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This issue of our International Humanitarian Law Journal is special for two reasons. First of all we have focused in all chapters on a topic which has been widely neglected during the last decades. It was obvious for us that the current destruction of cultural property in most of the present armed conflicts and the results of the Hague Expert Meeting of July 1993 necessitate an in-depth analysis of certain aspects of the legal regulations concerning the protection of cultural property in armed conflict. We have therefore chosen some of those aspects for the articles, which either concentrate on the present state of the legal framework or deal with aspects of the development of the law. We are most grateful to all authors for their willingness to contribute to this special issue on short notice. We also express our appreciation to the German Red Cross which is enabling us to distribute copies of this issue during the General Conference of UNESCO in October 1993 in Paris.

Due to the focus of this issue and the opportunity to present the journal to a world-wide audience for the first time, most of the articles published are written in English. This is the only modification to the previous issues, though we do publish individual articles in English from time to time. The structure of the journal with its different chapters serving the academic and dissemination interests of our readers has been maintained. Our international readers will therefore get an impression of the methods and means which have been used in this journal to contribute to the understanding and dissemination of international humanitarian law and related aspects since 1988. It should be emphasized that the publication of the International Humanitarian Law Journal is a cooperative project of the Institute for International Law of Peace and Armed Conflict at the Ruhr-Universität Bochum and the German Red Cross. As with all other issues these institutions are not responsible for the opinions expressed in the articles published.

The Editors

The Protection of Cultural Property in Armed Conflict: the Hague Meeting of Experts

The Hague Meeting of Experts on the Protection of Cultural Property in Armed Conflict was held from July 1993 to July 1994. The meeting was organized by the German Red Cross and the Institute for International Law of Peace and Armed Conflict at the Ruhr-Universität Bochum. The meeting was the first of its kind since the Second World War. It was a unique opportunity for experts from different countries to discuss the current state of the law and to propose measures for its improvement. The meeting was held in a friendly and cooperative atmosphere. The participants were able to exchange views and to reach a common understanding of the current state of the law. The meeting was a success and it is hoped that it will be followed by similar meetings in the future.

An unsere deutschsprachigen Leser

Die UNESCO spielt beim Kulturgüterschutz aufgrund der ihr im Haager Abkommen von 1954 übertragenen Funktion eine wichtige Rolle bei der Durchsetzung und Fortentwicklung des Kulturgüterschutzes im bewaffneten Konflikt. Da auf dem Haager Expertenmeeting im Juli 1993 erste Ansätze zu einer Verbesserung dieses Schutzes diskutiert worden sind, dient diese Ausgabe unserer Zeitschrift u.a. der Information der Teilnehmer an der UNESCO Generalkonferenz im Oktober 1993 in Paris, auf der der Kulturgüterschutz diskutiert wird. Damit der Beitrag der Informationsschriften an der Weiterentwicklung des humanitären Völkerrechts in den letzten Jahren einer größeren internationalen Öffentlichkeit deutlich werden kann, sind nahezu alle Beiträge dieses Heftes in Englisch. Eine solche Gestaltung des Heftes wird auch in Zukunft eine Ausnahme bleiben. So wird das nächste Heft wieder wie üblich nahezu ausschließlich aus deutschsprachigen Beiträgen bestehen.

Die Herausgeber

# The Protection of Cultural Property in Armed Conflicts: After the Hague Meeting of Experts

Dr. Horst Fischer\*

## I. Three Lessons from Present Armed Conflicts

In this decade the protection of cultural property in armed conflicts has gained renewed public attention. During the Gulf War the danger of destroying cultural monuments in Iraq generated public controversy about the responsibilities of parties to a conflict when attacking and defending military objects. In the war in the former Yugoslavia bombardments have raised many concerns about damage to famous monuments first in Dubrovnik and later during the siege of Mostar and other places. These and many other incidents have added to the growing awareness in the political domain about the necessity to analyze and improve the present legal framework of the protection of cultural property in time of war. In particular, UNESCO statements and reports of other governmental and non-governmental organisations on the effects of certain attacks have highlighted the peril to which cultural objects are still exposed in modern warfare. Such danger remains even if all parties to the conflict use highly accurate weapon systems. Though modern technology allows for precise targeting and attacks, it is obvious that cultural objects today are still destroyed due to collateral effects of attacks on military objects, error, negligence and fault. In this respect the effect of warfare on cultural property has not changed significantly since the adoption of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) of 14 May 1954.<sup>1</sup>

But there is a feature of present armed conflicts that deserves special attention. In the conflicts in the former Yugoslavia, but also in other recent wars, there is sufficient evidence of a specific method of warfare. Today, cultural property, and particularly places of worship, have been deliberately targeted in the planning and execution of attacks. In contrast to most conflicts since the Second World War, cultural objects are attacked and destroyed even if there are no military objectives nearby. In connection with other acts such attacks are executed to gain control over a given territory and to force people to leave their homes. "Ethnic cleansing" is the term which has been used to describe this method of warfare. In its report to the Secretary-General of the United Nations the Commission of Experts, established by UN-Security Council Resolution 780 of 6 October 1992, identified acts such as "murder, torture, rape, arbitrary arrest (...) forcible removal, displacement (...)" as means of ethnic cleansing. It also included in this description the wanton destruction of property.<sup>2</sup> It is obvious from the documents cited that the protection of cultural property under circumstances of ethnic strife and war is extremely difficult to ensure. If ethnic cleansing is not only a specific method of warfare but also the goal of the conflict, the destruction of cultural property cannot be avoided simply by applying the precautions necessary for identifying a military object. Only if the parties to

the conflict acknowledge the general value of such objects will certain protective measures be accepted. The development of the law cannot be successful without satisfactory answers to this challenge of present warfare in non-international armed conflicts.

It must be asked whether recent international reactions to the destruction of cultural property in the former Yugoslavia have reaffirmed and developed the law. Isn't a discussion of the development of the Hague Convention made obsolete by such statements? The Security Council of the United Nations has in fact condemned ethnic cleansing in many resolutions dealing with the armed conflict in the former Yugoslavia. But it is obvious from the wording of these resolutions that the condemnation of ethnic cleansing is a general statement. The resolutions are meant to prevent certain effects of warfare without referring to more detailed existing legal regulations. Such statements neither solve any of the practical problems nor do they provide a prudent basis for a detailed legal evaluation of the protection of cultural property in ethnic conflicts. The term "ethnic cleansing" is an artificial term which does not exist in international law treaties. Therefore every act which falls under this term must be evaluated separately to determine whether and under what circumstances it is in violation of treaty or customary law. The review of the present legal system for the protection of cultural property in war must take the described development into account. Such a review is certainly long overdue.

## II. Three Fundamental Deficiencies of the 1954 Hague Convention

The Convention contains two layers of protection for cultural property: the general and the special protection. The general protection granted by the Convention is applicable if an object is "cultural property" as defined in Art. 1 of the Convention. Only if additional qualifications regulated in chapter II of the Convention are met can the special protection regime be used to protect cultural property. The definition of the term "cultural property" in Art. 1 refers to three categories of protected objects. First of all movable or immovable property of great importance to the cultural heritage of every people is covered. As examples for such property lit. a of Art. 1 lists e.g. monuments of architecture, works of art and manuscripts. Certain buildings belong to the second category if their main and effective purpose is to preserve or ex-

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<sup>1</sup> 249 United Nations Treaty Series, pp. 358-364; hereafter referred to as the Convention.



hibit the movable cultural property defined in lit. a of Art. 1. If centres contain large amounts of the objects mentioned above, they are "centres containing monuments" and therefore also viewed as protected objects. Every High Contracting Party is in the position to define which objects belong to the cultural property mentioned in Art. 1. The obligations of the parties to the conflict concerning the general protection can be classified as peacetime and wartime obligations. As is stated in Art. 3 the High Contracting Parties must safeguard and respect cultural property. To safeguard, states must undertake such measures in peacetime and in its own territory to protect cultural property against the effects of an armed conflict.<sup>2</sup> The obligation to respect cultural property only appears in case of armed conflict. According to Art. 4 cultural property shall neither be attacked nor shall it be used for purposes which are likely to expose it to destruction or damage. Despite the clear wording of Art. 4 para. 1 the protection of cultural property against attacks is not absolute. Art. 4 para. 2 allows an exception in cases where "military necessity imperatively requires such a waiver". This exemption based on the purely subjective decision of the parties to the conflict diminishes the value of the general protection regime significantly. The situation is even more complicated with regard to the special protection regime. Basically, if cultural property is granted special protection the High Contracting Parties must refrain from any act of hostility directed against such objects.<sup>3</sup> Only in exceptional cases of unavoidable military necessity and applying the special criteria mentioned in Art. 11 para. 2 and 3 can attacks be lawfully undertaken against objects under the special protection regime. Though this regulation also does not provide a comprehensive protection of cultural property in war it might better function as a major obstacle in executing attacks than the general protection regime. The special protection regime nevertheless is not applicable in all situations affecting cultural property. Only if several fundamental preconditions identified in chapter II of the Convention are met may cultural property be placed under special protection. One basic requirement is that the special protection regime is limited to objects of a certain character and geographical location as defined in Art. 8 para. 1.<sup>4</sup> Even if such requirements are met, protection is only granted by the entry of those objects into the "International Register of Cultural Property under Special Protection". It is clear already from outlining the structure of the basic protection rules of the Convention that the protection of cultural property in armed conflict is far from satisfactory.

The Convention is an exceptional international humanitarian law treaty with regard to its scope of application. Most humanitarian law treaties contain regulations either for international armed conflicts or non-international armed conflicts, e.g. civil wars. Though some treaties like the Geneva Conventions also include a reference to non-international armed conflicts states have refrained from applying humanitarian law rules generally to all armed conflicts including non-international armed conflicts. The Convention is expressly applicable to wars, international armed conflicts, cases of partial or total occupation and non-international armed conflicts.<sup>5</sup> However, the application clause concerning non-international armed conflict contains a qualifying element.

Only those protective rules of the Convention which guarantee the respect of cultural property are applicable in non-international armed conflicts.<sup>6</sup> Therefore, no High Contracting Party is obliged to apply Art. 3 of the Convention dealing with safeguarding cultural property by peacetime measures. But there are other rules of the Convention the application of which is limited in non-international armed conflicts. In particular chapter VII on the execution of the Convention cannot be utilized in international armed conflicts. Its main regulations are dependent on actions of the High Contracting Parties thus excluding a non-governmental party in a civil war from actions without special agreement.<sup>7</sup> Interestingly the special agreement<sup>8</sup> signed by the parties to the conflict in Bosnia-Herzegovina does not refer to the Convention but to Art. 53 of Additional Protocol I.<sup>9</sup> The deficiencies of the Convention with regard to non-international armed conflicts are aggravated by the lack of a definition of what constitutes a non-international armed conflict. It is far from clear whether the definition given in other treaties would be applicable.

The execution regime of the Convention is based on three pillars. Firstly, the interests of the parties to the conflict should be safeguarded by the so-called protecting powers. Secondly, UNESCO can assist not only in providing technical assistance in organising the protection of the cultural property but also with any other problem in connection with the application and execution of the Convention. Thirdly, the High Contracting Parties are obliged to take all necessary steps to prosecute and punish violations of the Convention. The three levels of execution measures have never been applied satisfactorily. For example the Protecting Power System, which was included in the Convention following the example of the Geneva Conventions of 1949, did not play a significant role in the conflicts since 1954. States were very reluctant to use the Protecting Power System to safeguard their interests in an armed conflict. It seems as if only recently the general idea of enforcement of the Convention's obligations has gained new momentum by the initiatives of several international organisations including UNESCO.

2 Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1991), UN-Doc. S/25274, 26 January 1993, p. 16.

3 Art. 3.

4 Art. 9.

5 Objects as e.g. refugees, centres containing monuments and other immovable cultural property must be "situated at an adequate distance from any large industrial centre (...)", and "not be used for military purposes".

6 Art. 18 para. 1 and para. 2.

7 Art. 19 para. 1.

8 Art. 19 para. 2 allows for special agreements between parties to a conflict not of an international character to bring into force all or part of the other provisions of the Convention.

9 See for the text of the agreement, Humanitäres Völkerrecht, Nr. 4, 1992, pp. 195-197.

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of War Victims of International Armed Conflicts; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of War Victims of Non-International Armed Conflicts, 1125 United Nations Treaty Series, pp. 608-699.

### III. Three Aspects of the Hague Expert Meeting and its Aftermath

The Hague Expert Meeting was held at the invitation of the Netherlands Government. More than 20 governmental, scientific and independent experts convened for a thorough discussion of the application and effectiveness of the Convention. Thanks to the careful preparation of the meeting by the Netherlands Ministries involved and the UNESCO-Secretariat the participants were able to discuss all of the relevant topics starting from a high level of information. The meeting succeeded not only in identifying the lacunae of the Convention with respect to present armed conflicts. Fundamental and structural deficiencies were also discussed. For exchanging views on both current and fundamental issues it was a big advantage for all participants to be able to rely on an excellent report prepared by Prof. *Boylan*.<sup>11</sup> His work did not only provide a profound analysis of the law and its application but it also included a set of specific recommendations. These recommendations were not only helpful for the debate of the experts. Together with the results of the meeting<sup>12</sup> they could function as a structural scheme for any future discussion of the subject. Future attempts to reaffirm and develop the law should take into account the excellent preparation, structure and results of the Hague Meeting. During the meeting consensus seem to emerge about most issues including the continuing validity of the Convention's object and purpose, the need for universal acceptance of the Convention, the necessity of strengthening the enforcement mechanism of the Convention and the importance of dissemination of the Convention. Other questions which seem to be of general value for the future acceptance of the Convention were touched upon without leading to generally agreed conclusions. Such questions were, *inter alia*, the importance of the natural heritage concept, the role of the Protocols to the Convention, peace-keeping and cultural property and the general applicability of attempts of several countries during and after armed conflicts to safeguard cultural property.<sup>13</sup> Whether the consensus reached will be taken up in different fora and whether some or all of the questions mentioned will be solved in future negotiations is of vital importance for the future significance of the Convention.

Nevertheless, two topics are crucial for the whole process of the reaffirmation and development of the law: the relationship of the Convention to customary law as well as the Additional Protocols of 1977 and the general framework for the protection of cultural property in non-international armed conflicts. In The Hague there seemed to be disagreement about the precise scope of present customary law with regard to cultural property protection in armed conflicts. The small number of states having ratified the Convention has been one of the arguments against its customary validity as a whole or of its main parts. Only some of its fundamental rules were accepted as being customarily binding for all states. This and other arguments neglect the effect of the general rules of international humanitarian law which were reaffirmed and developed in the Additional Protocols of 1977. Additional Protocol I is based on the distinction between military objects and civilian objects. If an object is defined as being a civilian

object according to the criteria mentioned in Art. 51 of Additional Protocol I, it cannot be attacked. A cultural object, if it is under the prevailing circumstances defined as a civilian object, cannot be attacked even if the Convention would allow such attack under the military necessity clause of Art. 19. In this respect it can be argued that the Convention has been superseded in part by those customary law rules which have been reaffirmed in Additional Protocol I. If one would agree to such statements, the customary protection of the cultural property is already broader than that granted by the Convention. On the other hand Art. 53 of Additional Protocol I dealing with the protection of cultural objects and places of worship explicitly states that this article is without prejudice to the provisions of the Convention. According to the prevailing view this reference allows states which are parties to both treaties to defend attacks on cultural property by referring to the military necessity clause of the Convention. States which are only party to the Additional Protocols would be barred from using such reasoning. Though the definition of cultural property is not as broad as that of the Convention, states would diminish the protection of those objects covered by Art. 53 of Additional Protocol I if ratifying or acceding to the Convention. This strange and undesirable result is a strong proof of the urgent necessity to clarify the relationship between the Convention and subsequent treaties and present customary law at the outset of future international efforts.

The second fundamental problem to be solved before starting new negotiations is the application of the Convention's protective rules in non-international armed conflicts. Though the Convention is applicable in all armed conflicts the protective system is not adapted to the conditions of civil wars in particular ethnic conflicts. It is doubtful if states would succeed in developing the Convention in such a way as to cover the specific conditions of ethnic conflicts without at the same time improving the general basis of international humanitarian law in non-international armed conflicts. Success in this respect will depend mainly on the development of a neutral but strong enforcement mechanism. During the Hague meeting some experts opposed an intensified role of the Security Council as part of such structure. Following recent UN practice it seems as if the Security Council would be able to fulfil certain functions without an explicit authorization in a humanitarian law treaty like the Convention. If it perceives the destruction of cultural property as a **threat to the peace** the Security Council could use all measures provided by chapter VII of the UN-Charter. Other international organisations in particular regional ones may also play a decisive role in the enforcement of protective rules. To adjust international enforcement mechanisms to legitimate national sovereignty needs and the necessities of the incident in question is a fundamental precondition of a successful new structure. UNESCO might play a key role in this process.

11. P. Boylan, Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, London 1993.

12. See Final Report of the Expert Meeting reproduced in this issue on pp. 232 ff.

13. See p. 233 in this issue.

# The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954

Lyndel V. Prott\*

An important instrument to which relatively little attention has been paid is the Protocol to the Hague Convention which was adopted at the same time as the Convention itself. In view of the recent events which have involved the removal of cultural property in time of armed conflict (Cambodia, Kuwait, Vukovar in Croatia provide well-known examples), it is appropriate to give this Protocol closer attention<sup>1</sup>.

The short text of this Protocol is in fact a revolutionary legal instrument. It is not concerned with destruction - that is the subject of the Convention itself. Its purpose was to state clearly that the age-old practice of occupying armies carrying away cultural treasures from the people of the occupied territory was illegal and to make their national governments liable to return the objects or pay compensation for them if such objects left the occupied territory during their period of control.

The first of these aims crystallized principles which had been developing in international law for some time. Examples of looting, more or less officially organized, are well documented. A glaring example is provided by the depredations of Sweden against Poland in seventeenth century<sup>2</sup>; but many other cases could be cited of countries which suffered the loss of items of extreme cultural importance. But by the time of *Napoleon*, the massive relocation of cultural objects to Paris was seen as unacceptable by every country except France, and a good deal of that taken during the *Napoleonic* campaigns (though by no means all) was returned<sup>3</sup>.

"The *Lieber-Code: Instructions for the Government of Armies of the United States in the Field*" drafted in 1863 for use during the American Civil War restated the rules for the protection of cultural property. The Hague Convention concerning the Laws and Customs of War on Land of 1907 forbade the confiscation of private property (Art. 46) and pillage (Art. 47). It also provided that the property of municipalities, of institutions dedicated to religion, charity and education, the arts and sciences, even where State property, were to be treated as private property (Art. 55). Seizure of such institutions, historic monuments, works of art and science was forbidden and was to be made the subject of legal proceedings (Art. 56).

These provisions are reflected in Article 4 (3) of the 1954 Convention which reads:

*"The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of*

*theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party."*

However, there had been another development before 1954 which specifically dealt with the issues of illicit removal by occupying forces. Though the provisions against pillage and requisitioning of cultural property probably covered export from occupied territories, the experiences of World War II suggested that this was not enough. Quite early evidence emerged of systematic seizure of private and public collections and individual objects of importance throughout the area occupied by Nazi forces. Furthermore, evidence was not long in coming that many of these objects were being sold to purchasers either in Germany or in other countries. The Allied governments decided to put purchasers on notice, by issuing the Declaration of London of 1943, that they would not be able to retain such goods.

*"The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxembourg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:*

*Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.*

*Accordingly, the Governments making this Declaration and the French National Committee reserve all their*

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1 A detailed commentary on the Protocol will appear as one section of a general work on the Convention: J. Toman, *Commentaire sur la Convention de la Haye pour la Protection des Biens culturels en cas de Conflit armé* (Pedone, Paris) in press. An English version is being prepared by UNESCO for publication in early 1995.

2 S.E. Nahlik, *La Protection internationale des Biens culturels en cas de Conflit armé*, 120 *Recueil des Cours de l'Académie de la Haye* (1969-1), p. 77.

3 *Id.*, p. 80.

rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

*The Governments making this Declaration and the French National Committee solemnly record their solidarity in this matter.*"

This document provides the real precedent for the Protocol to the 1954 Convention. Article 1 of the Protocol provides that:

*"Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property (...)."*

This article provides an active duty to prevent removal from the occupied territory. It does not, however, specify how this is to be done. In the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Contracting Parties are obliged to impose export controls (Art. 6) and import controls (Art. 7 (b)). While this Convention is basically concerned with movement in peace time, Article 11 of that Convention also provides that:

*"The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit."*

Article 2 of the Protocol to the Hague Convention provides that:

*"Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory."*

This is a new provision, not reflected in any of the earlier instruments. Action consistent with this article has been taken by Israel. After the Six Day War of June 1967, the commanding Officer of the Israeli Defence forces in Judaea and Samaria declared that the law that was in force in the district on 7 June 1967 remained in force inasmuch as it did not contradict that decree, subject to changes in accordance with the military rule in the area. The Jordanian Antiquities Law No. 55 of 1966 then applied to those Districts. In 1970, two antiquity dealers in East Jerusalem were charged in the Military Court of Hebron under the Jordanian Law with exporting antiquities into "foreign territory" (i.e. from Hebron,

in Judaea, to East Jerusalem) without obtaining an export licence<sup>4</sup>. Berman comments:

*"It is noteworthy to mention that the charges against the petitioners in the trafficking of antiquities case discussed above were brought to prevent the illegitimate flow of antiquities from the Judaea and Samaria area, in compliance with the Hague Regulations of 1907 and the Red Cross Convention of 1949."*

It is interesting that she makes no mention of the Protocol to the Hague Convention, although both Israel (since 1958) and Jordan (since 1957) are Parties.

Other cases are not known, although it is clear that illegally taken objects from occupied territories enter the international market. While it is true that two of the big "art market" States, the United Kingdom and the United States, are not Party to the Protocol, what about Germany and Switzerland, which are? In the case of Germany, allegations have been made about the smuggling of Cypriot antiquities from Northern Cyprus, an area occupied by Turkey (the so-called Turkish Republic of Cyprus not being recognized). Switzerland was the known point of transfer (in the bond area of Geneva airport) of the Kanakaria mosaics stolen from a church in Northern Cyprus and subsequently returned after litigation in the United States<sup>5</sup>. Objects from the museum of Vukovar were taken to Paris, but withdrawn from exhibition and returned to Yugoslavia. Had Croatia officially invoked the help of the French authorities, it is difficult to see how they could have refused to seize the objects in compliance with the obligation under this article.

Article 3 of the Protocol provides that:

*"Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations."*

It does not appear that the question of reparations has been raised since the adoption of the Protocol, so that, so far, no case has arisen when the last sentence of this article might be applicable.

However, clearly the case described in the first part of the article has arisen. Both Iraq (since 1967) and Kuwait (since 1970) are Parties to the Protocol. The removal of large amounts of cultural property, including almost the entire contents of the Kuwait National Museum, to Baghdad is one of

4 S. Berman, *Antiquities in Israel in a Maze of Controversy*, 19 Case Western Reserve Journal of International Law (1987), pp. 343, 356. Id., p. 358.

5 Autocultural Greek-Orthodox church of Cyprus and the Republic of Cyprus v. Goldberg & Feldman Fine Arts, Inc. 717 F. Supp. 1374 (1989) aff'd 917 F. 2d 278.

the better known incidents of the Gulf conflict. However, the return of this material took place not by virtue of the Protocol, which was in fact barely mentioned, but according to Resolution 666 (1991) of the Security Council concerning the return of property to Kuwait, which also included cultural property. Under the supervision of the United Nations Return of Property Unit (UNROP), property was handed over in Baghdad to representatives of Kuwait in September and October 1991. However, Kuwait has since stated that not all the missing property has been returned. In so far as any remains in the hands of the Iraqi authorities, there is still a duty under the Protocol to return it.

After the conflict, Iraq made known that thousands of objects had been stolen from its provincial museums during the period of the military intervention and its immediate aftermath. Four volumes listing this catalogued material has been drawn up by the Iraqi authorities and deposited with UNESCO. Should any of this material be identified in the international market, States Parties to the Protocol will have the legal obligation to ensure that their obligations under the Protocol are not infringed.

Toman notes that a proposal to place a 20 year limitation on claims under this article was rejected at the Conference which adopted it.<sup>7</sup> Therefore claims under Article 3 are not prescribed in time.

Article 4 of the Protocol is a new development from the earlier codifications.

*"The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph."*

No case seems to have arisen where this article has been invoked. Its origin clearly lies in the Declaration of London and the implementing legislation in Switzerland. While the implementing rules in the three zones of occupation of the French, British and United States forces provided for the return of cultural property, overriding "the interest of other persons who had no knowledge of the wrongful taking", the Swiss legislation (adopted under some pressure from the Allies), provided that a good faith possessor had a right to be repaid the purchase price from the person from whom it was acquired. However, where a transferor in bad faith was insolvent or could not be sued in Switzerland, the judge could allow the good faith acquirer who had suffered damage "an equitable recompense at the cost of the confederation".<sup>8</sup> The Swiss government was held liable by Swiss Booty Chamber which stated that compensation must, not could, be awarded. The Decree was repealed after two years.<sup>9</sup> However, in becoming Party to the Protocol, Switzerland and the other Parties have agreed to provide compensation in these circumstances.

Discussions, proposals and votes at the drafting Conference make it clear that only the State which was in occupation has the duty to pay; not a State which afterwards re-

ceives such goods, nor the State from whose territory the objects were taken.<sup>11</sup>

The duty to compensate was raised by the Canadian delegate at a meeting of experts held in The Hague in July 1993 to discuss improvements to the Hague Convention and Protocol. The Canadian delegate wanted to be sure that Article 4 would not apply to forces which were in a foreign country as part of a peace-keeping operation. Clearly it would not. In the first place, as long as U.N. peace-keeping forces are only deployed with the consent of the State on whose territory they are operating, this cannot be regarded as "occupation". Furthermore, "occupation" could only be the case where the foreign power is sufficiently in control to exercise restraint over the movement of cultural property. In this respect a parallel can be made to Protocol I to the Geneva Conventions 1977 which only applies (Art. 1 (2)) to

*"armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."*

This is clearly not the case with peace-keeping troops, whose competence is strictly limited to peace-keeping operations. Although, therefore, they should in the spirit of the Convention, do their best to prevent pillage and destruction of the cultural heritage of the area where they are operating, being responsible, as part of a United Nations operation, to conform to the principles of customary international law, they could not be regarded as having to compensate a good faith purchaser for the return of cultural objects which left the territory where they were operating during their peace-keeping mission.

Article 5 was adopted at a time when a dispute existed between the Polish and Canadian authorities about the return of cultural property to Poland.

*"Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came."*

7 Study cited supra note 1, commentary on Protocol, Art. 3.

8 Law No. 59 Restitution of Identifiable Property (United States zone of occupation) s.3.75(2).

9 Decree of 10 December 1945 concerning actions for the recovery of goods taken in occupied territories during the war ("Booty Decree") (Switzerland).

10 For an extensive discussion of the Declaration of London, the position of the neutral countries (Sweden, Switzerland and Portugal) and the aftermath, see L.V. Prott and P.J. O'Keefe, Law and the Cultural Heritage - Vol. III: Movement (Butterworths, London) 1989, pp. 805-811.

11 J. Toman, Study cited supra note 1, discussion on Protocol, Art. 4.

The dispute case concerned treasures from the Polish State collections which had been taken to Canada for safe-keeping at the time of the attack on Poland by Germany in 1939. Though at first stored on Canadian government property, they were removed by one of the Polish representatives who had brought them to Canada shortly after the Canadian recognition of the new (Communist) government of Poland and placed in the hands of a private body, where they were seized by the provincial government of Quebec. While the Polish government argued that the Canadian government was responsible for impounding these treasures, since the property of a State should be immune from seizure, the Canadian government responded that the Polish authorities were at liberty to take legal action against the detainers. Eventually a settlement was reached without determining these issues<sup>12</sup>. A somewhat similar case concerned the Crown of St. Stephen, voluntarily handed to United States armed forces by a Hungarian emissary at the end of World War II, and subsequently held in the United States. It was returned after litigation in 1977<sup>13</sup>. An early example of temporary safe-keeping and subsequent return was the collection of the Prado, which was evacuated from Madrid to Geneva during the Civil War, and returned in 1939 when the government of General Franco was recognized by some members of the League of Nations<sup>14</sup>.

Why were the provisions on return of movables relegated to a Protocol, and not part of the Convention itself? The answer was given by Nahlik<sup>15</sup>. On the basis of well developed precedents concerning the restitution of cultural goods taken by invaders, it could have been expected, he wrote, that the new Convention would restate these rules of customary law. However, that was not to be the case. An opinion of UNIDROIT (the International Institute for the Unification of Private Law) took the view that all matters of private law should be excluded from the draft Convention, on the basis

that national private law on this matter was too diverse to permit a solution. This view was accepted by the UNESCO Committee of Experts but objected to, as discriminatory, by a number of states which had suffered occupation. At this point the United Kingdom and United States delegates declared that they would not be able to sign the Convention if it contained a section on restitution. With regret, therefore, the Rapporteur assigned these provisions to a separate instrument.

The position taken is not consistent with the insistence of these two States on restitution by the neutral States just a few years before. It is also evident that concerns about the domestic law of those States, in particular, the overturning of the protection of the "bona fide" purchaser, were no impediment to the adoption of the appropriate legislation by those States, by the military governments of both the United Kingdom and the United States in Germany, nor by that of Germany itself. Finally it has to be noted that neither the United Kingdom nor the United States ever became party to either the Convention or the Protocol, although France, Germany and Switzerland, all countries which would need to make changes to their domestic law, did.

- 12 A. Balawyder, *The Odyssey of the Polish Treasures* (St. Francis Xavier University Press, Anrignosis, Nova Scotia) 1978; S. A. Williams, *The Polish Art Treasures in Canada: 1940-1960*, 15 *Canadian Yearbook of International Law* (1977), p. 146; S.E. Nahlik, *Le Cas des Collections polonaises au Canada: Considérations juridiques, 1959-1960 Annuaire polonais des affaires internationales*, p. 172; The Case of the displaced Art Treasures, 23 *German Yearbook of International Law* (1980), p. 255.
- 13 *Dole v. Carter* 569 F. 2d 1109 (1977).
- 14 S.E. Nahlik, study cited supra note 2, pp. 104-105.
- 15 *Id.*, pp. 135-137.

# World Cultural Heritage List and National Sovereignty

Francesco Francioni\*

## 1. Introduction

The current focus on the international protection of cultural property is the result of a dramatic increase in deliberate and incidental destruction of monuments, artistic and religious buildings, libraries and movable works of art in the course of armed conflicts of an international or inter-ethnic character. It follows also from the emergence of a new astonishing and mindless strain of cultural terrorism with deliberate attacks against symbolic cultural sites such as the ancient centre of Rome and the Uffizi Gallery of Florence.

What is happening now with regard to cultural property is a somber reminder that often the most extreme conditions of violence, disaster and human suffering have to be reached before States awaken to the need for improving the effectiveness of a certain area of the law. This has happened with environmental regulation - often the ad hoc response to man-made catastrophes. It has been the case also with the international protection of human rights, whose process has always been preceded by the most outrageous attacks on human dignity, from genocide, to torture, to systematic racial discrimination. Now it is the turn of the protection of cultural heritage against armed violence.

If the States concerned and the international community as a whole are for the time being unable to prevent such occurrences of violence, it is at least a welcome development that several States and UNESCO are now taking the initiative to review and possibly improve the effectiveness of international treaties on the protection of cultural property, particularly in the event of armed conflict.

It is in the context of this initiative that it may be useful to rethink also the relationship and co-ordination between the existing conventional instruments adopted under the aegis of UNESCO. From this point of view, special significance can be attached to the question of the relationship between the 1972 World Heritage Convention (WHC) and the 1954 Hague Convention on the protection of cultural property in time of armed conflict.

This short paper is intended to discuss this relationship.

Obviously, it would be impossible, considering the limited scope of this paper, to deal with the many legal aspects - substantive, procedural, institutional - involved in this relationship. Of necessity, the focus must be more limited and - as indicated in the title - it is directed toward identifying what implications for national sovereignty can arise from the registration of cultural property with the WHC list and, con-

sequently, toward establishing what effects such registration may have on the regime of international protection of cultural property in time of armed conflicts.

This question has two dimensions: *de lege lata* and *de lege ferenda*. We shall explore them separately.

## 2. De lege lata

The view is still held by a certain number of Governments, that the registration of cultural property with the WHC list does not entail any burden on or restriction of national sovereignty. Several factors contribute to this opinion. One is constituted by art. 6 of the Convention which lays down a duty to cooperate in the protection of cultural heritage "(w)hilst fully respecting the sovereignty of the states on whose territory the cultural (...) heritage (...) is situated". Another factor is the rather "soft" character of the substantive obligations undertaken by the State Parties to the Convention. They essentially relate to "(...) ensuring the identification, protection, conservation, presentation and transmission to future generations" of the cultural heritage as far as possible and appropriate for each country (art. 4); to recognizing the value of such cultural property as a world heritage, and to cooperating in the conservation effort as required by the Convention (art. 6). Further, at the institutional level, the WHC does not set up a true international body capable of independent regulatory action binding on member States and subject to enforcement powers. It provides only for a "light" intergovernmental machinery (the World Heritage Committee) whose function is to perform the technical task of registering the cultural and natural heritage, monitoring the correct application of the Convention and deciding on the action to be taken with regard to requests for assistance and to the use of funds to finance specific projects.

Despite this apparent concern of the Convention with leaving intact the rights and jurisdictional powers of member States with regard to the sites and monuments registered with the WHC list, it is our view that the WHC entails some limited but significant restrictions on national sovereignty.

First of all, a contextual interpretation of the instrument reveals that its object and purpose is to recognize a collective interest of the international community as a whole in the protection and preservation of sites and monuments of universal significance, which are to be transmitted to future gener-

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ations as a testimony of human civilization. This concept is clearly stated in the Preamble which declares

*"(...) that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all nations of the world"*

and

*"(...) that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole".*

These acknowledgements may appear quite general, perhaps vague. However, they are not to be read in a vacuum. They must be interpreted in light of the development that international law – both customary and treaty law – has had in the period of time that has lapsed since the adoption of the WHC. Since 1972 the concept that States are individually and jointly bound to protect and promote certain interests that do not belong to any specific national community but to human kind as a whole has firmly taken root in international law. These interests are now recognized to be the protection of fundamental human rights, the maintenance of peace, and the protection of the general environment, especially in view of the increasing concern with "global" risks. To these general interests one must add the protection of the most significant testimonies of the cultural heritage of humankind.

The progress of international law in this field finds expression in several international texts. For instance, the 1972 UNESCO Recommendation concerning the protection at national level of the cultural and natural heritage states that cultural heritage

*"constitutes an essential feature of mankind's heritage and a source of enrichment and harmonious development for present and future civilization".*

Similarly, the 1978 UNESCO Recommendation for the Protection of Movable Cultural Property recognizes that such property

*"(...) representing the different cultures forms part of the common heritage of mankind and that every State is therefore morally responsible to the international community as a whole for its safeguarding".*

Before these instruments, the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict had already recognized, in 1954, that

*"(...) damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world".*

Against this general background, it would be quite bizarre to deny that State Parties to the WHC have recognized and accepted the existence of a world community entitlement to the conservation and protection of cultural property regis-

tered as world cultural heritage. This entitlement transcends national sovereignty and limits the individual States' freedom to dispose of such cultural property in a manner that is inconsistent with the preservation of its integrity in the interest of humankind.

a) What are the practical consequences deriving from the recognition of such general interest of the international community? The most important consequence, in our view, is the estoppel effect with regard to the possibility of invoking domestic jurisdiction as a shield to prevent the application of international law or to oppose the interference by international institutions with situations or disputes involving cultural property registered with the WHC list. One can envisage several hypothetical situations. In one, the Government of a country which has registered a certain site with the WHC list decides to proceed to authorize a touristic-commercial development of the site. A group of conservation activists brings an action in court in order to enjoin the prosecution of the project which they consider incompatible with the conservation of the site. Should the court consider the matter within the unfettered sovereignty and domestic jurisdiction of the forum State, and thus refrain from interfering with the executive's decisions? Or should it rather look at what obligations the WHC imposes on the forum State and thus cooperate in the judicial realization of such obligations notwithstanding the unwise executive's decision to license the project? It goes without saying that the correct answer is the latter one.

In another hypothetical situation the recognition of an overarching international community's interest transcending national sovereignty may work to the advantage of the State which has registered a site with the world heritage list. Let us suppose that the registering State has concluded a development contract with a foreign private firm for the purpose of developing a tourist industry along the coast of that State. Under that contract the State is bound to facilitate, licence, and authorize the construction of infrastructure necessary for the completion and functioning of the project. A dispute arises between the foreign investor and local authorities as a consequence of the latter's imposition of strict regulation for the building of infrastructures in an area where there are monuments registered with the WHC list. May the host State invoke this circumstance as a defence for non-compliance with the investor's request? The answer is yes, since the respect for the integrity of the cultural site is an objective limitation on the host State's exclusive control and jurisdiction. If the assumption were, instead, that the host State should retain full sovereignty over the site, it would be more difficult to oppose a claim by the foreign investor of non-compliance with the obligations undertaken with the investment contract.

b) The importance of the above legal consequences does not need to be emphasized. However, it is, perhaps, in relation to situations of armed conflict that registration with the WHC list produces its most direct effects on national sovereignty.

