direct prevention might as well involve the threat to use force.¹⁶ However, as war is often the greatest human rights violation of all and triggers further violations, exploring alternatives to use of armed force for the ASF may be the most profound protection of civilians in Africa.¹⁷

On the other hand, from a strategic point of view, military operations are usually conducted in the full glare of worldwide media attention, the strategic context of peace support operations (PSOs) must therefore be communicated

¹² *Ibid.*, p. 33.

¹³ The ASF will consist of a system of five regionally managed multidisciplinary contingents comprising 3,000–4,000 troops, between 300 and 500 military observers, police units, and civilian specialists on standby in their countries of origin.

¹⁴ Meanwhile, within the policy framework of the ASF, there is a process of establishing the ECOWAS Brigade while the SADC Standby Brigade was launched on 17 August 2007.

¹⁵ Johan Galtung, *PEACE BY PEACEFUL MEANS: PEACE AND CONFLICT, DEVELOPMENT AND CIVILIZATION* (London: International Peace Research Institute, 1996), p. 5.

¹⁶ Cf. THE RESPONSIBILITY TO PROTECT, *supra* note 11, p. 28.

¹⁷ Brian J. Foley, *Avoiding War: Using International Law to Compel a Problem-solving Approach, in Terrorism and Human Rights After September 11* (CAIRO Institute for Human Rights Studies, Cairo, Egypt), p. 109.

and understood by all parties involved. This means that the ASF will have to understand that they can encounter situations where the decisions they make at the tactical level have immediate strategic and political implementations. Failure to understand fully the mission and the operational environment can quickly lead to incidents and misunderstanding that will reduce legitimacy and consent and result in actions that are inconsistent with the overall political objective.¹⁸ Thus, the ASF need to acquire additional capacities that include the ability to operate within the framework of coalitions and in an atmosphere fraught with national sensitivities. The ASF will have to be able to handle human protection missions in difficult strategic environments. They will need the technical and organisational skills to employ both their troops and their equipment with an optimum effect for a great variety of tasks. This development requires the revision of military doctrines and strategies, and corresponding restructuring of the national armed forces, to enhance their defensive capabilities particularly the human protection role, and simultaneously limit their offensive strength.¹⁹ On this mission, strategy for the ASF would entail waging a ‘humanitarian war’ from a human rights perspective. This reflects the need for strategic thinking to formulate ‘ethics’ for using military might for altruistic purposes.²⁰ Unfortunately, discussion of non-violent tactics is usually limited to state-based diplomatic pressure and economic sanctions since human rights groups have a tendency towards cynicism that hinders strategic thinking and tactical experimentation.²¹

The role of intervention forces is really a form of policing rather than war.²² Reminiscent of the words of the former UN Secretary-General Dag Hammarskjöld, “peacekeeping is not a job for soldiers, but only soldiers can do it”.²³ Hence the national contingents forming the ASF would need to acknowledge and understand new non-military exogenous factors, to assume additional responsibilities and develop new patterns of non-violent action. In this sense, strategic efforts are not a matter reserved for the military geniuses but also for human rights and humanitarian activists as well as lawyers, theologians and the like, to develop standard operating procedures (SOPs) or better still ‘ethics for human protection’ to replace the so-called rules of engagement for human protection operations. With the declining demand for a ‘warrior’, ‘combatant’ or ‘battlefield technician’, a soldier becomes what Däniker calls a ‘guardian soldier’, who while protecting and maintaining order, is also capable of performing aid and rescue operations with the same energy and competence as combat missions. In this sense, protection would entail the use

¹⁸ See US Army FM 100-23, Chapter 1, Fundamentals of Peace, p. 1.

¹⁹ Roger Kibasomba and Björn Möller, *Europe and the Great Lakes Crisis*, Report from the Maputo Conference, 28–29 June 2001, Danish Ministry of Foreign Affairs, DANIDA, p. 111.

