

# Transfers of detainees: legal framework, *non-refoulement* and contemporary challenges

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## **Abstract**

*The article outlines the legal framework that governs transfers of individuals, and in particular the international law principle of non-refoulement and other obstacles to transfers. The author addresses some of the new legal and practical challenges arising in detention and transfers in the context of multinational operations abroad and analyses the contemporary practice of transfer agreements.*

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The transfer and repatriation of persons during or after armed conflict is a long-standing concern of the ICRC. During armed conflicts detainees are sometimes transferred from one warring party to another, or back to their country of origin. At the end of conflicts, the repatriation of prisoners of war or the release of security detainees poses challenges as to their safe return.

Over the past few years there have been many headlines about transfers of detainees. It is now public knowledge that within the framework of anti-terrorism measures, persons have been secretly transferred to and from various places of detention and have sometimes been mistreated during or after the transfer.

\* The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC.

In current conflicts such as those in Afghanistan, Iraq, the Democratic Republic of the Congo, Sudan and Chad, the presence of multinational forces gives rise to a number of questions. Who has the authority and capacity to detain persons captured in relation to the conflict: the host country or the members of the coalition or peacekeeping forces present on that country's territory? What legal framework applies to the transfer of persons by detainees between coalition members or countries contributing troops to a peacekeeping mission, or to transfers of persons by international troops to the host country? One of the main legal issues in this context is to what extent the principle of *non-refoulement* applies to transfers of detainees in armed conflicts and, in particular, in the course of multinational operations.

The starting point for any analysis must be the existing international legal framework governing the transfer of persons and, more particularly, the international law principle of *non-refoulement* and other legal rules. This article therefore starts by recalling international legal norms relevant for transfers. Second, it addresses some of the new challenges posed by detention and transfers in the context of multinational operations. Third, it looks at the contemporary practice of transfer agreements. Lastly, it recalls a few legal principles regarding post-transfer responsibilities of sending states.

## The principle of *non-refoulement* as the legal starting point

The principle of *non-refoulement* precludes the transfer of persons from one state to another if they face a risk of violations of certain fundamental rights. This principle is found – with some variations as to the persons it protects and the risks it protects from – in refugee law, extradition treaties, international humanitarian law and international human rights law. The following paragraphs will briefly recall its main features in the different bodies of law.<sup>1</sup>

### Legal sources of the principle of *non-refoulement*

#### *Refugee law*

The term '*non-refoulement*' is often associated with refugee law, since it is explicitly mentioned in Article 33 of the 1951 Refugee Convention.<sup>2</sup> This provision

1 The most extensive analysis of the principle of *non-refoulement* can be found in E. Gillard, 'There's no place like home: states' obligations in relation to transfers of persons', in this issue, and in Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: opinion', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2003, available at [www.unhcr.org/publ/PUBL/419c75ce4.pdf](http://www.unhcr.org/publ/PUBL/419c75ce4.pdf) (last visited 9 October 2007).

2 The principle of *non-refoulement* is also enshrined, without any limitation on security grounds, in Article 2(3) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa and reaffirmed as a rule of *jus cogens* in the Cartagena Declaration on Refugees (at para. 5). The principle also

precludes the *refoulement* – that is, forcible return or expulsion – of a refugee ‘in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. Under refugee law, the principle of *non-refoulement* is applicable to refugees (whether or not they have been recognized formally as such) and to asylum seekers. It should not be forgotten that some people captured in armed conflicts or other situations of violence may fall into these categories and are entitled to protection under refugee law. From the wording of Article 33(1) of the 1951 Refugee Convention (‘in any manner whatsoever’) it is clear that the *non-refoulement* rule is applicable to any form of forcible removal, including extradition, deportation or expulsion.<sup>3</sup>

In addition, a number of extradition treaties (whether multilateral or bilateral) as well as treaties combating terrorist or other crimes contain grounds to refuse transfers, such as the political offence exemption, non-persecution or non-discrimination clauses, non-extradition for reasons related to the requested state’s own notions of justice and fairness, or non-extradition based on international or regional human rights or refugee law.<sup>4</sup>

### *International human rights law*

The principle of *non-refoulement* is also a principle of international human rights law. Under this body of law, human rights can stand in the way of any transfer to another state, regardless of its formal nature. While some treaties use specific wording such as ‘return’, ‘expulsion’ or ‘extradition’, the formal description of the transfer is irrelevant. The underlying criterion is that of effective control over the individual: if effective control over the individual changes from one state to another, the principle applies.<sup>5</sup>

The principle of *non-refoulement* is explicitly recognized in a number of human rights instruments, e.g. in Article 3 of the Convention against Torture

appears in Article 3(3) of the Principles concerning Treatment of Refugees adopted by the Asian–African Legal Consultative Committee in 1966, with a limitation on security grounds.

- 3 For an in-depth analysis of the principle of *non-refoulement* in the 1951 Refugee Convention, see Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn, Oxford University Press, Oxford, 2007, pp. 201 ff.
- 4 Article 3 of the UN Model Treaty on Extradition; Article 3 of the 1957 European Convention on Extradition; Article 4 of the Inter-American Convention on Extradition; Article 9 of the 1979 UN Convention against the Taking of Hostages; Article 5 of the European Convention on the Suppression of Terrorism; European Union Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L, 321, 6.12.2003, p. 26; European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, OJ L190, 18 July 2002, pp. 1–20, preambular para. (13); UNHCR Executive Committee Conclusion, No. 17 (XXXI), 1980, ‘Problems of extradition affecting refugees’, paras. (d) and (e).
- 5 See Lauterpacht and Bethlehem, above note 1, para. 63; Committee against Torture (CAT), Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b) and para. 5(e).

and other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>6</sup> Article 22(8) of the American Convention on Human Rights, Article 13(4) of the Inter-American Convention to Prevent and Punish Torture, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, or Article 19(2) of the Charter of Fundamental Rights of the European Union.

More generally, as has been recognized in human rights jurisprudence, the *non-refoulement* principle is a fundamental component of the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.<sup>7</sup>

Indeed, the UN Human Rights Committee has stated that states parties to the International Covenant on Civil and Political Rights (ICCPR) may not in any manner ‘remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed’.<sup>8</sup> The European Court of Human Rights (ECtHR) has also deemed the *non-refoulement* prohibition to flow directly from the prohibition of torture and cruel and inhuman treatment in Article 3 of the European Convention on Human Rights (ECHR).<sup>9</sup> The UN Committee on the Rights of the Child has taken a similar position.<sup>10</sup>

The *non-refoulement* prohibition also covers the risk of arbitrary deprivation of life, in particular through imposition of the death penalty without

6 See Committee against Torture, General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22, UN Doc. A/53/44, 16 September 1998, annex IX.

7 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004, para. 28: ‘[t]he principle of non-refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment.’

8 Human Rights Committee, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12; and General Comment No. 31, Nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. HRI/GEN/1/Rev.1, 28 July 1994, p. 31, para. 9. The Human Rights Committee has consistently adopted the same position in its jurisprudence, e.g., *Chitat Ng v. Canada*, Communication No. 469/1991, 7 January 1994, UN Doc. CCPR/C/49/D/469/1991, para. 14.1; *Joseph Kindler v. Canada*, Communication No. 470/1991, 18 November 1993, UN Doc. CCPR/C/48/D/470/1991, para. 6.2; see the disagreement of the government of the United States with this interpretation of Articles 6 and 7 in Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, pp. 8 f.

9 European Court of Human Rights (ECtHR), *Soering v. The United Kingdom*, Judgment of 7 July 1989, Series A No. 161, para. 91; *Cruz Varas and Others v. Sweden*, Judgment of 20 March 1991, Series A No. 201, paras. 69–70; *Vilvarajah and Others v. The United Kingdom*, Judgment of 30 October 1991, Series A No. 215, p. 34, paras. 102–110; *Chahal v. The United Kingdom*, Judgment of 15 November 1996, Reports 1996-V, para. 74.

10 Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/16, 1 September 2005, paras. 27–28.

fundamental guarantees of fair trial. The Human Rights Committee has held explicitly that a risk of violation of the ICCPR's Article 6 (the right to life) constitutes an obstacle to removal from the territory.<sup>11</sup> The European Court of Human Rights has not had to decide a case of a transfer entailing a risk of arbitrary deprivation of life or death penalty without fair trial,<sup>12</sup> but has held that imposition of the death penalty in violation of fair trial principles amounts to inhuman treatment.<sup>13</sup> According to the Court's jurisprudence, a transfer would therefore be in violation of Article 3 ECHR if the person concerned faced such a risk. Moreover, given the irreparable harm that would arise from an arbitrary deprivation of life, Art 2 ECHR must be considered as bar to transfer if a person faces a risk of arbitrary deprivation of life. Thus the *non-refoulement* prohibition also covers transfers where a person risks arbitrary deprivation of life, including the death penalty without fair trial.

Moreover, under specific treaties and instruments the principle of *non-refoulement* extends to other grounds. For instance, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance prohibits the transfer of any person who faces a risk of enforced disappearance; the Charter of Fundamental Rights of the European Union prohibits the transfer of persons who risk the death penalty.<sup>14</sup> Under the jurisprudence of certain human rights bodies, the principle of *non-refoulement* can extend to other risks.<sup>15</sup> In each situation it will therefore be necessary to examine the specific treaties to which a state is party and assess whether they impose a broader ban on *refoulement* than the one mentioned here – that is, the prohibition of transfer if the person risks torture, cruel, inhuman or degrading treatment or arbitrary deprivation of life.

- 11 Human Rights Committee, General Comment No. 31, above note 8, para. 12; imposition of the death penalty without guarantees of fair trial constitutes a violation of the right to life, Human Rights Committee, General Comment on Article 6, UN Doc. HRI/GEN/1/Rev.1, 29 July 1994, para. 7.
- 12 It has left the question open in *S.R. v. Sweden*, Decision of 23 April 2003 and *Bader and others v. Sweden*, Judgment of 8 November 2005, para. 49. Note, however, that Protocols 6 and 13 are interpreted by some to entail a prohibition to transfer someone where he or she faces a risk of death penalty.
- 13 ECtHR, *Öçalan v. Turkey*, Judgment of 12 March 2003, para. 213, confirmed by the Grand Chamber in its Judgment of 12 May 2005, para. 169; *Bader and others v. Sweden*, above note 12, para. 47.
- 14 Article 19(2); see also Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*Official Journal* 2004, L 304, 30 September 2004, pp. 0012–0023), which provides for subsidiary protection where refugee law does not apply, but for other reasons such as the risk of the death penalty and torture or inhuman or degrading treatment or punishment people cannot be removed (Article 15).
- 15 For instance, the ECtHR has held that disregard for the minimum guarantees of fair trial might stand in the way of transfer: *Soering*, above note 9, para. 11; *Mamatkulov and Askarov v. Turkey*, Judgment of 4 February 2005 [GC], para. 88; see also Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/4/40, 9 January 2007, para. 49, on risk of arbitrary detention. The Committee on the Rights of the Child has also considered a number of risks which would cause irreparable harm to transferred children, such as forced recruitment: Committee on the Rights of the Child, General Comment No. 6, above note 10, p. 10.

