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Editorial

This again is a very special issue of our journal. As in the past we have reserved the freedom to publish issues partly or completely in English if the topic covered by the issue and the nationality of the contributors demand publication in the language of the original presentations and if moreover the dissemination effect would benefit from the publication in the original language. This issue is dedicated to the conference organised in June 2002 jointly by the Chair of International Humanitarian Law in Leiden, the Institute for International Law of Peace and Armed Conflict in Bochum and the Netherlands Red Cross with the support of the German Red Cross. The 25th Anniversary of the adoption of the Additional Protocols is indeed an international event, but the reason to organise the conference jointly goes beyond that anniversary and the interest of some of the most active institutions in the field of humanitarian law in Europe.

The Hague as the international law capital with its courts and tribunals not only offers expertise which is hard to get in other cities. By coincidence four eminent international lawyers who hade made the Additional Protocols of what they are today were able to make it to the conference place in the heart of The Hague at the specific date of signing the Protocols 25 years ago. Frits Kalshoven, George Aldrich, Ted Meron and Hans Peter Gasser deserve special thanks for having agreed to contribute to a conference which dealt with the impact and relevance of the two most important humanitarian law treaties developed after World War II. This issue of the journal is not only a collection of their contributions. Three young Dutch female scholars had commented on the presentations of the “fathers” of the protocols. Their most valuables reflections on the presentations are also printed in this issue.

Besides the complete collection of the conference papers we are also dealing with other issues of actual interest. Noelle Quénivet contributes to the debate on feminism and international humanitarian law by outlining her own perspective and Andreas Busch analyses practical problems related to transition from war to peace in Bosnia.

As usual reports about the dissemination activities of the Bochum Institute and the German Red Cross complete the journal. The two reports reflect the seminars organised for young lawyers on international humanitarian law in Southern Germany in the reporting period.

The editors

General Introduction to the Conference on the 25th Anniversary of the Additional Protocols, the Hague, 7 June 2002

Horst Fischer*

Dear colleagues, dear friends, let me welcome you to this extraordinary conference commemorating the 25th Anniversary of the signing of the Additional Protocols of the Geneva Conventions in 1977 and let me unusually start by addressing the audience and not mentioning first the speakers. I just would like to stress that, if you look around, we have a real international group here today from different European countries and other continents. A conference devoted to the Additional Protocols of 1977 deserves an international audience but today we have been able to attract quite a number of individuals from different backgrounds. We have academics in this room, we have governments represented here, and of course, also colleagues from the ICTY and other Hague-courts and international organisations do participate today. I need to stress that the invitation came on short notice and I am very happy that you could all make it possible to come.

We all expect a very interesting afternoon commemorating the 25th anniversary with a specific focus on actual questions related to the Protocols. In this regard, let me also mention the role of the organisers of the conference: The Netherlands Red Cross, the Leiden Chair of Humanitarian Law and the office of Bochum University in The Hague. We planned it some months ago, but we were not really sure whether others would plan similar events. Now we must say that this is indeed one of the few conferences on this specific occasion and I am very grateful to the organisations I have mentioned and the individuals behind them that they had the courage to wage a conference on this topic open to the public. Let me also mention the German Red Cross in this context as we plan to publish the proceedings of the conference in the last issue of our quarterly journal *Humanitäres Völkerrecht*, which our institute in Bochum jointly edits with the German Red Cross. Indeed today we see a joint effort of many to make the commemoration successful.

In this regard I specifically want to mention our speakers of today. By looking at the programme you have recognised the interesting mixture of today's participants: Ted Meron, George Aldrich, Hans-Peter Gasser and Frits Kalshoven. They have been working for and with humanitarian law since decades, and let me stress, and they have all in one way or the other participated in the process which led to the Additional Protocols in 1977 and their acceptance afterwards. They were involved in the preparation of the conference, in the negotiations and in the implementation of the protocols. To be able to present such a group of actors and observers is rather unique this year.

We set up a programme that will confront the presentations with three short commentaries by young academics and practitioners from the Netherlands. Machteld Boot, Liz Zegveld and Avril McDonald have agreed to comment and respond quickly to the presentations for the benefit of the general discussion afterwards. Let me thank you too for having agreed to come and for the active role you are willing to play.

Before I ask Judge Ted Meron to open the conference, let me mention a few elements of the background of the main-speakers and the commentators, which are important when discussing their presentations. You all know that Prof. Ted Meron is now judge at the ICTY in one of the Appeals Chambers. I have just learned from reading about the ICTY work, that working in an Appeals Chambers can entail specific stress because you do the work on issues which are important for ongoing proceedings in the trial chambers. So he is now under a specific stress but he is also coped with stress in his former functions as professor at NYU in New York and long time chief editor of the American Journal of International Law mot to mention his advisory work for humanitarian organisations.

Judge George Aldrich had a special role at the Geneva negotiations and when I am introducing the conference to my students in class, I always mention that Judge Aldrich was not only participating in the negotiations of the protocols but he definitely was the master-mind behind some of the most relevant articles. Prof. Aldrich was the chief negotiator of the United States at the conference. He has been working with and for humanitarian law since decades and is now judge at the US-Iran claims tribunal. At the university of Leiden he held the Red Cross chair for International Humanitarian Law as my immediate predecessor.

Hans-Peter Gasser was not only the Head of the Legal Department of the ICRC. He also was special advisor to the ICRC president. When I first met him he was working with and on States to convince them to ratify the Additional Protocols. So this year, we are having more than 150 ratifications and I should underline that this is a result and a success of Hans-Peter Gasser's invaluable work. There is just one major State with which he did not succeed and we will talk about that specific State – the United States of America – a little bit later. I should also mention that Hans-Peter Gasser has been the editor of the Review of the International Red Cross until this year.

To describe Prof. Kalshoven's activities in this room would mean to carry coal to Newcastle. Everyone in this room knows what Prof. Kalshoven has been doing in the past in the

* Prof. Dr. Fischer is the director of the Institute for International Law of Peace and Armed Conflict of the University of Bochum (Germany). He also holds the Chair of International Humanitarian Law at the University of Leiden (the Netherlands).

Netherlands including his positions at the university of Leiden being the first chair-holder of the Red Cross Chair and advisor to the Netherlands Red Cross. Prof. Kalshoven has been one of the most influential participants of the negotiations in Geneva. For today I should specifically mention Prof. Kalshoven's position as the first president of the fact-finding commission under article 90 of the Additional Protocol I. Active in negotiations and academia, he has promoted the idea of humanitarian law in many circles and functions including his work for the Secretary General's Commission on the Former Yugoslavia.

Let me also say some words about the commentators. Avril McDonald is the managing editor of the Yearbook of International Humanitarian Law, she is head of the humanitarian law unit at the Asser Institute and she will defend her PhD thesis later this summer.

Machteld Boot is the head of the humanitarian law team in the Netherlands Red Cross and we have already her dissertation on our table. Not only voluminous but also rich in content and I had the pleasure to listen to the defence not long ago in Tilburg.

Finally, Liesbeth Zegveld. She received her doctoral degree from Rotterdam University on a very interesting topic which is closely related to the deficiencies of the Additional Protocols: Non-State actors in international and non-international armed conflicts. Again I was present at the interesting defence of the thesis which is available with Cambridge University Press. Presently Mrs. Zegveld is working for a law firm in Amsterdam, a well-known law firm in the Netherlands also dealing with human rights cases.

Dear guests, colleagues and friends you have realized that practice and academic expertise is convened here today for the benefit of the discussion on the Protocols which were praised as major steps forward in international humanitarian law 25 years ago.

Thank you very much again for coming to this conference I would like to give now the floor to Judge Ted Meron. ■

Introductory Remarks

Judge Theodor Meron*

I would like to start by expressing my gratitude to you, Horst, and to the Netherlands Red Cross for inviting me to make the opening remarks during this conference commemorating the 25th anniversary of the adoption in Geneva in June 1977 of the two additional protocols to the Geneva Conventions. Their adoption on that day was a historical moment for the development of international humanitarian law. Horst, you have assembled here a panel of experts in the field. I am particularly pleased to see here Ambassador George Aldrich who is not only a very old friend but who deserves particular recognition because of his leadership of the United States delegation during the Geneva conference was critical to the successful negotiation of many of the difficult provisions which have been included in the additional protocols.

The principal object of Protocol I on international armed conflicts, was to bring up to date in a single treaty both the law of The Hague and the law of Geneva. The focus of the Protocol was greater protection for victims of war. The Protocol contains many critical provisions on that matter. It creates a new regime for the protection of medical aircraft, it develops rules for the protection of medical personnel and rules governing relief efforts for the civilian population. And, in reaction to the Vietnam War, it codified norms, important norms, for the recover of the missing and the dead and for disposing of the remains of the dead. The Protocol strengthened civilian defence and the protection of women and children. It elaborated a list of fundamental guarantees of humanitarian law and of human rights for persons affected by the conduct of hostilities who are involved in international armed conflicts and who are in the power of a party to the conflict and are not otherwise entitled to a more favourable treatment. By the definition of attacks, civilians, military objectives, and proportionality, the Protocol narrowed the parameters of permissible collateral damage to civilians, damages resulting from attacks on military objectives. It totally prohibited reprisals against civilians and civilian objects even in cases of persistent attacks by one belligerent in violation of the laws of war protecting civilians.

The Protocol, let me admit it, encroached on a number of sensitive topics which continue to be controversial to this very day, including innovations in the definition of combatants and POWs, and the total prohibition of reprisals on civilians and civilian objects. With regard to the definition of proportionality, particularly the parameters of permissible collateral damage to civilians, the Protocol's definition has not only resolved but also created some difficulties which will need to be worked out through practice. Almost from its very adoption in 1977, Protocol I entered the mainstream of humanitarian law scholarship, concepts and terminology. Today, any discussion of international humanitarian law without recognition of the contribution made by the Protocol is completely out of question. The military manuals of major military powers, such as Germany, are based on the Protocol and the

* Judge at the International Criminal Tribunal for the Former Yugoslavia. This is a transcript of the speech corrected by the author.

United States' air force and navy commanders handbooks commonly use the language of the Protocol. The Protocol is frequently invoked by governments, by the ICTY, by UN rapporteurs and of course by the ICRC, by the UN and by many NGO. As the public opinion becomes more aware of humanitarian principles, there has been a growing expectation of compliance but this expectation is still short of fulfilment.

In response to the Protocol, an additional layer of customary law has already been created. There has been a general acceptance that most of the provisions of Protocol I are declaratory of customary international law. What has been the influence of the Protocol on armed conflicts? Let me mention principally the Second Gulf War. As a matter of policy, the United States and its partners in that war, most of whom were parties to Protocol I, followed most of its provisions. The United States did so because of the need to coordinate the rules of war, the rules of engagement with its closest allies and also because, as the defence department of the United States observed in an early report to the Congress, many provisions of the Protocol are declaratory of customary law. In response to a memorandum the International Committee of the Red Cross presented during the Gulf War to the Department of Defence of the United States, which contained a version of the applicable rules of Protocol I, the United States Joint Chief of Staff prepared their own set of rules which contains the United States interpretation of the relevant rules of the protocols. It is quite clear that those instructions followed closely most of the provisions of Protocol I. One thing was clear: not even the greatest superpower could ignore Protocol I in a multinational war. It is perhaps too early to know what has been the impact of Protocol I on the recent and still continuing war in Afghanistan. The fact is that neither the United States nor Afghanistan are parties to the Protocol and that the war has been waged against persons who reject all humanitarian rules.

Protocol II is also of great importance. For the first time, it introduces into the law of non-international armed conflicts, some modest provisions of the law of The Hague. That development was followed and continued in the Statute of the ICC, the International Criminal Court. Protocol II greatly enriched the norms which are contained in common article 3 of the Geneva Conventions. Its unfortunately high threshold of applicability has been a problem but one that has been attenuated by recent trends to apply to non-international armed conflicts provisions previously limited to international wars. The ICTY has made a historic contribution to this development in decisions such as the *Tadic* 1995 interlocutory decision in jurisdiction. This development is vital for the effectiveness of humanitarian norms, international humanitarian law and human rights law.

To conclude, let me say that as in every important treaty, difficulties must be compared to achievements. In my view, the balance as reflected both by the high number of ratifications and by the contribution to the creation of customary international law points to a resounding success.

The Taliban, al Qaeda, and the Determination of Illegal Combatants

George H. Aldrich*

Last September 11, a small number of men who were members of a fanatical group known as "al Qaeda" carried out a suicidal armed attack upon the United States that resulted in very substantial material damage and the loss of life by some three thousand persons, the great majority of whom were civilians. In response, the United States and a number of allies have taken action to find, capture or kill as many members of that al Qaeda organization as possible and deprive it of funds, support and sanctuary.

As the leaders of al Qaeda and a large part of its membership and facilities were located within the territory of Afghanistan, the Taliban, who controlled all but a small part of Afghanistan and were, consequently, the effective government of Afghanistan, were requested to assist in this effort. The Taliban refused to do so and made clear that they would continue to give sanctuary to al Qaeda. As a result, the United States and its allies attacked the armed forces of the Taliban, as well as those of al Qaeda, in the process killing and capturing a considerable number of soldiers belonging to both entities. As these persons were captured in the course of an international armed conflict, questions immediately arose as to their legal status and as to the protections to which they might be entitled pursuant to international humanitarian law, particularly as it was clear that at least some of them were bound to face criminal proceedings for terrorist acts and other crimes.

While these questions were most often phrased in terms of entitlement to the status of, or protection as, prisoners of war (POWs), the real issue was whether they were legal or illegal combatants. In other words, were they persons who had a legal right to take part in hostilities, or, to the contrary, were they persons who could be prosecuted and punished for

* Judge at the Iran-US Claims Tribunal.

murder and other crimes under national law simply for their participation in an armed conflict?[1]

In February of this year, President Bush determined the position of the United States concerning at least some of these questions. In essence, as announced by the White House Press Secretary on February 7, 2002, he decided that:
(1) The 1949 Geneva Convention concerning the treatment of prisoners of war, to which both Afghanistan and the United States are Parties, applies to the armed conflict in Afghanistan between the Taliban and the United States;
(2) That same Convention does not apply to the armed conflict in Afghanistan and elsewhere between al Qaeda and the United States;
(3) Neither captured Taliban personnel nor captured al Qaeda personnel are entitled to be POWs under that Convention; and
(4) Nevertheless, all captured Taliban and al Qaeda personnel are to be treated humanely, consistent with the general principles of the Convention, and delegates of the International Committee of the Red Cross may visit privately each detainee.[2]

Let us examine these decisions in light of applicable international humanitarian law. In that connection, I must begin by noting the curious fact that I have not seen any public legal defense of those decisions by the United States other than by the Presidential Press Spokesman. If the State Department Legal Adviser, the Defense General Counsel, or the Attorney General has published any analytical justification of them, I am not aware of it. Perhaps there has not been enough public or Congressional criticism of the President's decisions to make such an analytical defense necessary as a matter of public relations, but those of us in the international legal community would certainly appreciate it. I know from my experience years ago as a lawyer for the United States that such analyses most certainly have been prepared, hopefully in time to assist the President in making his decisions, but, in any event, to defend those decisions.

Turning to the applicable law and the choices the President faced, I suggest that the decision to consider that there are two separate armed conflicts is correct. One is the conflict with al Qaeda that is not limited to the territory of Afghanistan. Al Qaeda is evidently a clandestine organization with elements in many countries and composed apparently of people of various nationalities, which has the purpose of advancing certain political and religious objectives by means of terrorist acts directed against the United States and other, largely Western, nations. As such, al Qaeda is not in any respect like a State and lacks international legal personality. It is not a Party to the Geneva Conventions, and it could not be a Party to them or to any international agreement. Its methods brand it as a criminal organization under national laws and as an international outlaw. Its members are properly subject to trial and punishment under national criminal laws for any crimes that they commit.

The armed attack against the Taliban in Afghanistan analytically is a separate armed attack that was rendered necessary because the Taliban, as the effective government of Afghanistan, refused all requests to expel al Qaeda and instead gave sanctuary to it. While the United States, like almost all other countries, refused to extend diplomatic recognition to the Taliban, both Afghanistan and the United States are Parties to the Geneva Conventions of 1949, and the armed attacks by the United States and other nations against the armed forces of the Taliban in Afghanistan clearly constitute an international armed conflict to which those Conventions, as well as customary international humanitarian law, apply.

This analysis must recognize that practical problems are likely to arise in some circumstances, for example, when al Qaeda personnel are captured while accompanying Taliban armed forces; but, once the al Qaeda personnel are identified, they clearly would not be entitled to POW status.[3] As persons who have been combatants in hostilities and are not entitled to POW status, they are entitled, under customary international law to humane treatment of the same nature as that prescribed by Article 3 common to the four Geneva Conventions of 1949 and, in more detail, by Article 75 of Geneva Protocol I of 1977; but they may lawfully be prosecuted and punished under national laws for taking part in the hostilities and for any other crimes, such as murder and assault, that they may have committed.[4] They have been illegal combatants, or, as my friend the late Professor and Judge Richard Baxter once described such persons, they are "unprivileged belligerents",[5] that is, belligerent persons who lack the privilege

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[1] While members of the Armed forces of Parties to the Geneva Conventions who are not combatants, such as medical personnel and chaplains, as well as certain categories of persons who accompany the armed forces are entitled to POW status if captured, other persons who are not members of the armed forces are civilians and, as such, are not privileged by law to take part legally in hostilities. See Regulations Respecting the Laws and Customs of War on Land, Art. 1, annexed to Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct.18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 4, 6 UST 3316, 74 UNTS 135 [hereinafter Geneva Convention No. III]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, Arts. 43 & 44, 1125 UNTS 3 [hereinafter Protocol I]. From this analysis I exclude the archaic "levée en masse" provided for in Article 2 of the Hague Regulations, supra, and retained in Article 4A(6) of Geneva Convention No. III, supra.

[2] See Press Release, Status of Detainees at Guantanamo, Fact Sheet and Statement (7 February 2002) (on file with author).

[3] I know of no evidence that would suggest that al Qaeda personnel were incorporated in Taliban military units as part of Taliban armed forces.

[4] With respect to illegal combatants to whom the Geneva Conventions apply, it may be argued that such persons enjoy some additional protections as "protected persons" under the Geneva Convention Relative to the Protection of Civilian Persons of 1949, but such status would not preclude their prosecution and punishment under national laws. See Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Part III, 6 UST 3516, 75 UNTS 287; US Department of the Army, The law of land warfare: United States army field manual, FM 27–10, para. 73 (1956). However, the negotiating history of the Convention is unclear on that question. In any event, the question seems academic in the context of al Qaeda personnel, as the Conventions do not apply to them and as virtually all of them appear to be nationals of States with which the United States has normal diplomatic relations, and such nationals are excluded from the definition of protected persons by Article 4 of the Convention.

[5] Baxter, R., "So-called "Unprivileged Belligerency": Spies, Guerillas and Saboteurs", (1951) 28 British Yearbook of International Law 323, reprinted in (1975) Military Law Review Bicentennial Issue 501.

enjoyed by the armed forces of a State to engage in warfare with immunity from any liability under national law or under international law, except as prescribed by the international laws of war. This vulnerability to prosecution for simply taking part in an armed conflict and for injuries that may have been caused in that connection is the sanction prescribed by the law to deter illegal combatants.

I find it quite difficult to understand the reasons for President Bush's decision that all Taliban soldiers lack entitlement to POW status. The White House Press Secretary gave the following, cryptic explanation of that decision:
"Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: they would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda."[6]

Members of the press attending a press conference probably do not carry with them copies of the Geneva Convention. If they had, they might well have asked the Press Secretary what happened to the first provision of Article 4. As many of you know, it provides as follows:
"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."[7]
Are the Taliban soldiers not members of the armed forces of a Party to the conflict? Or, at least, are they not members of militias or volunteer corps forming part of those armed forces? It is only with respect to the second category of POWs that we come to the four conditions referred to by the Press Secretary as justifying the President's decision, and that category relates only to militias and volunteer corps that do not, repeat not, form part of the armed forces of a Party to the conflict. On the basis of the public record to date, we cannot know the answer of the President to those questions. We are forced to speculate. Perhaps the United States might argue that Afghanistan has no armed forces within the meaning of that sub-paragraph 1, but rather only armies of competing warlords; but that would, I suggest, not be fully convincing given the general perception that, when the attacks began, the Taliban was the government in effective control of most of Afghanistan.

Perhaps the same argument could be phrased differently, for example, that no armed forces in Afghanistan "belong to" Afghanistan, which is the "Party to the conflict" and that only armed forces belonging to a Party to the conflict are entitled to POW status; but the different language would give me no greater confidence in the force of the argument. Certainly the protections of the Convention would be eroded if it were accepted that they need not be accorded to the armed forces of a government in effective control of the territory of a State by another State that declines to recognize the legitimacy of that government.

Another possible argument might be that the conditions specified for POW status by Article 4A(2) for militias and volunteer corps that are not part of the armed forces are somehow also applicable to all armed forces. While contrary to textual logic, the assertion has occasionally been made that those four requirements are inherent in the nature of armed forces of States.[8] I consider that to be a dangerous argument, however, one that States should be reluctant to put forward, because the fourth condition – that the militia or corps conducts its operations in accordance with the laws of war – can easily be abused, as it was by North Korea and by North Vietnam, to deny POW treatment to all members of a State's armed forces on the ground that some of its members allegedly committed war crimes. Even in a conflict where substantial war crimes were committed by the armed forces of a State, this would be a bad idea. Those who commit war crimes should be punished, but their crimes should not be used as an excuse to deprive others of the protections due POWs.

It seems clear to me that it would be much easier and more convincing for the United States to conclude that the members of the armed forces of the effective government of most of Afghanistan should, upon capture, be treated as POWs. That causes me to suspect that there may have been some unexplained reason behind the decision. I am forced to ask why the United States would wish to deprive all Taliban soldiers of POW status when they have been defending the government whose armed forces they are? Does it intend to prosecute them simply for participating in the conflict? I must doubt that. Does it intend to prosecute them for crimes under United States law? For crimes under some Afghan law? If a few of them are guilty of war crimes or crimes against humanity, they could be prosecuted while remaining POWs. I have questions, but no answers. I would suggest that a necessary first step would be for the United States to explain publicly what is the basis and the reason for denial of POW status to all Taliban prisoners, not simply by asserting that the Taliban armed forces did not distinguish themselves adequately from the civilian population and did not conduct their military operations in accordance with the laws of war, but by evidence documenting such assertions accompanied by a convincing explanation of the gravity of these matters and by some explanation of the evidently felt need to deprive them of POW status.

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6 See Press Release, supra note 2.

7 Geneva Convention No. III, supra note 1, at Art. 4.

8 See, e.g., Rosas, A., *The Legal Status of Prisoners of War*, Suomalanine Tiedeakatemia, Helsinki, 1976, p. 328; Mallison, W. T. & Mallison, S.V., "The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict", (1977) 9 Case Western Reserve Journal of International Law 44–48.

When I prepared the first draft of these remarks, I assumed that the rejection of POW status for Taliban soldiers must have been the result of some unexplained central purpose, probably one related to the ultimate prosecution of some of them. The longer I ponder the question of the reasons that might have inspired this decision by the President, the more I am inclined to suspect that there may well not have been any such unexplained purpose. Might it not be the case that the present administration in Washington believes precisely what the White House Press Spokesman said, that is, that the failure of the Taliban soldiers to wear uniforms of the sort worn by the members of modern armies and the support by the Taliban government of the unlawful terrorist objective of al Qaeda suffice to justify, or even require, denial of POW status to all members of the Taliban armed forces? Certainly, one can imagine such a determination being urged by those who, in the Reagan Administration, grotesquely described Geneva Protocol No. I as law in the service of terrorism.[9]

Without a doubt the most difficult element to defend of the decisions made by President Bush in February with respect to the status of prisoners taken in Afghanistan is the blanket, all-encompassing nature of the decision to deny POW status to the Taliban prisoners. By one, sweeping determination, President Bush determined that not a single Taliban soldier, presumably not even the army commander, could qualify for POW status under the Geneva Convention. While decisions by armed forces in the past doubtless included some decisions about army units or other groups as a whole, one cannot help but question the all-encompassing nature of this one. Can it possibly exclude any doubt? Moreover, can it legitimately preclude any contest by an individual prisoner?

Article 5 of the Convention states the following cautionary rule:
"Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[10]
Given that provision, either the United States must maintain that no doubt could arise with respect to any Taliban prisoner, or it must preserve the option of a determination by a tribunal in the event that any doubt does arise concerning a group or an individual prisoner. I have been informed that the Press Spokesman of the Department of State indicated in his press briefing on February 8 of this year that the United States would be prepared to review its determination about the applicability of Article 4 of the Convention should any genuine doubt about status arise in individual cases. I do not know whether such "review" would be made by a tribunal, as required by the Convention, or by the President. Review in individual cases is helpful and meaningful. Only if reviews occur in practice can that be determined. Given the broad and definitive nature of the President's determination, there would appear to be a risk that any review might well have to be limited to resolving doubts as to whether a prisoner was, in fact, a member of the Taliban armed forces, not whether those armed forces meet the standards of Article 4. If so limited, a right to individual review would fall far short of a right to determination of POW entitlement by an Article 5 tribunal.

The United States probably believes that its screening of Taliban captives prior to their transfer to the camp in Cuba is thorough and as fully adequate as a tribunal to ensure that they are legitimately detained for purposes of further criminal investigation. That may well be true, but, in view of the President's determination, such screening could have no effect on their entitlement to POW status.

There are, in my view, all too few places where international humanitarian law provides for the rights of individuals to challenge State action, but one of those few is the right of access to a tribunal granted by Article 5. It would be regrettable if in practice it proves to have been effectively negated for Taliban prisoners.

In this connection, I note that the United States Army Field Manual on the Law of Land Warfare makes the following interpretation of Article 5 of the Convention:
"*b. Interpretation.* The foregoing provision applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or who has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists."[11]

This interpretation clearly indicates that doubt arises and a tribunal is required whenever a captive who has participated in hostilities asserts a right to be a POW. That is a point that we were careful to state in Article 45, paragraph 1 of Protocol No. I when we negotiated it in the seventies, and, in my view, it is now part of customary international law. In that connection, I should point out that, when the armed forces of countries that are Parties to the Geneva Protocol capture Taliban soldiers, they will obviously be required by Article 45, paragraph 1 to give them POW status unless and until a tri-

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[9] See, e.g., Feith, D. J., "Law in the Service of Terror – The Strange Case of the Additional Protocol", National Interest, No. 1, Fall 1985, at 36; Sofaer, A. D., "Terrorism and the Law", (1986) 64 Foreign Affairs 901; Roberts, G. B., "The New Rules for Waging War: The Case Against Ratification of Additional Protocol I", (1985) 26 Virginia Journal of International Law 109; Safire, W., "Rights for Terrorists? A 1977 Treaty Would Grant Them", *New York Times*, 15 November 1984, at A31, col. 5.

For responses to these comments, see Aldrich, G. H., "Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I", (1986) 26 Virginia Journal of International Law 693; Solf, W. A., "A Response to Feith's Law in the Service of Terror – The Strange Case of the Additional Protocol", (1986) 20 Akron Law Review 261; Gasser, H.-P., "An Appeal for Ratification by the United States", (1987) 81 American Journal of International Law 912 and Aldrich, G. H., "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions", (1991) 85 American Journal of International Law 1.

[10] Geneva Convention No. III, supra note 1, at Art. 4.

[11] United States Army Field Manual, supra note 4, at para. 71(b).

bunal decides otherwise. This obligation might also prevent transfer of such prisoners to the United States.[12]

Also relevant to prisoners facing criminal prosecution is paragraph 2 of Article 45 of Protocol I which establishes a separate right of any person who has fallen into the power of an adverse Party and is to be tried by that Party for an offense arising out of the hostilities to have his entitlement to POW status determined by a judicial tribunal. When that text was negotiated, the United States Government was painfully aware of the experiences in Korea and Vietnam where many American military personnel were mistreated by their captors and were denied POW status by mere allegations that they were all criminals. Time evidently dulls memory.

In conclusion, I should stress that the legal difficulties I have indicated with the actions taken by the United States concerning prisoners captured in Afghanistan exist only with respect to persons who served in the armed forces of the Taliban, not with respect to those who were members of the al Qaeda terrorist group. The latter are, in my view, international outlaws who are entitled to humanitarian treatment, but nothing more.

This conclusion flows from the fact – that there are two armed conflicts involved in Afghanistan – one with the Taliban, to which the Geneva Conventions and, for Parties to it, Protocol No. I, apply, and another with al Qaeda, to which those treaties do not apply. Al Qaeda and its personnel do not belong to any Party to the Geneva Conventions and al Qaeda is not itself capable of being a Party to a conflict to which those Conventions and Protocol No. 1 apply. Members of al Qaeda are not entitled to be combatants under international law and are subject to trial and punishment under national laws for their crimes. ■

[12] Article 45, para. 1 provides: "A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal." Protocol I , supra note 1, at Art. 45.

