

# **Application of Human Rights in Situations of Military Occupation**

Particular Emphasis on the Right to Liberty and Security of Person  
and the Right Not to Be Subjected to Torture,  
Inhuman or Degrading Treatment

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# Table of Contents

<b><u>1</u></b>	<b><u>INTRODUCTION.....</u></b>	<b><u>1</u></b>
1.1	Subject and Structure of the Thesis .....	1
1.2	Definitions and Delimitations .....	5
1.2.1	Human Rights .....	5
1.2.2	Military Occupation .....	9
1.2.3	Delimitations .....	12
1.3	The Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, of 9 July 2004. ....	12
<b><u>2</u></b>	<b><u>SOURCES OF LAW.....</u></b>	<b><u>15</u></b>
2.1	Introduction .....	15
2.2	Treaties .....	16
2.2.1	The International Covenant on Civil and Political Rights .....	17
2.2.2	The European Convention on Human Rights .....	18
2.2.3	The CAT .....	19
<b><u>3</u></b>	<b><u>APPLICATION OF HUMAN RIGHTS INSTRUMENTS.....</u></b>	<b><u>20</u></b>
3.1	When are Human Rights Instruments Applicable? .....	20
3.2	Are Human Rights Instruments Applicable Outside State Territory?.....	20
<b><u>4</u></b>	<b><u>CONTENTS OF THE RIGHTS PROTECTED .....</u></b>	<b><u>23</u></b>
4.1	Introduction .....	23
4.2	The Right to Liberty and Security of Person .....	23

4.2.1	Introduction .....	23
4.2.2	“Right to Liberty” .....	25
4.2.3	Grounds of Detention .....	26
4.2.4	The Right to Information .....	31
4.2.5	The Right to Rapid Procedure .....	32
4.2.6	Judicial control .....	35
4.2.7	The Right to Compensation .....	37
<b>4.3</b>	<b>The Right Not to Be Subjected to Torture, Inhuman or Degrading Treatment.....</b>	<b>38</b>
4.3.1	Introduction .....	38
4.3.2	ECHR .....	39
4.3.3	ICCPR.....	41
<b>5</b>	<b><u>DEROGATION.....</u></b>	<b>43</b>
<b>5.1</b>	<b>Introduction .....</b>	<b>43</b>
<b>5.2</b>	<b>Derogation Clauses .....</b>	<b>44</b>
5.2.1	Requirements to the situation .....	44
5.2.2	Requirements to the measures .....	44
5.2.3	Obligation of Notification.....	46
<b>6</b>	<b><u>PRACTICES OF DETENTION AND ILL-TREATMENT .....</u></b>	<b>47</b>
<b>6.1</b>	<b>Introduction .....</b>	<b>47</b>
<b>6.2</b>	<b>Detention .....</b>	<b>48</b>
6.2.1	The Occupied Palestinian Territory .....	48
6.2.2	Chechnya .....	49
6.2.3	Northern Ireland .....	52
6.2.4	Observations .....	53
<b>6.3</b>	<b>Ill-treatment .....</b>	<b>54</b>
6.3.1	The Occupied Palestinian Territory .....	54
6.3.2	Chechnya .....	56
6.3.3	Northern Ireland .....	57
6.3.4	Observations .....	58

<b>7</b>	<b><u>CONCLUSION .....</u></b>	<b><u>59</u></b>
7.1	Introduction .....	59
7.2	Permitted restrictions.....	59
7.3	Human Rights and the <i>War on Terrorism</i> .....	60
<b>8</b>	<b><u>BIBLIOGRAPHY .....</u></b>	<b><u>62</u></b>

## Abbreviations

AI	Amnesty International
Art.	Article
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CHR	Commission on Human Rights
ECHR	European Convention on Human Rights (also <i>the Convention</i> )
e.g.	for example
HRC	the Human Rights Committee (also <i>the Committee</i> )
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights (also <i>the Covenant</i> )
ICJ	International Court of Justice
i.e.	that is
ILC	the International Law Commission
IRA	Irish Republican Army
NGO	Non-Governmental Organization
p.	page
para	paragraph
PCATI	the Public Committee Against Torture in Israel
UK	United Kingdom
UN	United Nations
US	United States of America

# 1 Introduction

## 1.1 Subject and Structure of the Thesis

The subject of the thesis is the application of human rights in situations of military occupation, with particular emphasis on the right to liberty and security of person, and the right not to be subjected to torture, inhuman or degrading treatment<sup>1</sup> The subject is chosen because allegations of violations of those rights are frequent in such situations, regardless of time and place of the conflict. An objective is to see to what extent the mentioned rights may be restricted in such emergency situations.

Situations of military occupation, and comparable situations, pose particular problems with respect to human rights. Violations of human rights are regrettably *a necessary consequence of military occupation*, as observed by John Dugard, the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories<sup>2</sup>

Sadly, these are not rare situations, even today. Over the last 50 years, examples may be found throughout the world, for instance in Northern Ireland, Chechnya, Tibet, Kurdistan, Cyprus, and Western Sahara.<sup>3</sup> The present situations in Afghanistan and Iraq may also be mentioned in this connection, even though the territories are considered to administer themselves. The most evident example of military occupation, however, is the Israeli-Palestinian conflict.

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<sup>1</sup> Hereafter, *ill-treatment* is used as a common term for torture, inhuman and degrading treatment.

<sup>2</sup> *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, 29.8.2002, paragraph 2. Such reports are hereafter referred to as reports of John Dugard.

<sup>3</sup> Some of these situations have now been stabilized, so that violence and violations of human rights no longer occurs on a regular basis, e.g. in the case of Northern Ireland.

The term *military occupation* is in a strict sense used for situations where a state has occupied, partially or entirely, the territory of another state or a non-self-governing territory, and places the territory under authority of its military forces. This usually concerns rather recent events.

However, the term may also be understood in a wider sense, to include situations that no longer are considered a conflict between two independent parties. This may be the case when the occupation or annexation of the territory took place a long time ago, and the situation has lasted for so long that the territory in question now is considered to be a part of the occupying or annexing state(s). In these situations, the official status of the situation is particularly disputed. This is the case in several of the examples mentioned above, like Chechnya and Tibet. The population of the territory, or at least a part of its population, considers the territory to be occupied, and desires to be liberated from the State to obtain its independence. The State, on the other hand, tends to consider those who want secession to be terrorists, as the struggle for independence often includes more or less armed resistance, and in any case conflicts with the interests of the State, who wishes to keep the territory under its control.

It is the latter sense of *military occupation* that is used in this thesis, because whether the particular situation is internationally considered an occupation or not, the factual situation remains more or less the same; a State in control of a territory where the population (at least parts of it) considers itself to be occupied by this State and fights for secession. This approach permits to look into and compare several conflicts of the same nature, regardless of the official label attached to them. In all cases, no matter the status of the situation, it concerns a territory's struggle for liberation and independence.<sup>4</sup>

Thus, the situation involves an occupant State, and one or several groups of resistance from the population of the occupied territory. The two sides are in armed conflict, and they tend

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<sup>4</sup> Hereafter, *territory* includes both territories where most of the population wants independence (like Palestine) and territories where only parts of the population want independence (like Northern Ireland).

to blame the other party of illegitimate actions, while justifying their own and revenge the actions of the other. Instead of reaching a solution to the conflict, they are caught in a vicious circle of violence.

The civilian population is the primary victim of the situation. It is often directly affected by the military actions of both sides. In addition, the protection of their human rights is sacrificed to security needs. It has been suggested that human rights instruments do not apply in occupied territories, both because the conflict takes place outside State territory, and because the situation concerns an armed conflict in which the application of humanitarian law excludes that of human rights law. These arguments have repeatedly been rejected by the ICJ. In chapter three, a presentation of when and where human rights are applicable is given.

Most of the rights protected in international human rights instruments are to some extent violated in situations of military occupation. Even the most basic rights, like the right to life, and the right not to be subjected to torture, are violated on a relatively large scale. Other frequent problems are the practices of discrimination, destruction of property, collective punishment, internment, expulsion, and violations of the rights to freedom of expression, movement and assembly.

This thesis discusses the rights not to be arbitrarily detained and not be subjected to ill-treatment, and the practices concerning these rights. These rights are two of the most fundamental human rights, concerning individuals' physical integrity, which make the subject especially important. They are also closely linked together, as the person concerned is subjected to torture or other ill-treatment subsequent to being detained. The rights protected are presented in chapter four, and the practices concerning them are looked into in chapter six.

Because it concerns an armed conflict, it is internationally recognized that the belligerent occupant does have legitimate security needs. The security needs must, however, be



balanced against the legitimate humanitarian needs of the people in the occupied territory. Some human rights treaties have derogation clauses, which permit to suspend some of the rights in time of *public emergency*<sup>5</sup> Also, the wrongfulness of an action or practice may be precluded on the basis of a ground called *state of necessity*, which is a ground recognized by customary international law. These grounds may justify infringements of the rights protected for the sake of public security The principles of distinction and proportionality play a key role in the consideration of what security measures may be permitted. These grounds for derogation are presented in chapter five.

Today, the question of to what extent a State's need for security may impair the protection of the individual's human rights, is of great present interest. It has especially been brought into discussion after the focus on the fight against terrorism, and there are varying opinions as to which considerations that have the greatest weight. These questions are briefly looked into in chapter seven.

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<sup>5</sup> International Covenant on Civil and Political Rights art. 4, European Convention on Human Rights art. 15, American Convention on Human Rights art.27. (The African Charter on Human Rights does not contain a general derogation clause)

## 1.2 Definitions and Delimitations

### 1.2.1 Human Rights

Human rights may be defined as *the law that deals with the protection of individuals and groups against violations of their internationally guaranteed rights, and with the promotion of these rights.*<sup>6</sup> These rights have been called the birthright of all human beings, and the protection and promotion of them as the first responsibility of Governments.<sup>7</sup>

Human rights law imposes fundamental exigencies to and limitations to the power of the State in relationship to the individual. The rights are guaranteed by international, binding treaties.

A challenge of human rights law is to ensure compliance with the treaties. There is no authoritative organ to enforce implementation. In case of non-compliance by a State, the State will only be exposed to political sanctions and disapproval

#### 1.2.1.1 Historical Background

Human rights law forms a branch of public international law. Under traditional public international law the States were the only subjects, with legal rights and obligations towards each other. The individual had no place in this system. It was an object rather than a subject of international law, with no rights or obligations.<sup>8</sup> This changed with the introduction of international humanitarian law and human rights law.

The modern development of humanitarian law began earlier than that of human rights, with the establishment of the International Committee of the Red Cross in the 19<sup>th</sup> century.<sup>9</sup> However, the development of both branches of law seriously progressed after the

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<sup>6</sup> Buergenthal, Shelton, Stewart, p. 1

<sup>7</sup> Vienna Declaration and Programme of Action 1993

<sup>8</sup> Møse, p. 31

<sup>9</sup> Buergenthal, Shelton, Stewart, p. 20.

experiences of the two World Wars. The Universal Declaration of Human Rights<sup>10</sup> of 10 December 1948 was a major breakthrough in human rights law. It was followed by the two Covenants of 1966 that entered into force in 1976. These are the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights, with additional protocols. Together, the Declaration and the two Covenants form the so-called *International Bill of Human Rights*. Regional human rights instruments have been elaborated in Europe, America and Africa, which more or less correspond with the global system of the UN. These are general conventions, dealing with a large number of rights.

In addition to these general instruments, specialized conventions have been elaborated concerning particular subjects. Examples are the Convention on the Elimination of All Forms of Racial Discrimination (7.3.1966), the Convention on the Elimination of All Forms of Discrimination Against Women (18.12.1979), the Convention on the Rights of the Child (20.11.1989), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10.12.1984).

These instruments are designed to protect the individual against state abuse, both from the state of the individual's nationality and any other state. They give the individual internationally guaranteed rights that to a certain extent may be invoked, and by this, the individual has become a subject of international law.

Human rights law obliges the State to ensure and protect certain fundamental rights of the individual. Thus, protecting the individual's human rights is a state responsibility. The responsibility has been extended to a personal responsibility for the gravest violations (crimes) of human rights with humanitarian law, thus transforming the individual into a subject with responsibilities under international law as well. This may be illustrated by the practice of the two *ad hoc*<sup>11</sup> International Criminal Tribunals for the former Yugoslavia<sup>12</sup>

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<sup>10</sup> Hereafter called *the Declaration*.