In this regard, we must reiterate that many of the armed conflicts that have spread from the former Soviet Union to



former Yugoslavia, from Africa to the Indian subcontinent, are internal or inter-ethnic conflicts. In many instances, as can be witnessed from the bloody war between Muslims, Serbs and Croats in Bosnia, but also from occasional outbursts of violence between different religious-ethnic groups in India, armed attacks extend to religious and cultural buildings and sites. It is as if the physical killing were not a sufficient tribute to the hatred of the enemies but required the annihilation of their cultural symbols, their history, their memory. International law has unfortunately failed to prevent these tragic occurrences. And what is happening today, especially in Bosnia, is a reason for grief and lament for any international lawyer. At the same time it must also be a reason for shaking from us that sense of futility that often pervades our discipline and for focusing on new initiatives to adjust existing law to new offences. One such initiative is the institution of an International Tribunal for the prosecution of persons responsible for crimes committed in the territory of former Yugoslavia after the onslaught of the civil war (1991). This initiative is important not only to restate the continuing validity of humanitarian law and of the Nuremberg principles on crimes of war and crimes against humanity, but also to further develop this law to extend its reach to new atrocities and new appalling offences that are shocking the conscience of humankind today. The practices of "ethnic cleansing" and of deliberate, massive and systematic rape, as now amply documented by impartial international institutions, are to be included in the new bleak inventory of international crimes. And so there has to be included, to use the very words of the statute of the Tribunal, the "(s)eizure of, destruction or wilful damage to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" [Art. 3 (d) of the Statute of the Tribunal, approved by Security Council Resolution 827 of 25 May 1993]. The inclusion of crimes against cultural heritage among the grave violations of the laws and customs of war to be prosecuted by the International Tribunal is of utmost importance due to the opportunity it will offer to develop and strengthen the idea of international responsibility for grave breaches of the law of war and for crimes against humanity.

It is not the purpose of this paper to dwell on the significance and prospects of jurisprudential developments in this direction. Others in this panel are addressing the topic of crimes against culture. For us, it is necessary rather to appreciate in light of this general background what effects the registration of cultural property with the world heritage list will have with regard to the national sovereignty of the state engaged in an armed conflict.

The first effect concerns the general duty of the host State to protect the registered cultural property in the event of armed conflict independent of whether that State is a party to the specific 1954 Hague Convention or not. This general duty flows from the recognition that the registering State has already expressed to the world community its interest in the preservation of the cultural property included in the world heritage list. In practical terms, this duty translates into the specific obligation for the host State to introduce into its military regulations and instructions provisions capable of

ensuring the knowledge and the respect of registered sites and monuments, of excluding the use of such monuments and sites for military defence, control and command purposes. Further, the special exception of military necessity must be applied in a very rigorous and restrictive manner to the conduct of hostilities involving world cultural heritage, so as to allow a suspension of the protection regime only in unquestionable cases of imperative military necessity. In this regard one may add that cultural property should be treated differently from the category of "natural heritage" equally covered by the World Heritage Convention. This is certainly not because the present writer is inclined to think that natural heritage should be given a lower value, but rather because of the realistic consideration that normally the natural sites registered with the 1972 Convention occupy a much more extensive land area than cultural sites and monuments and therefore are less susceptible to being "immune" from armed violence under the theory of military necessity and proportionality.

Besides this general duty of protection, the registration of cultural property with the world heritage list must be deemed to have the effect of potentially removing a non-international armed conflict, which takes place within the territory of the registering State, from the domain of domestic jurisdiction, thus making such conflict the legitimate concern of international law and institutions. This effect should not be underestimated in view of the current resistance of the States in whose territory civil or inter-ethnic strife occurs to recognize the international relevance of this type of armed violence and to treat it as an incident to be dealt with entirely within the scope of their territorial sovereignty and police action. It is submitted, however, that when the non-international conflict involves extensive damage and destruction of sites and monuments registered with the world cultural list, a clear interest of the international community is at stake and a valid argument exists for rejecting the plea of domestic jurisdiction and, at the same time, for justifying appropriate action by the competent international institutions. This conclusion is consistent with the action taken by the World Heritage Committee with regard to the old city of Dubrovnik, one of the nine sites registered with the world heritage list in the territory of former Yugoslavia. Following the extensive damage done to the historical and religious buildings of Dubrovnik, the World Heritage Committee took the initiative at its December 1991 meeting of placing the city on the list of cultural property in danger, making it possible for UNESCO to establish *in situ* missions, to allocate funds and to start emergency restoration work of monuments and buildings damaged by the war.

The above conclusions do not require that we enter into the merits of the issue whether the obligation to protect cultural property in time of armed conflict is grounded in customary international law, so as to bind also those States (still many) which are not Parties to the 1954 Hague Convention. This issue is discussed in another paper. For the purpose of the present analysis it is sufficient to conclude *de lege lata* that the specific obligation to protect cultural property in the WHC list stems from the 1972 Convention itself. Its applica-

tion is **universal** both because of the acknowledged exceptional and **universal** value for humankind as a whole of the cultural sites included in the list, and because of the nearly universal scope of application of the 1972 World Heritage Convention. It is an **erga omnes** obligation that the registering State has undertaken toward the international community as a whole via the World Heritage Convention. As such it must be respected and it must be held to impinge on national sovereignty regardless of the eventuality that the registering State or the other State(s) with which an armed conflict exists are Parties to the 1954 Hague Convention.

### 3. De lege ferenda

If we look now at the matter in a policy perspective, two aspects are worth being briefly considered.

The first one concerns the possible expansion of the powers of intervention by the United Nations in situations of internal conflicts causing extensive damage to world cultural heritage. As the law of the Charter stands today, the Security Council may not consider action or adopt specific measures unless the situation poses a threat to peace or is a violation of the peace and of international security. Since this threshold is a very high one under a literal interpretation of the Charter, one may envisage an evolution of the practice or a formal revision of the existing law of the Charter to the effect of considering attacks against cultural heritage of universal value as components of the general category of threats to peace and security which would justify a decision of the Security Council to deal with the situation under Chapter VI or VII of the Charter. This, of course, is a sensitive issue in light of the current controversy surrounding the extent of Security Council powers to deal with internal situations which, rather than posing a clear threat to international peace, become the object of humanitarian interest or of an imperative pursuit of justice. I am referring, naturally, to Security Council action in regard to Kurds in Iraq and humanitarian intervention in Somalia, as well as the adoption of measures in the form of sanctions against Libya for its refusal to co-operate in the prosecution of persons allegedly responsible for terrorist attacks. In all these cases the ratio for the action by the Security Council was the existence of a threat to the peace. However, it would be more honest to recognize that the de-

cisive motivating factor was the need to stop a genocide with regard to the Kurds and to Somalia, and the determination to suppress terrorism in the case of Libya. What counts, in any event, is that in none of the three cases did the Security Council conclude that its action could be prevented by arguments of national sovereignty and domestic jurisdiction under art. 2 (7) of the Charter.

The second direction in which an improvement of the law on the protection of cultural property is needed **de lege ferenda** is that of better co-ordination of the world cultural list with the regime of special protection under the 1954 Hague Convention. An automatic extension to all the world heritage list with the regime of special protection provided in the 1954 Hague Convention is not possible for a number of reasons. First, the world heritage list includes also natural sites which remain outside of the scope of the 1954 Hague Convention. Secondly, some of the cultural sites in the world heritage list are of such a size and geographic location as not to meet the requirements for immunity under the Hague Convention, such as adequate distance from strategic or industrial centres. Thirdly, the procedure for registration under the Hague Convention contemplates the possibility for the State Parties to raise objections against the registration for special protection of sites that are deemed not to meet the requirements laid down by the Convention. No such system of formal objections exists within the 1972 World Heritage Convention. In spite of these discrepancies, however, the two systems need to be harmonized and co-ordinated. One possibility is that of extending to the Hague Convention the system of registration based on the decision of an international organ (the Committee) which would also determine the necessary conditions for registration, such as distance from military targets. The paucity of registered sites under the Hague system of special protection indicates that it is this system that needs to be changed. Another possibility is that of recommending the Parties to the Hague Convention to review all their cultural sites and centres registered or proposed for registration with the world cultural list in order to place the maximum number of them under the special protection regime. This would lead to an effective interfacing of the two systems, thus remedying the present anomaly of the world cultural list covering hundreds of sites and the Hague special protection system presently being applicable to only one centre.

# Peacekeeping, Occupation and Cultural Property

Marion Haunton\*

## I. Introduction

States party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the '54 Convention) and its Protocol<sup>1</sup> incur certain obligations thereunder if they are in occupation of foreign territory. This paper discusses whether either the United Nations, or states party to the '54 Convention and Protocol that supply the national contingents of a peacekeeping force, could in any circumstances be held to be in occupation of the territory in which the peacekeeping force operated, thus incurring those obligations. The paper begins by examining the legal basis for peacekeeping forces and the way in which the role of peacekeeping forces has evolved over time. The law of occupation is then reviewed, as are the obligations imposed upon states by the '54 Convention and Protocol. Throughout, reference will be made to the situation in Somalia.

The paper is not exhaustive, merely illustrative; its purpose is to draw attention to an issue which appears to have been little explored.

## II. Legal authority for the establishment of peacekeeping operations

Peacekeeping operations take place under the auspices of the United Nations Charter<sup>2</sup> (the Charter), drafted by the founding members of the United Nations Organization (the UN). Article 23 of Chapter V of the Charter establishes the Security Council, which consists of 15 members of the UN, and Article 24 confers upon the Security Council primary responsibility for the maintenance of international peace and security on behalf of the UN. However, Article 2 (7) provides that nothing in the Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state, except with respect to enforcement measures under Chapter VII.

No mention is made in the Charter of peacekeeping and it is not clear which specific articles authorize peacekeeping operations. The earliest UN peacekeeping operations, such as those in Palestine, India and Pakistan, Lebanon and Yemen, tended to be observer missions, carried out by mostly unarmed military officers working with civilians<sup>3</sup>. It is now widely accepted<sup>4</sup> that operations of this kind were authorized by Chapter VI of the Charter, entitled "*Pacific Settlement of Disputes*".

Charter authority for later peacekeeping actions which involved the use of armed personnel is more controversial; often, the peacekeeping forces were given authority to go beyond the strictly peaceful settlement of disputes, yet the actions were not enforcement actions for the purposes of

Chapter VII, entitled "*Action with respect to threats to the peace, breaches of the peace, and acts of aggression*". However there does not seem to be any serious doubt that this type of peacekeeping operation is authorized by Section VII of the Charter, as it is consistent with Article 1 (1) which specifies that the first purpose of the UN is "*To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace*".

Article 42 of Chapter VII authorizes the Security Council, when measures not involving the use of armed force have been unsuccessful, to take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. There is nothing in the Charter which prevents the Security Council from authorizing a member state to use its national armed forces to enforce Security Council resolutions, rather than authorizing the establishment of a multi-national peacekeeping force.

## III. The mechanics of peacekeeping operations

In view of the diverse and changing composition of the Security Council, there must first be broad international support for a peacekeeping operation. Traditionally they have been established with the consent of the parties to the conflict and on the premise that the peacekeeping force act impartially and use force only in self-defence.<sup>5</sup> The Security Council establishes the mandate for the peacekeeping force, generally in the form of a resolution.

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- 1 Conventions and Recommendations of UNESCO concerning the protection of the cultural heritage, Paris, UNESCO, 1983, p. 15.
- 2 Charter of the United Nations, adopted by the United Nations Conference on International Organization, San Francisco, June 25, 1945, becoming effective on October 24, 1945; as amended, *Min-Chuan Ku* (Ed.), *A Comprehensive Handbook of the United Nations*, New York, 1978.
- 3 United Nations Security Council (New York: a pamphlet of the United Nations Department of Public Information, 1989).
- 4 See, for example, *O. Schachter*, *Authorized Use of Force by the United Nations and Regional Organizations*, in: *L.F. Damrosch/D.J. Scheffer* (Eds.), *Law and Force in the New International Order*, Boulder, 1991, pp. 81 et seq.
- 5 *The Blue Helmets: A Review of United Nations Peacekeeping*, Second Edition, New York, 1990, Part I.

A peacekeeping operation typically consists of a Force Commander appointed by the Secretary-General of the UN, military personnel provided by selected Member states of the UN, and a civilian component. The military personnel remain in their national service but are under the authority of the UN through the Force Commander, except with respect to disciplinary matters where responsibility is with the national service.<sup>6</sup>

When establishing a peacekeeping operation an agreement, traditionally in the form of an exchange of letters, must be entered into between the UN and participating states who are contributing personnel. Given the increased complexity of recent operations a model agreement<sup>7</sup> has been prepared by the UN, largely based upon UN past practice<sup>8</sup>. Article 28 of the model agreement provides that the "principles and spirit" of the 1949 Geneva Conventions and the 1977 Protocols thereto, and of the '54 Convention (but, interestingly, not the Protocol) must be observed and respected by the UN peacekeeping operation.<sup>9</sup>

Ideally, a status-of-forces agreement is concluded between the state in which the peacekeeping force is to operate (the host state) and the UN, which deals with such matters as the status of the peacekeeping operation and of its members, facilities to be afforded by the host state, jurisdiction, and settlement of disputes; again, the UN has created a model status-of-forces agreement<sup>10</sup>. In practice it is not always possible to complete such an agreement<sup>11</sup>, sometimes because there is no central government for the host state; for example, no agreement has been put into place with respect to Somalia.

#### IV. The evolution of peacekeeping operations

The 1990 UN publication on peacekeeping<sup>12</sup> asserts that "As the UN practice has evolved over the years, a peacekeeping operation has come to be defined as an operation involving military personnel, but without enforcement powers, undertaken by the UN to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and co-operation." Another principle from the beginning has been that arms could only be used by peacekeepers in self-defence, which was strictly defined.<sup>13</sup>

In 1992 the Secretary-General was asked to prepare an analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the UN for preventive diplomacy, for peacemaking and for peacekeeping. The report produced by the Secretary-General, entitled "An Agenda for Peace"<sup>14</sup>, identifies four UN security functions: preventive diplomacy, peacemaking, peacekeeping, and peace building. "Peacemaking" is defined as "(...) action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the UN"; thus the term "peacemaking" refers to what was traditionally called "peacekeeping". "Peacekeeping" is now defined in part as "(...) the deployment of a UN presence in the

field, hitherto with the consent of all the parties concerned (...) Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace".

Given that in traditional peacekeeping operations consent of the host state was a pre-requisite to the deployment of a peacekeeping force, the "hitherto" clause represents a considerable departure from established practice; clearly, the Secretary-General envisaged an expanded role for peacekeeping forces.

#### V. The situation in Somalia

In January, 1992 the interim Prime Minister of Somalia brought the deteriorating situation in Somalia to the attention of the Security Council<sup>15</sup>, which authorized the Secretary-General to increase humanitarian assistance to that country and, under Chapter VII of the Charter, ordered an embargo on the delivery of weapons and military equipment<sup>16</sup>.

In March, 1992 the Security Council requested the Secretary-General among other things to look into ways of ensuring the delivery of humanitarian aid<sup>17</sup>. In April<sup>18</sup>, the Security Council established under its authority a UN Operation in Somalia (UNOSOM); requested the Secretary-General to deploy a unit of 50 unarmed UN observers to monitor a ceasefire; and agreed to the establishment of a UN security force to ensure the safety and delivery of humanitarian supplies, as outlined in the report of the Secretary-General<sup>19</sup>. In July, the Security Council called upon all parties, movements and factions in Somalia to cooperate with the UN and assist in the establishment of the security force and the stabilization of the situation, and added that "in the absence of such co-operation, the Security Council does not exclude other measures to deliver humanitarian assistance to Somalia."<sup>20</sup>

6 Ibid., Appendix I.

7 Model Agreement between the United Nations and Member states contributing personnel and equipment to United Nations peacekeeping operations, U.N. Doc. A/46/185 (1991).

8 See, for example, the Aide-Mémoire on Function and Operation of United Nations Force in Cyprus, U.N. Doc. S/5653 (1964).

9 The reference to the '54 Convention may have been inserted in the model agreement in response to Resolution I of the Hague Conference, Records of the Conference Convened by the United Nations Educational, Scientific and Cultural Organization held at the Hague from 21 April to 14 May 1954, The Hague, Government of the Netherlands, 1961, p. 78; discussed in part VII of this paper.

10 Model status-of-forces agreement for peace-keeping operations, U.N. Doc. A/45/594 (1990).

11 M. Harbottle, *The Impartial Soldier*, London, 1970, p. 24.

12 Supra note 5, pp. 4 et seq.

13 See, for example, supra note 8.

14 An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping, U.N. Doc. A/47/277 (1992), paras. 20 and 21.

15 U.N. Doc. S/23445 (1992).

16 U.N. Doc. S/RES/733 (1992).

17 U.N. Doc. S/RES/746 (1992).

18 U.N. Doc. S/RES/751 (1992).

19 U.N. Doc. S/23829 (1992), paras. 24-33.

20 U.N. Doc. S/RES/767 (1992), para. 4.

The following month, given the continued deterioration of the situation, the Security Council authorized an increase in the size of UNOSOM to facilitate the provision of humanitarian aid: the total finally reached 4,219 personnel.<sup>21</sup>

By November the situation had become chaotic to the extent that UNOSOM was unable to complete its mandate, and the Secretary-General in a letter warned the Security Council that there was "(...) a widespread perception among Somalis that the UN has decided to abandon its policy of cooperation and is planning to 'invade' the country"<sup>22</sup>. He also noted that General Aidid "(...) may have made tentative moves towards a rapprochement with Ali Mahdi against the 'common enemy', i.e., the UN."

Several days later the Secretary-General sent a further letter<sup>23</sup>, laying out various options for ensuring the delivery of aid to Somalia. He advised that the situation had deteriorated beyond the point at which it was susceptible to the peace-keeping treatment; that several de facto authorities had refused to agree to the deployment of UN troops in areas where the need for humanitarian aid was most acute; and that in his view the Security Council had no option but to adopt more forceful measures. He also notified the Security Council that the USA had offered to take the lead in any operation which might be authorized to use forceful means to ensure the delivery of relief supplies.

In December the Security Council, acting under Chapter VII of the Charter, authorized the Secretary-General and member states to cooperate to implement the offer of the USA and to use "(...) all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia"<sup>24</sup>. The Security Council also called upon states "(...) to use such measures as may be necessary (...)" to ensure strict implementation of the arms embargo authorized in January, 1992<sup>25</sup>. As a result, the United Task Force (UNITAF) was organized under the lead of the USA. In March, 1993<sup>26</sup> the Secretary-General reported to the Security Council on the progress of UNITAF and the proposed transition from UNITAF to UNOSOM II. He noted, inter alia, that UNITAF had now deployed approximately 37,000 troops<sup>27</sup>; that Chapter VII enforcement powers would be needed for UNOSOM II<sup>28</sup>; that the deployment of UNOSOM II would not be subject to the agreement of any local faction leaders, as it should cover the whole country<sup>29</sup>; and that UNOSOM II would be the first operation of its kind to be authorized by the international community<sup>30</sup>.

In March the Security Council, again invoking Chapter VII of the Charter, authorized the expansion of UNOSOM II<sup>31</sup> in accordance with the recommendations of the Secretary-General in paragraphs 56-88 of his report<sup>32</sup>, initially for the period ending October 31, 1993. The report recommended, inter alia, that UNOSOM II be authorized to take appropriate action against any faction that violated or threatened to violate the cessation of hostilities<sup>33</sup>, and to take such forceful action as might be required to neutralize armed attacking forces<sup>34</sup>. The Secretary-General recommended an initial force of 28,000, but reserved the right to go back to the

Security Council for additional troops if necessary<sup>35</sup>. He specified that the rules of engagement should be defined by the UNOSOM II Force Commander<sup>36</sup>, who would report directly to the Secretary-General's Special Representative<sup>37</sup>. By the same Resolution the Force Commander of UNOSOM II was directed to assume responsibility for a secure environment in Somalia<sup>38</sup>: the actual transfer of command took place on May 4, 1993.

In June, 1993, again acting under Chapter VII of the Charter, the Security Council in response to violence against UN personnel reaffirmed that the Secretary-General was authorized under Resolution 814<sup>39</sup> of March, 1993 to take all necessary measures against all those responsible for inciting or performing the attacks "(...) to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment."<sup>40</sup>

In summary, in the space of approximately 15 months the peacekeeping force in Somalia evolved from an unarmed group of 50 observers to a force of nearly 30,000 armed troops. The force was authorized to use all necessary means to establish a secure environment for relief operations, and to take such action as might be required to neutralize attacking forces and to punish those responsible for attacks against UN personnel. Clearly, the principles of consent and cooperation of the "host state" no longer applied in Somalia; nor did the principle that enforcement powers not be granted in peace-keeping operations, or the principle that arms only be used in self-defence.

## VI. The law of occupation

Traditionally, "occupation" has been used almost synonymously with "belligerent occupation". Adam Roberts has extensively researched the key distinguishing characteristics of belligerent occupation, which in his view are that the occupation be by a belligerent state, of territory of an enemy

21 U.N. Doc. S/RES/775 (1992) and U.N. Doc. A/47/916/Add. 1 (1993), para. 2.

22 U.N. Doc. S/24859 (1992).

23 U.N. Doc. S/24868 (1992).

24 U.N. Doc. S/RES/794 (1992), para. 10.

25 Ibid., para. 16, referring to supra note 16.

26 U.N. Doc. S/25354 (1993).

27 Ibid., para. 6.

28 Ibid., para. 58.

29 Ibid., para. 97.

30 Ibid., para. 101.

31 U.N. Doc. S/RES/814 (1993), para. 5.

32 Supra note 26.

33 Ibid., para. 57 (b).

34 Ibid., para. 57 (f).

35 Ibid., paras. 71 and 74.

36 Ibid., para. 88.

37 Ibid., para. 78.

38 Supra note 31, para. 14.

39 Supra note 31.

40 U.N. Doc. S/RES/837 (1993), para. 5.

belligerent state, during the course of an armed conflict and before any general armistice agreement is concluded.<sup>41</sup>

D.W. Bowett<sup>42</sup>, in 1964, was of the opinion that a peace-keeping force operating under an agreement with the host state (i.e. with consent) is not in belligerent occupation, but that where a UN Force is performing an enforcement action under Chapter VII "(...) a UN Force may be in actual 'belligerent occupation' of territory (...)".

Both the 1899<sup>43</sup> and the 1907<sup>44</sup> Hague Regulations Respecting the Laws and Customs of War on Land presuppose that occupation occurs in the context of war. Article 42 of each provides that "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established and is in a position to assert itself". A similar definition is found in Article 41 of Laws of War on Land<sup>45</sup>, which provides that "Territory is regarded as occupied when, as the consequence of its invasion by the enemy's forces, the state from which it has been taken has ceased, in fact, to exercise there its regular authority, and the invading state alone finds itself able to maintain order therein. The limits within which this state of affairs exists determine the extent and duration of the occupation."

Given the number of different forms of foreign military involvement which have evolved, especially since World War II, the notion that "occupation" is synonymous with "belligerent occupation" and occurs only in the context of war is being increasingly challenged. Adam Roberts, for example, has posited that there are seventeen different types of occupation,<sup>46</sup> a number of which are not "belligerent occupation" but to which the law on occupations would apply. He suggests as a rule of thumb that "(...) every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable."<sup>47</sup> Both the '54 Convention and the Protocol use the term "occupation" rather than "belligerent occupation".

The Namibia case is an example of an occupation which did not take place in the context of war or armed conflict. In that case the International Court of Justice was of the opinion that although between 1920 and 1966 South Africa's supervisory presence in Namibia was legally mandated, the mandate was terminated by UN Security Council Resolution in 1966, after which "(...) the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of territory."<sup>48</sup>

## VII. The '54 Convention and Protocol - Obligations and interpretation

The '54 Convention, generally speaking, obligates its Parties to respect the cultural property of other Parties. Further, under Article 5, a Party that is in occupation of the whole or part of the territory of another Party shall as far as possi-

ble support the authorities of the occupied territory in safeguarding its cultural property and in preserving cultural property damaged by military operations. There are now 82 states party to the '54 Convention, thus the obligation to respect the cultural property of other states may be so well entrenched as to have become customary international law.

Part I<sup>o</sup> of the Protocol places obligations upon Parties in occupation of territory during an armed conflict that come into play even where the territory being occupied is not that of a Party. Part I requires each Party to prevent the exportation of cultural property from any territory occupied by it during an armed conflict; to return any cultural property which is brought into its territory from any occupied territory; and to indemnify such persons as had purchased the cultural property in good faith, when returning it to the occupied territory. Only 68 states are party to the Protocol, the obligations of which are in some respects more onerous than those of the '54 Convention and are less likely to be considered to form a part of customary international law.

41 A. Roberts, What is a Military Occupation?, in: The British Yearbook of International Law 1985, pp. 249 et seq. (261). Footnote 39 of this Article states: "The definition is adapted from those offered or implied by Graber, The Development of the Law of Belligerent Occupation 1863-1914 (1949), p. 5; Feilchenfeld, The International Economic Law of Belligerent Occupation (1942), p. 6; von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation (1957), p. 28."

42 D.W. Bowett, United Nations Forces: A Legal Study of United Nations Practice, London, 1964, pp. 490 et seq.

43 James Brown Scott (Ed.), Texts of The Peace Conferences at the Hague, 1899 and 1907, Boston/London, 1908, p. 51.

44 Ibid., p. 209.

45 Recommended for adoption by the Institute of International Law at its session in Oxford, September 9, 1880; *ibid.*, p. 389.

46 *Supra* note 41, pp. 260 et seq.

47 *Supra* note 41, p. 250.

48 Legal Consequences for states of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970); Advisory Opinion of the International Court of Justice, 49 I.L.R. 3, p. 48.

49 *Supra* note 1; Part I of the Protocol provides in full, p. 44:

The High Contracting Parties are agreed as follows:

1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May, 1954.

2. Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.

3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

4. The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph."

Article 18<sup>50</sup> of the '54 Convention provides that it applies in the event of declared war or any other armed conflict between two or more Parties; this would indicate that the scope of the '54 Convention is intended to be broader than the scope of the conventions governing warfare. Article 18 provides that the '54 Convention applies even when the state of war is not recognized by one or more of the Parties, and also applies to all cases of partial or total occupation by a Party, even where the occupation meets with no resistance. The Protocol has no application section, but it may be argued that it has the same application as the Convention as it was concluded at the same time.

The drafters of the '54 Convention intended that forces operating under the UN should be bound by its principles: Resolution 1 of the Hague Conference,<sup>51</sup> which was convened by UNESCO for the purpose of drawing up and adopting the '54 Convention, Regulations and Protocol, provides: "The Conference expresses the hope that the competent organs of the United Nations should decide in the event of military action being taken in implementation of the Charter, to ensure application of the provisions of the Convention by the armed forces taking part in such action." It is not clear whether the Conference intended that the provisions of the Protocol should also apply to forces operating under the UN; nor is it clear whether the drafters would have intended that the '54 Convention apply to peacekeeping forces under the UN.

The Vienna Convention on the Law of Treaties<sup>52</sup> specifies in the section dealing with the interpretation of treaties that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>53</sup> The purpose of the '54 Convention and Protocol is to protect cultural property in times of warfare, armed conflict and occupation: clearly that purpose would be better met by an interpretation that the '54 Convention and Protocol apply to a peacekeeping force.

## VIII. Summary

### 1. Could a peacekeeping force reasonably be considered to be in occupation of the territory in which the force is operating?

Where a status of forces agreement has been concluded between the UN and a host state, evidencing the consent of the host state; and where the peacekeeping force acts within the mandate given by UN Resolution in accordance with the Charter, the peacekeeping force could not be reasonably held to be in occupation of the host state. However, in situations where there is no consent by the host state to the presence of a peacekeeping force or where there are no civil authorities in existence; and where the force operates under a UN mandate such as that given in Somalia, which has been characterized as the first operation of its kind to be authorized by the international community; then the authorities cited above might well argue that the peacekeeping force is in occupation of part or all of the territory in which it operates, even though

the operation was validly authorized by the UN under Chapter VII of the Charter. At the very least, this is a grey area.

### 2. Could the obligations towards cultural property imposed by the '54 Convention and Protocol attach to the UN?

An argument could be advanced that as a peacekeeping force is under the control of the UN, the responsibilities of the '54 Convention and Protocol fall on the UN rather than on the state supplying the force. However, given that the UN is an organization and not a state it would be neither functionally or legally capable of acceding to the '54 Convention or Protocol, which are only open to accession by states.

### 3. Could the obligations of the '54 Convention and Protocol fall upon states party which supply the national contingents of the peacekeeping force?

D. W. Bowett held that "(...) national contingents in the service of the UN are bound, to the same extent and degree, to all those rules of warfare which would obtain if the same forces were engaged in international armed conflict for the state alone."<sup>54</sup> It must be remembered that during the exercise of the UN mandate the national contingents are under the sole authority of the UN and not of their respective states. However, if the Bowett view is correct, then by analogy national contingents of peacekeeping forces could be seen as being bound by the conventions that would obtain if those contingents were operating on behalf of their own state rather than the UN. Thus, if the states supplying the national contingents were parties to the '54 Convention and Protocol, it might well be held that the obligations thereunder attached to those states.

50 Supra note 1; Article 18 of the '54 Convention provides in full, p. 24: "Article 18. Application of the Convention

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them."

51 Supra note 9.

52 Vienna Convention on the Law of Treaties, entered into force January 27, 1980, Queens Printer for Canada, Ottawa, 1984. By Article 4 the Vienna Convention is non-retroactive.

53 Ibid., Article 31 (1).

54 Supra note 42, p. 504.

# The "Human Dimension" of the Protection of Cultural Property in the Event of Armed Conflict

Halina Niec\*

## I. Introduction

Protection of cultural property in the event of armed conflict is once again at the top of UNESCO's agenda. The problem of the effectiveness of the existing body of rules aimed to protect cultural property is at the core of the present attention, but among the many antecedents of this concern there is a fact, which the Secretary-General of the United Nations put in the following words: "The world into which the United Nations was born was a world of peace and war between nations. The world today is a world of war and peace within nations."<sup>1</sup> As a consequence, there are, at present, more than a dozen armed conflicts of very mixed character. In situations where there are difficulties with the clear identification of a legal character of conflicts - as is illustrated by the case of the former Yugoslavia<sup>2</sup> - there is no possibility to apply treaty-based monitoring and implementation mechanisms designated to supervise the actual adherence by States to internationally recognized standards of the protection of cultural property during armed conflicts. As a result, the safety of monuments and works of art continues to be seriously jeopardized in the ongoing conflicts, and in many instances the tragic destruction of cultural objects of special value are recorded.<sup>3</sup>

As can be seen from examining the developments in the former Yugoslavia, although the United Nations bodies have assumed an unprecedented active role in the enforcement of humanitarian norms in those conflicts<sup>4</sup>, little attention has been paid to destruction, looting, and devastation of cultural heritage.

It may be said that the General Assembly of the United Nations - "a universal membership body" - has not exercised its authority to provide international public opinion with adequate information on gross and systematic violations of the principles of international protection of cultural property and has failed to provide assistance when particular violations have occurred.

## II. The Concept of Culture in the Context of Human Rights

Today, various multilateral treaties are in force that serve to limit the negative impact of military hostilities on the existence and physical integrity of the artistic and historical heritage. However, while the direct object of those treaties is to provide protection to different elements of the heritage, it is obvious that the protection is not afforded for their own sake. Thus, the question arises: why should the cultural heritage be given national or international protection, whether in

time of peace or in time of armed conflict, or in other words "why preserve the past?"<sup>5</sup> It seems that the answer may come from the reflection on culture and the human right to culture. Just as the concept of human rights in the system of international law escapes a precise definitional framework<sup>6</sup>, the concept of culture in this area creates serious difficulties and international lawyers often use it to mean various things. The imprecision of the definition of culture can no longer be ignored as the term appears with increasing frequency in international discussions. This is especially the case in the context of human rights and current theories of development present in the sphere of international law. The concept of

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1 The Secretary-General, in his address to Grandes Conférences Catholiques, United Nations, Press Release SG/SM/1430, 28 April 1993, p. 6.

2 Referring to the conflicts in the former Yugoslavia, the Security Council in its Resolution 757 (1992) of 30 May 1992 used the following wording: "(...) the very complex context of events (...)"

3 See: UN E/CN.4/1993/50, Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1 of 14 August 1992. In his report, Mazowiecki writes: "Although the conflict in Bosnia and Herzegovina is not regarded as a religious one, it has been characterized by the systematic destruction and profanation of mosques, Catholic churches and other places of worship, as well as other sites of cultural heritage. This has been reported to be the case particularly in areas currently or previously under the control of Serb forces. The destruction by Serb forces of the Muslim cultural heritage museum of Trebinje in November 1992 and of its mosque on 26 January 1993 may be cited here to represent many other examples. However, it has been reported that some Orthodox churches have been destroyed in areas of central Bosnia and Herzegovina which were or are, under the control of government and/or Croat forces."

4 Role of the Competent United Nations Bodies in the Implementation of International Humanitarian Law, Information Document submitted by the IHL, LLHL, 18th Round Table on Current Problems of International Humanitarian Law, San Remo, 6 to 8 September 1993, pp. 4-6.

5 See: The Challenge to Our Cultural Heritage, Why Preserve the Past?, in: Y. Raj Isar (ed.), Proceedings of a Conference on Cultural Preservation, Washington, D.C., 8-10 April 1984, UNESCO, Paris 1985.

6 J. Feinberg wrote: "(...) as the right is a kind of claim, and a claim is an assertion of right so that a formal definition of either notion in terms of the other will not get us very far (...) I think not to attempt a formal elucidation of the idea of a right." J. Feinberg, The Nature and Value of Rights, Belmont, California 1979, p. 85. M. Lachs does not define this concept, but he calls our attention to the legal consequences of this institution when he states: "Right, a term like many others canonized by law, is not an abstraction, nor an elusive goal, but an institution which, as such, is recognized by society and the international community. A right is, as we know so well, intended to produce specific effects - its bearer is entitled to expect it to be respected." M. Lachs, Opening of the Workshop "The Right to Health as a Human Right", Hague Academy of International Law, United Nations Workshop, The Hague, 27-29 July 1978, Alphen aan Rijn 1979, p. 7.



"culture" is not only an intellectual construction, but it also affects the essence of the created, or only interpreted, norms of international law. In the discussions of lawyers, the definition of culture reaches an exceptional range - from general statements which have derived from examining law as one of the phenomena of culture<sup>7</sup> to the instrumental treatment of culture in its aspect of political influence on the international community<sup>8</sup>. This, as *Deputy* states, is just as effective in its propaganda dimension as any other weapon, or maybe even more so because we live in times of cultural conquests.<sup>9</sup>

The intellectual debate about the future of international law in a multicultural world, which took place in The Hague in 1983 and which has shown that excellent lawyers perceive and describe the phenomena of culture in various ways and point to different elements which in their opinion make up the concept's constituent characteristics, is one of the latest examples of the international lawyers' discussion of culture. In the context of this discussion, the speech of *G. de Lacharrière* deserves special attention.<sup>10</sup> He discusses the concept of culture in the context of international documents to determine which meaning of culture is used in international law.

In the introduction, Judge *Lacharrière* assumes that the concept of culture in its restricted sense must be separated from science, technology, ideology, and political and social systems, and that it refers only to literary and artistic works. Continuing in this line of thought, the author treats the incorporation of science and technology into the concept of culture as a significant broadening of its definition. He points out that the most extended notion of culture can be found in anthropological definitions, which include the convictions, ideologies, religions, morality, political, economic, social, and legal institutions, as well as ways of behavior, thought, and feeling.<sup>11</sup> Turning to the international legal documents, the author points to the UNESCO Constitution, which makes a distinction between culture and science and education; thus, in other words, it treats culture in the restricted sense. The Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations is the next document which observes the indicated distinction, according to *Lacharrière*. The Declaration talks about the duty of the States to cooperate in the "economic, social, cultural, technical, and commercial spheres (...)". The author does notice the widened view of culture, which includes science and technology, in Articles 13, 16, 55, 57 and 62 of the Charter of the United Nations. In these articles, in addition to economic and social spheres, only culture is pointed to as a sphere of international cooperation. However, the author immediately points to the Havana Declaration which was adopted by the heads of non-allied States and governments on 9 September 1979 and in which, in *Lacharrière's* opinion, the parties accepted the restricted interpretation of the cultural dimension of development by stating that development is closely connected not only with science and technology, but also with culture. Setting forth reasons for the restricted treatment of culture in international documents, *Lacharrière* uses the International Covenants on Human Rights as one of the

chief arguments. These Covenants distinguish cultural rights from economic, social, civil, and political rights. *Lacharrière* makes a general thesis that the concept of "culture" is used in international texts in the restricted interpretation<sup>12</sup>. The author states one digression from his norm, observing that the anthropological concept of culture can be found in Article 73a) of the Charter of the United Nations, which binds the States to respect the culture of the peoples in non-self-governing territories. For the author, this is an isolated case which does not weaken his fundamental thesis.<sup>13</sup>

Judge *Lacharrière* is incorrect when he narrows the definition of culture which functions in the sphere of international norms to literary and artistic works. His thesis is negated even in the text of Article 15 of the International Covenant on Economic, Social and Cultural Rights, which defines the right to culture, and in a number of international texts and commentaries on human rights. The main current of discussions about culture as seen in the area of human rights took place during the conference of experts organized by UNESCO in 1968. During the debate about a general definition of culture, the participants presented many conceptions and views. The most interesting formulations were presented by *A. N'Daw*, a Senegalese, *R. Thapar*, representing India, and a Soviet scholar, *V. Mshvenieradze*.