²⁰ Cf generally C.A.J. Coady, *The Ethics of Armed Humanitarian Intervention*, 45 PEACEWORKS (United States Institute for Peace, 2002).

²¹ Liam Mahony, “Military Intervention in Human Rights Crises: Responses and Dilemmas for the Human Rights Movement”, *International Human Rights Policy*, 2001 p. 19.

²² See Coady, *supra* note 20, p. 17.

²³ Dag Hammarskjöld, Former UN Secretary-General, quoted in Maj. Gen. (Ret.) Indar Rikhye, *THE POLITICS AND PRACTICE OF UNITED NATIONS PEACEKEEPING: PAST, PRESENT AND FUTURE* (Toronto: Brown Book Company Ltd, 2000), p. 219.

of force for prevention of proliferation of violence.²⁴ Of course use of armed force can never be humane, but its cruelty can be increasingly curtailed. By developing non-violent lines to achieve the long-term goal of abolition of war.²⁵ However, it is worthy of notice that planning of human protection operations should not apply best-case assumptions to situations where the local actors have exhibited worst-case behaviour. The Brahimi Report suggests that in this case, it means bigger forces, better equipped and more costly but able to be a credible deterrent. The Brahimi Report recommends that troops should be afforded the field intelligence and other capabilities needed to mount an effective defence against violent challengers.²⁶

III. THE CONTEMPORARY DOCTRINE FOR SAFEGUARDING CIVILIANS

The presence in war zones of military personnel and humanitarian staff is one of the most effective means of guaranteeing not only the delivery of relief aid but also the protection of victims from hostilities. However, drawing on experience, there is lack of emphasis on the protection of human rights of civilians in international interventions. For instance, in 1993, a small UN peacekeeping contingent was sent to Rwanda without a human rights component despite warnings that one was needed and when government forces engaged Tutsi civilians, the Security Council did not authorise them to use force to protect civilians.²⁷ The war in Sierra Leone, as another example, was largely ignored by much of the international community, with the exception of those who attempted to exploit its resources while the warring factions committed grotesque nature of attacks on civilians.²⁸ In Angola, UNAVEM II did little to protect human rights, often turning a blind eye to reports of human rights abuses.²⁹ This reflects the importance for a clear mandate to protect the rights of civilians during armed conflicts, because promotion of human rights means little if it does not mean to defend them when they are under attack.³⁰ In the Darfur crisis, the AU Mission to the Sudan (AMIS) which is mandated to protect the AU civilian and military observers, has been criticized for slow deployment and not providing for the protection of civilians under threat. Its fo-

²⁴ Rikhye *supra* note 17, pp. 104–106.

²⁵ See Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (International Peace Research Institute, 1996), p. 5.

²⁶ See Rikhye, *supra* note 23, p. 106.

²⁷ The UN Human Rights Commission refused to discuss the case of Rwanda in open session in 1993. The Secretary General and the Security Council acknowledged that the war and the genocide could be addressed separately and they should try to halt the killings. RPF opposition to a new UN force complicated and slowed the effort to mount a rescue operation for Tutsi civilians, see HRW Report: Rwanda: 1999. See also International Council on Human Rights Policy, *supra* note 11, p. 8.

²⁸ See generally The Human Rights Watch World Report 1999: Sierra Leone, *Defending Human Rights*, p. 2.

²⁹ See www.hrw.org/reports/1999/Angola/Ang1998-10.htm, at p. 7 (22 May 2007).

