

International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan

Marco Sassòli et Marie-Louise Tougas

Volume 56, numéro 4, juin 2011

URI : <https://id.erudit.org/iderudit/1005850ar>
DOI : <https://doi.org/10.7202/1005850ar>

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Éditeur(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (imprimé)
1920-6356 (numérique)

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Citer cet article

Sassòli, M. & Tougas, M.-L. (2011). International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan. *McGill Law Journal / Revue de droit de McGill*, 56(4), 959–1010. <https://doi.org/10.7202/1005850ar>

Résumé de l'article

Le transfert des détenus afghans par les forces canadiennes aux autorités afghanes a été l'objet de préoccupations, au sein de l'opinion publique et du Parlement, et a mené à certaines procédures judiciaires et enquêtes au Canada. Cet article explore les règles du droit international qui s'appliquent particulièrement à de tels transferts. Les règles du droit international humanitaire (DIH) les plus pertinentes sont celles relatives aux prisonniers de guerre et applicables dans les conflits armés internationaux. Cependant, on peut estimer que le conflit en Afghanistan n'est pas de caractère international. Néanmoins, ces règles pourraient s'appliquer dans ces circonstances, puisque le Canada a signé un accord avec l'Afghanistan et a fait certaines déclarations unilatérales. De surcroît, cet article présente le droit international des droits de l'homme (DIDH) et la jurisprudence portant sur l'obligation d'un État d'agir avec la diligence nécessaire lorsqu'il transfère la charge d'une personne à un autre État où il existe un risque réel de torture ou de traitement inhumain. Bien que le DIH contiennent les règles applicables aux conflits armés, le DIH pourrait, en tant que *lex specialis*, guider l'interprétation des concepts du DIH. Finalement, la conduite des dirigeants canadiens et des membres des forces canadiennes est régie par le droit pénal international (DPI). Par conséquent, cet article démontre l'interrelation intime entre le DIH, le DIDH et le DPI en ce qui a trait aux conflits armés contemporains et à la façon dont la jurisprudence des organismes de droits de l'homme et les tribunaux pénaux internationaux contribuent à notre compréhension des règles de DIH.

INTERNATIONAL LAW ISSUES RAISED BY THE TRANSFER OF DETAINEES BY CANADIAN FORCES IN AFGHANISTAN

*Marco Sassòli and Marie-Louise Tougas**

The transfer of Afghan detainees to Afghan authorities by Canadian forces raised concerns in public opinion, in Parliament, and was the object of court proceedings and other enquiries in Canada. This article aims to explore the rules of international law applicable to such transfers. The most relevant rule of international humanitarian law (IHL) applies to prisoners of war in international armed conflicts. However, the conflict in Afghanistan, it is argued, is not of an international character. The relevant provision could nevertheless apply based upon agreements between Canada and Afghanistan and upon unilateral declarations by Canada. In addition, international human rights law (IHRL) and the very extensive jurisprudence of its mechanisms of implementation on the obligations of a state transferring a person to the custody of another state where that person is likely to be tortured or treated inhumanely will be discussed, including the standard of care to be applied when there is an alleged risk of torture. While IHL contains the rules specifically designed for armed conflicts, IHRL may in this respect also clarify as *lex specialis* the interpretation of concepts of IHL. Finally, the conduct of Canadian leaders and members of the Canadian forces is governed by international criminal law (ICL). This article thus demonstrates how IHL, IHRL, and ICL are intimately interrelated in contemporary armed conflicts and how the jurisprudence of human rights bodies and of international criminal tribunals informs the understanding of IHL rules.

Le transfert des détenus afghans par les forces canadiennes aux autorités afghanes a été l'objet de préoccupations, au sein de l'opinion publique et du Parlement, et a mené à certaines procédures judiciaires et enquêtes au Canada. Cet article explore les règles du droit international qui s'appliquent particulièrement à de tels transferts. Les règles du droit international humanitaire (DIH) les plus pertinentes sont celles relatives aux prisonniers de guerre et applicables dans les conflits armés internationaux. Cependant, on peut estimer que le conflit en Afghanistan n'est pas de caractère international. Néanmoins, ces règles pourraient s'appliquer dans ces circonstances, puisque le Canada a signé un accord avec l'Afghanistan et a fait certaines déclarations unilatérales. De surcroît, cet article présente le droit international des droits de l'homme (DIDH) et la jurisprudence portant sur l'obligation d'un État d'agir avec la diligence nécessaire lorsqu'il transfère la charge d'une personne à un autre État où il existe un risque réel de torture ou de traitement inhumain. Bien que le DIH contiennent les règles applicables aux conflits armés, le DIH pourrait, en tant que *lex specialis*, guider l'interprétation des concepts du DIH. Finalement, la conduite des dirigeants canadiens et des membres des forces canadiennes est régie par le droit pénal international (DPI). Par conséquent, cet article démontre l'interrelation intime entre le DIH, le DIDH et le DPI en ce qui a trait aux conflits armés contemporains et à la façon dont la jurisprudence des organismes de droits de l'homme et les tribunaux pénaux internationaux contribuent à notre compréhension des règles de DIH.

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Introduction

Canada's military presence in Afghanistan started as participation in the post 9/11 US-led Operation Enduring Freedom.¹ In 2003, Canada became involved in the International Security Assistant Force (ISAF) created under the authority of the United Nations to "assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas."² The ISAF was authorized to take "all necessary measures"; that is, including the use of military force, to fulfill its mandate.³ The transfer and treatment of Afghan nationals arrested and detained by ISAF member states, especially by the United States at Guantanamo Bay, have raised legal issues and concerns in public opinion for years now. Canada is no exception in this regard. In 2005, an *Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan* (2005 Arrangement) was concluded, which contained detailed rules on the treatment, by both Canada and Afghanistan, of detainees arrested by Canadian forces and transferred to Afghan authorities.⁴ Following allegations that some of the detainees transferred by Canadian forces to Afghan authorities were being mistreated,⁵ it was supplemented by a second agreement in 2007, which prescribed measures for monitoring by Canadian diplomats, the Afghan Human Rights Commission and the International Committee of the Red Cross (ICRC) of the treatment of such detainees in Afghan hands (2007

¹ House of Commons, Standing Committee on National Defence, *Canadian Forces in Afghanistan* (June 2007) at 150 (Chair: Rick Casson) [*Canadian Forces in Afghanistan*].

² Resolution 1386, S Res 1386, UNSC, 56th, UN Doc S/INF/57 (2001) [mimeo] [Res 1386]. See also *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, S/2001/1154 UNSC, 56th (2001) [mimeo]; Canada, Department of National Defence, Board of Inquiry into In-theatre Handling of Detainees, *Final Report*, Part II — Canadian Forces Operations in Afghanistan 2006 (2009) at para 6, online: National Defence and the Canadian Forces <<http://www.vcds-vcemd.forces.gc.ca>>. See also *Canadian Forces in Afghanistan*, *supra* note 1 at 39.

³ See Res 1386, *supra* note 2.

⁴ *Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defense of the Islamic Republic of Afghanistan*, Canada and Afghanistan, 18 December 2005, [*Arrangement for the Transfer of Detainees*, 2005].

⁵ See Graeme Smith, "From Canadian Custody into Cruel Hands: Savage Beatings, Electrocutation, Whipping and Extreme Cold; Detainees Detail a Litany of Abuses by Afghan Authorities", *The Globe and Mail* (23 April 2007) A1. In 2009, the Chief of the Defence Staff Walter Natynczyk admitted "that a prisoner severely beaten in 2006 by Afghan interrogators had earlier been taken into custody by Canadian soldiers": Steven Chase, "Top General's Detainee Reversal Hikes Pressure for Public Inquiry", *The Globe and Mail* (9 December 2009) online: The Globe and Mail <<http://www.theglobeandmail.com>>.

Arrangement).⁶ Nevertheless, the transfer of Afghan detainees to Afghan authorities by Canadian forces continued to raise concerns due to serious allegations that, despite the new agreement, some of these detainees held by Canadian forces and transferred to Afghan authorities were then tortured⁷. Whether this involved violations by Canada of international law or Canadian domestic law, was the object of court proceedings⁸ and parliamentary debates.⁹ A House of Commons special committee was established¹⁰ and the Military Police Complaints Commission opened an inquiry into whether Canadian military police should have started criminal enquiries against members of Canadian forces involved in transfers in Afghanistan.¹¹ This article aims to explore the rules of international law applicable to such transfers.

⁶ *Arrangement for the Transfer of Detainees Between the Government of Canada and the Government of the Islamic Republic of Afghanistan*, Canada and Afghanistan, 3 May 2007 [*Arrangement for the Transfer of Detainees*, 2007].

⁷ See e.g. *House of Commons Special Committee on the Canadian Mission in Afghanistan*, 40th Parl, 2nd Sess, Evidence (18 November 2009) at 1530 (Richard Colvin) [*Special Committee on the Canadian Mission in Afghanistan*]. For the collection of documents supporting Mr. Richard Colvin's testimony, see "Anti-Terrorism and Torture" online: BC Civil Liberties Association <<http://www.bccla.org/antiterrorissue/09colvin.html>>. See also Letter from Michael Byers, and William A Schabas, to Mr Luis Moreno-Ocampo, (3 December 2009) online: Rideau Institute <<http://rideauinstitute.ca/file-library/Byers-Schabas-Letter-to-ICC-3-Dec-2009.pdf>>; Murray Brewster, "One in Five Afghan Detainees Reported Abuse to Canadian Diplomats", *Canadian Press* (4 October 2010) online: The Globe and Mail <<http://www.theglobeandmail.com>>.

⁸ See *Amnesty International Canada v Canadian Forces (Chief of the Defence Staff)* 2008 FCA 401, 305 DLR (4th) 741; *Amnesty International Canada v Canada (Chief of the Defence Staff)* 2008 FC 336, [2008] 4 FCR 546, leave to appeal to SCC, refused, 33029 (21 May 2009) [*Amnesty International*]. See also Amir Attaran & Paul Champ, *Canada's Afghan Detainee Litigation*, online: <http://web.ncf.ca/fk624/index_files/Page444.htm>.

⁹ See e.g. *House of Commons Debates*, 40th Parl, 3d Sess, vol 145, No 63 (15 June 2010) at 1040 (Hon Ralph Goodale), 1005 (Libby Davies); *House of Commons Debates*, 40th Parl, 3d Sess, vol 145, No 65 (17 June 2010) at 1145 (Pierre Paquette); *House of Commons Debates*, 40th Parl, 3d Sess, vol 145, No 28 (19 April 2010) at 1420 (Gilles Duceppe), 1435 (Claude Bachand), 1440 (Hon Ujjal Dosanjh), 1445 (Paul Dewar), 1515 (Hon Marlene Jennings); *House of Commons Debates*, 40th Parl, 2d Sess, vol 144, No 128 (10 December 2009) at 1100 (Opposition Motion—Documents regarding Afghan detainees), 1115-20 (Michael Ignatieff), 1130-45 (Hon Rob Nicholson); *House of Commons Debates*, 40th Parl, 2d Sess, vol 144, No 120 (30 November 2009) at 1215 (Paul Szabo), 1425 (Gilles Duceppe & Claude Bachand), 1430 (Hon Ujjal Dosanjh), 1550 (Hon Bob Rae).

¹⁰ See *Special Committee on the Canadian Mission in Afghanistan*, *supra* note 7.

¹¹ Canada, Military Police Complaints Commission, *Decision to Launch Probe into Second Afghanistan Complaint* (Ottawa: Afghanistan Public Interest Hearing, 2007), online: Military Police Complaints Commission <<http://www.mpcc-cppm.gc.ca/300/afghan/index-eng.aspx>>.

On the one hand, Canada, as a state, is bound by International Humanitarian Law (IHL) and International Human Rights Law (IHRL). On the other hand, the conduct of Canadian leaders and members of the Canadian forces is governed by International Criminal Law (ICL). The two levels, the state level and the individual level, interact. The jurisprudence of international criminal tribunals interprets the underlying rules of conduct of IHL addressed to states. Conversely, individual criminal responsibility, at least under Canadian domestic law, may arise for members of Canadian forces from conduct contrary to Canada's international obligations.

While IHL contains the rules specifically designed for armed conflicts, IHRL may clarify as *lex specialis* the interpretation of concepts of IHL or of ICL. In particular, the prohibition of torture and inhuman and degrading treatment in IHRL is violated by a state transferring a person to the custody of a state where that person is likely to be tortured or treated inhumanely. All three branches of international law may inform the interpretation of Canadian domestic law,¹² including the offences of torture, assault, and criminal negligence of the *Criminal Code*,¹³ and the service offences of cruel or disgraceful conduct, negligent performance of a military duty, and conduct to the prejudice of good order and discipline under the *National Defence Act*.¹⁴

I. International Humanitarian Law

International Humanitarian Law, often also referred to as the laws of war or the laws of armed conflict, is the branch of international law limiting the use of violence in armed conflicts, in particular by protecting those who do not or no longer directly participate in hostilities, including all persons detained in connection with an armed conflict. IHL applies to both sides in every armed conflict, giving them the same rights and obligations under IHL, independently of the legitimacy or otherwise of their cause.¹⁵ Even Security Council authorization, self-defence, or the consent

¹² See e.g. *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 at para 60, [2002] 1 SCR 3 [*Suresh*]. On the fact that customary international law is part of the law of Canada in the absence of conflicting legislation, see e.g. *R v Hape*, 2007 SCC 26 at paras 37-39, [2007] 2 SCR 292 [*Hape*]. See also Gib van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008).

¹³ RSC 1985, c C-46.

¹⁴ RSC 1985, c N-5.

¹⁵ On the fundamental principle of the equality of the belligerents before IHL, see Marco Sassòli, "Ius ad Bellum and Ius in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?" in Michael N Schmitt & Jelena Pejic, eds, *International Law and Armed Con-*

of the territorial government do not make IHL inapplicable. IHL is largely codified in treaties, in particular the four 1949 Geneva Conventions (Conventions)¹⁶ and the two 1977 Additional Protocols (Protocols).¹⁷ Canada and Afghanistan are parties to all these instruments. The Protocols, however, were only accepted by Afghanistan on 10 November 2009 and therefore only entered into force for Afghanistan on 10 May 2010.¹⁸

The Geneva Conventions only apply to armed conflicts. They make a strict distinction between international and non-international armed conflicts, the latter being governed by less detailed and less protective rules. As for customary international law, a recent comprehensive study undertaken under the auspices of the ICRC has listed a large body of customary rules, the majority of which, the study shows, apply to both international and non-international armed conflicts.¹⁹

One provision of IHL is of particular relevance in regard to transfers. article 12(2) of the Third Geneva Convention (Convention III) states: "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." As with most provisions of Convention III, this article is intended to apply only to international armed conflicts. The concept of "prisoners of war" exists only in such conflicts. It is therefore necessary to first determine whether the situation in Afghanistan constitutes an armed conflict of an international character. However, even if it is a conflict not of an international character, it may be relevant that Canada

flict: Exploring the Faultlines; Essays in Honour of Yoram Dinstein (Leiden: Martinus Nijhoff, 2007) 241 at 242.