In his presentation, *N'Daw* combined the dynamic aspect of the psychological definitions of culture, which treat it as the totality of attitudes, knowledge, and readiness directed toward the thorough reception of values as well as toward the element in which a given person creates new values, with terms typical of the anthropological definition.<sup>14</sup> He said: "Applying to culture its restricted meaning, it stands for what might be termed 'civilization' or at any rate, that aspect of civilization which ensures that a given people or nation

7 *Gusmao*, for example, holds this position. When researching law as a form of cultural expression, he defines the mere concept of culture "as everything that a person has created in the function of time and socio-cultural space." *P.D. Gusmao, Droit d'expression de la Culture, Structure et caractère du Droit comme œuvre culturelle et connaissance juridique, Mélanges en l'honneur de Paul Roubier, Paris 1961, p. 222.*

8 *R. McKeon* presents this type of thought; for him culture is a structure for communication and actions. *R. McKeon, Philosophy and Diversity of Cultures, UNESCO, Interrelations of Cultures, Paris 1953, p. 23.*

9 *R.-J. Dupuy*, Introduction du sujet, L'avenir du droit international dans un monde multiculturel, Colloque, La Haye, Université des Nations Unies, The Hague/Boston/London 1984, p. 29.

10 *Ibid.*

11 *G. de Lacharrière*, Le point de vue de juriste: La production et l'application du droit international dans un monde multiculturel, in: L'avenir du droit international dans un monde multiculturel, supra note 9, p. 67.

12 *Ibid.*, p. 69. However, during the same Colloquium Sompong Sucharitkul states that "La science et la technologie font partie du patrimoine culturel et scientifique de l'homme". *Sompong Sucharitkul, L'humanité en tant qu'élément contribuant au développement progressif du droit international contemporain.*

13 *Ibid.*

14 *S. Ossowski*, *Wież społeczna i dziedzictwo krwi*, Dzieła, Warszawa 1966, pp. 64-69. *Ossowski* represents the psychological conception of the cultural heritage of a group. The conception is based on the Polish scientific achievements.

possesses an individual heritage of its own; this can take the form of a way of life, or of a collection of beliefs or concepts; but in any case it has to be that 'something' which differentiates, distinguishes one people from another people, and which it is extremely difficult to pin down or express in words".<sup>15</sup>

Thapar saw culture as the totality of rights which enable a person to rise to his full potential. Thapar indicated that the constant transformation of culture is its most immanent characteristic. In each culture, this transformation takes place in a different rhythm, which, as he stated, results in a "tremendous polarization" between traditional culture and the culture of science and technology.<sup>16</sup>

The view of the Soviet scholar was that: "Culture is (...) the sum of total of material and spiritual values created by man in the process of socio-historical practice which, (...) are determined by objective laws of social progress. Culture is the ability to use achievements in order to subdue the elemental forces of nature with a view to solving imminent and urgent problems of social development."<sup>17</sup>

From the mosaic of definitions and wider conceptions of culture, the participants of the meeting adopted a common view of the phenomena of culture. In the report of the Conference, we read: "Culture does not serve any one purpose or set of purposes, but is, as it were, the medium through which all purposes are articulated and through which we live our lives".<sup>18</sup>

Although this definition of culture does not signify any new stage which would enrich the theoretical knowledge, it indicates changes in the approach to the same phenomenon and its connections with other aspects of social life. Thus, it is a pronounced accent in the general process of departure from the aesthetic definition of culture and of constructing a new conception which is characterized by the perception of all human activities, material products, products of thought and imagination, and values as an integrated system which affects the development of the personalities of individuals and social groups. The international acceptance of the widened conception of culture was emerging against the background of a modern theory of development, along with which models of activity towards democratization of culture, recognized as the fundamental aim of development, were planned.<sup>19</sup> This process began with UNESCO's calling of an international conference. The conference dealt with the institutional, administrative, and financial aspects of the cultural policies; it took place in Venice between 24 August and 2 September 1970. The uniqueness of this conference was the subject of the meeting; for the first time the participants were in agreement regarding a broadened conception of culture.

However, they formulated very concisely that "(...) culture is an inalienable and undeniable human right and it penetrates through all aspects of human life."<sup>20</sup>

The discussion about culture and its place in the totality of contemporary conceptions of the modern world was con-

tinued during the subsequent conferences: for Europe in 1972, Asia in 1973, Africa in 1975, America in 1978, and the Arab States in 1981. In 1982 the discussion was brought back to the world level. It was enriched by the mature regional experiences and a deeper scientific knowledge. Again, culture was discussed, with the variety of problems within the frames of cultural development. The participants' views were more similar. Although the participants were not fully satisfied with the degree of similarity, they were able to issue a declaration which contained the following definition of culture:

"(...) in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual, and emotional features that characterize a society or a social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of human being, value systems, traditions and beliefs; (...) culture gives man the ability to reflect upon himself. It is culture that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment. It is culture that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations."<sup>21</sup>

The response to the attempts at presenting technology allied with science as the antithesis of culture was not so much a conceptual widening of the definition of the term "culture", but a reminder that science is one of the rooms which make up the house of intellect. Works dealing with cultural values brought the merging view of culture and science to the international arena. The conference in Tehran was the inspiration for these works as it produced a new creative orientation in the area of research into the connection between science and cultural values, as seen in the field of human rights.<sup>22</sup> In response to the Tehran appeal to undertake research in the field of respect for human rights, as treated in the field of scientific and technological development, the General Assembly of the United Nations initiated the United Nations' work with resolution 3026 (XXVII) of 18 December 1972. This resolution called on the Secretary-General of the United Nations, the Commission of Human Rights, ILO, WHO, UNESCO,

15 UNESCO, Le droit culturel en tant que droit de l'homme. Vers une définition de la culture, Paris 1970, p. 18.

16 Ibid., p. 19.

17 Ibid., p. 46.

18 Ibid., Rapport de la réunion, p. 118.

19 See René-Maheu, Culture in the Contemporary World, Problems and Prospects, UNESCO, Paris 1973, p. 19; Introduction to Intercultural Studies, Outline of a project for elucidating and promoting communication between cultures, UNESCO, 1976-1980, Paris 1983, p. 33.

20 UNESCO, Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies, Venice, 24 August to 2 September 1970, Final Report, Paris 1971, Resolution 11, p. 21.

21 UNESCO, World Conference on Cultural Policies, Mexico City, 26 July to 6 August 1982, Final Report, Paris 1982, p. 41.

22 See: Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, New York 1968, especially Resolution XI, Human Rights and Scientific and Technological Developments, p. 12.

and FAO to prepare reports which would reflect the influence of scientific and technological development on the question of just distribution of income, the protection of the right to work, the protection of health, education, and an adequate standard of living. The General Assembly particularly specified its expectations with reference to the UNESCO report; the General Assembly asked for a presentation of views relating to the problem of preservation and further development of cultural values, steps taken to achieve this and those which should be taken in the future.<sup>23</sup>

Since the passing of this resolution, reflection on the limits of autonomy of science and technology seems to lead to a return to Taylor's traditional definition of culture. Taylor saw this phenomenon in a broad, anthropological sense; to him culture is a whole which includes science, beliefs, art, morality, law, custom, and skills required by an individual as a member of a community.<sup>24</sup>

When observing the search in the international arena for an all-encompassing definition of culture, one can hardly not see that the inspiration for this line of research was and is the perspective of human rights, especially the right to culture. Girard rightly noticed that the right to culture "(...) was proclaimed not only as a question of justice, but because it reflects an irresistible need of humankind. Culture is the answer to the utmost need of man, the need which gives him dignity, which makes him a person."<sup>25</sup>

The acceptance of a holistic conception of culture which horizontally penetrates all spheres of spiritual and physical activity of a person<sup>26</sup> has a number of consequences in the field of research of the right to culture. This acceptance primarily makes the process of recognizing the essence of the right to culture a dynamic and complicated one, which in turn has a bearing on the issue of widely understood implementation of the right seen in the categories of rights and duties of many subjects.

### III. The Right to Culture

The concept of the right to culture was born as a constituent part of the process of "collectivization of human rights" which began in the period preceding World War I. This time was filled with aspirations to find a radical solution to social problems and with a search for genuine freedom of the individual.<sup>27</sup>

The issue of a broadened catalogue of human rights, which would include cultural rights, was introduced into the international arena with the undertaking of work to create an international organization with general aims. Such an organization was foreseen by the Moscow Declaration of 1943.

One must not forget that the Dumbarton Oaks Proposals, a document signed by the Four Great Powers on 7 October 1944, included very general statements regarding human rights. They were included in Chapter IX devoted to the international economic and social cooperation, and respecting the statements was seen as one of the functions of the Gene-

ral Assembly and the Economic and Social Council. This function was "promoting the advancement of respect for human rights and fundamental freedoms".<sup>28</sup> This statement marked the beginning of the campaign to recognize the economic, social, and cultural rights as a special sphere of the organized international cooperation. The subject of economic, social, and cultural rights found a larger role in the far-reaching amendments submitted by many Latin American States. These States wished to include in the Charter of the United Nations a system of duties of the States in the field of human rights.<sup>29</sup>

Out of the submitted proposals, Panama's was the furthest reaching. According to it, the planned Declaration of Essential Human Rights was to be an integral component of the Charter, as was the Declaration of Rights and Duties of Nations<sup>30</sup>. In addition to the traditional rights and freedoms, Panama's project included the right to education, right to work, right to decent work conditions, right to food and housing. In the Uruguayan proposal, the international document declaring the duties of the States in reference to human rights was to be called the Charter of Mankind. Although it was to be a separate document, the Charter of Mankind was to be related to the constitution of the new universal organization. It was to be a provision included in the premise of the organization, on the strength of which the States would be under obligation "to respect the fundamental norms of international law and the basic rights of humankind laid down internationally and having international guarantees"<sup>31</sup>.

Uruguay saw the protection of human rights in the wide context of international cooperation; the delegation proposed an important expansion of Chapter IX. Uruguay's document can also be treated as an important outline of the catalogue of economic, social, and cultural rights, included in the system of international guarantees of their realization. In Uruguay's conception, cooperation in the sphere of international commerce and capital investments, as means to secure a higher level of income, employment, and consumption, on the principle of equal access to commerce, raw materials and finished products essential for the economic development of

23 Resolutions and Decisions adopted by the General Assembly during its Twenty-seventh session, New York, Official Records, Vol. I, Res. 3026 (XXVII).

24 E.B. Taylor, *Origins of Culture*, New York 1985, p. 11. First published in 1871.

25 A. Girard in collaboration with G. Gentil, *Cultural Development: Experiences and Policies*, UNESCO, Paris 1983, p. 16.

26 D.P. Schafer, *Culture and Cosmos: The Role of Culture in the World of the Future*, Cultures, 1980, Vol. VII, No. 2, pp. 38-39.

27 J.-M. Becet/D. Collard, *Les droits de l'homme, Dimensions nationales et internationales*, Paris 1982, pp. 35-38.

28 Documents of the United Nations Conference on International Organization, San Francisco, 1945 (later cited UNCIO), London/New York 1947, Vol. III.

29 Additional Amendments proposed by the Delegation of the Republic of Panama concerning Proposals for the Maintenance of Peace and Security agreed upon at the Conference of Dumbarton Oaks, 5 May 1945, UNCIO, Vol. III, p. 265.

30 *Ibid.*, pp. 266-269.

31 New Uruguayan Proposals on the Dumbarton Oaks Proposals, 5 May 1945, UNCIO, Vol. III, pp. 34-35.

States, was ranked among the most important goals of the future organization. This cooperation should take into account economic issues and issues connected with social welfare of the family, while also considering preferences in treatment of women and children. Uruguay's project also pointed to the cultural dimension of human rights; therefore, it included international intellectual cooperation, which would stimulate the cultural advancement of nations.<sup>32</sup>

Cuba presented a very extensive document, the Draft Declaration of International Duties and Rights of the Individual. According to this proposal, the future declaration was to be passed by the General Assembly, and member States would commit themselves in the Charter to abide by the rules of the Declaration.<sup>33</sup> The set of economic, social, and cultural rights had a very significant place in this draft of the Declaration. The cultural rights were not limited to the right to education and professional training, but included the right to participation in "civilization's advancement". Mexico, Chile, and Ecuador submitted similar projects.<sup>34</sup>

Latin American States and other States, such as Egypt, New Zealand, Norway, and India, attempted to strengthen those provisions of the Charter which deal with the duties of States and the powers of the organization in the field of human rights.<sup>35</sup>

Their efforts amounted to nothing because of ideological confrontations which surfaced when discussing the problem. Compromise was achieved; the Four Great Powers accepted a formula of cooperation to promote and respect human rights and fundamental freedoms, a formula which was supplemented by the principle of non-discrimination on the basis of race, sex, language, or religion; the compromise was also based on the consensus that working out a set of particular human rights remain only postponed, in the sense that the United Nations would undertake the work within the framework of realization of the functions of the General Assembly.

Due to the undisputable fact that the Charter of the United Nations neither includes a catalogue of human rights which should be obeyed universally nor determines the nature of the rights which belong to the individual, the question arises whether member States are left with an unlimited power to select the rights which they should guarantee in their internal orders. Alternatively, based on an analysis of the provisions of the Charter and of other international documents and considering, at least, the "not indifference" of The Universal Declaration of Human Rights, the categories of human rights specified in Article 27, including the category of cultural rights relevant for us, are contained within the scope of obligations of Article 55 of the Charter.<sup>36</sup>

Those who deny the mere possibility of agreement among peoples belonging to various cultures and various social systems on the issue of certain fundamental worth would have to explain the fact that on 10 December 1948 the Universal Declaration of Human Rights was accepted without negative vote.

The Declaration did not create a universal conception of human rights; the Declaration's value for the international community is that it includes an agreed upon catalogue of human rights. The catalogue's "complementary legal character to the Charter"<sup>37</sup> is that the member States can no longer claim that they "do not know what fundamental human rights mean in the interpretation of the Charter."<sup>38</sup> Even though it did not remove the antagonism between the ideas, the Declaration became a key for the promotional activity of the United Nations organs and a guide for the States in specifying the generally formulated rights.

Following this line of thought, one should also pay attention to the Preamble of the Charter, which reaffirms faith in the dignity and worth of the human person. This dignity is above-all the virtue of the human being, a being who has inalienable worth which cannot be reduced to the needs of fundamental nature. As Andrzejczak states, this is a "dignity of the person of our time. Dignity interpreted in this way is made up of human achievements in numerous fields (...)".<sup>39</sup> This dignity is also a consciousness that the individual has the right to be provided with chances for full self-realization, which is a form of freedom, and in this sense the individual's rights are inalienable.

Looking for the basis of the statement that the general category of cultural rights is within the range of laws with which the States must comply as a result of the Charter of the United Nations, one must not forget about the creation of UNESCO. UNESCO is a specialized organization of the United Nations system, whose constitution includes a number of obligations of the member States to promote the culture and education of mankind. Culture and education have been recognized to be a condition essential for human dignity, a condition which must be fulfilled by all nations in the spirit of mutual help and concern.<sup>40</sup>

In the Charter of the United Nations and in the Constitution of UNESCO the furthering of the cooperation to secure

32 Ibid., p. 43.

33 Seven proposals on the Dumbarton Oaks Proposals, 2 May 1945, submitted by the Delegation of Cuba, UNCIO, Vol. III, pp. 495-502.

34 See, respectively: UNCIO, Vol. III, Mexico, p. 60; Chile, pp. 294-295; Ecuador, pp. 400-404.

35 See, respectively: UNCIO, Vol. III, Egypt, p. 453; New Zealand, p. 586; Norway, p. 366; India, p. 527.

36 For an overview of the views of legal validity of the Declaration, see A. Eide/G. Alfredsson/G. Melander/L.A. Rehof/A. Rosas (eds.), *The Universal Declaration of Human Rights: A Commentary*, London/New York/Toronto 1992.

37 F. Capotorti, *Human Rights: the Hard Road Towards Universality*, in: R.St.J. MacDonald/D.M. Johnston (eds.), *The Structure and Process of International Law*, Dordrecht/Boston/Lancaster 1986, p. 982.

38 T. Buergerthal, *Codification and Implementation of International Human Rights*, in: A.H. Henkin (ed.), *Human Dignity, The Internationalization of Human Rights*, Alphen aan Rijn/New York 1979, p. 16.

39 H. Andrzejczak, *Filozoficzne podstawy Powszechnej Deklaracji Praw Człowieka / Philosophical Basis of the Universal Declaration of Human Rights*, *Roczniki Filozoficzne* 1966, Vol. XIV, p. 94. See also O. Schachter, *Human Dignity as a Normative Concept*, *American Journal of International Law*, 1983, Vol. 77, pp. 848-854.

40 Preamble of the Constitution of the United Nations Educational, Scientific and Cultural Organization.

respect for human rights and fundamental freedoms is not an aim in itself. It remains closely connected to a superior aim of the contemporary international society - the keeping of peace and security. UNESCO realizes this goal through means suitable for the organization: education, science, and culture. Clearly referring to the provisions of the Charter of the United Nations, the Constitution states in Article 11, that the Organization will promote collaboration to secure respect for those rights which the Charter affirms for all peoples of the world, without distinction of race, sex, language, or religion.<sup>41</sup>

Article 15 of the International Covenant on Economic, Social, and Cultural Rights covers the area of cultural rights. The Article states:

*"1. The States Parties to the present Covenant recognize the right of everyone:*

*a) To take part in cultural life;*

*b) To enjoy the benefits of scientific progress and its implications;*

*c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

*2. The steps to be taken by the States parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*

*3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*

*4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."<sup>42</sup>*

#### IV. Generic Link between the Protection of Cultural Property and the Right to Culture

Before beginning the legal analysis of Article 15, it should be stated that the Covenant does not use the term "the right to culture" and the title includes only a comprehensive term, "cultural rights". The term "the right to culture" appears in a few theoretical works, in the publications of the Secretariat of the United Nations, such as the *"United Nations Action in the Field of Human Rights"*,<sup>43</sup> and in UNESCO resolutions. The right to culture was mentioned for the first time in 1970 during the sixteenth session of the General Conference; it was mentioned in the broad context of issues devoted to the studies, development, and dissemination of culture.<sup>44</sup> The notion of the right to culture was mentioned for the second time in 1978 during the twentieth session of the General Conference. The problem of the respect for human rights was included in the section dealing with culture and communication; the General Conference turned to the Director-General to ask him to include the need to promote *"the right to culture as a human right, as it is defined in the*

*Universal Declaration of Human Rights"* within the competence of the Organization.<sup>45</sup> In the section entitled *"Culture and Communication"* of the documents of the Conference's twenty-first session, the Director-General is, among other things, authorized to promote research on the realization of the right to education, science, culture, and information and to develop normative means of broadening these rights.<sup>46</sup> Thus, the Organization mentions the right to culture also in this document.

The Fourth Extraordinary Session of the General Conference designed a medium-range UNESCO Plan for the years 1984-1989. Two concepts appear in the crucial program *"Culture and Future"* (Program XI. 4): the right to culture as a program within the program XI. 4, which is to be realized by the Organization with the aim to promote the authentic realization of cultural rights". In this case, the right to culture is treated as an element of the broader formulation of cultural rights. The resolutions of the Conference's twenty-second session, in 1983, include a section entitled *"Cultural Development and Cultural Policies"*. In this section, the Conference summons the Director-General to stimulate research to promote an effective realization of cultural rights; however, the Conference does not mention the right to culture.<sup>47</sup> In section XI. 4, the twenty-third session of UNESCO's General Conference does not mention at all the right to culture or cultural rights. The session focuses on the collective dimension of participation in cultural life.<sup>48</sup>

In the light of UNESCO's practice, one can conclude that the Organization does not pay much attention to a precise demarcation of the research concepts; it is also difficult not to see that the term "cultural rights" is, more often than not, used in a collective sense.

The term *"cultural rights"* appears only in the title of the twenty-eighth recommendation of the Mexican Conference *"Cultural Rights and Cultural Democracy"*. The document

41 Article 11 of the UNESCO Constitution.

42 International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly on 16 December 1966, text: Human Rights, A Compilation of International Instruments, United Nations, New York 1988, pp. 7-18.

43 United Nations Action in the Field of Human Rights, United Nations, New York 1983, pp. 203-205.

44 UNESCO, Actes de la Conférence générale, Seizième session, Paris, 24 October to 28 November 1970, Résolutions, Vol. I, Paris 1971, p. 50.

45 UNESCO, Records of the General Conference, Twentieth Session, Paris, 24 October to 28 November 1978, Résolutions, Vol. I, Paris 1980, p. 57.

46 UNESCO, Records of the General Conference, Twenty-first Session, Belgrade, 23 September to 28 October 1980, Paris 1980, p. 57.

47 Resolutions adopted during the Fourth Extraordinary Session of UNESCO General Conference. Resolutions dealing with the Medium Range Plan for 1984-1989, Paris 23 November - 3 December 1982, Paris 1983, p. 43.

48 UNESCO, Records of the General Conference, Twenty-second Session, Paris, 25 October to 26 November 1985, Résolutions, Vol. I, Paris 1984, p. 55.

49 UNESCO, Records of the General Conference, Twenty-third Session, Sofia, 8 October to 9 November 1985, Résolutions, Vol. I, Paris 1986, p. 62.

expresses the participants' conviction that individuals as well as nations should be guaranteed, without any discrimination, the right to culture and the right to education; this shows that the two rights were considered to be within the same category of rights. Later, the text treats the right to culture in a particular way: the text recommends that member States protect this right through means appropriate for cultural policy.<sup>50</sup> The preserved uniformity of definition shows that UNESCO member States identify the context of Article 27 of the Universal Declaration of Human Rights, thereby also Article 15 of the International Covenant of Economic, Social, and Cultural Rights, with the concept of the right to culture.

One who studies the relationship between the concepts of "cultural rights" and "the right to culture" finds an interesting picture when he or she becomes acquainted with the knowledge gained by the experts who were invited by UNESCO's Director-General to take part in the 1968 Paris meeting. The experts were asked to discuss the evolution of cultural rights since the proclamation of the Universal Declaration of Human Rights and the means and methods used to secure them.

Many experts identified "cultural rights" with "the right to culture" and used the two terms interchangeably. The speech of *B. Boutros-Ghali* can serve as an example. He states that the definition of "the right to culture" is inspired by Article 27 of the Universal Declaration of Human Rights and by Article 4 of the Declaration of the Principles of International Cultural Co-operation of 1966; however, in a later part of his speech Boutros-Ghali departs from his statement when he says: "the mere existence of cultural rights supposes that the right to education (...) has first found a practical application". In the next sentence Boutros-Ghali states: "Indeed, there is no right to culture without minimum education."<sup>51</sup> Then, *Tomo Martelanc* puts the social function of mass media in the context of "rights to culture".<sup>52</sup> *G.C. Argan* analyzes the concept of "the right to culture", proclaimed by the Universal Declaration on Human Rights, in its clash with the phenomenon of high culture and mass culture.<sup>53</sup> Only *V. Mshvenieradze* and *R. Thapar* use the term "cultural rights" consistently. For the first of them, "cultural rights" are the rights of a human being to labor and education, to free and all-around development of his or her personality, to an active participation in creating material and spiritual values as well as using them to further the progress of modern civilization.<sup>54</sup>

*R. Thapar* sees "cultural rights" in an extremely broadened scope, "(...) the whole gamut of rights - economic, political, and social" set in the system of values which constitute the essence of a given culture.<sup>55</sup> The Paris discussion resulted in the issuance of the statement "Cultural Rights as Human Rights". In it the experts agree that:

"The rights to culture include the possibility for each man to obtain the means of developing his personality, through his direct participation in the creation of human values, and of becoming, in this way, responsible for his situation, whether local or on a world scale."<sup>56</sup>

The content of the conference leads one to the conclusion that the experts decided that "the right to culture" is

merely another term for the concept of "cultural rights". The experts found it more valuable to look for and create the essence of this right during the conference than to set strict limits on the usage of each term.

Other views are represented in literature. In some views the term "cultural rights" is treated as the name of a system which includes a series of rights which are permanently in the process of formation and to which new rights are added<sup>57</sup>; for others the term means a general category of rights similar to those singled out by the International Covenants, such as civil, political economic, and social rights. For those authors it covers the right to education and the right to culture<sup>58</sup>.

Although it is true that it is difficult to determine a whole content of the treaty standard of the notion "the right to culture", it is equally true that at least the meaning of some components of the right has gradually become more explicit, for example, the meaning of the wording: to take part in cultural life.

In order to assist member States in the implementation of human rights that fall within the context of UNESCO activities, the Organization adopted the Recommendation on participation by the people at large in cultural life and their contribution to it.<sup>59</sup> The Preamble of this Recommendation recalls the principle of the equality of cultures, including the cultures of national minorities, and stresses the essential nature of the right to take part in cultural life by underlining that "participation in cultural life takes the form of an assertion of identity, authenticity and dignity; (...)". The Recommendation is of particular significance because it contains definitions of the term "access to culture" and "participation in cultural life" - two complementary aspects of the same thing as the Recommendation states in the Preamble.

- 50 UNESCO, World Conference on Cultural Policies, Mexico City, 26 July to 6 August 1982, Final Report, Paris 1982, pp. 79 and 82.
- 51 *B. Boutros-Ghali*, The Right to Culture and the Universal Declaration of Human Rights, in: Cultural Rights as Human Rights, UNESCO Studies and documents on cultural policies, No. 3, 1970, p. 73.
- 52 *T. Martelanc*, Right to Culture from the Aspects of Mass Media, in: Cultural Rights as Human Rights, supra note 51, p. 60.
- 53 *G.C. Argan*, Two Cultures?, in: Cultural Rights as Human Rights, supra note 51, p. 89.
- 54 *V. Mshvenieradze*, Cultural Interaction as a Factor Influencing Cultural Rights as Human Rights, in: Cultural Rights as Human Rights, supra note 51, p. 43.
- 55 *R. Thapar*, The Common Roots of our Alienation, in: Cultural Rights as Human Rights, supra note 51, p. 93.
- 56 Statement on Cultural Rights as Human Rights, in: Cultural Rights as Human Rights, supra note 51, p. 107.
- 57 See *I. Szabo*, Cultural Rights, Budapest 1974, pp. 46-50; *Y. Dinstein*, Cultural Rights, Israel Yearbook on Human Rights, Vol. IX, 1979, p. 58; *S. Mark*, UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture, and Communication, Texas International Law Journal, 1977, Vol. XIII, No. 1, p. 49.
- 58 *A.H. Robertson*, The Right to Culture, in: Cultures, 1978, Vol. I, pp. 24 and 29; *G. Melander*, Article 27, in: The Universal Declaration of Human Rights: A Commentary, supra note 36, p. 430.
- 59 UNESCO, Records of the General Conference, Nineteenth Session, Nairobi, from 26 October to 30 November 1976, Paris 1978.

Paragraph 2 of the Recommendation provides that:

*"For the purposes of the Recommendation:*

*a) by access to culture is meant the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property;*

*b) by participation in cultural life is meant the concrete opportunities guaranteed for all groups or individuals - to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and cultural progress of society".*

In the light of the above definitions, the core of the "composite" right to participate in cultural life is the interest of the human being in seeing or having preserved the opportunity to see monuments, architectural ensembles, historic sites, works of art at local, national, and world levels. This legitimate interest, recognized as a right, as it is manifested in the words: *"The State Parties to the present Covenant recognize the right of everyone: (...)"*<sup>60</sup>, has a corollary duty - a duty to secure and allow access to cultural property, in other words an obligation to take the necessary steps so that all individuals may have access to cultural heritage.

Realization of the right to access involves enormous amounts of legal and practical problems and opens an agenda of important questions that touch on the role of States, the international community, international organizations and individuals in the sphere of a broadly understood process of implementation.

With a view to aid Member States in their decision-making process connected with the implementation of the right, the UNESCO General Conference, in paragraph 4 of the Recommendation, asked Member States to adopt legislation or regulations in order to - *inter alia* - "q(i) protect and enhance the heritage of the past, and particularly ancient monuments and traditions which may contribute to the essential equilibrium of societies subject to a rapid process of industrialization and urbanization; (...)".

By attaching special importance to the legal protection of cultural heritage, the UNESCO General Conference has expressed its strong conviction that the fulfilment of this obligation by member States should be considered as one of the measures designated to secure enjoyment of the right to access. Consequently, it may be said that the Recommendation has the honor of being the first international document which has created a quasi-normative "human dimension" of the protection of cultural heritage.

The most clear reaffirmation of the validity of the genetic link between the protection of cultural heritage and human rights is to be found in the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE<sup>61</sup> - Paragraph 35 of the Document stipulates: *"The*

*participating States reaffirm that (...) preserving the cultural heritage form part of the human dimension of the CSCE."*

For a long time those two issues have been kept separate, and now ought to be brought together. The strong directive in this respect comes from the Draft Code of Crimes against the Peace and Security of Mankind *"(...) which if adopted, would constitute the broadest normative base to be found in a treaty instrument, for it enumerates the criminal acts which, as of now, are of greatest concern to the international community"*.<sup>62</sup>

During its forty-sixth session the International Law Commission provisionally adopted the list of crimes against the peace and security of mankind. Systematic or mass violations of human rights are included in the list under the draft Article 21. Persecution on social, political, racial, religious or cultural grounds is enumerated as a category of crimes covered by this Article.

In the Commentary to the Article the Commission explained that persecution on social, political, racial, religious or cultural grounds *"may take many forms, for example, (...) systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group"*<sup>63</sup>. It seems apparent from the above-cited pronouncement that the Commission has recognized the idea that the protection of cultural property is a compelling legal necessity for the enjoyment of human right to culture.

Against this background it thus would seem that the concept of linking protection of cultural property with a notion of human rights, and especially with the right to participate in cultural life, requires States and the international community to acknowledge that preventing the occurrence of violations of the human right to participate in cultural life should have a value similar to the concern for preventing the occurrence of violations of physical or mental integrity of the human being.

Let us not forget that even in the nightmare of wars, incredible acts of violence and brutality of every kind, there is the valid obligation to foster a greater awareness among peoples, politicians and soldiers of the irreplaceable value of monuments, historic parts of towns, and art treasures. Let us not forget that *"the individual was given a set of rights whose objective was not only a biological process lasting for a specific period of time, but also and, necessarily, that he*

60 Article 15 of the International Covenant on Economic, Social, and Cultural Rights, *supra* note 42, p. 13; see also: The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, in: The Review of the International Commission of Jurists, 1986, No. 37, pp. 43-53.

61 Text: Helsinki Monitor, Quarterly on Security and Cooperation in Europe, 1991, Vol. 2, No. 4, pp. 66-91.

62 L.S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations, Dordrecht/Boston/London 1992, p. 124.

63 Report of the International Commission on the work of its forty-third session, 29 April-19 July 1991, GA Official Records, Forty-Sixth Session, Sup. No. 10 (A/46/10), p. 268.

would enjoy economic rights and social and cultural services and be able to exercise other human rights so that he might live a full and dignified life."<sup>64</sup>

## V. Concluding remarks

Coming back to the introductory part of the paper, it seems to be arguable that the General Assembly's failure to extend proper attention to the protection of cultural property in the ongoing conflicts, and specially the conflicts in the former Yugoslavia, could be attributed to the missing link between human rights and international protection of cultural property during armed conflicts. The lack of the link has resulted from "the sharp compartmentalization between human rights and 'social' items" on the General Assembly agenda.<sup>65</sup>

While the policy of compartmentalization has been slowly disappearing from General Assembly practice and this is accompanied by the growing recognition of the fundamental interrelationship that exists between the protection of cultural property and the right to culture - the General Assembly, as the principal organ of the United Nations entrusted with the promotion of respect for human rights and with the function of monitoring the fulfilment of States' obligations in this field, should "upgrade" the protection of cultural property during armed conflicts by putting the topic under the umbrella framework of human rights. This structural shift would

enable the General Assembly to undertake a variety of practical and urgent actions which strengthen the protection of cultural heritage. But first of all, opening the human dimension umbrella over the protection of cultural property could "lend important momentum to the thematic debate at the Assembly"<sup>66</sup> on the protection of cultural property. At the operational level the General Assembly could, for example, request the Commission on Human Rights to include in the mandate of a Special Rapporteur on human rights situation the investigation of violations of the international standards applicable to the protection of cultural property in time of armed conflicts; or it could request the Security Council to determine that safe areas like those established by its Resolutions 819/1993 and 824/1993 in Sarajevo, Tuzla, Zepa, Gorazde, Bihac, and Srebrenica have also objectives similar to those envisaged in Article 11 of the 1954 Convention.

All the above mentioned actions would have an emergency character, but would rest on the solid foundation of the international law of human rights.

- 64 H. Gros-Espiell, *The Right to Life and the Right to Live*, in: D. Prémont (ed.), *Essays on the Concept of a "Right to Live"*, Brussels, 1988, p. 51.
- 65 J. Quinn, *The General Assembly into the 1990s*, in: P. Alston (ed.), *The United Nations and Human Rights, A Critical Appraisal*, London 1992, p. 61.
- 66 *Ibid.*, p. 75.



# Experiences of the Islamic Republic of Iran in the Preservation of Cultural Property Against War Damages (The Hague Convention, 1954)

Akbar Zargar/Younes Samadi\*

## I. Introduction

The extensive damages sustained by the Islamic Republic of Iran during the Imposed War significantly heightened this country's interest in the application of the terms of the Hague Convention of 1954. For eight years, over 2,500 kilometers of the water and land boundaries of the Islamic Republic of Iran were the direct scene of military operations, while the cities and hinterland areas also suffered aerial bombardments and rocket attacks. The indiscriminate, massive onslaught of the enemy seriously harmed the unique, time-honored cultural patrimony of Iran, which indeed is none but the cultural heritage of humanity. Hundreds of monuments, cultural and historic sites, museums and historic urban fabrics were destroyed. The country's important cultural and historic centers, such as Esfahan, Kashan, Shiraz, Shush, Dezful, Bakhtaran ..., were repeatedly targeted in blind attacks. The above mentioned cultural and historic centers, particularly the valuable, unique historic fabric of the city of Dezful, in Khuzestan Province, were heavily damaged, and the archaeological site of Shush<sup>1</sup>, which holds relicts from 6,000 years of human arts and crafts, and is famous at large as the oldest capital of Iran, did not remain unharmed either. Thus, the restoration and reorganization of the historic fabric of the cities damaged during the Imposed War ranks among the country's main cultural goals in the reconstruction period.

## II. The cultural heritage of Iran

Iran's natural conditions, the vastness of its land, its geopolitical situation, and the immigrations it has absorbed in the course of numerous centuries, have caused a multitude of civilizations to emerge in its various regions. Archaeologists have attributed the first traces of human existence in this country to the Paleolithic (800,000 years ago)<sup>2</sup>. Initial rural settlement is believed to have occurred in the 9th and 8th millennia BC. The venerable, rich Iranian civilization has contributed unequalled masterpieces to the world of arts and culture, among which the temple of Chogha-Zanbil<sup>3</sup> (1275-1210 BC), the historic ensemble of Persepolis<sup>4</sup> (1st millennium BC), and Imam (Naqsh-e Jahan) Square in Esfahan (17th century), are registered in the Inventory of the Cultural Heritage of the World.

Owing to particularities of their own, and in result of the country's geopolitical situation, Iranian arts and culture have ever duly exerted their influence upon those of the contemporary world. Thousands of archaeological sites dating back to various pre-historic and historic eras, close to 500 living

and active cities mostly featuring valuable nuclei or historic fabrics, thousands of highly valuable monuments and ensembles, and some four million movable cultural artifacts existing in museums and repositories, are precious memories of the great, rich, ancient, original Iranian culture and civilization.

