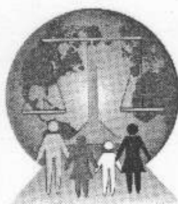
The Asylum Process and the Rule of Law



International Association of Refugee Law Judges
Netherlands

IV

HUMANITARIAN LAW, HUMAN RIGHTS AND REFUGEE LAW
The Three Pillars

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Almost half a century after the Hague 1907 Convention on war, more than half a century after the 1951 Geneva Convention on the status of refugees, the four 1949 Geneva Conventions and the European Human Rights Convention and almost thirty years after the two 1977 additional protocols to the Geneva Conventions, the scope and contents of refugee law cannot be properly assessed and evaluated without a constant reference to two other legal corpuses: International humanitarian law and international human rights law.Moreover, while duly keeping in mind the specificity of each of these three pillars, the time may have come to initiate a reflexion on the fruits of their combination and on the perspective such an evolution offers.

This report will be divided into into two parts:

Part I, "The three pillars. Genealogy and chronology" ,contains a brief chronological outline of the main instruments (1), followed by remarks on their evolution (2) and on the supervision of their implementation (3).

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Part II, "Towards a new problematic of refugee law ? A reflexion on contemporary developments"" , contains some tentative thoughts on a number of significant contemporary developments: the evolution of the law relating to aliens and refugees (1); the role of NGO' (2); The apparition of new forms of conflicts and their consequences for refugee law (3); the creation of international criminal courts and its significance (4).

I
THE THREE PILLARS: GENEALOGY AND CHRONOLOGY

A chronological outline of the main instruments (1) will be followed by some remarks on their evolution (2) and by observations on the supervision of their implementation.

1. Chronological outline of the main international instruments.

(IHL: International humanitarian law.- R.L: Refugee law. - IHRL: International human rights law).

- 1907 - IHL - Hague Convention on the laws and customs of war.
- 1922 - RL - Arrangement with regard to the issue of certificates of identity to Russian refugees.
- 1922 - RL - Arrangement relating to the issue of identity certificates to Russian and Armenian refugees and amending the previous arrangements.
- 1925- IHL – Protocol on the prohibition of the use, in war time,of asphyxiating, toxic or similar gas and of bacteriological means.
- 1928 - RL - Arrangement relating to the legal status of Russian and Armenian refugees.
- 1928 – RL - Arrangement concerning the extension to other categories of refugees of certain measures taken in favour of Russian and Armenian refugees.
- 1929 – IHL - Convention for the improvement of the condition of the wounded and the sick of armies in the field.
- 1929 – IHL - Convention relating to the treatment of war prisoners
- 1933 - RL - Convention relating. to the international status of refugees.
- 1936 - RL - Provisional arrangement concerning the status of refugees coming from Germany.
- 1938 - RL - Convention concerning the status of refugees coming from Germany.

- 1939 - RL - Additional Protocol to the 1936 provisional arrangement and 1938 convention concerning the status of refugees coming from Germany.
- 1945 - IHRL - London Agreement for the prosecution and punishment of the major war criminals of the European Axis.
- 1948 - IHRL - Convention on the prevention and punishment of the crime of genocide.
- 1948 - IHRL - Universal Declaration of Human Rights.
- 1949 - IHL - First Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field.
- 1949 - IHL - Second Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea.
- 1949 - IHL - Third Geneva Convention relative to the treatment of prisoners of war.
- 1949 - IHL - Fourth Geneva Convention relative to the protection of civilian persons in time of war.
- 1950 - IHRL - European Convention for the protection of human rights and fundamental freedoms.
- 1950 - RL - Statute of the Office of the UN High Commissioner for refugees.
- 1951 - RL - Convention relating to the status of refugees.
- 1954 - IHRL - Convention relating to the status of stateless persons.
- 1965 - IHRL - International Convention on the elimination of all forms of racial discrimination.
- 1966 - IHRL - International Covenant on civil and political rights.
- 1969 - IHRL - American Convention on human rights.
- 1969 - RL - Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa..
- 1977 - IHL - Additional Protocol I to the Geneva Conventions.
- 1977 - IHL - Additional Protocol II to the Geneva Conventions.
- 1979 - IHRL - Convention on the eliminatioin of all forms of discrimination against women.
- 1984 - IHRL - Convention against torture and other cruel, inhuman or degrading treatment or punishment.
- 1987 - IHRL - European Convention for the prevention of torture and inhuman or degrading treatment or punishment.
- 1989 - IHRL - Convention on the rights of the child.
- 1990 - RL - Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the member States of the European Community.