<sup>11</sup> An *ad hoc* tribunal is established for the purpose of dealing with a particular subject only.

and Rwanda,<sup>13</sup> and the recently established International Criminal Court,<sup>14</sup> whose purpose is to prosecute individuals of war crimes, genocide and crimes against humanity.

#### 1.2.1.2 The Relationship Between Human Rights Law and Humanitarian Law

International Humanitarian Law may be defined as the *human rights component of the law of war*.<sup>15</sup> It applies in international armed conflicts. In certain limited circumstances, it also applies in internal armed conflicts. It is designed to protect persons who do not or no longer can take part in armed hostilities. The principal sources are the four Geneva Conventions of 1949 with two additional protocols of 1977. Other sources are earlier treaties, like the Hague Regulations,<sup>16</sup> and various rules of customary international law. Humanitarian law has to a great extent been codified in treaties. These rules reflect *the most universally recognized humanitarian principles, and indicate the normal conduct and behaviour expected of States*<sup>17</sup>

The Geneva Conventions of 1949 are among the treaties that codify principles of humanitarian law, and they are today considered to have the status of customary international laws. They are therefore binding to all states, also to those that have not ratified the treaties. The *Geneva Law* (The Conventions of 1864, 1906, 1929 and 1949) protects the victims of war, aiming to *provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities*<sup>18</sup>

The two cardinal principles contained in the texts constituting the fabric of humanitarian law are the principles of distinction and proportionality. The principle of distinction is aimed at the protection of the civilian population and civilian objects, and establishes the distinction between combatants and non-combatants; States must never make civilians the

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<sup>12</sup> ICTY was established by Resolution 827 on 25.5.1993, by the UN Security Council.

<sup>13</sup> ICTR was established by Security Council Resolution 955, on 8.11.1994.

<sup>14</sup> The Statute of the ICC was adopted in Rome on 17.07.1998, and entered into force in April 2002.

<sup>15</sup> Buergenthal, Shelton and Stewart, p. 315

<sup>16</sup> See 1.2.2.2.

<sup>17</sup> Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, para 82

<sup>18</sup> Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, para 75.

object of attack. The principle of proportionality prohibits causing unnecessary suffering to combatants. It is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means, for instance in what weapons it uses.<sup>19</sup>

An interesting question in this context is whether or not the application of international humanitarian law would exclude the application of human rights instruments. Some states have suggested that human rights conventions are directed to the protection of human rights in peacetime, and that questions relating to human rights in hostilities are governed exclusively by the law applicable in armed conflict, i.e. humanitarian law. This was suggested in statements given to the ICJ concerning both the Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, and the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, of 9 July 2004.<sup>20</sup> In both cases, the argument was rejected by the Court. The Court stated that *the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions of derogation of the kind found in Article 4 of the Convention on Civil and Political Rights*.<sup>21</sup>

The ICJ then observed that there are three possible situations with regard to the relationship between human rights and humanitarian law: Some rights may be exclusively matters of humanitarian law, others exclusively matters of human rights law, and yet others may be matters of both branches.<sup>22</sup> The latter is the case in armed occupation. Human rights law continues to apply, and since it concerns an armed conflict, humanitarian law is also applicable, as *lex specialis*.<sup>23</sup> The two branches of law thus intertwine in these situations.

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<sup>19</sup> Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, para 78

<sup>20</sup> Hereafter called the Advisory Opinion on the *Wall*. It is presented in 1.3.

<sup>21</sup> Advisory Opinion on the *Wall*, para 106.

<sup>22</sup> Advisory Opinion on the *Wall*, para 106.

<sup>23</sup> *Lex specialis* is a rule of interpretation that presumes that specialized rules precede general rules in case of conflict, because the former are more adapted to the specific situation.

In hostilities, the test of what is e.g. an arbitrary detention, then falls to be determined by the law applicable in armed conflict which is designed to regulate the conduct of hostilities. In hostilities, the limits for what is permitted are usually wider than in peacetime, because of the particular circumstances of the situation. Thus whether a particular detention is to be considered an arbitrary detention contrary to Article 9 of the Covenant, *can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself*<sup>24</sup> Consequently, humanitarian law is used for interpreting the contents of human rights provisions.

## 1.2.2 Military Occupation

### 1.2.2.1 Characteristics

The general characteristics of military occupation are in short given above (see 1.1). Such a situation contains elements of armed conflict - the need to maintain law and order, to protect the security of the occupant's armed forces, and actions against groups of resistance - and elements of peace - the cessation of hostilities in the occupied area and the setting up of a military government in place of that of the local sovereign.<sup>25</sup>

The status of the conflict is often disputed, as the Occupant State wants to classify it as an internal conflict to maintain the greatest extent of control over the situation, while the entire, or parts of the population claims they are illegally occupied by a foreign state. This is, for instance, the case when the occupation took place a long time ago, and the territory now is considered a part of the state. An example of this is Chechnya, which after several decades of hostilities, was finally conquered by Russia in the 19<sup>th</sup> century. In 1991 Chechnya declared its independence, but has not achieved the status of a sovereign state because it lacks the necessary international recognition. In this thesis, the term *military occupation* is used in its wider sense, to include situations where a particular territory within a state is fighting for secession from this state.

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<sup>24</sup> Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, para 25.

<sup>25</sup> Cohen, p. 284.

### 1.2.2.2 The Hague Regulations Article 42

The Regulations Respecting the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 18 October 1907, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. They were prepared to revise the general laws and customs of war existing at that time. However, the International Tribunal of Nuremberg later found that *the rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war.*<sup>26</sup> The ICJ has reached the same conclusion in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>27</sup> In the Advisory Opinion on the *Wall*, the Court repeated this view, by stating that *the provisions of the Hague Regulations have become part of customary law*.<sup>28</sup> This was also recognized by all the participants in the proceedings before the Court in this case. Hence, the provisions of the Hague Regulations are binding even to states that have not ratified the Convention.

Article 42 of the Hague Regulations defines when a territory is considered to be occupied:

*Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.*

This implies that the authority of the hostile army must be effective, which is a question of fact.<sup>29</sup> The territory must *actually* be placed under authority of the belligerent army; organised resistance must have been overcome, leaving the hostile army in control of the area, and the invading force must have taken measures to establish its authority.<sup>30</sup> Military occupation exists from a legal point of view when the territory *is in the power and under*

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<sup>26</sup> Advisory Opinion on the *Wall*, para 89.

<sup>27</sup> Para 75.

<sup>28</sup> Advisory Opinion on the *Wall*, para 89

<sup>29</sup> Schwarzenberger, *Armed Conflict* p 324. This is also supported by the French text's wording *de fait*

<sup>30</sup> Schwarzenberger, *Armed Conflict* p174.

*the control of the occupant* and as long as the occupant *has the ability to make his will felt everywhere in the territory within a reasonable time*<sup>31</sup> Application of the legal regime of occupation does not depend on whether the occupying Power fails to exercise effective control over the territory, but on whether it has the *ability* to exercise such power.<sup>32</sup>

### 1.2.2.3 Distinction: Invasion – Occupation – Conquest

Occupation – Invasion: Occupation is distinguished from invasion by the fact that the occupant actually establishes some form of administration in the territory, while an invader does not.<sup>33</sup> Oppenheim defines belligerent occupation as *invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily*.<sup>34</sup>

Occupation – Conquest: Sections 353 and 358 of the US Army Field Manual (1965) distinguish between conquest and belligerent occupation thus: occupation *implies that the sovereignty of the occupied territory is not vested in the occupying power*. Occupation is essentially provisional, while conquest *implies a transfer of sovereignty, which generally takes the form of annexation and is normally effected by a treaty of peace*<sup>35</sup>

Occupation is thus a situation that falls between the cases of invasion and conquest. It is more stabilized than an invasion, with the occupying State's intent of holding the territory and the introduction of an effective administration, but it is not permanent like a conquest and no sovereignty is transferred.

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<sup>31</sup> See Cohen, p. 16 with further notes.

<sup>32</sup> This principle was affirmed by the US Military Tribunal at Nuremberg *In re List and Others* (the Hostages Case) in 1948, and has been reaffirmed since. See e.g. Report of John Dugard, 4.10.2001.

<sup>33</sup> Oppenheim, p. 434.

<sup>34</sup> Oppenheim, p. 434.

<sup>35</sup> Cohen, p. 17.



### 1.2.3 Delimitations

The subject of this thesis is thus the application of *human rights* in situations of military occupation as defined above, so that humanitarian law will not be discussed in particular. It focuses on the protection against arbitrary detention and ill-treatment provided for in the ICCPR and the ECHR.

### 1.3 The Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, of 9 July 2004.

The request for the Advisory Opinion was made by the General Assembly of the United Nations. The immediate events leading to the request originated in the United Nations Security Council, when a draft resolution, condemning as illegal the construction of the wall, was rejected as a result of negative votes from a permanent member on 14 October 2003. Subsequently, the matter was brought before the Tenth Emergency Special Session of the General Assembly. On 27 October 2003, the General Assembly adopted resolution ES-10/13, demanding Israel to stop and reverse the construction of the wall. During a meeting on 8 December, resolution ES-10/14 requesting the Advisory Opinion was adopted.

First, the ICJ considers if it has jurisdiction to give an opinion in this case, and confirms that it has. Thereafter, the Court considers if there are any compelling reasons for it to use its discretionary power not to give an advisory opinion. According to its Statute Article 65, the Court *may* give an advisory opinion. This has been interpreted to imply that the ICJ has a discretionary power to decline to give an advisory opinion even though the conditions of jurisdiction are met.<sup>36</sup> The Court observes that it *should in principle not decline to give an advisory opinion*,<sup>37</sup> given its responsibilities as the principle judicial organ of the UN<sup>38</sup> and

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<sup>36</sup> Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, para. 14.

<sup>37</sup> Advisory Opinion on the *Wall*, para. 44.

See also Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (ICJ Reports 1950, p. 71), and the Advisory Opinion on *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, para 29.

<sup>38</sup> See the UN Charter Article 92.

that giving an advisory opinion on request *represents its participation in the activities*<sup>39</sup> of the UN. *In accordance with its consistent jurisprudence, only “compelling reasons” should lead the Court to refuse its opinion.*<sup>40</sup> Considerations of judicial propriety may lead to compelling reasons not to give an opinion. This may be the case if the State concerned does not consent to the jurisdiction of the Court,<sup>41</sup> or if the Court does not have sufficient information before it. Neither of the examples was found applicable in the present case, and the question will not be discussed further because of the extent of the thesis

Many of the States submitting written statements to the Court concerning this case were of the opinion that the Court should decline to give the opinion. The reason that most of them mentioned, was that the Israeli-Palestinian conflict is a very difficult situation, and they were concerned that an advisory opinion relative to it would disturb, halt or completely ruin the delicate peace process.<sup>42</sup> The Court, however, finds no compelling reasons not to give an advisory opinion in this case, and mentions that it has never declined to respond to a request for an advisory opinion based on judicial propriety. When the Court in 1996 declined to give one on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, it was because of the Court’s lack of jurisdiction.<sup>43</sup>

After giving a definition and delimitation of the question posed to it in the request, a description of the historical background and of the wall, the Court moves on to determine the applicable law. Here, it finds that the application of international humanitarian law and human rights law is not mutually exclusive, as suggested by certain states.<sup>44</sup> The Court then looks into the effect the wall has for human rights of the population in the occupied territory, and finds that Israel is in breach of several of its obligations under the applicable provisions of international humanitarian law and human rights instruments.

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<sup>39</sup> ICJ Reports 1950, p. 71

<sup>40</sup> Advisory Opinion on the *Wall*, para 44. See also Advisory Opinion on *Certain Expenses of the United Nations*, I.C.J. Reports 1962, p. 155 and the Advisory Opinion on *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, para 29.

<sup>41</sup> See the Advisory Opinion on *Western Sahara* for a discussion of this ground.

<sup>42</sup> For example, this was the opinion of Norway. (See written statement of Norway).

<sup>43</sup> Advisory Opinion on the *Wall*, para 44

<sup>44</sup> See section 1.2.1.2 for this discussion.

The Court moves on to discuss if these breaches may be justified on grounds of self-defence on basis of Article 51 of the UN Charter, but finds that the Article is not relevant in the present case because Israel does not claim that Palestine qualifies as a State. Nor may Israel invoke a state of necessity to justify the construction of the wall, as the Court finds that this is not the only means to safeguard her interests against the peril invoked. Thus the Court concludes that the construction of the wall and its associated regime are contrary to international law. Finally, the Court examines the legal consequences resulting from the violations of international law, for Israel, other States, and the UN respectively.