Article 12 of Geneva Convention No. III includes the following restriction: "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in custody." Geneva Convention No. III, supra note 1, at Art. 12.

Defining the War on Terror and the Status of Detainees: Comments on the Presentation of Judge George Aldrich

Avril McDonald*

In his presentation, Judge Aldrich raises two legal questions of considerable interest: the status of detainees held by the US in connection with its 'war on terror', and the characterisation of the conflict.

1. The character of the 'conflicts' involving the Taleban and Al Qaeda

Judge Aldrich agrees with the White House that there are two separate armed conflicts:
One, between the US and its allies against the Taleban, the *de facto* government of Afghanistan, which took place on the territory of Afghanistan. This is an international armed conflict
Two, between the US and its allies against Al Qaeda, which is not confined to the territory of Afghanistan. Its status as 'international' or 'non-international' is not defined.

1.1. The conflict against Afghanistan

There is no doubt that there has been an armed conflict between the US and its allies against Afghanistan as understood by the 1949 Geneva Conventions and their 1977 Additional Protocols. Since it involves at least two States, clearly it is an international armed conflict, within the meaning of common Article 2 of the Geneva Conventions. Although the use of force in apparent self-defence by the US was a response to a terrorist attack on the United States by Al Qaeda, rather than to any act attributable to Afghanistan or for which Afghanistan was considered responsible, Afghanistan was attacked because it was considered to be harbouring and assisting Al Qaeda members and for its refusal to hand them over.

The international armed conflict began with the American strikes against Afghanistan. Even if, as the US President said, the attacks by Al Qaeda were a 'declaration of war', it seems to have been rhetorical rather than actual. One could accept that an international armed conflict began at that point only if one could show that Al Quada were acting on behalf of a State, which they were not generally considered

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to be, even if they were being supported by certain States. The US War Crimes Ambassador Pierre Prosper said that: "These aggressors initiated a war that under international law they have no legal right to wage." He added, "And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitute war crimes".[1] As a non-State, Al Qaeda is not legally competent to declare war on a State, so the attacks of September 11 could not have initiated an international armed conflict. Since their crimes in attacking the world trade centre and pentagon were not committed in the context of an armed conflict, they are not war crimes within the meaning of the Geneva Conventions. In fact, the acts can be legally characterised in several ways, as crimes against humanity, or as breaches of conventional law concerning terrorism. They could also be considered as acts of piracy.

Clearly, the attacks cannot be considered as committed in the context of an internal armed conflict. Whatever the attacks on the US on 11 September 2001 initiated, until the US used force against Afghanistan, it was neither an international nor an internal armed conflict. If it was a declaration of war, it is not a war contemplated by humanitarian law.

1.2. The conflict against Al Qaeda/the War on Terror

The 'conflict' between the US and Al Quada units in countries other than Afghanistan, that is, the so-called 'war on terror' is not *per se* an armed conflict within the meaning of the Geneva Conventions and their Additional Protocols. Most fundamentally, it is not a conflict between two or more States. On the one side there is the US and its allies and on the other side there is Al Queda, which Aldrich describes as "a clandestine organization with elements in many countries and composed apparently of people of various nationalities". Given that Al Qaeda seems to have no international legal status, and is simply composed of terrorists, criminals *hosti humanis*, who could be prosecuted by any State, but certainly by a State with a personal interest in the matter, such as the US; that for the most part they are not combatants, but simply civilian criminals; that they are mainly based in countries where there is no armed conflict, including the US itself; that they are not parties to the Geneva Conventions and Protocols, nor are they capable of becoming a party, it is impossible that any 'conflict' between that organisation, acting on its own behalf, and a State or coalition of States could be considered as an international armed conflict within the meaning of common Article 2 of the Geneva Conventions.

It is theoretically possible that some members of Al Quaeda could be considered as fighting for Afghanistan or as agents of the Taleban, and should then be considered as affiliated to Afghanistan's armed forces and as involved in an international armed conflict, although Aldrich states that no evidence of such involvement has been shown. More facts need to be made available regarding the relationship between the Taleban and Al Qaeda and whether Al Queda could be considered to be working as agents of the Taleban. Did they receive financial aid from the Taleban? To what extent were their operations known to and directed by Kabul, etc.? Did the Taleban have overall or effective control of Al Quada operations?

Nor can the campaign against Al Qaeda *per se* be considered as an internal armed conflict, within the meaning of common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II. There might however be cases where the US and its allies become involved in what might be an internal armed conflict on the territory of another State, where, by invitation, it helps States fight armed rebels with suspected links to Al Qaeda.

In fact, the 'war on terror' is clearly not an armed conflict at all. It consists of a multi-faceted counter-terrorism campaign, some aspects of which involve the use of military force, most of it carried out in States where there is no armed conflict, although aspects of the counter-terrorism campaign assume the characteristics of armed conflict where the US attacks a State considered to be harbouring or assisting Al Qaeda, as it did in Afghanistan. In this case, it would be an international armed conflict against the attacked State, rather than Al Qaeda, since Al Qaeda is not a State. Otherwise, the so-called 'war on terror' which the US is waging against Al Qaeda does not satisfy the conditions of the Geneva Conventions to be considered as an armed conflict.

It is thus not clear on what legal basis either the White House or Judge Aldrich can claim that there is an armed conflict involving Al Qaeda.

2. Status of captured Taleban/Al Qaeda

According to the US, neither captured Taleban nor Al Queda are entitled to POW Status. While the Third Geneva Convention applies to the former, as the US recognises that there was an armed conflict involving two parties: it and Afghanistan, they have forfeited their protection by violating humanitarian law and associating themselves with Al Qaeda, and further, through their failure to comply with the conditions of combatancy set out in Article 4 of the Third Convention.[2] They are thus 'unlawful combatants'. The Third Geneva Convention does not apply to Al Qaeda, who are also considered 'unlawful combatants'. This executive decision to consider all detainees as unlawful combatants, with no legal rights but who will be treated humanely, is supposed to settle the matter. There has been no review of the status of individual detainees by competent tribunals of a kind contemplated by the Third Convention.

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[1] Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Status and Treatment of Taliban and al-Qaida Detainees, Remarks at Chatham House, London, United Kingdom, 20 February 2002, <http://www.state.gov/s/wci/rls/rm/2002/8491.htm>, 23 October 2002.

[2] See White House Fact Sheet on Status of Detainees at Guataanamo Bay, 7 February 2002. Online at <http://whitehouse.gov/news/releases/2002/02/20020207-13.html>, 23 October 2002; US Department of Defense News Transcript, Secretary Rumsfeld Media Availability en Route to Camp X-Ray, 27 January 2002, <http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html>, 23 October 2002.

2.1. Status of Taleban detainees

The US position regarding the status of Taleban detainees is legally flawed and at variance with its own law.[3] It has been contested by numerous international lawyers and the International Committee of the Red Cross.[4] The Taleban are entitled to be considered as POWs. As Aldrich correctly asserts, as members of the armed forces, under Article 4(1) of the Third Convention they are entitled to presumptive POW status, as the four conditions of belligerency mentioned in Article 4(2) only applies to militias and volunteer corps that do not form part of the armed forces. No other reading of Article 4 is possible as it plainly states: "Prisoners of war, in the sense of the present Convention, are persons belonging to *one* of the following categories […]". Even if Taleban soldiers allied or associated themselves with members of Al Quaeda, this would not suffice to deny them the status of prisoner of war.

The lack of recognition by the US of the Taleban as the legitimate government of Afghanistan cannot justify a refusal to consider the captured Taleban as members of the armed forces of Afghanistan. It would be ridiculous to assert that a State's armed forces do not exist or have no legitimacy because a government is not recognised. Clearly, the Taleban were the *de facto* government, and in fact, the US tacitly recognised this by directing its dialogue and requests at the Taleban government. Legally, the war involved the US and the State of Afghanistan, and the US engaged with that State's armed forces. If the State of Afghanistan did not have any official armed forces recognised as such by the US, it is hard to see how the US could then have engaged in an international armed conflict involving the State of Afghanistan. In fact, the US has recognised that it was involved in an international armed conflict against Afghanistan. Otherwise, one would have to characterise US involvement in the conflict in Afghanistan as interference in an internal armed conflict with the aim of shifting the balance of power to the Northern Alliance.[5] If one were to regard Afghanistan as a failed State with no legitimate government and no army, one could imagine that the US involvement could be plausibly construed in this way, and the war as being some sort of 'internationalised' internal armed conflict. But this requires a wilful misreading of the actual situation.

In any event, the benefit of the doubt remains with the detainee who is entitled to POW status under Article 5 of the Third Convention until such time as his status is determined by a competent tribunal. The US is in clear breach of the Third Convention by presumptively denying POW status to captured Taleban and yet refusing to convene an impartial and independent Tribunal which can authoritatively determine their status. The burden is on the US to show that Taliban are not members of the lawful armed forces and not entitled to POW status, and to do so on a case-by-case basis.

As Judge Aldich observes, it is not entirely clear why the American are refusing to recognise the Taleban as POWs.[6] One reason may be that, under Article 102 of the Third Convention, captured combatants have to be treated to the same conditions of trial and sentencing as a State's own forces and this would make it illegal to try them before military commissions set up exclusively to try non-nationals. Moreover, under Article 103, prisoners of war should be tried as soon as possible. Once the conflict ends, POWs should be released unless they are being tried for a war crime or for other crimes committed in custody. The mere fact of having fought is not a triable crime. One can argue that the international armed conflict between the US and Afghanistan is now over. It seems that, while not wanting to consider the Taleban POWs, which it might have to release, US does not necessarily want to try them either. The government may try some of them before the military commissions it has established,[7] but since the detainees are really being held as suspected terrorists or persons who might have useful intelligence information, it might not be easy to try them for war crimes. On the other hand, the government has indicated that even if persons were tried and acquitted, they would still not be released, but will be held indefinitively for interrogation purposes.

If the Taleban detainees have no legal rights and status under the Third Convention, neither do they, in its view, have any status or rights under US national law. In fact, the government seems to take the view that they are persons without any legal status and rights whatsoever.

In fact, if they are POWs they must be released at the end of the conflict or tried for a particular crime they are suspected of committing. If they are not POWs and have committed a crime under national or international law, they can be tried for it before US or other courts, or before an international court. Otherwise, they should be released. But legally, one way or the other, they cannot be detained indefinitively without trial. Human rights law applies to them, and in particular, they can invoke Articles 9 and 14 of the ICCPR and Article 7 and 8 of the American Convention.

It is worth noting the February 2002 decision of the district court of California in the United States, in which a petition for *habeas corpus* filed on behalf of prisoners in Guantanamo bay, was rejected on three grounds. The court found that the petitioners, lacking a sufficiently close relationship with the detainees, did not have standing to seek the remedy; the court found that it had no jurisdiction over the detainees as they

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3 Including the US Army's Operational Law Handbook (2002) p. 22 and Department of Defense's Directive 5100.77 on the Law of War Program. See Murphy, S. D., "Contemporary Practice of the United States Relating to International Law", (1999) 93 American Journal of International Law 476.

4 ICRC Press Release on Geneva Convention on Prisoners of War, 9 February 2002.

5 This reading has been proposed by Fitzpatrick, J., "Jurisdiction of Military Commissions and the Ambiguous War on Terrorism", (2002) 96 American Journal of International Law 350.

6 See also Murphy, S.D., *Supra* note 3, 477.

7 By Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism of 13 November 2001, 66 Fed. Reg. 57, 833, 15 November 2001. The question of the legality of these commissions is outside the scope of this brief comment but has recently been the subject of an Agora in the American Journal of International Law. "Agora: Military Commissions", (2002) 96 American Journal of International Law 320-358.

were not present on US sovereign territory; no other court had jurisdiction, therefore the case could not be remitted.[8]

Relying on the earlier decision in *Johnson*,[9] the court found that Guantanamo Bay is part of Cuba and not part of US sovereign territory. It is interesting to note, however, that the court, not distinguish between Al Qaeda and the Taliban, did not say that these detainees have not no status or no rights at all – simply not under US law – but in fact have rights under the third Geneva Convention to which the United States is a party. According to the Court, these people are combatants and should be given protection under the third Geneva Convention.

b. Status of Al Qaeda detainees

According to Aldrich, detained Al Qaeda members are clearly not entitled to POW status. They are illegal combatants and may therefore be prosecuted for their participation in any armed conflict and for any crime they committed in the process.

It may be the case that member of Al Qaeda are not entitled to POW status. However, the almost meaningless status of 'illegal combatant' should not be applied across the board to detainees who are members of Al Qaeda, if indeed it should be applied to any detainees. Instead, it is necessary to distinguish between members of Al Qaeda depending on the context in which they are captured.

Members of Al Qaeda who have been captured in Afghanistan and who were engaged in combat against US and allied forces may indeed be considered as 'unlawful combatants', or better, as civilians illegally engaged in an armed conflict. Theoretically, some of them could be considered as belonging to the armed forces. It is also possible that members of Al Qaeda were members of militias or volunteer forces, and providing that they could prove that they had satisfied the four conditions of combatancy, in principle, could be entitled to POW status.

On the other hand, there might be members of Al Qaeda captured in Afghanistan who did not participate in the armed conflict and who were captured because of their membership of an illegal organisation. These persons should not be considered as unlawful combatants but should be regarded as terrorist suspects. If they are committed a common or an international crime, they may be prosecuted, but they cannot be held indefinitively without charge.

Likewise, members of Al Qaeda who have been captured outside the territory of Afghanistan, and with no connection to that armed conflict, should not be considered as 'unlawful combatants'. Since they are not involved in armed conflict, as that is normally understood, they cannot be considered as combatants, unlawful or otherwise, and international humanitarian law does not apply. They are persons suspected of crimes under national and international law. Members of Al Qaeda captured outside of Afghanistan and with no connection to that conflict cannot therefore be charged with a war crime by a Military Commission or any court, since, as indicated, their campaign against the US and the West cannot be characterised as an armed conflict, and neither can America's 'war on terror'.

[8] *Coalition of Clergy* v. *Bush*, No. CV 02-570 AHM (JTLX), 2002 WL 272428 at pp. 3-7 (C.D. Cal. Feb. 21, 2002).

[9] *Johnson* v. *Eisentrager*, 339 US 763 (1950).

New Rules Protecting Civilians in Armed Conflict: Was it Worth the Effort?

Hans-Peter Gasser*

1. Introduction

On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (Geneva, 1974-1977) adopted the two Protocols additional to the Geneva Conventions of 12 August 1949. Twenty-five years later, these two treaties have gained an undisputed place in the realm of international law. Indeed, Protocol I – on international armed conflict – has been ratified (or acceded to) by 160 States. The new treaty on the law governing non-international armed conflict, Protocol II, now binds 153 States. Modern history probably knows no other treaty with such a record – certainly no treaty dealing with sensitive security matters. The absence of the United States does not affect this conclusion, for several reasons: first, all other NATO member States (with the notable exception of Turkey) are party to the Protocols, and, second, the US in any case keeps today its distance from major multilateral treaties, in particular if they concern the protection of the human person.

The new rules on the protection of the civilian population against the effects of warfare are the most conspicuous innovation of both Protocol I and Protocol II. Wally Solf, the American military lawyer who played an eminent part in the drafting of the 1977 Protocols, wrote:

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"It cannot be doubted that the principal area of concern which motivated the initiatives that led to the convening of the 1974-1977 Diplomatic Conference was a shared need to formulate more effective rules to protect the civilian population and individual civilians from the effects of attacks in the light of the development of air power and modern methods and means of warfare."[1]

Ongoing conflicts, in particular the 35-year-old war in the Middle East, confirm this judgment. They are characterised by horrendous attacks intentionally directed against civilians. The governments involved, whether directly or indirectly, and the opposing groups are equally discredited by these crimes.

Until now Protocol I has never been applicable in an international armed conflict, as there has never been a conflict since 1977 between two States party to that Protocol. Nor has any government recognised Protocol II as applicable in an armed conflict waged on its own territory, although arguably the legal requirements for its applicability have been met more than once (e.g. in Chechnya). There is therefore no legal practice to help evaluate the effects of the new law on the main protagonists.

This does not, however, mean the end of our attempt to understand the status of the new rules on the protection of the civilian population. It is known, for example, that Protocol I was consulted by legal advisors of US forces in the (1991) Gulf War and in the Balkans, although the US is still not a party to it. On the other hand, both Protocols have already had an astonishing impact not only on the armed forces but also on the organised international community (United Nations!), governments, the academic world and even the general public (mainly through reporting by the media). Examples:

- the main bodies of the UN system, in particular the Security Council, refer to the new law as a matter of course; governments feel more and more obliged to justify their behaviour in an armed conflict in the light of the new law, in particular Protocol I;
- there is probably no longer any military lawyer deserving that name who does not take the law codified by the Protocols as the basis for his or her legal advice on targeting, in particular the rules protecting civilians;
- there are now far more academics who know and teach international humanitarian law than before the Diplomatic Conference, and more publications than ever before are available today on issues related to this field of international law;
- the existence of the Protocols has been acknowledged by international jurisdictions, in particular by the International Court of Justice (Advisory Opinion on nuclear weapons) and by the International Criminal Tribunal for the former Yugoslavia (ICTY);
- non-governmental organisations which previously never cared about international humanitarian law have started to show a marked interest in the Protocols, in particular their chapters on the protection of the civilian population.

It should be added that the 1974–1977 Diplomatic Conference was the first occasion for diplomats and international lawyers from Third World countries to familiarise themselves with international humanitarian law.
To sum up, the two Protocols have helped to generate unprecedented interest in and appreciation for international humanitarian law. This is a very important contribution to better protection of humanitarian interests in warfare.

2. A brief look at the rules on protection of the civilian population against the effects of hostilities

The protection of civilian persons and civilian objects in situations of international armed conflict has been strengthened and developed by Chapter IV of Protocol I. Under the heading "Basic Rule", Article 48 formulates the core principle of the new law as follows:
"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

In brief, attacks against civilians or the civilian infrastructure are prohibited and a distinction must always be made in military operations between the civilian population and civilian objects, which under humanitarian law are entitled to protection, and military objectives. This is of course an old rule, but Protocol I has the merit of having codified the general rule and elaborated provisions for specific issues or situations, drafted in modern language and mostly in precise wording.

Article 51 specifies the rule prohibiting military attacks against the civilian population and individual civilians. The article also codifies two notions which are fundamental for the "law of the battlefield", i.e. the rule of proportionality and the concept of collateral damage (Article 51.5(b)). This rule is extremely important, as all modern conflicts take place in populated areas. "Collateral damage" has even become a household word in media reports on military operations, particularly in the Middle East. Article 51 also prohibits reprisals against the civilian population, a rule which has, however, been the object of reservations.

Article 52 protects civilian objects – or the civilian infrastructure, such as housing, means of communication, public administration – against destructive attacks. This provision also gives a definition of what constitutes a "military objective": a fundamental contribution to international law.

- Other provisions deal with the protection of
- cultural objects and places of worship (Article 53);
- objects indispensable to the survival of the civilian population (prohibition of famine as a method of warfare – Article 54);
- the natural environment (Article 55);
- works and installations containing dangerous forces (Article 56).

[1] Bothe, M., Partsch, K.J. & Solf, W.A., *New Rules for Victims of Armed Conflict*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, p. 274.

Under the title "Precautions in attack", Article 57 is a checklist for commanders and legal advisors preparing a military operation.

For the first time in history, the law on non-international armed conflict includes provisions on the protection of the civilian population against the effects of military operations during such conflicts. Articles 13 to 18 of Protocol II do indeed break new ground by recognising that warfare has the same destructive effect on civilian life and property whether it is an international or an internal armed conflict.

3. Impact of the new provisions on protection of the civilian population: some examples

The new law on the protection of the civilian population has also left its mark on some remarkable international documents. They show that the 1977 Protocols have acquired a life of their own, of which the international community takes note as a matter of course.

3.1. Rome Statute of the International Criminal Court (ICC)

The Rome Statute of the ICC is unquestionably one of the most important international and multilateral treaties since the adoption in 1977 of the Additional Protocols. Its Article 8 codifies the Court's jurisdiction over persons suspected of having committed a war crime. Without specifically referring to Protocol I, Article 8 draws heavily on the Protocol's Chapter IV and incorporates grave breaches of the norms protecting the civilian population in the list of crimes. The ICC Statute even includes in Article 8 violations which are not grave breaches of the Geneva Conventions or Protocol I, such as attacks causing incidental loss to civilians or civilian property or damage to the environment (Article 8.2 (b)(iv)), or intentionally causing starvation (Article 8.2 (b)(xxv)). The provisions prohibiting such acts are to be found in Chapter IV of Protocol I. There is no doubt that without Protocol I the definition of the ICC's jurisdiction over war crimes would look different.

The same holds true for the Court's jurisdiction over breaches of international humanitarian law committed in non-international armed conflicts (Article 8.2 (c-f)). Subparagraph (e) includes a number of crimes committed against civilians or the civilian infrastructure. The source of those provisions is to be found in Protocol II.

3.2. Statute of the International Criminal Tribunal for the former Yugoslavia

There is no reference to the law of Protocol I in the Statute of the ICTY. Using old-fashioned Hague Law terminology the ICTY Statute nonetheless enumerates a number of violations of provisions which protect the human being against military operations and abuse of military force (see Article 3 and, concerning crimes against humanity, Article 5). The Tribunal dealt with prosecution for violations of these provisions in the *Blaskic* case.[2]

The ICTY made a historic contribution to strengthening the protection of civilians by deciding that a serious violation of the law governing non-international armed conflict may also be an international crime or a war crime.[3] Thus the Tribunal places breaches of the law protecting victims of non-international armed conflicts on the same footing as those that occur in international armed conflicts. This is a novel approach which clearly underlines the importance to be attributed to crimes committed in internal conflict. Such a development would not have been possible without Protocol II.

3.3. ICTY Report on the NATO Bombing Campaign against the Federal Republic of Yugoslavia

After the military campaign in Kosovo in 1999 the Prosecutor of the ICTY asked for a report on whether international law had been breached during the NATO bombing campaign and whether such violations constitute a sufficient basis to envisage criminal proceedings.[4] The resultant Report concludes, however, that the facts do not warrant a criminal investigation. The question whether military operations were always compatible with international humanitarian law was left open. It is not our intention to discuss either the content of the Report or its conclusions, but only to examine what use was made of the law of 1977.

Although the leading nation in that military campaign, the United States, was not bound by Protocol I, the authors of the Report took the law of Protocol I as the basis for their examination, in particular when referring to the rules governing targeting.[5] Of the various incidents considered by the Report we mention only the attack against the Leskovac railway bridge, where a civilian train was hit, the attack on a civilian convoy at Djakovica, and the attack on the TV station in Belgrade. The latter gives occasion to examine the situation of an armed attack against an object which simultaneously served military and civilian purposes (dual use).

The ICTY Report on the Kosovo campaign shows that Protocol I is relevant for examining the behaviour of the various protagonists on the battlefield, even though not all parties to that conflict were bound by the said treaty.

3.4. International Court of Justice Advisory Opinion on the legality of the threat or use of nuclear weapons

In its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons the ICJ explicitly referred to the new provisions on the protection of the environment in armed conflict, as codified by Articles 35, paragraph 5, and 55 of Protocol I.

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[2] ICTY, *Blaskic*, Case No. IT-95-14-T, Judgment, 3 March 2000.

[3] ICTY, *Tadic*, Case No. IT-94-1, Decision of 2 October 1995 (Jurisdiction).

[4] ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia,* ILM, Vol. 39, September 2000, p. 1257.

[5] William J. Fenrick, of the ICTY Office of the Prosecutor, wrote in his article on the Report that "[...] all legal analysis will presuppose the applicability of the Additional Protocol in its entirety". Fenrick, W., "The Law Applicable to Targeting and Proportionality after Operation Allied Force: a View from the Outside", *in Yearbook of International Humanitarian Law 2000*, T.M.C. Asser Press, The Hague, 2002, p. 57.

3.5. Observance by United Nations forces of international humanitarian law

On 6 August 1999, the United Nations Secretary-General's Bulletin published a set of guidelines giving "fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control".[6] These instructions for UN forces, which may have to use force in carrying out their mission, draw heavily on the new law of 1977, in particular on the rules governing the protection of the civilian population.

4. Concluding remarks

International law is not primarily an academic exercise. Its provisions live through practical application. If acceptance in practice is a criterion for evaluating the relevance of international rules, the provisions of the two Additional Protocols of 1977 on the protection of the civilian population against the effects of hostilities have stood the test. Today no government, no international organization and no academic can disregard that law. The law brought into being by the 1974–1977 Diplomatic Conference is well worth every effort.

However, there is no cause for rejoicing, as the ultimate goal of any norm is to be respected. Ongoing conflicts show that we are far away from this goal, and that much still remains to be done.

[6] Text published in *International Review of the Red Cross*, December 1999, p. 812, and *ILM*, Vol. XXXVIII, November 1999, p. 1656.

Comments on the Presentation of Dr. Hans-Peter Gasser

Machteld Boot*

Thank you Mr. Chairman, for giving me the opportunity to give a brief reply and thank you Dr. Gasser, for ultimately concluding that it was indeed worth the effort twenty five years ago! I would like to focus on the issue of protection as well, but more specifically in relation to the developments that started less than ten years ago with the establishment of the International Criminal Tribunal for the Former Yugoslavia, and which continued in the adoption of the Rome Statute of the International Criminal Court which will probably begin to work in few weeks.

We have now entered an area in which penal repression has become the focus of attention and, in that context, the first question that comes up is whether the civilian population is indeed protected by the fact that perpetrators are put to justice. Ultimately it is. Of course, applying criminal law and bringing perpetrators to justice does not protect civilians in itself because, after all, convicting and sentencing perpetrators always occurs after the fact, after the damage is done and after human rights and humanitarian law have been violated. Protection is only offered if rules of international humanitarian law are applied and if they are not violated in the first place. What we see since a few years is that international humanitarian is actually applied on a structural basis by judges, both before international and national criminal courts. In my view, this has indeed contributed to a better protection of those who no longer or do not participate in the hostilities. This is because of the awareness of the existence of rules of international humanitarian law, to which these criminal trials have contributed. It is clear that the current trend to putting an end to impunity for serious violations clearly signals that not everything is allowed in war, which contributes to the thesis that, in the end, prosecuting war criminals indeed deters future war criminals.

Another major contribution has been made by the ad hoc tribunal's Appeals Chamber in the *Tadic* case. This Decision has been mentioned both by Judge Meron, Hans-Peter Gasser and Horst Fischer, and I would like to quote the following sentence therefrom: "what is inhumane and consequently proscribed in international wars cannot be but inhumane and inadmissible in civil strife".

In 1993, when the Security Council decided to establish the International Criminal Tribunal for the Former Yugoslavia, the Council did indeed decide not to include the Additional Protocols in the Statute of the Tribunal. The Statute of the Rwanda Tribunal, which was adopted one year later in November 1994 , for the first time explicitly contains a provision that criminalises violations of common Article 3 and Additional Protocol II applicable in non-international armed conflicts. In the *Tadic* Jurisdiction Decision, of which I just quoted one part, the Appeals Chamber held that serious violations of international humanitarian law committed in non-international armed conflicts are international crimes.

These developments have been influential to the content of the Rome Statute, which gives the International Criminal Court jurisdiction not only over crimes committed in international wars but also over crimes committed in non-international armed conflicts, which include, as I said before, common Article 3 and Additional Protocol II. This list covers prohibitions that have been explicitly criminalised in the Rome Statute, for the first time also when they are committed in *non-international* armed conflicts. Examples of such

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crimes are intentionally directing attacks against the civilian population as such, intentionally directing attacks against personnel objects involved in humanitarian assistance and peace-keeping missions, rape and sexual violence, and conscripting or using children below the age of 15 in the armed groups or armed forces. Of course, the Rome Statute does not cover everything under the Second Additional Protocol on non-international armed conflict, notably the weapons provision does not appear in the second part of Article 8 Rome Statute. Neither do provisions on target selection and proportionality.

It is understandable that the focus of attention with respect to international humanitarian law is now on the Rome Statute and the entry into force of this instrument. However, I would like to point out that not only the Rome Statute includes rules of international humanitarian law. The Geneva Conventions include specific provisions listing acts that are considered grave breaches of their rules, such as the killing and torture of protected persons. The list of grave breaches was expanded in 1977 with the adoption of the First Additional Protocol to criminalise other acts and establishing universal jurisdiction over them, such as acts aimed at harming civilians through the unlawful combat in hostilities. According to the Rome Statute, the Court is complementary to national jurisdictions, which means that States are first responsible for bringing perpetrators to justice. Many States are now in the process of drafting legislation in order for their laws to be in conformity with the Rome Statute.

