BE (Disobedience to orders – landmines) Iran [2007] UKAIT 00035

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House

Date of Hearing: 15 & 16 June 2006
Date of Promulgation: 12 March 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Eshun
Senior Immigration Judge Grubb

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Miss F Webber, instructed by Newcastle Law Centre
For the Respondent: Mr T Eicke, instructed by Treasury Solicitor

(1) Generally, and subject to the additional ground identified by Lord Bingham in Sepet and Bulbul, punishment for refusal to obey military orders will amount to persecution only if carrying out the act ordered would make the individual (as distinct from his country) liable to sanctions in international law, or would change his status in international law (eg by excluding him from protection as a refugee. (2) Other than by Convention there is no international prohibition on the laying of landmines. (3) The international law of armed conflict is more extensive and detailed than international law as it applies to situations other than armed conflict, and it cannot be assumed that an act prohibited in armed conflict is also prohibited in peace.

DETERMINATION AND REASONS

The claim

1. The appellant is a citizen of Iran. He left Iran and came to the United Kingdom on 4 November 1999. He claims to be a refugee under the 1951 UN Convention relating to the Status of Refugees and the Protocol of 1967 on the basis that, if returned, he will be punished (or killed) by the Iranian military authorities for

having deserted from the Iranian army on being ordered to plant landmines in a civilian area in Iranian Kurdistan.

History of the appeal

2. The appeal has a somewhat lengthy history. The appellant arrived in the United Kingdom on 4 November 1999 and claimed asylum. On 30 March 2001, the Secretary of State refused his application. On appeal, an Adjudicator accepted the appellant's account but dismissed the appeal under the Refugee Convention and the European Convention on Human Rights. The appellant's further appeal to the Immigration Appeal Tribunal was unsuccessful. However, on 12 June 2003 by consent the Court of Appeal remitted the appeal to the Tribunal. Thereafter, on 8 July 2004 the Tribunal dismissed the appellant's appeal (BE (Military Service – Punishment – Landmines) Iran [2004] UKIAT 00183). The Tribunal concluded that the appellant had failed to establish that the conditions he would endure if imprisoned in Iran would reach the level of severity required for a breach of article 3 of the ECHR. The IAT also held that the order which the appellant refused to obey was not contrary to international law: either treaty law (because Iran was not a party to any relevant treaty) or customary international law, in particular Common Article 3 of the 1949 Geneva Conventions, which only applied in situations of war or armed conflict. The Tribunal concluded on the facts that the order he was given was not in the context of a war or situation of internal armed conflict. Thus, the appellant had failed to establish that any punishment imposed upon him for failing to obey the order would amount to persecution within the meaning of the 1951 Convention.

3. The appellant again appealed to the Court of Appeal which, on 13 January 2005, by consent, allowed the appeal, setting aside the decision of the Tribunal, and so leaving the appeal to the Tribunal undetermined. Following the commencement of the appeals provisions of the 2004 Act, the grant of permission to appeal to the Immigration Appeal Tribunal now takes effect as an order for reconsideration of the appeal by this Tribunal. The consent order is in the following terms:

> *"The Secretary of State agrees that the IAT erred in law and that this appeal should be allowed and the case remitted to a differently constituted IAT, on the basis that:*
>
> *(a) In the Court of Appeal judgment in Krotov v SSHD [2004] EWCA Civ 69; [2004] INLR 304, the Court (at §38) indicated that courts must consider, when assessing such claims under the refugee Convention, whether the appellant is or may be 'required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community' (§51);*
>
> *(b) However, the IAT only considered the different and separate question whether the actions the appellant was ordered to undertake were lawful under international law;*
>
> *(c) Further the Court indicated that, in times of peace, those 'basic rules of human conduct generally recognised by the international community; would find their reflection in international human rights law rather than international humanitarian law:*

> '… human rights really concern rights enjoyed by all at all times, whereas humanitarian rules concern rights which protect individuals in armed conflicts. Most Conventions and other documents which provide for the protection of human rights (a) include a far wider variety of rights than the rights to protection from murder, torture and degradation internationally recognised as set out above; (b) in any event contain safeguards which exclude or modify the application of such rights in time of war and armed conflict' [*Krotov, §38]*

(d) The IAT decided that in the present case there was no armed conflict. As a result, they should have considered the position of a deserter in times of peace.

(e) However, the IAT has only considered the position in relation to international humanitarian law (i.e. the laws of war) but has completely failed to consider the position under (wider) international law norms, and failed to ask itself the question identified by the Court of Appeal in §§37, 38 and 51 of the judgment in Krotov namely:

i) What are the 'basic rules of human conduct generally recognised by the international community' in times of peace based on an analysis of the relevant international human rights norms?; and/or

ii) In how far do the 'basic rules of human conduct' applicable in times of conflict and identified by the Court of Appeal in its judgment of Krotov apply in times of peace?"

4. The order makes clear that the scope of this reconsideration is limited in, at least, two respects. First, it is restricted to the appellant's claim to be a refugee under the 1951 Convention. The appellant's human rights claim is no longer in issue. Second, the IAT's finding that the appellant was not engaged in war or an internal armed conflict stands and our concern is with what, if any, are the applicable provisions of international law which apply in their absence.

5. No reference was made in argument before us to the provisions of the 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, which came into force after the hearing and was in the UK implemented by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2525/2006) and a Statement of Changes in Immigration Rules, Cm 6918. So far as it concerns the appellant's claim to be a refugee, we mention it below at the only point where in our view it is relevant: see paragraph 37. The subsidiary protection provisions of the Directive (implemented in the UK as provisions relating to 'humanitarian protection') have no impact on this appeal given the context in which we decide it. Humanitarian protection is available only to those who establish a risk of 'serious harm' to them if returned to their own country. 'Serious harm' is defined by the Directive and by paragraph 339C of HC 395 (as amended): it suffices for present purposes to say that in this case a claim to humanitarian protection would add nothing to the claim under Article 3 of the ECHR, which, as already indicated, is no longer in issue.

The facts

6. With those matters in mind, we turn to consider the facts, which were not in dispute before us. The essential facts are crisply stated in paragraph [3] of the Tribunal's decision (BE) when the appeal was last before it:

> *"3. … In 1998 the appellant did his military service. After two years he joined the regular army, becoming a sergeant. His training was in the laying and removing of land mines. In September 1998 he was sent to Iranian Kurdistan based in Paveh and Baneh where he spent two weeks. He was ordered to plant landmines but he refused because he did not want to kill innocent people in Kurdistan. He escaped. After six months he was arrested and tried by a military tribunal. He was sentenced to three months imprisonment and demoted. In June 1999 he was sent back to Kurdistan as a driver. In September 1999 a colleague was killed by the army for refusing to plant landmines. A week later he was ordered to plant landmines again. After discussion with a friend he saw his choice as being either to plant landmines as ordered or to desert. Since he believed that to plant landmines would endanger civilians, he deserted. First he went into hiding and then came to the UK via Turkey."*

7. In relation to the appellant, the IAT accepted two findings made by the Adjudicator. First, at paragraph [20], it accepted that:

> "*the appellant was trained to lay and remove landmines: it was not a case, therefore, of a soldier who refused to plant landmines per se.*"

8. Then, at paragraph at paragraph [21] it accepted the finding, that:

> "*the appellant had been ordered to plant landmines and had refused because he genuinely believed it might lead to the death of innocent civilians.*"

9. At paragraph 25 of his skeleton, Mr Eicke identified three crucial matters in respect of the laying of landmines by the Iranian government which we did not understand Ms Webber to dispute. First, at paragraph [19] the IAT said this:

> "*[There was a] lack of any specific objective evidence to show that at this particular time the Iranian authorities had planted anti-personnel land mines in this region with the deliberate intent of harming civilians or being reckless of harming them.*"

10. Secondly at paragraph [23], it said relying upon the Iran Landmine Monitor Report 2003:

> "*During the relevant period: (i) the Iranian government, whilst condemning landmines as inhumane weapons, confirmed that it has used and would go on using them to protect its borders and to combat drug smugglers and terrorists; (ii) areas it had mined included the province of Kurdistan (the area referred to by the appellant); and (iii) there have been civilian casualties in Kurdistan.*

11. Finally, Mr Eicke reminded us of the Adjudicator's finding (at paragraph [14] of his determination) that:

> *"I could find nothing in the background material before me that suggests the Iranian government is targeting the Kurdish civilian population."*

The starting point

12. This case is not about compulsory military service: the appellant is a volunteer, not a conscript. Nor, despite the introductory reference to such issues in para (a) of the Consent Order, is it about military discipline in general or about the possibility that a soldier could in the future be commanded to act against his conscience or against some rule of law. The appellant fears the consequences of having refused in the past to obey specific orders. Nevertheless, our starting point must be the speech of Lord Bingham in Sepet and Bulbul v Secretary of State for the Home Department [2003] UKHL 15 at [8]:

> *"There is compelling support for the view that refugee status should be accorded to one who has refused to undertake military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment."*

13. This view comprises, as it seems to us, three limbs. Translated into the facts of this case they are: (i) refusal to obey the order on the ground that obedience would or might amount to commission of 'atrocities or gross human rights abuses'; (ii) refusal to obey on the ground that obedience would mean participation in 'a conflict condemned by the international community'; and (iii) refusal to obey where the refusal itself would 'earn grossly excessive or disproportionate punishment'. If the appellant can show that his case falls under any of these he shows that the punishment he fears would amount to persecution within the meaning of the Refugee Convention.

14. Limb (ii) clearly refers only to orders given and to be obeyed within the context of armed conflict; a conflict moreover of a particular character. In the present case the Immigration Appeal Tribunal decided that there was no armed conflict and the Order remitting this appeal to the Tribunal is specifically on that basis. We need not, therefore, concern ourselves with it. Limb (iii) is not confined to circumstances of armed conflict. The Adjudicator found that any punishment would be for disobedience to military orders only, and the Immigration Appeal Tribunal, applying Krotov v Secretary of State for the Home Department [2004] EWCA Civ 69 on the basis of conclusions they had already reached, said this (at [40]-[41], emphasis added by us):

> *"Since the order was not contrary to national or international law, it cannot be said either that punishment imposed in view of a refusal to obey it by way of desertion would be illegitimate or disproportionate. Thus the punishment concerned would not involve the infliction of serious harm either under the Refugee Convention or Art 3. Nor would it involve flagrant denial of any other protected human right."*

15. All issues under the European Convention on Human Rights have, as we have said, fallen away. The reasoning of this passage in the Tribunal's determination is accepted, as it must be. What Miss Webber on behalf of the appellant does not accept is the starting point, which we have underlined in the passage cited above. It is not said that the orders were contrary to Iranian law; but the appellant's case is that the orders were contrary to international law.

Atrocities or gross human rights abuses

16. Before looking at the precise characterisation of that assertion we must analyse limb (i). As expressed by Lord Bingham, it is not confined to situations of armed conflict. Zolfagharkhani v Canada (1993) 3 FC 540, however, to which he refers and which appears to have been his source for this part of his proposition, was a case in which the finding of fact was that there was an armed conflict in progress (as it happens, between the Iranian government and Iranian Kurds, but within the context of the Iran-Iraq war). In Krotov, where limb (i) was explored, the context was again an armed conflict. It may well be that Lord Bingham intended the first limb to be confined, like the second, to situations of armed conflict. We are nevertheless unwilling to make that assumption against the appellant in the absence of clear words. We therefore proceed on the assumption, which we recognise may be too generous to the appellant, that where there is, as in the present case, no armed conflict, the appellant can succeed if he shows that obedience to the orders would (or, to adopt the formulation used by Lord Bingham in the context of the whole range of potential orders during a period of military service, might) have required him to commit atrocities or gross human rights abuses.

17. If the appellant can show that the very act that he was ordered to do amounts (or might amount) to an atrocity or to a gross abuse of human rights, he will have shown that the feared punishment is feared persecution. Despite Miss Webber's eloquent attempts to persuade us, we do not accept that in this case the act can bear that description. As Mr Eicke pointed out, on the undisputed facts, the laying of mines was not directed at civilians or the Kurdish community. It was not part of any campaign against anybody. The mine-laying is not shown to have with aggressive intent, nor is it shown that the Iranian government intended them to be detonated or for anybody to be hurt or was reckless as to such harm. It is true that experience suggests that anti-personnel landmines have unintended and devastating consequences, but that does not mean that every act of laying them is itself the commission of an atrocity, or a gross human rights abuse.

18. The language chosen by Lord Bingham is clearly a language of extremes. We were referred to the 'Berlin Wall' case, Streletz, Kessler and Krenz v Germany (2001) 33 EHRR 31, where landmines were used as part of a strategy preventing the free movement of citizens of the German Democratic Republic. It is clear from the report of that case that officers were under orders to prevent the survival of those

minded to cross the border. As well as static defences such as razor wire, there were dogs, automatic weapons, landmines, and a policy of shooting to kill, in order to 'annihilate border violators and protect the border at all costs'. The language of atrocity and of gross abuse is clearly appropriate to describe this strategy; and we do not exclude the possibility that in such circumstances every participant might be regarded as implicated in the dreadful consequences of it. Where there is no such strategy, however, and where the apprehended breach of another's human rights will, if it occurs at all, be an unintended consequence of the acts in question, we consider that there will be no 'atrocity', nor can any breach of human rights be called 'gross', if the unintended event occurs.

19. So far as she relies directly on Sepet and Bulbul, therefore, Miss Webber's argument fails.

Arguments beyond *Sepet and Bulbul*

20. Miss Webber also submits that in any event the act of planting anti-personnel land mines is an act contrary to international law. She does not base her submissions purely on an argument as to the atrocity of the act or purely on arguments about human rights, although both these elements feature at certain stages of her submissions. Rather, she argues that certain conduct, including for these purposes the planting of such weapons, is prohibited by rules of international law, and that it is the breach of the rules, rather than the effect of the breach, that gives the appellant his claim. She submits, in effect, that being required to do an act that is contrary to international law is a fourth possibility for the acquisition of refugee status from refusal to obey military orders, to be added to the three identified by Lord Bingham in Sepet and Bulbul. In order to maintain that submission in the present appeal, she seeks to show that the act the appellant was commanded to perform is indeed contrary to international law. She invokes international humanitarian law, an *a fortiori* argument, an argument based on Art 1F of the Refugee Convention, customary international law, and international human rights or 'the basic rules of human conduct generally recognised by the international community'. We treat each of these elements of her submission in turn below.