This thesis will, as mentioned, discuss the application of rules and practices concerning detention and ill-treatment in custody. The Advisory Opinion does not discuss these particular aspects of human rights, as the construction of the wall does not affect them. The relevance to this thesis lies primarily with the discussion of general applicability of human rights instruments in situations of military occupation, with respect to territorial application and the relationship to humanitarian law.

Advisory opinions are not, as such, legally binding. But they are judicial pronouncements of a judicial institution empowered to interpret and apply the human rights instrument. The authoritative character of the legal principle enunciated will thus not be diminished because it is pronounced in an advisory opinion and not in a contentious case.<sup>45</sup>

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<sup>45</sup> Buergenthal, Shelton, Stewart, pp. 270-271.

## 2 Sources of Law

### 2.1 Introduction

As mentioned above, human rights law forms a branch of public international law. Two fundamental principles of public international law are the principles of sovereignty and consent. These imply that states are free to do whatever they want within their territories, they are not subdued to the authority of anyone else, and they are not bound by anything they have not consented to. The Permanent Court of International Justice stated in the *Lotus* case that *restrictions upon the independence of States cannot . . . be presumed, and that States have a wide measure of discretion which is only limited in certain cases by prohibitive rules.*<sup>46</sup> The State may choose to limit its sovereignty by consenting to it in a treaty. However, the sovereignty of the State may also be limited by customary international law. This constitutes an exception to the principle of sovereignty, implying that the State may also be bound by rules that it has not expressly consented to.

Article 38 of the Statute of the ICJ lists the basic sources of public international law. It is not intended as an authoritative and limited list of pertinent sources or as a list identifying the sources by rank, but rather as directions for the ICJ of what sources it may apply in its decision-making process.<sup>47</sup> Generally, *treaties* and *customary law*<sup>48</sup> are considered to be the highest sources, because these are the only grounds that may create binding commitment of a State, thus international rules. Customary law will not be discussed further (although the unwritten customary rules contain some principles in human rights law) because treaties enjoy the greatest practical significance.<sup>49</sup> Some customary rules are codified in

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<sup>46</sup> PCIJ, Series A, No. 10, pp. 18 and 19

<sup>47</sup> Ruud, Ulfstein, Fauchald, p.16

<sup>48</sup> Article 38(1)(a) and (b).

<sup>49</sup> Møse, p. 26.

conventions, and some of the most fundamental rights protected in the human rights conventions grow to achieve the status of customary rules.

The other sources mentioned are *general principles of law*,<sup>50</sup> and as subsidiary means *judicial decisions* and *teachings of the most highly qualified publicists of the various nations*.<sup>51</sup> These become more or less elements of interpretation of the two primary sources when those are not sufficiently clear. The classification of *judicial decisions* as subsidiary means only implies that the system of precedence differs from the strict rule of precedence in the Anglo-American common law.<sup>52</sup> In practice, they enjoy a great importance in defining the contents and meaning of the treaty texts.

In human rights law, the Universal Declaration of Human Rights has a particular importance, even though it is not a binding treaty<sup>53</sup> It has had a great influence as inspiration for binding conventions on human rights, for instance the two UN Covenants of 1966, and the European Convention on Human Rights Today it is commonly recognized that the Declaration reflects general principles of law and that it *creates or at least reflects some legal obligations for the Member States of the UN*<sup>54</sup> The practices of the Human Rights Committee,<sup>55</sup> other human rights bodies and the case-law of international courts (like the ICJ or the European Court of Human Rights) have a major importance in interpreting the contents of the rights protected.

## 2.2 Treaties

International conventions are mentioned as the first source of international law, in Art. 38(1)(a). They are considered to be the principal sources of law, because they clearly

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<sup>50</sup> Art. 38(1)(c). These are fundamental principles common to the states' internal law.

<sup>51</sup> Art. 38(1)(d).

<sup>52</sup> Ruud, Ulfstein, Fauchald, p 28.

<sup>53</sup> It was elaborated by the UN Commission on Human Rights, and adopted by the UN General Assembly as a resolution on 10 December 1948.

<sup>54</sup> Buergenthal, Shelton and Stewart, pp. 39 and 43.

<sup>55</sup> Expressed through its General Comments, its comments to State reports, Concluding Observations, its practice concerning individual petitions and its views resulting from these cases.

express in writing what the State has chosen to comply with. To have binding force, they have to be ratified by the state. A general feature of human rights treaties is that they are autonomous; meaning that the terms used in the conventions are interpreted independent of other treaties or national laws. The ICCPR and the ECHR are subject for discussion in this thesis. I have included an outline of the specialized UN Convention Against Torture (CAT) to illustrate the importance attached to the protection against torture

### 2.2.1 The International Covenant on Civil and Political Rights

The ICCPR was adopted on 16 December 1966 by the UN General Assembly, and entered into force in 1976. Now there are 154 Parties to the Covenant, out of 191 Member States of the UN. The ICCPR contains provisions of several civil and political rights, for instance the right to life, the right to liberty and security and the right not to be subjected to torture. It also has a derogation clause that permits a State Party to suspend all but seven of the most fundamental rights in *time of public emergency which threatens the life of the nation*.<sup>56</sup> Article 4 is discussed more thoroughly in chapter 5.

Compared to the Declaration, the ICCPR is more specific of the rights proclaimed, stronger in its statement of obligation to respect the rights specified, and better provided with measures of review and supervision. The Covenant established a Human Rights Committee (HRC) with various functions designed to ensure the implementation of the Covenant by the States.<sup>57</sup> The State Parties are obliged to submit reports to the Committee on the human rights situation in their territories and measures adopted to ameliorate any present problems<sup>58</sup> The Covenant provides an optional inter-state complaint system that allows for a State Party to charge another with violations of the treaty, on the condition that both states have recognized the Committee's jurisdiction to receive such complaints.<sup>59</sup> Several

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<sup>56</sup> Art. 4.

<sup>57</sup> Art. 28.

<sup>58</sup> Art. 40

<sup>59</sup> Articles 41-43.

states have done so, but the remedy has not yet been resorted to.<sup>60</sup> An Optional Protocol of 16.10.1966 provides a mechanism for individual communications.

### 2.2.2 The European Convention on Human Rights

The decision to draft the ECHR was made after the UN adopted the Declaration, when it became clear that would take a long time before agreement to transform the Declaration into binding treaty obligations could be reached. The human rights system established by the European Convention is today the oldest and most effective of those currently in existence.<sup>61</sup> The Convention was adopted by the Council of Europe<sup>62</sup> on 4.11.1950, entered into force on 3.9.1953, and has been ratified by 45 States Monaco has signed, but not yet ratified it.<sup>63</sup>

The Convention guarantees certain core civil and political rights, which to a large extent correspond to rights protected by the ICCPR, such as the right to life, to liberty and security, the prohibition of torture etc. It also contains a derogation clause similar to that of the ICCPR.<sup>64</sup> The enforcement of the states' obligations under the Convention is supervised by the permanent European Court of Human Rights.<sup>65</sup>

The Convention ensures obligatory inter-state and individual complaints mechanisms, which the states accept by ratifying the treaty. However, before any communication may be directed to the Court, the conditions in Art. 35 must be met. For instance, all *available* and *effective* domestic remedies must be exhausted,<sup>66</sup> and the application cannot be *manifestly*

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<sup>60</sup> Møse, pp. 137-138, Buergenthal, Shelton, Stewart, p. 57.

<sup>61</sup> Buergenthal, Shelton, Stewart, p. 139.

<sup>62</sup> The Council is a regional intergovernmental organization created in 1949, with the purpose of promoting the principles of democracy, the rule of law and human rights. The organization has its seat in Strasbourg, and has two principal organs: The Parliamentary Assembly (the deliberative organ), and the Committee of Ministers (the executive organ).

<sup>63</sup> [www.coe.int](http://www.coe.int)

<sup>64</sup> Article 15 is discussed in chapter 5.

<sup>65</sup> Art. 19. The permanent Court was established due to a reform of the system in 1998.

<sup>66</sup> Art. 35(1). Møse, p. 126.

*ill-founded*<sup>67</sup> The judgements of the Court are binding. The Committee of Ministers supervises the execution of the Court's judgement.

The ICCPR and the ECHR protect many of the same rights, and are similar in many ways. The greatest difference is that the European Convention provides a much more efficient system of enforcement than the Covenant, containing obligatory inter-state and individual complaints and stronger mechanisms of enforcement and sanctions. Complaints involving European states will therefore usually resort to the European instruments. The communications to the European Court are usually individual complaints. Inter-state communications are less common, because states are reluctant to accuse other states of human rights violations, as this could lead to diplomatic difficulties.<sup>68</sup>

### 2.2.3 The CAT

This convention was adopted on 10.12.1984 by the UN General Assembly, entered into force on 26.6.1987, and has been ratified by 140 states. The CAT defines torture as *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person* for certain purposes, e.g. obtaining information, and states that there are *no exceptional circumstances whatsoever*<sup>69</sup> that justify such treatment. It covers torture inflicted both by government officials, and by private individuals or groups whose conduct is encouraged or tolerated by such officials.<sup>70</sup> The State Parties undertake to *take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction*.<sup>71</sup> The CAT establishes a Committee on Torture administering the measures of implementation provided for in the treaty; an obligatory reporting-system and optional inter-state and individual complaints mechanisms. In addition, the committee may undertake investigatory action.<sup>72</sup>

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<sup>67</sup> Art. 35(3)

<sup>68</sup> Møse, p.131.

<sup>69</sup> Articles 1(1) and 2(2)

<sup>70</sup> Art. 1(1). See Buergenthal, Shelton, Stewart, p. 88.

<sup>71</sup> Art. 2(1).

<sup>72</sup> See Part II of the Convention.



### **3 Application of Human Rights Instruments**

The application of human rights instruments in situations of military occupation was discussed in the Advisory Opinion on the *Wall*.<sup>73</sup> The ICJ first discussed the argument that application humanitarian law excludes the application of human rights law. Then the Court moved on to discuss the applicability of human rights instruments outside national territory.

#### **3.1 When are Human Rights Instruments Applicable?**

Generally, states are bound by the treaties they have ratified and international customary law. If a state has ratified a human rights instrument, the instrument is applicable. As seen above, in 1.2.1.2, human rights law is applicable not only in peacetime, but also in armed conflict, where humanitarian law serves as *lex specialis*. The State may, however, derogate from certain provisions, which will diminish the protection offered by the convention concerning those provisions.

#### **3.2 Are Human Rights Instruments Applicable Outside State Territory?**

The scope of application of the ICCPR is defined by its Article 2(1), which states that each State Party ...*undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...*

The wording can be interpreted as covering only individuals that are within the territory of the State and subject to that State's jurisdiction, reading *and* as implying cumulative conditions. But *and* may also be understood as implying alternative conditions, covering both individuals within the territory, and those outside the territory who are subject to the

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<sup>73</sup> Paras 102-113.

State's jurisdiction. The ICJ considers that the object and purpose of the ICCPR would make it seem natural that the States should be bound to comply with the Covenant's provisions also outside the national territory, because even though *the State's jurisdiction is primarily territorial, it may sometimes be exercised outside the national territory*.<sup>74</sup>

The Court adds that this is also consistent with the constant practice of the Human Rights Committee, as the Committee has found that the Covenant is applicable where the State exercises its jurisdiction on foreign territory.<sup>75</sup> The position of the Committee is confirmed by the *travaux préparatoires*<sup>76</sup> of the Covenant, which express that the drafters did not intend to permit States to escape from their obligations when they exercise jurisdiction outside their national territory. The Court finally takes note of Israel's argument – that the Covenant and similar instruments did not apply in the occupied territories – and of the respondent view of the Committee, which rejected the position of Israel. The Court thus finds sufficient support for the interpretation of Art. 2 implying that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

The European Convention does not open for this particular discussion of whether the Convention is applicable outside national territory or not, by simply stating in its Article 1 that the *High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention*.

Thus, human rights instruments are applicable outside national territory, if the territory in question falls within the State's jurisdiction. The question then becomes in what circumstances a State's jurisdiction extends to a territory outside its national territory.

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<sup>74</sup> Para 109.

