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Studien zu Grund- und Menschenrechten

Mit dieser Reihe (ISSN: 1435-9154) hat das MenschenRechts-Zentrum der Universität Potsdam (MRZ) ein Forum für Forschungsarbeiten eröffnet, die sich mit Fragen des internationalen, regionalen und nationalen Menschenrechtsschutzes befassen. Die Studien nehmen Arbeiten, die im MRZ selbst entstanden sind, und Gastvorträge, die an der Universität Potsdam gehalten wurden, auf. In Einzelfällen steht die Reihe auch externen Arbeiten offen.

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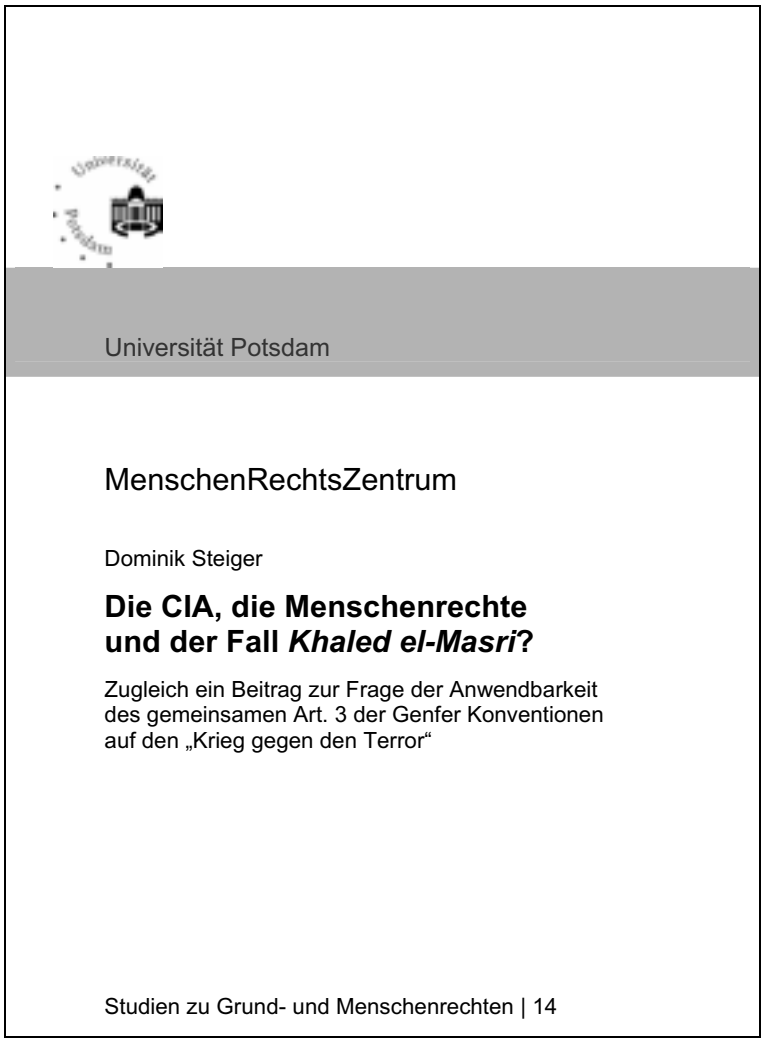

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Editorial

Die aktuelle Ausgabe der *Humanitäres Völkerrecht – Informationsschriften* steht im Zeichen der 17. Tagung der Rechtsberater und Rechtslehrer der Bundeswehr, der Juristen und der Konventionsbeauftragten des Deutschen Roten Kreuzes in Zusammenarbeit mit dem IFHV. Die Referenten und Teilnehmer der Tagung befassten sich in diesem Jahr mit dem Krieg im Libanon und sprachen dabei sowohl über seine völkerrechtlichen Aspekte als auch über die Erfahrungen, die Bundeswehr und Rotes Kreuz im Rahmen dieses Konfliktes machten. Ein Konferenzbeitrag, der die Beiträge der Tagung kurz zusammenfasst, bietet dem Leser die Möglichkeit, sich einen ersten Überblick über die Tagung zu verschaffen. Die Ausgabe enthält zudem Beiträge von zwei Referenten der Tagung. Zunächst berichtet *Alfred Hasenöhrl* – Leiter des DRK Regionalbüros für den Nahen Osten in Amman/Jordanien – im Verbreitungsteil der Ausgabe über Aktivitäten und Herausforderungen der Rotkreuzbewegung im Libanonkonflikt. Dabei beschreibt er zum einen sowohl die Operationen des Libanesischen Roten Kreuzes, als auch die des IKRK, der Internationalen Föderation und anderer nationaler Rotkreuz- und Rothalbmondgesellschaften wie des Deutschen Roten Kreuzes. Zum anderen bewertet er deren Effizienz und skizziert die Herausforderungen, denen sich die humanitären Helfer gegenüber sahen. Es folgt ein Beitrag von *Dr. Dieter Weingärtner* – Leiter der Rechtsabteilung des Bundesministeriums der Verteidigung – über die politischen und rechtlichen Aspekte des UNIFIL-Einsatzes der deutschen Bundeswehr. Nachdem er an die politischen Diskussionen um die Beteiligung der Bundeswehr an UNIFIL erinnert hat, greift er im Folgenden einige Rechtsfragen auf, die auch für andere Auslandseinsätze der Bundeswehr relevant werden können. *Theodora Christodoulidou* und *Kalliopi Chainoglou* widmen sich in ihrem Beitrag einer Fragestellung, die auch für die völkerrechtliche Bewertung des Libanon-Konflikts von großer Bedeutung ist: Dem Verhältnismäßigkeitsprinzip in Selbstverteidigung und humanitärer Intervention. Von der Feststellung ausgehend, dass das Verhältnismäßigkeitsprinzip im *jus ad bellum* ein eher vernachlässigtes Themengebiet ist, obwohl es für die Rechtmäßigkeit der Anwendung von Gewalt entscheidend ist, untersuchen die beiden Autorinnen Bedeutung und Anwendung des Verhältnismäßigkeitsprinzips in der Ausübung des Rechts auf Selbstverteidigung gegen Terrorismus und die Proliferation von Massenvernichtungswaffen und in der humanitären Intervention.

Die beiden anderen Beiträge in der Rubrik „Das Thema“ befassen sich mit Fragen des Menschenrechtsschutzes. Anfangs beschreiben Dr. *Peter Rackow* und *Ignaz Stegmiller* die Möglichkeiten und Grenzen von „intelligenten Sanktionen“ zur Terrorbekämpfung und analysieren die Rechtsprechung des EuG in den Fällen Yusuf, Kadi, Ayadi und Hassan. Im Anschluss geht *Jean-Pascal Obembo* der Frage nach, inwieweit der neu gegründete Menschenrechtsrat der Vereinten Nationen die Fehler der Menschenrechtskommission wiederholt oder ob er das Potential hat, zufriedenstellendere Ergebnisse zu erzielen als die alte Kommission.

Anna Sabasteanski setzt sich in ihrem Beitrag mit einer grundlegend anderen Fragestellung, nämlich mit der Geschichte und der derzeitigen Lage nuklearer Risiken und der Art und Weise, wie diese der Öffentlichkeit vorenthalten wurden, auseinander. Abschließend beschreibt sie aufkommende Risiken, die eine informierte öffentliche Diskussion notwendig machen, um einer erneuten Gefahr nuklearer Ausbreitung zu begegnen.

In einer aktuellen Fallstudie präsentiert *Jan Wiethoff* gefahrenabwehrrechtliche Maßnahmen zur Terrorbekämpfung und zeigt anhand dreier Szenarien (Luftsicherheit, Videoüberwachung und Rasterfahndung) das Spannungsfeld zwischen einer effektiven Gefahrenabwehr und den verfassungsrechtlichen Vorgaben des Grundgesetzes auf.

Nach einem Konferenzbericht über die „United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights“ folgen in gewohnter Weise eine Anzahl an Buchbesprechungen.

Mit dem Hinweis, dass alle Beiträge in dieser Ausgabe allein die Meinungen der Autoren und nicht notwendigerweise die der Redaktion wiedergeben, bleibt uns nur noch, Ihnen viel Vergnügen bei der Lektüre dieser Ausgabe zu wünschen.

Die Redaktion

„Intelligente Sanktionen“ zur Terrorbekämpfung – Yusuf, Kadi, Ayadi und Hassan vor dem EuG

Peter Rackow und Ignaz Stegmiller*

One of the main aims of the United Nations is to combat the financial basis of terrorism. Since the 1990s the general tendency drifts towards so-called “smart sanctions” which are directed against a narrow group of addresses – sometimes even individuals! – as opposed to the traditional UN sanctions which address states. Such a framework for sanctions brings about complex questions regarding International and European Criminal Law which the ECJ of First Instance had to deal with most recently. Based on Council Regulation (EC) No 881/2002 dated 27.05.2002 funds had been frozen and the parties involved claimed nullity of this regulation. Worth mentioning is that the regulation of interest here rests upon Security Council Resolutions 1267 and 1333 whose guidelines were implemented into European Law by Council Common Decision 2002/402/CFSP dated 27.5.2002 and the relevant Regulation 881/2002. The action of the plaintiffs was dismissed in first instance and the appeal is pending before the ECJ. Notwithstanding, a debate on the decisions of the ECJ of First Instance is rightly under way since the problems arising out of this topic are too grave to leave the judgements without a commentary. Therefore, the authors deal with the decisions of the ECJ and make us aware of their thoughts about it.

Eines der Hauptziele der Vereinten Nationen ist der Kampf gegen die Finanzierungsgrundlage des Terrorismus. Seit den Neunziger Jahren werden anstelle von herkömmlichen, gegen Staaten gezielte Sanktionen, verstärkt „intelligente Sanktionen“ verhängt, die sich gegen einen eng definierten Personenkreis – in manchen Fällen sogar gegen einzelne Personen – richten. Ein solches Sanktionsregime wirft komplexe Fragen an das internationale und europäische Strafrecht auf, mit denen sich auch der Europäische Gerichtshof jüngst erstinstanzlich befassen musste. Nachdem auf Grundlage von EG-Verordnung 881/2002 vom 27.05.2002 Finanzmittel eingefroren worden waren, machten die Kläger den Einwand der Nichtigkeit geltend. Beachtenswert ist dabei, dass diese Verordnung auf den Sicherheitsratsresolutionen 1267 und 1333 beruht, deren Richtlinien durch den Gemeinsamen Standpunkt 2002/402/GASP vom 27.05.2002 und Verordnung 881/2002 in das europäische Recht implementiert wurden. Die Klage wurde erstinstanzlich abgewiesen; die Berufung zum EuGH ist anhängig. Gleichwohl wird über die erstinstanzlichen Entscheidungen des EuG zu Recht diskutiert, da die aus ihnen resultierenden Probleme zu schwerwiegend sind, um sie unkommentiert zu lassen. Aus diesem Grund befassen sich die Autoren mit den Entscheidungen des EuG und legen ihre Sichtweise dar.

Die internationale Staatengemeinschaft sieht sich seit dem 11. September 2001 und den schweren Anschlägen von Madrid (11. März 2004) und London (7. Juli 2005), einer in dieser Form nie da gewesenen terroristischen Bedrohung ausgesetzt. Terrorwarnungen wie in Großbritannien am 10. August 2006, wo eine Anschlagsserie auf interkontinentale Flüge in die USA gerade noch vereitelt werden konnte[1], oder die geplanten Kofferbombenattentate in Regionalzügen in Dortmund und Koblenz am 31. Juli 2006, gehören beinahe schon zur Tagesordnung. Die Frage, wie die internationale Gemeinschaft all dem entgegentritt, stellt eine vorrangige rechtspolitische und juristische Herausforderung des 21. Jahrhunderts dar. Offensichtlich geht es hierbei im Kern darum, die Balance zu finden zwischen dem Erfordernis effektiver Terrorismusbekämpfung und der Wahrung der Grund- und Menschenrechte des Einzelnen. Verkompliziert wird diese an sich durch die Gesetzgebung und Rechtsanwendung auf nationaler Ebene zu bewältigende Aufgabe durch die internationale Dimension des Terrors – und diejenige seiner Bekämpfung. Die folgenden Ausführungen werden sich denn auch weniger der Terrorismusbekämpfung auf nationaler Ebene widmen, vielmehr stehen diejenigen völker- und europarechtlichen Aspekte und Fragestellungen im Zentrum, welche die im Herbst 2005 und im Sommer vergangenen Jahres durch das EuG entschiedenen Fälle *Yusuf*, *Kadi*, *Ayadi* und *Hassan* berühren. Internationale Terrorismusbekämpfung stellt fürwahr eine komplexe Querschnittsmaterie dar, die auf sämtlichen betroffenen Ebenen schwierige Rechtsprobleme aufwirft. Ein Schwerpunkt[2] der Antiterror-Maßnahmen auf der Ebene der Vereinten Nationen liegt im Bereich der Zerstörung der finanziellen Grundlagen des Terrorismus. Schon seit Anfang der 1990er Jahre lässt sich in der internationalen Sanktionspraxis hierbei nun ein Trend zu so genannten „intelligenten Sanktionen“ („smart sanctions“) beobachten, die sich dadurch auszeichnen, dass es sich um Maßnahmen nicht gegen ganze Staaten, sondern um solche

* Die Verfasser sind wissenschaftliche Mitarbeiter am Lehrstuhl von Prof. Dr. *Kai Ambos*, Ordinarius für Strafrecht, Strafprozessrecht, Rechtsvergleichung und internationales Strafrecht und Leiter der Abteilung ausländisches und internationales Strafrecht der juristischen Fakultät der Georg August Universität Göttingen.

1 „Britische Polizei vereitelt Terroranschläge; Verdächtige wollten offenbar Passagierjets im Flug sprengen / Verschärfte Sicherheitsvorkehrungen verursachen Chaos auf den Airports“, 11. August 2006, Frankfurter Rundschau, 2 f.; Alarmstufe Rot; „Wachsende Besorgnis in den USA“, 11. August 2006, Süddeutsche Zeitung, 2.

2 Weitere Schwerpunkte zur weltweiten Bekämpfung des Terrorismus sind (1.) Den Zugang zu Waffen, insbesondere Massenvernichtungswaffen, zu verhindern; (2.) Die Nutzung des Internets durch Terroristen verhindern, um ihnen den Zugang zu Rekrutierungs- und Kommunikationsmöglichkeiten zu entziehen; (3.) Terroristen den Zugang zu Reisemöglichkeiten entziehen; (4) Terroristen den Zugang zu ihren Zielen verwehren und verhindern, dass ihre Anschläge die gewollte Wirkung erzielen. Vgl. Bericht des Generalsekretärs, „Vereint gegen den Terrorismus: Empfehlungen für eine weltweite Strategie zur Bekämpfung des Terrorismus“, 27. April 2006, A/60/825.

gegen einen eingeengten Adressatenkreis – neuerdings sogar gegen einzelne Personen! – handelt[3]. Im Zusammenhang mit derartigen Sanktionen ergeben sich jedoch rechtliche Folgeprobleme, die hier beispielhaft an den Sicherheitsratsresolutionen [hiernach: Res.] 1267[4], bzw. Res. 1333 aufgezeigt werden. Konkret zielen diese Instrumente auf das Einfrieren von Geldern von Personen und Organisationen ab, die mit *Osama bin Laden*, Al-Qaida und den Taliban in Verbindung stehen. Diese Maßnahmen waren vom Sicherheitsrat im Grundsatz beschlossen und von dessen Sanktionsausschuss auf bestimmte Personen und Organisationen in Form von Namenslisten konkretisiert worden. EG/EU-Kommission und Rat haben diese Beschlüsse des Sicherheitsrats in der Folgezeit umgesetzt, und zwar durch den Gemeinsamen Standpunkt 2002/402/GASP des Rates v. 27.5.2002 „betreffend restriktive Maßnahmen gegen *Osama bin Laden*, Mitglieder der Al-Qaida-Organisation und die Taliban sowie andere mit ihnen verbündete Personen, Gruppen, Unternehmen und Einrichtungen“[5] und durch die Verordnung (EG) Nr. 881/2002 des Rates v. 27.5.2002, welche „die Anwendung bestimmter spezifischer restriktiver Maßnahmen gegen bestimmte Personen und Organisationen, die mit *Osama bin Laden*, dem Al-Qaida-Netzwerk und den Taliban in Verbindung stehen“ festlegt[6]. Die Umsetzung völkerrechtlich begründeter „smart sanctions“ durch die EU/EG und auf der Ebene der Mitgliedsstaaten der Gemeinschaft wurde nun in den Urteilen *Yusuf*[7], *Kadi*[8], *Ayadi*[9] und *Hassan*[10] vor dem EuG thematisiert, und wird Literatur und Praxis auch in Zukunft weiter beschäftigen. In all diesen Fällen waren Gelder eingefroren worden und die hiervon betroffenen *Yusuf*, *Kadi*, *Ayadi* und *Hassan* beantragten daraufhin, die als Sekundärrecht in den Mitgliedsstaaten unmittelbar geltende EG-VO 881/2002, die der Umsetzung der genannten UN-Sicherheitsratsbeschlüsse dient, gemäß Art. 230 Abs. 4 EGV für nichtig zu erklären. Das EuG wies die Klagebegehren indes in allen vier Verfahren ab, in den ersten beiden (*Yusuf* und *Kadi*) zeitgleich am 21. September 2005 mit identischem Argumentationsmuster. Die Entscheidungen *Hassan* und *Ayadi* ergingen am 12. Juli 2006 und folgen argumentativ weitestgehend *Yusuf* und *Kadi*[11]. Rechtsmittel zum EuGH sind inzwischen eingelegt, Berufungsverfahren momentan noch in allen Fällen anhängig und eine Entscheidung des EuGH darf mit Spannung erwartet werden. Die kritische Erörterung der EuG-Rechtsprechung im Schrifttum ist gleichwohl im Gange; die angeschnittene Sachproblematik ist indes von grundlegender Bedeutung und ihre Behandlung durch das EuG zu problematisch, als dass man der europäischen Gerichtsbarkeit unwidersprochen ihren Lauf lassen könnte!

1. „Smart sanctions“ und das Völkerrecht

1.1. Zur „Individualisierung“ völkerrechtlicher Sanktionsregimes

Bevor hier nun allerdings auf die Urteile und die europarechtliche Problematik im Einzelnen eingegangen wird, muss zunächst die neuartige Stellung des Individuums im Völkerrecht beleuchtet werden. Die Entwicklung, dass sich Maßnahmen des Sicherheitsrates direkt gegen Einzelpersonen und Organisationen richten, steht im krassen Gegensatz zum klassischen Sanktionsregime, welches sich allein gegen Staaten richtete. Vor 1945 wurde Völkerrecht weitestgehend als Ordnungsregularium zwischen Staaten verstanden[12]. Nach 1945 kam es zu einem schleichenden Paradigmenwechsel, wurde doch das Individuum als Akteur im Völkerrecht zunehmend anerkannt[13]. Vor allem die Charta der Vereinten Nationen erhob den Schutz der Menschenrechte zu einem ihrer wesentlichen Ziele und sorgte damit für eine stärkere Stellung des Einzelnen im Völkerrecht. Neben dem Schutz der Menschenrechte kristallisierte sich aber auch die individuelle völkerstrafrechtliche Verantwortlichkeit (individual criminal responsibility) des Individuums heraus, so bezeichnet *Ambos* die völkerstrafrechtliche Entwicklung von Nürnberg bis Den Haag als „die Geschichte der völkerrechtlichen Subjektwerdung des einzelnen“[14]. Ob Individuen aber unmittelbar durch eine Resolution (oder mittelbar durch Listungen eines Sanktionsausschusses, dazu vgl. unten) mit Sanktionen belegt werden können ist dadurch nicht zwangsläufig gesagt.

Wenden wir uns nun den „intelligenten Sanktionen“ an sich zu, so sind zuallererst deren Begriff und Entstehung zu klären. Was ist eine „intelligente“ Sanktion? Diese Sanktionen werden deshalb als „intelligent“ bezeichnet, weil sie zielgerichteter und effizienter als herkömmliche Sanktionen eingesetzt werden können[15]. Sie werden deshalb auch syno-

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[3] *S. Bartelt/ H.-E. Zeitler*, Intelligente Sanktionen zur Terrorismusbekämpfung in der EU, EuZW 23 (2003), S. 712; *S. Albin*, Kein Rechtsschutz bei Individualsanktionen zur Terrorbekämpfung, unter: http://www.boell.de/downloads/silke_albin_Rechtsschutz_Papier.pdf (am 7. März 2007). Zahlreiche Beiträge zu den „Intelligenten Sanktionen“ finden sich auch unter <http://www.smartsanctions.ch>.

[4] Vgl. SR-Res. 1267 sowie deren Aktualisierungen SR-Res. 1333, 1363, 1388, 1390, 1452, 1455, 1456, 1526, 1617, 1699. Abrufbar unter: <http://www.un.org/Docs/sc/committees/1267/1267ResEng.htm>.

[5] ABl. EG L 139 v. 29.5.2002, 4. Eingehend zur Terrorismusbekämpfung auf EU-Ebene *K. Ambos*, Internationales Strafrecht, München 2006, § 12, Rn. 11 ff; *E. v. Bubnoff*, Terrorismusbekämpfung – Eine weltweite Herausforderung, NJW 2002, S. 2672 ff.

[6] ABl. EG L 139 v. 29.52.2002, 10. Die VO 881/2002 wurde bis zum 8. März 2007 vierundsiebzig mal geändert, momentan aktuelle Fassung ist 14/2007, Abl. EG L 6/6 v. 10.1.2007. Instruktioneller Überblick über das europäische Blacklisting-System, *K. Ambos*, a.a.O. (Fn. 5), § 12, Rn. 12 ff.

[7] *EuG*, Urt. v. 21.9.2005 – T-306/01 *Ahmed Ali Yusuf* & Al Barakaat International Foundation ./. Rat und Kommission. [hiernach: Yusuf].

[8] *EuG*, Urt. v. 21.9.2005 – T-315/01 *Yassin Abdullah Kadi* ./. Rat und Kommission. [hiernach: Kadi].

[9] *EuG*, Urt. v. 12.7.2006 – T-253/02 *Chafiq Ayadi* ./. Rat und Kommission. [hiernach: Ayadi].

[10] *EuG*, Urt. v. 12.7.2006 – T-49/04 *Fraj Hassan* ./. Rat und Kommission. [hiernach: Hassan].

[11] So nimmt das Gericht in *Ayadi* stets Bezug auf die Urteile *Yusuf* und *Kadi* (vgl z. B. para. 87, 101, 140, etc.). Aus diesem Grund werden nachfolgend ausschließlich die Urteile *Yusuf* und *Kadi* zitiert, *Hassan* und *Ayadi* brachten *in der Sache* nichts Neues.

[12] *S. Albin*, a.a.O. (Fn. 3); *S. Hobe*, in: *P. Hofmann* (Hrsg.), Non-state Actors as New Subjects of International Law, Berlin 1999, S. 118 f.

[13] *S. Bartelt/ H.-E. Zeitler,* a.a.O. (Fn. 3), S. 712; *S. Albin*, a.a.O. (Fn. 3); *Hobe*, a.a.O. (Fn. 12), S. 119 ff.; zur Frage der Völkerrechtssubjektivität des Individuums mit zahlreichen Nachweisen zu den verschiedenen Auffassungen vgl. *K. Doehring*, Völkerrecht, 2. Auflage, Heidelberg 2004, § 2, Rn. 245.

[14] *K. Ambos*, a.a. O. (Fn. 5), § 7, Rn. 10.

[15] Vgl. <http://www.smartsanctions.ch>.

nym als „gezielte“ (targeted) Sanktionen bezeichnet. Diese zielgerichteten Maßnahmen richten sich gegen Individuen, Unternehmen oder Organisationen unter Einsatz von wirtschaftlichen und/oder anderen Maßnahmen ohne den Einsatz militärischer Mittel. Folgende Instrumentarien setzt der Sicherheitsrat dabei ein: Finanzielle Sanktionen (Einfrieren von Fonds und anderen Geldanlagen, Unterbindung von Transaktionen, Erschwerung von Investments); Unterbindung des Handels mit bestimmten Gütern (beispielsweise Waffen, Diamanten, Öl, Holz) oder bestimmten Dienstleistungen; Reiseverbote; Einschränkungen der diplomatischen Beziehungen; Beschränkungen bei Kultur- und Sportveranstaltungen; Beschränkungen des Luftverkehrs[16].

Seit Ende des 20. Jahrhunderts versuchte man Sanktionen gezielter einzusetzen, damit sie optimale Wirkung erzielen. Um diese Entwicklung voranzutreiben setzte der Sicherheitsrat am 17. April 2000 eine Arbeitsgruppe ein; diese sollte die Effektivität von UN-Sanktionen verbessern[17]. Durch den Interlaken Prozess[18], den anschließenden Bonn/Berlin Prozess[19] und als dritten Schritt den Stockholm Prozess[20] wurden „guidelines“ erarbeitet und die Umsetzung der Sanktionen zunehmend konkretisiert.

Äußerst wichtig ist bei der vorliegenden Materie eine Differenzierung zwischen Sanktionen, die sich noch gegen Staaten richten – so richtete sich die ursprüngliche Resolution 1267 gegen den Staat Afghanistan – und solchen, die sich direkt gegen Individuen richten. Durch SR-Res. 1333 erweiterte der Sicherheitsrat die in Res. 1267 verhängten Sanktionen auf die Vermögensgüter *Osama bin Ladens* sowie Personen, juristischen Personen und Mitglieder der Al-Qaida (Abs. 5, 8, 10 & 11), wodurch mit *Osama bin Laden* zum ersten Mal in der Geschichte des Völkerrechts eine natürliche Person unmittelbar mit Sanktionen gemäß Kap. VII UN Charta belegt wurde. In Res. 1390 beschloss der Sicherheitsrat die vorherigen Fassungen der Res. 1267 und 1333 erneut auszuweiten, indem auf eine offene Liste Personen und Institutionen gesetzt werden können, die dann entsprechend Sanktionen zu erwarten haben.

Von zentraler Bedeutung sind deshalb die Listungen, die durch einen Sanktionsausschuss („Sanctions Committee“) als Unterorgan des Sicherheitsrates (Art. 29 UN Charta) als Folge einer „smart sanction“ festgelegt werden. In diesen Listen werden die Personen und Vereinigungen bestimmt, gegen die sich letztlich die konkreten Maßnahmen richten, denn die UN-Mitgliedstaaten haben diese Liste jeweils in ihre nationale Rechtsordnung umzusetzen und in ihre Behördenabläufe zu integrieren[21]. In Deutschland erfolgt dies durch Änderung der Außenwirtschaftverordnung[22]. Zurzeit gibt es zehn aktive Sanktionsausschüsse des Sicherheitsrates[23]; einer davon – der sog. 1267-Ausschuss[24] – ist zuständig für das Einfrieren von Vermögensgütern von Personen und Vereinigungen, die mit den Taliban oder mit Al-Qaida verbunden sind. Dieser Ausschuss setzt sich aus allen 15 Mitgliedern des Sicherheitsrates zusammen (para. 2 (a) der Leitlinien) und stellt auf der Basis von Informationen der Vertragsstaaten eine Liste von Einzelpersonen und Vereinigungen auf (para. 6 der Leitlinien). Die Listen werden regelmäßig überprüft und aktualisiert (para. 7 der Leitlinien)[25]. Die aktuelle Liste vom 12. Dezember 2006 enthält 142 Einzelpersonen und eine Vereinigung, die mit den Taliban assoziiert werden, sowie 221 Einzelpersonen und 126 Vereinigungen, die mit Al-Qaida assoziiert werden[26].

1.2. Zur völkerrechtlichen Rechtsgrundlage intelligenter Sanktionen

Problematisch erscheint die völkerrechtliche Rechtsgrundlage für derartige Sanktionen gegen Individuen. Denn es wird durch die Vereinten Nationen ein Instrumentarium, welches an sich auf von Staaten ausgehende Bedrohungen des Friedens zugeschnitten ist, nunmehr gegen nichtstaatliche (terroristische) Bedrohungen gerichtet. Die Frage nach der

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16 “Targeted sanctions are intended to be directed at individuals, companies and organizations, or restrict trade with key commodities. The following instruments can be applied: Financial sanctions (freezing of funds and other financial assets, ban on transactions, investment restrictions); Trade restrictions on particular goods (e.g. arms, diamonds, oil, lumber) or services; Travel restrictions; Diplomatic constraints; Cultural and sports restrictions; Air traffic restrictions”, vgl. <http://www.smartsanctions.ch>.

17 “Note by the President of the Security Council”, S/2005/841, vgl. <http://www.un.org/Docs/sc/committees/sanctions/index.html>. Einen Überblick über die wichtigsten erarbeiteten Dokumente bietet: <http://www.un.org/Docs/sc/committees/sanctions/initiatives.htm>.

18 <http://www.smartsanctions.ch>.

19 <http://www.bicc.de/events/unsanc/>.

20 <http://www.smartsanctions.se/>.

21 Vgl. „Guidance for reports required of all States pursuant to paragraphs 6 and 12 of Resolution 1455“ <http://www.un.org/Docs/sc/committees/1267/guidanc_en.pdf>. Dort wird in Abschnitt II. 2 die Frage aufgeworfen, in welcher Art und Weise die Mitgliedsstaaten die Liste in nationales Recht umgesetzt haben. Die Pflicht zur Umsetzung wiederum ergibt sich aus Art. 25 und 48 UN Charta. Zwar ist die „Consolidated List“ ein dynamisches Annex zu den jeweiligen Resolutionen, sie entsteht aber durch den Sicherheitsrat bzw. dessen Unterorgan. Somit müssen Mitgliedsstaaten diesen *Beschluss* annehmen und durchführen. Vgl. insofern auch Res. 1617 (2005), wo in para. 1 auf die Liste verwiesen wird: “*Decides* that all States shall take the measures as previously imposed by paragraph 4 (b) of resolution 1267 (1999), paragraph 8 (c) of resolution 1333 (2000), and paragraphs 1 and 2 of resolution 1390 (2002) with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) (the “Consolidated List”):” Die Staaten müssen sich also direkt an dieser Liste orientieren und innerstaatliche Maßnahmen gegen die aufgeführten Personen ergreifen.

22 Siehe das Außenwirtschaftsgesetz (AWG) vom 28.4.1961 (BGBl. 1961, 481, 495, 1555) und die Außenwirtschaftverordnung (AWV) vom 18.12.1961 (BGBl. 1986, 2671). Die AWV setzt in § 69 d Beschränkungen aufgrund der Res. 1390 und 1373 um.

23 Sanktionsausschüsse gem. SR-Res. 751 (1992) – Somalia, SR-Res. 918 (1994) – Ruanda, SR-Res. 1132 (1997) – Sierra Leone, SR-Res. 1267 (1999) – Al-Qaida/Taliban, SR-Res. 1518 (2003) – Irak, SR-Res. 1521 (2003) – Liberia, SR-Res. 1533 (2004) – Demokratische Republik Kongo, SR-Res. 1572 (2004) – Elfenbeinküste, SR-Res. 1591 (2005) – Sudan, SR-Res. 1663 (2005) – Libanon/Hariri-Mord. Vgl. <http://www.un.org/Docs/sc/committees/INTRO.htm>.

24 <http://www.un.org/Docs/sc/committees/1267Template.htm>; seine Leitlinien finden sich unter: <http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf>.

25 Vgl. auch para. 5 der SR-Res. 1390. Mit SR-Res. 1363 wurde ferner ein „Monitoring-Komitee“ eingesetzt, welches die Umsetzung der Maßnahmen, die auf SR-Res. 1267 und 1333 beruhen, überwacht.

26 Vgl. <http://www.un.org/Docs/sc/committees/1267/pdflist.pdf>. Am Ende dieser Liste finden sich Namen und Vereinigungen die von der Liste genommen wurden.

völkerrechtlichen Basis der „targeted sanctions“ stellt sich vor diesem Hintergrund umso drängender, wenn man bedenkt, dass die Staatengemeinschaft von einer gemeinsamen Definition des Phänomens, welches auf völkerrechtlicher Grundlage bekämpft werden soll, noch immer weit entfernt ist. Nur dann also, wenn die Normen der UN Charta den intelligenten Sanktionsregimes eine tragfähige Grundlage geben, lässt sich das Bedenken ausräumen, dass der fehlende internationale Konsens über eine einheitliche Terrorismusdefinition[27] dadurch überspielt werden soll, dass der Sicherheitsrat letztlich für Zwecke der Terrorismusbekämpfung auf Kap. VII der UN Charta zurückgreift[28], bzw. speziell auf Art. 39 i. V. m. 41 UN Charta, wo eben nicht das Vorliegen von „Terrorismus“, sondern etwas anderes vorausgesetzt ist, nämlich „eine Bedrohung oder ein Bruch des Friedens oder eine Angriffshandlung“. Zudem sind Sicherheitsratsbeschlüsse nach Art. 25 UN Charta nur für Staaten verbindlich, nach Art. 48 Abs. 2 UN Charta werden sie von den Mitgliedsstaaten durchgeführt. Auch insoweit kommen Individuen, kommen nichtstaatliche Akteure nicht vor. Vor diesem Hintergrund bedarf es einer kritischen rechtlichen Analyse. Denn bei der Terrorismusbekämpfung darf der Zweck (Bekämpfung des Terrorismus) die Mittel (Sanktionen gegen Individuen?) nicht heiligen.

Die zentrale Frage lautet also, ob sich im von Art. 39 UN Charta gemeinten Sinne tatsächlich davon sprechen lässt, dass von den betroffenen Personen und Vereinigungen eine Bedrohung des (Welt-)Friedens ausgeht, auf welche die „Weltorganisation“ der Vereinten Nationen richtigerweise mit Mitteln des siebten Kapitels ihrer Charta reagieren können soll. Wie dargelegt versteht es sich beileibe nicht von selbst, dass durch Einzelpersonen oder nicht-staatliche Vereinigungen die Voraussetzungen von Art. 39 UN Charta *überhaupt* erfüllt werden können[29]. Ihre Völkerrechtssubjektivität muss in der Tat hinterfragt werden und in den unmittelbaren Durchgriffen auf die Rechte und Freiheiten von Individuen „nichts Außergewöhnliches“[30] zu erblicken, geht wohl einen Schritt zu weit. Andererseits muss man aber auch unter völkerrechtlicher Perspektive die *Dimension* der gegenwärtigen globalen terroristischen Bedrohung sehen: Während sich beispielsweise die deutschen Linksterroristen der Rote Armee Fraktion weitab der Realität lediglich als Teil einer *effektiven* internationalen Bewegung imaginierten, agiert und *wirkte* in den vergangenen Jahren *Osama bin Laden* tatsächlich als „global player“[31]. Wenn nun Einzelpersonen oder nicht-staatliche Organisationen sich in der Lage zeigen, den Frieden störende Wirkungen auszulösen, welche in ihrem Ausmaß und in ihren (Folge-) Wirkungen in die Größenordnung staatlicher kriegerischer Auseinandersetzungen fallen, so lässt sich im Hinblick auf Sinn und Zweck der Regelungen des siebten Kapitels, bei Zugrundelegung einer teleologischen Betrachtungsweise also, ein Eingreifen der Vereinten Nationen begründen. Vor diesem Hintergrund leuchtet dann auch durchaus ein, wenn *Frowein/Krisch* nicht-staatlichen Vereinigungen aufgrund der jüngsten völkerrechtlichen Entwicklung eine partielle rechtliche Subjektivität zuschreibt, und zwar eine gerade durch die Maßnahmen des Sicherheitsrates selbst erzeugte[32]. Diese Maßnahmen reagieren nämlich auf Bedrohungen des Weltfriedens neuer und eigener Art. Und auch der Umstand, dass die Adressaten der Sicherheitsratsbeschlüsse die Mitgliedsstaaten der Vereinten Nationen sind, fügt sich letztlich doch in das neue Bild. Denn – worauf *Schmalenbach* besonders hinweist – da die Resolutionen auch in den Fällen der „targeted sanctions“ in sozusagen „klassischer Weise“ durch die Mitgliedsstaaten der Vereinten Nationen umgesetzt werden müssen, kommt es nicht zur supranationalen Hoheitsausübung durch die Vereinten Nationen, welche mit ihrer völkerrechtlichen Struktur in der Tat nicht mehr vereinbar wäre[33]. Die Resolution und deren Listungen benennen zwar Individuen, diese werden aber letztlich durch Umsetzung auf nationaler Ebene (bzw. auch auf EU/EG Ebene in unserem vorliegenden Fall) sanktioniert. Nach alledem stellen die Art. 39, 41 UN Charta eine tragfähige Rechtsgrundlage für SR-Resolutionen, welche gegen nichtstaatliche Organisationen und Einzelpersonen gezielte Sanktionsmaßnahmen vorsehen, dar, das Problem eines angemessenen Ausgleichs zwischen dem Anliegen effektiver Terrorismusbekämpfung und den Menschen- und Grundrechtspositionen der von intelligenten Sanktionsregimes betroffenen Einzelnen betrifft zwangsläufig auch die nationale und gemeinschaftsrechtliche Ebene der Umsetzung der UN-Resolutionen.

1.3. Zu dem Verhältnis zwischen UN-Recht und dem Recht der EU/EG

In den Blick gerät damit die Schnittstelle zwischen dem UN-Recht und demjenigen der EU/EG. Aussagen zum Vorrang

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[27] Hierzu *J. Friedrichs*, Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism, LJIL 19 (2006), S. 69 ff.

[28] Eine völkerrechtliche Grundlage finden solche Maßnahmen laut *Tomuschat* nicht nur in Kap. VII UN Charta, sondern auch in einer weiten Auslegung des Selbstverteidigungsrechts nach Art. 51 UN Charta, vgl. *Ch. Tomuschat*, Der 11. September und seine rechtlichen Konsequenzen, EuGRZ 28 (2001), S. 535 ff. Der Rückgriff auf Art. 51 UN Charta mag in Hinsicht auf die Attacken des 11. September vertretbar sein, lag hier doch ein sehr spezieller Fall vor. Darüber hinaus stellt Art. 51 UN Charta jedoch keine ausreichende Rechtsgrundlage dar, denn man kann schwerlich bei jedem terroristischen Akt auf Selbstverteidigung zurückgreifen. Insbesondere die Bestimmung des richtigen Adressaten bzw. die Zurechnung des terroristischen Angriffs bereitet so erhebliche Schwierigkeiten.

[29] Dies vor dem Hintergrund der völkerrechtlich historischen Perspektive.

[30] So *K. Schmalenbach*, Normentheorie vs. Terrorismus: Der Vorrang des UN-Rechts vor EU-Recht, JZ 2006, S. 350. Bedenken sind hier jedoch angebracht, haben obige Ausführungen doch gezeigt, dass Resolutionen adressiert an Individuen durchaus etwas sehr Außergewöhnliches darstellen und im traditionellen Völkerrecht geradezu undenkbar waren. Vgl. auch *G. Biehler*, Individuelle Sanktionen der Vereinten Nationen und Grundrechte, AVR 41 (2003), S. 171.

[31] So, wenn er in einer frühen Botschaft aus dem Jahre *1994* (!) in selbstbewusst-beiläufiger Weise die Wiedereingliederung Andalusiens in das Kalifat auf die Agenda setzt (vgl. *B. Lawrence* [Hrsg.], Messages to the World. The Statements of Osama bin Laden. London u. a. 2005, S. 14), so wenn die von ihm inspirierten Einzelverbrechen in einer Größenordnung Opfer fordern, welche man aus der historischen Erfahrung nur mit kriegerischen Auseinandersetzungen zwischen *Staaten* assoziiert.

[32] *J. Frowein/N. Krisch*, Introduction Chap. VII, in: *B. Simma* (Hrsg.), The Charter of the United Nations – A Commentary, Oxford 2002, para. 44; vgl. auch *K. Osteneck*, Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft, Berlin 2004, S. 19 ff., insbes. 25 f. zur „dynamischen Interpretation“ der Tatbestände des Art. 39 UN-Charta durch den Sicherheitsrat.

[33] *K. Schmalenbach*, a.a.O. (Fn. 30), S. 350.

der Verpflichtungen gegenüber den Vorgaben der Vereinten Nationen im Vergleich zu sonstigen völkerrechtlichen Verpflichtungen treffen Art. 103 UN Charta und Art. 307 EGV. Bedenkt man nun aber, dass beide genannten Vorschriften einen Vorrang der völkerrechtlichen Verpflichtungen der *Mitgliedsstaaten* der Vereinten Nationen bzw. derjenigen des EG-Vertrags vorsehen hinsichtlich UN-Vorgaben gegenüber sonstigen völkerrechtlichen Verpflichtungen[34] und bedenkt man weiter, dass es sich bei der Gemeinschaft *nicht* um einen Mitgliedsstaat der Vereinten Nationen handelt, so wirft dies die Frage auf, inwieweit Handlungsformen der so genannten ersten Säule der Europäischen Union[35] – sekundärgemeinschaftsrechtliche Verordnungen nämlich – als Instrumente der Umsetzungen von UN-Vorgaben überhaupt zur Anwendung kommen können oder sogar müssen. Das EuG beantwortet diese Frage in einer Weise, welche weitreichende Konsequenzen nach sich zieht[36]. So sei die Gemeinschaft zwar – anders als ihre Mitgliedsstaaten – nicht *völkerrechtlich* durch die Charta der Vereinten Nationen zur Umsetzung von SR-Resolutionen verpflichtet[37]. Jedoch folgt für das *EuG* aus dem Europäischen Primärrecht, aus dem EG-Vertrag selbst, dass die Gemeinschaft letztlich in ebensolcher Weise wie die Mitgliedsstaaten der UN Charta verpflichtet ist[38]. Die Umsetzung der SR-Resolutionen durch EG-Verordnungen nach Maßgabe des diesbezüglichen Gemeinsamen Standpunkts sei also letztlich lediglich Ausdruck einer primärrechtlich begründeten Verpflichtung der Gemeinschaft[39].

Das Kernargument, welches das EuG hierfür anführt, besteht in dem Gedanken einer „Funktionsnachfolge“[40] der Gemeinschaft in Bezug auf ihre Mitgliedsstaaten. Durch die Einfügung der Regelung des Art. 301 EGV über „Wirtschaftssanktionen aufgrund GASP-Aktion“ sei nämlich eine primärrechtliche „spezifische Grundlage für Wirtschaftssanktionen“ geschaffen worden[41]: „Soweit demnach die Gemeinschaft aufgrund des EG-Vertrags Befugnisse übernommen hat, die zuvor von den Mitgliedsstaaten im Anwendungsbereich der Charta der Vereinten Nationen ausgeübt wurden, ist sie an die Bestimmungen dieser Charta gebunden (...).“[42]

Hierneben steht der Hinweis darauf, dass die Gemeinschaft die Erfüllung der „Verpflichtungen, die ihren Mitgliedsstaaten aufgrund der Charta der Vereinten Nationen obliegen“ nicht verletzen oder behindern darf, doch führt diese Anspielung auf den Grundsatz der Gemeinschaftstreue[43] wenig weiter, denn es ist das eine, jemanden anders bei der Erfüllung *seiner* Pflichten gewähren lassen zu müssen, es ist etwas anderes, die fremde Pflichtengebundenheit sozusagen an sich zu ziehen. Wie dem aber auch sei hat jedenfalls der durch das EuG in den Vordergrund gerückte Gedanke einer Aufgaben- (und damit auch *Pflichten*übertragung) erhebliches Gewicht, denn es spricht in der Tat einiges für die Sichtweise, dass in dem Maße, in dem die EG-Mitgliedsstaaten Sachbereiche staatlichen Handelns bzw. staatlicher Befugnisse nicht mehr uneingeschränkt eigenständig, sondern nur noch in europäischer Kooperation wahrnehmen, die mit ebendiesen Bereichen verbundenen völkerrechtlichen Verpflichtungen auf die europäische Ebene übergehen[44]. Soweit also die Mitgliedsstaaten primärrechtliche Regelungen im Gemeinschaftsrecht schaffen, welche einen Sachbereich – hier denjenigen der Wirtschaftssanktionen – betreffen, innerhalb dessen die Staaten an UN-Vorgaben gebunden sind, leuchtet es in der Tat ein, dass dann diese Verpflichtungen auf die Gemeinschaft übergehen[45].

Indes muss man auch sehen, dass auf diese Weise zum einen eine durchgehende Ableitungskette von den Resolutionen des Weltsicherheitsrates hin zu den Instrumenten der vergemeinschafteten ersten Säule der Europäischen Union entsteht, innerhalb derer die Ebene der Mitgliedsstaaten der EU/EG nur noch eine denkbar bescheidene Nebenrolle spielt. Erstens nämlich haben die europäischen Staaten – begegnen sie sich intergouvernemental innerhalb der zweiten Säule (GASP) – den UN-Vorgaben durch entsprechende Gemeinsame Standpunkte den weiteren europäischen Umsetzungsweg zu bahnen, da sie ja allesamt als Mitgliedsstaaten der Vereinten Nationen je für sich völkerrechtlich an die UN Charta gebunden sind, zweitens wirken die dann im Folgenden innerhalb der ersten Säule ergehenden Verordnungen als unmittelbar geltendes Recht auf nationaler Ebene. Zum anderen stellen *Tietje/Hamelmann* mit Recht heraus, dass die durch das EuG formulierte „Aufgabenübertragungsformel“ ihrerseits gegebenenfalls auf immer weitere Sachbereiche übertragen werden kann[46]. Aber letztlich liegt es natürlich in der Konsequenz der (gewollten) Stärkung der europäischen Kooperation, wenn ursprünglich rein-mitgliedsstaatliche Handlungsfelder und – sozusagen akzessorisch – die hiermit verbundenen Verpflichtungen partiell auf die Gemeinschaft übergehen.

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[34] Hierzu *Ch. Tomuschat*, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission, in: CMLR 43 (2006), S. 541; *K. Schmalenbach*, a.a.O. (Fn. 30), S. 351.

[35] Vgl. zur „Säulenstruktur“ von EU/EG *K. Ambos*, a.a.O. (Fn. 5), § 9 Rn. 5; *K. Ambos/P. Rackow*, Institutionelle Ordnung der Europäischen Union und Europäischen Gemeinschaft, Jura 2006, S. 506.

[36] *K. Schmalenbach*, a.a.O. (Fn. 30), S. 352 („Paukenschlag“).

[37] *Yusuf*, para. 242; *Kadi*, para. 192 dazu *Tomuschat*, a.a.O. (Fn. 34), S. 542; *K. Schmalenbach*, a.a.O. (Fn. 30), S. 351; vgl. auch *Ch. Tietje/S. Hamelmann*, Gezielte Finanzsanktionen der Vereinten Nationen im Spannungsverhältnis zum Gemeinschaftsrecht, JuS 2006, S. 300.

[38] *Yusuf*, para. 243; *Kadi*, para. 193.

[39] *Yusuf,* para. 257; *Kadi*, para. 207.

[40] Treffende Begriffsbildung bei *Ch. Tietje/S. Hamelmann*, a.a.O. (Fn. 36), S. 300.

[41] *Yusuf,* para. 252; *Kadi*, para. 202 zur Frage der Kompetenz der EG zur Umsetzung sogleich im Haupttext unter II. 1.

[42] *Yusuf,* para. 253; *Kadi*, para. 203 unter Verweis auf die *EuGH*-Rechtsprechung zur Frage der Gebundenheit der Gemeinschaft an GATT; vgl. hierzu *Ch. Tomuschat*, a.a.O. (Fn. 34), S.542 f.; *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S. 300.

[43] Vgl. *K. Schmalenbach*, a.a.O. (Fn. 30), S. 351.

[44] *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S 300 f.; i. E. zust. auch *Ch. Tomuschat*, a.a.O. (Fn. 34), S. 543.

[45] *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S 300 f.; krit. *K. Schmalenbach*, a.a.O. (Fn. 30), S 352, die allerdings nicht hinreichend berücksichtigt, dass das *EuG* in seinem Begründungsgang nicht lediglich auf Art. 307 und den Grundsatz der Gemeinschaftstreue rekurriert hat. Vgl. auch *K. Osteneck,* a.a.O. (Fn. 32), S. 343 ff.

[46] *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S. 300.

2. Die Europarechtliche Seite des Falles

2.1. Zur Umsetzung der UN-Vorgaben durch sekundäres Gemeinschaftsrecht

Wenden wir uns nach diesen Überlegungen zur Schnittstelle zwischen UN- und EG/EU-Recht nunmehr ganz den europarechtlichen Aspekten unserer Fallkonstellation zu, so wird rasch offenbar, dass die sich sozusagen wie ein roter Faden durch die gesamte Querschnittsproblematik ziehende Besonderheit, dass traditionell auf *Staaten* ausgerichtete Sanktionsinstrumente nunmehr gegen natürliche Personen gewendet werden, gerade auch im Hinblick auf das komplexe institutionelle Gefüge von Europäischer Union und Europäischen Gemeinschaften spezifische Probleme bereitet.

Wie geschildert beruht das Vorgehen im Wege einer EG-Verordnung, eines Instruments aus der ersten Säule also, auf einem Gemeinsamen Standpunkt, mittels dessen die EU die gemeinschaftsrechtliche Umsetzung der UN-Resolutionen für erforderlich erklärt hatte[47]. Dreh- und Angelpunkt unserer materiell-europarechtlichen Überlegungen muss nun dem Prinzip der begrenzten Einzelermächtigung gemäß die Suche nach einer tragfähigen Verbandskompetenznorm sein[48], denn auch wenn man dem EuG darin folgt, dass die Gemeinschaft zur Umsetzung der fraglichen Resolutionen des Sicherheitsrates verpflichtet ist, so kann sie dieser Verpflichtung ja nur im Rahmen der ihr gegebenen Kompetenzen nachkommen (Art. 5 Abs. 1 EGV)[49]! Aus der Eingehung bzw. dem Bestehen einer bestimmten Verpflichtung folgt nicht zwingend, dass die fragliche Verpflichtung auch umgesetzt werden kann.

Indes scheiden sämtliche in Betracht zu ziehenden Verbandskompetenzgrundlagen des EGV im Hinblick auf die angefochtene Verordnung im Ergebnis jedenfalls dann aus, wenn man sie für sich betrachtet. Der Rückgriff auf Art. 60 und Art. 301 EGV scheitert nämlich daran, dass diese Regelungen ganz auf der Linie des traditionellen Verständnisses von Wirtschaftssanktionen als *zwischenstaatlichen* Maßnahmen voraussetzen, dass es um die Einschränkung der „Wirtschaftsbeziehungen zu einem oder mehreren dritten Ländern geht“ (Art. 301 EGV), um „Sofortmaßnahmen auf dem Gebiet des Kapital- und Zahlungsverkehrs mit ... dritten Ländern“ (Art. 60 Abs. 1 EGV). Zwar war es dem Rat noch möglich, die VO Nr. 467/2001[50] auf der Grundlage der Art. 60, 301 EGV zu erlassen, da die Taliban bis zur Zerschlagung ihres Regimes weite Teile Afghanistans beherrschten, so dass sich durchaus davon sprechen ließ, dass Beschränkungen der Wirtschaftsbeziehungen zu einem Drittland stattfanden[51]. *Nach* dem Machtverlust der Taliban lässt sich indes für die angefochtene Verordnung kein derartiger Bezug zu einem Drittstaat herstellen, so dass das EuG kaum zu einem anderen Ergebnis kommen konnte, als dass die Art. 60, 301 EGV für sich keine tragfähige Kompetenzgrundlage bilden[52]. Scheitert also die Anwendbarkeit der Art. 60, 301 EGV gerade daran, dass es sich bei den streitgegenständlichen Maßnahmen um nicht gegen Staaten gerichtete „smart sanctions“ handelt, so liegen die Dinge bei der dritten in Betracht zu ziehenden Kompetenzvorschrift des EGV, bei der Kompetenzergänzungsklausel des Art. 308 EGV nicht ganz so klar. Die offene Vorschrift des Art. 308 EGV erlaubt dem Rat, „geeignete[] Vorschriften“ zu erlassen und die Subsumtion intelligenter Sanktionen unter diese Formulierung erscheint denkbar. Indes setzt die Kompetenzergänzungsklausel des EGV ihrer Funktion gemäß zum einen voraus, dass im Vertrag die „erforderlichen Befugnisse nicht vorgesehen“ sind und zum anderen muss dass „Tätigwerden der Gemeinschaft erforderlich [sein], *um im Rahmen des Gemeinsamen Marktes eines ihrer Ziele zu verwirklichen*“[53]. Hier nun liegt ein weiterer in der komplizierten institutionellen Struktur der Europäischen Union und der Europäischen Gemeinschaften verwurzelter problematischer Punkt, denn es versteht sich mit Blick auf die innerhalb der zweiten Säule lozierte Gemeinsame Außen- und Sicherheitspolitik (GASP) gewiss nicht von selbst, dass im Rahmen der vergemeinschafteten ersten Säule überhaupt Maßnahmen der Terrorismusbekämpfung erlassen werden können. Die durch den Maastrichter Vertrag geänderten Vorschriften der Art. 60, 301 EGV öffnen sich dem gemäß dann auch ausdrücklich der Umsetzung von gemeinsamen Standpunkten bzw. Aktionen aus dem Bereich der GASP[54] und stellen insoweit in der Tat „ganz besondere Vorschriften des EG-Vertrags“ dar[55]. Nicht so verhält es sich aber mit der allgemeinen und durch die Maastrichter Vertragsreform unberührte Klausel des Art. 308 EGV. Man wird dem EuG vor diesem Hintergrund darin zustimmen können, dass die Anwendbarkeit des Art. 308 EGV jedenfalls nicht schon daraus folgt, dass die vierte Begründungserwägung der Verordnung annimmt, dass die Maßnahmen „in den Geltungsbereich des Vertrags“ fallen[56]. Hergeholt erscheint des Weiteren auch, die angefochtene Verordnung dadurch mit dem Gemeinsamen Markt und den Zielen des EGV in Ver-

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[47] Vgl. *Ch. Möllers*, Das EuG konstitutionalisiert die Vereinten Nationen, EuR 2006, S. 426; auch schon *S. Bartelt/ H.-E. Zeitler,* a.a.O. (Fn. 3), S. 713.

[48] Vgl. nur *K. Ambos,* a.a.O. (Fn. 5), § 11 Rn. 1.

[49] *Yusuf,* para. 257; *Kadi*, para. 207 (Verpflichtung, „den fraglichen Resolutionen … in ihrem Zuständigkeitsbereich Wirkung zu verleihen“).

[50] VO (EG) Nr. 467/2000 des Rates vom 6.3.2001 über das Verbot der Ausfuhr bestimmter Waren und Dienstleistungen nach Afghanistan, über die Ausweitung des Flugverbots und des Einfrierens von Geldern und anderen Finanzmitteln betreffend die Taliban von Afghanistan und die Aufhebung zur Aufhebung der Verordnung (EG) Nr. 337/2000 (ABl. L 67, S. 1).

[51] *Yusuf*, para. 121 u. 127; *Kadi*, para. 87 ff. Vgl. für weitere smart sanctions auf der Grundlage der Art. 60, 301 EGV bspw. auch die VO (EG) Nr. 1705/98 des Rates vom 28.7.1998 betreffend die Aussetzung bestimmter wirtschaftlicher Beziehungen zu Angola zwecks Veranlassung der „União Nacional para a Independência Total de Angola (UNITA)“ zur Erfüllung ihrer Verpflichtungen im Rahmen des Friedensprozesses und zur Aufhebung der Verordnung (EG) Nr. 2229/97 (ABl. L 215, S. 1) und die VO (EG) Nr. 2488/2000 des Rates vom 10.11.2000 über die Aufrechterhaltung des Einfrierens von Geldern betreffend Herrn Milosevic und Personen seines Umfelds und die Aufhebung der Verordnungen (EG) Nr. 1294/1999 und (EG) Nr. 607/2000 sowie des Artikels 2 der Verordnung (EG) Nr. 926/98 (ABl. L 287, S. 19).

[52] *Yusuf*, para. 129 ff.; *Kadi*, para. 92 ff.; vgl. auch *K. Schmalenbach*, a.a.O. (Fn. 30), S. 351; *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S. 299; *Ch. Tomuschat*, a.a.O. (Fn. 34), S. 540. Überzeugend auch schon *K. Osteneck,* a.a.O. (Fn. 32), S. 182 f.

[53] Hervorh. durch d. Verf.

[54] *Yusuf,* para. 159; *Kadi*, para. 123 sprechen insofern von einem „Bindeglied“.

[55] *Yusuf,* para. 160; *Kadi*, para. 124.