The Rome Statute of the International Criminal Court is not the only instrument that contains the rules on international humanitarian law. It is first of all up to States to respect and to ensure respect for the rules of International Humanitarian Law; the Rome Statute did not change or end this obligation, which is contained in the first article of each of the four Geneva Conventions. The ratification and the implementation of the Additional Protocols, which complemented the Geneva Conventions, would be the first step in the further protection of those who do not or no longer take part in the hostilities.

In conclusion, I would like to very briefly quote part of a speech held by the ICRC's President Kellenberger yesterday at a round-table conference organised by the ICRC and the Swiss government, which was also referred to just now "our belief in the continued validity of existing law should not be taken to mean that IHL is perfect, for nobody of law can lay claim to perfection. But any attempt to re-evaluate its appropriateness can only take place after it has been determined that it is the law that is lacking and not the political will to apply it."

Thank you very much for your kind attention. ■

The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?

Frits Kalshoven*

On 31 May 1977, just one week before the adoption of the two Protocols Additional to the Geneva Conventions of 1949, the Plenary Meeting of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted a long text on the creation of a new, permanent instrument for the promotion and enforcement of international humanitarian law (or IHL). Included in Protocol I, the text became Article 90, and the instrument was styled the International Fact-Finding Commission.

Today, twenty-five years after its creation, there is reason to ask ourselves what has become of the Commission: why do we hear so little about it; has it turned into a "sleeping beauty"?

A first comment is that not even at its birth did the Commission qualify as a beauty. At that moment in time, it was nothing but a paper construct: an idea reduced to a string of treaty clauses, not rooted in customary humanitarian law and tainted with several unattractive birth marks reflecting the struggle that had accompanied its creation. At the Conference, in effect, the idea of creating a permanent fact-finding mechanism had been as enthusiastically embraced by some as strongly opposed by others. Since neither side could win, the outcome was the inevitable compromise: a text no-one was entirely happy with but that was not so bad as to preclude consensus.[1]

This outcome may be illustrated with the example of two German participants at the Conference. Both had been actively engaged in the debate but each on opposing sides, and at the end of the day both could support the adoption of Article 90, though each with their own misgivings. One was Dr. Dieter Fleck, delegate of the Federal Republic of Germany; the other, Professor Bernhard Graefrath, member of the delegation of the German Democratic Republic. For Dr. Fleck, the baby was less perfect than he had hoped for: the

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[1] For an overview of the drafting history of Art. 90, *see* Kalshoven, F. "The International Humanitarian Fact-finding Commission: its Birth and Early Years", in Denters, E. & Schrijvers, N. (eds.), *Reflections on International Law from the Low Countries,* Kluwer Law International, The Hague, 1998, pp 201-215.

text displayed defects that he had rather not seen. Professor Graefrath's preference would have been for an abortion; yet, largely owing to his own doings, the end product had become sufficiently neutralised for him to regard it as acceptable.

Always in these terms, the battle at the Conference may be described as one between the Fleckians on one side: proponents of a strong commission, with automatic, compulsory jurisdiction and, for some, even a right of initiative – largely, the Western and likeminded countries; and, on the other side, the Graefrathists: opponents of the very idea of an independent fact-finding body – the Soviet bloc, and a good part of the Third World. The outcome was a commission with no right of initiative, with "competence" instead of "jurisdiction", and not adorned with any automatic or compulsory powers: without exception, its activities would require the consent of all sides involved in a fact-finding situation.[2]

Article 90, paragraph 2(a) provides States parties to Protocol I with the option to give this consent beforehand, by depositing a declaration recognising the competence of the Commission in relation to any other State party accepting the same obligation. Twenty such declarations were required before the Commission could even be established. It took a full 14 years, until 1991, for the Commission to travel this distance from "virtual" to "real" existence – a long time, yet six years less than Professor Rudolf Bindschedler, head of the Swiss delegation at the Conference, had originally predicted.[3]

Today, the International Humanitarian Fact-Finding Commission (as it has restyled itself) is in the 11th year of its "real existence". Its competence has been recognised by 60 States, and these not just minor ones, such as Liechtenstein, Malta, or Trinidad and Tobago. Also major powers have done so: Russia as early as 1989; the United Kingdom, 10 years later. In effect, virtually all European States have made the declaration, with France as notable exception: that State overcame its hesitations to become party to Protocol I as late as 2001, and evidently has not considered the time ripe to accept the competence of the Commission as well. Contrast this with those States who declared their acceptance at times when they were actually engaged in armed conflict: Croatia, 11 May 1992; Bosnia and Herzegovina, 31 December 1992; and Colombia, 17 April 1995.

Even so, the Commission has to this day failed to attract actual work, whether from States that had made a prior declaration pursuant to Article 90, paragraph 2(a), or from parties which *ad hoc* decided to engage its services. These services, it should be noted, may be twofold: as provided in Article 90, paragraph 2(c), the Commission is competent to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol", and to "facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol" – the latter clause obviously reminiscent of similar clauses in various human rights treaties.

The Commission has attempted to improve its lot along two lines. The first line has involved an internal process, with the members trying to find ways around some of the restrictions embedded in Article 90. Particularly troublesome in this respect are: (1) the fact that Article 90 is included in an instrument, Protocol I, that is specifically applicable in international armed conflicts; and (2) the repeated references in the Article to "the Conventions and this Protocol". Obviously, international armed conflicts have become a rarity, with the great majority of today's armed conflicts being of the non-international variety. As well, what we regard today as international humanitarian law is quite a bit broader than the contents of the Geneva Conventions of 1949 and Protocol I of 1977 alone.

The Commission accordingly has almost from day one declared itself ready to carry out its functions in situations of internal armed conflict as well. It considers that nothing in the text of Article 90 prevents it from doing so, provided all the parties concerned in a particular enquiry or good offices procedure consent to its functioning. Similarly, it is convinced that whether in a situation of international or internal armed conflict, the scope of applicable law need not be restricted to "the Conventions and this Protocol" and may effectively encompass the entire field of IHL, again, provided the parties concerned accept such an extension.

The second line has consisted of a series of promotional activities. Members seized every opportunity to introduce and explain the Commission in academic and similar suitable meetings. The Commission was represented in international Red Cross and other official conferences. Delegations headed by the president visited a number of capitals, meeting with political and military authorities. Visits were brought to the United Nations headquarters and to permanent representatives of States members of the Security Council. The latter visits served, *inter alia*, to explain the possibility for that organisation, and for the Security Council in particular, to utilise the Commission for specific enquiries into alleged serious violations of IHL.[4]

While these combined efforts may have significantly contributed to the remarkable increase in the number of States that accept the competence of the Commission, its capacities remained untested in practice. Our question, whether the Commission has turned into a "sleeping beauty", might therefore be answered in this sense that although never a "beauty" in the first place, it certainly continues to be "sleeping". Why is this so? In effect, a number of factors may be

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[2] Prof. Graefrath wrote about this himself: "Die Untersuchungskommission im Ergänzungsprotokoll zu den Genfer Abkommen vom 12. 8. 1949", (1981) Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Ges.-Sprachw. R. XXX, p12.

[3] *Op. cit.* note 1, at 211. The requirement of 20 acceptances of the Commission's competence stems from an American amendment – one more country that did not particularly like the idea of an independent commission.

[4] More than once on those occasions it became apparent that not all of these authorities had a clear idea, to say the least, of IHL and its relations with, and distinctions from, human rights law.

determinant of this unsatisfactory situation. Two are highlighted here: (1) the Commission's independence, and (2) the reluctance of parties to an armed conflict to have the truth about certain alleged facts exposed.

The case of the former Yugoslavia may serve as an example. The break-up of Yugoslavia, in mid-1991, and the outbreak of armed conflicts between the various former parts of that State, coincided with the beginning of the "real existence" of the Commission. Allegations of serious violations of IHL accompanied the conflicts from the very outset. The ICRC time and time again urged the parties to refer their complaints to the Fact-Finding Commission. To the extent the parties reacted at all, each time at least one party chose not to follow that advice. Then, in October 1992, the UN Security Council, rather than mandating the Commission to investigate the facts at issue, requested the Secretary-General to set up a special commission of experts, with the task to collect and analyse all available information about serious violations, and to report its findings to the Secretary-General (and, through him, to the Security Council). Ironically, two of the five members of this *ad hoc* commission were also members of the Fact-Finding Commission.[5] As we know, this commission was soon overshadowed by the equally *ad hoc* International Tribunal for the Former Yugoslavia.[6]

The first factor mentioned above, the Commission's independence, was hailed at the outset as one of its major assets. It had been created on purpose as a treaty body, not organically connected with either of the two dominant networks in this sphere of interest: the Red Cross/Red Crescent Movement, and the United Nations (where initiatives for investigations are frequently launched, whether by the Security Council, the Secretary-General, the High Commissioner for Human Rights, or the Special Rapporteurs). To underscore its complete independence, the Commission initially held its annual meetings in Berne, at the seat of its Secretariat and, more important, far from the Geneva offices of the ICRC and the United Nations! However, as evidenced by the Yugoslavian example, such a blissful state of utter independence acts as a two-edged sword: while protecting the Commission from undue influence (the reason why the construction was chosen in the first place) it also isolates it as a sort of alien body not belonging to one's proper family.[7]

The other point, the reluctance of parties to see the truth about alleged facts exposed, is intrinsic in the nature of the Commission's mandate. For it to enquire into facts alleged to be serious violations of IHL requires that it searches for the truth about these allegations. True, the rules of procedure prescribe that a report of the Commission is sent to the parties and may be disclosed only by those parties. Even so, the outcome may be a finding that one party had lied (or "distorted the truth"). Clearly, this is what parties to armed conflicts do all the time, and they go to great lengths to prevent their schemes being exposed. Parties to the various Yugoslavia conflicts too, have often preferred to use allegations of violations as a propaganda weapon rather than as a first step towards the disclosure of the truth about the alleged facts.

In the course of the first 10 years of its actual existence, the Commission has more than once been involved in situations that might have led to real work. To mention a few: The Sri Lankan Tamil Tigers once were briefly interested in the possibility of submitting to the Commission, cases of alleged violation of IHL by government forces: they lost interest when they realised that the government might have claims against them as well. – The Chechnyan authorities invited the Commission to investigate violations allegedly committed by Russian forces, on the basis, unacceptable to the Commission, that Chechnya was an independent State and the conflict with Russia therefore an international armed conflict, and Chechnya was successor to the Soviet Union as party to the Geneva Conventions and Protocol I as well as in the declaration under Article 90 made in 1981 by the Soviet Union. – In the recent conflict in Afghanistan, Amnesty International wrote to the parties concerned (the United States, the United Kingdom, and the Northern Alliance) that they should have the facts that led to numerous deaths among prisoners at Mazar-I-Sharif clarified by the Commission; the parties never even answered to Amnesty's suggestion.

The Commission came closest to actual involvement in Colombia – a hornet's nest that has been the theatre of vicious internal armed conflict since long years.[8] At one time, after several years of talks with the government and one guerrilla party, the ELN, an agreement between these two parties was in the making. However, elections brought a new president, who set a different course which did not leave room for involvement of the Commission as long as the armed conflict was continuing. Even so, the case of Colombia is illuminating in that it brings to light the importance of trust gradually growing between parties, to the point where they can seriously consider entering into an agreement involving the submission of their mutual accusations of wrongful conduct of hostilities to an independent, neutral body of outsiders. The negotiating parties, it may be added, had set great store by the good offices capacity of the Commission, considering that its involvement actually might contribute to bringing the parties closer to peace.

The question may be asked whether the Fact-Finding Commission is likely to get an actual job any time soon? Any answer to that question would be a matter of speculation. Rather, I wish to add a few more words about the Commis-

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[5] The commission was established pursuant to Resolution 780 (UN Doc. S/RES/780 (1992)), with the present author as chairman and as members: Prof. Cherif Bassiouni, Mr. William J. Fenrick, Judge Keba Mbaye and Prof. Torkel Opsahl. Its final report, with Prof. Bassiouni as chairman, was submitted to the Security Council by the Secretary-General on 24 May 1994 (UN Doc. S/1994/674, 27 May 1994).

[6] The ICTY was established by Resolution 827 (UN Doc. S/RES/827 (1993)), 25 May 1993.

[7] To the Secretary-General, in 1992, the Commission must have appeared like a distinguished yet untested body. In the appointments list of 26 October 1992, the fact is mentioned that I was a member of the Fact-Finding Commission. Yet, the Commission was bypassed.

[8] On the attitude of Colombia in relation to Protocol II of 1977, and to IHL in general, *see*, by this author, "Protocol II, the CDDH and Colombia", in Wellens, K. (ed), *International Law: Theory and Practice*, Kluwer Law International, The Hague, 1998, pp 597–622.

sion's potentialities in relation to its function of "finding facts" concerning alleged serious violations of IHL. Consider, first, what may be the purpose of such an exercice? This actually will depend entirely on the specific task the Commission is given: it may be to establish an historical record; to expose the truth; to lay bare the facts pointing to the responsibility of a party; to provide grounds for compensation of victims. Each of these tasks may serve a useful purpose.

The Commission may also be called upon to identify the person or persons who *prima facie* may be regarded as individually criminally liable for a particular act, thus enabling the start of a prosecution that in turn may lead to a trial. In the early debate among members about Article 90, some members held this to be not just one possible role for the Commission but really its only task. It should be emphasised, and it was realised from the outset, that the Commission is not itself a judicial body. The most it could determine is "whether there are reasonable grounds for believing that [a particular person] committed the [serious violation imputed in the request]." I borrow this phrase from a Rule 61 decision taken by ICTY Trial Chamber II in September 1996 in the case of *Ivica Rajic*, who had been the commander of a Bosnian-Croat unit that attacked and destroyed the village Stupni Do in central Bosnia.[9] The question is: could the Fact-Finding Commission have done what this Chamber of the ICTY did? It may be recalled that at the time of the event (October 1993) both Bosnia and Herzegovina and Croatia had recognised the Commission's competence!

In effect, the Chamber found *prima facie* evidence of a variety of things: that *Rajic* had been in command of the Bosnian Croat unit that carried out the attack on Stupni Do;[10] that Bosnian Croats were acting as "agents" of Croatia in such clashes with the Bosnian government;[11] and that at the time, units of the Croatian Army were present in central Bosnia, had been sent there by the Croatian government, and were engaged in fighting against the Bosnian government[12] (so that even Article 2 of the ICTY Statute could apply[13]).

In my submission, the Fact-Finding Commission could have done all this. I do not know how many of its present members share this view. At least one member of the first hour has remained convinced that the Commission can do no more than verify the basic "facts" – that a gun was fired and a man fell; not: who instigated or ordered the act, let alone a matter of command responsibility of persons higher up. This may be a last trace of the struggle between the Fleckians and the Graefrathians, with the latter definitely on the losing side.

I am not suggesting that a Stupni Do-type fact-finding mission would have been easy – far from it. Indeed, I strongly hope that the Commission's first case is not of that order of complexity. Nor, for that matter, would Colombia have been my theatre of choice! Cases apt to arise out of the situation in that country would be not so much of the "whodunit" variety (since the facts would often be plain) but involve questions of ultimate responsibility.

To conclude: the Fact-Finding Commission has not so far had the chance to demonstrate its capabilities. I am convinced that its day will come. I am also convinced that it will then be able to prove itself a useful addition to the list of existing international instruments for the promotion and enforcement of IHL. The instruments on that list are neither numerous nor overly effective. As for the most recent and much-heralded addition, the International Criminal Court, time will tell what it can effectively contribute. To revert to Colombia, that State became a party to the Court's Statute, and the president used the occasion to warn the guerrillas to mend their ways, or else!

Even with this recent addition to our list, there remains room for further expansion, in particular with instruments with a more direct impact on the parties' level of respect for their IHL obligations than may be expected of any *ad hoc* or permanent international criminal jurisdiction. On that note, I stop, leaving the floor to my assigned commentator, Liesbeth Zegveld, who will address that further perspective.

[9] The *Prosecutor v. Ivica Rajic a/k/a/ Viktor Andric*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Decision of 13 September 1996.

[10] Paras. 9, 58-61.

[11] Para. 26.

[12] Paras. 13-21.

[13] Paras. 7, 8.

Comments on the Presentation of Prof. Frits Kalshoven

Liesbeth Zegveld*

Where the International Humanitarian Fact-Finding Commission is withheld from its proper functioning, other international bodies have taken over its supervisory tasks. A remarkable example is the Inter-American Commission on Human Rights. It got involved in the case of the Guantanamo Bay prisoners. On 12 March 2002, the Inter-American Commission adopted precautionary measures, asking the Government of the United States to "take the urgent measures necessary to have the legal status of the detainees of the Guantanamo Bay determined by a competent tribunal".[1] The Inter-American Commission noted that the rights of persons under control of a State, and in case of armed conflict, might

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[1] International Law in Brief, developments in international law, prepared by the editorial staff of International Legal Materials, The American Society of International Law, 19 March 2002 and 4 June 2002.

be determined in part by "reference to international humanitarian law as well as international human rights law".[2]

So, once again, the Inter-American Commission has filled the gap in supervision of compliance with international humanitarian law. It has done so before. I recall the *Tablada* case against Argentina,[3] and its reports on the situation of human rights in Colombia.[4]

What can we learn from the Guantanamo Bay initiative of the Inter-American Commission when assessing the Fact-Finding Commission?

A first possible answer would be: leave the supervision of compliance with international humanitarian law to human rights bodies. This is what Christopher Greenwood suggested in his report on international humanitarian law presented on the occasion of the Commemoration of the 1899 Hague Peace Conference. He proposed that "the monitoring mechanisms of human rights conventions could be used in an indirect way to assist in ensuring compliance with the law applicable in internal conflicts".[5]

A second option would be that the Fact-Finding Commission enlarges its mandate through extensive interpretation. When not going too much by the text, some provisions of Article 90 of Additional Protocol I may allow for a somewhat broader reading. An example is paragraph 2 sub (c) of this article. This provision reads: "The Commission shall be competent to enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol."[6] Importantly, this provision merely requires an allegation that international humanitarian law is seriously violated. The Fact-Finding Commission could agree that it may act upon such an allegation by individuals, for example, victims of the violations of international humanitarian law. I would thus not interpret this provision as requiring a State invitation to look into the case. If we apply this provision to the case dealt with by the ICTY in the *Rajik* judgement, to which Frits referred, the Fact-Finding Commission would have been competent to enquire into this matter, even absent a specific request from Bosnia Herzegovina or Croatia.

Practically, the Fact-Finding Commission may be dependent on State cooperation to find the facts, at least to carry out an investigation *in loco*. But physical presence is not the only means for the Fact-Finding Commission to find facts. In particular cases, the Fact-Finding Commission may obtain detailed information through other channels, such as the media, members of a party to the conflict who have fled the country and willing to provide information, or other international bodies that are present in the State territory concerned.

And even for an investigation *in loco*, international bodies, such as the United Nations that are already physically present in a particular State may mediate so as to get in the Fact-Finding Commission, and provide the necessary facilities. It may be argued that cooperation with the United Nations impairs the political independence of the Fact-Finding Commission, as the United Nations clearly is a political body. But, on the other hand, it makes the Fact-Finding Commission less dependent from States, which dependence has up until now completely blocked its functioning.

In this regard, Article 89 of Additional Protocol I on cooperation between the State Parties and the United Nations may be taken into account.[7] Why couldn't this article apply to the Fact-Finding Commission?

Also paragraph 2 sub (d) of Article 90 may leave some room for extending the Fact-Finding Commission's mandate. This provision stipulates that in situations in which parties have not recognised the competence of the Commission in advance, the Commission may institute an enquiry at the request of a Party to the conflict, with the consent of the other Party or Parties concerned.

The Fact-Finding Commission already agreed to read 'Party to the conflict' as including non-State parties in internal conflicts. So it accepted that it is also competent in internal conflicts. This interpretation may open the door for further broadening its mandate. For instance, the Fact-Finding Commission could take up requests from divisions of a conflict party. Maybe it could even take up requests from civilians who associate with one or another party, and who have become victims of violations of international humanitarian law.

Regarding 'the consent of the other party or parties', as required by paragraph 2 sub d, it has been suggested that if two States have recognised the competence of the Fact-Finding Commission, they may address the Commission with regard to an internal conflict occurring in one of these States, without the consent of the other party(-ies) in that internal conflict.

I admit, this second option, flexible reading of the Fact-Finding Commission's mandate, is not wholly in line with the textual logic of Article 90 of Additional Protocol I, but in view of the urgency of the situation and of earlier extensive interpretations by the Fact-Finding Commission of its competence, it may be worth considering.

A third and final possible response to the Guantanamo Bay initiative of the Inter-American Commission could be to more radically modify the Fact-Finding Commission and to equip it with a larger mandate allowing it to act on its own initiative, possibly at the request of individual victims. It could then also be considered that a judicial or quasi-judicialrole is conferred to it. The rules on evidence, laid down in paragraph 4 subs (b) and (c) of Article 90, already tend to confer to the Fact-Finding Commission a quasi-judicial character.

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[2] *Id.*

[3] Rep. No 55/97, Case No. 11.137, Argentina, 30 October 1997.

[4] Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, 4 October 1993; Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev.1, 26 February 1999.

[5] Greenwood C., "International Humanitarian Law" in Kalshoven, F. (ed), *The Centennial of the First International Peace Conference*, Kluwer Law International, The Hague, 2000, pp. 161-259.

[6] This provision applies with regard to States that have recognised the Commission's competence.

[7] Art. 89 reads: "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."

As a model for such a revision of the Fact-Finding Commission could serve the individual complaints procedures existing under human rights treaties. The International Covenant on Civil and Political Rights already served as a model for several procedural aspects of the Fact-Finding Commission.[8]

Especially the last idea received closer attention recently.[9] Texts have been drafted developing the idea of setting up a body competent to receive complaints or requests from individual victims of violations of international humanitarian law. The idea will be developed in two expert meetings, the first to be held in the winter of 2003.

In conclusion, it would seem to me that – in theory – Article 90 of Additional Protocol I could have proved to be useful, despite some shortcomings. It did institute for the first time a permanent, non-political and impartial body, to which the parties to the conflict could resort to at any time. The problem is, they did not. Therefore, the three options I just described (supervision of compliance with international humanitarian law by human rights bodies; extensive interpretation of its mandate by the Fact-Finding Commission; formally modifying the Fact-Finding Commission, extending it for example with an individual complaints procedure) may be worth considering more closely. ■

[8] For example the constitution of the Chamber of Enquiry under paragraph 3 of Article 90 is on some points similar to Art. 42 of the International Covenant on Civil and Political Rights, *see* Sandoz, Y. et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987, p. 1048.

[9] Kleffner, J. K. & Zegveld, L., "Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law", *Yearbook of International Humanitarian Law*, vol. 3, T.M.C. Asser Press, 2000, pp. 384–401.

The Additional Protocols 25 Years Later: Remarks on a Success Story

Horst Fischer*

The presentations and discussions of the conference deserve final comments on three major points: the success of the Additional Protocols, the influence of the protocols on other areas of international humanitarian law and the question whether there is a demand for new and additional rules. Let me start commenting on the success story by briefly making a remark concerning the perspective we had developed during this meeting on the Additional Protocols. Obviously, listening to everyone here, we had taken a lawyer's perspective looking at the protocols and looking at the past 25 years of their implementation. Now, Hans-Peter Gasser described the perspective from 1974 when the Diplomatic conference started and he referred to the main objective of the whole diplomatic process which was to better protect the civilians in armed conflict. Now, taking that into account, probably the right perspective for any debate in the Additional Protocols should have been based on a sociological approach, rather than a lawyer's approach. Of course that would have meant to deal with figures about the real protection of civilians in armed conflict provided by the restated and new law included in the Additional Protocols. To give a more convincing answer to the questions of protection we definitely need to enrich our debate by looking at the real situation on the ground.

However, from a legal perspective the Additional Protocols are an undeniable success. As Hans-Peter Gasser mentioned, there have been 160 ratifications for Protocol I and 150 for Protocol II now. With these numbers the Protocols belong to the class of treaties which are accepted not only by a majority of states but also ratified by states from all regions. However from time to time it is worth looking at the reservations and declarations made by the state parties. They are an indication of how much the text of the treaty reflects the consensus and moreover what value the text has been for the development of customary law. When forming a generally positive view, we should not forget that some of the fundamental and innovative rules of the Additional Protocols which were praised in the past as the success of the Diplomatic conference have now been challenged tremendously. Let me just quickly refer to some examples of the voiced criticisms.

Hans-Peter Gasser has outlined the advantages of article 51 of Additional Protocol I which is definitely a cornerstone of the whole Protocol. Out of all the innovations contained in the Protocol one would have expected the prohibition of reprisals against civilian population to be transformed into customary law quite quickly. The ICTY Chambers have already referred to such a customary law prohibition. On the other hand scholars, just to mention Christopher Greenwood, have used good arguments to criticise the judgement and outlined their view of the state of customary law also by referring to the reservations made by some states when ratifying the Protocols. The debate will especially continue with respect to the war against terrorism. This will not only have an effect on the state of customary law in this respect. The Additional Protocols as treaties will also suffer from this debate. The arguments used with regard to customary law do not only challenge the existence of the necessary state practice and *opinio juris*. By referring to the reservations regarding reprisals and under-

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lining the importance of the reservations, the usefulness of chapter IV of Additional Protocol I itself is put into question as it is a careful attempt to balance the protection of civilians in armed conflicts against the military interests of parties to an armed conflict. Though several statements were made after the end of the cold war its perspective has guided some states to maintain their positions regarding reprisals as best reflected in the detailed wording of the United Kingdom reservation. It must be asked whether in the new age, which will see not only the war against terrorism but also other international and non-international armed conflicts, a new perspective must be developed, a perspective guided by the wish to develop a watertight prohibition on attacking civilians directly. The Ottawa process gives guidance on the value of complete prohibitions rather than limitations and exceptions. In this respect withdrawing the reservations would be the appropriate answer instead of maintaining them and insisting on their value for customary law.

The harmful effect on the Additional Protocols is already felt in a similar debate regarding article 52 of Additional Protocol I and its importance for the definition of military objective both in the context of the treaty but also for the customary law rule. Though article 52 Additional Protocol I is clear on its face, states interpret and apply it differently. The direct and military advantage gained by the destruction of the object has been replaced as the required guideline by the value of the object for the maintenance of the enemy's political system and its overall ability to wage war. This tendency violates the object and purpose of that article as reflected in the text and it seriously endangers the overall usefulness of the Additional Protocol I in limiting the effects of attacks on civilians.

What has been said about the previous point is also valid for article 90 and its "non-use" by the state parties since entry into force of the Additional Protocol I. The inability of the State community to make use of that instrument contrasts sharply with the 1977 expectations when article 90 was regarded as one of the major advantages of Protocol I. The non-use of article 90 has not just created problems for the commission established under that rule. It has seriously undermined the conviction that a successful fact finding system could be set up in accordance with the rules of international humanitarian law. The disconnect between substantive humanitarian law rules and fact finding by state practice and the practice of the United Nations has created the impression that parties to an armed conflict cannot take care of the implementation of their humanitarian law obligations.

Regarding the influence of the Additional Protocols one can identify several areas that have benefited from their existence. Undeniably, the two Protocols led to an intensive scholarly debate about humanitarian law in general and the specific rules embodied in the treaties and the Geneva Conventions. One could dare to say that the Protocols have contributed to promote humanitarian law as an accepted and essential part of international law after 1977. They have also successfully influenced the drafting process of military manuals in the countries of state parties and beyond. Nowadays however, one needs to highlight the importance and influence, and Judge Meron has mentioned it, of international criminal law. By the number of publications in the last five years international criminal law publications have certainly outpaced humanitarian law publications. This had an important positive effect on the institutionalisation of the International Criminal Court. But there might also be a detrimental effect on humanitarian law. States and NGO's have focused so much on the development of international criminal law that other forms of implementing humanitarian law have been eclipsed somehow. We need to draw our attention back to what is needed during an armed conflict to abide by the law and not only focus on what can be done after the conflict to punish the violators of the law.

The influence of human rights on humanitarian law has also been mentioned. Liesbeth Zegveld referred to the proposal to replace humanitarian law components by human rights institutions. Indeed there is a certain merger of the two parts of international law but it seems that this is not to the benefit of humanitarian law.

Despite the necessary substantial merger caused by the overlap of rules there has been an institutional interest supporting the involvement of human rights institutions in humanitarian law. Some institutions traditionally dealing with human rights today produce more documents on the implementation of international humanitarian law than on human rights and their application. The question is what influence this development has had on the law itself. It seems that we are confronted with a diffusion of humanitarian law instead of a concentration and the development mentioned might be one of the reasons for that lack of clarity.