International humanitarian law

21. Miss Webber invoked the law of war (or of armed conflict), or international humanitarian law as it has become known. She argued that the appellant was entitled to disobey the order to lay landmines because it would offend customary international law and its principles of military necessity, humanity, discrimination (or distinction) and proportionality, as set out in the UK Ministry of Defence's *The Manual of the Law of Armed Conflict* (2005), chapter 2. In particular, she argued, these principles would prohibit the use of landmines against civilian targets. She referred us, in particular, to the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their

Destruction (1997); The Conventional Weapons Convention 1980, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (1998) and common Article 3 of the 1949 Geneva Conventions.

22. We can deal with this aspect of the case briefly. Iran is, of course, not a party to the Ottawa Convention or Protocol II. Even if their provisions, like those of the Geneva Conventions, formed part of customary international law they would, with the possible exception of the Ottawa Convention, form part of international humanitarian law. (We deal later with the relevance of these Conventions to customary international law in times of peace.) International humanitarian law is a species of international law applicable only in times of war or where there exists a situation of international or internal armed conflict (see, Prosecutor v Tadic, Appeal on Jurisdiction, ICTY, No. IT-94-1-AR-72 (Oct 2 1995)). It has no application in peacetime. That is no doubt why Miss Webber found its general principles so conveniently summarised in *The Manual of the Law of Armed Conflict*. As we pointed out earlier, the Immigration Appeal Tribunal determined that the appellant was not engaged in an armed conflict and the appeal was remitted to us by the Court of Appeal specifically on that basis.

23. Thus, Miss Webber's reliance upon international humanitarian law must fail.

The *a fortiori* argument

24. If it be taken that international humanitarian law as such applies only in situations of armed conflict, Miss Webber then adopts an *a fortiori* argument. In her written skeleton argument she acknowledges that human rights law and international humanitarian law have developed separately. She continues as follows:

> *"7.3 Initially, humanitarian law was applicable only to international conflicts, because of the doctrine of sovereignty, which was inimical to the possible intrusion by other States into a State's internal affairs. However, the speedy development of human rights doctrines, particularly during and after the Second World War, has resulted in the State-sovereignty oriented approached being gradually supplanted by a human-being orientated approach (see Prosecutor v Tadic (jurisdiction), ICTY, decision 2 October 1995, paras 96-7). This has meant (a) the application of the humanitarian norms developed in the context of international conflict to domestic conflict (ibid.); (b) the application in all States of certain principles in human rights law as peremptory norms, in all circumstances, regardless of the context, such as the right not to be arbitrarily deprived of life, the right to bodily integrity and the right to be free from cruel or inhuman treatment.*
>
> *7.4 Most Conventions which provide for the protection of human rights (a) include a far wider variety of rights than those applying during armed conflict, and (b) modify the application of such rights (save for those which are absolute in nature, as are the two cited above) in time of war and armed conflict (see Krotov v SSHD [2004 EWCA Civ 69, [2004] INLR 204, para 38). Thus, in time of peace, civilians are protected by a wider range of rights than during armed conflict, but all the rights applicable in armed conflict can be assumed to be applicable in peacetime as aspects of fundamental human rights: see The Corfu Channel case, Merits, ICJ Reports 1949 (p 22); Barcelona Traction*

Light and Power Company, Judgment of 5 February 1970, ICJ Reports 1970, para 33-4; Case Concerning Military and Paramilitary Activities In and Against Nicaragua, 1986 ICJ 14 (Merits Judgment, June 27), (1986) at paras 215, 218.

7.5 Thus the use of an indiscriminate weapon in a situation where a civilian population is likely to be affected (by death or severe injury), if prohibited during armed conflict, is even more likely to be contrary to the basic rules of human conduct in time of peace.

7.6 The appellant submits that, given the real likelihood of a landmine sown in a civilian area causing arbitrary death or severe injury to a civilian, and in particular a child, to have obeyed the order would have resulted in a real risk of his involvement in violation of fundamental human rights. He further submits that given the wider reach of the human rights Convention in times of peace than in times of armed conflict, such violations do not need to be characterised as 'gross' before he is entitled to refuse and to receive the protection of the Refugee Convention for desertion, since there is no conceivable military necessity for them, as there might be in wartime."

25. This *a fortiori* argument has a superficial attraction. In a sense it seems obvious that because a person's rights are likely to suffer diminution or abridgement in times of war, his rights in peace will be at least as extensive as in war. Similarly, it might appear that those rights protected in time of war must be those which are central and basic (so that they survive even the most severe conflict); and rights so central and basic must necessarily be protected in peacetime too. Despite the superficial attraction, however, it seems to us that this argument has no sound legal basis.

26. So far as concerns the authorities cited, Miss Webber made no further or more detailed reference to the Barcelona case. Tadic is clear authority for the extension to internal conflicts of the rules applicable to conflicts between sovereign States, but contains nothing to suggest that the same principles apply generally in the absence of armed conflict.

27. Both the Corfu Channel case and (in the passages with which we are primarily concerned here) the Nicaragua case concerned the planting of mines at sea. In the former case the mines were planted by Albania in Albanian waters through which there was, by the operation of international custom relating to straits connecting two parts of the high seas, a right of passage. It does not appear to have been suggested that the mine-laying itself was illegal; but, as the court's majority decision, dated 9 April 1949, indicates at p 22:

> *"The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No VIII, which is applicable in times of war, but on certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states."*

28. In the Nicaragua case the United States of America laid mines in Nicaraguan waters, preventing lawful passage to Nicaraguan ports. Much of the judgment responds to claims by the United States that insofar as its acts were acts of aggression they were not contrary to international law because any customary international law on the issue had been subsumed in treaties by the relevant provisions of which the United States was not bound as it was not a party to them. In its judgment of 27 June 1986 the Court rejected that argument, holding that treaty norms and customary norms could exist side by side, and that a State might be bound by customary norms even if there were identical norms in a treaty to which it had chosen not to subscribe. (We deal further and more generally with this issue below.) It followed that the mine laying in this case was itself unlawful, although 'the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts' (paras 215, 219). The United States however, by failing to give notice of the presence of the mines,

> *"commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No VIII of 1907. Those principles were expressed by the Court in the Corfu Channel case as follows:*
>
> > *'certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war'."*

29. From these authorities we derive the following principles. First, there are some 'elementary considerations of humanity' that have legal force apart from Conventions or Treaties. Secondly, those considerations apply in peace as well as in war. Thirdly, they are 'more exacting' in peace, although the precise meaning of that phrase is far from clear. Fourthly, they may be seen as *underlying* specific Convention provisions. Fifthly, so far at any rate as concerns the specific issue addressed in these cases (and we have been shown no other) they may relate to directing attention to the fact that an act has been done (whether lawfully or unlawfully) rather than to prohibition of the act itself. That, we apprehend, is because they are indeed principles of humanity rather than primary rules for the conduct of States' affairs whether in peace or war.