[56] *Yusuf,* para. 139; *Kadi*, para. 103: „Petitio principii“.

bindung zu bringen, dass man erklärt, die Umsetzung der UN- bzw. GASP-Vorgaben durch sekundäres Gemeinschaftsrecht sei „zur Vermeidung von Wettbewerbsverzerrungen“ erforderlich[57]. Dass die gegen bestimmte natürliche Personen und gegen Organisationen vorgesehenen Maßnahmen den Wettbewerb im gemeinsamen Markt verzerren würden, ist nicht ersichtlich[58]. Wenn auch das Gedeihen des Gemeinsamen Marktes gewiss ein bestimmtes Maß an Sicherheit voraussetzt, geht es doch zu weit, auf denkbar allgemeiner Grundlage die Bekämpfung des internationalen Terrorismus als Gemeinschaftsziel auszuweisen; die Sichtweise der Kommission, aus der Präambel des EGV ergäbe sich ein allgemeines Gemeinschaftsziel der Verteidigung des Weltfriedens verfehlt daher die normative und praktische Realität[59]. Größtes Gewicht kommt schließlich der Erwägung zu, mit der das EuG seine Überlegungen zur Frage der Anwendbarkeit des Art. 308 EGV abschließt. In der Tat verhält es sich nämlich so, dass die Anwendung der Kompetenzergänzungsklausel auf Konstellationen wie die streitgegenständliche letztlich die strukturelle Unterscheidung zwischen der ersten und der zweiten Säule in Gefahr bringen würde und mit Recht sagt das *EuG* in einer zentralen Passage, die es in ihrer Überzeugungskraft verdient, im Wortlaut wiedergegeben zu werden[60]: „Würde man anders entscheiden, so liefe dies letztlich darauf hinaus, dass diese Bestimmung auf alle Maßnahmen im Bereich der GASP und der polizeilichen und justiziellen Zusammenarbeit in Strafsachen (JI) anwendbar wäre, so dass die Gemeinschaft stets tätig werden könnte, um die Ziele dieser Politiken zu erreichen. Ein solches Ergebnis würde zahlreichen Bestimmungen des EU-Vertrages ihren Anwendungsbereich nehmen und stünde im Widerspruch zur Schaffung eigener Instrumente der GASP (gemeinsame Strategien, gemeinsame Aktionen, gemeinsame Standpunkte) und der JI (gemeinsame Standpunkte, Beschlüsse, Rahmenbeschlüsse).“

Allerdings lässt es das EuG sodann erstaunlicherweise nicht mit dem Ergebnis bewenden, dass das primäre Gemeinschaftsrecht zwar für sozusagen klassische Sanktionsregime in den Art. 60 und 301 EGV eine tragfähige Grundlage bereitstellt, die sich gegen Staaten wenden oder wenigstens einen hinreichenden Bezug zu solchen aufweisen[61], nicht aber für den neuartigen Typ der „smart“ oder „targeted sanctions“. Stattdessen folgt eine argumentative Pointe, welche das EuG bereits an einigen Stellen seiner Urteilsbegründung durch die wiederholte Verwendung der Formulierung vorsichtig angedeutet hat, dass die Art. 60, 301, 308 EGV jeweils (nur) „für sich genommen keine ausreichende Rechtsgrundlage“ für die Verordnung bereitstellen[62]. Der Ausweg aus dem „Dilemma“[63] soll also darin bestehen, dass die Art. 60, 301, 308 EGV zusammengenommen doch als Grundlage der Verordnung dienen sollen[64]. Nun ist es zwar richtig, dass – worauf das EuG besonders hinweist – i. R. d. Art. 60, 301 EGV das „Tätigwerden der Gemeinschaft in Wirklichkeit ein Tätigwerden der Union auf der Grundlage des Gemeinschaftspfeilers“ darstellt[65], allerdings verhält es sich doch so, dass diese Vorschriften sowenig wie Art. 308 EGV nach Wortlaut und Funktion einschlägig sind. Dass nun drei je für sich aus verschiedenen Gründen unanwendbare Regelungen zusammengenommen doch für einen bestimmten komplexen Sachverhalt einschlägig sein sollen, stellt eine – vorsichtig ausgedrückt – schwierige Vorstellung dar, die auch kaum plausibler wird durch den Verweis auf den Kohärenzartikel des EUV[66]: „In dem besonderen Zusammenhang, auf den sich die Artikel 60 EG und 301 EG beziehen, ist der Rückgriff auf die ergänzende Rechtsgrundlage des Artikels 308 EG daher aufgrund des in Artikel 3 EU aufgestellten Kohärenzerfordernisses gerechtfertigt, wenn diese Bestimmungen den Gemeinschaftsorganen nicht die im Bereich wirtschaftlicher und finanzieller Sanktionen erforderliche Zuständigkeit verleihen, um zur Verwirklichung des von der Union und ihren Mitgliedsstaaten im Rahmen der GASP verfolgten Zieles tätig zu werden.“

Im Argumentationsgang des Gerichts fungiert die Kohärenzklausel des Art. 3 EUV damit als eine Art Rechtsfolgenverweisung auf Art. 308 EGV. Denn jene Norm, deren Voraussetzungen – wie das EuG ja in aller Deutlichkeit herausstellt hat – *nicht* vorliegen, soll nur in ihrer lückenfüllenden Rechtsfolge auf den Bereich der Umsetzung intergouvernementaler Kooperation innerhalb der ersten Säule anwendbar sein. Das EuG verfällt damit im Ergebnis erstaunlicherweise also genau auf dasjenige, was doch eigentlich vermieden werden sollte[67], die (weitere) Auflösung der Unterschiede zwischen dem Unions- und dem Gemeinschaftsrecht[68]. Was diesen Gesichtspunkt anbelangt, so liegt die *Yusuf/Kadi*-Rechtsprechung des EuG ganz auf einer Linie mit der *Pupino*-Entscheidung des EuGH und mit derjenigen zur Nichtigkeit des Rahmenbeschlusses zum Umweltschutz[69]. Dass aber mit Hilfe des Kohärenzgebots die „Trennung zwischen Union und Gemeinschaft deutlich relativiert“ werden kann[70], will nicht überzeugen. Sollen die Unterschiede zwischen

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[57] Vgl. erneut die vierte Begründungserwägung der EG-VO 881/2002.

[58] *Yusuf,* para. 141 ff.; *Kadi*, para. 105 ff. Mit Recht spricht *Ch. Möllers*, a.a.O. (Fn. 47), S. 426 von „teilweise erstaunlichen ... Ausführungen von Rat und Kommission“.

[59] Zutr. ablehnend *Yusuf,* para. 152 f.; *Kadi*, para. 116 f.; krit. auch *E.–J. Husabø*, in: *E.-J- Husabø/A. Strandbakken* (Hrsg.), Harmonization of Criminal Law in Europe, Antwerp 2005, S. 69.

[60] *Yusuf,* para. 156; *Kadi*, para. 120.

[61] Vgl. oben bei Fn. 52.

[62] *Yusuf,* para. 130, 133, 134; *Kadi*, para. 94, 97, 98.

[63] *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S. 299 (300).

[64] *Yusuf,* para. 158 ff.; *Kadi*, para. 122 ff.

[65] *Yusuf,* para. 161; *Kadi*, para. 125.

[66] *Yusuf*, para. 164; *Kadi*, para. 128

[67] Vgl. o. Fn. 60.

[68] Krit auch *Ch. Möllers*, a.a.O. (Fn. 47), S. 427 (dem *EuG* habe nach seinen vorherigen Ausführungen „kaum etwas anderes übrig bleiben dürfen, als die Kompetenz der Gemeinschaft zu verneinen“!); vgl. auch schon *S. Bartelt/ H.-E. Zeitler,* a.a.O. (Fn. 3), S. 715; zust. dagegen *Ch. Tomuschat*, a.a.O. (Fn. 34), S. 540 („entirely persuasive“); *K. Schmalenbach*, a.a.O. (Fn. 30), S. 352; *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S. 299 (300).

[69] *EuGH* Urt. v. 16.6.2005 – C-105/03 *Maria Pupino*; *EuGH* Urt. v. 13.9.2005 – C 176/03 Kommission ./. Rat (Nichtigerklärung des RB 2003/80/JI des Rates vom 27.1.2003 zum Schutz der Umwelt durch das Strafrecht); mit Recht krit. hierzu *M. Heger*, Europäisches Umweltstrafrecht, JZ 2006, S. 310 ff.; *Ch. Hillgruber*, Unmittelbare Wirkung von Rahmenbeschlüssen im Bereich polizeilicher und justizieller Zusammenarbeit in Strafsachen, JZ 2005, S. 844.

[70] Dem *EuG* zust. *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S. 300: das *EuG* löse „im Ergebnis die vermeintlich starren Grenzen zwischen Unions- und Gemeinschaftsrecht“ auf. Vgl. auch *S. Steinbarth*, Individualrechtsschutz gegen Maßnahmen der EG zur Bekämpfung des internationalen Terrorismus, ZEuS 2006, S. 275 ff.

dem vergemeinschafteten Bereich und der zweiten (und dritten) Säule nach dem Scheitern des Verfassungsprojekts nicht auf kurzem Wege durch die europäische Justiz planiert werden, so muss das Kohärenzgebot als Gebot gegenseitiger Abstimmung begriffen werden und nicht gleichsam als Sollbruchstelle der Tempelarchitektur[71]. Die Argumentation des EuG mutet ergebnisorientiert an und *Tomuschat* will dem EuG gerade im Hinblick auf die vermeintlich drohenden Folgen einer Verneinung einer gemeinschaftlichen Verbandskompetenz für „targeted sanctions" folgen: Die Union könnte ihre Verpflichtungen gegenüber der UNO nicht erfüllen und es würde eine neue Verfassungskrise drohen[72]. Indes liegt es ja nicht so, dass der Gemeinsame Standpunkt zwingend hätte im Rahmen der ersten Säule umgesetzt werden müssen. Die Alternative des nationalstaatlichen Vorgehens wäre doch stets gegeben[73] und man muss sicherlich kein „Euroskeptiker" sein, um daran zu zweifeln, dass eine drohende (weitere) Krise der EG/Union Auslegungshypertrophien gerade im Bereich der Kompetenzvorschriften des EGV legitimieren können soll. Die effiziente Bekämpfung der Bedrohung durch den internationalen, derzeit vorrangig den islamistisch motivierten Terrorismus ist eine unabweisbare Notwendigkeit unserer Zeit und „smart sanctions" stellen eine konsequente Fortentwicklung der internationalen Sanktionspraxis dar. Ohne eine Ergänzung der Art. 60, 301 EGV fehlt es aber an der (Art. 5 Abs. 1 EGV!) unverzichtbaren Kompetenzgrundlage für diesbezügliche europäische Aktivitäten auf der Basis des EGV und es stellt sich die Frage ob die gerade im Gefolge des Scheiterns des Verfassungsprojekts einsetzenden und kaum zu übersehenden Tendenzen, die Überwindung der Säulenarchitektur auf justiziellem Wege voranzutreiben, dem Europäischen Gedanken nicht einen Bärendienst leisten.[73a]

2.2. Zur gerichtlichen Prüfungskompetenz – *ius cogens* als internationaler Ordre public?

Wie dem nun auch sei musste sich von dem – wie gezeigt: zweifelhaften – Standpunkt aus, dass die Art. 60, 301, 308 EGV zusammengenommen eine tragfähige Basis für die gemeinschaftsrechtliche Umsetzung des Gemeinsamen Standpunkts und damit letztlich eben auch der SR-Resolution im Verordnungswege darstellen, für das EuG die Folgefrage ergeben, ob und inwieweit ihm eine *Prüfungskompetenz* zur inhaltlichen Kontrolle der fraglichen Sanktionsregimes verbleibt, setzen diese doch verbindliche UN-Vorgaben um[74]. Hinsichtlich des „ob" der Prüfungskompetenz stellt sich hier mithin die Frage nach dem Verhältnis zwischen Resolutionen des Sicherheitsrates und dem Gemeinschaftsrecht unter einem neuen Blickwinkel. Nämlich im Hinblick auf die Fragestellung, ob das von den Klägern angerufene Gericht überhaupt prüfungskompetent ist.

Das EuG geht nun auch unter diesem Blickwinkel *grundsätzlich* von einem Vorrang der Resolutionen des Sicherheitsrates aus: „Demnach ist davon auszugehen, dass die fraglichen Resolutionen des Sicherheitsrates grundsätzlich nicht der Kontrolle durch das Gericht unterliegen und dass das Gericht nicht berechtigt ist, ihre Rechtmäßigkeit im Hinblick auf das Gemeinschaftsrecht – und sei es nur inzident – in Frage zu stellen".[75]

Ein solch klares Bekenntnis zum Vorrang des Völkerrechts hätte nun eine Klageabweisung aufgrund mangelnder Prüfungskompetenz nahe gelegt[76]. Das EuG jedoch öffnet sich im nächsten Absatz eine Hintertür um den Sicherheitsrat einer engen Rechtskontrolle durch die europäische Gerichtsbarkeit im Falle des Verstoßes gegen *ius cogens* (zwingende Normen des Völkerrechts) zu unterwerfen: „Dagegen kann das Gericht die Rechtmäßigkeit der fraglichen Resolution des Sicherheitsrates im Hinblick auf das Jus Cogens, verstanden als internationaler Ordre public, der für alle Völkerrechtssubjekte einschließlich der Organe der UNO gilt und von dem nicht abgewichen werden darf, inzident prüfen"[77]

Das EuG argumentiert also wie folgt: Eine Kontrolle der Verordnung käme einer indirekten Kontrolle der Sicherheitsratsresolution gleich, dazu sei das EuG grundsätzlich nicht befugt. Für den Bereich des *ius cogens* verbleibe jedoch die Möglichkeit einer inzidenten Kontrolle, das EuG sieht sich also befugt, die Verordnung anhand der durch das *ius cogens* geschützten Grundrechte der Kläger zu prüfen. Die Identifikation verbleibender Bereiche gerichtlicher Überprüfbarkeit von SR-Resolutionen mit dem *ius cogens* stellt eine zumindest im gedanklichen Ansatz insoweit überzeugende Lösung dar, als auch der Sicherheitsrat sich nicht über das zwingende Recht erheben dürfen soll, doch liegen die Probleme nicht zuletzt in ihrer praktischen Umsetzung. Denn mag nun die Existenz des *ius cogens* an sich zwar universell anerkannt sein, so besteht beileibe keine Einigkeit darüber welche Normen zum zwingenden Völkerrecht zählen. Und es tritt hinzu, dass bei näherer Betrachtung auch so sicher nicht ist, ob sich aus diesem Konzept gerade der Rahmen einer *gerichtlichen Prüfungskompetenz* ableiten lässt[78]. Die genauen rechtlichen Konsequenzen eines Verstoßes gegen *ius cogens* sind alles andere als klar.[79] Die Begründung des EuG hierfür fällt allerdings äußerst knapp aus und erschöpft sich letztlich lediglich in dem Verweis darauf, dass bei einem Verstoß gegen *ius cogens* Sicherheitsratsbeschlüsse keinerlei Bindungswirkung entfalten würden[80]. Richtig ist nun zwar die rechtliche Rück-

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[71] Überzeugend *S. Bartelt/ H.-E. Zeitler,* a.a.O. (Fn. 3), S. 715 („Art. 308 darf ... nicht dazu dienen, den Vertrag zu modifizieren."); vgl. zu Art. 3 EUV des Weiteren *H.-J. Blanke*, in: *Ch. Callies/M. Ruffert* (Hrsg.), EUV/EGV, 2. Auflage, Neuwied 2002, Art. 3 EUV Rn. 6 m. w. N. aus der Kommentarliteratur.

[72] *Ch. Tomuschat*, a.a.O. (Fn. 34), S. 540.

[73] Vgl. *K. Schmalenbach*, a.a.O. (Fn. 30), S. 353.

[73a] Vgl. auch *M. Kotzur*, Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft, EuGRZ 2006, 21 („Motor der Konstitutionalisierung").

[74] Vgl. oben bei Fn. 34 ff.

[75] *Yusuf*, para. 276; *Kadi*, para. 225.

[76] So schon *M. Payandeh*, Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte, ZaöRV 66 (2006), S. 53.

[77] *Yusuf*, para. 277; *Kadi*, para. 226.

[78] Vgl. *M. Payandeh*, a.a.O. (Fn. 76), S. 54 ff., der indes lediglich die Begründung des EuG für diesen „Akt der Rechtsschöpfung" kritisiert, um sodann einen eigenen Ansatz vorstellt, um eine begrenzte Rechtskontrolle des Sicherheitsrates durch staatliche und überstaatliche Gerichte aus dem Völkerrecht herzuleiten. Die Annahme einer solchen Kompetenz ist aber durchaus problematisch und wenn *Payandeh,* a.a.O., S. 63 zum Ergebnis gelangt, es könnten nur „hinreichend qualifizierte" Verstöße gegen das Völkerrecht gerichtlich überprüft werden, die „eine gewisse Erheblichkeitsschwelle" überschreiten. Dies dürfte nun im Vergleich zur *EuG*-Lösung kaum geringere Abgrenzungsschwierigkeiten ergeben.

[79] *Ch. Möllers*, a.a.O. (Fn. 47), S. 428.

[80] *Yusuf*, para. 281; *Kadi*, para. 230 ff.

kopplung des Sicherheitsrates an die UN Charta und die Annahme eines Verbots *ultra vires* zu handeln[81]. Ob sich aber aus einem solchen *ultra vires*-Verbot eine gerichtliche Prüfungskompetenz für *ius cogens*-Verstöße ableiten lässt ist nicht denknotwendig der Fall. Immerhin werden bzw. wurden Sicherheitsratsresolutionen bislang *prima facie* als rechtsgültig erachtet[82] und dem gemäß gab es bislang auch noch nie eine gerichtliche Überprüfung einer Sicherheitsratsresolution. Selbst der IGH (als *möglicherweise* dem Rechtswege nach zuständiges Gericht[83]) hat von einer direkten Kontrolle einer Sicherheitsratsresolution bislang Abstand genommen und noch nie Völkerrechtsverstöße im Bereich des *ius cogens* geprüft[84]. Entscheidungen des Sicherheitsrates unter Kap. VII der UN Charta sind in ihrem Kern nun einmal zwangsläufig politische Entscheidungen, denen ein weites Ermessen eröffnet sein muss („a political decision which lies at the heart of the Council's discretion"[85]). Dieses politische Ermessen durch ein Gericht überprüfen zu lassen – sei es auch nur im so schmalen wie seinen Grenzen nach unsicheren Bereich des *ius cogens* – erscheint nicht systemkonform. Alles in allem wäre vor diesem Hintergrund die Verneinung der Prüfungskompetenz einhergehend mit einer Klageabweisung mangels judizieller Überprüfungskompetenz konsequent gewesen – oder aber eine *sehr starke* Begründung dafür erforderlich gewesen, dass doch ein Bereich gerichtlicher Überprüfbarkeit besteht.

Diese Erwartung wird indes nicht befriedigt. Woraus nämlich schließt das EuG zuständig zu sein, einen solchen Verstoß zu überprüfen? Hier fehlt in dem Urteil eine überzeugende Begründung und der nackte Verweis auf materielles Recht überzeugt nicht. Denn dass selbst der Sicherheitsrat der Vereinten Nationen ohne jede Einschränkung an bestimmte Normen des Völkerrechts gebunden ist, ist das eine. Ob innerhalb des durch das *ius cogens* markierten Bereichs die Handlungen des Sicherheitsrates, ob seine Resolutionen *gerichtlich* überprüft werden können das andere. Es lässt sich durchaus ohne logischen Bruch erklären, dass der Sicherheitsrat zwar an bestimmte Regeln des Völkerrechts gebunden ist, ohne dass aber die Frage, ob er in einem bestimmten Fall dieser Verpflichtung auch tatsächlich gerecht geworden ist, durch internationale, europäische oder auch nationale Gerichte zum Zwecke des Individualrechtsschutzes überprüft werden kann.

Gleichwohl hat das EuG nun also den Standpunkt eingenommen, dass eine gerichtliche Überprüfung von SR-Resolutionen im Bereich des zwingenden Völkerrechts möglich ist und riskiert es damit den unsicheren Grund einer inzident-Kontrolle von SR-Resolutionen gerade nach Maßgabe des *ius cogens* zu betreten. Im Folgenden musste sich das EuG folglich der Frage zuwenden, ob im Rahmen seiner – nur in (unsicheren) Grenzen, denjenigen des *ius cogens*-Bestandes nämlich eröffneten – Prüfungskompetenz die angegriffene EG-Verordnung die Grundrechte der Kläger verletzen. Das EuG verneinte dies. Materiell-rechtlich hatten sich die Kläger gegen die Umsetzung der Resolution in Form der Verordnung (EG) Nr. 881/2002 gewendet[86] und die folgenden Verletzungen der Gemeinschaftsgrundrechte gerügt: Achtung des Eigentums, Anspruch auf rechtliches Gehör und effektiven gerichtlichen Rechtsschutz.[87] Der Gerichtshof prüft die Grundrechte der Kläger soweit der Bereich des *ius cogens* betroffen ist und kommt diesbezüglich zu den folgenden Ergebnissen: Erstens seien die Kläger nicht *willkürlich* ihres Eigentumsrechts beraubt worden, soweit dieses Recht in seinem Bestand durch das *ius cogens* umfasst wird[88]. Das Einfrieren von Geldern sei nämlich legitim im Kampf gegen den Terrorismus und greife jedenfalls nicht in die Substanz des Rechts am Eigentum ein, sondern nur in dessen Nutzung[89]. Außerdem sehen die Sicherheitsratsresolutionen eine regelmäßige Überprüfung vor, die ein Vorbringen – mit dem Ziel der Streichung vor dem Sanktionsausschuss – über die Heimatstaaten ermöglichen würden[90]. Zu den Verteidigungsrechten stellt das EuG fest, dass keine Norm des *ius cogens* eine persönliche Anhörung durch den Sanktionsausschuss gebiete[91]. Die Betroffenen könnten sich auch jederzeit über nationale Behörden um eine Streichung von den Listen bemühen[92]. Zu der Frage einer möglichen Anhörung durch Gemeinschaftsorgane verneint das Gericht eine solche Verpflichtung; bei der Umsetzung der Resolution hätte es den Gemeinschaftsorganen an Ermessenspielraum gefehlt.[93] Zum Anspruch auf rechtliches Gehör macht das Gericht zwei bemerkenswerte Ausführungen. Zunächst wird eine Überprüfung der politischen Ermessensentscheidung des Sicherheitsrates unter Kap. VII UN Charta abgelehnt[94]. Sodann stellt das EuG aber fest, dass es an Rechtsschutz auf UN Ebene fehlt, das Recht auf Zugang zu den Gerichten jedoch nicht absolut sei und ohnehin das allgemeine Interesse an der Wahrung des Weltfriedens und der internationalen Sicherheit

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[81] Hierzu *J. Frowein/N. Krisch*, Art. 39, in: a.a.O. (Fn. 32), para. 27; *B. Fassbender*, 'Quis judicabit?' The Security Council, its Powers and its Legal Control, EJIL 11 (2000), S. 227.

[82] Die Resolutionen des Sicherheitsrates haben also den *Anschein* (*prima facie*) rechtsgültig zu sein, und der *IGH* müsste dies argumentativ widerlegen. Hier zeigt aber die Praxis, dass der *IGH* eine solche Überprüfung meidet, gab es doch bisher keine Widerlegung der *prima facie*-Rechtgültigkeit: vgl. *Certain Expenses of the United Nation*s, Advisory Opinion, ICJ Reports 1962, 168; *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding SC Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, para. 20; *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* [hiernach: Lockerbie], Urteil IGH, ICJ Reports 1998, 9.

[83] Die Frage der *gerichtlichen* Überprüfbarkeit von SR-Resolutionen und diejenige nach dem zuständigen Gericht, die sich für den konkreten Fall eines von einer Resolution in ihren Konsequenzen individuell Betroffenen stellt, berühren sich, können aber nicht in eins gesetzt werden! Zur Rechtswegfrage unten 2.3.

[84] *D. Bowett*, The Impact of Security Council Decisions on Dispute Settlement Procedures EJIL 5 (1994), S. 94.

[85] *Lockerbie*, 9; *Case Concerning the Northern Cameroons*, Order, ICJ Reports 1963, 3.

[86] Vgl. o. Fn. 6.

[87] *Yusuf*, para. 190 ff.; *Kadi*, para. 233 ff.

[88] *Yusuf*, para. 303; *Kadi*, para. 252.

[89] *Yusuf*, para. 296 ff.; *Kadi*, para. 245 ff.

[90] *Yusuf*, para. 300 f.; *Kadi*, para. 249 f.

[91] *Yusuf*, para. 314; *Kadi*, para. 268.

[92] *Yusuf*, para. 317 f.; *Kadi*, para. 270 f.

[93] *Yusuf*, para. 328 f. Eine Überprüfung hätte nach Ansicht des Gerichts keinerlei Wirkung entfaltet, denn die Gemeinschaftsorgane setzten ja nur strikt UN Vorgaben um. Sie hätten dabei – auch bei Anhörung der Betroffenen – ihre Position nicht überdenken und abändern können (mangels Ermessen bei der Umsetzung!), waren sie doch an die Festsetzungen des Sicherheitsrates und des Sanktionsausschusses gebunden.

[94] *Yusuf*, para. 339; *Kadi*, para. 284.

gegenüber dem Interesse des Klägers auf rechtliches Gehör überwiege[95]. Die gewisse Spannung, die diesen Aussagen unübersehbar innewohnt, rührt natürlich daher, dass das völkerrechtliche Arsenal, welches traditionellerweise gegen Staaten gerichtet wurde und bezüglich dessen sich in der Vergangenheit daher die ungeklärte Problematik des effektiven Individualrechtsschutzes nicht ergeben hat, nunmehr gegen Individuen gewendet wird.

Wenn das EuG nun aber den Weg des Vorrangs des UN-Rechts einschlägt, so muss es diesen auch konsequent bis zum Ende beschreiten, es hätte also denknotwendig die Klage mangels gerichtlicher Überprüfungskompetenz abweisen müssen. Das EuG hat stattdessen erkennbar versucht, eine Kompromisslinie nach Maßgabe eines äußerst problematischen Kriteriums zu finden, desjenigen des *ius cogens* nämlich. Der gewählte Mittelweg führt nun allerdings zu gravierenden praktischen Problemen: Das EuG wagt sich auf das äußerst umstrittene Gebiet des *ius cogens* bzw. der gerichtlichen Kontrolle des Sicherheitsrates vor. Das Abschneiden individualschützender gerichtlicher Überprüfbarkeit liegt allerdings in der Natur der komplexen Querschnittsmaterie. Insofern scheint Abhilfe nur *de lege ferenda* möglich[96]. In anderen Worten: das EuG hat sich bei seinem Versuch, *de lege lata* einen Kompromiss zu finden weit vorgewagt und es hat dabei keinen *tragfähigen* Argumentationsweg gefunden. Weder kann nämlich die Argumentation des EuG zur Frage der gerichtlichen Überprüfbarkeit von gemeinschaftsrechtlich umgesetzten Resolutionen des Sicherheitsrats überzeugen, weniger noch die Herleitung einer Kompetenzgrundlage für deren sekundärrechtliche Umsetzung.

2.3. Alternative (Rechts-)Wege?

Yusuf, Kadi, Ayadi und *Hassan* gingen im Wege einer Nichtigkeitsklage nach Art. 230 EGV vor, was aus ihrer Interessenperspektive natürlich ein konsequenter Schritt war, denn die angegriffene VO ist als EG-Sekundärrecht in den Mitgliedsstaaten unmittelbar anwendbares Recht[97]. Die Frage der Zulässigkeit der Nichtigkeitsklage warf keine Probleme auf, denn die Kläger sind in dem angegriffenen Instrument namentlich genannt, so dass die nach Art. 230 Abs. 4 EGV vorausgesetzte unmittelbare und individuelle Betroffenheit sicherlich zugrunde gelegt werden konnte[98]. Zwar ist in Fällen wie den hier behandelten der Rechtsweg zu den nationalen Gerichten nicht abgeschnitten[99], denn denkbar wäre es ja beispielsweise durchaus, im Wege der Zivilklage gegen die mittelbaren Auswirkungen einer Listung vorzugehen[100]. Ob ein solcher Schritt aber unter anwaltlicher Perspektive der Nichtigkeitsklage vorzuziehen wäre, erscheint zweifelhaft mit Blick auf die Regelung des Art. 234 EGV[101]. Etwa im Fall einer Zivilklage gegen ein Bankhaus auf Auszahlung eines Guthabens stünde im Kern des dann entstehenden Rechtsstreits offensichtlich die EG-Verordnung, so dass wohl schon die erste Instanz dem EuGH vorlegen würde (vgl. Art. 234 Abs. 2 EGV) und die letzte Instanz hierzu im Hinblick auf die offenkundige Entscheidungserheblichkeit der Verordnung gemäß Art. 234 Abs. 3 EGV verpflichtet wäre. Der alternative Rechtsweg über nationale Fachgerichte führt also wiederum zum EuGH und man muss sehen, dass dem Kläger hierbei die erstinstanzliche Prüfung seiner Sache durch das EuG verloren ginge[102]. Der EGMR, der (nur) im Hinblick auf nationale Umsetzungsakte angerufen werden könnte, da die EG nicht Mitglied der EMRK ist[103], steht seinerseits auf dem Standpunkt, dass zum einen die Listung *für sich* noch keine Verletzung von EMRK-Gewährleistungen der betroffenen Personen darstellt und zum anderen hinsichtlich bestimmter belastender Maßnahmen, welche hierauf zurückgehen, der Rechtsweg zum EuGH gegeben sei. Die Anrufung des EGMR wäre also auch nicht sonderlich aussichtsreich, hat er doch mit der geschilderten Begründung in einer dem betrachten Fall parallel liegenden Konstellation die Klage als unzulässig abgewiesen[104]. Nähme man nunmehr anstatt der EG-Verordnung bzw. der an diese als unmittelbar geltendes Sekundärrecht anknüpfenden konkreten Maßnahmen den Gemeinsamen Standpunkt oder gar die UN-Resolution in den Blick und suchte nach rechtswegeröffnenden Angriffspunkten, so stieße man rasch an Grenzen, welche sich daraus ergeben, dass intelligente Sanktionen, welche Individuen treffen, Weiterentwicklungen traditioneller Sanktionsregime darstellen, welche nun einmal keinerlei Individualbezug aufweisen: Art. 46 EUV bestimmt ausdrücklich die Unzuständigkeit des EuGH für die Überprüfung von Maßnahmen innerhalb der zweiten intergouvernementalen Säule der Europäischen Union[105] und ein Rechtszug, der es individuell hiervon betroffenen Personen ermöglichen würde, gegen Resolutionen des Sicherheitsrates vorzugehen, existiert nicht[106]. Auf UN-Ebene besteht insoweit eine Rechtsschutzlücke, denn bislang gibt es dort kein Gericht, das für derartige Klagen zuständig ist[107]. Mittlerweile sieht

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[95] *Yusuf*, para. 341 ff.; *Kadi*, para. 286 ff.

[96] Vgl. *Ch. Tietje/S, Hamelmann*, a.a.O. (Fn. 40), S. 302 mit der einleuchtenden Forderung nach Schaffung eines „internationalen Verwaltungsverfahrensrechts".

[97] *K. Schmalenbach*, a.a.O. (Fn. 30), S. 351; *G. Biehler*, a.a.O. (Fn. 30), S. 173.

[98] Vgl. *Ch. Tomuschat*, a.a.O. (Fn. 34), S. 539.

[99] Missverständlich *K. Schmalenbach*, a.a.O. (Fn. 30), S. 351.

[100] So der Vorschlag von *E.-J. Husabø*, a.a.O. (Fn. 59), S. 72; vgl. auch schon *G. Biehler*, a.a.O. (Fn. 30), S. 174.

[101] Vgl. zu Art. 234 EGV etwa *K. Ambos,* a.a.O. (o. Fn. 5), § 11 Rn. 40 f. m. w. N.

[102] Nehmen wir an dieser Stelle einmal die deutsche Perspektive ein, so wäre es denkbar, gegen ein nach Vorabentscheidung des *EuGH* ergehendes letztinstanzliches Urteil etwa unter Berufung auf Art. 14 GG mit der Verfassungsbeschwerde vorzugehen. Indes geht das *BVerfG* bekanntlich von einem Kooperationsverhältnis zum *EuGH* aus. Die Zulässigkeit einer Verfassungsbeschwerde wäre in der betrachteten Fallgestaltung – ebenso wie die Vorlage nach Art. 100 Abs. 1 GG – nach den in der Entscheidung zur Bananenmarktordnung konkretisierten Kriterien von der Darlegung abhängig, dass Grundrechtsschutz auf Gemeinschaftsebene generell nicht gewährleistet sei (*BVerfG*, Beschl. v. 7.6.2000 – 2 BvL 1/97, NJW 2000, 3124 ff.; instrukt. hierzu *F. Mayer*, Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung, EuZW 2000, S. 688). Aussichtsreich wäre der Weg nach Karlsruhe mit Blick auf die „sehr theoretische" Reservekompetenz (*Jutta Limbach*) des *BVerfG* damit auch nicht!

[103] Vgl. *G. Biehler*, a.a.O. (Fn. 30), S. 178.

[104] Hierzu *S. Bartelt/ H.-E. Zeitler,* a.a.O. (Fn. 3), S. 714.

[105] Dazu *S. Bartelt/ H.-E. Zeitler,* a.a.O. (Fn. 3), S. 714.

[106] Insbesondere sieht die *IGH*-Satzung keine derartigen Klagemöglichkeiten vor. Vgl. hier auch *Ch. Tomuschat*, a.a.O. (Fn. 34), S. 538.

[107] *S. Albin*, a.a.O. (Fn. 3), 3. Zum Fehlen einer „Internationalen Verfassungsgerichtsbarkeit" *M. Payandeh*, a.a.O. (Fn. 76), S. 49 f.

para. 8 der Leitlinien[108] immerhin ein „de-listing" Verfahren vor, die Betroffenen müssen sich dafür aber an ihre Heimatregierungen wenden. Ob die Regierungen für die Betroffenen – welche sie ja gegebenenfalls im Sicherheitsrat für eine Listung vorgeschlagen haben – Partei ergreifen, ist fraglich. Ohnehin kann dieses „de-listing"-Verfahren nur als erster Schritt in die richtige Richtung bewertet werden, einem *gerichtlichen Rechtsschutzverfahren* kann es aber nicht gleichgesetzt werden. Hier sollte in Zukunft eine Lösung *de lege ferenda* gesucht werden, möglicherweise als Individualklage vor dem *IGH*. Zwar ist der IGH bislang nur für Streitigkeiten zwischen Staaten zuständig, Individualklagen sind im IGH-Statut nicht vorgesehen. Heißt dies aber zwangsläufig, dass man eine Klagemöglichkeit für Einzelpersonen nicht in Erwägung ziehen kann? Die neuartige Stellung des Individuums sollte auch in diesem Bereich zu einem Umdenken führen, wenn Individuen mit (Wirtschafts-)Sanktionen belegt werden, so muss man sie auch mit (Rechts-) Schutzmöglichkeiten ausstatten! Eine Alternative zur Ausweitung der diesbezüglichen Kompetenzen des IGH wäre die Einsetzung einer Kontrollkammer durch den Sicherheitsrat, doch dürfte diese Kammer nicht als Unterorgan des Sicherheitsrates konzipiert werden, sondern müsste als *unabhängiges* Organ agieren können. Wie auch immer eine Lösung letztlich aussehen mag, es fest steht: Der Rechtsschutz auf UN-Ebene ist nicht befriedigend und es sollte in naher Zukunft eine tragfähige Lösung *de lege ferenda* erarbeitet werden.

3. Schluss

Die Art. 39, 41 UN-Charta erfassen nach ihrem Wortlaut und nach Sinn und Zweck dieser Regelungen durchaus friedensstörende Aktivitäten nicht-staatlicher Vereinigungen und gegebenenfalls auch solche von Einzelpersonen. Dem steht nicht entgegen, dass sich die Staatengemeinschaft bis zum heutigen Tage nicht auf eine konsensfähige Terrorismusdefinition verständigen konnte. Denn der Bereich desjenigen, was man gemeinhin unter den für ideologische Vorwertungen anfälligen Begriff des „Terrorismus" subsumiert oder nicht subsumiert und der tatbestandliche Bereich des Art. 39 UN-Charta weisen allenfalls eine Schnittmenge auf. Das Konzept der Friedensstörung, welche die Weltorganisation der Vereinten Nationen betrifft, und das unsichere des Terrorismus stehen in einem aliud-Verhältnis zueinander, so dass es nicht etwa eine sozusagen logische Voraussetzung friedensstörender Aktivitäten i. S. v. Art. 39 UN Charta nichtstaatlicher Akteure darstellt, dass – was immer man hierunter im Einzelfall verstehen *will* – „Terrorismus" vorliegt[109]. Die Überlegungen des EuG zur Bindung der Gemeinschaft an die UN-Vorgaben überzeugen, denn in dem Maße, in dem die Mitgliedsstaaten bestimmte staatliche Handlungsformen wie hier den Bereich wirtschaftlicher Sanktionsmaßnahmen auf die Gemeinschaft übertragen bzw. nur noch in europäischer Kooperation vorgehen, gehen die diesbezüglichen Verpflichtungen der Mitgliedsstaaten gegenüber dem Recht der Vereinten Nationen auf die europäische Ebene über. Die Gemeinschaft steht damit grundsätzlich in der Pflicht, UN-Vorgaben zu intelligenten Sanktionen umzusetzen. Allerdings bedürfte sie hierfür im Primärrecht einer Art. 10 EGV entsprechenden Kompetenzgrundlage. Die diesbezüglichen Erwägungen des EuG zum Bestehen einer gemeinschaftsrechtlichen Kompetenzgrundlage zur Umsetzung durch UN-Recht vorgegebener intelligenter Sanktionsregimes im Wege von EG-Verordnungen leuchten nicht ein. Art. 60, 301, 308 EGV werden auch zusammengenommen den Anforderungen an eine begrenzte Einzelermächtigung nicht gerecht und der gescheiterte Verfassungsvertrag sah in Art. III-321 Abs. 2 Verf-V eine Regelung über Wirtschaftssanktionen gegen nichtstaatliche Vereinigungen und natürliche Personen vor: „Sieht ein nach Kapitel II erlassener Europäischer Beschluss dies vor, so kann der Rat nach dem Verfahren des Absatzes 1 restriktive Maßnahmen gegen natürliche oder juristische Personen sowie Gruppierungen oder nichtstaatliche Einheiten erlassen." Es ist nicht akzeptabel, dass die Europäische Gerichtsbarkeit Desiderate des gescheiterten Verfassungsprozesses auf sozusagen kaltem judiziellem Wege realisiert. Problematisch ist des Weiteren die Annahme des EuG einer *gerichtlichen* Prüfungskompetenz in Bezug auf den Bereich des zwingenden Völkerrechts, des *ius cogens*. Das Konzept des *ius cogens* ist bereits seiner Funktion nach ungeeignet, Bereiche gerichtlicher Überprüfbarkeit von UN-Maßnahmen zum Zwecke der Gewährleistung individuellen Rechtsschutzes zu definieren. Bezüglich sozusagen klassischer Sanktionsregimes ergab sich die Frage des Individualrechtsschutzes nicht, weil diese auf Staaten ausgerichtet waren. Gleichwohl ist natürlich denkbar, dass eine SR-Resolution, die ein derartiges Regime vorsieht, gegen zwingendes Völkerrecht verstößt. Hat aber, was diese Überlegung deutlich werden lassen soll, die Frage, ob ein bestimmtes Sanktionsregime in seiner Konstitution mit dem *ius cogens* in Einklang steht oder nicht, gar nichts mit der Dimension des Individualrechtsschutzes zu tun, so leuchtet es auch nicht ein, dass gerade der internationale Ordre public, von dem das EuG spricht, Bereiche gerichtlicher Überprüfbarkeit markiert. Daraus, dass der Sicherheitsrat an bestimmte Regeln des Völkerrechts gebunden ist, lässt sich eben nicht zwingend ableiten, dass für einen bestimmten Fall die Wahrung dieser Grenzen durch internationale, europäische oder auch nationale Gerichte zum Zwecke des Individualrechtsschutzes überprüft werden kann. Abhilfe ist hier nur *de lege ferenda* zu leisten, durch Schaffung von Regelungen, die Klarheit darüber verschaffen, ob und inwieweit targeted sanctions *gerichtlich* überprüfbar sind. *De lege lata* bleibt es aber wohl bei einer für von intelligenten Sanktionen individuell Betroffenen reichlich unbefriedigenden Situation, denn alternative Rechtswege zu dem in den betrachteten Fällen beschrittenen erweisen sich als nicht gangbar. Aufgrund der Vorlageregelungen des Art. 234 EGV führen sozusagen alle Rechtswege zum EuGH. Und dieser hat dann auch derzeit als Rechtsmittelinstanz zu entscheiden über die Berufungen von *Yusuf, Kadi, Ayadi* und *Hassan*.

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[108] Zu den Leitlinien vgl. o. Fn. 24.

[109] Man wird auf die Umstände des Einzelfalles abstellen müssen. Dass die Aktivitäten der deutschen R.A.F. oder der italienischen Roten Brigaden *Terrorismus* waren, wird man wohl annehmen können. Wenn nun auch die genannten Vereinigungen die deutsche oder die italienische *innere Sicherheit* gefährdeten, so ging von ihnen aber sicherlich keine friedensstörende Wirkung aus wie sie das VII. Kapitel der UN Charta im Blick hat. Umgekehrt verhält es sich mit den religiös-politisch motivierten Aktivitäten von *Osama bin Laden* und der Al-Qaida. Dass diese den (Welt-) Frieden tangieren, wird man Ende 2006 kaum mehr in Frage stellen können.

The Principle of Proportionality in Self-Defence and Humanitarian Intervention

Theodora Christodoulidou and Kalliopi Chainoglou*

This article examines the principle of proportionality in *jus ad bellum*. Although the principle of proportionality in *jus ad bellum* determines the legality of the use of force and circumscribes it, it is a rather neglected area. Indeed, the principle of proportionality from a *jus ad bellum* perspective and within the context of self-defence has been underdeveloped, while the conduct of war (*jus in bello*) has been tentatively updated to deal with the technological developments on weapons and the modern types of warfare. Similarly, traditionally self-defence debates have tended to focus on whether, and not to what extent or when, to allow defensive measures. In parallel, mainstream analysis on the principle of proportionality in humanitarian intervention moves from the just war doctrine to the principle of proportionality in *jus in bello*, totally ignoring the principle of proportionality in humanitarian intervention from a *jus ad bellum* perspective. This article examines the meaning of the principle of proportionality and its application in the exercise of the right of self-defence against terrorism and weapons of mass destruction proliferation and in humanitarian intervention.

Dieser Beitrag untersucht das Verhältnismäßigkeitsprinzip im *jus ad bellum*. Obwohl das Verhältnismäßigkeitsprinzip im *jus ad bellum* entscheidend für die Rechtmäßigkeit der Anwendung von Gewalt ist und diese beschränkt, ist es ein eher vernachlässigtes Themengebiet. In der Tat ist das Verhältnismäßigkeitsprinzip im *jus ad bellum* und im Kontext der Selbstverteidigung unterentwickelt, während die Regeln der Kriegsführung (*jus in bello*) zögernd fortentwickelt wurden, um mit technologischem Fortschritt und modernen Formen der Kriesführung umzugehen. Gleichermaßen haben sich Debatten über Selbstverteidigung traditionell auf die Frage ob und nicht wann oder in welchem Ausmaß Selbstverteidigungsmaßnahmen zulässig sind, konzentriert. Zur selben Zeit verschieben sich die herkömlichen Untersuchung des Verhältnismäßigkeitsprinzips im Rahmen der humanitären Intervention von der *bellum justum*-Doktrin zum Verhältnismäßigkeitsprinzip im *jus in bello* und lassen dabei die Betrachtung aus einer *jus ad bellum*-Perspektive außer Acht. Dieser Artikel erforscht Bedeutung und Anwendung des Verhältnismäßigkeitsprinzips in der Ausübung des Rechts auf Selbstverteidigung gegen Terrorismus und die Proliferation von Massenvernichtungswaffen und in der humanitären Intervention.

1. Introduction

The UN Charter prohibits states from using force, with two exceptions: either actions are mandated by a Chapter VII Security Council Resolution or actions are taken in self-defence without prior Council approval in accordance with Article 51 of the UN Charter – but only in case of an "armed attack". However, state practice and *opinio juris* indicate that there is increasing support for additional exceptions to the use of force that are not written in the UN Charter. For example, states have come to the point of endorsing the principle of the "responsibility to protect" (which falls within the wider concept of humanitarian intervention) while they have indicated strong support for the right to take defensive measures against imminent threats (anticipatory self-defence). Few but powerful states have also argued for the right to take defensive measures against more latent threats (pre-emptive self-defence).

Under the UN Charter the right to self-defence can be exercised if an armed attack occurs. The *Caroline* incident of 1837 provides the criteria according to which states may resort to force in self-defence: states must show that "the necessity of self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation" and the use of force is justified only when it is "necessary and proportional to the threat at hand".[1] The principle of proportionality in the *Caroline* formulation was stated to require "nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it".[2] Today, despite the existing uncertainty with regards to the legal regulation of the use of force, all states agree that for any use of force to be lawful it must be both necessary and proportionate.

Although the *Caroline* criteria are universally considered to be a watershed event in the history of *jus ad bellum*, the criteria remain vague till today and do less than little to provide us with the content of proportionality and with a contemporary definition of "imminent threat" or "proportionate responses to an imminent threat". The international environment is permeated by modern security challenges, the seriousness of which is amplified by the advances in technology and shifts in the nature of warfare. The *Caroline* criteria provide an unstable "platform" upon which a state may formulate as to what should be a necessary and proportional response to a threat that is yet to materialize. At the same time, international legal scholars have failed to present a satisfactory account of proportionality in the states' decision-making process.

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1 "The Caroline Case", (1837) 29 British and Foreign State Papers 1137-1138. [Hereinafter: "*Caroline*"].

2 *Caroline*, *supra* note 1.

The following discussion discusses the principle of proportionality in *jus ad bellum* with a reference to the principle of proportionality in the areas of state responsibility and *jus in bello*. The input offered by the International Court of Justice [hereinafter the "ICJ" or the "Court"] jurisprudence on the concept of proportionality in *jus ad bellum* is also taken into consideration, and then the issue of the re-conceptualization of proportionality within the wider context of modern terrorism and weapons of mass destruction [hereinafter "WMD"] proliferation, pre-emptive self-defence and humanitarian intervention is addressed.

2. The Principle of Proportionality in the area of State Responsibility and *jus in bello*

The concept of proportionality features in different areas of law: *jus ad bellum* (e.g. self-defence), state responsibility (e.g. countermeasures against international wrongful acts), *jus in bello* (e.g. conduct of hostilities). For example, from the perspective of the law of state responsibility the principle of proportionality plays a significant role in regulating and restraining the nature and intensity of countermeasures taken in response to international wrongful acts and eliminating the danger of abuse inherent in a decentralized system as the international legal order.[3] Article 51 of the International Law Commission's Articles on the Responsibility of States for International Wrongful Acts [hereinafter "the ILC Articles"] establishes an essential limit on the taking of countermeasures by providing that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". The wording of Article 51 of the ILC Articles delimits proportionality as a relation of equivalence between breach and response that is independent of the question whether the countermeasures in question were necessary to achieve the aim of ensuring compliance.[4] Indeed, the principle of proportionality in the area of state responsibility seems to be weighted against the gravity of the wrongful act.

Professor Enzo Cannizaro commenting on the concept of proportionality in the law of state responsibility has proposed that proportionality be assessed in accordance with the nature of countermeasures (i.e. coercive, punitive, etc) and that proportionality should be therefore classified into "external proportionality" and "internal proportionality".[5] "External proportionality" has the role of assessing the appropriateness and reasonableness of the pursued objective that the acting state wishes to achieve by acting in self-redress while "internal proportionality" has the role of assessing the appropriateness of the content of the countermeasures to the specific objective they seek to attain.[6]

The principle of proportionality in the law of state responsibility is conceptualized in a different manner than the principle of proportionality in *jus ad bellum* and *jus in bello*. The *jus in bello* rule of proportionality focuses on the regulation of the conduct of the conflict. Proportionality in *jus in bello* determines the balance between the achievement of a military goal and the cost in terms of suffering and loss of civilian life.[7] It weighs the legitimacy of attacking a particular military target e.g. collateral damage to civilians, it applies irrespective of whether the use of force is deemed lawful or not, and plays no part whatsoever on the legality of the use of force as a whole. The bodies of rules regulating *jus in bello* and *jus ad bellum* have long conspired to remain separate; this fact had particular influence on the evolution of the conception of the principle of proportionality.[8]

3. Two possible interpretations of Proportionality (in *jus ad bellum*) and Double Proportionality

Proportionality in *jus ad bellum* is found in customary international law. The legal analysis of the principle of proportionality is restricted to the principle of proportionality in self-defence. Legal doctrine has indicated two possible interpretations of proportionality: it could be measures either against the size and scope of the armed attack or measures that meet the actual needs of self-defence (i.e. measures to repel the attack and restore the situation that existed prior to the attack).

The following analysis examines which interpretation seems to be favoured by the ICJ. In the case concerning *Military and Paramilitary Activities in and against Nicaragua* [hereinafter "*Nicaragua*"] the ICJ noted that "there is a specific rule whereby self-defence would warrant only measures which are *proportional to the armed attack* (emphasis by the authors) and necessary to respond to it, a rule well established in customary international law."[9] According to the Court's finding a proportionate response in self-defence amounts to *any type* of measures necessary to respond to an armed attack that has taken place or is ongoing. In this case the defensive measures failed the test of proportionality due to a combination of factors i.e. the selected targets and the scale of the attacks.[10] Given this fact and the fact that the Court did not attempt to specify what type of measures may be acceptable as proportionate (apart from being necessary) in the exercise of the right of self-defence, it can be safely argued that the Court interpreted the concept of proportionality against the size and the scope of the armed attack. The *Nicaragua* approach was reaffirmed in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* case.[11]

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[3] *Naulilaa* (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), UNRIAA, vol. II, (1928), at 1028; *Air Services Agreement* of 27 March 1946 *(United States v France)*, UNRIAA, vol. XVIII, (1978), at 417; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports (1997), at 7.

[4] See J. Crawford, The International Law Commission's Articles on State Responsibility, Cambridge, Cambridge University Press, 2002, p.296.

[5] E. Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures", (2001) 12 European Journal of International Law, 898-916.

[6] *Ibid.*

[7] See Articles 51(5)(b) and 57(2)(a) (ii), (iii) and (b) of Protocol Additional to the Geneva Conventions of 1949, and relating to the protection of victims of international armed conflicts (Protocol I). Even where the principle of proportionality is not specifically mentioned, it is reflected in many provisions of the Additional Protocol I.

[8] See *infra* discussion "Calculating Proportionality" at p. 16.

[9] *Nicaragua v. United States of America,* ICJ Reports, (1986) at 94, para. 176.

[10] See J. Gardam, Necessity, Proportionality and the Use of Force by States, Cambridge, Cambridge University Press, 2004, p.158.

[11] See *Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports, (1996) at 245 and especially paras. 41-43.

In the recent *Oil Platforms* case, the US and Iran held opposing views as to the meaning of proportionality. Iran in its Memorial seems to have opted out for the second approach, i.e. proportionality should be understood in terms of the measures taken to halt and repel the attack. Iran stated:

"The concept of proportionality suggests an equation. On the one side of this question is the action taken in self-defence. But on the other side there are two possibilities: either the size and scope of the aggression, or the actual needs of self-defence. […] Thus, it was not a question of proportionality measured against the delict, but rather of proportionality in terms of taking measures to halt and repel the attack, and thus protect the object that has been attacked."[12]

It then continued: "[…] proportionality […] relates to two quite different elements of the measures taken in self-defence, namely (i) the degree and form of the force to be used; and (ii) the target chosen for the measures in self-defence."[13]

Strangely though, Iran seemed to have changed its mind in its Oral Pleadings and in its Reply and Defence to Counter-Claim. It suggested that proportionality in self-defence should be weighted against the size and scope of the armed attack. Indeed, in its Reply and Defence to Counter-Claim Iran stated that "even if the two operations launched by the United States constituted self-defence, they were still illegal as violations of the principle of proportionality, the damage inflicted by them to Iran being grossly disproportionate to the damage caused by the two events alleged to constitute armed attacks by Iran."[14] And then, referring to the principle of proportionality continued:

"[…] counter force must not be excessive in relation to the first use of force. This means that the damage done by the counter-force must be commensurate with or generally comparable to that caused by the first use of force.[15] […] the incidence of the damage caused to two US-flagged ships, […] can in no way be compared; it was wholly incommensurate with and out of proportion to the damage caused to the platforms and to Iran."[16]

In its Oral Pleadings Iran measured the proportionality principle against the initial armed attack as opposed to an act proportionate to repel the attack:

"[P]roportionality of a counter-action means that it is not excessive, it must, in other words be commensurate to the act triggering it, i.e. to the first use of force.[17] […] In comparison to the damage caused to the American or allegedly American ships, the damage caused to the oil platforms was excessive."[18]

The US on the other hand suggested that proportionality should be understood in terms of the measures taken to halt and repel the attack:

"[F]orce can be used in self-defence, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked.[19] […] Similarly, proportionality does not necessarily dictate that defensive actions be restricted to a particular geographic scope."[20]

Particularly, the US noted that the level of casualties and damage to civilian property along the "time, place and objective" were the requisite factors for the assessment of proportionality.[21] The US also noted that the fear of expanding the level or scope of conflict between the US and Iran was another restraining factor for the selection of proportionate targets. On the application of the principle of proportionality to the particular case, the US noted:

"in taking action that was carefully calibrated to achieve the objective of defeating and deterring Iranian attacks, the United States met the requirements of proportionality […]."[22]

In their pleadings both the US and Iran (in its Memorial only) seem to agree on a vital point regarding the conception of proportionality that was raised 20 years ago and more by the then Judge Ago. Back then Ago said:

"it would be mistaken […] to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimension disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive action, and not the forms, substance and strength of the action itself […]. Its lawfulness cannot be measured except by its capacity for achieving the desired result."[23]

Along these lines the US in *Oil Platforms* argued that "the desired result was to defeat and deter armed attacks by Iran and thereby protect US ships against the ongoing situation of threats posed by Iranian actions in the Gulf."[24] In effect the US claimed that its actions were lawful self-defence measures and thus proportionate because proportionality was measured in terms of what the end result of self-defence would achieve.

However, the ICJ approached the issue from another perspective. It seems that the Court favoured the first approach when it stated:

"*As a response to the mining* (emphasis by the authors) by an unidentified agency, of a single United States warship, which

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[12] Memorial of the Government Submitted by the Islamic Republic of Iran, 8 June 1993, paragraph 4.21. *Case Concerning Oil Platforms* (*Islamic Republic of Iran v. United States of America*), 6 November 2003 available at <http://www.icj-cij.org>.

[13] *Ibid*, para. 4.22.

[14] Reply and Defence to Counter-Claim Submitted by the Islamic Republic of Iran, 10 March 1999, para. 7.13, p. 137.

[15] *Ibid*, para. 7.62

[16] *Ibid*, para. 7.63.

[17] Iran's Oral Pleadings, CR 2003/7, para. 61.

[18] *Ibid*, para. 64.

[19] Counter Memorial and Counter-Claim Submitted by the United States of America, 23 June 1997, para. 4.31, p. 141.

[20] I*bid*, para. 4.32.

[21] *Ibid*, 4.34-4.35.

[22] *Ibid*, para. 5.48.

[23] R. Ago, "Addendum to the Eight Report on State Responsibility", (1980) II Yearbook of International Law Commission, Part One, Doc. CN.4/318/ADD. 5-7, p. 6, para. 121. Iranian Memorial, partly quoting R. Ago at para. 4.21.

[24] Rejoinder submitted by the US, 23 March 2001, para. 5.49.

was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force."[25]

Indeed, what the Court required from the US was to "show that its actions were necessary and proportional to the armed attack made upon it."[26] With this statement the Court clarified that the proportionality of self-defence measures, is to be assessed neither in relation to the final objective of the self-defence operation nor in relation to the specific incidents of targeting; instead proportionality should be assessed by taking into account the scale of the whole operation as well as the necessity of the measures taken in self-defence.[27]

In the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) [hereinafter the *"Armed Activities* case"] the principle of proportionality was dealt again peripherally. In the Separate Opinion of Judge Kooijmans it was argued that the lawfulness of the conduct of the attacked state should be subjected to the same test as that applied in the case of the claim of self-defence against state: 1) does the use of force by irregular forces amount to an armed attack, and if so, 2) is the 'defensive' action by the attacked state in conformity with the requirements of necessity and proportionality.[28] Uganda also maintained the same argument. In order to prove the proportionality of its actions (i.e. against the territory of the Congo and the bases of operation of the insurgents), Uganda examined whether the armed attack mounted by an insurgent group into or against the territory of Uganda constituted an armed attack. The examination of this question relied on three criteria:

"First, were the operations carried out with the purpose, shared with the Government of the Congo, of destabilizing Uganda? Second, did the attacks consist of operations mounted, in military terms, from within the Congo? Third, were the attacks mounted by armed groups acting on behalf of the Congo?"[29]

While the focus in the first place was on the determination of the use force in question as an armed attack or aggression, Uganda claimed that it was also necessary to identify "the source, that is, the responsible government, in relation to specific attacks or patterns of specific attacks."[30]

Uganda claimed in its Oral pleadings that the substance of the principle of proportionality consists of three (3) elements: *purpose*, *necessity* and *causation* and that the content of the principle of proportionality is buttressed if there is a "pattern or sequence of linked attacks"[31]. Uganda claimed that a series of acts of certain seriousness that were carried out by irregular forces supported by the Government of Congo with the purpose of destabilizing Uganda were sufficient to trigger the right of self-defence. Accordingly Uganda asserted she was justified in taking measures in response to this series of attacks.