Finally, the influence of the protocols on the development of customary law is a fundamental issue. All speakers referred to it. In academic circles it is easy to sit together and to identify rules of the Additional Protocols which can be regarded as customary law. States such as the United States have produced their own evaluation on this point and presented it to the public. Obviously there is also strong disagreement on certain issues such as the prohibition of reprisals against civilians and whether the reservations by some states regarding reprisal have prevented a customary law from emerging. Despite these important differences the main issue though is the disagreement on the methodology to be used.

Ted Meron had been one of the key advisors guiding the ICRC-expert group on customary law through the process of defining the right methodology but we as group members have also heard some very critical voices regarding our decisions. Unfortunately the law itself is not very helpful in this regard neither is the jurisprudence of the ICTY and ICTR. Despite the innovative parts of ICTY judgements on the existence of the prohibition of reprisals they offer little on the methodology used by the chambers to identify the existence of the rule. We need an intensive debate here in peacetime to be better prepared for war situations where the application of humanitarian law on a customary law basis is at stake.

Finally, is there a demand for change? It seems, as usual, that those who have a certain distance to the protocols are more in favour of advancing some changes and developments whereas those who had been in Geneva and who have pro-

duced the protocols are more reluctant to go forward to change. The question is whether in the 25th year we should follow one or the other approach.

Now, let's be reminded first that the negotiations for the additional protocols started in 1974, 25 years after the adoption of the Geneva Conventions in 1949. It took some years but this year it is now also 25 years after the conclusion of the protocols. The question is whether the law we have on the table is still adequate or not.

In this context some issues need to be highlighted. There is for example agreement among scholars that looking at the conflict within Afghanistan and the conflict between the US and Afghanistan that traditional rules of international humanitarian law afford the instruments to deal with all groups involved. However, Al Qaeda members of non-Afghan nationality create problems and the law protecting them indeed might not be adequate. Others might claim the law applicable to such persons does not allow for sufficient protection of the states against terrorism. But this is just one example of many we will be faced with in a new international environment: when NATO's ships controlling ships off the coast of East Africa meet armed resistance in their attempt to search is that a situation where international humanitarian law is applicable?

A second area of concern is the position and the influence of groups and companies in armed conflicts of the civil war type. We have yet not understood how to develop incentives for groups to abide by the law without at the same time destroying the traditional parameters of the law in non-international armed conflicts. This also true for the question on how civilians can best be protected in civil wars in particular when the distinction between those fighting and the civilians is difficult to maintain.

A third area of concern is the question of the use of weapons and in particular the use of weapons of mass destruction. Obviously there is this threat of the use of weapons of mass destruction by terrorists. But recent debates also show that the nuclear powers are rethinking their strategy regarding use of small nuclear weapons. Some of the problems related to these questions were already addressed at the conference in 1974–1977 but just from a different perspective.

Some states might say that humanitarian law conferences are too difficult and ask why we should open Pandora's box. The Red Cross movement would certainly claim that preservation is less dangerous than discussion and the military might expect that a new debate will restrain their operational freedom. So there are good reasons for not even starting a new debate on the adequacy of the law.

When looking at the adequacy of the law though from the perspective of the victim, other questions are equally important: The Additional Protocols were developed to protect the civilians in armed conflicts having in mind the character of conflicts and warfare as it had emerged since the Second World War. Can we really claim that warfare has not changed and the victims are better protected today than in the past? Wouldn't a debate on the adequacy of the law also permit us to reaffirm the main objective of humanitarian law in a changed international environment?

That perspective is exactly what is missing in the present debate on all the different aspects of international humanitarian law and international criminal law. Punishment in particular should not be used in exchange for the maintenance of peace and security in the region nor in the attempt to make parties aware of their obligations to apply the law. The plea must be to look at the guarantees for individual, and the position of the individual confronted in war with new situations. We need to stress the preventive side of humanitarian law as well as the punishment side. 25 years after the adoption of the Additional Protocols it is indeed time to further develop the constraints on war by using the debate on the adequacy of the law. ■

Privatisation and Human Rights in Countries in Transition: The Repeated Privatisation of the Company Agrokomerc in Bosnia and Herzegovina

Andreas Busch*

1. Introduction

In May 2002 the Human Rights Chamber, a human rights tribunal set up for Bosnia and Herzegovina under the Dayton peace accords,[1] issued a final decision on the privatisation of the joint-stock company Agrokomerc.[2] Agrokomerc was widely referred to as one of the country's "giant" enterprises, and the case surrounding its privatisation was unusual in many respects, playing a strategic and highly symbolic role in both the political and economic history of the country.

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1 *See* Decaux, E., "La chambre des droits de l'homme pour la Bosnie-Herzégovine", (2000) 44 Revue trimestrielle des droits de l'homme 709.

2 *See* Decision on Admissibility and Merits, delivered on 8 March 2002, and Decision on Requests for Review of 8 May 2002, *Muhamed Skrgic, Raska Cerimovic, Fikret Murtic and the Association for the Protection of Unemployed Shareholders of Agrokomerc v. the Federation of Bosnia and Herzegovina*, cases nos. CH/00/5134, CH/00/5136, CH/00/5138 and CH/01/7668.

The case illustrates the difficulties for transitional states to guarantee the maintenance of ownership rights in the light of political developments and new power structures. The case is also interesting in that it applies European human rights law to a privatisation process and is an example of the impact that an international tribunal and panel of judges sponsored by the economically powerful members of the Council of Europe countries can have in ensuring the rule of law in a transition country.

The case may be summarised as follows: In the late 1980's Agrokomerc was the largest producer of agricultural products in Yugoslavia. At that time, the then Yugoslav parliament, in a courageous project to liberalise a socialist economy, initiated legislation to enable employees to acquire shares in the companies by which they were employed. Agrokomerc was chosen by Yugoslav economists to be the model for improving company performance through employee privatisation - an idea that was yet to emerge in other formerly socialist economies. The conditions for the acquisition of shares were generous towards the workers with discounted shares being allocated based on the number of years worked. As employees were usually not able to invest immediately in the company, they could pay for their shares in instalments deducted directly from their salaries.

In 1993 the instalment payments were interrupted as a result of the war in Bosnia and Herzegovina between 1992 and 1995. During the war, Fikret Abdic, the general director of Agrokomerc, became the warlord of a breakaway state, the "Autonomous Republic of Western Bosnia and Herzegovina," and used the assets of Agrokomerc to finance his militias. In August 1994 Abdic and his followers were defeated by governmental troops and Agrokomerc was placed under control of the Bosnian government. The post-war government then ignored the prior privatisation and ran the Agrokomerc as a state-owned company. The Agrokomerc managers, appointed by the government, failed to maintain the company's pre-war performance and subsequently laid off thousands of employees. Many of the laid-off workers saw their dismissal as a punishment for their support of Abdic during the war – a belief strengthened as assets of their company were stripped through a series of subsequent "small-scale" privatisations and other misappropriations. Furthermore, despite this downturn in fortunes, some former soldiers loyal to the government were given jobs with the firm.

Over 3,000 former employees of Agrokomerc, who had either been dismissed or remained on waiting lists for employment, then formed a Shareholders Association, which they chose to represent them in a court battle for their alleged shareholder rights. The case passed first through the domestic court system before being referred eventually to the Human Rights Chamber.

In the case presented to the Human Rights Chamber, the applicants claimed to be the shareholders of the company, while the respondent Party in the form of the Federation of Bosnia and Herzegovina claimed to be the sole owner of Agrokomerc. The state, which itself had appointed Agrokomerc's management in 1994, endorsed its claim to be the sole owner of the company in previous court proceedings. It had commissioned audits on the ownership structure of the company which did not recognise shares allocated under the 1989 privatisation process and the accounts presented were subject to change on the basis of government decrees. Former employees and shareholders had no possibility to participate in the audits or to present evidence for their claim and feared that their shares would be sold again by government authorities in a new round of privatisation.

In June 2000, having unsuccessfully lodged numerous petitions and initiated administrative and court proceedings, a group of individual shareholders, later joined by the Shareholders Association, lodged applications with the Human Rights Chamber against the Federation of Bosnia and Herzegovina. The Chamber transmitted the applications to the Federation of Bosnia and Herzegovina for its observations under Article 1 of Protocol No. 1 to the European Convention on Human Rights and also under Article 6 of the Convention.

2. The applicants' case

Agrokomerc was registered in October 1991 as a joint stock company consisting of 53 % internal shares and 47 % state capital. This registration was based on 1990 legislation under which socially-owned companies could be privatised through the sale of internal shares to employees. Under these regulations, which became known as the Markovic scheme after the Yugoslav prime minister under whose government this legislation was introduced, employees could become holders of internal shares immediately upon registration of the company as a joint stock company and their registration as shareholders by the court under the applicable laws. The employees were only obliged to pay for their internal shares in instalments over a maximum period of ten years. Holders of registered internal shares were also entitled to participate in the distribution of company profits in proportion to the amount of their paid, as opposed to registered, internal shares.[3]

In the case of Agrokomerc, the management board decided in August 1991 to register the company as a joint-stock company and to issue internal shares. In April 1992, the management board issued additional decisions to pay off the allocated shares of the employees. The employees had claimed compensation to make up for reduced salaries they received between 1987 and 1991. They wanted this compensation amounting to almost 121 million Deutsche Mark to be converted into payment of the already registered shares. The pre-war management accepted this and consequently entered the sum into Agrokomerc's accounts. Furthermore, in April 1992

[3] For further explanation of the „Markovic scheme" see Sarcevic, P., "Privatisation in Yugoslavia and Croatia" in Sarcevic, P. (ed), *Privatisation in Cental and Eastern Europe*, Graham & Trotman, London, 1998, pp. 81–96; and Uvalic, M. and Vaughan-Whitehead, D. (eds), *Privatization Surprises in Transition Economies. Employee Ownership in Central and Eastern Europe* Edward Elgar, Cheltenham, 1997.

the management also recognised the claim of the employees to the value of 243 million Deutsche Mark, representing the value of inventory goods produced by Agrokomerc. The employees claimed to be entitled to this sum arguing that they did not receive anything for it during the time of production. The sum was therefore also converted into payments for internal shares.

As the post-war government did not recognise the applicants' shares they were prevented from taking advantage of them. They could not transfer the shares or their entitlements to them, and were not offered any appropriate compensation to address their claim. Furthermore, due to the failure of the government-appointed management, the value of Agrokomerc decreased dramatically. Therefore, the applicants not only requested the recognition of their status as shareholders but also claimed compensation for the devaluation of their shares caused by the loss of value of Agrokomerc since the government has controlled its business.

3. The respondent parties' case

The respondent Party in the proceedings argued that allocating a portion of salaries to the payment of registered internal shares without paying corresponding taxes and contributions on this amount was unlawful and consequently, this share capital was not effectively formed. For this reason, government appointed auditors reversed the entry showing privately held share capital and stated in its results that the company consisted of 100 % state capital. The Agent of the respondent Party also opined that the employees, as alleged shareholders, bore some responsibility for the failure of Agrokomerc to pay taxes and contributions. They also argued that the employees had the opportunity to influence management decisions first through the Workers' Council and then through the general assembly of shareholders.

4. The Chamber's Ruling

The Chamber had to examine whether the applicants had pre-existing "possessions" which they allege had been adversely interfered with by the authorities of the Federation in order to invoke Article 1 of Protocol No. 1 to the Convention. The Chamber found that the applicants acquired internal shares based upon their payment for those shares which were registered in the court. However, as the Chamber found that the amount of share capital in Agrokomerc registered in court before the war was based upon unpaid internal shares, the Chamber declined to rely solely upon the registration as establishing protected "possessions" of the applicants. Rather, the Chamber considered that the applicants acquired protected possessions in the form of internal shares in Agrokomerc only in relation to the amount of their actually paid internal shares.

The Chamber did not find that the respondent Party convincingly established that taxes and contributions were not paid on salaries allocated to the payment of internal shares. The Chamber also considered that the party responsible for the payment of taxes and contributions is Agrokomerc and not its individual shareholders. It applied the general principle in corporate law that individual employees and shareholders are not liable for alleged omissions of the company. Additionally, with particular regard to the Federation's claim that contributions for the allocated part of the salaries were not paid, the Chamber held that the shares could not be cancelled on the grounds that employees did not receive certain employment benefits from their employer and the issuer of the shares in question.

The Chamber was unable to establish any legal basis for the decision to convert employee claims for reduced salaries from August 1987 to July 1991 into internal shares. The Chamber found that neither the decision on issuance of internal shares nor the domestic legal system contained a provision which would authorise the decision. The Chamber also found no domestic provision which would allow an employee to later reclaim the amount of reduction of his salary during times when his employer was forced to pay guaranteed minimum salaries. The Chamber therefore did not consider that the applicants acquired any protected possessions in the corresponding shares in Agrokomerc.

As to the applicants' request to enter into the accounts the value of inventory goods of the company as of March 1992 to the benefit of paid internal shares, the Chamber likewise declined the claim. It was not able to determine any legal basis by which such inventory goods could have been converted into paid shares. The Chamber found that the applicants' assertion to have had created the inventory goods without having received anything of value in return for them did not sufficiently support their claim. The Chamber concluded that this conversion was *prima facie* illegal. Therefore it concluded that the applicants do not have protected "possessions" for any internal shares created or paid for by the conversion of inventory goods of Agrokomerc.

The applicants also claimed that when they reinvested their annual dividends, these funds were used to pay for shares which had not yet been paid for. The Chamber recognised this claim.

In conclusion, the Chamber held that the applicants acquired protected possessions in internal shares of Agrokomerc for which payment was made mainly on the basis of allocations of parts of salaries on the one hand and distribution of profits in proportion to the amount of paid internal shares on the other.

The Chamber further held that the cancellation of the applicants' shares in favour of state capital in Agrokomerc deprived the applicants of their protected possessions. It also found that by exercising effective exclusive control over the management of Agrokomerc, the authorities of the Federation further interfered with the rights of the applicants to participate in the management and to share in the profits of Agrokomerc in relation to their paid shares. In these respects it found that the Federation did not act "subject to the conditions provided by law". Consequently, the Chamber con-

cluded that the Federation violated the rights of the applicants protected by Article 1 of Protocol No. 1 to the Convention.

As to Article 6 of the Convention, the Chamber found that the ordinary courts denied competence to decide the ownership structure of Agrokomerc and to recognise the applicants' rights as shareholders. The Chamber found that the applicants did not have any real opportunity to present documents, testimony, or legal argument in writing or in person during the audit process and that there had been no actual or effective proceedings in which the applicants had been invited to participate. Thus, the failure of the respondent Party to provide the applicants with an opportunity to resolve their dispute in regular proceedings before its courts made it impossible for the applicants to have their rights properly determined. The Chamber concluded that the applicants have not had an effective right to "access to court" to resolve their claim of ownership of shares in Agrokomerc. Therefore it found the respondent Party had violated Article 6(1) of the Convention.

5. Remedies ordered by the Chamber

Having found a breach of the European Convention on Human Rights, the Chamber nonetheless faced a dilemma: although it had found that the applicants were shareholders, it could not determine the precise amount of paid internal shares acquired by each individual shareholder. This made determining appropriate remedies for the case particularly challenging. The Chamber concluded that it was necessary to order a forensic audit to determine the complete ownership structure of Agrokomerc: to this end, it required the respondent Party to employ internationally recognised auditors. The Chamber recommended that the respondent Party approach the World Bank with a request to fund the forensic audit from credits already arranged as part of a nationwide facility to promote privatisation. As an interim measure, the Federation of Bosnia and Herzegovina was ordered to recognise the capital structure of Agrokomerc as registered by the regional court in 1991, that is, 53 % share capital and 47 % state capital.

The Chamber further ordered the Federation to appoint three members to an interim supervisory board of Agrokomerc, and to allow the applicants, through the Shareholders Association, to appoint four of its members. Their role would be to observe the work of the management of the company until after the completion of the forensic audit and until the assembly of shareholders appoints the regular supervisory board as required by Bosnian law. The Chamber, however, did not award any compensation for pecuniary damages to the applicants by holding that the recognition of the applicants as shareholders is "adequate and capable of ensuring respect for the applicants' protected human rights and of remedying the established violations of the Convention by the respondent Party". The Chamber was seemingly deterred from quantifying the loss of value of shares by the uncertain outcome of the audit and a possibly enormous financial burden for the respondent Party. By recognising the applicants as shareholders and indicating the losses of the company since the government took control over it but rejecting the compensation claims, it could be argued that the decision did not remedy the damages occurred. However, this may all depend on the outcome of the forensic audit. The Chamber therefore held that it might make additional orders based upon the results of the audit.

6. Conclusion

After the delivery of the Chamber's decision, representatives of the Shareholders Association held a press conference in which they declared that justice had prevailed and encouraged their countrymen to return to Bosnia and adding that it was now time to rebuild the pre-war success story of Agrokomerc. The reality and implications of this case are however much more complex.

There is no doubt however that Bosnia and Herzegovina's economy is falling behind compared to its neighbours as a result of weak regulatory environments, high unemployment, low wages and continuous migration to other countries.[4] In this case, the Human Rights Chamber for Bosnia and Herzegovina proved that international human rights tribunals are a possible way to secure the rule of law in commercial matters in transitional environments. The Human Rights Chamber was created under the model of the European Court of Human Rights in Strasbourg and is not a commercial court. However, the vast majority of the applications which the Chamber has received since the end of the war in Bosnia and Herzegovina concern property disputes which the domestic judiciary often failed to solve. In effect, the Chamber became a mechanism for ensuring that existing legal titles are respected in the reconstruction of the country.

However, it should not be forgotten that it remains the task of the ordinary courts to safeguard the rule of law and to provide a sufficient means to strengthen the conditions for economic prosperity. The Chamber can react to a small number of cases, and only after all possible domestic remedies are exhausted in cases where human rights instruments can be applied. As such, it is a not a substitute for effective domestic remedies. It should also be remembered that the Chamber's judges were not assigned on the basis of their commercial experience or of their knowledge of the implications on other privatisation processes elsewhere. As such, the witness states of the Dayton Peace Agreement may be advised to further increase their efforts to reform the judiciary and to train domestic lawyers in Bosnia and Herzegovina so that the judiciary gains the expertise to solve benchmark commercial cases before the intervention of temporary international bodies such as the Human Rights Chamber become necessary. ■

[4] *See* International Crisis Group (ICG), *Balkans Report No. 115: Bosnia's Precarious Economy: Still Not Open for Business*, 7 August 2001. The report can be obtained from the following website, <www.crisisweb.org>, 1 August 2002.

War! The President, the Congress, and the Constitution

Geoffrey S. Corn*

Recent world events have once again focused United States and international attention on the very serious question of war and peace. While the authority of the United States to take military action without the express authorization of the United Nations Security Council has been the main focus of the international community, domestic U.S. attention has been focused on the respective roles of the President and the Congress in making such a decision. With regard to this "domestic legal authority" question, there is, in my opinion, a great myth that the President of the United States has plenary and unilateral authority to decide when to commit the armed forces of our nation into combat operations. From the appearance created through the media, it is understandable that this myth exists. Indeed, most Americans, even those in the legal or national security realm, would probably endorse this position. However, a review of the history of war-making in the United States, and a careful analysis of the cases dealing with this issue that have been decided by our federal courts, reveals that this is indeed a myth.[1]

In order to fully grasp this issue, it is important to draw a distinction between "unilateral," or perhaps more appropriately "exclusive" authority and "shared" or "concurrent" authority of the decision to commit forces to combat. Unilateral authority is an exclusive authority vested in the President, which may be exercised by him based on his discretion, and most importantly, may not be interfered with by any other branch of government. Shared authority might still place the President in a position to take initiative in the decision to commit forces to combat, but the authority to do so would be derived from the powers of both the executive and legislative branches of government acting concurrently. The key distinction with this basis for war power is that the Congress is not disabled from interfering with Presidential decisions.[2]

Under the traditional doctrines of interpreting the constitutional powers of the various branches of the United States government, exclusive authority is limited to those powers that are explicitly vested in each branch.[3] Thus, Congress has the exclusive power to coin money, because Article I of the Constitution of the United States expressly vests that power in Congress. As a result, any attempt by the President to interfere with the exercise of that power would be an unconstitutional act in violation of the principle of separation of powers. Likewise, the President has the exclusive power to nominate ambassadors as vested in him by Article II of the Constitution. While approval of the nomination is contingent on the advice and consent of the Senate, Congress cannot constitutionally interfere with the nomination decision.

A brief review of the treatment of war powers in the Constitution reveals that the power to decide when and where to commit the armed forces to combat is simply not expressly addressed. Instead both the President and the Congress are vested with powers essential to the existence and operation of the armed forces. The President is designated as the Commander in Chief of the armed forces and the militia (today referred to as the National Guard) when it is called into federal service, reflecting the conclusion of the drafters of the Constitution that the execution of military operations required a unity of command. This is the only express grant to the President of authority over the armed forces found in the Constitution. In contrast, the Congress is expressly granted the power to raise and support the army; provide for and maintain a navy; make rules for the government of the land and naval forces; to define and punish piracies and offenses against the law of nations; to provide for calling forth the militia to suppress insurrection and repel invasions; to provide for organizing, arming, and disciplining the militia; and perhaps most significantly for this discussion, to declare war and grant letters of marque and reprisal (many scholars regard the "marque and reprisal" clause as the eighteenth century technique for authorizing undeclared, or "imperfect" war).

It is obvious from this recitation of provisions from the U.S. Constitution that any argument that the President has "exclusive" authority over the armed forces defies common sense. But the power to raise, support, and regulate forces does not necessarily equate to the power to decide when and where to use them, and thus historically, the focus of debate over the issue of war powers has been the relationship between the President's authority as Commander in Chief and the Congressional authority to declare war. This debate has generated three basic theories of war power: the "strict construc-

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* The views and opinions expressed in this article are those of the author and are not those of the Department of the Army, or any other agency of the U.S. Government. Lieutenant Colonel Geoffrey S. Corn is Chief, International and Operational Law, Office of the Judge Advocate, U.S. Army Europe. He previously served as a Professor of International and Operational Law at the Judge Advocate General's School in Charlottesville, Virginia. He is a graduate of Hartwick College and the U.S. Army Command and General Staff College, and earned his J.D. at George Washington University and his LL.M. at the Judge Advocate General's School.
In May of this year, during the German American Law Symposium in Garmisch, I made a presentation on the United States law regarding the authority of the President to order the armed forces into combat operations. This presentation generated significant interest from the German participants at the Symposium, and Dr. Dieter Fleck subsequently asked me if I would prepare a paper for publication summarizing the substance of the presentation. What follows is my offering in response to this request. While I have omitted citations and references, a more comprehensive treatment of this issue can be found in my article "Clinton, Kosovo, and the Final Destruction of the War Powers Resolution," published in the William and Mary Law Review, Volume 42, April 2001.

1 *See* Major Geoffrey S. Corn, "Presidential War Power: Do the Courts Offer Any Answers?" (1998) 157 Military Law Review 180.

2 *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) (analyzing the significance of determining that a executive action was based on exclusively vested constitutional authority).

3 *Id. See also* Koh, H., *The National Security Constitution: Sharing Power after the Iran-Contra Affair*, Yale University Press, New Haven, 1990, pp 70–72.

tionist" theory, the "executive power" theory, and the "historical practice" theory.[4]

Proponents of a strict construction of war powers focus almost exclusively on the war declaration clause of the Constitution, asserting that Congress, and only Congress, may decide to engage the forces of the nation in conflict. According to this theory, the Commander in Chief power only provides for unified command after the Congress has decided to engage armed forces in conflict. Unfortunately for proponents of this theory, it is unsupported by both the history of war making decisions, and by virtually every federal court decision that has analyzed this issue.[5]

Proponents of the executive power theory of war powers assert that because the President is the Chief Executive and the Commander in Chief, he is vested with the inherent authority to decide when and where to commit the nation to conflict. This theory treats the declaration clause of the Constitution as simply a mechanism allowing the Congress to make a state of conflict "perfect" in the international law sense, and not as an exclusive grant of power of the decision to make war. Proponents of such extensive executive power concede that Congress retains the power to influence war-making decision through its control over the budget, however, they reject that proposition that the President must seek some indication of congressional support in order to make war. The consequence of such a theory is that it treats the war making power of the President as virtually exclusive, and therefore has the effect of disabling the Congress in such decisions. While Presidents and their advisors have historically asserted this theory of war power, it appears to contradict the division of this power reflected in the Constitution, and is not supported by federal court decisions that have analyzed this issue.[6]

Between these two polar extremes lies the historical practice theory of war power. Proponents of this theory assert that the power to make war is shared between the President and the Congress. How this power has been executed throughout history is used to illustrate how the constitutional separation of power was intended to function. This history reveals a longstanding practice of Presidents taking the initiative in war making decisions, but also reveals that some evidence of congressional support – either express or implied – for such decisions existed in virtually every military operation ordered by the President. Thus, the Constitution is interpreted as allowing the President to act when he deems necessary. However, such action, and the continuation of military operations, must be based on some indication of congressional support. As a result, this theory ostensibly preserves for the Congress, through the express rejection in the form of legislative action manifesting a clear opposition to the President's action, the power to effectively halt a military operation.[7] What is critical to the appeal of this theory is that it allows the Congress and the President to decide how to execute their shared authority.

It is this last theory of war power that finds the most support in the federal court decisions that have analyzed this issue. Although such decisions have been rare throughout our history, and are not commonly known, they do nonetheless reflect the interpretation of the judiciary, the branch of our government with the recognized authority to "say what the law is."[8] Litigants in these cases have ranged from owners of ships captured and sold as prize during the course of undeclared naval hostilities, to service members seeking to avoid deployment to conflict areas, to members of Congress seeking to obtain court declarations that the actions of the President were in violation of the Constitution. The common thread that runs through virtually every one of these cases is that once a court determines that evidence exists of congressional support or acquiescence to presidential war making decisions, even if implied, the actions of the President are treated as outside the scope of judicial review. The implied message from these cases is, therefore, that an absence of such support could be debilitating to the authority of the President.

Issues related to war powers have existed since the inception of our nation. However, it was during the Vietnam conflict that congressional opposition to presidential war making initiative really began to emerge. During the conflict, several federal courts determined that sufficient congressional support existed to justify presidential execution of the war, rejecting the argument that a formal declaration of war was constitutionally required.[9] In response to this, and a growing sense that the balance of power over war making decisions had moved too far into the realm of the President, the Congress passed, over the veto of President Nixon, the War Powers Resolution.[10] The purpose of this federal statute, the first ever to attempt to establish the legal process for authorizing military conflict, was to "fulfill the intent of the

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4 *See, e.g.*, Koh, H., *The National Security Constitution: Sharing Power after the Iran-Contra Affair*, Yale University Press, New Haven, 1990 (articulating the "shared power" theory); Turner, Robert F., "The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful", (1984) 17 Loyola of Los Angeles Law Review 683 (arguing in favor of the executive power theory); Ely, J. H., *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, Princeton University Press, Princeton, 1993 (arguing in favor of a strict reading of the Declaration Clause of the Constitution requiring congressional authorization for almost all war-making decisions).

5 *See* Corn, Major G. S. "Presidential War Power: Do the Courts Offer Any Answers?", (1998) 157 Military Law Review 180.

6 *See* Corn, Major G. S., "Clinton, Kosovo, and the Final Destruction of the War Powers Resolution", (2001) 42 William And Mary Law Review 1149.

7 I use the qualifier "ostensibly" here because such a situation has never occurred. Although towards the end of the conflict in Vietnam, and during the U.S. participation in operations in Lebanon in 1983, the Congress was extremely close to taking such an action, in both cases political compromise averted such a stark divergence of positions between these two branches. There is, however, ample evidence to suggest that express congressional action in opposition to a presidential war making initiative should, unless the conflict was truly "defensive" in nature, be treated as binding on the President. Of course, how a President might react to such a situation itself raises a multitude of constitutional issues.

8 This quotation comes from the landmark decision of the Supreme Court of the United States in the case of *Marbury v. Madison*, 1 Cranch 137, (1803), in which the doctrine that the judiciary is the final arbiter of constitutional disputes was established.

9 *See* Friedman, L. & Neuborne, B., *Unquestioning Obedience to the President: The ACLU Case against the Legality of the War in Vietnam*, Norton, New York, 1972.

10 *See* Nixon, R., Veto of the War Powers Resolution, 5 Public Papers 893 (Oct. 24, 1973).

framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities [...]"[11]

In order to achieve this stated purpose, the War Powers Resolution, which is still in force today, established that: "[T]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces.)."[12]

Through this statute, Congress clearly embraced the "strict construction" theory of war power, allowing the President to commit forces into hostilities on his own authority only in response to an attack on the United States or its armed forces (an authority endorsed throughout our history by the federal courts). Unfortunately for proponents of this theory, the law never truly had its intended effect. The practice of Presidents subsequent to 1973 seemed to follow the traditional historical pattern of presidential initiative based on implied congressional consent. Almost every President since 1973 has asserted that they consider the law to be an unconstitutional intrusion into their authority, and even when acting consistently with its terms, Presidents have always been careful to articulate that they were doing so as a matter of political comity, and not from a sense of legal obligation.[13]

The question of whether the War Powers Resolution violated the Constitution by improperly restricting the President's authority was in the background of many war power decisions since 1973. However, it was not until Operation Allied Force – the air war against Yugoslavia – that the facts of a conflict made answering the question unavoidable. Up until that point, every conflict engaged in by the United States had either been conducted based on express congressional authorization (for example, the Persian Gulf War of 1991), or had been terminated prior to the end of the sixty day "grace period" built into the statute[14] (for example, Operation Just Cause in Panama).