<sup>75</sup> See e.g. *Lopez Burgos v. Uruguay* (52/79) and *Lilian Celiberti de Casariego v. Uruguay* (56/79), concerning arrests carried out by Uruguayan agents in Brazil or Argentina.

<sup>76</sup> The official documents prepared in the process of elaborating a treaty, which may help to interpret the meaning of the texts as they often express the intentions of the treaty drafters.

*Jurisdiction* is interpreted as a situation of *de facto* control, not one of *de jure* exercise of governmental powers. The term is functional, not geographical, implying that jurisdiction exercised from e.g. a Norwegian embassy on foreign territory may provide grounds for complaints against Norway.<sup>77</sup> A territory under military occupation falls within the jurisdiction of the Occupying State, given the fact that the Occupying State actually has set up an administration of the territory, thus exercising its jurisdiction.

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<sup>77</sup> Møse, p. 140.

## **4 Contents of the Rights Protected**

### **4.1 Introduction**

The right to liberty and security of person and the right not to be subjected to torture, inhuman or degrading treatment are protected by a variety of human rights instruments. This thesis deals with the protection offered by the ICCPR and the ECHR, as mentioned in the introduction. Because the extent of the thesis does not permit a detailed account of the contents of the rights protected, a general outline is given in sections 4.2 and 4.3.

### **4.2 The Right to Liberty and Security of Person**

#### **4.2.1 Introduction**

Detention may sometimes be a necessary means to protect the society from certain dangers. Detention is, however, a serious infringement of a person's liberty and physical integrity, and experience show that persons are vulnerable to other human rights violations while in custody. It is therefore important to prevent arbitrary detention. The right not to be arbitrarily detained is affirmed by the Declaration Articles 3 and 9, and protected by the ICCPR Art. 9, the ECHR Art. 5 and several other human rights instruments. The protection offered by these provisions may be subject to derogation in times of public emergency.

The ICCPR Art. 9(1) and the ECHR Art. 5(1) establish the positive right to liberty and security, and the negative – that no one shall be subjected to arbitrary detention, unless the law prescribes this. There are no exceptions to the right to security, while there are some limits to the right to liberty.<sup>78</sup>

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<sup>78</sup> Møse, p. 242.

Under the European Convention, the *right to security* does not have an independent significance.<sup>79</sup> The practice concerning Art. 5 suggests that the term is only applicable to situations that concern deprivation of liberty. It is rather a factor in the interpretation of the right to liberty.<sup>80</sup> Unlike the ECHR, the ICCPR attributes an independent significance to the *right to security*. According to the Human Rights Committee, there are no grounds to interpret the term to apply only to situations concerning deprivation of liberty. The right implies a duty for the State to take appropriate steps to protect persons against death threats, when the State is aware of the situation.<sup>81</sup>

The right to liberty may, as mentioned, be limited. Here, the ECHR is far more detailed than the ICCPR. The ECHR expressly gives an exhaustive list of situations when deprivation of liberty is justified, in Art 5(1)(a)-(f). The Covenant simply establishes that detention or arrest cannot be arbitrary, and that someone may not be deprived of his liberty unless national law establishes the grounds and procedure for this. Whether the difference in the wording implies a difference in the contents of the protection or not, depends on the practice of the treaties, as they are autonomous, and do not depend on the interpretation of the other.<sup>82</sup>

The ECHR Art. 5(2)-(5) and the ICCPR Art. 9(2)-(5) establish further conditions, using more or less identical wording. Paragraph 3 and a part of paragraph 2 are only applicable to persons against whom criminal charges are brought, but the rest applies to *all persons* deprived of their liberty by detention or arrest. Below, a presentation of the contents of the Articles is given. First, the right to liberty is discussed (4.2.2), followed by an outline of grounds of detention (4.2.3). Then Paragraphs 2-5 are discussed in separate sections (4.2.4-4.2.7), treating the ECHR and the ICCPR under each section because of the similarities of the provisions in both treaties.

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<sup>79</sup> Møse, p. 242

<sup>80</sup> Møse, p. 242.

<sup>81</sup> Møse, p. 243.

<sup>82</sup> Møse, p. 239.

#### 4.2.2 “Right to Liberty”

According to the wording and practice concerning this term (of both treaties), it is a general term covering any deprivation of liberty, whether in criminal cases or in other cases.<sup>83</sup> It contemplates individual liberty in its classic sense, meaning the physical liberty of the person. It aims to ensure that no one should be dispossessed of this liberty in an arbitrary fashion<sup>84</sup>

Mere restrictions upon liberty of movement are not covered by the Articles, and are not subject to the conditions for deprivation of liberty laid down in it. A distinction must then be made between situations of deprivation of liberty according to Art. 5(1) and other limitations of liberty. The European Court of Human Rights has found that the difference between restriction upon liberty and deprivation of liberty is a question of *degree or intensity, and not one of nature or substance*<sup>85</sup> of the measure in question. In considering if this situation constituted deprivation of liberty under Art. 5(1), the Court stated that account had to be taken of a whole range of criteria such as the *type, duration, effects and manner of implementation of the measure in question*<sup>86</sup>

In *Guzzardi v. Italy*, a member of the mafia had been ordered to compulsory residence on an island for 16 months, and a number of restrictions were put upon his liberty. For instance, he was confined to a small area, he was under constant surveillance, did not have any real possibilities to make social contacts, and was liable to punishment by "arrest" if he failed to comply with any of his obligations. The Court noted that special supervision accompanied by an order for compulsory residence in a specified district *does not of itself come within the scope of Article 5*,<sup>87</sup> and that it is not possible to speak of *deprivation of liberty* on the strength of any one of these factors taken individually. But *cumulatively and*

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<sup>83</sup> Møse, p. 239, HRC General Comment 8.

<sup>84</sup> *Engel v. Netherlands*, para 58.

<sup>85</sup> *Guzzardi v. Italy*, para 93.

<sup>86</sup> *Guzzardi v. Italy*, para 92.

<sup>87</sup> Para 94

*in combination*<sup>88</sup> they may constitute a deprivation of liberty within the meaning of Art. 5. In this case, violation of the Convention was found, as the measures taken by the State could not be justified by any of the sub-paragraphs of Art. 5.

Normal restrictions upon the freedom of movement of the members of the armed forces do not constitute a deprivation of liberty according to Art. 5, because of the *specific demands of military service*.<sup>89</sup> Penalties of light arrest and aggravated arrest both fall outside of Art. 5, while the penalty of strict arrest is covered. The latter implies being locked in a cell, and the Court has found that it entails a violation of the Convention, as it cannot be justified by any of the sub-paragraphs (a)-(f)<sup>90</sup>

Detention might violate Art. 5 even though the person concerned might have agreed to it. The Court has stated that the right to liberty is *too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he consents to be taken into detention*<sup>91</sup>

#### 4.2.3 Grounds of Detention

##### 4.2.3.1 ECHR

According to the ECHR, deprivation of liberty is allowed in 6 specific cases, listed in Art. 5(1)(a)-(f). These exceptions to the right to liberty are exhaustive and subject to strict interpretation according to the European Court's jurisprudence<sup>92</sup> According to the second phrase of Art. 5(1), all deprivations of liberty must be in accordance with national law and the general principles of the Convention, and not arbitrary. *National law* refers primarily to formal, written law, but practice might also in certain circumstances achieve that status.<sup>93</sup> Whether a particular detention constitutes a violation of the Convention will therefore also

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<sup>88</sup> *Guzzardi v. Italy*, para 95.

<sup>89</sup> *Engel v. Netherlands*, para 59

<sup>90</sup> *Engel v. Netherlands*, paras 61-63.

<sup>91</sup> *De Wilde, Ooms and Versyp v. Belgium*, para 65.

<sup>92</sup> Møse, pp. 243-244.

<sup>93</sup> Møse, p. 244

depend on the internal law of the State. If the law does not prescribe detention for a certain situation, detention will in that case constitute a breach of the Convention. The European Court is cautious in trying the grounds for detention in national law, as the States are the primary interpreters and appliers of that law. If national courts have found that the conditions of the internal law are satisfied, the European Court will be reluctant to review that decision. However, it will react to obvious breaches of national law.<sup>94</sup> To not be considered arbitrary, the detention has to be in accordance with one of the six subparagraphs of Art. 5(1).

#### 4.2.3.1.1 Art. 5(1)(a)

This alternative concerns typical cases of detention following a *conviction by a competent court*. The limits for what cases fall within this exception are somewhat uncertain, but the provision does establish some minimum conditions. Imprisonment on indefinite time is not in itself in variance with the Convention, but depends on the particular circumstances of the situation.

The Article does not allow so-called preventive detention, i.e. the arrest of someone to avoid future offences. In the Guzzardi judgement, the Court stated that *conviction* implies that it must be established in accordance with the law *that there has been an offence - either criminal or... disciplinary, implying a finding of guilt*<sup>95</sup>

#### 4.2.3.1.2 Art. 5(1)(b)

The first alternative allows for the detention of persons that are not complying *with the lawful order of a court*, for example witnesses that have a duty to testify in a criminal case. The second alternative permits to detain someone if it is necessary to *secure the fulfilment of any obligation prescribed by law*. This could be interpreted to allow preventive detention,

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<sup>94</sup> Møse, p. 244. An evident breach of the Convention might be that there are no legal grounds for the detention, and the State authorities recognize this, or if it obvious for other reasons.

<sup>95</sup> Para 100.



but it has been established by the European Court that it is not the case. This provision is applicable only with the purpose to compel a person to fulfil *a specific and concrete obligation which he has until then failed to satisfy*<sup>96</sup> A wide interpretation would entail *consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration*<sup>97</sup>

#### 4.2.3.1.3 Art. 5(1)(c)

On certain conditions, detention may be used in the course of criminal prosecution. Under any circumstances, the purpose of the deprivation of liberty must be to bring the detainee before the *competent legal authority*. This term refers to the same legal authority that according Art. 5(3) shall exercise judicial control with the deprivation of liberty carried out according to Art. 5(1)(c).<sup>98</sup> It is sufficient that the authorities intended to bring the person before the legal authority at the time of the arrest.<sup>99</sup>

Sub-paragraph c establishes three alternative grounds for detention. Alternative one requires that there must be a *reasonable suspicion* against the detainee for having committed an offence, amounting to a probability of over 50% This implies that there must be facts or information sufficient to convince an unbiased third party that the accused has committed the particular offence. *Reasonable suspicion* must exist at the time of the arrest, and as long as the person is detained.<sup>100</sup>

Alternative two permits the detention of a person when it is *reasonably considered necessary to prevent his committing an offence* It does not provide a legal basis for preventive detention. This was first established in the case of *Lawless v. Ireland*, where the Court found that detention without actual intent to bring the detained before a competent legal authority was a violation of the Convention. Lawless was suspected of being a

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<sup>96</sup> *Engel v. Netherlands*, para 69.

<sup>97</sup> *Engel v. Netherlands*, para 69.

<sup>98</sup> Møse, p. 252.

<sup>99</sup> Møse, p. 253.

<sup>100</sup> Møse, pp. 253-254.

member of the IRA, and was held in custody for five months. This was in accordance with national law, but not with Art. 5(1)(c) of the Convention.<sup>101</sup>

As a rule, the Article does not provide grounds for the re-detention or continued detention *of a person who has served a sentence after conviction of a specific criminal offence where there is a suspicion that he might commit a further similar offence.*<sup>102</sup>

The third alternative allows detaining a person when it is *considered necessary to prevent his fleeing* after having committed an offence. These cases will normally fall within the scope of the first alternative. This suggests that the alternative's significance is primarily in the consideration of whether continued custody is in conformity with Article 5(3) of the Convention.

#### 4.2.3.1.4 Art 5(1)(d)

This sub-paragraph permits the detention of minors on strict conditions. Generally, internal law sets the standard of who is considered to be minor, although the term has an autonomous core.<sup>103</sup> This exception to the right to liberty must also be seen in the light of the Convention on the rights of the Child.

#### 4.2.3.1.5 Art. 5(1)(e)

Certain groups may also be lawfully detained. This concerns for instance alcoholics, vagrants or persons spreading infectious diseases. The sub-paragraph sets no maximum limit to the period of time the persons falling within these groups may be detained, thus making the provision of judicial control in Art 5(4) especially important in this regard.

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<sup>101</sup> *Lawless v. Ireland*, para 48. In this case, the Court concluded that because of the derogation clause in Art. 15, the particular detention did not entail a violation of the Convention after all.