Moreover, the element of causality underpinning this series of attacks and other factors relevant to the use of force was evident enough to qualify the criterion of necessity for the exercise of the right of self-defence. Uganda argued:

"The element of seriousness is in the present context to be related both to the degree of force employed and to other factors. What is defensive, and what is proportionate or reasonable, depends on several factors apart from the degree of force. One such factor is the purpose: which in this case was to destabilize the Government of Uganda and to destroy or weaken her public order system. […] A further factor is the agency, that is, the organizational connection between the armed group carrying out the operation, and the central Government of the Congo. Indeed, there was also a tripartite relationship involving the armed groups, the Governments of the Congo and the Sudan. […] It is these causal connections which justify a defensive reaction to neutralize the bases from which the armed groups operated as *de facto* organs of the Congolese Governments and of the Sudan."[32]

In addition, two more factors such as the "sudden increase in the tempo and gravity of the armed attacks" and the "impact of the sequence of armed attacks" necessitated Uganda to act in self-defense.[33] According to Uganda:

"The sequence of armed attacks[34] [...] involved the purpose of destabilizing Uganda's Government and weakening its public order system, a purpose shared with the central Government of the Congo. The attacks were carried out by groups supported by the central Government of the Congo and acting as its agents. The sequence constituted a pattern of armed attacks for which the Congo was responsible and which were mounted from bases within its territory. In the result military action against those bases within the Congo became an operational necessity within the framework of a continuum of attacks from Congolese territory, and the escalation of the military action against Uganda in the period June to August 1998."[35]

The Court, of course, in its Judgment did not follow such an analytical strand. Once the Court found that the preconditions for the exercise of self-defence did not exist in the particular case, it refrained from examining whether the alleged actions in self-defence were exercised in circumstances of necessity and in a manner that was proportionate. However the Court was tempted to comment that "the taking of air-

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[25] *Oil Platforms* case, para. 77.

[26] *Ibid*, para. 51.

[27] *Oil Platforms* Judgment, para. 72.

[28] Separate Opinion of Judge Kooijmans, p. 7, available at <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

[29] Oral Pleadings, Verbatim Record, 18 April 2005, p. 24, para. 54, available at <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

[30] *Ibid*, para. 57, p.25.

[31] *Ibid*, para. 61, p.26.

[32] I*bid*, paras. 62-64.

[33] *Ibid*, paras. 65-66.

[34] Uganda, *supra* note 29, para.66.

[35] *Ibid*, para.67.

ports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of trans-border attacks it claimed had given rise to the right of self-defense, nor to be necessary to that end."[36]

The above analysis of the *Nicaragua*, *Nuclear Weapons, Oil Platforms*, and *Armed Activities* cases seems to argue that the ICJ's approach to proportionality, albeit epigrammatically at times, is to strike a balance between the attack and the wrong provoking it, thereby favouring the first approach to proportionality.

On the other hand, and contrary to what the ICJ said, Judge Ago more than 20 years ago wrote: "what matters in this respect is the result to be achieved by the defensive action, and not the forms, substance and length of the action itself […]. Its lawfulness cannot be measured except by its capacity for achieving the desired result."[37] In her Dissenting Opinion at the *Nuclear Weapons* case Judge Higgins also maintained this position.[38]

Similarly, several scholars argue that the principle of proportionality determines the amount of force that can legitimately be used to achieve the goal, thereby favouring the second approach to proportionality.[39] Nonetheless, this distinction as to the two possible interpretations of proportionality may not be so rigid. The UK Attorney General on April 21st 2004 in his response to a Parliamentary Question referred to the need for uses of force to be "proportionate to the threat faced and […] limited to what is necessary to deal with the threat."[40] This statement seems to signal that the concept of proportionality should be qualified or – as Professor Lowe commented – that proportionality amounts to double proportionality.[41]

4. Calculating proportionality

Having clarified that a use of force should be proportionate to the size and scope of the armed attack and to the actual needs of self-defence, the next question is what is the measure with which proportionality is calculated? Contemporary analysis indicates that the proportionality of the response to the act triggering the right of self-defence has implication on the degree of force and consequently on the weaponry which a state might lawfully use. This means that the principle of proportionality imposes an additional level of limitation upon a state's conduct of hostilities, influencing its choice of weapons, targets and the area of conflict,[42] as well as the geographical and destructive scope of responses on third states and people, and even influencing whether the campaign should rely mainly on air strikes and high altitude, rather than on a combination of air and land forces. Professor Greenwood aptly noted that modern *jus ad bellum* "is not concerned solely with whether the initial resort to force is lawful; it also has implication for the subsequent conduct of hostilities."[43]

The aforementioned measures (i.e. means and methods of warfare) by which proportionality is calculated have been traditionally analyzed from the *jus in bello* perspective. This modern analysis of proportionality in *jus ad bellum* links issues that are traditionally found in *jus in bello* with *jus ad bellum* issues. In fact, it 'picks up' *jus in bello* issues and puts them under the umbrella of the *jus ad bellum.* This has an impact on the legality of the use of force irrespective of whether the state resorting to the use of force complies with the *jus in bello.* Indeed, calculating the principle of proportionality by the means and methods of warfare is an approach that can latently be found in the *Nuclear Weapons* and *Oil Platforms* case referred to above. The Court in the *Nuclear Weapons* case commended whether a nuclear response as a means of warfare is compatible with the principle of proportionality, and stated that "the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirement of proportionality."[44] Similarly, the Court in the *Oil Platforms* case commenting on the criteria of necessity and proportionality highlighted that one aspect of both of these criteria is the "nature of the *target* (emphasis by the authors) of the force used avowedly in self-defence".[45] The ICJ considered here the lawfulness of the self-defence measures by additionally taking into account whether the selected targets were used for military activities, whether there was sufficient evidence proving it and whether the alleged victim state took sufficient steps to complain repeatedly to the alleged aggressor state. The ICJ's approach in the *Oil Platforms* clearly has the effect of merging issues and considerations of two different and separate bodies of laws – that of *jus ad bellum* and *jus in bello*.

The analysis so far indicates that for an action to be proportionate in *jus ad bellum* the means and methods of warfare should be proportionate (a) to the threat faced *and* (b) to achieve the goal. The following discussion approaches the concept of proportionality from both perspectives.

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[36] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda*), Judgment, 19 December 2005, para. 147.

[37] R. Ago, "Addendum to the Eighth Report on State Responsibility", (1980) II Yearbook of the International Law Commission, Part One, Doc. A/CN.4/318/ADD.5-7, p. 60, para. 121 (1980).

[38] *Advisory on the Legality of Nuclear Weapons* case, Dissenting Opinion of Judge Higgins, para. 5.

[39] J. Gardam, "Proportionality and Force in International Law", (1993) 87 American Journal of International Law 403-406; C. Greenwood, "Self-defense and the Conduct of International Armed Conflict", in Y. Dinstein and M. Tabory, International Law at a Time of Perplexity: essays in honour of Shabtai Rosenne, Dodrecht, Nijhof, 1989 at 273; C. Greenwood, "The Relationship between *Jus ad Bellum* and *Jus in Bello*", (1985) 9 Review of International Studies 224.

[40] UK Attorney General Lord Goldsmith, Lords, (April 21 2004) Hansard, col. 370, available at <http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_head0>.

[41] V. Lowe, "Clear and Present Danger: Responses to Terrorism", (2005) 54 International and Comparative Law Quarterly 192-193.

[42] Greenwood, *supra* note 39, p. 273.

[43] C. Greenwood, "*Jus ad Bellum* and *Jus in Bello* in the *Nuclear Weapons Advisory Opinion*", in L. Boisson de Chazournes and P. Sands (eds.) International Law, the International Court of Justice and Nuclear Weapons, Cambridge, Cambridge University Press, 1999, at 265.

[44] *Nuclear Weapons* Judgment, para. 43.

[45] *Oil Platforms* Judgment, para. 74.

5. Proportionality in Self-defense

According to Article 51 of the UN Charter, states may exercise the inherent right to individual or collective self-defence if an armed attack occurs.[46]

In 2002 and 2006 the US claimed that the traditional law of self-defence cannot accommodate global terrorism and WMD proliferation and further claimed that a right of pre-emptive self-defence exists to defend against imminent threats (usually arising from the contemporary security environment of terrorism and WMD proliferation).[47] This conception of pre-emptive self-defence invited the re-consideration and re-conceptualization of proportionality, and in particular, proportionality in anticipatory and pre-emptive self-defence within the context of terrorism and WMD proliferation.

Both anticipatory self-defence and pre-emptive self-defence expand the meaning of the response to an "armed attack". Self-defence actions are classified as anticipatory or pre-emptive in accordance to when a threat for an armed attack is considered to be imminent (in the case of anticipatory self-defence) or more distant in future (in the case of pre-emptive self-defence). An armed attack can be imminent and unavoidable even if it is not materialized and consummated.[48] In this sense the attack is pictured as a multi-step process on a timeline from peacetime to conflict. Anticipatory self-defence is concerned with the temporal aspect of the threat; it must be tightly connected in time and space with the awaited use of force. Pre-emptive self-defence is the use of force against a state farther back along the *ex ante* chronological line, even where there is no reason to believe that an attack is planned; in such a case when a threat is neither anticipated nor is there any evidence that materialization of the threat is imminent, yet it is suspected that given the right circumstances a threat will emerge on the chronological line. Pre-emptive self-defence refers to pre-emptive action not against an actual armed attack, even an imminent one, but against a potential threat the consequences of which, if realized in practice, would be devastating and incorrigible. State practice indicates that there is a certain difficulty in clarifying when a use of force in self-defence amounts to anticipatory or pre-emptive self-defence.

As mentioned in section 3 above, proportionality in self-defence is concomitant with the size and scope of an armed attack (first interpretation of proportionality) and the aim of the defensive responses (second interpretation of proportionality). However, either interpretations of proportionality are difficult to apply within the context of anticipatory or pre-emptive self-defence because certain questions arise. For example, with regard to the first interpretation of proportionality and within the context of anticipatory self-defence, should the proportionality calculation be measured against the potential impact of the expected threat and/or the harm caused by the threat? Or should it be measured against the damage that past terrorist attacks have caused and the possibility of the continuation of the terrorist threat (i.e. future terrorist threats)? Within the pre-emptive self-defence context, proportionality is even more difficult to be measured against the immaterialized, suspected harm.

With regard to the second interpretation of proportionality and within the context of anticipatory/pre-emptive self-defence, proportionality calculation should also be measured against the purpose of the defensive actions. Therefore, the question arises as to what are the legitimate aims of anticipatory/pre-emptive responses to the threat of an armed attack? State practice indicates not only there is a certain difficulty in clarifying when a use of force in self-defence amounts to anticipatory or pre-emptive self-defence, but also in identifying what are the aims/objectives of the defensive responses in anticipatory and pre-emptive self-defence and as a result, what means and methods of warfare would be proportionate in anticipatory and pre-emptive self-defence.

The purpose of the anticipatory self-defence is to pre-empt an imminent or expected attack, and the purpose of pre-emptive self-defence is to deter states or non-state actors from pursuing a specific course of action that, if allowed to evolve/mature, may potentially develop into an armed attack, while the purpose of the traditional self-defence is to defend against an armed attack that has already taken place. It is often the case that states that use force anticipatorily do so because they judge the potential aggressor on his past behaviour and conduct or pre-existing wrongdoing which is likely to be repeated in the future. Therefore the *purpose* of anticipatory self-defence is not only concerned with pure pre-emption of an imminent attack but also with pre-existing coercion. Likewise, this is often the case with the restrictive/traditional conception of self-defence (where states will wait to use force until after an armed attack has occurred): when states use force to defend themselves, they do so partly to prevent a future act from taking place. Therefore, the *purpose* even of the restrictive conception of self-defence is not concerned only with the defence against an attack that has taken place but is also future-oriented. This means that the defensive response, within the traditional concept of self-defence, may not only be concerned with the repulsion of an attack but also with the pre-emption of future coercion.[49] Take for example the US responses to 9/11 attacks. The current view is that the US suffered an attack from a non-state organization, which was supported or tolerated by the *de facto* government of Afghanistan and as a response the US used force in self-defence in order to root out the al-Qaeda training camps and topple the oppressive Taliban.[50]

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[46] See generally R. Higgins, Problems and Process: International Law and How We Use It, Oxford, Oxford University Press, 1994, p.232.

[47] See generally: The National Security Strategy of the United States of America 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf>; The National Security Strategy of the United States of America 2006, available at <http://www.whitehouse.gov/nsc/nss/2006/>; W.H. Taft VI, Memorandum: The Legal Basis for Preemption, (18 November 2002), available at <http://www.cfr.org/publication>.

[48] See for example the position of the UK Attorney General Lord Goldsmith, *supra* note 40, on the concept of imminence.

[49] S.D. Murphy, "The Doctrine of Preemptive Self-defense", (2005) 50 Villanova Law Review 735.

[50] Obviously, one can look the attack from another perspective, and argue that the US responses were nothing else but an exercise of preemptive self-defense as the "armed attack against the WTC and the Pentagon was over and no defensive action could have ameliorated its effects." M.J. Glennon, "Preempting terrorism: The case for Anticipatory self-defense", (28 January 2002) Weekly Standard 26.

The *Nuclear Weapons* case established that proportionality is to be assessed in accordance with the balance reached between the threat and the means chosen to deal with it. The present authors feel that the means of warfare are vitally interrelated to the methods of warfare so we interpret the Court's findings in *Nuclear Weapons* case as establishing that proportionality is subject to the balance between the threat and the means and the methods of warfare chosen to deal with the threat. However, it is the case that it is not only difficult to determine proportionality in anticipatory or pre-emptive self-defence but also to assess the proportionality of defensive responses to terrorist attacks emanating from a state but carried out by non-state actors.[51] The current security milieu faces challenges that distort the assessment of proportionality. The problem lies mainly in the assessment of what the threat amounts to; to a lesser extent the problem arises when assessing what are the reasonable means to repel such a threat. Within the anticipatory self-defence context the question is whether proportionality should be measured against the potential impact of the expected threat and the harm caused by the threat and the force necessary to repulse the threat of attack *or* against the purpose of the defensive action only. Within the pre-emptive self-defence context proportionality is even more difficult to be measured against the developing threat and/or the impact of the immaterialized and unimaginable harm.

Determining proportionality in anticipatory or pre-emptive self-defence within the context of terrorism and WMD is an ever more difficult task, as is the assessment of proportionality when the terrorist attacks emanate from a state, but are carried out by non state actors. Is the aim in pre-emptive self-defence (a) to prevent a repetition of a terrorist attack; (b) to destroy some terrorist cells and infrastructure linked to the terrorist activities; (c) to topple the government; (d) to occupy the target state; (e) to attack a military target or a city; or (f) to destroy weapons that are already weaponized? Should defensive military measures target a terrorist training camp when that can be almost immediately rebuilt or relocated in the territory of another state (either supporting terrorist activities or unable but willing to confront the terrorist activities)? In the case of non-state actors, does the possession of WMD equal the use of WMD? In such a case is there a necessity to act? If the principle of necessity is satisfied here then the principle of proportionality steps in and functions as a second legitimizing factor for the prospective use of force in anticipatory or pre-emptive self-defence. But the question remains: how is proportionality to be measured? In either case the scope of the right of self-defence does not allow the use of force to 'punish' a potential aggressor.

Legal literature till 2001 identified three different approaches to measure proportionality especially against terrorist attacks: 1) the "eye-for-an-eye" approach, 2) the "cumulative proportionality" approach; and 3) the "deterrent" proportionality".[52] The "eye-for-an-eye" proportionality approach posits that the defensive response be proportionate to the character of the initiating threat[53] (i.e. first interpretation of proportionality). The second approach posits that in the case of a series of attacks, the cumulative effect of these attacks may justify a single yet of greater impact defensive response[54] (i.e. first interpretation of proportionality). According to this approach if a state is threatened and harassed by terrorists on a repetitive basis, the state may have only one chance to avert future attacks or to reduce their effectiveness and frequency: that of taking action in self-defence of a greater degree than each terrorist attack in order to eliminate the centre of the terrorist organization.[55] The third approach posits that the defensive response be of such impact enough to deter terrorists from planning and carrying out future terrorist attacks[56] (i.e. second interpretation of proportionality). All these approaches were developed and tested in state practice when terrorism was perceived to be state-supported or state-sponsored.[57]

However, in the aftermath of 9/11 it has been clear that the face of terrorism has changed and therein evolved beyond recognition. The war on terror cannot fit within any of the aforementioned three approaches. Fitzpatrick has correctly pointed out that at first instance "no limits of proportionality are relevant because the future terrorist activity can always be hypothesized in apocalyptic terms".[58] It is apparent that due to the changes in the security environment the different levels of maturation of threat will necessitate a different response and different degree of proportionality. It is also due to these changes in the security environment that the very concept of self-defence is undergoing a process of evolution that accompanies a process of evolution for the principle of proportionality itself.[59]

Accordingly, it is argued that in specific circumstances regarding terrorist operations and WMD proliferation the exercise of self-defence should be primarily conditional on the concept of necessity and proportionality, instead of imminence, which was traditionally viewed as a temporal standard referring to the nearness of an impeding attack. To avoid the risk of miscalculation, (since to verify the nearness of the impeding attack would require highly qualitative objective evidence), it is suggested that the temporal interpretation of

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[51] E.P.J. Myjer and N.D. White, "The Twin Towers Attack: An Unlimited Right to Self-Defense?", (2002) 7 Journal of Conflict and Security Law 8, pose the question: "Does an attack on a small part of the United States justify an armed a response against a whole country?".

[52] A.C. Arend and R.J. Beck, International Law and the Use of Force, London, Routledge, 1993, p.165.

[53] G.F. Intoccia, "American Bombing of Libya", (1987) 19 Case Western Reserve Journal of International Law 205-206.

[54] G. Roberts, "Self-Help in Combating State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals", (1987) 19 Case Western Reserve Journal of International Law 282.

[55] D.W. Greig, International Law, London, Butterworths, 1970, p.887.

[56] A. Coll, "Military Responses to Terrorism: The Legal and Moral Adequacy of Military Responses to Terrorism", (1987) 81 American Society International Law Proceedings 299.

[57] See generally R. Erickson, Legitimate Use of Military Force Against State-Sponsored International Terrorism, Maxwell Air Force Base, Air University Press, 1989.

[58] J. Fitzpatrick, "Speaking Law to Power: The War against Terrorism and Human Rights", (2003) 14 European Journal of International Law 247.

[59] See K. Chainoglou, "Re-conceptualizing Self-Defence in International Law", (2007) 18 King's Law Journal 61.

imminence is set aside for an advanced standard that retains the requirement for necessity while taking into consideration the types of threats that will trigger the right of self-defence.[60] The uncertain *origin*, *locus* and *magnitude* of the contemporary threats magnify the need to observe and determine principles of necessity and proportionality in the use of force to repel such threats/attacks.[61] Any forcible measures must first and above all pass the test of necessity.[62]

A number of international scholars have suggested that proportionality should be considered as a concept weighing the response against the harm expected to be suffered from an attack. This approach would be in line with the first interpretation of proportionality. However, these scholars have added new elements to the equation such as the cost of not preventing a threat from maturing into an armed attack, the nature of the threat, the magnitude of harm to be expected and the probability of the threat materializing and hence causing harm. Thus, such an approach would measure proportionality against the expected harm. The benefit of this approach is that it resolves the conundrum of the content of the principle of proportionality in the contemporary security environment. Under this approach proportionality is gauged by determining whether the cost of pre-empting the harm that might be caused by the attack (if it is utilized) is outweighed by the magnitude of an attack factored by the probability of its occurrence. In such a scenario if a nation can use force earlier that can repulse an attack at a lower cost than the expected harm, then lower levels of use of force can be considered proportionate to the expected harm.[63] However, in particular cases, there may be practical problems such as a considerable degree of uncertainty regarding the *character* or the *exact nature* of the threat. This would in effect "distort the balance" of the equation of the potential magnitude and probability of the attack's occurrence. Even more, the requirement of necessity would not be satisfied in the event of not identifying the character or the nature of the threat.

How should proportionality then be measured in cases of threats from terrorists and WMD proliferation? We propose that proportionality be measured in the light of the objective of the defensive response as well as the means and methods employed therein. A state that is reasonably convinced of the impossibility to escape the occurrence of an attack regarding WMD proliferation or terrorism should act upon the small window of opportunity with which it is presented in order to protect its interests and the population.[64] The "last window of opportunity", even on an early timeline where states are still at the point of acquiring WMD pre-capability materials, offers the chance to states to surgically eliminate the threat, in other words to target the relevant assets that are the source of the threat and use force limitedly for a very short period, and to exert greater influence on the aggressor's cost-benefit calculations.[65] The last window of opportunity actions may fall within the context of halting the development and weaponization of WMD-useable material, acquisition plans or actual use of WMD.[66]

It should be noted though that the test of proportionality in these cases of action within a specific window of opportunity will be influenced by a balancing-of-costs and a political cost-benefit analysis which would make a state think twice before exercising its right to self-defence at this specific time.

Along the same lines, a defending state may employ surgical strikes to neutralize terrorist cells, destroy terrorist training camps actively engaged in hostile activities and to reduce their capacity in planning, organizing and conducting future terrorist activities.[67]

However proportionality is gauged differently when the defensive measures do not target the host state of the terrorist base but rather the non-state actors operating on the territory of the host state. When the territorial state merely claims to be willing to root terrorists out of its territory but acts like Afghanistan before 9/11 and therefore refuses to act alone or join forces with the defending states, the territorial state becomes accomplices to the terrorist activities. Should no effective action be taken and the territorial state's territory continues to be improperly used for a reasonable time (measured by the threat the situation poses to the defending state), the defending state may cross the border of the sanctuary state without its consent and dispatch military units for the sole purpose of the counter-proliferation operation only; as soon as the threat is eliminated the military units must leave the foreign territory. In such a case, the proportionality calculation should also take into account the potential effects/consequences of the defensive response (i.e. the risk of collateral damage in civilians) on the territory of a state not directly or not at all responsible for the threat. Consider for example the US Predator attacks on al Qaeda operatives in January 2006 on the territory of Pakistan where 18 civilians were killed. Such operations may not target the sanctuary state itself, if it has not committed an "armed attack", but they may target it if any of the non-state actors' actions are attributed to it.[68] In the latter case the acting state may extend the scope of the defensive actions to the toppling of the government and the potential temporary occupation of the state to which the terrorist acts are attributable.[69]

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[60] See generally S. Wallace, "Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defence", (2004) 71 University of Chicago Law Review 1770; M.L. Rockefeller, "The 'Imminent Threat' Requirement for the Use of Pre-emptive Military Force: Is it time for a non-temporal standard?", (2003-4) 33 Denver Journal of International Law and Policy 139.

[6] R. M llerson, "*Jus Ad Bellum* and International Terrorism", (2002) 32 Israel Yearbook on Human Rights 35.

[6] For a discussion on the issue see Chainoglou, *supra* note 59, at 75 *et seq*.

[6] J. Yoo, "Using Force", (2004) 71 University Chicago Law Review 757.

[64] See D. Sloss, "Forcible Arms Control: Preemptive Attacks on Nuclear Facilities", (2003) 4 Chicago Journal of International Law 45.

[65] See J. Gardam, "A role for Proportionality in the War on Terror", (2005) 74 Nordic Journal of International Law 20-21.

[66] E. Bunn, "Pre-emptive Action: When, How, and to What Effect?",(July 2003) 200 Strategic Forum 3.

[67] T. Gazzini, The Changing Rules on the Use of Force in International Law, Manchester, Manchester University Press, 2005, p.198.

[68] See M.N. Schmitt, "Preemptive Strategies in International Law", (2003) 24 Michigan Journal of International Law 543.

[69] B. Junee and S. Toope, "The Use of Force: International Law After Iraq", (2004) 53 International and Comparative Law Quarterly 795-6, fn. 58.

However, as Gazzini correctly points out, "measures not expected to affect the terrorist network and activities cannot be justified as self-defence as they do not directly contribute to the achievement of the objective."[70] The selection of targets depends on the degree of state support, sponsorship or passive toleration of the territorial state towards the non-state actors. For example in the case of Afghanistan, the Taliban had fully harmonized the state's operations with Al Qaeda's operations. In those circumstances it was considered lawful not only to destroy the infrastructure and the facilities used by the Taliban, but also to destitute and replace the Taliban government and prevent any other possible future attack emanating from the territory of Afghanistan.[71] It should be noted though that this attitude represents a breaking point in the state practice with regard to the principle of proportionality till 2001.

Until Operation Enduring Freedom in Afghanistan state practice and the general view was that the total defeat of the aggressor, namely the total destruction of the military capability of the aggressor and the overthrow of the regime that did not comply with the requests of the international community (i.e. to stop providing safe haven to terrorists) was disproportionate. But in the aftermath of the 9/11 it is widely accepted that the stateless and borderless terrorist operations threaten not only the survival of certain states but also the international peace and security; hence states have claimed that they have the right to pursue and exercise their inherent right of self-defence against terrorists wherever the latter may be. Therefore, the geographical scope of defensive measures may be expanded.[72] Nonetheless, the expansion of the geographical scope does not throw the principle of proportionality out of the picture. As Gardam says a proportionate preemptive action would still have "to be carefully crafted to achieving the destruction of the group concerned, with the minimum impact on the State concerned, its population and infrastructure."[73]

Another issue relevant to the assessment of proportionality is the timing of the defensive action and the duration of the action in question. Indeed, the question is, should the defensive action continue years after the armed attack, or after the first response to an armed attack or after the end of hostilities or after the period in which any resumed attack could be contemplated? The temporal element of proportionality has been the object of debates among scholars. For example, Gardam argues that proportionality remains relevant throughout conflict.[74] State practice is inconclusive on the precise conditions required. The essence of the principle of proportionality is *a priori* based on the relationship between the threat and the defensive response; inherent in this relationship is the temporal element. Extraterritorial law enforcement operations against al Qaeda operations on the territories of Yemen, Pakistan and Philippines which continue to take place five years after Operation Enduring Freedom began in Afghanistan stretch considerably the temporal element of proportionality.[75]

As proportionality is organically time-conditioned, the legality of the defensive measures is dependent on the evidence available at the time of the defensive response. An important aspect of proportionality is the gathering of qualitative intelligence that will verify the *intent* of the potential aggressor and the *nature* of the threat.[76] From this point of view intelligence forms an essential part of the criterion of necessity and contributes to a dynamic and pragmatic assessment of proportionality in the sense that throughout the use of force in self-defence the question that ought to be asked is *whether there is need for further force to be used*. The scope of the response in self-defence will be determined in accordance with the evidence known or reasonably to have been known at the time of response. Such knowledge of evidence and depending on whether the defending state will share it with the rest of the international community will condition the reaction of third states after the response. The assessment of the principle of proportionality is dependent also on the reaction of third states. However, there are certain issues surrounding the gathering of intelligence that would distort the assessment of proportionality and the identification of the threat in question as well as of the means available in practice to counter it. For example, there is always the possibility that the evidence gathered for intelligence purposes is patchy (due to its nature or source) or even wrong. For this reason the ICJ in *Oil Platforms* rejected any margin of appreciation by states and requested the clear and objective proof of a threatened attack.[77] However, the ICJ's finding seems not to take into consideration certain strategic issues. It is highly questionable what type of evidence the alleged defending state must produce and at which stages of the defensive action the evidence must be communicated to the other states. In conclusion, it can be argued that the assessment of proportionality is dependent on the assessment of the timeline of the threatened attack as well as on the gathering of real evidence; the nature of a proportionate defensive response necessitates that the defensive action is planned and carried out with the belief and the intent that any delay in countering the threatened attack would probably result in the defending state's inability to defend itself against the threatened attack and that defending state has considered all the parameters in order to decide whether there is a need for further force to be used. Overall the impact of the force used must be weighed against and if possible be less than the impact of the attack it

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[70] Gazzini, *supra* note 67, p.198.

[71] See M.C. Bonafede, "Here, There, and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism After the September 11 Attacks", (2002) 88 Cornell Law Review 203-214; B.A. Feinstein, "Operation Enduring Freedom: 'Legal Dimensions of an Infinitely Just Operation'", (2002) 11 Journal of Transnational Law and Policy 280-293.

[72] See Counter-memorial and Counter-claim submitted by the US, 23 June 1997, para. 4.32, p.171; O. Schachter, International Law in Theory and Practice, Dodrecht, Nijhof, 1991, p.154.

[73] Gardam, *supra* note 65, p.17.

[74] J. Gardam, "Necessity and proportionality in *jus ad bellum* and *jus in bello*", in L. Boisson de Chazournes *et al*, *supra* note 43, at 280.

[75] M.E. O'Connell, What is War?, (17 March 2004), available at <http://jurist.law.pitt.edu/forum/oconnell1.php>.

[76] See R.A. Zayac, Jr., "United States' Authority to Legally Implement the Self-defence and Anticipatory Doctrines to Eradicate the Threat Posed by Countries Harbouring Terrorists and Producing Weapons of Mass Destruction", (2005) 29 Southern Illinois University Law Journal 452.

[77] *Oil Platforms* Judgment, paras. 71-76.

is intended to preclude or of the damage likely to be prevented. It should be noted however that when the threat targets mainly the survival of a state rather than the less vital interests of the state, the scope of proportionality of the response in self-defence will amplify accordingly.

6. Proportionality in Humanitarian Intervention

Few topics have raised so much controversy and debate in the use of force area, as the issue of humanitarian intervention. Humanitarian intervention is usually defined as "the use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied",[78] and without SC authorization.[79] Taking into consideration the increasing state practice and *opinio juris* favouring humanitarian intervention as part of customary international law,[80] the issue of identifying the principle of proportionality in humanitarian intervention becomes imminent.

While the problems in identifying the principle of proportionality in anticipatory self-defence and pre-emptive self-defence mainly relate to the issue of how you can identify the proportionality when the threat or harm has not yet materialized, the problems in identifying the principle of proportionality in humanitarian intervention are different.

First, the ICJ in its jurisprudence and the *Caroline* case refer to proportionality in self-defence only. This is so because traditionally self-defence has been the only exception to the general prohibition on the use of force enshrined in article 2(4) of the UN Charter. Second, most analysis on the principle of proportionality in humanitarian intervention moves from the just war doctrine to the principle of proportionality in *jus in bello*, totally ignoring the principle of proportionality in humanitarian intervention from a *jus ad bellum* perspective. Although the contribution of the just war doctrine and the *jus in bello* in the principle of proportionality in humanitarian intervention is essential, as the first one refers to the ethical underpinnings of proportionality and the second to the legality of the conduct of a particular means and method of warfare, the principle of proportionality from a *jus ad bellum* determines whether the use of force is legal or not.

The question of whether the principle of proportionality imposes additional requirements on the means and methods of warfare is an issue that was tackled several times by international lawyers but not from a *jus ad bellum* perspective. Rather, they choose to construct their argument through the *jus in bello*. Michael Bothe for example asks: "what really constitutes a military objective within the framework of humanitarian intervention?"[81] He then argues that as the goal of humanitarian intervention is not the military defeat of an adversary, but rather the protection of human rights of the population, the traditional notion of military advantage loses much of its significance.[82] Therefore, where the exclusive purpose of a military operation is to safeguard the human rights of a certain population, this very context excludes a legal construction of the notion of military advantage or contribution to the military effort which disregards the life and health of this very population. In this context, the notion of military objective has to be construed in a much narrower way than in other types of conflict"[83] [and] "more severe restraints would be imposed on the choice of military targets and of the balancing test applied for the purposes of the proportionality principle than in a 'normal' armed conflict."[84]

Similar, albeit less analytical approach is taken by the Independent International Commission on Kosovo when it stated that in cases of humanitarian intervention "there must be even stricter adherence to the laws of war and international humanitarian law than in standard military operations."[85]

While the position that the principle of proportionality in humanitarian intervention imposes stricter rules in international humanitarian law may sound appealing, it is equally rejected by many. Such an approach implies that international humanitarian law does not apply equally to both sides in the conflict. Rather, it depends on the cause or the legality of the action under *jus ad bellum*. This approach not only would lead to the conflation of two bodies of law that have long conspired to remain separate but would also compromise the principle of equal application of international humanitarian law.[86] Indeed, as Roscini pointed out, humanitarian law treaties do not distinguish between different kinds of interventions according to their purpose. The principle of equality of the belligerents is well-established: humanitarian law cannot be different for the good and the bad guys.[87] Moreover, as aptly put by Farer "on what grounds might we require that the permissibility of means used in fighting (for whatever end) be subject to criteria that would vary depending on the motives of those who precipitate the conflict- with the most demanding criteria being applied to the most nobly motivated participants?"[88]

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[78] J. L. Holzgrefe, "The Humanitarian Intervention Debate", in J.L. Holzgrefe and R.O. Keohane (eds.), Humanitarian Intervention: Ethical, Legal and Political Dilemmas, Cambridge, Cambridge University Press, 2003, at 18.

[79] R.O. Keohane, "Introduction" in Holzgrefe *et al*, *supra* note 78, at 1, where he names this definition as unauthorized humanitarian intervention.

[80] See T. Christodoulidou, The Use of Force and the Promotion and Protection of Human Rights, unpublished PhD thesis, London, King's College London, 2004.

[81] M. Bothe, "Legal Restraints on Targeting: Protection of Civilian Population and the Changing Faces of Modern Conflicts", (2001) 31 Israel Yearbook on Human Rights 43.

[82] *Ibid.*

[83] *Ibid*, p.48.

[84] M. Bothe, "The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY", (2001) 12 European Journal of International Law 535.

[85] Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned, New York, Oxford University Press, 2000, pp.179 and 195.

[86] C. Greenwood, "The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign", (2001) 31 Israel Yearbook on Human Rights 125-127.

[87] M. Roscini, "Targeting and Contemporary Aerial Bombardment", (2005) 54 International and Comparative Law Quarterly 437.

[88] Remarks by T. Farer, "Bombing for Peace: Collateral Damage and Human Rights, (2002) 95 American Society International Law Proceedings 105.

Another group argues that the requirement that the principle of proportionality imposes stricter application belongs only within the ethical sphere or in the just war doctrine.[89] Murphy states that "efforts should be made to induce States and other combatants to adhere to at least the ethical and moral dimensions of international humanitarian law, regardless of the presence or absence of a formal legal obligation to do so."[90] Additionally, the International Commission on Intervention and State Sovereignty (ICISS) applying the just war tradition states that "military intervention should only be undertaken when the prospects for success are strong- when the intervention is likely to do more good than harm."[91] This intellectual strand deals with the Sisyphean task of balancing the 'good' versus the harm that is done or is going to be done. Here, the calculation of proportionality is based on the risk taken and the harm inflicted. Accordingly, military measures that carry no risk but result in large destruction, e.g. through air strikes or psycho-operations which subject the population to mental pressures than to wholesale killing, will be considered disproportionate.

However, the High Level Panel in its 2004 report suggested five basic criteria of legitimacy when the SC considers whether to authorize the use of military force. Those criteria of legitimacy are reminiscent of the just war doctrine criteria and one of those criteria is proportional means. The High Level Panel writes: "Proportional means. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the treat in question?"[92] Along similar lines is Secretary-General's report "In Larger Freedom" when he requested "[…] the SC to adopt a resolution on the use of force that sets out the principles for the use of force [and] the need to consider –when contemplating whether to authorize the use of force […], whether the military option is proportional to the threat at hand."[93] The SC has not yet adopted any resolution on the issue, and it remains to be seen whether these criteria will become part of customary international law. Until this is clarified, the question remains as to whether the High Level Panel introduced just war criteria in its report, which would suggest that the principle of proportionality is an ethical rather than a legal principle, just like the ICISS's Report, or whether the High Level Panel report transformed just war criteria to legal ones, which would suggest that the principle of proportionality is a legal principle.

Having clarified that the above arguments approach the issue of proportionality not from a *jus ad bellum* perspective, Professor Greenwood argued that the limitations imposed by the principles of necessity and proportionality in self-defence would apply *mutatis mutandis* to any other possible justification for the use of force, humanitarian intervention included,[94] obviously with the relevant adjustments. Building on the principle of proportionality in self-defence and applying *mutatis mutandis* the principle of proportionality in self-defence, proportionality in humanitarian intervention is measured against the size and scope of the human rights violations (i.e. force that is proportional to the human rights violations) and determines the amount of force that can be used to achieve the goal (i.e. force that is proportional to meet the goal).

According to the first interpretation of proportionality, the use of force should be proportionate to the human rights violations triggering it, which means that only grave human rights violations may warrant a use of force proportionate. Indeed, humanitarian intervention is limited to situations where there is publicly available evidence that grave human rights are being committed in a state and the state supports them, acquiesces in them or cannot control them. This first interpretation should sound familiar to those who speak of the conditions upon which a right to humanitarian intervention may be based. However, the difference is that this limitation on the use of force is part of a well established principle in customary international law and not part of the legal literature[95] or the efforts of certain states to initiate more systematic discussion on humanitarian intervention.[96]

With regards to the second interpretation of the principle of proportionality, states should use only the amount of force requisite to achieve the goal. Proportionality is weighted not against the military goal but against the "political goal" of the intervention. The political goal of humanitarian intervention is to stop human rights violations and prevent further human rights violations in the territory in which the states intervene, rather than straightforwardly defeating (let alone destroying) an opposing military force. This marked difference in objective means that humanitarian interventions are quite unlike conventional combat, in which the main mission is precisely to destroy or render ineffective an opposing army.[97] Therefore, proportionality in humanitarian intervention means that the force used should be appropriate to achieve the goal of stopping human rights violations and preventing further human rights violations in the territory in which the states intervene. Indeed, a military intervention conducted

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89 See J.F. Murphy, "Some Legal (And a Few Ethical) Dimensions of the Collateral Damage Resulting from NATO's Kosovo Campaign", (2001) 31 Israel Yearbook on Human Rights 76-77; N.J. Wheeler, "Dying for 'Enduring Freedom': Accepting Responsibility for Civilian Casualties in the War against Terrorism", (2002) 16 International Relations 218.

90 Murphy, *Ibid*, at 76-77.

91 Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect, Canada, International Development Research Centre, 2001, p.142.

92 Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (2004), paras. 207-208.

93 Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, U.N. Doc. A/59/2005 (2005), p. 58.

94 Greenwood, Self-defense, *supra* note 39, p. 274 fn 9.

95 For example see A. Cassese, "*Ex Iniuria Ius Oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", (1999) 10 European Journal of International Law 23.

96 See for example the Danish Institute of International Affairs, Humanitarian Intervention: Legal and Political Aspects, Copenhagen, Danish Institute of International Affairs, 1999; Netherlands Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law, Humanitarian Intervention: Advisory Report NO. 13, (2000), available at <http://www.aiv-advice.nl>.

97 G.R. Lucas, Jr., "From *Jus ad Bellum* to *Jus ad Pacem*: Re-thinking Just-War Criteria for the Use of Military Force for Humanitarian Ends", in D.K. Chatterjee and D.E. Scheid (eds.) Ethics and Foreign Intervention, Cambridge, Cambridge University Press, 2003, at 77.

for the sake of protecting human rights or averting a humanitarian tragedy cannot itself rely upon military means which provoke a humanitarian tragedy similar to the original impending tragedy the interventionists sought to avert. Means and methods of warfare that do not aim to prevent further human rights violations and anticipate exacerbation of human suffering may violate the principle of proportionality. Obviously, this is easier said than done: how does someone know which means and methods of warfare would be appropriate to stop human rights violations in a particular conflict? Dirty wars have plagued African states for years, civil conflicts lead to human rights violations and switch to international ones. Finding out which means are appropriate to stop human rights violations in the particular conflict is an extremely difficult and complex task and acquires in depth knowledge of the conflict in question. This suggests that the principle of proportionality in humanitarian intervention brings under its umbrella issues that have long been considered as non legal, such as policy considerations and issues of the effectiveness of the intervention. It can even be suggested that the correct application of the principle of proportionality, after examining all the relevant factors, intelligence, information etc most likely should lead to effective humanitarian interventions.

It is often argued that grave human rights violations are taking place in Chechnya (Russia) and in China and sometimes these violations have exceeded those in Kosovo, without the option of humanitarian intervention being considered by states. However, it seems that the application of the principle of proportionality into such cases leads to the conclusion that a possible humanitarian intervention in those countries would likely not stop human rights violations and therefore be disproportionate. Indeed, it is difficult to imagine the success of a humanitarian intervention if military action were taken against a major power. The possible repercussions following a major war, including the use of nuclear weapons and the involvement of more than one state, outweigh humanitarian interventions as disproportionate. This means that the application of the principle of proportionality may preclude military action against major powers. However, it should be make clear that military action against military powers is precluded based on considerations of proportionality and not on any other political considerations. Hence, the correct application of the principle of proportionality means that humanitarian interventions are selective by nature.

Since the principle of proportionality is part of the decision-making process, it is considered in advance of an attack, after analyzing all the relevant information and intelligence. One cannot assess the proportionality of an activity by its outcome. Of course, calculations about whether the action is appropriate in terms of proportionality are often easier *ex post facto* than prior to the intervention. If the outcome of the intervention did not manage to stop human rights violations, something which had not been anticipated, and the means and methods of warfare were appropriate at that time to achieve the legitimate end, the action would be disproportionate. Maybe such intervention is a failed or unsuccessful intervention but not a disproportionate one. Nonetheless, as explained above, despite the normative difference between proportionate and successful humanitarian interventions, the distinction in practice is not, and should not be so rigid. In fact, these two issues seem interrelated.

7. Conclusion

In this paper we have tried to tackle a very complicated issue: the principle of proportionality. Recent state practice and the reaction of the international community to state practice indicates that proportionality is an intuitive yet complex concept susceptible to political manoeuvring. With Afghanistan and Iraq we have seen that "proportionality is almost a marketing imperative, helping above all to sell the [military] campaign to a sceptical public who can see the very real effects of bombs give awry".[98]

We feel that proportionality is an issue which despite its importance not only in determining the legality of a use of force, but also in circumscribing the scope of the force and limiting the destructive impact of armed conflict, has been sidelined by most legal scholars and international organs like the ICJ. Proportionality today remains a rather rhetorical tool within a highly politicized sphere of military action that fails to take into consideration complexities surrounding each use of force and each geopolitical environment. For example 'dirty wars' have plagued the African continent for over 20 years now. Civil conflicts switch into international conflicts and *vice versa* without being able to track down their duration, the identity of the actors and the factions being involved, the status of the states involved (i.e. weak or failed) and the territories being under dispute. In these cases it can be almost impossible to gauge the proportionality of actions taken in self-defence. Also, with regards to humanitarian intervention, the principle of proportionality attempts to put under its umbrella issues that have not traditionally been considered as legal, but rather as moral, or policy considerations, or issues of the effectiveness of the intervention. To an extent, the principle of proportionality in humanitarian intervention has managed to pull these issues under its umbrella. However, as Michael Ignatieff said: "moral questions stubbornly resist being reduced to legal ones, and moral exposure is not eliminated when legal exposure is."[99] We believe that so do policy considerations and issues of effectiveness. ■

[98] K. Carmola, "The Concept of Proportionality: Old Question and New Ambiguities", in M. Evans (ed.), Just War Theory – A Reappraisal, New York, Palgrave Macmillan, 2005, at 102.

[99] M. Ignatieff, Virtual War: Kosovo and Beyond, London, Chatto & Windus, p. 199.

Recreating the Human Rights Commission with only a name change while replicating its main flaw [1]

Jean-Pascal Obembo Esq.*

The pursuit of human rights was one of the main reasons for creating the United Nations and its Charter the first international treaty whose aims are expressly based on universal respect for human rights. In this regard the UN Charter must be considered in order to make a proper assessment of the UN reform and particularly of the reform of the UN human rights system where the UN Commission on Human Rights (CHR) was replaced by a new organ named the "Human Rights Council" (HRC) which UN Secretary General Kofi Annan had suggested in his report to the General Assembly "In Larger Freedom: Towards Development, Security and Human Rights for All" and in his address to the 61st session of the CHR. He backed his proposal by stating "we have reached a point at which the Commission's declining credibility has cast a shadow on the reputation of the United Nations as a whole, and where piecemeal reforms will not be enough." The CHR is often described as a "discredited organ" by some member states and NGOs not only because of its membership but also because its decisions were based on political rather than on human rights considerations. It appears as if most critics tend to ignore the nature of the institution, which was not intended to act as a Human Rights Court. The CHR mandate was to promote and protect human rights, but in its first meeting in January 1947 the CHR adopted a resolution effectively denying itself the mandate to enforce internationally recognized human rights. The key issue in this paper is not to support or reject the HRC as a new UN human rights organ, but to consider whether the new organ has the potential to perform better than the old Commission. As a result this paper will analyze whether and how the HRC has been able or will be able to relegate politicization, selectivity and partiality to the past. Finally, it will examine whether the human rights obligations contained in the UN Charter are still relevant compared to the "voluntary pledges and commitments" that potential members of the Human Rights Council now have to make whilst they submit their candidature.

Das Streben nach Menschenrechten war eines der Hauptmotive für die Erschaffung der Vereinten Nationen und ihre Charta der erste internationale Vertrag, dessen Ziele ausdrücklich auf der universellen Achtung der Menschenrechte basieren. Daher muss die VN-Charta bei einer Bewertung der Reform der Vereinten Nationen und insbesondere ihres Menschenrechtsschutzsystems in Betracht gezogen werden. Im Zuge derer wurde die VN-Menschenrechtskommission auf Vorschlag von Generalsekretär Kofi Annan durch einen Menschenrechtsrat ersetzt. Sowohl in seinem Bericht an die Generalversammlung „In Larger Freedom: Towards Development, Security and Human Rights for All", als auch in seiner Rede während der 61. Sitzung der Kommission machte er deutlich, dass „wir einen Punkt erreicht haben, an dem die schwindende Glaubwürdigkeit der Kommission einen Schatten auf das Ansehen der Vereinten Nationen insgesamt geworfen hat und an dem stückweise Reformen nicht ausreichen werden." Die VN-Menschenrechtskommission wird von Mitgliedstaaten und NROs auf Grund seiner Mitglieder und seiner politischen Entscheidungen oft als „diskreditiertes Organ" beschrieben. Es scheint jedoch, dass die meisten Kritiker dabei außer Acht lassen, dass die Kommission nicht geschaffen wurden, um als Menschenrechtsgerichtshof zu agieren. Obwohl sich das Mandat der Kommission auf die Förderung und den Schutz der Menschenrechte erstreckt, wies die Kommission in ihrer ersten Sitzung im Januar 1947 die Kompetenz zur Durchsetzung der international anerkannten Menschenrechte in einer Resolution von sich. Ziel des Aufsatzes ist es nicht, den Menschenrechtsrat als neues VN-Menschenrechtsorgan zu unterstützen oder zurückzuweisen, sondern zu beurteilen, ob er das Potential hat bessere Leistungen zu erbringen als die alte Kommission. In Folge dessen wird untersucht werden, ob und wie der Menschenrechtsrat in der Lage war oder sein wird, Politisierung, Selektivität und Parteilichkeit in die Vergangenheit zu verbannen. Schließlich wird geprüft, ob die in der Charta der Vereinten Nationen enthaltenen Menschenrechtsverpflichtungen im Vergleich zu den von möglichen Mitgliedern des Menschenrechtsrates im Zuge ihrer Bewerbung verlangten „freiwilligen Gelöbnissen und Verpflichtungen" weiterhin von Bedeutung sind.

Introduction

The UN Charter is a key instrument one would need to consider in order to make a proper assessment on the UN reform, and this is particularly relevant in the field of human rights with the reform of the UN human rights system whereby the UN Commission on Human Rights (CHR) is being replaced by a new organ named "Human Rights Council". It is clear that "[t]he promotion and protection of human rights is a

[1] Please see, International Information Programs, USinfo.state.gov.; United States Pressing for Strong U.N. Human Rights Council, John Bolton U.S. Ambassador said January 11, 2006 "The United States will not support artificial changes. Recreating the Human Rights Commission with only a name change, while replicating all its flaws, will simply serve to undermine the goal set by most of us, but sadly not all, share — namely, the promotion of freedom, liberty, and human rights", the Ambassador said in pressing for a streamlined, action-oriented mandate that focuses on abuses of civil and political. It should be noted that abuses focused on economic, social and cultural rights are not mentioned

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bedrock requirement for the realisation of the Charter's vision of a just and peaceful world" as articulated by the UN Secretary General[2]. The Charter is the first international treaty whose aims are expressly based on universal respect for human rights. Although the term "human rights" appears in scattered places in the UN Charter, there can be no argument that human rights are at the centre of the UN system[3]. The UN exists to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

In "In larger freedom: towards development, security and human rights for all[4]" and in his address to the 61st session of the CHR, the UN Secretary General clearly articulated his views about the Commission on Human Rights and which kind of reform he wanted to see in place in order to make the main UN human rights body delivering a more effective and robust mandate[5]. This reform of the CHR was part of the wider UN reform agenda set out in his report to the General Assembly[6]. He suggested the replacement of the CHR with a smaller standing "Human Rights Council" (HRC) having the status of a principal organ of the United Nations or a subsidiary organ of the General Assembly, and whose membership should be elected by a two-third majority of the General Assembly[7]. He backed his proposal by stating that the Commission's ability to perform its tasks as having been "undermined by the politicisation of its sessions and the selectivity of its work" and went on saying that "we have reached a point at which the Commission's declining credibility has cast a shadow on the reputation of the United Nations as a whole, and where piecemeal reforms will not be enough". It has often been articulated that the CHR was a "discredited organ" because not only of its membership but also of its decisions. Decisions based on political rather than on human rights considerations. It appears as if most critics of the CHR have the tendency to ignore the nature of this organ. It is worth reminding them that when the CHR was established in 1946, it was not intended to become or act as a Human Rights Court[8]. While in 1947, Australia went so far as to advocate the establishment of an international court of human rights, empowered to hear appeals of decisions of national courts "in which any question arises as to the rights of citizenship or the enjoyment of human rights and fundamental freedom"; and to hear "disputes arising of Articles affecting human rights in any treaty or convention between States referred to it by parties to the treaty or conventions"[9]. However, by the end of 1948, the international consensus that this would have required had already evaporated with the onset of the Cold war. The CHR mandate was to promote and protect human rights, even in its early days its activities focused on promotion[10]. During decades the Commission concentrated on promotion rather than protection. The CHR was known as a "Charter based" body, because it is specifically mentioned in the UN Charter.

The key issue in this paper is not to support or reject the Human Rights Council as a new UN human rights organ replacing the Commission on Human Rights, but simply to consider whether the new organ would do a better job than the old organ. Like the old organ, the new one will also be a governmental body – made of government representatives – and it would be interesting to see how politicisation, selectivity and impartiality will be ingredients of the past. Finally, one would need to consider if the human rights obligations contained in the UN Charter still have its relevance compared to the "voluntary pledges and commitments" potential members of the Human Rights Council have to make.

1. Reforming the Commission on Human Rights

There is general agreement in contemporary political science as well as in legal studies that "institutions matter". However, consensus breaks down when analysing the outcome of specific institutional structures. In that respect, the CHR could not escape that analysis. A lack of agreement of UN member states over what outcomes were produced by the CHR was basically used to initiate its so-called reform.

In broad terms, one needs to reform an organ/body when this organ/body is no longer delivering the expected outcome for which it was created in the first place. That means a reform must be substantial in its nature, and not something addressing only its form. A definition of the term reform is needed in order to understand why there was a need for a reform of the CHR. Reform is "a change for the better as a result of correcting abuses/self-improvement in behaviour or morals by abandoning some vice/making changes for improvement in order to remove abuse and injustice"[11]. It is clear that the threshold is very high and something below this threshold would simply be a "reformette". A reformette can be defined as a superficial reform not addressing the substance. However, in order to understand the substance of the so-called reform of the CHR and see it replaced by the "Human Rights

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2 Please see UN Secretary General, Strengthening of the United Nations: an agenda for further change, UN Doc A/57/387 (2002), para. 45.

3 The term "human rights" appears in several provisions of the UN Charter, such as para. 2 of the Preamble, Article 1(3), Article 1(1) (b), Articles 55 and 56, Article 62(2), Article 68, and Article 76 (c). Please see also Jean-Pierre Cot and Alain Pellet (eds.), La Charte des Nations Unies, Paris, Economica/Bruylant, 1985, pp.12-16.

4 Report of the UN Secretary General, A/59/2005, 21 March 2005.

5 On 7 April 2006, in Geneva (Palais des Nations).

6 Please see note 2 above.

7 Please see note 4 above, paras 181-183.

8 It was created by a Resolution of the Economic and Social Council (ECOSOC) at its first meeting, on February, 1946. Please see also Jean-Pascal Obembo Esq. LLB (Hons), LLM (Essex), DESS (Paris I Panthéon Sorbonne), Senior Human Rights Lawyer for the Permanent Mission of Congo Brazzaville to the United Nations-Geneva "Réformer la Commission des Droits de l'Homme" (Genève 22/08/2005), and also Olivier de Frouville, Maître de Conférence à l'Université de Paris X –Nanterre « Un Conseil des droits de l'homme…faute de mieux » in La Tribune de Genève, 29/03/2006.

9 ESCOR; 4th Sess., 1947, Suppl. No. 3 (E/259).

10 *Idem*, at its first meeting in January 1947, the CHR adopted a resolution effectively denying itself the mandate to enforce internationally recognised human rights "The Commission recognises that it has no power to take any action in regard to any complaints concerning human rights".

11 This is definition "*a la carte*" of the term reform as found in WordReference.com English Dictionary, WordNet 2.0 Copyright 2003 by Princeton University.

Council", one needs to grasp how the UN started with the creation of the CHR. The CHR until its abolition, and subsequent replacement by the HRC, was the oldest human rights body in the UN system, created shortly after the birth of the UN, in 1946. This was by way of a Resolution[12] of the Economic and Social Council (ECOSOC) at its first meeting, on February 16, 1946. The CHR was one in nine (9) "functional commissions" that deal with critical issues such as the status of women, sustainable development and crime prevention and criminal justice[13].

Like its fellow commissions, the CHR played a crucial role in defining international – human rights – standards and norms, and in promoting and monitoring the implementation of those norms. So far, it cannot be said that the role of the CHR was to enforce, as a Human Rights Court would do international human rights standards and norms, but simply to promote and monitor the implementation of these norms by member states.

The idea of reforming a system is an attractive one, and the same rationale would apply for the UN human rights system with a reform of its main organ. Before embarking upon the attractive idea of reforming the CHR, it would be worth examining the original mandate of this organ. Established by ECOSOC resolution 5(I) of 16 February 1946, then amended by ECOSOC resolution 9(II) of 21 June 1946, the CHR was mandated to submit proposals, recommendations and reports to its parent body (ECOSOC) on the following: (a) an international bill of rights; (b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters; (c) the protection of minorities; (d) the prevention of discrimination on grounds of race, sex, language or religion; (e) any other matter concerning human rights not covered by the other items. The Commission was also expected to undertake special tasks assigned to it by ECOSOC, and to "make studies and recommendations and provide information and other services at the request of ECOSOC"[14]. Despite its mandate to deal with "any matter concerning human rights", the Commission was initially reluctant to address protection of human rights and decided to concentrate on promotion. In its first twenty years, the CHR maintained that "it had no power to take any action in regard to any complaints concerning human rights"[15]. It should be noted that the development of international human rights norms was almost the sole function of the Commission during that period. This very restrictive approach was finally abandoned when ECOSOC adopted what eventually turned out to be two separate procedures: the public procedure under Resolution 1235 (XLII) in 1967 and the confidential procedure under Resolution 1503 (XLVIII) in 1970[16]. And subsequently the Commission's activities expanded to cover, in various degrees, all five aspects of its original mandate.

When created the Commission had in terms of it membership, independent experts. The composition of the Commission then changed radically since its creation in 1946. Proposals made in 1946 to the effect that it should consist of independent expert were decisively rejected by the ECOSOC, which decided to have government representatives instead. Thus the Commission's single most characteristic was that it was composed of government representatives. This was significant in transforming the Commission into a forum for defending government records, rather than examining it. Then membership expanded gradually from 18 in 1946, to 21 in 1962, 32 in 1967, 43 in 1980 and 53 in 1992 until March 2006[17]. It should be noted that on each occasion the rationale was to ensure a more equitable and geographical balance[18].

2. UN Member States undermined the work of UN CHR

It is often said in a popular saying that "when one would like to get rid off of its dog, one should accuse the dog of having contracted rabies". The same popular saying was used to justify the replacement of the CHR by a HRC. Anathema was used for that purpose, such as "a discredited organ". But so far, there has been no substantial argument demonstrating that the CHR failed to deliver what it was set out to do. This is because the CHR was a political organ mandated to deal with human rights. A political organ by nature will do politics whenever it likes. It is about self-interests of its members. Then what is politics[19]? On hearing the word politics, what usually springs to mind are images of government, politicians and their policies or more negatively the idea of corruption and dirty tricks. The word politics comes from the Greek word *polis*, meaning the state or community as a whole. The concept of the *polis* was an ideal state and came from the writings of great political thinkers such as Plato[20] and Aristotle[21]. In his novel "The Republic", Plato describes the ideal state and the means to achieve it. An ideal society is

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[12] Please see document E/20 15th February 1946.

[13] These commissions are distinct from the various UN "Specialised Agencies", such as the International Labour Organisation, and from UN "Programmes" and "Funds", such as the UN Development Programme (UNDP) and the UN Children's Fund (UNICEF).

[14] Council Res. 5 (I), sect. A, para.3 of 16 February 1946.