When President Clinton announced that the armed forces of the United States would participate in the NATO air campaign against Yugoslavia, several members of Congress sent him a letter demanding that he seeks express congressional authority for this action. This letter was followed by a lawsuit in the United States District Court for the District of Columbia in Washington D.C., in which the Congressmen, led by Representative Tom Campbell of California, asked the Court to issue a declaration that the President was acting without constitutional authority.

In support of their claim, the Congressmen had offered before the Senate and the House of Representatives several actions. The first was a declaration of war against Yugoslavia, which was soundly defeated in both houses. The second was a Joint Resolution expressly authorizing conduct of the air war. While this Resolution passed the Senate, in the House of Representatives it failed to pass on a tie vote. The third was an emergency funding authorization to pay for the conflict, which easily passed both Houses of Congress.

The plaintiffs argued that these results proved that Congress did not support the conflict, and that the requirement of the War Powers Resolution for express congressional authorization was not satisfied. In response, lawyers representing the President argued that the decision to engage U.S. forces into hostilities was a constitutional exercise of the power of the President as Commander in Chief and Chief Executive.

The District Court dismissed the case based basically on a theory that because Congress had not voted to deny authorization to use force, and had in fact voted to authorize continued expenditures for the conduct of the operation, there was no real dispute between the Congress and the President. Thus, once again absence of express congressional opposition to a war making decision, coupled with evidence of implied support in the form of funding, led to a conclusion that the actions of the President were beyond judicial review.

The plaintiffs immediately appealed this decision, and by the time the case was argued before the appellate court, the sixty-day "grace period" under the War Powers Resolution had expired. Thus, the plaintiffs were armed with a new circumstance: the first conflict since 1973 to extend beyond sixty-days without express congressional authorization. Although it seemed that the court would have no alternative but to address the War Powers Resolution challenge, this issue was basically ignored. The court focused instead on the same facts that supported the lower court decision and concluded that the absence of express congressional opposition to the President, coupled with ample evidence of implied support for the conflict, placed review of the actions of the President beyond the scope of the judiciary. The court made clear that it was unwilling to rely on a statutory procedure established by one Congress nearly thirty years prior to the case in order to invalidate the decision of the current Congress to support the President through means short of express authorization.[15]

The long term effect of this case is difficult to predict, but it certainly suggests that the War Powers Resolution will not be allowed to disrupt the longstanding historical practice of

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[11] The War Powers Resolution, Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. paras. 1541-1548 (1988) (hereinafter the War Powers Resolution).

[12] *Id.*

[13] *See* Corn, Major G. S., "Clinton, Kosovo, and the Final Destruction of the War Powers Resolution", (2001) 42 William And Mary Law Review 1149.

[14] This is a provision that seemed to recognize that there might be situations where the President could be uncertain as to his authority to commit forces to hostilities, and therefore required that no commitment of forces to hostilities could continue beyond sixty days absent express congressional authorization.

[15] *See* Corn, Major G. S., "Clinton, Kosovo, and the Final Destruction of the War Powers Resolution", (2001) 42 William And Mary Law Review 1149.

allowing the President and the Congress to determine how to best cooperate on war making decisions and support. The decision, along with virtually every other decision related to this issue, emphasized that Congress always retains its prerogative to pass a resolution expressly opposing a presidential war making decision. In such a case, it is very probable that a court would intervene if the President indicated he intended to ignore the congressional opposition. How such a dispute would be resolved is pure speculation. However, virtually every court that has addressed this issue has suggested that it would be difficult to sustain the authority of the President in such a situation, primarily because it would have the practical consequence of disabling the Congress from the war making decision process.

This case, and the history that underlies it, sleads to three clear conclusions. The first is that it is a mistake to assume that the President of the United States has exclusive and plenary power over the decision to commit the nation to conflict. While he certainly has the power to take the initiative in such decisions, and history shows that his initiative will almost always be followed by the Congress, there is very little support for the conclusion that his power is so comprehensive that it enables him to act contrary to the express will of Congress. The second is that the War Powers Resolution has not, and in all likelihood will not, have the effect of altering the longstanding historical practice of allowing the President and the Congress to determine how to best cooperate in war making decisions, thereby allowing the President to legitimately rely upon the implied consent of Congress as a basis to conclude his war making initiatives are constitutionally valid. The final conclusion is that any effort to establish precise and binding legal procedures for a government to decide to commit its nation to conflict should be embarked upon with great caution. The United States history of war making, and especially our experience with the War Powers Resolution, demonstrates the value of preserving political flexibility in establishing the legal foundation for such actions.[16]

[16] Recent domestic political events seem to underscore this basic conclusion. Although, as has been the case in recent history, the President initially indicated that he saw no requirement to seek congressional authorization for military action against Iraq, he subsequently decided to seek such express authorization in the form of a Joint Resolution. This decision was well received by congressional leaders, and the Congress and the President are currently in the process of negotiating the language of this Resolution. While the Congress may modify the language of the authorization to limit the scope to dealing exclusively with Iraq, and not with any "regional" issue, it seems clear that Congress will expressly authorize the President to take the measures he deems necessary to deal with the threat the U.S. believes is presented by Iraq, thereby leaving no doubt as to the issue of the domestic legal authority for undertaking such military action.

Feminist scholars and international (humanitarian) law: are their claims justified?

Noëlle Quénivet*

1. Introduction

For some years international law has been swept in the Anglo-Saxon world by a wave of articles taking a feminist or gender approach. Feminism is the belief in political, economic, and social equality of the genders. Feminism is, in fact, a set of social theories and political practices that are critical of past and current social relations, and whose critique is primarily motivated and informed by the experience of women. "The feminist perspective focuses primarily on the concept of patriarchy and the societal institutions that help maintain it."[1]

2. Feminism and international law

2.1. The beginning of the movement

In the late 70s, feminist writers focused all their attention on national laws. Not only did they push towards the amendment of the then contemporary laws, notably related to employment, but also towards the introduction of new laws such as those prohibiting sexual harassment at work.[2] Feminism has effected many changes on society, including women's suffrage, broad employment for women at more equitable wages ("equal pay for equal work"); the right to initiate divorce proceedings and "no fault" divorce; the right to control their own bodies and medical decisions, and many others.

"In recent years international law has come under the scrutiny of feminist scholars who have challenged its claim to objectivity and neutrality".[3] In 1991 in their seminal article on feminist approaches to international law,[4] Chinkin,

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[1] Jasinski, J.L., "Theoretical explanations for violence against women" in Renzetti, C.M., Edleson, J. L. & Bergen, R.K. (eds), *Sourcebook on violence against women*, Sage Publications, London, at 12.

[2] MacKinnon has been pioneering in this field in the mid-1970s, suing sexual harassment as a form of sex discrimination and being consequently involved in litigation, legislation, and policy development on women's human rights domestically and internationally.

[3] Buss, D. E., "Going global: feminist theory, international law, and the public/private divide" in Boyd, S.B. (ed), *Challenging the public/private divide: feminism, law, and public policy*, University of Toronto Press, Tortonto, 1997, at 360.

[4] Chinkin, C., Charlesworth, H. & Wright, S., "Feminist approaches to international law", (1991), 85 American Journal of International Law 613.

Charlesworth and Wright, three Australian scholars opened the gates for reinterpretation of the rules of international law. In the American Journal of International Law they set the basis for a reassessment of international law through the gender prism. Feminist methods, instead of proclaiming an objective truth, "seek to expose and question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as category of analysis."[5] Whereas the former points at the weaknesses of the system, the later claim is generally known under the heading "mainstreaming".[6] The Vienna programme of action stressed that "the equal status of women and the human rights of women" should be "integrated into the mainstream of United Nations system-wide activity" and "form an integral part of United Nations human rights activities."[7]

2.2. Methods

Feminists have adopted two approaches. Whereas most of them challenge the very categories of law and nonlaw, some of them, like insiders, have been working towards the redrafting of international law so as to ensure that it takes into account feminist views.

Indeed, to examine the laws "would be to accept the existing framework and limit the task to attempting to improve these rules. The aim […] is to expose some of the underlying assumptions on which the law is based. Feminists have referred to this approach as asking "the woman question".[8] In asking this question, they are undoubtedly challenging the assumption of the law's gender neutrality. Using law is a fatal concession because the law and legal methods are, in their opinion, bastions of stereotypical masculinity, hence of male domination because they are based on adversity, on authority and rationality.[9] Feminists portend that "[t]he language of human rights is resolutely and utterly male"[10] and consequently, in MacKinnon's words, they "are not attempting to be objective about [violence against women], [they] are attempting to represent the point of view of women."[11] In this framework, feminists have often been criticised for carrying out political, interested and partial analyses. As Koskenniemi suggests, "[t]heir relative lack of interest in standard international law is perhaps a reflection of their frustration with what appears to them to be shallow theory and chauvinist practice."[12]

Others argue that to examine the laws "requires intellectual rigour (in male terms) in the task of uncovering the hidden gender of areas of knowledge."[13] Consequently, feminists are participating in male-structured debates.

To reach their goal, i.e. to show that the laws fail to take into account the experiences and values of women and subsequently integrate women's point of view in international law, feminists needed to create reading tools. The methods they have adopted "emphasize conversations and dialogue rather than the production of a single, triumphant truth."[14] Gunning has described one of the techniques as "world travelling"; for, to express women viewpoint requires "multicultural dialogue and a shared search for areas of overlap, shared concerns and values".[15]

Mohanty, on the other hand, has portended the view that women should consider themselves as a community that is not constructed on the bases of sex but that is constructed on women's perception of gender.[16]

Another "technique for identifying and decoding the silences of international law is paying attention to the way that various dichotomies are used in its structure."[17] In their opinion, international legal discourse rests on a series of distinctions such as public/private,[18] objective/subjective, legal/political, logic/emotion, order/anarchy, action/passivity, culture/nature, protector/protected, the first binary term characterising male behaviour while the second describes women.

As to the substance, feminist scholarship has developed along two lines: the examination and critique of international

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5 Charlesworth, H., "Feminist methods in international law", (1999) 93 American Journal of International Law 379.

6 Wright however notes that "[t]here is no adequate means of knowing what is "female" because the "feminine" is presently defined by men to serve men's interests". Wright, S., "Human rights and women's rights: an analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women" in Mahoney, K.E. & Mahoney, P., *Human Rights in the 21st century: a global challenge*, Part 1, Martinus Nijhoff, Dordrecht, at 80.

7 Article 38 of the Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24 (Part I), 13 October 1993.

8 Gardam, J., "A feminist analysis of certain aspects of international humanitarian law", (1992) 12 Australian Yearbook of International law 266.

9 Smart, C., *Feminism and the power of law*, Routledge, London, 1989, pp. 86–87.

10 Wright, S., "Human rights and women's rights: an analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women" in Mahoney, K. E. & Mahoney, P., *Human Rights in the 21st century: a global challenge*, Part 1, Martinus Nijhoff, Dordrecht, at 77.

11 MacKinnon, C. A., "Sex and violence: a perspective" in Stiglmayer, A. (ed), *Mass rape: the war against women in Bosnia-Herzegovina*, University of Nebraska Press, Lincoln and London, 1993, at 29.

12 Koskenniemi, M., "Book review: Reconceiving Reality: Women and International Law. (Studies in Transnational Legal Policy No. 25.) Edited by Dorinda G. Dallmeyer", (1995) 89 American Journal of International Law 229.

13 Charlesworth, H. & Chinkin, C., *The boundaries of international law: a feminist analysis*, Melland Schill Studies in International Law, Manchester University Press, Manchester, 2000, p.21.

14 Charlesworth, H., "Feminist methods in international law", (1999) 93 American Journal of International Law 379.

15 Gunning, I., "Arrogant perception, world-travelling and multicultural feminism/ the case of female genital surgeries", (1991) 23 Columbia Human Rights Law Review 191.

16 Mohanty, C., "Introduction: cartographies of struggle" in Mohanty, C. T., Russo A. & Torres, L. (eds), *Thirld world women and the politics of feminism*, Indiana University Press, Bloomington/Indianapolis, 1991, at 4.

17 Charlesworth, H. & Chinkin, C., *The boundaries of international law: a feminist analysis*, Melland Schill Studies in International Law, Manchester University Press, Manchester, 2000, p. 49.

18 The public/private issue is a common thread that runs throughout feminist writings. See Charlesworth, H., "Worlds apart: public/private distinctions in international law" in Thornton, M. (ed), *Public and private: feminist legal debates*, Oxford University Press, Melbourne, 1995, at 243; Gavison, R., "Feminism and the Public/Private Distinction", (1992) 45 Stanford Law Review 1; Romany, C., "Women as Aliens: A Feminists Critique of the Public/Private Distinction in International Human Rights Law", (1993) 87 Harvard Human Rights Journal 105.

human rights on the one hand, and the critical analysis of international legal doctrines and structures on the other.[19] Their principal focus has been on the exclusion of women from international law and their subordination. In the first group, there have been three distinct lobbies:
– the humanitarian women's lobby that has been immensely influenced by the armed conflict in Bosnia-Herzegovina and the claims of the "comfort women";
– the African and Asian lobby interested in health and traditional practices;
– the North-American, European and Latin American lobby concentrating on domestic violence, rape and sexual harassment.[20]

This paper aims at presenting and commenting upon the claims made by the first group of women, scholars interested in the situation of women in armed conflicts.[21]

3. The focus on women in armed conflicts

In 1992, Gardam, rightly, pointed out that "[t]he issue of gender in the context of the law of armed conflict is not one that has attracted attention from feminists."[22] However, shortly after the publication of her article in the Australian Yearbook of International Law, a combination of events catapulted other feminist writers towards undertaking such an analysis. The Conference of Beijing was in sight, it became obvious that the Convention against all forms of discrimination towards women[23] needed to be revised, reports from Bosnia-Herzegovina mentioning mass rapes of Muslim women came to the attention of the wider public, the first claims towards compensation for women who had been forced into prostitution by the Japanese armed forces during World War II were heard and so on. These soon became feminists' battlefields because, in their opinion, they pointed at all the deficiencies of international law in tackling women issues. In their view "armed conflict often exacerbates inequalities (in this context, those based on gender) that exist in different forms and to varying degrees in all societies and that make women particularly vulnerable when armed conflict breaks out."[24]

Feminists have identified common issues that touch women during armed conflicts on the basis that women experience armed conflict in a different way than men. "Traditionally, reports and studies on the effects of armed conflict tend to incorporate women in the general category of civilians without regard to the different experiences of men and women civilians."[25]

In their view, to integrate the "woman question" into international humanitarian law, there are two options: to re-examine and re-evaluate the Geneva Conventions so as to "incorporate developing norms on violence against women during armed conflict"[26] or "to encourage a reinterpretation of the existing provisions of international humanitarian law to take account of gender perspectives and changing interpretations of the rules."[27]

First, women are more likely to experience conflict as civilians. Feminists contend that the distinction between combatants and civilians is gendered. Whereas men tend to be integrated into the armed forces, women stay behind the combat front and become civilians. There are two points that need to be looked upon: women's life as civilians and women as possible combatants.

3.1. Women's life as civilians

Women as civilians bear the brunt of casualties. This is due to the fact that in the last decades, there have been less direct confrontations between national armed forces in international armed conflicts where civilians were usually kept aside the combat. On the other hand, there has been a rise in the number of internal armed conflicts, in which civilians where caught between the forces of the government and the armed opposition groups. The civilians, in fact, have become a target of State's forces because they are deemed to help the so-called "rebels" by providing them with either food or shelter. Women, who stay behind, thus become the first targets of State agents who wish to obtain information concerning their male relatives who are suspected of fighting against the government. In this regard, they are likely to be sexually assaulted.[28]

While they are striving for their own survival and facing not only intensive bombings but also economic hardship, they have to care for others especially children and elderly people. By seeing women in these roles, feminists continue to play the male game which is to regard women in their caring and nurturing role, inherent in womanhood.

If evacuated to zones where they are less susceptible to be shelled and/or attacked by grounds forces, they are generally "exposed to foreign – and often inadequate – living conditions, and consequently, tend to be more prone to accidents, injuries, and disease".[29] As Chinkin stresses, "[a]nother consequence of war for many women is the deprivation of home

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[19] Buss, D. E., "Going global: feminist theory, international law, and the public/private divide" in Boyd, S. B. (ed), *Challenging the public/private divide: feminism, law, and public policy*, University of Toronto Press, Tortonto, 1997, at 362.
[20] See Coomaraswamy, R., *Reinventing international law: women's rights as human rights in the international community*, Edward A. Smith Lecture, Harvard Law School, Human Rights Program, 1997.
[21] It should be borne in mind that feminists do not speak with a single voice. It is however possible to point to viewpoints shared by the great majority of feminist scholars.
[22] Gardam, J., "A feminist analysis of certain aspects of international humanitarian law", (1992) 12 Australian Yearbook of International law 265.
[23] Convention on the Elimination of All Forms of Discrimination Against Women, GA Res 34/180, UN Doc. A/34/830 (1979).
[24] Gardam, J. & Charlesworth, H., "Protection of women in armed conflict", (2000) 22 Human Rights Quarterly 150.
[25] Gardam, J. & Charlesworth, H., "Protection of women in armed conflict", (2000) 22 Human Rights Quarterly 150.
[26] Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. E/CN.4/1998/54, 26 June 1998, para. 95.
[27] Gardam, J. & Charlesworth, H., "Protection of women in armed conflict", (2000) 22 Human Rights Quarterly 163.
[28] As there is already much literature on the subject-matter this paper does not examine sexual offences committed in times of armed conflict.
[29] Gardam, J. & Charlesworth, H., "Protection of women in armed conflict", (2000) 22 Human Rights Quarterly 153.

and food thereby forcing them to become refugees".[30] However it is within the scope of this article to examine the status and living conditions of women as refugees. One just needs to bear in mind that the great majority of refugees in camps are women and children, thereby proving that women are indeed more likely to be on the "civilian" side.

Because in times of armed conflict, food is scarce and cultural factors may exacerbate this by stating that men are to eat first, women may suffer of malnutrition. Also, as civilians are not the first ones to receive food and shelter, except if provided by United Nations bodies or NGOs, they are less likely to be healthy.

Feminist claims as to the living conditions of women in times of armed conflicts, although showing the reality, are irrelevant as far as it concerns international humanitarian law. Indeed, the aim of international humanitarian law as enshrined in the Geneva Conventions, their protocols and in international customary law is not to dictate life during armed conflicts but what/who, when, where and how something or someone can be destroyed or shot. The only provisions that specifically deal with *life as a civilian* are related to occupation.

"States and the military have traditionally supported initiatives aimed at the protection of combatants but have resisted inroads into freedom of military action designed to protect civilians."[31] In fact, the goal of international humanitarian law as it stands is not to provide for a humanitarian or human rights framework. If feminist writers wish this to happen, then they need to draw the attention towards the drafting of a new convention guaranteeing certain rights during armed conflicts. The problem pointed out by feminists writers is not related to international humanitarian law but to the lack of adequate laws related to the living conditions of civilians during armed conflicts. From a feminist perspective, the distinction between international humanitarian law and human rights law has allowed international humanitarian law to factor out concerns that do not relate to soldiers, i.e. to men.[32] Recently, feminist scholars, have admitted that "the failure to address many of the problems experienced by women as a result of armed conflict can be attributed to the boundaries of international humanitarian law. Increasingly, scholars are focusing on the unreality of the rigid divisions between human rights law, international humanitarian law, and refugee law."[33] Charlesworth, for example, point at the fact that the International Committee of the Red Cross, while working in Afghanistan, considered that the exclusion of women from any workplace was outside its mandate.[34]

Despite the fact that more and more scholars have called for improved protection for civilians by the law of armed conflict, feminists argue that still such amendments would not warrant protection for women because it would not take into account gender. Gardam, for example, expresses the opinion that a protocol to protect women in times of armed conflict is necessary.[35] In my opinion, such a protocol is not necessary as it would suffice to change the laws pertaining to civilians caught up in armed conflicts and, to use the fashionable terminology, "gender-mainstream" them. It should be possible to look at each provision and then, on the basis of the reality on the grounds, decide whether a particular article needs to be amended, taking into account the "woman-question". This question proves that most feminist writers, with the exception of Gardam, speak about women in armed conflicts and not about how provisions of international humanitarian law consider women except when it comes to sexual offences.

3.2. Women's life as combatants

A critique that can be addressed to studies of the impact of conflict on women's lives is that they have focused on male violence against women, the effects of armed conflicts on family life and the additional burdens placed on women. Little has been written about women's capacity for violence.[36] The genocide in Rwanda highlighted this issue that runs against feminist conceptions. For example, the NGO African Rights describes in its report *Not so Innocent: When Women Become Killers* how a pregnant former gendarme, Félicitée Semakuba led an attack against refugees driven to the hilltop of Kabuye in commune Ndora, Butare, and killed thousands of unarmed people.[37] Even nuns have been convicted for genocide before Belgian courts.[38] According to official statistics, there are currently 3,105 women in prison in Rwanda, representing 3.4 % of the total prison population.[39] However, one should remember that the extent to which women took an active role in the killings in Rwanda is unprecedented anywhere in the world.

Furthermore, more and more women are being formally integrated in conventional armed forces despite the resistance of the military. As early as the 1940s, the USA conducted a full-scale experiment to see how well women could perform as soldiers. The experiment stunned General Marshall and its staff as it revealed that mix gender units performed better

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[30] Chinkin, C.M., "Women and peace: militarism and oppression" in Mahoney, K.E. & Mahoney, P. (eds), *Human Rights in the Twenty-first Century*, Martinus Nijhoff, Dordrecht, 1993, at 410.

[31] Gardam, J., "A feminist analysis of certain aspects of international humanitarian law", (1992) 12 Australian Yearbook of International law 268.

[32] Charlesworth, H., "Feminist methods in international law", (1999) 93 American Journal of International Law 386.

[33] Gardam, J. & Charlesworth, H., "Protection of women in armed conflict", (2000) 22 Human Rights Quarterly 160.

[34] Charlesworth, H., "Feminist methods in international law", (1999) 93 American Journal of International Law 386.

[35] Gardam, J., "Women and the law of armed conflict: why the silence?", (1997) 46 International Comparative Law Quarterly 58.

[36] Chinkin quickly addresses the issue by stating that "[i]t is true that women are typically nurturers and carers, but this does not mean they are necessarily opposed to use of force and conflict in certain circumstances." Chinkin, C.M., "Women and peace: militarism and oppression" in Mahoney, K.E. & Mahoney, P. (eds), *Human Rights in the Twenty-first Century*, Martinus Nijhoff, Dordrecht, 1993, at 412.

[37] African Rights, Not so Innocent: *When Women Become Killers*, August 1995.

[38] The two nuns, Consolata Mukangango, or Sister Gertrude, and Julienne Mukabutera, known as Sister Julienne Kisito were convicted of genocide on 8th June 2001.

[39] Cited in Hogg, N., "Women accused of genocide in Rwanda", (2001) 4 Newsletter of ICHRDD, <http://serveur.ichrdd.ca/flash.html>, 3 July 2002.

than all-male units.[40] However due to the reticence of the armed forces, the experiment was never put into practice, thereby drawing the gender line between the combatants and the civilians. The decision was not based on grounds of efficiency but "rather on the current needs of the Army for female office workers, on the state of public opinion, and on the general hostility toward women in non-traditional gender roles in 1943".[41] In contrast, the Soviets mobilised 800,000 women in the Red Army during World War II, half of them were in front-line duty units.[42]

It should be noted that in the last few decades, more and more women have entered the military not only as nurses or secretaries but also as combatants, a change that has been accounted by feminists only in the last two years.[43] Israel, since its creation, has requested its women to temporarily serve in the armed forces as conscripts; however since 1968, they have not been used in times of armed conflict. The United States, for example, has deployed women on the ground, during the Gulf war. As a matter of fact, some of them were captured by the Iraqi forces and held prisoners of war.[44] However, until now, many countries which have amongst their ranks women, refuse to send them on combat missions. One still has to admit that in case of an armed conflict, it is likely that these women would be deployed in front lines. Also one can stress the usage of women as snipers in guerrilla wars such as Chechnya. The feminisation of the armed forces or elements of the armed opposition groups starts to blur the gendered divide between combatants and civilians.

4. International humanitarian law

International humanitarian law as such has become the focus of few feminist scholars except with regards to sexual offences. Mainly, Gardam and Charlesworth, alone or in co-operation have published in the field of general international humanitarian law as spelled out in the Geneva Conventions and the Additional Protocols. Their focus is primordially on the protection offered by these instruments to women and on the principles of proportionality and military necessity.

4.1. Protection of women granted by international humanitarian law

Thirty-four provisions of the Geneva Conventions and their additional Protocols ostensibly provide safeguards for women.[45] According to feminist writers "they all deal with women in their relationships with others, not as individuals in their own right".[46]

First, they contend that 19 of these articles consider women in their roles as mothers as these provisions "are intended primarily to protect children".[47] A quick look at the Geneva Conventions and their protocols indeed reveals that many articles provide for the protection of expectant mothers and mothers of young children. Feminists argue that "[i]t is as if we can either be men (or "the same as men") or mothers ("different from men")".[48] This comment is also found more generally in feminist writings on international law where, it is argued, women are perceived as "victims, particularly as mothers, or potential mothers, in need of protection".[49]

Second, these provisions relate to the sexual and reproductive aspects of women's lives and tend to take the male standpoint. For example, international humanitarian law provides that pregnant women should receive special treatment as prisoners of war[50] and that women should be protected from sexual offences.[51]

Third, the provisions relating to women are drafted in terms of protection rather than in terms of prohibition. Gardam notes that the provisions dealing with women are "drafted in different language from the provisions protecting combatants and civilians generally. For one thing, they are expressed in terms of 'protection' rather than prohibition."[52] This is all the more true concerning sexual offences. The author of this article, in agreement with Khushalani, contends that article 76 of API casts a double duty on States as, firstly, they have to ensure respect for women ("women shall be the object of special respect" and, secondly, provide them protection ("shall be protected").[53] In addition, in terms of prosecution, it is irrelevant whether a person is protected from a given act or an act is prohibited. In both instances, the perpetrator is criminally liable for such acts. The author however reckons that this "protection" versus "prohibition" debate points at the classical power relationship between men and women.

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[40] Campbell, D'A., "Women in combat: the world war two experience in the United States, Great Britain, Germany, and the Soviet Union", (1993) 57 Journal of Military History 302.

[41] Campbell, D'A., "Women in combat: the world war two experience in the United States, Great Britain, Germany, and the Soviet Union", (1993) 57 Journal of Military History 306.

[42] Griesse, A.E. & Stites, R., "Russia: revolution and war" in Goldman, N.L. (ed), *Female soldiers: combatants or non-combatants?*, Greenwood Press, London, 1982, at 73.

[43] Gardam, J. & Charlesworth, H., "Protection of women in armed conflict", (2000) 22 Human Rights Quarterly 152.

[44] One should note that the first captive women were treated with respect by the Iraqi forces.

[45] A review of all these provisions can be found in Preux, J. de, "Special protection of women and children", (1985) 248 International Review of the Red Cross 292, update 5 June 2000 can be retrieved from <http://www.icrc.org/eng>, 4 July 2002.

[46] Gardam, J. & Charlesworth, H., "Protection of women in armed conflict", (2000) 22 Human Rights Quarterly 159.

[47] Gardam, J., "Women and the law of armed conflict: why the silence?", (1997) 46 International Comparative Law Quarterly 57.

[48] Wright, S., "Human rights and women's rights: an analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women" in Mahoney, K. E. & Mahoney, P., *Human Rights in the 21st century: a global challenge*, Martinus Nijhoff, Dordrecht, at 80.

[49] Charlesworth, H., "Feminist methods in international law", (1999) 93 American Journal of International Law 381.

[50] Krill, F., "The protection of women in international humanitarian law", (1985) 249 International Review of the Red Cross 337.

[51] See in particular article 27(2) of GCIV (*Convention relative to the protection of civilian persons in time of war*, 12 August 1949, 754 UNTS 287) and article 76 of API which expands the protections offered to women affected by the armed conflict (*Protocol relating to the protection of victims of international armed conflicts*, 8 June 1977, 1125 UNTS 3).

[52] Gardam, J., "Women and the law of armed conflict: why the silence?", (1997) 46 International Comparative Law Quarterly 57.