¹⁶ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31, Can TS 1965 No 20 [*Geneva Convention I*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85, Can TS 1965 No 20 [*Geneva Convention II*]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135, Can TS 1965 No 20 [*Geneva Convention III*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, Can TS 1965 No 20 [*Geneva Convention IV*].

¹⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3, Can TS 1991 No. 2 [*Protocol I*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609, Can TS 1991 No 2 [*Protocol II*].

¹⁸ See *Protocol I*, *supra* note 17, art 95(2); *Protocol II*, *supra* note 17, art 23(2).

¹⁹ Jean-Marie Henckaerts & Louise Doswald-Beck with contributions by Carolin Alvermann et al, *Customary International Humanitarian Law*, vol 1: *Rules* (Cambridge, UK: Cambridge University Press, 2005).

has stated in agreements with Afghanistan and in instructions to its forces that it will treat Afghan detainees in accordance with Convention III. A judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has equally applied article 12 of Convention III in a non-international armed conflict.

A. The Classification of the Conflict and its Impact on the Applicable Rules of IHL

1. The Definition of International Armed Conflicts

International armed conflicts are covered by the four Geneva Conventions (and Protocol I). Common article 2 to the Conventions states that they “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”²⁰ Only states can be parties to the Conventions. And, while Afghanistan is a state, the Taliban and al-Qaeda are not states. Therefore, the rules of the Conventions (other than their common article 3 discussed hereafter) do not apply to a conflict with such non-state actors.

As for customary international law, there is no indication confirming what seemed to have been the view of the Bush administration; that the concept of international armed conflict under customary international law is broader and includes a worldwide armed conflict against terrorist groups, which was called the “war on terror”.²¹ The Obama administration has abandoned the term of “war on terror”.²² While its position is still under review, it nevertheless continues to argue that an armed conflict exists (and the laws of war apply) between the United States, on the one hand, and al-Qaeda, the Taliban, and “associated forces” on the other hand. While it does not explicitly classify this “novel type of armed conflict”, it applies, at least by analogy, IHL of international armed conflicts when determining for what reasons an enemy fighter may be targeted or

²⁰ Common art 2 to *Geneva Conventions I-IV*, *supra* note 16.

²¹ See William K Lietzau, “Combating Terrorism: Law Enforcement or War?” in Michael N Schmitt & Gian Luca Beruto, eds, *Terrorism and International Law: Challenges and Responses* (Sanremo: International Institute of Humanitarian Law, George C Marshall Center, 2002) 75 at 80; US, Department of State, *Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba* (2006) 45:3 ILM 742, online: American Society of International Law <www.asil.org/pdfs/ilib0603212.pdf>.

²² See *Re Guantanamo Bay Detainee Litigation*, DC 08-442 (DC Dist Ct, 2009) (Memorandum of the Respondents), online: US Department of Justice <<http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>>.

detained.²³ It does not, however, consider that these fighters are prisoners of war (POWs), but rather unprivileged enemy belligerents.

In any case, state practice and *opinio juris* do not apply the law of international armed conflict to conflicts between states and some non-state actors. On the contrary, and in conformity with the basics of the Westphalian system, states have always distinguished between conflicts against one another, to which the whole of IHL applied, and other armed conflicts, to which they were never prepared to apply those same rules, but only more limited humanitarian rules.

2. The Definition of Non-International Armed Conflict

Non-international armed conflicts are covered by common article 3 and, when certain conditions are met, by Protocol II. According to an ICRC study²⁴ and the jurisprudence of international criminal tribunals,²⁵ non-international armed conflicts are also covered by largely the same customary rules as international armed conflicts. For IHL of non-international armed conflicts to apply, an armed conflict must exist, which raises the question of the lower threshold of application (i.e., distinguishing armed conflicts from sporadic violence and riots), and it must not be of an international character, which raises the question whether every armed conflict not opposing states is perforce a non-international armed conflict.

The lower threshold of applicability of IHL of non-international armed conflicts is not defined by treaty law, but it is generally considered that a minimum intensity of violence and a minimum degree of organization of the non-state actors involved distinguish an armed conflict from violent crime, sporadic violence, and riots, to which IHL does not apply.²⁶ As it is

²³ See *ibid* at 1.

²⁴ Henckaerts & Doswald-Beck, *supra* note 19.

²⁵ See especially *Prosecutor v Duško Tadić*, IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at paras 96-126 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org>> [*Tadić*, Appeal on Jurisdiction].

²⁶ For a discussion of the criteria of the intensity of violence and degree of organization, see *Prosecutor v Ramush Haradinaj*, IT-04-84-T, Judgment (3 April 2008) at paras 49, 60 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org>>. For an even more detailed analysis, based upon a vast review of the jurisprudence of the ICTY and of national courts, see *Prosecutor v Ljube Bošković*, IT-04-82-T, Judgment (10 July 2008) at paras 177-206 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org>>.

uncontroversial that these conditions are met in Afghanistan,²⁷ the transfer of Afghan detainees by Canadian forces to Afghan authorities is governed by IHL.

More controversial in relation to Afghanistan and the conflict fought there by the United States, Canada, and NATO allies, is whether every armed conflict not fought by one state against another is perforce not of an international character, even if it is fought in several countries. Under the Bush administration, the United States considered that the conflict in Afghanistan directed at al-Qaeda was international and not covered by common article 3, which is the heart of the IHL of non-international armed conflicts.²⁸ This reasoning was not followed by the Supreme Court of the United States in *Hamdan v. Rumsfeld*, which held that every armed conflict which “does not involve a clash between nations” is not of an international character, and that the latter phrase “bears its literal meaning.”²⁹ The decision of the Supreme Court of the United States is convincing, although the wording of the IHL treaties is ambiguous.

On the one hand, common article 3 refers to “armed conflicts not of an international character” and article 1 of Protocol II refers to “armed conflicts which are not covered by article 1 of ... Protocol I,” two indications that every armed conflict not qualifying as international is perforce non-international. On the other hand, common article 3 refers to armed conflicts “occurring in the territory of one of the High Contracting Parties.” According to the object and purpose of IHL, this must be understood as simply recalling that treaties apply only to their state parties.

If this wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not “non-international armed conflicts”, there would be a gap in protection, which could not be explained by state concerns about sovereignty. Those concerns made the law of non-international armed conflicts more rudimentary. Yet concerns about state sovereignty could not explain why victims of conflicts spilling into the territory of several states should benefit from less (or no) protection than those affected by conflicts limited to the

²⁷ Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, “International Law and Armed Non-State Actors in Afghanistan” online: (2011) 93:881 Int’l Rev Red Cross at 5-10 <<http://www.icrc.org/eng/resources/international-review/review-881-afghanistan/index.jsp>>.

²⁸ See “Memorandum from The White House Regarding Humane Treatment of al Qaeda and Taliban Detainees” (7 February 2002), in The Honourable James R Schlesinger, *Final Report of the Independent Panel to Review DoD Detention Operations*, App C (Washington DC: United States Department of Defense, 2004), online: US Department of Defense <<http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf>>.

²⁹ 548 US 557 at 562, 126 S Ct 2749 (2006).

territory of only one state. In addition, articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) extend the jurisdiction of that tribunal to enforce, *inter alia*, the law of non-international armed conflicts, to the neighbouring countries.³⁰ This confirms that even a conflict spreading across borders remains a non-international armed conflict. In conclusion, “internal conflicts are distinguished from international conflicts by the parties involved rather than by the territorial scope of the conflict.”³¹

A sustained “war” between one or several states on the one side, and a transnational terrorist group, such as al-Qaeda, on the other side, may fall under the concept (and IHL) of a non-international armed conflict.³²

3. Classification of the Conflict in Afghanistan

It is uncontroversial that since 2001 the level of violence and the degree of organization of the Taliban and, at least in Afghanistan, of al-Qaeda are sufficiently high to make IHL applicable, even if the requirements of intensity and organization of the parties of IHL of non-international armed conflicts are applied.³³ The United States agrees, indeed, that the conflict between the Taliban and the Afghan government is not of an international character and that this characterization is not altered by the fact that the latter is heavily supported by international forces. The only construction under which the entire conflict in Afghanistan could be claimed to be of an international character today, in 2011, would be to recall that the conflict was indeed international in 2001, because it was fought between the United States and the de facto government of Afghanistan, which was constituted by the Taliban, and to consider that this conflict continues until the defeat of the Taliban. And the Taliban are not yet defeated. However, most, including the ICRC, consider that the conflict turned into a conflict not of an international character in 2002 (when the Karzai government was first appointed by the Loya

³⁰ *Statute of the International Criminal Tribunal for Rwanda*, SC Res 955, UNSCOR (1994).

³¹ Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge, UK: Cambridge University Press, 2002) at 136.

³² See OAS, Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OR OEA/SerL/V/II.116/Doc5, rev 1 (2002) at para 7, online: Organization of American States Inter-American Commission on Human Rights <<http://www.cidh.oas.org>>; M Cherif Bassiouni, “Legal Control of International Terrorism: A Policy-Oriented Assessment” (2002) 43:1 Harv Int’l LJ 83 at 99.

³³ See Bellal, Giacca & Casey-Maslen, *supra* note 27 at 10-12.

Jirga³⁴ and then elected) since the new government of Afghanistan agreed to and requested the support of foreign forces in its continuing fight against the Taliban. Formally, one could consider that until the Taliban are completely defeated, their conflict with the United States and Canada maintains its international character³⁵ and the United States as an occupying power could not have altered this classification by introducing changes, such as establishing, recognizing, or concluding agreements with a new local government in the territory they occupied following their invasion.³⁶ However, this is certainly not the thesis of the United States or Canada and it encounters different legal problems including, *inter alia*, that it is controversial whether the United States were ever an occupying power in Afghanistan, that it is difficult to consider free elections a change introduced by the occupying power, that the UN Security Council has given its blessing to the new arrangements,³⁷ and that such UN Security Council resolutions prevail over any other international obligation under article 103 of the UN Charter.

The conflict presently taking place in Afghanistan is therefore not of an international character and is governed by common article 3 to the Geneva Conventions and customary IHL of non-international armed conflicts. As IHL applies to every act having a “required relationship” with the conflict,³⁸ the transfer of detainees by the Canadian forces to Afghan authorities is covered by IHL of non-international armed conflicts.

4. Possibility of Applying Rules of IHL of International Armed Conflicts to Non-International Armed Conflicts

In the last twenty years, the jurisprudence from international criminal tribunals, the influence of human rights law and even some treaty rules adopted by states have narrowed the gap between the law of non-international armed conflicts and the law of international armed con-

³⁴ C.f. Adam Roberts, “The Laws of War in the War on Terror” in Professor Yoram Dinstein & Fania Domb, eds, *Israel Yearbook on Human Rights* (The Hague: Martinus Nijhoff, 2003) vol 32, 193 at 211. See also Bellal, Giacca & Casey-Maslen, *supra* note 27 at 6.

³⁵ See Yoram Dinstein, “Terrorism and Afghanistan” in Michael N Schmitt, ed, *The War in Afghanistan: A Legal Analysis*, International Law Studies, vol 85 (Newport, RI: Naval War College Press, 2009) 43 at 51.

³⁶ See *Geneva Convention IV*, *supra* note 16, art 47.

³⁷ See Res 1386, *supra* note 2.

³⁸ See *Tadić*, Appeal on Jurisdiction, *supra* note 25 at para 70; *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, Judgment (1 June 2001) at paras 425-46 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.ictor.org>>.

flicts.³⁹ In the many fields where the treaty rules still differ, this convergence has been rationalized by claiming that under customary international law, the differences between the two categories of conflicts have gradually disappeared. This development has reached its provisional acme with the publication of the ICRC Customary Law Study, which claims, after ten years of research on “state practice” that 136 (or more) out of 161 rules of customary humanitarian law apply equally to non-international armed conflicts.⁴⁰ Even those who remain sceptical as to whether state practice has truly eliminated the difference to the extent claimed, suggest that questions not answered by the law of non-international armed conflicts must be dealt with by analogy to the law of international armed conflicts, except if the very nature of non-international armed conflicts does not allow for such an analogy (e.g., concerning combatant immunity from prosecution and the concept of occupied territories).⁴¹

In addition, parts or all of IHL of international armed conflicts may become applicable to a non-international armed conflict based upon special agreements between the parties to the conflict or upon a unilateral undertaking by one party. Common article 3(3) encourages parties to a non-international armed conflict to bring into force, by means of special agreements, all or part of the other provisions of the Conventions. In addition, as will be explained hereafter in relation with article 12 of Convention III (which belongs to IHL of international armed conflicts), the ICTY appeals chamber has applied parts of IHL of international armed conflicts to a non-international armed conflict based upon unilateral and informal statements of a party.⁴² Even if the conflict in Afghanistan is of a non-international nature, pursuant to the 2005 Agreement⁴³ or pursuant to its unilateral statements or pursuant to both, Canada could be considered to have agreed to apply Convention III. Thus, whether Canada is bound by Convention III on the basis of those agreements will be discussed.⁴⁴ But, first we will present an overview of the prohibition of torture in IHL.

³⁹ See especially the ground-breaking case *Tadić*, Appeal on Jurisdiction, *supra* note 25, at paras 86-136.

⁴⁰ Henckaerts & Doswald-Beck, *supra* note 19.

⁴¹ Marco Sassòli & Antoine A Bouvier, *How does Law Protect in War?*, 2nd ed (Geneva: ICRC, 2006) at 251.

⁴² See Part I.C.2.a, below.

⁴³ *Arrangement for the Transfer of Detainees*, 2005, *supra* note 4 at para 3.

⁴⁴ See Part I.C., below.

