

THE COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION AND INTERNATIONAL
HUMANITARIAN LAW

*David Weissbrodt**

A. INTRODUCTION

The four Geneva Conventions¹ and the two Additional Protocols of 1977² are the primary humanitarian legal instruments, but generally lack authoritative mechanisms for interpretation. Interpretation and application of these treaties are principally left to the judgment of the States parties to the Geneva Conventions and Protocols,³ as well as

* The author thanks Leo Twiggs for his help in preparing this article. Another, longer version of this article appeared as D. Weissbrodt, *The Approach of the Committee on the Elimination of Racial Discrimination to Interpreting and Applying International Humanitarian Law*, 19 *Minn. J. Int'l L.* 327 (2010). This topic was selected for the *Liber Amicorum* because Rüdiger Wolfrum was a very well respected member of the Committee on the Elimination of Racial Discrimination.

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 21 October 1950, 75 UNTS 31 [hereinafter Geneva Convention 1]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 21 October 1950, 75 UNTS 85 [hereinafter Geneva Convention 2]; Geneva Convention relative to the Treatment of Prisoners of War, 21 October 1950, 75 UNTS 135 [hereinafter Geneva Convention 3]; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 21 October 1950, 75 UNTS 287 [hereinafter Geneva Convention 4].

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 7 December 1978, 1125 UNTS 3 [hereinafter Geneva Protocol 1]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 7 December 1978, 1125 UNTS 609 [hereinafter Geneva Protocol 2].

³ See Geneva Convention 1, Article 49. See also K. Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 *McGill Law Journal* 285, at 305 (2005) ("With regard to the enforcement of the Geneva Conventions more broadly, all contracting parties are required by article 1 to respect the Conventions, but the only external enforcement mechanism in the treaty is article 49 of the First Convention, which requires high contracting parties to enact penal legislation so as to prosecute grave breaches of the Conventions."); N. Popovic, *Humanitarian Law, Protection of the Environment, and Human Rights*, 8 *Georgetown International Environmental Law Review* 67, at 77 (1995) ("Much of the responsibility for compliance with the Geneva Conventions and Protocols is left to the parties themselves, aided or cajoled by the International Committee of the Red Cross (ICRC).") The ICRC has also convened scholars from around the world to gather customary

increasingly to the International Criminal Court and tribunals.⁴ The International Committee of the Red Cross (ICRC) encourages States parties to comply with their obligations under humanitarian law, but it is not an adjudicative body⁵ and rarely publishes its authoritative interpretations of the Geneva Conventions and Protocols.⁶ At the same time, the eight human rights treaty bodies, the thirty thematic mechanisms of the U.N. Human Rights Council (formerly Commission), and three regional human rights commissions/courts have responded to various situations involving humanitarian law violations.⁷ Further, national courts have been asked to apply humanitarian law for some time, and particularly in the context of the “war on terror” post 2001.⁸ These various institutions, however, have merely taken on the task of developing and interpreting humanitarian law on an *ad hoc* basis.

This Article reviews the jurisprudence of one of the principal human rights treaty bodies, the Committee on the Elimination of Racial Discrimination (“CERD,” “Committee,” or “Race Committee”).⁹

international law as to the content of humanitarian law. J. M. Henckaerts / L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1 (2005).

⁴ See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, UN SCOR, 49th Sess., 3453rd mtg., at 3, UN Doc. S/RES/955 (1994), 33 ILM. 1598, at 1600 (1994).

⁵ See M. M. Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court*, 38 *Texas International Law Journal* 621, at 641 (2003) (noting that the ICRC lacks adjudicative powers).

⁶ See, e.g., for an exceptional publication of an ICRC report: International Committee of the Red Cross [ICRC], *Regional Delegation for United States and Canada, ICRC Report on the Treatment of Fourteen ‘High-Value’ Detainees in CIA Custody* (2007).

⁷ See, e.g., Comm’n Human Rights, Res. 2002/34 of 22 April 2002, para. 13(a) (expressing Commission’s “grave concern over the continued occurrence of violations of the right to life highlighted in the report of the Special Rapporteur [on extrajudicial, summary or arbitrary executions] as deserving special attention [including] violations of the right to life during armed conflict”). See also P. Alston, *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the “War on Terror,”* 19 *European Journal International Law* 183, 196–197 (2008) (“Finally, the recent study on customary international humanitarian law produced under the auspices of the International Committee of the Red Cross concluded that ‘[t]here is extensive State practice to the effect that human rights law must be applied during armed conflicts’”).

⁸ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, at 631–632 (2006) (finding Common Article 3 of the Geneva Conventions applicable).

⁹ CERD is the body of 18 independent experts established by the International Convention on the Elimination of All Forms of Racial Discrimination, 4 January 1969,