- 1990 - RL - Schengen Convention applying the agreement of 14 June 1985 on the gradual abolition of checks at their common borders.
- 1993 - IHRL - Statute of the International Criminal Tribunal for the former Yugoslavia.
- 1994 – IHRL – Statute of the International Tribunal for Rwanda.
- 1998 - IHRL - Rome Statute of the International Criminal Court.
- 2001 - RL - EU Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member States in receiving such persons and bearing the consequences thereof
- 2003 - RL - EU Directive on minimum norms for reception conditions.
- 2003 - RL - Regulation on the determination of the State responsible for examioning applications for asylum lodged in one of the member States of the European Union.
- 2004 - RL - EU Directive on subsidiary protection.
- 2004 - RL - EU Directive on minimum standards for the qualification ansd status of third country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

2. The evolution of the scope and contents of refugee law, international humanitarian law and international human rights law.

(A) Refugee law

A two- fold evolution is visible: the first one led from a series of instruments relating to distinct categories of refugees according to their country of origin, characteristic of the 1920's and of the 1930's to the adoption of a single general convention covering all relevant aspects of the status of refugees, the 1951 Geneva one.Hence the silence of other human rights intsruments on refugees, the 1951 Convention being considered as a lex specialis. The second evolution relates to the apparition of a regional refugee law: this is now the case inside the EU, following the "communautarization" of asylum and immigration since the Amsterdam Treaty. Although the Geneva Convention is ritually mentioned by EU instruments, what is taking place amounts in fact to a deliberate and substantial revision of the 1951 Convention in a restrictive direction.

(B) International human rights law

The evolution has been a four-fold one, i. e.:

- The combination of universal (the UN convention on genocide, the two Covenants, the conventions on discrimination, on the rights of the child, against torture) and of regional (Europe, America, Africa) instruments.
- Conventions relating to the rights of specific categories of persons (e.g. children, women).
- Conventions the aim of which is the prohibition of certain acts (e.g. the conventions against torture or against discrimination).
- The recent creation of international criminal courts: the International Criminal Tribunal for the former Yugoslavia; the International Criminal Courts for Rwanda and the International Criminal Court.

(C) International humanitarian law.(1)

Its scope has been extended in three directions:

- as to the categories of persons protected: starting with the military it now includes civilian populations.
- as to the situations covered, from war to armed conflicts, international or not (2)
- As to the rights mentioned, as shown, in particular, by Art. 3 common to the 1949 Geneva Conventions I, II and IV.
- In its Opinion on the legality of the threat to use or the use of nuclear weapons (1996) the ICJ affirmed that the predominating principle of humanitarian law is what has been called the " de Martens clause" (see the 1899 Hague Convention II on the laws and customs of war, reiterated in Art.1-2 of the 1977 Additional Protocol I.The Court concluded that the principles and rules of humanitarian law apply to nuclear weapons(§ 87).

3. The supervision of the implementation of international instruments.

Different conceptions have led to different practices.

(A) International human rights law.

The rule has been, generally speaking, to set up treaty bodies the task of which is a triple one: to receive, discuss and evaluate the periodic reports of the State parties on their implementation of the convention.To decide on individual applications when such a right has been recognized by State parties.To finally elaborate general commentaries on the convention.

In addition, such general bodies as the UN Commission on human rights and the sub- Commission have created fact-finding bodies, special rapporteurs or working groups, to study a particular

theme or the situation in a given country.This is not the place for a detailed assessment of all these mechanisms.Most evaluations are critical (3).

Two exceptions must be mentioned. Both are European ones .The first one is the European Convention on Human Rights. As early as 1950 it contained two major legal innovations: the right of individual petition, allowing an individual to bring an action against a State before an international forum; a Court to adjudicate on them. The second one is the 1987 European Convention for the prevention of torture and inhuman or degrading treatment or punishment.Each Party is under an obligation to allow the Committee set up under the Convention to visit freely any place within its jurisdiction where persons are deprived of their liberty by a public authority (Art. 1). Free and unlimited access is provided for by the Convention. Reports are published, together with the State's comments, with the latter's consent.They have been, over the years, an important source of information, used in domestic as well as international courts and other fora.

(B) International humanitarian law

The Conventions mentioned supra do not set up any permanent supervising body. Under Art. 90 of the 1977 Additional Protocol I an international fact - finding committee may be created when a number of conditions are met. One of them is the acceptation of its jurisdiction by 20 State parties. The only body which can make inquiries in this area is the International Red Cross Committee, a private Swiss organisation. The ICRC has played an important role in the codification of international humanitarian law in 1949 and in 1977.(4). Its role in the protection of persons covered by these instruments is explicitly mentioned in the 1949 Geneva Conventions (Art. 9 of Conventions I, II and III; Art. 10 of Convention IV) and in the 1977 Additional Protocol I (Art. 5) .In its 1986 decision on the Nicaragua vs USA case (Military and paramilitary activities in Nicaragua and against it) the ICJ referred to the practice of the ICRC in order to define humanitarian assistance.