## *International humanitarian law*

The principle of *non-refoulement* is also reflected in Article 45(4) of the Fourth Geneva Convention, which provides that

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.<sup>16</sup>

No parallel is found in the Third Geneva Convention relating to prisoners of war. Article 118 thereof states that ‘[p]risoners of war shall be released without delay after the cessation of active hostilities’. As soon as work on drafting the 1949 Geneva Conventions began, the ICRC drew the attention of states to cases where prisoners of war were repatriated against their will,<sup>17</sup> but exceptions to the obligation to repatriate were rejected by the Diplomatic Conference.<sup>18</sup> Nonetheless, the ICRC has always taken the view that, while the mere wish of prisoners of war could not be a bar to repatriation, they must not be repatriated if it would be ‘contrary to the general principles of international law for the protection of the human being’ that the supervisory bodies must be able to satisfy themselves on a case-by-case basis that the decisions of the prisoners of war have been made freely and serenely.<sup>19</sup> The ICRC has proceeded according to those principles in many conflicts, for instance in the war between Iran and Iraq,<sup>20</sup> the 1990–1 Gulf War<sup>21</sup> and the war between Ethiopia and Eritrea.<sup>22</sup>

Furthermore, the Geneva Conventions contain a much broader restriction on the transfer of prisoners of war or civilian internees between allied powers in

16 While the term ‘persecution’ is not defined in humanitarian law, it refers, as a minimum, to serious violations of human rights (right to life, freedom, security) on such grounds as ethnicity, nationality, religion or political opinion. See Article 1 of the 1951 Refugee Convention; *UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, re-edited January 1992, paras 51–53; 1998 Statute of the International Criminal Court, Article 7(2)g. See also Gillard, above note 1, with further references.

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

18 Article 109 of the Third Geneva Convention does, however, prohibit the repatriation of sick or injured prisoners against their will during hostilities. This must clearly be interpreted as also covering prisoners of war who are not wounded and sick. *Ibid.*, p. 512. The reason why it was inserted in the rules on the wounded and sick is that they were the only ones eligible for early release under the Third Geneva Convention.

19 *Ibid.*, pp. 547–9.

20 *ICRC Annual Report 1989*, p. 87.

21 *ICRC Annual Report 1991*, p. 100.

22 *ICRC Annual Report 2006*, p. 97; *ICRC Annual Report 2007*, p. 102.

international armed conflict. Article 12(2) of the Third Geneva Convention stipulates that

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

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

These two provisions do not apply as broadly as those of human rights law, in that they apply only to certain categories of persons. Article 45 of the Fourth Geneva Convention applies to aliens in the territory of a party to an international armed conflict, and Article 12 of the Third Geneva Convention applies to prisoners of war. Also, in their original sense, they apply to transfers between allied powers in an international armed conflict, and there is no parallel provision for non-international armed conflicts.

Nonetheless, the humanitarian principle underlying these provisions, namely that a detaining power should ensure that the ally to whom it transfers detainees treats them according to the standards of the Geneva Conventions, should also be taken into account in non-international armed conflict (especially in so-called internationalized non-international armed conflicts – that is, internal conflicts in which foreign troops from outside the country intervene on the side of the government). For instance, if countries contributing troops to a multinational force in a non-international armed conflict transfer detainees amongst each other, the principle underlying Articles 12(2) of the Third and 45(3) of the Fourth Geneva Convention should be taken into account.

In addition, Article 3 common to the four Geneva Conventions absolutely prohibits torture, cruel treatment or outrages upon personal dignity, in particular humiliating and degrading treatment. This provision should be interpreted in the light of the interpretation given to the parallel provisions in human rights law. If the absolute human rights law prohibition of torture and other forms of ill-treatment precludes the transfer of a person at risk of such treatment, there is no reason why the absolute prohibition in humanitarian law should not be interpreted in the same way.

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

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

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

These existing norms of humanitarian law applying to transfers do not preclude application of the *non-refoulement* principle under human rights law or refugee law. Indeed, in certain situations, as the International Court of Justice has stated, humanitarian law is *lex specialis* to human rights law.<sup>23</sup> This could in principle also be the case where humanitarian law, by its silence – that is, by not prohibiting a certain conduct – would seem to preclude the application of such a prohibition under human rights law. In this regard the limited scope of *non-refoulement* and other legal norms of transfer in humanitarian law is not to be understood as a qualified silence in the sense that the drafters consciously eliminated the possibility of more protective norms. For while humanitarian law deals with certain aspects of transfers, there is nothing in the *travaux préparatoires* of the Geneva Conventions and Protocols to indicate that the drafters considered all situations in which transfers might take place (such as transfers to another state during a non-international armed conflict) and deliberately rejected application of the *non-refoulement* principle arising from other sources of law. Nor is there any conflict between the existing set of rules in humanitarian law on the one hand and human rights or refugee law on the other. Rather, the norms of humanitarian law and those of human rights or refugee law are complementary.

A parallel can be drawn with the relationship between *non-refoulement* in refugee law and in human rights law. It has been the long-standing position of the UN High Commissioner for Refugees that lack of protection under refugee law does not preclude protection under human rights law.<sup>24</sup> This is sometimes referred to as complementary protection.<sup>25</sup> Thus, taking humanitarian law into account as an additional pertinent body of law, the three bodies of law provide complementary protection in terms of *non-refoulement* within their respective sphere of application.

23 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, pp. 226–593, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106.

24 See *Factum of the Intervenor*, UNHCR, United Nations High Commissioner for Refugees, *Suresh v. the Minister of Citizenship and Immigration; the Attorney-General of Canada*, SCC No. 27790, reprinted in *International Journal of Refugee Law*, Vol. 14 (January 2002), p. 141, at para. 27: ‘Article 3(1) [of the Convention against Torture] prevails over Article 33(2) [of the Refugee Convention]’; *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCR, January 2007, para. 11.

25 On complementary protection, see Goodwin-Gill and McAdam, above note 3, pp. 285 ff.; Jane McAdam, ‘Complementary protection and beyond: How states deal with human rights protection’, Working Paper No. 118, UNHCR, August 2005.



## Obligations under the principle of *non-refoulement*

The scope of the *non-refoulement* principle has been developed in jurisprudence and practice over time. Only a few aspects of it will be highlighted here.

First, it applies to any type of transfer, regardless of the legal designation of the transfer measure, be it expulsion, extradition, return, repatriation or any other. This is made clear, as mentioned above, by the wording of Article 33(1) of the 1951 Refugee Convention ('in any manner whatsoever'), as well as the broad language of international humanitarian law and the jurisprudence of human rights bodies. Furthermore, under both humanitarian law and human rights law, the crucial factor is the transfer of effective control from one state to the other, which means that under these bodies of law the *non-refoulement* principle can stand in the way of transfers between states, even if the person stays within the same territory. While this is not the situation originally envisaged in the relevant provisions, it is the only interpretation compatible with the very object and purpose of the *non-refoulement* principle. Indeed, obligations could otherwise be circumvented by transferring a person first, for instance, to the transferring state's own embassy or military base in another country and then from the embassy to that country's government. Through a simple formality the whole principle would be undermined.

Second, the principle of *non-refoulement* not only prohibits transfers to a country where the person will face a threat of persecution, ill-treatment or arbitrary deprivation of life, but also prohibits so-called secondary *refoulement* – that is, transfer to another state from which there is a risk of further transfer to a third state where he or she will face such a threat.<sup>26</sup> Obviously, the test must be made by the first country *ex ante*, and if there is no foreseeable risk at the time it transfers a person to another country, it cannot be held accountable if he or she is subsequently transferred to a third state. A formal requirement that transfers be subject to the *non-refoulement* principle only if a person is transferred directly to the territory where he or she is at risk would have the unreasonable result that the principle could easily be circumvented. The prohibition of secondary *refoulement* means that if detainees are transferred between members of a coalition (for instance in order to share detention facilities or procedures for transfers), the transferring force must assure itself that the force to which it transfers a person will not then transfer that person to a third country in violation of the *non-refoulement* principle. To ensure that there is no unlawful secondary *refoulement*, some transfer agreements contain clauses barring transfer from the receiving state to a third state.

26 UNHCR, Note on the Principle of Non-Refoulement, 1 November 1997; UNHCR, Note on Diplomatic Assurances, August 2006, para. 8; Human Rights Committee, General Comment No. 31, above note 8, para. 12; Committee against Torture, General Comment No. 1, Implementation of Article 3 of the Convention in the context of Article 22, A/53/44, annex IX, 21 November 1997, paras. 2 and 3; ECtHR, *T.I. v. the United Kingdom*, Appl 43844/98, Decision as to admissibility of 7 March 2000, p. 15; UNHCR EXCOM Conclusion No. 58 (XL), Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, 1989, para. f(i); Lauterpacht and Bethlehem, above note 1, para. 243.

Third, the principle of *non-refoulement* may prohibit transfers to countries where not only the receiving state's authorities constitute a potential risk, but also non-state entities or individuals if the receiving state is unable or unwilling to protect the transferee.<sup>27</sup> This is of particular relevance where the release of people from custody into certain areas might expose them not only to abuse by state authorities there, but also to retaliation or persecution by other parties. In such situations Article 5(4) of Additional Protocol II cited above, which stipulates that a detainee's safety must be ensured when he or she is released, is also relevant.

Fourth, it is important to reiterate that the principle of *non-refoulement* is absolute, with the sole exception of Article 33(2) of the 1951 Refugee Convention. None of the provisions of human rights law or international humanitarian law<sup>28</sup> allows for an exception to it. Since this principle has been derived from the absolute prohibition of torture and cruel, inhuman or degrading treatment and from the right to life itself, it is logical that states cannot, on any account, circumvent these obligations and place people in jeopardy by transferring them to other states where they risk such treatment.