[53] Khushalani, Y., *Dignity and honour of women as basic and fundamental rights*, Martinus Nijhoff Publishers, London, 1982, p.57.

Concerning the particular circumstances of women detained as prisoners of wars or civilians having taking up arms to resist the invading forces during wartime, article 14(2) of the Geneva Convention III indirectly provides for the protection of women as it mentions that "women shall be treated with all the regard due to their sex", which should, according to the Commentary, be interpreted in the sense that due regard shall be taken to women's "weakness", "honour and modesty"[54] and "pregnancy and child-birth". Women as civilian internees also benefit from special protection due to their sex.

4.2. The principle of distinction between civilians and combatants

From the perspective of women, the most important principle of humanitarian law is that which requires armed forces to distinguish between civilians and combatants and between civilian and military objects. Operations should always be directed towards the latter, namely, civilians and civilian objects are unlawful targets.

Since, as previously mentioned, women make up the vast majority of the civilian population, the principle of distinction is of paramount importance for feminist writers.[55] The gendered distinction between civilians and combatants is thereby even more underlined.

Feminists states that the distinction between combatants and civilians mirror the relation between the protector and the protected, a hierarchy that has been observed in international relations more generally.[56] Those who take up arms are equated with males whereas others are considered as feminine. Such an analogy tends to assume that all women working for the armed forces are masculine and behave in similar fashion to men. Gardam, on the basis of one article written by Grant, asserts that the experience of women in the military indicates that women behave like men once incorporate in the armed forces.[57] As little research has been done on how women warriors consider themselves, the pernicious stamp of masculinity in the armed forces cannot be proven.

4.3. Military necessity

"The law of armed conflict is a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other."[58] Feminist scholars argue that humanitarian considerations as encapsulated in the law of armed conflict reflect the public/private split and that they, in practice, perpetuate and reinforce the legitimacy of priorities set by the armed forces.

In Gardam's opinion, "the military is a constant barrier to the development of humanitarian law with an emphasis on the protection of individual."[59] This is best seen in the way the armed forces and their commanders conceive the principle of military necessity against which all attempts to delimit the conduct of warfare have to be measured. The underlying assumption of this doctrine is that State's victory that will lead to the survival of the nation is of paramount importance. It seems to flow from this standpoint that considerations of other kinds are left aside. One should nonetheless bear in mind that in the last few years, some military operations have been carried out in compliance with most provisions pertaining to the protection of the civilian population and objects.[60] The comment made by feminist writers appear only relevant as far as non-international armed conflicts are concerned.

The usage of the particular vocabulary such as "collateral casualties" or "collateral damages" well reflect the idea that (female) civilian victims and damages are of secondary or peripheral concern. A first critique that can be addressed towards the feminist standpoint is that feminist writers are likely to forget that men can also fall within the category of civilians and hence the loss of their lives is also considered as peripheral. For example, there were as many female as male "collateral casualties" as a result of the operation carried out by the NATO forces against the Former Republic of Yugoslavia.[61] Humanitarian law does not intrinsically consider women worthless and expendable. It is however true that aerial bombardment, one the major causes of civilian casualties, remain largely unregulated. The composition of the armed forces as well as the way they look upon civilians may help in understanding why in practice it appears that women are not considered as worthy of protection from bombardments and other military attacks.

It is said that combatants may have to face additional dangers to protect the civilian population, a burden that some commanders refuse to assume. First, she argues that men take decisions that favour men, the combatant and not women, the civilian. Second, she believes that because women are not part of the decision-making process, they are not seen and this "non-personhood" or objectification of women takes on a particular perspective in conjunction with militarism. As "[m]ilitarism requires of the participants an expertise in objectification",[62] women are nothing but the "other", the

[54] *The Geneva Conventions of 12 August 1949: commentary*, vol. 4, International Committee of the Red Cross, Geneva, 1960, p.147. Honour and modesty includes protecting women prisoners from rape, forced prostitution, and any form of sexual (indecent) assault.

[55] Gardam, J.G., "The law of armed conflict: a feminist perspective" in Mahoney, K.E. & Mahoney, P. (eds), *Human Rights in the Twenty-first Century*, Martinus Nijhoff, Dordrecht, 1993, at 421-422.

[56] Stiehm, J.H., "The protected, the protector, the defender", (1982) 5 Women's Studies International Forum 367.

[57] Gardam, J., "Gender and non-combatant immunity", (1993) 3 Transnational Law and Contemporary Problems 367.

[58] Sandoz, Y., Swinarski, C. & Zimmerman, B., *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Geneva, 1987, 1625, para. 1389, p. 393.

[59] Gardam, J., "A feminist analysis of certain aspects of international humanitarian law", (1992) 12 Australian Yearbook of International law 276.

[60] See the operation conducted by the Allied forces against Iraq in 1991 and by NATO against the Former Republic of Yugoslavia in 1998. Although both operations can be criticised for having led to civilian casualties, they have been by and large carried out according to the rules of warfare.

[61] Human Rights Watch, *Civilian deaths in the NATO air campaign*, Vol. 12, No. 1 (D), February 2000, Amnesty International, *NATO/Federal Republic of Yugoslavia: "collateral damage" or unlawful killings? violations of the laws of war by NATO during operation allied force*, EUR 70/018/2000, 6 June 2000.

[62] Scales, A., "Militarism, male dominance and law: feminist jurisprudence as oxymoron", (1989) 12 Harvard Women's Law Journal 44.

enemy. "Thus the alleged neutrality of the rationale for the priorities inherent in the laws of armed conflict is revealed as fallacious."[63] Gardam states that "[m]ilitary necessity is part of the broader framework of the relationship between militarism, sexism, and patriarchy, and most significantly in this context, the demands of national security."[64]

It is however not clear whether women in the armed forces would not behave in similar fashion and also prefer to sacrifice civilian (female) lives for the sake of a well-conducted operation that would lead to no casualty on the side of the armed forces.

4.4. The principle of proportionality

Another important issue raised by feminist writers and more particularly by Gardam and Charlesworth is the principle of proportionality, enshrined in article 51 (5) (b) of Additional Protocol I that states that attacks on military objectives can only be carried out if they are not "expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[65] According to the aforementioned writers, this provision does not require commanders to assess whether long-term civilian casualties may result from this attack. For example, it does not call for an appraisal of the possibility that civilians may have to leave the area and hence that potentially a refugee flow may be created. In their view, "[t]his failure to recognize and take account of the whole picture of what happens after an armed attack affects women particularly".[66]

It is true that long-term effects of military operations on the civilian population are not taken into account. Strangely, effects on the environment, provided they are widespread, long-lasting and severe, have been envisaged in article 35 (3) of API. Moreover, damages caused to the environment that may adversely affect the health or survival of the population are also prohibited by article 55 of API. However operations that have long-lasting negative effects on the population though not derived from damages caused to the environment are not prohibited. Perhaps, such an addition in a future new protocol would be necessary. On the other hand, one needs to bear in mind that the principle of proportionality includes the principle of foreseeability: "the foreseeable injury to civilians must not be 'excessive' in relation to the military advantage sought".[67] Probably a wider interpretation of this concept could ensure that armed forces take into account long-term effects of their operations as a result of which the population is, for example, displaced en masse.

In similar vain, although the principle of proportionality should, according to Additional Protocol I be applied to each single operation, it is often the case that armed forces assess the military advantage on a cumulative basis rather than on a case by case basis.[68] By doing so, armed forces do not examine whether a specific operation could lead to a too high proportion of civilian casualties in a particular area. For example, for the sake of shutting down CCC, armed forces may target a heavily populated area mostly inhabited by women. However in conjunction with other operations of lesser importance, the operation does not appear to breach the principle of proportionality. In this sense, civilian casualties are not properly taken into account. It is however arguable whether the interpretation of the principle of proportionality on a cumulative basis disadvantages more women and generally civilians.

5. Conclusion

The entire debate on international humanitarian law per se as seen by feminist writers centres on the "male gender" of the laws of armed conflict. The author of this article believes that instead of calling for a new protocol on women in armed conflicts, a new protocol on the protection of civilians from military operations should be adopted. It should strictly define when a particular area can be targeted, taking into account not only the short term damages caused to the place and the inhabitants but also the long term consequences for the civilian population.[69] More particularly, rules on aerial bombardment should be drafted so as to avoid unnecessary casualties and damages. At the same time, this Protocol should be so drafted as to take into account the viewpoint of women. It should also be possible to retroactively declare that the provisions relating to women enshrined in the Geneva Conventions and their Protocols should be interpreted in the light of this new approach. ■

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[63] Gardam, J., "A feminist analysis of certain aspects of international humanitarian law", (1992) 12 Australian Yearbook of International law 278.

[64] Gardam, J., "Gender and non-combatant immunity", (1993) 3 Transnational Law and Contemporary Problems 349.

[65] *Protocol relating to the protection of victims of international armed conflicts*, 8 June 1977, 1125 UNTS 3.

[66] Gardam, J. & Charlesworth, H., "Protection of women in armed conflict", (2000) 22 Human Rights Quarterly 161.

[67] McCall, J. H., "Infernal Machines and Hidden Death: International Law and Limits on the Indiscriminate Use of Land Mine Warfare" (1994) 24 The Georgia Journal of International and Comparative Law 260.

[68] Gardam, J., "Proportionality and force in international law", (1993) 87 American Journal of International Law 409.

[69] There might however be problems as to the definition of what can be foreseen by the armed forces before mounting an operation.

American Servicemembers Protection Act 2002

One Hundred Seventh Congress of the United States of America
At the Second Session
H.R. 4775

Begun and held at the City of Washington on Wednesday, the twenty-third day of January, two thousand and two

An Act – Making supplemental appropriations for further recovery from and response to terrorist attacks on the United States for the fiscal year ending September 30, 2002, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2002, and for other purposes, namely:

TITLE I
SUPPLEMENTAL APPROPRIATIONS

TITLE II
AMERICAN SERVICE-MEMBERS' PROTECTION ACT

SEC. 2001. SHORT TITLE.

This title may be cited as the 'American Servicemembers' Protection Act of 2002'.

SEC. 2002. FINDINGS.

Congress makes the following findings:

(1) On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, meeting in Rome, Italy, adopted the 'Rome Statute of the International Criminal Court'. The vote on whether to proceed with the statute was 120 in favor to 7 against, with 21 countries abstaining. The United States voted against final adoption of the Rome Statute.

(2) As of April 30, 2001, 139 countries had signed the Rome Statute and 30 had ratified it. Pursuant to Article 126 of the Rome Statute, the statute will enter into force on the first day of the month after the 60th day following the date on which the 60th country deposits an instrument ratifying the statute.

(3) Since adoption of the Rome Statute, a Preparatory Commission for the International Criminal Court has met regularly to draft documents to implement the Rome Statute, including Rules of Procedure and Evidence, Elements of Crimes, and a definition of the Crime of Aggression.

(4) During testimony before the Congress following the adoption of the Rome Statute, the lead United States negotiator, Ambassador David Scheffer stated that the United States could not sign the Rome Statute because certain critical negotiating objectives of the United States had not been achieved. As a result, he stated: 'We are left with consequences that do not serve the cause of international justice.'

(5) Ambassador Scheffer went on to tell the Congress that: 'Multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.'

(6) Notwithstanding these concerns, President Clinton directed that the United States sign the Rome Statute on December 31, 2000. In a statement issued that day, he stated that in view of the unremedied deficiencies of the Rome Statute, 'I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied'.

(7) Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury.

(8) Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.

(9) In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States.

(10) Any agreement within the Preparatory Commission on a definition of the Crime of Aggression that usurps the prerogative of the United Nations Security Council under Article 39 of the charter of the United Nations to 'determine the existence of any ... act of aggression' would contravene the charter of the United Nations and undermine deterrence.

(11) It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.

SEC. 2003. WAIVER AND TERMINATION OF PROHIBITIONS OF THIS TITLE.

(a) AUTHORITY TO INITIALLY WAIVE SECTIONS 5 AND 7 – The President is authorized to waive the prohibitions and requirements of sections 2005 and 2007 for a single period of 1 year. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority –

(1) notifies the appropriate congressional committees of the intention to exercise such authority; and
(2) determines and reports to the appropriate congressional committees that the International Criminal Court has entered into a binding agreement that –
(A) prohibits the International Criminal Court from seeking to exercise jurisdiction over the following persons with respect to actions undertaken by them in an official capacity:
(i) covered United States persons;
(ii) covered allied persons; and
(iii) individuals who were covered United States persons or covered allied persons; and
(B) ensures that no person described in subparagraph (A) will be arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court.

(b) AUTHORITY TO EXTEND WAIVER OF SECTIONS 5 AND 7 – The President is authorized to waive the prohibitions and requirements of sections 2005 and 2007 for successive periods of 1 year each upon the expiration of a previous waiver pursuant to subsection (a) or this subsection. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority –
(1) notifies the appropriate congressional committees of the intention to exercise such authority; and
(2) determines and reports to the appropriate congressional committees that the International Criminal Court –
(A) remains party to, and has continued to abide by, a binding agreement that –
(i) prohibits the International Criminal Court from seeking to exercise jurisdiction over the following persons with respect to actions undertaken by them in an official capacity:
(I) covered United States persons;
(II) covered allied persons; and
(III) individuals who were covered United States persons or covered allied persons; and
(ii) ensures that no person described in clause (i) will be arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court; and
(B) has taken no steps to arrest, detain, prosecute, or imprison any person described in clause (i) of subparagraph (A).

(c) AUTHORITY TO WAIVE SECTIONS 4 AND 6 WITH RESPECT TO AN INVESTIGATION OR PROSECUTION OF A NAMED INDIVIDUAL – The President is authorized to waive the prohibitions and requirements of sections 2004 and 2006 to the degree such prohibitions and requirements would prevent United States cooperation with an investigation or prosecution of a named individual by the International Criminal Court. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority –
(1) notifies the appropriate congressional committees of the intention to exercise such authority; and
(2) determines and reports to the appropriate congressional committees that –
(A) a waiver pursuant to subsection (a) or (b) of the prohibitions and requirements of sections 2005 and 2007 is in effect;
(B) there is reason to believe that the named individual committed the crime or crimes that are the subject of the International Criminal Court's investigation or prosecution;
(C) it is in the national interest of the United States for the International Criminal Court's investigation or prosecution of the named individual to proceed; and
(D) in investigating events related to actions by the named individual, none of the following persons will be investigated, arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court with respect to actions undertaken by them in an official capacity:
(i) Covered United States persons.
(ii) Covered allied persons.
(iii) Individuals who were covered United States persons or covered allied persons.

(d) TERMINATION OF WAIVER PURSUANT TO SUBSECTION (c) – Any waiver or waivers exercised pursuant to subsection (c) of the prohibitions and requirements of sections 2004 and 2006 shall terminate at any time that a waiver pursuant to subsection (a) or (b) of the prohibitions and requirements of sections 2005 and 2007 expires and is not extended pursuant to subsection (b).

(e) TERMINATION OF PROHIBITIONS OF THIS TITLE – The prohibitions and requirements of sections 2004, 2005, 2006, and 2007 shall cease to apply, and the authority of section 2008 shall terminate, if the United States becomes a party to the International Criminal Court pursuant to a treaty made under article II, section 2, clause 2 of the Constitution of the United States.

SEC. 2004. PROHIBITION ON COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT.

(a) APPLICATION – The provisions of this section –
(1) apply only to cooperation with the International Criminal Court and shall not apply to cooperation with an ad hoc international criminal tribunal established by the United Nations Security Council before or after the date of the enactment of this Act to investigate and prosecute war crimes committed in a specific country or during a specific conflict; and
(2) shall not prohibit –
(A) any action permitted under section 2008; or
(B) communication by the United States of its policy with respect to a matter.

(b) PROHIBITION ON RESPONDING TO REQUESTS FOR COOPERATION – Notwithstanding section 1782 of title 28, United States Code, or any other provision of law, no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.

(c) PROHIBITION ON TRANSMITTAL OF LETTERS ROGATORY FROM THE INTERNATIONAL CRIMINAL COURT – Notwithstanding section 1781 of title 28, United States Code, or any other provision of law, no agency of the United States Government may transmit for execution any letter rogatory issued, or other request for cooperation made, by the International Criminal Court to the tribunal, officer, or agency in the United States to whom it is addressed.

(d) PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT – Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government may extradite any person from the United States to the International Criminal Court, nor support the transfer of any United States citizen or permanent resident alien to the International Criminal Court.

(e) PROHIBITION ON PROVISION OF SUPPORT TO THE INTERNATIONAL CRIMINAL COURT – Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.

(f) PROHIBITION ON USE OF APPROPRIATED FUNDS TO ASSIST THE INTERNATIONAL CRIMINAL COURT – Notwithstanding any other provision of law, no funds appropriated under any provision of law may be used for the purpose

of assisting the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the International Criminal Court.

(g) RESTRICTION ON ASSISTANCE PURSUANT TO MUTUAL LEGAL ASSISTANCE TREATIES – The United States shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters, multilateral conventions with legal assistance provisions, and extradition treaties, to which the United States is a party, and in connection with the execution or issuance of any letter rogatory, to prevent the transfer to, or other use by, the International Criminal Court of any assistance provided by the United States under such treaties and letters rogatory.

(h) PROHIBITION ON INVESTIGATIVE ACTIVITIES OF AGENTS – No agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.

SEC. 2005. RESTRICTION ON UNITED STATES PARTICIPATION IN CERTAIN UNITED NATIONS PEACEKEEPING OPERATIONS.

(a) POLICY – Effective beginning on the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

(b) RESTRICTION – Members of the Armed Forces of the United States may not participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations, the creation of which is authorized by the United Nations Security Council on or after the date that the Rome Statute enters into effect pursuant to Article 126 of the Rome Statute, unless the President has submitted to the appropriate congressional committees a certification described in subsection (c) with respect to such operation.

(c) CERTIFICATION – The certification referred to in subsection (b) is a certification by the President that –
(1) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because, in authorizing the operation, the United Nations Security Council permanently exempted, at a minimum, members of the Armed Forces of the United States participating in the operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by them in connection with the operation;
(2) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because each country in which members of the Armed Forces of the United States participating in the operation will be present either is not a party to the International Criminal Court and has not invoked the jurisdiction of the International Criminal Court pursuant to Article 12 of the Rome Statute, or has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against members of the Armed Forces of the United States present in that country; or
(3) the national interests of the United States justify participation by members of the Armed Forces of the United States in the peacekeeping or peace enforcement operation.

SEC. 2006. PROHIBITION ON DIRECT OR INDIRECT TRANSFER OF CLASSIFIED NATIONAL SECURITY INFORMATION AND LAW ENFORCEMENT INFORMATION TO THE INTERNATIONAL CRIMINAL COURT.

(a) IN GENERAL – Not later than the date on which the Rome Statute enters into force, the President shall ensure that appropriate procedures are in place to prevent the transfer of classified national security information and law enforcement information to the International Criminal Court for the purpose of facilitating an investigation, apprehension, or prosecution.

(b) INDIRECT TRANSFER – The procedures adopted pursuant to subsection (a) shall be designed to prevent the transfer to the United Nations and to the government of any country that is party to the International Criminal Court of classified national security information and law enforcement information that specifically relates to matters known to be under investigation or prosecution by the International Criminal Court, except to the degree that satisfactory assurances are received from the United Nations or that government, as the case may be, that such information will not be made available to the International Criminal Court for the purpose of facilitating an investigation, apprehension, or prosecution.

(c) CONSTRUCTION – The provisions of this section shall not be construed to prohibit any action permitted under section 2008.

SEC. 2007. PROHIBITION OF UNITED STATES MILITARY ASSISTANCE TO PARTIES TO THE INTERNATIONAL CRIMINAL COURT.

(a) PROHIBITION OF MILITARY ASSISTANCE – Subject to subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.

(b) NATIONAL INTEREST WAIVER – The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.

(c) ARTICLE 98 WAIVER – The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.

(d) EXEMPTION – The prohibition of subsection (a) shall not apply to the government of –

(1) a NATO member country;
(2) a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or
(3) Taiwan.

SEC. 2008. AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES AND CERTAIN OTHER PERSONS DETAINED OR IMPRISONED BY OR ON BEHALF OF THE INTERNATIONAL CRIMINAL COURT.

(a) AUTHORITY – The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.

(b) PERSONS AUTHORIZED TO BE FREED – The authority of subsection (a) shall extend to the following persons:
(1) Covered United States persons.
(2) Covered allied persons.
(3) Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government.

(c) AUTHORIZATION OF LEGAL ASSISTANCE – When any person described in subsection (b) is arrested, detained, investigated, prosecuted, or imprisoned by, on behalf of, or at the request of the International Criminal Court, the President is authorized to direct any agency of the United States Government to provide –
(1) legal representation and other legal assistance to that person (including, in the case of a person entitled to assistance under section 1037 of title 10, United States Code, representation and other assistance in the manner provided in that section);
(2) exculpatory evidence on behalf of that person; and
(3) defense of the interests of the United States through appearance before the International Criminal Court pursuant to Article 18 or 19 of the Rome Statute, or before the courts or tribunals of any country.

(d) BRIBES AND OTHER INDUCEMENTS NOT AUTHORIZED – This section does not authorize the payment of bribes or the provision of other such incentives to induce the release of a person described in subsection (b).

SEC. 2009. ALLIANCE COMMAND ARRANGEMENTS.

(a) REPORT ON ALLIANCE COMMAND ARRANGEMENTS – Not later than 6 months after the date of the enactment of this Act, the President should transmit to the appropriate congressional committees a report with respect to each military alliance to which the United States is party –
(1) describing the degree to which members of the Armed Forces of the United States may, in the context of military operations undertaken by or pursuant to that alliance, be placed under the command or operational control of foreign military officers subject to the jurisdiction of the International Criminal Court because they are nationals of a party to the International Criminal Court; and
(2) evaluating the degree to which members of the Armed Forces of the United States engaged in military operations undertaken by or pursuant to that alliance may be exposed to greater risks as a result of being placed under the command or operational control of foreign military officers subject to the jurisdiction of the International Criminal Court.

(b) DESCRIPTION OF MEASURES TO ACHIEVE ENHANCED PROTECTION FOR MEMBERS OF THE ARMED FORCES OF THE UNITED STATES – Not later than 1 year after the date of the enactment of this Act, the President should transmit to the appropriate congressional committees a description of modifications to command and operational control arrangements within military alliances to which the United States is a party that could be made in order to reduce any risks to members of the Armed Forces of the United States identified pursuant to subsection (a)(2).

(c) SUBMISSION IN CLASSIFIED FORM – The report under subsection (a), and the description of measures under subsection (b), or appropriate parts thereof, may be submitted in classified form.

SEC. 2010. WITHHOLDINGS.

Funds withheld from the United States share of assessments to the United Nations or any other international organization during any fiscal year pursuant to section 705 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (as enacted by section 1000(a)(7) of Public Law 106–113; 113 Stat. 1501A-460), are authorized to be transferred to the Embassy Security, Construction and Maintenance Account of the Department of State.

SEC. 2011. APPLICATION OF SECTIONS 2004 AND 2006 TO EXERCISE OF CONSTITUTIONAL AUTHORITIES.

(a) IN GENERAL – Sections 2004 and 2006 shall not apply to any action or actions with respect to a specific matter involving the International Criminal Court taken or directed by the President on a case-by-case basis in the exercise of the President's authority as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the United States Constitution or in the exercise of the executive power under article II, section 1 of the United States Constitution.

(b) NOTIFICATION TO CONGRESS –
(1) IN GENERAL – Subject to paragraph (2), not later than 15 days after the President takes or directs an action or actions described in subsection (a) that would otherwise be prohibited under section 2004 or 2006, the President shall submit a notification of such action to the appropriate congressional committees. A notification under this paragraph shall include a description of the action, a determination that the action is in the national interest of the United States, and a justification for the action.
(2) EXCEPTION – If the President determines that a full notification under paragraph (1) could jeopardize the national security of the United States or compromise a United States law enforcement activity, not later than 15 days after the President takes or directs an action or actions referred to in paragraph (1) the President shall notify the appropriate congressional committees that an action has been taken and a determination has been made pursuant to this paragraph. The President shall provide a full notification under paragraph (1) not later than 15 days after the reasons for the determination under this paragraph no longer apply.

(c) CONSTRUCTION – Nothing in this section shall be construed as a grant of statutory authority to the President to take any action.

SEC. 2012. NONDELEGATION.

The authorities vested in the President by sections 2003 and 2011(a) may not be delegated by the President pursuant to section 301 of title 3, United States Code, or any other provision of law. The authority vested

in the President by section 2005(c)(3) may not be delegated by the President pursuant to section 301 of title 3, United States Code, or any other provision of law to any official other than the Secretary of Defense, and if so delegated may not be subdelegated.

SEC. 2013.
DEFINITIONS.

As used in this title and in section 706 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001:

(1) APPROPRIATE CONGRESSIONAL COMMITTEES – The term 'appropriate congressional committees' means the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate.

(2) CLASSIFIED NATIONAL SECURITY INFORMATION – The term 'classified national security information' means information that is classified or classifiable under Executive Order 12958 or a successor Executive order.

(3) COVERED ALLIED PERSONS – The term 'covered allied persons' means military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan, for so long as that government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the International Criminal Court.

(4) COVERED UNITED STATES PERSONS – The term 'covered United States persons' means members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court.

(5) EXTRADITION – The terms 'extradition' and 'extradite' mean the extradition of a person in accordance with the provisions of chapter 209 of title 18, United States Code, (including section 3181(b) of such title) and such terms include both extradition and surrender as those terms are defined in Article 102 of the Rome Statute.

(6) INTERNATIONAL CRIMINAL COURT – The term 'International Criminal Court' means the court established by the Rome Statute.

(7) MAJOR NON-NATO ALLY – The term 'major non-NATO ally' means a country that has been so designated in accordance with section 517 of the Foreign Assistance Act of 1961.

(8) PARTICIPATE IN ANY PEACEKEEPING OPERATION UNDER CHAPTER VI OF THE CHARTER OF THE UNITED NATIONS OR PEACE ENFORCEMENT OPERATION UNDER CHAPTER VII OF THE CHARTER OF THE UNITED NATIONS – The term 'participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations' means to assign members of the Armed Forces of the United States to a United Nations military command structure as part of a peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations in which those members of the Armed Forces of the United States are subject to the command or operational control of one or more foreign military officers not appointed in conformity with article II, section 2, clause 2 of the Constitution of the United States.

(9) PARTY TO THE INTERNATIONAL CRIMINAL COURT – The term 'party to the International Criminal Court' means a government that has deposited an instrument of ratification, acceptance, approval, or accession to the Rome Statute, and has not withdrawn from the Rome Statute pursuant to Article 127 thereof.

(10) PEACEKEEPING OPERATION UNDER CHAPTER VI OF THE CHARTER OF THE UNITED NATIONS OR PEACE ENFORCEMENT OPERATION UNDER CHAPTER VII OF THE CHARTER OF THE UNITED NATIONS – The term 'peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations' means any military operation to maintain or restore international peace and security that –
(A) is authorized by the United Nations Security Council under chapter VI or VII of the charter of the United Nations; and
(B) is paid for from assessed contributions of United Nations members that are made available for peacekeeping or peace enforcement activities.

(11) ROME STATUTE – The term 'Rome Statute' means the Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998.

(12) SUPPORT – The term 'support' means assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals.

(13) UNITED STATES MILITARY ASSISTANCE – The term 'United States military assistance' means –
(A) assistance provided under chapter 2 or 5 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.); or
(B) defense articles or defense services furnished with the financial assistance of the United States Government, including through loans and guarantees, under section 23 of the Arms Export Control Act (22 U.S.C. 2763).

SEC. 2014.
REPEAL OF LIMITATION.

The Department of Defense Appropriations Act, 2002 (division A of Public Law 107–117) is amended by striking section 8173.

SEC. 2015.
ASSISTANCE TO INTERNATIONAL EFFORTS.

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

TITLE III – OTHER MATTERS

This Act may be cited as the '2002 Supplemental Appropriations Act for Further Recovery From and Response To Terrorist Attacks on the United States'.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

Informationstagung für Rechtsreferendare in Pfalzgrafenweiler, Baden-Württemberg

Catherine Rauch*, Melanie Schmaljohann**

Am 10. und 11. Juni 2002 fand die alljährliche zweitägige Informationstagung zum Humanitären Völkerrecht und über die Genfer Rotkreuzabkommen der DRK-Landesverbände Baden-Württemberg und Badisches Rotes Kreuz für Rechtsreferendare statt. Eine besondere Bereicherung erfuhr die Tagung durch die Teilnahme von *Max Markgraf von Baden* sowie des leitenden Oberstaatsanwalts a. D. *Rolf Dieter Herrmann*.