(C) Refugee law

The State Parties to the 1951 Geneva Convention had no intention to set up a permanent supervising body other than the UNHCR itself (5).

Its missions are described in the 1950 Statute of the UNHCR

Under Art. 35-1 of the Convention:"The Contracting States undertake to co-operate with the Office of the UNHCR, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising

the application of the provisions of this Convention." As W. Kälin rightly remarked (6) there is a link between Art. 35-1 on the sixth paragraph of the preamble to the Convention:" Noting that the UNHCR is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner". Going back to the Statute of the UNHCR we read that he "shall provide for the protection of refugees falling under the competence of his Office by a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto....d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States" (Art. 8).

II
TOWARDS A NEW PROBLEMATIC OF REFUGEE LAW? A REFLEXION ON CONTEMPORARY DEVELOPMENTS

Four significant contemporary developments will be commented on

(1) The evolution of the law relating to aliens and refugees: the case law of the European Court of Human Rights as an illustration;
(2) The role of NGOs;
(3) The apparition of new forms of conflicts and their consequences for refugee law
(4) The creation of international criminal courts .From Nuremberg to The Hague to domestic courts.Towards a reunification of the three pillars?

(1) The evolution of the law relating to aliens and refugees: the case law of the European Court of human rights as an illustration

The law relating to aliens and refugees has been influenced by a number of legal and non –legal developments.

(A) Legal developments are of two-fold nature: international and domestic ones. At the international level the most important development has been the multiplication of human rights conventions (see supra I). As a result international law plays an important and growing role before domestic courts in the area of fundamental rights, including those of aliens, asylum- seekers and refugees, irrespective of the "dualist" or "monist" nature of the legal system.

At the domestic level, in addition to the influence of international

law, the two main developments have been the rise of constitutional law and of the case law of constitutional courts on the one hand, the expanding scope of judicial review of administrative action on the other one.

(B) Non - legal developments: The legal status and condition of aliens has become everywhere a matter of public and political debate, as shown by the frequent changes of legislation.NGOs have partipated to such debates; they also provide legal help and advice to aliens and asylum- seekers before domestic and international fora.

As a result the law applying to aliens has undergone profound and irreversible changes. The time at which it was composed almost exclusively of domestic instruments , allowing a wide discretion to the Administration, while judicial review of decisions was a rare and limited exercise, is gone forever.It contains now a number of rights and guarantees, both procedural and substantive.Among the latter one can mention the right to family reunion, the taking into account of the alien's individual situation (familial, social, medical). The case law plays an important role in shaping it .Courts have developed new tools and instruments of review .The increasing volume of the legal literature relating to the subject is both a cause and a consequence of the tendencies described supra.

The case law of the European Court of human rights relating to aliens and asylym seekers is an apt illustrration of these developments (7). The ECHR plays an important role to-day in Europe in the shaping and application of the law relating to aliens and asylum-seekers.This would have come as a surprise to the drafters and authors of the Convention. In 1949-1950, that is in the immediate post-war Europe, no-one thought of the rights of aliens. The main issue was then that of the " Displaced persons" (DPs) – one of the many understatements of the century -.The UNHCR was created in 1950 to replace the expiring IRO and the 1951 Geneva Convention was created to take care of refugees, that is, at the time, of European ones, as shown by the wording of Art..1- B. The 1967 New York Protocol changed the scope of the Convention in time and space.The "travaux préparatoires" of the Convention confirm this absence of preoccupation.Only clauses of th Convention, before the adoption of the Protocols relating to aliens restricted their rights, as shown by Art.5-1-f) on their detention during deportation or extradition proceedings or following a refusal of entry and Art. 16 on restrictions of their political activities. Later on the provisions contained in Art. 4 of the 4th Protocol (1963) prohibiting the collective expulsion of aliens and in Art. 1 of the 7th Protocol on procedural safeguards relating to their expulsion are extremely timid. 50 years later, we are in a position to assess the impact of the Convention and of the case law of the Strasbourg Court on the legal situation of aliens and asylum – seekers.

In cases before the Court the two provisions of the Convention most frequently invoked are Articles 3 and 8: the very importance of the rights guranteed by these Articles is one reason.The fact that, under the case law of the Court, Art. 6 does not apply to proceedings relating to the entry, stay, deportation or extradition of aliens, since decisions taken in such proceedings do not relate to disputes over civil rights and obligations and do not entail the determination of a criminal charge against the applicant is another one (8). I shall therefore comment the case law relating to these two Articles before turning to the issue of stay of execution of the challenged decision.

Article 3

Under Art. 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment". A few words on the contents of this Article, before turning to its application to decisions relating to aliens.

(a) Contents.