[15] Please see Commission on Human Rights, Report on the 1st session (27 Januar-10 February 1947), Chap. V, par.21-22; See also Philip Alston, "The Commission on Human Rights" in Philip Alston (ed), The United nations and Human Rights: A critical appraisal, Oxford, 1992, p. 126-210.

[16] The Commission devoted much time to monitoring the implementation of the standards it had set. Besides the special procedures, it turned to the 1503 and 1235 procedures.

[17] When holding its 62nd and last session (March-April 2006 in Geneva).

[18] Africa 15, Asia 12, Latin America/Caribbean 11, Western Group 10, and Eastern Europe 5, while India and the Russian Federation have had continuous membership since the Commission began its work in 1947, and only twice has a permanent member of the Security Council not also been a member of the Commission- UK in 1991 and the USA in 1992. On the other hand, records show that only 123 of the UN's 191 State members have even been members of the Commission on Human Rights and several of them served one term.

[19] The actual definition seems to have been obscured and almost lost by such representations and clichés that tend not to pinpoint the true essence, which defines this thing, called politics. In order to make an attempt at a definition of politics a systematic approach is required: an historical overview, followed by different core concepts in order to get closer to a fair and true definition of politics.

[20] Plato (1987) The Republic, Penguin, London, UK.

[21] Aristotle (1996) The Politics and the Constitution of Athens, Cambridge University Press, Cambridge, UK.

in practice a rather difficult aim and even an impossible aim to achieve. A state is in itself-preserving by nature. Self-perpetuation is the main rule. Human beings are like States, they possess their own interests, ideas and preferences, which may differ to those of their contemporaries. In the "Blackwell Encyclopaedia of Political Thought", Miller supports the following "Politics presupposes a diversity of view, if not about ultimate aims, at least the best way of achieving them"[22]. Basically, alliances were formed by some members in order to pursue a particular aim. For instance, the United States, supported by the Western countries, was always keen on tabling/supporting a Commission's decision against Cuba under item 9 of this organ, but not even considered initiating a similar decision against Saudi Arabia/Pakistan. Saudi Arabia is a traditional friend of the United States in a business and strategic sense. The United State would not do anything in the world to compromise their relations with Saudi Arabia. At the same time, the United States ambassador never qualified the election of Saudi Arabia or Pakistan to the CHR as an "absurdity" as he did when a country they did not like for various reasons was elected to the Commission.

The starting point is that the 53 States members of the CHR were elected by ECOSOC. This election, which usually took place in May each year, elected approximately a third of the members of the Commission. The members served for three-year periods and could then be re-elected. The CHR had no permanent members, unlike the Security Council. It is important to note that no UN member state became a member of the CHR by "self-appointment". The Commission has been repeatedly criticised for the composition of its membership. In particular, several if not all of its member countries themselves have "dubious" human rights records, including states whose representatives have been elected to chair the commission[23]. No country in the UN membership can claim that it has not human rights concerns, that shoul not be addressed[24].

Critics against the late CHR were not always fair since it appears that criticisms were based on a poor undertanding of this organ. Prior to its annual session, the Commission elected a Bureau to manage its proceedings and carried out certain responsibilities on its behalf over the coming year. This Bureau consisted of a a Chairperson, as well as three Vice Chairperson and a Rapporteur (one from each regional group, these persons made up the so-called "Expanded Bureau" of the Commission). It met regularly during the session of the CHR. The chair did not give a particular state more voting rights than any other member of the CHR. The Commission adopted most of its decision by consensus. When this was not possible, the decision was put to a vote.

Several human rights critics expressed concern for the memberships of the People's Republic of China, Cuba, Zimbabwe, Russia, Saudi Arabia, and Pakistan, and the past memberships of Algeria, Syria, Libya, and Vietnam[25]. These countries have variously been accused of human rights violations, and the concern is that they will work against resolutions on the commission condemning human rights, thus indirectly promoting despotism and domestic repression. It can hardly be supported – even indirectly – the view that the UN Commission on Human Rights had ever promoted despotism or domestic repression. But when it came to implement decisions adopted by the CHR, this was a matter left to member states. In some cases, some members of the CHR did very little when it came to implement decisions of the CHR at the national level, even if the adopted text was their own product[26]. One might ask the following question: how can ECOSOC elect to the CHR countries known to be "human rights violators"? ECOSOC elected these countries to the CHR, but in return ECOSOC never got criticised. As ECOSOC is the UN organ mandated to elect members of the CHR, it should have been criticised for electing countries known to be human rights violators. It is strange that all criticisms were directed to the Commission, and no one criticised ECOSOC. If there was a "discredited" UN organ, it should have been ECOSOC – as a parent body – and not the Commission.

The Chairmanship used to rotate on a regional basis. This is why Libya ended up with the Chairmanship of the 59th session of the CHR. This happened simply on the basis of the geographical rotation principle. This principle of geographical rotation is also used when it comes to appoint the UN Secretary General. In other words a well-established UN principle and practice[27]. A country did not obtain the Chairmanship on the basis of some measurable human rights criterion. There was no such a thing in the mechanism leading to the position of the Chair. Each regional group is free to propose whatever a candidate when it is its turn to take over the

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[22] Please see, Miller, D (1987) The Blackwell Encyclopaedia of Political Thought, Basil Blackwell, Oxford, UK.

[23] Please see the « Country Reports on Human Rights Practices » for 2005 and previous years (a publication of the US Department of State) describing the performance of 196 countries in putting into practice their international commitments on human rights. According to this US document/publication no country in the world can claim a clean human rights record. Some are more violators than others.

[24] For instance, in the West, asylum-seekers are detained in prisons with convicted criminals or in detention centres and this is contrary to the 1951 Geneva Convention on Refugees. They suffer discrimination and assault from law enforcement officers. Trafficking in human beings and sexual exploitation of women is well documented, prison population overrepresented by foreign nationals. For instance in Champ Dollon (Switzerland), it is alleged than foreign nationals represent between 70 and 80 per cent of those incarcerated. While in the developing world, human rights violations and abuses is also a part a "normal" life. For further details, see footnote above.

[25] The UN Economic and Social Council has 54 members, elected for three-year terms by the General Assembly. Voting in the Council is by simple majority; each member has one vote. Seats on the Council are allotted based on geographical representation with 14 allocated to African States, 11 to Asian States, 6 to Eastern European States, 10 to Latin American and Caribbean States, and 13 to Western European and other States. 18 seats are either newly elected or renewed each year. Membership can be renewed immediately after it expires.

[26] Congo Brazzaville (CHR member 2004-2006) drafted and negotiated on behalf of the African Group a resolution on Abduction of Children in Africa (2005/43). The irony is that in September 2005, Congo Brazzaville was unable to provide any information to the OHCHR on measures taken to implement this particular resolution, in fact their own product.

[27] "The Conservatives are pressing for the UK government to lobby for the decision to be overturned", a request made by Michael Ancram, BBC Radio 4's Today Programme, 21 August 2002, despite new efforts to improve British relations with Tripoli. The Foreign Office says the rules do not allow other nations to make their nominations for the role.

Chairmanship of the Commission[28]. Critics of Libya as Chair[29] need to be reminded that the public tasks of the Chair are the following: to open and close every meeting, to direct the debate and give floor to the speakers, to put draft resolutions and decisions to a vote, and to proclaim the results, to manage the time alloted for the presentation and oral statements. The Bureau planned the order of the day by which each agenda item was discussed, proposed the rules to respect during the session, proposed the time length of interventions and the rights of reply, executed in the intercessional period the tasks that the Commssion attributed to it. Further the CHR adopted resolutions/decisions by consensus or without a vote or, by hand raising or, by roll call vote. Nothing in this presupposed that the Chair could manipulate the work of the CHR by imposing its views.

This principle of geographical rotation is deemed to continue with the newly established HRC since the "reform" has kept the idea of maintaining regional groups.

Another criticism was that the CHR was not used for constructive discussion of human rights issues, but as a forum for politically selective finger-pointing and criticism. The desire of states with "problematic" human rights records to be elected to the CHR was largely to defend themselves from such attacks. The "main liability of the Commission on Human Rights", if there was one, was the nature of its membership, i.e government representatives. In his writings "The Politics", Aristotle state that "Man is by nature a political animal". Due to his nature man should consider and realise his/her role within the *polis*. So according to Aristotle politics is not a dreamt up concept, but a rather inherent feature of mankind. Politics could then be defined as a power struggle between those members belonging to various groups/ political affiliations in the international community. Thus playing/doing politics is what states do best. To some extent they can be compared to children when they behave like naughty boys/girls in the playground by bullying each other. This may be a simplistic way to illustrate how the Commission operated, but this is simply reflecting antagonising forces within that organ. As professor V-Y Ghebali puts it "All this is just to say that most UN member States are concerned with avoiding international interference in their domestic affairs than with a genuine protection of human rights, whether within or outside national boundaries. Sadly, human rights diplomacy is often politics by other means"[30].

The United States, which had been a member since the establishment of the body in 1947, was not elected to the Commission in the late 1990's[31]. The technical reason for this was the lack of sufficient support from European states which were critical of Washington's opposition to the creation of the International Criminal Court[32]. The United States was elected to the Commission again in 2003. The United States ambassador walked out of the commission following the uncontested election of Sudan to the commission, calling it an "absurdity", pointing out Sudan's problems with ethnic cleansing in the Darfur region[33].

It is clear that the Darfur crisis was acknowledged by Commission's members of the African Group, including the Sudanese government. This attitude/reaction could be compared with the so-called "constructive engagement" of the United State of America and the United Kingdom during the apartheid regime. This is hardly a surprise since recent history explains this policy[34]. From his first days in office the Reagan Administration made no secret of its contempt for former President Jimmy Carter's human rights policy. The question of how much human rights should figure in American foreign policy had been a prominent issue in the 1980 election campaign. Even as a candidate, Reagan had associated himself with Jane Kirkpatrick, whom he later designated as the United States' permanent representative to the United Nations, with her widely publicised view that Carter's moralist human rights policy had been detrimental to American strategic interests. It might be worth also noting that, one of the first acts Reagan did was to nominate Ernest Lefever, Assistant Secretary of State for Human Rights and Humanitarian Affairs[35], a man how had suggested that the promotion of human rights abroad should not be the responsibility of the United States[36].

Sudan can not be blamed for being elected by ECOSOC to become a member of the CHR[37]. Instead the blame should go to ECOSOC[38]. Indeed, on July 30, 2004 it was the United

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[28] Please see Middle East Review of International Affairs, Fall 2002, Vol. 9, No.2 where a fair account was of how Libya ended up as Chair of the Commission on Human Rights "Africa is due to chair the next session of the Un Commission on Human Rights, and the African Group has nominated the country of Libya for the seat. The chair is selected on a rotational basis and 2003 provides the continent the opportunity to select a country representative. Libya's nomination was confirmed at the recently concluded inaugural summit of the new African Union. African governments' nomination of Libya as chair of the Commission undercuts their new commitment to promote human rights and good governance".

[29] See note 27 above where Michael Ancram also said "It does seem Alice in Wonderland stuff; it's like making a criminal a chief constable". A Chief Constable is, for example, the most senior police officer/police chief in London or in a county.

[30] Conference paper on « What future for the United nations ? » by Professor Victor-Yves Ghebali of HEI-Geneva, October 20, 2005, Geneva

[31] In May 2001.

[32] A rare move from this group against the United Sates of America, a traditional ally in whatever circumstances.

[33] On the 4th of May 2004.

[34] Please see Foreign Affairs, Summer 1986 « the Reagan Turnaround on Human Rights ».

[35] From 1981 to 1985 Negroponte was the US ambassador to Honduras, and it is alleged that during his tenure he oversaw the growth of military aid to Honduras from 4 million US dollars to 77.4 million US dollars a year. Critics say that during his ambassadorialship, human rights violations in Honduras became systematic. While his predecessor under the Carter Administration ambassador Jack Binns made numerous complaints about human rights abuses by the Honduran military and claimed he fully briefed Negroponte before leaving the post.

[36] This is a trend of US foreign policy and not simply a question of who is leading the administration. For instance, in 2005, the US Administration acknowledged the use of "rendition". Rendition is the practice of transporting persons forcibly and without due process from one country to another where they risk being interrogated under torture or ill-treatment. Renditions are illegal under international law to which all European governments are party.

[37] This should be the case for countries such as Libya, Zimbabwe and other members of the so-called Like Minded Group (LMG).

[38] If a Ku Klux Kan leader gets to the White House as President, those who should be blamed are people who elected him/her and not the position/standing of President.

Nations Security Council, not the Commission, that passed a resolution threatening Sudan with unspecified sanctions if the situation in the Darfur region did not improve within the following 30 days. The Security Council passed the resolution, with China and Pakistan abstaining. The reasons given for this action were the attacks by the Janjaweed Arab militias on the non-Arab African Muslim population of Darfur.

At the same time, human rights violations committed in the West, such as issues relating to torture, arbitrary or incommunicado detention/migration are rarely challenged. For instance, the CHR was unable to reach agreement on any text sanctioning the United States for its treatment of prisoners in the Abu Ghraib detention centre or at Guantánamo Bay[39]. Although defeated, this resolution led to a serious effort by the USA to explain its policies and practices, and to some governments to express their concern, after voting against the adoption of resolution L. 94/Rev.1[40]. This took place while 2005 was the year in which evidence was made public of the involvement of European governments in US led renditions. Governments championed human rights on the one hand, and undermined them on the other. This is called duplicity.

3. Human Rights are proclaimed to be universal and indivisible

Human rights are legally binding for all countries in the world. Some of these rules are set out in countries national laws, other are set out in international human rights treaties. It is clearly established that countries would look at the human rights agenda from their own particular narrow angle. Scholars, the United Nations and others are convinced that human rights are universal and indivisible. This was established by the World Conference on Human Rights; also know as "Vienna Declaration and Programme of Action"[41]. But the United States delegation opposed its adoption. There is a small set of crucial human rights which are valued, at least in theory, by all governments all over the world[42]. But the reality in various parts of the world is quite different. No countries can stand international scrutiny by stating that no human rights occur in its territory. Two broad groups can be distinguished: western countries and other countries (including developing countries). These two large groups would need to be considered separately.

3.1. Political Nature of Human Rights in the West

As far as the United Sates of America is concerned, as the leading member of the western group, it criticises quite often the inclusion of economic, social and cultural rights. This can be dated back to1948 when the UN General Assembly was considering the adoption of the Universal Declaration on Human Rights (UDHR). Western countries started to criticise the inclusion of economic, social and cultural rights in the final draft of the UDHR. The adoption of the UDHR needed states to vote 1,400 times on practically every word and every clause of the text[43]. Most constitutions in groups are clear about the fact that civil, political, economic, social and cultural rights are to be treated in equal terms. But the arena of human rights discourse and practice in the west has been dominated by attention to civil and political rights[44]. By contrast, economic, social and cultural rights are not given the same weight as civil and political rights. What the United Sates and other Western countries do not accept is that not all human rights values and practices typically endorsed by Western countries are automatically accepted elsewhere. There is a West-centric perspective when the West deals with human rights. Liberal democratic ideals and institutions command almost universal allegiance in Western societies. This phenomenon is to be understood in light of the West's shared history and culture. In what seems like an all too obvious theoretical mistake, however, it is often assumed without arguments that this liberal democracy also meets the deeper aspirations of the rest of the world. These aspirations are hardly universal as the West likes to proclaim. If the enjoyment of civil and political rights is very important to people's ability to participate in society, make choices about their lives, and live with dignity, on the other hand people will not be able to participate, make choices about their lives and live with dignity if they suffer poverty, illiteracy or are homeless. The fact of giving civil and political rights a higher status in the human rights discourse, often takes place in the international arena, for instance, when drafting/adopting a resolution. While at the domestic level the practice is that human rights are indivisible.

"The Castro Government has long waged war on the basic human rights of its people. It controls all aspects of daily life through an elaborate and pervasive system of undercover agents, informers, and neighborhood committees working to detect and suppress dissent and impose ideological conformity. Spouses are encouraged to report on each other, and children on their parents. Independent voices have been arrested on charges as vague as 'dangerousness' or as clearly political as 'disrespect for authority.' Dissidents are routinely and falsely labeled foreign spies, mercenaries, and agents of the United States. Access to information is tightly controlled, including access to the Internet, and publications such as the Boston Globe are labeled 'enemy propaganda,' the possession of which is a criminal offense"[45]. This description is a one sided approach of what is taking place in Cuba, which

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[39] Cuba tabled a resolution L. 94/Rev.1; 8-22-23 on Detainees in Guantanamo.

[40] For instance, Canada and the EU.

[41] Please see Doc. A/CONF.157/23, the Vienna Declaration and Programme of Action was adopted on 25 June 1993.

[42] These are likely to be the prohibition against slavery, genocide, murder, torture, prolonged arbitrary detention, and systematic racial discrimination. These rights also now parts of customary international as well as parts of several international human rights instruments.

[43] The vote in the General Assembly, then composed of 56 member States, was 48 in favour, 8 abstained (the socialist states, Saudi Arabia, and South Africa), and none against.

[44] For example, free expression, political and civic association, freedom from torture, cruel, inhuman and degrading treatment.

[45] Please see, Continuing Human Rights Abuses in Cuba Michael G. Kozak, Principal Deputy Assistant Secretary, Democracy, Human Rights, and Labor, Testimony before the Committee on Government Reform, Washington DC, June 17, 2004.

illustrates U.S. policy and its allies in various parts of the world, when the U.S. is unable to tolerate a regime standing against its influence. It is an open secret that U.S. policy is more concerned with the preservation of its commercial interests. That is why the Reagan Administration elaborated the concept of "Constructive Engagement" in South Africa in order to continue trading with the apartheid regime of white rule. Washington (and London) explained to the rest of the world that economic sanctions were not helpful in ending the apartheid regime. Instead, they were advocating that trade with South Africa would have increased the potential of ending the apartheid regime[46].

The United States was South Africa's largest trading partner, its second largest foreign investor, and the source of one-third of its international credit. Another regrettable feature of the Reagan Administration's policy was its failure to denounce attacks on persons or institutions with which it disagreed, or with whom its allies disagreed[47]. The US government never voiced human rights concern for black South Africans during the apartheid regime as it is doing for people of Cuba. The African National Congress (ANC) was considered to be a terrorist organisation simply because it was fighting against the "white rule" system of government well known as "apartheid" regime. The U.S. opposed economic sanctions against the apartheid regime, by conceptualising what is being known as "constructive engagement". Constructive engagement served the US only to preserve its trading and financial interests in South Africa[48]. Most observers of the apartheid era believe that the Reagan and Thatcher's policy of "constructive engagement" when dealing with South Africa gave life support to that racist regime by prolonging its hold on power. Strangely enough, President Poutine of Russia made a similar comparison on 10 May 2006 in his address to the Russian Parliament "The United States is like a wolf, it forgets all about human rights and democracy when its interests are at stake".

Saudi Arabia is a very reliable partner of the United States. This is because of Saudi Arabia's unique role in the Arab and Islamic worlds. Its possession of the world's largest reserves of oil and its strategic location make its friendship important to the United States. These are two things for example, Cuba or China could not offer to the United States[49]. Diplomatic relations were established with Saudi Arabia in 1933. The United States and Saudi Arabia share a common concern about regional security, oil export and imports, and sustainable development. So close consultations between the U.S. and Saudi Arabia have developed on international, economic, and development issues such as the Middle East peace process and shared interests in the Gulf. The continued availability of reliable sources of oil, particularly from Saudi Arabia, remains important to the prosperity of the United States as well as to Western Europe and Japan. Saudi Arabia is often the leading source of imported oil for the United States, providing about 20 per cent of total U.S. crude imports and 10 per cent of U.S. consumption. Finally, the U.S. is Saudi Arabia's largest trading partner, and Saudi Arabia is the largest U.S. export market in the Middle East. Currently, Saudi Arabia is an important partner in the campaign against terrorism, providing assistance in the military, diplomatic, and financial arenas. Counter-terrorism cooperation between Saudi Arabia and the United States increased significantly after the 12th of May, 2003 bombings in Riyadh and continues today. In February 2005, the Saudi government sponsored the first ever International Counter-Terrorism Conference in Riyadh. Not a conference on International Human Rights Standards and Counter-Terrorism. Even in the West human rights commitments are not always clear. Countries are prepared to bend human rights principles whenever it suits them. For instance the United Kingdom was prepared to use evidence obtained by torture in its courts, while Britain's condemnation of torture was enshrined in law by the 1951 European Convention on Human Rights. Until the verdict of the Law Lords, the UK government had clung to the principle that evidence obtained by torture overseas could be used against international terror suspects[50]. And these are civil and political rights favoured by Western Powers. This is not China or a developing country. Western countries must be like Caesar's wife that is above suspicion when it comes to "promote and respect" human rights.

It is fair to say that the U.S. Department of States provides information about the human rights situation in Saudi Arabia. But this information is hardly articulated in any open forum. The official web site of the U.S. States Department has 5 sentences when addressing human rights in Saudi Arabia. It goes on saying "Despite close cooperation on security issues, the United States remains concerned about the human rights condition in Saudi Arabia. Principal human rights problems include abuse of prisoners and incommunicado detention[51], prohibition or severe restrictions on the freedom of speech, press, peaceful assembly and association, and religion; denial of the right of citizens to change their government; systematic discrimination against women and ethnic and religious minorities; and suppression of worker's rights". Even though most of these suppressed rights are civil and political rights, for being the most important rights people should enjoy, these are denied and the U.S. is not mounting a campaign to denounce these practices. Barry F. Lowenkron

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[46] "Internal policy-making procedures should be structured to ensure that human rights is not in a position to paralyse or unduly delay decisions on which human rights concerns conflict with the vital United States interests", by National Security Adviser Richard Allen, in a report submitted by Reagan's transition planning team, Human Rights: The First Decade, pp. 31, 33.

[47] Please see, The Tech. Vol. 105, Number 47, 1985.

[48] US corporations controlled almost half of the South African oil industry, 75% of the computer industry, and 23% of the auto industry. Leading US exporters to South Africa included in 1983 218.4 million US dollars in aircraft and aircraft turbines-60% of South Africa's supply.

[49] Communists and opposing US foreign policy or leadership.

[50] For further information, see Law Report 81, The Times, Friday December 9, 2005.

[51] The US and Saudi Arabia can also initiate a dialogue on this issue, because the US is accused of doing the same thing "Thousands of detainees continued to be held in US custody without charge or trial in Iraq, Afghanistan and the US naval base in Guantanamo Bay, Cuba. There were reports of secret US run detention centres in undisclosed locations where detainees were held in circumstances amounting to disappearances". Please see Amnesty International Report 2006.

once stated that "In terms of Saudi Arabia, the President worked out with the King a strategic dialogue, which will – the purpose of the strategic dialogue is to elevate all the facets of our relationship, including the issues of reform, including the issues of development and exchanges. And I regret that I will probably not be able to attend the session devoted to these issues which is supposed to be taking place next week in the Kingdom because I'll be testifying on the Hill on the Human Rights Reports"[52]. As one can understand Saudi Arabia is not like Cuba, Libya (in 2003), Zimbabwe, Sudan, or China. With Saudi Arabia the U.S is engaged in a "strategic dialogue" while a similar "strategic dialogue" cannot be offered to China or Cuba[53]. Now that the United States is restoring full diplomatic relations with Libya, in recognition of Libya's continued commitment to its renunciation of terrorism and the excellent cooperation Libya has provided to the United States and other members of the "international community" in response to common global threats faced by the civilised world since September 11, 2001[54]. One can anticipate that Libya will also be offered a "strategic dialogue" instead of naming and shaming Libya[55]. In addition to that, the United States intends to remove Libya from the list of designated state sponsors of terrorism. Libya will also be omitted from the annual certification of countries not cooperating fully with anti-terrorism efforts. It can be said without exaggeration, that this attitude is the so-called "double standard" attitude. However, it must be stressed that the United States is not alone with this kind of policy. Most countries in the West do have the same attitude. During his visit in Saudi Arabia, the French President did not raise any human rights concern[56]. He focused his attention on issues such as diplomacy and politics, economic relations, military and security cooperation between France and Saudi Arabia. Even civil and political rights were not discussed with Saudi authorities. Of course, Saudi Arabia is not one of these African States administered by France during its colonial period that can be lectured. While the United States talks about having a "strategic dialogue" with Saudi Arabia, France is more concerned with its "strategic partnership" established in 1996. Among trading partners, human rights cannot become an agenda item for discussion.

"The United States possesses unprecedented and unequaled strength and influence in the world. Sustained by faith in the principles of liberty, and the value of free society, this position comes with unparalleled responsibilities, obligations, and opportunity. The great strength of this nation must be used to promote a balance of power and freedom"[57]. Then one might ask if the United States is taking very seriously this leadership position by using double standard?

The United States is not party to the following international human rights instruments: the International Covenant on Economic, Social and Cultural Rights (ICESCR)[58], the Convention for the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC)[59], the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (ICRMW). No Western country with a significant migrant population is party to this last instrument[60]. This is hardly a good example of a country supposed to lead the world. It seems that international law is made for other countries, and as such it is not applicable to the United States. The United States withdrew it signature to the Rome Treaty establishing the International Criminal Court under the Bush Administration[61].

3.2. Political Nature of Human Rights in the Developing World

This group of countries is made of a broad range of countries, including big, medium and small, communists or former communists and most developing countries. By ratifying international human rights instruments, in particular the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR member states have committed themselves to respecting, protecting and guaranteeing human rights. Individual constitutions also contain a relatively large propor-

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52 Please see, Briefing upon Release of the 2005 Human Rights Reports by Paula Dobriansky, Under Secretary of State for Global Affairs and Barry F. Lowenkron, Assistant Secretary of State for Democracy, Human Rights, and Labor answered questions from the press on the release of the Country Reports on Human Rights Practices, Washington, DC, March 2006. During this press conference, Mr. Lowenkron declined to answer the first question on Saudi Arabia (What about Saudi Arabia, in terms of concern about human rights?) by saying. " What you are asking me to do is to start making comparisons between them – countries – all, which I won't."

53 This is not a new attitude from a U.S Administration "It is not our task to choose between black and white. We will not lend our voice to support those dedicated to seizing or holding power through violence". Crocker, Chester, "Regional Strategy for Southern Africa" in line with the U.S. policy of "Constructive Engagement", United States Department of State, Bureau of Public Affairs, Washington, DC., Current Policy, No. 308, 29 August 1981.

54 Secretary of States Condoleezza Rice, Washington, DC, May 15, 2006, said in her released press statement relating to the U.S. Diplomatic Relations with Libya.

55 *Idem*, « Today's announcements are tangible results that flow from the historic decisions taken by Libya's leadership in 2003 to renounce terrorism and to abandon its weapons of mass destruction programs. As a direct result of those decisions we have witnessed the beginning of that country's re-emergence into the mainstream of the international community. Today marks the opening of a new era in U.S. – Libya relations that would benefit their citizens".

56 Please see, http : www.diplomatie.gouv.fr ; Visite d'Etat en Arabie Saoudite du Président de la République M. Jacques CHIRAC ; Interviewed by Al Hayat (4 March 2006), he said «Depuis, les liens entre nos deux pays n'ont cessé de se renforcer. La dynamique de rapprochement a été couronnée par la mise en place du partenariat stratégique en 1996, lors de ma visite à Djeddah. Il englobe la diplomatie et la politique, les relations économiques, la coopération en matière militaire et de sécurité. Il porte également sur le volet culturel que j'estime primordial et qui doit être renforcé ». Il n'est nullement fait mention des droits de l'homme, et dire que la France c'est le pays des droits de l'homme!

57 President Bush, West Point, New York, June 1, 2002, in The National Security Strategy of the United States of America, September 2002.

58 The United States signed the CESCR.

59 Somalia is the only other UN member not party to the CRC.

60 ICRMW, Entry into force: 1 July 2003, in accordance with article 87 (1); Signatories: 27, Parties: 34 mainly from Africa, Asia – Middle East – and Latin America.

61 *Idem* « We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the international Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept". President Bush, Washington, DC (Joint Session of Congress), September 20, 2001.

tion of human rights, from which a direct constitutional obligation is derived. But in practice, this group seems to prioritise economic, social and cultural rights. This is particularly the case at the international level. For this large group of countries, human rights are considered first from an economic, social and cultural rights perspective. Instead of emphasising the indivisibility and interdependence of human rights, this group like the Western countries, is dividing human rights. It is often forgotten that the implementation of civil, political and economic, social and cultural rights is mutually dependent and must occur in a joint and integrated manner. Civil and political rights are perceived to be a luxury they cannot afford until when they are able to feed, house, and educate their people in adequate fashion[62]. Some would even quote Bertold Brecht, by saying that "a ballot paper will not feed a person, but food will". While scrutinising the draft on the UDHR some islamic states objected to the articles on equal marriage rights and on the right to change religious belief. This could be compared to some extent to the objection made by Western countries against the inclusion of economic, social and cultural rights in the UDHR.

By contrast, economic, social and cultural rights are much less known and rarely form the subject of concerted political effort in a country like the United States or other Western countries. It is clear that human rights violations taking place in some Afro, Asian and Latin American countries are making headlines in most parts of the globe. Most of these human rights violations are often the result of member states being unable to fulfill their human rights obligations. This can be for various reasons. Some time, a state has simply not enough resources to work and deliver within a human rights treaty framework. There are states that decide to accord great significance to the implementation of rights such, housing, health, food, water, social security, education and environment. But for some Western countries, these rights are considered humanitarian issues. The press coverage or pressure from Western states will depend very[63] much on whether that country is an ally of Western states or perceived to be as a "threat, or challenge" to Western influence/authority or interests. If most Western countries are not keen of the idea of promoting economic, social and cultural rights, a country like India shares some of the views expressed by Western countries. During the recent Open-Ended Working Group discussions on whether to draft an Optional Protocol for the ICESCR, which could be of assistance to millions of people who live in poverty, countries such as the United States, Australia, the United Kingdom, Canada and India opposed the drafting of the Optional Protocol. It should be reminded further that the United States is the only developed country not to have ratified the ICESCR. This is despite the fact that the 1993 Vienna Declaration and Programme of Action maintains that political and civil rights and economic, social and cultural rights are of equal status so states should not prioritise either set of rights yet typically the West, at the domestic level, only define human rights as civil and political rights[64]. It should also be mentioned that a number of members from either group accord great and equal significance to civil, political or economic, social and cultural rights as confirmed in the Vienna Declaration of 1993.

4. The "main liability" of the new UN Human Rights organ like the "discredited" CHR is the nature of its membership

On 16 February 1946 ECOSOC established the CHR, consisting of nine individual members, acting in their personal capacities, and in turn the CHR recommended that the future CHR should be comprised of independent experts. ECOSOC rejected this proposal, and decided to have instead 18 representatives of member states. By this decision, the political nature of the CHR, even if not pre-determined by the Charter, was definitively established thus making the CHR an intergovernmental body[65]. This decision subsequently created a major problem for the UN human rights body. The nature of the membership became its main liability. The word liability is found in association with the words "action, claim or demand", all of which relate to civil liability. In legal terms, liability could be defined as "any legal responsibility, duty or obligation. The state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied or in consequence of torts committed". The main consequence of this observation is that the Human Rights Council is not being given a good start in life. Its major handicap is also its single most important characteristic that is composed of government representatives.

In tort law, it can be said that the liabilities of one man are not in general transferred to his/her representatives further than to reach the estate in his hands. For example, an executor is not responsible for the liabilities of his testator further than the estate of the testator which has come to his hands. If we apply this concept to the CHR case, the CHR and its successor is just the executor and not a testator. Testators here are member states. This liability continues only during the membership in a strict legal sense, but may be extended to all UN members. The factual circumstances in which it was alleged that the CHR failed to deliver within its mandate are comparable to those of any public body in any given country. For instance, let's take cases dealing with local authority have alleged failure to deal with abused children in the community and local authority's alleged negligence regarding a child in their care. But if there is a liability, this can be attributed to the local authority as an organisation/institution, and

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[62] This approach is perceived by the West to be an excuse in order to deny civil and political rights to their own nationals.

[63] Establishing a complaints mechanism allowing the Committee on Economic, Social and Cultural Rights to consider individual complaint against a State party.

[64] This belief did not prevent the US to pass legislation in December 2005- the Detainee Treatment Act-which removed the right of Guantanamo detainees to file habeas corpus claims in the US federal court against their detention or treatment, allowing instead only limited appeals against the decisions of the Combatant Status Review Tribunals and military commissions.

[65] Although no precise definition is given, an "intergovernmental " organ tends to imply an institution (a) established by treaty as a subject of international law; (b) financed by governments ; (c) possessing a decision-making organ composed of government representatives. This can apply to some extent to the Human Rights Council as this was the case with the Commission on Human Rights.

not to the Social Services Directorate, which is only a part of that organisation/institution[66]. So if the CHR failed, like the Social Services Directorate in a local government, then liability should be attributed to the United Nations as an organisation. This is because it failed to manage properly one of its directorate/organ, by appointing/electing members who cannot perform effectively by virtue of their nature (government representatives). In a typical court case, in most jurisdictions, the court will hold liable the parent body in case of alleged negligence rather than a subsidiary organ. This is what happened with the CHR. ECOSOC its main organ or the United Nations was not blamed for the alleged failure of the CHR to perform within its mandate.

The decision taken by ECOSOC to make government representatives members of the CHR is what one might call the original sin of the organ mandated to deal with human rights. Original sin because the decision to make government representatives members of a body mandated to deal with human rights was clearly a mistake. This is because governments, no matter from which part of the world they come from, are most concerned with promoting and protecting their own interests. What is reflected in the membership of the Human Rights Council (HRC) and as it used to be with the CHR, is simply a geographic political representation of the UN membership. This should mean that this political representation has multiple and competing dimensions. A general understanding of political representation is one that contains different, and conflicting, conceptions of how governments should represent and so hold representatives to standards that are mutually incompatible in most cases. This is when a particular member state is being targeted by a particular region as a human rights violator, while others are hardly mentioned[67]. Media coverage plays an important role in politics as well as in human rights, which is a continuation of politics by other means. Countries with a more developed press industry can influence what the press decides to raise as issues of concern[68]. Although pandering to the international community is not rare, it is far more common for government representatives to change or influence political opinion for domestic policy reasons. Some governments have found that altering public opinion can be the most effective way, to get their message across. Some governments have found that altering public opinion can be the most effective way to reduce the cost of pursuing their own policy preferences and increase their own likelihood of success. In some way as a result of this trend, international media now focuses primarily on tactics, rather than policy detail. For instance, it is perfectly legitimate for Western countries to denounce human rights violations taking place in Darfour[69] or Zimbabwe, but at the same time, they do not denounce incommunicado/secret detention of suspected terrorists when administered by the United States[70].

Once a particular stereotype is in somebody's mind, it is not easy to change that person's mind on the merits or drawbacks of a particular policy. For instance, it is alleged that most Cubans are oppressed by their communist regime. What is not said is that most Cubans have access to education and primary health care. It is much easier and therefore extremely common for governments to use what is called framing. Instead of simply offering supporting facts or arguments, some governments attempt to define the debate itself to emphasise a particular set of attitudes. Emotions ran high and there was little debate on the main reason why the CHR underperformed.

In their most twisted form, these arguments become sub-rational and seek to directly appeal to irrational or unconscious perceptions and attitudes, for example with this simplistic but popular concept such as "countries in the Axis of Evil" in the United States. This is how the CHR ended up as a discredited body for most people. By using carefully crafted language, governments are able to present their irrational claims as if they are actually rational. This type of argument seeks to break old associations and create new ones. This last effect is magnified by the way mass media tend to echo itself: what one columnist paraphrased on Wednesday is reported by others as a fact on Thursday, and quotation on Friday[71]. In this way, facts can arise out of nothing more than repetition. What is new about this? Governments have always slanted on irrational arguments. The human rights discourse is currently being very seriously distorted in a more pernicious way. The sophistication of irrationalism is unprecedented. The practice of systematically designing a set of supposedly impartial facts to support previous/future decisions or actions has never been more pervasive. It is of vital importance for the international community[72] that governments give reasons for their actions and be accountable for them. For instance, why tabling a resolution aimed at terminating the mandate of the Independent Expert on the Human

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66 Please see, Child Abuse Tort Claims Against Public Bodies, subtitle: A Comparative Law View, Editor/Edition: Green, Sarah, Fairgrieve, Duncan, Blackwell, Oxford, United Kingdom, 2004, 232 pages, a book in which law scholars and practitioners investigate how factual circumstances contained in recent landmark British House of Lords cases dealing with local authority's alleged failure to deal with abused children in the community.

67 During the 61st session of the CHR, the USA had to table its own resolution on Cuba because they were unable to "persuade" anyone else to do it (2005/12; adopted 21-17-15). In response, Cuba tabled a resolution (L. 94/Rev.1; 8-22-23) on detainees in Guantanamo.

68 More likely to influence the media even if these are independent and privately own.

69 The President of Sudan was denied the opportunity to take over the Chairmanship of the African Union in a Summit held in Khartoum in January 2006 because of the human rights situation in Darfour. This is a precedent in Africa, and the Chair went to Congo Brazzaville as a compromise. The second precedent was that during the summit, the human rights situation in Zimbabwe was discussed as an agenda item by African head of states and governments.

70 For further information on this subject, there are general comments and recommendations from the Committee Against Torture (May 2006) addressing this concern. See also the 2005 annual report of Amnesty International dealing with the same concern.

71 In November 2005, three UN human rights experts declined an offer by the US government to visit Guantanamo as it placed restrictions inconsistent with the standard terms of reference for such visits. But most media reports within days failed to mention the reasons UN experts gave to decline the visit. They simply reported that UN experts decline to visit Guantanamo.

72 In a broader sense of this expression and should not be a group of Western countries.

Rights Situation in Afghanistan[73]? These arguments should be rational, meaning that they are conducted in a logical manner. There should be actual debates, based on established facts that use logic to make opposing arguments, rather than emotional associations or innuendo.

Otherwise there is a danger that facts are manufactured to justify and strengthen perceptions of reality. Then sub rational arguments appear to be rational, but making it impossible to argue against rationally. "In any event, the depoliticisation of human rights has natural limits. It can not be meaningfully achieved in the framework of an intergovernmental body. On the contrary what is needed is an independent expert's body"[74]. The Foreign Minister of Peru courageously articulated the same view on 14 March 2005 by observing that the inter-governmental model for the membership of the CHR inevitably resulted in a body that could hardly remain neutral with regard to the protection of human rights, reproducing, to a greater or lesser extent, the selectiveness or the political use of human rights[75]. He went on proposing that the CHR be reconstituted as a body consisting of independent experts, and this proposal failed to win support in 2005 as the one tabled in1946 and rejected by ECOSOC.

5. Lowering UN Member States Legal Obligations under the UN Charter when Standing for Election to the Human Rights Council

During the debate on the reform of the UN CHR, member states avoided to amend the UN Charter in order to make the proposed new UN human rights body one of the main organ of the UN, standing along the principal organs[76]. But member states decided to replace the then CHR by the Human Rights Council reporting directly to the GA, a more representative body comprising 191 members instead of the 54 members of ECOSOC. This is because amending the Charter was not a foregone conclusion; this was like opening a "Pandora box" leading to unfamiliar grounds.

Like any structured organisation, the UN has a constitution. The UN Charter is the constitution of the UN[77]. As a Charter, it is a constituent treaty and all signatories are bound by its articles. Following the ratification of the Charter, member states have the obligations to transpose its provisions into their domestic law, if this is not an automatic process. Furthermore, it explicitly says that the Charter trumps all other treaty obligations.

Chapter II of the UN Charter is very clear about the obligations of member states. Article 4.1 provides that "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations". Once a state forms the opinion to join the UN, it has to ratify its Charter. This is done freely and in good faith. Good faith is the basic tenet of any legal relationship, without which a legal relationship can not be contemplated. This is articulated under Chapter XIX: Ratification and Signature. Thus Article 111 (second paragraph) provides that "IN FAITH WHEREOF the Representatives of the Governments have signed the present Charter". Suspension and Exclusion from UN membership are also considered in the Charter under Chapter II, specifically and respectively in Articles 5 and 6 of the Charter. These two articles have not been used in the past. So there is no precedent and there is little doubt that one of these two articles will be used in the future. Even the South African apartheid regime could not be expelled from the United Nations as that would have required a decision of the Security Council where the three Western Powers[78] exercised their veto[79]. But given the international climate against the apartheid regime, South Africa's full participation in the United Nations became close to extinction, when a resolution clearly stated that "the South African regime has no right to represent the people of South Africa"[80].

The pursuit of human rights was one of the main reasons for creating the United Nations. Its Charter obliges all member states to promote "universal respect for, and observance of, human rights" and to take "joint and separate action" to that end. In fact, the term "human rights" appears in the following key important provisions of the UN Charter: paragraph 2 of the Preamble, Article 1(3), Article 13 (1) (b), Articles 55 and 56, Article 62(2), Article 68, and Article 76 (c). This a clear illustration of human rights obligations laid upon UN

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[73] The mandate of the Independent Expert on Afghanistan was terminated – allegedly at the insistence of the USA because of the Expert's criticism of ill-treatment of detainees – during the 61st session of the Commission on Human Rights (2005).

[74] Conference paper on "What future for the United nations?" page 5 by Professor V-Y Ghebali, 20/10/2005.

[75] Statement by H.E. Manuel Rodrigez-Cuadros to the 61st session of the CHR, Geneva, 14 March 2005.

[76] The principal organs established for the pursuit of the UN's purposes are: the General Assembly; the Security Council; the Economic and Social Council; the Trusteeship Council; the International Court of Justice; and the Secretariat. See Article 7 of the UN Charter.

[77] Opened for signature: June 26, 1945 in San Francisco – USA; Entered in force: October 24, 1945; Conditions for entry into force: ratification by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory States; Parties in 2006: 191.

[78] 18-30 October 1974, the Security Council considered the relationship between the United Nations and South Africa, and received a proposal to recommend to the General Assembly the immediate expulsion of South Africa from the United Nations in compliance with Article 6 of the Charter. The proposal received 10 votes in favour, but was not adopted because of the negative votes of three permanent members –France, the United Kingdom and the United Sates of America.

[79] 14 December 1973, the General Assembly declared under resolution 3151 G(XXVIII) that the South African regime has "no right to represent the people of South Africa" and that the liberation movements recognized by the OAU (now AU) are "the authentic representatives of the overwhelming majority of the South African people". In addition, on 30 September 1974, the General Assembly decided – by 98 votes to 23, with 14 abstentions – not to accept the credentials of the representatives of South Africa. At the same meeting, the Assembly adopted – by 125 votes to 1, with 9 abstentions – a resolution calling upon the Security Council "to review the relationship between the United nations and South Africa in the light of the constant violation by South Africa of the principles of the Charter and the Universal Declaration of Human Rights" – Resolution 3207 (XXIX).

[80] It should be noted that on 5 December 1979, South Africa was expelled from the annual General Conference of the International Atomic Energy Agency, meeting in New Delhi.

member states in relation to the Charter. This legal framework was created in order to consider measures/actions to deal with human rights issues.

Ending the UN Charter Obligations with "voluntary pledges and commitments"?

Unfortunately, many governments in various parts of the globe pay lip service to human rights obligations contained in the Charter or act though their human rights obligations end with its ratification. Several governments neglect the continuing obligations contained in Articles 55 and 56 of the Charter, which is "to cooperate with the United Nations in promoting respect for human rights". The UN Charter is a legal document of a constitutional value, and many states seem to act as if their obligations under this instrument became redundant after its ratification. When states pay lip service to their human rights obligations under the Charter, this is as if states were not giving effect to their own domestic law. For example, when a state adopts legislation and does not take the necessary measures for its implementation.

The key point to note here is the hierarchy of legal norms in international human rights law in particular, and in public international law in general. Is there an international trend whereby mere "voluntary pledge and/commitments" are more likely to bind UN member states rather than the UN Charter?

Although the use of a voluntary pledge and/commitments does not necessarily conflict with the use of traditional legal norms in the human rights field, it is debatable in relation to its impact on "promotion and protection" of human rights if compared to state responsibility under the UN Charter of positive obligations in relation to human rights. A voluntary pledge and/commitments can be compared to an ordinary political manifesto[81]. A political manifesto is made of voluntary pledges a political party will make in order to convince the electorate to vote for that political party instead of their fellow competitors[82]. Voters will vote on the basis of whether or they believe/trust what is being sold to them. This political manifesto is sometimes considered to be a kind of "catalogue" where voters could chose items and identify themselves with the products on offer. It is perfectly normal for the seller of goods to fail to deliver a few items on its catalogue, for diverse reasons. The subsequent election pledge can suffer the same fate as some of the items on offer on the catalogue. Observers should not be surprised of such an outcome. It is perfectly normal in politics. Normal because the obligation to deliver an election pledge is not a normative one, but rather a political. Not a normative because it is not enforceable in an open court[83]. Reasons for failing to deliver can be diverse, for instance, a lack of resources, the public no longer believes in the implementation of that particular measure, or simply because circumstances have so changed that there is no more need to deliver that particular pledge.

In short, these "voluntary pledge and commitments" could be considered as campaign materials in order to maximise their chances of being elected to the Human Rights Council. After a close examination of most of these voluntary pledge and commitments, one would observe that these are not very different when compared to campaign materials. Some are very short, while others are much elaborated. This is a reflection of the UN membership with its regional diversity and culture. To some extend this shows a bright light of what each candidate thinks and acts when it comes to human rights. This is because a mere "voluntary pledge and commitments" is without a normative force like specific human rights provisions contained in the UN Charter, and subsequent international human rights instruments. A voluntary pledge and commitments can simply be compared to political aims without normative force.

Voluntary pledges and commitments simply mean the expression of a candidate's intent to abide by a specific set of principles and actions in the human rights field. The pledge is "voluntary" in the sense that it is signed at the candidate's own initiative and is not required by international agreements, national laws and regulations. It is being promoted as something which is going to foster long-term cultural changes in human rights issues.

The idea of "voluntary pledges and commitments" might raise the issue of free election. Although candidates are not required under any international instrument to make "voluntary pledges and commitments", candidates would then feel forced to make a pledge with which they might not agree at all. Because of the widespread/general practice, of the expected pledge, this action settles in people's mind as if it was mandatory. Candidates would be making the voluntary pledges and commitments not because they are convinced of its worthiness, but because this is what you were supposed to do when standing elections for the HRC. Candidates would simply conclude that if you want your candidature to be taken seriously, you must make voluntary pledges and commitments. Not making one would simply put states out of the race, even before it starts.

Another problem can be that voluntary pledges and commitments may be interpreted as something against freedom of speech. Even though this is not compulsory, but its widespread use may lead candidates to believe that it is compulsory. This is how customary law is created in international law. Customary law is recognised, not because it is backed by the power of some strong individual or institution, but because

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[81] A political manifesto is a document setting out the policies of a particular political party/candidate in order to win votes from the electorate. In order to attract the electorate/voters, a political party/candidate needs to sell itself/to captivate the electorate by making voluntary pledges and/commitments to its potential voters.

[82] For instance, a political manifesto of the Labour Party (centre left) as opposed to the one from the Conservative Party (centre right) in most democratic countries.

[83] For instance, during the last general elections in Italy in April 2006, an Association of Italian Pensioners contemplated suing Silvio Berlusconi, the then Premier minister, for failing to deliver his previous election pledge "to increase the purchasing power" of Italians pensioners. This group was told that courts have no power to enforce such a voluntary pledge contained in an election manifesto.

each individual/state recognises the benefits of behaving in accordance with other individuals'/states' expectations, given that others also behave as one expects.[84] Alternatively, if a minority coercively imposes law from above, then that law will require much more force to maintain social order than is required when law develops from the bottom through mutual recognition and acceptance. "Voluntary pledges and commitments" would be very difficult to enforce as such because they are not part of any treaty obligation. Pledges are not like the Charter and to a lesser extent other international human rights obligations. Members of the HRC will be exercising a dual role: judges and defendants. This situation is not different from that of the CHR. It would also be very difficult to exclude a HRC member by reaching the threshold of 2/3 of the General Assembly. No member of the HRC can claim to have a clean record when it comes to "promote and protect" human rights at home and abroad.

The danger is that, by introducing "voluntary pledges and commitments", some UN member states might come to think that legal obligations contained in the Charter are no longer their concern. Member states ratified the Charter and its obligations are unambiguous for its members on what the UN expects from them in the human rights field. It is clear if making a "voluntary pledge and commitments" is a useful exercise for member states because it takes them away the from human rights obligations under the UN Charter. The overall impression is that these obligations are diluted in unchartered waters.

Peer review is being trumpeted as the "mechanism" which is going to make members of the Human Rights Council behave up to international human rights standards. This "sudden enthusiasm" is simply misleading because like the CHR, the HRC is a body made of representatives of governments/states, and as such states will sit in the new organ as judges and defendants. They would be judges when it suits them (considerations are broader than just human rights), and defendants when they cannot do otherwise (forced to defend their own human rights records). But still this is not an international human rights court as suggested by Australia in 1948. It is far better to be inside rather than being outside. By being inside, a state with the benefit of hindsight can prevent any "hostile action" against its interests. For this "strategic attitude" most states share the same attitude, and labels such as Western, developing countries and any other denomination is irrelevant. What is important is what is "at stake". It is not always clear, but states like to support each other in particular their friends – in a broader sense – and like to embarrass those they do not like – this is hardly new.

UN member states parties to international human rights instruments know too well the specific obligation contained in these treaties to submit period reports to treaty monitoring bodies. The fact is a significant number of member states do not always report regularly as they should. It is also the case that those who make the effort to comply with their reporting obligations, are not always keen to implement general comments/recommendations of various treaty bodies in order to conform their domestic legislation to the said instrument.

Are these voluntary pledges and commitments more important/powerful that the UN Charter? If yes, then this is a dangerous footpath the UN and its members have taken.

Conclusion

The UN human rights body was upgraded from a functional commission of the ECOSOC to a subsidiary organ of the General Assembly by the adoption of Resolution 60/251 (2006). Reporting to the General Assembly is certainly a very positive step for the new organ. This is justified because ECOSOC is a smaller group. The adoption of the resolution establishing the HRC was not a unanimous one, even though the expression "overwhelmingly approved" was used: 170 in favour, 4 against and 3 abstained[85]. The new organ replacing the CHR is the HRC. "Changes in the design of the human rights body can not solely be cosmetic", the U.S government said during the negotiations on the new organ. The United States went further by stating that "they will not support artificial changes"[86]. Obviously the United States thought that there was a substantial problem with the proposed new human rights organ. Unfortunately this problem was never articulated[87]. But those familiar with the main handicap of the CHR would realise that any reform of the CHR not addressing the nature of its membership was doomed to failure. This is a failure because the reform has not addressed the main problem. The CHR's single most important characteristic was that it was composed of government representatives. In the same vein, the United States made it clear that the so-called reform of the CHR was simply "recreating the CHR with only a name change, while replicating all its flaws, and undermining the goal of promoting freedom, liberty, and human rights".

The CHR was a political organ of the UN mandated to promote and protect human rights[88]. In the light of so-called adopted reform, the HRC will carry with it the Commission's single most important characteristic: its composition. This means that the HRC will also be a political organ. Features such as subjectivity, selectivity and impartiality will be part of the new organ. It is alleged that the CHR was a forum for defending government records, rather than examining them, and then it would be very difficult to prevent the HRC to stop its members from being both judges and defendants. The agenda and working procedures of the HRC will not be able to keep at bay politicisation. This is because no government

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[84] Please do note that an element of practice is needed in order to have a comprehensive definition of customary international law.

[85] Against: Israel, Marshall Islands, Palau and United States; abstentions: Belarus, Iran, Venezuela. Iran and Venezuela failed to get elected to the HRC partly because they did not support the establishment of the new organ. This is maybe a price they are paying for abstaining.

[86] A secret ballot on each candidate requiring a majority at the General Assembly, any UN member can be elected since geographical blocks are kept.

[87] This was may be to exclude countries claiming close links with the West, including trading partners.

[88] Please see, Miko Lempinen in The United Nations Commission on Human Rights and the Different Treatment of Governments: An Inseparable Part of Promoting and Encouraging Respect for Human Rights? Danish Centre for Human Rights, 27.5. 2005.

in the world likes to be criticised, and in that respect will oppose any action which is likely to embarrass them on its human rights record, or at least will try to minimise the concerns of the international community.

Members of the HRC have all pledged their attachment to the promotion and protection of human rights. They need to be reminded that the UN Charter ratified by every UN member state includes an obligation "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". One can only hope that members will not pay lip service to their "voluntary pledge and commitments", as they were quick to forget that the UN Charter contains the substance of their pledge. While the Charter contains clear legal obligations, a voluntary pledge cannot claim the same force in terms of obligations. The irony is that member states avoided amending the UN Charter while reforming the CHR, but this did not stop them afterwards to undermine the legal standing of the Charter. ■

Nuclear Cover-ups

Anna Sabasteanski*

The history of the nuclear age has been one of secrecy and deceit, from hiding the effects of radiation through today's failure to disclose the extent of the risks posed by the expansion of nuclear power, following the misleading claim that it is essential to mitigate global climate change. This article addresses the history and current status of nuclear risks and the ways in which they have been hidden from the public, then goes on to describe emerging threats that pose new dangers and require informed public discussion before launching into a new generation of nuclear expansion.

Die Geschichte des Kernzeitalters ist vom Verschleiern der Auswirkungen radioaktiver Strahlung über das Unvermögen den Umfang der Risiken nuklearer Ausbreitung offen zu legen bis hin zur heutigen Behauptung sie sei entscheidend, um den globalen Klimawandel abzuschwächen, von Geheimhaltung und Täuschung bestimmt. Der folgende Beitrag befasst sich mit Geschichte und der derzeitigen Lage nuklearer Risiken und der Art und Weise, wie diese der Öffentlichkeit vorenthalten wurden. Danach werden aufkommende Risiken beschrieben, die eine neue Gefahr darstellen und eine informierte öffentliche Diskussion notwendig machen, bevor eine neue Generation der nuklearen Ausbreitung lanciert wird.

The history of the nuclear age has been one of secrecy and deceit. Now, at a time when nuclear energy is being proposed as a solution to the crisis of global climate change, it is essential to understand the impact of past secrecy, to make transparent the extent of the risks presented by nuclear and radiological materials as they are used today, and to openly debate their appropriate application and effective oversight.

1. The Deadliest Cover-up

The world's first atomic bomb exploded in the desert of New Mexico on 16 July 1945. This test explosion, named Trinity, came after decades of international research in radiation and commensurate developments in physics. These developments took place in the open, but as the nature of radiation and the potential of the atom became understood, the same researchers urged secrecy to prevent atomic knowledge supporting Hitler's Germany in its efforts to build a bomb.[1]

The subsequent effort became the Manhattan Project, and those whom had first identified the threat were among the first subjected to secrecy and censorship. The military classified even the petitions signed by scientists opposed to atomic weapons, and placed strict limits on normal scientific discourse. The topic of radiation was strictly prohibited.[2]

Barely three weeks after Trinity, the United States exploded the only two nuclear devices ever used as a weapon of war.[3] „Little Boy" was dropped on Hiroshima on 6 August. The town of 300,000 was destroyed. About 45,000 people died immediately, and twice that died over the next few months from radiation-related illnesses. As the crew of the Enola Gay watched the bomb detonate, Commander Robert Lewis wrote in his log, „My God, what have we done?"[4] Three days

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1 Einstein's Letter to President Roosevelt, 2 August 1939, reproduced in the Atomic Archive, http://www.atomicarchive.com/Docs/Begin/Einstein.shtml.

2 General Leslie M. Groves discussed „Security Arrangements and Press Censorship" in Chapter 10 of *Now It Can Be Told: The Story of the Manhattan Project*, New York, Da Capo Press, 1962. Barton J. Bernstein, „Nuclear Deception: the U.S. record", *Bulletin of the Atomic Scientists*, August/September 1986, pp 40-43.

3 Guardian staff, „'Rain of ruin' threat to Japan", *The Guardian*, 7 August 1945, http://www.guardian.co.uk/secondworldwar/story/0,,1224313,00.html; Leader, *The Guardian*, 7 August 1945, http://www.guardian.co.uk/secondworldwar/story/0,,1542723,00.html.