³⁰ Zelim Skurbaty, AS IF PEOPLES MATTERED: A CRITICAL APPRAISAL OF 'PEOPLES' AND 'MINORITIES' FROM THE INTERNATIONAL HUMAN RIGHTS PERSPECTIVE AND BEYOND (The Hague: Kluwer Law International, 2000), p. 189.

cus is limited to observing and reporting violations of human rights by the parties to the conflict.³¹

Nevertheless, according to Nicholas Berry, today's wars are vulnerable to intervention: "inject members of the international community into these wars as non-partisan third parties, and these rag-tag wars can be overwhelmed and made dysfunctional. They can be sabotaged. The third parties would have enough capabilities to upset the power relations between the warring parties and prevent victory by one side, to mute the horror of combat on civilians, and to create the basis for diplomatic settlements".³² Thus, modern conflicts can be decided by a variety of means of pressure and by a whole range of instruments including a psychological reaction to convince the enemy of the futility of initiating or continuing the combat without reviving the anachronism of annihilation.³³ Therefore, the ASF –who will operate as peacekeepers as well as humanitarian actors –has a key role to play in the protection of the people at risk during violent conflicts by ensuring compliance of IHL and respect for human rights. As the Darfur crisis has demonstrated, there is an urgent need for the international community to control and outlaw indiscriminate forms of warfare that maim and kill innocent civilians.³⁴

IV. THE ROLE OF THE SECURITY COUNCIL IN MILITARY INTERVENTION TO PROTECT CIVILIANS

Military intervention for civilian protection is a serious commitment for the UN. In Resolution 1291(2006), for example, the UN Security Council unanimously reaffirmed the 2005 UN World Summit commitment on the R2P.³⁵ The UN Security Council has increasingly included language on protecting vulnerable civilians in mandates for UN peace operations in Africa, including in Sierra Leone, DRC, Liberia, Burundi, Côte d'Ivoire, and Sudan.³⁶ Since 1999, there has been a 500 per cent expansion in UN peace operations globally, and more than 80 per cent of these have been deployed to Africa.³⁷ The UN has also made progress in strengthening the Department of Peacekeeping Operations (DPKO), increasing numbers of headquarters staff to around 600. However, the new UN Secretary-General Ban Ki-moon has cautioned that the unprecedented global surge in UN peacekeeping operations has left its leadership 'impossibly overstretched' and unable to cope without serious reform and additional resources.³⁸

³¹ See Bah, *supra* note 2, p. 32.

³² Nicholas O. Berry, *WAR AND THE RED CROSS: THE UNSPOKEN MISSION* (London: Macmillan, 1997), pp. 30–31.

³³ Däniker, *supra* note 11, p. 98.

³⁴ G.S. Goodwill-Gill, in *The Rights of Children in Armed Conflicts*, Conference on the Rights of Children in Armed Conflict, Final Report of a Conference held in Amsterdam, the Netherlands, on 20–21 June 1994, p. 78.

³⁵ United Nations, Security Council Resolution 1291, 24 February 2006.

³⁶ Cf. T. Berkman and V. Holt, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations* (Washington, DC: Henry L. Stimson Centre, 2006).

³⁷ Center on International Cooperation, 2006.

³⁸ See United Nations, 'General Assembly supports Ban Ki-Moon's reform proposals for stronger UN, Press Release, News Centre, 5 April, 2007.

Further, over the years the Security Council has provided a conceptual framework to combat the problem of protection of civilians, but what is needed now was practical action and a more systematic approach.³⁹ The Security Council's *Aide-memoire* of March 2002 is a centrepiece of a strategy for civilian protection, which has already proved useful in Sierra Leone and the Ituri region of the DRC Coordination between the Office for the Coordination of Humanitarian Affairs (OCHA) and the Department of Peacekeeping Operations was also progressing. The *Aide-memoire* is important to ensure that government responses to perceived security threats meet international legal standards. The 'road map' annexed to the report of the Secretary-General in this respect provides direction for further progress.⁴⁰ In that light, practical actions to protect civilians are described in three key areas: secure humanitarian access; the clear separation of civilians and combatants; and the swift re-establishment of the rule of law, justice and reconciliation during the transition.

A. Provision of Humanitarian Access to Civilians in Armed Conflict

To improve humanitarian access to civilians in armed conflict, it is imperative that all parties to a conflict, including non-state actors (NSAs), must understand their obligations and responsibilities to civilians, with clearly defined conditions for access in any terms of engagement. Human Rights organizations, Humanitarian agencies and the ASF should coordinate contact in that regard, with the *aide-memoire* used to guide access negotiations. Contact between warring parties on humanitarian access issues should be structured; framework agreements are the best option when no peacekeeping mission is present.