In connection with counter-terrorism policies, states have sometimes questioned the absolute nature of the *non-refoulement* principle, arguing that it can compel them to keep convicted or suspected terrorists in their territory.<sup>29</sup> While this is a legitimate concern, it cannot override the consideration on which the principle is founded. Just as no reason, including war or any other emergency situation, can justify a derogation from or limitation to the absolute prohibition of torture or any other form of ill-treatment or arbitrary deprivation of life, there can be no reason that would justify a transfer exposing someone to the risk of such violations. This has been the long-standing jurisprudence of human rights bodies.<sup>30</sup>

Lastly, it is important to stress the procedural obligations of states flowing from the principle of *non-refoulement*.

27 ECtHR, *H.L.R. v. France*, Judgment of 29 April 1997, Reports 1997-III, para. 40; *D. v. The United Kingdom*, Judgment of 2 May 1997, Reports 1997-III, paras. 49–53; *Salah Sheekh v. The Netherlands*, Judgment of 11 January 2007, para. 147. The Human Rights Committee has not yet had to decide this question specifically, but its general statement on the prohibition to transfer anyone who is at risk of 'irreparable harm' is not confined to violations committed by state officials; the Convention against Torture, on the other hand, covers only torture committed by or on behalf of state agents (but also cases when non-state entities exercise quasi-governmental functions: *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, 14 May 1999, UN Doc. CAT/C/22/D/120/1998, 25 May 1999).

28 Although Article 45(5) of the Fourth Geneva Convention exempts extraditions from its scope of application.

29 See the 'Observations of the governments of Lithuania, Portugal, Slovakia and the United Kingdom intervening in the Application No. 25424/05', *Ramzy v. the Netherlands*, paras. 25–29, available at [www.redress.org/publications/GovernmentinterventionsobservationsinRamzy%20case22November.pdf](http://www.redress.org/publications/GovernmentinterventionsobservationsinRamzy%20case22November.pdf) (last visited 17 June 2008).

30 Human Rights Committee, Concluding observations: Canada, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 15; Committee against Torture, *Tapia Paez v. Sweden*, UN Doc. CAT/C/18/D/39/1996, 7 May 1997, para. 14.5; Committee against Torture, Concluding observations: Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 4(a); ECtHR, *Chahal*, above note 9, para. 80; *Saadi v. Italy*, Grand Chamber Judgment of 28 February 2008, para. 138. See also Rene Bruin and Kees Wouters, 'Terrorism and the non-derogability of *non-refoulement*', *International Journal of Refugee Law*, 15 (5) (2003).

The state that is planning to transfer a person to another state must assess whether there is a risk of violation of his or her fundamental rights, regardless of whether the person has expressed a fear or not. If the risk is considered to exist, the person must not be transferred. To ensure that the assessment is performed in a diligent manner and that the person in question will be duly heard, procedural obligations are essential.<sup>31</sup> While these obligations are not contained in humanitarian law, both human rights law and refugee law stipulate that persons who are to be transferred have the right to challenge the transfer decision before an independent and impartial body – that is, independent of the one that took the decision. This procedural right is based on general principles of human rights law, including the right to a remedy and the requirement of a fair hearing.<sup>32</sup> The extent to which the potential transferee's concern is well founded – that is, the existence of the risk – must be assessed on an individual basis.<sup>33</sup>

The threshold of risk that must be assessed differs somewhat in the articulation of different human rights bodies, but the varying formulations do not really make a substantive difference in practice. As Bethlehem and Lauterpacht summarize, 'the fullest formulation of the threshold articulated in international practice' can be described as 'circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment'.<sup>34</sup> The United States follows a different standard of proof under the Convention against Torture, according to which torture must be 'more likely than not'.<sup>35</sup> This standard, however, finds no support in the wording of Article 3 of the Convention against Torture, which speaks of 'substantial grounds for believing that he would be in

31 The procedural dimension is especially emphasised in Lauterpacht and Bethlehem, above note 1, paras. 159 f.; Gillard, above note 1. In national jurisprudence similar requirements have been imposed in: *Suresh v. Canada* (Minister of citizenship and immigration) (2002) ISCR. 3, 2002 500 1, paras 121–122 and *Khouzam v. Attorney General of the United States and others*, Decision of the United States Court of Appeals for the Third Circuit, 5 December 2008 ([www.acl.org/immigrants/gen/37887gl20081205.html](http://www.acl.org/immigrants/gen/37887gl20081205.html), viewed 6.12.2008).

32 See ICCPR, Articles 2(3), 13; ECHR, Article 13; ACHR, Article 27; Article 1 of Protocol No. 7 to the ECHR; Human Rights Committee, *Mansour Ahani v. Canada*, Communication No. 1051/2002, 15 June 2004 paras No. 6, No. 8, UN Doc. CCPR/C/80/D/1051/2002, paras 10.6–10.8; Committee against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, 24 May 2005, UN Doc. CAT/C/34/D/233/2003, para. 13.7; Committee against Torture, Concluding observations: Australia, UN Doc. CAT/C/AUS/CO/3, 22 May 2008, para. 17; Committee against Torture, Conclusions and recommendations: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 20; ECtHR, *Chahal*, above note 9, paras. 151–152; Report of the Special Rapporteur on Torture, above note 7, para. 29; Inter-American Commission on Human Rights, Decision of 28 October 2002, 'Extension of precautionary measures (N. 259) regarding detainees in Guantánamo Bay, Cuba', and Resolution No. 1/06 on 'Guantánamo Bay precautionary measures' of 28 July 2006, para. 4; see also Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 2002, para. 394.

33 This was recently reaffirmed by the Council of Europe's Steering Committee for Human Rights (CDDH), Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), 'Meeting Report, 1st Meeting', Strasbourg, 7–9 December 2005, DH-S-TER(2005)018, and 'Meeting Report, 2nd Meeting', Strasbourg, 29–31 March 2006, DH-S-TER(2006)005.

34 Lauterpacht and Bethlehem, above note 1, para. 249, with references to practices in paras. 245–248.

35 Reservations of the United States of America upon ratification of the Convention against Torture ([www.ohchr.org/english/bodies/ratification/viewed](http://www.ohchr.org/english/bodies/ratification/viewed) 9 December 2008).

danger of torture'. Substantial grounds means that there has to be a proper evidential basis for concluding that a risk exists. Further, a risk is not to be equated with a likelihood. In the words of the UK Court of Appeal, 'a "real risk" is more than a mere possibility but something less than a balance of probabilities or more likely than not'.<sup>36</sup>

While neither human rights law nor refugee law require that the review body be a court of law, it follows from general principles of human rights law, especially the right to a remedy and the guarantee of a fair hearing, that a number of minimum procedural safeguards must be respected for the remedy to be effective. Thus the authorities must inform the person concerned in a timely manner of the intended transfer, and the person must have an opportunity to make representations to the appropriate body in order to express any fears that he or she may face persecution or threats to life and limb after the transfer. This also implies that the information given to the person allows him or her to take a well-informed decision. He or she should be assisted through legal counsel.<sup>37</sup> During the review the transfer must be suspended, since otherwise the principle of *non-refoulement* would essentially be undermined, given the irreversible nature of the harm.<sup>38</sup> Depending on which legal regime is applicable, further procedural safeguards may have to be observed. In practice many countries have a system of court review of transfers.

## Transfers and the role of the ICRC

On a number of occasions the ICRC has visited detainees who fear that if released or transferred they will be subject to violations of their human rights or exposed to other risks, such as retaliation within their community. In such situations it will make known the fears of the person concerned to the authorities. It is not the ICRC's role to assess whether and to what extent the fear is well founded. The obligation to do so rests with the authorities. Nonetheless, to be able to transmit any misgivings to the transferring authorities, the ICRC often asks to conduct pre-departure interviews with the detainees.

Another aspect which concerns the ICRC is the actual transfer procedure: the ICRC frequently lends its services to facilitate the return of detainees, and especially prisoners of war, to their places of origin. In this respect it is important to clarify that if the ICRC fears that transfers would be contrary to international legal requirements, it would not be in a position to lend its services. Moreover, as a

36 England and Wales Court of Appeal, *AS & DD (Lybia) v. Secretary of State for the Home Department*, [2008] EWCA Civ 289, para. 60.

37 1951 Refugee Convention, Article 32(2). Lack of counsel was one of the factors taken into account by the European Court of Human Rights to assess the effectiveness of the remedy in *Chahal*, above note 9, para. 154.

38 See, for example, ECtHR, *Jabari v. Turkey*, Judgment of 11 October 2000, para. 50, in which the Court found that a refugee status determination procedure that did not have suspensive effect on the deportation and which did not permit a review of the merits of an application violated Article 13 of the Convention (right to a remedy); Committee against Torture, Concluding observations: Australia, above note 32, para. 17; further references on the need for a suspensive effect are found in Gillard, above note 1.

matter of general policy the ICRC only helps those people to return who want to do so – that is, if they have given their informed consent to the transfer – for it would be incompatible with its humanitarian mandate to engage in activities which, even if lawful, could be harmful to the person concerned. So even if the transfer is lawful under international law, the ICRC would not in principle lend its services to facilitate the return of people against their will.

## Transfers in the context of multinational operations

While transfers of persons are traditionally associated with transfer from the territory of one state to another, a growing phenomenon is the transfer of people in the context of multinational operations. These can take the form of operations to assist the host government, such as the International Security Assistance Force (ISAF) in Afghanistan and the Multi-National Force–Iraq (MNF-I), or of peace-keeping, peace-enforcement or peacemaking operations<sup>39</sup> under the auspices of the United Nations, carried out by states; they can also be carried out by states under the umbrella of regional organizations such as NATO or the European Union, which, in turn, have been mandated by the United Nations.

During such operations people can be transferred between troop- or police-contributing countries, between those countries and the host nation, or between the United Nations, troop- or police-contributing countries, regional organizations and the host nation.

While the complexity of such operations raises a multitude of truly challenging practical questions, it is possible – and important – to break the complex phenomenon down into its constituent parts according to the existing international legal framework, so that political and practical solutions can be found within that framework. For while the distinct nature of each such operation has legal implications for a number of issues, such as the mandate and basis for detention, it is immaterial for observance of the principle of *non-refoulement* and other legal obstacles for transfers, which apply in all situations as a matter of refugee law, human rights law and/or humanitarian law.<sup>40</sup>

### Application of the principle of *non-refoulement*

The first question to arise is whether the principle of *non-refoulement* can apply, as it stands, to persons who are detained by forces abroad. This will depend on the applicable body of law.