4 David McNeill, „'My God, what have we done?' – the commander of the 'Enola Gay' „*The Independent*, 5 August 2005, http://news.independent.co.uk/world/asia/article303774.ece.

later, on 9 August, „Fat Man" was dropped on Nagasaki, killing at least 40,000 people by the end of the year.[5]

Daily Express reporter Wilfred Burchett was the first to enter Hiroshima, in the early hours of 3 September 1945. He wrote, „Hiroshima does not look like a bombed city. It looks as if a monster steamroller had passed over it and squashed it out of existence. I write these facts as dispassionately as I can in the hope that they will act as a warning to the world." He described people incinerated and badly burned, and documented „The Atomic Plague", in which doctors fall as they work, and people die mysteriously and horribly, and attributed these deaths to radiation in the air and water. He was able to telex the story to London, where the story led on 5 September.[6]

George Weller was the first journalist to reach Nagasaki. His eyewitness reports of the aftermath of the U.S. attack on Nagasaki were submitted to occupation authorities and censored. They never made it to press, but came to light last year when his son found carbon copies.[7] He also describes the effects of radiation. Writing on 9 September 1945 he reports, „The atomic bomb's peculiar disease, uncured because it is untreated, and untreated because it is not diagnosed, is still snatching away lives here. Men, women and children with no outward marks of injury are dying daily in hospitals, some after having walked around three or four weeks thinking they have escaped.... But they are dead; dead of the atomic bomb. And nobody knows why".[8]

U.S. occupation authorities responded to public horror (and bad press) generated by these revelations by placing severe limits on reporters, and spreading propaganda that diminished the true effects of radiation. They were even able to suppress the information that the Hiroshima bomb killed about a dozen American Prisoners of War.[9] Burchett was reviled as an apologist for the Axis powers and accused of communist propaganda. Reports were censored, with one exception: award-winning *New York Times* science reporter William Laurence. Described as „the bomb's official press agent"[10] Laurence had been seconded in a role that we now identify as embedded reporting, beginning while the atomic weapons were being developed and tested in the southern U.S. state of New Mexico.[11]

As reports emerged from Japan, Laurence reported a different story. He wrote that atomic testing in New Mexico confirmed that the atomic explosion, not radiation, was responsible for deaths in Hiroshima. He claimed that tests in the aftermath of Trinity „gave the most effective answer... to Japanese propaganda that radiations were responsible for deaths, even after the day of the explosion, August 6, and that persons entering Hiroshima had contracted mysterious maladies due to persistent radioactivity".[12]

Such propaganda and strict control over both public and private exchange of information was highly effective, but did not succeed in suppressing all of the details. John Hersey's 31 August 1946 *New Yorker* article was particularly influential. He interviewed atomic bomb survivors and detailed their experiences on the day of the bomb, and for weeks after.[13]

As information crept out, the world began to understand the words chosen by Manhattan Project director Robert Oppenheimer when, after the Trinity test, he quoted from the *Bhagavad-Gita*, „Now I am become Death, the destroyer of worlds".

How would other countries respond to this unprecedented weapon, and to the awesome military power controlled by the U.S.?

2. The Proliferation of Secrecy

Albert Einstein said, „Any fool can make things, bigger, more complex, and more violent. It takes a touch of genius – and a lot of courage – to move in the opposite direction."[14] In this nuclear age we have had an abundance of fools and cowards.

Witnessing the enormous destructive capacity of atomic weapons, other countries hastened to acquire them. The U.S. built up its arsenal, using remote Pacific islands for testing, and was able to mass-produce nuclear weapons by May 1948. The U.S. also led the way in developing alternative delivery mechanisms, including intercontinental ballistic missiles and nuclear-equipped submarines, and developed the even more powerful hydrogen and neutron bombs. The Soviet Union detonated its first atomic device in August 1949. The United Kingdom got the bomb in 1952, France and Israel around 1960, the Chinese in 1962, India in 1972, South Africa in 1979, Pakistan in the early 1980s, and North Korea in 2004.[15]

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[5] Campaign for International Cooperation and Disarmament, „Hiroshima and Nagasaki Information", http://www.cicd.org.au/index.php?category=hiroshima&page=hiroshima_and_nagasaki_information; Yale University Law School's Avalon Project, „The Atomic Bombings of Hiroshima and Nagasaki by The Manhattan Engineer District, June 29, 1946", http://www.yale.edu/lawweb/avalon/abomb/mpmenu.htm.

[6] *Ibid.* Also note Wilfred Burchett *et al, Memoirs of a Rebel Journalist: The Autobiography of Wilfred Burchett*, Sydney, University of New South Wales Press, 2005.

[7] Democracy Now, „Long-Suppressed Nagasaki Article Discovered", 5 August 2005, http://www.democracynow.org/article.pl?sid=05/08/05/154825. George Weller and Anthony Weller, *First Into Nagasaki: The Censored Eyewitness Dispatches on Post-Atomic Japan and Its Prisoners of War*, New York, Crown, 2006.

[8] National Public Radio, „George Weller, Reporting from Nagasaki", 25 June 2005 http://www.npr.org/templates/story/story.php?storyId=4717966.

[9] Barton J. Bernstein, „Unraveling a Mystery: American POWs Killed at Hiroshima", *Foreign Service Journal*, October 1977, pp 17-19.

[10] Orville Prescott, „Books of the Times, review of William Laurence, *Dawn Over Zero: The Story of the Atomic Bomb*, New York, Knopf, 1948, in the *New York Times Book Review*, 28 August 1948, at 37.

[11] General Leslie M. Groves, *op cit.*

[12] William L. Laurence, „U.S. Atom Bomb Site Belies Tokyo Tales", *The New York Times*, 12 September 1845, at 1.

[13] Steve Rothman, „The Publication of 'Hiroshima' in *The New Yorker*, 8 January 1997, http://www.herseyhiroshima.com/; David Remnick, editor, *The Complete New Yorker*, (DVD set), New York, The New Yorker, April 2006.

[14] Quoted in The Atomic Mirror, „Nuclear Weapons Free Zones Briefing Paper", http://www.atomicmirror.org/nfz/briefing/index.htm.

[15] Anna Sabasteanski, „The Nuclear Century", (2005) TerrorismCentral Newsletter, 7 August 2005.

Each of these programs was developed in secret and with little transparency even among sectors within government and the individuals working on the projects. Lack of information sharing among those most closely involved had no impact on information leaking out to other governments and individuals. Stalin's agents in the US told him of the Trinity explosion before President Truman, and other World War II allies were also involved. Nuclear weapons proliferation defined the Cold War, in which nuclear information was the most valuable currency.[16]

Initial nuclear testing took place above ground. This is the source of perhaps the cruelest and most diabolical of nuclear cover-ups, for it harmed the dedicated foot soldiers that supported their government's strategic efforts. Even worse, nuclear mining, fallout, waste and contamination hurt the civilian bystanders, caught up and killed by an invisible poison. It affected the personnel working on the Manhattan Project to develop and test the first weapon. It harmed the miners in the southern U.S., and other areas around the world. It displaced and killed the Pacific Islanders who were the unwitting guinea pigs of global testing. Knowledge that radiation could be deadly was suppressed. Knowledge that neither the Atomic Energy Commission nor anyone else understood radiological safety was suppressed even more. As far as the public was concerned, radiation was a beautiful thing.[17]

The Marshall Islands are located in the northern Pacific, and are comprised of five islands and 29 atolls. They came under U.S. control following the defeat of Japan. U.S. officials determined that the area was a perfect place to undertake a series of atmospheric nuclear weapons tests in the Marshall Islands.[18]

In early 1946, U.S. officials met with the people of Bikini Atoll and asked if they would temporarily leave so the U.S. could test atom bombs. The U.S. military governor Commodore Ben Wyatt told the islanders this was „for the good of mankind and to end all world wars." Neither the King nor his people had heard of such a bomb, but said they would go, leaving it in God's hands. Legal procedures to resolve issues of reparation and repatriation are not yet resolved, but legal efforts are under way.[19]

The world's fourth atomic bomb exploded on 1 July 1946.[20] The test bomb was a thousand times more powerful than that dropped on Hiroshima. The fallout covered nearby villagers, a Japanese fishing boat, and many of those serving in the U.S. military.[21] [22] When the U.S. tested its first hydrogen bomb on 1 November 1952 it destroyed the entire island of Elugelab and left a 175-feet crater.[23] The first deliverable hydrogen bomb was tested on 1 March 1954. Far more powerful than predicted, fallout covered around 200 islanders and two-dozen American technicians, leading them to suffer radioactive burns and poisoning.[24] Between these and 18 August 1958, the US conducted 67 atmospheric tests in the Marshall Islands.[25] France conducted more than 120 nuclear tests on the volcanic island of Mururoa.[26] Worldwide, between 1951 and 1962, there were more than 2,000 atmospheric nuclear tests, creating hotspots around the world.[27] The U.S. Centers for Disease Control reports that „Any person living in the contiguous United States since 1951 has been exposed to radioactive fallout, and all organs and tissues of the body have received some radiation exposure."[28]

In a bizarre irony, the propaganda intended to reduce fear of radiation and minimize risks to humans increased popularity for all things atomic, with everything from hairstyles to cafes borrowing from the new discoveries. Repeated testing and

http://www.terrorismcentral.com/Newsletters/2005/080705.html#FeatureArticle.

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16 BBC History, „The Cold War: The Cambridge Spies", http://www.bbc.co.uk/history/worldwars/coldwar/cambridge_spies_01.shtml; CNN Interactive, „Cold War Experience Espionage", http://www.cnn.com/SPECIALS/cold.war/experience/spies/; Jeffrey T. Richelson, *Spying On The Bomb: American Nuclear Intelligence from Nazi Germany to Iran and North Korea*, New York, WW Norton, 2006.

17 The National Security Archive provides data from the Advisory Committee on Human Radiation Experiments and related archives. http://www.gwu.edu/~nsarchiv/radiation/

Note in particular the 20 December 1950 meeting of the Atomic Energy Commission in which it discussed safety questions that may be satisfactorily answered in the future. http://www.gwu.edu/~nsarchiv/radiation/dir/mstreet/commeet/meet6/brief6/tab_f/br6f3a1.txt For a sense of the atomic age culture, watch *The Atomic Cafe*, a 1982 movie that collects 1960s government propaganda films designed to assure Americans that the atomic bomb posed no threat to their safety. http://www.publicshelter.com/main/tac.html.

18 Jonathan Weisgall, *Operation Crossroads: The Atomic Tests at Bikini Atoll*, Annapolis, Naval Institute Press, 1994; Naval Historical Center, „Operation Crossroads Fact Sheet", http://www.history.navy.mil/faqs/faq76-1.htm.

19 Ruth Levy Guyer, „Radioactivity and Rights: Clashes at Bikini Atoll", *American Journal of Public Health*, 91 (9) September 2001, http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1446783; *People of Bikini v U.S.A.*, Amended Complaint, 18 July 2006, http://www.bikini-atoll.com/7-18-06%20Amended%20complaint.pdf.

20 William Laurence, „Fiery 'Super Volcano' Awes Observer of 3 Atom Tests", *The New York Times*, 1 July 1946 at 1.

21 BBC, „Bikini Atoll bomb test remembered", 1 March 2004, http://news.bbc.co.uk/2/hi/asia-pacific/3522243.stm.

22 „Operation Crossroads" Atomic Veterans, http://www.aracnet.com/~pdxavets/crossroa.htm.

23 Department of Energy, „Photo Library – Operation Ivy", http://www.nv.doe.gov/library/photos/ivy.aspx; *Ibid*, „Historical Test Film", http://www.nv.doe.gov/library/films/film.aspx?ID=81; C. Thomas *et al*, „Analysis of radiation exposure for naval personnel at Operation Ivy", Washington, NTIS 13 May 2001.

24 Associated Press, „2nd Hydrogen Blast Proves Mightier Than Any Forecast", *The New York Times*, 18 March 1954 at 1; Lindsay Parrott, „Japan buries Fish Exposed to Atom: Sampan Showered With Ashes From Explosion Provides Anti-American Issue", *The New York Times* 18 March 1954 at 9.

25 Department of Energy, „Marshall Islands Chronology 1994 to 1990", http://worf.eh.doe.gov/ihp/chron/; Compact of Free Association Amendments Act of 2003 108 P.L. 188; 117 Stat. 2720; 2003 Enacted H.J. Res. 63; 108 Enacted H.J. Res. 63, http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp109Bg14C&refer=&r_n=sr237.109&db_id=109&item=&sel=TOC_17901&.

26 Faye Flam, „Nuclear Fallout", *Philadelphia Inquirer* 1995, reprinted by the Franklin Institute, http://sln.fi.edu/inquirer/fallout.html.

27 National Institutes of Health, „NCI Completes Nationwide Study of Radioactive Fallout from 1950s Nuclear Tests", 25 July 1997, http://www.nih.gov/news/pr/jul97/nci-25.htm; Paul Rincon, „Plutonium traced in British soil", *BBC*, 6 September 2004, http://news.bbc.co.uk/2/hi/science/nature/3630284.stm.

28 Centers for Disease Control and Prevention and the National Cancer Institute, *Report on the Feasibility of a Study of the Health Consequences to the American Population From Nuclear Weapons Tests Conducted by the*

proliferation to additional countries also helped make the atom bomb less frightening. The next atomic test in the Bikini Atoll was called a „dud" and some people even sneered at the notion that the atomic bomb was a cataclysmic weapon.[29] At the same time, schoolchildren were being taught to „duck and cover"[30] and Pacific islanders, other civilians,[31] and nuclear veterans were becoming ill and dying.[32]

The U.S. was not alone in such endeavors. It is worth taking a look at two cases in which details have emerged in the not too distant past. In January 2004 we discovered that the architect of Pakistan's nuclear program, Abdul Qadeer Khan, headed an international nuclear supermarket. Among his clients were Iran and North Korea, whose nuclear programs have continued to expand. In 2005, press investigations and newly released British archival footage revealed Britain's involvement in Israel's development of its secret nuclear program.

„Pakistan's Nuclear Proliferation Activities and the Recommendations of the 9/11 Commission: U.S. Policy Constraints and Options" by the U.S. Congressional Research Service draws on research into Pakistan's exploitation of nuclear technology to question the fundamental contradiction in US policies to support both Pakistan's military government and nuclear non-proliferation objectives.

The report explains, „First, in over fifty years, the United States and Pakistan have never been able to align their national security objectives except partially and temporarily. Pakistan's central goal has been to gain U.S. support to bolster its security against India, whereas the United States has tended to view the relationship from the perspective of its global security interests. Second, U.S. nuclear non-proliferation objectives towards Pakistan (and India) repeatedly have been subordinated to other U.S. goals. During the 1980s, Pakistan successfully exploited its importance as a conduit for aid to the anti-Soviet Afghan mujahidin to deter the application of U.S. nuclear non-proliferation law. Not only did Pakistan develop its nuclear weapons capability while receiving some $600 million annually in U.S. military and economic aid, but some of the erstwhile mujahidin came to form the core of Al Qaeda and Taliban a decade later". The report proceeds to discuss US policy failures from the 1974 Indian nuclear test through Pakistan's emergence as a critical U.S. ally after the 11 September 2001 terrorist attacks.[33]

Pakistan is not a member of the Nuclear Non-proliferation Treaty so is not bound by its ban on transfer of nuclear weapons related technology or materials to any other state. It is not a member of the Nuclear Suppliers' Group and so is not subject to its guidelines for nuclear exports. Instead, it has engaged in widespread nuclear proliferation.[34]

Pakistan's nuclear proliferation activities were rooted in the secret activities of Dr. Abdul Qadeer Khan and his associates at Khan Research Laboratories. From the 1980s through 2002 they developed an international network operated out of Pakistan that spanned at least four continents. The Scomi Precision Engineering factory in Kuala Lumpur, Malaysia, manufactured centrifuge parts. SMB Computers was a front company in Dubai, run by Sri Lankan businessman BSA Tahir. Operatives in Europe, the Middle East and Africa purchased additional components. There is evidence that Pakistan bartered uranium enrichment technology for North Korean missiles and perhaps provided information on uranium melting to Iraq. Sources for this information remain sketchy and unverified.[35]

While all this went on, Pakistan failed to address reports on Khan's activities emanating from his colleagues, the U.S. government, and the press, which all provided evidence of a proliferation ring. In October 2003 centrifuge equipment *en route* to Libya was intercepted. In December Libya renounced its WMD programs and revealed Khan's support, for which he was paid some $100 million. The network, involving at least seven different countries, unraveled, and Pakistan's response to this again suggested prior knowledge, particularly on the part of top military officials. Khan accepted full responsibility for his activities and said that the government has not authorized them, but Khan was granted a conditional pardon from criminal prosecution. Subsequently, several civilian scientists and retired military officers were charged with proliferation-related crimes.[36] [37]

Moving on to a second secret program, we turn to Israel.

Israel was interested in atomic energy from the time the nation was founded. Low-grade uranium deposits were found in the Negev Desert in 1948 and nuclear scientists

United States and Other Nations, CDC/NCI, August 2001, „Executive Summary page 1, http://www.cdc.gov/nceh/radiation/fallout/default.htm.

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[29] William L. Laurence, „Bikini 'Dud' Decried for Lifting Fears", *The New York Times,* 4 August 1946 at 3.

[30] Archer Productions, *Duck and Cover*, 1951, http://www.archive.org/details/DuckandC1951.

[31] Michael Field, „French military continuing nuclear cover up", *South Pacific Reporter*, http://203.97.34.63/french%20polya.htm; Norm Dixon, „Tahiti: Nuclear Cover-up stokes Tension With France", *Scoop* 22 August 2006, http://www.scoop.co.nz/stories/HL0608/S00227.htm.

[32] Australian Nuclear Veterans Association web site http://users.bigpond.net.au/anva/; French Nuclear Weapons Test Veterans web site http://www.converge.org.nz/pma/cra0648.htm; Health Protection Agency „Third Epidemiological Study of Nuclear Test Veterans", 24 February 2003, http://www.hpa.org.uk/hpa/news/nrpb_archive/press_releases/2003/press_release_03_03.htm; J. Christopher Johnson *et al*, *Mortality of Veteran Participants in the CROSSROADS Nuclear Test*, National Academies Press, 1996.

[33] Congressional Research Service, „Pakistan's Nuclear Proliferation Activities and the Recommendations of the 9/11 Commission: U.S. Policy Constraints and Options", CRS Order Code RL32745, 25 January 2005, http://www.fas.org/spp/starwars/crs/RL32745.pdf; *The Final Report of the 9/11 Commission on Terrorist Attacks Upon the United States*, http://www.9-11commission.gov/.

[34] Anna Sabasteanski, „Nuclear Proliferation in Pakistan", *TerrorismCentral Newsletter*, 30 January 2005, http://www.terrorismcentral.com/Newsletters/2005/013005.html#FeatureArticle.

[35] *Ibid.*

[36] *Ibid*, IAEA Staff Report, „Experts Target Nuclear Proliferation Risks at IAEA Seminar", 6 February 2004, http://www.iaea.org/NewsCenter/News/2004/NGO_Forum0602.html.

[37] U.S. House of Representatives, Committee on International Relations, Subcommittee on International Terrorism and Nonproliferation, „The A.Q. Khan Network: Case Closed" hearing 25 May 2006 testimony sug-

were actively recruited. In 1952 the Israeli Atomic Energy Commission was secretly founded within the Ministry of Defense. Soon after, Israeli scientists were able to extract uranium and make heavy water. France began to cooperate with Israel on nuclear research. Scientists were trained in the US under the Atoms for Peace program in the late 1950s. Israel purchased nuclear reactors from France and the US. The Suez crisis expanded French/Israeli cooperation to accelerate weapons research. The Dimona nuclear facility was started in October 1957. France and Israel secretly agreed to construct the facility for scientific research, and construction began in 1958. Soon after, Norway sold 20 tons of heavy water to Israel. In 1960, Britain's *Daily Express* reporter Chapman Pincher broke the news that „Israel May be Making an A-bomb", working on its own weapons.[38]

On 3 August 2005, investigative reporter Michael Crick with BBC Newsnight revealed that Britain played an important role in helping Israel build its bomb, and concealed that from the US and others. France could not supply the heavy water necessary for the Dimona reactor and asked the US, which refused to provide it without strong safeguards to ensure it was only for peaceful purposes. The French then turned to Norway, the world's largest producer, but they did not have a sufficient quantity. The UK had bought a large supply from Norway that it no longer needed. Norway recommended Israel could obtain the heavy water from them.[39]

Under the secret deal, Britain was paid 1.5 million pounds (20 million today). Safeguards were deemed „overzealous". Norway, which brokered the exchange, had the right to inspect the heavy water for some 30 years but did so only in April 1961 when it was in storage. Indeed, the civil servants involved in the agreement apparently took no heed of the political, technical or policy implications and treated it as merely a beneficial financial transaction with Norway. They decided it was preferable not to mention the transaction to the US, which at the time was deeply concerned about Israel getting the bomb.

At the time of this report, documents in the British National Archive suggested that the government ministers in the Macmillan government had not been consulted and that civil servants with the Foreign office and the UK Atomic Energy Authority has acted on their own. After the initial report Foreign Office Minister Kim Howells confirmed this impression by claiming that „the UK was not in fact a party to the sale of heavy water to Israel" and had only negotiated „the sale back to Norway of surplus heavy water". This assurance was also given to the IAEA and its member governments.[40]

Now, documents obtained under the Freedom of Information Act show that the UK was a knowing party to the deal, and intelligence assessments confirmed that the sale was crucial to Israel's development of weapons. For example, there is a copy of the contract and a March 1961 Joint Intelligence Bureau report that says, „The main Israeli achievement in the importing line relates to 20 tonnes of heavy water ... negotiations were undertaken whereby the water ultimately passed into Israeli hands". These revelations have led to allegations of a cover-up, that Mr. Howells had been deliberately misleading, and to demands for an inquiry.[41]

Israel maintains its official policy of „nuclear ambiguity" by neither confirming nor denying that it has nuclear weapons, but it is believed to have the most advanced nuclear weapons program in the Middle East, with as many as 200 nuclear warheads. Israel is not a signatory of the NPT and does not permit inspection of its nuclear facilities.

The cases of Nazi Germany, the USSR, China, France, India, South Africa, Taiwan, Iraq, North Korea, Libya, and Iran[42] all offer important lessons in the harm that can arise from lack of transparency and governance in such critical programs. However, the examples of Israel and Pakistan also offer another lesson; what George Perkovich calls the „Democratic Bomb". His latest policy brief explains that:

„Instead of treating nuclear weapons and materials as problems wherever they exist, the Bush administration has pursued a „democratic bomb" strategy, bending non-proliferation rules for friendly democracies and refusing to negotiate directly with 'evil' nondemocratic regimes such as North Korea and Iran. Yet regime change and democratization cannot solve major proliferation challenges in the necessary timeframe and actually can make them worse. Non-proliferation should take precedence over democratization. Universal rules remain essential and must be invigorated, which requires cooperation with major powers that differ on democracy."[43]

3. Nuclear and Radiological Accidents

At the same time that nuclear weapons were proliferating, there was a surge in other radiological and nuclear applications, ranging from illuminated watches to cancer treatment.

Since radiological material is used in medical and industrial applications, accidents are fairly common, but tend to be localized and have a limited impact. Indeed, in the early days after radium was discovered, and even into the 1950s and beyond, it was widely considered a miracle cure. Early researchers in radioactivity were unaware of the threat posed

gests that this case is in fact not fully resolved. http://www.internationalrelations.house.gov/testimony.asp?committee=5.

[38] Anna Sabasteanski, „Israel's Bomb and Nuclear Nonproliferation", *TerrorismCentral Newsletter*, 11 December 2005, http://www.terrorismcentral.com/Newsletters/2005/121105.html#FeatureArticle.

[39] Michael Crick's *Newsnight* reports: http://news.bbc.co.uk/1/hi/programmes/newsnight/4513936.stm http://news.bbc.co.uk/1/hi/programmes/newsnight/4743493.stm.

[40] *Ibid.*

[41] National Security Archive, „National Intelligence Estimates of the Nuclear Proliferation Problem: The First Ten Years, 1957-1967", http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB155/index.htm.

[42] Jeffrey T. Richelson, *Spying on the Bomb: American Nuclear Intelligence from Nazi Germany to Iran and North Korea*, New York, WW Norton, 2006; National Security Archive,

by exposure, and no protective equipment was available. One early tragedy was the death of Marie Curie, from radiation-related aplastic anemia.

The „Radium Girls" is an early industrial case in point. Luminous paint was developed after World War One, and the women employed to paint illuminated watches began exhibiting a range of illnesses. The owners of the plant knew that radiation was harmful, but did not take any protective measures, nor did they inform their workers. U.S. health officials in the state of New Jersey undertook an investigation into the deaths of four workers, with a range of symptoms. They found contamination everywhere, several cases of advanced radium necrosis, and even lesions on the company's lead chemist. The illnesses and deaths eventually worked through the legal system, which eventually demonstrated the link between their jobs and radiological poisoning. This case also had led to new measures to protect workers, including establishing exposure levels.[44]

Radiation-related deaths were often related to mining and manufacturing as well. In some of these cases, as with the radium girls, workers could spread to their homes and other locations. A transnational incident occurred in 1983 when a radiation therapy machine discarded in Mexico contaminated a truck that travelled to the U.S. and elsewhere, contaminating steel sold for building materials, and other items.[45] This case led to the Nuclear Regulatory Commission and the Customs Service to install their first radiation detectors.

Such dispersion remains a problem today, particularly in developing countries. The Shinkolobwe Uranium Mine in the Democratic Republic of Congo has been closed indefinitely following a collapse that killed eight miners, and led to detection of high levels of radiation. Shinkolobwe uranium was used in the 1945 Hiroshima and Nagasaki bombs.[46] The Database of Radiological Incidents and Related Events lists 128 major accidents and events causing radiation casualties.[47]

However, it is two nuclear accidents that led to public disillusion with nuclear power, and directly contributed to a 2-decade hiatus in most new plants.

The first of these accidents occurred in the U.S. state of Pennsylvania on 28 March 1979. What became the most serious incident in U.S. commercial nuclear plant history began with a simple equipment failure at Three Mile Island Unit 2. Followed by worker errors and compounded by design flaws, the nuclear core melted down, and released a small amount of radioactivity. The walls of the nuclear container were not breached, but neither the government nor the local residents had been prepared for such an incident, and it generated both distrust and political action.[48]

This was merely a prelude to a much more serious incident.

Early on 26 April 1986, reactor four at the Chernobyl nuclear power station exploded, releasing ionizing radiation across a huge swath of Europe and beyond. The Soviet government waited several days to acknowledge the accident, after Swedish engineers identified levels of radiation five times higher than normal. Only gradually was the scale of what is now known as the world's worst nuclear accident revealed.[49]

Three Chernobyl workers died immediately in the explosion. High doses of radiation received during the emergency response killed another 25 people within weeks. Through 2004, 19 workers died from causes associated with acute radiation poisoning. There have been 4,000 cases of thyroid cancer attributable to Chernobyl's release of radioactive iodine, and 15 have died of this disease.

Chernobyl is located in what is now the Ukraine. Residents there and in Russia and Belarus were exposed to the highest levels of radiation, which has led to a 10-fold increase in thyroid cancers, and anticipated long-term effects of such exposure, including birth defects, immunological disorders, and other cancers. Contamination remains a problem, rendering the area uninhabitable, but this wilderness has been friendly to natural rehabilitation.

Numbers of deaths related to the broader fallout are difficult to assess and the estimates have been controversial. The Chernobyl Forum estimates that up to 4,000 people may die from Chernobyl fallout, and another 5,000 from radiation-related deaths in contaminated regions.[50] The International Agency for Research on Cancer in Lyon estimates up to 16,000 radiation-related deaths throughout Europe.[51] Earlier this year, Greenpeace estimated a death toll of up to 100,000.[52]

http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB162/index.htm.

43 George Perkovich, „Democratic Bomb: Failed Strategy", Carnegie Endowment for International Peace, November 2006, http://www.carnegieendowment.org/files/PB49_final1.pdf.

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44 University of Medicine and Dentistry of New Jersey, University Libraries Special Collections, „U.S. Radium Corporation East Orange, NJ", http://www.umdnj.edu/librweb/speccoll/USRadiumCorp.html; Bill Kovarik, „The Radium Girls", http://www.runet.edu/~wkovarik/envhist/radium.html; R. E. Rowland, „Radium in humans: A review of U.S. studies", Argonne National Laboratory, September 1994, http://www.ntis.gov/search/product.asp?ABBR=DE95006146&starDB=GRAHIST.

45 Texas Comptroller of Public Accounts, „El Cobalto", http://www.window.state.tx.us/border/ch09/cobalto.html.

46 UN Environment Program, „UN Assesses Uranium Mine in Democratic Republic of Congo", UNEP, 9 November 2004, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=412&ArticleID=4661&l=en.

47 William Robert Johnston, „Database of Radiological Incidents and Related Events", http://www.johnstonsarchive.net/nuclear/radevents/index.html.

48 U.S. Nuclear Regulatory Commission, „Fact Sheet on the Accident at Three Mile Island", http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html; Public Broadcasting Corporation, „Meltdown At Three Mile Island", http://www.pbs.org/wgbh/amex/three/; Three Mile Island Virtual Museum and Resource Center, http://www.threemileisland.org/.

49 TerrorismCentral, „Recommended Reading", 30 April 2006, http://www.terrorismcentral.com/Newsletters/2006/043006.html#7.

50 Chernobyl Forum Expert Group, „Chernobyl's Legacy", http://www.iaea.org/NewsCenter/Focus/Chernobyl/index.shtml.

Chernobyl was notable for the delay in notification and subsequent concealment and deception regarding the scale of the accident.[53]

Following this disaster, it was not surprising that nuclear power became unpopular.

Much has been learned in the aftermath of the Hiroshima and Nagasaki bombings, as well as experience with accidental release of radioactive materials, and the use of radiation in medical and other non-military applications:

1. Radiation is deadly and has long-term negative health effects:
a. Acute radiation poisoning can occur several months to several years after an incident, with symptoms ranging from uncontrollable bleeding and radiation-induced cataracts to death.
b. Radiation destroys the immune system.
c. Radiation causes chromosome mutations, severe birth defects, impaired growth and mental retardation, and higher mortality rates.
2. Radiation can cause cancer, even at low doses.
3. Atomic energy generates waste materials for which there is no acceptable storage or disposal mechanism.
4. Radioactive materials and facilities can not be easily secured and are subject to accidental and deliberate release of radioactive material, such as the devastating accident at Chernobyl and the emergence of nuclear black markets.[54]

Despite these experiences, there have been repeated reactor outages in the aging plants. Since the 1979 Three Mile Island incident U.S. nuclear power reactors have been shut down 38 times for at least a year (two years or more in seven cases) in order to restore safety margins to minimal standards.[55] There are similar examples in reactors around the world, with an outage recorded somewhere practically every week.

Now we must learn from history and our experiences, and begin to take into account new and emerging threats.

4. Emerging Threats

In October 2006, International Atomic Energy Agency (IAEA) Director General Dr. Mohamed ElBaradei addressed the United Nations General Assembly. He described the growing expectations for nuclear power, 20 years after Chernobyl and in a world in which „recently we have seen rising expectations regarding the future role of nuclear power, particularly among many developing countries. The rapid growth in global energy demand is putting a premium on all energy sources. Climate change concerns have highlighted the advantages of nuclear power in terms of its minimal greenhouse gas emissions. And the sustained nuclear safety and productivity record over the past twenty years has made nuclear operating costs relatively low and stable."[56]

Several governments, notably the coalition of Australia[57], the United Kingdom[58], and the United States[59], have recommended rapid expansion of nuclear power as a solution to reduce emission of greenhouses gases that contribute to global warming. These proposals are undergoing intense scrutiny, but most attention has been focused on the problems that contributed to the decline of the industry over more than two decades: primarily plant safety design and waste disposal.

These problems are being addressed, but there are a number of emerging threats that deserve greater attention: failure of the Non-proliferation treaty (NPT) review, the conflict of interest within IAEA, geopolitical risks, climate change, workforce, costs, and secrecy.

4.1. Failure of the NPT review[60]

The Nuclear Non-Proliferation Treaty (NPT) is an international treaty designed to prevent the spread of nuclear weapons and weapons technology; promote cooperation in peaceful uses of nuclear energy; and achieve nuclear, general and complete disarmament. Every five years there is a review conference of the treaty. The seventh review took place in May 2005.

It was clear from the beginning that things were not going well and that attendees had widely divergent views. The agenda was not agreed until May 11. It established three main committees:

– Main Committee I, nuclear disarmament and security assurances, led by the non-aligned movement;
– Main Committee II, safeguards and regional issues, including the creation of a nuclear-weapon-free zone in the Middle East, under the helm of the Eastern European and Other States Group
– Main Committee III, headed by the Western European and Other States, on implementation of the Treaty's provisions related to the peaceful uses of nuclear energy.

[51] International Agency for Research on Cancer Working Group on Chernobyl, „IARC and the Cancer Consequences of the Chernobyl Accident", http://www.iarc.fr/chernobyl/index.php.

[52] Greenpeace International, „Chernobyl Health Report", 18 April 2006, http://www.greenpeace.org/international/news/chernobyl-deaths-180406.

[53] International Student Movement of the International Physicians for the Prevention of Nuclear War, „The cover up", http://www.ippnw-students.org/chernobyl/coverup.html.

[54] Sabasteanski, *op cit*; Radiation Effects Research Foundation, http://www.rerf.or.jp/; Centers for Disease Control and Prevention, „Radiation Emergencies", http://www.bt.cdc.gov/radiation/; Idaho State University Radiation Information Network, http://www.physics.isu.edu/radinf/; University of Michigan, Health Physics Society, http://www.umich.edu/~radinfo/.

[55] David Lochbaum, *Walking a Nuclear Tightrope: Unlearned Lessons of Year-plus Reactor Outages*, Boston, Union of Concerned Scientists, September 2006.

[56] Mohamed ElBaradei, „Statement to the Sixty-First Regular Session of the United Nations General Assembly", (30 October 2006) International Atomic Energy Agency http://www.iaea.org/NewsCenter/Statements/2006/ebsp2006n020.html.

[57] Australian Government, Department of the Prime Minister and Cabinet, *Draft report: Uranium Mining, Processing and Nuclear Energy – Opportunities for Australia?* Commonwealth of Australia, 2006. http://www.dpmc.gov.au/umpner/docs/draft_report/full_report.pdf.

[58] U.K. Department of Trade and Industry, *The Energy Challenge. Energy Review Report 2006*, HMSO, 2006. http://www.dti.gov.uk/files/file 31890.pdf.

[59] U.S. White House, *The Advanced Energy Initiative*.

At the end of the meetings, Main Committee I Chair Sudjadnan Parnohadiningrat submitted papers on disarmament that the Committee had been discussing. He told the plenary that the papers „do not reflect fully the views of all state parties, nevertheless the committee agreed to annex the papers" to the final report. Main Committee II Chair Laszlo Molnar said they had been unable to reach consensus to attach their draft report for the plenary. Committee III Chair Elisabet Borsiin-Bonnier reported no consensus on substantive matters and therefore the report given the plenary was „primarily of a technical nature".

The conference plenary approved the technical components of the final report, which included no recommendations. Conference president Sergio de Queiroz Duarte changed the title of the final document from „conclusions and recommendations of the conference" to „conclusions of the conference". He also decided not to make a final statement during the wrap-up plenary because he felt it would be difficult in light of the „wide divergence of views" among the State parties.

Putting a positive light on these failures, Duarte told a press briefing that although the conference had accomplished very little in terms of results, agreements or final decisions, there had been some progress „in the ways issues were discussed and the interest that delegations had shown in those discussions and … documents presented". He added that it is perhaps too early to tell if the failure of the conference undermined the 35-year-old NPT and said „We'll have to wait and see".

UN Secretary-General Kofi Annan issued a statement in which he „very much regrets" that the meeting closed without substantive agreement, noting that the States parties „missed a vital opportunity to strengthen our collective security against the many nuclear threats to which all States and all peoples are vulnerable". He warned that the State parties' „inability to strengthen their collective efforts is bound to weaken the Treaty and the broader NPT-based regime over time".[61]

While the conference was underway, the U.S. moved forward with plans for new tactical nuclear weapons and weapons in space, adding to the inevitable conclusion that the future of non-proliferation looks grim indeed.[62]

4.2. Conflict of Interest Within IAEA

One of the complications with any nuclear monitoring and compliance regime is the dual role of the International Atomic Energy Agency. IAEA is chartered both to enforce international measures, under supervision of its Board of Governors and the United Nations, and to champion the use of nuclear and radiological materials for peaceful purposes.[63]

The clearest example of the difficulty this represents is with the current situation in Iran. On the one hand, Iran has requested technical assistance from IAEA for nuclear power plant construction. This request has, for the moment, been rejected because it conflicts with efforts to uncover and mitigate the threat posed by a potential secret weans program.[64]

4.3. Geopolitical risks

Of the 28 new reactors currently under construction, 16 are in developing countries. Although North America and Western Europe have the highest percentage of existing reactors, recent growth has been primarily in Asia and Eastern Europe, where safeguards are extremely weak, and there is heightened risk of political instability.

Countries formed after the fall of the Soviet Union and those emerging from the shadow of Soviet dominance of Eastern Europe pose particular vulnerabilities. The governments are unstable and are largely secretive, corrupt, and dictatorial. Soviet-era stockpiles of conventional arms as well as nuclear, radiological, biological, and chemical weapons and materiel are poorly secured, and have been associated with proliferation.[65] They are also a likely source for terrorists looking for weapons of mass destruction.[66]

These regions are also known for high levels of occupational accidents. Many of these occur in the mining industries, which also pose environmental disasters. The confluence of these factors is illustrated, for example, in Kyrgyzstan's Mailuu-Suu uranium mine, where landslides and earthquakes threaten to wash huge quantities of uranium waste into the Syr Darya river basin.[67]

4.4. Climate change

Nuclear plants are built beside sources of water used for coolant. As plants age, sea levels rise, and waters warm, seri-

http://www.whitehouse.gov/infocus/energy/.

[60] United Nations, Non-Proliferation Treaty 2005 Review, http://www.un.org/events/npt2005/; Center for Nonproliferation Studies, NPT Briefing Book, April 2005, http://cns.miis.edu/research/npt/briefingbook_2005/index.htm.

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[61] UN Secretary General Kofi Annan address to the NPT Review Conference, http://www.un.org/apps/sg/sgstats.asp

[62] TerrorismCentral Newsletters 8 May 2005 and 29 May 2005, http://www.terrorismcentral.com/Newsletters/2005/050805.html#FeatureArticle, http://www.terrorismcentral.com/Newsletters/2005/052905.html#FeatureArticle.

[63] IAEA, „Pillars of Nuclear Cooperation", http://www.iaea.org/OurWork/index.html.

[64] IAEA, „In Focus: IAEA and Iran", http://www.iaea.org/NewsCenter/Focus/IaeaIran/index.shtml; Christine Spolar, „U.N. to Iran: No help on nuclear reactor", *Chicago Tribune*, 23 November 2006, http://www.chicagotribune.com/news/custom/newsroom/chi-061123iran,1,7289617.story?coll=chi-news-hed.

[65] C. J. Chivers, „Post-Soviet danger: Vulnerable munitions depots", *International Herald Tribune* 16 July 2005, http://www.iht.com/articles/2005/07/15/news/ukraine.php; U.S. House of Representatives, Committee on International Relations, Subcommittee on the Middle East and Central Asia, „U.S. Policy in Central Asia: Balancing Priorities (Part II), hearing, 26 April 2006 http://www.internationalrelations.house.gov/testimony.asp?committee=7; *Ibid*, „U.S. Security Policy in Central Asia (Part I), hearing 27 October 2005, http://www.internationalrelations.house.gov/archives/mecahear.htm; Matthew Burn and Anthony Wier, *Securing the Bomb 2006*, Nuclear Threat Initiative, July 2006, http://www.nti.org/securingthebomb.

ous cases of corrosion within both pipes and inside reactors have increased, and pose a growing safety threat.[68]

Estimates of how long reactors can be kept in service have not taken into account the changing risk presented by climate change. Among the more unanticipated risks has been an increase in jellyfish populations due to warming waters. This already has led to clogged pipes and outages in Japan and Sweden.[69]

4.5. Workforce

Professor Jon Petter Omtvedt wants to develop a nuclear plant based on thorium, but there's a problem: „Omtvedt sees a need to import scientists since Norway has neglected the development of domestic nuclear physicists in recent years, and with greenhouse gas emissions a growing problem, he wants the project started quickly."[70]

Norway is not the only problem with a shortage of nuclear scientists. The average age of the nuclear workforce around the world is 50 years. Half the workforce will retire in 15 years. In the Czech Republic, more than a third are retiring in the next five years.[71]

4.6. Costs

It is common for industry to ignore the total lifetime cost of its product, generally leaving it to governments to address end-of-life issues through taxation. Governments are beginning to take action against this, for example, by passing laws to reduce packaging, require recycling, repair environmental damage, and so on. In the case of nuclear power and other nuclear or radiological applications, the government has assumed the expense of secure disposal of the more dangerous waste materials. Not all governments will be willing or able to continue such subsidies.

New nuclear plant designs will require billions to develop and construct, incorporating new requirements better to secure facilities, reduce waste, and manage control systems. Some governments, as in the U.S., are providing tax incentives to help overcome the initial investment hurdle. More, and newer, nuclear enrichment processing plants are also necessary to support any increase in nuclear power generation.

This does not address the problems of ongoing expenses. Ten years ago, nuclear energy cost about a tenth of the cost of coal. That is no longer the case. Uranium is a rare element, and the prices of processed uranium are at an all time high, up by over 800% since 2001. This is not a function of demand, but rather of limited supply, including last year's flooding of a major Canadian mine. Alternatives to uranium are years or decades away.[72]

4.7. Secrecy

In 1964, Atomic Energy Commission Classification Office Director Dr. James Beckerley warned that it's „time to stop 'kidding' ourselves about atomic 'secrets' and time to stop believing that Soviet scientists are incompetent", and called for a review of secrecy laws that could make it hard for the U.S. to maintain the nuclear weapons lead.[73]

Increased medical and industrial use of nuclear and radiological materials naturally led to release of information from the private sector. The public sector also eased up on secrecy as information sharing was seen as promoting technical advances, as well as a reduced risk environment.[74]

This new openness took a dramatic turn after the terrorist attacks on 11 September 2001. Under President Bush, there has been a dramatic increase in the amount of information that is classified, and huge quantities of material previously unclassified have been reclassified. In some cases, this was done through legitimate concerns over providing too much technical detail in a threat environment that could include nuclear terrorism, but most cases arose from radically broadening classification rules.[75]

OpenTheGovernment.org released the Secrecy Report Card 2006 in September. It cited indicators of growing secrecy such as:

– „In 2005, the Foreign Intelligence Surveillance Court approved all 2,072 requests for secret surveillance orders made by U.S. intelligence agencies, rejecting none. So while surveil-

[66] Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe*, New York, Times Books, 2004, and http://www.nuclearterror.org/; William Langewiesche, „How to Get a Nuclear Bomb", *The Atlantic Monthly*, December 2006, pp 80-98.

[67] Organization for Economic Security and Cooperation in Europe, „OSCE campaign to focus on health hazards of old Kyrgyz uranium mines", 9 January 2004, http://www.osce.org/item/8020.html.

[68] Lochbaum, *op cit*; Nicholas Clunn, „NRC: Protective liner OK for 2 more years, plant seeking license renewal", *Asbury Park Press* 11 November 2006; Mark Shaffer, „Plant tells regulators chemical woes fixed", *The Arizona Republic*, 21 November 2006.

[69] „Nuclear plant struck by jellyfish", BBC News, 20 July 2006, http://news.bbc.co.uk/2/hi/asia-pacific/5197846.stm; Associated Press, „Jellyfish Cause Reactor Shutdown in Sweden", Breitbart.com, 29 August 2006, http://www.breitbart.com/news/2005/08/29/D8C9HR480.html.

[70] Halvor Tjonn and Jonathan Tisdall, „Norway's next energy boom", *Aftenposten*, 1 December 2006.

[71] IAEA, *The Nuclear Power Industry's Ageing Workforce: Transfer of Knowledge to the Next Generation*, IAEA TECDOC Series No 1399, 29 June 2004; Staff Report, „Change of the Guard Raising Alarm Bells", IAEA 11 November 2005, http://www.iaea.org/NewsCenter/News/2005/change_guard.html; Greta Joy Dicus, „The Changing Nuclear Workforce", Nuclear Regulatory Commission 30 November 2000.

[72] Australian Uranium Association, „The Economics of Nuclear Power", November 2006, http://www.uic.com.au/nip08.htm; University of Chicago, *The Economic Future of Nuclear Power*, August 2004, http://www.anl.gov/Special_Reports/NuclEconAug04.pdf; Buurma, Christine, „Progress Energy says new nuclear reactor would cost up to $3.5 bln", *MarketWatch*, 12 December 2006, http://www.marketwatch.com/news/story/progress-energy-says-new-nuclear/story.aspx?guid=%7BEB7FFA4A-CD39-4239-B0A7-A4D7AEEFE0B1%7D.

[73] *New York Times*, 17 March 1964 at 5.

[74] George Washington University reaped the rewards of openness with significant additions to the National Security Archive. http://www.gwu.edu/~nsarchiv/nsa/NC/nuchis.html.

[75] „Executive Order on National Security Classification Amended", U.S. Department of Justice, FOIA Post, http://www.usdoj.gov/oip/foiapost/2003foiapost14.htm; Andrew Card, „Memorandum for the Heads of

lance of foreign organizations and nationals under the jurisdiction of this secretive court has doubled in the past five years, the public knows nothing of whom or what is being investigated or how agencies are carrying out such investigations.

– The government issued 9,254 National Security Letters during 2005. These letters can be used to obtain information about individuals without the government applying for a court-reviewed warrant and, thus, without any external review.

– In 2005, „black" programs accounted for 17 percent of the Defense Department acquisition budget of $315.5 billion. Classified acquisition funding has nearly doubled in real terms since FY 1995, when funding for these programs reached its post-Cold War low.

– Since 2001, the „state secrets" privilege has reportedly been invoked 22 times – an average in 5.5 years (4) that is almost twice as high as the previous 24 years (2.46).

– President George W. Bush has issued 132 signing statements challenging over 810 provisions of federal laws. In the 211 years of our nation's history preceding 2000, presidents issued fewer than 600 signing statements that took issue with the bills they signed."[76]

Now, the Nuclear Regulatory Commission has issued a proposed rule to further restrict nuclear information.[77]

This dramatic increase in secrecy could not come at a worse time. The drastic changes that global climate change will bring can only be addressed with transparency and enormous efforts to share information globally. Geopolitical threats also require frequent and open exchange of information. Sharing knowledge with a new generation of nuclear scientists is essential, and many of these experts are likely to come from developing countries. The growing number of programs to develop new generations of nuclear energy and nuclear weapons will thrive even more in darkness, threatening the future of any effort to control proliferation.

5. In Closing

In *Twentieth Century Book of the Dead* Gil Elliot compares nuclear weapons as a more virulent form of the plague. His comments are as relevant now as they were more than three decades ago:

„When politicians, in tones of grave wonder, characterize our age as one of vast effort in saving human life, and enormous vigor in destroying it, they seem to feel they are indicating some mysterious paradox of the human spirit. There is no paradox and no mystery. The difference is that one area of public death has been tackled and secured by the forces of reason; the other has not. The pioneers of public health did not change nature, or men, but adjusted the active relationship of men to certain aspects of nature so that the relationship became one of watchful and healthy respect. In doing so they had to contend with and struggle against the suspicious opposition of those who believed that to interfere with nature was sinful, and even that disease and plague were the result of something sinful in the nature of man himself."[78]

It is this lesson that will inform both non-proliferation efforts and the future of nuclear energy, taking into account both technology *and* humanity. ■

Executive Departments and Agencies", White House, 19 March 2002, http://www.fas.org/sgp/bush/wh031902.html; Henry Waxman, „Secrecy in the Bush Administration", House Committee on Government Reform, 14 September 2004, http://www.democrats.reform.house.gov/features/secrecy_report/index_exec.asp; National Archives, „National Archives Information Security Oversight Office Releases Audit on Withdrawal of Records from Public Access", 26 April 2006, http://www.archives.gov/press/press-releases/2006/nr06-96.html.

[76] OpenTheGovernment.org, „Secrecy Report Card 2006", 3 September

Die Rotkreuzbewegung im Libanonkonflikt 2006 – Aktivitäten und Herausforderungen

Alfred Hasenöhrl*

Das folgende gibt eine Übersicht über die Aktivitäten der Rotkreuzbewegung im Libanonkonflikt im Sommer 2006, die Herausforderungen und völkerrechtsrelevanten Ereignisse. Auf eine völkerrechtliche Beurteilung dieser Ereignisse wurde ebenso verzichtet wie auf umfangreiches Zahlenwerk und Statistiken.

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1. Kontext

Der Ausbruch des Konfliktes im Juli 2006 kam weithin unerwartet. Die Reaktion der israelischen Armee auf die Entführung zweier ihrer Soldaten durch Hezbollah war ungewöhnlich heftig und legt für viele den Schluss nahe, dass von Beginn an, neben der Befreiung der Soldaten, die Zerstörung der Hezbollah-Strukturen das Ziel des Angriffes auf den Libanon war. Am Ende der 34-tägigen Feindseligkeiten hatte der Libanon fast 1.200 Tote sowie viele Tausend Verwundete zu beklagen. Über eine Million Menschen waren innerhalb

des Landes und in den Nachbarländern auf der Flucht. Mehrere zehntausend Ausländer wurden evakuiert. Ein beträchtlicher Teil der zivilen Infrastruktur sowie 30.000 Wohneinheiten wurden zerstört. Eine weitere Hinterlassenschaft des Konfliktes sind mehr als 100.000 Blindgänger, insbesondere Streumunition, von der noch die Rede sein wird.

2. Der Ausgangspunkt der Rotkreuzbewegung

Auch die Rotkreuzbewegung wurde von dem unerwartet heftig ausbrechenden Konflikt überrascht. Während das Libanesische Rote Kreuz (LRK) seinen Aktivitäten in Friedenszeiten nachging, waren das Internationale Komitee des Roten Kreuzes (IKRK) und die Internationale Föderation der Rotkreuz- und Rothalbmondgesellschaften (IFRK) nur mit geringer Präsenz im Lande und überwiegend mit Organisationsentwicklung des LRK befasst. In sehr kurzer Zeit mussten Strukturen aufgebaut und Ressourcen mobilisiert werden, um auf den sich ausbreitenden Konflikt angemessen zu reagieren.

2.1 Die Operation des Libanesischen Roten Kreuzes

Der Ambulanz- und Rettungsdienst des LRK leistete enorme Arbeit. Über 15.000 Menschen wurden unter oft schwierigsten Umständen versorgt. 2.400 freiwillige Helfer arbeiteten bis zur Erschöpfung in einem Umfeld, das von Gefahr für das eigene Leben, Chaos und Zugangsbehinderungen geprägt war.

Der medizinische Dienst des LRK versorgte mehr als 50.000 Patienten in Gesundheitszentren und mobilen Kliniken. In Notunterkünften wurden 200.000 Menschen durch das Jugendrotkreuz mit Nahrung, Wasser und Hilfsgütern versorgt. Tausende bekamen psychologische Unterstützung durch Beratungsteams. Die LRK-Blutbank stellte mehrere tausend Einheiten Blut bereit, die oft unter beträchtlicher Eigengefährdung zu den Krankenhäusern im Süden Libanons transportiert wurden.

2.2 Die IKRK Operation

Dem IKRK gelang es innerhalb kurzer Zeit, eine beträchtliche Kapazität aufzubauen. Über einhundert internationale Delegierte und einige hundert lokale Angestellte führten die Operation durch. Als „lead agency“ der Rotkreuzbewegung in Konflikten wurden durch das IKRK alle Aktivitäten der Bewegung koordiniert und logistisch unterstützt. Auch oblag dem IKRK die sehr schwierige Koordination mit der israelischen Armee, um Zugang und Sicherheit für humanitäre Aktivitäten und Konvois zu erreichen. Auch wurde sich um Schutz für die Zivilbevölkerung durch aktive Kommunikation mit den Konfliktparteien bemüht. Das LRK wurde finanziell und logistisch unterstützt, um den Fortgang der LRK-Operation zu gewährleisten.

Große Mengen Hilfsgüter wurden in der Konfliktregion verteilt. Dies beinhaltete neben Wasser und Nahrungsmitteln auch Medikamente, Hygiene- und Haushaltsartikel. Insbesondere ist auch die Bereitstellung von Treibstoff für Krankenhäuser und Wasserwerke zu nennen.

Unmittelbar nach Beginn des Waffenstillstandes wurden große Anstrengungen unternommen, essentielle Infrastruktur provisorisch instand zu setzen. Primär wurde die Wasserversorgung wieder instand gesetzt und Generatoren für Wasserwerke und Krankenhäuser bereitgestellt.

2.3 Unterstützung durch die Internationale Föderation

Die Internationale Föderation konzentrierte sich auf die Unterstützung des Libanesischen Roten Kreuzes. Eine Kapazitäts- und Bedarfsanalyse wurde durchgeführt. Des Weiteren wurde aktive Unterstützung in den Bereichen Finanz- und Berichtswesen, Logistik, Planung und Kommunikation gewährt.

2.4 Unterstützung durch das Deutsche Rote Kreuz

Das DRK lenkte seine Hilfe während des Konfliktes durch das IKRK. Hilfsgüter (Babynahrung, medizinisches Material) wurden durch das IKRK in den Libanon transportiert und verteilt, beziehungsweise dem LRK zur Verfügung gestellt. Auch unterstützte das DRK die Operation des IKRK durch die kurzfristige Bereitstellung von Personal.

Direkte Hilfe wurde vom DRK in Syrien geleistet, in dem bis zu 250.000 Flüchtlinge Zuflucht gefunden hatten. Der Syrische Rote Halbmond wurde durch medizinisches Material bei der Betreuung der Flüchtlinge unterstützt.

2.5 Unterstützung durch andere Rotkreuz- und Rothalbmondgesellschaften

Eine große Anzahl Rotkreuz- und Rothalbmondgesellschaften aus Europa und dem arabischen Raum beteiligten sich an den Hilfsmaßnahmen. Das Spektrum der Hilfe reicht von der Bereitstellung von Personal über finanzielle Unterstützung bis zu Hilfslieferungen in großer Anzahl. Auch sind hier zwei Feldhospitäler zu nennen, die von den Rothalbmondgesellschaften von Saudi Arabien und Katar im Libanon in Betrieb genommen wurden.

2.6 Effizienz der Rotkreuzhilfe

Trotz der ungünstigen Ausgangslage erwies sich die Rotkreuzhilfe als sehr effizient. Dem IKRK gelang es innerhalb von 48 Stunden, einen „Emergency Appeal“ zu veröffentlichen, um die internationale Gemeinschaft auf die benötigten Ressourcen hinzuweisen. Auch gelang es innerhalb kurzer Zeit, eine personelle und logistische Kapazität aufzubauen, die es ermöglichte, substantielle Hilfe zu leisten und auch das LRK finanziell und technisch zu unterstützen.

Koordinationsmechanismen zwischen den einzelnen Komponenten der Rotkreuzbewegung griffen von Anbeginn. Alle Aktivitäten und Konvois im Krisengebiet wurden vom IKRK „field co-ordinator“ koordiniert. Dadurch wurde große Effektivität erreicht, und es gelang, die meistbetroffenen Teile der Zivilbevölkerung bei möglichst geringer Eigengefährdung zu erreichen.

2.7 Hilfe trotz Herausforderungen

Insgesamt fand die Operation in einem sehr schwierigen Umfeld statt, das oft erhebliche Herausforderungen an die beteiligten Rotkreuz/halbmond-Akteure stellte. Die Koordination mit der israelischen Armee gestaltete sich schwierig. Zugangsbeschränkungen und Verzögerungen behinderten die Arbeit kontinuierlich. Humanitäre Korridore wurden nicht eingerichtet oder getroffene Vereinbarungen wieder zurückgenommen. Unterbrochene Versorgungswege erschwerten den Transport von Hilfsgütern erheblich. Das Hauptstraßennetz im gesamten Libanon war zerstört, und Hilfslieferungen mussten über lange Umwege im Nordlibanon transportiert werden. Der Weitertransport in den Südlibanon gestaltete sich als extrem schwierig. Seetransporte wurden verzögert, da die israelische Armee Anlandeerlaubnis nur verspätet gab.

Die Schutzwirkung des Rotkreuz-Emblems war verschiedentlich nicht gegeben. Dies gibt Anlass zu großer Sorge. Insgesamt wurden während der Feindseligkeiten 14 freiwillige Helfer des LRK verwundet, acht LRK Einrichtungen beschädigt oder zerstört und drei Ambulanzen beschädigt. Am schwersten wiegt jedoch der Angriff auf eine Ambulanz, bei der ein Helfer getötet und zwei weitere verletzt wurden. Da dieser Hubschrauberangriff bei Tageslicht auf ein klar gekennzeichnetes Fahrzeug und Personal stattfand, fällt es schwer, an einen Irrtum oder Kollateralschaden zu glauben.

Es bleibt auch festzuhalten, dass Partner sich verschiedentlich nicht an den Zielen und Prioritäten des LRK orientiert haben. Hilfslieferungen waren gelegentlich unnötig und unangebracht. Der Bedarf an Feldhospitälern wurde nur ungenügend ermittelt. Diese „Fehltritte“ wurden mit den Partnern intensiv aufgearbeitet und die künftige Koordinierung scheint sichergestellt zu sein.

3. Es bleiben völkerrechtliche Fragen

Der Konflikt hat eine Reihe völkerrechtlich relevanter Fragen aufgeworfen. Diese sind seit Eintritt des Waffenstillstandes in einer Reihe von Kommissionen und Konferenzen behandelt worden. Ich kann und will hier nicht eine rechtliche Beurteilung vornehmen, sondern lediglich eine Reihe von Vorkommnissen und Ereignissen aufzeigen, die unmittelbar Einfluss auf die Rotkreuzoperation und die humanitäre Arbeit im Allgemeinen hatten.

3.1 Schutzwirkung des Rotkreuz-Emblems

Der oben erwähnte direkte Angriff auf eine LRK Ambulanz, ein Toter und verwundete Helfer sowie zerstörte Einrichtungen sprechen eine deutliche Sprache. Die Schutzwirkung des Rotkreuz-Emblems war nur mit Einschränkungen und nur, wenn die RK-Einrichtung nicht „im Weg“ war, gegeben. Kollateralschäden an RK-Einrichtungen wurden von der israelischen Armee hingenommen. Der Lauf der Ereignisse legt die Vermutung nahe, dass die Einrichtungen und Fahrzeuge des IKRK gerade noch als „neutral“, die des LRK jedoch bereits als die „andere Seite“ gesehen wurden.