B. The Prohibition of Torture in IHL

There are serious allegations supporting the assertion that some of the Afghan detainees transferred by Canada were tortured by Afghan officials.⁴⁵ Torture and other inhuman treatment are formally prohibited by IHL. According to Jean Pictet, the editor of the authoritative Commentaries to the Conventions published by the ICRC, "[t]he obligation to grant protected persons humane treatment is in truth the *leitmotiv* of the four Geneva Conventions."⁴⁶ Many provisions of IHL treaties prohibit torture and inhuman treatment.⁴⁷ For the purpose of this article, it is sufficient to refer to common article 3 to the Conventions, applicable during non-international armed conflicts, which states, *inter alia*:

In 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:

(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.

...

(c) outrages upon personal dignity, in particular humiliating and degrading treatment.⁴⁸

⁴⁵ See Smith, *supra* note 5; Chase, *supra* note 5; Brewster, *supra* note 7.

⁴⁶ Jean S Pictet, ed, with the collaboration of Oscar M Uhler et al, "IV Geneva Convention: Relative to the Protection of Civilian Persons in Time of War" in *The Geneva Conventions of 12 August 1949: Commentary*, translated by Roland Griffin & CW Dumbleton (Geneva: ICRC, 1958) at 204.

⁴⁷ See e.g. *Regulations Respecting the Laws and Customs of War on Land, Annex to the Convention Respecting the Laws and Customs of War on Land*, 18 October 1907, 36 US Stat 2277, 1 TI Agree 631 (1907 *Hague Convention*), art 4; *Geneva Convention III*, *supra* note 16, art 13; *Geneva Convention IV*, *supra* note 16, arts 4, 27. For a more detailed and general review of this topic, see Cordula Droeger, "In Truth the Leitmotiv: The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law" (2007) 89:867 *Int'l Rev Red Cross* 515 [Droeger, "In Truth the Leitmotiv"].

⁴⁸ Common art 3 to *Geneva Conventions I-IV*, *supra* note 16.

Common article 3 prohibits three forms of treatment: torture, cruel treatment, and outrages upon personal dignity. At the time when the detainees were transferred to Afghan authorities, they were clearly no longer actively participating in the hostilities and were therefore covered by those prohibitions. Whether a transfer to another authority violates IHL because that other authority violates those prohibitions of IHL⁴⁹ or whether such transfer constitutes an act of aiding and abetting in the prohibited acts will be discussed later.⁵⁰

International Humanitarian Law treaties do not provide for a definition of torture or other forms of inhuman treatment. Therefore, the scope of this prohibition has to be drawn from IHRL as *lex specialis* in this respect,⁵¹ the rules of which will be discussed later in this article,⁵² and from the jurisprudence of international criminal tribunals. The ICTY adopted the definition of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, requiring the infliction of severe pain or suffering, whether physical or mental.⁵³

An act of torture had traditionally to aim to attain a “prohibited purpose”, but

[i]n practice, this leads to an extremely wide notion of purpose. Indeed, “intimidating or coercing him or a third person” and “reason based on discrimination of any kind” are such wide notions that most deliberate acts causing great suffering to a specific person, especially in detention, will be caused for one of these purposes or a purpose very similar to this one.⁵⁴

Inhuman treatment can be defined as an intentional act that causes serious mental or physical suffering or injury or constitutes a serious at-

⁴⁹ See Part I.C.2, below.

⁵⁰ See Part III.C, below.

⁵¹ See Part II.A, below. Contrary to IHRL, IHL does not require that state agents commit the act in order for an act to constitute torture. Consequently, acts by non-state actors during an armed conflict can constitute torture. See e.g. *Prosecutor v Dragoljub Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgment (22 February 2001) at para 491 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), aff’d IT-96-23 & IT-96-23/1-A, Judgment (12 June 2002) at para 148 (Appeals Chamber), online: ICTY <<http://www.icty.org>>.

⁵² See Part II.D, below.

⁵³ *Prosecutor v Anto Furundžija*, IT-95-17/1-T, Judgment (10 December 1998) at para 159-160, 162 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY [*Furundžija*].

⁵⁴ Droege, “In Truth the Leitmotiv”, *supra* note 47 at 527.

tack on human dignity.⁵⁵ According to the ICTY jurisprudence, there is no real difference between cruel treatment and inhuman treatment.⁵⁶ The threshold of pain is simply slightly lower than for torture, which requires severe rather than serious physical or mental suffering.

In assessing the severity of the pain inflicted, all circumstances of the case have to be considered; for instance, environment, duration, isolation, mental health or strength, cultural beliefs and sensitivity, gender, age, social or political background, and past experiences. The threshold of pain can be reached by a single act or can be the result of a combination or accumulation of acts.⁵⁷

As the prohibition on torture, in IHL, exists in non-international armed conflicts and covers all persons detained in relation to such a conflict, the question whether Convention III applies to the transfer of Afghan detainees and whether the persons transferred had to be treated as POWs is irrelevant for the prohibition of torture and the possible aiding and abetting by Canadian forces in such alleged acts of torture. Nevertheless, Convention III contains additional specific rules on the transfer of POWs.

C. Restrictions as to the Transfer of Prisoners of War

1. Article 12 of Convention III and its Meaning

Article 12(2) and (3) of Convention III reads:

(2) Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

(3) Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or

⁵⁵ See *Prosecutor v Zejnil Delalic*, IT-96-21-T, Judgment (16 November 1998) at para 543 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org>>.

⁵⁶ See *ibid* at para 552.

⁵⁷ See e.g. *Prosecutor v Brdanin*, IT-99-36-T, Judgment (1 September 2004) at paras 483-84 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org>>.

shall request the return of the prisoners of war. Such requests must be complied with.

The ICRC Commentary explains in the context of multinational operations that

if prisoners are interned on the territory of a Power other than that which captured them, they should nevertheless wherever possible be guarded by troops of the latter Power and should receive the treatment to which they would have been entitled if they had been interned on the territory of that Power.⁵⁸

In the *Vukovar Hospital Case*, the appeals chamber of the ICTY referred to an

obligation of each agent in charge of the protection or custody of the prisoners of war to ensure that their transfer to another agent will not diminish the protection the prisoners are entitled to. This obligation is so well established that it is even reflected in ... paragraphs 2 and 3 of Article 12 of Geneva Convention III, which applies to the transfer of prisoners of war to another High Contracting Party.⁵⁹

The ICTY treated article 12 as part of the non-derogable principle that POWs must be treated humanely and protected from physical and mental harm, which encompasses an obligation to ensure a transfer to safe custody.⁶⁰ Furthermore, the standards of Convention III were regarded as customary rules.⁶¹ As will be discussed below, the ICTY stated in the *Vukovar Hospital Case* that the protection of POWs under the custody of commanders is part of the legal duty imposed on them by IHL.⁶² Accordingly, if article 12 applied, before transferring the detainees to the Afghan authorities, Canada should be satisfied of the willingness and ability of these authorities to respect the standards of Convention III. If Canada is not satisfied that the detainees transferred will not be subjected to torture or cruel, inhuman, or degrading treatment by Afghan authorities and if article 12 applied, it may not transfer them. In the case that Canada be-

⁵⁸ Jean Pictet, ed, with the collaboration of Jean de Preux, "III Geneva Convention: Relative to the Treatment of Prisoners of War" in *The Geneva Conventions of 12 August 1949: Commentary*, translated by AP Henry (Geneva: ICRC, 1960) at 134 [Pictet, III Geneva Convention, *Commentary*].

⁵⁹ *Prosecutor v Mile Mrkšić (Vukovar Hospital Case)*, IT-95-13/1-A, Judgment (5 May 2009) at para 71 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org>> [Mrkšić, Appeals Chamber].

⁶⁰ *Ibid* at paras 71, 74.

⁶¹ See e.g. *Prosecutor v Milorad Krnojelac*, IT-97-25-A, Judgment (17 September 2003) at para 220 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org>>.

⁶² See Part III.C, below.

comes aware of that possibility⁶³ after the transfer, it should take effective measures to correct the situation or request the return of the POWs. According to article 12, the obligation of evaluating the willingness and the abilities of the transferee power rests on the detaining power. Standards applicable to the decision of transferring detainees will be looked at hereafter.⁶⁴

2. Applicability of Article 12 to the Transfers in Afghanistan

The applicability of article 12 to the transfers discussed in this article may be questioned for three reasons. First, the conflict is not of an international character and the transferees are not POWs. Second, as the conflict is not of an international character, the question arises whether Canada is legally bound by its undertaking in agreements with Afghanistan to nevertheless apply Convention III. Third, even if Convention III applies, the transfer of Afghans to the Afghan authorities may be considered not to be a transfer covered by article 12, but a case of repatriation.

a. Is Canada Bound to Apply Article 12 Based Upon its Agreements with Afghanistan?

Article 12 of Convention III applies to international armed conflicts and the conflict in Afghanistan must be classified, as mentioned above, as non-international. However, state parties to a non-international armed conflict are encouraged to bring into force, by means of special agreements, all or part of the other provisions of Convention III as stated in common article 3 of the Conventions. As previously mentioned, paragraph 3 of the 2005 Arrangement between Canada and Afghanistan states that: "The Participants will treat detainees in accordance with the standards set out in the Third Geneva Convention."⁶⁵ This agreement is not per se an agreement between the parties to the non-international armed conflict as envisaged by common article 3, but rather an agreement between allies. It may nevertheless be binding upon Canada under international law.

It has been argued, however, by Professor Christopher Greenwood, now judge at the International Court of Justice, that this agreement is not legally binding, *inter alia* because it bears the informal title "arrange-

⁶³ Indeed, Pictet (III Geneva Convention, *Commentary*, *supra* note 58 at 138) clarifies that grave breaches such as torture and inhuman treatment constitute a failure to carry out the Conventions in any important respect, which triggers the obligation under art 12(3) of the *Geneva Convention III* (*supra* note 16, art 12).

⁶⁴ See Parts I.C.2.D, II.E.3, and III.C, below.

⁶⁵ *Arrangement for the Transfer of Detainees*, 2005, *supra* note 4, para 3.

ment” and uses terms like “will” instead of “shall” when enumerating the parties’ obligations.⁶⁶ With all due respect, we cannot agree.

First, article 2(1)(a) of the Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation*.”⁶⁷ To this effect, Anthony Aust stated: “[I]n itself the name does *not* determine the status of the instrument; what is decisive is whether the negotiating states intend the instrument to be (or not to be) binding in international law.”⁶⁸ In the *Qatar v. Bahrain* case, the ICJ considered that as soon as states meet and agree on certain commitments they create legal rights and obligations for themselves.⁶⁹ The text agreed upon is, therefore, a legally binding agreement, regardless of its form and of other considerations. According to the court, the (objective) “intention to be bound” has to be inferred from the text itself, and not from the (subjective) intentions of the states parties.

Does the *Arrangement for the Transfer of Detainees* indicate *commitments* entered into by Canada and Afghanistan? In the 2005 Arrangement, the parties committed themselves to apply the standards provided for by Convention III relating to the treatment of POWs and authorize the ICRC to visit detainees “whether held by the Canadian Forces or by Afghanistan.”⁷⁰ In a non-international armed conflict, detaining powers are not bound to apply the standards of treatment laid down by Convention III since there are no POWs. Moreover, the right of the ICRC to visit any person captured in relation to an armed conflict is restricted to international armed conflicts.⁷¹ In a non-international armed conflict, the ICRC

⁶⁶ Christopher Greenwood, “International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces”, Report (2007) at para 74 filed in *Amnesty International*, *supra* note 8, online: Canada’s Afghan Detainee Litigation <http://web.ncf.ca/fk624/index_files/Page444.htm>.

⁶⁷ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 2(1)(a), Can TS 1980 No 37 [emphasis added].

⁶⁸ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge, UK: Cambridge University Press, 2007) at 23.

⁶⁹ Jan Klabbers, “Qatar v Bahrain: the Concept of ‘Treaty’ in International Law” (1995) 33 *Archiv des Völkerrechts* 361 at 375; *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v Bahrain), [1994] ICJ Rep 112 at para 25 [Qatar].

⁷⁰ *Arrangement for the Transfer of Detainees*, 2005, *supra* note 4, para 4.

⁷¹ See *Geneva Convention III*, *supra* note 16, art 126; *Geneva Convention IV*, *supra* note 16, art 143(5).

may only “offer its services”.⁷² The 2005 Arrangement goes beyond the legal framework applicable to non-international armed conflicts and thus creates legal rights and obligations for both Canada and Afghanistan.

According to the definition of a treaty by the ICJ in *Qatar*, the 2005 Arrangement qualifies as a treaty. This is also the opinion expressed by Michael Byers, “[T]he Canada-Afghanistan Arrangement ... is an international treaty that creates binding obligations under international law—as indeed it should, if it is to provide meaningful protections.”⁷³ The same can be said of the 2007 Arrangement, which supplements the 2005 Arrangement. It reiterates most of the obligations stated in the 2005 Arrangement. In addition it also provides that

in the event that allegations come to the attention of the Government of Afghanistan that a detainee transferred by the Canadian Forces to Afghan authorities has been mistreated ... the Government of Afghanistan will inform the government of Canada, the AIHRC [Afghanistan Independent Human Rights Commission] and the ICRC of the steps it is taking to investigate such allegations.⁷⁴

By offering the ICRC “full and unrestricted access” to the detainees, article 2 implements legal rights and obligations.

Second, the 2007 Arrangement was signed by the Canadian Ambassador to Afghanistan, who has under article 7(2)(b) of the Vienna Convention the power to bind Canada through treaties with Afghanistan. Third, as demonstrated above, both arrangements provide for detailed mechanisms of implementation, which is an indication that they were legally binding. In our view, the Arrangements could only be considered void of binding character if both Canada and Afghanistan had mental reservations and did not really intend the detainees to be treated correctly, but simulated this agreement to reduce public discontent. This is not what we suggest. One may add that on 18 December 2005, the very day the Chief of the Defence Staff of Canada and the Minister of Defence of Afghanistan signed the 2005 Arrangement, they equally signed “Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan”, which provided, *inter alia*, for immunities

⁷² See *Geneva Convention I*, *supra* note 16, art 3; *Geneva Convention II*, *supra* note 16, art 3; *Geneva Convention III*, *supra* note 16, art 3; *Geneva Convention IV*, *supra* note 16, art 3.

⁷³ Michael Byers, “Legal Opinion on the December 18, 2005: ‘Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan’” (April 2006), Liu Institute for Global Issues, online: University of British Columbia <http://www.ligi.ubc.ca/sites/liu/files/Publications/10Apr2006_MByersOpinion_Canada-Afghanistan.pdf> at 3.

⁷⁴ *Arrangement for the Transfer of Detainees*, 2007, *supra* note 6, para 10.

for members of the Canadian forces against prosecution by Afghanistan.⁷⁵ Surely, if Afghanistan had nevertheless arrested members of the Canadian forces, Canada would not have accepted an Afghan claim that this arrangement is not legally binding.