Veranstaltungen dieser Art werden vom Deutschen Roten Kreuz regelmäßig in Zusammenarbeit mit den Landesverbänden im Rahmen seines satzungsgemäßen Verbreitungsauftrages ausgerichtet, um unter anderen Juristen mit den Grundsätzen des humanitären Völkerrechts bekannt zu machen. Dahinter steht die grundsätzliche Überlegung, dass die effektive Anwendung des Rechts zwingend dessen Kenntnis voraussetzt.

Nachdem die Teilnehmer zunächst von *Dr. Rudolf Goldmann*, langjähriger Landeskonventionsbeauftragter des Landesverbandes Baden-Württemberg, in der im Nordschwarzwald gelegenen DRK-Landesschule in Pfalzgrafenweiler begrüßt wurden, führte *Dr. Heike Spieker* vom DRK-Generalsekretariat in Berlin die anwesenden Rechtsreferendare zunächst in die Thematik des humanitären Völkerrechts ein. Es entspann sich eine lebhafte Diskussion über die Anwendung des Kriegsvölkerrechts auf die Anschläge vom 11. September 2001 und die darauf folgenden Ereignisse. Hierbei ging es insbesondere um die Einordnung dieser „modernen Konfliktformen" unter die „klassischen" Definitionen des humanitären Völkerrechts. Im Rahmen der Diskussion wurde gemeinsam mit *Dr. Spieker* auch das stete Problem der Durchsetzbarkeit der völkerrechtlichen Normen erörtert.

Im Anschluss an diese Einführung in die rechtlichen Fragestellungen stellte *Dr. habil. Gerhard Bestermöller*, stellvertretender Leiter des Instituts für Theologie und Frieden in Hamburg, den Teilnehmern das Kriegsächtungsprogramm der katholischen Kirche vor. Der Vortragende erläuterte, dass die Idee einer kriegsfreien Staatengemeinschaft dadurch erreicht werden solle, dass es eine den Staaten übergeordnete Macht gebe, deren Aufgabe darin bestehe, als hoheitliche Autorität im zwischenstaatlichen Konfliktfall einzugreifen.

In diesem Zusammenhang setzte er sich kritisch mit den Thesen des Philosophen *Jürgen Habermas* auseinander. Dieser sieht in der gegenwärtigen Staatenordnung die Demokratien den anderen Staatsformen als überlegen und somit als moralisch zum Einschreiten legitimiert an. Diese Legitimation ergebe sich daraus, dass die Demokratie *per se* friedliebend sei und daher nicht aus eigennützigen Motiven, sondern zur Verteidigung der Menschenrechte einem bewaffneten Konflikt beitrete. Diese Thesen wurden im Forum kontrovers diskutiert.

Als Fazit seiner Ausführungen präsentierte *Dr. Bestermöller* die Botschaft des kirchlichen Kriegsächtungsprogrammes, welche den Weg zum ewigen Frieden im Warten auf Jesus Christus und in der Nächstenliebe sieht.

Den Abschluss des ersten Veranstaltungstages bildete der Vortrag des Oberstleutnants im Generalstab des Bundesverteidigungsministeriums *Ralf Hoffmann*, der über das Thema „Information War – Konfliktformen im 21. Jahrhundert unter Nutzung der Möglichkeiten der Informationstechnologie" referierte. Die wachsende Bedeutung der Informationstechnologie in Konfliktsituationen wurde nicht zuletzt durch die ansprechende technische Präsentation der Vortragsinhalte aufgezeigt. Es wurde deutlich, dass Konflikte heutzutage militärisch nicht erst auf dem „Schlachtfeld", sondern oft bereits im Vorfeld durch gezielte Informationsbeschaffung oder Nichtinformation entschieden werden. So habe einen strategischen Vorteil, wer aus der Informationsflut die wichtigen Informationen herauszufiltern und eigene zurückzuhalten wisse. Ein zweiter wichtiger Aspekt sei, dass moderne Kommunikationswege neue Angriffsziele für feindliche Übergriffe böten. Man stelle sich einen feindlichen Zugriff auf die EDV des Pentagon vor. Der Vortrag warf interessante Fragen auf, die Chancen und Risiken moderner Informationstechnologien gegenüberstellten.

Der nächste Morgen begann mit der Präsentation des Roten Kreuzes. *Dieter Sprich*, Koordinationsbereichsleiter des Landesverbandes, stellte zunächst die sieben Grundsätze der internationalen Rotkreuz- und Rothalbmondbewegung vor: Menschlichkeit, Unparteilichkeit, Neutralität, Unabhängigkeit, Freiwilligkeit, Einheit und Universalität.

Er verdeutlichte deren Bedeutung anhand von Beispielen. So gebiete das Gebot der Menschlichkeit für jeden Einsatz zugleich eine Abwägung der Notwendigkeit am Maßstab des menschlichen Leides. Auch das Neutralitätsprinzip stehe in einem ständigen Spannungsfeld, denn nur seine strikte Beachtung – bar jeder Wertung der vorherrschenden Umstände – gewährleiste dem Roten Kreuz den bedingungslosen Zugang zu den Krisenregionen.

In einem zweiten Teil stellte *Sprich* die Organisation des Deutschen und des Internationalen Roten Kreuzes vor.

Im Anschluss erläuterte Prof. *Dr. J. van Ess* von der Universität Tübingen die Bedeutung des heiligen Krieges im Islam. Er stellte zunächst klar, dass die wörtliche Übersetzung des Wortes „Dschihad" nicht „heiliger Krieg", sondern „Einsatz für Gott" sei. Welche Gestalt dieser „Einsatz" nehme, beruhe auf der Entscheidung des Einzelnen, weil es ein geistliches Oberhaupt, das den Koran verbindlich auslegen könnte, im Islam nicht gebe. Daraus ergebe sich, dass die Übersetzung mit „heiliger Krieg" lediglich eine Interpretation sei.

So unterscheide sich der muslimische heilige Krieg von dem christlichen darin, dass die Christen von einem geistlichen Oberhaupt zum heiligen Krieg aufgerufen würden, der Dschihad jedoch stets auf einem eigenen Entschluss des Einzelnen beruhe; der Einzelne entschließe sich hier, sich für das Wort Gottes einzusetzen. In einer historischen Rückschau entwickelte *van Ess* sodann die Facetten dieses Konzeptes, um dann die historische Entwicklung des Dschihad in der Geschichte des Islam nachzuzeichnen. Hierbei wurde deutlich, dass sich die Vorstellungen vom heiligen Krieg in der westlichen Welt nicht mit dem Kodex des Islam decken. In der historischen Betrachtung fällt auf, dass dieser Einsatz nicht unbedingt mit Gewaltanwendung gleichzusetzen ist.

Der Vormittag endete mit einem Vortrag von Rainer Griesbaum, Bundesanwalt beim Bundesgerichtshof, der den Teilnehmern einen praktischen Einblick in die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien gab.

Nachdem in § 6 Nr. 1 StGB normierten Weltrechtsprinzip unterlägen Auslandsstraftaten, die sich gegen übernationale Kulturwerte und Rechtsgüter richte, und an deren Schutz ein gemeinsames Interesse

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aller Staaten bestehe, der deutschen Strafgewalt. Hierzu gehöre auch der Tatbestand des Völkermordes. Es habe daher bei der Kooperation die Gefahr von Abgrenzungsschwierigkeiten mit der Zuständigkeit des Jugoslawien-Tribunals bestanden, welches die Ahndung schwerer Verstöße gegen das humanitäre Völkerrecht im Gebiet des ehemaligen Jugoslawiens zum Gegenstand habe (Art. 1 des Statuts). Der Gerichtshof habe zwar insoweit eine Vorrangkompetenz, diese müsse er jedoch nicht ausüben, so dass bereits erste Ermittlungen abgestimmt werden müssten. Ersuche der Gerichtshof um Überleitung des Verfahrens, müsse das deutsche Gericht oder die deutsche Staatsanwaltschaft prüfen, ob das Verfahren in die örtliche, zeitliche und sachliche Zuständigkeit des Gerichtshofes falle und ob Personenidentität des Verdächtigen vorliege. Anhand von Beispielen erläuterte der Vortragende einzelne der zahlreichen verfahrensrechtlichen Probleme der Zusammenarbeit.

In einem zweiten Teil stellte *Griesbaum* das Gesetz zur Einführung des Völkerstrafgesetzbuches vor, welches am 30. Juni 2002 in Kraft getreten sei. Anlass dieses Gesetzes sei die Annahme des Statutes des Internationalen Strafgerichtshofes gewesen. Der Internationale Strafgerichtshof habe die Gerichtsbarkeit über Völkermord, Verbrechen gegen die Menschlichkeit und Kriegsverbrechen, jedoch habe er hierfür keine vorrangige Kompetenz, so dass die Staaten nach dem Grundsatz der Komplementarität auch weiterhin zur Verfolgung berufen seien. Der deutsche Gesetzgeber habe daher das Erfordernis gesehen, das deutsche materielle Strafrecht an das Römische Statut und das allgemeine humanitäre Völkerrecht anzupassen und so die vorrangige innerstaatliche Strafverfolgung zu erleichtern. Dabei hätten die praktischen Erfahrungen in der Kooperation mit dem Jugoslawien-Tribunal in die Arbeiten des Gesetzgebers einfließen können.

Zusammenfassend kann man sagen, dass die interdisziplinäre Gestaltung des Programmes es den anwesenden Juristen ermöglichte, einmal über den eigenen fachlichen Tellerrand hinauszublicken und sich dem humanitären Völkerrecht nicht nur unter rechtlichen Aspekten zu nähern.

Besonders hervorzuheben sind schließlich die ausgezeichnete Unterbringung in der frisch renovierten DRK-Landesschule Pfalzgrafenweiler sowie der freundliche Empfang der Teilnehmer. Sporteinrichtungen und der Partykeller der Schule boten Gelegenheit zu einem angenehmen Ausklang des ersten Tages. Diese wurde von den Teilnehmern, die aus dem ganzen Bundesland angereist waren, ebenso wie von den Referenten genutzt.

Wer an einem fachlich bereichernden Seminar in offener Atmosphäre interessiert ist, sollte auf Aushänge an den Landgerichten achten oder sich an seinen DRK-Landesverband wenden. ■

Bericht über die Referendartagung des DRK-Landesverbandes Hessen e.V. zum Humanitären Völkerrecht vom 17./18. Oktober 2002 in Mühltal/Trautheim

Helen Theimann*

Eine Tagung zum humanitären Völkerrecht? Das klingt doch spannend, so dachte ich mir, als ich die Mitteilung des Hessischen Ministeriums der Justiz und das Tagungsprogramm des DRK in den Händen hielt. Schön, dass jemand auch dieses „Randgebiet" des juristischen Handwerks bedienen will, zumal die Ausbildung während der Referendarzeit – das ist die praktische juristische Ausbildung bei Gericht, Staatsanwaltschaft, Anwalt und in der Verwaltung zwischen den beiden Staatsexamina – in Hessen leider stark auf die „klassischen" juristischen Betätigungsfelder ausgerichtet ist. So kam mir dieses Angebot sehr entgegen, zumal ich mich bereits während des Studiums im Wahlfachbereich mit dem Völkerrecht auseinandergesetzt hatte und mein Wissen gerne ein wenig auffrischen und erweitern wollte.

So reiste ich am 17. Oktober 2002 zum Tagungsort, dem DRK Bildungs- und Tagungszentrum in Mühltal. Der Teilnehmerkreis, der mich dort erwartete, war wesentlich kleiner, als ich es mir vorgestellt hatte – wir waren insgesamt nur elf Referendare –, aber das hatte einige Vorteile: Auf der einen Seite war der Umgang wesentlich persönlicher, andererseits konnten so mühelos interessante Diskussionen mit den jeweiligen Referenten geführt werden.

Nachdem uns Herr *Lotz*, der Konventionsbeauftragte des Landesverbandes, begrüßt hatte, informierte uns zunächst Frau *Quénivet*, wissenschaftliche Mitarbeiterin des auf dem Gebiet des Humanitären Völkerrechts wohl aktivsten Lehrstuhls der Bundesrepublik, dem IFHV der Ruhr-Universität Bochum, auf charmante und kompetente Art und Weise über die Grundlagen des humanitären Völkerrechts. Darauf folgte ein Kurzvortrag des Landesgeschäftsführers des DRK-Landesverbandes Hessen, Herrn *Klemp*, der uns über die Tätigkeit des DRK und seiner Landesverbände aufklärte und uns auch ein wenig in die geschichtliche Entwicklung des Deutschen Roten Kreuzes einweihte.

Der Landesverband konnte für diesen Tag der Tagung Herrn *Lerch*, seines Zeichens langjähriger Redakteur für die Bereiche Außenpolitik und Nahost der F.A.Z., als Referenten gewinnen. Dieser versorgte uns mit Hintergrundinformationen über die Bedeutung des „Heiligen Krieges" im Islam. Die Fortsetzung des Vortrages von Frau *Quénivet* rundete diesen Tag ab.

Der nächste Tag versprach mindestens ebenso spannend zu werden wie der erste. Oberstleutnant im Generalstab *Hoffmann* gab einen Überblick über Tendenzen, Optionen und Perspektiven zum Thema „Information War", und ich vermute, dass den anderen Teilnehmern ebenso wie mir nun ein wenig mulmig zumute ist, wenn sie ihren Computer einschalten und ein wenig im Internet surfen. Wer hat sich auch vorher Gedanken darüber gemacht, dass jeder Schritt, den man dort tut, einfach zu überwachen und zu analysieren ist? Außerdem fürchte ich seit diesem Vortrag Mikroben, die sich auf das in meiner Hardware befindliche Silicium stürzen könnten, weil sie sich dank verschiedener Manipulationen davon ernähren.

Dr. Heintze, ebenfalls Mitglied des IFHV der Ruhr-Universität Bochum, sensibilisierte uns für die Frage, wie das Völkerrecht auf die „Neuen Kriege", insbesondere das, was wir als „Terrorismus" bezeichnen, reagiert. Er machte deutlich, dass das Völkerrecht flexibel genug sei, um auf neue Probleme angemessen reagieren zu können und eine Grundlage für eine effektive Handhabung derselben bilde.

Ihm folgte Herr *Lüder*, wissenschaftlicher Mitarbeiter der FernUniversität Hagen, der sich in seinem Vortrag mit der internationalen Strafgerichtsbarkeit – von den Tribunalen in Nürnberg und Tokio nach dem Zweiten Weltkrieg über die *Ad-hoc*-Gerichtsbarkeit in Bezug auf Ruanda und das ehemalige Jugoslawien bis zum kürzlich eingerichteten Internationalen Strafgerichtshof – auseinander setzte und uns

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so eines der Mittel für die Durchsetzung humanitären Völkerrechts näher brachte.

Hieran anschließend und insofern thematisch geschickt aufgebaut beleuchtete Herr *Heinsch*, wissenschaftlicher Mitarbeiter an der Universität Köln, das erst kürzlich in Kraft getretene Deutsche Völkerstrafgesetzbuch und die darin erfolgte nationale Umsetzung des humanitären Völkerrechts.

Nach diesem abwechslungsreichen Programm endete die Veranstaltung mit einer Verabschiedung durch Herrn *Lotz*.

Ich habe es als äußerst positiv empfunden, dass jeder der Referenten sich unseren neugierigen Fragen stellte und auch nach dem eigentlichen Vortrag und in den Pausen für jede Diskussion offen war. Teilweise setzten sich deshalb die Gespräche über das Gehörte oder das am nächsten Tag zu Behandelnde bis in den späten Abend des Donnerstags fort, und viele der Vortragenden haben sich die Zeit genommen, wie wir im Tagungszentrum zu übernachten und an den gemeinsamen Mahlzeiten und sogar an dem Besuch der „Kellerklause" teilzunehmen. Die Reihe der Dozenten war hochkarätig besetzt, und selten genug bekommt man die von uns deshalb gern genutzte Gelegenheit, mit Fachleuten beim abendlichen Bier oder beim Mittagessen Auge in Auge zu diskutieren oder sich informieren zu lassen.

Nicht unerwähnt sollte bleiben, dass die Unterbringung und Versorgung im Tagungszentrum hervorragend war und meine diesbezüglichen Bedenken (die aus anderweitigen Erfahrungen resultierten) bereits beim Anblick des freundlichen Zimmers, das mir zugewiesen wurde, zerstreut wurden. Frau *Metz*, die Mitarbeiterin des Landesverbandes, die uns während der Tagung betreute, war für jede Anregung offen und ebenso wie Herr *Lotz* immer besorgt, unseren Aufenthalt so angenehm wie möglich zu gestalten.

Als Fazit bleibt mir, diese Tagung jedem zu empfehlen, der ein Interesse für das humanitäre Völkerrecht mitbringt, egal ob er Vorkenntnisse auf diesem Gebiet besitzt oder nicht, und mich noch einmal bei den Organisatoren/innen für die geleistete Arbeit herzlich zu bedanken. ■

Symposium: The Non-International Armed Conflict – Fusion or Co-existence of International Human Rights Law

Holger Scheel*

Vom 19. bis zum 22. September 2002 fand in Kiel ein Symposium statt, zu dem *Wolff Heintschel von Heinegg* (Frankfurt/Oder) und *Rainer Hofmann* (Kiel) eingeladen hatten. Gegenstand des Symposiums war das Verhältnis des humanitären Völkerrechts zum Menschenrechtsschutz im nicht-internationalen bewaffneten Konflikt. Die Organisatoren hatten Wissenschaftler aus Europa und den Vereinigten Staaten eingeladen, weshalb das Symposium in englischer Sprache abgehalten wurde.

Eröffnet wurde die Tagung von den beiden Organisatoren, die die Teilnehmer begrüßten und einen Überblick über das Thema des Symposiums gaben. Der Ablauf des Symposiums gestaltete sich dann folgendermaßen: Es wurden insgesamt fünf Vorträge gehalten, die im Anschluss von einem Kollegen in einem kurzen „comment" besprochen wurden. Die verbleibende Zeit wurde von den Teilnehmern für umfassende Diskussionen genutzt.

Den ersten Vortrag hielt *David Turns* zu dem Thema „Methods and means of warfare in non-international conflicts", in dem er die Besonderheiten des nicht-internationalen bewaffneten Konflikts herausstellte. In diesem Zusammenhang erörterte er das Verhältnis zwischen dem humanitären Völkerrecht und, als sein in der Zukunft wohl sehr wichtiger Durchsetzungsmechanismus, dem Statut des Internationalen Strafgerichtshofes. Als zentrales Problem stellt sich hier nach Ansicht des Redners das Problem, dass das Statut Tatbestände enthält, bei denen nicht endgültig geklärt ist, ob diese nach Völkergewohnheitsrecht Kriegsverbrechen darstellen. Ferner ging er auf die Transformation völkerrechtlicher Verträge, die den Schutz von Menschenrechten zum Inhalt haben, durch Großbritannien ein.

Besprochen hat diesen Vortrag *Dieter Fleck*, der die Gelegenheit dazu nutzte, in diesem Rahmen den Entwurf des „Sanremo Manual on The Protection of Victims of Non-International Armed Conflicts" vom August 2002 vorzustellen.

Hans-Peter Gasser hielt einen Vortrag über das Verhältnis von humanitärem Völkerrecht und Menschenrechtsschutz („Conflict, International Humanitarian Law and International Human Rights Law"). Er stellte Gemeinsamkeiten und Unterschiede von humanitärem Völkerrecht und den Menschenrechten dar und führte die Anknüpfungspunkte an, an denen die Charakteristika dieser zwei Rechtsgebiete festgestellt werden können. Den Vortrag *Hans-Peter Gassers* kommentierte *Torsten Stein* von der Universität Saarbrücken, der für die Darstellung des Verhältnisses von humanitärem Völkerrecht und Menschenrechten ein Joint-Venture als Bild gebrauchte, jedoch Wert darauf legte, die beiden Rechtsgebiete klar voneinander zu unterscheiden und nicht zu vermischen.

Am Nachmittag des ersten Tages wurden dann die Völkerrechtssubjekte in nicht-internationalen Konflikten behandelt. Hierzu sprach *Horst Fischer* (Kommentator *Knut Doermann*), der einen Vortrag über die Möglichkeiten des Schutzes der Zivilbevölkerung in nicht-internationalen bewaffneten Konflikten („The protection of civilians and the civilian population in non-international armed Conflicts") hielt.

Das Thema des zweiten Vormittages waren die Möglichkeiten der Durchsetzung der Rechte von Individuen. Hierzu hielt *Hans-Joachim Heintze* einen Vortrag, der den Titel „The Implementation of International Humanitarian Law by Human Rights Mechanisms" trug und von *Reinhard Haßenpflug* besprochen wurde. In diesem Vortrag erläuterte *Hans-Joachim Heintze* insbesondere die Möglichkeit der Anwendung und Durchsetzung humanitären Völkerrechts mittels der Europäischen Menschenrechtskonvention. Dieses stelle im Verhältnis zu den Menschenrechten das speziellere Rechtsgebiet dar. Als Beispiele führte *Heintze* vor allem die Auseinandersetzungen im ehemaligen Jugoslawien, den Kurdenkonflikt und den Zypernkonflikt an. Ferner ging er auf die praktische Bedeutung des Art. 15 EMRK im Rahmen bewaffneter Konflikte ein.

Den Abschluss des Symposiums bildete *Leslie C. Green* mit seinem Vortrag „Criminal Responsibility of Individuals in (non-)international Conflicts". In diesem erörterte er grundlegend die Geschichte und den gegenwärtigen Stand des humanitären Völkerrechts und zeichnete die Perspektiven auf, die der Internationale Strafgerichtshof bietet, um zur Sanktionierung

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von Völkerrechtsverbrechen beizutragen. Besprochen wurde dieser Beitrag von *Heike Spieker*.

Geprägt war das Symposium von intensiven Diskussionen, für die die Organisatoren viel Zeit vorgesehen hatten. In diesen wurde, nachdem diese Frage auch schon in den Vorträgen angesprochen worden war, das Verhältnis von humanitärem Völkerrecht und Menschenrechten beleuchtet. Eine Kontroverse entzündete sich hier z.B. daran, ob es sich wirklich um zwei nebeneinander stehende Rechtsgebiete handelte oder ob sie nicht vielmehr in einem vertikalen Verhältnis zueinander stünden: das Rechtsgebiet der Menschenrechte als Basis und hierüber, als das speziellere Rechtsgebiet, das humanitäre Völkerrecht (*Rainer Hofmann*). Das Verhältnis dieser beiden Rechtsgebiete und auch der Schutz von Individuen in bewaffneten (nicht-internationalen) Konflikten wurde anhand zahlreicher Beispielsfälle erörtert (u. a. Jugoslawien-Konflikt, Zypern). Des Weiteren nahm in den Diskussionen die Frage, wie sich der internationale Terrorismus auf diese beiden Rechtsgebiete auswirke, breiten Raum ein.

In diesem Bericht konnte die Thematik des Symposiums natürlich nur kurz angerissen werden. Wer sich ausführlich informieren möchte, der sei auf das „German Yearbook of International Law" verwiesen, welches im Band 45 (2003) die Eröffnungsansprache *Wolff Heintschel von Heineggs*, sämtliche Vorträge und die „comments" veröffentlicht. Erscheinen wird dieser Band aller Voraussicht nach im Februar 2003. ■

Hans Magnus Enzensberger (Hrsg.), Krieger ohne Waffen. Das Internationale Komitee vom Roten Kreuz

Die Andere Bibliothek, Eichborn Verlag, Frankfurt am Main, 2001, 347 Seiten, € 27,50

Julia Tilgen*

In seiner Vorbemerkung stellt *Enzensberger* fest, dass das Rote Kreuz „*eines der ältesten Markenzeichen der Welt, vermutlich bekannter als Coca-Cola*" (S. 7) sei, man aber dennoch zuwenig über seine Tätigkeit wisse. Diesem Missstand möchte *Enzensberger* mit „Krieger ohne Waffen" abhelfen.

„*Wer verstehen will, was das Internationale Komitee vom Roten Kreuz leistet, wird sich mit historischen, analytischen und administrativen Überlegungen nicht begnügen können. Letzten Endes kann diese Arbeit nur aus der Perspektive von Helfern beurteilt werden, die sich einer Mission verschrieben haben, von der sie wissen, dass sie nie ein gutes Ende nehmen wird*" (S. 8).

In diesem Sinne ist es *Enzensberger* gelungen, sowohl Helfer zu Wort kommen zu lassen, insbesondere Delegierte des Internationalen Komitees vom Roten Kreuz (IKRK), als auch das notwendige Maß an historischer Hintergrundinformation und aktueller Analyse zusammenzustellen. Die von *Enzensberger* ausgewählten Beiträge unterschiedlicher Qualität sind zum Teil Originalbeiträge, zum Teil Auszüge aus Referaten, journalistischen Artikeln oder Monographien.

Michael Ignatieff, Forscher am King's College, Cambridge, und Moderator, Drehbuchautor und Kommentator für die BBC, führt den Leser mit „Die Ehre des Kriegers I" in die Geschichte des Roten Kreuzes ein, beginnend mit *Henri Dunants* Erkenntnis aus der Schlacht von Solferino 1859, die darin bestand, dass der Krieg unausweichlich sei, man aber im Sinne wahrer Menschlichkeit und Zivilisation einen Weg suchen müsse, um wenigstens seine Schrecken etwas zu mildern. Aus dieser Erkenntnis sind 1864 das Rote Kreuz und die Erste Genfer Konvention entstanden. *Ignatieff* streift die Geschichte der vier Genfer Konventionen sowie der Zusatzprotokolle, um sich dann mit dem IKRK auseinander zu setzen. Hier befasst er sich vor allem mit der Doktrin der Neutralität. „*Auch beim IKRK stellt man sich die Frage, ob Dunants Beharren auf der Gleichheit aller Opfer, wie gerecht deren Anliegen auch sein mögen, in den erbitterten Kämpfen heutzutage, in denen eine ethnische Gruppe danach strebt, die andere auszulöschen, noch sinnvoll ist*" (S. 25).

Im Anschluss an *Ignatieffs* Einführung ist ein Auszug aus *Henri Dunants* „Eine Erinnerung an Solferino" abgedruckt, dem Augenzeugenbericht des 1828 in Genf geborenen und 1910 in Heiden gestorbenen Begründers des Roten Kreuzes, der am 24. Juni 1859 von den Anhöhen um Castiglione beobachtete, wie die Streitkräfte unter Kaiser Napoleon III. von Frankreich und Kaiser Franz Joseph von Österreich in den Weinbergen und Schluchten von Solferino miteinander kämpften.

Arnold Kübler, Begründer der Schweizer Zeitschrift Du, würdigt in „Henri Dunant, die Schlacht von Solferino und die Anfänge des Roten Kreuzes" vor allem den ungewöhnlichen Lebensweg *Henri Dunants*. „*Dunant – der Begründer des Roten Kreuzes. So viel weiß fast jeder Zeitgenosse, und in den meisten Köpfen stellt sich dazu die übliche Vorstellung ein, die zu großen Gründungen gehört, die Vorstellung vom guten Einfall, von Komitees, Sitzungen, Vereinbarungen, Statuten, Paragrafen. Aber der Weg zur Begründung des Roten Kreuzes ist etwas ganz anderes, er ist vor allem Opfer und Einsatz eines ganzen Lebens, an seinem Anfang steht ein Erlebnis, steht eine Tat, die einen Menschen aus der ganzen Ordnung seines Daseins riss, das bis dahin ein sicheres, wohleingefügtes Dasein an einer bevorzugten Stelle der Welt gewesen war*" (S. 53).

Marcel Junod, der als Delegierter des IKRK in Äthiopien, Spanien und in der Türkei tätig war und während des Zweiten Weltkriegs in Berlin intervenierte, berichtet in „Kämpfer beiderseits der Front. Spanien 1936 bis 1938" von seinen einschneidenden Erfahrungen als Delegierter des IKRK im vom Bürgerkrieg zwischen Camaradas und Caballeros erschütterten Spanien, insbesondere von Gefangenenregistrierungen und -austauschaktionen, die er unter Einsatz seines Lebens organisierte und durchführte.

Jean-Claude Favez, der an der Universität Genf Schweizer Geschichte lehrt und dem das IKRK für seine Quellenforschung seine Archive zugänglich machte, befasst sich in „Das Internationale Rote Kreuz und die Todeslager des Dritten Reiches" sowohl mit der Geschichte des DRK während des Dritten Reiches als auch mit der Position des IKRK angesichts des Holocaust.