Es bleibt anzumerken, dass von Seiten der Hezbollah keine einzige Missachtung des Emblems oder sonstige Behinderung der humanitären Arbeit berichtet wurde.

3.2 Angriff auf humanitären Konvoi und Nichteinhaltung humanitärer Korridore

Der Angriff auf einen humanitären Konvoi, trotz UNIFIL „clearance“, sowie die Verzögerungen oder Weigerungen, humanitäre Korridore einzurichten, verzögerten, behinderten oder verhinderten effektive RK-Interventionen. Das israelische Militär schien humanitäre Hilfe als eine „Stärkung“ der Gegenseite zu begreifen und deren Behinderung als Teil der militärischen Strategie.

3.3 Einsatz von Streumunition in Wohngebieten und landwirtschaftlichen Anbauflächen

Die militärische Zweckmäßigkeit des Einsatzes von Streumunition („cluster bombs“) in den genannten Flächen wird weithin in Frage gestellt – insbesondere da 80% der Streubomben in den letzten 48 Stunden des Konfliktes abgeworfen wurden. Da diese Art der Munition über eine extrem hohe Blindgängerrate (20%) verfügt, drängt sich die Frage auf, ob der eigentliche Zweck des Einsatzes war, weite Gebiete über längere Zeit unnutzbar zu machen. Opfer unter der Zivilbevölkerung, bis lange nach Ende des Konfliktes, wurden in Kauf genommen.

3.4 Zerstörung ziviler Infrastruktur

Die Zerstörung ziviler Infrastruktur ging weit über das Maß dessen hinaus, was unmittelbar als militärisch sinnvoll erscheint. Dies trifft vor allem auf die Wasser- und Energieversorgung zu, als auch auf das landesweite Straßennetz. Der Transport von Hilfsgütern sowie die Fluchtwege der Zivilbevölkerung waren teilweise unterbrochen oder fanden auf „abenteuerlichen“ Wegen statt. Auch hier scheint, neben dem militärischen Nutzen eine wirtschaftliche Schädigung des Landes durchaus eingeplant gewesen zu sein. Umweltschädigung durch die gezielte Bombardierung von Öllagereinrichtungen kommt noch erschwerend hinzu. ■

Das UNIFIL-Mandat der Bundeswehr – politische und rechtliche Aspekte

Dieter Weingärtner*

1. Einleitung

Die Presse ist voll von Berichten über den Afghanistan-Einsatz der Bundeswehr. Aber wann haben Sie eigentlich zum letzten Mal etwas über den Einsatz der Bundesmarine vor der libanesischen Küste im Rahmen der VN-Operation UNIFIL gehört oder gelesen? – Nach meiner Erinnerung ging zuletzt Ende Januar eine Meldung durch die Presse, nach der die Fregatte Karlsruhe vor der libanesischen Küste 6 Menschen aus Seenot gerettet hatte, und zwar von Rettungsinseln eines nordkoreanischen Frachters, der am Tag zuvor im Sturm gesunken war. In den Berichten, die das Bundesministerium der Verteidigung zur Lage in den Auslandseinsätzen an den Deutschen Bundestag übermittelt, tauchen als berichtenswerte Ereignisse Vorgänge wie ein Besuch des Bundestagspräsidenten beim deutschen Einsatzkontingent oder eine Vereinbarung zwischen der Bundesrepublik Deutschland und dem Libanon über Ausbildungshilfe im Bereich Schiffssicherung und Überwachung der Territorialgewässer auf.

Nach den hitzigen Diskussionen über die Beteiligung der Bundeswehr an UNIFIL im vergangenen Herbst erstaunt es schon ein wenig, wie schnell dieser Einsatz der Bundeswehr, an dem ja immerhin circa 1000 deutsche Soldatinnen und Soldaten beteiligt sind, in der Öffentlichkeit in den Hintergrund, um nicht zu sagen in Vergessenheit geraten ist. Der Deutsche Bundestag wird sich, wenn nichts Unvorhergesehenes passiert, erst Ende August dieses Jahres wieder näher mit dem Einsatz befassen, wenn es um die Verlängerung des Mandats geht.

Ich möchte die Gelegenheit dieses Vortrages zum einen dazu nutzen, noch einmal an die politischen Diskussionen um die Beteiligung der Bundeswehr an UNIFIL zu erinnern. Zum anderen möchte ich am Beispiel UNIFIL einige Rechtsfragen aufgreifen, die sich auch im Zusammenhang mit anderen Auslandseinsätzen der Bundeswehr stellen können.

2. Die Vorgeschichte des UNIFIL-Einsatzes der Bundeswehr

Über die Geschichte des Nahost-Konfliktes und über die jüngere Entwicklung im Libanon brauche ich hier nicht viele Worte zu verlieren. Auslöser der Kampfhandlungen im Südlibanon im Juli und August 2006 war ein Überfall der Hisbollah auf eine israelische Grenzpatrouille, bei dem drei israelische Soldaten getötet und zwei weitere entführt wurden. Ein solcher Vorfall ist an sich nicht außergewöhnlich. Seitdem die israelische Armee sich im Mai 2000 nach 18 Jahren Besatzung aus der sogenannten Sicherheitszone im Südlibanon zurückgezogen hat, haben sich zahlreiche Zwischenfälle ereignet, bei denen israelische Grenzposten beschossen und dann als Vergeltungsaktion Stellungen der Hisbollah oder deren Nachschublager angegriffen wurden. Eher unerwartet ging Israel nach dem Vorfall am 12. Juli 2006 mit massiven militärischen Mitteln im Süden des Libanon gegen die Hisbollah vor und zerstörte libanesische Infrastruktureinrichtungen in großem Umfang. Die seit 1978 vor Ort stationierten UNIFIL-Truppen waren nicht in der Lage, die Auseinandersetzungen zu unterbinden. In den 28 Jahren ihres Aufenthalts im Südlibanon war es den VN-Soldaten selten gelungen, deeskalierend zu wirken. Vielmehr war ihre eigene Sicherheit ununterbrochen gefährdet. Dies lag auch daran, dass sie lediglich über ein schwaches Mandat verfügten, das allein auf eine Beobachtermission ausgerichtet war.

Angesichts der Kampfhandlungen stellte der Sicherheitsrat der Vereinten Nationen in der am 11. August 2006 verabschiedeten Resolution 1701 (2006) fest, dass der Konflikt im Südlibanon eine Bedrohung des Weltfriedens und der internationalen Sicherheit darstelle. Er forderte die Konfliktparteien zur vollständigen Einstellung der Feindseligkeiten auf, verlängerte das Mandat der UNIFIL bis zum 31. August 2007 und genehmigte die Erhöhung der UNIFIL-Truppenstärke auf bis zu 15.000 Soldaten. Zudem erweiterte er Auftrag und Befugnisse von UNIFIL erheblich.

Nach Verabschiedung der Resolution des Sicherheitsrates herrschte seit dem 14. August 2006 weitgehend Waffenruhe. Der israelische Truppenrückzug aus dem Libanon begann am 16. August 2006. Die von Israel geräumten Gebiete wurden umgehend von UNIFIL-Soldaten gesichert und anschließend der libanesischen Armee übergeben. Zur vorgesehenen Verstärkung von UNIFIL gab es bereits am 14. und am 17. August 2006 erste Truppenstellertreffen in New York. Auf dem Sonderrat der EU-Außenminister am 25. August 2006 stellte eine Reihe von Mitgliedstaaten signifikante Beiträge zu UNIFIL in Aussicht. Zu dieser Zeit arbeitete das Department for Peacekeeping Operations der VN bereits an Entwürfen von Einsatzkonzept und Einsatzregeln.

3. Die politische Diskussion in Deutschland

Für die Bundesrepublik Deutschland stellte sich nunmehr die Frage, ob und in welcher Weise sie sich an der VN-Friedensmission im Nahen Osten beteiligen sollte. Innenpolitisch nicht umstritten war die humanitäre Hilfe, die für die notleidende Zivilbevölkerung im Libanon zur Verfügung gestellt wurde. Bereits bei dem Truppenstellertreffen am 17. August

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2006 kündigte die Bundesregierung aber auch ihre Bereitschaft an, im Rahmen von UNIFIL eine maritime Task Force zur Küstenüberwachung zur Verfügung zu stellen, um die Aufhebung der damals bestehenden israelischen Seeblockade gegen den Libanon zu erreichen. Allerdings stellte sie eine solche Beteiligung selbstverständlich unter den Vorbehalt der Zustimmung des Deutschen Bundestages.

In der Folgezeit entwickelte sich eine lebhafte Debatte über Sinnhaftigkeit und Opportunität einer deutschen Beteiligung an UNIFIL – in der Öffentlichkeit über die Medien einerseits und in internen Politikerrunden andererseits. Im Bundestag debattiert wurde das Thema allerdings erst am 19. und 20. September 2006, als über die Zustimmung des Parlaments zu dem Einsatz zu entscheiden war. Dies entspricht der üblichen Praxis bei der Vorbereitung von bewaffneten Auslandseinsätzen der Bundeswehr. Die Bundesregierung sondiert im Rahmen des betreffenden Systems kollektiver Sicherheit – hier der Vereinten Nationen –, ob und welche Beiträge an der Mission von der deutschen Seite gewünscht werden, und prüft, ob die Bundeswehr in der Lage ist, diese Beiträge zu leisten. Über den Stand der Verhandlungen hält sie zumindest die Spitzen und die maßgeblichen Außen- und Verteidigungspolitiker der Koalitionsfraktionen auf dem Laufenden. Diese informellen Kontakte sind erforderlich, weil das Bundeskabinett einen bewaffneten Einsatz der Bundeswehr im Ausland nur dann beschließen wird, wenn die verfassungsrechtlich erforderliche Zustimmung des Bundestages gesichert ist, von Ausnahmen – ich erinnere an die Vertrauensfrage von Bundeskanzler *Schröder* – abgesehen. Wenn der Bundestag über den Antrag der Bundesregierung berät, sind die Würfel also in der Regel schon gefallen. Kleinere Ergänzungen oder Modifizierungen, die einzelnen Abgeordneten eine Zustimmung doch noch ermöglichen, erfolgen durch Protokollerklärungen des Bundesaußenministers und des Bundesverteidigungsministers im Rahmen der Ausschussberatungen.

Im Fall des Libanon-Einsatzes kristallisierte sich schnell heraus, dass ein Einsatz deutscher Bodenkampftruppen nicht in Frage kam. Dass solche Truppen notfalls auch gegen israelische Soldaten mit Waffengewalt vorgehen müssten, wurde angesichts der historischen Belastungen als unmöglich empfunden. Andererseits wollte sich Deutschland aber auch nicht auf humanitäre Hilfe für die Zivilbevölkerung beschränken. Ein aktiver Beitrag der Bundeswehr zur Friedenssicherung im Nahen Osten wurde vielmehr als außenpolitische Chance empfunden, zumal nicht nur die VN, sondern auch die Konfliktbeteiligten einem solchen Engagement positiv gegenüber standen.

Diese Überlegungen wurden dann auch in den Debatten im Plenum des Deutschen Bundestages am 19. und 20. September (Plenarprotokolle 16/49 und 16/50) deutlich. Für die Bundesregierung hoben der Bundesaußenminister und der Bundesverteidigungsminister die historische Bedeutung dieses – in einen europäischen Kontext eingebetteten – friedenstiftenden deutschen Einsatzes im Nahen Osten hervor. Es gehe nicht um ein prinzipienloses Aufbrechen außenpolitischer Tabus, sondern um Glaubwürdigkeit und die Anerkennung von Normalität. Deutschland wolle den Friedensprozess aktiv unterstützen und damit für den Weg von Verständigung und Aussöhnung werben. Dieser Argumentation schloss sich die große Mehrheit der Abgeordneten der Koalitionsfraktionen und auch der Fraktion Bündnis 90/DIE GRÜNEN an. Die FDP-Fraktion und die Fraktion DIE LINKE begründeten ihre Ablehnung damit, dass deutsches Militär angesichts der Historie nicht in den Nahen Osten gehöre und dass die deutschen Soldatinnen und Soldaten dort in Situationen kommen könnten, die sie überforderten. Deutschland könne in dieser Region nicht neutral sein und deshalb sei ein militärischer Beitrag Deutschlands zur Friedenssicherung dort nicht sinnvoll. Zweifelhaft sei darüber hinaus, ob ein effektiver Beitrag zur Friedenssicherung geleistet werden könne.

Der Bundestag stimmte dem Antrag der Bundesregierung mit 442 gegen 152 Stimmen bei vier Enthaltungen zu (Plenarprotokoll 16/50, Stenografischer Bericht S. 4855ff.). Dabei gab es in allen Fraktionen „Abweichler" von der jeweiligen Mehrheitsmeinung. Die Abstimmung war – wie oft bei Entscheidungen über Auslandseinsätze der Streitkräfte – als Gewissensentscheidung freigegeben worden.

Seither ist es nicht nur in der Öffentlichkeit, sondern auch im Bundestag ruhig um den UNIFIL-Einsatz der Bundeswehr geworden. Nur einmal gab es noch Aufregung, als die FDP-Fraktion eine kleine Anfrage stellte (BTDrs. 16/3211) und eine Sondersitzung des Verteidigungsausschusses beantragte, weil sie in den Aussagen des Bundesverteidigungsministers zu den Befugnissen der Bundesmarine Widersprüche zu erkennen glaubte und Fragen zur Robustheit des Mandates und zum Umfang des Einsatzgebietes der Maritime Task Force beantwortet haben wollte. Auf diese Punkte werde ich später noch eingehen.

4. Rechtliche Aspekte

Sie wissen, dass es für bewaffnete Einsätze der Bundeswehr im Ausland sowohl einer völkerrechtlichen als auch einer verfassungsrechtlichen Grundlage bedarf. Die völkerrechtliche Basis ist in der Regel ein Mandat der Vereinten Nationen. Dieses liegt im Fall UNIFIL in Form der Resolution 1701 (2006) des VN-Sicherheitsrates vor, die zunächst die Konfliktparteien zur Einstellung der Feindseligkeiten und zur Einhaltung einer ständigen Waffenruhe auffordert. Beschlüsse des Sicherheitsrates sind allerdings nicht wie Gesetze aufgebaut und ausformuliert. Der Sicherheitsrat „bekundet", „bekräftigt", „fordert auf", „beschließt". Der konkrete Gehalt der Resolution muss meist durch Interpretation ermittelt werden.

Die Resolution 1701 (2006) weist der bereits im Libanon anwesenden UNIFIL-Truppe zusätzlich zu ihrem bisherigen Mandat die Aufgabe zu, die libanesische Regierung bei der Ausübung ihrer Autorität im gesamten Hoheitsgebiet und die libanesischen Streitkräfte bei ihren Bemühungen zu unterstützen, im Südlibanon ein Gebiet zu schaffen, das – abgesehen von libanesischen und UNIFIL-Kräften – frei von bewaffnetem Personal und von Waffen ist. Die libanesische Regierung soll UNIFIL – auf deren Ersuchen – bei der Siche-

rung der Staatsgrenzen unterstützen, um das Verbringen von Rüstungsgütern ohne ihre Zustimmung in den Libanon zu verhindern. UNIFIL wird ermächtigt, alle erforderlichen Maßnahmen zu ergreifen, um sicherzustellen, dass ihr Einsatzgebiet nicht für feindselige Aktivitäten genutzt wird, und um Personal der VN, humanitäre Helfer und Zivilpersonen zu schützen.

Die Resolution des Sicherheitsrates ist an zahlreichen Stellen recht vage gefasst. Sie lässt sich nicht eindeutig einem der Kapitel der VN-Charta – in Betracht kommen Kapitel VI und Kapitel VII – zuordnen. Auch dies ist angesichts des Zwangs zum Kompromiss im Sicherheitsrat nicht ungewöhnlich. So sind die Befugnisse der Truppe mit den Worten „alle erforderlichen Maßnahmen, die nach ihrem Ermessen im Rahmen ihrer Fähigkeiten liegen" („all necessary action") umschrieben. Dies wird die Anwendung militärischer Gewalt einschließen, auch wenn sie nicht ausdrücklich erwähnt wird. An mehreren Stellen betont das Mandat, dass alle Maßnahmen auf Ersuchen und in Unterstützung der libanesischen Regierung erfolgen sollen. Ohne diese ausdrückliche Betonung der Souveränität des Libanon wäre eine solche Resolution im Sicherheitsrat nicht zustande gekommen. Ein derartiges Ersuchen liegt hinsichtlich der seewärtigen Sicherung der Grenzen gegen Waffenschmuggel durch eine von Deutschland geführte Maritime Task Force in Form eines Schreibens des libanesischen Ministerpräsidenten an den Generalsekretär der VN vom 6. September 2006 vor. In dem Schreiben zitiert der Präsident allerdings auch einen Beschluss des Ministerrates vom 4. September 2006, nach dem die libanesische Armee auf Anforderung Unterstützung durch UNIFIL „insbesondere" in den äußeren sechs Meilen der Territorialgewässer (12-Meilen-Zone) erhalten soll. In diesem Schreiben spiegeln sich die Gegensätze innerhalb der libanesischen Regierung, die auf die Beteiligung der Hisbollah zurückzuführen sind, wider.

Konkretisiert werden die Befugnisse von UNIFIL durch das Einsatzkonzept (CONOPS) und die Einsatzregeln (Rules of Engagement), mit deren Erstellung unmittelbar nach Verabschiedung der Resolution 1701 (2006) begonnen wurde. Derartige Einsatzgrundlagen erarbeitet das Department of Peacekeeping Operations der VN. Eine Befassung weiterer Instanzen, etwa des Sicherheitsrates, erfolgt nicht. Die Rules of Engagement für UNIFIL, die ebenso wie der Einsatzplan am 11. September 2006 gezeichnet wurden, räumen UNIFIL weitreichende Befugnisse auf libanesischem Hoheitsgebiet einschließlich des Küstenmeeres ein (use of force, detention, seizure, boarding) und betonen weniger als die VN-Resolution die vorrangige Verantwortung der libanesischen Regierung und die Voraussetzung eines Ersuchens des Libanons um Unterstützung. Dieser Umstand führte zu den dargestellten Diskussionen über die „Robustheit" des Mandats im Deutschen Bundestag und zu der Frage, ob ein generelles Ersuchen der libanesischen Regierung vorlag (vgl. das erwähnte Schreiben des Ministerpräsidenten vom 6. September 2006) oder ob für ein Eingreifen im Einzelfall jeweils eine ausdrückliche Autorisierung durch libanesische Stellen erforderlich ist. Hierzu fanden in der Folgezeit zahlreiche Gespräche zwischen verschiedenen Beteiligten und auf verschiedenen Ebenen statt.

Gelöst wurde das Problem letztlich pragmatisch. Alle maßgeblichen Dokumente, insbesondere das zwischen den VN und der libanesischen Seite ausgehandelte Protokoll zur technischen Umsetzung des Einsatzkonzeptes und der Einsatzregeln, sind auf ein kooperatives Zusammenwirken zwischen UNIFIL und den libanesischen Streitkräften und auf laufende Konsultationen ausgerichtet. Beim deutschen Einsatzkontingent befindet sich ein libanesischer Verbindungsoffizier, der dann, wenn Maßnahmen von deutscher Seite her in libanesischen Gewässern erforderlich werden – dies ist der Ausnahmefall, weil Schiffskontrollen in der Regel von libanesischen Kräften durchgeführt werden – konsultiert wird. Probleme hat es bei diesem Verfahren bislang nicht gegeben. Die Bundesregierung hat daher dem Bundestag gegenüber erklärt (BTDrs. 16/3517, S. 3f.): „Die Mandatsausübung ist in vollem Umfang gewährleistet. Nach dem kooperativen und effektiven Ansatz der Operation können verdächtige Schiffe in allen Zonen … kontrolliert werden."

Seevölkerrecht spielt eine wesentliche Rolle, wenn es um die Befugnisse der deutschen UNIFIL-Einheiten außerhalb libanesischer Hoheitsgewässer, also auf hoher See geht. Die Area of Maritime Operations (AMO) reicht bis 50 Seemeilen vor die libanesische Küste. Auf hoher See unterstehen Schiffe nach dem Seerechtsübereinkommen ausschließlich der Hoheitsgewalt des Flaggenstaates. Die Rechte des Flaggenstaates nach Seevölkerrecht werden auch durch die VN-Resolution 1701 (2006) nicht außer Kraft gesetzt, die keine Ermächtigung zu Zwangsmaßnahmen auf hoher See enthält. Einsatzplan und Einsatzregeln können das allgemeine Seevölkerrecht nicht verdrängen. Eine Kontrolle eines Schiffes (boarding) außerhalb der libanesischen Hoheitsgewässer ist damit nur mit Zustimmung des Kapitäns oder des Flaggenstaates zulässig. Letztere kann bei Schiffen unter deutscher und – aufgrund des Ersuchens um Unterstützung – libanesischer Flagge vorausgesetzt werden. Nach Seevölkerrecht können auch des Waffenschmuggels verdächtige Schiffe ohne Flagge kontrolliert werden. Die Befugnis zu Zwangsmaßnahmen ist darüber hinaus für den Fall der Nacheile anerkannt. In allen anderen Fällen haben die Kräfte der Bundesmarine ebenso wie im Rahmen der Operation Enduring Freedom (OEF) vor dem Horn von Afrika aber nur die Möglichkeit, verdächtige Boote auf hoher See zu beobachten und abzufragen, ein Einschreiten – dann vorrangig durch libanesische Kräfte – ist erst bei Eindringen in libanesische Hoheitsgewässer möglich.

Das Mandat der VN fordert die Mitgliedstaaten auf, im Libanon humanitäre Hilfe zu leisten und den Frieden zu sichern. Es enthält aber auch deutliche robuste Elemente einer friedensschaffenden Operation nach Kapitel VII der VN-Charta (Maßnahmen bei Bedrohung oder Bruch des Friedens), etwa die Verhinderung von feindlichen Aktivitäten oder die Durchsetzung des Auftrags gegen Widerstand mit Gewaltanwendung. Nach deutschem Verfassungsverständnis handelt es sich damit um einen bewaffneten Einsatz der Bundeswehr im Ausland. Ein solcher Einsatz ist nach dem grundlegenden Urteil des Bundesverfassungsgerichts aus dem Jahr 1992 (BVerfGE 90, S. 286ff.) zwar durch Art. 24 Abs. 2 GG, die Beteiligung an einem System gegenseitiger kollektiver Si-

cherheit wie den VN, abgedeckt, bedarf allerdings der Zustimmung des Deutschen Bundestages.

Der Antrag der Bundesregierung auf Beteiligung bewaffneter deutscher Streitkräfte an UNIFIL (BTDrs. 16/2572), dem der Bundestag am 20. September 2006 zustimmte, nimmt auf die VN-Resolution 1701 (2006) und auf die Bitte der libanesischen Regierung um Unterstützung bei der Absicherung der seeseitigen Grenzen des Libanon Bezug. Als Aufgaben der Bundeswehr nennt er insbesondere die Führung der maritimen Operation, die Aufklärung des Seegebiets der AMO, die Kontrolle des Seeverkehrs in der AMO inklusive der Kontrolle von Ladung und Personen an Bord, die seewärtige Sicherung der libanesischen Küste und der Küstengewässer, die Umleitung von Schiffen im Verdachtsfall sowie Abriegelungsoperationen. Er nimmt Bezug auf die Ermächtigung aus der VN-Resolution, alle erforderlichen Maßnahmen zur Erfüllung des Auftrags zu ergreifen, und erwähnt ausdrücklich, dass dies notfalls auch die Anwendung militärischer Gewalt umfasst.

Im Zusammenhang mit der Parlamentsbeteiligung tauchten noch zwei verfassungsrechtliche Fragen auf, die durchaus einer Erwähnung wert sind. Zum einen ging es darum, ob ein Einsatzgruppenversorger der Marine, der mit Waffen lediglich zur Selbstverteidigung ausgestattet ist, als Lazarettschiff für die Behandlung von Kriegsopfern in Begleitung einer Fregatte bereits vor Vorliegen eines Bundestagsbeschlusses in einen Einsatz vor der libanesischen Küste geschickt werden durfte. Bei der Frage, ob deutsche Soldaten in einen bewaffneten Auslandseinsatz entsandt werden, der dem Parlamentsvorbehalt unterliegt, wird aber nicht in erster Linie auf die mitgeführten Waffen abgestellt. Vielmehr ist nach § 2 Abs. 2 Satz 2 des Parlamentsbeteiligungsgesetzes (ParlBetG) bei humanitären Hilfsleistungen der Streitkräfte, bei denen Waffen lediglich zum Zweck der Selbstverteidigung mitgeführt werden, die Zustimmung des Bundestages nur dann nicht erforderlich, wenn nicht zu erwarten ist, dass die Soldaten in bewaffnete Unternehmungen einbezogen werden. Insofern war etwa der Transport von Hilfsgütern der VN von Larnaca nach Beirut durch die Luftwaffe unproblematisch. Angesichts der damaligen Situation konnten aber Angriffe auf den Einsatzgruppenversorger nicht ausgeschlossen werden. Der vorgesehene Begleitschutz durch eine Fregatte war ein deutliches Indiz dafür. Das Bundesministerium der Verteidigung verzichtete daher auf den Einsatz dieses Bootes ohne Bundestagsmandat.

Weiter stellte sich die Frage, ob der Einsatzgruppenversorger vor der Parlamentsbefassung zumindest von Deutschland aus Richtung Libanon in See stechen durfte. Die Fahrzeit bis zur libanesischen Küste beträgt ca. zwei Wochen. Nach § 2 Abs. 2 Satz 1 ParlBetG sind vorbereitende Maßnahmen kein Einsatz im Sinne dieses Gesetzes. Der bewaffnete Einsatz beginnt nach herrschender Meinung erst bei Eintreffen im Einsatzgebiet, das heißt dann, wenn die Einbeziehung in eine bewaffnete Unternehmung droht. Das Auslaufen des Schiffes aus einem deutschen Hafen erschien daher unter dem Aspekt des Parlamentsvorbehaltes unproblematisch. Gleichwohl machte die Bundesregierung von dieser Möglichkeit aus politischen Gründen nicht Gebrauch.

Ein letzter rechtlich interessanter Aspekt betrifft die Festnahme bzw. das Festhalten von Personen, die im Verdacht des Waffenschmuggels stehen. Die Einsatzregeln ermächtigen UNIFIL auch im Bereich der Marineoperation, Waffenschmuggler – deren Verhalten wird als „feindliche Aktivität" im Sinn des VN-Mandats verstanden – vorläufig festzunehmen. Auswirkungen auf die Bundeswehrkräfte hat diese Befugnis bislang nicht, da nach dem Einsatzkonzept und den Absprachen mit der libanesischen Seite Beschlagnahmen und Festnahmen durch die libanesischen Streitkräfte erfolgen sollen. Gleichwohl sehen die Einsatzregeln der VN vor, dass von UNIFIL festgehaltene Personen sobald wie möglich den zuständigen lokalen Behörden zu übergeben sind. Dies erscheint – aus deutscher Sicht – deshalb nicht unproblematisch, weil der Libanon nach wie vor die Todesstrafe kennt. Schon seit längerem bemühen sich die VN um eine Zusage des Libanon, dass von UNIFIL übergebene Personen im Libanon nach international anerkannten menschenrechtlichen Standards behandelt werden und dass an ihnen die Todesstrafe nicht vollstreckt wird. Bis zum Abschluss derartiger Vereinbarungen verbleibt die Möglichkeit, jeweils im Einzelfall die Übergabe vom Vorliegen einer entsprechenden verbindlichen Zusage abhängig zu machen. Wie gesagt sind dies bislang nur theoretische Überlegungen. Festnahmen durch deutsche Soldaten sind bisher nicht erfolgt und sollen auch in Zukunft nicht erfolgen.

5. Schluss

Der UNIFIL-Einsatz der Bundesmarine funktioniert in der Praxis. Mit Stand 5. März 2007 hat die Maritime Task Force (MTF) UNIFIL 3607 Schiffsabfragen getätigt. Davon wurden 15 von der MTF gemeldete Schiffe durch libanesische Hafenbehörden näher untersucht. Über dabei entdeckte illegale Waffen ist nichts bekannt geworden. Ob der UNIFIL-Einsatz der Bundesmarine damit erfolgreich ist und ob Kosten und Nutzen – auch unter Berücksichtigung des internationalen Ansehens Deutschlands – in einem angemessenen Verhältnis zueinander stehen, obliegt politischer Bewertung. ■

Gefahrenabwehrrechtliche Maßnahmen zur Terrorbekämpfung im Spannungsfeld der „Effektivität der Gefahrenabwehr“ und den verfassungsrechtlichen Vorgaben des Grundgesetzes – Luftsicherheit, Videoüberwachung, Rasterfahndung

Jan Wiethoff*

1. Einleitung

Die Gefahren des internationalen Terrorismus sind seit den Anschlägen von New York, Madrid und London allgegenwärtig. Nach den missglückten Kofferbombenattentaten in Deutschland wurde die politische Diskussion um eine effektive Abwehr dieser Gefahren neu entfacht. Dabei werden regelmäßig grundrechtsrelevante Maßnahmen wie der Abschuss von entführten Flugzeugen, die Videoüberwachung von Bahnhöfen, und die Rasterfahndung als Antwort auf die terroristische Bedrohung vorgeschlagen. Gemeinsam ist all diesen Maßnahmen, dass ihnen verfassungsrechtliche Bedenken begegnen. Das Bundesverfassungsgericht hat jüngst Antworten bezüglich des Luftsicherheitsgesetzes und der Rasterfahndung gegeben. Die verfassungsrechtliche Zulässigkeit der Videoüberwachung von Bahnhöfen ist dagegen weiter umstritten. In diesem Beitrag sollen die grundrechtlichen Bedenken anhand der Rechtsprechung des Bundesverfassungsgerichtes und – dort wo diese fehlt – anhand von Urteilen unterinstanzlicher Gerichte und Beiträgen der Literatur untersucht werden.

2. Das Luftsicherheitsgesetz (BVerfG, Urteil v. 15.2. 2006 1 BvR 357/ 05)

Im Januar 2005 trat das Gesetz zur Neuregelung von Luftsicherheitsaufgaben in Kraft. Das Gesetz enthielt unter anderem die Regelung, dass die Streitkräfte der Bundeswehr befugt sind, mit Waffengewalt auf ein Flugzeug einzuwirken, sofern davon auszugehen ist, dass das Luftfahrzeug gegen das Leben von Menschen eingesetzt wird und diese Einwirkung das einzige Mittel zur Abwehr der Gefahr ist (§ 14 III LuftSiG).

2.1. Formelle Verfassungswidrigkeit

Das Bundesverfassungsgericht hält das Luftsicherheitsgesetz schon deshalb für nichtig, weil die Gesetzgebungskompetenz[1] des Bundes für den Erlass des Luftsicherheitsgesetzes fehle und somit eine Verstoß gegen Art. 35 GG vorliege[2]. Das Bundesverfassungsgericht begründet den Verstoß gegen Art. 35 GG damit, dass den Streitkräften im Anwendungsbereich des Art. 35 II, III GG im Einklang mit Wortlaut, Zweck und Entstehungsgeschichte der Vorschrift nur solche Eingriffe erlaubt sind, zu denen auch die Polizei nach den Landespolizeigesetzen befugt ist[3]. Infolgedessen könne den Streitkräften nur der Gebrauch solcher Waffen gestattet sein, die nach den Polizeigesetzen auch die Polizei verwenden darf[4]. Somit verbiete sich der Einsatz militärspezifischer Waffen[5].

2.2. Materielle Verfassungswidrigkeit – Verstoß gegen Art. 1 GG iVm 2 II GG

Weitaus interessanter sind jedoch die Ausführungen des Bundesverfassungsgerichts zur Vereinbarkeit des Luftsicherheitsgesetzes mit den Grundrechten. Danach steht § 14 III LuftSiG mit der Menschenwürde des Art. 1 GG und mit Art. 2 II GG nicht in Einklang, soweit er es den Sicherheitskräften gestatte, Luftfahrzeuge abzuschießen, in denen sich Menschen als Opfer eines Angriffs auf die Sicherheit des Luftverkehrs befinden[6]. Nur soweit sich die Einzelmaßnahme des § 14 LuftSiG gegen ein unbemanntes Luftfahrzeug oder gegen den- oder diejenigen richte, denen der Angriff zuzurechnen ist, begegne die Vorschrift keinen materiell – verfassungsrechtlichen Bedenken[7]. Die Verknüpfung des Lebensschutzes (Art. 2 II GG) mit der Menschenwürdegarantie des Art. 1 I GG begründet das Bundesverfassungsgericht damit, dass das menschliche Leben die vitale Basis der Menschenwürde als höchstem Konstitutionsprinzip und oberstem Verfassungswert sei[8].

Anschließend verdeutlicht das Verfassungsgericht, die Spannungslage, in der sich der Staat im Falle der terroristischen Bedrohung durch ein entführtes Luftfahrzeug befindet. Einerseits sei es dem Staat untersagt, durch eigene Maßnahmen unter Verstoß gegen das Verbot der Missachtung der menschlichen Würde in das Grundrecht auf Leben einzugreifen[9]. Andererseits bestehe eine staatliche Pflicht, das menschliche Leben zu schützen[10]. Nach diesen Grundsätzen sei es dem Staat untersagt, den Menschen zum Objekt des Staates zu machen[11]. Genau das passiere aber, wenn der Staat zu einer

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1 Anmerkung: Richtigerweise begründet Art. 35 GG Verwaltungskompetenzen, vgl. auch W.-R. Schenke, Verfassungswidrigkeit des Art. 14 II LuftSiG, in: Neue Juristische Woche 11 (2006) S. 737.

2 BVerfG NJW 2006, S. 751, S. 757.

3 W.-R. Schenke, a.a.O. (Fn.1), S. 737.

4 W.-R. Schenke, a.a.O. (Fn.1), S. 737.

5 BVerfG NJW 2006, S. 751, S. 757.

6 BVerfG NJW 2006, S. 751, S. 757.

7 BVerfG NJW 2006, S. 751, S. 757.

8 BVerfG NJW 2006, S. 751, S. 757.

9 BVerfG NJW 2006, S. 751, S. 757.

10 BVerfG NJW 2006, S. 751, S. 757.

11 BVerfG NJW 2006, S. 751, S. 757.

Abwehrmaßnahme nach § 14 III LuftsiG greife[12]. Denn dadurch würden die Insassen des Flugzeugs zu einem Objekt der staatlichen Rettungsaktion. Zudem sei zu berücksichtigen, dass die tatsächliche Situation im Flugzeug zum Entscheidungszeitpunkt des zuständigen Hoheitsträgers meist gar nicht zu überblicken sei[13].

Anschließend geht das Verfassungsgericht auf Argumente ein, die in der politischen Diskussion für die Zulässigkeit des § 14 III LuftSiG vorgebracht wurden.

2.2.1 Konkludenter Grundrechtsverzicht

Zunächst lehnt das Bundesverfassungsgericht einen konkludenten Grundrechtsverzicht (Einwilligung) von Besatzung und Passagieren durch das Besteigen des Flugzeugs als Annahme ohne realistischen Hintergrund und daher lebensfremde Fiktion ab[14].

2.2.2. Menschenwürde auch für „dem Tode geweihte"

Ferner lehnt es die Argumentation ab, ein Abschuss sei schon deshalb zulässig, da die Menschen an Bord ohnehin dem Tode geweiht seien[15]. Die Menschenwürde genieße vielmehr ohne Rücksicht auf die Dauer der physischen Existenz verfassungsrechtlichen Schutz[16].

2.2.3. Passagiere als Teil einer Waffe

Auch die Ansicht, die Passagiere seien nicht schutzwürdig, da sie Teil einer Waffe seien, ist nach Ansicht des Verfassungsgerichtes nicht mit dem Menschenwürdebild des GG zu vereinbaren, da auf diese Weise unverhohlen zum Ausdruck gebracht werde, dass die Opfer des Vorgangs nicht mehr als Mensch wahrgenommen werden, sondern vielmehr als Teil einer Sache gesehen und somit verdinglicht würden[17].

2.2.4. Solidarische Einstandspflicht der Passagiere im Interesse des Staates

Des Weiteren erteilt das Gericht der Meinung, dass der Einzelne in bestimmten Situationen verpflichtet sei, sein Leben im Interesse des Staatsganzen zu opfern, eine Absage, da eine solche Sichtweise mit der Menschenwürdegarantie unvereinbar sei[18]. Interessanterweise lässt das Bundesverfassungsgericht an dieser Stelle ausdrücklich offen, ob sich eine erweiterte solidarische Einstandspflicht unter dem Gesichtspunkt des (im Anwendungsbereich des Art 14 III LuftSiG nicht generell vorliegenden) Staatsnotstandes ergeben könnte[19].

2.2.5. Kein Schutz für die Täter

Zuletzt stellt das Gericht klar, dass Art. 14 III LuftSiG insofern mit Art. 2 II 1 iVm Art. 1 I GG vereinbar sei, als sich die unmittelbare Einwirkung mit Waffengewalt gegen ein unbemanntes Luftfahrzeug oder ausschließlich gegen Personen richtet, die das Luftfahrzeug als Tatwaffe gegen das Leben von Menschen auf der Erde einsetzen wollen[20]. Auch an dieser Stelle ist die Argumentation des Gerichtes nachvollziehbar. So führt das Verfassungsorgan aus, dass derjenige der ein Luftfahrzeug als Waffe zur Vernichtung menschlichen Lebens missbrauchen will, nicht als Objekt staatlichen Handelns in seiner Subjektsqualität in Frage gestellt werde[21]. Es entspreche im Gegenteil gerade seiner Subjektstellung, wenn ihm die Folgen seines selbstbestimmten Verhaltens persönlich zugerechnet würden[22].

2.3. Ausblick

Wie auch *Schenke* in seiner Besprechung des Urteils anmerkt, hat das Bundesverfassungsgericht in seinem Urteil zwei wichtige Fragestellungen offengelassen[23]. Dies ist zum einen die Frage, ob eine Tötung Unschuldiger durch den Staat stets und ausnahmslos verfassungsrechtlich – also auch durch Verfassungsänderung – ausgeschlossen ist[24]. Eine Frage die in der politischen Auseinandersetzung zuletzt wieder diskutiert wurde. Ferner unbeantwortet ist die Frage, ob die Tötung unschuldiger Flugzeuginsassen auch ausgeschlossen ist, wenn es um den Schutz des Staates vor existenziellen Bedrohungen geht[25]. Der Lösungsansatz *Schenkes*, der versucht mit einer fiktiven mutmaßlichen Einwilligung der Flugzeuginsassen zur Rettung des „Staatsganzen" zu argumentieren, scheint mit den Aussagen des Verfassungsgericht (Annahme ohne realistischen Hintergrund, Schutz der Menschenwürde unabhängig von der Dauer der physischen Existenz) in Widerspruch zu stehen.

3. Videoüberwachung an Bahnhöfen (VGH Mannheim, Urteil vom 21.7.2003 – 1 S 377/02)

Nach den glücklicherweise fehlgeschlagenen Kofferbombenattentaten wurde von den Politikern gefordert, Videoüberwachungsmaßnahmen an Bahnhöfen zu treffen, um das Risiko terroristischer Anschläge zu verringern. In vielen Bundesländern gibt es auch tatsächlich eine Ermächtigungsgrundlage für die optische Überwachung öffentlicher Räume[26]. Im konkreten Fall hatte der VGH Mannheim zu prüfen, ob die Videoüberwachung bestimmter öffentlicher Verkehrsräume in der Innenstadt Mannheims zulässig ist. Hier soll nur die verfassungsrechtliche Problematik dargestellt werden.

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12 BVerfG NJW 2006, S. 751, S. 758.
13 BVerfG NJW 2006, S. 751, S. 758.
14 BVerfG NJW 2006, S. 751, S. 758.
15 BVerfG NJW 2006, S. 751, S. 758.
16 BVerfG NJW 2006, S. 751, S. 758.
17 BVerfG NJW 2006, S. 751, S. 758.
18 BVerfG NJW 2006, S. 751, S. 759.
19 BVerfG NJW 2006, S. 751, S. 759.
20 BVerfG NJW 2006, S. 751, S. 760.
21 BVerfG NJW 2006, S. 751, S. 760.
22 BVerfG NJW 2006, S. 751, S. 760.
23 W.-R. Schenke, a.a.O. (Fn.1), S. 738.
24 W.-R. Schenke, a.a.O. (Fn.1), S. 738.
25 W.-R. Schenke, a.a.O. (Fn.1), S. 738.
26 Vgl. die Aufzählung bei J. Vahle, Vorsicht, Kamera! – Anmerkungen zur „Video-Novelle" im nordrhein-westfälischen Polizeigesetz, in: Neue Zeitschrift für Verwaltungsrecht 2 (2001) S. 166.

3.1. Erfordernis einer bereichsspezifischen Ermächtigungsgrundlage

Das Bundesverfassungsgericht hat mit dem Urteil zur Volkszählung[27] ein Grundrecht geschaffen, das für die dauernde Videoüberwachung von offen zugänglichen Orten von grundlegender Bedeutung ist[28]. Aus dem Gedanken der Selbstbestimmung folge eine Befugnis des Einzelnen, grundsätzlich selbst zu entscheiden, wann und innerhalb welcher Grenzen persönliche Lebenssachverhalte offenbart werden[29]. Für Eingriffe in das informationelle Selbstbestimmungsrecht als Teilaspekt des Allgemeinen Persönlichkeitsrechtes aus Art. 2 I iVm Art. 1 GG bedürfe es daher einer gesetzlichen Grundlage, aus der sich die Voraussetzungen und der Umfang der Grundrechtsbeschränkungen klar und für den Bürger erkennbar ergeben[30] (sog. bereichsspezifische Ermächtigungsgrundlage).

Problematisch erscheint hier zunächst, dass eine reine Videoübertragung in eine Polizeidienstelle funktionsgleich mit einer Polizeistreife erscheint[31]. Vergleichbar ist diese Videoübertragung daher mit einem technisch verstärkten Auge des diensthabenden Streifenbeamten[32]. Niemand käme jedoch auf den Gedanken, für die Durchführung einer Polizeistreife eine bereichsspezifische und den Bestimmtheitsanforderungen der Wesentlichkeitstheorie des Bundesverfassungsgerichtes entsprechende Ermächtigungsgrundlage zu fordern. Vielmehr kann als Rechtsgrundlage für die Streifenfahrt nach allgemein herrschender Auffassung sogar die Aufgabenzuweisungsnorm an die Polizei[33] herangezogen werden[34]. Begründet wird dies gerade damit, dass eine bloße Streifenfahrt noch keinen Eingriffscharakter besitze[35]. Insofern könnte man differenzieren zwischen der reinen Bildübertragung ohne Eingriffscharakter, für die folgerichtig keine bereichsspezifische Ermächtigungsgrundlage erforderlich wäre und der Videoaufzeichnung, die wegen der nachträglichen Auswertungsmöglichkeit unstreitig Eingriffscharakter besitzt und ohne entsprechende Rechtsgrundlage rechtswidrig wäre. Der VGH Mannheim ist dieser Differenzierung nicht gefolgt. Vielmehr ist das Mannheimer Gericht der Auffassung, dass auch die bloße Videoübertragung Eingriffscharakter besitzt[36]. Begründet wird dies insbesondere damit, dass die Videoüberwachungssysteme eine Beobachtung ermöglichen, die weit über die Wahrnehmungsmöglichkeiten des menschlichen Auges hinausgehen[37]. Verwiesen wird dabei auf die „Rund-um-die-Uhr-Überwachnung", die Dreh- und Schwenktechnik und die Möglichkeit des Zooms[38].

3.2. Formelle Verfassungsmäßigkeit der landesrechtlichen Rechtsgrundlagen

Folgt man dieser Ansicht und fordert eine bereichspezifische Ermächtigungsgrundlage für Bildübertragung und Videoaufzeichnung, so stellt man fest, dass sich die Mehrheit der Bundesländer im Rahmen ihres Gefahrenabwehrrechtes eine entsprechende Rechtsgrundlage geschaffen haben. Das nächste Problem, mit dem sich der VGH Mannheim beschäftigen musste, war daher die Frage nach der Gesetzgebungskompetenz der Länder. Denn sollte die Videoüberwachung nicht in den Regelungsbereich des Gefahrenabwehrrechtes fallen, sondern in den Bereich des Strafrechtes und damit in die Bundeskompetenz, dann wäre die jeweils vorhandene Rechtsgrundlage formell verfassungswidrig und die darauf basierende Videoüberwachung rechtswidrig. Vor diesem Hintergrund stellt sich die Frage, was denn nun eigentlich Zweck der polizeilichen Videoüberwachung ist: die Abwehr drohender Gefahren auf der Grundlage der landesrechtlichen Polizeirechts oder die Aufklärung bereits begangener Straftaten?[39] Vor allem angesichts der Tatsache, dass Straftaten wie Drogendelikte oder Taschendiebstähle zwar beobachtet werden, aber wegen der fehlenden unmittelbaren Zugriffsmöglichkeit eines Polizeibeamten vor Ort nicht verhindert werden können, erscheint eine Zuordnung zur Bundeskompetenz „Strafrecht" als durchaus sachgerecht[40].Der VGH Mannheim sieht dagegen den Schwerpunkt der Maßnahme im Bereich des Gefahrenabwehrrechts[41]. Begründet wird dies mit der präventiven Wirkung der Videoüberwachung, indem potentielle Täter durch die offenen und daher erkennbaren Überwachungsmaßnahmen von der Begehung von Straftaten in den überwachten Bereichen abgeschreckt werden[42]. Ferner spreche auch der Zweck, nämlich die Steigerung des Sicherheitsgefühls der Bevölkerung für eine gefahrenabwehrrechtliche Wirkung[43]. Die Möglichkeit, das gewonnene Material später auch zur Aufklärung von Straftaten und Identifizierung von Tätern nutzen zu können, begründe keine kompetenzrechtlichen Bedenken, da der repressive Nebenzweck die primäre Zweckrichtung der Strafverhütung nicht überlagern könne[44].

3.3. Materielle Verfassungsmäßigkeit der Rechtsgrundlagen

Da – wie bereits festgestellt – sowohl die bloße Bildübertragung als auch die Videoaufzeichnungen Eingriffe in den Schutzbereich des Rechtes auf informationelle Selbstbestimmung darstellen, musste der VGH Mannheim prüfen, ob diese Eingriffe verfassungsrechtlich gerechtfertigt sind.

Dazu stellt der VGH Mannheim zunächst fest, dass das Recht auf informationelle Selbstbestimmung dem Einzelnen

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27 BVerfGE 65, 1 ff.

28 M.A. Zöller, Möglichkeiten und Grenzen polizeilicher Videoüberwachung, in: Neue Zeitschrift für Verwaltungsrecht 11 (2005), S. 1237; F. Roggan, Die Videoüberwachung von öffentlichen Plätzen – Oder: Immer mehr gefährliche Orte für Freiheitsrechte, in: Neue Zeitschrift für Verwaltungsrecht 2 (2001), S. 135.

29 F. Roggan, a.a.O. (Fn. 28), S. 135.

30 BVerfGE 65, 1 ff.; F. Roggan, a.a.O. (Fn. 28), S. 135.

31 M. A. Zöller, a.a.O. (Fn 28), S. 1238.

32 M. A. Zöller, a.a.O. (Fn 28), S. 1238.

33 Anmerkung: in NRW beispielsweise § 1 PolG NW.

34 F. Roggan, a.a.O. (Fn. 28), S. 136.

35 F. Roggan, a.a.O. (Fn. 28), S. 136.

36 Vgl. VGH Mannheim NVwZ 2004, S. 498, S. 500.

37 VGH Mannheim NVwZ 2004, S. 498, S. 500.

38 VGH Mannheim NVwZ 2004, S. 498, S. 500.

39 M.A. Zöller, a.a.O. (Fn 28), S. 1238.

40 Vgl. auch M.A. Zöller, a.a.O. (Fn 28), S. 1239.

41 VGH Mannheim NVwZ 2004, S. 498, S. 499.

42 VGH Mannheim NVwZ 2004, S. 498, S. 499.

43 VGH Mannheim NVwZ 2004, S. 498, S. 499.

44 VGH Mannheim NVwZ 2004, S. 498, S. 499.

nicht das Recht im Sinne einer absoluten uneinschränkbaren Herrschaft über seine Daten einräume, sondern der Einzelne im Interesse der Allgemeinheit Beschränkungen hinnehmen müsse[45]. Dazu wird zunächst ausgeführt, dass das Grundrecht als Grundrechtsschranke dem Gesetzesvorbehalt des Art. 2 I GG unterliege[46]. Anschließend folgt als Schranken-Schranken-Prüfung eine ausführliche Verhältnismäßigkeitskontrolle[47]. Im Rahmen dieser Prüfung stellt das Gericht fest, dass die Videoüberwachung zur Erreichung des (präventiven) Gesetzeszwecks geeignet sei[48]. Darüber hinaus sei die Videoüberwachung auch erforderlich, da ein verstärkter Polizeikräfteeinsatz wegen der angespannten Situation der öffentlichen Haushalte nicht in Betracht käme[49]. Zudem sei eine erhöhte Polizeipräsenz auch wegen der fehlenden Möglichkeit des Zoomens und des Aufzeichnens weitaus weniger geeignet[50]. Letztlich geht der VGH Mannheim auch von der Verhältnismäßigkeit im engeren Sinne (Angemessenheit) von Bildübertragung und Videoaufzeichnung aus[51]. Zwar stelle die Videoaufzeichnung einen nicht unerheblichen Eingriff in das Recht auf informationelle Selbstbestimmung dar[52]. Jedoch stehe dieser Beeinträchtigung das öffentliche Interesse an der vorbeugenden Bekämpfung von Straftaten gegenüber[53]. Dem Grundrecht auf informationelle Selbstbestimmung trage der Gesetzgeber insbesondere dadurch Rechnung, dass ein großflächiges oder flächendeckendes Überwachungssystem nach dem Vorbild Londons gerade nicht statuiert werde, sondern eine Überwachung auf Örtlichkeiten mit besonderer Kriminalitätsbelastung, so genannte Kriminalitätsschwerpunkte, beschränkt sei[54]. Insgesamt sei daher eine gesetzliche Regelung, die eine Videoüberwachung von Kriminalitätsschwerpunkten zulässt, verfassungsrechtlich nicht zu beanstanden[55].

3.4. Ausblick

Erfreulich ist, dass sich der VGH Mannheim für eine bürgerfreundliche Betrachtungsweise entschieden hat und schon die bloße Kameraüberwachung als Bildübertragung wertet. Zudem weist der VGH Mannheim darauf hin, dass eine landesrechtliche Regelung, die die Videoüberwachung ausgewählter Orte zulässt, unter bestimmten Umständen verfassungskonform ausgelegt werden muss[56]. Das sei jedenfalls immer dann der Fall, wenn die Videoüberwachung über den aufgezeigten Eingriff in das Recht auf informationelle Selbstbestimmung hinaus in Kollision mit der Ausübung anderer grundrechtlicher Freiheiten trete[57]. Das Gericht nennt hier die Fälle, in denen, die Kamera aufgrund ihrer Ausrichtung den Einblick in private Wohnräume ermöglicht, Eingänge zu Etablissements des Rotlichtmilieus im Überwachungsbereich liegen (Art. 14 GG) oder auf einem videoüberwachten Platz Versammlungen (Art. 8 GG) durchgeführt werden.

4. Rasterfahndung (BVerfG, Beschluss vom 4.4. 2006 – 1 BvR 518/02

Nach den terroristischen Anschlägen vom 11. September 2001 führten die Landespolizeibehörden unter Mitwirkung des Bundeskriminalamtes eine bundesweit koordinierte Rasterfahndung nach islamistischen Terroristen durch, nachdem bekannt geworden war, dass einige der Attentäter zuvor in Deutschland gelebt hatten[58]. Ziel war insbesondere die Erfassung so genannter Schläfer, also Personen, die zu terroristischen Handlungen bereit sind, sich jedoch lange Zeit hindurch sorgfältig um ein gesetzeskonformes und möglichst unauffälliges Verhalten bemüht hatten, um ihr kriminelles Vorhaben dann im entscheidenden Zeitpunkt überraschend und damit besonders wirkungsvoll verwirklichen zu können[59]. Die Landeskriminalämter erhoben dazu Daten unter anderem bei Universitäten, Einwohnermeldeämtern und dem Ausländerzentralregister und rasterten die Datenbestände nach folgenden Kriterien: männlich, Alter 18 bis 40 Jahre, Student oder ehemaliger Student, islamische Religionszugehörigkeit, Geburtsland oder Nationalität bestimmter, im Einzelnen benannter Länder mit überwiegend islamischer Bevölkerung[60]. Die durch Datenabgleich nach diesen Kriterien auf Landesebene gewonnenen Daten wurden dem Bundeskriminalamt übermittelt und dort in die bundesweite Datei „Schläfer“ eingestellt[61]. An der bundesweit koordinierten Rasterfahndung beteiligte sich auch das Land Nordrhein-Westfalen. Gestützt wurde diese Maßnahme auf § 31 PolG NW, wonach die Polizei sowohl von öffentlichen Stellen als auch Stellen außerhalb des öffentlichen Bereichs die Übermittlung personenbezogener Daten bestimmter Personengruppen zum Zwecke des automatisierten Abgleichs mit anderen Datenbanken verlangen kann, soweit dies zur Abwehr einer gegenwärtigen Gefahr für den Bestand oder die Sicherheit des Bundes oder eines Landes oder für Leib, Leben oder Freiheit einer Person erforderlich ist[62]. Der Beschwerdeführer, marokkanischer Staatsbürger islamischen Glaubens, begründete seine Verfassungsbeschwerde gegen die richterliche Anordnung der Rasterfahndung (vgl. § 31 IV PolG NW) nach Erschöpfung des Rechtsweges damit, dass sein Grundrecht auf informationelle Selbstbestimmung aus Art. 2 I i.V.m. 1 I GG verletzt sei.

4.1. Verfassungsmäßigkeit des § 31 PolG NW

Das Bundesverfassungsgericht bejaht zunächst einen Eingriff in den Schutzbereich des Rechtes auf informationelle Selbstbestimmung und betont sodann, dass dieses Recht jene Beschränkungen hinnehmen muss, die durch überwiegende

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45 VGH Mannheim NVwZ 2004, S. 498, S. 500.
46 VGH Mannheim NVwZ 2004, S. 498, S. 501.
47 VGH Mannheim NVwZ 2004, S. 498, S. 502.
48 VGH Mannheim NVwZ 2004, S. 498, S. 502.
49 VGH Mannheim NVwZ 2004, S. 498, S. 502.
50 VGH Mannheim NVwZ 2004, S. 498, S. 502.
51 VGH Mannheim NVwZ 2004, S. 498, S. 502.
52 VGH Mannheim NVwZ 2004, S. 498, S. 502.
53 VGH Mannheim NVwZ 2004, S. 498, S. 502.
54 VGH Mannheim NVwZ 2004, S. 498, S. 503.
55 VGH Mannheim NVwZ 2004, S. 498, S. 504.
56 VGH Mannheim NVwZ 2004, S. 498, S. 504.
57 VGH Mannheim NVwZ 2004, S. 498, S. 504.
58 Vgl. zum Sachverhalt auch BVerfG NJW 2006, S. 1939 f..
59 BVerfG NJW 2006, S. 1939.
60 BVerfG NJW 2006, S. 1939.
61 BVerfG NJW 2006, S. 1939.
62 Anmerkung: die Vorschrift wurde 2003 geändert.

Allgemeininteressen gerechtfertigt sind[63]. Diese Beschränkungen bedürfen nach Ansicht des Gerichtes jedoch einer verfassungsmäßigen gesetzlichen Grundlage, die insbesondere dem Grundsatz der Verhältnismäßigkeit und dem Gebot der Normenklarheit entsprechen müsse[64]. Insofern musste das Bundesverfassungsgericht bei der Prüfung der Einzelmaßnahme inzidenter zunächst die Verfassungsmäßigkeit der landesrechtlichen Rechtsgrundlage überprüfen.