30. We do not find a transition from 'principles of humanity' obligating States in their relations one with another to a general assertion of human rights vested in individuals an easy one, and we do not see it in these authorities, or in Tadic (where the admissibility judgment was given on 2 October 1995), despite the development of principles of human rights in national and international jurisdictions over the period spanned by these judgments. More particularly, there is nothing at all here to suggest that the 'law of peace', if we may so describe it, includes all the protective provisions of the law of war. There is not even any authority here for saying the law of war – international humanitarian law – itself is a source of the law applicable in times of peace. What is said is rather that there are certain considerations underlying international humanitarian law and Treaties governing conflicts, which, because they reflect general considerations of humanity, must apply also in peacetime. One such consideration is an obligation

to *warn* about mines. No other such consideration has been identified in the materials put to us. The suggestion that there is here authority for a duty not to *lay* mines is entirely without foundation, as is the suggestion that the content of international humanitarian law (rather than some considerations upon which it lies) is to be regarded as a source of the law of peace.

31. The superficial attraction of the *a fortiori* argument, to which we referred at the beginning of this section, rests on a misapprehension. 'International law' is not a general universal law governing mankind. 'International law' is the phrase used by lawyers to describe the system of rules, derived from various sources, that govern the relations between States. For that reason its content is, save in the specific area of international human rights law, which we consider further below, largely confined to such matters; and it is not surprising if, with that exception, it is relatively silent so far as the rights of individuals (or the duties of States towards individuals) are concerned in time of peace. It is in times of war that one State is most likely to have such dealings with the citizens of another State as to require regulation. As Tadic shows, the principles of the laws of war between sovereign States are applicable also to internal conflicts. That movement is no doubt inspired to an extent by principles of protection, but there is no doubt also an international interest in such conflicts, for it is an unfortunate fact that wars may spread, and even if the conflict remains confined within the boundaries of one State, it may have effects in the international community by producing refugees or demanding sanctions.

32. In times of peace, while there may need to be some regulation of the way States treat nationals of other States in alien territory, and while States may bind themselves by Treaty to any number of new obligations, the relations between a State and its own nationals are likely to escape the attention of international law in general. A graphic illustration of this reality is provided by the Rome Statute of the International Criminal Court, Part 2, headed 'Jurisdiction, Admissibility and Applicable Law'. The Court's jurisdiction is in Art 5 specified as including '(a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression'. 'Genocide' is defined in Art 6 as encompassing any of five specified acts. 'Crimes against humanity' are defined as including any of eleven specified acts (which are the subject of further definition) 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. 'War crimes' is the subject of a much more extensive definition. The Court is to have jurisdiction over all such acts *in particular* (ie not exclusively) when committed as part of a plan or policy or as part of a large-scale commission of such crimes. The crimes themselves are then listed. There are fifty in all, listed under four separate heads (Art 8.2(a)(i)-(viii); (b)(i)-(xxvi); (c)(i)-(iv); (e)(i)-(xii). It is abundantly clear that the content of international humanitarian law – the law of war – is substantially more detailed than international law as it applies in the absence of conflict, and for the good reason we have set out above.

33. Thus, the *a fortiori* argument also fails.

The argument based on Article 1F

34. Article 1F of the Refugee Convention is as follows:

> *"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
> *(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
> *(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
> *(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."*

35. It may not at first sight be clear why this Article, which is evidently exclusionary in character, could be the subject of reliance by the appellant in the present case. The clue is the context. The Refugee Convention generally provides international protection to those at risk of persecution for any of the 'Convention reasons'. Those who fall within the terms of Art 1F are, however, excluded as undeserving of such protection, despite any risk of their persecution. It is therefore reasonable to suppose that the international community, in assessing refugee claims, considers the acts mentioned in Art 1F to have a particular character. If they are the acts that are of such severity as to disqualify a claimant from refugee status, they must also be regarded as the acts which no person ought to commit and therefore must be acts which nobody can properly be ordered to commit. In Krotov, Potter LJ referred to this reasoning at [39]:

> *"It can well be argued that just as an applicant for asylum will be accorded refugee status if he has committed international crimes as defined in (a), so he should not be denied refugee status if his return to his home country would give him no choice other than to participate in the commission of such international crimes, contrary to his genuine convictions and true conscience."*

36. He went on to refer to paragraph 10 of the EU 1966 Joint Position of Council:

> *"... refugee status may be granted, in the light of all the other requirements of the definition, in cases of punishment of conscientious objection or deliberate absence without leave and desertion on grounds of conscience if the performance of his military duties were to have the effect of leading the person concerned to participate in acts falling under the exclusion clauses in Article 1F of the Geneva Convention."*

37. We should also mention Council Directive 2004/83/EC (the 'Qualification Directive'), which, is based on the Refugee Convention and has binding force in all EU countries apart from Denmark from 10 October 2006. In Art 9(2) it defines 'Acts of Persecution' as including

> *"(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)"*

which exclusion clauses are to all intents and purposes identical with those in Art 1F of the Refugee Convention.

38. The role of Article 1F in setting out some principles of *in*clusion is in our view established. Although its effect is confined by Potter LJ on the facts of Krotov to acts within paragraph (a), and is confined by the Qualification Directive to acts in a conflict, Article 1F is seen by the international community as a yardstick for the identification of acts that a person has a good reason for refusing to perform. For the purposes of assessing Miss Webber's argument under this head we are prepared to take the view of the EU joint position, which is the widest view. According to this, punishment for failure to perform any proscribed act within the compass of the whole of Art 1F, whether or not in a conflict, would be persecution.

39. So far as concerns Art 1F(a), Miss Webber seeks to show that the act which the appellant was commanded to perform was 'a crime against peace, a war crime or a crime against humanity as defined in the international instruments drawn up to make provision for such crimes' by reference to Art 7 of the Rome Statute of the International Criminal Court, and Art 6 of the Charter of the International Military Tribunal. We have no doubt that these are instruments of the character described in Art 1F(a).

40. In the Rome Statute, Miss Webber points to the definition of 'crimes against humanity' as including '(a) murder; ... (k) other inhumane acts of a similar character intentionally causing serious injury to body or to mental or physical health'. She argues that the laying of landmines amounts to an act within one of those categories. The problem is, however, that the Rome Statute definition is subject to the following overriding restriction:

> *"when committed as part of a widespread or systematic attack or directed against any civilian population, with knowledge of the attack;"*

and 'attack directed against any civilian population' is further defined as meaning:

> *"a course of conduct involving the multiple commission of acts [classed as crimes against humanity] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack."*

41. This part of Miss Webber's argument is doomed to failure on the facts, for essentially the same reasons as we gave in respect of the argument that the order involved the commission of an atrocity or a gross breach of human rights. There is no evidential foundation for a finding that the order in this case was to do an act that fell within the definition of a 'crime against humanity' in the Rome Statute.