B. Promotion of the Rule of Law

In the interest of promoting the rule of law, justice and reconciliation, it is crucial that resources must be provided to reform national institutions as soon as possible after the end of a conflict. Similarly, early and adequate disarmament, demobilization and reintegration of combatants (DDR) must also be ensured, with attention to reconciliation at the community level.

C. Gender-Based Abuses in Conflict Situations

It is also important that laws and regulations inconsistent with international legal standards be repealed, in particular those regarding the right to return, property rights and housing rights, and that impartial mechanisms be put in place for the return and restoration of property. Finally, international

³⁹ Secretary-General Tells Security Council Protection of Civilians in Situations of Armed Conflict is Key to Sustainable Peace.

⁴⁰ The report of the Secretary-General (document S/2002/1300), the third such report since September 1999. See also other reports of the Secretary-General (documents S/2002/1154 and S/2002/1299); Reports by the expert panels on the illegal exploitation of resources were also valuable regarding the relation of such exploitation and harm to civilians (documents S/2002/1146 and S/2002/1115).

tribunals and the ICC must be supported, to bring to justice perpetrators of grave violations of humanitarian and human rights law.

D. Protection of Civilians while Countering Terrorism

AU States must condemn terrorism without reservation and fight it with focused energy. The rider though is that States must respond to acts of terrorism in a way that respects the need to protect civilian life and property. The UN Secretary-General has cautioned that to pursue security at the expense of human rights will ultimately be self-defeating. In addition, because of the added complexities caused by terrorism, the UN faces the burden to formulate clear guidelines for its future work on the protection of civilians in armed conflict in areas where terrorist organizations are active.

V. THE ROLE OF THE INTERNATIONAL COMMUNITY IN SAFE-GUARDING CIVILIANS IN AFRICA

While developing countries contribute the vast majority of personnel for UN deployments, Western militaries have provided vital operational capacity to underpin UN peace operations in Africa, including US and French deployments in Liberia and Côte d'Ivoire, respectively, and EU support for the UN mission during elections in the DRC in 2006. Thus, there is no doubt that support for the protection of fundamental human rights is one of the foundations of US and EU countries. Recently, the US has broadened its foreign aid policy to include providing more protection to civilian populations in countries where governments fail their citizens. An example of the new policy is the strategy now being implemented to protect internally displaced persons (IDPs) in the Darfur region of Sudan from starvation and death.⁴¹ On its part, the EU has become an increasingly important player in African peace and security. *Operation Artemis* was the first example of the EU's increasing willingness to develop its operational military capacity on the ground in Africa. More recently, in June 2006, the EU sent a small military operation coined EUFOR DR Congo to help MONUC deter anticipated violence during elections in the DRC in July 2006 although it is not clear to what extent the EUFOR DR Congo improved civilian security in reality.⁴²

The 'Battlegroups' concept is, at present, the primary operational tool for EU military interventions. In 2004, the EU agreed to establish 13 Battlegroups, which are based on a battalion-sized force of 1,500 troops, formed by a framework nation or by a multinational coalition of EU Member States.

⁴¹ Speaking at an October 27 meeting of the agency's Advisory Committee on Voluntary Foreign Aid, Roger Winter, heads USAID's Bureau for Democracy, Conflict and Humanitarian Assistance quoted by Kathryn McConnell Washington File Staff Writer, U.S. Foreign Aid Policies to include Safeguarding Civilians, USAID's Winter reviews U.S. assistance being extended to Darfur, 28 October 2004.

⁴² Deployment was delayed as EU member states were slow to come forward to contribute troops. Germany had previously agreed to lead the mission, but spent weeks in negotiations to build up sufficient numbers of personnel. EUFOR DR Congo was eventually deployed with an element of 400-450 troops stationed in Kinshasa, and a battalion-sized 'on-call' force outside the country, ready for rapid deployment when needed. (House of Lords, 2006).