Consequently, from the very onset of the Imposed War, serious attention was devoted to the preservation of the country's cultural heritage against war damages. The objects in the custody of museums located in heavily bombed areas were removed and transferred to secure repositories and preservation complexes. In view of preserving the cultural property existing in the country's museums and repositories, appropriate storage facilities were designed following established scientific standards and immediately put into use.

## III. Constitution of the National Counseling Committee

Following the acceptance of the Security Council's Resolution 598 by Iraq, and after the establishment of peace, the opportunity arose to implement those terms of the 1954 Convention which are applicable in times of peace. In compliance with the second resolution of this convention, a National Counseling Committee was constituted in 1989, under the direction of the director of the Iranian Cultural Heritage Organization (ICHO), in presence of the representatives of the Ministry of Foreign Affairs, the Armed Forces General Headquarters, the Joint Headquarters of the Army of the Islamic Republic of Iran, the Joint Headquarters of the Islamic Revolution Guards, the Legal and International Services Bureau of the Islamic Republic of Iran, the National UNESCO Committee and the Iranian Cultural Heritage Organization.

Initial surveys showed that, notwithstanding the adoption of the convention in question and Iran's adhesion to it in

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- 1 Mémoires de la mission Archéologique en Iran, Mission de Susiane, 36 volumes.
- 2 A. Ariai and C. Thibault, Nouvelles précisions à propos de l'outillage paléolithique ancien sur galets du Khorassan (Iran), *Paléorient* 3, pp. 101-108.
- 3 R. Ghirshman, *The Ziggurat of Tchoga Zanbil*, in MDP.
- 4 E. Herzfeld, *Persepolis I, II*, Chicago, 1939.

1956, no serious action aiming at its implementation had taken place before the victory of the Islamic Revolution.

Despite difficulties inherent to the adopted text of the convention, and regardless of the disproportion of its suggested methods with the extent of damages inflicted in contemporary wars, particularly in view of the continuous qualitative and quantitative development of weaponry during the recent past, which, in practical terms, have considerably reduced its capability and practical effectiveness, the spirit of the convention, which calls for the decrease of war-induced destruction and the preservation of the cultural heritage from such harm, and thus constitutes a positive step toward the achievement of peace throughout the world, was welcomed by the Iranian National Counseling Committee, who stressed upon the implementation of all the immediately practicable items.

During the past two years, the Iranian National Counseling Committee has actively discussed and examined each of the items of the convention and taken the necessary measures by setting up educational, technical and engineering, legal and military sub-committees, whose activities are listed below.

### 1. Education

One of the most essential subjects raised during the sessions of the National Counseling Committee and thoroughly discussed with the participation of military and educational experts was the implementation of the goal stipulated in Act 7, Paragraph 1 of the Hague's 1954 Convention. The best, most practicable way of "creating a spirit of respect toward the cultures of nations within the armed forces" was considered by the committee to be the provision of cultural courses designed to deepen the knowledge of the military personnel about culture, the cultural heritage and the country's international obligations in this regard. In order to facilitate the achievement of this goal, the National Counseling Committee recommended the utilization of both direct and indirect education.

**a) Indirect education.** Although the implementation of the obligations stipulated in the 1954 Convention is the responsibility of the high-ranking military of both signatory parties, with fact-finding (military obligations) being entrusted to officers ranking at least among division generals, nevertheless the soldiers, rank and file officers and low-level commanders can also contribute significantly by refraining from attacking the enemy's cultural artifacts, by safeguarding Iran's own cultural heritage, by avoiding to utilize the perimeters of historic and cultural sites as trenches, headquarters or other military facilities, which can jeopardize the obligations included in the convention. It is therefore imperative to supply this personnel with the minimum required information concerning the respect of the cultural heritage of mankind. Due to the practical difficulties of providing them with a direct education, the National Counseling Committee has suggested the use of indirect education, emphasizing the necessity of its implementation. To the present, the following steps have been taken in this regard:

(1) Supplying the libraries of the military education centers of the armed forces with cultural books and periodicals and encouraging historic, cultural and artistic studies among the personnel.

(2) Organizing group visits of museums and historic sites for the personnel of the armed forces, upon direct invitation and by expedition of gratuitous entry cards.

(3) Publishing articles and interviews on various topics, taking into consideration the readers' level of knowledge, in the publications of the armed forces and ICHO.

(4) Printing and reproducing posters of historic relics, to be displayed in military locales.

(5) Encouraging the establishment of military museums and seriously cooperating with the realization of this project.

(6) Acquiring the cooperation of the television in featuring films connected with the cultural heritage. In this regard, the preliminaries concerning the publication of a guide book, which will include a brief illustrated foreword introducing the cultural heritage, expounding the values it holds and stressing the necessity of preserving it as a parcel of the cultural heritage of all mankind, as well as the text of the Hague Convention of 1954, have been completed. This book will be printed in large circulation and put at the disposition of the armed forces.

**b) Direct education.** Since military decisions to be executed on the battlefield are taken by military commanders, the provision of direct education in the higher education centers and universities of the armed forces is particularly important. For this reason, having obtained the opinion and counsel of its military and educational experts, the National Counseling Committee prepared and adopted, taking into account the occupational fields and academic antecedents of the personnel to be educated, a specific course entitled "Teaching the Cultural Heritage in the Armed Forces". This project gained the assent of the responsible military authorities, and instructions were issued concerning its implementation at the level of the higher education centers and universities of the armed forces.

"Teaching the Cultural Heritage in the Armed Forces" aims primarily at familiarizing the military personnel with the contents of the Hague Convention of 1954, so that, gaining awareness about the universal cultural heritage, they may discerningly acknowledge and implement the items of this convention. It is therefore intended in this project to provide an acquaintance with the most important and valuable artistic achievements of Iran and the world, through appropriate teaching aids (films, slides, ...).

The National Counseling Committee has entrusted the Iranian Cultural Heritage Organization with the task of fulfilling this education. In order to assure its proper achievement, create the necessary coordination between the military higher education centers and the instructors, secure the cooperation of the required instructors, and also provide facilities and teaching aids, the Iranian Cultural Heritage Organ-

ization created a Directorship for the Cultural Heritage Education of the Armed Forces, under which all the educational affairs of the project adopted by the National Counseling Committee were centralized. In cooperation with liaison educational officers appointed by the armed forces, this Directorship guides the education of the cultural heritage among the armed forces.

This 10-hour course is designed in two, theoretical and practical, parts for each educational level. Thus students of various grades, while completing their theoretical course, become acquainted with the cultural heritage and the historic and cultural values of these relics through visits of museums, palace-museums, historic monuments, traditional arts workshops and archaeological sites, carried out under the supervision of experienced instructors and guides.

ICHO's project for "Teaching the Cultural Heritage in the Armed Forces" comprises three main chapters:

- (1) Culture and the Cultural Heritage;
- (2) Cultural Property;
- (3) Duties and Obligations of the Armed Forces in relation with the terms of the Hague Convention of 1954.

The instructors are selected, taking into consideration the level of knowledge, specialization, prior awareness and current occupation of the students, from among the most proficient ICHO experts, all benefiting from past teaching experience in universities. Taking advantage of appropriate teaching aids, they convey the necessary information concerning the various periods of human life, particularly in Iran.

Presenting the necessary information about movable cultural property dating back to various historic periods and expounding the particularities and historic, artistic and cultural values of monuments, sites, ensembles, museums and movable cultural property are among the subjects included in this course.

Complementing the theoretical education of the armed forces' students, a program of visits to cultural centers is provided. In accordance with a pre-established schedule, the military units make guided tours in museums, exhibitions, ancient monuments, excavation sites and restoration workshops. The aim of this practical education is to intimately familiarize the students with the cultural heritage. During these visits, they first learn about the situation and the stages involved in discovering ancient artifacts in the workshops of Iranian archaeological missions by Iranian archaeologists, then become acquainted with the restoration of immovable and movable objects in the laboratories of the Iranian Cultural Heritage Organization, and finally get to know how scientific examinations and deductions are made upon discovered documents with the purpose of learning about political, social, economic, artistic and cultural events in past periods. In presenting historic specimens, examples related to the students' occupational branches are utilized.

The course includes the duties and obligations of the armed forces concerning the preservation of cultural property

against damages deriving from war. Obviously, it is only after becoming familiar with the value and importance of the cultural heritage that the armed forces will knowledgeably implement the instructions stated in the convention concerning the preservation of the cultural heritage, national and alien alike, as part of the cultural heritage of mankind.

During the first yearly course, military and security commanders on the level of armed forces completed the program, and, in view of the interest and eagerness expressed by the country's military commanders and responsible authorities, will be repeated indefinitely. The success of this project is the outcome of precise planning, reliance upon the expertise of educational and military specialists in designing the course, its proper, commensurate implementation, matching the knowledge levels, specialization categories and learning capabilities of the students, and the particular care taken concerning applied education.

#### IV. Technical and engineering operations

Beyond doubt, one of the most effective ways of safeguarding historic cultural artifacts and monuments against war-induced damage is the implementation of Act 8 of the Hague Convention of 1954, concerning special protection. In order to assure the proper implementation of this act, the Iranian National Counseling Committee set up a technical and engineering sub-committee and, while procuring the equipment necessary to complete the Inventory of National Artifacts, examined the situation of valuable cultural historic artifacts and monuments bearing in mind the terms of above mentioned Act 8.

Avoiding the military utilization of the perimeters of historic sites and refraining from establishing constructions susceptible of being targeted as military objectives within a specified radius around these were seriously emphasized by the National Counseling Committee, and relevant instructions were drafted and put into application.

##### 1. Matching the existing conditions with the terms of the convention

Due to a lack of sufficient interest toward the cultural heritage and the implementation of the terms of the convention before the advent of the Islamic Revolution, occasionally constructions susceptible of being targeted as military objectives were built in the vicinity of historic sites and monuments. In coordination with the relevant institutions, a schedule for the evacuation of such facilities was prepared and adopted by the National Counseling Committee, and put into application. In this regard, the approval of the Higher Council of Urbanism and Architecture, as the highest legal instance in the country concerning urban projects, was secured for the evacuation of military barracks located within urban areas, and the project is currently under execution.

2. In order to comply with the stipulations of the convention concerning the securization of areas within the perimeter or in the vicinity of historic sites against eventual war damage, and in view of impeding the construction of edifices contravening the terms of the Hague Convention of 1954 in

areas nearby such sites, the exact dimensions of the perimeter and sanctuary, the geographic location and the preservation standards specific to each site, alongside those of the corresponding military enclosure, are brought to the attention of relevant authorities by the Iranian Cultural Heritage Organization. The penal laws of the country forbid any construction work contravening the standards published, and provisions exist for the punishment of such action.

Among the difficulties hindering the preparation of relevant directions in the Iranian National Counseling Committee was that of determining the "sufficient distance" required in Act I, Paragraph 1, Section A of the convention. The lack of indications concerning the magnitude of this distance, as well as that of any related standards, are objectionable points in the convention which seem in need of amendment.

The ever increasing destructive power and shrapnel scatter radius on bombs, rockets and other explosive projectiles currently used in military operations make it even more difficult to determine the "sufficient distance", to the extent that demonstrating the necessity of respecting it has become impossible.

In Iran, seeking to obviate this difficulty, the National Counseling Committee benefits from the services of a team of military experts who determine a "military sanctuary", taking into account the destructive power and shrapnel scatter radius of current weapons to evaluate the "sufficient distance" beyond which facilities capable of being targeted as military objectives must be built.

Preparing the project of creating particular shelter featuring the latest scientific standards for the country's museums, to which the cultural objects can be rapidly transferred in emergency situations, as well as planning in view of creating regional public shelters for the cultural property falling within the definition of the convention, are sternly pursued.

## V. Legal sub-committee

In view of the progress achieved in international law since 1954, which calls for the inclusion of such benefits in the convention and its adaptation to the legal systems preva-

lent inside various countries, and with the purpose of dispelling technical contradictions which exist in some items of the convention, this sub-committee has been studying the text of the Hague Convention of 1954 and the relevant protocol. It has separated the practicable terms from those requiring amendment, submitted the necessary suggestions to the National Counseling Committee, and, in accordance with the decisions taken by the National Counseling Committee, prepared and submitted the required implementation instructions. The legal sub-committee has also prepared suggestions for the amendment of the 1954 Convention, which were sent to the UNESCO following approval by the National Counseling Committee.

Notwithstanding the ambiguities and deficiencies of the text of the convention, and stressing upon the necessity of amending it so as to adapt its terms and items to the latest legal and cultural achievements of the contemporary world and the magnitude of imaginable damages deriving from the technological warfare of the last few decades, the Iranian National Counseling Committee insists upon the necessity of implementing the terms of the convention in question as the sole international document dealing with the preservation of the cultural heritage against war damages.

International cultural organizations, headed by the UNESCO, must necessarily act in the face of the aggression of war against culture and cultural heritages. In the absence of fundamental action aimed at banning war or reducing its destructive effects, implementing the 1954 Convention, regardless of its deficiencies, is a highly imperative duty in both human and cultural terms, which calls for ever greater efforts on the part of the country's responsible authorities, thinkers at large, and international cultural institutions, particularly the UNESCO.

A brief review of the Iranian National Counseling Committee's achievements within a short period of three years clearly shows that the military forces are highly interested and eager to become acquainted with cultural legacies and the mission they carry in this context. What makes the realization of such acquaintance possible is to find a common language and achieve coordination between the members of the Committee.

# A Current Case: The Destruction of the Last Mosques in Banja Luka on 8 September 1993

Monica Wallenfels\*

## I. Factual background

The two remaining mosques in the town of Banja Luka in northern Bosnia were attacked during the night from 8 to 9 September 1993. According to a report in the *Neue Zürcher Zeitung*, they were set on fire and destroyed in the flames. Although it was not certain which of the parties was responsible, this was clearly not a side-effect of the hostilities but rather a deliberate act. It leaves the 50,000 Muslims living in Banja Luka, which had 16 mosques before the outbreak of hostilities in Bosnia, without a place of worship.<sup>1</sup>

This is merely one example from a whole series of attacks on religious buildings and other cultural property in the conflict in the former Yugoslavia. Other incidents have been documented by the Commission of Experts established pursuant to resolution 780 (1992) of 6 October 1992<sup>2</sup> as well as by the Mazowiecki-Commission<sup>3</sup>.

## II. The international humanitarian law issues raised

It is a well-documented fact and one of the greatest tragedies of the war in the former Yugoslavia that hundreds of thousands of civilians, not involved in the fighting, are exposed to immeasurable suffering. This is one of the decisive factors which led the Security Council of the United Nations to establish the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991.<sup>4</sup> The Security Council decided to establish the International Tribunal in its resolution 808 (1993) of 22 February 1993. Pursuant to paragraph 2 of that resolution, the Secretary-General submitted his Report dealing with the details of such a tribunal, including a recommended statute, on 3 May 1993.<sup>5</sup> The Security Council approved the Report and adopted the proposed Statute of the International Tribunal with its resolution 827 (1993) of 25 May 1993.

Without the establishment by the Security Council of the International Tribunal, a determination of which norms of humanitarian law can be applied in the conflict in the former Yugoslavia could bring with it immense difficulties.<sup>6</sup> In light of the Statute of the International Tribunal, however, some clarity has been achieved.

While the Statute does not rule out the applicability of other norms rendering acts by the conflicting parties prohibited, it follows the principle 'nullum crimen sine lege' which

requires the restriction of its jurisdiction to "rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."<sup>7</sup> If a measure undertaken by a party to the conflict is covered directly by the catalogue of crimes in articles 2 to 5 of the Statute, it must be considered to be a serious violation of international humanitarian law (as per article 1 of the Statute). In this connection, attention should be drawn to the following explanation in the Report of the Secretary-General:

*"It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law."<sup>8</sup>*

In determining whether the measure of destroying places of religious worship during the war in Bosnia is admissible or under what conditions it is punishable, it is therefore clearly appropriate to refer to the Statute of the International Tribunal.

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- 1 *Neue Zürcher Zeitung* from 9 September 1993, p. 2.
- 2 See the reference to the interim Report of the Commission of Experts (S/25274) in the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993 (hereinafter the "Report of the Secretary-General"), para. 9.
- 3 Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, E/CN.4/1993/50, pp. 23-24.
- 4 Hereinafter referred to as the "International Tribunal" or simply the "Tribunal".
- 5 Report of the Secretary-General, supra note 2. The Statute of the International Tribunal is included as an Annex to the Report and will be referred to hereinafter as the "Statute of the International Tribunal" or the "Statute".
- 6 For an overview of the norms dealing with the protection of cultural property see: The Federal Ministry of Defence of the Federal Republic of Germany (ed.), *Humanitarian Law in Armed Conflicts - Manual*, Bonn 1992, pp. 91-96.
- 7 Report of the Secretary-General, supra note 2, para. 34.
- 8 Report of the Secretary-General, supra note 2, para. 29.

### III. Legal analysis

#### 1. Personal jurisdiction

As a first step, the personal jurisdiction of the International Tribunal in this case must be examined. Article 6 of the Statute, "Personal jurisdiction", sets out that the Tribunal "shall have jurisdiction over natural persons pursuant to the provisions of the present Statute". This article must be read in the light of the general article 1, "Competence of the International Tribunal", which states:

*"The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."*

Clearly, the Tribunal has jurisdiction over the arsonists in this particular case as they are "natural persons". It is interesting to note that the Statute, like Additional Protocol II, is directed in part at protecting the civilian population but does not make a distinction between combatants and non-combatants.<sup>9</sup> Thus, any person responsible for a serious violation, irrespective of his or her membership in an (officially) organized army, falls within the jurisdiction of the Tribunal. In the introductory section of the Report of the Secretary-General, reference is made to the events leading up to the decision to establish the International Tribunal, including the resolutions of the Security Council in this regard: Both resolution 764 and resolution 771 speak of the "parties to the conflict" and reaffirm their respective obligations under international humanitarian law.<sup>11</sup> This might lead one to ask whether these obligations perhaps only apply to official "parties to the conflict". The Statute of the International Tribunal however does not use this formulation. It is thus to be understood that anyone committing a crime falling under the articles 2 to 5 of the Statute of the International Tribunal is subject to the Tribunal's jurisdiction.

#### 2. Subject-matter jurisdiction

Having established that personal jurisdiction with respect to the arsonists is afforded by the Statute of the International Tribunal, the second and more crucial question is whether subject-matter jurisdiction is also present in this case. In laying down the violations to be dealt with by the International Tribunal, the Statute incorporates specific norms of "conventional international humanitarian law which has beyond doubt become part of international customary law"<sup>12</sup> including the Geneva Conventions of 12 August 1949 for the Protection of War Victims<sup>13</sup> and the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907<sup>14</sup>. The two other sets of norms incorporated in the Statute originate from the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (article 4 of the Statute) and the Charter of the International Military Tribunal of 8 August 1945 (article 5 of the Statute, "Crimes against humanity"). These do not include norms dealing di-

rectly with the destruction of cultural or other property, and are therefore not of interest here. By limiting the applicable international customary law to these four sources, the Statute does not take into account developments since 1949 and thus does not incorporate any provisions of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.

It must therefore be examined whether the provisions of the Statute dealing with the destruction of property and cultural property originating from these two conventions - specifically article 2 (d) and article 3 (d) - are applicable in this case.

#### a) Article 2 (d) of the Statute

The relevant provision of article 2, "Grave breaches of the Geneva Conventions of 1949", reads as follows:

*"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*

(...)

*(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;"*

As the destruction of mosques is not related to the protection of the wounded and sick or of prisoners of war - the area of protection of the First, Second and Third Geneva Conventions of 1949 - it is the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War which must be drawn upon. To determine whether the destruction of mosques falls under the jurisdiction laid down in article 2 (d) of the Statute, it is therefore necessary to determine whether they would be protected under the Fourth Geneva Convention. There is no explicit protection for cultural property or property dedicated to religion in the Fourth Convention; it is covered, however, by article 53 which states:

9 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. The text is reprinted in: D. Schindler/J. Toman (eds.), The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents, 3rd edition, Dordrecht 1988, pp. 689ff.

10 See H. Fischer, Humanitäres Völkerrecht und humanitäre Hilfe im Krieg in Bosnien-Herzegowina, in: W. Volt (ed.), Humanitäres Völkerrecht im Jugoslawienkonflikt - Ausländische Flüchtlinge - Andere Rotkreuz-Fragen, 36. Tagung der Justitiare und Konventionsbeauftragten des Deutschen Roten Kreuzes vom 10. bis 12. September 1992 in Homburg, Bochumer Schriften zur Friedenssicherung und zum humanitären Völkerrecht, Vol. 18, Bochum 1993, pp. 27ff.

11 See resolution 764 (1992) of 13 July 1992, para. 10; resolution 771 (1992) of 13 August 1992, para. 1.

12 Report of the Secretary-General, supra note 2, para. 35.

13 Text of the four conventions reprinted in: D. Schindler/J. Toman, supra note 9, pp. 373ff.

14 Text reprinted in: D. Schindler/J. Toman, supra note 9, pp. 63ff.

"Any destruction (...) of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

This article is based on a very broad definition of property which includes religious edifices such as the mosques in this case.<sup>15</sup>

The application of article 53 is rendered problematic by the fact that within the system of the Fourth Geneva Convention this article applies to destruction of property within occupied territory and by the "Occupying Power". Neither article 147 of the Geneva Convention, which classifies the extensive destruction and appropriation of property as a grave breach, nor article 2 of the Statute of the International Tribunal mentions the restriction that the protected property must be located within occupied territory. The phrase "if committed against persons or property protected by the present Convention" in article 147 of the Geneva Convention makes clear that for the purposes of that Convention, the property must indeed be located on occupied territory.<sup>16</sup> Does the provision in article 2 of the Statute "namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention" mean that the mosques in this case would also have to be located on occupied territory in order to be covered?

From a practical point of view it can be argued that in the war in the former Yugoslavia - and it is exclusively for the prosecution of violations committed during this conflict that the International Tribunal was established - it is often impossible to determine whether territory is occupied or not. Unlike international armed conflicts - such as those envisaged in the first place by the Geneva Conventions of 1949 - here one cannot speak clearly of the "own" territory of those involved as opposed to "enemy" territory since many areas have a population composed of different ethnic groups. On the other hand, the principle of 'nullum crimen sine lege' would necessitate a strict application by the International Tribunal of the rules established by the Geneva Conventions. It is therefore uncertain whether the destruction of the mosques in this case falls under article 2 (d) of the Statute of the Tribunal. The result would depend on the definition afforded to the term "occupied territory" by the Tribunal, which would indeed have to take into account the special characteristics of the conflict in the former Yugoslavia.

The other requirements of article 2 (d) - that the destruction was "extensive", "not justified by military necessity" and "carried out unlawfully and wantonly" - would also have to be determined in this particular case by the Tribunal. It is clear that under normal circumstances, the destruction of a mosque is not justified by military necessity.

#### b) Article 3 (d) of the Statute

More directly applicable in this case is article 3 of the Statute of the International Tribunal, "Violations of the laws or customs of war", which states:

"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

Unlike the Statute's article 2, this article does not explicitly mention the convention of origin of this part of international customary law. From the Report of the Secretary-General we learn that this article is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land<sup>17</sup> and its annexed Regulations.<sup>18</sup> The Regulations of the Hague Convention (IV) set out protection of property of institutions dedicated to religion etc. in article 56 which, like article 53 of the Fourth Geneva Convention discussed above, is applicable to occupied territory but which provides for a broader scope of protection than article 53. It should be remarked as well that while the wording "(...) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education (...)" may seem unclear - how does one seize, destroy or damage an institution? - it should be interpreted in light of article 56 paragraph 1 of the Hague Convention (IV), which makes explicit reference to the property of such institutions.

Should the requirement of occupied territory not be fulfilled according to the International Tribunal, the protection corresponding to article 27 of the Hague Convention (IV) may be applicable, provided that the situation is seen as a siege or bombardment. Although this article is not as close to the wording of article 3 (d) of the Statute as is article 56, it does provide the same scope of protection:

"In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand."

It is uncertain whether the mosques in this situation would have to be marked by a distinctive and visible sign in

15 "The extension of protection to public property and to goods owned collectively, reinforces the rule already laid down in the Hague Regulations, Articles 46 and 56 according to which private property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences must be respected." See J. S. Pictet (ed.), IV Geneva Convention - Commentary, Geneva 1958, article 53, p. 301.

16 See J. S. Pictet, supra note 15, article 147, p. 601.

17 Hereinafter the "Hague Convention (IV)".

18 Report of the Secretary-General, supra note 2, paras. 41-44. See also H.-P. Gasser, Der Internationale Strafgerichtshof für das frühere Jugoslawien und das "Kriegsrecht und die Kriegsgebräuche" - Eine Glosse zu Artikel 3 des Statuts, in: HuV-1/2/1993, pp. 60ff.

order for a violation under article 3 (d) to be found. It is useful in any case to think about the reasons for the requirement of such signs. The idea of marking protected buildings etc. is not connected with a decision by the parties to the Hague Convention (IV) that only those buildings meeting this formal requirement are worthy of protection. Rather it is based on practical considerations. It is not realistic to assume that a combatant in a conflict, who is in most cases unfamiliar with the foreign terrain on which he is fighting and who might very well come from a completely different culture, can easily recognise buildings of cultural or religious significance on the territory of the enemy. One must keep in mind, however, what type of conflict is being waged in Bosnia: it is a war between cultural/religious groups which have lived close together over an extended period of time. The arsonists in this case knew very well that the buildings that they set on fire were mosques. In fact, markings on the buildings would surely not have made a difference as the attack was aimed specifically at these buildings, which are central to the religious conviction of the "enemy", and thus of symbolic importance. As such the attack must be characterized as "destruction or wilful damage".

As long as the requirement of "occupied territory" or "sieges and bombardments" do not stand in the way - and this would have to be determined by the International Tribunal, particularly in light of the fact that article 3 of the Statute does not explicitly mention Hague Convention (IV) - it is to be expected that the destruction of the mosques would fall under the subject-matter jurisdiction provided in article 3 (d) of the Statute.

### 3. Conclusion

To conclude, the International Tribunal established by the Security Council has the jurisdiction - personal and subject-matter - to convict those responsible for destroying the mosques in Banja Luka. Whether this concrete situation fulfils all of the requirements of article 2 (d) or article 3 (d) of the Statute would, of course, remain to be decided by the International Tribunal.

From a personal point of view, I would like to thank the members of the International Tribunal for their kind invitation to participate in the proceedings of the Tribunal. I am also grateful to the members of the Tribunal for their kind invitation to participate in the proceedings of the Tribunal. I am also grateful to the members of the Tribunal for their kind invitation to participate in the proceedings of the Tribunal.

The International Tribunal for the former Yugoslavia (IT-97-13) has jurisdiction over the crimes of genocide, crimes against humanity, and war crimes. The Tribunal is composed of judges and prosecutors. The Tribunal is also responsible for the protection and promotion of the rights and interests of the victims of the crimes. The Tribunal is also responsible for the protection and promotion of the rights and interests of the victims of the crimes.

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# Cultural Property and the Nuremberg War Crimes Trial

Jacqueline Nowlan\*

## I. Introduction

In World War II, cultural property was extensively removed from invaded and occupied countries as well as deliberately destroyed. The Nuremberg War Crimes Trial revealed, inter alia, the whole extent of destruction and pillage of cultural property by Germans during World War II. One of the largest operations concerning pillage of cultural property is known as the "Einsatzstab Rosenberg". *Rosenberg*, one of the defendants in Nuremberg, was designated by the Committee of the Chief Prosecutors as a major war criminal and was later sentenced to death by hanging. In January 1940, *Rosenberg* became Head of the Center for National Socialist Ideological and Educational Research which then became known as the Einsatzstab Rosenberg. Although its original task was to establish a research library, it soon extended to a project for the seizure of cultural treasures throughout the invaded countries in Europe. As of 14 July 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the West. No difference was made between private and public property. Museums and libraries as well as private houses were plundered, art treasures and collections were confiscated. The occupied eastern territories were not spared either. On 17 July 1941, *Rosenberg* was appointed as their Reich Minister. Towns, cities and villages were systematically destroyed or plundered.<sup>1</sup>

According to Article 6 of its Charter, the Nuremberg Tribunal had the competence to try and punish crimes against peace, war crimes and crimes against humanity. Article 6 of the Charter reads:

"(...) *The following acts or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:*

(...) *b) War Crimes: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (...)"*

Although Art. 6 (b) of the Charter does not refer to cultural property explicitly, its destruction or seizure is covered in so far as plunder of property, wanton destruction of centers of population or devastation not justified by military

necessity is involved. Keeping these facts and the mandate of the Nuremberg Tribunal in mind, it should come as no surprise that the Nuremberg Tribunal also dealt with the treatment of cultural property by the defendants.

## II. The Indictment

The individual defendants were indicted under Article 6 of the Charter. They were charged on four counts, including war crimes. Part of the description of war crimes committed by the defendants dealt with plunder of public and private property. The indictment charged some defendants with having plundered more than 21,903 art objects in the western countries. It was stated that the museums of Nantes, Nancy and Marseille were completely pillaged. Private art collections of great value were stolen. In Norway and other countries, property was confiscated by decree. Belgium's economic exploitation amounted to 175 billion Belgian Francs.<sup>2</sup> Almost the same was true for the Eastern Countries. They were systematically plundered and destroyed. The most devastated towns and cities were listed in the indictment. It was also stated that 427 museums, some also named as an example, were destroyed and that art treasures were stolen. 1670 Greek Orthodox churches, 237 Roman Catholic churches, 67 chapels, and 532 synagogues were destroyed.

## III. The Taking of Evidence

The evidence relating to war crimes was overwhelming, in its volume as well as its detail. As the judges themselves found it impossible to review it adequately, or to record the mass of documentary and oral evidence that had been presented<sup>3</sup>, a description of the taking of evidence concerning treatment of cultural property, including the hearing of witnesses and documentary evidence such as films,<sup>4</sup> can only be of an exemplary nature.<sup>5</sup> For example, the witness *M. Gerthoffer*, heard before the Tribunal on 6 February 1946,<sup>6</sup>

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1 *Der Prozeß gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof Nürnberg*, Vol. I, pp. 62ff.

2 *Der Prozeß gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof Nürnberg*, Vol. I, pp. 61f.

3 This is revealed by the judgment, reprinted in: *AJIL* 1947 (41), p. 172 (224).

4 Compare, e.g., *Der Prozeß gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof Nürnberg*, Vol. VIII, pp. 115f.

5 For more detailed information, see, e.g., *Der Prozeß gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof Nürnberg*, Vol. IV, pp. 90, 95f., 103f., 606; Vol. VI, pp. 486f.; Vol. VII, pp. 65f., 76f.; Vol. VIII, pp. 50, 68, 113f.; Vol. XI, pp. 515f.; Vol. XII, pp. 551f.; Vol. XVIII, pp. 113f.; Vol. XXII, p. 615.

6 *Ibid.*, Vol. VII, pp. 64f.

reported that plunder had been well organized. The most important although not the sole organ was the Einsatzstab Rosenberg. According to Gerthoffer, seizure of art objects began as soon as German troops entered Belgium, the Netherlands and France. The seizure of art objects as well as other material goods constituted an integral part of national socialist expansionist policy. The order to seize included private as well as public property. Making no distinction whether the owner was Jewish or not, everything of artistic value was taken by illegal means.<sup>7</sup>

Many more details were given and other witnesses provided similar evidence. Although the treatment of cultural property by the defendants during the war was of relatively minor importance compared to the other terrible crimes committed, the extent of damage and seizure of foreign property with special emphasis on art objects and museum pieces revealed during the taking of evidence in Nuremberg could not be left unnoticed.

#### IV. The Judgment

In dealing with the facts revealed during the taking of evidence, the treatment of foreign public and private property, including cultural property, by some defendants was also referred to in the judgment. After stating that it was impossible to review the evidence relating to war crimes adequately, the Tribunal decided to deal with war crimes quite generally and to refer to them later when examining the responsibility of the individual defendants. After the Tribunal concluded from the hearing of evidence that "public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity"<sup>8</sup>, it examined the law relating to these facts. The Tribunal concluded that Articles 49 and 52 of the Hague Convention, "together with Article 48, dealing with the expenditure of money collected in taxes, and Articles 53, 55, and 56, dealing with public property, made it clear that under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear. (...) There was in truth a systematic plunder of public or private property, which was criminal under Article 6 (b) of the Charter."<sup>9</sup>

As far as the law relating to the war crimes listed in Article 6 (b) of the Charter is concerned, the Tribunal stated that these crimes were covered by Articles 46, 50, 52 and 56 of the Hague Convention and Articles 2, 3, 4 and 46 of the Geneva Convention of 1929. According to the Tribunal, the question of the applicability of the Hague Convention did not have to be answered because the relevant rules were recognized by all civilized nations, "and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."<sup>10</sup>

Besides these remarks covering property in general, specific attention was paid to the intention behind the behaviour

of the defendants, who suggested that the purpose of the seizure of art treasures was protective and meant for their preservation. Nevertheless, the judges found that the sole purpose of the seizures was to enrich Germany.<sup>11</sup>

Dealing with the responsibility of the individual defendants, the judgment mentions seizure of property first of all in connection with Göring, who is referred to as "the active authority in the spoliation of conquered territory".<sup>12</sup> Rosenberg was found "responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe". Explicit reference was made to the seizure of art objects, including famous paintings and museum pieces.<sup>13</sup> In connection with Keitel, the judgment reads: "The OKW Chief directed the military authorities to cooperate with the Einsatzstab Rosenberg in looting cultural property in occupied territories."<sup>14</sup> Dealing with Seyss-Inquardt, the judgment mentions that "there was widespread pillage of public and private property which was given color of legality by Seyss-Inquardt's regulations, and assisted by manipulations of the financial institutions of the Netherlands under his control".<sup>15</sup> As far as Jodl is concerned, cultural property or even property as a whole is not directly mentioned, but he is found responsible for an order to destroy Leningrad or Moscow completely.<sup>16</sup> The other defendants are similarly only dealt with in a more general way as far as cultural property could be concerned, e.g. as taking part in, or commanding economic exploitation of the invaded countries.

#### V. Final Remarks

As shown above, the Nuremberg War Crimes Tribunal also examined the extensive destruction and plunder of cultural property during World War II. This applies to all stages, including the indictment as well as the judgment. Although cultural property as such is explicitly referred to rather seldom<sup>17</sup> - thus, leaving it to be dealt mainly in the general connection as part of private or public property - various objects, such as paintings, museum pieces, monuments, etc., generally understood to belong to cultural property, were referred to. The lack of explicit mention of cultural property seems to be due to the fact that, according to the Charter of the Nuremberg Tribunal (as well as to international humanitarian law then applicable on which the subject matter jurisdiction of the Tribunal is based), destruction or seizure of cultural property as such was not directly listed as a war crime. Cultural property was rather indirectly covered by

7 Ibid., especially Vol. VII, p. 69.

8 AJIL 1947 (41), p. 225.

9 AJIL 1947 (41), p. 235.

10 AJIL 1947 (41), pp. 248f.

11 AJIL 1947 (41), p. 238.

12 AJIL 1947 (41), pp. 272f., especially p. 274.

13 AJIL 1947 (41), p. 287.

14 AJIL 1947 (41), p. 282.

15 AJIL 1947 (41), p. 320.

16 AJIL 1947 (41), p. 316.

17 The term is used, e.g., in connection with Keitel, see AJIL 1947 (41), p. 282.

other war crimes, e.g., plunder of public or private property, thus making no distinction between objects of cultural or of mere financial value. Other reasons why cultural property is seldom explicitly mentioned can also be put forward. For example, the fact that other war crimes as well as other counts committed by the defendants were so serious and obviously proven, probably rendered it superfluous to dwell on this particular subject in a more detailed way. Nevertheless,

the fact that the Nuremberg Tribunal already referred to destruction and pillage of cultural property as such and of various objects understood to be part of cultural property must not be underestimated. Keeping the seriousness of other crimes committed by the defendants in mind, the Nuremberg Tribunal's dealing with the destruction of art objects etc., emphasizes the importance of protection of these objects and the gravity of violating a norm providing for their protection.

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# International Tribunal for Violations of International Humanitarian Law in Former Yugoslavia: Applicable Law

Bosko Jakovljevic\*

## I. Introduction

1. By its resolution 808 of 22 February 1993 the Security Council of the United Nations decided to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (hereafter: International Tribunal). By its resolution 827 of 25 May 1993 the Security Council adopted the Statute of the International Tribunal (the Statute)<sup>1</sup> regulating many questions necessary for its functioning. The draft Statute was proposed by the Secretary-General of the United Nations, but responsibility for this decision lies on the Security Council. It is proposed here to examine the subject matter competence of the International Tribunal, namely Articles 1-5 of the Statute.