42. The Charter of the International Military Tribunal (under which the Nuremberg trials were held) defines at Art 6 the following as crimes within the jurisdiction of the Tribunal:

> *"(b) Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment ... of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war ..., wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*
>
> *(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."*

43. There is in our view no doubt both from the wording of these clauses and their context that they refer only to acts committed in a conflict or (in the case of (c)) before a conflict that actually takes place. Indeed in R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarete (No 3) [2001] 1 AC 147 at 272G, Lord Millett observed as follows in the course of a discussion of the extent of the prohibition against crimes against humanity within customary international law:

> *"The Nuremberg Tribunal ruled that crimes against humanity fell within its jurisdiction only if they were committed in the execution of or in connection with war crimes or crimes against peace. But this appears to have been a jurisdictional restriction based on the language of the Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law."* (emphasis added)

44. Because of the terms of Art 1F(a), we are concerned at this point of the argument not with the substantive requirements of international law but with the language of the Charter as one of the international instruments to which Art 1F(a) makes reference. The act ordered in the present case, unconnected with any conflict, could not fall within the definition in the Charter of the International Military Tribunal.

45. So far as concerns Art 1F(b), Miss Webber relies on the (UK) Landmines Act 1998, submitting in her written skeleton as follows:

> *"The Landmines Act 1998 makes it a criminal offence under UK law to lay landmines, and gives UK courts jurisdiction over offences committed abroad. Such a sentence passed on a refugee already in the UK results in a presumption of a particularly serious crime, constituting the refugee a danger to the community for the purposes of refoulement, by virtue of s 72 Nationality, Immigration and Asylum Act 2002. The level of sentence reflects the degree of gravity with which the act of planting landmines is seen, and shows that it is seen by the UK legislature as being an act which is contrary to the basic rules of human conduct."*

46. The final phrase is considered in some detail below. We should point out that fourteen years is the maximum, not the automatic sentence; and that s72 is

confined to the interpretation of Art 33(2) of the Convention and cannot assist in interpreting Art 1F. Further, as Mr Eicke submitted, the provisions of the Act are modelled on the provisions and extent of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Ottawa Convention) in that insofar as it concerns activities abroad it prohibits acts only by British citizens and certain British juridical persons. In s 5 of the Act there is an exemption for acts in the course of or for the purposes of a military operation outside the United Kingdom that involves the participation of British soldiers and those of some other State. It is not easy to envisage circumstances in which, as Miss Webber suggests, 'a British citizen laying landmines with the appellant in Iran would be liable to imprisonment for fourteen years'. But this, with respect, is not the point. We are concerned with the construction of Art 1F(b). If this appellant *had* laid the mines he would not be *excluded* by that Article, because he would have committed no criminal offence under the law applicable to him. The operation of the same interpretation to the same Article compels the result that his *refusal* to lay the mines does not lead to his *inclusion* by Art 1F(b).

47. So far as concerns Art 1F(c), Miss Webber's case is as follows:

> *"The Preamble and Article 1 of the [United Nations] Charter demonstrate that among the principles and purposes of the UN is the preservation of peace, and the need to save humanity from the scourge of war and its untold sorrow. The development of a legal framework for disarmament, the development of international humanitarian law regulating the deployment of weapons, and the development of international human rights law in which the life, dignity and bodily integrity of the human person are paramount values, are all fundamental to the work of the UN. The Conventions, Declarations and Resolutions referred to above [ie those relating to landmines] make it abundantly clear that the deployment of indiscriminate and inhumane weapons of war which cause untold suffering to civilians is contrary to the purposes and principles of the UN."*

48. With respect, this argument seems to us to be stronger in rhetoric than in sound legal principle. The United Nations Charter is a Charter between States and in principle regulates the relations between States. Acts 'contrary to the purposes and principles of the United Nations' are likely for the most part to be committed by those who have control, de jure or de facto, of the organs of a State or in some other way can control its policy. Indeed, the tentative view expressed in the UNHCR *Handbook* (at para 162, emphasis added) is that

> *"an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles."*

49. That view has, so far at least as this jurisdiction is concerned, given way to a view that acts of international terrorism clearly fall within Art 1F(c) despite being committed by individuals who have no authority within a State (KK [2004] UKIAT 00101; [2004] Imm AR 284; see now also s 54 of the Immigration, Nationality and Asylum Act 2006): but it is in our view inconceivable that an ordinary soldier

carrying out orders could be seen as having such individual responsibility for the maintenance of international peace that he could be penalised under this head. For such a person, only paragraph (a) or (b) would be appropriate as an exclusionary provision; and, similarly, such a person cannot rely on paragraph (c) to justify his refusal to obey orders.

50. Thus, even if the principle that in certain circumstances Art 1F can be a guide to inclusion within the Refugee Convention is taken at its widest, it does not assist the appellant on the facts of this appeal.

Customary international law

51. Under the heading '*Customary international law*' Miss Webber's skeleton asserts as follows:

> *"The appellant's contention is that he is not required to show that the landmine ban has achieved the status of a peremptory norm of international law in order to justify his refusal to lay land mines, provided he can show – as he can – that the level of abhorrence and condemnation of the use of landmines, even among non-States Parties to the Ottawa Convention, is such that the landmine ban has been recognised with record speed as at least an emerging norm of international law."*

52. The appellant seems here to be making two submissions. The first is that there is a rule of customary international law prohibiting the deployment of landmines in such circumstances as those in which the appellant received his order. The second is that if there is not a rule of customary international law there is an 'emerging norm', which has in this case the same effect as an actual rule of law.

53. Nothing in Miss Webber's skeleton or submissions, or in anything else we were shown, supports the second submission. The very phrase 'emerging norm' demonstrates the difference between an established rule and the concept upon which Miss Webber would allow individuals to rely. It is, in more traditional language, *lex ferenda* as distinct from *lex lata*. There is simply no authority to suggest that States or individuals are bound by concepts or practices that have not become law, whether or not they may do so in the future, or may be in the process of becoming law. The description of the 'landmine ban', as Miss Webber calls it, as an 'emerging norm', together with the evidence that it has been 'recognised with record speed', are matters that in so far as they are relevant to this appeal at all go solely to the question of whether a rule against deploying anti-personnel landmines in times of peace is at present a peremptory norm of international law. If it is not, it need not be followed save by States that are parties to the Treaties concerned. If that is so, the fact that those States are numerous, the fact that those States collected together very quickly in their subscription to the Treaties, the fact that this country is itself bound as a State Party, and the fact that right-thinking people might well agree with the endeavours of the Treaties, are alike irrelevant in establishing obligations of States that are not parties.