Whether binding under international law as a treaty or not, the 2005 Arrangement could also be seen as a unilateral undertaking. In the *Nuclear Tests Case*, the ICJ accepted that a statement made by the French president at a press conference was a legally binding unilateral undertaking.⁷⁶ Why should the numerous promises by the competent authorities of both Canada and Afghanistan, that they will treat detainees in accordance with Convention III, not be seen as legally binding? Furthermore, in *Mrkšić*, the ICTY appeals chamber held much more vague unilateral undertakings to make Convention III applicable, including its article 12. In that case, the Zagreb Agreement between Yugoslav forces and Croatian forces on the evacuation of the Vukovar hospital did not mention the application of Convention III. The appeals chamber nevertheless deduced from the evidence that the Yugoslav People's Army (JNA) "had agreed" that the Croat forces were to be considered POWs, and that this Convention was to apply.⁷⁷ The evidence presented before the trial chamber on this issue was: (1) the instruction given by the European Community Monitoring Mission (ECMM) on the implementation of the Zagreb Agreement indicating that Convention III applied to POWs;⁷⁸ (2) an order of 18 November 1991 issued by the command of the 1st Military District of the JNA and signed by General Panić instructing the JNA units in the area of Vukovar to respect Convention III;⁷⁹ and (3) several statements made by Colonel Pavković of the JNA to the ECMM asserting that Croat forces would be treated as POWs and that Convention III would apply.⁸⁰ Article 12 of Convention III could thus be applicable to Canadian forces in Afghanistan.

b. Applicability of Article 12 to Repatriations?

In Afghanistan, the detainees were actually transferred by Canadian forces to their own government. In an international armed conflict, such a

⁷⁵ See *Amnesty International*, *supra* note 8 at paras 163-68.

⁷⁶ *Nuclear Tests Case (Australia v France)*, [1974] ICJ Rep 253 at 267, para 43.

⁷⁷ *Mrkšić*, Appeals Chamber, *supra* note 59 at para 69.

⁷⁸ *Prosecutor v Mile Mrkšić*, IT-95-13/1-T, Judgment (27 September 2007) at para 144 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org>> [*Mrkšić*, Trial Chamber].

⁷⁹ *Ibid* at paras 71, 581.

⁸⁰ *Ibid* at para 582.

transfer constitutes repatriation rather than a transfer covered by article 12. Indeed, when a POW is repatriated, the power on which the POW depends and to whom he or she is repatriated is by definition not willing to treat him or her as a POW. No state in the world treats its own soldiers as POWs. This would mean that each repatriation violates article 12. This would make repatriations nearly impossible, which would be contrary to the object and purpose of Convention III. Repatriations therefore do not fall under article 12, but under article 118 of Convention III and the non-*refoulement* principle discussed hereafter. That principle does not prohibit the repatriation of POWs simply because they will no longer be treated as POWs once repatriated, but only if they will be persecuted, tortured, or treated inhumanely once repatriated.⁸¹

c. Repatriation in Non-International Armed Conflicts

The transfers of insurgents by Canadian forces to the Afghan authorities are however not cases of repatriations in an international armed conflict between Canada and Afghanistan, but transfers in a non-international armed conflict between Canada (or the Afghan government supported by Canada) and the Taliban. Canada agreed to apply Convention III to such transfers. If Canada transferred detainees to the enemy, the Taliban, article 118 and not article 12 of Convention III would apply to such repatriations (because the Taliban have no obligation to treat their own forces as POWs). The detainees were, however, not repatriated in this sense (i.e., transferred to the enemy party of the non-international armed conflict to which they belong) but to the Afghan authorities allied to Canada and opposing the Taliban to whom the transferred detainees belong. In our view, when Convention III is applied to a non-international armed conflict, only the transfer of captured rebel fighters to their own party constitutes repatriation, while a transfer to the government fighting against those rebels constitutes a transfer covered by article 12 of Convention III.

d. The Obligations of Canada under Article 12 in Afghanistan

By concluding an agreement with Afghanistan in which the latter undertook to treat the transferred detainees according to Convention III, Canada made sure that the Afghan government was bound and declared that it was willing to apply Convention III. That is, however, not sufficient under article 12, which mentions two additional conditions: that the

⁸¹ Marco Sassòli, "The Status, Treatment and Repatriation of Deserters under International Humanitarian Law" [1985] Yearbook of the International Institute of Humanitarian Law 9 at 34-35.

transferring power must satisfy itself of the willingness and of the ability of the transferee power to apply Convention III. The Afghan authorities are certainly able not to torture or ill-treat the transferred detainees. To allow Canada to be satisfied that the Afghan authorities are also willing to comply with the Convention, it is certainly not sufficient that the latter have undertaken to do so. Otherwise this condition would not be listed separately in article 12. Even the 2007 Arrangement adds that

Afghan authorities will be responsible for treating such individuals in accordance with Afghanistan's international human rights including prohibiting torture and cruel, inhuman or degrading treatment, protection against torture and using only such force as is reasonable to guard against escape.⁸²

But this cannot be a final and non rebuttable indication that the Afghan authorities are willing to comply with the prohibition of torture and inhuman treatment. As will be explained in relation to IHRL, international human rights bodies have not accepted such assurances as conclusive evidence that no risk of torture exists, but have requested that the transferring state evaluates whether those assurances correspond to reality. Through the 2007 Arrangement, Canada enabled itself to make such an evaluation. As to the question of when a state may be satisfied that a transferee power is willing and able to comply, the ICRC Commentary simply affirms: "The Power wishing to transfer prisoners can only satisfy itself of the ability of the receiving Power to accept the prisoners through prior investigation."⁸³ The exact requirement must, therefore, be determined according to the more precise requirements of IHRL as the *lex specialis*.⁸⁴ In addition, the standard of care required in cases of such transfers will be discussed more in detail in relation to the jurisprudence of the ICTY on when such a transfer constitutes (an act of aiding and abetting in) a war crime.⁸⁵

3. Canada's Obligations if Article 12 Does Not Apply

If Convention III is not applicable to the transfers discussed in this article, common article 3, which is considered to be the expression of customary international law would apply. It explicitly enshrines the prohibition of violence and threat to life against persons not taking part in hostilities, including detainees. According to the appeals chamber of the ICTY, common article 3 "reflects the same spirit of the duty to protect

⁸² Supra note 6, art 4.

⁸³ Pictet, III Geneva Convention, *Commentary*, supra note 58 at 136.

⁸⁴ See Parts II.A and II.E.3, below.

⁸⁵ See Part III.C, below.

members of armed forces who have laid down their arms and are detained as the specific protections afforded to prisoners of war in Geneva Convention III as a whole.”⁸⁶ Although it did not clearly state so, the appeals chamber appeared to be willing to apply the principle of article 12, that until final release and repatriation, each agent having custody of prisoners must ensure that their transfer does not diminish the protection to which they are entitled, even independently of any undertaking by the detaining power to comply with Convention III and simply based upon common article 3.⁸⁷ In this context, reference could also be made to article 5(4) of Protocol II, applicable to non-international armed conflicts, which reads: “If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.” The same result could also flow from an application of IHRL as the *lex specialis* in this respect.⁸⁸

II. International Human Rights Law

First, Part II considers the applicability of IHRL in armed conflicts and to the conduct of a state outside its territory. Then it explains the IHRL prohibition of torture and inhuman or degrading treatment and its implications on the transfer of detainees during armed conflicts abroad. Finally it alleges the standard of care applicable to the decision to transfer if a risk of torture and inhuman or degrading treatment.

A. *Simultaneous Applicability of IHL and IHRL in Armed Conflicts*

IHRL protects human beings in all situations. Its rules were developed in regard to problems individuals face in peacetime, above all when confronting their own state. Formally, however, there is no limitation on its material field of application. It applies in peacetime and in times of armed conflict. Its applicability during armed conflicts has been reaffirmed time and time again by the UN Security Council, the UN General Assembly, the now-defunct UN Human Rights Commission and its Special Rapporteurs, as well as by the ICJ. The ICJ affirmed that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation.”⁸⁹ The prohi-

⁸⁶ *Mrkšić*, Appeals Chamber, *supra* note 59 at para 70.

⁸⁷ *Ibid* at paras 70-71.

⁸⁸ See Part II.A, below. See especially Cordula Droegge, “Transfers of Detainees: Legal Framework, *Non-refoulement* and Contemporary Challenges” (2008) 90:871 *Int’l Rev Red Cross* 669 [Droegge, “Transfers of Detainees”].

⁸⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 106 [*Construction of a Wall*]. See also *Le-*

bition of torture and inhuman and degrading treatment cannot be subject to derogations⁹⁰ and, in any case, Canada has not declared any such derogation.

As both IHL and IHRL apply in armed conflicts, their rules overlap and may even contradict each other. It is generally accepted that the problems of application and interpretation caused by the overlapping of IHL and IHRL are resolved by the maxim *lex specialis derogat legi generali*. The ICJ has said that in armed conflicts, "The test of what is an arbitrary deprivation of life ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."⁹¹ The Inter-American Commission on Human Rights, for its part, has affirmed that

in a situation of armed conflict, the test for assessing the observance of a particular right [protected by the American Declaration of the Rights and Duties of Man] may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*.⁹²

As for the Human Rights Committee, it writes, "[M]ore specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights."⁹³

While the applicability of the maxim is clear, the utility, scope, and meaning of the *lex specialis* principle are subject to many unresolved controversies, in particular as far as IHL and IHRL are concerned.⁹⁴ Some

gality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep 226 at para 25 [*Threat or Use of Nuclear Weapons*].

⁹⁰ See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 4, Can TS 1976 No 47 [ICCPR]; *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 143, art 27, 9 ILM 673 [ACHR]; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, art 2(2), Can TS 1987 No 36 [CAT].

⁹¹ *Threat or Use of Nuclear Weapons*, *supra* note 89 at para 25.

⁹² *Coard v United States* (1999), Inter-Am Comm HR, No 109/99, No 10.951 at para 42, Inter-American Yearbook on Human Rights: 1999, OEA/Ser.L/V/II.106 doc3 1283. See also IACHR, *Decision on Request for Precautionary Measures: Detainees in Guantanamo Bay, Cuba* (2002), 41 ILM 532.

⁹³ CCPR, 80th Sess, 2187th Mtg, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev1/Add13 (2004) at para 11 [*General Comment No 31*].

⁹⁴ See especially Conor McCarthy, "Legal Conclusion or Interpretative Process? *Lex Specialis* and the Applicability of International Human Rights Standards" in Roberta Arnold and No  lle Qu  nivet, eds, *International Humanitarian Law and Human Rights: Towards a New Merger in International Law* (Leiden: Martinus Nijhoff, 2008) 101.

argue that IHL always prevails,⁹⁵ or at least, it prevails in every situation for which it has a rule. Others, applying the rule of interpretation used to decide between competing or contradictory human rights rules, argue that in any circumstance one must apply the rule that provides the greatest level of protection.⁹⁶ This approach neglects the fact that IHL is a compromise between the elementary considerations of humanity—thus, the protection of the individual—and military necessity. It is preferable to apply the more detailed rule, that is, that which is more precise vis-à-vis the situation and the problem to be addressed.

The meaning of the principle *lex specialis derogat legi generali* in general and in particular concerning IHL and IHRL has been explored by one of the authors elsewhere.⁹⁷ The principle is a useful tool of interpretation, but it does not indicate an inherent quality in one branch of law or of one of its rules. Rather, it determines which rule prevails over another in a particular situation.⁹⁸ Each case must be analyzed individually.⁹⁹

Several factors must be weighed to determine which rule, in relation to a certain problem, is the *lex specialis*. Specialty in the logical sense implies that the norm that applies to certain facts must give way to the norm that applies to those same facts as well as to an additional fact present in the circumstances. Between two applicable rules, the one which has the larger common contact surface area with the situation applies. The norm with the scope of application that enters completely into that of

⁹⁵ This appears to be the position of the United States: US, *Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba* (2002), 41 ILM 1015.

⁹⁶ See Gloria Gaggioli and Robert Kolb, “A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights” (2007) 37 *Isr Ybk Hum R* 115 at 122.

⁹⁷ Marco Sassòli, “Le droit international humanitaire, une *lex specialis* par rapport aux droits humains?” in Andreas Auer, Alexandre Flückiger & Michel Hottelier, eds, *Les droits de l’homme et la constitution, Etudes en l’honneur du Professeur Giorgio Malinverni* (Zurich: Collection Genevoise, Schulthess, 2007) 375.

⁹⁸ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission*, finalized by Martti Koskeniemi, UN Doc A/CN.4/L.682 (13 April 2006) at para 112; Heike Krieger, “A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study” (2006) 11:2 *J Confl & Sec L* 265 at 269, 271; Philip Alston, Jason Morgan-Foster & William Abresch, “The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the ‘War on Terror’” (2008) 19:1 *EJIL* 183 at 192; International Law Commission, *Report of the International Law Commission: Fifty-sixth session*, UNGAOR, 59th Sess, Supp No 10, UN Doc A/59/10 (2004) at para 304.

⁹⁹ See Anja Lindroos, “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*” (2005) 74:1 *Nordic J Int’l L* 27 at 42.

the other norm must prevail, otherwise it would never apply.¹⁰⁰ It is the norm with the more precise or narrower material and personal scope of application that prevails.¹⁰¹ Precision requires that the norm addressing a problem explicitly prevails over the one that treats it implicitly, the one providing more details over the other's generality,¹⁰² and the more restrictive norm over the one covering the entire problem but in a less exacting manner.¹⁰³

A less formal factor—and also less objective—that permits determination of which of two rules apply is the conformity of the solution to the systemic objectives of the law.¹⁰⁴ Though, characterizing this solution as *lex specialis* perhaps constitutes misuse of language. However, the systemic order of international law is a normative postulate founded upon value judgments.¹⁰⁵ And when formal standards do not indicate a clear result, this teleological criterion must weigh in, even though it allows for personal preferences.¹⁰⁶

B. The Extraterritorial Applicability of IHRL

The transfer of detainees occurs outside the territory of Canada. IHRL, therefore, only applies if its obligations bind a state, even when acting beyond that state's territory.

On the universal level, under the International Covenant on Civil and Political Rights (ICCPR) a party undertakes “to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized.”¹⁰⁷ This wording and the negotiating history lean towards un-

¹⁰⁰ Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed (Berlin: Springer, 1991) at 267-68.