2. International Humanitarian Law (hereafter: IHL) is a term used very widely. Primarily, it is used to designate the rules of international law for the protection of war victims. This is the traditional or stricto sensu IHL. There exists in the doctrine also another concept, according to which IHL includes, besides the rules for the protection of war victims, also other rules which are humanitarian in character.<sup>2</sup> The International Tribunal has adopted a new kind of IHL, besides the rules for the protection of war victims, the Statute includes rules protecting human beings against the crimes of genocide and the crimes against humanity. These are crimes committed regardless of whether they are in peacetime or wartime. In this case, these other rules are applied only to the situation of armed conflicts in the former Yugoslavia.

## II. Qualification of Various Armed Conflicts in Former Yugoslavia under IHL

3. There were three main theaters of war in the former Yugoslavia since 1 January 1991, the date chosen by the Security Council. They were not completely separated, but they are subject to different legal norms.

The armed conflicts in the former Yugoslavia were internationalized to a great degree; various factors contributed to this. However, in the field of IHL, specific rules on the qualification of such conflicts exist. These rules are important, because there is great difference between the rules applicable in international and those in non-international armed conflicts. This difference should be borne in mind when analyzing the conflicts from the point of view of IHL.

4. There was a conflict in the territory of the former Yugoslav Republic of Slovenia, now an independent state, be-

ginning 25 June 1991. The armed conflict was very short-lived, it ended in the first ten days of July 1991, and did not develop into a full-scale war. Slovenia postponed the application of its declaration of independence for three months, and actually, it became effective 8 October 1991, but it was internationally recognized only in January 1992. From the point of view of IHL, it was a non-international armed conflict, in which Article 3 of the Geneva Conventions was applicable, besides the rules of customary law applicable in such conflicts. The development of operations did not justify, it seems to me, the application of Protocol II of 1977. In its declaration of succession, Slovenia indicated that the Geneva Conventions and the Protocols of 1977 entered into force for Slovenia on 25 June 1991. But the independence was not effective during the armed conflict, and international recognition was received more than six months later. There were other cases of proclamation of independent states in the territory of the former Yugoslavia, but without international recognition such proclamations could not have effect on the IHL qualification of the conflict. Therefore, the armed conflict in Slovenia could not be regarded as an international armed conflict in the sense of IHL.

5. There is an armed conflict in the territory of the former Yugoslav Republic of Croatia, now an independent state, beginning 25 June 1991, which is still going on. The views of the parties to the conflict were very different as to the qualification of this conflict from the point of view of IHL. There were three basic phases in this conflict.

The first phase was from 25 June 1991 until 14 January 1992. Although the armed conflict was internationalized to a great degree, there was intervention of foreign states and international intergovernmental organizations, in the sphere of IHL its qualification is subject to the rules of IHL relative to this question.

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The armed conflicts in the former Yugoslavia interrupted normal circulation of information and documents. This paper was written on the basis of documents available, mainly those that could be obtained in Yugoslavia. When access to other documents becomes possible, the whole legal analysis and the conclusion could be reexamined and even changed.

1 Security Council: Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993.

2 See in particular J. Patrnogic/B. Jakovljevic, International Humanitarian Law in the Contemporary World, International Institute of Humanitarian Law (Publ.), Collection of Publications 10, San Remo, Italy, 1991. In this study various concepts of IHL are examined.

6. Art. 2, paragraph 1 of the Geneva Conventions of 1949 qualifies as an international armed conflict between the High Contracting Parties.<sup>3</sup> Croatia was not such a party in the first phase. It deposited its declaration of succession on 11 May 1992, indicating the effect on the date of its independence, 8 October 1991. However, prior to international recognition, the declaration of independence could not qualify the conflicts as international in the sense of IHL.

7. By Art. 2, paragraph 3 of the Geneva Conventions, an armed conflict could be qualified as international if a power, not party to the Conventions, accepts and applies them. As far as I know, there was no act of acceptance on the part of Croatia, in the sense of this paragraph.

8. Art. 1, paragraph 4 of Protocol I of 1977 provides for the possibility that an armed conflict fought by a liberation movement could be considered international in the sense of IHL. But to apply this rule, it would be necessary that the procedure laid down in Art. 96, paragraph 3 of Protocol I is followed. A declaration in the sense of this Article was never made by Croatia, not by any other authority in the armed conflict in the former Yugoslavia. Therefore, Art. 1, paragraph 4 of Protocol I could not be applied.

9. An important act should be noted in this first phase of the armed conflict in Croatia. On 27 November 1991, an agreement, entitled Memorandum of Understanding, was signed in Geneva on the proposal of the International Committee of the Red Cross (ICRC).<sup>4</sup> The agreement was signed by various Yugoslav authorities and Croatia. It was not ratified, but the parties to the conflict considered to be bound by it. The Agreement extended the application of the great part of codified IHL to the conflict in Croatia, making a selection which Articles of the Geneva Conventions and of Protocol I apply and which do not apply. The Agreement did not qualify the conflict. However, international law does not permit to select from a multilateral treaty certain parts, and to omit other parts, which was done in this Agreement. This is possible only if the Agreement is based on Art. 3, paragraph 3 of the Geneva Conventions, relative to non-international armed conflict. In this Agreement, the rules of the first three Conventions apply in such a way that they do not convey to the war victims the status granted by the Conventions, but only their right to enjoy the treatment accorded by the Conventions. This formula is used when there is not full and direct application of a treaty, but only the desire to accord to victims certain treatment.

In this Agreement there is an article that the provisions of the agreement "shall not affect the legal status of the Parties to the conflict". This clause was taken from Art. 3, paragraph 3 of the Geneva Conventions of 1949, relative to non-international armed conflicts.

All these arguments bring me to the conclusion that the Memorandum of Understanding, at the time of its signing, showed that the armed conflict in Croatia was a non-international one, in the sense of IHL. The situation was changed in 1992. Therefore, on 23 May 1992, the Memorandum was amended, so that the whole of IHL was made applicable.

10. Second phase, from January 1992 until today: the armed conflict is qualified as an international one in the sense of IHL, as far as the relations between Croatia and Yugoslavia were concerned. The new, reduced Yugoslavia, without Croatia, was proclaimed on 27 April 1992. Thus, the legal situation changed completely.

11. A new, third phase began on 22 January 1993, with the attack of Croatia on the areas of the "Serbian Republic of Krajina", protected by the United Nations as UNPAs. No agreement of a general character was signed. The Republic of Krajina proclaimed independence, but this proclamation was not internationally recognized. Croatia probably qualified this conflict as a non-international one because the UN considered this territory to be a part of its own. The presence of UN forces, UNPROFOR, and the fact that areas under UN protection were attacked, may qualify the conflict as international. No specific rules or acts of qualification of the conflicts were made, as far as I know. If I obtain new relevant documents, the qualification may be changed. Which rules apply in the absence of any specific legal act? Customary rules common to all types of armed conflicts. The situation was also further complicated by the fact that the United Nations were not a contracting party to IHL treaties.

12. All these phases show that in different phases of the armed conflict in Croatia, different qualifications could be made, non-international and international while on the qualifications depends the scope of applicable rules.

13. In Bosnia-Herzegovina, the armed conflict started on 6 April 1992 and is still going on.

In the first phase, Bosnia was still part of former Yugoslavia and it was a non-international armed conflict. Very soon, the new, reduced Yugoslavia, without Bosnia-Herzegovina, was proclaimed (17 April 1992), and the Yugoslav Army withdrew.

14. In the meantime, already on 22 May 1992, an important agreement was signed by the three parties to the conflict, the Moslem, Serbian Orthodox and Croatian Catholic. The Agreement was signed in Geneva on the proposal of ICRC.<sup>5</sup> According to its rules, Article 3 of the Geneva Convention applies to the conflict. In addition to this, in conformity with Art. 3, paragraph 3 of these Conventions, many other rules of IHL were extended to this conflict. The Agreement clearly shows that the conflict, from the point of view of IHL, is a non-international one. A sort of ratification of the Agreement was made, the signatures were confirmed by the competent authorities of the three parties to the conflict.

3 United Nations, Treaty Series, Vol. 75, No. 970-973.

4 The text of this Agreement should be obtained from the ICRC, Geneva, who has taken the initiative to propose the conclusion of such agreement, and who has participated in the meetings examining its implementation.

5 The text of the Agreement could be obtained from the ICRC, Geneva. This Agreement was followed by two others, of 23 May and 6 June 1992, for implementation, and by many ad hoc agreements regulating specific questions, especially the release of prisoners.

15. For the Federal Republic of Yugoslavia (Serbia and Montenegro), the armed conflict in Bosnia-Herzegovina is a non-international armed conflict in a neighbouring country. The Security Council condemned Yugoslavia for assistance to one of the parties and imposed severe political, diplomatic, economic and cultural sanction on 30 May 1992. Croatia was heavily engaged in the conflict in Bosnia-Herzegovina, but no sanctions were applied to it. No explanation was given for this difference in the application of the UN law in the same armed conflict.

16. Certain conclusions may be drawn from the above examination of the application of IHL in the conflict in former Yugoslavia. The efforts of the ICRC not only to protect and assist the victims, but to extend applicable law, by proposing special agreements, and by taking part in their implementation, should be noted and commended. ICRC acted in the fulfilment of its mandate.

The significant factor in the application of IHL in the humanitarian actions for the protection of and assistance to victims, and in the extension of IHL, are also the United Nations, its various organs and agencies.

Important humanitarian actions were carried out on the basis of these agreements. The agreements were violated systematically and on a large scale, but their validity was never challenged. The Bosnian Agreement was confirmed also by the London Conference on former Yugoslavia, 28 August 1992 (Action Programme, 3 VIII). These agreements represent an additional source of IHL applicable in the Yugoslav conflicts, together with customary and codified IHL which is in force. The agreements in particular show the difference in the qualifications of the armed conflicts in the sphere of IHL, differences existing in each theatre of war and in each phase of the conflicts.

### III. International Tribunal: Subject-Matter Competence

17. Four groups of rules were covered by the Statute of the Tribunal: the Geneva Conventions, the Laws and Customs of War, Genocide, Crimes against Humanity. No difference was made between the rules applicable in international and non-international armed conflicts and between the rules applicable in different phases of these conflicts, nor was any mention of the rules contained in special agreements. Only reference to customary rules was made, equal for all types of conflicts.

I do not believe that in customary law there is no difference between the rules for international and non-international armed conflicts. Why should states elaborate in 1977 two sets of rules different from each of the two types of conflict? There is not sufficient practice to support the evidence that the same rules apply to these different types of war. The principle of sovereignty precludes the possibility of applying in non-international conflicts certain rules, which are normally applicable in an international armed conflict. The status of prisoners of war is seldom granted in internal conflicts, only

the enjoyment of the treatment in accordance with this standard of the III Convention. There is no protecting power. Rules for the occupation and on the protection of aliens are difficult to apply in non-international armed conflicts. In the former Yugoslavia, special agreements concluded between the parties to the conflict help very much to solve these problems because they express the readiness of the parties to these internal conflicts to apply directly many of the rules existing for international conflicts, regulating, in a very precise way, all the relevant questions.

18. In addition to these rules, the principle of "elementary considerations of humanity" should be mentioned. In the Nicaraguan case, the International Court of Justice considers that these considerations are contained in Art. 3 of the Geneva Conventions.<sup>6</sup> Do these considerations cover all the other rules for which the International Tribunal is competent? That would not be easy to prove. We propose to examine the four groups of rules contained in the Statute.

### Grave Breaches of the Geneva Convention of 1949

19. The Statute has summarized in Art. 2 the grave breaches enumerated as such in the four Conventions. But taking into consideration the fact that most of these conflicts are internal in the sense of IHL, it is difficult to believe that all the parties would agree to give the captured combatants the status of prisoners of war, mentioned in items (e) and (f) of this Article. Again, in a civil war, the population is mixed, persons often change sides and all the authorities mobilize persons under their control. How to apply the rule that a crime is to "compel prisoners of war or civilians to serve in the forces of a hostile power" in a civil war? It is not possible to copy the rules contained in Art. 130 of the III Convention and apply it in the Yugoslav war without any changes or additional qualifications. Item (g) prohibits unlawful deportation, transfer or confinement. But what is unlawful in a civil war, where the population is mixed, where citizenship is not determined or clarified? How can you prohibit and declare criminal the confinement of persons in such a war? Therefore, I think that in adapting the rules of the Geneva Conventions to the Yugoslav war, literal transcript of the grave breaches without modification is not possible.

20. The Geneva Conventions operate with the concept of "protected persons": those which are not nationals of the Power in whose hands they are or the enemy wounded, sick, prisoners of war.<sup>7</sup> How to determine in a civil war or secessionist war, who is the enemy soldier or national. Is a Serbian civilian in Bosnia, in the hands of the Moslem forces, a foreign national? The formulation of the rules, designed to protect foreign nationals and members of enemy armed forces in international conflicts, cannot be considered "persons protected under the relevant Geneva Conventions" in the sense of Art. 2 of the Statute, without any further qualifica-

<sup>6</sup> See International Court of Justice, Reports 1986, p. 114.

<sup>7</sup> Art. 4 of III Geneva Convention of 1949, Art. 4 of IV Geneva Convention of 1949.

tion. The reformulation, restatement of the existing rules, to apply to the specific case of the Yugoslav War requires much more subtlety.

### Laws and Customs of War

21. There is a tendency to extend the rules on combat, elaborated for international conflicts, to non-international conflicts. In this sense was the effort of the Security Council to proclaim the rules of Art. 3 of the Statute, Violation of the Laws and Customs of War. But the formulas were taken from the IV Hague Convention of 1907<sup>8</sup> which are not sufficient and are not covering fully the protection against modern warfare. In the special agreements concluded, the parties to the conflict committed themselves to the application of modern formulation of traditional rules for combat. This restatement of the rules relative to the methods and means of warfare are contained in Protocol I of 1977, designed for international armed conflicts, and by the will of the parties they were made applicable to the Croatian and Bosnian conflicts. Therefore, reference to these agreements should be made by the International Tribunal, when applicable.

### Genocide

22. Genocide has been declared an international crime, which could be committed either in time of peace or in time of war. The rules contained in the Convention against genocide of 1948<sup>9</sup> were included in Art. 4 of the Statute. The difference between international and non-international armed conflicts is not necessary for the application of these rules. What is new is the inclusion of the crime of genocide in the list of crimes prohibited by IHL: it is an extension of the concept of IHL and its serious violations.

So far it was classified as a crime against the rules on the protection of human rights. The fact that a crime at the same time falls in the group of serious violations of human rights and of IHL reflects the reality, as IHL should be viewed as a part of the wider concept of human rights<sup>10</sup>.

### Crimes against humanity

23. This group of crimes was first recognized at the Nuremberg Trial.<sup>11</sup> The Security Council has taken from the Nuremberg principles the crimes listed under (a), (b), (c), (d), (i) and (h) of Art. 5 of the Statute. To this, the Security Council has added torture and rape, probably from the IV Geneva Convention, and then imprisonment. There is no indication of the source from which these additional crimes were taken.

24. The formulation of these acts calls for some comments.

Deportation cannot be unlawful in itself, only if it is done unlawfully, so that the limits and conditions are not respected.<sup>12</sup>

Imprisonment cannot be considered a crime by itself. Imprisonment is a practice normal in peacetime, and very much

practiced in time of war, but international law cannot prohibit this practice to any authority, de jure or de facto. Only with some qualification this act could be proclaimed a crime, otherwise it prohibits something which all the authorities in the world perform lawfully. The conditions of imprisonment must respect the standards adopted world-wide. Therefore, the formulation of this crime is very imprecise and will cause much confusion.

25. In adopting Art. 5 the Security Council has produced a very curious cocktail of rules. Taking some criminal acts from Nuremberg principles, it has omitted important elements and in this way changed them. These crimes were connected with the other crimes tried in Nuremberg, those against peace and war crimes. Another element omitted was that crimes against humanity could be performed, according to Nuremberg, also in peacetime, before the war. By omitting these two components of the crimes against humanity, the Security Council has introduced a new formulation of the Nuremberg principles. In addition to this, it has added other crimes. Therefore, a completely new formulation of the crimes against humanity was elaborated, and included in the concept of "serious violations of IHL" also a novel term.

The whole concept of the crimes against humanity, as outlined in the Statute, is questionable. It was established in 1945 when the Laws and Customs of War were much more limited than today. In the meantime, the law protecting war victims has been greatly extended: in 1949, through the Geneva Conventions, universally accepted, and in 1977, by Protocol I, much of it could be considered as generally accepted law. All the acts listed in Art. 5 (a-g) of the Statute are covered by this new law, called IHL. Even the act mentioned in Art. 5 (h) "persecution on political, racial and religious grounds", although not mentioned expressis verbis, could be considered to be covered by the Geneva Conventions and Protocol I, especially its Art. 75, which was in fact taken from human rights instruments. In any case, crimes listed in Art. 5 of the Statute, because they are committed in war, are covered by the Geneva Conventions of 1949 and parts of Protocol I of 1977 under the new term IHL, not known in 1945. All these acts are war crimes in the sense of contemporary international law and Art. 85 of Protocol I. The difference between war crimes and crimes against humanity, necessary in 1945, has disappeared today. Therefore, to proclaim a special category of crimes against humanity in time of war is unnecessary, and may only cause confusion, as the same act could be invoked under different headings. There remains, however, the group of crimes against humanity in situation other than armed conflicts.

- 8 The Hague Conventions and Declarations of 1899 and 1907, New York, 1915, p. 100.
- 9 United Nations, Treaty Series, Vol. 78, No. 1021.
- 10 See Human Rights: A Compilation of International Instruments, UN edition.
- 11 United Nations, Treaty Series, Vol. 82, No. 251.
- 12 Detailed rules about the conditions for prohibited and permitted deportations exist in IHL. See in particular Art. 49 IV Geneva Convention of 1949.

26. If the Security Council has the power to elaborate new criminal law, to correspond to the principle "nullum crimen, nulla poena sine lege", then it could add "other inhumane acts", mentioned in the last subitem of Art. 5. Can any penal law contain such vague formula?

I would suggest certain additional acts which are relevant to the Yugoslav situation and may be added to the list of crimes against humanity. Involuntary disappearances is a crime which was largely practiced in these armed conflicts, bringing death to numerous victims without any trace left. Therefore, the obligation, existing under IHL, to register and inform about the combatants captured and civilians detained, through the tracing service, was so important. Persons violating this obligation should be made responsible, because it enabled great numbers of persons to disappear from this earth.

The sufferings of populations encircled or exposed to military operations were so great that the sending of relief was vital for them. Therefore, persons responsible for preventing or impeding humanitarian relief shipments, in violation of specific agreements between the parties<sup>13</sup> should be tried for the violation of this obligation.

Visits to detainees by the delegates of ICRC are vital for war victims, to prevent their disappearance, torture and murder. The breach of this obligation, undertaken in special agreements signed by the parties to the conflicts<sup>14</sup>, should also bring persons responsible before the International Tribunal.

Ethnic cleansing is a terrible practice, it is covered by other rules of IHL, but its formulation as a specific crime could facilitate the punishment of those responsible.

Perfidious use of the red cross emblem for evident reasons should also be mentioned among other crimes to be suppressed through penal law. It is a criminal act, a grave breach according to Art. 85 Protocol I of 1977 and the Yugoslav penal code (Art. 153).

Attack on persons hors de combat is already prohibited, but according to Art. 85 of Protocol I it is a grave breach of IHL.

Finally, attacks on installations containing dangerous forces, under the conditions set out in Art. 85 of Protocol I, are also a grave breach of IHL, which should be suppressed by including it in the list of serious violations of IHL.

The Statute has left open the question who has the right to define "other inhumane acts", mentioned in Art. 5 (i)? The Tribunal itself? Does it have legislative power?

#### IV. Concluding Remarks

27. Penal responsibility in non-international armed conflicts is not accepted in written law, nor there is sufficient practice to support the idea that it is a part of customary law. But the special agreements, Art. 11 of the Memorandum of

Understanding of 27 November 1991, and Art. 5 of the Agreement of 22 May 1992 on the armed conflict in Bosnia-Herzegovina, contain the undertaking to the parties to the conflict to prosecute and punish war criminals. On this basis could be constructed penal responsibility, when these agreements are applicable. Where the whole of IHL is applicable, the basis is in the existing conventions.

28. Methods. The Security Council has performed a large codification work in the field of IHL. But the Secretary General of the United Nations was placed in a difficult position, to propose this codification within the period of about three months. Such codification and restatement of law requires much time, many months or even years of work, with wide consultation of all relevant factors. The diplomatic Conference elaborating the protocols lasted four years (1974-1977), two months every year, with numerous preparations, with the whole international community participating, including the liberation movements. It was not possible to accomplish all this within three months. This hastily done codification was finally adopted by 15 states of the world in the name of all the others, which were not properly consulted. This is a very unusual codification work. It is valid for one case only, but it will certainly have influence on the whole IHL in the future.

29. The result of this hasty work is a cocktail of various rules put together. Many of them formulated in a new way, with equal rules for all types of armed conflicts. The consequences of such a work are far-reaching. Are the states going to accept that completely equal rules should govern both international and internal armed conflict? This codification is supposed to be the restatement of customary law. It is certainly so in many of its rules, which cover crimes generally accepted as containing acts punishable in all situations, international war, internal war, or in peacetime, including internal disturbances. But some of the rules are new, modified or incompletely and imprecisely defined. This deficiency is the result of the procedure applied. The question is also whether the Security Council is authorized to restate and modify IHL.

30. There is a new concept of "serious violations of IHL", which covers both grave breaches of IHL and other crimes. There is also a new concept of IHL, starting with the traditional IHL but extending to genocide and some other acts, which are a part of human rights law. The connection between IHL and the human rights law has become more evident in this Statute of the International Tribunal.

31. What should be noted is that fact that IHL was separated from the question of crimes against peace. IHL in the new concept should be applied regardless of "the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict" (preamble of Proto-

13 See the Memorandum of Understanding, Art. 9. See the Agreement on the conflict in Bosnia-Herzegovina, Art. 2.6.

14 See the Memorandum of Understanding, Art. 3 and 4. See the Agreement on Bosnia-Herzegovina, of 22 May 1992, Art. 2.3 and 2.4.



col I of 1977). This independence of IHL from political qualifications and actions is important to preserve IHL, to permit IHL to perform its basic function, the protection and assistance to war victims. In this sense IHL is a part of human rights law in the widest sense, it protects human beings against actions of political entities.

32. Special agreements concluded between the parties to the conflict, both those of a general nature, or ad hoc agreements to regulate specific questions, should be taken into consideration as a source of law, where applicable.

33. The Statute reflects the general tendency to align the rules for non-international armed conflicts to the rules for international armed conflicts, because the basic need for the protection of human beings is the same. States have to say to what extent this is in conformity with their sovereign rights.

34. The new formulation of rules of IHL and the establishment of an International Tribunal for the conflicts in for-

mer Yugoslavia should not be limited to this case. This precedent should be extended to all armed conflicts in the world, present and future, without undue delay. Only in this way the rule of law would be maintained.

35. There is the phenomenon of politicization of IHL, of its use for political purposes. This could be dangerous for the victims. Therefore, the basic principles of IHL should be reaffirmed. Humanity, impartiality and neutrality are the basis and the strength of IHL. No discrimination between the victims should be permitted. They all have the same right to protection and assistance. The same is valid for persons accused of violations of IHL. All persons accused for these violations should be tried to establish whether they are responsible for the commission of such crimes. The Statute of the International Tribunal proclaims these principles, and they should be followed in the practice of the Tribunal. It is in the interest of victims to render justice, according to legal rules which are generally accepted. Penal protection is certainly one of the aspects of the protection of war victims.

1. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

2. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

3. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

4. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

5. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

6. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

7. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

8. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

9. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

10. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

11. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

12. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

13. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

14. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

15. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

16. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

17. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

18. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

19. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

20. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

21. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

22. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

23. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

24. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

25. *Journal of International Law*, 1978, Vol. 15, No. 1, p. 1.

II. I. OBJECTS OF THE TREATY

The Treaty contains a list of objects which are to be protected. It is to be noted that the objects are not limited to the objects of the Convention. The objects of the Convention are:

1. The physical movement, maintenance, scientific, artistic, educational and cultural institutions shall be considered as objects and shall be protected and protected by the Convention.

2. The obligation of protection and respect, which is inherent upon the belligerents, is extended in the same way to the objects in these institutions (Art. 1 para. 2).

3. The objects in these institutions are also protected by the Convention.

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25. The objects in these institutions are also protected by the Convention.

# The Protection of Cultural Property as laid down in the Roerich-Pact of 15 April 1935

Knut Dörmann\*

## I. The Origins of the Treaty

Until 1935 cultural property was protected, as far as treaty law is concerned, only in a very limited way. The Hague Regulations Respecting the Laws and Customs of War on Land of 1899/1907<sup>1</sup> and the Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War of 1907<sup>2</sup> contained some provisions with respect to the protection of cultural property<sup>3</sup>. The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments<sup>4</sup> was the first treaty dedicated exclusively to the protection of cultural property.<sup>5</sup> This convention, which was drafted on the American continent, is better known as the Roerich-Pact, referring to Professor *Nicolas Roerich* who initiated it with his proposals in 1929. At the request of the Roerich-Museum in New York the convention was prepared by *Georges Chklaver*. His draft was thereupon discussed by the International Museum Office of the League of Nations. In the years 1931-1933 it was the subject of three private conferences. Finally, in 1933, the 7th International Conference of American States recommended the signature of the Roerich-Pact. On 15 April 1935, 21 states of the Pan-American Union signed the convention<sup>6</sup> after its Governing Board had drawn up the final text.<sup>7</sup> The Treaty, which is open to ratification only for American states<sup>8</sup>, has so far been ratified by 10 states.<sup>9</sup>

## II. Contents of the Treaty

The Treaty consists of eight articles with the articles 6 to 8 of operative character (Art. 6: possibility of accession; Art. 7: depositary; Art. 8: possibility of denunciation). This overview shall be limited to the articles 1-5 which contain the obligations of the contracting parties.

Art. 1 para. 1 stipulates that

*"the historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents"*.

This obligation of protection and respect, which is incumbent upon the belligerents, is extended in the same way to the personnel of these institutions (Art. 1 para. 2). In contrast to the above-mentioned treaties this obligation applies not only during war-time, but also in peace-time (Art. 1 para. 3). In this respect the Roerich-Pact had considerable influence on the further development of the protection of cultural property on the universal level<sup>10</sup>. The enumeration of historic monuments, artistic and cultural institutions underlines that above all immovable cultural property shall be protected<sup>11</sup>. Movable cultural property is only protected in a very indirect

way when it is inside the buildings mentioned in Art. 1<sup>12</sup>. This differentiation between immovable and movable property has a long tradition as the previous above-mentioned regulations of international humanitarian law have shown. Art. 5 of the Hague Convention concerning Bombardment by Naval Forces in Time of War, for example, only relates to immovable cultural property. The Hague Regulations Respecting the Laws and Customs of War on Land contain one provision which can be classified as protecting movable cultural property in a very indirect way: According to Art. 53 *"an army of occupation can only take possession of (...) all movable property belonging to the State which may be used for military operations"*. Considering that movable cultural property is in general not suitable for military aims, it is protected at least against confiscation.<sup>13</sup> In this respect the Roerich-Pact seems to be a first, but very small, step towards an extended protection of movable cultural property. This special necessity becomes obvious considering recent technological development which makes it possible to move "immovable" monuments as a whole<sup>14</sup>. Finally, with the adoption of the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954<sup>15</sup>, both movable and immovable cultural property is protected although in different intensities.

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- 1 *D. Schindler/J. Toman* (eds.), *The Laws of Armed Conflicts*, 3rd edition, Dordrecht 1988, pp. 63ff. (RGI. 1901, p. 423/RGI. 1910, p. 132).
- 2 *D. Schindler/J. Toman* (eds.), *supra* note 1, pp. 811ff. (RGI. 1910, p. 256).
- 3 *W.A. Solf*, *Cultural Property*, in: *R. Bernhardt* (ed.), *EPIL*, Instalment 9, 1986, pp. 64-68 (64); *D. Schindler/J. Toman* (eds.), *supra* note 1, p. 737.
- 4 *LNTS*, Vol. 167, 1936, pp. 290-294.
- 5 *S. von Schorlemer*, *Internationaler Kulturgütererschutz*, *Schriften zum Völkerrecht* (102), p. 270; *W.A. Solf*, *Cultural Property*, *supra* note 3, p. 64.
- 6 *H. Strebel*, *Kulturgüterchutz*, in: *K. Strupp/H.-J. Schlochauer* (eds.), *Wörterbuch des Völkerrechts*, pp. 381-383 (382).
- 7 *D. Schindler/J. Toman* (eds.), *supra* note 1, p. 737; *W.A. Solf*, *Cultural Property*, *supra* note 3, p. 64.
- 8 *Cf. P. Verri*, *Le destin des biens culturels dans les conflits armés* (II), *Revue internationale de la Croix-Rouge*, 1985, pp. 127-139 (134f.).
- 9 *Cf. S. von Schorlemer*, *supra* note 5, pp. 269f.: Brazil, Chile, Dominican Republic, El Salvador, Guatemala, Columbia, Cuba, Mexico, Venezuela, USA.
- 10 *S. von Schorlemer*, *supra* note 5, p. 269.
- 11 *Cf.* in this connection the wording of the preamble: *"the Roerich-Pact (...), which has as its object (...) to preserve in any time of danger all (...) immovable monuments"*.
- 12 *W.A. Solf*, *Cultural Property*, *supra* note 3, p. 65; *S. von Schorlemer*, *supra* note 5, p. 67.
- 13 *S. von Schorlemer*, *supra* note 5, pp. 67f.
- 14 *S. von Schorlemer*, *supra* note 5, p. 65.
- 15 *D. Schindler/J. Toman* (eds.), *supra* note 1, pp. 745ff. (BGBI. 1967 II, p. 1233).

According to Art. 2 of the Pact in connection with the preamble ("*nationally and privately owned (...) monuments which form the cultural treasure of peoples*") it follows that the obligation to respect is independent of the question of ownership. Consequently objects which are owned by private persons are protected in the same way.<sup>16</sup> The only precondition for protection is that the monuments and institutions are situated on any part of the territory "*subject to the sovereignty of each of the Signatory and Acceding States*". This is also a special feature of the Roerich-Pact which was taken up by the UNESCO Convention and is a hint at the preventive idea of a "world heritage"<sup>17</sup> of cultural properties, which has to be protected by the whole community of states.<sup>18</sup>

The Treaty does not specify which concrete obligations of behaviour follow from the obligation to respect and protect. Neither is the wording of the preamble very helpful in this context. The object to "*preserve in any time of danger*" does not lead to further qualification. According to the last sentence of Art. 2 the contracting states only "*agree to adopt measures of internal legislation necessary to insure said protection and respect*".

The short enumeration in Art. 1 of the objects which shall be preserved does not make clear which monuments fulfil the preconditions for the said protection and how to identify them in a given case. The last point is taken up in Art. 3 borrowing concepts from the 1864 Geneva Convention on the Wounded in Armies in the Field. In accordance with this provision the mentioned monuments and institutions are marked with a distinctive protective sign (red circle with triple red sphere on a white background). Art. 4 of this convention provides that the contracting parties may send a list to the Pan-American Union which contains the monuments or institutions entitled to the protection of the Treaty. This list, as well as any later changes, will be notified to the other contracting states. An international control with regard to the marking is not provided. According to Art. 5 of the Pact the

selected monuments and institutions cease to enjoy the protection set forth in Art. 1 if they are used for military purposes.

The protection of cultural property in the Roerich-Pact is limited to these few provisions described above. Considering the early date of this convention it nevertheless played an important role in encouraging future development in this field on a universal level. Its relevance for today is enhanced by the UNESCO Convention which according to Art. 36 supplements the provisions of the Roerich-Pact<sup>19</sup>. In view of the fact that the Convention of 1954 created a new protective sign (cf. Art. 16), the new distinctive emblem replaces the red circle with a triple red sphere on a white background for those states which are party to both treaties<sup>20</sup>. In addition to this, the marking of cultural property in accordance with the Roerich-Pact is of special importance with regard to Art. 85 of Additional Protocol I to the Geneva Conventions. According to this provision, intended attacks on "*clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization*" are grave breaches. Consequently, attacks directed against clearly marked cultural objects registered with the Pan-American Union in conformity with the Roerich-Pact must be qualified as grave breaches in the sense of Additional Protocol I<sup>21</sup>.

16 S. von Schorlemer, supra note 5, p. 69.

17 Cf. in this regard the wording of the preamble as well which mentions monuments "*which form the cultural treasure of peoples*".

18 S. von Schorlemer, supra note 5, p. 70.

19 H. Strebel, Kulturgüterschutz, supra note 6, p. 282; S. von Schorlemer, supra note 5, p. 277.

20 H. Strebel, Kulturgüterschutz, supra note 6, p. 282f.

21 W. A. Solf, Cultural Property, supra note 3, p. 65.

# Meeting of Experts on the Application and Effectiveness of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), Final Report\*

## The Hague, 5 - 7 July 1993

### Final Report

1. A meeting of legal and cultural experts was convened in The Hague between 5 and 7 July 1993 to examine the application and effectiveness of the Convention for the Protection of Cultural Property in the event of armed conflict (The Hague, 14 May 1954) at the invitation of the Netherlands Government.

The meeting was organized by the Ministry of Welfare, Health and Cultural Affairs and the Ministry of Foreign Affairs, with the collaboration of the UNESCO Secretariat. Experts from nineteen countries, representatives of UNESCO and of two non-governmental organizations, and two experts attending in their personal capacity participated in the meeting which was chaired by Mr. *Adrian Bos*, legal adviser at the Ministry of Foreign Affairs. The full list of participants is to be found in Annex I to this report.

2. The meeting was opened by the Netherlands Minister for Foreign Affairs, *Dr. Peter H. Kooijmans*, who stressed the importance the Netherlands Government attached to the development of international humanitarian law, including cultural heritage protection law. A comprehensive review of the 1954 Convention, which formed part of "Hague Law", could make a substantial contribution towards the achievement of one of the main purposes of the UN Decade of International Law. He concluded by expressing his conviction that the expert meeting would contribute to the protection of our common cultural heritage, the loss of which went far beyond the destruction of buildings, objects and sites. The report of the meeting was presented to the Minister for Cultural Affairs, *Ms. Hedy d'Ancona*, who expressed her satisfaction at the fact that the expert meeting had been successful in providing the necessary guidance to the next step in the review process of the 1954 Convention within the framework of UNESCO. She furthermore stressed that one of the issues discussed by the meeting, namely the education and training of military forces taking part in UN peace-keeping activities, will in the very near future be undertaken by the Netherlands Government.

3. The participants adopted the Agenda of the meeting (Annex II). The UNESCO representative gave an account of the events leading to the convening of this meeting, and explained that a report including a set of recommendations had been prepared for the Secretary by Prof. *Patrick Boylan*. She expressed the wish that the results of this meeting would constitute a substantive contribution to the discussion on this matter at the 142nd session of the Executive Board and the 27th General Conference of UNESCO. At the end of the meeting the UNESCO representative stressed that the issue of the Protocol additional to the 1954 Convention and its relation to the 1970 Convention needs further discussion.

4. The expert meeting started with a general discussion on the application and effectiveness of the 1954 Convention on the basis of a Discussion Paper prepared by the Netherlands, and focused in general terms on possible ways and means of strengthening the 1954 Convention.

5. During the general debate, the expert meeting acknowledged that the object and purpose of the Convention were still valid and realistic and that its fundamental principles could be considered as part of international customary law. It was observed that a reaffirmation of these principles might be appropriate. At the same time attention was drawn to apparent weaknesses in the provisions of the Convention and to failures in the implementation.

It was generally acknowledged that universal acceptance of the 1954 Convention was an essential condition for the effective protection of cultural property in times of armed conflict. Recent cases of armed conflicts have shown the importance of protecting cultural property. It was observed that destruction of cultural property sometimes appeared to be an objective of armed conflict. Efforts should be made, at national, regional and international level, to increase the number of States Party and to promote implementation and more effective application by Contracting Parties. Existing regional organizations could play a prominent role in encouraging new ratifications, thereby contributing to a better balance in the participation of countries from different geographical regions in the Convention. In addition, it was pointed out that information on the operation of the Convention should be addressed to the persons, both military and civilian, responsible for its implementation. In this connection, various experts stressed the need for proper enforcement measures including sanctions under national legal systems.

One of the conditions for the effectiveness of the Convention's protective system is the adoption of the preventive measures contained in the Convention. However, the expert meeting noted that no provision was made for essential measures such as the preparation of precise documentation on the protected cultural property and its availability; this should be remedied.

6. Subsequently, the expert meeting turned to a discussion of the substantive issues as identified in the Discussion Paper. These issues are dealt with in the following subsections.

#### 6.1 Scope of the Convention

Although it was considered highly desirable that an international legal instrument which also protected the natural heritage should be developed, it was agreed that the scope of the 1954 Convention - because of its very distinctive character - should not be extended to include the natural heritage. The protection regime laid down for cultural property in the 1954 Convention did not meet the requirements of an adequate protection regime for the natural heritage. The participants acknowledged that the protection of the natural heritage was dealt with in various other fora.