Battlegroups are intended to be deployable within 15 days and sustainable for 30 days (but extendable up to 120 days). They are designed to be compatible with UN Chapter VII mandates, and will, in most instances, be deployed in response to a request from the UN. They will be capable of robust peace enforcement on a limited scale, such as local suppression of hostilities, separation of parties and prevention of atrocities. The plan is that the EU should be able to undertake two concurrent single Battlegroup-size rapid response operations simultaneously.⁴³ On paper, Battlegroups appear to be highly relevant to rapid military interventions for humanitarian protection purposes in Africa. The December 2005 EU *Strategy for Africa* pledged to deploy operations ‘involving EU Battlegroups’ to promote African peace and security.⁴⁴ However, experts have noted that Battlegroups have not been configured for the specific tasks of civilian protection, and no framework nations or multinational coalition members have made clear commitments to deploy them to crises in Africa. Discussions between the EU and NATO have reached broad agreement that Battlegroups will be mutually reinforcing with the larger NATO Response Force (NRF).

Standards, practical methods and procedures for Battlegroups are designed to be compatible with those defined within the NRF, so that there should be considerable potential for synergy between the two initiatives.⁴⁵ The NRF comprises 25,000 troops for rapid deployment with global reach. The NRF is a ready and highly technologically advanced force comprising land, air, sea and Special Forces components. It is intended to be capable of performing missions worldwide across the whole spectrum of operations, including crisis management, and as ‘an initial entry force’ for larger, follow-on operations. The NRF has the capacity to start to deploy after five days notice and to sustain itself for operations lasting 30 days, or longer with reinforcements. To this end, David Mepham and Alexander Ramsbotham have recommended that the EU should mandate Battlegroups to prioritise civilian protection in crises in Africa, through configuring, training and equipping them for the specific tasks of civilian protection. The North Atlantic Council should be prepared to deploy the NATO Response Force and other key assets to support AU or UN peace operations, or stand-alone interventions in Africa if necessary.

VI. SAFEGUARDING CIVILIANS: WHICH WAY THE AFRICAN STANDBY FORCES?

There are still questions on the international capacity and willingness to undertake military intervention in Africa. Western commitments have been very selective, and their contributions have been ‘standalone’, operating outside UN command and control structures. This explains why the former UN Secretary-General Kofi Annan and the independent UN High-level Panel on Threats, Challenges and Change voiced concerns over western governments’

⁴³ David Mepham and Alexander Ramsbotham, *Safeguarding Civilians*, Institute of Public Policy Research, 2007.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

increasing reluctance to contribute troops to UN peace operations.⁴⁶ In the same vein, to date, it has been observed that NATO's operational activities in Africa have been restricted to providing logistic support to AMIS in Darfur, and some minor training and capacity-building assistance. With NATO assets already severely stretched in Afghanistan and Kosovo, and with the UK and the US still heavily committed in Iraq, there seems little immediate prospect of that changing. The international political fallout from the Afghanistan and Iraq interventions raises further questions about the willingness of NATO to support military intervention in Africa. Further, while the NRF appears exceptionally well placed to respond to a fast-moving war crimes or genocide-type situation like Rwanda in 1994, it is still not clear how far NATO will be prepared to deploy the NRF or other key assets to support military interventions in Africa is unclear.⁴⁷