Under international humanitarian law, Article 12 of the Third Geneva Convention protects prisoners of war against transfers, wherever they are

39 For a description of the various forms of multinational operations under the auspices of the United Nations, see United Nations Peacekeeping Operations, Principles and Guidelines, ‘Annex 2’, UN Department of Peacekeeping Operations, Department of Field Support, pp. 94 ff.

40 The only exception which could modify the obligations of *non-refoulement* would be a Security Council resolution pursuant to Chapter VII of the United Nations Charter, as will be discussed below.

imprisoned, and Article 45 of the Fourth Geneva Convention similarly protects any persons who are aliens in the territory of a party to a conflict. Article 5(4) of Additional Protocol II applies to detainees in a non-international armed conflict, including those held by a party engaged in such a conflict abroad.

As for refugee law, UNHCR's position is that the principle of *non-refoulement* 'applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.'<sup>41</sup> The decisive criterion for UNHCR is whether persons 'come within the effective control and authority of that State'.<sup>42</sup>

With regard to human rights law, a discussion of the respective scope of application of the various human rights treaties is beyond the scope of this article.<sup>43</sup> For present purposes, suffice it to recall that the International Court of Justice has generally held that human rights obligations apply not only on the territory of a country, but also abroad.<sup>44</sup> International human rights bodies have held that human rights treaties apply whenever state authorities have the overall control over a territory<sup>45</sup> or when they have control over an individual.<sup>46</sup>

41 *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, above note 24, para. 24, in which UNHCR explicitly distances itself from the decision of the US Supreme Court in *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155 (1993).

42 *Ibid.*, at para. 43.

43 For a more detailed discussion of the extraterritorial application of human rights treaties, see Cordula Droège, 'Between dissonance and harmony: humanitarian law and human rights', in this issue.

44 ICJ, *Nuclear Weapons* case, above note 23, para. 25; ICJ, *Wall* case, above note 23, paras. 106–111; *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, para. 216.

45 ICJ, *Wall* case, above note 23, paras 107–113; *DRC v. Uganda* case, above note 44, paras. 215–220; Human Rights Committee, General Comment No. 31, above note 8, para. 10; Human Rights Committee, Comments of the Human Rights Committee: Cyprus, CCPR/C/79/Add.39, 3 August 1994, para. 3; Human Rights Committee, Concluding observations: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11; ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A 310, para. 62; *Cyprus v. Turkey*, Judgment of 10 May 2001, Reports 2001-IV, para. 77; *Bankovic & Others v. Belgium and 16 Other Contracting States*, Application No. 52207/99, admissibility decision [GC], 12 December 2001, para. 70.

46 Human Rights Committee, *López Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3; *Celiberti v. Uruguay*, UN Doc. CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3; Committee against Torture, Conclusions and recommendations: United Kingdom, above note 5, para. 4(b); Committee against Torture, Conclusions and recommendations: United States of America, above note 32, paras. 15 and 20. For the United States' arguments see United States' response to the Committee against Torture's list of issues to be considered during the examination of the second periodic report of the United States of America, UN Doc. CAT/C/USA/Q/2, 26 April 2006, pp. 33–7; ECtHR, *Öcalan*, above note 13, para. 93; *Issa & others v. Turkey*, Judgment of 16 November 2004, para. 71; Inter-American Commission on Human Rights, *Coard v. the United States*, Case 10.951, Report No. 109/99, 29 September 1999, para. 37; UK House of Lords, *Al-Skeini and others v. Secretary of State for Defence*, [2007] UKHL 26. In a recent judgment the Federal Court of Canada rejected the application of the Canadian Charter of Rights and Freedoms to persons detained in Canadian military custody in Afghanistan, but held that international law did apply to such persons. It did not make any statements as to the applicability of specific international human rights treaties: Federal Court of Canada, *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defense and Attorney-General of Canada*, Judgment of 12 March 2008, 2008 FC 336.

Thus if a country detains a person abroad and therefore has effective control over him or her, human rights law and the principle of *non-refoulement* flowing from it apply. It is important to note that such control is not contingent upon a formal requirement such as a formal detention. Effective control is the decisive criterion for the application of human rights because it is the factual criterion which makes it possible to assign responsibility for respect for human rights to state authorities. It is immaterial how long any deprivation of liberty lasts and how it is designated formally (arrest, *garde à vue*, detention, temporary detention, etc.). The principle of non-refoulement applies to short- and long-term deprivation of liberty.<sup>47</sup> So, if a transfer occurs immediately after a person is arrested, captured or even voluntarily surrenders to the authorities, the mere fact of being able to compel him or her to move from the control of one state to another against his or her will demonstrates that the authorities have control over that person.<sup>48</sup> In some situations, forces present in another state do not detain a person for any length of time, but instead hand him or her over to the host nation immediately after arrest or capture. In those cases the principle of *non-refoulement* applies by virtue of the fact that the transferring forces did assume enough effective control over the person to transfer him or her, however short the period of control may have been.

As pointed out above, the principle also applies in situations where a person is transferred within the territory of one state, but out of the effective control of one state to the effective control of another, for example if a person held by a multinational force is transferred to the authorities of the host country. The material question is whether the person faces a risk, not whether the person crosses a physical frontier.<sup>49</sup> In military operations abroad, in which a country or organization holds people 'on behalf of' or with the agreement of the host nation, that country or organization nonetheless does in fact have effective control over them and has the power to transfer a person or not. The principle of *non-refoulement* applies.<sup>50</sup>

### Attribution to the international organizations and/or contributing nations

In multinational operations people may be captured, detained or transferred by the forces of troop- or police-contributing countries. The first question that arises in

47 See ICCPR, Article 9(1); ECHR, Article 5; American Convention on Human Rights, Article 7; African Charter on Human and Peoples' Rights, Article 6. All these articles apply to arrest and detention.

48 Danish Ministry of Foreign Affairs, 'Non-paper on legal framework and aspects of detention', *Copenhagen Conference: The Handling of Detainees in International Military Operations*, 11–12 October 2007, Denmark, p. 12: 'a transfer will basically imply that the receiving State assumes the responsibility of the detainees'.

49 Gillard, above note 1; Lauterpacht and Bethlehem, above note 1, para. 114.

50 Committee against Torture, Conclusions and recommendations: United Kingdom, above note 5, paras. 4(b) and 5(e). The United Kingdom rejects the applicability of Article 3 of the Convention against Torture to detainees of the UK in Iraq and Afghanistan. See Comments by the United Kingdom to the Conclusions, CAT/C/GBR/CO/4/Add.1, 8 June 2006, para. 14.

the event of such a transfer is who is legally carrying it out – that is, to whom it is attributable – to the organization, the country, or both?

In an operation conducted under the auspices of an international organization (i.e. the United Nations or a regional organization), the transfer is attributable to that organization if it exercises effective control over the measure taken.<sup>51</sup> Usually this is the case if it exercises operational control and command over the transfer measure.<sup>52</sup> This means that for every operation the actual situation must be analysed in order to know who ultimately decides on the measure in question.

As regards the United Nations, a simple authorization of the Security Council for states to carry out the operation (e.g. Operation Turquoise in Rwanda, UNOSOM in Somalia<sup>53</sup>) will not usually suffice to attribute to the United Nations acts carried out by their contingents. For instance, while Security Council Resolution 1546 expressly authorizes the Multinational Forces in Iraq to carry out ‘internment where this is necessary for imperative reasons of security’, detainees are under the exclusive control not of the United Nations, but of the United States and the United Kingdom, which decide on detention, release and transfer.<sup>54</sup> In the case of the International Security Assistance Force in Afghanistan, for instance, the decision to transfer lies exclusively with the troop-contributing countries and not with NATO or the United Nations. This is borne out by the fact that many of these countries have concluded separate bilateral agreements on transfers with the government of Afghanistan which contain guarantees for the treatment of detainees.<sup>55</sup>

Transfer measures will usually be attributed to the United Nations if a peacekeeping force is conceived as one of its subsidiary organs (e.g. UNMIK in Kosovo, MONUC in the Democratic Republic of the Congo).<sup>56</sup> In practice,

51 Responsibility of international organizations – comments and observations received from international organizations, A/CN.4/545, 25 June 2004, pp. 17–18. See also the statements of states in the *Behrami* case, which mainly argued that the relevant criterion was ‘effective overall control’. ECtHR, *Behrami v. France and Saramati v. France, Germany and Norway*, Applications No. 71412/01 and 78166/01, Decision as to Admissibility [GC], paras 82, 98, 104, 113.

52 Report of the Secretary-General on the administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, UN Doc. A/51/389, 20 September 1996, paras. 17–18; Response of the UN Secretariat to the International Law Commission, UN Doc. A/CN.4/545, 25 June 2004, pp. 17–18; Responsibility of international organizations – comments and observations received from governments and international organizations, UN Doc. A/CN.4/556, 12 May 2005.

53 Report of the Commission of Inquiry established pursuant to Security Council Resolution 885 (1993) to investigate armed attacks on UNOSOM II personnel which led to casualties among them, UN Doc. S/1994/653, 1994.

54 *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL, para. 23.

55 See statement by Colonel Stephen P. Noonan in the case of *Amnesty International Canada*, above note 46, para. 33.

56 See ‘Agreements for settlement of claims in relation to damages suffered in the course of operations in Congo’, UN *Treaty Series*, Vol. 535, p. 191, at p. 199; Report of the Secretary-General on financing of United Nations peacekeeping operations, above note 52, paras. 7–8; letter of the UN Legal Counsel to the Director of the Codification Division of 3 February 2004, quoted in Second report on responsibility of international organizations by Mr Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/541, 2 April 2004, para. 36.



however, even when operations are conceived as such subsidiaries they are nonetheless made up of state contingents, and the home countries will frequently interfere with the UN operational command and give orders to their contingents, especially where they operate detention facilities. In those situations it might be possible that detention and transfer are attributable either exclusively to the troop-contributing country or to both the country and the UN or regional organization if both have effective control.