Its importance is a three-fold one: First, it relates to torture and other prohibited treatment or punishment. Such a prohibition has later on becopme a universaal one, as shown by the 1984 and 1987 conventions on torture. Second, such a prohibition is an absolute one, excluding any restriction or derogation under Art.15.Three, it applies, ratione personae, to all persons within the jurisdiction of a contracting State, irrespective of their behaviour or status.The differences with the non-refoulement clause contained in Art.33 of the 1951 Geneva Convention are obvious:the letter applies only to refugges, contains the restriction mentioned in Art.33-2 and , besides, mention only " life or freedom", and not torture.

(b) Application to aliens.

Art. 3 has been invoked mainly against decisioons to expel or extradite aliens.What was at issue was the risk, for the alien, to be exposed, in the country of destination, to torture or to treatment contrary to Art. 3.4 legal issues arise: the extra-territorial application of the Convention;the nature of the risk for the applicant; definitions and the origin of the risk.

The extra-territorial application of the Convention

Both the Commission (9) and the Court (10) held that a decision to expel or to extradite an alien may give rise to a question under Art. 3 if he may be subjected to treatment prohibited by Art. 3. The decisive step was taken in the Soering case in 1989.There is no need to describe the facts of the case, now well-known.The Court considered that the long period prior to execution forced prisoners to endure many years

of death-row conditions with " the anguish and mounting tension of living in the ever-present shadow of death".It held that these, combined with the personal circumstances of the applicant, constituted a real risk of treatment contrary to Art.3. It emphasized that the only responsibility engaged was that of the UK, which planned to extradite S. and not that of a third State T .The two-fold significance of this case lies in the affirmation of the extra-territorial scope of the ECHR and in the possibility of a conflict of treaty obligations if a treaty obliges a State to surrender a person.

The Kalantari case may also be mentioned here (11).K.had fled Iran and applied for refugee status in Germany.He alleged that one of his sisters had been executed and that another one had disappeared.He himself had participated in anti-governmental activities and the police had searched his apartment.His asylum application was rejected and an expulsion order towards Iran was taken against him.He brought an action in Strasbourg, alleging that his expulsion to Iran would expose him to the risk of treatments contrary to Art.3.During the proceedings before the Court, the German Government gave the assurance that he would not be expelled. The case was struck out. (12)

The nature of the risk for the applicant

There must be serious and strong reasons to believe that the applicant, if sent back to the receiving State, will run a real risk to be subjected to treatments contrary to Art.3 .This applies particularly to asylum-seekers whose application has been rejected and who are sent back to their country of origin. A good example is the Jabari case, where the Court took into consideration refugee law and the action of the HCR. Mrs J.,an Iranian, applied for refugee status in Turkey.Her application was denied.The European Court for human rights held that the Turkish authorities did not examine seriously her application:under Turkish law she had five days to submit it .There had been no proper examination of her claim relating to the risks for her if she were sent back to Iran.The Court held that the automatic and mechanical implementation of such a brief time limit to introduce an application for asylum was incompatible with the protection of the fundamental values contained in Art. 3.After the refusal of her application, the local HCR office examined her case and grantezd her refugee status.The HCR followed its guidelines and directives on gender-based persecution: she was prosecuted for adultery in Iran, the penalties being death by lapidation, flagellation or being flogged.The HCR held that Mrs.J had a well-founded fear of persecution based on her membership of a particular social group: women transgressing social mores.What is of particular interest here is that the Court gave much attention to the HCR's decision and on its grounds.It also mentioned Amnesty's International 's submission on the penalties used in Iran against women convicted of adultery (13).

Definition.

Unlike the 1984 UN Convention against torture(14) ,the ECHR does not contain a definition of torture.The Court takes into account the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects and the sex, age and state of health of the person.

The origin of the risk.

Three distinct legal issues arise. The first one is that of non-State authors.They may, the Court held, be taken into account.The applicant must show that the risk is a real one and that the public authorities cannot protect him (15).The second one is as follows: the risk of treatment contrary to Art 3 may have other causes than action of public authorities or private bodies.In a case decided in 1997 the Court held the UK to be in breach of Art 3 by expelling the applicant, who was suffereing from AIDS and only had a short time to live, to his State of origin (St Kitts), where he would not have access to appropriate medical treatment and would die in complete destitution (16).The third issue relates to the case of asylum-seekers whose application is rejected or held inadmissible and who are sent back to another country, through bilateral readmission agreements, or the Dublin Convention (now replaced by a Regulation) or because this country is held to be a " safe third country".The fact is that the case law of European countries on persecution by non-State actors is not the same everywhere. Some countries, like Germany, do not take at all into account such persecution. Others do, on certain conditions. The diverging interpretations were mentioined by the UNHCR in its submission before the European Court of human rights in the T.I. v. UK case (17).In such a case, the HCR held, "indirect removal could violate the non- refoulement principle.In its decision on substance (18) the Court affirmed an important principle: the British Government intended to remove T.I to Germany, where a deportation order to Sri-Lanka awaited him, on the basisi of the Dublin Convention. Rejecting the argument of the UK the Court added:

"Where States establish international organizations or, mutatis mutzandis, international agreements to pursue cooperation in certain fierlds of activities, there may be implications for the protection of fundamental rights.It would be incompatible with the purpose and object

of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the filed of activity covered bu such attribution"

The Court went on to examine whether the UK had complied with their obligation to protect the applicant from the risk of torture and ill-treatments prohibited by Art. 3.