<sup>102</sup> *Eriksen v. Norway*, para 86.

<sup>103</sup> Møse, p. 255.

#### 4.2.3.1.6 Art. 5(1)(f)

The exception to the right to liberty established in this sub-paragraph concerns situations where the authorities need to apply detention as a means of controlling illegal immigration, or where an offender is detained with the view of deporting or extraditing him, pending the demand of extradition.

#### 4.2.3.2 ICCPR

Art. 9 does not contain an exhaustive list of when detention is permitted. There are two general, cumulative conditions for lawful deprivation of liberty under the Covenant.<sup>104</sup> One is the requirement that any deprivation of liberty must be *on such grounds and in accordance with such procedures as are established by law*. Whether *law* implies that statutory rules are needed, or if administrative rules are sufficient, has not been clearly established, but practice points to the latter.<sup>105</sup>

The other condition is that the detention cannot be arbitrary. The practice of the HRC has established that *arbitrary* does not only refer to unlawful detention, but also implies *inappropriateness, injustice and lack of predictability*<sup>106</sup> Cases of abductions or “disappearances,” as well as arrests made solely on political grounds have been found to constitute arbitrary deprivations of liberty.<sup>107</sup>

Deprivation of liberty must be reasonable and necessary, for instance to prevent fleeing, further similar offences or the destruction of evidence,<sup>108</sup> similar to the ECHR Art. 5(1)(c). Being applicable to *all* deprivations of liberty, the ICCPR Art 9(1) may also cover cases of mental illness, vagrancy, drug addiction, educational purposes, or immigration control,<sup>109</sup>

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<sup>104</sup> Møse, pp. 260-261.

<sup>105</sup> Møse, p. 261.

<sup>106</sup> See Møse, p. 261 with further notes.

<sup>107</sup> Møse, pp. 242 and 261 with further notes.

<sup>108</sup> See Møse, p. 261.

<sup>109</sup> HRC General Comment 8.

which is similar to the ECHR Art. 5(1)(e)-(f). This suggests that some of the considerations that are made under the European Convention are pertinent under the Covenant as well.

#### 4.2.4 The Right to Information

##### 4.2.4.1 ECHR

Art. 5(2) applies to *all* cases concerning deprivation of liberty.<sup>110</sup> The Article ensures the right of a detainee *to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him*. The purpose is to provide an efficient possibility for the detainee consider the lawfulness of the arrest and to demand judicial control of it in accordance with Art. 5(4).

In *Fox, Campbell and Hartley v. UK*, the Court established some general conditions to the information, stating that the information must be given in a *simple, non-technical language that he can understand* and of the *essential legal and factual reasons for his arrest*<sup>111</sup> The Court also pronounced that *promptly* do not require all information to be given in its entirety at the very moment of the arrest Whether the content and promptness of the information conveyed were sufficient must be *assessed in each case according to its special features*.<sup>112</sup> The Court found in the *Fox* case that a matter of a few hours was within the constraints of time imposed by the notion of promptness. 12 days have been accepted in one case, while a period of 10 days was considered a violation of the Convention in another.<sup>113</sup>

The *Fox* case concerned several persons arrested on suspicion of terrorism. At the arrest they were informed that they were arrested and charged according to one particular legal provision, indicating the legal basis for the arrest. During the interrogation, it was revealed what specific criminal acts they were suspected of. The Court concluded that at the time of

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<sup>110</sup> *Van der Leer v. Netherlands*, paras 27-28.

<sup>111</sup> Para 40.

<sup>112</sup> Para 40.

<sup>113</sup> Møse, p. 263.

the arrest the information was insufficient, but that it was amended through the police interrogations.<sup>114</sup> Thus, the crucial point is whether the information is brought to the attention of the detainee to enable him to understand why he is arrested, within a reasonable period of time.

#### 4.2.4.2 ICCPR

The wording of the corresponding provision in the Covenant Art. 9(2) differs from the ECHR in two respects: It does not expressly state that the information must be given in a language the detainee understands, and it distinguishes between the information of the reasons for the detention (that has to be given *at the time of the arrest*) and the information of any charges brought against him (that has to be given *promptly*).<sup>115</sup> In many cases before the HRC, violation of this article has been found, but these are usually cases where *no* information has been given<sup>116</sup> However, it has been established that anyone detained has the right to be sufficiently informed to take appropriate steps to be released if he considers the arrest to be invalid. This corresponds with the ECHR<sup>117</sup>

#### 4.2.5 The Right to Rapid Procedure

The ECHR Art. 5(3) and the ICCPR Art. 9(3) contain conditions for rapid procedure in cases of *criminal investigation* The application of the Articles to criminal cases exclusively follows from both the wording and practice concerning the Articles.<sup>118</sup> First, arrested persons must be brought *promptly* before a judge, or *other officer* authorized by law to exercise judicial power, for a decision of custody or release. Secondly, detainees are entitled to trial *within a reasonable time*, or to release pending trial.

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<sup>114</sup> *Fox* para 40.

<sup>115</sup> *Drescher Caldas v. Uruguay* (43/1979)

<sup>116</sup> Møse, p. 263.

<sup>117</sup> Møse, p. 264.

<sup>118</sup> Møse, p. 264.

#### 4.2.5.1 The right to be brought promptly before a judge

The bringing before a judge to decide on the question of custody must happen *promptly*. Concerning the ECHR, the precedent is the case of *Brogan v. UK*, where four terrorist suspects were arrested and interrogated before they were released without having been brought before a judge. The European Court pronounced that the context of terrorism had the effect of prolonging the duration of custody permitted under the Article.<sup>119</sup> However, in this case the limits were exceeded, as the person detained for the shortest amount of time was detained for four days and six hours, and the Court found that a period of such duration *falls outside the strict constraints as to time permitted*.<sup>120</sup> Thus, there is a strong presumption that longer periods also constitute violations of the Convention. Shorter periods will be subject to a consideration of the concrete situation.

The *officer* must have some of the attributes of a judge, that is to say, *he must satisfy certain conditions each of which constitutes a guarantee for the person arrested*<sup>121</sup> He must be independent of the executive and of the parties. This does not mean that the *officer* may not be to some extent subordinate to other judges or officers if they also enjoy similar independence. The procedural requirement obliges the *officer* to hearing himself the individual brought before him. The substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention, and of ordering release if there are no such reasons.<sup>122</sup>

In its General Comment 8, the Human Rights Committee stated that *promptly* requires that *delays must not exceed a few days* Practice does not provide any guidelines as to where the exact limit goes, as most cases have concerned incidents where the limits of Art. 9(3) clearly have been violated<sup>123</sup>

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<sup>119</sup> Para 61.

<sup>120</sup> *Brogan v. UK*, para 62.

<sup>121</sup> *Schiesser v. Switzerland*, para 31.

<sup>122</sup> *Schiesser v. Switzerland*, para 31.

<sup>123</sup> Møse, p. 267.

#### 4.2.5.2 Trial Within Reasonable Time

The time span between the arrest and trial must be *reasonable*. The period of time the person is held in custody cannot be too long, or he has to be released. But even if he is released pending trial, the trial must be held within a reasonable time. The accused must be considered innocent until his conviction, and be released when detention no longer is reasonable. These principles were established by the European Court in four judgements in the late 1960's.<sup>124</sup>

Whether the condition of *within reasonable time* is satisfied depends on the particular circumstances of each case. The duration of the detention is estimated from the arrest to the time when the detainee is released or convicted in the first instance.<sup>125</sup> Continued detention is only permitted if the public interest outweighs the respect for the individual's liberty. An absolute condition for continued detention is that there is still a reasonable suspicion against the detainee for having committed an offence. However, after a certain time this is no longer sufficient alone. Then, the authorities must justify relevant and sufficient reasons in addition to the suspicion.<sup>126</sup>

Factors taken into account in this consideration might be the complexity of the case, the conduct of the authorities and the conduct of the accused.<sup>127</sup> Practice of Art. 5(3) show that what is accepted as being *within reasonable time* depends on the specific circumstances of the situation in question. For example, a time span of 2 years, 1 month and 2 days was found to constitute a violation of the Convention,<sup>128</sup> while a period of 4 years and 3 days has been accepted, because of the complexity of the case and the conduct of the accused.<sup>129</sup>

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<sup>124</sup> Møse, p. 267-268.

<sup>125</sup> Møse, p. 269

<sup>126</sup> Møse, p. 268.

<sup>127</sup> Møse, p. 272.

<sup>128</sup> *Toth v. Austria*

<sup>129</sup> *W v. Switzerland*

Unlike the ICCPR, the Covenant Art. 9(3) expressly states that detention in custody of persons awaiting trial *shall not be the general rule*. Pre-trial detention *should be an exception and as short as possible*.<sup>130</sup> Art. 9(3) also establishes that release may be subjected to guarantees for the accused to appear for trial, and at any other stage of the proceedings. The ECHR Art. 5(3) only allows this for appearance for trial.

#### 4.2.6 Judicial control

Both the ECHR Art. 5(4) and the ICCPR Art. 9(4) require that all persons arrested or detained are entitled to take proceedings *before a court* in order for that court to decide, *in a certain speed*, on the *lawfulness* of the detention in question. If the detention is unlawful, the detainee *shall be released*. Both Articles apply to any deprivation of liberty, whether decided by the courts or the executive. These are important guarantees for the purpose of the Articles; namely to avoid arbitrary detentions.

##### 4.2.6.1 ECHR

According to the practice of Art. 5(4), a court does not necessarily have to be a court within the regular court system, but also other organs of a judicial nature. Such an organ must satisfy the conditions of independence from the executive and the parties, and has to follow judicial procedures, for instance respect the fundamental principle of contradiction, meaning that all parties to a case should be heard. The organ has to have the power of making binding decisions to qualify for the term *court* within the meaning of the Convention. The ECHR does not require an instance of appeals, but if the internal law has established such a system, this instance must also satisfy the exigencies of the Convention.<sup>131</sup> If the detention was decided by the court, the detainee has a right to try the decision before the court in reasonable intervals, to consider if the circumstances justifying the detention have changed.<sup>132</sup>

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<sup>130</sup> HRC General Comment 8.

<sup>131</sup> Møse, p. 279.

<sup>132</sup> Møse, p. 282.



The *court* shall try the *lawfulness* of the detention. That implies that the court has to assess whether the conditions for detention still exist. This assessment is the same as in 5(1), considering the lawfulness in the light of domestic law, the Convention, the Convention's general principles, and the purpose of the exceptions.<sup>133</sup> The court is not required to try the expediency of the detention.<sup>134</sup>

The Article also demands a certain speed of the proceedings, from when the request for release is made to the time when the court gives its decision. The limit of what is considered *speedily* depends on all the circumstances of the particular situation. Relevant criteria are similar to those of Art. 5(3). But the exigencies of speed are stricter for Art. 5(4), especially if it concerns a criminal case.<sup>135</sup> In the *Fox* case, 44 hours did not exceed the limits, while cases of 31 and 36 days and more have been found in violation of the Convention. However, the Court accepted a period of 17 months in *Letellier v. France* because of the particular circumstances of the case.<sup>136</sup>

#### 4.2.6.2 ICCPR

Art. 9(4) is considered by the Committee as an especially important guarantee, applicable to all persons deprived of their liberty by arrest or detention.<sup>137</sup> The three conditions of the Article are the same as for the European Convention, although there is a small difference in the wording. While the ECHR uses *speedily*, the Covenant applies *without delay*. If this implies a difference in the application of the Articles, remains to be decided by conventional practice. Whether this condition is satisfied depends on an assessment of the concrete situation.<sup>138</sup> Both 3 and 5 months have been judged unacceptable.<sup>139</sup> The

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<sup>133</sup> *Brogan v. UK*, para 65.

<sup>134</sup> Møse, p. 284.

<sup>135</sup> Møse, p. 286.

<sup>136</sup> Møse, pp. 286-287.

<sup>137</sup> HRC General Comment 8.

<sup>138</sup> Møse, p. 289

<sup>139</sup> See *Torres v. Finland* and *Kelly v. Jamaica*

proceedings must be *before a court*. This term includes not only regular courts, but also specialized tribunals.<sup>140</sup>

#### 4.2.7 The Right to Compensation

ECHR Art. 5(5) and ICCPR Art. 9(5) establish the right to compensation for cases of detention in contravention of their provisions.