While the question whether dual attribution is possible is not fully settled in doctrine,<sup>57</sup> in some situations it might be the legal reading most appropriate to the factual circumstances of the case. As the Special Rapporteur on the Responsibility of International Organizations of the International Law Commission writes, ‘what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control. This would also leave the way open for dual attribution of certain conducts’.<sup>58</sup>

International human rights bodies have similarly focused on the remaining control by the troop-contributing country and have held that the latter continues to be bound by its obligations under human rights law even if it transfers some of its powers to an international organization. For instance, the Human Rights Committee has stated that

a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. ... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.<sup>59</sup>

While the European Court of Human Rights takes a more complex approach, it likewise continues to hold states accountable for their conduct in pursuance of their obligations as members of international organizations. It has indicated in its jurisprudence that a state is not entirely absolved of its obligations under the European Convention on Human Rights if it transfers sovereign powers

57 For the possibility of dual attribution see Second report on responsibility, above note 56, para. 6; ‘Agreements for settlement of claims: Congo’, above note 56; see also the positions of states referenced in the Report by Mr Gaja, above note 56, para. 44; In the *Behrami* case, above note 51, paras. 135, 139, the European Court of Human Rights appears to have ignored the possibility of dual attribution.

58 Second report on responsibility, above note 56, para. 48.

59 Human Rights Committee, General Comment No. 31, above note 8, para. 10; see also Human Rights Committee, Concluding observations: Belgium, UN Doc. CCPR/C/79/Add.99, 19 November 1998, para. 14; Human Rights Committee, Concluding observations: Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001, para. 8; Human Rights Committee, Concluding observations: Belgium, UN Doc. CCPR/CO/81/BEL, 12 August 2004, para. 6.

to an international organization. In the *Bosphorus* case, the Court held that there will be a presumption that the state acts in conformity with the European Convention on Human Rights if it acts in compliance with legal obligations flowing from membership in an organization whose protection of fundamental rights is equivalent to that afforded by the European Convention.<sup>60</sup>

In the recent decision in the cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the Court attributed the detention of persons by national contingents within the framework of KFOR (Kosovo Force) operations to the United Nations, because it found that ultimate effective control lay with the United Nations.<sup>61</sup> While the application of the Court's general findings to the facts of the case seems rather stretched in this decision, the important point is that the European Court of Human Rights follows the approach that the conduct in a multinational operation is attributable to the organization or state which has effective control and command. Since the Court expressly distinguished the facts of the *Behrami* case from those of the *Bosphorus* case, it is to be assumed that it would uphold its jurisprudence on responsibility of states under the European Convention in cases where the conduct is attributable to the state.

It is possible that the Court will in future exercise restraint in adjudicating on any conduct of states party to the European Convention on Human Rights pursuant to a Chapter VII resolution of the Security Council. While this might be compatible with the primacy that the Charter takes over other treaties, it is problematic in terms of attribution, which is solely regulated by the factual question of effective control.

To sum up, the attribution of conduct in the event of transfers of persons will depend on a factual assessment of which organization and/or state has effective control, which will typically be the one that has operational command and control. In any case, either the country or the organization is responsible, if not both. There is consequently no gap as far as the obligation to respect refugee law, human rights law and humanitarian law is concerned.

## Legal responsibilities of international organizations in respect of transfers

While the *non-refoulement* principle has been codified and developed in the context of transfers carried out by states, there is no question that the United Nations and regional organizations are also bound by it, insofar as it is customary law.<sup>62</sup> Indeed, it is a long-standing principle that the United Nations and

60 ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, Judgment of 30 June 2005, paras 149–158.

61 ECtHR, *Behrami*, above note 51, paras. 133–141.

62 For the customary nature of the principle of *non-refoulement*, see Goodwin-Gill and McAdam, above note 3, pp. 345–55; Lauterpacht and Bethlehem, above note 1, para. 63; UNHCR, 'The principle of *non-refoulement* as a norm of customary international law: Response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93', 31 January 1994.

international organizations are bound by rules of international law to the extent that they carry out functions that have a bearing on such rules. As the International Court of Justice held in its advisory opinion in the *WHO and Egypt* case, ‘International Organizations are subject to international law, and as such, are bound by any obligations incumbent upon them under general rules of international law.’<sup>63</sup> These obligations are circumscribed by limits of the international organization’s mandate – that is, its purposes and functions as specified or implied in its constituent documents and developed in practice.<sup>64</sup>

International organizations like the United Nations or the European Union carry out detention and transfers of detainees; these activities may affect the concerned persons’ rights under humanitarian law, human rights law and refugee law. Insofar as the obligations under those bodies of law are part of customary law, such organizations are bound by them.

Beyond the responsibility arising from direct attribution to them, international organizations are also bound by the obligation to *ensure respect* for international humanitarian law.<sup>65</sup> Thus, if a multinational operation is carried out under the umbrella of an international organization, that organization is particularly well placed to take steps to prevent and terminate violations of international humanitarian law committed by the state. In such cases it should exert its influence as far as possible within the framework of its relations with the state concerned.

### The challenge of differing international obligations and differing capacities of contributing countries

It is sometimes argued that the *non-refoulement* principle with its various legal bases cannot apply to multinational operations since it relies on too many different bodies of law; that it would be impracticable if different contributing countries have different obligations, especially under regional human rights treaties.<sup>66</sup>

It is true that the diversity of legal obligations may give rise to a number of practical problems and may result in the somewhat incongruous situation that different persons in a same host nation might be protected by different legal obligations. But this consideration cannot put into question the legal rules. The legal position remains that states cannot absolve themselves from their obligations under international law by adhering to international organizations or by

63 ICJ, *Interpretation of the agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports 1980, p. 73, para. 37.

64 ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at p. 180.

65 See Article 1 common to the 1949 Geneva Conventions; ICJ, *Wall* case, above note 23, paras. 159, 160.

66 This consideration appears to underlie the decision in the case of *Behrami*, above note 51, where it was also argued by states (at paras. 90, 101, 111, 115); it is also an important consideration in *Amnesty International Canada*, above note 46, para. 274.

contributing to multinational operations. To the extent that states have effective control by virtue of the transfer, the obligations flowing from such control are incumbent upon them. This legal position is not unrealistic in view of the existing practice in multinational operations; on the contrary, it is common practice of contributing countries in multinational operations to abide by rules that are above the common denominator, either out of legal or policy considerations. For instance, European countries or the United Nations traditionally follow a policy not to transfer people to a country where they would face the death penalty, even though other countries might do so. Another example is the decision by the Canadian government to suspend transfers for a period, out of concern for the treatment of individuals upon transfer.<sup>67</sup> Nonetheless, practical considerations of consistency evidently make it desirable from the point of view of contributing countries to have a uniform standard, and clarity as to that standard.

### Security Council resolutions under Chapter VII of the UN Charter

One question that might arise in the framework of multinational operations under Chapter VII of the UN Charter is whether transfers in such operations will also be governed by the principle of *non-refoulement* and other relevant legal norms. Or can the obligations flowing from the principle of *non-refoulement* be disregarded in operations conducted with the authorization of the Security Council or as delegated operations of it?

A parallel could be drawn to the European Court of Human Rights holding in the cases of *Behrami*. The Court argued that

The Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including ... with the effective conduct of its operations.<sup>68</sup>

In a similar vein it has been argued with regard to the transfer of persons held by ISAF contributing troops to the government of Afghanistan that 'to interpret human rights obligations of one State as precluding the transfer of detainees taken prisoner in Afghanistan and held there to the Government of Afghanistan would be to frustrate the achievement of the objectives of the resolutions establishing ISAF and defining its mandate'.<sup>69</sup>

67 See Canada's suspension of its transfers to the Afghan government: *Amnesty International Canada*, above note 46, para. 61.

68 *Ibid.*, para. 149.

69 Christopher Greenwood, *International Law Framework for the Treatment of Persons detained in Afghanistan by Canadian Forces*, Report submitted to the Federal Court of Canada in the case of *Amnesty International Canada*, above note 46, para. 33.

Indeed, it is widely accepted by jurisprudence,<sup>70</sup> states<sup>71</sup> and parts of doctrine<sup>72</sup> that the Security Council is not bound to respect all international law obligations apart from the UN Charter itself. If a multinational operation is conducted under the auspices of a Security Council resolution under Chapter VII of the Charter, the obligations of member states flowing from that resolution can override most obligations under international law, including humanitarian and human rights law, by virtue of the Charter's Articles 25 and 103.<sup>73</sup> In principle, this includes not only humanitarian and human rights treaty law, as the wording of Article 103 would indicate, but also customary law.<sup>74</sup>

However, two considerations must be taken into account when considering the legal impact of Chapter VII resolutions.

The first is that Chapter VII resolutions cannot displace peremptory norms of international law (*jus cogens*).<sup>75</sup> While not all aspects of the *non-refoulement*

70 ICJ, *Orders of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America and Libyan Arab Jamahiriya v. United Kingdom)*, ICJ Reports 1992, p. 16, para. 42 and p. 113, para. 39; European Court of First Instance, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of 25 September 2005, *Official Journal C/281/17*, para. 181; *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Case T-306/01, Judgment of 25 September 2005, *Official Journal C/281/17*, paras. 233, 234; ECtHR, *Behrami*, above note 51, para. 149; *Al-Jedda* (UKHL), above note 54. In the *Al-Jedda* case, however, a majority of the Lords did not consider that Article 5 of the ECHR was entirely displaced, but that it was qualified (*Ibid.*, paras 39, 125, 126, 136).

71 See, in particular, the argumentation of states in *Behrami*, above note 51, paras. 97 (Denmark), 102 (Estonia), 106 (Germany), 113 (United Kingdom); argumentation of the United Kingdom in the European Court of First Instance, *Yassin Abdullah Kadi*, above note 70, para. 177.

72 Jochen Frowein and Nico Krisch, 'Commentary to Article 42', in B. Simma (ed.), *The Charter of the United Nations*, 2nd edn, 2002, para. 27; Marten Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation', *International Review of the Red Cross*, Vol. 86 (856) (December 2004), p. 763; Steven R. Ratner, 'Foreign occupation and international territorial administration: the challenges of convergence', *European Journal of International Law*, Vol. 16 (2005), p. 710. A number of authors take a more differentiated view and argue that the Security Council must be bound by at least some parts of these bodies of law: Marco Sassòli, 'Legislation and maintenance of public order and civil life by occupying powers', *European Journal of International Law*, Vol. 16 (2005), p. 661 (at p. 681, Sassòli argues that any derogation from international humanitarian law by the Security Council must be explicit); Robert Kolb, 'Occupation in Iraq since 2003 and the powers of the Security Council', *International Review of the Red Cross*, Vol. 90 (869) (March 2008), p. 29, at p. 33, sets a limit at rules 'of a fundamentally humanitarian character'; Luigi Condorelli argues that the Security Council must respect international humanitarian law in its entirety: 'Le statut des Forces des Nations Unies et le droit international humanitaire', in Claude Emanuelli (ed.), *Les Casques bleus: Policiers ou Combattants?*, 1997, p. 89, at pp. 105–6.