Article 8

This article, one of the most important ones of the ECHR, guarantees rights and liberties which, under other international or domestic instruments, were not then are not always protected as they should be.In cases relating to aliens, it is used by applicants challenging a refusal of entry, or of a residence permit, or a deportatioin order. The Court's case law may be summed up as follows.

(*a*) Under a well- established principle opf international law; States are empowered to decide the conditions of entry and of residence of aliens and to order their expulsion on public order grounds.

(*b*) The Convention does not guarantee the right to establish one's family life in a given country (19).

(*c*) However they must , whenever they take decisions relating to aliens, respect their international obligations.If they infringe a right guaranteed by the Convention, the right to respect for one's private and family life here, these limitations must be based on a pressing social need and be proportionated to the legitimate end pursued (20.)

(*d*) Whenever the violation of Art. 8 is invoked, four questions must be answered: the first one relates to the existence of a family life.Under the Court's case law the primary group is constituted by parents and children, irrespective of marriage and of the status of children and even of actual cohabitation (21).Ther second question concerns the existence of an interference with it.The third question is: is the decision based on one of the grounds enumerated in Art. 8-2? The last and most difficult question is: is the decision proportionated to the aim pursued? The problem, as for other rights, is how to a achieve a fair balance between the individual right protected and those of society at large.The Court takes into consideration such elements as the behaviour of the alien, including the existence of sentences and their level, the existence of links with his country of origin and the contents and context of his family life in the country of residence.

Stay of execution: the Mamatkulov and Askarov v Turkey case (2005).

The facts were as follows: Both were Uzbek nationals, members of an opposition party M. arrived in Turkey in 1999 and was arrested under an international arrest warrant.The Uzbebk autorities requested his extradition on suspicion of homicide , attemped attatck against the Prime Minister and explosion of a bomb. A. arrived in 1998. The facts were the same.By mid-March, 1999, three weeks after M.'s arrival, the Turkish cvourts rejected both appeal against their extradition. They then brought an action before the European Court of Human Rights.On March 18, 1999 the president of the relevant chamber indicated to the Turkish Government, on the basis of Art. 39 of the rules of procedure of the Court, that it was desirable, in the interest of the parties and of the smooth progress of the proceedings before the Court, not to extradite the applicants to Uzbekistan prior to the meeting of the competent Chamber, on March 23.On that day, the Chamber extended the interim measure until further notice.The next day, the Turkish Government ordered the extradition, which took place on March 27th.On month later, it informed the Court that it had received assurances about the two applicants from the Uzbek authorities:they would not be subjected to torture or sentenced to death.On June 28,1999, they were sentenced to 20 and 11 years of imprisonment.

Before the Court they alleged the violation of several Articles of the Convention: 3 (no violation was found); 6-1 (This Article does not apply to extradition proceedings), and finally 34, on the right of individual application: by extraditing them despite the stay indicated by the Court under Rule 39 of the Rules of the Court, Turkey, they held, had failed to comply with its obligations nunder Art. 34 of the Convention. The contents of these two articles are the following one:

Art 34:" The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 of the Rules of the Court provides: " 1" The Chamber or, where apppropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of ther parties or of the proper conduct of the proceedings before it."

In its previous judgment of 2003 (the case had been sent up to the Grand Chamber) the Court held:

"... any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any other act or omission that will undermine the authority and effectiveness of the final judgment.Consequently, by failing to comply with the interim measures indicated by the Court under Rume 39 of its Rules, Turkey is in breach of its obligations under Art. 34 of the Convention".

The issue was an important one.On the face of Art. 39 interim measures are not binding for the Government .How did the Court, both in 2003 and 2005, arrive at the opposite conclusion, thus departing from its previous case law (22). It took into consideration four elements:

(*a*) The importance of the right of individual application in the system of the Convention.It creates objective obligations for each State.Its safeguards must be effective and practical.

(*b*) The Court looked at the practice of interim measures under the Convention system. Art. 39 does not state the grounds on which it may be applied.The Court applies it in restricted circumstances, i.e. When there is an imminent risk of irreparable damage in relation with the right to life (Art.2), the prohibition of torture and of inhuman or degrading treatment (Art. 3) or, exceptionnally, the right to respect for one's private and family life (Art. 8).The majority of the cases in which interim measure have been indicated concern deportation or extradition proceedings. Hence the special interest of the judgment for aliens's law. Cases of States failing to comply with such measures are very rare.In the Soering case, the UK Government complied, in spite of its obligations towards the USA under the extradition Treaty.