¹⁰¹ N Bobbio, “Des critères pour résoudre les antinomies”, in Ch Perelman, ed, *Les antinomies en droit* (Bruxelles: Bruylant, 1965) 237 at 244.

¹⁰² See e.g. Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Leiden: Martinus Nijhoff, 2003) at 124.

¹⁰³ See e.g. *Brannigan and McBride v United Kingdom* (1993), 258 ECHR (Ser A) 29 at para 76, 17 EHRR 539 (concerning the relationship between arts 13 and 5(4) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Eur TS 5, as amended by *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 11 May 1994, 2061 UNTS 7, Eur TS 155 [ECHR]).

¹⁰⁴ International Law Commission, *supra* note 98 at para 107.

¹⁰⁵ Krieger, *supra* note 98 at 280.

¹⁰⁶ Bobbio, *supra* note 101, 240-41. See also C Wilfred Jenks, “The Conflict of Law-Making Treaties” (1953) 30 Brit YB Int'l L 401 at 450.

¹⁰⁷ ICCPR, *supra* note 90, art 2(1) [emphasis added].

derstanding territory and jurisdiction as cumulative conditions.¹⁰⁸ The United States and Israel therefore deny that the Covenant is applicable extraterritorially.¹⁰⁹ The ICJ,¹¹⁰ the UN Human Rights Committee (HRC),¹¹¹ and other states¹¹² are however of the opinion that the Covenant equally applies in an occupied territory.¹¹³ From a teleological point of view it would indeed be astonishing that persons whose rights can neither be violated nor protected by the territorial state lose any protection of their fundamental rights against the state who can actually violate and protect their rights.

For instance, in 2006, the HRC, in its consideration of reports submitted by the United States, recalled that the ICCPR applies with respect to individuals within their territory and to those subject to their jurisdiction, and that it also applies in times of war.¹¹⁴ The HRC also recalled the obli-

¹⁰⁸ See Michael J Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation" (2005) 99 AJIL 119, at 123-24.

¹⁰⁹ See *Construction of a Wall*, *supra* note 89 at paras 102, 110 (position of the Israeli government); Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967" (1990) 84 AJIL 44 at 71-72. The High Court of Justice of Israel recognizes the extraterritorial applicability of IHRL: see Orna Ben-Naftali & Yuval Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories" (2003-2004) 37:1 Isr LR 17 at 87-95. For the position of the United States, see *Comments on the Concluding Observations*, *infra*, note 114; CCPR, *Consideration of Reports: United States*, *infra* note 114; John B Bellinger III, "Legal Issues in the War on Terrorism—Reply to Silja NU Vöneky" (2007) 8:9 German Law Journal 871 at 877. The Coalition Provisional Authority Administrator in Iraq, Ambassador L Paul Bremer is reported to have stated in a letter to Amnesty International that "the only relevant standard applicable to the Coalition's detention practices is the Fourth Geneva Convention of 1949" (Memorandum from Amnesty International, *Iraq Memorandum on Concerns Related to Legislation Introduced by the Coalition Provisional Authority* (4 December 2003) at 4, AI-Index MDE 14/176/2003, online: Amnesty International <<http://www.amnesty.org>>).

¹¹⁰ *Construction of a Wall*, *supra* note 89 at paras 107-12; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168 at paras 216-17.

¹¹¹ CCPR, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee; Israel*, UN Doc CCPR/C/79/Add.93, 63d Sess (18 August 1998) at para 10 and *General Comment No 31*, *supra* note 93 at para 10.

¹¹² UK, Ministry of Defence, *The Manual of the Law of Armed Conflict* (New York: Oxford University Press, 2004) at para 11.19.

¹¹³ See generally Walter Kälin, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Doc E/CN4/1992/26, 48th Sess (1992) at paras 55-59.

¹¹⁴ CCPR, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee; United States of America*, UN Doc CCPR/C/USA/CO/3/Rev1, 87th Sess (18 December 2006) at para 10 [CCPR, *Consideration of Reports: United States*]. In its comments on the concluding observations of the Committee, the United States restated its longstanding position that the Covenant does not apply extraterritorially, see *ibid*; *United States of America*, *Ad-*

gation of the United States to conduct investigations involving all “allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment ... in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations” as well as to prosecute and punish those responsible for the violations.¹¹⁵

Therefore, according to the HRC and other international organs, Canada is required to respect its international obligations under the ICCPR in regards to the activities of its armed forces in Afghanistan. This convention formally prohibits torture and does not allow for any derogation to this prohibition, even in times of war.¹¹⁶

The extraterritorial applicability of the *Canadian Charter of Rights and Freedoms* is more contentious.¹¹⁷ On the one hand, in *Canada v. Khadr*, the Supreme Court of Canada held in 2008 that the principles of international law and comity of nations, which require that Canadian officials operating abroad comply with local law and which might preclude application of the *Charter* to acts of Canadian officials committed abroad, do not extend to participation in processes that violates Canada’s binding

dendum: Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee, UN Doc CCPR/C/USA/CO/3/Rev1/Add1 (12 February 2008) at 2 [*Comments on the Concluding Observations*].

¹¹⁵ CCPR, *Consideration of Reports: United States*, *supra* note 114 at para 14.

¹¹⁶ ICCPR, *supra* note 90 arts 4, 7.

¹¹⁷ On the one hand, the Supreme Court of Canada held in *Suresh* that s 7 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*]) applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts (*supra* note 12 at para 54). See also *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283. Nevertheless, in a case concerning evidence collected abroad by Royal Canadian Mounted Police officers, the Court stated that the *Charter*, on the other hand, cannot be enforced in another state’s territory and that the involvement of a Canadian state actor is not in itself sufficient. The Court refused to apply the *Charter* standards as a criminal investigation in the territory of another state is not a matter within the authority of Parliament or the provincial legislatures, as required by s 32(1) of the *Charter*, because they have no jurisdiction to authorize enforcement abroad (*Hape*, *supra* note 12 at para 94). The Court added that under international law, each state’s exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference (*ibid* at para 45). In the present case, one can wonder if the conduct of the Canadian forces in regard of the transfer of Afghan detainees falls within the scope of “matters within the authority of Parliament” as prescribed by s 32(1) of the *Charter* as international law specifically gives the responsibility for the treatment of POWs to the detaining power, and as the tools to determine the scope of article 32 include Canada’s international obligations (*ibid* at para 33).

international human rights obligations.¹¹⁸ The fact that Mr. Khadr, unlike the detainees transferred in Afghanistan, is a Canadian citizen is irrelevant under IHRL: “The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada’s international obligations.”¹¹⁹ On the other hand, the Supreme Court of Canada dismissed in May 2009 the application for leave to appeal against a Federal Court of Canada decision,¹²⁰ in a case concerning the transfer of Afghan detainees by members of Canadian forces to Afghan authorities despite a risk of torture. The Federal Court of Canada held that the *Charter* does not apply to the conduct of members of the Canadian forces in relation to detainees held by Canadian military personnel on Afghan soil because Afghan authorities had not consented to its application, and based upon the degree of control that the Canadian forces exert over the detainees. The Federal Court of Canada also concluded “that the *Charter* would not apply to restrain the conduct of the Canadian forces in Afghanistan, even if [it was established] that the transfer of the detainees ... would expose them to a substantial risk of torture.”¹²¹

However, these decisions concern the extraterritorial application of the *Charter* while the present discussion concerns the applicability of international law, which is as binding on Afghanistan as on Canada. The Federal Court of Canada, therefore, did not exclude the extraterritorial applicability of Canadian IHRL obligations to the transfers in Afghanistan.

If IHRL applies extraterritorially, the next question that arises is when a person can be considered to be under the jurisdiction of a state.¹²² The Inter-American Court and Commission for Human Rights have tended to adopt broad views of what situations may give rise to a state having extraterritorial jurisdiction,¹²³ while the strictest test adopted by the European Court of Human Rights (ECtHR), was articulated in *Bank-*

¹¹⁸ *Canada (Minister of Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 at para 28 [Khadr].

¹¹⁹ *Ibid* at para 26.

¹²⁰ See Amnesty International, *supra* note 8. It should be noted that the Federal Court rendered its decision on this case before the Supreme Court of Canada decided Khadr (*supra* note 118).

¹²¹ See *Amnesty International*, *supra* note 8 at para 328.

¹²² John Cerone, “Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations” (2006) 39:5 Vand J Transnat’l L 1447 at 1491-92.

¹²³ See *Alejandro v Cuba* (1999), Inter-Am Comm HR No 86/99, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106 doc3 586 at para 25.

ović v. Belgium—that a state must exercise effective control over territory by being physically present on that territory in order to have jurisdiction.¹²⁴ But the test was later relaxed.¹²⁵

It is uncontroversial that, for all treaties, jurisdiction arises through a state's extraterritorial exercise of control over persons, when those persons are detained by agents of that state. In regard to the control over detainees, in the case of *Al-Saadoon v. United Kingdom*,¹²⁶ the ECtHR had to decide whether the transfer of Iraqi prisoners from UK custody to the Iraqi authorities contravened the European Convention on Human Rights (ECHR) as the British authorities had not obtained any guarantees that the death penalty would not be imposed on the prisoners. The detainees, who had been arrested in 2003 by UK forces, were controversially transferred to the Iraqi authorities on 31 December 2008, a few hours before the mandate of the Multi-National Force (MNF) expired. The applicants contended that they were within the jurisdiction of the United Kingdom within the meaning of article 1 of the ECHR.¹²⁷ The court stated in its decision on admissibility that

given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question [in Iraqi territory], the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction.¹²⁸

The Convention was therefore applicable and the case admissible. The court based its decision on the fact that, *inter alia*, Coalition Provisional Authority Order Number 17 provided that all premises used by the MNF should be inviolable and subject to the exclusive control of the MNF.¹²⁹ Consequently, the United Kingdom exercised *de facto* and *de jure* control over the premises.

C. What is the Impact of a UN Mandate?

Normally, the legality or illegality of an exercise of jurisdiction does not matter for the applicability of IHRL. Theoretically, UN Security

¹²⁴ *Banković v Belgium*, No 52207/99, [2001] XI ECHR 333 at paras 70-71.

¹²⁵ See *Issa v Turkey*, No 31821/96, [2005] 41 EHRR 567 at paras 76-82; *Pad v Turkey* (dec), No 60167/00, [2007] VI ECHR at para 54.

¹²⁶ *Al-Saadoon v United Kingdom* (dec), No 61498/08, [2009] ECHR [*Al-Saadoon*].

¹²⁷ Art 1 ECHR provides that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention" (*supra* note 103).

¹²⁸ *Al-Saadoon*, *supra* note 126 at para 88.

¹²⁹ *Ibid* at para 87.

Council resolutions could, under article 103 of the UN Charter, prevail over IHRL obligations of states. In *Al Jedda*, the UK House of Lords considered UN Security Council Resolution 1546, authorizing internment where it was “necessary for imperative reasons of security” qualified the United Kingdom’s obligations under article 5 of the ECHR.¹³⁰ However, the UN Security Council resolutions concerning Afghanistan contain no language similar to that of Resolution 1546, which could be claimed to govern the admissible transfers of detainees.

United Nations Security Council resolutions should, whenever possible, be interpreted in a manner compatible with the rest of international law. The mandate of the Security Council to maintain international peace and security includes the possibility to authorize the use of force. How such force may be used is, however, governed by other branches of international law, including IHRL. No one would claim that a UN Security Council resolution urging states to prevent acts of terrorism implicitly authorizes torture or summary executions. In addition, it is often argued that even the Security Council must comply with *jus cogens*,¹³¹ and the prohibition of torture discussed here belongs to *jus cogens*.

A distinct question relates to situations where foreign forces are participating in a peace operation in a way that their acts can be attributed only to the United Nations. A much-criticized recent judgment of the ECtHR in the *Berhami* case suggests that in such a case the sending state will not have jurisdiction for the purposes of its obligations under human rights treaties.¹³² This judgment runs counter to both explicit statements by some states and to state practice.¹³³ More recently, in its admissibility

¹³⁰ See *R ex rel Al-Jedda (FC) v United Kingdom (Secretary of State for Defence)*, [2007] UKHL 58, at para 2, at paras 26-39 (per Lord Bingham), 125-29 (per Baroness Hale), at paras 130-35 (per Lord Carswell), and at para 151 (per Lord Brown), [2008] 2 WLR 31 [*Al-Jedda*]. Lord Rodger agreed in principle in *obiter dictum* at para 118 (*ibid*).

¹³¹ See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Yugoslavia)*, Order of 8 April 1993, [1993] ICJ Rep 407 at 440-41, paras 100-102, Judge Lauterpacht, separate opinion.

¹³² See *Behrami v France* [GC] (dec), No 71412/01, [2007] ECHR. In this case, the question of attribution was not clearly distinguished from the above-mentioned question of whether a Security Council resolution overrides the substantive human rights obligations of a state, but in its global reasoning the ECtHR suggested that such resolutions have precisely that effect (*ibid* at para 149). The two questions were distinguished in the *Al Jedda* case by the UK House of Lords, which rejected on the facts the claims of the government under the first question but answered the second question affirmatively (*Al-Jedda*, *supra* note 130 at paras 22-24 (attribution); at para 39 (human rights), per Lord Bingham). Lord Rodger dissented on the question of attribution (*ibid* at para 99).

¹³³ See e.g. CCPR, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments by the Government of Ger-*

decision in the aforementioned *Al-Saadoon* case, the United Kingdom did not even argue that because of the UN mandate the United Kingdom had in Iraq, persons the United Kingdom detained there did not fall under its jurisdiction.¹³⁴ It may well be that a state contributes troops to a peace operation in such a way that it no longer has control over what those troops do and that the exclusive command and control is with the United Nations, with another international organization, or with a third state.¹³⁵ In fact, this is the situation the drafters envisaged in articles 43 through 47 of the UN Charter, which have remained dead letter. In reality, contributing states retain a very large degree of control over their forces. Everyone familiar with ISAF in Afghanistan knows of the national caveats. If UN Security Council resolutions and NATO rules allow a contributing state to opt out of a certain kind of operation, out of any given operation, or out of certain methods to implement them, that state has enough control over the acts of its own troops to be responsible for their conformity with the state's human rights obligations.

many to the concluding observations of the Human Rights Committee, UN Doc CCPR/CO/80/DEU/Add.1 (11 April 2005) at 3 [mimeo]; CCPR, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee; Poland*, UN Doc CCPR/CO/82/POL, 82d Sess (2 December 2004) at para 3 [mimeo]; CCPR, Human Rights Committee, *Summary Record of the 1707th Meeting*, UN Doc CCPR/C/SR.1707, 64th Sess (27 October 1998) at para 22 (Belgium) [mimeo]. Other states parties have answered questions regarding the actions of their national forces in peacekeeping missions without contending that the ICCPR does not apply beyond their state borders or in that context: see CCPR, Human Rights Committee, *Summary Record of the 1680th meeting*, UN Doc CCPR/C/SR.1680, 63d Sess (24 September 1998) at para 41 (Colombia) [mimeo]; CCPR, Human Rights Committee, *Summary Record of the 1738th Meeting*, UN Doc CCPR/C/SR.1738, 65th Sess (7 March 1999) at paras 29, 32-33 (Canada) [mimeo].