Favez' Quellenforschung zum DRK führte zu folgendem Ergebnis: „*Die unter Führung Adolf Hitlers und der nationalsozialistischen Partei am 30. Januar 1933 an die Macht gelangte Regierung interessierte sich [...] sehr schnell für das DRK, das in kaum einem Jahr ‚gleichgeschaltet' wurde. [...]*

In den Jahren nach der Gleichschaltung wurde das DRK zum aktiven Glied des NS-Staats. Es arbeitete mit SA und SS zusammen wie mit den sozialen oder karitativen Organisationen des Regimes (Nationalsozialistische Volkswohlfahrt). Seine Frauenvereine, die getrennt organisiert waren, da die Nazis die Gleichheit von Frauen und Männern nicht einmal bei der Pflege von Verwundeten und Kranken zugeben wollten, unterstanden Gertrud Scholtz-Klink,

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der auch die Leitung der Frauenorganisation der NSDAP (NSF) oblag. [...] Adolf Hitler persönlich nahm bei Hindenburgs Tod dessen Stelle an der Spitze der Organisation ein. 1936 erklärte der Herzog von Sachsen-Coburg und Gotha im Stil des Regimes:
‚Die Neuorganisation ist abgeschlossen. Das Führerprinzip ist fest verankert. In Deutschland ist das Rote Kreuz unter nationalsozialistischer Leitung bereit, seine Aufgaben zu übernehmen und sie sicherer, einiger und schneller zu erfüllen als in der Zeit des Novembersystems. – Jedes Mitglied des Deutschen Roten Kreuzes arbeitet unablässig, um sich der Schirmherrschaft des Führers würdig zu erweisen. Nach alter Tradition sind es meist die höheren Staatsbeamten, die den großen Sektionen der Länder und der preußischen Provinzen vorstehen. Überall werden die wichtigen Stellen im Roten Kreuz von führenden Mitgliedern der Partei bekleidet. [...]‘
Zwischen 1936 und 1938 erfolgte ein weiterer Schritt mit der Ablösung Hocheisens durch den Reichsarzt-SS, Brigadeführer Ernst Grawitz, der später einer der Hauptverantwortlichen für die an KZ-Häftlingen vorgenommenen medizinischen Experimente war. Mit dem Titel eines Stellvertretenden Präsidenten, dann eines Geschäftsführenden Präsidenten (1.1.1938) übernahm der Reichsarzt-SS die Leitung des DRK unter der rein nominellen Oberhoheit des Herzogs von Sachsen-Coburg und behielt sie bis zu seinem Selbstmord in den letzten Tagen des Dritten Reiches bei“ (S. 118 f.).

Die Haltung des IKRK analysiert *Favez* wie folgt: „*Als unpolitische Institution, konfrontiert mit einem totalitären Staat, einem ihm neuen Phänomen trotz der sowjetischen und italienischen Präzedenzfälle, hat das IKRK genauso wenig wie seine Zeit im allgemeinen das Wesen der Veränderungen begriffen, die das Dritte Reich in die internationalen Beziehungen brachte, auch im humanitären Bereich, und in die Rolle des Rechts in der nationalen und internationalen Gesellschaft. Der Anfechtung der liberalen Werte suchte es durch eine Verstärkung seiner eigenen Neutralität zu begegnen. Es konnte sich aber nicht gänzlich dem schweizerischen Patriotismus der Kriegszeit entziehen noch der Besinnung auf die konservativsten Werte der eidgenössischen Tradition. Mit seiner Berufung auf das Völkerrecht angesichts juristisch nicht erfasster Opfer, die es um Hilfe baten, hat das IKRK schließlich oft nicht die Möglichkeiten zum Handeln gesucht, sondern im Gegenteil eine Rechtfertigung seiner Untätigkeit, um nicht die ihm durch die Abkommen übertragene Mission ins Wanken zu bringen, auf der damals seine Existenz beruhte*“ (S. 132 f.).

Andreas Doepfner, Redakteur der Neuen Zürcher Zeitung beschäftigt sich in „Louis Haefliger. Ein Fall von Menschlichkeit“ mit der Lebens- und Wirkungsgeschichte *Haefligers*. *Haefliger* ließ sich am 21. April 1945 von seinem Arbeitgeber, der Bank Leu in Zürich, beurlauben und verließ seine Familie, um als Freiwilliger eine Lastwagenkolonne des IKRK mit Lebensmitteln und Medikamenten in das KZ Mauthausen zu bringen und die Heimführung von Häftlingen aufzunehmen. *Haefliger* befreite – ohne Kontakt zu Genf und der Außenwelt – am 05. Mai 1945, nachdem er amerikanische Unterstützung organisiert hatte, das oberösterreichische Konzentrationslager Mauthausen und rettete 60.000 jüdische, österreichische, polnische, belgische und französische, jugoslawische und russische KZ-Häftlinge vor der kurz bevorstehenden durch *Himmler* angeordneten Massakrierung. *Doepfner* geht in seinem Beitrag auch auf das schwierige Verhältnis der Schweiz zu ihrem Staatsbürger *Louis Haefliger* ein. „*Von den Häftlingen selbst wurde er als Erlöser aus tiefster Not erkannt. Dafür ist er später in Österreich und Israel ausgezeichnet worden. Doch ebenso ist er geschmäht, ja verfemt worden, vor allem in seiner Heimat, der Schweiz, die sich schwer tut mit Helden der Menschlichkeit*“ (S. 137).

Gundolf S. Freyermuth, der als deutscher Romancier in Snowflake, Arizona, lebt, versucht in „Der Hilfs-Multi, Besuche beim Deutschen Roten Kreuz“ die Verwaltungs- und Personalstruktur sowie die Tätigkeitsbereiche des DRK darzustellen, verliert sich jedoch mitunter in langatmigen Personenbeschreibungen. Insgesamt lässt der Beitrag *Freyermuths* Sachlichkeit und Objektivität vermissen. „*So verwaltet sich, was einmal mit dem listigen Widerstand für Mord und Totschlag recht spannend begann, derweil mit ABC-Schutztrupps und anderem atombombentauglichen Schnickschnack dahin. Als halbstaatliche Version eines weltweiten wie unfreiwilligen Galgenhumors gegen die schludrigen Experten*“ (S. 189).

Daniel Hitzig, der für das Schweizer Fernsehen arbeitet und drei Jahre lang Delegierter des IKRK in Palästina und im Irak war, analysiert in „Das Kreuz mit dem Kreuz. Das IKRK, die Föderation und die nationalen Rotkreuz- und Rothalbmondgesellschaften“ kenntnisreich und fundiert das konfliktbeladene Verhältnis zwischen IKRK, Föderation und nationalen Rotkreuz- und Rothalbmondgesellschaften. *Hitzig* schildert zudem die Hintergründe und den aktuellen Stand der Debatte um die Einführung eines neuen Schutzzeichens, das frei von jeglicher religiöser Bedeutung sein soll.

Jörg Bischoff, langjähriger Delegierter des IKRK und inzwischen Journalist und Redakteur in Bedigliora (Tessin), schildert in „Bandar Anzali–Tripolis–Mogadischu. Erinnerungen eines Delegierten.“ seinen Weg als Delegierter des IKRK, der ihn aus der Universität direkt zu den Krisenherden der Welt führte.

„*An einem Junimorgen des Jahres 1982 beschloss ich, zum IKRK zu gehen. Ich war Assistent an der Universität und bereitete eine Doktorarbeit in französischer Literatur vor. Auf der ersten Seite berichtete die Zeitung, dass die israelische Armee im Libanon eingefallen war. In den hinteren Seiten stieß ich auf eine Anzeige, mit der das IKRK Delegierte für den Feldeinsatz im Ausland suchte. Die Anzeige lieferte eine Antwort auf die Frage, die ich mir beim Lesen der ersten Seite gestellt hatte. Noch länger in Seminaren und Bibliotheken herumzusitzen schien mir weder attraktiv noch richtig*“ (S. 227).

Georg Brunold, Philosoph, Redakteur bei der Neuen Zürcher Zeitung und bei der Zeitschrift Du, ist mit „Der Stoff, aus dem der Delegierte ist. Philosophieren mit Peter Gottfried Stocker“ eine Charakterstudie über *Stocker* gelungen, der Delegationschef des IKRK in Nicaragua, Somalia, Afghanistan und Sarajevo war. Dessen Fähigkeiten, wie die der Geduld, der Zurückhaltung und des distanzierten Einfühlungsvermögens in die Gedankengänge korrupter Menschen können für einen IKRK-Delegierten als idealtypisch gelten. Denn „*[nur] dem Delegierten kann die Fahne ihre Glaubwürdigkeit und die Wahrung ihres Ansehens anvertrauen, und nur der Delegierte kann es sein, von dem die Fahne ihrerseits den Kredit erhält. [...] Der Delegierte ist – in des Wortes ganzer Bedeutung – der Bevollmächtigte, und nicht nur über den Verlauf einer Operation bestimmt die Leitung im Feld, sondern oft bereits darüber, ob sie zustande kommt. Wenn der Delegierte [...] die Verantwortung sucht und nicht den Aufstieg in der Organisation und ihre Privilegien*“ (S. 253 f.).

Urs Boegli, der seit 1998 die Mediendienste des IKRK leitet, analysiert in „Zuschauen verpflichtet. Verpflichtet Zuschauen?“ insbesondere die Problematik humanitärer Intervention durch das Rote Kreuz angesichts einer neuen Qualität kriegerischer Auseinandersetzungen.

„*Die new warriors empfinden keine moralische Pflicht mehr, einer größeren Bevölkerungsgruppe zu einem besseren Leben zu verhelfen. Solche ideologischen Schönheiten gehören der Vergangenheit an.*

Statt dessen haben wir es mit simpler, roher Gewalt zu tun. Davon zeugen, um ein Beispiel zu nennen, die Bilder aus Sierra Leone, wo den Leuten die Hände abgeschnitten werden, damit sie nicht mehr die falsche Seite wählen, wie beim letzten Mal. Der Wunsch ‚Regierung zu werden', hat in vielen neuen Kriegen ausgedient.
Viele dieser neuen Krieger sind reich. Sie haben Zugang zu Ressourcen und Schmuggel. Auf die humanitäre Hilfe sind sie nicht mehr angewiesen. Es macht für sie keinen großen Unterschied, ob sie die Hilfe durchkommen lassen oder nicht. Allenfalls interessiert es sie, unseren Fahrzeugpark zu rauben" (S. 274).

In „Das Fernsehen und die humanitäre Hilfe" befasst sich *Ignatieff* mit den Auswirkungen des Fernsehens auf die humanitäre Intervention, insbesondere mit dem Spannungsverhältnis zwischen Wahrheit und medialer Verzerrung.

„*Die mediale Verzerrung liegt in der Gefühlsbetontheit begründet, denn jede emotionelle Kunst opfert per Definitionem Nuancierung, Ambivalenz und Komplexität zugunsten starker Gefühle. Folglich handelt es sich beim Fernsehen um Kunst, die die Identifikation der Wahrheit vorzieht*" (S. 289).

Den Abschluss des Bandes bildet *Ignatieffs* „Die Ehre des Kriegers II". *Ignatieff* analysiert die Qualität gegenwärtiger kriegerischer Auseinandersetzungen und stellt die entscheidende Frage, ob und inwieweit das Genfer und das Haager Regelwerk sowie das Rote Kreuz für die chaotischen Verhältnisse der Welt nach dem Kalten Krieg noch geeignet sind. *Ignatieff* ist zu klug, um eine direkte Antwort auf diese Frage zu geben.

Er schildert das Dilemma des Roten Kreuzes angesichts des Jugoslawien- und des Afghanistankonflikts und befasst sich mit der Diskussion um den bewaffneten Schutz von Mitarbeitern des Roten Kreuzes, die im Anschluss an den 17. Dezember 1996, als sechs Mitarbeiterinnen und Mitarbeiter des Roten Kreuzes in einem IKRK-Hospital in Novye Atagi nahe Grosny in Tschetschenien im Schlaf von Unbekannten umgebracht wurden, intensiv geführt wurde.

Insgesamt informiert „Krieger ohne Waffen" auf einem überwiegend hohen Niveau über Geschichte und Gegenwart des Roten Kreuzes. Die Zusammenstellung von Beiträgen unterschiedlicher Autoren erlaubt die Beleuchtung eines Problems aus unterschiedlichen Perspektiven. Gleich einem Mosaik ist es dem Leser möglich, sich ein Gesamtbild vom Roten Kreuz zusammenzufügen und fehlende Mosaiksteinchen durch weiterführende Lektüre zu ergänzen. ■

Werner Hoyer/Gerd F. Kaldrack (Hrsg.), Europäische Sicherheits- und Verteidigungspolitik (ESVP): Der Weg zu integrierten europäischen Streitkräften?

Nomos Verlagsgesellschaft, Baden-Baden 2002, 343 Seiten, € 44,–

Sascha Rolf Lüder*

Als Musterfall für eine supranationale Zusammenarbeit gilt die Europäische Union (EU). Im Anschluss an den Zweiten Weltkrieg waren sich die Staaten Westeuropas bewusst, dass sie nur durch einen Zusammenschluss und den zumindest teilweisen Verzicht auf eigene Hoheitsgewalt zu Gunsten einer supranationalen Einrichtung ihre politischen und wirtschaftlichen Aufgaben zukünftig würden erfüllen können. Mit dem am 26. Februar 2001 unterzeichneten Vertrag von Nizza ist die Verwirklichung der Idee von einem politisch vereinten Europa ein weiteres Stück näher gerückt. War die europäische Integration bis weit in die 80er Jahre hinein maßgeblich von der Erfüllung wirtschaftlicher Aufgaben geprägt, so zielt die EU inzwischen zunehmend darauf ab, auch die Kernbereiche staatlicher Souveränität auf europäischer Ebene zu verbinden. Namentlich zählt hierzu die Außen- und Sicherheitspolitik. Ein zusammenwachsendes Europa ohne eine gemeinsame Außen- und Sicherheitspolitik wäre unvollständig und in einem wichtigen Politikfeld kein handlungsfähiger Partner. Nicht zuletzt durch den Kosovokonflikt hat sich unter den Europäern die Überzeugung verstärkt, dass hierzu insbesondere eine gemeinsame Sicherheits- und Verteidigungspolitik mit effizienten Entscheidungsgremien sowie zivilen und militärischen Fähigkeiten unerlässlich ist. Die Notwendigkeit, in Fragen der Sicherheits- und Verteidigungspolitik mit einer Stimme zu sprechen, zeigt sich heute mehr denn je.

Der hier anzuzeigende Sammelband, gemeinsam herausgegeben vom früheren Staatsminister im Auswärtigen Amt *Dr. Werner Hoyer,* MdB, und Oberst a.D. *Gerd F. Kaldrack*, stellt ein umfassendes Kompendium zur Entwicklung einer Europäischen Sicherheits- und Verteidigungspolitik (ESVP) dar. Entsprechend seines Untertitels richtet der Sammelband einen Fokus auf die zunehmende Multinationalisierung der Streitkräfte – ein Bereich, der nicht nur in rechtlicher Hinsicht einer zunehmenden Erörterung bedarf: Multinationalität als politisches Ziel fördert den europäischen Integrationsprozess und stellt die Entschlossenheit der Mitgliedstaaten unter Beweis, glaubwürdig für gemeinsame Sicherheit einzustehen.

Der Sammelband ist in fünf Teile untergliedert: 1. „Sicherheit heute – global und umfassend"; 2. „Europäische Verteidigungspolitik – Das militärische Zusammenwachsen von EU-Staaten"; 3. „Grundlagen und Perspektiven für eine Europäische Sicherheits- und Verteidigungspolitik"; 4. „ Sicherheit im Widerstreit: NATO – EU-Partner"; 5. „Europäische Streitkräftestrukturen der Zukunft"; 6. „Europäische Rüstungszusammenarbeit"; 7. „Ausblick".

Der erste Teil enthält zwei einführende Beiträge des ehemaligen Generalinspekteurs der Bundeswehr und Vorsitzenden des Militärausschusses der Nordatlantikvertrags-Organisation (NATO) General a.D. *Klaus Naumann* sowie des Präsidenten des Bundesnachrichtendienstes *Dr. August Hanning*. General *Naumann* vertritt die Ansicht, dass Sicherheit bereits in Zeiten des Kalten Krieges nie ausschließlich eine militärische Aufgabe gewesen sei. So habe der Harmel-Doktrin der NATO immer eine Doppelstrategie von Dialog und Entspannung einerseits und glaubhafter Verteidigungsfähigkeit andererseits zu Grunde gelegen. Im Angesicht der Globalisierung sei heute ein modernes Verständnis von Sicherheit entstanden, in dem innere und äußere Sicherheit einen untrennbaren Verbund darstellten. Vor allem sei Sicherheit nicht mehr regional begrenzt. In Zukunft müsse Sicherheit ein Politikfeld der EU werden, wolle diese *„nicht politischer Zwerg"* (S. 33) bleiben. Präsident *Dr. Hanning* widmet sich in seinem Beitrag der mit der Globalisierung verbundenen Abkehr von einer *„starren Fixierung auf den Nationalstaat als Exklusivakteur"* (S. 34 f.). Aus umfassender, übergreifender Sicht bedeute Globalisierung die Ausdehnung und Intensivierung der internationalen Beziehungen, verbunden mit der Entstehung eines *„weltweiten Interaktionsraumes"* (S. 36). Wesentliches Element eines zukünftigen Koordinatensystems für sicherheitspolitische Überlegungen werde die Einteilung in *„starke Staaten"* (S. 37) aus dem Bereich der Organisation für wirtschaftliche Zusammenarbeit und Entwicklung und *„schwache Staaten"* (S. 37)

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sein, die von einem Zerfall der Ordnungs- und Machtstrukturen bis hin zur Staatsauflösung gekennzeichnet seien.

Der zweite Teil gibt einen Überblick über den langen Weg von dem rein zwischenstaatlich angelegten Modell einer Europäischen Verteidigungsgemeinschaft (EVG) hin zur Diskussion über integrierte europäische Streitkräfte innerhalb der EVSP. Während der Beitrag *Dr. Dieter Krügers* vom Militärgeschichtlichen Forschungsamt der Bundeswehr die Gründe für das Scheitern der EVG in der Frühzeit des europäischen Einigungsprozesses zusammenfasst, erläutert Generalmajor a.D. *Helmut Neubauer* die Erfahrungen mit militärischer Integration am Beispiel des Eurokorps als einem multinational geführten Großverband. Brigadegeneral *Georg Nachtheims* Beitrag ist der Deutsch-Französischen Brigade als möglichem Strukturmodell für künftige europäische Streitkräfte gewidmet. Generalleutnant *Walter Jertz* fragt nach der Perspektive nationaler Luftstreitkräfte innerhalb der ESVP; ein entsprechender Beitrag bezogen auf die Seestreitkräfte stammt von Vizeadmiral a.D. *Ulrich Weisser*.

Im dritten Teil nimmt *Dr. Johannes Varwick* von der Universität der Bundeswehr Hamburg eine umfassende Analyse der Strukturen der Gemeinsamen Außen- und Sicherheitspolitik (GASP) vor, die der ESVP als Grundlage dient. Eine Einschätzung der heutigen Lage stammt von *Javier Solana*, dem Hohen Vertreter für die Gemeinsame Außen- und Sicherheitspolitik der EU. Die Positionen der im Europäischen Parlament vertretenen Fraktionen zur ESVP werden von *Jannis Sakellariou* (Sozialdemokratische Partei Europas), *Elmar Brok* (Europäische Volkspartei), *Graham R. Watson* (Europäische Liberale, Demokratische und Reformpartei) und *Joost Lagendijk* (Grüne Partei) vorgelegt. Positionsbestimmungen aus deutscher Sicht folgen von *Dr. Walther Stützle*, seinerzeit Staatssekretär des Bundesministeriums der Verteidigung, und *Dr. Wolfgang Gerhardt*, MdB, Vorsitzender der Fraktion der Freien Demokratischen Partei im Deutschen Bundestag.

Die Schaffung integrierter europäischer Streitkräfte wird das transatlantische Verhältnis grundlegend neu definieren. Die im vierten Teil hierzu enthaltenen Artikel stammen vom italienischen Außenminister *Lamberto Dini* und vom NATO-Generalsekretär Lord *Robertson*. Die Bedeutung der ESVP speziell für die Vereinigten Staaten von Amerika beleuchtet *Dr. Karen Donfried*, Generaldirektorin beim German Marshall Fund. Den Wandel des sicherheitspolitischen Status' Österreichs und seine Auswirkungen auf eine Teilnahme Österreichs an der ESVP skizziert Außenministerin *Dr. Benita Ferrero-Waldner*. Ihre Amtskollegin *Kristiina Ojuland* und Verteidigungsminister *Dr. Janusz Onyszkiewicz* erläutern die Positionen der Kandidatenstaaten Estland und Polen.

Der fünfte Teil behandelt verschiedene Fragekomplexe, die sich bei der Diskussion künftiger europäischer Streitkräftestrukturen neben den schon behandelten stellen. Während Generalleutnant a. D. *Jürgen Schnell* sich der ökonomischen Perspektive Europas sowie möglichen Effizienz- und Rationalisierungsgewinnen durch europäische Streitkräfte widmet, nimmt der erste Generaldirektor des Militärstabes der EU, Generalleutnant *Rainer Schuwirth,* in Bezug auf den innerhalb der nationalen Streitkräfteanteile erforderlichen Umstrukturierungsprozess Stellung. Der Vorsitzende des Deutschen Bundeswehr-Verbandes Oberst *Bernhard Gertz* fragt nach der Wahrung sozialer Belange bei der Schaffung europäischer Streitkräfte. Seine Ausführungen werden ergänzt durch einen Diskussionsbeitrag von *Andreas Prüfert*, seinerzeit Geschäftsführer der Karl-Theodor-Molinari-Stiftung, hinsichtlich einer gemeinsamen europäischen Führungsphilosophie.

Der sechste Teil beinhaltet Beiträge zur europäischen Rüstungszusammenarbeit. Im Anschluss an eine von Professor *Margarita Mathiopoulos*, Gründerin des Potsdam Center for Transatlantic Security and Military Affairs, vorgenommene Einführung widmen sich Generalmajor a. D. *Andries Schlieper*, *Thomas Enders* von der European Aeronautic Defence and Space Company, *Joachim Rohde* von der Stiftung Wissenschaft und Politik sowie Generalmajor a.D. *Hartmut Schmidt-Petri* einem weiteren Aspekt bei der Integration europäischer Streitkräfte – vom Rüstungsmarkt in Europa bis hin zu einer gemeinsamen Logistik für zukünftige europäische Streitkräfte.

Im siebten Teil des Sammelbandes finden sich drei gleichsam zusammenfassende und ausblickende Beiträge. Zunächst erläutert *Patrick Cox*, Präsident des Europäischen Parlamentes, den gestiegenen Einfluss des EP bei außen- und sicherheitspolitischen Fragestellungen innerhalb der EU. Dennoch liege die primäre Verantwortung hierfür weiterhin beim Rat der Europäischen Union. *Patrick Cox* unterstreicht in diesem Zusammenhang die Notwendigkeit einer wirksameren parlamentarischen Kontrolle. Der frühere deutsche Außenminister *Hans-Dietrich Genscher* stellt fest, dass es auch im Bereich der ESVP um nichts anderes gehe, als um die Übernahme von Verantwortung für die Zukunft in der Gestalt einer Politik, welche der Einmaligkeit und Unverwechselbarkeit jedes Einzelnen gerecht werde. Eine solche Ordnung bedürfe der Absicherung. Die veränderten sicherheitspolitischen Rahmenbedingungen hätten fundamentale Auswirkungen auf den Auftrag europäischer Streitkräfte. Die Bündelung der Kapazitäten sowie die Integration in multinationale Strukturen sei dabei ein Gebot, das sich aus wirtschaftlichen Gründen ergebe: Sie entspreche der Logik des europäischen Integrationsprozesses. Zugleich mahnt *Genscher* an, dass neben der militärischen Komponente auch andere globale Herausforderungen wie z.B. der Kampf gegen Hunger und Armut sowie der Schutz der natürlichen Lebensgrundlagen nicht vernachlässigt werden dürften. Gleichermaßen fordert er von der EU eine stärkere außen- und sicherheitspolitische Handlungs- und konzeptionelle Gestaltungsfähigkeit. Gemeinsam mit seinem Büroleiter *Frank Schuster* betrachtet Staatsminister a.D. *Dr. Hoyer* abschließend Rahmenbedingungen und Erwartungen an eine zukünftige europäische Außen- und Sicherheitspolitik. Demokratische Legitimation, Transparenz und Handlungsfähigkeit gehören für sie zu den Leitlinien für GASP und ESVP. Im Vordergrund ihres Plädoyers steht zusammenfassend die politische Forderung nach Überwindung mitgliedstaatlicher Egoismen, verbunden mit einer echten Stärkung der EU und ihrer Organe, insbesondere von EP und Europäischer Kommission.

45 Jahre nach dem Scheitern der EVG ist der Einstieg in die ESVP gelungen. Mit den Beschlüssen von Nizza sind die Voraussetzungen geschaffen worden, dass die EU ihrer Verantwortung für Stabilität in und um Europa gerecht werden kann. Zwar steht die Errichtung einer „europäischen Armee" bislang noch nicht auf der Tagesordnung. Allerdings wird zunehmend deutlich, dass die EU neben einer gemeinsamen Verfassung und einer gemeinsamen Währung auch europäischer Streitkräfte bedarf. Aus der Bereitschaft der Mitgliedstaaten zu internationalem Engagement wächst die erforderliche außen- und sicherheitspolitische Handlungsfähigkeit auch auf Ebene der EU, um auf internationale Entwicklungen entscheidenden Einfluss nehmen und eine maßgebliche Rolle bei der Wahrung von Frieden und internationaler Sicherheit spielen zu können. Der von Staatsminister *Dr. Hoyer* und Oberst *Kaldrack* herausgegebene Sammelband leistet für die in den Mitgliedstaaten notwendige Diskussion hierüber einen unverzichtbaren Beitrag. ■

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Der NATO-Einsatz gegen die Vertreibung der Kosovaren hatte noch nicht begonnen, aber er wurde vorausgesehen. Zum Zeitpunkt der Publikation der Vorträge hat die Welt als neuartige Erfahrung den Kosovo-Konflikt erlebt. Deutlicher konnte der Beweis nicht erbracht werden, daß anerkannte und durchsetzbare Regeln des Völkerrechts für die Erhaltung von Frieden und Menschlichkeit unverzichtbar sind.

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Frankfurt/Main, May 28–30, 1999

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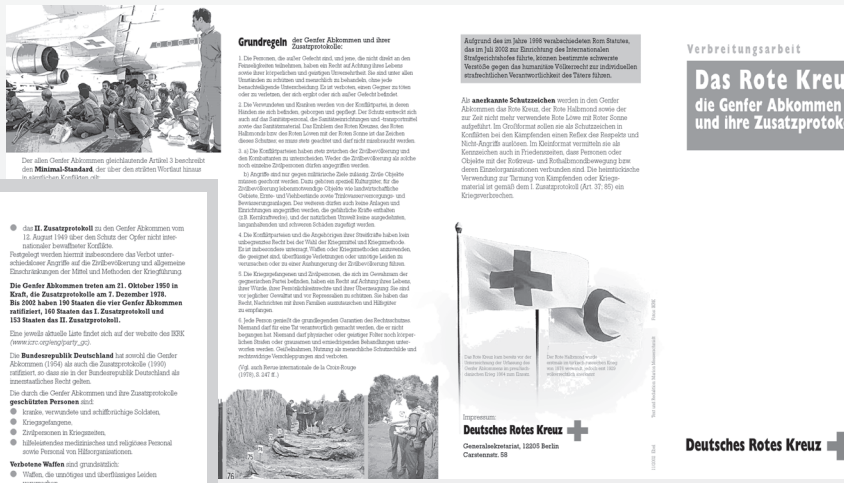

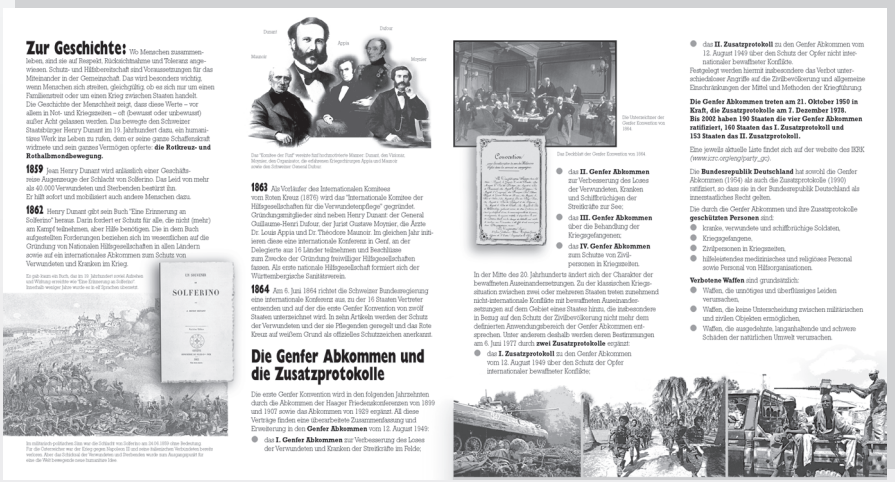

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