Against backdrop, Costantinos is of the view that whatever the technical construction chosen to express the R2P in Africa, Africans must be the ultimate determinants of their own democratic fate by understanding the states of the right and obligations of citizenship and respect for democracy and ensuring the sustainability of peace and security in the continent. Africans should act by themselves to determine their own democratic fate in spite of countless declaration and manifestos on human security. The sustainability of the system will depend on its understanding by States of the right and obligations of citizenship and respect for democracy.⁴⁸ In the same vein, Ambassador Djinit counsels that Africans have to protect peace and security in Africa themselves without abusing the concept of non-interference through a collective force in insuring peace and security.⁴⁹ In this connection, Khobe has highlighted some of the problems with AU deployments which include: excessive control by home governments; language difference; lack of standardization of equipment, arms and ammunition; different standards, doctrines and staff procedures; poor sea and airlift capabilities; absence of vital air-to-ground supports asserts, particularly ground attack helicopters; lack of logistic support for some contingents; inadequate resources to deal with humanitarian problems; poor coordination and liaison with international relief agencies; and the misrepresentation of force activities by mercenary organizations and the international mass media.⁵⁰ These are the issues that the ASF Military Staff Committee (MSC) comprising senior military officers of the Members of the AU PSC will have to advise and assist in solving in order to promotion the protection of civilians in Africa.

⁴⁶ United Nations, *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, 21 March, New York: United Nations Department of Public Information, 2004, para. 216.

⁴⁷ Mepham and Ramsbotham, *supra* note 43.

⁴⁸ Dr. B.T. Costantinos, Vice President of African Humanitarian Action opening the workshop entitled "The African Union and 'the responsibility to protect' From Non-Interference to Non-Indifference", Hilton Hotel, Addis Ababa, 2007.

⁴⁹ Yonas Abiye, *Africans Urged to Underpin 'Responsibility To Protect' in the Continent*, THE DAILY MONITOR (Addis Ababa), 11 June 2007.

⁵⁰ Matikishe Maxwell Khobe, *The evolution and conduct of ECOMOG operations in West Africa*, www.iss.org.za/Pubs/Monographs/No44/ECOMOG.html.

VII. CONCLUSION

Although in March 2007, the UN General Assembly endorsed Ban's plans to restructure DPKO. However, Secretary-General Ban's proposals do not address the issue of enhancing the capacity of UN peace operations to promote civilian protection. This is an obvious oversight given the increasing emphasis placed on civilian protection in UN mandates. In the past, efforts towards the development of appropriate holistic doctrine for the protection of civilians have been ad hoc, fragmented and based on evolving horrors of conflicts in Africa and elsewhere. This has led to a gap between the means and ends of the UN and AU peace operations in terms of their mandates and the resources, capacities and willingness to use force in upholding mandates. Even though the UN is making an effort to consolidate its doctrine for peace-support operations through such mechanisms as standard generic training modules (SGTM), the political dynamics of the UN System point to difficulties in achieving consensus on what may be expected of UN peace operations to carry out forcefully all provisions of the mandate. Notwithstanding that western support has sometimes played a pivotal role in enhancing the capability of UN operations to deliver civilian protection, there is need to transform their existing force capacities into suitable contingents for the specific tasks of civilian protection, and should be prepared to deploy troops and other military assets to UN peace operations in Africa.

On this account, it has been suggested that UN Member States should implement Secretary-General Ban Ki-moon's proposals to create two new UN peacekeeping departments, a Department of Peace Operations and a Department of Field Support, making sure that a unity of command is maintained so as to ensure better planning, faster deployment and a more responsive system of support for those working on the ground. Importantly, David Mepham and Alexander Ramsbotham have recommended that the UN should develop a working concept for civilian protection, and should build this into UN peacekeeping training modules and doctrine, containing a detailed breakdown of the specific requirements of civilian protection.⁵¹ Likewise, the AU and the EU need to collaborate so that the EU Battlegroups and NATO's Response Force could make coordinated contribution to the R2P in Africa. Efforts should thus be made to develop and strengthen African capacities for PSOs with the ASF constituting the nucleus of such mechanism. To this end, Bah suggests that attention should be given to the development of African capacities at the strategic, operational and tactical levels, which are essential for the successful application of the ASF. Importantly, the security architecture should include a strong early warning and early response capacity.