(*c*) The Court next examined closely the views and practice of other international bodies having either individual petition procedures or procedures for the judicial settlement of inter-State disputes.One thing was clear: international courts and institutions have stressed the importance and purpose of interim measures.They have pointed out that compliance with them is necessary to ensure the effcetiveness of their decisions on the merits and have held that lack of compliance is a breach of the State's obligations. This is the practice of the UN Human Rights Committee, of the UN Committe overseeing the implementation of the Convention agaionst torture, of the ICJ (see the La Grand case, Germany v the USA). In one word the interpretation of the scope of interim measures cannot be dissociated from

the proceedings to which they relate or the decision on the merits they seek to protect (23).

(*d*) The Court then answered the question: Did the applicants' extradition hinder the effective exercise of their right of application? The answer was: yes.Their extradition reduced the level of protection of the Court for the rights asserted under Art. 2 and 3. .Moreover the applicants lost contact with their lawyers and were denied an opportunity to have further inquiries made in order to evidence their allegations under Art. 3.The Court was prevented by the applicants' extradition from conducting a proper examination of their complaints and ultimately from protecting them, if need be, against potential violations of the Convention. Turkey was found to be in breach of Art. 34 (24)

(2) The role of non- governmental organizations

In the three domains studied here—refugee law, international humanitarian law and international human rights law – their role has become more and more important and visible. Here are a few illustrations:

(*a*) They have had a direct influence on the drafting of certain international conventions, as shown by the role of the ICRC – admittedly a sui generis body -in the codification of international humanitarian law (22 bis), of the international coalition in the drafting of the Rome Statute of the ICC or of a Swiss NGO in the drafting of the 1987 European Convention against torture.

(*b*) They role in the monitoring of the implementation of conventions by States is vital.Their reports are a key source of information for Governments, public opinion at large and national and international courts and other bodies.

(*c*) Their supervision of the nomination and election of judges of such courts as the European Court of Human Rights and the ICC has proven to be very useful (23).

(*d*) Their submissions before international or domestic courts in the form of amicus briefs have been extremely helpful.

(*e*) On the ground they have been instrumental in providing humanitarian assistance in such key areas as medicine, food and shelter, especially for refugees.

(*f*) As a consequence their international status has been recognized and affirmed by a number of instruments: The UN Charter (Art. 71), varied resolutions of the UN General Assembly on their role in providing humanitarian assistance, the 1986 Council of Europe convention on the recognition of the moral personality of international NGO's.

(3) The apparition of new forms of conflict and their consequences for refugee law

In its classic form refugee law was built on a simple model: a tyrannic or oppressive State persecuted certain persons who fled and needed international and national protection in order to live in peace elsewhere and be able to travel. Such is still the case in many countries throughout the world.Since the end of the XXth century the world scene has been marked by the apparition of new types of situations, which have created new problems in relation to the protection of refugees and with the implementation and interpretation of the 1951 Geneva Convention. Here are a few illustrations.

(*a*) Persecution by non-State agents, while the State is either powerless or an accomplice.

(*b*) Civil wars accompanied by mass killings and exodus of populations (Rwanda, Sudan).

(*c*) Total collapse of the State, giving way to general anarchy or the coexistence of a number of local de facto authorities.

(*d*) Combination of civil war and international armed conflict: Yugoslavia in the 90's.

(*e*) Imposition of a kind of UN "protectorate", as in Kosovo. Who is in charge of what in such a new situation is a pertinent question.The organizational chart in Kosovo is the following one: the Special Representative of the UN has four bodies under his authority: the HCR is responsible for " humanitarian affairs"; the UN is in charge of "temporary civil administration"; OSCE cares for " Institution building" ; the European Union is responsible for " reconstruction"(25).

(*f*) Local protection provided to certain populations by special measures (e.g. the Kurds in Northern Iraq.

These new and complex situations have generated a number of debates on such issues as internal flight, the protection, or absence of, provided by public authorities, domestic or international. Here are some recent examples drawn from the case law of the French Commission des recours des réfugiés:

The first case relates to Somalia: the applicant, a woman, had been persecuted by members of Hawiyé militia after the fall of President Syad Barr in 1991 because she belonged to the Reer Hamar clan whose members, designated as foreigners, had been victims of systematic violence. After the death of her busband,in 1998, she had again been victim of violebnces and fled.In such circumstances the CRR held that the applicant had a well-founded fear of being persecuted, in view of her belonging to the minority mentioned supra, if she returned to

Mogadiscio, her region of origin, where rival hawiyé factions share de facto power. She could not, the decision held, avail herself, in Mogadishu or elsewhere, of the protection of a public authority.Refugee status was granted (26).