73 Since Articles 40 and 42 of the Charter refer to 'necessary measures', there is some indication that the Security Council should be guided by the principle of proportionality. However, the Charter leaves such broad leeway to the Security Council in the exercise of its powers that only measures that were manifestly out of proportion to the aim pursued would be contrary to the Charter. See Frowein and Krisch, above note 72, para. 30; Kolb, above note 72, p. 35.

74 Rudolf Bernhard, 'Commentary to Article 103', in Simma, above note 72, para. 21.

75 See the Vienna Convention on the Law of Treaties, Articles 5, 53 and 64; European Court of First Instance, *Yassin Abdullah Kadi*, above note 70, para. 226 (note that the ECJ appears to adopt a rather broad view of the content of *jus cogens* with regard to human rights obligations, see paras 231, 282 of the same judgment); Separate Opinion of Judge Lauterpacht in the Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia*

principle can be considered *jus cogens*, an argument can be made that at least insofar as *non-refoulement* is inherent to the prohibition of torture, it falls under the *jus cogens* prohibition of torture.<sup>76</sup> It has also been argued that the *non-refoulement* prohibition in refugee law is *jus cogens*.<sup>77</sup>

Second, while it is understood that the Security Council is not entirely bound by international law as a whole, it is also accepted that as promotion of human rights is one of the purposes and principles of the United Nations,<sup>78</sup> a complete disregard for human rights law and humanitarian law would violate the Charter, for the Security Council is meant to exercise its powers in accordance with the purposes and principles of the United Nations.<sup>79</sup> Indeed, the Security Council has sometimes found violations of these bodies of law to constitute threats to international peace and security and has called for compliance with them in numerous resolutions.<sup>80</sup>

The extent to which a Security Council resolution must be explicit or unequivocal in order to displace international law is not at all clear. For instance, if the Security Council were unequivocally to order transfers of persons to the host country, leaving no discretion to the troop-contributing countries, this could displace the *non-refoulement* principle, short of its *jus cogens* dimension. But Security Council resolutions, being the result of political compromises, are typically formulated in a broad manner. In general, they will contain wording like ‘take all necessary measures’. Even where a resolution goes into greater detail, such as Resolution 1546, which authorizes ‘internment where this is necessary for imperative reasons of security’ for MNF-I in Iraq, there is no indication as to how these measures will be implemented. The presumption, therefore, must be that member states will carry out these measures in conformity with existing international law, unless otherwise indicated.<sup>81</sup> A contrary presumption, that in doubt international law may be violated, would be implausible.

and Montenegro), Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 440, para. 100; Frowein and Krisch, above note 72, para. 29; Kolb, above note 72, p. 35.

76 See UNHCR, Note on Diplomatic Assurances, August 2006, above note 26, para. 16; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Anto Furundzija*, Case IT-95-17/1, Trial Chamber II, Judgment of 10 December 1998, para. 144; note that the European Court of First Instance seems to accept that the prohibition of inhuman or degrading treatment constitutes *jus cogens*: European Court of First Instance, *Yassin Abdullah Kadi*, above note 70, para. 240.

77 UNHCR, Executive Committee, Conclusion No. 25, General conclusion on international protection, 1982, para. (b); Conclusion No. 79, General conclusion on international protection, 1996, para. (d); Cartagena Declaration on Refugees, para. 5; Jean Allain, ‘The *jus cogens* nature of *non-refoulement*’, *International Journal of Refugee Law*, Vol. 13 (2001), p. 533.

78 Charter, Article 1(3).

79 *Ibid.*, Article 24(2); Frowein and Krisch, above note 72, para. 28; Kolb, above note 72, p. 35.

80 Frowein and Krisch, above note 72, pp. 724–5, with references.

81 The Security Council explicitly mentioned Article 103 in Resolution 670 of 25 September 1990, where it recalled ‘the provisions of Article 103 of the Charter’ and ‘decide[d] that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement ...’. The Security Council has subsequently affirmed the primacy of its decisions in numerous resolutions. See reference in Jean-Marc Thouvenin, ‘Commentaire à l’article 103’, in Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds.), *La Charte des Nations Unies*, 3rd edn, 2005, p. 2144.

Thus when a Security Council resolution allows for ‘all necessary measures’, especially if in support of a host country, this could be interpreted to not only include the use of force but also detention or internment, as well as transfers to the host country. However, the resolution will not have defined in any manner what legal framework will govern such use of force, detention or transfer. It must be presumed that such measures will be implemented in conformity with international law, unless otherwise explicitly indicated or unless the formulation is unequivocal and cannot be interpreted in a meaningful manner without requiring a displacement of existing international law.

Going even further, the European Court of Justice has held in the context of measures taken pursuant to Security Council resolutions under Chapter VII that, as far as acts of the European Community were concerned, ‘respect for human rights is a condition for the lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community’.<sup>82</sup> Thus, as a matter of European Community law, even measures taken pursuant to Chapter VII must comply with European human rights law.

Needless to say, even though the Security Council is not bound by all norms of humanitarian and human rights law, basic humanitarian and human rights principles would strongly militate in favour of Security Council-mandated operations to be conducted in accordance with these bodies of law.

### ICRC standpoint on interventions in multinational operations

From an ICRC standpoint, it must be stressed that the legal attribution is not the only relevant criterion for its humanitarian dialogue with the authorities. The ICRC may notify several authorities of its concerns with regard to transfers, and not only the authority which is ultimately legally responsible under international law.

In principle, it first submits its bilateral interventions to the authority that has direct control over persons of concern (e.g. the prison authority) and, depending on the case or type of violation, at various levels of authority.<sup>83</sup> In its confidential bilateral dialogue with parties to conflicts, the level at which the ICRC engages with the authorities will depend on where it can hope to prevent unlawful or harmful behaviour or make it cease. If, in the context of multinational operations, ultimate legal responsibility rests with an international organization, the ICRC could, for instance, hold a dialogue both with the detaining and transferring authorities of the troop-contributing country and with the authorities of the

82 European Court of Justice (Grand Chamber), *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Joint cases C-402/05 P and C-415/05 P, Judgment of 3 September 2008, para. 284.

83 ‘Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of the other fundamental rules protecting persons in situations of violence’, *International Review of the Red Cross*, Vol. 87 (858) (June 2005), p. 393, at p. 394.

United Nations or regional organization on whose behalf the country carries out the transfer and to which the transfer decision is ultimately attributable.

If the ICRC is unable to improve the situation through bilateral confidential representations, it may, in accordance with the principles and guidelines that determine its action, resort to humanitarian mobilization. It does so on the basis of Article 1 common to the Geneva Conventions, which enshrines an obligation of all states to respect and ensure respect for the Conventions. In this case, it can share its concerns about violations of the law with governments of third countries, with international or regional organizations, or with persons able to support it in seeking to influence the behaviour of parties to a conflict. However, the ICRC only takes such steps when it has every reason to believe that the third parties approached will respect the confidential nature of its representations to them.

## Transfer agreements

When people are suspected of or convicted for criminal activity, especially terrorist activities, states have a very high incentive to remove such persons from their territory. As their *non-refoulement* obligations can hinder such removal, many states resort to agreements with the receiving states in which the latter give assurances as to the proper treatment of the transferred persons.<sup>84</sup> These

84 This has been the subject of wide discussion: see John B. Bellinger, Legal Advisor to the Secretary of State before the House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight, Diplomatic Assurances, ‘Statement of the Honorable John B. Bellinger, III, Legal Adviser, U. S. Department of States’, 10 June 2008; Kate Jones, ‘Deportations with assurances: Addressing key criticisms’, *International and Comparative Law Quarterly*, Vol. 57 (2007), p. 183, with further references at p. 184 on assurances entered by the United Kingdom; High Commissioner for Human Rights, Human Rights Day Statement, ‘On Terrorists and torturers’, 7 December 2005, available at [www.unhchr.ch/hurricane/hurricane.nsf/0/3B9B202D5A6DCDBCC12570D00034CF83?opendocument](http://www.unhchr.ch/hurricane/hurricane.nsf/0/3B9B202D5A6DCDBCC12570D00034CF83?opendocument) (last visited 20 October 2008); Report of the High Commissioner for Human Rights on protection of human rights and fundamental freedoms while countering terrorism to the UN Commission on Human Rights, UN Doc. E/CN.4/2006/94, 16 February 2006, paras 9–10, 18–20; Report of the Special Rapporteur on Torture, above note 7, paras. 29–30; Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2005/103, 7 February 2005, paras. 54–56. See also Human Rights Committee, Concluding observations: Yemen, UN Doc. CCPR/CO/84/YEM, 9 August 2005, para. 13; Human Rights Committee, Concluding observations: Canada, UN Doc. CCPR/C/CAN/CO/5, above note 30, para. 15; Human Rights Committee, Concluding observations: United Kingdom, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008, para. 12; Replies to the list of issues by the United Kingdom, UN Doc. CCPR/C/GBR/Q/6/Add.1, 18 June 2008, paras 84–97; Committee Against Torture, Concluding observations: Canada, UN Doc. CAT/C/CR/34/CAN, above note 30, paras 4(b), 5(e); Committee against Torture, Conclusions and recommendations: United Kingdom, above note 5, para. 4(d); Human Rights Watch, *Empty Promises: Diplomatic Assurances no Safeguard against Torture*, April 2004; Human Rights Watch, *Still at Risk, Diplomatic Assurances no Safeguard against Torture*, April 2005; Center for Human Rights and Global Justice, NYU Law, *Torture by Proxy: International and Domestic Law applicable to ‘Extraordinary Renditions’*, 2004; Centre for Human Rights and Global Justice, NYU Law, *Beyond Guantanamo: Transfers to Torture One Year After Rasul v. Bush*, January 2005; Amnesty International, *Afghanistan – Detainees Transferred to Torture: ISAF Complicity?*, November 2007, ASA 11/011/2007.



agreements – which can take many forms and can be binding or non-binding – are often referred to as diplomatic assurances and are meant to ensure that transferred persons will be treated in accordance with international standards.

The reason for entering into such agreements is that states cannot detain people indefinitely or cannot detain them at all under their national law for security reasons, or consider them to constitute a threat to national security.<sup>85</sup> Sometimes states find alternative solutions, such as transfer to third countries.<sup>86</sup> However, it is not an easy task to find countries willing to accept the persons concerned.