The importance to mankind of the protection of cultural property was emphasized. The designation of cultural property for protection under the Convention was also an indication of mankind's interest in its protection.

The question was raised of whether the word "occupation", in the 1954 Convention permits the application of the relevant provisions of the Convention to activities undertaken within the framework of peace-keeping activities.

As long as the UN peace-keeping forces operate with the consent of the host state, such operations were not regarded as an occupation under the Convention.

#### 6.2 (Special) Protection Regime

The first issue that was discussed was the definition of cultural property as used in the Convention. The definition given in Article 1 of the Convention still seemed largely acceptable to the participants, for it was considered to be broad enough to cover all of the cultural heritage in need of protection.

\* Published as UNESCO Doc. 142 EX/15.

The experts furthermore elaborated on the protective system provided for in the 1954 Convention and the distinction between the two levels of protection: general protection and special protection. Arguments for and against the validity and usefulness of such a distinction were raised. It was stressed, nevertheless, that, if the protection system were to be modified, the level of protection should on no account be lower than the level of protection already contained in the existing provisions of the 1954 Convention and in other instruments such as the 1972 World Heritage Convention or the Protocols of 1977 to the Geneva Conventions of 1949.

Some doubts were expressed about the usefulness of the special protection regime. The procedure for entering cultural property on the International Register of Cultural Property under Special Protection was considered to be too complicated. If this regime were maintained, it should be simplified, namely by revising its conditions and making them more objective. In that connection the experience of registering cultural sites on the World Heritage List of the 1972 Convention could be used for reference. Some participants noted, however, that the cultural sites as such should be used as reference.

It was suggested that provision be made for certain institutional arrangements under the 1954 Convention, similar to that in the 1972 Convention, for improving the requirements for entry in the International Register, thus facilitating the application of the special protection system.

### 6.3 Enforcement

It was generally felt that the enforcement of the Convention should be strengthened and that the regime of sanctions deserved further attention. It was stated that attacks on cultural property were already defined as war crimes in the 1977 Protocol I to the Geneva Conventions of 1949, and that under the 1954 Convention States Party were under an obligation to impose sanctions at national level on those who breach the Convention. It was suggested that such attacks should also be described as war crimes in the Hague Convention itself, for instance by formulating an additional instrument, such as a Protocol to the Convention.

It was acknowledged that two aspects of the question of sanctions had to be taken into account: on the one hand the responsibility of the State for a violation of the Hague Convention, and on the other individual criminal responsibility, in which case those involved should be prosecuted either by an international tribunal or by national tribunals.

### 6.4 The destruction of cultural in times of armed conflicts of a non-international character

The wish was expressed that ideally the protection afforded to the cultural heritage in internal conflicts should not differ from that given in international conflicts. However this question is linked to the issue of respect for national sovereignty, as was stressed by several participants. In that connection the possible role of the Security Council was mentioned, in ensuring the protection of cultural heritage in an internal conflict forming a threat to international peace and security. Some delegations, however, expressed doubt about a possible role for the United Nations in the protection of the cultural heritage, emphasizing the need for the consent of the host state and recalling the military necessity principle.

In any event the preparation in peace-time at national level of appropriate lists of protected cultural properties could certainly improve their protection in the event of an internal conflict.

### 6.5 Institutional issues

The Expert Meeting conducted a wide-ranging exchange of views on the question of whether there was a need for an institutional mechanism under the 1954 Convention. It was concluded that an organ modelled along the lines of the World Heritage Committee

could contribute to a more effective application of the 1954 Convention. In this connection the meeting took note of the recommendations of Prof. Boylan (Appendix X of his Report) concerning the appropriateness of establishing a Committee, and identified various tasks and functions, such as monitoring, supervising, education and advising which could be undertaken by such an organ. This needed further elaboration, however.

It was pointed out by some delegations that an institutional mechanism could perform important functions with respect to evaluating requests for (new) entries in the International Register for Special Protection and could formulate objective and neutral criteria for such entries. It was also concluded that reporting under the 1954 Convention would be improved by the development of an institutional mechanism. It was the feeling of the Meeting that the establishment of an organ could, furthermore, improve the awareness among States and peoples of the object and purpose of the 1954 Convention, whereas a rotating membership would heighten the involvement of the Contracting Parties to the Convention.

Some participants noted, whilst acknowledging the appropriateness and urgency of establishing some sort of institutional mechanism, the need for administrative and secretarial support. Various options for servicing an institutional mechanism and their financial consequences were discussed. There was a general feeling that the UNESCO Secretariat, because of its experience and expertise, could perform an important role in this connection.

Some delegations raised important issues relating to the more procedural aspects of the establishment of such an organ. These issues were not discussed in detail, although it was pointed out by many experts that here the practice of the World Heritage Committee and the 1970 Convention on measures against illicit traffic in cultural property could provide guidance on how to approach this matter.

The meeting also discussed under this item the role of non-governmental organizations. It was agreed that maximum use should be made of their expertise on both a practical and an educational level. Some experts drew attention to certain operational functions which could be performed by representatives of non-governmental organizations in liaison with the organ to be established and/or UNESCO.

The meeting discussed in fairly general terms the establishment of a possible relationship between UN peace-keeping activities/forces and the implementation of the 1954 Convention and the question of whether UNESCO could play a role within the context of UN peace-keeping, so as to assist in improving the protection afforded to the cultural heritage in times of armed conflict. It was observed that such participation could only operate within a mandate laid down by the Security Council of the United Nations for peace-keeping activities, in accordance with international law and the United Nations Charter. The appropriateness of having permanent observers, be it representatives of non-governmental organizations, ICCROM or UNESCO, cooperate with United Nations peace-keeping forces in the field was generally acknowledged. The meeting agreed that modalities and possible systems of cooperation between the agencies and institutions involved needed further discussion.

### 6.6. Commissioners-General/Protecting Powers

There was general agreement that neither the mechanism of the Commissioners-General nor that of the Protecting Powers had worked, but there was some hesitation about abolishing the systems laid down and about deleting the provisions from the 1954 Convention and its Regulations at a future stage of the revision process. It was observed that this was partly the result of benign neglect of the 1954 Convention, but States were also extremely hesitant about admitting that they were involved in armed conflicts.

The meeting discussed various modalities which could be developed to improve the 1954 Convention in this respect. Some delega-

tions referred to a possible role for the ICRC, which could act as a neutral intermediary in the event of conflict, but others opined that this might result in a conflict of interest for that organization, whilst the primary task of the ICRC seemed to be directed to the saving of human life. It was observed that the Fact-Finding Commission established under Article 90 of Additional Protocol I could also play a role, although it was pointed out that the number of States having accepted the competences of the Fact-Finding Commission did not coincide with the number of ratifications of Additional Protocol I.

The meeting stressed the importance of developing a flexible and simplified regime which would involve representatives of UNESCO and non-governmental organizations in performing certain operational and preventive activities. In this respect the creation of some kind of "Blue Shield" organization which could operate in emergency situations or in situations where UNESCO's involvement proved difficult was mentioned. Some delegations referred to the possibility of adding to the 1954 Convention a provision along the lines of Articles 9 and 10 of Geneva Conventions I-III and Articles 10 and 11 of Geneva Convention IV.

Some delegations pointed out that a future institutional mechanism could play a role in providing UNESCO and/or non-governmental organizations and parties to a conflict with relevant documentation and information on the cultural heritage.

#### 6.7. Dissemination of knowledge/understanding

The importance of the dissemination of information on the Hague Convention was discussed in detail, both in general and in reference to other substantive issues.

Some experts stressed that UNESCO should be encouraged to play an important role in that respect. The NGOs and ICCROM were also mentioned both as sources of information and as distributors. The participants noted that where dissemination is concerned different audiences were involved. First of all, the public in general should be educated to respect the cultural heritage of their own and other peoples. Public awareness was seen as even more important in today's world, where armed conflict involves large sections of the civilian population. Increasing awareness among military personnel, *inter alia* through the development of manuals, was recognized as another aspect of the issue of the dissemination of information. The usefulness of exchanges of information on such parts of the manuals was mentioned.

It was stressed that practical measures including training schemes should be developed in relation to the protection of cultural heritage in the face of both natural and civilian disasters as well as armed conflicts.

It was argued that the States Party to the Convention should be more aware of their obligations with respect to training and education especially during peace-time preparation. Also mentioned was the use of exchanges of information on the implementation of other international instruments in the same field. In this connection reference was made to the need for the protection of cultural property to be incorporated in training courses of all kinds.

Finally, the hope was expressed by the meeting that the Report would facilitate further discussions and decision-making in UNESCO on the role and importance of the Hague Convention for the Protection for Cultural Property in the Event of Armed Conflict.

## ECOSOC reviews the Co-ordination of Humanitarian Assistance and discusses World Conference on Natural Disaster Reduction and the consequences of the Chernobyl disaster.

Economic and Social Council (Summer Session 1993)

### I. Agreed Conclusions on the Co-ordination of Humanitarian Assistance: Emergency Relief and Continuum to Development

1) The Council welcomed the report of the Secretary-General and reaffirmed that General Assembly Resolution 46/182 is the basis for strengthening co-ordination of humanitarian assistance of the United Nations system for natural disasters and other emergencies.

2) The Council further emphasized the important leadership role of the Secretary-General, through the Emergency Relief Co-ordinator working closely with him, for co-ordinating coherent and timely humanitarian response to major and complex emergencies and natural disasters.

3) The Council emphasized that the co-ordination role of DHA must be fully supported by governments, organizations of the UN System, as well as NGOs.

4) The Council stressed that the Emergency Relief Co-ordinator should participate fully in the overall UN planning if responses to complex emergencies to serve as the humanitarian advocate in ensuring that the humanitarian dimension, particularly the principles of humanity, neutrality and impartiality of relief assistance are taken fully into account.

5) The Council called on the operational agencies of the UN system to implement, through the IASC under the leadership of the Emergency Relief Co-ordinator, the agreed division of responsibilities.

6) The Council stressed that co-ordination should be field oriented. It noted that DHA was not an implementing agency with operational responsibility and capacity in the field. At the same time, the Council emphasized the importance of the role of the Emergency Relief Co-ordinator in facilitating access to emergency areas by operational organizations, co-ordinating inter-agency needs assessment missions, preparing consolidated appeals and supporting field co-ordination.

7) The Council recognized the increasing need for humanitarian assistance and underlined the importance of adequate financial resources from existing sources and arrangements, both for relief and the continuum to development.

8) The Council requested the governing bodies of relevant organizations of the UN system to provide their full support for the implementation of the agreed conclusions of the Council.

9) The Economic and Social Council further agreed on the following:

## Preparedness and Prevention

10) DHA, in co-operation with organizations of the UN system, should intensify efforts to promote preparedness, capacity-building and contingency planning for potential humanitarian emergencies. In that context DHA should accelerate the development of an effective emergency information management system. DHA should promote timely response to early warning of potential humanitarian emergencies.

11) Training is one of the most effective instruments for enhancing the preparedness and response capacity of governments and relief personnel of the UN system. Training capacities of individual UN agencies should contribute fully to meeting system-wide training requirements. The Disaster Management Training Programme (DMTP) should be further developed in full co-operation with relevant organizations of the system as an important system-wide instrument for capacity building, emergency training, and for team building at Headquarters and in the field.

## Natural Disasters

12) DHA should intensify its co-operation with governments, organizations of the system and NGOs to develop a coordinated effort to build-up national capacities for disaster prevention, preparedness and mitigation in the context of the International Decade for Natural Disaster Reduction.

13) DHA should continue to develop the United Nations Disaster Assessment and Co-ordination Standby Team, working closely with the Resident Co-ordinator and the Disaster Management Team, to assist governments in the immediate survival phase of natural disasters.

## Prompt and effective response to complex emergencies

14) DHA should work closely with operational agencies and other concerned entities to ensure, in the initial phase of a major or complex emergency, that there is sufficient emergency response capacity in the field. In exceptional cases where there is no such presence, the UN could consider the deployment of an inter-agency emergency response team for a limited period. The Council welcomed IASC discussion on this matter.

## Inter-Agency Standing Committee (IASC)

15) The IASC under the leadership of the Emergency Relief Co-ordinator should serve as the primary mechanism for inter-agency co-ordination of policy issues relating to humanitarian assistance and for formulating a coherent and timely United Nations response to major and complex emergencies. It should be more action-oriented and meet more frequently. It should serve as the forum for more intensive collaboration with ICRC, IFRC, IOM as well as NGOs. All members of the Standing Committee are responsible for the effective functioning of the IASC structure.

16) IASC should review and decide on arrangements to effectively address "gaps" in the provision of humanitarian assistance, including such issues as demining and internally displaced persons.

## Field Level Co-ordination

17) UN Resident Co-ordinator and the Disaster Management Team should continue to be the first line responsible for a co-ordinated international response to disasters and emergencies. In some instances, there may be a need to appoint a special co-ordinator for humanitarian assistance. Whatever the co-ordination structure, the in-country co-ordinator should work in close co-operation with the government concerned and local relief organizations and should communicate directly with the Emergency Relief Co-ordinator. The organizational and reporting arrangements of the various co-ordination structures including their financing, together with the responsibility and accountability of each part of the UN system,

should be clearly defined at an early stage and communicated to those concerned.

18) When necessary DHA should ensure, with the full co-operation of operational organizations, the strengthening of the office of the in-country co-ordinator with additional emergency staff. United Nations agencies should provide financial, staff and other resources in support of such field co-ordination units. The Council also recommended the General Assembly to consider the provision of resources which could be drawn on by the Emergency Relief Co-ordinator for establishing special co-ordination arrangements in the initial stage of an emergency.

19) As appropriate, consideration should be given, in the context of IASC, to entrusting primary responsibility in specific complex emergencies to operational agencies, under the overall leadership and co-ordination of the Emergency Relief Co-ordinator.

## Central Emergency Revolving Fund

20) The Financial Regulations relating to the operation of the CERF should be reviewed by the Secretary-General to ensure that disbursements from the CERF are made as quickly as possible.

21) The Council recommended that the General Assembly, in reviewing the overall functioning of the CERF on the basis of the results achieved and the needs identified, consider increasing its size and expanding its scope to include other international organizations.

22) DHA should, in the context of early response, encourage the active utilization of the CERF to address urgent relief requirements in the initial stage of a complex emergency.

23) Operational Agencies should make full and appropriate use of the CERF and make every effort to reimburse it, in the first instance, from the contributions received.

## Consolidated Appeals

24) Consolidated appeals should be used selectively for major and complex emergencies that require a system-wide response. Relevant operational agencies should participate fully in their preparation. DHA and concerned operational agencies should work closely to establish priorities within consolidated appeals, based on a comprehensive and realistic projection of relief requirements. Appeals should take into account the activities of bilateral donors, as well as ICRC, IFRC and the NGOs and also make reference to related disbursements from the CERF.

25) Consolidated appeals should be put together at the field level with the active participation of the host government, the Resident Co-ordinator and field representatives of the organizations of the system, donors, as well as NGOs. Consolidated appeals, with appropriate plans of operation, should be a key component of a comprehensive strategy which meets immediate humanitarian needs, is compatible with longer-term rehabilitation and development requirements, and addresses root causes. Special attention should be paid to the needs of vulnerable groups including children and women. Information on the follow-up of the consolidated appeals, including the contribution and disbursement of donors and the implementation of projects contained therein, should be provided regularly to governments.

## The Continuum from Relief to Rehabilitation and Development

26) Governments, development organizations of the UN system, together with the Bretton Woods institutions and regional commissions should be involved at an early stage of emergencies to ensure that need assessments including those of NGOs, relief programmes and consolidated appeals take account of rehabilitation

and long-term development requirements; promote national capacity-building; and help to prevent and mitigate future emergencies.

27) Relevant development organizations should strengthen their capacities to put into place rehabilitation particularly basic infrastructure programmes. Member states and development agencies should consider the establishment of appropriate funding mechanisms to expedite the execution of timely rehabilitation projects. Development organizations of the UN system together with the Bretton Woods institutions are invited to promote the consideration of issues relating to the relief to development continuum in appropriate development fora such as the UNDP Round Table and World Bank Consultative Groups.

### Resources and Management

28) The Department of Humanitarian Affairs should be provided from the UN regular budget with staff as well as administrative resources that are commensurate with its responsibilities. DHA's organizations and management capacities should be strengthened through recruitment, training, and staff development. DHA should also be afforded the necessary administrative flexibility to discharge its responsibilities for effective emergency preparedness and response.

## II. ECOSOC Endorses "New Approach" to Address Consequences of Chernobyl Disaster

The ECOSOC on 22 July endorsed proposals for future action to deal with the consequences of the 1986 Chernobyl accident, as recommended by the Co-ordinator of International Co-operation concerning that disaster.

## Internationale Konferenz zum Schutze der Kriegsoffer, Genf, 30. August bis 1. September 1993\* Von der Vollversammlung am 1. September 1993 verabschiedete Erklärung

Die Teilnehmer der am 30. August bis 1. September 1993 stattfindenden Internationalen Konferenz zum Schutze der Kriegsoffer geben feierlich folgende Erklärung ab:

### I

1. Wir sind nicht bereit hinzunehmen, daß Krieg, Gewalt und faß sich auf der Welt immer weiter ausbreiten und Grundrechte der menschlichen Person in zunehmend schwerwiegender und systematischer Weise verletzt werden. Wir sind nicht bereit hinzunehmen, daß Verwundete keine Gnade finden, Kinder massakriert, Frauen vergewaltigt, Gefangene gefoltert und den Opfern grundlegende humanitäre Hilfeleistungen verweigert werden, daß das Aushungern von Zivilpersonen als Methode der Kriegführung eingesetzt wird, Verpflichtungen gemäß humanitärem Völkerrecht in Gebieten, die unter fremder Besetzung stehen, nicht eingehalten, Familien von vermißten Personen Informationen über das Schicksal ihrer Angehörigen vorenthalten, Bevölkerungsgruppen rechts- und willkürlich vertrieben und Länder verwüstet werden.

2. Wir sind nicht bereit hinzunehmen, nachdem der Krieg selbst bisher nicht hat ausgerottet werden können, daß Verpflichtungen des humanitären Völkerrechts, deren Ziel die Begrenzung des durch bewaffnete Konflikte verursachten Leidens ist, ständig verletzt werden. Wir verurteilen mit Nachdruck diese Verletzungen, die zu einer steten Verschlechterung der Lage jener Personen führen, die durch das Recht geschützt werden sollen.

3. Wir sind nicht bereit hinzunehmen, daß die Zivilbevölkerung im Rahmen eines bewaffneten Konfliktes immer öfter Hauptopfer

The Council take note of the oral report of the Under-Secretary-General for Humanitarian Affairs on strengthening of international co-operation and co-ordination of efforts to study, mitigate and minimize the consequences of the Chernobyl disaster, and of the proposals contained therein for future action in this issue, and decides to keep the matter under study.

## III. ECOSOC Discusses World Conference on Natural Disaster Reduction

The ECOSOC takes note of the report of the Secretary-General on the International Decade for Natural Disaster Reduction, and supports the preparatory work on the World Conference on Natural Disaster Reduction conducted by the secretariat of the International Decade for Natural Disaster Reduction and the Scientific and Technical Committee.

The Council welcomes the offer of the Government of Japan to act as host for the World Conference from 23 to 27 May 1994 at Yokohama, Japan. It recommends that the General Assembly, at its forty-eighth session give further consideration to the plans and preparations for the World Conference and to the report of the Secretary-General on the International Decade for Natural Disaster Reduction.

von Feindseligkeiten und Gewalttaten wird, zum Beispiel indem sie absichtlich zu Angriffszielen gemacht oder als menschliche Schutzschilde benützt und insbesondere, wenn sie Opfer der abscheulichen Praxis der "ethnischen Säuberung" wird. Wir sind alarmiert durch die deutliche Zunahme von sexuellen Gewalttaten vor allem gegen Frauen und Kinder, und wir bekräftigen, daß solche Handlungen schwere Verletzungen des humanitären Völkerrechts darstellen.

4. Wir mißbilligen die in der Austragung von Feindseligkeiten eingesetzten Mittel und Methoden, die schweres Leiden unter Zivilpersonen verursachen. In diesem Zusammenhang bestätigen wir unsere Entschlossenheit, das bestehende Recht bewaffneter Konflikte, insbesondere solcher nicht internationaler Natur, anzuwenden, zu klären und, wo dies als notwendig erachtet wird, weiter zu entwickeln, um den Opfern solcher Konflikte wirkungsvolleren Schutz zu gewähren.

5. Wir bekräftigen die Notwendigkeit, in Übereinstimmung mit dem Völkerrecht die Bande der Solidarität zu verstärken, die die Menschheit gegen die Tragik des Krieges, wie auch in ihren Bemühungen zum Schutze von dessen Opfern vereinen müssen. In diesem Sinn unterstützen wir bilaterale und multilaterale Verstöße, die den Abbau von Spannungen und die Vermeidung des Ausbruchs bewaffneter Konflikte zum Ziele haben.

6. Wir verpflichten uns, in Zusammenarbeit mit der UNO und in Übereinstimmung mit deren Charta die vollständige Einhaltung

\* This document was reprinted in English in HuV-I 3/1993.



des humanitären Völkerrechts im Falle von Völkermord und anderen schweren Verstößen gegen jenes Recht durchzusetzen.

7. Wir fordern, daß auf nationaler, regionaler und internationaler Ebene Maßnahmen getroffen werden, damit die Hilfe und Unterstützung leistenden Personen ihre Aufgaben im Dienste der Opfer bewaffneter Konflikte in völliger Sicherheit ausführen können. Unter dem Hinweis, daß zur Friedenswahrung eingesetzte Kräfte im Einklang mit dem humanitären Völkerrecht handeln müssen, fordern wir außerdem, daß den Angehörigen jener Kräfte erlaubt wird, ihr Mandat ohne Behinderung zu erfüllen und daß ihre körperliche Unversehrtheit geachtet wird.

## II

Wir bekräftigen unsere Verantwortung, gemäß dem den Genfer Übereinkommen gemeinsamen Artikel I das humanitäre Völkerrecht einzuhalten und dessen Einhaltung durchzusetzen, damit die Kriegsgesetze geschützt werden. Wir halten sämtliche Staaten dazu an, alles daran zu setzen, um:

1. Das humanitäre Völkerrecht durch Unterrichtung seiner Normen in der allgemeinen Bevölkerung zu verbreiten, unter anderem durch deren Aufnahme in Lehrprogramme und die Steigerung des Bewußtseins der Medien, damit das Volk sich jenes Recht zu eigen machen kann und die Kraft hat, in Übereinstimmung mit dessen Normen auf deren Verletzungen zu reagieren.

2. In öffentlichen Verwaltungen, die für die Anwendung des humanitären Völkerrechts verantwortlich sind, entsprechende Lehrveranstaltungen zu organisieren und dessen Grundregeln in militärische Ausbildungsprogramme sowie militärische Verhaltenskodices, Handbücher und Vorschriften aufzunehmen, sodaß jeder Kämpfende sich seiner Verpflichtung bewußt ist, jene Regeln zu beachten und bei deren Durchsetzung mitzuwirken.

3. Mit größter Aufmerksamkeit nach praktischen Mitteln zu suchen, um das Verständnis für das humanitäre Völkerrecht in bewaffneten Konflikten sowie dessen Einhaltung in Situationen zu fördern, in denen die Strukturen eines Staates auseinanderbrechen und dieser infolgedessen nicht in der Lage ist, seinen Verpflichtungen gemäß jenem Recht nachzukommen.

4. Wo dies nicht schon getan wurde, den Beitritt zu den einschlägigen Staatsverträgen, die seit der Annahme der Genfer Abkommen von 1949 abgeschlossen worden sind, beziehungsweise die Bestätigung der Nachfolge in jene Verträge zu überprüfen und wiederzuerwägen, insbesondere in bezug auf:

- das Zusatzprotokoll zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer internationaler bewaffneter Konflikte vom 8. Juni 1977 (Protokoll I);
- das Zusatzprotokoll zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer nicht internationaler bewaffneter Konflikte vom 8. Juni 1977 (Protokoll II);
- das Übereinkommen von 1980 über das Verbot oder die Beschränkung des Einsatzes bestimmter konventioneller Waffen und dessen drei Protokolle;
- die Konvention von 1954 über den Schutz von Kulturgut bei bewaffneten Konflikten.

5. Auf nationaler Ebene alle angemessenen Vorschriften, Gesetze und Maßnahmen zu beschließen und umzusetzen, um die Einhaltung des in bewaffneten Konflikten anwendbaren humanitären Völkerrechts durchzusetzen und dessen Verletzung zu ahnden.

6. Zu einer unparteiischen Abklärung von behaupteten Verletzungen des humanitären Völkerrechts beizutragen und insbesondere die Anerkennung der Zuständigkeit der Internationalen Ermittlungskommission gemäß Artikel 90 des in Teil II, Absatz 4, dieser Erklärung genannten Protokolls I zu prüfen.

7. Sicherzustellen, daß Kriegsverbrechen gebührend verfolgt und geahndet werden und dementsprechend die Bestimmungen über die für schwere Verletzungen des humanitären Völkerrechts vorgesehenen Strafen umzusetzen und die beförderliche Errichtung eines geeigneten rechtlichen Apparates zu unterstützen und in diesem Zusammenhang die umfangreichen Arbeiten anzuerkennen, die von der Völkerrechtskommission im Hinblick auf die Schaffung eines internationalen Strafgerichtshofes verrichtet worden sind. Wir bestätigen, daß Staaten, die humanitäres Völkerrecht verletzen, verpflichtet sind, Schadensersatz zu bezahlen, wo der Einzelfall dies verlangt.

8. Die Koordination der humanitären Nothilfeaktionen zu verbessern, um diesen die nötige Kohärenz und den nötigen Wirkungsgrad zu verleihen; den humanitären Organisationen, die damit betraut sind, den Opfern bewaffneter Konflikte Schutz zu gewähren und zu helfen und die für das Überleben wesentlichen Güter und Dienstleistungen zukommen zu lassen, die notwendige Unterstützung zu geben; rasche und wirkungsvolle Hilfsoperationen zu erleichtern, indem den erwähnten humanitären Organisationen Zugang zu den betroffenen Gebieten gewährt wird, sowie die geeigneten Maßnahmen zu treffen, um die Rücksichtnahme auf deren Sicherheit und Unversehrtheit in Übereinstimmung mit den anwendbaren Regeln des humanitären Völkerrechts zu verbessern.

9. Die Einhaltung des Schutzes der Embleme des Roten Kreuzes und des Roten Halbmondes sowie aller übrigen vom humanitären Völkerrecht vorgesehenen Embleme zu verstärken, welche medizinisches Personal, medizinische Objekte, Installationen und Transportmittel, religiöses Personal und Kultstätten, sowie die vom humanitären Völkerrecht bezeichneten Hilfspersonen, Güter und Transporte schützen.

10. Die Einhaltung derjenigen Regeln des in bewaffneten Konflikten anwendbaren humanitären Völkerrechts zu bekräftigen und durchzusetzen, die Kulturgut, Kultstätten und die natürliche Umwelt entweder vor Angriffen auf die Umwelt als solche, oder gegen willentliche Zerstörungen schützen, die schwere Umweltschäden verursachen, sowie weiterhin die Möglichkeit der Verstärkung jener Regeln zu prüfen.

11. Die Wirksamkeit des humanitären Völkerrechts zu gewährleisten und, in Übereinstimmung mit jenem Recht, entschlossen vorzugehen gegen Staaten, die für Verletzungen des humanitären Völkerrechts verantwortlich sind, damit diesen Verletzungen ein Ende bereitet wird.

12. Die anstehende Konferenz zur Abklärung der Tragweite und Auswirkung des Übereinkommens von 1980 über das Verbot oder die Beschränkung des Einsatzes bestimmter konventioneller Waffen und dessen drei Protokolle, welche ein Forum für weitere Beiträge zu jenem Instrument bietet, zu nutzen, und die Verstärkung bestehenden Rechts zu prüfen sowie das Problem des unterschiedlichen Einsatzes von Minen, die Zivilpersonen in verschiedenen Teilen der Welt verstümmeln, einer wirkungsvollen Lösung zuzuführen.

Aus dieser Erklärung heraus bekräftigen wir die Notwendigkeit, die Umsetzung des humanitären Völkerrechts wirkungsvoller zu gestalten. In diesem Sinn und Geist rufen wir die Schweizer Regierung auf, ein Treffen einer intergouvernementalen Expertengruppe mit offener Beteiligung einzuberufen, deren Aufgabe es sein wird, nach praktischen Wegen zu suchen, um die Beachtung und Einhaltung jenes Rechts zu fördern sowie einen Bericht zuhanden der Staaten und der nächsten Versammlung der Internationalen Rotkreuz- und Rothalbmondkonferenz auszuarbeiten.

Abschließend bekräftigen wir unsere Überzeugung, daß das humanitäre Völkerrecht den Weg zur Versöhnung offenhält, die Wiederherstellung des Friedens zwischen Kriegführenden erleichtert und die Eintracht zwischen allen Völkern nährt, indem es inmitten bewaffneter Auseinandersetzungen für die Wahrung eines Geistes der Menschlichkeit besorgt ist.

# Von der "Hermetischen Gesellschaft" zum "Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht"

## - Wissenschaft in Bochum -

Bericht über das internationale Symposium anlässlich des fünfjährigen Bestehens des IFHV "Internationale Konfliktbewältigung - humanitäre Hilfe", Bochum, 26. Juni 1993

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Nicht alle Wünsche gehen in Erfüllung; Blühträume brauchen ihre Zeit und werden dann - gelegentlich - doch noch wahr.

Ende des 18. Jahrhunderts bemühte sich Carl Arnold Kortum, Bergarzt in Bochum, darum, seiner Heimatstadt Ansehen in der Wissenschaft zu verschaffen und gründete die "Hermetische Gesellschaft". Diese Gesellschaft lud 1796 im Reichsanzeiger Alchimisten ein, ihre Erfahrungen mitzuteilen. Was jedoch wie eine große Forschergemeinschaft aussah, war Täuschung: die Hermetische Gesellschaft bestand nur aus Carl Arnold Kortum und einem Kollegen aus Schwerte.

Zwei Jahrhunderte später ist das Ansehen Bochums als Stadt der Wissenschaften solide begründet, dank der Ruhr-Universität. Unter den verdienstvollen Einrichtungen der Universität ragt ein Institut hervor, das in diesem Sommer auf sein fünfjähriges Bestehen zurückblicken konnte: das Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht unter der Leitung seines Direktors Knut Ipsen und seines Geschäftsführers Horst Fischer. Interdisziplinär angelegt und entschieden auf die Praxis ausgerichtet, hat das Institut mit seinen Mitarbeitern in den nur fünf Jahren seines Bestehens Maßstäbe im Friedenssicherungsrecht und im humanitären Völkerrecht gesetzt.

Seinem Selbstverständnis getreu, beging das IFHV, wie es unter Kennern und Freunden genannt wird, das Jubiläum mit einem internationalen Symposium zum Thema: Internationale Konfliktbewältigung - Humanitäre Hilfe. Rund 180 Vertreter von Bundes- und Landesministerien, Bundeswehr, Deutschem Roten Kreuz, verschiedener Nachbarfakultäten der Ruhr-Universität und europäischer wissenschaftlicher Institute waren am 26. Juni 1993 im Auditorium der Ruhr-Universität versammelt.

In seinem Grußwort erinnerte der Innenminister des Landes Nordrhein-Westfalen Herbert Schnoor daran, daß es im Jahr 1988, als das IFHV gegründet wurde, für die Bundesrepublik noch eine sichere Entfernung zur Welt mit ihrer klaren Teilung in Westen, Osten und Süden gegeben habe. Im Windschatten der Mauer hätten die Probleme des Friedenssicherungsrechts und des humanitären Völkerrechts nur bedingte politische Aktualität gehabt. Dies habe sich inzwischen grundlegend geändert. In diesem veränderten Umfeld habe das IFHV entscheidende Beiträge zu einer klaren Orientierung gegeben.

Cornelio Sommaruga, Präsident des Internationalen Komitees vom Roten Kreuz, skizzierte den Standort seiner Organisation: "Das Internationale Komitee vom Roten Kreuz in einer zersplitterten Welt: zwischen Politik und humanitärer Aktion". Humanitäres Handeln könne seinen Ursprung in der Philanthropie, im Sühneleisten der gar in Heuchelei haben. Humanitäres Handeln könne aber auch als Teil einer allgemeinen Mission verstanden werden, die ein Klima des Vertrauens wahren will, die eine gewisse Stabilität anstrebt in den Beziehungen zwischen Staaten und innerhalb der Staaten und die sich im Interesse möglichst vieler Menschen für Rechtmäßigkeit einsetzt und die Rechtssysteme stärken will. Damit bewege sich das Rote Kreuz mitten in der Politik. Es müsse sich ihr jedoch mit einem gewissen Schutzschild nähern, in einer kohärenten huma-

nitären Aktion, die ihre Kraft aus den Grundsätzen der Neutralität, der Unparteilichkeit und der Unabhängigkeit schöpft. Er unterstrich die Gefahr, daß Neutralität und Unabhängigkeit der humanitären Aktion gefährdet werden, weil die Wechselwirkung zwischen Politik und humanitären Belangen nicht genügend beachtet wird. Es sei nicht ungefährlich, die humanitäre Aktion als anderes Mittel der Politik zu konzipieren oder sie als Alibi der Staaten zu nutzen, während diese ihre politische Verantwortung nicht wahrnehmen. In der Jugoslawien-Krise erwecke die internationale Staatengemeinschaft den Eindruck, sie wolle ihre Passivität auf politischer Ebene und ihr Zögern, selbst einzugreifen, rechtfertigen, indem sie einen humanitären Aktivismus den und Anschein eines großen Engagements erwecke, das handlungsunfähigen Politikern als Alibi dient.

Sommaruga kritisierte den Gedanken eines "Rechts auf humanitäre Einmischung", das die humanitäre Aktion von Staaten in den Rang eines Ordnungsprinzips einer neuen Weltordnung erhebt. Er stellt die Frage, ob eine humanitäre Intervention das bestehende, in den Genfer Rotkreuz-Abkommen verankerte humanitäre Völkerrecht bereichern könne. Wie verhalte es sich, wenn in einem gut gerüsteten Staat humanitär interveniert werden müsse? Müsse die humanitäre Einmischung mit dem Recht einhergehen, die Opfer unter Berücksichtigung politischer Interessen und des Kräftespiels eines jeden Konfliktes auszuwählen und dabei die Unparteilichkeit außer acht zu lassen? Wie sollen die Prioritäten unter den zahlreichen Konflikten der Gegenwart gesetzt werden? Zeige nicht gerade die Tatsache, daß so viele mörderische Konflikte gleichzeitig ausgetragen werden, die Grenzen des Rechts auf humanitäre Einmischung auf?

Der Präsident des IKRK analysierte die Auswirkungen von militärischen Interventionen auf die Aktionen humanitärer Organisationen in den gleichen Krisengebieten. Den Staaten komme die Rolle des Polizisten und Richters zu, die über die Achtung des Rechts und die Bestrafung des Rechtsbrechers wachen müssen, während die humanitären Organisationen die Rolle des guten Samariters, der Hilfe bringt, zu übernehmen hätten. Wollte man diese beiden unterschiedlichen Funktionen in einer einzigen humanitären Demarche verbinden, deren Verwirklichung die Staaten erzwingen würden, geriete die humanitäre Aktion unweigerlich in die Politisierung. In diesem Zusammenhang stellte Sommaruga auch die Frage, ob es opportun sei, auf militärische Mittel zurückzugreifen, um den Schutz derer zu gewährleisten, die mit der Durchführung der humanitären Aktion betraut sind. Zwar habe sich im ehemaligen Jugoslawien und in Somalia der Einsatz bewaffneter Eskorten zum Schutz der humanitären Konvois leider als unvermeidlich erwiesen. Solche Maßnahmen müßten jedoch zeitlich begrenzte Ausnahmen bleiben. Wollte man sich nämlich mit solchen Mitteln abfinden, bedeutete dies, daß das Rote Kreuz jegliche Hoffnung aufgibt, die Kriegführenden dazu zu bringen, das humanitäre Völkerrecht zu achten. Nüchtern erkannte Sommaruga an, daß das humanitäre Völkerrecht zwar einen beachtlichen Entwicklungsstand erreicht habe, daß aber der Grad, mit welchem die humanitären Normen von den Parteien in internationalen oder internen Konflikten eingehalten werden, un-

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befriedigend sei. Es bestehe die absolute Notwendigkeit, das humanitäre Völkerrecht schnellstens wieder in seine volle Autorität und seinen ureigenen Wert einzusetzen. Das aber sei nur mit dem Willen und dem Engagement der Staaten möglich. Diesem Zweck diene die vom IKRK initiierte und vom Schweizer Bundesrat, dem Depositar der Genfer Rotkreuz-Abkommen, ausgerichteten Internationalen Konferenz zum Schutz der Kriegsopfer.