54. We must therefore consider whether a ban on the deployment of anti-personnel landmines in peacetime is a part of customary international law. So far as concerns the relation of Conventions or Treaties to rules of customary international law, the following principles are clear. First, a rule of customary international law may arise or be established without the need for or intervention of any Treaty, provided that the practice of States is established, widespread and consistent and accompanied by the 'evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it'. (This definition of *opinio juris* we owe to the judgment of the International Court of Justice in the North Sea Continental Shelf cases, ICJ Reports 1969, para 77.) Secondly, where a Treaty covers the same ground as a rule of customary international law, it does not follow that the customary norm has ceased to have effect as such: so a State that derogates from the Treaty may still be bound by the customary norm: Nicaragua case judgment, paras 174-182. Thirdly, a norm of customary international law may have a Treaty as its origin. The judgment in the North Sea Continental Shelf cases explores this possibility, indicating at para 71, in a passage included in Miss Webber's written skeleton, that a Treaty may have

> *"generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention."*

55. Miss Webber goes on to submit that 'factors indicating that Treaty provisions have become norms of customary international law include (a) very widespread and representative participation in a Convention; (b) whether the Convention admits of reservations; (c) extensive and virtually uniform State practice, occurring in such a way as to show general recognition that a rule of law is involved'. This, in our view, is not an accurate way of expressing the minimum requirements. The *opinio juris* is necessary in all cases. Mere uniformity of practice or near-universality of ratification of the Treaty cannot suffice. To cite again from the same judgment, at para 74:

> *"Although the passage of only a short period of time is not necessarily, or itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within that period of time, short though it might be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have concurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."*

56. There are other requirements, some of which we explore below. In particular, if the Treaty is said to be the source of the norm, then the norm *as expressed in the Treaty* must be of the sort that could be regarded as amounting to a general rule of law. This is the reason why the question whether the Treaty admits of reservations is relevant; but that is only one of the relevant questions going to this issue. Caution is always necessary: as para 71 of the North Sea Continental Shelf cases judgment continues after the passage cited by Miss Webber:

"There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised ways by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained."

57. We do not understand the appellant's case to be based on any suggestion that there is a customary rule of international law preventing the laying of landmines in times of peace other than one derived from a Convention. It is true that certain aspects of the use of landmines offend against certain of the laws of war: for example the principles of proportionality and distinction, which, as well as being incorporated in Articles 51 and 57, and 48 (respectively) of Additional Protocol I (1977) to the Geneva Conventions of 1949, are part of customary international law applicable in situations of armed conflict. Those rules do not, however, apply in the absence of armed conflict and nothing else before us is sufficient to establish a rule in the sense evoked by the appellant that predates or is independent of the Treaties to which we were referred.

58. The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 1980, together with its Protocol II (1996) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices are confined in their effect to situations of armed conflict: see Article 1 and the third Recital to the Convention, and the second and third paragraphs of Article 1 of the Protocol. If a rule of customary international law on the deployment of landmines other than in situations of armed conflict has emerged, its source must be the Ottawa Convention of 1997, paragraph 1 of Article 1 of which consists of undertakings by each State Party 'never under any circumstances' to use anti-personnel mines or to develop, acquire, keep or transfer them or to assist anyone else (whether or not a State Party) to do so.

59. Miss Webber relies on the fact that at the date of the hearing a considerable number of States had ratified the Ottawa Convention, amounting in all to about three-quarters of the members of the United Nations. In addition she cites General Assembly Resolutions and a UN Press Briefing as indications of general abhorrence of the damage done by anti-personnel landmines. In our judgment the material advanced on the appellant's behalf is not sufficient to show that the norms of the Ottawa Convention have become norms of customary international law, for the following reasons.

60. First, looked absolutely simply in terms of numbers, we do not consider that ratification of a Treaty by three-quarters of the countries in the world is evidence of acceptance of a new norm derived from the Treaty. We accept that such a number might perhaps be sufficient if there were other potential sources of the norm - for example another Treaty, to which other States were party – but that is not the case here.

61. Secondly, the identification of States that have not ratified the Ottawa Convention is of considerable interest. They include (apart from Iran) the USA, China, India, Pakistan, the Russian Federation, North and South Korea, Poland, Bahrain, Morocco, Indonesia, Singapore and Finland. There are here large countries and smaller ones; there are three (more than half) of the permanent members of the UN Security Council as well as Indonesia, which is an elected member for 2007; there are countries whose history, governance and present policy varies widely. It is simply not possible to say that the States that have not ratified the Convention are to be together regarded as resisting acceptance of an existing norm. On the contrary: if the States Parties to the Ottawa Convention are seen as representative of the States of the World, the States not party to the Convention are in many ways an equally representative group.

62. Thirdly, we see no reason to say that it is those States that are particularly affected by the asserted norm that have ratified the Convention. If it were the case that all or nearly all of the States that historically have produced, traded in or deployed landmines had ratified the Convention, it might not perhaps matter very much that other States had not done so. But the position is that whereas some affected States (such as the United Kingdom) have ratified the Convention, others have not done so; and amongst smaller countries we may not be unduly cynical in perceiving an unwillingness to ratify the Convention if a neighbouring superpower has not done so. If we are right about that, the suggestion is that these smaller States reserve a right to use landmines if they consider it necessary to do so, which would be another factor counting against the existence of a rule of customary international law.

63. Fourthly, despite the general statements from various sources cited by Miss Webber for the appellant, we do not detect an *opinio juris* in support of the asserted norm. States Parties and some International organisations urge those States that have not ratified the Convention to do so, but the tone is one of exhortation, based on humanitarian arguments, not of a statement of legal principle said to compel non-Parties to observe the norm even if they do not ratify the Convention. We are not aware of any assertion that the provisions of Article 1 of the Convention have the force of customary international law save the single UN Press Briefing to which Miss Webber drew our attention. It is dated 1 October 1998 and states that the Ottawa Convention is a 'Convention of conscience, that acquired force of binding international law with historic speed'. No doubt there may be more such statements, but we are confident that it is not a view held by States or international lawyers in general or even by the United Nations itself, whose own legislative body, the Security Council, would be very unlikely, because of its composition, to be able to assent to the terms of this briefing. Annual resolutions of the General Assembly seek further ratifications of the Convention, rather than recognitions of the Convention's norms as binding customary rules; and expressions of deep concern and regret over the use of landmines do not amount to recognition that there is a binding international law rule against them.

64. Fifthly, the fact that the Resolutions to which Miss Webber made reference are typically carried *nem con* is not as she suggested explicable only on the ground that there is general recognition of the existence of a binding norm. The combination of the resolutions with the fact that by no means all of those voting in favour have ratified the Convention has another obvious explanation. It is that States in general seek the time when all States will have *mutually and reciprocally* abandoned the use of landmines, many States seeing no obligation to do so without the protection offered by other States doing the same. This, as we have hinted above, may well be the specific reason for non-ratification by certain States. But this explanation for the widespread exhortation to the Treaty coupled with less than universal ratification of it has a wider impact in the context of the arguments put to us. It is an approach to the banning of landmines that is *essentially contractual* or conventional; the obligation of one State depending therefore not on a peremptory norm but on the obligations accepted by other States. We do not rule out the possibility that if the desired universal ratification of the Convention were achieved (or nearly achieved) it might be possible to move on thence to arguments for the development of a customary rule; but in the present period the acts and assertions of States are on this view referable to issues of contract rather than issues of supervening obligation.