¹³⁴ See *Al Saadoon*, *supra* notes 126 at paras 87-88; *ECHR*, *supra* note 103, art 1.

¹³⁵ In practice, it is not always clear precisely what level of "command and control" the United Nations exercises over the forces under the UN Force Commander. And Marten Zwanenburg notes, "[P]articipating states always retain full command ... to withdraw the troops," which is the authority to withdraw their forces from the mission, but they otherwise transfer the authority to command or control their forces to the UN Commander in an agreement covering the troop contribution (*Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff, 2005) at 38-41). The way in which terms are used in those agreements may make it difficult to pinpoint any differences in precise levels of control. However, despite the official transfer of authority (command/control), national forces tend to continue to "remain loyal to their national governments," such that they may follow orders that diverge from those issued by the UN Force Commander (Ray Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (Cambridge: Cambridge University Press, 2007) at 124). See also *ibid* at 115-25.

D. The Prohibition of Torture and Inhuman or Degrading Treatment in IHRL

The prohibition of torture and other ill-treatment is universally recognized and has been enshrined in many treaties.¹³⁶ Torture and other ill-treatment has been interpreted broadly and prohibits a wide range of conduct. The prohibition does not only contain a negative obligation for states but also a positive one to secure individuals from prohibited treatment as well as procedural obligations such as an obligation to investigate *prima facie* allegations of torture and other ill-treatment.¹³⁷

To fall under the prohibition a treatment must reach a “minimum level of severity”.¹³⁸ The assessment of whether an act did or did not reach this level is relative and will depend on the circumstances of each case, such as the duration of the treatment, its physical and mental effects on the victims, and the personal characteristics of the victims (age, sex, health, and so forth).¹³⁹ Torture is the highest degree of prohibited treatment and implies the intentional or deliberate infliction of severe mental or physical suffering in the pursuit of a specific purpose, such as gaining information, punishment, or intimidation.¹⁴⁰

E. The Prohibition of Transferring Persons to a State Where They Risk Being Tortured or Ill-Treated

1. Scope of the Prohibition

The prohibition to expel, extradite, or otherwise forcibly remove someone into a territory where his or her security could be compromised, referred to as the *non-refoulement* principle, first appeared in article 33 of the *Convention Relating to the Status of Refugees* of 1951 (1951 Convention), which reads:

¹³⁶ See e.g. *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, UN Doc A/810 (1948), art 5; *ECHR*, *supra* note 103, art 3; *ICCPR*, *supra* note 90, art 7; *ACHR*, *supra* note 90, art 5; *CAT*, *supra* note 90, arts 2, 16.

¹³⁷ See *ibid*, art 2. See also, *Ahmed v United Kingdom* (1998), ECHR (Ser A) 2357, at para 22, 29 EHRR 1; *Assenov v Bulgaria* (1998), ECHR (Ser A) 3265, at para 102, 28 EHRR 652.

¹³⁸ See *Ireland v United Kingdom* (1978), ECt HR (Ser A), ECHR 5, at para 162, 2 EHRR 25.

¹³⁹ See e.g. *ibid* at para 162; *Soering v United Kingdom* (1989), 161 ECHR (Ser A) 4, at para 100, 11 EHRR 439 [Soering]; *Labita v Italy* [GC], No 26772/95, [2000] IV ECHR, at para 120.

¹⁴⁰ *CAT*, *supra* note 90, art 1.

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹⁴¹

Non-*refoulement* in a refugee context is predicated on a threat of persecution. The same principle appeared in IHRL and has been expressed as follows:

No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.¹⁴²

Nowadays, it is well established that the prohibition of *refoulement* includes the risk not only of torture but also of cruel, inhuman, or degrading treatment. The 1951 Convention, adopted prior to all other relevant treaties, only specifies “life or freedom”.¹⁴³ However, according to the United Nations High Commissioner for Refugees (UNHCR),¹⁴⁴ this wording is intentionally broad and does include the threat of ill-treatment. The African Union Convention refers, *inter alia*, to a threat to “physical integrity or liberty.”¹⁴⁵ The Charter of Fundamental Rights of the European Union is even more explicit and mentions “inhuman or degrading treatment.”¹⁴⁶

¹⁴¹ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 art 33, Can TS 1969 No. 6 (entered into force 22 April 1954, accession by Canada 2 September 1969) [1951 Convention].

¹⁴² Sir Elihu Lauterpacht & Daniel Bethlehem, “The Scope and Content of the Principle of Non-*refoulement*: Opinion” in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (New York: Cambridge University Press, 2003) ch 2.1 at para 252. For a detailed study of the standards of protection from *refoulement* under different IHRL instruments, see CW Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Antwerp: Intersentia, 2009) at 187-423.

¹⁴³ Art 33 reads: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (*supra* note 141).

¹⁴⁴ See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007), online: UNHCR <<http://www.unhcr.org>> [UNHCR, *Advisory Opinion*].

¹⁴⁵ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45, art II(3): “No person shall be subjected by a Member State

Although no provision of the ICCPR contains a prohibition of non-*refoulement*, the HRC recognized that the ICCPR may prohibit measures such as expulsion, extradition, or compulsory return: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or *refoulement*."¹⁴⁷ This extension of the ICCPR has however been contested by the United States.¹⁴⁸ As a state party to the Convention Against Torture, the United States, nevertheless, admits that it is bound by that treaty's non-*refoulement* provision, but it argues that it is limited, in conformity with the wording of that treaty, to cases of risk of torture, and only to cases in which it is "more likely than not that [the] person will be tortured."¹⁴⁹

The first judicial body to affirm that an expulsion, an extradition, a deportation, or a compulsory return may raise the question of the prohibition of torture and other cruel, inhuman, or degrading treatment was the now defunct European Commission of Human Rights.¹⁵⁰ The Commission's jurisprudence was confirmed by the European Court of Human Rights in 1989 in *Soering*. That case concerned a German citizen held in

to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened."

¹⁴⁶ EC, *Charter of Fundamental Rights of the European Union*, [2010] OJ C 83/2 at 389 art 19(2): "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

¹⁴⁷ UNHRC, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (vol I) 200 at para 9 [emphasis added]. The Committee refers to "individuals", not to "refugees", confirming that the principle of non-*refoulement* applies to all persons threatened of return to a place where they could fear for their physical integrity. Later it broadened the risk that triggers the application of the principle to "irreparable harm": see *General Comment No 31*, *supra* note 93 at para 12.

¹⁴⁸ While submitting its second and third periodic reports to the Committee, the United States argued that it is not bound by this assertion, which is not a provision of the ICCPR. The Committee answered that the United States

should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of *inter alia*, their transfer, rendition, extradition, expulsion or *refoulement* if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment (CCPR, *Consideration of Reports: United States*, *supra* note 114 at para 16).

¹⁴⁹ *Comments on the Concluding Observations*, *supra* note 114 at 9.

¹⁵⁰ See e.g. *X v Netherlands* (1967), 23 Eur Comm'n HR CD 137; *X v Germany* (1967), 23 Eur Comm'n HR CD 94.

prison in the United Kingdom where he was waiting for his extradition to the United States where he could face the death penalty. He contested his extradition on the grounds that it would be contrary to article 3 of the ECHR prohibiting torture and other cruel, inhuman, and degrading treatment. The court confirmed that the ECHR was applicable to measures of removal from a state's territory:

It would hardly be compatible with the underlying values of the Convention ... were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intentment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.¹⁵¹

The ECtHR has on many occasions explicitly confirmed that the principle of non-*refoulement* includes cases of danger of ill-treatment.¹⁵²

Taking the aforementioned treaty provisions into account, the UNHCR considers that “[t]he prohibition of *refoulement* to a risk of cruel, inhuman or degrading treatment or punishment, as codified in universal as well as regional human rights treaties is in the process of becoming customary international law, at the very least at regional level.”¹⁵³

2. Extraterritorial Application of the Prohibition

Because the detainees transferred by Canada were not present in Canada, the question arises whether it is necessary that the person transferred is present on the territory of the transferring state or whether the fact that this person is under the control of this transferring state suffices to trigger the applicability of the principle of non-*refoulement*. Scholarly

¹⁵¹ *Soering*, *supra* note 139 at para 88.

¹⁵² *Ibid* at paras 90-91; *Saadi v Italy* [GC], No 37201/06, [2008] ECHR at para 126, 49 EHRR 30 [*Saadi*], *Vilvarajah v United Kingdom* (1991), 215 ECHR (Ser A) 6 at para 103, 14 EHRR 248; *Ahmed v Austria* (1996), 1996-VI ECHR (Ser A), 24 EHRR 278 at para 39; *HLR v France* (1997) III ECHR (Ser A) at para 34, 26 EHRR 29; *Jabari v Turkey*, No 40035/98, [2000] VII ECHR 151 at para 38; *Sheekh v Netherlands*, No 1948/04, [2007] ECHR at para 135.

¹⁵³ UNHCR, *Advisory Opinion*, *supra* note 144 at para 21.

writings support the latter understanding.¹⁵⁴ In an Advisory Opinion, UNHCR had an opportunity to make clear that it

is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.¹⁵⁵

It adds that “[a]s with non-*refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State’s territory, but rather, whether they come within the effective control and authority of that State.”¹⁵⁶ Similarly, the HRC is of the opinion that, in this regard, the question is whether the individual is under the jurisdiction of a state and that the obligation under article 33(1) includes refugees a state “detains outside its own territory.”¹⁵⁷ The Supreme Court of the United States has, however, rejected any extraterritorial application of the non-*refoulement* principle under the 1951 Convention¹⁵⁸ and the United States administration rejected it concerning its IHRL obligations.¹⁵⁹

In *Al-Saadoon v. United Kingdom*, the ECtHR found that the United Kingdom, in transferring Iraqi detainees it held in Iraq to Iraqi authorities during armed conflict without having the assurance that the detainees would not be subjected to the death penalty, violated the prohibition of torture and demonstrated cruel, inhuman, or degrading treatment:

[T]hrough the actions and inaction of the United Kingdom authorities the applicants have been subjected, since at least May 2006, to

¹⁵⁴ See Lauterpacht & Bethlehem, *supra* note 142 at paras 114, 241; Droege, “Transfers of Detainees”, *supra* note 88 at 682-83. Emanuela-Chiara Gillard recalls that states involved in the conflicts in Afghanistan and Iraq have concluded agreements “to ensure certain standards as to conditions of detention and treatment and judicial guarantees” for the people previously detained by these states in the territories of Afghanistan and Iraq and surrendered to the local authorities, and considers that these agreements “are indicative of [the sending states’] belief that they bear some responsibility towards the persons transferred” (“There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons” (2008) 90:871 *Int’l Rev Red Cross* 703 at 715).

¹⁵⁵ UNHCR, *Advisory Opinion*, *supra* note 144 at para 24. It also states: “The obligation set out in Article 33(1) of the 1951 Convention is subject to a geographic restriction only with regard to the country where a refugee may not be sent to, not the place where he or she is sent from” (*ibid* at para 26).

¹⁵⁶ *Ibid* at para 43.

¹⁵⁷ CCPR, *Consideration of Reports: United States*, *supra* note 114 at para 16.

¹⁵⁸ *United States (Immigration and Naturalization Service) v Haitian Centers Council, Inc.*, 509 US 155 (1993).

¹⁵⁹ CCPR, *Consideration of Reports: United States*, *supra* note 114 at para 10.

the fear of execution by the Iraqi authorities ... [C]ausing the applicants psychological suffering of this nature and degree constituted inhuman treatment. It follows that there has been a violation of Article 3 of the Convention.¹⁶⁰

Thus, in that case, the ECtHR found that the general possibility of Iraqi detainees being subjected to the death penalty violated the prohibition of torture without requiring the proof of a specific threat to a particular individual. However, the knowledge of such a specific threat would be required in the context of International Criminal Law.

3. The Standard of Care Applicable to a Transfer when the Risk of Torture Is Alleged

As explained in the preceding section, IHL and IHRL apply simultaneously during armed conflicts and the rule that should prevail is determined by the principle of *lex specialis*. In regard to the duty of care, a detaining power should apply to the treatment of POWs under its custody the rules of IHL, which are, on the one hand, more specific and should be regarded as prevailing. On the other hand, rules of IHRL are more detailed on the standards a state should apply before transferring an individual to the custody of another state and the determination of when such a transfer might be prohibited by international law.

Indeed, IHL is not explicit as to the required degree of assurance a state must have that a detainee will not be tortured or mistreated if transferred to another state, or in terms of article 12 of Convention III, that the transferee power is willing to comply with Convention III. IHRL jurisprudence provides some guidance in this regard. The ECtHR has developed interesting jurisprudence on the expulsion, *refoulement*, or transfer of an individual to a state where the individual is at risk of being tortured. Although Canada is not a state party to the ECHR, this jurisprudence can be relevant since the prohibition of torture is universal and enshrined in human rights law binding upon Canada.¹⁶¹ It can thus be of interest in interpreting the conformity of the transfers discussed in this article with Canada's international human rights obligations.

As mentioned above, the ECtHR held that a state party to the ECHR violates the prohibition in article 3 of the ECHR of subjecting an individual under its jurisdiction to torture, or to inhuman, or degrading treat-

¹⁶⁰ *Al-Saadoon v United Kingdom* (just satisfaction), No 61498/08, (2 March 2010) at para 144.