The HRC stated in its General Comment 8 that if so-called preventive detention is used (for reasons of public security) it must be controlled by these same provisions: It must not be arbitrary, and must be based on grounds and procedures established by law, 9(1), information of the reasons must be given, 9(2), and court control of the detention must be available, 9(4), as well as compensation in the case of a breach, 9(5). If criminal charges are brought in such cases, the full protection of Article 9(2) and 9(3) and Article 14, must also be granted.

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<sup>140</sup> Møse, p. 289.

### 4.3 The Right Not to Be Subjected to Torture, Inhuman or Degrading Treatment

#### 4.3.1 Introduction

Torture, inhuman and degrading treatment are serious violations of a person's physical and mental integrity. Acts of torture are not only horrible in themselves, but such abuses have terrible long-term consequences, as they destroy the lives of detainees and dehumanize interrogators.<sup>141</sup> The right not to be subjected to ill-treatment is affirmed in the Declaration's Article 5, and is protected by a variety of treaties, including the ICCPR and the ECHR. Several specialized conventions, like the CAT, have also been elaborated to enforce the protection against ill-treatment.

The right cannot be subject to derogation in times of emergency, applies to its full extent in armed conflict, and no justification may be invoked to excuse violations of it<sup>142</sup> It is now commonly recognized that the protection against torture has the status of customary international law.<sup>143</sup> However, allegations of ill-treatment are still frequent, even against state parties to treaties obliging them to abstain from the use of such treatment and to take positive steps to ensure that it does not occur.

The wording of the ECHR Art. 3 and the ICCPR Art. 7 are similar, although the ICCPR contains an additional protection against involuntary medical or scientific experimentation. The provisions are general, covering a number of situations. Their core field of application is infringement of individuals' physical integrity. The protection against ill-treatment is particularly important for persons deprived of their liberty, as individuals are vulnerable to such treatment in custody. The aim of the provisions is to protect both the dignity and the physical and mental integrity of the individual.

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<sup>141</sup> HRW, *Torture Worldwide*.

<sup>142</sup> See e.g. ICCPR Art. 4, ECHR Art. 15(2), the Geneva Conventions of 1949, HRC General Comment 20, para 3.

<sup>143</sup> Møse, p. 207.

### 4.3.2 ECHR

The European Convention Art. 3 prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct.<sup>144</sup> The wording does not itself qualify the term torture, and the case-law has not established any exhaustive definitions of what situations it applies to. However, practice has clarified the relationship between the terms *torture, inhuman or degrading treatment*<sup>145</sup> The treatment in question must satisfy a certain *minimum level of severity* to fall within the scope of Art. 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, e.g. the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim<sup>146</sup> The distinction between the terms *derives principally from a difference in the intensity of the suffering inflicted*<sup>147</sup>

The most severe cases qualify as *torture*. The European Court has qualified torture as *deliberate inhuman treatment causing very serious and cruel suffering* Treatment causing intense and mental suffering to the person, or leading to acute psychiatric disturbances during interrogation qualifies as *inhuman treatment*, whether actual bodily injury is inflicted or not. The least severe cases fall within the scope of the term *degrading treatment*, covering treatment that arouses *feelings of fear, anguish and inferiority capable of humiliating and debasing, and possibly breaking* the victim's physical or moral resistance.<sup>148</sup> If the treatment does not qualify for any of these, it might constitute a violation of Art. 8; the right to private life.<sup>149</sup>

In *Ireland v. UK*, the Court found that the combined use of five particular techniques for hours at a stretch during so-called *interrogation in depth* constituted inhuman and degrading treatment, but did not amount to torture<sup>150</sup> These techniques included forcing

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<sup>144</sup> *Ireland v. UK*, para 163.

<sup>145</sup> Møse, p. 208.

<sup>146</sup> *Ireland v. UK*, para 162.

<sup>147</sup> *Ireland v. UK*, para 167.

<sup>148</sup> *Ireland v. UK*, para 167.

<sup>149</sup> Møse, p. 208.

<sup>150</sup> *Ireland v. UK*, paras 167-168.

detainees to remain for periods of some hours in a “stress position” (described as being *spreadeagled* against the wall; with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers), hooding, subjection to a continuous loud and hissing noise, sleep deprivation, and deprivation of food and drink<sup>151</sup>

The Article implies a burden of proof for the authorities. If a person in their custody has been injured, and the authorities cannot provide a plausible explanation of how that happened, they are presumed responsible for the injuries.<sup>152</sup> The authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.<sup>153</sup>

The Court has pronounced that the use of force not strictly necessary to handle the detainee, in itself reduces the human dignity, and thus violates Art. 3.<sup>154</sup> Art. 3 also implies an obligation to investigate arguable claims of serious abuse by the police or other authorities, with the aim of finding and punishing those responsible. If the investigation is not sufficiently efficient, it entails a violation of Art. 3.<sup>155</sup>

In cases of deprivation of liberty, the physical conditions of the detention may entail a violation of Art. 3.<sup>156</sup> Solitary confinement is not in itself in variance with the Convention. Whether the confinement is acceptable depends on a consideration of the particular circumstances of the situation. Relevant criteria are, e.g. the duration, purpose and conditions of the detention, and the effects on the detainee.<sup>157</sup>

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<sup>151</sup> *Ireland v. UK*, para 96.

<sup>152</sup> *Møse*, p. 211.

<sup>153</sup> *Ireland v. UK*, para 159.

<sup>154</sup> *Møse*, p. 211.

<sup>155</sup> *Assenov v. Bulgaria*, para 102.

<sup>156</sup> See *Peers v. Greece*, para 75.

<sup>157</sup> *Møse*, p. 220.

### 4.3.3 ICCPR

Like the ECHR, the Covenant Art. 7 does not define the terms *torture*, *inhuman* or *degrading treatment*. The distinction between the three depends on the nature, purpose and severity of the treatment applied.<sup>158</sup> Many complaints have been decided by the Committee, but usually it just establishes that there has been a violation of the Article, without specifically mentioning which of the terms were applicable to the case.<sup>159</sup>

*Torture* was found in *Bazzano, Masssera and Others v. Uruguay*, (107/1981), where a person had been forced to stand, wearing a hood, for several hours so that he fell and broke his ankle. He was also beaten and given electric shocks. *Inhuman and cruel treatment* was found in *Tshiekedi v. Zaire*, (242/1987) where the detainee was deprived of food and drink for four days. *Degrading treatment* was found in *Polay Campos v. Peru*, (557/1994), where a revolutionary leader had been displayed to the press in a cage.

The Article is applicable to acts causing physical pain, and to acts causing mental suffering to the victim. The prohibition extends to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.<sup>160</sup> Prolonged solitary confinement of the detainee may amount to acts prohibited by article 7<sup>161</sup> Deprivation of liberty pending execution of the death penalty (death row) is not in itself in variance with the Covenant.<sup>162</sup> But the conditions under the custody might lead to a violation, and the execution must be carried out in such a way as to cause *the least possible physical and mental suffering*.<sup>163</sup>

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<sup>158</sup> HRC General Comment 20, para 4.

<sup>159</sup> Møse, p. 215.

<sup>160</sup> HRC General Comment 20, para 5.

<sup>161</sup> HRC General Comment 20, para 6.

<sup>162</sup> Møse, p. 216.

<sup>163</sup> HRC General Comment 20, para 6.

The prohibition in Art. 7 is complemented by the positive requirements of Art. 10(1) which stipulates that: *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*<sup>164</sup>

Under the ECHR and ICCPR alike, a decision by a Contracting State to extradite a fugitive may engage the conventional responsibility of that State where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to ill-treatment in the requesting country.<sup>165</sup>

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<sup>164</sup> HRC General Comment 20, para 2.

<sup>165</sup> *Soering v. UK*, para 91. HRC General Comment 20, para 9.

## 5 Derogation

### 5.1 Introduction

Some rights protected by human rights instruments may be subjected to derogation by conventional derogation clauses in time of public emergency threatening the life of the nation. There is also a correspondent, independent ground for preclusion of the wrongfulness of an action or practice, recognized by customary international law, called *state of necessity*. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other.<sup>166</sup> *State of necessity* will not be treated in particular because the extent of the thesis is limited to the ICCPR and the ECHR. A brief outline is given below, before derogation clauses are discussed in 5.2.

*State of necessity* is codified in Article 25 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts. It can only be accepted on an *exceptional basis*, and can only be invoked under *certain strictly defined conditions which must be cumulatively satisfied*. The main condition is that the measure in question must be *the only way for the State to safeguard an essential interest against a grave and imminent peril*. The State concerned is not the sole judge of whether those conditions have been met.<sup>167</sup>

An interesting question in this context is the relationship between *state of necessity* and treaties with qualifying clauses or derogation clauses. Again, the extent of the thesis has no room for this discussion. In the Advisory Opinion on the *Wall*, the ICJ found that it did not

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<sup>166</sup> ILC Commentaries to the Draft Articles

<sup>167</sup> *Gabčíkovo-Nagymaros Project*, para 51



need to consider that question. However, common conditions for *state of necessity* and derogation clauses are that the means applied must be strictly required by the exigencies of the particular situation, and the principle of proportionality must be respected.

## 5.2 Derogation Clauses

The ECHR Art. 15 and the ICCPR Art. 4 provide grounds for derogation in times of emergency. However, the measure of derogation and its material consequences are subjected to a specific regime of safeguards for the purpose of preventing the abuse of a State's emergency powers.<sup>168</sup>

### 5.2.1 Requirements to the situation

Not every national emergency qualifies to permit derogation. The situation has to be of a serious nature, and will often be an event which is of concern to the international community in terms of maintenance of peace and security.

### 5.2.2 Requirements to the measures

Permitted derogations must be limited to the extent *strictly required by the exigencies of the situation*, which reflects the principle of proportionality.<sup>169</sup> The measures taken must be the least intrusive means amongst those which may achieve the desired result. The objective of the derogation must be the restoration of a state of normalcy where full respect for the Covenant can again be secured, and measures are only permitted to the extent absolutely necessary to achieve that goal. The Human Rights Committee stated in its General Comment 29, concerning Art. 4, that this requirement relates to the *duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to*

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<sup>168</sup> HRC General Comment 29.

<sup>169</sup> HRC General Comment 29.

Also during an armed conflict are measures derogating from the Covenant allowed only if and to the extent that the situation constitutes a threat to the life of the nation. Measures derogating from the provisions of the Covenant must be of an *exceptional and temporary nature*<sup>170</sup> Furthermore, the measures applied may in no circumstances be inconsistent with the State's *other obligations under international law*, whether based on treaty or general international law.

Both the ECHR Art. 15(2) and the ICCPR Art. 4(2) list some non-derogable rights, like the right not to be subjected to torture. However, this does not imply that other articles in the treaties may be subjected to derogations at will. A careful analysis under each article based on an objective assessment of the actual situation must be conducted, because of the legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation.<sup>171</sup> There are elements that cannot be made subject to lawful derogation under Article 4.<sup>172</sup> If a derogable provision expresses a norm of general international law not subject to derogation, that element prevails. An example is ICCPR Art. 10(1) that requires that all persons deprived of their liberty *shall be treated with humanity and with respect for the inherent dignity of the human person* Though not mentioned in Art. 4, this provision is considered to have the status of a non-derogable element. The HRC finds support for this conclusion by the reference to the preamble to the Covenant and by the close connection between articles 7 and 10.

That status may also be obtained in order to protect non-derogable rights. For instance, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the Covenant<sup>173</sup>

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<sup>170</sup> HRC General Comment 29.

<sup>171</sup> HRC General Comment 29.

<sup>172</sup> HRC General Comment 29.

<sup>173</sup> HRC General Comment 29.

### 5.2.3 Obligation of Notification

Both the ECHR Art. 15(3) and the ICCPR Art. 4(3) oblige the State to inform the international community when it takes measures derogating from its conventional obligations. The State must justify its decision to proclaim a state of emergency and any specific measures based on such a proclamation.

## 6 Practices of Detention and Ill-treatment

### 6.1 Introduction

Detention and ill-treatment in custody seem to be frequently resorted to in situations of military occupation. The occupying state often labels resistance groups of the occupied territory as *terrorists* to justify actions against those groups as anti-terrorism operations. Detention is viewed as preventing a potentially greater threat to the wellbeing of the State and its peoples. The motivation may also be to strike down on opposition, by silencing, controlling or intimidating political opponents. Ill-treatment is often applied to obtain information from detainees or suspects, although such abuses are absolutely prohibited by universally agreed-upon standards. Some governments justify such treatment as inevitable in the global war on terrorism.