Similarly, transfer agreements are becoming an increasingly common feature in multinational operations. In Afghanistan, for instance, a number of members of ISAF have concluded agreements with the Afghan government on the transfer of detainees.<sup>87</sup> One of the reasons given by these states is that they are invited to support the host government, which retains the primary responsibility for maintaining law and order, and do not want to encroach on its sovereignty.<sup>88</sup> Also in Afghanistan, for instance, it is NATO policy to transfer or release detainees in principle within 96 hours.<sup>89</sup> Another much more practical reason is that states or international organizations might not have any capacity to hold people in custody, as in Afghanistan, where some countries contributing to ISAF have no detention facility. These considerations do not, however, provide a legal argument against the validity of the *non-refoulement* principle under international law. Clearly, if states are present in situations of armed conflict, it is foreseeable that they will have to take people under their effective control, in which case they will be responsible for those persons' well-being. Furthermore, it is possible to transfer people between countries contributing to a multinational force, as long as the transferring state ascertains that the receiving state will not violate its obligations under the *non-refoulement* principle or its broader obligations under Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention in cases of international armed conflict.

It is true, however, that *non-refoulement* obligations can present a considerable challenge to states unable to transfer people back to their countries of origin, but without any framework for dealing with them. In such situations, states

85 This is indeed a concern in some immigration regimes. See Committee against Torture, Concluding Observations: Australia, above note 32, para. 11(b).

86 Seeking legal admission to a third country is explicitly foreseen for refugees who are expelled for security reasons, 1951 Refugee Convention, Article 32 (3).

87 Such transfer agreements have been concluded, for instance, between the government of Afghanistan and the those of Canada, Denmark, the Netherlands, Norway and the United Kingdom respectively.

88 See argument of the Canadian government in Federal Court of Canada, *Amnesty International Canada*, above note 46, para. 85. This was also the underlying consideration in the United States Supreme Court decision in *Munaf et al. v. Green, Secretary of the Army et al.*, 12 June 2008, pp. 17–23, in which American citizens held by US forces in Iraq requested *habeas corpus* protection against being transferred to the Iraqi justice system. The Supreme Court rejected the case, but appeared to reserve the right to grant *habeas corpus* to a person who would be at risk of torture, pp. 24–5; see also Greenwood, above note 69, paras. 48, 61.

89 ISAF, 'Standard operating procedures: Detention of non-ISAF personnel', 31 August 2006, para. 7.

have sometimes found alternative solutions, such as prolongation of temporary detention; release of individuals who do not pose a serious risk, accompanied by surveillance measures and regular appearances before government authorities; transfers to third states; or transfers limited to specific detention facilities where the person does not run a risk or specifically excluding detention facilities where he or she would run a risk.<sup>90</sup>

## Transfer agreements and international obligations

Transfer agreements frequently contain some sort of post-transfer mechanisms to monitor compliance with the agreement. For instance, they may contain clauses that the transferring state's diplomatic or consular authorities, or bodies such as national human rights commissions, have a right to visit the transferee.

Transfer agreements do not, *per se*, relieve the country of its obligations under the *non-refoulement* principle, in particular the obligation to make an individualized assessment as to whether the potential transferee will face a risk of persecution, ill-treatment or arbitrary deprivation of life, during which the person concerned must be able to make his or her concerns heard.<sup>91</sup> This is no different from conflicting obligations arising, for instance, from the principle of *non-refoulement* and extradition treaties. In those situations too, the obligation to transfer arising from the extradition treaty is overridden by the principle of *non-refoulement*.<sup>92</sup> As mentioned above, the *non-refoulement* principle is absolute,<sup>93</sup> and states cannot absolve themselves from its requirements by entering into other agreements.

Any diplomatic assurance received is only one of many relevant factors that must be taken into account in assessing whether and to what extent the fears of the individual are well founded.<sup>94</sup> In determining the weight, if any, to be given to

90 This was accepted by the European Court of Human Rights in the case of *Al-Moayad v. Germany*, Appl. No. 35865/03, Decision of 20 February 2007, paras. 65–72.

91 With regard to refugee law see UNHCR, Note on Diplomatic Assurances, above note 26, paras 27, 36: in UNHCR's opinion, 'diplomatic assurances should be given no weight when a refugee who enjoys the protection of Article 33(1) of the 1951 Convention is being refouled, directly or indirectly, to the country of origin or former habitual residence' (para. 30); ECtHR, *Saadi*, above note 30, para. 148; The importance of a case-by-case review was most clearly reaffirmed by the Council of Europe's Steering Committee for Human Rights, above note 33, which stated that 'diplomatic assurances are not an alternative to a full risk assessment' which must be carried out 'on a case-by-case basis'. See also *Khouzam v. Attorney General of the United States* (above note 31).

92 ECtHR, *Soering*, above note 9, para. 86.

93 Except in Article 33(2) of the 1951 Refugee Convention.

94 The question whether the risk and in particular the reduction of risk through diplomatic assurances can be reviewed by a court was discussed at length in the case of *AS & DD (Libya) v. the Secretary of State for the Home Department*, [2008] EWCA Civ 289, which answered it positively; the effectiveness of a transfer agreement is also analysed at length in Special Immigration Appeals Commission, *Omar Othman v. Secretary of State for the Home Department*, SC/15/2005, 26 February 2007, paras. 490–521. The ECtHR has always reviewed the reliability of such agreements, as in the cases of *Chahal*, above note 9, para. 105, and *Saadi*, above note 30, para. 147. In the United States, on the other hand, courts take the approach that the executive branch is best placed to assess the risk, as restated by the Supreme Court in *Munaf et al. v. Green, Secretary of the Army et al.*, 12 June 2008, p. 25. The government does not show courts

an agreement, the review body should be guided by the position adopted by various human rights and other bodies, namely that

- in cases of transfer to states where there is ‘systematic practice of torture’, assurances are unlikely to remove the risk;<sup>95</sup>
- general assurances to the effect that the receiving state will abide by international standards, without giving an assurance relating directly to the individual concerned, are not capable of removing the risk for that person;<sup>96</sup> and
- diplomatic assurances *may* remove the risk only if accompanied by an independent and effective post-transfer monitoring mechanism.<sup>97</sup>

Beyond these legal considerations, transfer agreements to obtain assurances against ill-treatment or other violations should, if at all, be used cautiously and with circumspection. While they cannot be qualified in abstract terms as necessarily unreliable, since the political and diplomatic pressure created by single cases may – in certain circumstances, and if followed up with strong post-return mechanisms – protect the individual,<sup>98</sup> experience in some cases has shown that assurances have been disregarded.<sup>99</sup>

The main reason for this disregard is that it is difficult to establish a reliable and effective monitoring mechanism. In one instance, the European Court

diplomatic assurances that it has obtained from other governments: John B. Bellinger, above note 84; Ashley Deeks argues that judicial review should be limited to procedural aspects and not substantive matters: ‘Avoiding transfers to torture’, Council on Foreign Relations Paper, CSR No. 35, June 2008, p. 38.

- 95 See Report of the Special Rapporteur on Torture, above note 7, para. 37; Report of the Special Rapporteur on Torture, UN Doc. A/60/316, 30 August 2005, para. 51; Committee against Torture, Conclusions and recommendations: United States of America, above note 32, para. 21; Human Rights Committee, Concluding observations: United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16; Concluding observations: United Kingdom, above note 84, para. 12. The criterion of systematic violations is not foreign to the risk-assessment in *non-refoulement*: according to Article 3(2) of the Convention against Torture, to assess whether there are substantial grounds for believing that the person will be subjected to torture, the existence of a ‘consistent pattern of gross, flagrant or mass violations of human rights’ must be taken into account.
- 96 ECtHR, *Saadi*, above note 30, para. 147; similarly, UNHCR’s Note on Diplomatic Assurances, above note 26, para. 51, states that ‘diplomatic assurances would meet the suitability criterion only if they could effectively eliminate all reasonably possible manifestations of persecution in the individual case’.
- 97 Committee against Torture, Conclusions and recommendations: Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 5(e); Conclusions and recommendations: United States of America, above note 32, para. 21; Conclusions and recommendations: United Kingdom, above note 5, para. 4(d). For the United Kingdom’s reply to these recommendations, see Comments by the government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture, UN Doc. CAT/C/GBR/4/Add.1, 8 June 2006, paras. 49–69.
- 98 As argued, for instance, by the government of the United Kingdom in ‘Replies to the List of Issues (CCPR/C/GBR/Q/6) to be taken up in connection with the consideration of the sixth periodic report of the government of the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/6)’, UN Doc. CCPR/C/GBR/Q/6/Add.1, 18 June 2008, para. 88; Jones, above note 84, pp. 188–187; Bellinger, above note 84, p. 4; Ashley Deeks, above note 94, p. 22.
- 99 See, e.g., Committee against Torture, *Agiza*, above note 32; ECtHR, *Shamayev and 12 others v. Georgia and Russia*, Application No. 36378/02, Judgment of 12 April 2005; see also the redacted report of the Department of Homeland Security, Office of the Inspector General, on the case of Maher Arar: ‘The removal of a Canadian citizen to Syria’, OIG-08-08, March 2008, pp. 5, 22, 27.

of Human Rights, on receipt of an assurance from a state requesting extradition that the Court's staff would be given access to the persons concerned, lifted an order requiring it not to extradite them. When it attempted to visit them, however, access was denied.<sup>100</sup> In cases before the Committee against Torture, ill-treatment was found to have occurred despite the provision of assurances which included a monitoring mechanism.<sup>101</sup> The UN High Commissioner for Human Rights and the UN Special Rapporteur on Torture have warned against the use of diplomatic assurances, such assurances being unreliable and unable, in their opinion, to remove the risk of torture or other forms of ill-treatment.<sup>102</sup> Diplomatic assurances have also been strongly criticized by human rights organizations.<sup>103</sup>

Indeed, when resorting to diplomatic assurances, states should be aware that while it is straightforward to determine whether a state has complied with an undertaking not to impose or carry out the death penalty, it is much more difficult to monitor compliance with an undertaking not to ill-treat persons deprived of their liberty, as torture typically takes place 'behind closed doors' and its occurrence is denied. In addition, only a very limited number of people in any particular place of detention are likely to be monitored pursuant to those assurances. It may be difficult for them to communicate any allegations of ill-treatment to the monitoring body, as they might run the risk of reprisals for having informed the monitoring body of the ill-treatment. Also, assurances can only be useful insofar as the authorities have control over security forces, which is not always the case. Lastly, if assurances are violated it is not clear what, if any, remedy is available to the individual concerned.