¹⁶¹ On the prohibition of torture at the international level, see *ICCPR*, *supra* note 90, art 7; *CAT*, *supra* note 90, art 2. And at the domestic level, see *Charter*, *supra* note 125, ss 7, 12; *Criminal Code*, RSC 1985, c C-46, s 269.1.

ment or punishment, if it exposes that person to the likelihood of torture, inhuman, cruel, or degrading treatment in a place outside its jurisdiction. In *Soering*, the ECtHR held that

the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. ... In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.¹⁶²

The *Soering* principle also extends to expulsions.¹⁶³ In 1996, the ECtHR in *Chahal v. United Kingdom* explicitly established that the prohibition of extradition or expulsion to a place where a person might face treatment contrary to article 3 was absolute.¹⁶⁴ That “the right to be free from torture requires not only that [states] refrain from torture but [also] take steps of due diligence to avoid a threat to an individual of torture from third parties” has been also mentioned by the HRC in regard to state obligations under the ICCPR.¹⁶⁵

In *Saadi v. Italy*, the ECtHR gave some indications on the degree of assurance a transferring state must receive before sending someone back to a receiving state. Italy wanted to deport Saadi to Tunisia where he had been sentenced to twenty years of imprisonment for membership in a terrorist organization. The Italian government asked for diplomatic assurances from Tunisia that if Saadi were to be deported to Tunisia, he would not be subjected to treatment contrary to article 3 of the ECHR. The Tunisian government confirmed “that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia.” The competent Minister

¹⁶² *Soering*, *supra* note 139, at para 91.

¹⁶³ See *Cruz Varas v Sweden* (1991), 201 ECHR (Ser A) 8 at para 70, 14 EHRR 1.

¹⁶⁴ *Chahal v United Kingdom* (1996), 22 Eur Comm’n HR DR 1832 at para 79, 23 EHRR 413: “The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.”

¹⁶⁵ See e.g. *Communication No 1051/2002*, UN HRCOR, 80th Sess, Annex, UN Doc CCPR/C/80/D/1051/2002 (2004) at para 10.7.

pointed out “that Tunisia has voluntarily acceded to the relevant international treaties and conventions.”¹⁶⁶ The ECtHR objected

that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.¹⁶⁷

The court did not clarify what would qualify as sufficient assurances, but it noted that “the weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time.”¹⁶⁸ The HRC considers that diplomatic assurances were insufficient when they contained neither mechanisms for monitoring their respect, nor arrangements for effective implementation.¹⁶⁹ Even the United States declares that “[d]iplomatic assurances are not used as a substitute for such a case-specific assessment.”¹⁷⁰

In regard to Canada’s responsibility for allegedly ongoing instances of ill-treatment of transferred detainees, the 2005 and 2007 Arrangements, which offered serious mechanisms of implementation, certainly go beyond mere assurances and could be relied upon as an important element in the assessment of whether an individual detainee to be transferred risked torture. However, if the implementation mechanisms revealed that Afghanistan was not complying with its undertakings, the mere existence of those agreements and mechanisms could obviously not condone continuing transfers by Canada. To the contrary, the implementation mechanisms must have allowed the Canadian authorities to get precise information on how transferred detainees were treated. If the monitoring possibilities were not fully used by Canadian authorities, this would equally be relevant for assessing Canada’s responsibility for transfers of detainees who were actually tortured.

As for “the probability that subjection to proscribed ill-treatment or persecution will occur,” the ECtHR and the UN Committee against tor-

¹⁶⁶ *Saadi*, *supra* note 152, at para 55.

¹⁶⁷ *Ibid* at para 147.

¹⁶⁸ *Ibid* at para 148.

¹⁶⁹ *Communication No. 1416/2005*, UN HRCOR, 88th Sess, Annex, UN Doc CCPR/C/88/D/1416/2005 (2006), at paras 11.4-11.5; UNHRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Sweden*, 74th Sess, UN Doc CCPR/CO/74/SWE (2002) para 12(b).

¹⁷⁰ *Comments on the Concluding Observations*, *supra* note 114 at 10.

ture have considered that the risk must be “real, personal and foreseeable ... going beyond the mere possibility that subjection to proscribed ill-treatment will occur.”¹⁷¹ The UN HRC refers to “a necessary and foreseeable consequence of the removal.”¹⁷² Criteria suggested in scholarly writings are prospectivity (“the possibility ... must lie in the present or near future”),¹⁷³ objectivity (based on “determinable facts and circumstances”),¹⁷⁴ the existence of an individualized risk (which may also be based upon the belonging to a group); but in the end all available facts and circumstances of the specific case at hand must be assessed.¹⁷⁵ The mere fact that detainees are tortured in Afghanistan is, therefore, not sufficient to bar Canada from transferring detainees to the Afghan authorities. What must be furthermore established is that detainees belonging to the category of those transferred by Canada (i.e., the Taliban) were tortured and that the detainees transferred by Canada were actually tortured, despite the 2005 and 2007 Arrangements and the implementation mechanisms foreseen by them.

As previously mentioned, these principles and standards also apply in the case of transfers of detainees in the context of armed conflicts, and they apply equally when the detainee is already on the territory of the transferee state, but under the control of the transferring state. Cordula Droege summarizes the transferring state’s obligation:

While legal obligations vary from treaty to treaty, the baseline is that people must not be transferred if there are substantial reasons for believing that they would be exposed thereby to a risk of persecution, torture, cruel, inhuman or degrading treatment or arbitrary deprivation of life.¹⁷⁶

III. International Criminal Law

Whether or not the transfer of detainees in Afghanistan amounts to international crimes is relevant in several respects. First, if it does, members of the Canadian forces involved could be prosecuted before the ICC and before Canadian courts, under Canadian domestic law implementing ICL. Second, if transfers constituted international crimes, Canada would be in violation of its international obligations by not prosecuting them. In

¹⁷¹ Wouters, *supra* note 142 at 542. For an overview, see *ibid* at 246-64, 458-75, 542.

¹⁷² *Ibid* at 392. See also *ibid* at 391-95, 542.

¹⁷³ *Ibid* at 543.

¹⁷⁴ *Ibid* at 544.

¹⁷⁵ See *ibid* at 542-48.

¹⁷⁶ Droege, “Transfers of Detainees”, *supra* note 88 at 700.

addition, a state ordering its soldiers to commit international crimes violates international law itself.¹⁷⁷

The transfers could not possibly constitute acts of genocide. It is also very difficult to argue that they are crimes against humanity. Indeed, for such a classification to apply, they would have to be committed as part of a widespread or systematic attack directed against any civilian population and pursuant or in furtherance of a state policy, with knowledge of the attack.¹⁷⁸ We will therefore only discuss whether they are war crimes. One category of war crimes is that of grave breaches of the Geneva Conventions. As those breaches are criminalized in Canadian law separately, we will first discuss them and then the larger concept of war crimes. In both cases, because Canadian forces are not alleged to ill-treat prisoners themselves, the main question is whether they have aided or abetted in such crimes committed by Afghan officials who torture the transferred prisoners.

A. The Concept of Grave Breaches of the Geneva Conventions

Certain violations of the Geneva Conventions are criminalized as “grave breaches”. Article 130 of Convention III classifies torture and inhuman treatment of POWs as a grave breach of that Convention. State parties to the Geneva Conventions are under an obligation to enact, enforce through domestic criminal law, and to prosecute and punish the commission of grave breaches.¹⁷⁹ In Canada, grave breaches are criminalized by the *Geneva Conventions Act*.¹⁸⁰

As mentioned above, it is difficult to argue that the conflict in Afghanistan is an international armed conflict. The question of the applicability of the grave breaches regime to non-international armed conflicts was raised in *Tadić*.¹⁸¹ In the ICTY appeal chamber’s decision on jurisdic-

¹⁷⁷ See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)*, [2007] at paras 166, 396-99, online: International Court of Justice <<http://www.icj-cij.org>>.

¹⁷⁸ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, arts 7(1), 7(2)(a), 37 ILM 999, online: United Nations Treaty Collection <<http://untreaty.un.org>> (entered into force 1 July 2002) [*Rome Statute*].

¹⁷⁹ See *Geneva Convention I*, *supra* note 16, art 49; *Geneva Convention II*, *supra* note 16, art 50; *Geneva Convention III*, *supra* note 16, art 129; *Geneva Convention IV*, *supra* note 16, art 146; *Protocol I*, *supra* note 17, art 85. See also Marko Divac Öberg, “The Absorption of Grave Breaches into War Crimes Law” (2009) 91:873 *Int’l Rev Red Cross* 163.

¹⁸⁰ RSC 1985, c G-3.

¹⁸¹ *Tadić*, Appeal on Jurisdiction, *supra* note 25.

tion,¹⁸² the judges had to decide whether the accused could be held criminally liable for crimes committed during a non-international armed conflict under article 2 of the ICTY Statute. This article establishes that: "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949 ... against persons or property protected under the provisions of the relevant Geneva Convention."¹⁸³ Before the trial chamber, the United States, appearing as *amicus curiae*, submitted the opinion that grave breaches included violations of IHL committed during a non-international armed conflict and directed against persons or property protected by common article 3 of the Geneva Conventions, even if they cannot be considered as *protected persons and property* in the technical meaning established by the Geneva Convention.¹⁸⁴ The appeals chamber rejected this argument and held that the notion of *protected persons and property* of the Statute has to be the same as the one of the Geneva Conventions (i.e., restricted to the context of international armed conflicts).¹⁸⁵ One judge, Georges Abi-Saab, disagreed with this conclusion.¹⁸⁶ In the meantime, however, article 4 of the Statute of the ICTR, designed to deal with acts committed during a non-international armed conflict, does not mention grave breaches, nor does article 8(2)(c) and (e) of the Rome Statute. Thus, grave breaches generally have no application during non-international armed conflicts.

However, it could be argued that Canada has agreed, in particular through the 2005 Arrangement, to apply Convention III, including its article 130 on grave breaches. It is however doubtful whether the provisions on grave breaches, which constitute obligations of states to criminalize and prosecute certain conduct, can be considered as a standard of "treatment" of detainees with which Canada agreed to comply, even in the 2005 Arrangement. Although this issue was not discussed before the ICTY, it must be mentioned that the parties to the conflict in Bosnia and Herzego-

¹⁸² *Ibid* at paras 79-84.

¹⁸³ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (International Tribunal for the Former Yugoslavia), SC Res 827, UNSCOR (1993), art 2.

¹⁸⁴ *Tadić*, Appeal on Jurisdiction, *supra* note 25 at para 83. For definitions of "protected persons and property", see Geneva Convention I, *supra* note 16, art 13; Geneva Convention II, *supra* note 16, art 13; Geneva Convention III, *supra* note 16, art 4; Geneva Convention IV, *supra* note 16, art 4.

¹⁸⁵ *Tadić*, Appeal on Jurisdiction, *supra* note 25 at para 81.

¹⁸⁶ *Prosecutor v Duško Tadić*, IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995) at 535-39 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), Judge Abi-Saab, Separate Opinion on the Defence Motion for Interlocutory.

vina undertook a similar obligation,¹⁸⁷ but the ICTY did not consider the grave breaches regime applicable on that basis.

Even if the regime of grave breaches was deemed applicable, the transfer of detainees by Canadian forces to Afghan authorities would not constitute a grave breach merely because it violates article 12 of Convention III. It would only be considered a grave breach insofar as it constitutes an act of aiding and abetting torture or of inhuman treatment by the Afghan authorities. It must, however, be recalled that in IHRL, the mere fact of transferring a detainee to a state where he or she will be sentenced to death or tortured has been considered to itself constitute an instance of inhuman treatment.¹⁸⁸ Thus such a transfer could be considered as an act of torture and inhuman treatment also under the grave breaches provisions.

B. The Concept of War Crimes

Serious violations of IHL constitute war crimes under customary international law,¹⁸⁹ criminalized in Canada through the *Crimes against Humanity and War Crimes Act*.¹⁹⁰ The concept of war crimes applies to violations of both IHL of international and of non-international armed conflicts.¹⁹¹ War crimes include, but are not limited to grave breaches.¹⁹² This section deals only with war crimes other than grave breaches.

The ICRC study on customary IHL includes among war crimes in non-international armed conflicts cruel treatment, and torture, as well as outrages upon personal dignity—in particular humiliating and degrading treatment.¹⁹³ According to the ICTY, to fall under the category of war crime under customary IHL, an offence must meet four requirements:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, [the treaty must have been unquestionably binding upon the parties at the time of the alleged offence];

¹⁸⁷ See Agreement No 1, Bosnia and Herzegovina, 22 May 1992, cited in Sassòli & Bouvier, *supra* note 41, vol II at 1765, art 2.4.

¹⁸⁸ See Part II.E.1, above.

¹⁸⁹ See Henckaerts & Doswald-Beck, *supra* note 19 at 568.

¹⁹⁰ SC 2000, c 24 [*War Crimes Act*].

¹⁹¹ *Tadić*, Appeal on Jurisdiction, *supra* note 25 at paras 86-136; *Rome Statute*, *supra* note 178, art 8.

¹⁹² *Protocol I*, *supra* note 17, art 85(5).

¹⁹³ Henckaerts & Doswald-Beck, *supra* note 19 at 590.

(iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. ... ;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹⁹⁴

Violations of common article 3 of the Conventions were explicitly held to fulfill these conditions.¹⁹⁵ Similarly, article 8(2)(c) of the Rome Statute classifies, “[i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949” as war crimes, and explicitly mentions “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”¹⁹⁶ According to article 6(3) of the *War Crimes Act*,¹⁹⁷ war crime means:

[A]n act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

The ICTY specifically defines that, to be a war crime, torture

(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition

(ii) this act or omission must be intentional;

(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;

(iv) it must be linked to an armed conflict;

(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.¹⁹⁸

¹⁹⁴ *Tadić*, Appeal on Jurisdiction, *supra* note 25 at para 94.

¹⁹⁵ See *ibid* at paras 87-93.

¹⁹⁶ Art 3 common to *Geneva Conventions I-IV*, *supra* note 16.

¹⁹⁷ *Supra* note 190.

¹⁹⁸ *Furundžija*, *supra* note 53 at para 162.

C. *The Concept of Aiding and Abetting in International Criminal Law*

Members of the Canadian forces do not themselves torture detainees. As explained above, the mere transfer of a detainee to the custody of a state that risks torturing the detainee has been considered to constitute inhuman treatment under IHRL. Until now, it has, however, not yet been treated as a grave breach of the Geneva Conventions or the war crime of torture, or inhuman or cruel treatment.