There is no room for an in-depth study of practices of detention and ill-treatment in this thesis, so the discussion will be quite general, and mostly based on reports of NGOs. Thus, the thesis cannot provide any exhaustive conclusion as to the extent or contents of such practices, but will merely give an outline of some practices reported of.

Three areas are chosen: The Occupied Palestinian Territory, Chechnya and Northern Ireland. They are chosen because they are conflicts that still exist today, and some of them are frequently discussed in the media. They are also the ones I have found the most information on concerning the subject. Three are chosen because it gives the study a broader area to contrast and compare, and more easily permit to observe a general practice if there is one. Only the Israeli-Palestinian conflict is internationally recognized as occupation, while the others are considered internal conflicts. However, they are all covered by *military occupation* in its wider sense. The emphasis will be on Palestine, and

the discussion on Northern Ireland will be somewhat superficial, as that conflict is less acute today, but is included for the geographical spread of the examples

Both the ICCPR and the ECHR are applicable to the cases of Northern Ireland<sup>174</sup> and Chechnya,<sup>175</sup> while only the ICCPR is applicable to Palestine.<sup>176</sup>

## 6.2 Detention

### 6.2.1 The Occupied Palestinian Territory

The historical context of the Israeli-Palestinian conflict is one of conflict and successive wars for over 50 years, prolonged occupation for over 30 years, and a protracted, fragile peace process. Israel derogated from the ICCPR Art. 9 upon ratification, and has adopted laws allowing various forms of detention. Under certain provisions, detentions may be extended indefinitely<sup>177</sup>

The right to liberty is violated on a large scale by Israeli military interventions in the Occupied Palestinian Territory.<sup>178</sup> Detention is a commonly used measure of the Israel Defence Forces to strike down on Palestinian opposition. Every year, thousands of Palestinians are detained. Some of them are released without charge shortly after the arrest, while others are held without trial or access to a lawyer.<sup>179</sup> Thousands are charged with security offences. The trials before military courts do often not meet international standards of fairness.<sup>180</sup> A large number of juveniles are also held in detention for political offences, mostly for throwing stones at the Israeli security forces.<sup>181</sup>

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<sup>174</sup> UK ratified the ICCPR on 20.5.1976, the ECHR on 3.9.1953, and the CAT on 8.12.1988.

<sup>175</sup> Russia ratified the ICCPR on 16.10.1973, the ECHR on 5.5.1998, and the CAT on 3.3.1987.

<sup>176</sup> Israel ratified both the ICCPR and the CAT on 3.10.1991.

<sup>177</sup> B'Tselem.

<sup>178</sup> Report of John Dugard, 29.8.2002.

<sup>179</sup> Reports of John Dugard, HRW, AI, B'Tselem.

<sup>180</sup> AI, *Report 2005*, p. 145.

<sup>181</sup> Report of John Dugard, 29.8.2002. B'Tselem.

Hundreds of Palestinians are held in administrative detention, i.e. detention by administrative order rather than judicial procedure, without charge or trial.<sup>182</sup>

Administrative detention entails restriction on access to counsel and to the full disclosure of reasons of the detention, limiting the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment. The Human Rights Committee considers these measures to derogate from Art. 9 more extensively than what is permissible pursuant to Art. 4.<sup>183</sup>

Sometimes, detention is applied as a collective punishment. For instance, during the assaults on Palestinian towns in March and April 2002, all males between 16 and 45 were detained in several towns. Most of them were held for several days, regardless of the personal responsibility of those arrested, while those not released were held without trial or access to a lawyer<sup>184</sup> Prolonged detention without any access to a lawyer or other persons of the outside world violates Articles 7, 9, 10 and 14(3)(b), and no one should be held for more than 48 hours without access to a lawyer.<sup>185</sup>

Human rights activists are often the victims of arbitrary detention. An example is `Abd al-Latif Gheith, a 63 years old and board chairman of Addameer,<sup>186</sup> who was detained after security officials questioned him at a military checkpoint about Addameer's activities and staff. After a week, Israel's deputy military commander issued an order detaining Gheith in a military detention camp without charge for six months on unspecified grounds of *endangering security*<sup>187</sup>

## 6.2.2 Chechnya

In its report to the Parliamentary Assembly of the Council of Europe, the Committee on Legal Affairs and Human Rights condemned the human rights situation in Chechnya as

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<sup>182</sup> Reports of John Dugard, HRW, AI, B'Tselem.

<sup>183</sup> Concluding Observations of the HRC: Israel 21/08/2003, para 12.

<sup>184</sup> Report of John Dugard, 29.8.2002.

<sup>185</sup> Concluding Observations of the HRC: Israel 21/08/2003.

<sup>186</sup> A prisoner support organization based in Ramallah.

<sup>187</sup> HRW

*catastrophic*.<sup>188</sup> Acts of terrorism have been committed by Chechen fighters in Chechnya and in other parts of Russia. Russia's federal forces have detained and "disappeared" thousands of Chechens suspected of involvement with rebel forces and tortured them in custody to obtain confessions and information, considering these actions to be counterterrorism operations<sup>189</sup> *Disappearances*, rape, torture and extrajudicial executions by federal troops and Chechen fighters are everyday occurrences in Chechnya.<sup>190</sup>

In most cases, the Russian and Chechen authorities fail to conduct prompt, independent and thorough investigation into allegations of human rights violations against the civilian population. Since 1999, only one serviceman has served an active prison sentence for torture or disappearance in Chechnya.<sup>191</sup> National laws have been adopted, extending the length of time that someone suspected of *terrorism-related* offences may be held without charge to 30 days, and increasing the maximum sentence for these offences from 20 years to life imprisonment<sup>192</sup>

According to the finds of HRW, *disappearances* in Chechnya are so widespread and systematic that they constitute crimes against humanity. Since 1999, between 3,000 and 5,000 individuals are estimated to have "disappeared." Often, their corpses are found in unmarked graves or dumped by road sides or elsewhere, but in most cases they are simply never heard from after being taken into custody.<sup>193</sup>

Reports received by Amnesty International, show that many of these abuses take place during targeted raids by Russian federal and Chechen forces.<sup>194</sup> Forced disappearances are

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<sup>188</sup> AI, *Report 2005*, p. 209.

<sup>189</sup> HRW, *Torture Worldwide*

<sup>190</sup> Joint Statement by AI, HRW, the Medical Foundation for the Care of Victims of Torture, and Memorial, 8 April 2004.

<sup>191</sup> HRW, *Torture Worldwide*

<sup>192</sup> AI, *Report 2005*, p. 209.

<sup>193</sup> HRW, *Torture Worldwide*.

<sup>194</sup> AI, *Report 2005*, p. 209.

allegedly carried out to conceal the torture and summary execution of those in their custody<sup>195</sup>

The examples are obviously many. One is the raid of the village of Duba-Yurt Military vehicles carrying uniformed and masked men entered the village in the middle of the night, raiding 19 houses, and detaining 11 men. Three of them were released soon afterwards. The bodies of the remaining eight were found a couple of weeks later, several kilometres away, reportedly bearing marks of torture and multiple gunshot wounds.<sup>196</sup>

Human rights defenders and people seeking justice through the European Court of Human Rights tend to be harassed, as these people oppose the practices of the State, and let human rights violations be known to the world. One example is the case of Anzor Pokaev His father and nine others filed an application to the European Court in July 2003 concerning the disappearances in April 2002 of their relatives, who included Anzor's brother Anzor was detained about a year later, during a raid in his home allegedly carried out by federal troops His body was found at the roadside the next morning bearing several gunshot wounds<sup>197</sup>

Women are increasingly being detained and tortured in order to make them confess to cooperating with Chechen armed groups.<sup>198</sup> An obvious example of arbitrary detention is the case of "Madina" who was detained by Russian federal forces, blindfolded and taken to the main Russian military base in Khankala, where she was ill-treated (see 6.3.2) After two weeks she was released and told that the officers had made a mistake in detaining her. They threatened to kill her if she reported what had happened to her<sup>199</sup>

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<sup>195</sup> HRW, *Torture Worldwide*.

<sup>196</sup> AI, *Report 2005*, p. 209.

<sup>197</sup> AI, *Report 2005*, p. 211.

<sup>198</sup> AI, *Report 2005*, p. 209.

<sup>199</sup> AI, *Report 2005*, p. 209.



### 6.2.3 Northern Ireland

Over the years, particularly since *The Troubles* began in 1969, the authorities in Northern Ireland have exercised a series of extrajudicial powers of arrest, detention and internment. The government has justified these measures as effective means of containing violence in order to combat *the longest and most violent terrorist campaign witnessed in either part of the island of Ireland*<sup>200</sup>

The UK derogated from paragraphs 1 to 4 of Art. 5, and have adopted several acts and regulations permitting various forms of detention, enabling the authorities to effect extrajudicial deprivation of liberty falling into three basic categories: Initial arrest for interrogation, detention for further interrogation (*interim custody*) and preventive detention (*detention*).<sup>201</sup>

Some regulations permitted unlimited duration of the detention, and in many cases it lasted for some years.<sup>202</sup> The detainees were normally not informed of the reasons of their arrest, and the possibility of judicial control was often limited<sup>203</sup> In 1991, Professor Peter Burns (the UN rapporteur for the UK) observed a practice of holding suspects in incommunicado detention for 48 hours, extending detention for up to seven days, denying access to independent medical examination, and the removal of the right to silence. Furthermore, detainees were often denied immediate access to solicitors, were not brought promptly before judges or, if charged, brought speedily before a court for adjudication<sup>204</sup>

Over the years, some thousand individuals have been held in detention and/or charged with *terrorist-type offences*<sup>205</sup> Not only persons suspected IRA terrorists were detained, but also persons suspected of being involved or associated with the IRA. In some cases persons were even detained for interrogation about the activities of others, and persons were

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<sup>200</sup> Ireland v. UK, para 11.

<sup>201</sup> Ireland v. UK, para 78.

<sup>202</sup> Ireland v. UK, paras 84-87.

<sup>203</sup> Ireland v. UK, paras 81-86

<sup>204</sup> HRW, *Children in Northern Ireland*.

<sup>205</sup> Ireland v. UK, paras 11-92.

arrested or detained on the basis of inadequate or inaccurate information.<sup>206</sup> A HRW investigation in 1992 showed that quite a few juveniles were detained for some time as well.<sup>207</sup> Compensation for wrongful arrest or false imprisonment was paid in some cases.<sup>208</sup>

#### 6.2.4 Observations

In all three cases, the states have provided domestic legislation to combat terrorism, allowing various forms of detentions, and detention extending for longer periods of time, sometimes indefinitely. Although this legislation is directed to protect the state from terrorist actions, reports of NGOs suggest that civilians to a large extent are taken into custody and held in detention as well, without adequate grounds. Civilians who are vaguely connected to, or suspected of having information on alleged terrorists, as well as human rights activists, seem to be particularly vulnerable to arbitrary detention.

General features seem to be that detentions are carried out without proper grounds or particular suspicion, and that individuals are held in incommunicado detention without access to a lawyer or possibility of judicial control within reasonable time. Allegations of human rights violation seem to be poorly investigated.

Detentions of long durations seem to be a common feature in Northern Ireland and Palestine, while *disappearances* seem to be a particular problem in Chechnya. The use of detention as collective punishment seems to be a special feature in Palestine.

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<sup>206</sup> *Ireland v. UK*, paras 38-41, 81.

<sup>207</sup> HRW, *Children in Northern Ireland*

<sup>208</sup> *Ireland v. UK*, para 143.