Der Präsident des IKRK versprach, seine Organisation werde trotz aller Schwierigkeiten, Frustrationen und Mißerfolge in aller Bescheidenheit, doch mit großem Eifer ihre Botschaft der Hoffnung weitertragen, die ihre Kraft aus dem Ideal einer solidarischen Welt schöpfe, solidarisch im Kampf um die Verhütung und Linderung menschlichen Leidens und die allzeitige Achtung der Würde von Frauen und Männern. Diese Solidaritätspflicht gehe alle an.

Im zweiten Referat des Symposiums widmete sich *Frits Kalshoven* der Rolle von internationalen Mechanismen bei der Durchsetzung des humanitären Völkerrechts. *Kalshoven* ist Vorsitzender der UN-Expertenkommission für Kriegsverbrechen im ehemaligen Jugoslawien, außerdem ist er Mitglied der Internationalen Ermittlungskommission nach dem I. Zusatzprotokoll zu den Genfer Rotkreuz-Abkommen. *Kalshoven* berichtete zunächst über die Internationale Ermittlungskommission und machte deutlich, daß die Ermittlungskommission die Vorarbeiten für ihre Arbeit abgeschlossen habe, ihres ersten Einsatzes jedoch noch harre. Die Kommission sei dafür zuständig, alle Tatsachen zu untersuchen, von denen behauptet wird, daß sie eine schwere Verletzung der Genfer Abkommen darstellen, und dazu beizutragen, daß das humanitäre Völkerrecht wieder eingehalten wird, indem sie ihre guten Dienste zur Verfügung stellt. In diesem Zusammenhang wies *Kalshoven* darauf hin, daß an keiner Stelle der Genfer Abkommen oder der Zusatzprotokolle definiert sei, was als "schwere Verletzung" anzusehen sei. Er berichtete über die Sorge der Mitglieder der Internationalen Ermittlungskommission, ihre Kommission könne ein Papiertiger bleiben, weil sie von den Staaten nicht eingeschaltet werde. Es müsse also die Frage gestellt werden, ob die Kommission initiativ werden könne, um Konfliktparteien dazu zu bringen, sie anzufordern. Außerdem müsse gefragt werden, ob die Ermittlungskommission eine Einladung zum Tätigwerden annehmen könne, die von Organen der Vereinten Nationen ausgesprochen wird.

Seine Ausführungen zur Rolle der Vereinten Nationen bei der Durchsetzung des humanitären Völkerrechts leitete *Kalshoven* damit ein, daß er daran erinnerte, daß die Vereinten Nationen in der Vergangenheit kein Interesse am Kriegsvölkerrecht hatten, weil sie den Frieden als ihre Aufgabe ansahen. Dies habe sich jedoch in den letzten Jahren, beginning mit dem Krieg zwischen Iran und Irak von 1980 bis 1988, geändert. Dennoch zeige das Beispiel des Krieges in Bosnien-Herzegowina, daß es lange Zeit brauche, bevor der UN-Sicherheitsrat aktiv in die Konfliktbeilegung eingreife. Die Resolutionen des Sicherheitsrates zum Sammeln von Informationen und zur Einrichtung einer Expertengruppe wurden erst dann verabschiedet, als der Konflikt in Bosnien-Herzegowina bereits tobte. Eine weitere Unsicherheit habe sich daraus ergeben, daß lange Zeit völlig ungewiß gewesen sei, ob es jemals ein Kriegsverbrechertribunal geben werde. Der Auftrag der Expertenkommission zu Kriegsverbrechen im früheren Jugoslawien sei dementsprechend vage gefaßt: dem Generalsekretär über Schlußfolgerungen aus der Verletzung von humanitärem Völkerrecht zu berichten. Diese Aufgabe sei mit den fünf in die Kommission berufenen Experten und dem kleinen zugeordneten Stab kaum zu verwirklichen. In seinem Bericht über die Arbeit der Expertenkommission unterstrich *Kalshoven* die Schwierigkeiten, mit der Informationsmenge fertig zu werden. Es sei fast unmöglich, den Wahrheitsgehalt von Informationen zu überprüfen. Die Expertenkommission habe deshalb beschlossen, wenigstens in begrenzten Fällen, z.B. zu den Kämpfen um Sarajevo, durch Ermittlungen vor Ort Klarheit zu schaffen. Es gehe im wesentlichen weniger um die juristischen Arbeiten, sondern um praktische, organisatorische Fragen des Managements. *Kalshoven* skizzierte anschließend die zweite Institution, die von den Vereinten Nationen, zur Durchsetzung des humanitären Völkerrechts eingesetzt worden

ist: das Kriegsverbrechertribunal in Den Haag. Das Mandat des Tribunals beschränke sich auf die Ereignisse im ehemaligen Jugoslawien nach dem 1. Januar 1991. Anwendbar sei das humanitäre Völkerrecht, womit die Chance bestehe, die Regeln der Genfer Abkommen und der beiden Zusatzprotokolle anzuwenden.

In einer Gesamtbewertung begrüßte *Kalshoven* die Einrichtung des Tribunals, wenn es auch besser gewesen wäre, wenn seine Einrichtung die Zustimmung aller Staaten der Welt gefunden hätte. Man dürfe nie vergessen, daß das Verhalten der Vereinten Nationen immer politisch bestimmt sein werde. Zur Durchsetzung des humanitären Völkerrechts müßten deshalb weiterhin und verstärkt die Instrumente der Genfer Abkommen, nämlich die Einrichtung von Schutzmächten und die Internationale Ermittlungskommission, eingesetzt werden.

*Kalshoven* schloß seine Ausführungen mit einem Paradoxon: Je weniger zivilisiert ein bewaffneter Konflikt sei, um so größer sei die Neigung aller Betroffenen, im Blick auf die Durchsetzung des Rechts eine Mischung von Menschenrechten und humanitärem Völkerrecht zugrunde zu legen. Diese Vermischung beider Rechtsmaterien sei möglicherweise die einzige Chance, die letzte Hoffnung, wenigstens die grundlegenden Normen durchzusetzen.

Das dritte Referat des Symposiums hielt Prof. *Wieruszewski* vom Menschenrechtszentrum in Genf über die Rolle internationaler Mechanismen für die Durchsetzung von Menschenrechten. Zu Beginn seiner Ausführungen zitierte *Wieruszewski* die KSZE-Charta von Paris aus dem Jahre 1990, um anschließend deutlich zu machen, daß die damalige Euphorie inzwischen durch eine realistische Überschätzung abgelöst worden sei. Angesichts des wirtschaftlichen Niedergangs, sozialer Spannungen, des aggressiven Nationalismus, der Intoleranz, der Fremdenfeindlichkeit und der ethnischen Konflikte im KSZE-Gebiet sei zu fragen, ob die internationalen Institutionen angemessen ausgestattet seien, um mit diesen Herausforderungen fertig zu werden. Die Vereinten Nationen hätten sich in der Vergangenheit, nach ihrer Gründung, zunächst darauf beschränkt, Standards festzulegen. In den späten 60er Jahren habe man dann begonnen, Institutionen und Verfahren einzurichten, um diese Standards wirksam umzusetzen. Inzwischen gebe es sieben Institutionen, die für die Umsetzung von Menschenrechten zuständig seien: der Menschenrechtsausschuß, der Ausschuß für wirtschaftliche, soziale und kulturelle Rechte, der Ausschuß zur Beseitigung von Rassen Diskriminierung, die Dreiergruppe zu Apartheid, der Ausschuß zur Beseitigung der Diskriminierung von Frauen, der Ausschuß gegen Folter und der Ausschuß über die Rechte des Kindes. Diesen Ausschüssen müssen die Vertragsparteien regelmäßig Bericht erstatten. Ein weiterer Fortschritt wurde 1970 mit der Einrichtung eines Verfahrens zur Behandlung von individuellen Beschwerden über Menschenrechtsverletzungen erreicht. Auf der Grundlage von einzelnen Mitteilungen erstellt das Sekretariat des UN-Wirtschafts- und Sozialausschusses monatlich eine vertrauliche Liste, die im Wirtschafts- und Sozialausschuß und in seinen Unterausschüssen zirkuliert wird, ohne daß es darüber eine Ansprache gibt. Daneben habe sich ein Beratendes- und Beobachtungssystem entwickelt. Zu Beginn der 80er Jahre habe man den länderorientierten Ansatz zugunsten eines themenorientierten Ansatzes verschoben. Als erstes Beispiel dafür sei die Errichtung der Arbeitsgruppe über das erzwungene oder unfreiwillige Verschwinden zu nennen, der danach die Einsetzung eines Sonderberichterstatters über Folter, über religiöse Intoleranz, über Söldner, über Kinderhandel, gefolgt sei. Dieses System sei in den letzten Jahren vertieft worden, wobei es darauf ankomme, Sachverhalte zu ermitteln und gute Dienste und Vermittlungen anzubieten.

Im Rahmen der KSZE seien sogenannte Langzeitmissionen in Krisengebieten eingerichtet worden, insbesondere in den Gebieten des früheren Jugoslawiens. Nach der Einschätzung von *Wieruszewski* haben sich die Staaten, indem sie den themenbezogenen Ansatz gewählt haben, verwundbarer gemacht. Sie haben bewußt auf das Argument verzichtet, die Durchsetzung von Menschenrechten sei eine interne Angelegenheit jedes Staates.

Das Geflecht von Institutionen könne nicht darüber hinwegtäuschen, daß die Staatengemeinschaft nicht in der Lage sei, massive und systematische Menschenrechtsverletzungen zu stoppen. Man könne sich des Eindrucks nicht erwehren, daß die Einführung neuer Durchsetzungsinstrumente als Ersatz oder Alibi für politische Untätigkeit dienen solle. Das grundlegende Problem werde dadurch verschärft, daß es gelegentlich zum Wettbewerb verschiedener Menschenrechtseinrichtungen komme. Ein durchgreifender Menschenrechtsschutz könne nur dann erreicht werden, wenn die Universalität, die Anteilbarkeit und die gegenseitige Abhängigkeit aller Menschenrechte zugrunde gelegt werde und dies in einer gleichmäßigen Beobachtung und einer gleichen Behandlung aller Menschenrechtsverletzungen zum Ausdruck komme. Erforderlich seien Frühwarnmechanismen, präventive Diplomatie und frühzeitige Maßnahmen gegen die erkennbaren Ursachen von Menschenrechtsverletzungen.

Den Abschluß des Symposiums bildete ein Podiumsgespräch zum Spannungsfeld von humanitärer Hilfe und kollektiver Hilfe, an dem unter Leitung von *Knut Ipsen*, *Botho Prinz zu Sayn-Wittgenstein*, Präsident des DRK, *Egon Bahr*, Direktor des Instituts für Friedensforschung und Sicherheitspolitik an der Universität Hamburg, sowie Admiral a.D. *Dieter Wellershoff*, Präsident der Bundesakademie für Sicherheitspolitik in Bonn, teilnahmen. In seiner Einführung stellte *Ipsen* die Frage, ob man in Regionen wie Jugoslawien oder Somalia, in denen die Staatsgewalt zusammengebrochen ist, überhaupt noch humanitäre Hilfe leisten könne, ohne gleichzeitig kollektive Hilfe zu gewährleisten. *Prinz Wittgenstein* machte klar, daß er mit großer Sorge, gelegentlich auch mit großem Ärger, beobachte, daß der Beginn der humanitären Hilfe mehr und mehr zweckfremd werde, daß er politisiert und instrumentalisiert werde, um politische Ziele zu erreichen. Dies habe eindeutig negative Auswirkungen auf die Hilfsorganisationen, die ihre Hilfe ausschließlich an Neutralität, Unabhängigkeit und Unparteilichkeit orientieren. Nach seinem Eindruck versuche die Staatengemeinschaft, sich ein Alibi zu schaffen, um von dem notwendigen politischen Handeln und dem Durchsetzen humanitären Völkerrechts abzulenken. Anstelle von der Pflicht zur humanitären Intervention solle man lieber von der Pflicht zur humanitären Investition sprechen. Die Staatengemeinschaft müsse sich verpflichtet fühlen, die humanitären Hilfsmaßnahmen von Nicht-Regierungsorganisationen zu unterstützen. Zu den humanitären Investitionen gehöre auch die Umsetzung des humanitären Völkerrechts. Er teile die Einschätzung von *Sommaruga*, daß es keiner neuen völkerrechtlichen Bestimmungen bedürfe, vielmehr könne schon viel erreicht werden, wenn das geltende humanitäre Völkerrecht konsequent eingehalten und durchgesetzt werde.

*Wellershoff* griff in seinem Beitrag den Titel der jüngsten Publikation von *Bahr* auf: Vom Recht des Stärkeren zur Stärke des Rechts. Er plädierte dafür, den drei traditionellen konstitutiven Elementen eines Staates - Staatsgebiet, Staatsvolk und Staatsregime - in viertes Element hinzuzufügen, nämlich die Einordnung des Staates in die internationale Staatengemeinschaft. In vier Thesen formulierte *Wellershoff* seine Thesen zum Verhältnis der Staaten zu den Menschenrechten: die Menschenrechte seien der Staatengemeinschaft anvertraut, die Staaten seien zu gemeinschaftsfreundlichem Verhalten verpflichtet, die Pflichten der Staaten müßten vom Konsens der Bürger getragen sein, soweit dies noch nicht gegeben sei, müßten die Staaten dafür Sorge tragen. Ein derart verstandenes Völkerrecht brauche funktionsfähige Strukturen und Instrumente. Letztlich entzünde sich der Streit immer wieder an der Frage, nach welchen Kriterien die Souveränität eines Staates eingeschränkt wer-

den dürfe. *Bahr* plädierte dafür, zunächst einmal über die internationale Konfliktverhinderung zu reden, bevor man sich mit der internationalen Konfliktbewältigung beschäftige. Erst wenn die Konflikte nicht zu verhindern seien, komme die Frage der humanitären Hilfe auf. Er plädierte dafür, in der Staatengemeinschaft zu einem Zustand zu kommen, in dem die Stärke des Rechts gilt. Gelingen dies nicht, bleibe es de facto beim Recht des Stärkeren. Jeder Staat, jedes Volk, jede Minderheit, jede Gruppe, jedes Individuum müsse das Recht auf Unterstützung verlieren, wenn es nicht auf Gewaltanwendung verzichte. Wer zur Durchsetzung seiner Ambitionen oder seiner Rechte Gewalt anwende, sollte künftig kein Recht mehr auf Unterstützung der Staatengemeinschaft haben. In einer Intervention unterstrich *Sommaruga* die herausragende Bedeutung, die das Konzept von Schutz und Hilfe für das IKRK habe. Das Rote Kreuz könne sich nicht darauf beschränken, Hilfsgüter zu liefern. Es müsse gleichzeitig dafür sorgen, daß sie an die richtigen Adressaten kommen, und dafür sorgen, daß die Personen, denen geholfen wird, gleichzeitig auch geschützt werden. Auch er sieht die Rolle der Staaten in der humanitären Hilfe vor allem darin, daß sie unparteilichen Institutionen ihre humanitären Aktionen ermöglichen. Wenn die Vereinten Nationen sich daran machen, aufgrund ihrer Kompetenzen gewisse Verletzungen des humanitären Völkerrechts mit Gewalt zu korrigieren, müsse dies sorgfältig von humanitärer Hilfe unterschieden werden. Wenn nämlich humanitäre Hilfe unter dem Schutz bewaffneter Gruppen durchgeführt werde, werde sie zur Zielscheibe der Gegenseite und verliere die Unparteilichkeit.

*Bahr* pflichtete der These *Sommarugas* bei, es müsse zwischen der Garantie zur Einhaltung internationalen Rechts durch die Kollektivität der Staatengemeinschaft und der humanitären Hilfe sauber getrennt werden. Die Staatengemeinschaft sei verpflichtet, gegen Rechtsbrecher vorzugehen, um das Recht wiederherzustellen. Davon getrennt sei die humanitäre Hilfe zu sehen, die ohne Ansehen der Person oder der Parteien geleistet werden müsse. Auch *Wellershoff* plädierte für eine strikte Trennung, unterstrich aber, daß es Grenzbereiche gebe, in denen die Streitkräfte als logistische Unterstützung der Hilfsorganisationen tätig seien, z.B. beim Absichern von Schutz-zonen oder beim Durchsetzen von Maßnahmen der Vereinten Nationen. Er wiederholte jedoch, daß humanitäre Hilfe uneingeschränkt vom Grundsatz der Unparteilichkeit getragen werden müsse.

Angesichts der Erfolglosigkeit der Staaten bei der Umsetzung des humanitären Völkerrechts forderte *Prinz Wittgenstein* noch einmal humanitäre Investitionen der Staaten. Als Beispiel nannte er das von *Fischer* angelegte Modell einer psychologischen Friedensführung. Wenn es zutrefte, daß gerade in Jugoslawien der Konflikt dadurch angeheizt worden sei, daß die Medien Haß und Gewalt gepredigt haben, müsse es doch möglich sein, die Medien dafür einzusetzen, Aggressionen abzubauen und die Gewaltspirale zu stoppen. Für diese Zwecke müsse viel mehr Phantasie und Kraft aufgewandt werden.

In seinem Schlußwort griff *Ipsen* noch einmal eine These auf, die in vielen Beiträgen des Symposiums immer wieder angesprochen worden ist, daß nämlich in der heutigen Gesellschaft ein Grundkonsens über bestimmte Maximen, die nicht mehr in Frage zu stellen sind, offensichtlich nicht besteht. Es existiere weder auf der internationalen noch auf der nationalen Ebene jemand, der in der Lage wäre, Mehrheiten auf einen derartigen Grundkonsens einzustimmen. Einen kleinen Beitrag zu dieser Konsensfindung zu leisten, sei der Anspruch des Instituts für Friedenssicherungsrecht und Humanitäres Völkerrecht, dem gerecht zu werden, es auch in Zukunft trachten werde.

# 18th Round Table on Current Problems of International Humanitarian Law,

San Remo (Italien), 6. - 8. September 1993

Hans-Joachim Heintze\*

Im Mittelpunkt des diesjährigen Round-Tables standen die neuen Möglichkeiten des Schutzes von Zivilisten angesichts des verstärkten Engagements der UNO im Bereich der humanitären Hilfe. Die Initiativen der UNO und anderer kompetenter Organisationen der UN-Familie sind aus der Sicht des humanitären Völkerrechts nicht unproblematisch und werfen viele Fragen auf. Wahrscheinlich stellte sich jeder Fernsehzuschauer beim Betrachten der Bilder des UN-Einsatzes in Somalia solche Fragen, denn man sah leider auch viel zu viele Opfer unter der Zivilbevölkerung. Das Unverständnis für viele Entwicklungen vertiefte sich in der Öffentlichkeit noch dadurch, daß auch die politisch Verantwortlichen nicht in jedem Fall plausible Antworten geben konnten und sich die unter dem Dach der UN agierenden verschiedenen nationalen Truppenteile offenkundig nicht einig über ihr Vorgehen waren. Deutlich wurde auch, daß die juristischen Probleme, die ein solcher Einsatz der UN-Truppen aufwirft, selbst durch Völkerrechtler nicht immer leicht zu lösen waren. Die Entwicklung der letzten Monate ging einfach zu rasant vor sich; der UN-Sicherheitsrat hat eine beispiellose Anzahl von Resolutionen verabschiedet, und die bewaffneten Konflikte auf der Welt haben Dimensionen erreicht, die noch vor kurzem unvorstellbar erschienen.

Angesichts dessen war das traditionsreiche International Institute of Humanitarian Law (IIHL) in San Remo gut beraten, sich in diesem Jahr im Rahmen der vielbeachteten und von rund 160 Teilnehmern besuchten Veranstaltung dem Thema der Rolle der UN bei der Verwirklichung des humanitären Völkerrechts und damit verbundenen Fragen zuzuwenden. Einleitend machte der Präsident des IIHL, Botschafter *Hector Gros-Espiell*, darauf aufmerksam, daß das Institut in San Remo zahlreiche Anstöße zur Entwicklung und zur Durchsetzung des humanitären Völkerrechts gegeben habe. Dabei waren vor allem immer die Staaten der Ansprechpartner. Auch die neueren Entwicklungen wie das Engagement der UNO könnten nicht darüber hinwegtäuschen, daß auch in Zukunft die Verantwortung für die Implementierung des humanitären Völkerrechts bei den Staaten liege. Den Eröffnungsvortrag mit dem Thema "Role of competent United Nations bodies in the implementation of international humanitarian law" hielt Botschafter *Erich Kussbach*, der auch Vorsitzender der Internationalen Ermittlungskommission (vgl. zu diesem Organ den Artikel von *Manuel Sager*, in: *HuV* 1/4/1991, S.168ff.) ist. Der Referent ging von den weltpolitischen Veränderungen aus, die es möglich machten, daß die UNO eine wesentlich aktivere Rolle im internationalen Leben übernehmen konnte. Das werde insbesondere an der Tätigkeit des Sicherheitsrats deutlich, der nunmehr Einsätze von UN-Truppen anordne, die weit über das traditionelle peace-keeping hinausgehen. Die UN-Truppen übernehmen auch Aufgaben, die früher von humanitären Organisationen wahrgenommen wurden. Dies sei insofern nicht unproblematisch, als die UNO humanitäre Hilfe nicht als neutrale Institution leistet, sondern unter politischen Gesichtspunkten unter Einfluß einer deutlichen Parteinahme. Die Hilfe für die Opfer - das sei die einzige Aufgabe wahrhaft humanitärer Hilfe - werde hier politisch instrumentalisiert und somit zur "Geißel" von Interessen der Staaten. *Kussbach* belegte dann diese These an den Beispielen des Iraks, des früheren Jugoslawiens und Somalias. Gerade Somalia zeige, daß die mit Gewalt durchgesetzte Hilfe mehr Probleme mit sich bringe, als die UNO zunächst annahm. Dadurch würden nämlich auch die Helfer als Feinde angesehen und zum Ziel der Angriffe der unterschiedlichen Milizen. Zudem ist durch das - aufwendige - Engagement der UNO die Gefahr gegeben, daß traditionelle Hilfsorganisationen verdrängt werden und ihren Platz räumen müssen. Die auf-

gebauten Kontakte könnten abrupt abbrechen. Bei einer solchen Beendigung des UNO-Einsatzes wären dann aber die anderen Hilfskanäle nicht mehr erhalten.

Überhaupt müsse man den Eindruck gewinnen, daß gegenwärtig viele Aktivitäten der UNO nicht berücksichtigen, daß bereits andere Organe bestehen. Das werde schlaglichtartig daran deutlich, daß die UNO im bewaffneten Konflikt im früheren Jugoslawien nicht auf die bestehende Ermittlungskommission, die gemäß Artikel 90 ZP I im Jahre 1991 gegründet wurde, zurückgriff. Statt dessen entsandte sie ohne jede Begründung eine eigene fact-finding-Kommission mit dem Auftrag der Ermittlung von Verletzungen des humanitären Völkerrechts, der ansich in die Kompetenz der Ermittlungskommission fällt. Es frage sich daher, ob hier Ignoranz im Spiel ist; auf jeden Fall sei die Ermittlungskommission zur Zusammenarbeit mit der UNO bereit.

Wie sich das Engagement der UNO aus der Sicht einer humanitären Organisation darstellt, erklärte in einem anschließenden Vortrag *Frau Irene Khan* vom UNHCR. Augenblicklich biete die Lage ein widersprüchliches Bild. Einerseits begrüßten die humanitären Organisationen die Hilfe durch Streitkräfte, weil die militärische Logistik natürlich Hilfsmaßnahmen möglich mache, die sonst nicht zu leisten wären. Dies treffe beispielsweise auf die Aktion Airdrops zu. Andererseits sei das UNO-Konzept oftmals nicht klar zu erkennen, da die Organisation politische Ziele verfolge, die sich sehr schnell ändern könnten. Die humanitäre Hilfe könne sich jedoch nicht von solchen Erwägungen leiten lassen, sondern müsse unabhängig nach dem ausschließlichen Gesichtspunkt der Bedürftigkeit erfolgen. Der UNHCR befinde sich deshalb in einem Dialog mit der UNO.

In der Diskussion wurden viele Beispiele für die bei besserer Abstimmung und Planung vermeidbaren Überschneidungen zwischen den verschiedenen Organisationen angeführt. Auch wurde bemängelt, daß völkerrechtliche Bestimmungen nicht immer korrekt eingehalten werden. Insbesondere die Rolle des Sicherheitsrates wurde in diesem Zusammenhang hinterfragt. Sein Handeln lege manchmal die Vermutung nahe, daß nicht immer die UN-Charter Richtschnur für seine Resolutionen sei.

Auch der Vortrag von *Dr. Hans-Peter Gasser* vom IKRK mit dem Thema "Protection of civilian populations of States which are under embargo measures" mußte sich wiederum dem Sicherheitsrat zuwenden. Der Referent setzte sich mit der Forderung auseinander, im Falle eines Embargos Maßnahmen zum Schutz der Zivilbevölkerung zu ergreifen. Dieser Schutz, so *Gasser* überzeugend, solle den humanitären und neutralen Körperschaften überlassen werden. Während theoretische Positionen leicht entwickelt werden könnten, stelle sich die Praxis als wesentlich problematischer dar. Wie kompliziert das Embargo aus der Sicht des humanitären Völkerrechts und des Flüchtlingsrechts tatsächlich ist, zeige das Beispiel des früheren Jugoslawiens, wo Hunderttausende von Flüchtlingen bei der Zivilbevölkerung unterkufft gefunden haben; ebendiese leide nun unter Embargomaßnahmen. Dieser Widerspruch bedürfe offensichtlich einer Lösung. Hier seien neue Konzepte gefragt.

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Dasselbe trifft natürlich auf das Projekt zu, zu dem Prof. Carlo Ruzso, Richter am Europäischen Menschenrechtsgerichtshof, sprach: die Schaffung des Internationalen Strafgerichtshofes. Dabei spricht er insbesondere auf Beispiele der Abstrafung von Kriegsverbrechen durch nationale und internationale Gerichte ein, wobei deutlich wurde, daß die Praxis doch wesentlich umfangreicher ist, als gemeinhin angenommen wird. Zugleich zeigte der Vortrag aber, daß noch wesentliche konzeptionelle Fragen offen sind. So sind beispielsweise die Probleme der Beweiserhebung und des anzuwendenden Rechts immer noch nicht gelöst. In der Diskussion wurde zudem klar, daß es keine kontinuierliche und glaubwürdige Beobachtung der tatsächlichen Vorgänge im früheren Jugoslawien gibt, da keine solchen Gremien wie die Internationale Ermittlungskommission vor Ort fact-finding betreiben. Berichte von Massenmedien orientierten sich jedoch oftmals eher an kommerziellen und sensa-

tionellen Aspekten denn an einer Sachverhaltsdarstellung. Die angesprochenen Probleme sind aber nur ein kleiner Ausschnitt der Fragen, vor denen ein solcher Gerichtshof stehen wird. Auch reichte die Diskussionszeit nicht aus, Lösungsmodelle tatsächlich zu besprechen. Zweifellos wurde aber deutlich, daß es noch großer Anstrengungen der UNO bedürfen wird, um tatsächlich ein effektives Organ zu schaffen.

Gerade das zuletzt angesprochene Thema macht deutlich, daß dem humanitären Völkerrecht eine große Dynamik innewohnt. Die diesjährige Tagung in San Remo konnte nicht alle aufgeworfenen Fragen beantworten; aber allein das Benennen der Probleme ist ein großes Verdienst, da hier jedes Nachdenken über eine Lösung beginnen muß.

## Cours de Droit International Humanitaire, Spa (Belgien), 1. - 11. September 1993

Heike Thomae\*

Vom 1. bis zum 11. September 1993 veranstaltete das belgische Rote Kreuz zusammen mit dem IKRK in Spa (Belgien) zum fünften Mal einen Sommerkurs zum humanitären Völkerrecht, an dem 34 Personen aus 18 Ländern teilnahmen, darunter drei aus Deutschland.

Die Mehrzahl der Teilnehmer hatte gerade ihr Jurastudium beendet oder stand kurz vor dessen Abschluß. Für die Zulassung zum Kurs waren Kenntnisse im Völkerrecht und in der französischen Sprache Voraussetzung. Die Kursgebühren betragen 8000 belgische Francs, die auch die Kosten für die Unterbringung und Verpflegung in Spa deckten.

Nach einem herzlichen Empfang und einer Begrüßungsrede von Jacques Delruelle vom belgischen Roten Kreuz und Daniel Thürer, Mitglied des IKRK, in Brüssel wurden die Teilnehmer nach Spa gefahren, wo die beiden Betreuer des Kurses Benoit Cuvelier, Rechtsberater beim belgischen Roten Kreuz, und Robert Gaillard-Moret, Delegierter des IKRK, über den genauen Ablauf des Kurses Auskunft gaben.

Pro Tag wurden in der Regel ein bis zwei der insgesamt 13 Themengebiete behandelt, wobei den Teilnehmern durch einen etwa einstündigen Vortrag eines Experten ein Überblick über das jeweilige Gebiet vermittelt wurde. Die Vortragenden waren zum größten Teil Hochschulprofessoren aus der Schweiz und aus Frankreich - zum Teil erfolgte die Einführung in das humanitäre Völkerrecht durch Experten des Militärs und des IKRK.

An alle Teilnehmer wurden zu Beginn des Kurses detaillierte Zusammenfassungen der Vorträge verteilt, die zum Teil mit ausführlichen Literaturhinweisen versehen waren. Außerdem hatte das IKRK die französischsprachigen Vertragstexte (Genfer Konventionen und Zusatzprotokolle I und II) ausgehändigt, so daß den Kursteilnehmern eine Vorbereitung auf die einzelnen Vorträge möglich war.

Zur Vertiefung der einzelnen Themengebiete wurden die Teilnehmer in fünf- bis sechsköpfige Arbeitsgruppen eingeteilt, wobei darauf geachtet wurde, daß in jeder Gruppe unterschiedliche Nationalitäten vertreten waren. Nach jedem Expertenvortrag hatten die Arbeitsgruppen die Aufgabe, einen dem jeweiligen Themengebiet entsprechenden Fall unter Anwendung der vier Genfer Konventionen und der beiden Zusatzprotokolle zu bearbeiten. Während dieser Zeit gab der Vortragende noch manche Hilfestellung zur Lösung der zum Teil sehr komplexen Fälle. Der von der Gruppe jeweils be-

nannte Gruppensprecher hatte die Ergebnisse dem Plenum vorzustellen, wobei die Lösungsansätze der verschiedenen Arbeitsgemeinschaften häufig zu interessanten und lebhaften Diskussionen innerhalb des Plenums mit dem Experten führten.

Mit einer Einführung in das humanitäre Völkerrecht begann Luigi Condorelli, Professor an der juristischen Fakultät der Universität Genf (Schweiz), mit der Vortragsreihe. Er definierte zunächst das humanitäre Völkerrecht und bestimmte dann das Verhältnis zum Völkerrecht. Ausführlich ging Condorelli auf die Unterscheidung zwischen *ius contra bellum* und *ius in bello* ein.

Einen Vortrag über den Schutz von Zivilpersonen, die sich in den Händen des Gegners befinden, hielt Marie-José Domestici-Met, Professorin an der französischen Universität Aix-Marseille III. Dabei behandelte sie insbesondere das Recht der Schutzmächte und des IKRK, Zutritt zu den von der IV. Genfer Konvention geschützten Personen zu verlangen.

Einen besonders ausführlichen Vortrag hielt Jean-Jacques Ferrari, der Oberst und Stabsoffizier in der Schweiz ist, über den Kombattantenstatus. Nach einer Einführung in die Regelungen der Haager Konventionen und deren Entwicklung bis zu den Genfer Konventionen und den Zusatzprotokollen befaßte Ferrari sich insbesondere mit dem Schutz von Personen, die an Feindseligkeiten teilgenommen haben und keinen Kombattantenstatus besitzen, wie z. B. Söldner und Guerillatruppen.

In seinem Vortrag über den Schutz von Kriegsgefangenen widmete sich Jean Mallein, Juraprofessor an der Universität Brest (Frankreich), besonders ausführlich dem Problem der Führung und Verwaltung von Kriegsgefangenenlagern.

Der Vortrag von Marcel Oriane (belgisches Rotes Kreuz) und Yann Ollivier vom französischen Roten Kreuz über die Internationale Bewegung des Roten Kreuzes und des Roten Halbmondes bot den Teilnehmern die Möglichkeit, sich näher mit deren Statuten und Regelungen auseinanderzusetzen. Der Schwerpunkt der Ausführungen lag zudem auf dem Rotkreuz-Zeichen und dessen Schutz.

Dominique Turpin, der öffentlichen Recht an der französischen Universität Clermont-Ferrand lehrt und Präsident des Französischen Instituts für humanitäres Recht und Menschenrechte ist, beschäftigte

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te sich in seinem Vortrag in enger Anlehnung an die entsprechenden Konventionen und Protokolle mit dem Schutz der Zivilbevölkerung in Kriegszeiten.

Über den Schutz und die Sorge für die Verwundeten, Kranken und Schiffbrüchigen hielt *Robert Remacle*, Oberstleutnant bei der belgischen Luftwaffe und Experte für Kriegsverbrechen, einen Vortrag. Besonders Gewicht legte Remacle in seinen Ausführungen auf den Schutz von Sanitätseinheiten. Ergänzend zum Vortrag von *Orianne* und *Ollivier* erläuterte *Remacle* die Bedeutung des Rotkreuz-Zeichens und seine Verwendung.

Einen Vortrag über Menschenrechte und humanitäres Völkerrecht hielt *Denise Plattner*, Rechtsberaterin beim IKRK, die für den verhinderten *Maurice Torelli* von der Universität Nizza kurzfristig eingesprungen ist. Sie ging dabei auf die Unterschiede zwischen den Menschenrechten und dem humanitären Völkerrecht ein, sowohl hinsichtlich des materiellen und personellen Anwendungsbereichs als auch in bezug auf Zielsetzung und Mechanismen zur Durchsetzung, betonte dabei jedoch den komplementären Charakter von Menschenrechten und humanitärem Völkerrecht.

Ausgehend vom gemeinsamen Art. 3 der Konventionen von 1949 und vom II. Zusatzprotokoll von 1977 widmete *André Andries*, Oberstaatsanwalt am belgischen Militärgerichtshof, seinen Vortrag den nicht internationalen bewaffneten Konflikten. *Andries* bezog sich in seinen Ausführungen auch auf die internationale Ermittlungskommission (Art. 90 des I. Zusatzprotokolls) mit Sitz in Bern, deren erste Sitzung am 12. und 13. März 1992 stattfand und die zuständig ist für die Untersuchung von Tatsachen, von denen behauptet wird, daß sie eine schwere Verletzung der Genfer Konventionen oder des I. Zusatzprotokolls darstellen. Außerdem soll sie dazu beitragen, daß das Abkommen und das I. Zusatzprotokoll eingehalten werden, indem sie ihre guten Dienste zur Verfügung stellt.

Eine willkommene Abwechslung vom täglich sechs- bis siebenstündigen Programm bot ein eintägiger Workshop, der von dem belgischen Psychologieprofessor *Eric David* geleitet wurde und in dem die Teilnehmer durch Rollenspiele für ihr eigenes Aggressionspotential sensibilisiert werden sollten. Leider war für die Teilnahme an diesem interessanten Experiment, das auf lediglich 15 Personen zu geschnitten war, die perfekte Beherrschung der französischen Sprache Voraussetzung. Für die nicht frankophonen Kursteilnehmer wurde zur gleichen Zeit eine Diskussionsrunde angeboten, bei der Fragen vor allem zu aktuellen Themen behandelt wurden.

*Jean-Noël Wetterwald* vom Hohen Flüchtlingskommissariat aus Genf widmete sich in seinem Vortrag den Flüchtlingen. Aufgrund seiner eigenen praktischen Erfahrungen konnte *Wetterwald* den Teilnehmern einen interessanten Einblick in die Arbeit des UN-

HCR vermitteln, wobei er sich insbesondere auf die Flüchtlingsproblematik im Golfkrieg und im ehemaligen Jugoslawien bezog.

*Jacques Stroun*, Mediziner und Chef der für Gefangenhaltung zuständigen Abteilung des IKRK, berichtete über die Aktivitäten des IKRK in internen Konflikten. Durch den Vortrag bot sich den Teilnehmern die Möglichkeit, das humanitäre Völkerrecht einmal aus einer anderen, nicht rein juristischen Sichtweise zu betrachten, zumal *Stroun* selbst über seine äußerst interessante Tätigkeit als Arzt in Gefangenlagern bei verschiedenen Missionen in Lateinamerika, Afrika, Asien und im ehemaligen Jugoslawien berichten konnte.

Am letzten Tag des Kurses hielt *Denise Plattner* ihren zweiten Vortrag über die Durchsetzung des humanitären Völkerrechts, in dem sie die Bedeutung der Schutzmächte und des IKRK als Kontrollorgane für die Anwendung des humanitären Völkerrechts hervorhob. Als absolute Notwendigkeit für die Durchsetzung des humanitären Völkerrechts sieht *Denise Plattner* die Verpflichtung der Vertragsparteien an, in gegenseitiger juristischer Unterstützung Verletzungen des humanitären Völkerrechts strafrechtlich zu ahnden.