## The ICRC and transfer agreements

The ICRC, on account of its very nature and methods of work, cannot act as the monitoring body under transfer agreements and does not wish to be considered or named as such in them.

First, any involvement by the ICRC in post-transfer monitoring might cause it to be viewed as an 'implementing agency or agent' of the transferring state – that is, as having been 'placed under contract' by that state to visit detainees in the receiving state, an assignment incompatible with its neutrality and independence and that would jeopardize perception thereof. To act as a monitoring

100 ECtHR, *Shamayev*, above note 99.

101 Committee against Torture, *Agiza*, above note 32.

102 High Commissioner for Human Rights, Human Rights Day Statement: 'On terrorists and torturers', 7 December 2005, above note 84; Address by the High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law, 16 February 2006, available at [www.biiicl.org/news/view/-/id/14/](http://www.biiicl.org/news/view/-/id/14/) (last visited 21 October 2008); Report of the Special Rapporteur on Torture, UN Doc. A/60/316, 30 August 2005, para. 46. See also Inter-American Commission on Human Rights' decision on precautionary measures for the detainees at Guantánamo Bay, above note 32, p. 10 and Resolution No.1/06 on Guantánamo Bay precautionary measures, above note 32, para. 4.

103 Amnesty International, 'Diplomatic assurances' – *no protection against torture or ill-treatment*, campaign factsheet ACT40/021/2005, December 2005; and Human Rights Watch, *Empty promises: diplomatic assurances no safeguard against torture*, April 2004.

mechanism could ultimately undermine future negotiations on an agreement with the state in question or with third states for detention-related activities by the ICRC. It would moreover risk being used by transferring states for their own purposes, for instance if they claim that any danger of ill-treatment is averted thanks to ICRC visits.

Second, in accordance with its right to visit detained persons in international armed conflicts<sup>104</sup> and its right to take any humanitarian initiative in non-international armed conflicts and other situations of violence,<sup>105</sup> the ICRC sometimes makes post-transfer visits to transferees in receiving states. It may already be visiting a place of detention to which a person is transferred and therefore have access to that person. It will, however, negotiate access and the terms and conditions for its visits independently of any agreement between two states. To ensure compliance with the provisions of international law relating to detainees, the ICRC enters into dialogue with the detaining authorities and the detaining country. This dialogue is usually confidential, so that the transferring state will not necessarily learn about the ICRC's findings. While the ICRC may wish to inform that state or other states in cases where violations persist and its confidential dialogue alone has no effect, it will do so in line with its own internal directives,<sup>106</sup> not on the basis of an agreement between the transferring and the receiving state.

## Post-transfer responsibilities

If a transfer does take place, the responsibility for the transferred person rests with the receiving state. The sending state might, however, have a number of post-transfer obligations. These can flow from primary obligations under international law, such as under humanitarian law, or from secondary obligations according to the law of state responsibility if the transfer was in violation of international law. There can also be responsibilities flowing from the duty to ensure respect for international humanitarian law and to abstain from assisting in any violations.

### Post-transfer responsibilities in international humanitarian law

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

[I]f that Power [namely the receiving power] fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of

104 Third Geneva Convention, Article 126; Fourth Geneva Convention, Article 143.

105 Geneva Conventions, Common Article 3; Statutes of the International Red Cross and Red Crescent Movement, Article 5.

106 On the ICRC's terms and conditions for its work, see 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of the other fundamental rules protecting persons in situations of violence', above note 84, p. 393.

war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Article 45(3) of the Fourth Geneva Convention imposes identical obligations in an international armed conflict with regard to protected persons transferred between allied powers.

In other words, if the sending state learns that detainees are being subjected to grave breaches of the Geneva Conventions or that their basic needs or the requirements concerning conditions of detention are not being met, such as accommodation, food, hygiene, or labour, it must take steps to provide direct assistance.<sup>107</sup> The commentary on these provisions specifies that if for any reason the situation cannot be remedied, ‘the power which originally transferred the prisoners must request that they be returned to it. In no case may the receiving Power refuse to comply with this request, to which it must respond as rapidly as possible’.<sup>108</sup> Thus international humanitarian law imposes significant post-transfer responsibilities on the sending state, requiring it to follow up on the treatment of transferred persons and to take action if their treatment is not satisfactory; such action can include requesting the return of the persons concerned. As said above, the humanitarian considerations underlying these provisions – that is, to ensure that in transfers between allied powers the sending power continues to be responsible for the well-being of detainees, should also be taken into account in respect of transfers between allied powers in a non-international armed conflict.

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

## Responsibility for an internationally wrongful act

Other bodies of international law do not contain similar obligations for the transferring state. However, if a state transfers a person in violation of the principle of *non-refoulement*, it commits an internationally wrongful act. In principle, this entails an obligation of reparation,<sup>109</sup> including an obligation of *restitutio in integrum*,<sup>110</sup> which could consist in allowing the person to come back on to the

107 Pictet, above note 17, p. 138; and Pictet, above note 28, pp. 268–9.

108 Pictet, above note 17, p. 139.

109 Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case*, (*Germany v. Poland*), (*Merits*), PCIJ (ser. A) No. 17, 1928, p. 29. See also Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001: ILC Articles on State Responsibility, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly Resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006.

110 If it is not materially impossible or does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. See Article 35 of the ILC Articles on State Responsibility, *ibid.*

sending state's territory. But human rights bodies have stopped short of requesting the person's return to the sending state, and have merely granted persons unlawfully transferred a right to compensation. More recently, the Committee against Torture and the Human Rights Committee have recommended that states should take measures to inquire about the whereabouts and well-being of the transferred person and to ensure that he or she is not being ill-treated.<sup>111</sup> If it is not possible to request that person's return, inquiring into his or her well-being and taking measures to alleviate any suffering can help to avoid or put an end to violations.

### Obligation to ensure respect for international humanitarian law

On the basis of Article 1 common to the Geneva Conventions, all states have an obligation not only to respect but also to ensure respect for international humanitarian law. This entails a responsibility for all states, including those not engaged in a given armed conflict, to take feasible and appropriate measures to ensure that the rules of humanitarian law are respected by the parties to that conflict.<sup>112</sup> It is a commitment to promote compliance with that law,<sup>113</sup> and to act 'with due diligence to prevent [violations of humanitarian law] from taking place, or to ensure their repression once they have taken place'.<sup>114</sup>

Thus all states that become aware of such violations should take steps to terminate them. They have various methods at their disposal, such as bilateral diplomatic interventions or multilateral mechanisms. These obligations are particularly pertinent in situations where states or international organizations are present in the territory of another state. Their troops must not only avoid giving any encouragement, aid or assistance if they witness violations of humanitarian law by the host nation, but should also take every possible step (within their mandate and in conformity with general international law) to dissuade it from committing them. Or if member states of an international organization are parties to a conflict, acting with its authorization or under its umbrella, the international organization should, where necessary, intervene to ensure respect for humanitarian law by them.

A number of states and international organizations have recently chosen to give host countries greater support in increasing their capacity to receive

111 Human Rights Committee, *Chitat Ng*, above note 8, para. 18; *Mansour Ahani*, above note 32, para. 12; Committee against Torture, *Brada v. France*, Communication No. 195/2002, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 15.

112 ICJ, *Wall case*, above note 23, para. 158; Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions revisited: protecting collective interests', *International Review of the Red Cross*, Vol. 82 (837) (March 2000), pp. 67–87.

113 See intervention by Mr Claude Pilloud from the International Committee of the Red Cross at the Diplomatic Conference of Geneva of 1949, Final Act of the Diplomatic Conference of Geneva, 12 August 1949, Part II, Section B, Report of the ninth session of the Special Committee of the Joint Commission, 25 May 1949, p. 51; ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, 2nd edn, Geneva, April 1958, p. 129; Pictet, above note 17, p. 18.

114 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC/Martinus Nijhoff, 1987, commentary on Article 91, p. 1058.

transferred persons in satisfactory conditions of detention and to try them according to international standards.<sup>115</sup> Such states are in a particularly favourable position to ensure respect for humanitarian law standards by the host nation and, accordingly, bear a particular responsibility in that regard.

## Responsibility for a wrongful act of another state

One of the reasons for transfers can be that the persons concerned will be subject to criminal proceedings in the receiving state. Sometimes the sending state might cooperate with the receiving state in those proceedings, as often occurs for trials relating to terrorism or organized crime.

In such situations, if the proceedings do not comply with international fair trial standards, the sending state might be held internationally responsible for deliberate assistance in breaching the obligation to provide a fair trial. On the basis of international law and practice<sup>116</sup> it is in fact accepted – and considered by the International Court of Justice to reflect customary law<sup>117</sup> – that a state may not aid or assist another state in the commission of a breach of international law. For instance, if a sending state assists a receiving state in compiling evidence for an unfair trial, it might – depending on the importance of its assistance – be assisting in a violation of international law if aware of the circumstances of the case and if the evidence is material to the trial proceedings.

## Summary

The foregoing analysis has sought to outline the legal framework that governs the transfers of individuals. While legal obligations vary from treaty to treaty, the baseline is that people must not be transferred if there are substantial reasons for believing that they would be exposed thereby to a risk of persecution, torture, cruel, inhuman or degrading treatment or arbitrary deprivation of life. An independent and impartial body must review the decision to transfer and assess whether there is a risk.

115 See Jones, above note 84, p. 190.

116 See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, p. 151, paras. 7–9, with references to state practice. The principle has been summarized in Article 16 of the Draft articles on responsibility of States for Internationally Wrongful Acts, with commentaries, in the following manner:

A State which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

117 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, para. 420.



Transfers arising in multinational operations abroad are only now drawing attention to legal and practical issues. The real challenge will be to find practical solutions to accommodate the object and purpose of those operations and their inherent restrictions as operations carried out at the invitation of the host government and often under the auspices or even under the command and control of the United Nations. Solutions will have to take into account the very limited capacity and political will to detain persons who should normally be detained by the host country, while at the same time respecting the principle of *non-refoulement*. Solutions can encompass, among others, prolongation of temporary detention, transfers to third states, transfers to specific places where there is no risk, and monitoring or even joint administration of detention to monitor transferred persons.

The ICRC will strive to visit people whenever possible before their transfer and will notify the transferring authorities of any fears that they might have. While it will often also try to visit people after their transfer, it seeks to do so on the basis of its own humanitarian initiative and within the framework of its humanitarian dialogue with the relevant authorities, and carries out such visits in accordance with its own terms and conditions.