The two other cases relate to Kosovo and to the absence of protection afforded by the UNMIK. One case related to the situation in North Mitrovica, where the control by KFOR and UNMIK was not complete, so that Albanian refugees, who had returned, could not avail themselves of the protection of international authorities.The two applicants were a couple. Their house had been partially destroyed and looted by elements of the UCK, which the husband refused to join.He was then threatened with death and had to be evacuated by KFOR. He could not return. He could go to Mitrovica South or to the region of Pristina, but would be exposed there to reprisals by the UCK and without protection. Refugee status was granted.(27).

The second case gives an idea of the complexity and savagery of certain situations.The applicant, a Serbian national, was from Kosovo and belonged to the Albanian community.She lived in Kosovo with her companion .Members of her family in Kosovo collaborated with Serbian authorities by transmitting them information on the UCK. Former members of the latter and Albanian compatriots looking for members of her family used reprisals against her. She was threatened and had to leave for Pristina.There again she was threatened by the same people who accused her of collaborating with the Serbs.She complained to the police and to KFOR, but could not obtain any protection from them and fled the country. Refugee status was granted.(28).

(4) The creation of international criminal courts. From Nuremberg to The Hague to domestic courts: Towards the reunification of the three pillars?

The creation of international criminal courts is one of the major legal innovations of the XXth century. The way the ideas and the institutions developed over half a century contains many lessons ,and maybe a guide for the perplexed or the sceptics.

(*a*) The first step was the 1945 Statute of the Nuremberg IMT and its 1946 judgment (29):
The idea that individuals had certain obligations under international law, the use of criminal law to prosecute and punish the authors of certain crimes, the definition of crimes of war and and the creation of the concept of crimes against humanity have been its major and lasting achievements.

(*b*) The conventions adopted in the course of the next 40 years have laid the legal foundation of the jurisdiction of the new

international criminal courts. Whether they belong to international humanitarian law (the 1949 Geneva Conventions and the 1977 Protocols), refugee law (the 1951 Convention) or international human rights law (from the 1948 Genocide Convention to the Covenants, the Convention against torture and that on the rights of the child) is irrelevant here.

(*c*) The creation, in 1993 and 1994 of the International Criminal Tribunals for the former Yugosloavia and for Rwanda were a major step.Their jurisdiction, as enunciated in their statute (ICTFY, Art. 2 to 5), ICC (Art. 6 to 8) builds on the conventions mentioned in B) supra.

(*d*) The importance of the creation of the ICC is a three-fold one: it is the first permanent international criminal court. Its Statute (30) contains a more detailed and precise definition of the three categories of crimes which fall under its jurisdiction. The idea of complementarity with domestic courts is stated.

(*e*) That complementarity with domestic courts should coexist with the juridiction of an international court is a rather new concept. After 1946 the trials of German criminals before domestic courts took place after the IMT gave judgment.The fact that international grave crimes may, in certain circumstances, belong to the jurisdiction of States should increase their responsibility and diminish the temptation of passivity. The Pinochet decision of the House of Lords and the way the criminal procedure codes or laws of a number of countries have been changed after they ratified the Rome Convention are apt illustrations of this new and fundamental trend.

(*f*) The creation , here and there (East Timor, Sierra- Leone, Cambodia), of internationalised criminal courts, associating domestic members and foreign ones shows that the choice is not always between a full international court and a national one.

Whatever misgivings one may have on the way these new courts have been functioning till now, their very existence must definitely be included in our reflexion on the three pillars. The specificity of each of them remains, as to their scope and instruments of supervision.But a new dimension has been added to the international – and national legal order.And refugee law, that is all those in charge of implementing it, i. e of translating into actual practice the central notion of protection must take this global development into account.