4.1.1. Verhältnismäßigkeitsprüfung

Anschließend prüft das Bundesverfassungsgericht die Verhältnismäßigkeit des § 31 PolG NW. Dabei wird die Geeignetheit und Erforderlichkeit der Rasterfahndung zur Erreichung des legitimen Zwecks, namentlich der Abwehr einer Gefahr für den Bestand oder die Sicherheit des Bundes oder eines Landes oder für Leib, Leben oder Freiheit einer Person, auffallend kurz festgestellt. Die Prüfung der Verhältnismäßigkeit im engeren Sinne (Angemessenheit) erfolgt dann wieder ausführlich[65]. Das Gericht weist darauf hin, wie ein Ausgleich der widerstreitenden Interessen vorgenommen werden kann: Das Spannungsverhältnis zwischen der Pflicht des Staates zum Rechtsgüterschutz und dem Interesse des Einzelnen an der Wahrung seiner von der Verfassung verbürgten Rechte könne durch den Gesetzgeber in abstrakter Weise dadurch gelöst werden, dass bestimmte intensive Grundrechtseingriffe erst von bestimmten Verdachts- oder Gefahrenstufen an vorgesehen werden dürfen[66]. Nach diesen Maßstäben dürfe eine Rasterfahndung nicht schon im Vorfeld einer konkreten Gefahr ermöglicht werden. Denn sie würde zu vollständig verdachtslosen und mit hoher Streubreite erfolgenden Grundrechtseingriffen führen, die Informationen mit intensivem Persönlichkeitsbezug erfassen könnten[67]. Deshalb sei es erforderlich, dass der Gesetzgeber die Zulässigkeit der Rasterfahndung an das Erfordernis einer konkreten Gefahr für die betroffenen Rechtsgüter anknüpft[68]. Dabei müsse sich die für die Feststellung einer konkreten Gefahr erforderliche Wahrscheinlichkeitsprognose auf Tatsachen beziehen[69]. Vage Anhaltspunkte oder bloße Vermutungen ohne greifbaren, auf den Einzelfall bezogenen Anlass reichen dagegen nicht aus[70]. Eine allgemeine Bedrohungssituation, wie sie spätestens seit dem 11. September 2001, also seit nunmehr fünf Jahren ununterbrochen bestanden hat, oder außenpolitische Spannungslagen reichen für die Anordnung einer Rasterfahndung ebensowenig aus[71].

4.1.2. Notwendigkeit einer verfassungskonformen Auslegung

Im Ergebnis hält das Bundesverfassungsgericht die Ermächtigungsgrundlage des § 31 PolG NW für verfassungsgemäß, verlangt aber eine den obigen Ausführungen entsprechende verfassungskonforme Auslegung[72].

4.2. Ausblick

Interessant ist, dass das Bundesverfassungsgericht die Einzelmaßnahme im vorliegenden Fall für verfassungswidrig hielt. Zwar gibt es mit § 31 PolG NW eine taugliche Rechtsgrundlage für die Anordnung der Rasterfahndung. Die gebotene verfassungskonforme Auslegung führt letztlich jedoch dazu, dass die Eingriffschwelle soweit erhöht wird, dass konkrete Tatsachen vorliegen müssen, auf die die konkrete Gefahr gestützt werden kann. Im konkreten Fall gab es jedoch keine über die allgemeine Bedrohungssituation hinausgehenden Erkenntnisse über konkrete Gefährdungen oder speziell über Anschläge oder Anschlagvorbereitung in Deutschland[73].

5. Bewertung

Alle Entscheidungen verdeutlichen die Spannungslage zwischen der staatlichen Pflicht zur Gefahrenabwehr und der Bindung des Staates an die Grundrechte des Einzelnen. Berufen zur Auflösung der Konfliktlagen ist in erster Linie der Gesetzgeber. Bereits bei der Ausgestaltung der Rechtsnormen muss der Gesetzgeber alle wesentlichen Entscheidungen selbst treffen. Damit sind insbesondere die Entscheidungen über Eingriffe des Staates in die Grundrechte bezeichnet. Bei der Formulierung grundrechtrelevanter Eingriffsbefugnisse kommt für den Gesetzgeber erschwerend hinzu, dass die Bestimmtheitserfordernisse, die an die jeweilige Norm zu stellen sind, mit der Eingriffsintensität steigen. Schon hier wird deutlich wie wichtig eine effektive gerichtliche Kontrolle der Eingriffsnormen am Maßstab der Grundrechte des Grundgesetzes ist. Genau dieser Aufgabe sind die Gerichte in den vorliegend besprochenen Fällen – auf verschiedenen Wegen – gerecht geworden. ■

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63 BVerfG NJW 2006, S. 1939, S. 1941.
64 BVerfG NJW 2006, S. 1939, S. 1941.
65 Vgl. BVerfG NJW 2006, S. 1939, S. 1941.
66 BVerfG NJW 2006, S. 1939, S. 1941 f., S. 1946.
67 BVerfG NJW 2006, S. 1939, S. 1946.
68 BVerfG NJW 2006, S. 1939, S. 1947.
69 BVerfG NJW 2006, S. 1939, S. 1947.
70 BVerfG NJW 2006, S. 1939, S. 1947.
71 BVerfG NJW 2006, S. 1939, S. 1947.
72 Vgl. BVerfG NJW 2006, S. 1939, S. 1947f.
73 BVerfG NJW 2006, S. 1939, S. 1948.

The United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw, 8.–9. November 2006

Jagoda Walorek*

This session was convened by the Office of the UN High Commissioner for Human Rights[1] in response to a Commission on Human Rights resolution[2]. It was furthermore a follow-up to the joint OHCHR-UNDP seminar on good governance practices for the promotion and protection of human rights from Seoul in September 2004. It was therewith a subsequent meeting emerging a professional discussion and a call for action in combating corruption.

However recent and often questioned concern of the UN Treaty Bodies and Human Rights Specialized Agencies towards corruption, its reasoning is clear. Over $ 1Tr US spent on bribery each year obviously blocks international aid. "Corruption is moreover an obstacle to progress"[3] and it does "distort the very rule of law,"[4] which makes the powerful human oriented entities of the world community legibly accurate to step in, stand up and speak up.

The joint two days session was devoted to the issue of combating corruption, good governance, human rights and the mutual interdependence between them. The host country provided an opening introduction. Mrs. Anna Fotyga, Foreign Minister of Poland (elected chairperson of the conference) presented combating corruption as one of the new government's main objectives. She spoke on measures introduced against money laundering and bribery, procured laws and the first national surveillance unit[5] dealing exclusively with the crime of corruption. Mrs. Fotyga as well as the subsequent speaker – Mr. Kazimierz Marcinkiewicz – (mayor of Warsaw at this time) were enthusiastic about the development of undertaken actions and sought for credit for the efforts made. They expressed contentment, that the discussion about corruption takes place explicitly in Poland as it shows, that the transformation countries are not alone in the struggle against it.

The welcome words of the host country officials were followed by speeches from United Nations officers. The representative of Mr. Sergei Ordzhonikidze, Director General of the Geneva Office of the UN as well as Ms. Maria-Francisca Ize-Charrin[6] from the OHCHR referred to one of the main objectives of the United Nations, namely: To promote and encourage respect for human rights and for fundamental freedoms for all.[7] Corruption, as they noted renders human rights on various levels. It hinders the achievement of the UN Millennium Development Goals and obstructs aid, which "can only work where there is good governance."[8] Both speakers admitted the deepest concern from the UN as a human rights warrant. Ms. Ize-Charrin reminded about the previous actions of the organization and their focal outcome in form of an UN Convention against Corruption from 14. December 2005.[9] She urged further states to ratify the treaty and also indicated a main objective of this conference – to identify concrete ways in which governance efforts to fight corruption are assisted by and contribute to human rights protection.

Mr. Param Cumaraswamy[10] who Ms. Ize-Charrin subsequently gave the floor to, chose a following approach towards the outlined point. He focused on "integrity and ethics", which when seeded in the human consciousness as norms of conduct, will exclude the urge of bribery. Calling this occurrence a pure evil and a cancer of society, which needed to be eradicated, he not only spoke against its depth impact on the human nature, but also named several ideas to make combating more feasible. He primarily urged awareness raising to private entrepreneurs. Concerning the evident interdependence of politics and business, the impact on a corruption-free development of the latter will fight nepotism in the public sphere and mitigate the marginalization of the poor, who naturally cannot afford to bribe whilst suffering most from economical booms. Mr. Cumaraswamy supported the idea of the commission's supervision by strengthened national human rights entities. To safeguard an additional warranty to this model he called for a true independence of the judiciary, whose indifference for bribes, can only be achieved by reasonable salaries. Concluding, the speaker referred to the maxim of human rights anti-corruption activists, that "a national integrity system must be launched."

Mr. Cumaraswamy's words were well received and, indeed, the subsequent speaker effected some of this thinking into current reality, as Poland's Minister of Justice Mr. Zbigniew Ziobro presented the paths of conduct of his government. Mr. Ziobro's professional speech or rather a political manifesto condemned the impunity of public officials (sportsmen, social activists and businessmen) the time of the former government and spoke on the legislative efforts of his own office. However political, his legal actions were seen to be of great value, as the newly introduced denunciation procedure (to break the bond between the briber and bribed) and the high transparency level in public sector, turned out to be highly effective.

Following spokesman within the panel on "Impact of corruption on human rights" – Mr. Nihal Jayawickrama[11] approached the issue with an explicit examination of the actual interdependence between corruption and the fundamental rights of man. As a former director of Transparency International he had full insight in the global trends and statistics. According to the 2005 Corruption Perception Index,[12] ten out of twelve most corrupt countries are classified[13] as being "not free". An obvious conclusion arises, that such states do not guarantee the respect for basic Civil and Political Rights[14] of the inhabitants as their severe restrictions insure the very existence of the foreman and the corrupt officials. Patronage and sycophancy become the order of the day. This also concerns Social and Economic Rights[15], as national resources are diverted from public use into private benefit. The speaker concurred with Kofi Annan, that "corruption hurts the poor," as

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1 Further referred to as UNHCHR.

2 2005/68 of 20. April 2005.

3 Laisenia Quarase, former Prime Minister of Fiji.

4 Enrique V. Iglesias, President of the Intern-American Development Bank.

5 Central Anti-Corruption Bureau, erected on 09. June 2006.

6 Director of Operations, Programme and Research Division.

7 As stated Art. 3 UN-Charter.

8 Lee H. Hamilton.

9 Adopted by the General Assembly by Resolution (A/RES/58/4) on 31 Oct. 2003.

10 Former UN Special Rapporteur on the Independence of Judges and Lawyers.

11 Former Executive Director of Transparency International, Berlin.

12 http://www.transparency.de/Tabellarisches_Ranking.813.0.html.

13 Classification undertaken by: Freedom House 2006 Assesment: http://www.freedomhouse.org/template.cfm?page=278.

14 ICCPR, 1966, Section II of ECHR, UDHR.

15 ICESCR 1966, European Social Charter 1961, UDHR.

it stipulates inequality[16] and discrimination[17] by allowing the few wealthy individuals to develop a privileged status. Furthermore, some freedoms typically affected by corruption are access to health care, education, fair trial and impartial elections. Consequently Mr. Jayawickrama created a whole catalogue of human rights recognized by the International Community and present in its numerous treaties and conventions. Following the words of the former Transparency International executive, it is seen as apparent that corruption is a global phenomenon, indirectly having a disastrous impact on the entirety of personal freedoms and that this needs much greater care and attention. The speaker established an inclusive code of action for the legislature, executive and the judiciary[18] and showed proof of its effectiveness in countries following the presented solutions, as they are listed in the above mentioned report, as the least corrupt. As the world leaders in democracy and following the rule of law the self-evident conclusion noted was, that good governance is a means to diminish venality.

The first session of the conference ended with a plenary discussion, where delegates had an opportunity to share their countries' experiences in handling corrupt behaviors, especially concerning individual regional and development aspects.

The next session was devoted to the question, "how human rights and good governance principles can help in fighting corruption". It was moderated by Mr. Robert Archer, Executive Director of International Council on Human Rights Policy. This panel started with a case study presented by Ms. Sandra Coliver[19], who used an example of solutions introduced by Mexico, Canada and Japan, to prove, that warranting the basic freedoms is essential in the strive against corruption. In her reasoning, the spokeswoman concentrated on the urge of transparency, and pleaded for the right to information as a method to achieve it, explaining, that only the public access to information about the income of the officials can prevent them from venality. Yet, when asked how to handle the possible refusal of the government to access such information, Ms. Coliver – representative of the USA – responded from a position of a state, which is a pioneer in accepting and broadening democratic solutions[20]. She suggested the implementation of laws acceptable by the constitution, as her country of origin did after the Watergate Scandal. This answer didn't satisfy the delegates of states who need to proceed with the struggle for democracy and the rule of law in the first place.

The final speech of this session was from Mr. Maina Kiai, representative of the National Human Rights Institute in Kenya. In his visionary presentation Mr. Kiai undertook a precise examination, on how to fight corruption using human rights approaches. The first idea mentioned referred to semi-revolutionary movements "bottom-up, demand driven, where citizenry themselves are the key players in advocating change and reform and holding political elites accountable.[21]" He noted access to information is critical for success of such civil initiatives, and he condemned the majority of countries in the world, which deny this basic freedom to their inhabitants. "Why hire a lawyer, if you can buy a judge" – the speaker quoted a popular saying in his country, to picture the urge of independence and efficiency of the judiciary. Equality under the law[22], so often apparent in human rights treaties and conventions can serve fighting corruption only if truly respected. Mr. Kiai mentioned furthermore the principle of separation of powers, as they serve mutual control to each other and stressed the call for impartial, accountable police forces, effective electoral administration and independent ombudsmen offices. Behind any of these motions, if proceeded on properly hides a guarantee of respect for corresponding fundamental rights. Based on the correlation between good governance and the exertion of human rights, their mutual accordance leaves no place for corruption. The speaker concluded by admitting that, "there is no human rights, without the right humans", signaling, that any attempt of creating a system of effective correspondence must be based on the real involvement and goodwill of its creators.

The conclusions arising from this part of the conference, were formulated by Mr. Robert Archer. The rapporteur noted in his summary the urge towards international cooperation in combating corruption, also in the form of strengthened supranational justice, which would exclude the issue of impunity. "Law, law, law" – were his final watch words. The authority of the rule of law will not solve all the aspects presently responsible for corruption, but it definitely is a first step, which needs to be taken globally in the fight against it.

The following panel concentrated on the "role of civil society, private sector and the media." Professionals representing these fields expressed their deep conviction about the extending role of citizenry, entrepreneurs and free media in curbing corruption. The panelist, Mr. Colm Allan – Director of the South African Public Service Accountability Monitor explained the effort undertaken by his office as to "obtain justifications and explanations for the use of public resources from those entrusted with their management, as those responsible for public resources have an obligation to explain/justify how decisions/actions have contributed to the progressive realization of citizens (socio-economic) rights – and to take steps to correct ineffective use." A thought occurs, that public society needs to have access to the information about the activities of the executive, not only to satisfy the freedom of obtaining it, but also to provide a bottom-up supervision tool, required for the proper functioning of a democratic system. Similar role has been given to the private sector, "which can become involved in fighting corruption, supporting good governance, and promoting human rights through implementing internal compliance and ethics programs."[23] The function of the media cannot be forgotten, – if independent, it creates an external link between the actions of the government and the society, supporting the democratic idea of their interdependence.

The last session within the conference was devoted to the issue of "safeguarding human rights while fighting corruption." This session was convened to search for exact ideas and precise solutions of how to avoid further violations of human rights. The first speaker – Mr. John MacMillan – Commonwealth Ombudsman, stressed the importance of his office. Though ombudsmen themselves don't possess the right to penalize, their presence is indispensable, as a mitigating factor towards the officials, to ground their awareness, that a corrupt behavior can always be reported to an apolitical body to provoke the criminalization process.

The subsequent speaker, Mr. Zbigniew Romaszewski, agreed with his predecessors, that introducing new laws will help counter corruption, the senator however took a step forward in this consideration, referring explicitly to an adequate legal instrument of the proportionality principle. Safeguarding the fundamental freedoms of man, otherwise caused by corruption – can be achieved by shortening other rights. Such measures have been successfully exercised

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16 Art. 1 UDHR.

17 Art. 14 ECHR, Art. 1 Protocol No. 1 to ECHR, Art. 26 ICCPR.

18 HR/POL/GG/SEM/2006/BP.2.

19 Senior Legal Officer of the Justice Initiative, Open Society Institute.

20 Henry Kissinger "The Diplomacy".

21 HR/POL/GG/SEM/2006/BP.2.

22 Art. 7 UDHR, Art. 26 ICCPR.

23 From the speech of panellist: Mr. Roy Snell, CEO of the Society of Corporate Compliance and Ethics, USA.

in the recent years to combat terrorism.[24] Especially some restrictions to the right to privacy, (hidden cameras, setting of legal entrapments, interception of communication) appear justified for fighting for transparency. Furthermore, Mr. Romaszewski urged for simplification of law. Regulations cannot be a feasible medium in countering corruption, if not understandable for the citizenry. Awareness raising and education are inevitably connected with it. Moreover, ambiguities within the laws encourage politicians to manipulate their contents and create space for venality.

The following speaker opened a dialog with the statement of Senator Romaszewski. Mr. Roberto Saba, Executive Director of Association for Civil Rights opposed to make use of the proportionality principle while fighting corruption. He claimed, that violating rights to defeat the bigger evil (as in case of terrorism and street crime) is unjust. "Persons are ends in themselves and there is no way to justify, that we use any individual as a means for achieving a higher end.[25]" Nevertheless, since law is the primary solution in combating corruption, applying its principals appears indispensable. The speaker admitted eventually, that if such morally unjust measures need to be undertaken, they have to address everybody equally, because only that way a solid rule of law regime can be achieved. "If we defeat corruption, it must be without giving up our ideals and values. If we give them up, corruption would have defeated us." – this significant statement concluded the last session of the conference.

Eventually, the floor was opened for final remarks and a summary of the chairperson.

Although the crime of corruption does not victimize a certain number of people, neither it allows certain statistics to be constructed, it obviously is a large-scale offence. In fact, imagining that $ 1 Tr. US is vanishing yearly into the private accounts of officials worldwide, provokes the conclusion that venality, clientelism, nepotism and patronage are not internal issues of states of occurrence. Through hurting the basic principle of the rule of law, the idea of democracy and violating the most fundamental human rights, they become a global problem and it is expected from the international community to step in the struggle against it.

Throughout the conference, numerous professional remarks and significant ideas have been raised. Nevertheless a particular code of conduct in fighting corruption hasn't been crystallized. Implementing new laws as a primary means appears very accurate. Then again, the rule of law is not perceived equally. Solutions adaptable in developed democracies stay a remote goal in countries struggling for democracy in the first place. This fact seems to diminish the practical power of the United Nations in curbing corruption, which however global, operates mainly on legal instruments. Therefore different measures need to be undertaken. Introducing a moral code, which presents corruption as an ethical evil is right. Then again, since bribery is as old as dealing with money is, it is rather irrational to expect, that the human nature can be changed overnight. Different practices need to be developed. The given idea of whistle-blowing and the awareness raising seem very accurate, therefore launching a professional discussion in an international forum and presenting the effects of formerly introduced solutions serves the primary goal of the conference. It is only to be anticipated to what extend words will turn into actions. ■

[24] § 33a I Nr 2,3 of the Lower Saxony's Security and Order Regulation, German Terrorism Countering Regulation, 9. January 2002 (BGBl. I S. 361), German Telecommunication Law, 22. June 2004 (BGBl. I S. 1190).

[25] HR/POL/GG/SEM/2006/BP:3.

17. Tagung der Rechtsberater und Rechtslehrer der Bundeswehr, der Juristen und der Konventionsbeauftragten des Deutschen Roten Kreuzes in Zusammenarbeit mit dem Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht (IFHV), Bad Mergentheim, 9.–10. März 2007

Katja Schöberl und Laura Ryseck*

1. Zusammenfassung

Bereits zum 17. Mal trafen sich in diesem Jahr die Rechtsberater und Rechtslehrer der Bundeswehr, die Juristen und Konventionsbeauftragten des Deutschen Roten Kreuzes sowie interessierte Gäste aus Medien und Wissenschaft, um gemeinsam über ein aktuelles Thema des humanitären Völkerrechts nachzudenken und zu diskutieren. Nachdem im vergangenen Jahr der „Krieg ohne Soldaten – Outsourcing of War und Kindersoldaten" Thema der Tagung war, befassten sich die Referenten und Teilnehmer in diesem Jahr mit dem Krieg im Libanon. Als Referenten konnten auch in diesem Jahr wieder hochrangige Vertreter aus Wissenschaft und Praxis gewonnen werden, die allesamt sehr anregende Vorträge hielten und sich der Diskussion mit dem (Fach)Publikum gekonnt stellten. Aus organisatorischen Gründen fand die Tagung dabei erstmals nicht in Bad Teinach, sondern im Roten Saal des Deutschordensschlosses in Bad Mergentheim statt.

2. Die Beiträge im Einzelnen

Die Tagung begann nach einem kurzen Grußwort von Dr. *Rudolf Goldmann* – dem Landeskonventionsbeauftragten des DRK-Landesverbandes Baden Württemberg – mit einer Einführung durch den akademischer Direktor des IFHV, Prof. Dr. *Horst Fischer*. Er erläuterte, dass es eine gemeinsame Überlegung der beteiligten Institutionen gewesen sei, sich im Rahmen der diesjährigen Tagung mit dem Krieg im Libanon zu befassen, da dieser eine Reihe interessanter Fragen an das humanitäre Völkerrecht aufgeworfen habe.

Zunächst rekapitulierte Frau *Danja Blöcher*, Doktorandin an der Ruhr-Universität Bochum, die Geschehnisse, die sich im vergangenen Juli und August ereigneten. Sie ging zuerst auf den Vorfall ein, der den bewaffneten Konflikt zwischen dem Staat Israel und der Hisbollah ausgelöst hat, beschrieb dann den Verlauf des Konfliktes und skizzierte abschließend seine Folgen. Dabei machte sie darauf aufmerksam, dass die Faktenlage noch immer ungesichert sei, da sich die Berichterstattungen zum Teil stark voneinander unterschieden. Auch die zu beklagenden Opferzahlen – insbesondere auf Seiten der Hisbollah – wichen voneinander ab. Hier würden die Angaben zwischen 250 und 500 Toten liegen – je nachdem, ob man auf Informationen der Hisbollah oder der israelischen

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Armee zurückgreife. Frau *Blöcher* gab darüber hinaus einen sehr guten, kurzen Überblick über die Geschichte des Libanons, sein politisches System, die Entstehung der Hisbollah sowie die Entwicklung des UNIFIL-Einsatzes im Südlibanon seit 1978. Zudem ging sie kurz auf die an der Grenze zu den von Israel besetzten Golan-Höhen gelegenen Shebaa-Farmen ein, die seit dem Abzug der israelischen Armee aus dem Südlibanon im Jahr 2000 den zentralen Streitpunkt zwischen Israel, der Hisbollah und der libanesischen Regierung darstellen.

Im Anschluss an Frau *Blöchers* Einführungsvortrag legte Herr *Rainald Becker*, Leiter der Redaktion Weltspiegel des Südwestrundfunks, seine Einschätzungen bezüglich des bewaffneten Konflikts, insbesondere der Art und Weise, wie dieser geführt wurde, sowie bezüglich der aktuellen Lage im Libanon dar. Dabei konnte er auf Eindrücke und Erkenntnisse zurückgreifen, die er als Berichterstatter im Libanon persönlich gewonnen hat.

Zunächst betonte er, dass man weder von Gewinnern noch von Verlierern des Konfliktes sprechen könne. Diese Kategorien würden seiner Komplexität und seinen Folgen nicht gerecht. Im Folgenden ging Herr *Becker* näher auf die Art der Kriegsführung, insbesondere die Zielauswahl der israelischen Luftwaffe ein. So könne er sich beispielsweise die vollständige Zerstörung einer Schule im Südlibanon nicht als Fehltreffer der Israeli Defense Forces (IDF) erklären. Zudem hob er besonders den massiven Einsatz von Streumunition in den letzten 72 Stunden vor Inkrafttreten des Waffenstillstandes hervor und bezeichete ihn als „bitteres Kapitel" dieses bewaffneten Konfliktes. Der Einsatz der zum größten Teil stark veralteten Streubomben sowie deren hohe Blindgängerrate habe dazu geführt, dass ein großer Teil der landwirtschaftlichen Fläche im Süden des Libanons nicht mehr nutzbar sei.

Im Hinblick auf die aktuelle politische Situation im Libanon kam Herr *Becker* zu dem Ergebnis, dass eine politische Einbindung der Hisbollah die einzige Lösung der innenpolitischen Krise darstelle, da sie zu einer Entradikalisierung der Bewegung beitragen könne.

Nach einer kurzen Unterbrechung wandte sich Prof. Dr. *Andreas Zimmermann* vom Walther-Schücking-Institut für Internationales Recht der Universität Kiel zunächst dem *ius ad bellum* und insbesondere der Frage zu, ob der bewaffnete Angriff Israels auf Hisbollah-Milizen auf libanesischem Staatsgebiet eine legitime Selbstverteidigung darstellte. Da keine Resolution des VN-Sicherheitsrates vorgelegen habe, die Israel in seiner Gewaltanwendung ermächtigte, komme allein Artikel 51 VN-Charta als Legitimationsgrundlage in Betracht. Um die Voraussetzungen des Artikel 51 zu erfüllen, müsse der bewaffnete Angriff nach herrschender Auffassung jedoch von einem Staat ausgehen bzw. ihm nach denen im ILC-Entwurf verankerten Kriterien zurechenbar sein. Von einer unmittelbaren völkerrechtlichen Verantwortung des Staates Libanon für die Aktivitäten der Hisbollah könne jedoch auf Grund dessen Unvermögen, effektive Kontrolle über ihre bewaffneten Flügel auszuüben, nicht ausgegangen werden. Prof. *Zimmermann* regte daher an, darüber nachzudenken, ob nicht auch ein Selbstverteidigungsrecht gegen Angriffe bewaffneter nicht-staatlicher Gruppen auf Grundlage von Artikel 51 VN-Charta bestehe. Der Wortlaut des Artikel 51 setze im Gegensatz zu Artikel 2 Absatz 4 VN-Charta nicht voraus, dass es sich um die „zwischenstaatlichen Beziehungen" zweier oder mehrerer Staaten handeln müsse. In jedem Fall jedoch müsse die staatliche Antwort auf einen bewaffneten Angriff nicht-staatlicher Akteure den Grundsatz der Verhältnismäßigkeit achten. Dieser Grundsatz sei zum einen, dem IGH im Nicaragua-Urteil und Nuklearwaffen-Gutachten folgend, in Artikel 51 inhärent, zum anderen komme ihm im *ius in bello* völkergewohnheitsrechtliche Geltung zu. Israel sei, da kein „persistent objector" in Bezug auf Artikel 51 Absatz 5 ZP I, somit zu jeder Zeit an den Grundsatz der Verhältnismäßigkeit gebunden gewesen, obwohl es nicht Vertragspartei des ersten Zusatzprotokolls zu den Genfer Konventionen ist.

Dr. *Dieter Weingärtner*, Leiter der Rechtsabteilung des Bundesministeriums der Verteidigung, befasste sich daran anschließend mit den völker- und verfassungsrechtlichen Aspekten des Einsatzes deutscher Soldaten im Rahmen des UNIFIL-Mandates.

Zunächst verwies er jedoch auf die politische Diskussion in Deutschland, die dem Einsatz vorausging, und erläuterte, dass die Beteiligung der deutschen Bundeswehr an der Maritime Task Force dem Umstand geschuldet sei, dass die Bundesregierung einerseits einen aktiven Beitrag zur Lösung des Konfliktes leisten wollte, andererseits eine Beteiligung deutscher Truppen im Kampfeinsatz am Boden auf Grund der historischen Verantwortung Deutschlands ausgeschlossen wurde. Die rund 1000 deutschen Soldaten operierten nun im Rahmen der Sicherheitsratsresolution 1701; ihre konkreten Befugnisse und Kompetenzen bestimmten sich nach den vom Department of Peacekeeping-Operations verabschiedeten Rules of Engagement. Ebenfalls von völkerrechtlicher Bedeutung sei das allgemeine Seevölkerrecht, welches die Befugnisse außerhalb libanesischer Hoheitsgewässer bestimme.

Verfassungsrechtlich sei zu bemerken, dass der Deutsche Bundestag dem Einsatz deutscher Streitkräfte im Ausland im September 2006 gemäß dem Parlamentsbeteiligungsgesetz zustimmte. Weiter sei es unbedenklich, ein Lazarettschiff, das zu Selbstverteidigungszwecken bewaffnet sei, zu „vorbereitenden Maßnahmen" bereits vor dem Vorliegen eines solchen Parlamentsbeschlusses in See stechen zu lassen – in dem konkreten Fall sei aus politischen Erwägungen ohnehin darauf verzichtet worden. Von verfassungsrechtlichem Interesse könne jedoch die Frage werden, wie mit Personen verfahren werden soll, die an Bord eines deutsche Schiffes festgehalten würden. Obwohl diese gemäß des VN-Mandates an lokale Behörden übergeben werden müssten, ist fraglich, ob die deutschen Grundrechte eine Auslieferung nicht verhinderten, sollte in dem entsprechenden Land die Todesstrafe fortbestehen. Dies sei im Libanon zwar der Fall, doch sei weder der Tatbestand des Waffenschmuggels mit dieser Strafe bedroht noch hätten die deutschen Einheiten bislang Personen festgenommen.

Zu Beginn des zweiten Tages ging Prof. *Fischer* der Frage nach, welche möglichen Auswirkungen – von ihm als „Echos" bezeichnet – der Libanon-Konflikt auf die weitere Entwicklung des humanitären Völkerrechtes haben könnte. Dabei beschränkte er sich zunächst auf die Qualifizierung des bewaffneten Konfliktes sowie der an ihm Beteiligten und auf die Zulässigkeit bestimmter Methoden der Kriegsführung.

Er erläuterte erstens, dass sich die Kategorie des zwischenstaatlichen Konflikts nicht auf die konkrete Situation anwenden ließe, da dem Staat Israel eine Gruppe bewaffneter Personen und kein zweiter Staat gegenüber gestanden habe.

Ginge man davon aus, dass es sich um einen internationalen Konflikt zwischen dem Staat Israel auf der einen und der Hisbollah auf der anderen Seite handelte, sei jedoch zweitens weiterhin ungeklärt, welch individueller Status dem einzelnen Hisbollah-Kämpfer zukäme. Ohne Zweifel könne jedoch festgehalten werden, dass ihre Bezeichnung als Terroristen oder „unlawful combattants" derzeit jeglicher völkerrechtlichen Grundlage entbehre.

Drittens würden die Hisbollah-Kämpfer diese Unsicherheit zu ihren Gunsten nut-

zen, indem sie vortäuschten, als Zivilisten den Schutz des humanitären Völkerrechtes zu genießen. Dies entbinde die Oberbefehlshaber der Streitkräfte jedoch nicht von der Pflicht, den Status einzelner Personen zu ermitteln. Nicht ohne Grund habe die internationale Staatengemeinschaft während der Verhandlungen über die Zusatzprotokollen zu den Genfer Konventionen darauf verzichtet, einen Kriterienkatalog aufzustellen, anhand dessen Personen oder vielmehr ganze Personengruppen als Kombattanten zu klassifizieren seien. Die seit langer Zeit geführte Debatte über das Instrument der „direkten Beteiligung an Kampfhandlungen" habe nun neuen Impetus erhalten. Ebenso sei während des Libanon-Konfliktes die nach dem ersten Golfkrieg begonnene Diskussion über die Rechtmäßigkeit des Angriffs auf zivile Infrastruktur wie Straßen und Brücken fortgesetzt worden. Durch die Bombardierung solcher Ziele seien nicht nur die Versorgungswege der Hisbollah, sondern auch die Korridore der humanitären Hilfsorganisationen unterbrochen worden. Als letzten Aspekt griff Prof. *Fischer* den massiven Einsatz von Streumunition in den letzten 72 Stunden des Kriegsgeschehens auf. Dabei verwies er insbesondere auf die dadurch angetriebenen Verhandlungen im Rahmen der CCW sowie der Oslo-Initiative, die eine völkerrechtliche Beschränkung des Einsatzes von Streumunition oder gegebenenfalls sogar ihre internationale Ächtung zum Ergebnis haben könnten. Er gab diesbezüglich jedoch zu bedenken, dass es eines solchen internationalen Vertrages nicht zwingend bedürfe, da der Einsatz dieser unterschiedslosen bzw. unterschiedslos wirkenden Waffe bereits heute als völkerrechtswidrig anzusehen sei.

Abschließend bemerkte er, dass der Libanon-Konflikt weitere Echos ausgelöst habe, über die es sich in der Zukunft zu diskutieren lohne. Insbesondere sei zu klären, inwieweit ein Staat für Folgeschäden auf dem Territorium eines anderen Staates, auf dessen Staatsgebiet er bewaffnete Gruppen bekämpft habe, in die Verantwortung genommen werden kann. Zudem sei die Pflicht der internationalen Staatengemeinschaft, auf eine effektive Ahndung von Völkerrechtsverbrechen zu drängen, zu diskutieren, so *Fischer*.

Anknüpfend an den Vortrag von Dr. *Weingärtner* am vorherigen Tag berichtete Oberregierungsrat *Wolfgang Schall*, Rechtslehrer an der Schule für Feldjäger und Stabsdienst der Bundeswehr, über seine Erfahrungen als erster Rechtsberater im „Deutschen Einsatzkontingent UNIFIL".

Zunächst beschrieb er nochmals klar den Auftrag der deutschen Marineeinheiten: Dieser bestünde nicht darin, die gesamte Grenzsicherung zu übernehmen, da diese weiterhin in der Verantwortung des Libanons liege. Die deutsche Marine übernehme auf Ersuchen der libanesischen Regierung im Rahmen des UNIFIL-Mandats lediglich eine unterstützende Funktion. Gemäß den Rules of Engagement sei der Marine auch die Anwendung militärischer Gewalt gestattet, allerdings erst bei Erfüllung einiger genau definierter Bedingungen. Partner bei der Sicherung der Seegrenzen gegen die illegale Einfuhr von Waffen sei die libanesische Marine, welche von Oberregierungsrat *Schall* als sehr kompetent und international ausgebildet beschrieben wurde, allerdings unter schlechter materieller Ausstattung leide. Die Zusammenarbeit wurde dennoch als sehr gut bezeichnet, die Kompetenzteilung als entlang der Aufteilung der libanesischen Hoheitsgewässer klar definiert beschrieben. Während die deutsche Marine für die äußeren sechs Seemeilen zuständig sei, würden die inneren sechs Seemeilen in der Verantwortung des Libanons liegen. Nur für einen schmalen Streifen im Süden, im Grenzgebiet zu Israel, gebe es eine Sonderregelung. Die Aufgabe der deutschen Marine bestehe in der Abfrage von Schiffen und deren eventueller Umleitung bei Verdacht, während die konkrete Durchsuchung eines Schiffes im Hafen durch die libanesischen Behörden erfolge.

Eine Bedrohung der deutschen Marineeinheiten durch die Hisbollah oder durch Aktivitäten palästinensischer Flüchtlinge aus den Flüchtlingslagern heraus sei zwar latent vorhanden, hätte konkret allerdings bislang noch keine Probleme verursacht. Die „Zusammenstöße" mit israelischen Kampfjets, welche ein grosses Echo in der Presse gefunden haben, seien nach den Angaben *Schalls* weit dramatischer dargestellt worden, als sie es in der Tat waren. Tatsächlich gebe es keinerlei Probleme in der Zusammenarbeit mit Israel.

Zuletzt ging *Wolfgang Schall* auf seine Funktion als Rechtsberater auf See ein und veranschaulichte an einem Beispiel, wie erfolgreich die Überwachung in Kooperation mit der libanesischen Marine bisher verlaufen sei, wenngleich bislang keine Waffen sichergestellt oder verdächtige Personen verhaftet worden seien.

Als letzter Referent umriss und bewertete *Alfred Hasenöhrl*, Regional Representative des DRK in Amman/Jordanien die Aktivitäten der Rotkreuzbewegung während des Libanon-Konfliktes.

Dabei betonte er, dass die Hilfsaktionen des Libanesischen Roten Kreuzes hauptsächlich von freiwilligen Helfern durchgeführt worden seien, die dabei finanziell und logistisch sowohl von der Internationalen Föderation der Rotkreuz- und Rothalbmondgesellschaften als auch vom Internationalen Komitee vom Roten Kreuz (IKRK) unterstützt worden seien. Das IKRK sei als „lead agency" nicht nur darum bemüht gewesen, den Schutz der Zivilbevölkerung durch aktive Kommunikation mit den Konfliktparteien („protection") oder den Transport von Hilfsgütern sicherzustellen, sondern habe auch die Koordination der nationalen Rotkreuzgesellschaften übernommen. Das DRK habe der IKRK-Delegation zum Beispiel Personal zur Verfügung gestellt und den Syrischen Roten Halbmond bei der Versorgung libanesischer Flüchtlinge auf syrischem Staatsgebiet unterstützt.

Als positiv bewertete er die Schnelligkeit und Effizienz, mit der bestehende Strukturen nach der Entsendung eines „emergency appeals" durch das IKRK bei Ausbruch der Feindseligkeiten ausgebaut worden seien. Auch hätten die regelmäßig abgehaltenen Movement Coordination Meetings dazu beigetragen, die Hilfsaktionen der beteiligten Akteure sinnvoll zu koordinieren. Weitaus problematischer habe sich hingegen die Koordination mit der israelischen Armee gestaltet. Die Versorgung der Zivilbevölkerung sei mitunter schwierig gewesen, da Versorgungswege unterbrochen und die Schutzwirkung des Emblems unter anderem durch den Beschuss eines Rettungswagens in Zweifel gezogen worden seien.

3. Wertung

Zusammenfassend lässt sich sagen, dass der Libanonkrieg einige Fragen an das Völkerrecht aufgeworfen hat, welche auch im Rahmen der Tagung nur teilweise geklärt werden konnten. Die angeregten Diskussionen während der Tagung sowie der abschließenden Podiumsdiskussion ließen erkennen, dass insbesondere bezüglich der Rechtmäßigkeit der Anwendung von Waffengewalt gegen bewaffnete, nicht-staatliche Gruppen sowie im Hinblick auf den Begriff der „direkten Beteiligung an Kampfhandlungen" noch erheblicher Diskussions- und Klärungsbedarf besteht. Es bleibt daher zu hoffen, dass die Tagungen der Rechtsberater und Rechtslehrer der Bundeswehr sowie der Juristen und Konventionsbeauftragten des Deutschen Roten Kreuzes auch in den kommenden Jahren ein Forum für diese und ähnliche Fragen bieten.

Holger Zetzsche/Stephan Weber (Hrsg.), Recht und Militär. 50 Jahre Rechtspflege der Bundeswehr, Forum Innere Führung Band 26, Baden-Baden 2006, 194 Seiten, € 36

Dieter Fleck*

Den beiden Herausgebern ein Kompliment vorweg: nichts in diesem Band, der zu einem runden Jubiläum der kleinen Gruppe der Rechtsberater, Rechtslehrer und Truppendienstrichter der Bundeswehr erscheint, hat den Charakter von Lobeshymnen. Stattdessen wurde der Anlass genutzt, eine kritische Bestandsaufnahme der Organisationsstruktur der Rechtspflege in der Bundeswehr sowie ihrer wesentlichen Aufgabenfelder und Anforderungen zu unternehmen, ohne bestehende Probleme zu beschönigen oder Patentrezepte zu versprechen.

Für unbefangene Betrachter mag es paradox wirken, dass die Einrichtung der Rechtsberater und Rechtslehrer, die sich innerhalb und außerhalb der Bundeswehr großer Zustimmung erfreut und sogar als international anerkanntes Modell gelten kann, seit 1956 nur eine vorläufige Dienstanweisung hat und dass sogar Statusfragen, wie ihre verfassungsrechtliche Einordnung in die Streitkräfte oder die Wehrverwaltung, vor allem aber die Soldaten- oder Beamteneigenschaft bei Auslandseinsätzen noch immer nicht abschließend geklärt sind. Die Beiträge der Betroffenen machen allerdings deutlich, dass sie sich längst im Umfeld solcher „Vorläufigkeiten" fest eingerichtet haben und sich bewusst sind, dass wesentliche Herausforderungen, von deren Bestehen der Erfolg oder Misserfolg ihrer Tätigkeit abhängt, nicht durch verbindliche Regeln, sondern vielmehr durch überzeugende Argumente zu bestehen sind.

Die Mitautoren dieses Buches, die sich mit großer Sachnähe und sehr unterschiedlichen Erfahrungshorizonten zum Thema äußern, vertreten ausnahmslos ihre persönliche Auffassung. Dabei treten zum Teil auch gegensätzliche Standpunkte hervor, die weiterführenden Überlegungen nur nützen können. Sieht *Klaus Dau* die Rechtsgrundlage für die Tätigkeit der Rechtsberater ausschließlich in der dem Bundesminister der Verteidigung gemäß Artikel 65a GG zustehenden Organisationsgewalt, so erkennt *Knut Ipsen* eine gesetzliche Bindungswirkung im Zustimmungsgesetz zu den Zusatzprotokollen I und II zu den Genfer Rotkreuz-Abkommen (BGBl. 1991 II S. 968), das die völkerrechtliche Verpflichtung zur Rechtsberatung militärischer Führer, für deren Verankerung in Artikel 82 ZP I das deutsche Modell Pate gestanden hatte, innerstaatlich umsetzt. Handelt es sich dabei auch lediglich um eine Verpflichtung, Rechtsberater „bei Bedarf" verfügbar zu halten und militärische Führer der zuständigen Befehlsebenen bei der Anwendung des humanitären Völkerrechts sowie der „geeigneten Unterweisungen" der Streitkräfte auf diesem Gebiet zu beraten, so steht doch fest, dass es sich hier um eine Verpflichtung zu professioneller Rechtsberatung handelt, die eine entsprechende Ausbildung und Vorbereitung zur Voraussetzung hat, was auch organisatorische Kontinuität erfordert.

Zu Art und Umfang dieser Ausbildung und Vorbereitung bestehen allerdings recht unterschiedliche Vorstellungen. Während *Ipsen* die Empfehlung der Weizsäcker-Kommission unterstützt, „für die einsatzbezogene, insbesondere völkerrechtliche Rechtsberatung bei Auslandseinsätzen Soldaten mit entsprechender juristischer Ausbildung" zu verwenden, führt *Dau* eine Vielzahl von Gründen an, die für die Beibehaltung des beamteten Volljuristen sprechen, der sich militärische Kenntnisse meist durch Reserveoffizierausbildung und vor allem durch seine Tätigkeit am Arbeitsplatz erworben hat. Die Bereitschaft zu militärischer Fortbildung ist unter Rechtsberatern in der Tat besonders ausgeprägt. *Uwe Althaus* bezeichnet die SHAPE Guidelines For Operational Planning als unentbehrliches Handwerkszeug für den Rechtsberater. *Peter Dreist* spricht sich für eine Verzahnung der Ausbildung der Rechtsberater mit Teilen der militärischen Ausbildung für Luftbildauswertung und Waffenkunde aus. *Oskar Matthias Frhr. v. Lepel* wirbt für ein integratives Ausbildungskonzept unter enger Zusammenarbeit zwischen Taktiklehrern und Rechtsberatern. Dabei sollte die Notwendigkeit der rechtlichen und insbesondere der völkerrechtlichen Aus- und Fortbildung auch von Volljuristen nicht unterschätzt werden.

Die Beiträge dieses Bandes behandeln ein weites Feld, das das „Einsatzrecht" in einer Gemengelage zwischen Verfassungsrecht, Dienstrecht, humanitärem Völkerrecht, Menschenrechten und sowohl nationalem als auch internationalem Strafrecht beschreibt. Wie *Ipsen* mit vollem Recht betont, handelt es sich dabei im Gegensatz zur Deutschen Wehrmacht im Zweiten Weltkrieg nicht etwa um „freiwillig übernommene Verpflichtungen", um die Leiden der Opfer militärischer Einsätze „nach Möglichkeit" zu mildern. Bei Erlass und Anwendung der jeweiligen Regel muss deren Verbindlichkeit zum Ausdruck kommen und es sollte sichtbar gemacht werden, dass die Macht des Rechts auch Kraft verleiht.

Die Beiträge dieses Bandes lassen keine durchgängige rechtliche Doktrin erkennen, was bei der Vielgestaltigkeit von Streitkräfteeinsätzen und den dabei zu lösenden Aufgaben nicht überrascht, aber kritischen Nachdenkens bedarf. Zu Recht weist *Roman Schmidt-Radefeldt* darauf hin, dass sich heute, fünfzig Jahre nach Gründung der Bundeswehr, eine Entwicklung vollzieht, die „strukturell mit dem Aufgabenwandel der Streitkräfte nach dem Kalten Krieg vergleichbar ist – und dies nicht nur im Hinblick auf Einsatzgebiet und Einsatzziel, sondern auch in Bezug auf unsere Verfassung". So werden konkrete Auswirkungen der Subsidiarität von Streitkräfteeinsätzen und der Zusammenarbeit zwischen Polizei und Militär nur im europäischen Kontext zu klären sein. Einsatzregeln müssen sich nach weltweit gültigen Maßstäben richten, deren vertrags- und gewohnheitsrechtliche Verankerung nicht außer Acht gelassen werden sollte, was eigene Akzentsetzungen, die durchaus in deutschem Interesse liegen können, nicht ausschließt. Das Buch legt hier Regelungslücken offen, die bei allem Respekt für individuelle Auslegungsarbeit einheitlich und also „amtlich" geschlossen werden sollten. *Wolfgang S. Heinz* fordert eine kontinuierliche Überprüfung der Antiterroristengesetzgebung auf ihre Wirksamkeit und nicht beabsichtigte Wirkungen, aber auch neue Anstrengungen bei der Ausbildung der Bundeswehrangehörigen in fundamentalen Fragen des Menschenrechtsschutzes und seiner extraterritorialen Anwendung. Eine amtliche Bestandsaufnahme und klare Handlungsanweisungen für den Soldaten sind hier gefragt. Andererseits überrascht *Dreist* mit der Auffassung, im nicht internationalen bewaffneten Konflikt könnten „allenfalls ... Grundsätze des humanitären Völkerrechts, und zwar der Opferschutzgedanke, der Grundsatz der Menschlichkeit oder die Fortgeltung der Schutzzeichen, keinesfalls aber das Kampfführungsrecht gelten"; auch sei die Forderung, bei militärischen Friedenseinsätzen das humanitäre Völkerrecht zu beachten, „zwar von einem humanitären Geist getragen, inhaltlich aber unzutreffend".

Es liegt im Interesse aller an Auslandseinsätzen Beteiligten, solchen persönlichen Auffassungen überzeugende Anweisungen

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für die Praxis entgegenzusetzen. Was den für die Bundeswehr bisher nur in Randbereichen relevant gewordenen Fall des nicht internationalen bewaffneten Konflikts betrifft, so sind die in Artikel 8 Abs. 2 Buchst. c) des Römischen Statuts des Internationalen Strafgerichtshofs (BGBl. 2000 II S. 1394) zusammengefassten Regeln, aber auch das fortschreitende Völkergewohnheitsrecht zu beachten. Für Friedenseinsätze der Bundeswehr, auch wenn sie nicht einem VN-Kommando unterstehen, sollten die einschlägigen Richtlinien des VN-Generalsekretärs befolgt werden, wonach die Grundprinzipien und Grundregeln des humanitären Völkerrechts auf Friedenstruppen Anwendung finden, „soweit und solange sie in Situationen des bewaffneten Konflikts als Kombattanten aktiv an dem Konflikt beteiligt sind", demzufolge auch „bei Zwangsmaßnahmen oder bei Friedensoperationen, wenn der Einsatz von Gewalt zur Selbstverteidigung gestattet ist"[1]. Die extraterritoriale Geltung von Menschenrechten muss auch bei robusten Friedenseinsätzen deutlich gemacht werden. Dies entspricht nicht nur einer humanitären Grundeinstellung, vielmehr dient es dem Interesse, dem Ziel eines Friedenseinsatzes nicht durch fragwürdige Mittel und Methoden zu schaden, die einer gerichtlichen und parlamentarischen Kontrolle kaum standhalten könnten.

Die verantwortliche Rolle des Rechtsberaters ist nicht nur bei der Auslegung völkerrechtlicher Verpflichtungen gefordert, sondern ebenso bei der Ahndung von Rechtsverletzungen. *Stephan Weber* beschreibt anschaulich, dass der Rechtsberater in vielfältiger Weise an der Strafrechtspflege mitwirkt, nicht nur im Rahmen der amtlichen Auskunftserteilung, sondern auch durch eigene Ermittlungsarbeit in Abstimmung mit den Strafverfolgungsbehörden. Er zeigt, dass die letztere, vor allem bei Auslandseinsätzen wichtige Aufgabe weitgehend hinter die operative Rechtsberatung zurücktreten muss, betont aber auch die Rolle des Völkerstrafgesetzbuchs (BGBl. 2002 I S. 2254) als Bezugsdokument für die Rechtsberatung. *Claus Kreß* stellt die Entwicklung des Völkerstrafprozessrechts mit ihren auch für Rechtsberater wissenswerten Auswirkungen vor. In einem grundsätzlichen Beitrag zu militärischem Gehorsam und Gewissensfreiheit setzt *Hans Georg Bachmann* sich mit dem Urteil des Zweiten Wehrdienstsenats des Bundesverwaltungsgerichts vom 21. Juni 2005 – 2 WD 12.04 –[2] auseinander, durch das ein Major, der sich geweigert hatte, an einem IT-Projekt mitzuarbeiten, weil er befürchtete, mit diesem Projekt die seiner Ansicht nach rechtswidrige Beteiligung Deutschlands an dem Krieg gegen den Irak zu unterstützen, vom Vorwurf des Ungehorsams freigesprochen worden ist. Das Bundesverwaltungsgericht hatte die Frage, ob der erteilte Befehl völkerrechtswidrig und damit unverbindlich war, nicht entschieden, sondern die Unverbindlichkeit des Befehls mit der subjektiven Gewissensentscheidung des Soldaten begründet, obwohl dieser ausdrücklich erklärt hatte, dass er eine Entscheidung des Bundesverfassungsgerichts zur Vereinbarkeit des ihm erteilten Befehls mit allgemeinen Regeln des Völkerrechts akzeptieren würde. *Bachmann* spricht sich dafür aus, Verbindlichkeit und Rechtmäßigkeit eines Befehls zu prüfen, bevor der Frage nachgegangen wird, ob Gewissensgründe ausnahmsweise zur Unverbindlichkeit des Befehls führen. Dadurch werde vermieden, dass einem Soldaten auch dann eine Gewissensentscheidung abverlangt wird, wenn mangels Verbindlichkeit des Befehls keine Gehorsamspflicht besteht. So begrüßenswert diese Überlegung auch ist, da sie das Recht des Soldaten auf klare Führungsentscheidungen auf gesicherter rechtlicher Grundlage unterstreicht, lässt sie sich doch kaum auf diejenigen Fälle anwenden, die zwischen Vorgesetzen und Untergebenen rechtlich umstritten bleiben. Hier wird der Untergebene von vornherein alle Argumente vortragen, die aus seiner Sicht gegen die Ausführung des Befehls sprechen. Er wird sich dabei auch auf Gewissensgründe berufen müssen, wenn er für den Fall, dass die Verbindlichkeit des Befehls geklärt ist, damit noch gehört werden will.

Zum Ausblick auf die Rolle der Rechtspflege der Bundeswehr im 21. Jahrhundert hält *Holger Zetzsche* eine stärkere Verzahnung der Rechtslehre mit der Rechtsberatung für möglich, die sich am fortschreitenden Wandel der Bundeswehraufgaben orientiert. Trotz des berechtigten Lobs für ihre qualifizierte Aufgabenerfüllung fehle es der Rechtspflege an nachhaltiger Anerkennung und Unterstützung. An diesem speziellen und wichtigen Organisationsbereich zu sparen und zu transformieren, mache wegen der ohnehin geringen Personalstärke, aber auch wegen der nicht ersichtlichen strukturellen Probleme keinen Sinn. Es bleibt zu hoffen, dass so viel kritische Argumente nicht ohne politische und fachliche Resonanz bleiben. Die Organisation der in Rechtsfragen ausschließlich der Rechtsabteilung des Bundesministeriums der Verteidigung unterstellten Rechtspflege sollte dauerhaft gestärkt, ihre personelle Unterstützung und fachliche Fortbildung gesichert und etwa bestehende Zweifel zur Tragweite bestimmter Rechtsgrundsätze sollten durch klare Verhaltensanweisungen ausgeschlossen werden.

[1] Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, ST/SGB/1999/13, Section 1.1, in International Peacekeeping 5/(4-5), 1999, 160.

[2] JZ 2005, 913; NZWehrr 2005, 254.

Marten Zwanenburg, Accountability of Peace Support Operations, Martinus Nijhoff, Leiden 2005, 364 pages + xii, € 98

Robin Geiß*

Marten Zwanenburg, in this revised version of his PhD thesis, has delivered a timely analysis regarding the highly topical issue of the scope and content of responsibility and accountability for breaches of international humanitarian law by peace support operations. The question "Who guards the guardians?" has gathered significant momentum ever since the Security Council revived after the Cold War came to an end. While the Security Council had laid largely dormant throughout the decades of the Cold War, the 1990s have seen a sharp increase in Security Council activity, namely in the adoption of measures under Chapter VII of the Charter. Initial euphoria about the Council's resurrection soon gave way to an array of concerns inherently connected to Security Council enforcement action and the activities of some peace support operations. In this context the author, after an historic reflection on the United Nations Operation in the Congo in july 1960, reflects in an introductory manner on examples of alleged and partially proven misconduct of United Nations Operations in Somalia (UNOSOM I, II; UNITAF) as well as of KFOR personnel in the former Yugoslavia.

In the following introductory chapter Zwanenburg identifies his main research objective, outlines the structure of his study as well as the research methodology applied and provides the reader with three main research questions to be pursued in the course of his analysis. First, to which legal entity

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must the conduct of a peace support operation be attributed? Secondly, what is the scope of international humanitarian law rules which are binding on states and international organisations that take part in peace support operations? Thirdly, who is entitled to invoke responsibility and accountability for breaches of international humanitarian law by peace support operations, and which mechanisms are available to invoke them? Despite the considerable activity of ECOWAS and an increasingly important role of the EU in the context of peace support operations Zwanenburg limits his study to peace support operations under the United Nations and NATO as the two most dominating organisations in the field of peace support operations.

In the first chapter, the author traces the historic development of peace support activity under UN command and illustrates how the sheer variety of such operations, each of which had to be adapted to the individual circumstance at the time in a rather *ad hoc* fashion, has barred the evolution of a uniform definition of peace support operations. In line with the overall research objective the author restricts his definition to such operations that involve activity of armed forces and relies on the definition of peace support operations developed by NATO.

In chapter two, the author turns to the question of attribution of conduct of peace support operations to the international organisation authorising them as well as with regard to respective due diligence obligations of the contributing states. Zwanenburg, resorting to customary law, focuses on the criteria of attributability and argues in favour of an application of the principles of the law of state responsibility towards international organisations by way of analogy. In chapter 3, the author then turns to the question of the applicability of international humanitarian law norms vis-à-vis peace support operations. This chapter is particularly valuable because it sets into context more recent developments, particularly state and organisational practice, as reflected e.g. in the Model Participating State Agreement, Status of Forces Agreements, the Convention on the Safety of United Nations and Associated Personnel, the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law as well as the Statutes of the ICC (esp. Art. 8, 2 b) iii) and the Special Court for Sierra Leone. On the basis of this analysis the author establishes the application of international humanitarian law to international organisations with accepted international legal personality. Moreover, Zwanenburg argues that state practice illustrates that the international/non-international armed conflict dichotomy is irrelevant to UN peace support operations; first of all because state sovereignty is not an attribute of international organisations, and secondly because he sees an increasing tendency to abandon this traditional dichotomy in contemporary practice. Finally, arguably to restrict the potentially wide range of his foregoing findings, the author demands a relatively high level of intensity for the application of international humanitarian law vis-à-vis peace support operations.

In chapters 4 and 5, focus is shifted towards the question of the legal consequences for breaches of international humanitarian law by peace support operations and existing mechanisms for invoking such responsibility. Again the author seeks orientation from the ILC draft articles on state responsibility, manoeuvres through the rather sporadic and incoherent practice and concludes that manifold obstacles remain with regard to the invocation of international responsibility of an international organisation for the violation of international humanitarian law by peace support operations. The concept of the "injured state" remains central to the invocation of international responsibility and thus bars individual action in cases where a state for whatever reasons is unwilling, or as it was the case in Somalia, unable to act in the interest of its citizens. While the author sees some potential in the existing international human rights machinery to provide an acceptable forum for the invocation of international responsibility of international humanitarian law, in chapter 6, he innovatively proposes a number of new mechanisms for invoking accountability. Here, the author focuses attention on past proposals for the establishment of an international humanitarian ombudsperson who would handle allegations of abuse by peacekeeping staff on the global level and simultaneously considers the creation of mission-based ombudsperson offices. Zwanenburg concludes that an ombudsman can be a remedial mechanism for the rights of individuals and proposes that a permanent claims commission and the institution of the ombudsman should be established as complementary mechanisms in order to implement the entire scale of what international responsibility entails, i.e. legal as well as political responsibility.

It is certainly the wealth of legal materials, state and organisational practice considered throughout the study as well as the innovative ideas outlined in the concluding chapter which make this contribution particularly valuable. The topic is timely and of eminent importance for the future development for international humanitarian law, especially in light of the fact that the number of peace support operations is rather likely to increase in the future. It is for these reasons that Zwanenburg's work has been awarded the Paul Reuter Prize 2006 by the ICRC and is thus to be warmly recommended to anyone working in the field of peace-keeping and humanitarian law. ■

Dennis Dijkzeul (ed.), Between Force and Mercy. Military Action and Humanitarian Aid, Berlin 2004, 417 pages, € 44

Wolf-Dieter Eberwein*

One of the threats to the humanitarian agencies today are competitors of a special kind: the soldiers. Some states however, committed to the preservation of the partial international humanitarian order in the case of armed conflict, the *ius in bello*, tend to consider humanitarian aid as an instrument in their political toolbox rather than as an end in itself. This is why they are supportive of the military's intrusion into the humanitarian space guaranteed by international humanitarian law. Against this very much simplified picture of humanitarian action today the title of the book edited by Dijkzeul is slightly irritating. The main title "between force and mercy" does not correspond to the content of the book (which is worth reading) as force in this case is primarily treated as the instrumental correlate of the new US vision of world order and how to construct it. Mercy, furthermore suggests that humanitarian action is some charitable kind of activity. Yet, nowadays humanitarian aid is considered to be an obligation of the international community rather than a discretionary activity of people who care about victims of their choice.