65. Sixthly, although we should not be inclined to allow our judgment to depend on this point alone, we have some doubt whether the terms of the Convention itself, taken as a whole, can be regarded as of a fundamentally norm-creating character. It is true that Article 1 is in the most universal terms; but Article 13 permits amendments to the Convention (including Article 1) and envisages the presence, at meetings considering such amendments, of non-State Parties. Such provisions are by no means unusual, but they do not help to show that the norms set out in Article 1 are indeed universal and peremptory in the terms there used, and that in those terms they bind all States. Further, Article 18 of the Convention, entitled 'Provisional application' is as follows:

> *"Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force."*

66. That provision was part of the Convention from its origin and it may not be surprising that it has not been deleted: but if Miss Webber's argument is right it can now be of no effect at all, because every State that is not already a Party is bound by the norms of paragraph 1 of Article 1 independently of ratification, acceptance, approval or accession. Again this point is no doubt of lesser force, but it is not easy to see that a Convention including a provisional application clause can be seen as embodying a peremptory norm covering the same ground as that clause.

67. As we noted above, the International Court of Justice at the end of para 71 in the North Sea Continental Shelf cases judgment warns against lightly regarding a conventional rule as having attained the status of a peremptory norm. Here the number and nature and interests of the States that are not parties to the

Convention, the apparent lack of supporting *opinio juris*, the existence of an alternative explanation for the posture of States in respect of the Convention, and the terms of the Convention itself, all point away from that conclusion.

68. The argument that a ban on landmines in peacetime has become a binding rule of customary international law therefore also fails.

The 'basic rules of human conduct generally recognised by the international community'.

69. It will be recalled that the Order of the Court of Appeal remitting this matter to the Tribunal specifically required us to identify whether there are any and if so what 'basic rules of human conduct generally recognised by the international community' in times of peace, and also to identify whether the 'basic rules of human conduct' that are identified in Krotov as applicable in times of war are also applicable in times of peace. It will also be recognised that we may appear to have moved rather slowly towards an attempt to deal with those issues. The reason for the delay is partly that we needed to respond to the appellant's case in the way put by Miss Webber; but it is partly also that the concept of a group of 'basic rules of human conduct' that have legal force other than in times of armed conflict appears to be a novel one save insofar as it is either to be limited to the proscription of 'atrocities or gross human rights abuses' or to be based on Conventions having force as such. The preceding parts of this determination have been devoted to considering whether there could be any other basis for the identification of these basic rules in a way which would assist the appellant in this case. We have concluded that there is not. Further, it is far from clear that any authority binding on us points to the existence of such a corpus of rules. The phrase 'the basic rules of human conduct' appears to be derived in Krotov from para 171 of the *UNHCR Handbook* (see eg Potter LJ at [22]), where the context is clearly that of armed conflict. The phrase is used again in that context by Potter LJ at [29] where he cites, to the same effect, Laws LJ in Sepet and Bulbul v SSHD [2001] EWCA 681 and an unreported decision of the Immigration Appeal Tribunal.

70. Krotov itself is a decision confined on its facts to situations of armed conflict, and it is somewhat difficult to see that the paragraphs of the judgment of Potter LJ to which reference is made in the Court of Appeal's Order in the present case have any wider reference. Paragraph [37] follows a discussion identifying a number of rules proscribing certain conduct in situations of armed conflict. It is as follows:

> *"In my view, the crimes listed above, if committed on a systematic basis as an aspect of a deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the Refugee Convention"*

71. Paragraph [38] is cited in part in the Order, but we must set it out in full:

> *"It is in my view preferable to refer in this context to 'basic rules of human conduct' or 'humanitarian norms' rather than to 'abuse of human rights', at least unless accompanied by the epithet 'gross': cf the observations of Lord Bingham of Cornhill quoted above [sc Sepet and Bulbul [2003] UKHL 15 at [8]]. That is because human rights really concern rights enjoyed by all at all times, whereas humanitarian rules concern rights which protect individuals in armed conflicts. Most Conventions and other documents which provide for the protection of human rights (a) include a far wider variety of rights than the rights to protection from murder, torture and degradation internationally recognised as set out above; (b) in any event contain safeguards which exclude or modify the application of such rights in time of war and armed conflict: see generally the approach set out in Ingrid Detter, The Law of War (2nd edn, Cambridge University Press, 2000, at pp 160-163)."*

72. What Potter LJ is clearly doing here is distancing the general jurisprudence of human rights and its vocabulary from 'this context', that is to say the law of armed conflict. The part of para [38] cited in the Order is, we apprehend, not intended as a ground-breaking advance in the development of the international law of human rights but is merely a reason for asserting that the language of 'human rights' should not be used carelessly to denominate the 'crimes listed above' and the ills caused by their commission in times of armed conflict. In any event, this paragraph refers as a source of *any* international law of human rights only to 'Conventions and other documents which provide for the protection of human rights'. It is not suggested here that there is a body of human rights law to be found outside such documents.

73. Paragraph [51] is as follows:

> *"As I have already indicated, while these objections [sc to various proposed points of interpretation] have force, they should not in my view prevail over the necessity for the courts, in seeking to define and apply the working test in cases of this kind, to have regard to the realities of the particular conflict in which an applicant has refused to participate rather than to the specific question of whether that conflict has yet been internationally condemned. If a court of tribunal is satisfied: (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may be required, on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community; (b) that they will be punished for refusing to do so; and (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum-seeker to serve in the relevant conflict, then it should find that a Convention ground has been established."*

74. The substance of this paragraph is clearly concerned solely with situations of armed conflict. Further, the phrase 'the basic rules of human conduct generally recognised by the international community' is not merely being used here in this context: it is defined by Potter LJ at [38] specifically for the purpose of use in the context of situations of armed conflict. There is nothing here to suggest a general law of human rights in times of peace, and, crucially, there is nothing to suggest that there is any body of rules called 'the basic rules of human conduct generally recognised by the international community' that has any normative effect save in situations of armed conflict.

75. Miss Webber submitted that these and other remarks in Krotov should not be read as 'imposing a universal requirement of conflict in order for desertion to be justified as an objection to the basic rules of human conduct . ... The issue in all cases is whether the acts objected to are repugnant, not whether they are performed in war or peace'. She gave as her reason 'otherwise, a serving soldier who was ordered to mutilate or torture a prisoner in his custody in peacetime could not seek refugee status on desertion'. We do not agree with the reason. As we have discussed above, and as is generally accepted, a person ordered to commit a serious non-political crime within the meaning of Article 1F of the Refugee Convention on its true construction would have a claim. Further, a person ordered to commit an atrocity or a gross human rights abuse would have a claim. It is by no means apparent to us that the Court of Appeal in Krotov intended to go any further than this; and we certainly consider that if they had done so they would have been making new law.

76. That conclusion is sufficient to deal with the questions which the Order identifies as not having previously been answered by the Tribunal. The 'basic rules of human conduct generally recognised by the international community' is a phrase used in the analysis of certain aspects of the law of armed conflict. The rules in question do not as such apply in times of peace, and there is no body of rules known by that name that is to be derived from 'an analysis of relevant international human rights norms' and is recognised in times of peace.

77. Further, we should with respect add that (despite the words of the Order) the Court of Appeal's indication at para [51] of what courts should consider 'when assessing such claims' does not apply to this appeal. It applies only in the context of situations of armed conflict.