*Yolande Camporini* von der Liga der Rotkreuzgesellschaften, *Robert Gaillard-Moret* und *Benoit Cuvelier* widmeten den Abschlußvortrag der praktischen Verbreitung des humanitären Völkerrechts und machten deutlich, daß eine der Hauptsachen für die zahlreichen Verletzungen des humanitären Völkerrechts Unkenntnis über dessen Inhalt ist. Als Zielgruppe für eine Verbreitung der Inhalte des humanitären Völkerrechts sahen die Vortragenden nicht nur die bewaffneten Armeen und die Regierungen, sondern auch Universitäten, Schulen und Medien an. Außerdem wurde auf die Verpflichtung der Vertragsparteien hingewiesen, das humanitäre Völkerrecht zu verbreiten.

Nicht unerwähnt bleiben soll der Ausflug am Wochenende nach Burg Reinhardtstein und der Besuch einer kleinen aber besonders aktiven Rotkreuz-Station in Malmedy, deren Mitarbeiter sich sichtlich über den internationalen Besuch freuten und uns herzlich willkommen hießen. Sie berichteten über ihre Tätigkeit und zeigten uns u.a. die Kleidersammlung und die Ausrüstung für den Katastrophenschutz und Rettungsdienst. Abgerundet wurde die Exkursion mit einem Museumsbesuch in Stavelot.

Für jeden Kursteilnehmer besteht im Rahmen des Sommerkurses die Möglichkeit, ein Diplom zu erhalten, wenn er zu einem von 16 vorgegebenen Themengebieten aus dem humanitären Völkerrecht eine etwa 20-seitige Seminararbeit in französischer Sprache verfaßt. Die Arbeiten werden von Juristen des IKRK begutachtet, die auf das vom Teilnehmer ausgewählte Thema spezialisiert sind.

## Manfred Nowak, U.N. Covenant on Civil and Political Rights – CCPR Commentary,

N.P. Engel Publisher, Kehl/Strasbourg/Arlington 1993, 974 Seiten, DM 262,-

Hans-Joachim Heintze\*

Bei dem vorliegenden Werk handelt es sich um die überarbeitete Fassung der 1989 erschienenen deutschsprachigen Kommentierung des mittlerweile wohl wichtigsten UN-Menschenrechtsvertrages. Schon die deutschsprachige Fassung stieß auf großes internationales Interesse und ist ein Standardwerk in jeder juristischen Bibliothek. Durch die Übersetzung ins Englische erschließt sich das Buch verdientermaßen nun weitere Leserkreise und wird vor allem auch zu einem handhabbaren Instrument für die diversen menschenrechtlichen Gremien der UNO, in der Deutsch bekanntlich keine Arbeitssprache ist.

*Nowaks* Buch erschien rechtzeitig zu der mit großen Erwartungen verknüpften Wiener UN-Weltmenschenrechtskonferenz vom Juni dieses Jahres, die den Platz der Menschenrechte nach dem Ende der Ost-West-Konfrontation neu bestimmen sollte. So mancher Kommentar der jüngsten Vergangenheit zeigt die Notwendigkeit dieser Neuorientierung. Der Verlauf der Konferenz, auf der ein neu-

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er Gegensatz - der zwischen Nord und Süd - artikuliert wurde, machte ebenso wie die neuen Konfliktherde in der ehemaligen Sowjetunion und im früheren Jugoslawien deutlich, daß die exakte Analyse der bestehenden menschenrechtlichen Verpflichtungen die Voraussetzung für jede ernsthafte Diskussion über Menschenrechte ist. Um diese zu ermöglichen, leistet das Buch einen hervorragenden Beitrag. Im Vergleich zur deutschen Ausgabe hat sich der Wert des CCPR-Kommentars noch gesteigert, da die Entwicklung seit 1989 berücksichtigt und auch ergänzte Anhänge eingearbeitet wurden (so findet man das Zweite Fakultativprotokoll nunmehr hier). Das macht die Nutzung des CCPR-Kommentars auch als Nachschlagewerk möglich. Analog zur deutschen Ausgabe behandelt der Autor jeden Artikel des Menschenrechtspaktes und des Ersten Fakultativprotokolls detailliert nach einem einheitlichen Muster. Das Auffinden der einzelnen Aspekte wird durch Randnummern und einen sehr detaillierten Index erleichtert.

Die verarbeitete Informationsfülle im Text ist beeindruckend. So wird die zwanzigjährige Ausarbeitungsphase des Paktes ebenso berücksichtigt wie die sechzehnjährige Praxis des UN-Menschenrechtsausschusses, der immerhin mehr als 170 Staatenberichte prüfte und 21 Allgemeine Erklärungen zur Verwirklichung einzelner Artikel des Paktes verabschiedete. Hinzu kommt, daß sich der Ausschuß mit rund 500 Individualbeschwerden befassen mußte. Dieses gewaltige Arbeitspensum belegt die Bedeutung der Menschenrechte im Völkerrecht der Gegenwart - es zeigt aber zugleich, vor welcher komplizierter Aufgabe der Autor des Kommentars stand: aus den Bergen von Papier galt es, das juristisch Entscheidende herauszufiltern und auf einem noch vertretbaren Umfang von rund 1000 Seiten darzustellen. Während *Nowak* diese Herausforderung ausgezeichnet meisterte, wirft das Buch doch praktisch in allen seinen Analysen die Frage auf, wie sich der UN-Menschenrechtsausschuß den Aufgaben der Zukunft stellen wird. Offenkundig kann er mit seinen bisherigen Methoden angesichts der großen Zahl von Mitgliedsstaaten in den Pakten und im Ersten Fakultativprotokoll nicht mehr weiterarbeiten, weil es sonst zum Kollaps käme. Auch scheint noch ungelöst, welche Schritte der Menschenrechtsausschuß zur Durchsetzung seiner Beschlüsse fassen will.

Welche Fundgrube der CCPR-Kommentar darstellt, wird beispielhaft an der Kommentierung von Art. 1 - dem Selbstbestimmungsrecht der Völker - deutlich. Dieses Recht spielt im Zusammenhang mit den Entwicklungen in früheren sozialistischen Staaten eine erhebliche Rolle. Auf 20 Seiten werden die wesentlichen Aspekte dieses Rechts zusammengetragen: die historische Herausbildung, die lange Zeit umstrittene Rechtsnatur des Selbstbestimmungsrechts, der kollektive und permanente Charakter dieses Rechts, die Durchsetzung, die Berechtigung aller Völker zur Wahrnehmung dieses Rechts sowie der äußere und innere Aspekt des

Selbstbestimmungsrechts. Auf den 20 Seiten kommt die ganze Widersprüchlichkeit der Staatenpraxis bezüglich dieses Rechts brillant zum Ausdruck. Der Autor hütet sich zu Recht, definitive Urteile im Theorienstreit abzugeben, so beispielsweise zu der Frage, ob lediglich verfassungsrechtlich anerkannte Völker in multinationalen Föderationen das Selbstbestimmungsrecht beanspruchen (wie Cassese meint) oder ob auch "wichtige Minderheiten" - wie die Ureinwohner - sich darauf berufen können (siehe Kiss). *Nowak* stellt diesen Theorien die Staatenpraxis und die bisherigen (Nicht-)Entscheidungen des Menschenrechtsausschusses gegenüber; da beide aber erhebliche Unklarheiten beinhalten, kommt der Autor zu dem Schluß, daß diese Frage "awaits a substantive ruling by the Committee, either under the State reporting procedure (e.g. by way of formulating its own report on a particular State or by publishing another General Comment concerning Art. 1) or by deciding on an inter-State communication" (S. 22).

Der Kommentar gibt hier dem Ausschuß Hausaufgaben auf. So begrüßenswert mehr Klarheit in dieser Hinsicht wäre, die Forderung steht in einem gewissen Spannungsverhältnis zu der zuvor konstatierten Arbeitsüberlastung des Ausschusses. Auch zeigt die zutreffend dargestellte politisch motivierte juristische Selbstbeschränkung des Ausschusses in den mit Artikel 1 begründeten Individualbeschwerdefällen (Mikmaq gegen Kanada und besonders im Südtirol-Fall), daß dieses Expertengremium wahrscheinlich überfordert wäre, derart grundsätzliche Probleme definitiv zu entscheiden.

Dennoch ist es sehr zu begrüßen, daß der Autor auf offene Probleme deutlich hinweist, weil das Buch sicher nicht nur von den Ausschußmitgliedern bei ihrer Arbeit herangezogen wird. Zu hoffen ist, daß sich die Teilnehmerstaaten des Paktes bei der Anfertigung ihrer Staatenberichte und Stellungnahmen zu Individualbeschwerden ebenfalls an dem Kommentar orientieren. Bei der Berücksichtigung der hierin enthaltenen Vorgaben müßte eigentlich eine deutliche Erhöhung der Qualität der Berichte zu erwarten sein. Die dadurch ermöglichte Effektivierung der Implementierung der Paktbestimmungen wäre die erfreulichste Auswirkung dieses beachtlichen Buches, das ganz sicher weltweite Verbreitung erfahren wird.

Abschließend sei noch auf eine kleine Schwäche des Buches verwiesen, die die wissenschaftliche Arbeit damit erschwert: Das Abkürzungsverzeichnis ist recht kurz geraten und gibt vor allem nicht die Titel der Zeitschriften wieder. Dies ist bei den großen wohleingeführten Titeln kein Problem. Was macht man aber, wenn der Artikel von *Stavenhagen* (Fn. 3 auf S. 481) in der NIHR nachgelesen werden soll? Einschlägige Nachschlagewerke versagen und die Kenntnis des Rezensenten auch. Vielleicht kann dem in einer wünschenswerten deutschen Neuauflage abgeholfen werden.

## John Packer/Kristian Myntti (eds.), *The Protection of Ethnic and Linguistic Minorities in Europe*,

Institute for Human Rights, Åbo Akademi University, Åbo 1993, 260 Seiten, FIM 70,-

Knut Dörmann\*

"No society was immune to the tensions between ethnic, religious or linguistic groups within the state" - wie sehr hat sich diese Aussage im Vorwort des von *John Packer* und *Kristian Myntti* herausgegebenen Buches über den Schutz von ethnischen und sprachlichen Minderheiten angesichts der jüngsten Ereignisse in der ehemaligen UdSSR und im früheren Jugoslawien bewahrheitet. In weiser Vorahnung wurde 1990 vom Åbo Akademi University Institute for Human Rights in Turku/Åbo, Finnland ein Menschenrechtskurs veranstaltet, der die besonderen Probleme der Minderheiten in Europa zum Gegenstand hatte. Ein Produkt dieser Veranstaltung ist

dieser nunmehr vorliegende Band, der neun Beiträge verschiedener Teilnehmer beinhaltet. Obwohl der Kurs vor drei Jahren stattfand, sind die Texte allesamt aktualisiert worden, bevor sie in den Druck gingen. Die Beiträge werden sinnvoll durch einen umfangreichen Annex ergänzt, der die Europäische Charter über regionale oder Minderheitensprachen, Auszüge aus dem KSZE-Abschlußdokument von Helsinki 1992 und die UN-Deklaration über die Rechte

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der Personen, die nationalen, ethnischen, religiösen und sprachlichen Minderheiten angehören, enthält.

Einführend (S. 9-13) liefert *Allan Rosas*, Direktor des Åbo Instituts, einen allgemeinen Überblick über die Entwicklung des Minderheitenrechts im Vertragsvölkerrecht und innerhalb internationaler Organisationen. Seine Darstellung, die wohl bewußt knapp gehalten ist, führt vom Diskriminierungsverbot der Europäischen Menschenrechtskonvention über Art. 26 des Paktes über bürgerliche und politische Rechte bis hin zum UNESCO-Übereinkommen gegen Diskriminierungen im Unterrichtswesen und zum Internationalen Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung. Diese wenigen Normen, die unmittelbar oder mittelbar dem Schutz von Minderheiten dienen, zeigen, daß es noch vieler Aktivitäten auf internationaler Ebene bedarf, bis ein zufriedenstellender Rechtszustand erreicht werden kann. Auch die Bemühungen innerhalb der Vereinten Nationen, der KSZE und des Europarates verdeutlichen, daß in den letzten Jahren lediglich die Bereitschaft gewachsen ist, diesen wenig zufriedenstellenden Zustand zu korrigieren. Wohl in Anbetracht dieses langwierigen Prozesses gelangt *Rosas* zu der - sicherlich zutreffenden - Schlußfolgerung, daß Minderheiten nur sinnvoll durch legislative Akte auf nationaler Ebene geschützt werden können (S. 13). Gewisse Hoffnungen setzt der Autor aber auch in die Aktivitäten des unlängst im Rahmen der KSZE geschaffenen Amtes eines Hochkommissars für Nationale Minderheiten.

Im Anschluß daran widmet sich *Jan Helgesen* in seinem Beitrag (S. 15-22) "The Protection of Minorities in the Conference on Security and Co-operation in Europe (CSCE): A Note on the Helsinki Document 1992" dem Minderheitenschutz im Rahmen der Konferenz über Sicherheit und Zusammenarbeit in Europa (KSZE). Einleitend stellt der Autor schlaglichtartig den langen Weg innerhalb der KSZE von anfänglicher Ignoranz bis hin zu einer intensiven Befassung mit den Minderheitenproblemen dar. Er weist darauf hin, daß über lange Jahre hinweg die Dominanz der jeweiligen Mehrheit in den heutigen Krisengebieten und auch anderswo die tiefen Gegensätze zwischen den Bevölkerungsgruppen nicht zu Tage treten ließ. Über die Nicht-Existenz eines Minderheitenproblems waren sich Regierungen in Ost und West nahezu einig. Erst mit Perestroika und Glasnost wandelte sich das Bild nicht nur in der damaligen UdSSR, sondern auch in weiteren Staaten Europas. So erlangte die Frage des Minderheitenschutzes Ende der 80er, Anfang der 90er Jahre in der KSZE "a status of great importance and hyper-sensitivity" (S. 17). Vorläufiger Höhepunkt ist das Helsinki Dokument von 1992 "The Challenges of Change". *Helgesen* greift daraus die Schaffung des Amtes eines "Hochkommissars für Nationale Minderheiten" heraus. In diesem Abschnitt setzt er sich kritisch mit der in seinem Mandat begründeten Abhängigkeit des Hochkommissars vom "Ausschuß Hoher Beamter" auseinander und stellt die berechtigigte Frage, ob es nicht sinnvoller gewesen wäre, eine von staatlicher Einflußnahme nahezu unabhängige Institution zu schaffen. In Anbetracht dessen, daß der Hochkommissar entsprechend der bisherigen Tradition innerhalb der KSZE keine Sanktionsbefugnis hat, sieht *Helgesen* diese enge Verbindung mit dem Ausschuß Hoher Beamter als sehr sinnvoll an, da sein Tätigwerden insoweit die Zustimmung der einflußreichen Staaten, die den Ausschuß dominieren, voraussetzt und seinen Empfehlungen daher mehr Gewicht zukommt.

Nach Auffassung des Autors stellt die Schaffung des Hochkommissars einen wichtigen Schritt dar, den Minderheitenschutz innerhalb der KSZE voranzutreiben. Dieser war indessen nur aufgrund eines inzwischen in der Staatenwelt gewachsenen "feeling of responsibility" möglich, der zu "increased willingness of the Governments to seek solutions" (S. 19) führte. Die allerdings nach wie vor bestehenden Vorbehalte drücken sich in den dem Hochkommissar übertragenen Kompetenzen aus: Ihm wird lediglich eine präventive und keine "reparative" Funktion zuerkannt; mit offenem Ausbruch eines Konfliktes sind seine Befugnisse nahezu erschöpft, und eine Reaktion kann nur noch auf höchster staatlicher Ebene erfolgen.

Mit seinem Artikel "On the Definition of Minorities" (S. 23-66) versucht *John Packer*, sich mit einem nach Wissen des Rezensenten neuen Ansatz dem seit jeher ungelösten Problem zu widmen, wie der Begriff Minderheit zu definieren ist, d.h. welche konstitutiven Merkmale Voraussetzung dafür sind, daß eine Gruppe von Menschen als Minderheit zu bezeichnen ist. Bevor der Autor in medias res geht, setzt er sich mit der im neueren Schrifttum häufig geäußerten Meinung auseinander, eine exakte Definition sei nicht nötig, um einen effektiven Minderheitenschutz zu gewährleisten. Diese Auffassung lehnt *Packer* im wesentlichen mit zwei Argumenten schlüssig ab. Zum einen müsse eindeutig feststellbar sein, wer Zuordnungsobjekt von Rechten und Pflichten ist und zum anderen bestünde ohne eine exakte Definition die Gefahr, daß Staaten durch unilaterale Auslegung die Existenz bestimmter Minderheiten leugnen könnten.

In seinem Versuch "to resolve the definitional problem" (S. 24) zieht *Packer* zunächst allgemeine philosophische Erwägungen heran, die bestimmend für die aktuelle Menschenrechtssichtweise sind. Dieser ideengeschichtliche Exkurs, der den Leser von *Augustinus* über *Hobbes*, *Montesquieu* u.a. zu *Rousseau* führt, ist in seiner Plausibilität auch jenseits der Minderheitenproblematik von besonderem Interesse. Der Autor arbeitet drei Prinzipien heraus - das grundlegende Prinzip der Gleichheit aller Menschen, die sog. "majority rule", so wie sie ursprünglich von *Hobbes* entwickelt wurde, und das Demokratieprinzip -, die als Leitlinie für seinen Definitionsversuch dienen. Angesichts dieser umfangreichen Vorarbeiten mutet das Definitionsergebnis von *Packer* schon ein wenig banal an: "the 'or' a minority is a group of people who freely associate for an established purpose where their shared desire differs from that expressed by the majority rule" (S. 45).

Im Unterschied zu den bisher vorherrschenden Definitionsversuchen, die das Vorliegen einer Minderheit an besonderen objektiven Merkmalen - wie gemeinsame Ethnizität, Religion oder Sprache - festmachen, hebt *Packer* eher einen subjektiven Aspekt hervor, nämlich den Willen, ein gemeinsames Anliegen zu verfolgen, welches von dem der Mehrheit abweicht. Als objektive Merkmale akzeptiert der Autor insoweit lediglich die Äußerung dieses Willens und das Vorliegen eines freiwilligen Zusammenschlusses. Merkmale wie Ethnizität, Religion oder Sprache sind seiner Auffassung nach abzulehnen, da sie im Widerspruch zur Gleichheit aller Menschen stehen, so wie sie im Zeitpunkt der Geburt besteht. Diese seien lediglich das Produkt des sozialen Umfelds, in dem eine Person aufwächst und daher für eine Minderheitendefinition nicht zu berücksichtigen.

Die Argumentation *Packers* ist in sich zweifellos schlüssig. Ob sie sich allerdings in der Staatenpraxis durchsetzen kann, erscheint mehr als zweifelhaft. Nach Meinung des Rezensenten krankt der von *Packer* gewählte Ansatz vor allem daran, daß er eine Definition unter Außerachtlassung der den Minderheiten eventuell zu gewährenden Rechte zu gewinnen versucht. So wäre es z.B. illusorisch jeder Gruppe, die sich freiwillig zu einem gemeinsamen Ziel zusammengeschlossen hat, Autonomierechte zuzuerkennen. Merkmale wie gemeinsame Ethnizität, Religion oder Sprache waren bisher immer Elemente, die die besondere Schutzbedürftigkeit einer Gruppe begründeten. Wenn eine Volksgruppe diese Charakteristika aufwies, ließ sich regelmäßig auch eine Bereitschaft in weiten Teilen der Staatenwelt feststellen, ein besonderes Regime zu deren Schutz zu entwickeln. Die weite Definition *Packers* wird in dieser Allgemeinheit kaum dazu geeignet sein, zu einer Weiterentwicklung bestehender Regelungen beizutragen.

Auf diese in die Minderheitenproblematik im allgemeinen einfließenden Beiträge folgen Beschreibungen der Minderheitensituation in einzelnen ausgewählten europäischen Ländern. Hierbei wird in allen Darstellungen besonderes Augenmerk auf die tatsächliche und rechtliche Lage einzelner Volksgruppen gelegt. *Slavi Pashovski* widmet sich in seinem Artikel (S. 67-78) den Minderheiten in Bulgarien. Seine Darstellung macht deutlich, wie langsam der Prozeß nach dem Ende des kommunistischen Regimes hin zu mehr Ak-

zeptanz für die Bedürfnisse anderer Volksgruppen von staten geht. Dieser Befund wird in dem Artikel über nationale Minderheiten in Polen von *Agnieszka Rochowicz* (S. 105-122) bestätigt. Die Entwicklung in Polen ist zumindest in rechtlicher Hinsicht weiter vorgeschritten als in Bulgarien. Besonders interessant für die deutschen Leser ist die Beschreibung des deutsch-polnischen Nachbarchaftsvertrages und seiner positiven Auswirkungen auf die deutsche Minderheit. Aus dem Beitrag von *Kristian Myntti* (S. 79-104) über die Minderheiten in Finnland ist besonders die Darstellung der vorbildlich geregelten Autonomie der Åland-Inseln hervorzuheben, welche nahezu jegliches Konfliktpotential zwischen Schweden und Finnland beseitigt hat.

Das Beispiel Großbritanniens, so wie *Tamara K. Hervey* (S. 123-144) es beschreibt, zeigt, welche Bedeutung der Frage einer exakten Definition von Minderheiten in der aktuellen Staatenpraxis zukommt. Mit der simplen Feststellung, in Großbritannien gäbe es keine Minderheiten, gelingt es der britischen Regierung, eine Weiterentwicklung internationaler Standards zu bremsen. So ist es auch nicht verwunderlich, daß sich im britischen Rechtssystem keine speziellen Regelungen zum Schutze von Minderheiten finden. Sonderregelungen, die im Hinblick auf die Waliser bzw. Schotten bestehen, sind historisch gewachsen und können und sollen daher nicht auf andere Volksgruppen übertragen werden.

Der Beitrag von *Milan Paunovic* über "Nationalities and Minorities in the Yugoslav Federation and in Serbia" (S. 145-168) konnte infolge der jüngsten Ereignisse im ehemaligen Jugoslawien bedauerlicherweise nicht mehr aktualisiert werden. Dennoch ist er sehr lehrreich unter historischen Aspekten; auch wird dem Leser offenbar, wie tief verwurzelt die aktuellen Geschehnisse in nicht gelösten Minderheitenfragen der Vergangenheit sind. Die Darstellung der Verhältnisse im Kosovo macht deutlich, daß man trotz der grausamen Zustände in Bosnien-Herzegowina andere potentielle Krisenherde nicht aus den Augen verlieren darf. Mit Bedauern wird der Leser die Feststellungen *Paunovic'* zur Kenntnis nehmen, daß insbesondere das ehemalige Jugoslawien innerhalb der UN Vorreiter für einen verbesserten Minderheitenschutz auf internationaler Ebene war. Wie lassen sich damit die ethnischen Säuberungen vereinbaren?

Abgeschlossen wird dieser Teil des Buches mit einem Artikel von *Michael M. Jansen* über die Situation der Sinti und Roma in der

Bundesrepublik Deutschland (S. 167-208). Der Autor arbeitet sehr dezidiert die tiefgreifenden Unterschiede in rechtlicher und faktischer Hinsicht zwischen dieser Volksgruppe und den in Deutschland anerkannten nationalen Minderheiten wie den Dänen und Sorben heraus. Letztere genießen im Hinblick auf die Aufrechterhaltung ihrer Sprache und Kultur sowie die Möglichkeit, am politischen Willensbildungsprozeß teilhaben zu können, erhebliche Privilegien gegenüber den Sinti und Roma. Die Darstellung *Jansens* macht deutlich, daß in Deutschland die Anerkennung als nationale Minderheit entscheidend für einen speziellen Schutz ist. Ansonsten können sich Volksgruppen wie die Sinti und Roma nur auf den allgemeinen Schutz, den das Diskriminierungsverbot nach Art. 3 Abs. 3 GG und die übrigen Grundrechte bieten, berufen. *Jansen* tritt im Hinblick auf die Schaffung einer für alle Beteiligten fruchtbaren multikulturellen Gesellschaft für darüber hinausgehende Regelungen ein. Insbesondere ist seine Forderung nach bisher auf internationaler Ebene nicht anerkannter positiver Handlungspflichten des Staates hervorzuheben. Gerade dieser letzte Beitrag zeichnet sich durch eine besonders saubere Aufarbeitung der internationalen Verpflichtungen eines Staates, hier der Bundesrepublik Deutschland, ihrer innerstaatlichen Umsetzung sowie sonstiger über den internationalen Standard hinausgehender Regelungen aus.

Neben diesen Berichten wäre sicherlich auch eine Darstellung der jüngst mit einem großen Aufschrei zur Kenntnis genommenen Autonomieregelung für Südtirol, um die Österreich und Italien so lange gerungen haben, interessant gewesen. Insgesamt kann man aber dennoch den Herausgebern zu diesem sehr aufschlußreichen Buch über den Minderheitenschutz in Europa nur gratulieren. Die Beiträge über die Situation in einzelnen ausgewählten Ländern erweisen sich als höchst bedeutsam unter rechtsvergleichenden Aspekten. Gleichzeitig können die dargestellten nationalen Regelungen, wenn sie als repräsentativ anzusehen sind, Indiz für die Bereitschaft der Staaten sein, internationale Standards in diesem Rechtsgebiet zu entwickeln. Nimmt man die Artikel dieses Buches zum Maßstab und berücksichtigt man die schon seit langer Zeit anhaltenden Auseinandersetzungen um eine Minderheitenkonvention oder ein -protokoll innerhalb des Europarates kann der Leser dieses Buches nicht sehr zuversichtlich sein. Allgemein anerkannt scheint lediglich das Diskriminierungsverbot zu sein, im übrigen sind die Regelungen mehr oder minder den Bedürfnissen der einzelnen Minderheiten angepaßt.

## Volker Türk, Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR),

Duncker & Humblot, Berlin 1992, 332 Seiten, DM 118,-

Guido Hesterberg\*

Der UNHCR ist in der letzten Zeit mehr denn je an den Brennpunkten der Welt im Einsatz. Daher ist es begrüßenswert, daß mit dem vorliegenden Buch eine aktuelle und umfassende Analyse von Struktur und Funktionen dieses VN-Organs erschienen ist.

Die drei großen Teile des Buchs beschäftigen sich zuerst mit der Entstehungsgeschichte des UNHCR, dann mit dem institutionellen und legislativen System, in das er eingebettet ist, und schließlich mit dem Aufbau und den Funktionen des UNHCR selbst, wobei dieser Teil der umfangreichste ist.

In der Schilderung des historischen Hintergrunds werden auf knapp 30 Seiten die ersten Reaktionen der Völkergemeinschaft auf das Flüchtlingsproblem bis hin zur Gründung des UNHCR übersichtlich und klar dargestellt. Dabei wird zunächst auf die Einrichtungen des Völkerbundes eingegangen: das Hochkommissariat für

die russischen Flüchtlinge, das Internationale Nansenamt, das Hochkommissariat für Flüchtlinge aus Deutschland und schließlich das Hochkommissariat für Flüchtlinge, die jedoch damals allesamt nur als temporäre Einrichtungen angesehen wurden. Von diesen Anfängen ausgehend zeichnet der Autor den Weg über die internationale Flüchtlingsorganisation der Vereinten Nationen (IRO), die ebenfalls nur temporär angelegt war, bis zu dem Punkt, als sich die Erkenntnis durchsetzte, daß das Flüchtlingsproblem beständig blieb und langfristige Lösungsansätze erforderte, was dann zur Gründung des UNHCR führte.

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Nach dieser historischen Einleitung wird im zweiten Teil auf die "Rahmenbedingungen" des UNHCR im VN-System eingegangen, d.h. es geht um die Kompetenzen und Beziehungen der übrigen VN-Organen hinsichtlich des UNHCR. Die Generalversammlung, die den UNHCR ja geschaffen hat, wird hier als erste untersucht. Der Autor schildert die Struktur und die Eigenschaften des UNHCR-Statuts sowie die ihnen zugrunde liegenden fundamentalen Prinzipien. Da die Generalversammlung das Statut, das sie 1950 in einem Anhang zu Res. 428 V verabschiedet hat, auch weiterhin ändern kann, schließen sich noch eine Reihe weiterer Resolutionen an das UNHCR-Statut im engeren Sinne an, in denen von diesem Änderungsrecht Gebrauch gemacht wurde. Diese wiederum haben den relevanten Bestimmungen der VN-Charta zu entsprechen und den vier fundamentalen Prinzipien des UNHCR-Statuts, die der Autor anschließend herausarbeitet (das humanitäre, das "non-political", das universelle sowie das Vermittlungs- und Vertretungsprinzip). Nach der Erörterung weiterer Rechtsetzungsmöglichkeiten der Generalversammlung werden schließlich deren interne und externe Wirkungen behandelt.

Daran anschließend geht es um die Rechtsetzungsmöglichkeiten des Wirtschafts- und Sozialrates (ECOSOC), des VN-Generalsekretärs und des Exekutivkomitees für das Programm des Hohen Flüchtlingskommissars der Vereinten Nationen (EXCOM). Letzteres ist das Steuerungsorgan des UNHCR, als solches aber auch wieder subsidiäres Organ der Generalversammlung.

Im dritten Teil folgt nun die ausführliche Beschreibung des UNHCR selbst. Es werden zunächst die rechtliche Stellung (relative Autonomie, eigenes Budget, Fähigkeit zum direkten Vertragsschluss mit Staaten, aber keine Völkerrechtssubjektivität) und die Organisationsstruktur des UNHCR erläutert (Bedienstete, Privilegien, Finanzierung, Programmzyklus, Budgetkontrolle). Sodann schließt sich eine detaillierte Untersuchung der Kompetenzen und Funktionen an. Den verschiedenen Rechtsgrundlagen entnimmt der Autor folgende drei Hauptfunktionen des UNHCR: "International Protection", "Assistance" sowie das Suchen und die Förderung von dauerhaften Lösungen für Flüchtlingsprobleme. Daneben stellt er noch verschiedene andere Funktionen fest, wie z.B. spezielle Aufgaben in bezug auf Staatenlose, die Good-offices-, die Koordinations-, die entwicklungspolitische oder die präventive Funktion hinsichtlich Flüchtlingssituationen. Dieses Gliederungskonzept wird in der weiteren Abhandlung beibehalten.

Da für "International Protection" nirgends eine Legaldefinition existiert, ordnet der Autor diese Funktion zunächst begrifflich und historisch ein (Flüchtlinge haben keinen diplomatischen Schutzstaat, daher gibt es das Konzept der "International Protection" durch eine internationale Organisation), bevor er auf die inhaltliche Dimension eingeht. Unter den direkten internationalen Schutz fallen das Prinzip des Non-refoulement, Asyl, Wahrung und Sicherung der Menschenrechte, internationale Solidarität/Lastenenteilung und z.B. die Bereiche der Feststellung der Flüchtlingseigenschaft, der Ausweisung, Auslieferung und des Schutzes von Flüchtlingsfrauen und -kindern. Unter dem indirekten internationalen Schutz wird die Schaffung von Umgebungen, Normen und Standards verstanden, die menschenrechtsgerechtes Leben ermöglichen. Die Durchführung und Durchsetzung dieser "International Protection"-Funktion liegt ebenfalls beim UNHCR, wobei hier eine direkte Verbindung zur Genfer Flüchtlingskonvention bzw. dem Zusatzprotokoll von 1967 besteht: Sobald Staaten sich verpflichtet haben, die Konvention und damit deren Art. 35 einzuhalten, schaffen sie eine direkte Verbindung zu § 8 (a) UNHCR-Statut, der vorsieht, daß der Flüchtlingshochkommissar u.a. die Anwendung von Konventionen überwachen soll, die sich auf Flüchtlinge beziehen. Durch diese Verbindung zum UNHCR haben sie nach Ansicht des Autors auch dessen "Protection"-Tätigkeiten zu dulden. Der UNHCR hat in dieser Hinsicht eine Doppelfunktion: Einerseits ist er VN-Organ, andererseits Konventionsorgan aller Konventionen, die Menschenrechte und Flüchtlinge zum Thema haben. Positiv anzumerken ist

zu diesem Kapitel, daß die Begründungen hier wie auch sonst im Buch stets klar und nachvollziehbar sind.

Als Beispiel zu einer Kooperationsverpflichtung der Staaten aus Art. 35 Genfer Flüchtlingskonvention i.V.m. § 8 (a) UNHCR-Statut folgt ein Exkurs über deren Umsetzung im österreichischen Asylrecht. Da am 1. Juni 1992 in Österreich ein neues Asylgesetz in Kraft getreten ist, verliert dieser Abschnitt vor allem für nichtösterreichische Völkerrechtler ein wenig an Wert. Er könnte jedoch staatsrechtlich insofern weiterhin bedeutsam sein, als die in ihm analysierte Verwaltungspraxis und höchstrichterliche Rechtsprechung unter Umständen auch für die weitere Zusammenarbeit zwischen UNHCR und österreichischen Behörden richtungweisend ist.

Die "Assistance"-Funktion, die danach untersucht wird, tritt in ihrem Umfang nicht ganz so deutlich hervor. Das mag aber auch daran liegen, daß sie nicht von Beginn des UNHCR als eigenständige Hauptfunktion angesehen wurde und auch heute "für viele der übrigen Funktionen des UNHCR zumeist das Mittel der Realisierung derselben" darstellt; "es bildet gleichsam deren Untergrund" (S. 194). Als die wesentlichen Inhalte werden hier "Emergency Relief", "Care and Maintenance" und dauerhafte Lösungen wie lokale Integration von Flüchtlingen, freiwillige Repatriierung und allgemeine Resettlement-Programme angesehen.

Zu den im folgenden behandelten weiteren Funktionen des UNHCR ist noch anzumerken, daß im Abschnitt "Recht auf humanitäre Initiative" das Problem der humanitären Intervention leider nur sehr kurz abgehandelt wird. Insofern ist der frühe Erscheinungstermin des Buches zu bedauern. Das Kapitel wäre bei der heutigen Situation in Somalia sicherlich umfangreicher ausgefallen. Des weiteren sei noch der Punkt "Die entwicklungspolitische Funktion des UNHCR" erwähnt, der durch gute Schilderung und Übersichtlichkeit auffällt.

Im nächsten Abschnitt wird schließlich noch der Inhalt des Flüchtlingsbegriffs genau analysiert. Es wird folgende Einteilung vorgeschlagen: Kategorie A: Flüchtlinge i.S.d. eigentlichen UNHCR-Statuts, was der Definition der Genfer Flüchtlingskonvention entspricht. Kategorie B: Flüchtlinge i. S. d. UNHCR-Statuts im weiteren Sinne. Hierzu gehören auch die nachfolgenden speziellen Resolutionen der Generalversammlung, die sich mit dem Thema befassen. In diese Kategorie fallen vor allem die "displaced persons". Definiert werden die Kategorie-B-Flüchtlinge als "Personen, die nicht nach Art. 1 (A) GFK anerkannt sind, aber aus politischen, religiösen, rassistischen oder anderen 'valid reasons' nicht in ihren Herkunftsstaat zurückkehren können oder wollen" (S. 293). Auch die Kompetenz des UNHCR für diese Gruppe ist allgemein anerkannt. Für Asylsuchende vor ihrer Anerkennung als Flüchtlinge wird eine Subkategorie zu A und B eingeführt. Kategorie C umfaßt Personen, die hauptsächlich der "Assistance"-Funktion des UNHCR bedürfen (worunter im wesentlichen "internally displaced persons" fallen, die das Staatsterritorium nicht verlassen). Zu Kategorie D gehören spezielle verwundbare Gruppen (Kinder, Frauen, Behinderte, alte Menschen) und Kategorie E beinhaltet die Staatenlosen. Beachtenswert an dieser Einteilung ist vor allem, daß sie nicht starr an der Definition des § 6 UNHCR-Statut festhält, sondern auch die weitere Rechtsetzung der Generalversammlung mit einbezieht; eine Vorgehensweise, die sicher in der weiteren Diskussion Beachtung finden wird.

Insgesamt fällt das Buch durch seinen klaren Aufbau und die gute Gliederung der einzelnen Abschnitte auf. Positiv sind auch die kurzen Zusammenfassungen am Ende der Kapitel. Mit dieser Veröffentlichung liegt nun ein kompaktes Lehr- wie Nachschlagewerk vor, das zwar die allerneuesten Entwicklungen in Jugoslawien, dem Nordirak und Somalia nicht mehr berücksichtigen konnte, aber dennoch einen soliden Einblick in ein VN-Organ verschafft, das heute angesichts des immer akuter werdenden Flüchtlingsproblems mehr und mehr Bedeutung erlangt.

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