## 6.3 Ill-treatment

### 6.3.1 The Occupied Palestinian Territory

The Israeli Supreme Court ruled in September 1999 that six frequently-used practices of the Israeli Security Agency violated existing laws. These included beatings, prolonged sleep deprivation, covering the head with a sack, violent shaking, painful hackling, and prolonged painful positioning.<sup>209</sup>

In 2002, the Public Committee Against Torture in Israel (PCATI) reported that there appeared to be a gradual reversion to the use of torture despite the Supreme Court decision outlawing its use. Methods reportedly used during interrogation included the methods mentioned above in addition to kicking, deprivation of food and drink, exposure to extreme temperatures, unhygienic conditions, and intense psychological pressure.<sup>210</sup> Cases where the detainees were stripped to their underpants, blindfolded, handcuffed, paraded before television cameras and insulted were also observed, as well as subjection to loud noises and threats against family members.<sup>211</sup>

Children detained for stone-throwing were subjected to similar treatment, and were also doused with cold water in winter, shot at with toy pistols with plastic pellets from close range and having their heads placed in the toilet while the toilet was flushed.<sup>212</sup>

According to Israeli human rights activists and defence lawyers, the techniques outlawed by the 1999 ruling are now used less frequently, but have been replaced by techniques that are extremely stressful psychologically.<sup>213</sup> These techniques include greater isolation for longer periods, denial of access to lawyers and family members for extended periods,

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<sup>209</sup> HRW, *Torture Worldwide*, Report of John Dugard, 8.9.2003.

<sup>210</sup> HRW, *World Report 2003*, Report of John Dugard, 8.9.2003.

<sup>211</sup> Report of John Dugard, 17.12.2002.

<sup>212</sup> Report of John Dugard, 6.3.2002.

<sup>213</sup> HRW, *Torture Worldwide*

prolonged interrogation sessions, use of collaborators to threaten detainees, and threats to family members. Interviews by HRW of former detainees showed that physical violence, or the threat of it, is often present in the treatment of detainees.<sup>214</sup> Thus, abusive interrogation techniques, sometimes amounting to torture, continue to be practiced in Israel. This conclusion is supported by various NGOs.<sup>215</sup>

An example is the case of Marwan Barghouti, who was arrested by Israeli security forces in 2002, and taken to a detention centre. He was allegedly held in incommunicado detention for a month. Later he was allowed visits from his lawyers, but not his family. During interrogations he was tortured using a method known as *shabeh*, being forced to sit on a small sloping chair, where the front legs are shorter than the back legs, with his hands and feet shackled. He was also deprived of sleep, allowed to sleep for only two hours a day over a period of 72 hours. In addition, his interrogators made threats to kill him and his son, who was held in a prison in Israel.<sup>216</sup>

Israel tends to invoke the *necessity defence* argument to justify interrogation techniques incompatible with Art. 7. The Supreme Court ruling permits the security agency to claim the *necessity defence* in cases where “exceptional interrogation means” are allegedly needed, as in so-called “ticking bomb” cases.<sup>217</sup> These are situations in which interrogators are said to learn that a terrorist suspect in custody knows where a ticking bomb has been planted and must force that information from him to save lives. This argument is not recognized under the Covenant.<sup>218</sup>

Charges of torture and ill-treatment tend not to be adequately investigated. Complaints about inhuman treatment are generally not investigated or taken seriously. According to

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<sup>214</sup> HRW, *Torture worldwide*

<sup>215</sup> HRW, AI, PCATI, World Organization against Torture, Al-Haq, Mandela Institute For Human Rights and many more.

<sup>216</sup> AI

<sup>217</sup> HRW, *Torture worldwide*

<sup>218</sup> *Concluding Observations* of the HRC: Israel. 21/08/2003, para 18.

HRW, no Israeli Security Agency or officer has faced criminal or disciplinary charges for acts of torture or ill-treatment since 1999.<sup>219</sup>

### 6.3.2 Chechnya

Generally, Russian police routinely uses torture or other ill-treatment to extract confessions.<sup>220</sup> The treatment of alleged terrorists will then obviously not be any better. Investigations into allegations of ill-treatment are rare and often inadequate, thus contributing to a climate of impunity.<sup>221</sup>

As previously mentioned, *disappearances* are used to conceal ill-treatment. According to HRW, the majority of the bodies found subsequent to *disappearances*, showed signs of severe mutilation. This mutilation included flaying or scalping, severed finger tips and ears, broken limbs, and close range bullet wounds typical of summary executions. Some of these bodies have been examined by medical doctors, revealing that some of the deliberate mutilations were inflicted while the detainees were still alive.<sup>222</sup>

Those who are released from detention report of serious beatings, threats of *disappearance*, electric shocks and various other acts of ill-treatment. A man interviewed by HRW in February 2005 reported that during detention he was held on the concrete floor of a tiny, unheated cell, handcuffed with a plastic bag over his head the entire time. He had also been severely beaten and injected with an unknown drug.<sup>223</sup> Women are, in addition, sometimes victims of rape, and threats of rape, during detention. For example, “Madina” (see 6.2.2) was beaten, subjected to electric shocks every day, stripped naked and sexually abused by groups of officers during her detention.<sup>224</sup>

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<sup>219</sup> HRW, *Torture worldwide*. AI, *Report 2005*, p. 142. Report of John Dugard, 6.3.2002.

<sup>220</sup> AI, *Report 2005*, p. 211.

<sup>221</sup> AI, *Report 2005*, p. 211.

<sup>222</sup> HRW, *Torture Worldwide*.

<sup>223</sup> HRW, *Torture Worldwide*

<sup>224</sup> AI, *Report 2005*, p. 209.

Women are also vulnerable in their own homes. During *sweep operations* (house-to-house searches for *Chechen rebels* by Russian forces), male relatives often leave their villages for safer locations to avoid arbitrary arrest, torture, and *disappearances*. Left alone without protection, many women are subjected to rape and other ill-treatment.<sup>225</sup>

Ill-treatment is not only inflicted on those individuals suspected of *terrorist-related offences*. Also relatives and acquaintances of the wanted persons are subjected to such treatment. For example, over 80 relatives of Omar Khambiev, a former Chechen Minister of Health, were rounded up from various parts of Chechnya by the Kadyrovsty.<sup>226</sup> They were reportedly tortured and ill-treated for a twofold purpose: First, in an attempt to stop Khambiev speaking out about violations in Chechnya. Secondly, to force his brother, a leader of a Chechen armed opposition group, to surrender.<sup>227</sup>

### 6.3.3 Northern Ireland

During the period 1971-1975, over two thousand allegations of ill-treatment were reportedly made against the police and army<sup>228</sup> The ill-treatment included severe beatings and kicking, in addition to the combined use of the five techniques mentioned in 4.3.2.

An investigation by HRW in 1991 showed that detainees were still quite frequently subjected to severe beatings, threats, insults, spitting, and incarceration in inhumane conditions. Minors were also subjected to such treatment.<sup>229</sup> However, in April 1992, some human rights activists and lawyers reported that they had not received complaints of physical abuse from detainees for some months. It was suggested that international pressure

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<sup>225</sup> HRW

<sup>226</sup> The *Kadyrovsty* is Chechen security forces under the command of Deputy Prime Minister Ramzan Kadyrov.

<sup>227</sup> AI, *Report 2005*, p. 209.

<sup>228</sup> *Ireland v. UK*, para 140.

<sup>229</sup> HRW, *Children in Northern Ireland*

from international human rights bodies and NGOs had an effect in stopping, at least temporarily, such physical abuse.<sup>230</sup>

The HRW investigation also showed that harassment of minors by security forces in the streets was very common. Persons under the age of 25 were often stopped by the army or police and subsequently hit, kicked, threatened, insulted and humiliated. Some were ordered to take off their shoes, or even their clothes in the middle of the street<sup>231</sup>

Police investigation into allegations of ill-treatment was often not carried out<sup>232</sup>  
Compensation for ill-treatment was paid in some cases.<sup>233</sup>

#### 6.3.4 Observations

Widespread practices of ill-treatment have been observed in all three cases, sometimes applied to obtain information from the detainee, and in some cases performed as random abuse without any particular purpose. General features are severe beatings, kicking, hooding, threats of further ill-treatment, threats against family members, and incarceration in poor conditions.

The method of painful, prolonged positioning seems to be a common feature of ill-treatment in Northern Ireland and Palestine, although the positions used are not identical. The use of electric shocks, and to a certain extent rape and various forms of mutilation, seem to be a particular feature of ill-treatment in Chechnya. Police investigation into allegations of ill-treatment is often not satisfactory, if carried out at all.

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<sup>230</sup> HRW, *Children in Northern Ireland*

<sup>231</sup> HRW, *Children in Northern Ireland*

<sup>232</sup> *Ireland v. UK*, paras 118, 140-141. HRW, *Children in Northern Ireland*

<sup>233</sup> *Ireland v. UK*, paras 107-143.

## 7 Conclusion

### 7.1 Introduction

The Advisory Opinion on the *Wall* established that human rights instruments are applicable in situations of military occupation, in interaction with humanitarian law. This position was already taken by most states, the HRC (which had consistently expressed that opinion in decisions, Concluding Observations, reports and General Comments), the UN General Assembly (expressed through various resolutions), as well as by the ICJ itself, in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Even though the Advisory Opinion on the *Wall* might not have entailed a great change of the legal situation, it has clarified and reinforced the position taken by repeating and clearly expressing it. Thus, the protection of the right to liberty and security and the right not to be subjected to ill-treatment apply in situations of military occupation

### 7.2 Permitted restrictions

According to the ICCPR and the ECHR, detention is permitted on certain conditions: Detention in a particular case must be prescribed by domestic law, it cannot be arbitrary, the detainee has a right to information and rapid procedure, and the detention must be subject to judicial control. Ill-treatment is, however, prohibited under any circumstances, which is emphasised by various human rights instruments.

According to reports, practices in contravention of the mentioned rights are common in situations of military occupation, including widespread practices of arbitrary detention and ill-treatment in custody. The occupying state often adopts counter-terrorism laws, permitting detentions that do not satisfy the conditions of human rights instrument. The harassment of human rights activists suggest that sometimes such laws are applied as



weapons against political opponents, to control or silence them. Civilians in general are also the victims of arbitrary detention, as the examples in section 6.2 show. There also seem to be a widespread practice of ill-treating detainees using various methods, sometimes amounting to torture. Most common, however, are severe beatings and incarceration in poor conditions.

However, the limits for what is permitted in time of emergency are somewhat extended, and derogation clauses (and the ground *state of necessity*) may permit the use of security measures that infringe certain human rights in time of emergency. But even these impose certain limits to the measures applied: The measures have to be strictly necessary and proportionate. Ill-treatment cannot be justified under any circumstances, but a State may derogate from the protection against arbitrary detention. This does, however, not mean that the State can carry out detentions at will and deprive detainees of all their rights. The right to *judicial control* of the detention, as well as the right to be treated with humanity in detention, have been found to constitute a non-derogable element, which cannot be diminished by derogation.

Thus, the right to liberty and security of person may be restricted (on strict conditions) to a large extent in situations of military occupation, but certain elements prevail even then. Restrictions upon the right not to be subjected to torture, inhuman or degrading treatment are not allowed, even in times of emergency.

### 7.3 Human Rights and the *War on Terrorism*

The renewed discussion of how to combat terrorism has brought some to claim that human rights must be sacrificed to security needs. This argument is particularly invoked by states struggling to maintain control in occupied territories, e.g. Israel and Russia. A growing tendency is the use of language defining political opponents, or groups of resistance in occupied territories, as *terrorists* in order to justify measures taken against them, or simply discredit their cause.

States are entitled to take strong action to prevent acts of terrorism, but there are limits on the extent to which human rights may be violated in the name of anti-terrorism action, some of which have been discussed in this thesis<sup>234</sup> The challenge ahead is to maintain these limits, and to make states comply with their international obligations under humanitarian and human rights law. Human rights bodies and NGOs are consistently emphasising the importance of respecting human rights norms. UN Secretary-General Kofi Annan stated in March 2005 that compromising human rights *cannot serve the struggle against terrorism*<sup>235</sup>

Security measures restricting human rights do not necessarily obtain the purpose of protecting the State's interests Depriving people of their rights and subjecting them to abuse will in the long run create feelings of resentment and anger, and if pushed too far, it may lead the people to take desperate measures directed against the State The State may, in turn, take measures against those acts, and so the conflict escalates The pattern has been detected in situations of military occupation, where observers have seen that it also entails less obvious consequences harming the occupying state. As expressed by the Israeli parliamentary speaker in 2002: *The jailer and his prisoner are locked up for most of the day behind the same walls and without hope ... occupation corrupts*<sup>236</sup>

It seems like the conclusion reached by John Dugard, that *the promotion and protection of human rights is the most effective method of combating terrorism*, may be true.<sup>237</sup>

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<sup>234</sup> Reports of John Dugard.

<sup>235</sup> HRW

<sup>236</sup> Report of John Dugard, 6.3.2002.

<sup>237</sup> Report of John Dugard, 29.8.2002.

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