NOTES

1. Texts in Code de droit international humanitaire, E.David, F. Tulkens and D. Vandermeersch, Eds, Bruylant, Brussels, 2002.
2. See D. Momtaz, "Le droit international humanitaire applicable aux conflits armés non internationaux", RCADI, The Hague, vol. 292, 2001, pp. 9- 145 .
3. See The UN and Human Rights.A Critical Appraisal, Ph. Alston, Ed., The Clarendon Press, Oxford, 1992; The Monitoring System of Human Rights Treaty Obligations, E. Klein, Ed., Arno Spitz, Berlin, 1998. The Future of the UN Human Rights Treaty Monitoring, Ph.Alston d J. Crawford, Eds.,Cambridge University Press, Cambridge, 2000; A. Bayevsky, The UN Human Rights Treaty System: Universality at the Crossroads, Transnational Publishers, Ardsley (NY), 2001.
4. See its Draft Rules limiting the risks incurred by civilian populations in times of war (1956).
5. Guy G; Goodwin- Gill, The Refugee in International Law, 2nd ed.,Clarendon Press, Oxford, 1996, p. 7 ss.
6. W. Kälin, "Supervising the 1951 Convention Relating to the Status of Refugees and beyond", in Refugee Protection in International Law. UNHCR Global Consultations on International Protection, E. Feller, V.Türk and F. Nicholson, Eds, Cambridge University Press, Cambridge, 2003, p. 613, at 616.
7. See T. Einarsen," The European Convention on Human Rights and the notion of an implied right to de facto asylum", IJRL, vol. 2, n°3 (1990), p. 361; UNHCR, European Series, Vol.2,n°3, July 1996,The European Convention on Human Rights and the Protection of Refugees, Asylum – Seekers and Displaced Persons"; N. Mole, Problems raised by certain aspects of the present situation of refugees from the standpoint of the European Convention on Human Rights, Council of Europe,Human Rights Files, N° 9 (rev.), Strasbourg, 1997; H. Labayle, "L'éloignement des étrangers devant la Cour européenne des droits de l'homme", RFDA., 13, 1997. 977; H. Lambert, "Protection against refoulement from Europe: Human rights law comes to the rescue", 48 ICLQ (1999) 515; "The European Convention on Human Rights and the rights of refugees and other persons in need of protection to family reunion", IJRL, vol. 11, n°3, 1999, 427; L. Marzano, " La protection offerte par la Convention européenne des droits de l'homme aux demandeurs d'asile et aux réfugiés", RUDH. 2002. 176.
8. Maaouia v France, October 5, 2000; IJRL, vol. 13, n° 13, (2002), 381; RUDH. 2000. 284.
9. See X v Germany, Application n° 1465/62; Amekrane v UK,Application n° 5961/72; Altun v Germany, Application n° 10308/83; Kirkwood v UK, Application n° 10479/83.
10. Soering v UK, June 26, 1989, EuGRZ.1989. 314; HRLL.1990.335; RUDH. 1989. 99; Cruz Varas v Sweden, March 20, 1991; EuGRZ.1991.203; HRLJ.1991.142; RUDH.1991.209.Vilvarajah and al v UK, October 30,

1991; HRLJ.1991.432; RUDH.1991.537; Chahal v UK, November 15, 1996; RUDH.1997.365.

11. Kalantari v Germany, October 11, 2001.
12. For a similar epilogue, relating to the extradition to China of a Chinese-Sierra-Leone national accused of murder, see Yang Chun Jun v Hungary, January 11, 2001 (Admissibility) and March 8, 2001 (case struck out), HRLJ, 2001,277 and 282.
13. Jabari v Turkey, July 11, 2000(see infra); see ailso Vivarajah et al v UK, mentioned supra n. 10.
14. Art. 1-1.
15. HLR v France, April 29, 1997; RUDH.1997.60.
16. D v UK, May 2, 1997.
17. Decision on admissibility in IJRL,vol.12,n° 2, 2000,p.244, at 258 (Decision on the merits, March 7, 2000).
18. March 7, 2000.
19. Abdulaziz, Cabales and Balkandali v UK, March 28, 1985; EuGRZ.1985.567.
20. Nasri v France,July 13,1995,§ 41; Boughanemi v France,April 24,1996,§ 41;C.v Belgium,July 8, 1996,§ 32.
21. Boughanemi, quoted supra n.20,§ 35;Berrehab v Netherlands,June 21, 1988,§ 21.
22. Cruz Varas v Sweden, quoted supra n. 10.

22bis. On the IRDC and Nazi camps, see J.C.Favez, Une mission impossible? Le CICR,les déportations et les camps de concentration nazis, Payot,Lausanne,1988.

23. On the European Court of Human Rights see Interights, Judicial Independence.Law and Practice of appointments at the European Court of Human Rights,London, 2003
24. Mamatkulov and Askarov v Turkey, February 4, 2005. For an earlier study see Interim Measures Indicated by International Courts, R. Bernhardt, Ed, Springer, 1994.
25. See chart in A.Sigg, International human rights law, international humanitarian law, refugee law: Geneva from early origins to the 21st century, Swiss Federal Department of Foreign Affairs, Berne, 2003.
26. CRR, September 22, 2004, Mlle Hussen, ép.Adoyre; see also, same date,Mlle O.
27. CRR,April 4, 2003, M et Mme Morina.
28. Id, September 23, 2004,Mme Qerimi.
29. Text of judgment in The judgment of Nuremberg, 1946, London, Stationery Office,1999.On the creation of the IMT and the preparation of the trial, see R. Overy, " The Nuremberg trials: International law in the making", in From Nuremberg to The Hague:The Future of International Justice, Ph. Sds, Ed., Cambridge University Press, 2003, p. 1.
30. See J. Crawford," The drafting of the Rome Statute", in From Nuremberg...,op. cit., p. 109.