The subtitle refers to one central aspect of this new security paradigm, its conse-

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quences for the relationship between the humanitarian actors and the military. Whereas the humanitarians mostly deplore their increasingly limited range of action, at least some of the military has learnt that humanitarian activities in general are not really their specialty and that both communities must find ways and means to live side by side. What becomes clear after having read the book is that the political decision makers' ambitions, visions and expectations contrast with the deficiencies of translating them into efficient and effective action programs. What the book also reveals is that the present practices undermine the existing international humanitarian principles.

This being said the various papers included cover a much larger array of issues than title and subtitle suggest which is the value added of the book. Less satisfied would be a reader expecting to find out more about the difficult if not potentially destructive coupling of military intervention with humanitarian aid. The question then is what this book, the outcome of a conference organised in 2002 by the Humanitarian Affairs Program of Columbia University, provides in terms of new insights and answers. Two years after the publication of the 14 revised papers the answer is necessarily mixed.

The book is subdivided into three parts; Context and Concepts (I), Policy Differences and National Differences ((II), Field Perspectives (III). After the introduction by the editor the first part on "contexts and concepts" includes three papers, one by Dijkzeul dealing with "old optimism and new threats", the analysis by Fomerand on "American concepts of multilateralism" and by Danchin on "human rights, humanitarian law and the war on terrorism". Dijkzeul's article is interesting given his ambition to be comprehensive. This is certainly the case given his elaborated dimensional analysis. But unfortunately comprehensiveness is traded off for precision in the details. The knowledgeable readers already knew most of it and some might even disagree with some of his observations. The paper by Fomerand is illuminating in that it clearly shows the restrictive US perspective on multilateralism, a sort of marriage between *realpolitik* and a Wilsonian vision. What happens when r*ealpolitik* dominates is very precisely analyzed by Danchin. His point is that the present US administration is in the very process of destroying the international order, as unsatisfactory and limited as it may be, both the *ius ad bello* and the *ius in bello*, the former going at the expense of human rights, the latter undermining humanitarian law.

What this first part reveals is the fact that the book has a clear US bias. This is somewhat unfortunate as the European Union as a relevant set of actors is anything but an appendix of US policy and US NGOs. The only exception of this "super power bias" is the paper by Herman about the Dutch and their engagement both in military and humanitarian terms which is included in the second part "policy differences and national differences". The paper by Spieker on the "International Red Cross/Red Crescent" provides the normative background as to how the military-humanitarian relationship should be organised in order to satisfy international humanitarian law. The article by Bardos – a critique of "US policies in the Balkans" – illustrates the comment made in the introduction that policy objectives and practice diverge considerably. Desired objectives and actual performance do not match. According to the author almost everything went wrong in terms of the policies pursued in the Balkans. As the late Karl Deutsch wrote many years ago, power is the ability not to learn. That could be the inference one can draw from the analysis of Collins and McNerny of the "US experience in Afghanistan". The military intervention following the 9/11 terrorist attack is for the time being the watershed between a potential solution as how to put into practice among others a principled relationship between the military and the humanitarians outlined among others in the UN document on Military-Civil Defense Assets. If these guidelines were followed that might have helped to retain the relative neutrality, impartiality and independence of humanitarian action from the military. That might as well have avoided the instrumentalisation by, and interference of, the military in the domain of humanitarian aid.

The third part on "field perspectives" includes six papers, all of them are stimulating and providing the reader with new insights. To read the article by Rollins, a UK army officer, on "cooperation and coordination" between the military and the humanitarians is refreshing in that an experienced soldier clearly reminds politicians that the military can do a number of things which the humanitarians cannot and vice versa. He offers a pragmatic point of view that might be useful for resolving what he calls the humanitarian paradox: keeping the distance from each other which presupposes some form of cooperation between them. Lack of adequate financing is another issue which points to the general inadequacy of political planning if not inability of policy makers to learn as Garfield shows in his study on the "consequences of sanctions". Sanctions are mostly ineffective and cause more humanitarian problems than resolving them. His perspective is focused on the impact of sanctions on public health. The same author also analyses the "humanitarian action in Iraq". Against the background of the time passed since 2004 his analysis would probably be different with respect to the humanitarian activities of NGOs even though still valid with respect to the glaring inability of the US to stabilize the country.

One element of humanitarian action beyond the US bias is demining. Salomon analyses and evaluates the consequences of "UN coordination of humanitarian mine action in Kosovo". According to him this was a relatively effective response to an important issue. Yet again the funding mechanism was inadequate. Whereas Diskett, Hansch and Randall focus on civil military relations in humanitarian assistance after 9/11, Bornemisza and Poletti assess the impact of the war in Iraq on the challenges to neutrality, impartiality and independence of humanitarian action. The former point to the paradox that more interventions go hand in hand with the decreasing usefulness of the military, the latter are somewhat undecided as how to evaluate the consequences. In both wars NGOs refused to deliver aid, a responsibility of the occupying power, through the military. This seems to contradict the other critique they raise, namely that, among other things, independence and impartiality were severely constrained in the immediate build-up to the war. Their conclusion, however, that humanitarians should learn to be more proactive and strategic in their approach to responding to humanitarian crises seems too simple. In the end, humanitarians can only decide whether to "take it or to leave it", if the military – or even more precisely – politics disregard humanitarian principles.

In his conclusion: "winning the war and losing the peace" Dijkzeul undertakes once again the heroic effort to synthesize the findings of the book. Again, as laudable as the intention is and as provocative and intellectually challenging his four scenarios are as to how the future may look like, some doubts remain. One is the author's insufficiently elaborated notion of terrorism as a major international threat in combination with weapons of mass destruction. For one, terrorism is not at all predominantly an international or transnational phenomenon but first of all nationally or regionally limited. Terrorism has become a kind of wild card used for legitimizing the indiscriminate use of force. Criminal offenses or conflicts which could be considered as non-international conflicts according to the second Additional Protocol of the Geneva Conventions are treated as one and the same evidence of terror against which every means is justified in waging war. The

danger of terrorists acquiring and using weapons of mass destruction is based on a risk assessment that is a very specific construction of political reality. The probability of a nuclear attack by terrorists is unknown and very likely close to zero. The probability, however, that the war against terror undermines not only the credibility of the US but also threatens the existing norms enshrined in human rights and humanitarian law, not to speak of some fundamental democratic principles (in particular in the US), is relatively high as the past few years have shown. Thus far, neither the militarization of humanitarian action nor so-called humanitarian interventions have benefited the victims of armed conflicts, nor have they contributed to the construction of the new world order.

Notwithstanding the critical remarks the book is definitely worth reading. ■

David M. Malone (ed.), The UN Security Council. From the Cold War to the 21st Century, Lynne Rienner Publishers, Boulder 2004, 745 pages, $ 29.95

Noëlle Quénivet*

The role of the United Nations Security Council is central to ensuring that the world lives in peace and that States abide by the main principles of international law, notably by settling peacefully their disputes. More importantly the Security Council regulates the use of force between subjects of international law and is entitled to expand/limit the scope of application of the prohibition of the use of force. It is in this context that one must read Malone's edited book on the UN Security Council.

The book, divided into five parts, aims to provide the reader with a broad view of the work accomplished by the Security Council "from the cold war to the 21st century" as its title indicates. In reality, the book gathers a series of articles describing the positions of the five permanent members towards certain issues and then goes into analysing major UN peace operations established by the Security Council.

The book is divided into five major chapters, "security council decisionmaking: new concerns", "enforcing council mandates", "evolving institutional factors", "major UN operations on four continents" and "implications" that deal with all relevant and contemporary issues pertaining to the work of the Security Council. It must be added that although the high number of chapters, 39 all in all, may look disconcerting at first glance, it makes it easier to read and especially to locate information on particular issues.

Like any book comprised of a plethora of contributions, some chapters are challenging while others more descriptive. Due to space constraints, the reviewer only focuses on some chapters that reflect the general content and style of the book. Generally, barring some exceptions, the contributions are descriptive, offering the well-informed reader little new and engaging material. Reading the contributions the reviewer could not get rid of this awkward feeling of déjà-vu as many of these chapters have been in full or part published elsewhere. On the other hand, this book is of great use for those who are newcomers in the field and wish to obtain basic information presented in a logical fashion.

Taking an innovative approach, the first part deals with the Security Council decision-making and examines various contemporary issues such as human rights and terrorism.

Weschler's presentation of the way human rights were slowly included in the policy of the Security Council challenges some preconceived ideas. First, she depicts the evolution of the approach of the Security Council towards human rights and its initial reluctance to examine human rights-related issues. In a second step she pinpoints that the generally held view that the Security Council took seriously human rights violations after 1991 is wrong. To bolster up her stance she explains that initially only informal briefings took place (p. 62) since the Security Council refused even listening to complaints related to human rights violations. She also indicates that at the beginning members of the Security Council had little access to relevant information as they had developed only few links with NGOs. In her opinion, it was Kofi Annan who put human rights high on the agenda of the Security Council. From then on the Security Council not only articulated a policy aimed at stopping human rights violations but also at preventing them. In this regard, Welscher's contribution is an outstanding insight into the life of the Security Council and its stance towards human rights.

In stark contrast stands chapter 6 that is more narrative and lacks in-depth analysis. Luck's contribution is a historical description of the Security Council's reaction to terrorism and the growing legal acceptance of unilateral acts of counter-terrorism. For example, it is regrettable that, when explaining that the US has always preferred unilateral action (p. 93) to reply to terrorism, Luck does not investigate the different forms that anti-terrorism may take in legal literature (pre-emptive, preventive, retaliatory, anticipatory, interceptive use of force). Rather his comments stay general. Further, although his idea that the Middle East is a source of conflict leading to terrorist activities is of interest in the framework of the fight against terrorism, Luck does not elaborate much on it so that the reader is left with many questions and no answers.

The second part of the manuscript centres upon enforcement mechanisms, investigating notably the concept of the use of force and "virtual trusteeship".

Roberts starts his chapter on the use of force by explaining how the two challenges of humanitarian intervention and the right to act pre-emptively against emerging threats are affecting the two major international law principles of non-intervention and sovereign equality of States. He believes that to protect the principles from violations force can only be used if approved by the United Nations. In his opinion, there are two possibilities: either the UN endows certain States with the right to enforce a UN mandate or UN forces engage in such an activity. Unfortunately both decisions are highly dependent upon political considerations (pp. 138-139). Following his theory that the use of force can only be approved by the UN Roberts makes the case for the legality of the use of force against Iraq on the basis of former Security Council resolutions (p. 143). The "revival theory" has, however, been harshly attacked. First, the presumption of continuity of Security Council resolutions is more than doubtful. Second, the said resolutions, though endowing the Coalition with enforcement powers, were linked to a particular situation, that between Iraq and Kuwait, and cannot be applied in all cases relating to Iraq. Rather impressive in the chapter is

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Roberts' courage to define the terms pre-emption and prevention (pp. 144-148) and criticise the Bush doctrine because, in his opinion, it does not fit the criteria set by the *Caroline* case and, moreover, does not take into account the consequences of such a position. Turning back to the political element contained in international law Roberts admits that reasons for expanding the possibilities to use force hinge upon new situations and it is therefore difficult to predict under which circumstances a State may lawfully use force.

Another interesting chapter in part II speaks of "virtual trusteeship", a highly intriguing notion put forward by Chesterman. Typical of his writings is the mixture of high quality analysis and crusty comments and anecdotes. For example, he refers to documents that few people, even specialists, know such as the draft submitted by Norway to provide for a broader trusteeship mandate that would have allowed the UN to set up operations such as those undertaken in East Timor and Kosovo. Like many other authors he also suggests his own taxonomy of peacekeeping operations based on the local political context. As a result, he categorises them according to the clarity of the final status of the territory administered by the UN. Undoubtedly, this determines the activities undertaken by the UN and, more particularly, their success. Finally, Chesterman raises the difficult question of how the UN can fit the reality and plan what is exactly necessary for a specific mission. Unfortunately, Chesterman does not offer any practical solution to these issues, thereby unwillingly demonstrating that the UN can only react, improvise, and provide for *ad hoc* and sometimes inappropriate solutions.

Part III of the book investigates the evolving institutional factors surrounding the work of the Security Council. Focus of this review are the international criminal tribunals/courts and the role of the US in the Security Council.

The general introduction to the international criminal courts is rather disappointing considering the solid background of the three practitioners (Philippe Kirsch, John Homes and Mora Johnson) who wrote it. One would have expected a more juicy presentation of the courts from the writers. In fact, for those who are already acquainted with the tribunals and their history this contribution is just a repetition of common positions. The only catching parts of the article relate to the position of the Security Council towards such tribunals once they started to work. For example, they point out that the Security Council did not support the ICTY much after its establishment. Further, the Security Council passed the shameful resolution 1422 providing immunity to UN peacekeepers, thereby undermining the current wave towards the eradication of immunity for serious violations of international law and thereby cutting short its own impulse towards generating peace through justice.

Rawski and Miller were assigned the difficult task to report on the role of the United States in the Security Council. Their greatest complaint is that although the US has launched many virtuous initiatives in the Security Council it has often been rather inconsistent and in some cases even opposed reforms they had instigated. Examples provided are, *inter alia,* the expansion of the notion of "threat to international peace and security", the support for the creation of the *ad hoc* international criminal tribunals and the use of sanctions, all efforts initially driven and subsequently undermined by the US in the Security Council. These illustrations are undoubtedly the main strength of this article since it is rare to read contributions that so bluntly present the facts. Further, the authors try to explain this paradox by referring to the American exceptionalism, the influence of the US public opinion, and the activism of Congress that dominate US foreign politics.

The last major part of the book focuses on the major UN operations. Eleven operations were chosen, some of them, e.g. Rwanda, East Timor, presented in separate chapters written by different authors.

In few but pithy pages Berdal provides an excellent account of the role of the Security Council or lack thereof during the armed conflict in Bosnia. He rightly explains that although all major powers agreed upon the necessity to sponsor the provision of humanitarian aid, they could not subscribe to a common political and military strategy to put an end to the conflict. The creation of the safe areas showed the will but not the power of the Security Council mainly due to internal disputes within this institution. Peacekeeping in this framework is definitely the wrong word to be used, as there is no "peace" to keep. Berdal stresses that containment obviously fits better to the situation. Even when the Security Council used its Chapter VII powers it "was often just as concerned with conveying the impression of resolve as it was with taking meaningful action on the ground" (p. 460). Berdal also sounds a note of caution against the myth that it was Operation Deliberate Force in August 1995 that led to Milosevic caving in to the negotiation table. Berdal makes the case that it was rather a combination of factors and, more particularly, the notes sent to Milosevic by military commanders in the field that guided Milosevic's move. On a sad but real note, Berdal concludes that the conflict showed that despite the end of the cold war and the hopes raised after the UN operation in Iraq the Security Council could not agree on common values to protect under all circumstances.

Another appealing chapter is the one on the conflict in Sierra Leone. Hirsch starts his contribution by heralding that the peacekeeping mission in Sierra Leone was a success despite the fact that it was carried out in Africa and blatantly lacked resources. In other words, he points out that if the will is there, in that case it was the support of the United Kingdom, it is possible to bring peace to an African country with limited means. It is such a pity that his words do not resonate in the ears of the Security Council when it passes resolutions on Darfur! Further, Hirsch indicates that only a mixture of measures brought peace to Sierra Leone: military pressure, continuation of the negotiations, sanctions against Liberia, the establishment of the Special Court for Sierra Leone and so on. It is quite comforting to read such lines in a period where individuals often argue that only military actions based on humanitarian grounds can solve a crisis. It is indeed the mixture of measures that leads to a solution accepted by the international community as well as by the local population. Unfortunately, in examining this armed conflict, the Security Council forgot to look at the region as a whole, preferring to deal with countries one by one, as if no links existed between for example Liberia and Sierra Leone. This is to obliterate regional dynamics and the way conflicts feed each other. The Security Council stance towards the conflict in the Democratic Republic of the Congo is another proof of the veracity of Hirsch's words. Breaking new grounds this chapter is probably one of the most challenging and best written.

The book concludes with three chapters concentrating on legal and political issues pertaining to the Security Council. More generally the book, taken as a whole, offers an outlook on the future role of the Security Council. The range of issues broached makes it an excellent reference work to be used in courses focusing on the use of force, collective security and more particularly the Security Council. Its price also makes it easily available to students. ■

Michael Byers, Kriegsrecht, Berlin 2005, 215 Seiten, € 24.80

Regine Reim*

„Die Welt soll besser werden – für alle. Den Regeln des internationalen Kriegsrechts zu gehorchen ist ein notwendiger erster Schritt in dieser Richtung." – So das Fazit von *Michael Byers*, Professor für Internationale Politik und Internationales Recht an der Universität von British Columbia in Vancouver, Kanada. Als Beitrag dazu sieht er seine Publikation zum Kriegsrecht, die nicht nur Fachleuten, sondern vielmehr dem interessierten Laien einen leicht verständlichen Einblick in das Kriegsvölkerrecht geben soll. Um insbesondere diese Zielgruppe der allgemein interessierten Öffentlichkeit anzusprechen, ist das Werk kaum klassisches Lehrbuch, sondern vielmehr eine fachliche Aufbereitung der Geschichte und aktueller Entwicklungen der Materie. *Byers* will anhand konkreter Präzedenzfälle die politische Aktualität des Kriegsrechts belegen, dies insbesondere vor dem Hintergrund der in den vergangenen Jahrzehnten zu beobachtenden Entwicklung von Konflikten zwischen souveränen Staaten hin zu einer wachsenden Zahl innerstaatlicher Konflikte.

Thematische Kernbereiche der Abhandlung sind die Handlungsvollmacht der Vereinten Nationen, Fragen der Selbstverteidigung (insbesondere auch des Sonderfalls der präemptiven Selbstverteidigung), humanitäre Interventionen sowie das im bewaffneten Konflikt geltende Völkerrecht, einschließlich der Darstellung von Durchsetzungsmechanismen der internationalen Gerichte und Tribunale.

„Das Gleichgewicht zwischen militärischen und humanitären Erwägungen ist ins Wanken geraten." – so *Byers*. Politische und finanzielle Überlegungen führten demgemäß dazu, dass zunehmend militärische Notwendigkeit über humanitäre Rücksichtnahme gestellt werde. In der Debatte der Verletzung von Regeln des humanitären Völkerrechts – illustriert am Beispiel des Golfkriegs von 1991 – vertritt *Byers* die Meinung, dass in derartigen Fällen zumeist keine willentliche Rechtsverletzung anzunehmen sei, sondern vielmehr unterschiedliche Interpretationen der Gesetze der Ausgangspunkt von Rechtsstreitigkeiten seien.

Byers führt einleitend in einige Grundbegriffe ein, beginnend mit dem Terminus „Kriegsrecht", „Recht des bewaffneten Konflikts" und „humanitäres Völkerrecht". Die notwendigen rechtlichen Bestimmungen werden in den Text eingeflochten und anhand konkreter Fallbeispiele erörtert. Fußnoten finden sich im Interesse der Lesbarkeit nicht, wohl aber ausführliche Quellenhinweise und ausgewählte Websites im Anhang, ebenso wie ein Personenregister. Als eines der zentralen Dokumente des Rechtsgebiets ist im Anhang die deutsche Fassung der Charta der Vereinten Nationen beigefügt. Wohl am Erscheinungsdatum der zugrunde liegenden englischsprachigen Originalfassung mag es liegen, dass noch separate Verweise auf die ICRC-Datenbanken zum Kriegsrecht sowie zu den Genfer Abkommen und den Zusatzprotokollen aufgeführt sind. Im Interesse der Aktualität sei an dieser Stelle auf die neue Fassung der IKRK-Datenbanken zum humanitären Völkerrecht (http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Info_resources:IHL_databases?OpenDocument) hingewiesen, die sowohl das zugrunde liegende Vertragsrecht als auch den Stand der Implementierung auf nationaler Ebene dokumentieren. Hilfreich gerade für den fachlichen Neueinsteiger wäre eine Übersicht einschließlich der Fundstellen zu den zentralen Abkommen der Rechtsmaterie im Buch selbst gewesen.

Thematische Vollständigkeit kann man aufgrund der Zielstellung des Buches nicht erwarten. So fehlt beispielsweise eine Auseinandersetzung mit der aktuellen Problematik der Nutzung von Gefängnissen und u.U. auch Folter von Gefangenen in Drittstaaten durch Nationen, die sich selbst dem Genfer Recht verpflichtet haben. Gleichwohl wird das Werk dem Anspruch gerecht, Grundzüge der Materie zu vermitteln und Anreize für eine weitergehende Beschäftigung zu setzen.

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Anne-Marie Slaughter, A New World Order, Princeton University Press, Princeton 2004, 341 pages, € 16.95

Dennis Dijkzeul and Aram Weitzman*

Anne-Marie Slaughter's notable new book, A New World Order, boldly claims not only that human kind needs a new world order, but that this order already exists. Such claims for a new world order, however, often draw considerable derision and cynicism as they are extremely hard to realize. The New International Economic Order that the developing countries proclaimed in the 1960s and 1970s has never become a reality. Instead, it divided UN member states and paralyzed the world body. Similarly, President George H.W. Bush's proclaimed new world order, after defeating Saddam Hussein in the 1991 Gulf War, never came to fruition. Yet, the search for such an order has never come to a halt.

Even the staunch realist, Edward Hallett Carr, ended his classic "The Twenty Years' Crisis, 1919-1939" with an exhortation to the international community to find a new basis for the international world order.[1] This is all the more telling given that his book was a formidable critique of an era that both produced the League of Nations and witnessed its demise. However, Carr also warned against pursuing world government models "until some progress has been made in digging the foundations" (Carr, p. 239). Now, 60 years later, Slaughter contends that these foundations exist and are ready to be fortified and built upon. However, they are not the foundations of a world *government*, but of a system of world *governance*, based on transnational government networks.

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[1] For a recent edition, see Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939*, Houndmills, Palgrave, (2001 [1939]).

She begins her argument in the book's introduction with the observation that the challenges for global governance are enormous. They vary from terrorism, arms dealing, trafficking, and environmental threats to poverty and other global economic and security issues. These challenges straddle borders and cultures.

Yet, the traditional answers to these threats, such as hegemonic dominance or world government, leave much to be desired. In the first case, the United States as the mightiest state in the world cannot impose its will whenever it so pleases as the worsening situations in Iraq and Afghanistan demonstrate. Rather, the U.S. also needs to use its soft power: the power of persuasion and information. In the case of world government, even though we "need more government on a global and a regional scale […] we don't want the centralization of decision-making power and coercive authority [of a world government] so far from the people actually to be governed" (p. 8). Such a government would not be accountable to the people it governs.

The much-touted NGOs only form a partial alternative. They do play a useful role, but like special interest groups, NGOs are neither democratically representative nor accountable. Finally, international organizations, the UN for example, are important in certain areas, but also suffer from several problems: like NGOs, they lack representative accountability; they lack effective enforcement mechanisms, and they suffer from barriers to implementation, such as lack of resources.

Then there is a less-noticed alternative in the form of budding, but underreported transnational government networks made up of domestic officials from multiple countries. Noticing these transnational networks, however, requires a conceptual shift. "Stop imagining the international system as a system of states – unitary entities like billiard balls or black boxes – subject to rules created by international institutions that are apart from, 'above' these states. Start thinking about a world of governments, with all the different institutions that perform the basic functions of governments – legislation, adjudications, implementation – interacting both with each other domestically and also with their foreign and supranational counterparts. States still exist in this world; indeed, they are crucial actors. But they are 'disaggregated.' They relate to each other not only through the Foreign Office, but also through regulatory, judicial, and legislative channels" (p. 5). Much of the business of international affairs is thus no longer conducted at the level of heads-of-state or just by diplomats; instead, many government officials, in a variety of functions, are reaching out to each other across borders to solve joint governance problems, as well as to reinforce each other's domestic efforts.

The aim of Slaughter's book is to show that these networks are proliferating, while discussing their advantages and disadvantages for constructing a world order that is able to meet the challenges of our time.

In her first three chapters, Slaughter describes what the world looks like when we disaggregate the state and start looking for these government networks. Loosely basing herself on Montesquieu's Trias Politica, she discusses three types of networks: regulatory, judicial, and legislative networks. She first presents how national regulators – varying from central bankers to utilities commissioners – have established transnational networks, such as the Basel Committee and the International Organization of Securities Commissioners, to exchange information, foster enforcement, or promote harmonization. Second, judges increasingly form their own networks. In some instances, they learn about and cite judgments handed down by judges in other countries. At other times, they develop principles that allow them to cooperate better, for example with international litigation. Third, are networks of legislators, lagging behind the other two types of networks, because they tend to focus on their national constituencies, which are territorially bound. Limitations notwithstanding, they do work together or exchange information concerning "issues of common interest, such as human rights, environmental protection, and opposition to the death penalty" (pp. 14-15).

In the next part, Slaughter systematically outlines what a new world order should look like by discussing its structure, power, and norms in three chapters. In chapter four, she outlines the structure of the disaggregated world order based on government networks. She first explains how horizontal networks of officials at similar levels in state hierarchies help each other with enforcement, harmonization, and exchanging information. Then she describes the limited but critical role that vertical networks could play, where *domestic officials enforce supranational policies at the national level, thus remaining accountable to their national constituencies, while implementing in a way that supranational institutions alone cannot.* For instance, "the genius of the European Union […] is that it is much more a transgovernmental than a federal system. Individual EU members can maintain the distinctive character and autonomy of their national institutions, while at the same time reaping the benefits of collective governance through government networks" (p. 134). In this sense, transgovermentalism can enhance intergovernmentalism.

In chapter five, Slaughter discusses how power functions within the networked world. First, she outlines how government networks promote convergence by export of regulatory rules and practices from one country to another. Alternatively, when national government institutions acknowledge a prevailing international standard, but choose "to diverge from it for reasons of national history, culture, or politics," such networks help promote informed divergence. Second, the networks can improve compliance with international treaties and customary law. Vertically, this happens through enforcement networks, for instance, when a supranational court or regulatory body can rely on the coercive capacity of a national government institution. Horizontally, technical assistance may help to build capacity for execution. Finally, government networks can foster cooperation by transferring successful domestic approaches to the international arena and other countries, for example through benchmarking. Slaughter further describes how these networks can consciously be constructed to become the prime mechanisms for global governance, as they foster self-regulations, socialize their members, and build trust and reputation over time. Interestingly, this helps prevent labeling an entire state as good, bad, or weak. Instead, by focusing on performance at a lower level in a state, these networks can either target capable officials to strengthen them in their pursuit of, for example, the rule of law or exclude those who do not function sincerely.

Yet, strengthening the structure or harnessing power alone are not enough to build a just world order. Acknowledging the dangers of either a global technocracy or powerful states running roughshod over weaker ones, Slaughter discusses how the emerging world order can be made more just. She argues that *all* officials should be recognized as carrying out both international and national functions. The networks should also be made as visible and transparent as possible, and especially legislative networks still need to be strengthened further. In addition, governments need to remain the backbone of the networks to ensure participation and accountability. Importantly, she also recommends specific "constitutional norms" for a disaggregated world order that is inclusive and tolerant.[2]

[2] These norms are global deliberative equality, legitimate difference, positive comity, checks and balances, and subsidiarity.

In the conclusion, Slaughter redefines sovereignty for a disaggregated world order. Her disaggregated sovereignty, however, is not so much an erosion, as an adaptation of state sovereignty. "The core characteristic of sovereignty would shift from autonomy from outside interference to the capacity to participate in transgovernmental networks of all types. This concept of sovereignty as participation, or status, means that disaggregated sovereignty would empower government institutions around the world to engage with each other in networks that would strengthen them and improve their ability to perform their designated government tasks individually and collectively… If transgovernmental organizations of judges, regulators, or legislators had formal status at the level of international law, they could adopt formal membership criteria and standards of conduct that would create many more pressure points for the global community to act upon a wayward state, but also many more incentives and sources of support for national government officials aspiring to be full members of the global community yet so often lacking capacity or political and material reinforcement in the domestic struggle against corruption or the arbitrary and often concentrated use of power" (pp. 34 -35). Furthermore, it would not just "be up to the 'state' to uphold human rights or protect the environment… It would be up to the members of the executive branch, the judiciary, and the legislature. And in a world in which violations of international law increasingly carry individual penalties, such obligations could make themselves felt" (p. 35).

At the core of the book are two related ideas: the disaggregated state and non-hierarchical power. The fact that there is no centralized authority ruling our current world system implies that there can be no central command-and-control hierarchy. Moreover, such central power can also lack legitimacy or lead to resistance. "From 'power over' to 'power with' is precisely the transformation from hierarchy to network" (p. 207). Slaughter thus promotes a marriage of soft power with hard power. Information, persuasion, and socialization over time contribute to self-regulation, trust, and predictable patterns of behavior among network members. And states will still act as unitary actors where necessary, as with decisions to go to war.

Slaughter's prescription for a world order without world government is a timely one. Due to her original perspective on both the state and power, she is able to bridge the traditional divide between international relations' emphasis on self-interested state-power and international law's emphasis on common norms and laws that can transcend the individual state's interests. With this bridge, she also resolves some of the traditional contradictions between the idealist – or functionalist – and the realist approaches in international relations. As her government networks complement, but also rely on the state, she also integrates multilateralist and unilateralist approaches. Hence, European and US approaches to international power can be amalgamated to a great extent. Slaughter's reinterpretation of these issues is an impressive intellectual achievement. She moves from a world organized in unitary self-interested states to a system of global governance where states and networks complement each other.

Nevertheless, the book is bound to raise controversy. A cursory reading may result in dismissal of her thesis on the ground that it is utopian or that it makes unrealistic demands on heads of state. The core of what she describes, however, already exists empirically. Even when she makes her most value-laden proposals in the later chapters of the book, she is very careful to distinguish between her normative and her positive claims. Indeed, most of the interventions she proposes are in the spirit of adapting *ex post facto*, cultivating an already widespread phenomenon, rather than inventing something new. Importantly, she never suggests these networks are a panacea.

If there is any real chink in her armor, it is whether the networks she both describes and advocates supporting have as great potential for governance as she would have us believe. Her strongest evidence is the degree to which governance has already been enhanced by existing networks – something which is, at best, difficult to measure. While she describes many networks, she mainly remains at the policy level. Her empirical analysis thus fails to show in detail how the actual participants in these networks operate, nor does it prove that these networks have the claimed impact. In this sense, more detailed empirical research into the actual functioning and the quantitative impact of the networks is necessary. In addition, it is not clear how different networks relate to each other. Can they also have power struggles or a lack of communication between them? And when, for instance, does a disaggregated state become just a fragmented state? Her safeguards make it more likely that networks will continue to function in the public interest, but they do not ensure that powerful elites or interest groups will not manipulate a network for their own purposes. Like well-intentioned humanitarians and early web enthusiasts, she pays too little attention to the potential pitfalls of these new networks.

In sum, Slaughter's book presents both an empirical description of changing global governance through transnational government networks, and a normative appeal to use such networks consciously to promote a more effective and just world order. But her normative appeal is stronger than her empirical analysis. Nonetheless, Slaughter succeeds in laying out a fresh vision that transcends traditional approaches to international affairs. Her book is a manifesto that will influence the debate on international order for years to come. It should be required reading for international law and international relations scholars alike. ■

Gustaaf Geeraerts/Natalie Pauwels/Eric Remacle (eds.), Dimensions of Peace and Security. A Reader, Peter Lang, Brussels 2006, 283 pages, € 29.20

Monika Heupel*

The objective of the volume "Dimensions of Peace and Security: A Reader", edited by Gustaaf Geeraerts, Natalie Pauwels and Éric Remacle, is to "introduce […] some of the most pertinent issues in contemporary peace and security studies" to the "non-specialized public as well as undergraduate students" (p. 9). More precisely, the volume is meant to be an "invitation to those new to the study of peace and security to reflect on many of the issues that have been sidelined in the wake of September 11th and the subsequent 'War on Terror'" (p. 15). Following an introduction, in which the editors briefly outline the peace and security implications of the end of the Cold War and the broadening of the security agenda, the overall 13 contributions are grouped in four parts.

Part I (Peace and War) covers philosophical and conceptual dimensions of peace and security and explores the relationship between war and globalisation as well as war and the environment. In Chapter 1, Vicent

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Martínez-Guzmán addresses the foundations of the notions of negative and positive peace. Rather than focusing on "that which is not peace" (negative peace), he argues, peace researchers ought to concentrate on the "reconstruction of our competence to live in peace" (positive or imperfect peace) (p. 24). Such a reconstruction, he claims, can involve reviving the narratives of different civilizations on issues related to positive peace. In chapter 2, Francisco A. Muñoz traces the evolution of Peace Research. In particular, he elaborates on the conceptual broadening of its central terms such as peace (from negative to positive/imperfect peace) and violence (from direct to structural violence). Further, he explicates that progress in Peace Research to a large degree depends on the adoption of an inter- and transdisciplinary approach. In chapter 3, Ka Po Ng deals with the complex relationship between globalisation and war. On the one hand, he contends, globalisation mitigates conflict insofar as intensified trade and the spread of institutions and norms constrain violent behaviour. On the other hand, globalisation facilitates conflict insofar as it tends to involve uneven distribution of economic gains, cultural hegemony, erosion of sovereignty and heightened proliferation risks. In chapter 4, Arthur H. Westing concerns himself with the environmental and ecological consequences of war. Environmental manipulations in wartime, he points out, be they unintentional – like for example air and water pollution in combat zones – or intentional – like for example forest clearing and breaching of dams – can have lasting detrimental effects. Equally, the legacies of explosive remnants of warfare such as anti-personnel land mines and cluster bomb submunitions are likely to undermine the recovery of post-conflict societies.

Part II (Arms Control) integrates contributions on the defence industry, arms control and disarmament. In chapter 5, Keith Hartley gives attention to the future of national defence industries in light of the end of the Cold War and the emergence of security threats such as transnational terrorism and weapons of mass destruction proliferation. Against the background of declining defence budgets and rising equipment costs, he asserts, governments are confronted with the difficult choice whether to protect or open their national defence markets. In chapter 6, Trevor Findlay attends to monitoring, verification and compliance arrangements in the area of arms control and disarmament. Besides addressing related theoretical issues, he deals with the practical dimensions of such arrangements by giving a brief overview of verification and monitoring techniques and technologies as well as compliance mechanisms and agencies. Finally he sketches technological, organisational and political future trends. In chapter 7, Bela Arora applies the Gramscian concept of hegemonic bloc to the contemporary arms control regime. This regime, he argues, is an instrument of the hegemonic bloc – the United States in particular – designed to perpetuate the military *status quo*. Based on this assessment, he calls for exposing the hegemonic discourses which sustain the asymmetrical power relations embodied in the current arms control regime.

Part III (Defence Technology and Conversion) is devoted to military and civilian implications of science and technology, and obstacles to and prospects of industrial conversion. In chapter 8, Jordi Molas-Gallart addresses the relationship between military and civilian technology. He provides a historical account and characterises the relationship as bi-directional insofar as progress in military technology can spill over into civilian technology and *vice versa*. Further, he examines the features of dual-use goods – goods with both military and civilian applications – and their detrimental impact on arms control, disarmament and transparency of arms transfers. In chapter 9, F. Javier Rodríguez Alcázar explores the potential of what he calls "social shaping" of science and technology. Instead of harnessing scientific and technological innovations for peace, he holds, such innovations have so far to a large degree been utilised for the development of military technology. To reverse this trend, he demands the involvement of citizens in the "social shaping" of science and technology and in particular summons peace researchers and activists to propagate a reorientation of investment in knowledge and technology creation. In chapter 10, Jonathan Michael Feldman deals with industrial conversion, i.e. the multidimensional process of reusing defence resources for civilian purposes. He explicates that conversion faces various economic and political barriers like for instance the organised interest of specialised military companies and the difference between military and civilian markets. Yet, he argues, industrial conversion can be promoted by strategies such as establishing community-controlled companies and creating networks with educational institutions and the media.

Part IV (Peacekeeping and Conflict Prevention) is concerned with the four fields of action named in the United Nations (UN) Agenda for Peace, that is conflict prevention, peacemaking, peacekeeping and peacebuilding. In chapter 11, Ramesh Thakur gives attention to the theoretical and practical evolution of collective security and peacekeeping. The first part of the chapter outlines the meaning of collective security, its practical qualifications and its application in the framework of the League of Nations and the UN. The second part covers the evolution of peacekeeping over six generations from traditional peacekeeping to multinational peace restoration as well as its limitations. In chapter 12, Cedric de Coning addresses the four fields of action mentioned in the Agenda for Peace, referring to all of them as peacekeeping. He explores the implication of the broadening of the notions of peace, conflict and violence for the evolution of peacekeeping in theory and practice. Moreover, he underlines that actors involved in the four fields of action face complex requirements and have frequently failed to avert the outbreak of violence and to stabilise fragile peace. Eventually, in chapter 13, Albrecht Schnabel and David Carment discuss conceptual and application-related dimensions of conflict prevention. They present challenges and critique actors engaging in conflict prevention encounter. In addition, arguing for the merits of conflict prevention – it is easier and less costly in political, economic and human terms – they provide ample suggestions on how to overcome such obstacles like for example integrating both local and external actors and mainstreaming conflict prevention in various activities and programmes.

"Dimensions of Peace and Security: A Reader" features in particular three merits. Firstly, individual chapters provide very insightful and concise accounts of contemporary peace and security issues. Especially the chapter by Schnabel and Carment on conflict prevention is worth to be set apart as it constitutes an excellent discussion of the state-of-the-art in this field both in terms of its conceptual and application-oriented analysis. Also, the chapter by Ng on the complex relationship between globalization and war sticks out by virtue of its well-structured presentation. Secondly, the volume devotes attention to issues which are only rarely dealt with in introductory readers on peace and security. First and foremost, the chapters on the defence industry, the relationship between military and civilian technology and the social shaping of science and technology shed light on frequently underrepresented dimensions. Finally, Part I but also Part IV reflect the widening of the security agenda discussed in the introduction of the volume. This applies most notably to the first two chapters of the volume which explicitly examine the theoretical and practical underpinnings of reconceptualising the central terms of Peace research.

Yet, next to these merits, other aspects of the volume are less convincing. Firstly, the overall conception of the volume and the composition of its contributions are not evident. The editors claim that they intend to bring together contributions on "pertinent issues" and "important dimensions" related to peace and security which have recently often been "sidelined" and made "less visible" (p. 9, 15). At the same time they emphasise that they do not aim at providing a "comprehensive review of everything falling under the rubric of peace and security" (p. 15). Both claims are obviously valid but they do require further elaboration. What accounts for the compilation of just these chapters which differ clearly in terms of both empirical focus and methodological orientation? Why do six out of 13 chapters deal with issues related to military technology and arms control whereas other dimensions of peace and security are disregarded? The volume would have gained from a more thorough discussion of its overall conception and the specific contribution it intends to make on the current debate on dimensions of peace and security. Secondly, have the issues the volume attends to really been "sidelined in the wake of September 11th and the subsequent 'War on Terror'" (p. 15)? Certainly, September 11th and the "War on Terror" have in some ways diverted attention from certain issues related to human security and the broadening of the security agenda. However, the heightened interest in transnational terrorism in the aftermath of September 11th has also drawn attention to issues discussed or at least touched upon in the volume such as the need to address root causes which give rise to violent conflict and terrorism (ch. 13), the threat of weapons of mass destruction proliferation to terrorists, the perilous implications of dual-use technologies (ch. 8) and verification, monitoring and compliance arrangements in arms control regimes (ch. 6). Finally, it would have been desirable if the editors had elaborated on why the volume is most suitable for "those new to the study of peace and security" (p. 9). Why did the editors integrate some extremely specialised accounts (see for example ch. 5) and include several chapters on similar issues (see ch. 5 – ch. 10) while neglecting other issues when addressing an audience with little previous knowledge on the overall subject? Furthermore, given the limited knowledge of the target audience many chapters would have profited from a more comprehensive list of references.

In sum, the volume makes a worthwhile contribution to the debate on contemporary dimensions of peace and security inasmuch as it addresses less explored issues, relates to the expansion of the security agenda and features individual instructive and well-written chapters. Yet, the overall conception of the volume, the compilation of its chapters and its relevance to the target audience lack clarity and would have required further discussion.

Elisabeth Porter/Baden Offord (eds.), Activating Human Rights, Peter Lang, Frankfurt am Main/Bern [u.a.] 2006, 284 pages, € 47.90

Burra Srinivas*

Contemporary discourses on human rights encompass a wide variety of issues, which arguably constitute the comprehensive spectrum of human rights. The multiplicity of discriminations and deprivations is sought to be defined in the larger framework of human rights despite the absence of any legal instruments addressing many of these issues. The book under review reflects this diversity of issues. As the classification of articles in the book suggests, a commendable effort is made to reflect a wide array of issues in a book length space. The book is divided into four parts: the first part deals with "Human Rights Theory and Action"; the second with "Organizational Defenses of Human Rights"; the third with "Human Rights in International Contexts"; and the fourth one with "Activating Particular Rights". As the editors point out in the introduction, all the contributions in the book reflect three important aspects of human rights discourses. These are: theoretical reflections, contexualisation of human rights discourse in specific issues and the defense of human rights by individuals, organizations, countries and cultures.

Part I contains four essays. In his essay Baden Offord goes into the complex relationship between human rights theory and practice and argues that "activating human rights is much more than legal or legislative reform" and should be contexualised in social, ecological and cultural spheres. Limiting the human rights literature to the texts of law, as it is the prevalent case today, he argues, delinks the human rights praxis from everyday reality. While taking examples of some prominent human rights activists from India, Offord makes an observation that "there is a fundamental need for activism to be understood more comprehensively, to recast our material view of an activist into a nuanced appreciation of its range and possibilities". This observation requires careful consideration because human rights activism is predominantly activated and led by middle class sections and because of their privileged positions they often tend to subsume and to even sometimes delegitimise the grass root level movements.

Jim Ife's essay challenges the generational classification of human rights. He argues that the categorization of first and second generation human rights as individual rights and third generation rights as collective rights effectively marginalizes the latter while it refuses at the same time to accept that many human rights can have both individual and collective dimensions, and therefore there should not be any separate category for collective rights. While arguing to desegregate economic, social and cultural rights he makes the unconvincing suggestion that clubbing the three categories of rights together is likely to marginalize social and cultural rights, as economic rights will inevitably assume a greater importance. In reality, despite grabbing attention in discussions economic rights are no way better protected by States than social and cultural rights. However, his alternative proposal for classification of rights into seven categories may make the reader think beyond stereotyped images of human rights.

In his essay Carl F. Stychin points out the two important trends in the globalization of human rights: one is the globalization of human rights standards based on which the notions of universal standards of civilization, progress and modernity are built and the second trend is the universalizing of same sex sexualities as identities. The author explains how the human rights discourse and activism take both cosmopolitan and communitarian standpoints depending on the political context in which the rights are being articulated. While underlining the necessity of identity rights, like same sex identity, the author presents the necessity of engaging in struggles for political transformation, i.e., to engage in self-critical approach in recognizing the rights of different nature, like race, gender and class.

Monica McWilliams' essay in Part I deals with a subject similar to Sam Garkawe's in Part II. Both authors propose two different

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models of justice delivery system as an alternative to the standard criminal adjudication process in their respective essays. Monica McWilliams proposes restorative justice that intends to include victims, persecutors and the society at large in the post conflict peace building process. Sam Garkawe highlights the strengths of the truth and reconciliation commission in South Africa and argues for it as an alternative model for other transitional societies. These two models, restorative justice and amnesty for truth, need serious consideration particularly in view of the conceptual and other difficulties like sovereignty that arise in the case of international criminal adjudication.

In part II Lara Fergus highlights the distinction between the public and private sphere, which is often used as a pretext in perpetuating the gender bias and in relegating most of the women specific human rights into the private sphere. She shows that this distinction is not just linked to conceptual analysis but also pervaded into human rights activism like for example in the activities of Amnesty International. She convincingly presents with data how women's human rights issues have entered very lately on to the agenda of Amnesty International and how the Organization failed to translate these policy commitments into its practices.

Michael Morison's essay critically examines the working methods of the transitional administration and post conflict reconstruction in Timor Leste under the aegis of the United Nations. He vividly indicates the negative effect of the policies that resulted from institutional and ideological structures imported from outside and implanted into the Timor Leste society. Thus, he argues for the bottom up-approach in contrast to the top down-approach, which was used. Morison's observations can therefore be of valuable use for other transitional administration initiatives.

In Part III on "Human Rights in International Contexts", Chee Soon Juan's essay is an eye-opening account of the appalling human rights situation in Singapore, a city-state known for its economic progress. Juan encapsulates the *modus-operandi* of the establishment in silencing the dissent whether directly or indirectly. This essay should provoke further studies that help analyse the mechanisms through which a State operates to hide its politically illiberal systems behind its free market economic prosperity. An interesting comparative study is presented in Kulwant Singh's article. Singh focuses on the methods that were adopted to resolve the property rights of refugees and displaced persons in two different contexts – Bosnia and Herzegovina and Jammu and Kashmir. While appreciating the innovative methods adopted by the international community in facilitating the return of refugees and displaced persons and in the restoration of their property rights in Bosnia and Herzegovina, Singh suggests that such experiences may be of help in resolving similar problems confronted in the context of the Jammu and Kashmir crisis.

Kiikpoye K. Aaron's essay sharply contexualises the violation of human and environmental rights in Nigeria in the backdrop of the political economy of oil exploration and exploitation. While pointing out that local communities' rights are violated by way of leaving them out of benefit sharing from oil exploration and exploitation, the author demonstrates that the environment has become the common victim as people are forced to resort to certain vandalism to assert their rights which is again leading to environmental degradation, in addition to the one already caused by oil exploration. The author, though, does not equate the two situations. It is rather fair to present that though the environment may seem as a common victim, it also ultimately leads to the violation of human rights of local people, as they are the inhabitants of that land. This essay exposes the uneven wealth distribution and also the privileged state apparatus in most of the post colonial states which in collusion with international capital compromise the interests of the majority of their peoples for the benefit of certain classes.

Part IV contains three essays. Mainstream human rights discourse is subjected, and rightly so in certain respects, to criticism for excluding certain issues from its ambit. Disability is one of those issues, which do not find their rightful recognition in the core framework of international human rights. In their essay Gerard Goggin and Christopher Newell go beyond bodily dimension and locate the disability problem in a social, political, cultural and ethical context. The authors emphasize that people with disability are human beings and seek not only for the removal of mere "obstacles" but for a change in the fundamental and deeply cherished beliefs regarding disability located in the social, political and cultural settings.

Chantal Nadeau analyses the politics of blood and the relationships it establishes in the context of same sex domestic rights. She contexualises the granting of equal rights to gays and lesbians regarding family and marriage in the framework of sexuality, rights and nation state and observes that legislation does not grant national citizenship to all queers but only to those who are sexually responsible and legitimate a heteronormative compulsory model of sexual exchange that excludes non-monogamy, multiple partner kinship and the refusal to embrace coupledom.

Irane Watson makes the intrepid and valid statement that existing human rights frameworks do not provide the basis or even the minimum standard for the survival of Aboriginal peoples. This essay, though on the status of Aboriginal peoples in Australia, is a statement on the plight of many indigenous and local communities who were subordinated and subsumed under the assimilationist homogeneous nation state policies in many countries. The author calls this subordination of Aboriginals in various forms an "invisible genocide", which operates silently leading to the destruction of Aboriginals.

This collection of essays draws the reader's attention to some of those issues, which need recognition and conceptualisation within the framework of human rights language that claims universality and inclusiveness. All in all, it can be a valuable reference for anyone concerned with the theory and practice of human rights. ■

David P. Forsythe, The Humanitarians: The International Committee of the Red Cross, Cambridge University Press, Cambridge 2005, 356 pages, £ 17.99

Willemijn Keizer*

David Forsythe's *The Humanitarians: The International Committee of the Red Cross* provides an independent scholarly examination of the ICRC. Although the ICRC is the only non-state actor formally recognized under international law and a key protagonist in the development of International Humanitarian Law (IHL), there is still very little known about how it functions. As the author notes in his introduction, "until rather recently one could not find a substantial and significant body of work … concerning what the agency did

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and how it took its decisions" (p. 1). This should not come as a surprise though, as the ICRC still maintains many of its self-imposed secretive policies and is therefore often treated as a mysterious entity by outsiders. Cutting through this aura required a lengthy and broad research effort that drew on many previously unstudied documents and new interviews.

The author, a widely-recognized expert on the ICRC and Charles J. Mach Distinguished Professor at the University of Nebraska, was ideally suited to this challenge. In addition to consulting, he has studied and published about the organisation for over 30 years. In this book, he examines the ICRC as an actor within international relations and its role in the humanitarian landscape. His main thesis is that prior to 1970 the ICRC often failed to live up to its self-constructed image of neutrality, impartiality, independence and effectiveness. Over the course of the last three and a half decades, however, the agency has made great improvements in professionalizing its policies, guidelines and practices. Forsythe's argument is divided in two main sections: a historical essay and thematically-organized policy study.

The first section provides a loose chronology of the agency's background that provides the reader an understanding of the ICRC's evolution. Yet as the author notes, he is "not a historian, but a political scientist with an awareness of the importance of history" (p. 6). Indeed, the greatest strength of the book is Forsythe's political analysis of this process, not his treatment of the historical details or legal technicalities – though his presentation is both detailed and nuanced. More importantly, his tracing of the organisation's growth since its humble beginnings in the mid-1800s under Henri Dunant is pertinent to understanding how the ICRC became such an influential non-state actor.

Through the use of short case studies, he walks the reader through the ICRC's beginnings and its betrayal of humanitarian principles during the WWII (Chapter 1), its attempts to advance these values during the Cold War (Chapter 2), professionalisation efforts against the backdrop of changes in the nature of conflict in the Balkans, Africa and elsewhere (Chapter 3) and the organisation's difficulties in reconciling the so-called "Global War on Terror" with humanitarianism (Chapter 4). This approach permits the author to introduce and elucidate both some of the specific challenges the ICRC has faced during its history and, more importantly, the dilemmas that underlie them. These include the role of neutrality in conflict, the difference between independence and neutrality, the need for cooperation with militaries/governments to visit prisoners and the agency's reliance on individual states to access conflict zones.

While supportive of the ICRC's overall efforts, the author does not shy away from criticizing the agency when it has fallen short, starting with the now familiar story of its silence during the Holocaust. He also pays particular attention to the ICRC's inability to systematically deliver humanitarian relief during the Biafra conflict – which led to the establishment of *Médecins sans Frontières* (MSF), and the agency's failure to adapt its conventional approach to Chile and Argentina's dirty war that may have exacerbated the phenomenon of "disappearances" in the latter. Forsythe contends that such failings were the result of the ICRC's lack of both a strategic vision to inform its specific responses and an overall professional framework to guide revisions to its institutional policies. He attributes recent changes to the agency's much belated implementation of the Tansley Report's recommendations, a highly critical 1975 internal study.

This sets the stage for section two, which analyzes the ICRC's principles, structure, management and relation to IHL. Unfortunately, his treatment of these critical issues is somewhat uneven. He starts with a strong examination of the principles of neutrality, independence and impartiality, and how the ICRC's sometimes dogmatic beliefs have had affected their operations and credibility (Chapter 5). I take some issue, however, with the author's assertion that "it is somewhat surprising after 140 years the ICRC should still be addressing questions about the meaning of its impartial and neutral humanitarian protection" (p. 200). As section one ably demonstrated, the nature and conduct of conflicts are in constant flux, compelling the ICRC to re-examine its core assumptions. In fact, one could argue that such questioning is evidence of the agency's institutional maturity.

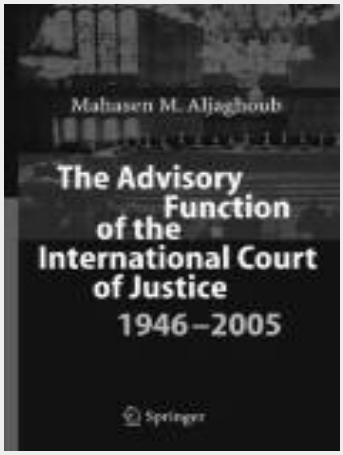
Next, the author explains, in elaborate detail, the organisational structure of the ICRC and the Red Cross Societies (Chapter 6). This is a valuable contribution, as even many professional humanitarians are occasionally confused about the exact role and status of the individual societies vis-à-vis Geneva. This section also contains the fullest explanation of Forsythe's "Swiss culture" hypothesis, a concept he alludes to repeatedly in the preceding 200 pages. In brief, this contends the ICRC is essentially an expression of Swiss political and historical culture. The author suggests that the Swiss predilection for "collective policy making, managerial expertise, attention to detail, slowness to regard women as fully equal, unilateralism/aloofness, discretion/secrecy, conservatism and risk aversion, aversion to public moral judgments, and stolid public demeanor" explains the essence of the ICRC (p. 241). On first review, this argument has face validity, yet Forsythe himself admits this assertion lacks empirical substantiation (p. 238). Rather than address the topic of Swiss culture rigorously, he "leave[s] to the sociologists and social historians most of this large subject" (without referencing them), cites a handful of journalistic sources and calls for others to take up the subject (pp. 238-41). This is a pity, as his notion is intriguing and failing to address it more thoroughly significantly weakens the book.

The book then regains its footing with a discussion of International Humanitarian Law (Chapter 7). Forsythe first provides a basic introduction to the topic that explains the differences between Human Rights Law (HRL) and IHL, which he correctly points out are often conflated. This is quite useful for the general reader, though it may serve only as a review for professionals in the field. The chapter then examines the ICRC's specific role in the development, dissemination and implementation of IHL. He contends that the ICRC's work is less influenced by the juridical aspects of IHL than by its moral reasoning and historical practice. These, in turn, have facilitated the ICRC's invention and practice of "alegal diplomacy" (p. 259). The author does acknowledge the importance of IHL as a body of law, but claims quite convincingly that is has "always [been] one war too late" (p. 260).

In the conclusion, Forsythe tries to predict how the ICRC will evolve in the coming years. This is no easy task, as the agency "manifests liberal ends but conservative means" (p. 281) and he acknowledges that neither he nor the ICRC can fully reconcile this paradox. Consequently, the author cannot provide a clear picture of the future and the agency remains slow to change. In addition to struggling with this core dilemma, he notes the organisation must also address other, more visible challenges, such as synchronizing internal efforts, collaboration with external actors, working with the media and including women in management – but curiously not the so-called "militarization of aid." Ultimately, however, he is somewhat sceptical that humanitarian concerns will prevail over national interests despite the ICRC's sincere and formidable efforts.

Overall, I found this book to provide both a solid overview and detailed account of the ICRC. It highlights the agency's contempo-

rary and historical accomplishments as well as documenting its shortcomings and their root causes. While not without its own flaws, the book should appeal to both generalists and specialists. Students, diplomats and concerned citizens will benefit from a greater understanding of the ICRC and the Red Cross movement's history and role in the international system. Humanitarians, developmentalists/diplomats and security professionals, on the other hand, can gain from its detailed insight to the ICRC's inner workings, role in contemporary conflicts and internal dilemmas.



The Advisory Function of the International Court of Justice 1946-2005

M. M. Aljaghoub, University of Jordan, Amman, Jordan

The book provides a comprehensive analysis of the advisory role of the International Court of Justice in light of its jurisprudence and overall contribution over a period of more than 55 years. The author highlights the "organic connection" between UN organs and the Court and the Court's contribution as one of the UN's principal organs to the Organisation. The basic argument of this study is that the advisory function should be understood as a two-sided process involving the interplay between UN organs and the ICJ. The request for and the giving of an advisory opinion is a collective coordinated process, involving more than one organ or part of the Organisation. The author concludes that the Court's role as a participant in the UN's work is circumscribed by its duty to act judicially. In practice, the Court has succeeded in establishing a balance between its role as a principal organ of the UN and its position as a judicial institution with a duty to administer justice impartially.

► Comprehensive analysis of the advisory role of the International Court of Justice

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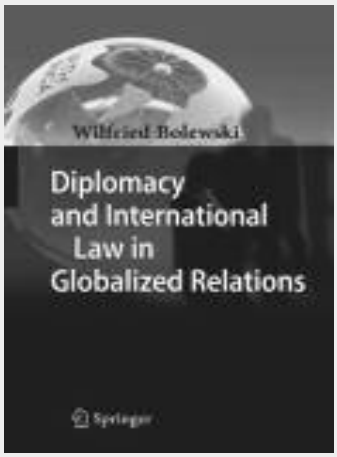

Diplomacy and International Law in Globalized Relations

W. Bolewski, Diplomatic Academy, German Foreign Office, Berlin, Germany

Diplomacy is transforming and expanding its role as the method of interstate relations to a general instrument of communication among globalized societies. Adapting to globalization the practice of diplomacy is shared by non-state participants, thus becoming privatized and popularized.

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