The notion of aiding and abetting has been interpreted broadly by international jurisprudence.¹⁹⁹ Contrary to the stricter *mens rea* requirements for complicity in Canadian criminal law, the ad hoc tribunals consider that in ICL, a knowledge-based *mens rea* is sufficient—while the Rome Statute may be interpreted as requiring specific intention.²⁰⁰ In addition, the presence of a person of authority in the place of commission of the unlawful act²⁰¹ or the omission to act,²⁰² if they have a “direct and/or substantial” effect on the commission of the crime by the principal perpetrator, can constitute the material element of aiding and abetting.²⁰³

In *Tadić*, the trial chamber considered “all acts of assistance by words or acts that lend encouragement or support” as *actus reus* of criminal responsibility for “aiding and abetting”.²⁰⁴ Furthermore, the accused does not need to be present at the place and moment where the crime is com-

¹⁹⁹ See e.g. *ibid* at para 235: “[T]he actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.” See also *Ferdinand Nahimana v Prosecutor*, ICTR-99-52-A, Judgment (28 November 2007) at para 482 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.unict.org>>.

²⁰⁰ See Fannie Lafontaine, “Parties to Offences under the Canadian Crimes against Humanity and War Crimes Act: An Analysis of Principal Liability and Complicity” (2009) 50 C de D 967.

²⁰¹ See e.g. *Prosecutor v Mitar Vasiljević*, IT-98-32-T, Judgment (29 November 2002) at para 70 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II), online: ICTY <<http://www.icty.org>> [Vasiljević] [footnote omitted]: “Mere presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.”

²⁰² See e.g. *Prosecutor v Tihomir Blaškić*, IT-95-14-T, Judgment (3 March 2000) at para 284 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [Blaškić].

²⁰³ See also Karim Khan & Rodney Dixon, *Archbold International Criminal Courts: Practice, Procedure & Evidence*, 3d ed (London: Sweet & Maxwell, 2009) at 863-64; Guénaél Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford: Oxford University Press, 2005) at 284-87.

²⁰⁴ *Prosecutor v Duško Tadić*, IT-94-1-T, Opinion and Judgment (7 May 1997) at para 689 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [Tadić, Opinion and Judgment].

mitted.²⁰⁵ The assistance can be given before, during, or after the commission of the unlawful act.²⁰⁶

If the assistance can be diverse in its form, it needs to be direct, or it must have a substantial effect on the commission of the unlawful act.²⁰⁷ To establish a substantial contribution to an unlawful act, the proof of a direct link of causality between the assistance and the unlawful act is not required. According to the jurisprudence, it suffices that “the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.”²⁰⁸ It is, therefore, not required to prove that the unlawful act would not have occurred without the conduct of the accomplice.²⁰⁹

In 2009, in *Mrkšić*, the appeal chamber of the ICTY convicted two officers of the JNA for war crimes in connection with the transfer of Croat men, held under the custody of the JNA, from the Vukovar hospital to a hangar in Ovčara where they were left to irregular Serb forces who later killed them.²¹⁰

The accused officers of the JNA were Colonel Mile Mrkšić and Major Veselin Šljivančanin. The city of Vukovar in Croatia, whose independence had not yet been recognized at the time, had been the object of attack by the JNA from August until November 1991. In the last days of the siege, several hundred people sought refuge at the Vukovar hospital hoping that the hospital would be evacuated in the presence of international observers. On 20 and 21 November 1991, 194 Croats were taken from the Vukovar hospital to Ovčara, where Serb forces mistreated them and executed them after the departure of JNA members. Šljivančanin exercised command authority (conferred on him by Mrkšić) over the military police involved in the evacuation of the prisoners from the hospital to Ovčara.

The trial chamber convicted Mrkšić of war crimes for having aided and abetted the murder of these people, as well as acts of torture, inhu-

²⁰⁵ See e.g. *ibid* at para 687.

²⁰⁶ See e.g. *Vasiljević*, *supra* note 201 at para 70; *Blaškić*, *supra* note 202 at para 285.

²⁰⁷ See e.g. *Furundžija*, *supra* note 53, at paras 234-35.

²⁰⁸ *Tadić*, Opinion and Judgement, *supra* note 204 at para 688.

²⁰⁹ *Prosecutor v Ignace Bagilishema*, ICTR-95-1A-T, Judgement (7 June 2001) at para 33 (International Criminal Tribunal for Rwanda, Trial Chamber I) [footnote omitted]: “The Chamber, however, agrees with the view expressed in *Furundžija*, that the assistance given by the accomplice need not constitute an indispensable element, i.e. a *conditio sine qua non*, of the acts of the perpetrator.”

²¹⁰ *Mrkšić*, Appeals Chamber, *supra* note 59 at para 69. See also Giulia Pinzauti, “Protecting Prisoners of War: The *Mrkšić et al* Appeal Judgment” (2010) 8 *Journal of International Criminal Justice* 199.

man, cruel, or degrading treatment imposed on them by members of the irregular force. As for Šljivančanin, the trial chamber found that he failed to discharge his legal duty to protect the POWs held in Ovčara from acts of mistreatment and convicted him of the war crime of having aided and abetted the torture of POWs. He was acquitted of the charge of murder as a war crime because the trial chamber found that, once all JNA members withdrew from Ovčara pursuant to Mrkšić's order, Šljivančanin ceased to be responsible for the security of the prisoners left to the irregular forces' custody. This finding was challenged by the prosecutor on appeal. The appeals chamber accepted the appeal and convicted Šljivančanin because his failure to act substantially contributed to the murders by irregular forces after he had transferred the detainees to those forces and left Ovčara. Šljivančanin had, as explained above, a duty under article 12 of Convention III to protect the POWs even after Mrkšić's order to withdraw, and this duty "included the obligation not to allow the transfer of custody of the prisoners of a war to anyone without first assuring himself that they would not be harmed."²¹¹

The facts in *Mrkšić*, in which Yugoslav government forces transferred detainees to irregular Serb forces operating in Croatia, are not directly analogous to the ones under study here. Nevertheless, the ICTY based its conviction on article 12 of Convention III, which applies to transfers between states. Canadian forces have a duty to protect detainees under their custody similar to the one of Šljivančanin. The mere existence of official arrangements between Canadian and Afghan authorities would not be sufficient, as such, to fulfill this duty in regard to criminal responsibility. What counts is whether they knew that transferred detainees were nevertheless tortured. If so, their failure to act in order to fulfill their duty to protect their detainees could be regarded as aiding and abetting in international crimes, by omission.²¹² Contrary to the withdrawal by Šljivančanin, the Canadian forces transferring detainees to the Afghan authorities who did not yet have control over them could also be seen as aiding and abetting by their acts. Even then, it may be important to know (e.g., in the context of service offences) whether they had a duty to protect the prisoners. In this context, the ICTY appeals chamber recalled that

"omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act". The *actus reus* of aiding and abetting by omission will thus be fulfilled when it is established that the failure to discharge a legal duty as-

²¹¹ *Mrkšić*, Appeals Chamber, *supra* note 59 at para 74.

²¹² The commission of a war crime by omission is also recognized by the Canadian *War Crimes Act* (*supra* note 190, s 6(3)).

sisted, encouraged or lent moral support to the perpetration of the crime and had a substantial effect on the realisation of that crime.²¹³

The appeals chamber considered that, to find someone guilty for aiding and abetting the commission of a war crime by omission, it must be established that the accused had (1) a legal duty to act, and (2) the ability to act (i.e., that means were available to the accused to fulfill their duty).

As for the requisite *mens rea* for aiding and abetting by omission, the appeals chamber held that “(1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator; and (2) he must be aware of the essential elements of the crime which was ultimately committed by the principal.”²¹⁴

The *mens rea* required is knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence, a knowledge which need not have been explicitly expressed and may be inferred from all the relevant circumstances. The aider and abettor need not share the *mens rea* of the principal; he must, however, be aware of the essential elements of the crime ultimately committed by the principal, including his state of mind.²¹⁵

The accused does not need to share the *mens rea* of the principal, in the sense of an intention to commit the crime.²¹⁶ Neither does the accused need to know the exact crime that was intended by the principal: “If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”²¹⁷

In *Mrkšić*, the trial chamber deduced from various elements of Mrkšić’s knowledge that he was aware that, in leaving the prisoners to the paramilitary forces, they would probably be victims of violence and murder.²¹⁸ According to the appeals chamber: “The fact that an ‘omission

²¹³ *Mrkšić*, Appeals Chamber, *supra* note 59 at para 49 (partially referring to *Prosecutor v Naser Orić*, IT-03-68-A, Judgement (3 July 2008) at para 43 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org>> [Orić]). See also *Prosecutor v Tihomir Blaškić*, IT-95-14-A, Judgement (29 July 2004) at para 663 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org>>).

²¹⁴ *Mrkšić*, Appeals Chamber, *supra* note 59 at paras 159, 49.

²¹⁵ *Mrkšić*, Trial Chamber, *supra* note 78 at para 556.

²¹⁶ *Furundžija*, *supra* note 53 at paras 245, 249.

²¹⁷ *Ibid* at para 246.

²¹⁸ *Mrkšić*, Trial Chamber, *supra* note 78 at para 621:

The probability, indeed the considerable likelihood, that prisoners of war would be gravely injured and murdered was, in the established circumstances, one which the Chamber finds to have been obvious to Mile Mrkšić and to anyone with his knowledge of the attitude of the TO and paramilitary forces to the Croat forces. He

must be directed to assist, encourage or lend moral support to the perpetration of a crime' forms part of the *actus reus* not the *mens rea* of aiding and abetting."²¹⁹ Furthermore, that the act be specifically directed to assist, encourage, or lend moral support to the perpetration of the crime is not an essential ingredient of the *actus reus* of aiding and abetting.²²⁰ The appeals chamber rejected higher standards of *mens rea*, namely that the accused intended to provide assistance to the commission of the crime or accepted that the crime would be a possible and foreseeable consequence of his omission.²²¹

In regard to the transfer of the detainees by members of Canadian forces to Afghan authorities, those members have, under the ICTY jurisprudence discussed, a legal duty to protect detainees under their custody from the possibility of being tortured by other troops to whom they would be transferred. They have the possibility to fulfill this duty by not transferring the prisoners to the Afghan authorities. If they know that the omission of fulfilling this duty assists the commission of the crime of torture by Afghan authorities, they are, under ICL, responsible for aiding and abetting in the crimes committed by members of Afghan authorities.

Even if such a legal duty is rejected or deemed not to cover the transfers, the transfers of prisoners by members of the Canadian forces to Afghan authorities could nevertheless be regarded as a form of aiding and abetting by action. In that case, the requisite *mens rea* would be the same under ICL.²²² The existence of the 2005 and the 2007 Arrangements does not foreclose the knowledge of Canadian forces members that the transfer would lead to the commission of the crime of torture by Afghan authorities.

Conclusion

Under IHRL there exists an obligation, which is applicable even extra-territorially, not to reject, return, or expel a person in any manner what-

was aware that some prisoners had indeed been executed by TO and paramilitary forces the previous day and of the difficulties experienced by JNA soldiers on 20 November 1991 by virtue of the efforts of TO and paramilitary forces to gain access to the prisoners of war. In the Chamber's finding, when he ordered the withdrawal of the JNA guards, he well knew that this left the TO and paramilitary with unrestrained access to the prisoners and that by enabling this he was assisting in the commission of the offences of violence and murder that he was aware would indeed probably follow.

²¹⁹ *Mrkšić*, Appeals Chamber, *supra* note 59 at para 159

²²⁰ *Ibid.*

²²¹ *Ibid.* For a discussion on omission as a form of aiding and abetting, see Khan & Dixon, *supra* note 203 at 863-64.

²²² See *Orić*, *supra* note 213 at para 43.

soever, where this person would be compelled to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. Before the conclusion of the 2005 Arrangement, Canada certainly violated IHRL—as well as IHL interpreted in light of IHRL and ICL—where Canadian officials transferred Afghan prisoners knowing that they would probably be tortured. In that case, those officials also committed, according to the (very far-reaching) ICTY jurisprudence, an international crime. The conclusion of the 2005 Arrangement—and even more so with the conclusion of the 2007 Arrangement, which offered serious mechanisms of implementation—certainly mitigated Canada’s responsibility for allegedly ongoing instances of ill-treatment of transferred detainees. However, the jurisprudence of international human rights bodies states that legal undertakings by transferee authorities guaranteeing respect for fundamental rights “in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices [of ill-treatment] resorted to or tolerated by the authorities”²²³ would still be relevant.

After the conclusion of the 2005 Arrangement, article 12 of Geneva Convention III, became equally relevant. It states: “Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” This article, applicable to international armed conflicts, governs the transfers in Afghanistan (by analogy to what the ICTY decided in *Mrkšić*) because Canada undertook to comply with Convention III and because the transfer to the Afghan authorities, rather than the Taliban to whom the detainees belonged, could be qualified as transfer rather than repatriation. Whether the transfers actually violated this provision despite the undertaking by Afghan authorities to treat prisoners in accordance with Convention III and the monitoring measures foreseen in the 2007 Arrangement, again depends on what Canadian officials knew—for instance, what they knew about the practice of torture in the specific prisons where detainees were to be sent or about the human rights violations record of the Afghan officials or government services to which the detainees were transferred. It also depends on whether Canada used the monitoring possibilities offered by the Arrangement and on what measures Canada took when aware of ill-treatment of detainees it transferred.

²²³ Saadi, *supra* note 152 at para 147.

From the point of view of international law, this article should have shown how intimately interrelated IHL, IHRL, and ICL are in contemporary armed conflicts and how the jurisprudence of human rights bodies and of international criminal tribunals informs the understanding of IHL rules.

As for the real issue, this article shows that transfers of detainees by Canadian forces to Afghan authorities despite a risk of torture raises numerous legal issues both in regards to national and international law. These legal issues should be taken seriously by the Canadian government. As we do not know what Canadian officials knew at different points of time and what the results were of the monitoring foreseen by the agreements concluded with Afghanistan, we cannot definitively conclude whether international law was respected or violated. In our view, this deserves a serious inquiry—if only to uphold the credibility of IHL worldwide, among Canadian forces, and in the Canadian public. Such credibility in the eyes of all those who actually fight armed conflicts avoids the wrong impression that IHL is only selectively applied. This is an essential condition for the respect of IHL, and so is crucial for the survival and dignity of war victims worldwide—and even more so for the credibility and victory of those who claim to fight wars for the benefit of the Afghan people. In our view the only independent inquiry we are aware of—undertaken by the Military Police Complaints Commission—is a first step, but it is insufficient because it is limited to the question of whether or not the Military Police should have undertaken an investigation about the alleged facts. This could lead to an investigation into the criminal responsibility of members of the Canadian forces, who benefit from the presumption of innocence, which implies that *mens rea* must be proven beyond reasonable doubt; but not into the question of a possible violation by Canada of its international obligations.