However, as regards the AU, analysts have noted that doctrine development is still too early in the time for the establishment of the ASF by 2010.⁵² Still, the challenge for the ASF in this context is to find tactics and strategies of military intervention that fill the current gap between outdated

⁵¹ Bah, *supra* note 2, p. 45.

⁵² The ASF should be given much greater support by African states and international donors, so that it has the necessary equipment, resources, mandate and doctrine to make an effective contribution to the protection of civilians in acute crises in Africa. Aboagye and Bah, *supra* note 3, p. 6; see also Mepham and Ramsbotham, *supra* note 43, p. xiii.

concepts of peacekeeping and full-scale military operations that may have deleterious impacts on civilians. Peacekeeping operations succeed when they are led or complemented by well-equipped, well-trained forces of sufficient size and with a mandate that allows for robust defence as well as counter-attack. A British force deployed to Sierra Leone in 2000 to assist the UN peacekeeping mission is a perfect example, as is a French-led force Operation Artemis deployed in Eastern DRC in 2003. The existence of a well trained and equipped ready force in their own countries of origin will undoubtedly provide the ASF with the capacity for rapid deployment in regional and other conflicts on the continent, as well as under the auspices of the UN. Operation Artemis represents a possible template for ASF deployments.⁵³ In the wake of continued dithering by the international community, such ASF intervention will endow the continent with the capacity for prevention, management and resolution of existing and emerging conflicts. The ASF should constitute the nucleus mechanism. The operationalization of the ASF and its constituent brigades should therefore be given priority as a way of lending credence to the notion of 'African solutions to African problems'. Nonetheless, the Stand-by Brigades can possible build on the EU Battlegroups concept.

In short, the ASF need better training and equipment as well as robust mandates to protect civilians. This requires a review of the military roles and capacities relevant to international peace and security challenges of the 21st Century, particularly a review of defence policies of Member States to meet the prevailing challenges. This should therefore address four broad categories of needed change: the exploration and development of the kinds of alternative military models required; the promotion of a more effective multilateral institutional framework for multilateral military action; further development of the Common African Defence and Security Policy (CADSP) to reflect the military and non-military dimensions of international peace and security efforts; and the development of a broader international consensus and a more responsive, and accountable, multilateral decision-making mechanism in support of the ASF's peace support operations.⁵⁴ Building on the CADSP, the AU may implement these guidelines if it has an integrated set of civil-military capabilities that would be suited to carry out human security operations and a legal framework that underpins decisions to intervene as well forming the basis for a law-enforcement approach to operations. Strengthening and devel-

⁵³ The possibility that strengthening African military protection capacities could tip fragile civil-military balances in certain countries. Any increases in military institutions' capacities in Africa must be linked to proportionate investments to make security forces democratically accountable to civilian authorities; see Report of the Secretary-General on the implementation of the Conference on Security, Stability, Development and Cooperation in Africa, Department of Foreign Affairs, Republic of South Africa, p. 10; available at: www.dfa.gov.za/foreign/Multilateral/africa/cssdca.htm (15 June 2006); see also the AU Common African Defence and Security Policy, Sirte, February 2004. See 'The Development of a Common European Security and Defence Policy—The Integration Project of the Next Decade', Remarks by Dr. Javier Solana, High Representative of the EU for Common Foreign and Security Policy, EU-Commission/ Institut für Europäische Politik Conference, Berlin, 17 December 1999, www.fas.org/news/europe/091217-eu-fp.htm (5 May 2005)

⁵⁴ Festus B. Aboagye and Alhaji MS Bah, "Introduction", in Aboagye and Bah (eds.), *supra* note 3, p. 6; see also Mephan and Ramsbotham, *supra* note 43, p. xiii.

opment of civil–military links will ensure that issues such as regional integration or even in cases of humanitarian intervention which, in the past were purely state-driven, would receive strong inputs from the citizenry.⁵⁵ The AU and Regional Economic Communities (RECs) should also work towards developing their own accountability mechanism.

⁵⁵ Bah, *supra* note 2, pp. 45–46.