78. In the written skeletons of both parties the Refugee Convention issue is put as being whether:

> *"being forced to plant landmines in civilian areas is contrary to the basic rules of human conduct and to be punished for refusing to engage in such conduct amounts to persecution".*

79. In view of what we have said, the answer to that question must be in the negative for the purposes of this appeal. The rules to which reference is made are rules that have no application in this appeal. The argument based on 'the basic rules of human conduct' therefore also fails.

International human rights law

80. International human rights law is, as Potter LJ made clear in Krotov, different from the law of war. It is found in international Conventions and other documents. Those documents tend to offer and protect a wider range of human rights than the rights protected in war; and they tend to have provisions varying or abridging some of the rights in times of war.

81. They have, as we read them, another feature, which is common to many Conventions. They are made between States, and whereas they are clearly entered into for the protection of the human beings whose rights are the subject of them, the obligations are imposed on States, not on individuals. As we have seen, the law of war imposes negative obligations on individuals; and, in addition, there are some 'elementary considerations of humanity' that may apply to the conduct of individuals. Further, it may be possible to extrapolate, from Lord Bingham's indication that a requirement to commit 'atrocities or gross human rights abuses' could found a refugee claim on the ground that the punishment for refusal would be persecutory, a rule that the commission of such acts would be a breach of international human rights law, although it is difficult to see where the sanction would lie unless the act was also proscribed by some Treaty or Convention.

82. Miss Webber submits that the planting of landmines in peacetime in an area inhabited and frequented by civilians contravenes 'elementary considerations of humanity set out in Articles 6 and 7 of the ICCPR and is thus contrary to the basic rules of human conduct'. We have already dealt with the last phrase and do not need to consider it further. We have noted that international human rights law is to be found in the relevant Conventions and other documents, and so we are not concerned with what are here called 'elementary considerations of humanity set out in' the International Covenant on Civil and Political Rights of 1966 (the ICCPR), to which Iran is a State Party, as is the United Kingdom. We are concerned instead with the actual content of the Convention. Articles 6 and 7 are as follows:

> "***Article 6***
> *1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
> *2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
> *3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
> *4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
> *5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
> *6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*
>
> ***Article 7***
> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*

83. The appellant's case under this head is as follows. Laying of landmines is a breach of Article 6 or Article 7 or both. Therefore the act that the appellant was ordered to perform was a breach of Article 6 or Article 7 and was accordingly a breach of the ICCPR. He was accordingly not required to perform that act, and any punishment for his refusal to do so will amount to persecution.

84. That argument poses numerous difficulties. In the first place, we have the greatest difficulty in accepting the proposition that the laying of landmines, even in the circumstances identified by Miss Webber, that is to say in peacetime and in an area inhabited and frequented by civilians, is itself capable of being a breach of these Articles of the Covenant. Looking as we do in this Tribunal on a daily basis at in-country claims based on the similar provisions of the European Convention on Human Rights, we are accustomed to evaluating a right to resist expulsion from this country according to the calculus of the risk on return to another country. But that is not an essential feature of the law contained in the human rights Conventions in general. In general, a breach of human rights is not committed merely by doing an act which might, under certain circumstances, breach the human rights of an as yet unidentified individual. While there is no victim, there is no breach.

85. Secondly, we have set out in paragraphs 6-11 of this determination the accepted factual basis upon which we decide this appeal. Nothing in the material before us goes to establish that the individual act that the appellant refused to commit was in fact one that would breach anybody's rights as protected by the ICCPR. It is not, as we understand it, suggested that he was to be responsible for laying an entire minefield, and, even if he were, there is no assessment of the risk posed to others by that particular minefield. The same could be said of an order to take part in general in a mine-laying party. If by obeying the order the appellant had responsibility for all the acts of his comrades, there would still be no evidence of the level of risk created by this particular sortie. The effect of any particular act of mine-laying by the appellant would depend on a number of things including no doubt whether there were published warnings and notices, the position of one mine in relation to others, the level of frequentation of the area, and the efficiency or otherwise of the mines themselves.

86. Thus, the position in our view is that mine-laying itself cannot be seen as a breach of the ICCPR in the absence of actual harm to individuals; and that even if a breach of the ICCPR were to be seen in the creation of a risk of a breach of Articles 6 or 7, (which we do not think is the correct approach) the appellant fails to show that the actual act he refused to do would have created such a risk if he had done it.

87. But there are, however, further problems for the appellant in his attempt to rely on the ICCPR. The appellant's claim is not that *his* human rights as protected by the ICCPR would have been breached by his act. He claims an incidental protection from the ICCPR on the basis that he is entitled to refuse to breach the rights of

others. But this aspect of his claim raises a third difficulty. The ICCPR places no obligations on individuals. The obligations are undertaken by the States party to the Covenant. The appellant could not be the subject of sanction in any action based on the ICCPR. He is in a quite different position from a person who is ordered to do something for which he would in international law bear personal responsibility, for example an act of genocide, or who is ordered to commit an act which would for some other reason remove him from the protection of the Refugee Convention. His own individual liability under international law is entirely unaffected by obeying the order. His country may be liable for a breach of the ICCPR: but he will not be.

88. The last consideration shows that this element of the appellant's argument amounts in truth to a claim to base his own attitude to military discipline and the law of his own country solely on his conscience. He seeks exemption from the order not because he will suffer any consequences as a result of obeying, but because he feels, with all honesty and conviction, that he should not obey it. The decision of the House of Lords in Sepet and Bulbul makes it absolutely clear that conscientious objection to military service does not of itself ground a refugee claim.; and the position can be no different for other conscientious refusals to obey the law.

89. Thus Miss Webber's argument based on the ICCPR also fails.

Conclusion

90. We do not accept that the rules of international law relating to situations of armed conflict can be translated readily into times of peace. In war there are good reasons for States to be concerned with the activities of other States, and the international community, is necessarily engaged; so detailed rules of war (or armed conflict) have developed. Armed conflicts within a single State are conveniently governed by the same rules. The stresses and motives of conflict make it particularly important to regulate conduct so that it should not pass the boundaries of the humane conduct of war. In peacetime many of these considerations are absent, and it has been a clear feature of the development of international law that the rules applicable to war are to be distinguished from those applicable to peace.

91. It may well be that the number of acts for which an individual bears personal responsibility in international law will continue to increase; and we apprehend that individual responsibility in international law may become an increasing feature of the law of peace as well as the law of war. For the present and no doubt for the foreseeable future, such changes will have to be brought about by Treaty. In the mean time it is not in general open to an individual to claim the surrogate protection of the international community in order to escape punishment for refusing to obey the law of his country in circumstances where obedience would have no consequence in international law for him. He may be able to resist where his own human rights are infringed, and he can resist if he is required to do something for which he would be individually responsible in international law or

which would have consequences for his standing in international law if he claimed asylum. But he is not entitled to base a claim on an attempt to guard his country's conscience. His own conscientious refusal does not of itself found a claim, and he is not responsible, save as already indicated, for the acts of his country.

92. It follows from the above that we reject each basis upon which the appellant's asylum appeal was argued. There being no other matter before us, we find that the Adjudicator made no material error of law and we order that his determination, dismissing the appellant's appeal, shall stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: