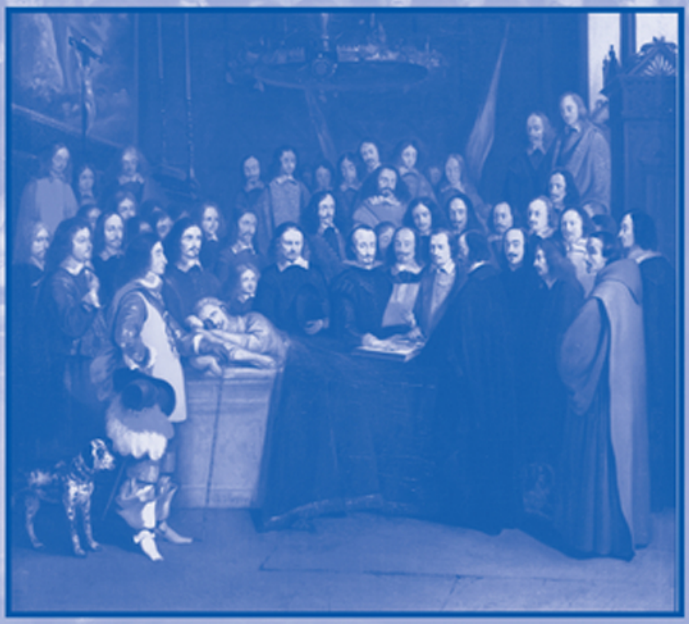
International Humanitarian Law Series

Law at War: The Law as it Was and the Law as it Should Be

Liber Amicorum Ove Bring

Edited by
Ola Engdahl and Pål Wrange



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Law at War:
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International Humanitarian Law Series

VOLUME 22

The International Humanitarian Law Series is a series of monographs and edited volumes which aims to promote scholarly analysis and discussion of both the theory and practice of the international legal regulation of armed conflict.
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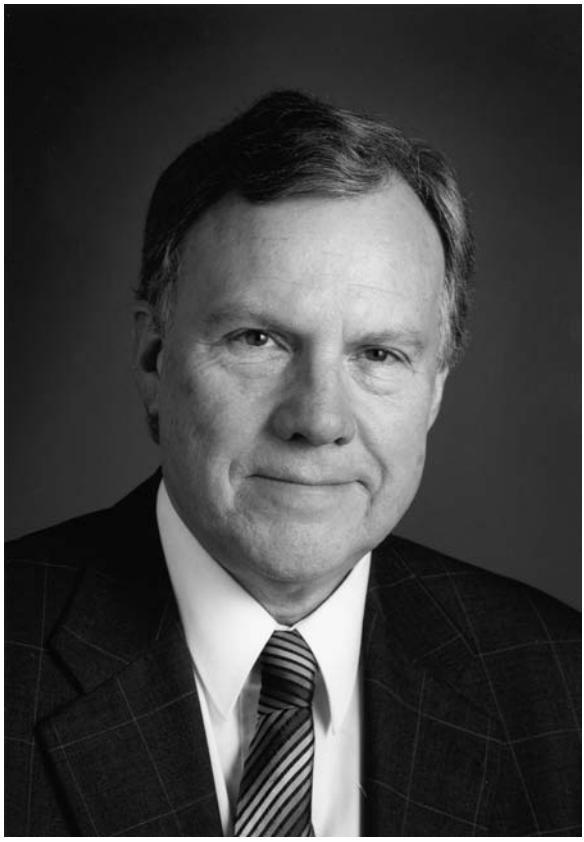

Professor Ove Bring

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Peace of Westphalia 1648. The United Netherlands are recognized by Spain, 15 May 1648.
'Allegory of Hugo Grotius and the Peace of Westphalia'.
Painting, c.1648/80, school of Gerard Ter Borch (1617-1681).

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Preface

This is a tribute to Ove – the teacher, the colleague and the friend. Ove's academic work will be reviewed in an essay by his companion in law and in life, Marie Jacobsson, and no-one could do it better than she. For our part, we shall here briefly recount some of the more salient points of his career, and add a few reflections.

Ove took his PhD at Stockholm University in 1979 with a dissertation on the protection of foreign investments, and was awarded a readership (assistant professor; docent) at the same university in 1983. Before finishing his PhD, Ove took employment at the Swedish Ministry for Foreign Affairs in 1975 as a legal adviser, and between 1987 and 1993 he was the special legal adviser for public international law (*folkrättsrådgivare*) and assistant under-secretary. In 1993, Ove returned to Academia when he took up the chair in international law at the University of Uppsala. Four years later he proceeded to Stockholm and the Carl Lindhagen chair in international law at Stockholm University. In that same year he was also appointed a professor of international law at the Swedish National Defence College, and when he resigned from Stockholm University in 2005, he was able to devote himself full time to the Defence College, where he and colleagues built up the Centre for Public International Law.

Ove has and has had many assignments. In 1995 he was appointed Swedish Conciliator under the European Convention on Conciliation and Arbitration within the CSCE (now OSCE), and in 1999 he became a member of the Permanent Court of Arbitration in The Hague. He is a member of the Swedish Foreign Ministry Delegation on International Law (*Folkrättsdelegationen*), was until 2007 a member of the Council of the San Remo Institute of International Humanitarian Law and is the current chairman of the Swedish Branch of the International Law Association. He is further a member of the Royal Swedish Academy of War Sciences, the Royal Swedish Society of Naval Sciences and a member of the The Royal Swedish Academy of Letters, History and Antiquities (*Vitterhetsakademien*).

For the Swedish public, Ove is 'Mr International Law', a one-stop, one-call encyclopedia of international law for students, journalists and policymakers. He made the events on and after September 11 comprehensible to a wide audience, he spoke out on the 2003 invasion of Iraq, he commented with spirit and vigour on Kosovo. Not only have his interests been in tune with what the public demanded, he has also always been able to explain difficult things in a manner accessible to all, and in a way that is a joy to listen to.

But there is also another side of Ove's involvement in public affairs, that of the humanitarian and human rights advocate. His engagement in the right to freedom of

speech is reflected in the fact that Ove is a member of the board of the Swedish Helsinki Committee and was a founding member of the Swedish Salman Rushdie committee. That commitment is evident also in many of the commissions that he has had. He participated in the Thomson/Blackwell humanitarian missions to former Yugoslavia reporting on the treatment of prisoners in Bosnia to the Committee of senior Officials of the Conference of Security and Cooperation in Europe (1992–93), which was an important part of the process that eventually led to the creation of the International Criminal Tribunal for the former Yugoslavia. In 1994 the Swedish Foreign Minister appointed him head of a human rights mission to China and Tibet and in 1998 he was commissioned by Sida, the Swedish International Development Authority, to report on human rights, democracy and constitutional law developments in Vietnam.

This broad engagement with international law matters is no coincidence. Not only is Ove very much a lawyer, he is also a 'policy-person' (which is not the same as a politician). For international lawyers, the vocation is very often not only a vocation, but also a calling. And Ove is a prime example of this. Nevertheless, he has not been the type of lawyer that allows policy to corrupt legal analysis. Rather, he has talked about trends in an almost McDougalian way and has often been willing to support trends that have been to his liking, he has never substituted wishful thinking for legal analysis.

* * * *

The theme of this Liber Amicorum has not been chosen randomly. Although Ove has been interested in many issues – not least investment protection and commercial arbitration – international law relating to the use of force has always been closest to his heart, and that pertains both to the *jus in bello* and the *jus ad bellum*, to peacekeeping as well as international criminal law and arms control. Furthermore, Ove has never restricted himself to legal analysis *de lege lata* (not that such a restriction is necessarily a bad thing, though). Rather, a hallmark of his writing has been the trajectories from what has been to what should be, the connecting links between time past, the present and the future. This is evidenced not least in his latest, majestic work on neutrality and collective security. Further, the focus on Nordic contributors (thus leaving out many of Ove's other friends) reflects his interest in the Nordic dimension of international law. We would like to thank all of the contributing authors for agreeing to follow our idea of focusing on legal history and de lege ferenda. That this often must involve also analysis of the law as it is, is not surprising (and neither regrettable).

* * * *

The initiative to this book was taken by Gustaf Lind who contacted Marie Jacobsson. It has, however, been the task of the two of us – Ola Engdahl and Pål Wrange, who also happen to be his two most recent doctoral graduates – to edit the volume. We would like to thank Gustaf for his continued support, and acknowledge that although Marie was not comfortable with being a co-editor of a Liber Amicorum to her husband, she assisted in conceiving the project, in tracing many of the contributors and in numerous other ways.

For various reasons, the timeframe for producing this volume has been rather compressed. Thanks are due to Brill and to the editor of the International Humanitarian Law series – Tim McCormack – for publishing the work in a timely manner. eddy.se did a tremendous job in providing the originals within very short time. The contributors have all cooperated within the tight schedule, which we are grateful for, particularly considering how busy they all are. The editors have benefited greatly from the swift editorial assistance of Maja Janmyr and Lise Wållberg, with help from Emelie Blomkvist. Brian Moore did the linguistic review with fervour matched only by his speed.

The National Defence College and Emil Heijnes Stiftelse have given generous grants for the costs of producing the volume, for which we are sincerely thankful.

Ola Engdahl *Pål Wrange*

Chapter 1

From Ove to Bring

*Marie Jacobsson**

1. Ove – From the Perspective of a Companion and Spouse

Ove has such an unsentimental view of his own writings. Many academics keep a detailed track record of what they have written and would not miss the opportunity to add something to their list of publications. This is certainly not the case with Ove. He *deletes* titles from his list. He likes the idea that if he adds a title, he should erase another, so as to keep the list short and focused. He has some sort of a written record, but its comprehensiveness is far from reliable and it certainly has a 'best before' date. He takes a similar approach to early editions of his books. If a new edition is printed, he gladly throws away the previous one. He himself knows exactly what he has written and when, but he sees few reasons to keep copies of everything he has written. Given the fact that he is a very well-organised person, this behaviour is an anomaly. It was not until recently, and just by chance, that I found out that he was co-author of a book on political developments in Latin America published in 1969.

Another characteristic example is the presentation of him as an author in his most recent book: *The Rise and Fall of Neutrality – or the History of Collective Security.* It only contains references to *two* of his previous books – both of which he has co-authored with a colleague. In the presentation he has not mentioned one of his own publications. "Why should I", he said, "these two books are the most recent ones". This is not a reflection of inverse snobbery – it is merely rationality.

I had taken it upon myself to present Ove's writings. A reasonably straightforward task, I thought. That turned out to be a major miscalculation. Even I had underestimated Ove's rational approach to his publications and the complications it led to in searching for copies of his books and articles. I had to get assistance from others. Dr. Ola Engdahl and the Library at the Defence College have been of great help. Ove's youngest son Fredrik Bring was entrusted with the task of discreetly interviewing his father over a glass of beer or two. In disguising his interrogation behind his true

* Principal Legal Adviser on International Law to the Swedish Ministry for Foreign Affairs and a Member of the United Nations International Law Commission (ILC). She is also Associate Professor of International Law at the University of Lund, Sweden.

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interest in history and human rights (in general) and in his father's personal history (in particular), Fredrik was indeed very successful.[1]

It is a challenge to do research and to cover up one's writing when a seriously interested person is around and keeps asking what you are writing about. I had to hide my manuscript, searches for books, contacts with the editors, librarians and other relevant persons. All communications by private email had to be labelled "Administrative questions", "Next planning meeting" or something that Ove would be genuinely uninterested in so as to prevent Ove from opening it. An additional complication was the fact that the work had to be undertaken at home (either in Stockholm or at Dalhems prästgård) and during vacations, weekends and holidays – when Ove is always around. I sometimes felt awkward – as if I was having an extramarital affair.

This compilation of Ove's writings does not encompass any of the legal analysis he made during his almost 20 years as a legal adviser on international law at the Swedish Ministry for Foreign Affairs (1975–1993). As would have been the case with any legal adviser, Ove produced a considerable quantity of legal analysis on a variety of issues during this period. Nor does it contain a list of presentations made at international academic conferences, public hearings or debates, NGO events, lectures etc, since it would be impossible to make such a list. Both elements – written legal analysis and public presentations – are part of a legal adviser's or a professor's daily work and do not need to be mentioned separately. Furthermore, his contributions in arbitration cases and analysis provided to law firms are not included either, for obvious reasons.

However, his written contributions to newspapers are listed because they reflect Ove's engagement in the contemporary or cultural aspects of international law. When Ove left the Ministry he became more accessible to the media, but his interest in making international law known to a wider audience started early, as will be shown below.

So what, then, is the point of listing his writings? Well, the co-editors of the book, Pål Wrange and Ola Engdahl, and in addition, Ove's former doctoral student Gustaf Lind and myself, thought that it would assist in giving a relevant presentation of his work to colleagues who meet him in the international arena. Ove is of the view that it is important to write in his mother tongue Swedish and the major bulk of his work is therefore published in Swedish. To write in a minority language, which can be read easily only in the Nordic countries, is quite unusual these days, when most international lawyers find it important to write solely in English. The use of words, grammar and syntax are important elements in all Ove's writings and he prefers to weigh his words on a golden scale in his own language, than on a silver scale in a foreign language.

I have known Ove as an international lawyer for a very long time and as my spouse for a somewhat shorter time. It is not difficult to respect Ove's knowledge, integrity, interest and concentration. However, his habit of entitling his articles and presentations: "*From X to Z*" has never appealed to me. I find it repetitious and somewhat unexciting. Ove, who genuinely dislikes non-comprehensive and pretentious

1 I am also indebted to Mr Timothy Chamberlain at the Swedish Ministry for Foreign Affairs for his assistance in translating the titles of Ove Bring's books and articles and for assisting me in checking my language. In addition to his professional assistance, Timothy has taken the time to answer my questions with respect to certain formulations and to the tone of the article.

titles, claims that his 'X to Z' titles or subtitles serve the purpose of declaring the content to the reader.

"Not again", I say. But Ove insists.

2. Bring – From the Perspective of a Colleague

Bring's interest in international law encompasses both public and private international law. It dates back to his time as a doctoral candidate when his supervisor, the late Professor Hilding Eek at Stockholm University, requested him to lecture on private international law. This was a wise step.

His doctoral thesis: *The Protection of Foreign Investment and the Law of Nations. A Study on the Influence of Developing States on Customary International Law* (1979) bears evidence of his interest in the connection between the development of international law and the political realities of the time in which a particular legal rule is developed. It does not matter if the legal norm developed in the 17th century, during the Concert of Europe or in the post-colonial era, if the emerging norm has technical or economic roots or is based on new political or moral values.

The thesis is interesting in that it focuses on the protection of foreign investment – an area where private and public international law coincide. It consists of three parts: the non-occidental trend in international law, the law of the protection of aliens and their property, and investment protection and contract law – and this is an early sign of the proliferation of his interests.

Bring never lost his interest in how regional legal systems or non-occidental countries influence the development of international law. It is characteristic that his stated ambition in the article *Hugo Grotius and the Roots of Human Rights Law* (2006) is to encourage young scholars to trace the 'roots' of international human rights law, not only in traditional western philosophy, but also in the cultures of Asia and Africa. This is a recurring theme in his writings. In his introductory lecture to the Royal Academy of Letters, History and Antiquities: *The Early History of Human Rights. From Ancient Times to the French Revolution* (2004) he states that despite the apparent occidental bias in the title, elements of human rights can be found in old Asian and Middle Eastern cultures. However, he says, the area remains to be further researched and he calls for multidisciplinary research in areas such as archaeology, ethnography, and legal history.

It is often noted by reviewers of his books that Bring never gets carried away by aligning himself politically with either one side or the other. While for example recognizing the importance of the right of self-determination of peoples, he does not approve of the oversensitivity of new-born states with respect to sovereignty, in particular if such an attitude fails to protect the people in the territory. This is evidenced both by his thesis and his subsequent books.

Bring's interest in a world order based on co-operation is beyond all doubt. At an early stage he took an interest in the duty to co-operate and his references to Wolfgang Friedmann's idea of the transformation of the international "law of co-existence" into a "law of co-operation" are recurrent. From this it is no great leap to become a genuine friend of the United Nations, an affection that is far beyond romanticism or naivety. He is a firm believer in the collective security system, as established by the UN Charter and he trusts that there is room for a legal development within the framework of the

Charter. We find early evidence of this in *International Law and World Politics* (1974) and *Dag Hammarskjöld and International Law* (1982), although it was a good few years before he wrote his first book on the UN Charter.

In the meantime he developed a strong interest in humanitarian law, strongly influenced by the ongoing negotiations on the 1977 Additional Protocols to the 1949 Geneva Conventions and later the negotiations on the so-called Conventional Weapons Convention, adopted in 1980. It was Dr. Hans Blix (then Principal Legal Adviser on International Law to the Swedish Ministry for Foreign Affairs) that recruited the young Bring and sent him to Geneva as a member of the Swedish delegation. Blix's engagement in international humanitarian law was not only particularly important in modern Swedish foreign policy, but became crucial for Bring's interest in humanitarian law.

However, Bring had a foundation to build on since, early on in his career, he had taken an interest in issues related to *jus ad bellum* and *jus in bello* and their political context. Bring's first newspaper article addressed both the *jus ad bellum* and the *jus in bello* aspects of the then latest developments in the Vietnam War, i.e. the crossing of the 17th latitude by armed forces from North Vietnam. Bring, who at the time had neither written his doctoral thesis nor begun to work at the Ministry for Foreign Affairs, interpreted the matter in light of the fact that many countries *de facto* had recognised Korea as two Koreas. We find, in his newspaper article *The Vietnam War and International Law* (1972), a theme that has come back over and over again in his positions: the fact that one country acts in contravention of international law (according to Bring: the US intervention in the South and bombings of targets in the North) does not justify the other side (North Vietnam) violating international law (in this case Article 2(4) of the UN Charter). Against this background Bring aired criticism of a rhetorical statement in Prime Minister Olof Palme's Labour Day speech (Första maj-tal). Another article on the same theme was published two weeks later (*The USA, Vietnam and international law*). Here Bring discussed the argument put forward by the US Ambassador George Bush in the Security Council who claimed that the US blockade was an act of self-defence. This was not the last time Bring would refer to George Bush senior and later to his son George W. Bush.

Two years later, Bring brought another of his concerns to the fore, namely, the connection between domestic policy concerns and national compliance with international law (*'Tough old boys' – outside the frame of the laws of war?* (1974)). The relatively speaking strong military Sweden was about to make cuts and changes in its army structure. This was a sensitive domestic issue, but Bring viewed the domestic arguments from the perspective of an international lawyer. The cause of Bring's concern was a publication by one of the most prominent Swedish generals, Nils Sköld, (later Commander-in-Chief of the Army) in which he had drawn certain operational conclusions from the Vietnam War. Sköld claimed that Sweden could make use of guerrilla operations and civil resistance in order to meet an enemy if Sweden was forced to militarily abandon parts of its territory (and hence the cutbacks were not detrimental to Sweden's ability to defend itself). Bring argued that such thinking would not only increase the suffering of the civil population, but also increased the risk of more brutal treatment of the active resistance fighters than if they had been regular soldiers. It is obvious that the critical comments on General Sköld's publication were the starting point, or rather, had given Bring the opportunity to write about the current legal regulations

and their relation to the proposal by the International Committee of the Red Cross on what categories of fighters could be given prisoner of war status – a proposal that later led to the controversial Article 44 of the 1977 First Additional Protocol. It goes without saying that Bring's article also contains a number of historical annotations from World War II.

Bring voiced concern about the lack of national debate on international law matters in an article a few months later (*International law hiding behind domestic politics?* (1975)). It is natural, writes the young Bring, that government statements and positions take place against a domestic political background, but this must not lead to a lack of compliance with international law. It is therefore important to have an open debate on international law, since such a debate may prevent politicians from disregarding international law. Even on a more general level, it is important to have a discussion on compliance with international law since such a discussion could widen and deepen the purely political debate. "The legal norms have an ability to cut through rigid ideological attitudes and may serve as a counterbalance against tendentious political conclusions" writes Bring, who also continues to claim that the public debate on the Vietnam War would have been well served by a legal and not just political approach.

Bring's interest in international humanitarian law extended over to disarmament law. This interest was certainly promoted by his role as a legal adviser and his recurring trips to Geneva and New York. Disarmament and arms control were issues where the Swedish voice was heard and the matter had, noted Bring, not only political, but also legal overtones. His book *The International Law of Disarmament* (1987) is a thorough and profound overview of the law of disarmament and its intersection with regulation of weapons under the laws of warfare. It contains chapters on disarmament under the League of Nations and the United Nations, the doctrines concerning nuclear weapons, arms control and environmental law. It deals with non-proliferation and strategic restrictions of nuclear, chemical and biological weapons, conventional weapons, demilitarised areas and arms control at sea and in space. The historical examples are numerous and the book also contains thoughts on future perspectives. The book benefits from the fact that Bring could draw on his experience as a legal adviser to the Ministry for Foreign Affairs and his experience of disarmament negotiations, primarily in Geneva.

The next step was his book on *The Law of the UN Charter* (1992) and the subsequent four editions of the sister book, *The UN Charter and World Politics. On the Role of International Law in a Changing World* (1994–2002). Bring's starting points are the major legal principles on which the UN Charter is built: equality of states, peaceful settlement of disputes, the prohibition of aggression and non-intervention, the right of self-defence and of self-determination and finally the duty to co-operate and to act *bona fide*. Bring uses historical and modern examples and analyses them from the perspective of *lege lata* and *lege ferenda*.

These volumes, together with a number of articles such as *Dag Hammarskjöld and International Law* (1982) and *From Suez to Kosovo: A Dynamic View of Chapters VI to VIII of the UN Charter* (1999) show Bring's interest in the development of international law, particularly the law of the UN Charter. As a lawyer, he is cautious, meticulous and analytical in his interpretations, but he is not 'conservative' or rigid. He knows where to draw the line and when he is moving to a discussion *de lege ferenda*.

Bring's interest in the dichotomy between the collective security system and neutrality led him to write the book *The Rise and Fall of Neutrality – or the History of Collective Security* (2008). No Swedish government lawyer – since the time of Jean Baptiste Bernadotte's declaration of neutrality in 1834 – has been able to avoid the legal aspects of neutrality. Given the fact that Sweden's aim to be neutral in wartime was long combined with a policy of neutrality, the Swedish concept of neutrality has always been a living organism. Bring's interest in the matter has several layers – political, historical, philosophical – but is always rooted in the legal context.

A government lawyer working at the MFA during the Cold War period was, for obvious reasons, somewhat restrained with respect to commenting on the legal notion of neutrality vs. the political notion of the policy of neutrality. However, the idea of Sweden as a neutral state has yet another dimension and that is the domestic dimension. When the Berlin Wall fell and the two superpowers started to cooperate in the Security Council the issue of neutrality became – in a sense – even more sensitive. Sweden was on its way to joining the European Union, the Government kept the legal analysis close to its heart and it is not by chance that we find Bring's articles on neutrality, collective security and the EU appearing shortly after he had left the Ministry.

It is worth mentioning that Bring never criticises individual colleagues who work in the various Ministries (Foreign Affairs, Defence, Justice). "I know the conditions under which they work", he often says, and "I am not prepared to single them out and to criticise them". He is prepared to criticise a government position or lack of action, but his lack of enthusiasm for criticism merely for the sake of criticism has been a disappointment to more than one journalist.

Although Bring is prepared to change or modify his views, few radical changes may be found. One of the most notable is sometimes said to be his view of humanitarian intervention. As a relatively young lawyer he wrote a short, polemical article against the view of the late Professor Atle Grahl-Madsen: *Humanitarian Intervention in Uganda* (1979). Grahl-Madsen had argued that humanitarian intervention was a legal concept that could be applied in the cases of "Kampuchea" and Uganda. Bring replied that there was a discrepancy between international law and 'international morality' in the case of Uganda and argued that the prohibition on the use of force in Article 2(4) was of an almost categorical nature and that the UN Charter contained no provisions on humanitarian intervention. In the more than 20 years between the article and military operations in Kosovo in 1999, Bring has maintained and deepened his interest in the matter and it would be fair to say that he has a somewhat more multilayered approach today. However, if one reads his articles carefully it is very difficult to discern any justification for humanitarian intervention before the UN has done all it is possible to do (and there are plentiful opportunities to act, he claims). His article *Dag Hammarskjöld and the Issue of Humanitarian Intervention* (2003), in which Bring traces the thinking of the former UN Secretary-General Dag Hammarskjöld in the context of his upbringing, reading and philosophical ideas, he also reflects on the concept of humanitarian intervention and the responsibility of the UN to act. This is a typical Bring article: a historical background, in this case in the context of the history of ideas, a legal problem in a political context, and a discussion *de lege lata* and *de ferenda* within the context of the responsibility of the UN.

This modification of his views on the *jus ad bellum* is to some extent neither surprising nor particularly divisive. Far more contentious were his thoughts on the *jus in*

bello in a situation of humanitarian intervention (see e.g. *International Humanitarian Law after Kosovo: Is lex lata sufficient?* (2002)). Bring did the unthinkable for a humanitarian lawyer: he asked whether *lex lata* was sufficient in the context of a humanitarian intervention or whether a *lege ferenda* discussion was called for in order to achieve a better protection for the civilian population, for example during a UN Peace Operation. By simply putting the question, he opened himself up to criticism both from those who place an emphasis on the humanitarian side of the laws of warfare and those who consider themselves as guardians of military necessity. He certainly had to sharpen his arguments in the discussions on targeting within the context of the ongoing Air and Missile Warfare project, in which he serves as an expert.[2] Perhaps we may see his thinking further developed in a forthcoming article on the subject?

Bring's profound cultural interest, particularly in literature and theatre, history and the history of ideas, has deepened further and become even more apparent since he left the Ministry. He is a member of the Royal [Swedish] Academy of Letters, History and Antiquities and he seldom misses a meeting.[3]

Neither his interest in Swedish authors – not least August Strindberg (1849–1912) nor his interest in the subject 'law and literature' is a whim. The interest in literature dates back to a time before he became a law student. One of the advantages he saw in moving from the Ministry to the University was the opportunity to work with international law in a wider, more academic and cultural context. It is with true joy and pleasure that he searches for new knowledge and inspiration. This includes female authors and political activists often disregarded in old and contemporary history books. Bring has a genuine interest in the life conditions of individuals and the context in which they live and act. He easily engages himself in their destiny. Early on he discovered Bertha von Suttner and therefore saw it as a great opportunity to make a presentation of some of her ideas, as reflected in her famous novel 'Die Waffen nieder' (1889), at a seminar in The Hague in 2005 (*Bertha von Suttner and International Law, the development of the ius contra bellum*). Bring's starting point is a thorough reading of von Suttner's 'Die Waffen nieder' – checking it of course in its original language and in the different Swedish editions, and placing it in its historical context and in the context of contemporary international law – as well as von Suttner's engagement in the Peace Conference held in 1899. Apart from analysing the main character Martha's (von Suttner's) views on the use of force, Bring also sheds light on her interest in the history of ideas and the ideas of various confederations and unions in Europe.

He truly enjoys searching for traces of international law aspects in literature, be it in Sophocles, Aristophanes, Aristotle, More and Rousseau, or in more modern authors such as Knut Vonnegut, Norman Mailer or Imre Kertész. His forthcoming article *Humanitarian Law and Literature – From Utopia to Slaughterhouse Five* (2008) bears evidence of this. The time period is carefully chosen so as not to collide with the

2 <www.ihlresearch.org/amw/>.

3 The Royal Academy of Letters, History and Antiquities was established in 1753 and its principal aims are to promote research in the field of the humanities, theology, and social sciences, to work for the preservation of the cultural heritage of Sweden, to promote international cooperation in the same fields and by so doing to maintain contact with foreign academies and international scholarly organisations.

excellent work of his colleague and friend Professor and Judge Theodor Meron, in particular his book *Henry's Wars and Shakespeare's Laws* (1993).

Every now and then Bring is contacted by authors from outside the legal field who ask for assistance in the nitty-gritty details of international law and he responds with enthusiasm to such requests.

3. And Back to Ove, Again

This short presentation of Ove's writings is not comprehensive but nor is it arbitrary. It is a short personal reflection on a few features of his interests and writings that I know engage him at a personal level. It is not an analysis of his academic legacy or of his personality, his interests and engagement outside his writings and legal interests. It is a presentation of him with the kind of a personal overtone that a colleague who also happens to be his wife can allow herself.

Chapter 2

The Writings of Ove Bring

Marie Jacobsson

This presentation of Ove Bring's writings is neither complete, nor is it a formal 'list of publications' to be included in a proper *Curriculum Vitae*. It simply aims at giving a reasonable picture of Bring's spheres of interest as reflected in his writings.

A number of publications are not included in the list, such as books that he has co-edited or treaty collections that he has compiled with colleagues.

His numerous presentations and official lectures are not listed, although some of them have been transformed into articles. Some of his contributions are reflected in the reports from the biannual meetings of the International Law Association and the annual reports from the Round Table Yearbook of the Institute of International Humanitarian Law in San Remo.

Bring's many newspaper articles are included since they reflect his engagement in the current debate on international law and politics and his profound interest in placing international law in a historical, cultural and legal context. The articles are most often published in the 'Debate' or 'Cultural' sections. It should be underlined that the headlines of articles are beyond the control of the author of the newspaper article. This means that the headlines do not properly reflect the contents of an article, but rather are chosen so as to attract the attention of the reader – often to the surprise and sometimes even dismay of the author. One such example is the headline of Bring's article on booty of war, *Ethics outweigh law* (2007) – a title that any international lawyer would feel somewhat uncomfortable with.

Bring has written numerous articles in the Swedish National Encyclopedia (Nationalencyklopedin), many of which are signed. They are accessible in the Encyclopedia and on the internet and often used as references.

1. Books and Booklets

All in Swedish except *International Criminal Law in Historical Perspective*.

1. **The Rise and Fall of Neutrality – or the History of Collective Security,** (*Neutralitetens uppgång och fall – eller den kollektiva säkerhetens historia*) Atlantis, 2008, 454 pp.

Comment: Bring's most recent book is a historical and political overview of neutrality and collective security. The emphasis is placed on the period from the 17th cen-

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 9–20.

tury onwards. The book has attracted considerable attention in Sweden as it became part of a domestic debate on issues of Swedish security policy.

2. **The International Use of Force under International Law**, *(Internationell våldsanvändning och folkrätt)* with Said Mahmoudi, Norstedts Juridik, 2006, 208 pp.

Comment: Bring contributed five separate articles to the book, four of which had been published previously. The new contribution is an article on the Iraq war and the issues of legality and legitimacy.

3. **Sweden and International Law**, *(Sverige och folkrätten)* with Said Mahmoudi, Norstedts Juridik, Stockholm, 1st ed. 1997, 2nd ed. 2001 and 3rd ed. 2007.

Comment: Professor Mahmoudi was Bring's colleague at Stockholm University. This book is the first book in Swedish that focuses on Swedish positions and views on a variety of international law issues. It serves both as a text book and a reference book.

4. **The Autonomy of the Åland Islands during 80 Years. Experiences and challenges**, *(Ålands självstyrelse under 80 år. Erfarenheter och utmaningar)* Ålands landskapsstyrelse, Mariehamn, 2002, 119 pp.

Comment: This book was commissioned by the Åland Government and addresses the history, experiences of and challenges to the autonomy of the Åland Islands region (the autonomous Finnish, but Swedish-speaking region in the Baltic Sea).

5. **The UN Charter and World Politics. On the Role of International Law in a Changing World**, *(FN-stadgan och världspolitiken. Om folkrättens roll i en föränderlig värld)* Norstedts Juridik, Stockholm, 1st ed. 1994, 2nd ed. 1997, 3rd ed. 2000 and 4th ed. 2002, 334 pp.

Comment: This book is a somewhat shortened and adapted version of the Law of the UN Charter. The basic structure of each edition is the same, but each new edition is updated so as to reflect the most recent developments, such as the UN Reform Programme under Secretary-General Kofi Annan and the legal implications of the 9/11 terrorist attacks against the USA.

6. **International Law for the [Swedish] Total Defence System. A Manual**, *(Folkrätt för totalförsvaret. En handbok)* with Anna Körlof, Norstedts Juridik, Stockholm, 2nd ed. 2000 and 3rd ed. 2002, 339 pp.

Comment: Anna Körlof is a doctoral candidate and a former colleague of Bring at the National Defence College.

7. **International Criminal Law in Historical Perspective**, Jure, Skriftserien vid Juridiska fakulteten, Stockholms Universitet, Visby, 1st ed. 2001 and 2nd ed. 2002, 157 pp.

Comment: This book consists of two parts: an introduction to international criminal law and a collection of treaties.

8. **Legal developments in Vietnam. Democracy and Human Rights. A Sida report**, *(Utvecklingen på det rättsliga området i Vietnam. Demokrati och mänskliga rättigheter. En rapport på uppdrag av Sida)* with Christer Gunnarsson and Anders Mellbourn, The Swedish Institute of International Affairs, Research Report 30, Stockholm, 1998, 84 pp.

Comment: Bring has written Chapter 3, Legal Developments, pp. 28–44. This is a report commissioned by the Swedish International Development Agency, written with Professor Gunnarsson, Lund University, and Director Anders Mellbourn, Swedish Institute for International Affairs.

9. **Åland on the Security Policy Agenda**, *(Åland på den säkerhetspolitiska agendan)* Report by Ove Bring, Lauri Hannikainen, Pertti Joenniemi and Krister Wahlbäck. Meddelanden från Ålands högskola, no 8, Mariehamn, 1996, 42 pp.

10. **International Law for the [Swedish] Total Defence System. A Manual**, *(Folkrätt för totalförsvaret. En handbok)* Norstedts juridik, 1994, 306 pp.

Comment: This book replaces the Manual on Military International Law (1987). It has a wider focus in that it encompasses the international law rules that are relevant for the entire Swedish Total Defence System and hence not only for the Swedish Armed Forces.

11. **The Law of the UN Charter**, *(FN-stadgans folkrätt)* Norstedts Juridik, Stockholm, 1992, 430 pp.

Comment: This book is Bring's major work on the law of the UN Charter, with a focus on self-determination, aggression, non-intervention, sanctions, use of force and humanitarian intervention. It contains a historical background and reflects legal positions and developments in the light of important political cases. It goes without saying that it also contains a chapter on the future outlook.

12. **Humanitarian Law and Arms Control**, *(Humanitär rätt och vapenkontroll)* UD informerar 1989:5 (Swedish Ministry for Foreign Affairs Information Series 1989:5).

13. **Manual on Military International Law. Rules on territorial protection, warfare and humanity**, *(Handbok i militär folkrätt. Regler om gränsskydd, krigföring och humanitet)* Allmänna förlaget, Publica Juridik, 1987.

Comment: Commodore Dr.h.c. Torgil Wulff, who was engaged in negotiation and implementation of the laws of warfare, had previously published the book Manual on International Law *(Handbok i folkrätt)* with Professor Stig Jägerskiöld. Commodore Wulff died in 1986. Since there was a need for an updated version, Bring partly updated the book so as to better reflect international law in general and the most recent developments in humanitarian law in particular. The book was published in collaboration with the estate of the late Torgil Wulff.

14. **International Law**, *(Folkrätten)* Co-authors Hilding Eek and Lars Hjerner, Institutet för rättsvetenskaplig forskning, Norstedts, 4th ed. 1987, 492 pp.

Comment: This book is the fourth edition of the late Professor Hilding Eek's main work on international law. Professor Eek died in 1983, and the publisher asked his successor Professor Lars Hjerner, and Ove Bring, to update Eek's book.

15. **The International Law of Disarmament**, *(Nedrustningens folkrätt)* Norstedts, Stockholm, 1987, 400 pp.

Comment: This book is a thorough overview of the law of disarmament. It contains historical examples and thoughts on future perspectives. The book benefits from the fact that Bring could draw on his experience as a legal adviser to the Ministry for Foreign Affairs and his experience of disarmament negotiations, primarily in Geneva.

16. **Aggression, self-defence and non-intervention. Three studies in international law**, *(Aggression, självförsvar och non-intervention. Tre studier i internationell rätt)* Iustus förlag, Uppsala, 1982, 103 pp.

Comment: The choice of title for this publication is inspired by Hans Blix's *Sovereignty, Aggression and Neutrality*, The Dag Hammarskjöld Foundation, Uppsala, 1970.

17. **The Protection of Foreign Investment and the Law of Nations. A Study on the Influence of Developing States on Customary International Law**, *(Det folkrättsliga investeringsskyddet. En studie i u-ländernas inflytande på den internationella sedvanerätten)* doctoral thesis, Stockholm University, Liber Förlag, Stockholm, 1979, 307 pp.

18. **The Laws of War. Human Rights in Armed Conflicts**, *(Krigets lagar. Mänskliga rättigheter i väpnade konflikter)* UD informerar 1977:4 (Swedish Ministry for Foreign Affairs Information Series 1977:4).

19. **International Law and World Politics**, *(Folkrätten och världspolitiken)* Askild & Kärnekull, Stockholm, 1974, 215 pp.

20. **Development at a standstill. Political, economic and social aspects**, *(Utveckling i baklås. Politiska, ekonomiska och sociala aspekter)* Co-authors: Carl Magnus Grenninger, Maude Edgahr, Göran G.Lindahl, Anders Sjöberg, Lars Kronvall, and Arne Carlsgårdh, LTs förlag, Stockholm, 1969.

Comment: Bring contributed: *Political developments in Argentina (Den politiska utvecklingen i Argentina)* pp. 22–89.

2. Articles in English

1. '**Humanitarian Law and Literature – From Utopia to Slaughterhouse Five**', to be published in *Yearbook of International Humanitarian Law*, The Hague, 2008.

2. '**Hugo Grotius and the Roots of Human Rights Law**', in J. Grimheden, R. Ring (eds.), *Human Rights Law: From Dissemination to Application. Essays in Honour of Göran Melander*, Martinus Nijhoff Publishers, Leiden, 2006, pp. 131–147.

3. '**The Iraq War and International Law: From Hugo Grotius to George W. Bush**', with Per Broström, in J. Hallenberg and H. Karlsson (eds.), *The Iraq War: European perspectives*, Routledge, London & New York, 2005, pp. 118–140.

4. '**Bertha von Suttner and International Law, the development of the ius contra bellum**', in *Report on the Symposium on the occasion of the 100th anniversary of the Nobel Peace Prize award to Bertha von Suttner*, organised by the Embassies of Austria, Norway and Sweden in cooperation with the Carnegie Foundation in the Peace Palace on 18 April 2005, published in collaboration with the Foundation for Austrian Studies, 2005, pp. 21–26.

5. '**National Implementation of UN Sanctions: Chapter 14 on Sweden**', in V. Gowland-Debbas (ed.), *National Implementation of United Nations Sanctions: A Comparative Study*, Koninklijke, Brill NV, 2004, pp. 473–522. Professors Per Cramér, Göran Lysén, and Ove Bring contributed to the chapter dealing with Sweden.

6. **'A Right of Self-Defence against International Terrorism?'**, with David I. Fisher, in D. Amnéus and K. Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, Lund, 2004, pp. 177–192.

7. **'Dag Hammarskjöld and the Issue of Humanitarian Intervention'**, in J. Klabbers and J. Petman (eds.), *Nordic Cosmopolitanism*, Essays for Martti Koskenniemi, Martinus Nijhoff Publishers, The Hague 2003, pp. 485–518.

8. **'From Nordic Neutrality to Regional Security: Small States in International Law and Politics'**, in *Essays in Honour of Gunnar G. Schram*, Almenna Bokafelagid, Reykjavik 2002, pp. 77–92.

9. **'International Humanitarian Law after Kosovo: Is *lex lata* Sufficient?'**, *Nordic Journal of International Law* (2002) pp. 39–54. This article is a shortened and slightly revised version of the article published in International Law Studies (2002).

10. **'International Humanitarian Law after Kosovo: Is *Lex Lata* Sufficient?'**, in A. E. Wall (ed.), Legal and Ethical lessons of NATO's Kosovo Campaign, US Naval War College, 78 *International Law Studies*; Newport, Rhode Island, 2002, pp. 257–272.

11. **'The Westphalian Peace Tradition in International Law: From Ius ad bellum to Ius contra bellum'**, in Essays in Honour of Professor Leslie C. Green, US Naval War College *International Law Studies*, Newport, Rhode Island, 2000, pp. 57–80.

12. **'Arms Control and International Environmental Law'**, 39 *Scandinavian Studies in Law*, Stockholm (2000) pp. 397–417.

13. **'Should Nato take the lead in formulating a doctrine on humanitarian intervention?'**, 47 *NATO Review 24*, Issue 3 (1999). Also published in: 10 *United States Air Force Academy Journal of Legal Studies* (Annual, 1999) pp. 61–66.

14. **'From Suez to Kosovo: A Dynamic View of Chapters VI to VIII of the UN Charter'**, in *Liber Amicorum for Bengt Broms*, Publications of the Finnish Branch of the International Law Association, Helsinki, 1999, pp. 12–38.

15. **'Reconstruction of External Relations in the Light of the Maastricht Treaty: The Case of Sweden'**, in *Anglo-Swedish Studies in Law*, Iustus Förlag, Uppsala, 1999, pp. 11–19.

16. **'The Legal Dimension of Multinational Peace Operations'**, *Juridisk Tidskrift*, Stockholm University, Nr 4 (1997–1998) pp. 944–951.

17. **'Peacekeeping and peacemaking: Prospective Issues for the United Nations'**, *Melbourne University Law Review* (1995) pp. 55–65.

18. **'The Changing Law of Neutrality'**, in O. Bring and S. Mahmoudi (eds.), *Current International Law Issues*, Nordic Perspectives, Essays in Honour of Jerzy Sztucki, Norstedts Juridik, Stockholm, 1994, pp. 25–50.

19. **'Correspondents' Agora: UN Membership of the former Yugoslavia'**, 87 *American Journal of International Law*, No.2 (April 1993) pp. 244–246.

20. **'Kurdistan and the Principle of Self-Determination'**, *German Yearbook of International Law* (1992) pp. 157–169.

21. **'Blinding Laser Weapons and International Humanitarian Law'**, with Bengt Anderberg and Myron Wolbarsht, *Journal of Peace Research* (1992) pp. 287–297.

22. **'The Gulf War and International Law-Legitimacy and Constraints'**, in *Current Problems of the International Humanitarian Law*, Finnish Red Cross and Åbo Akademi Institute for Human Rights, 1992, pp. 21–26.

23. **'Reflections on Richard Falk's article on the Gulf War: Should a functional approach to the UN Charter be considered unconstitutional?'**, *Juridisk Tidskrift*, Stockholm University (1991–92) pp. 375–378.

24. **'The 1981 Inhumane Weapons Convention'**, in XIII *Disarmament (United Nations)*, No. 4, (1990) pp. 157–168.

25. **'International Law and Arms Restraint at Sea'**, in S. Lodgaard (ed.), *Naval Arms Control*, PRIO, 1990, pp. 187–197.

26. **'Naval Arms Control and the Convention on the Law of the Sea'**, in R. Fieldhouse (ed.), *Security at Sea*, SIPRI, 1990, pp. 137–143.

27. **'Regulating Conventional Weapons in the Future – Humanitarian Law or Arms Control'**, *Journal of Peace Research* (1987) pp. 275–286.

28. **'Redressing a Wrong Question: The 1977 Protocols and the Issue of Nuclear Weapons'**, with Heinrich Reimann, *Netherlands International Law Review* (1986) pp. 99–105.

29. **'Star Wars' and International Law: The Multilateral Dimension'**, *Nordic Journal of International Law* (1986) pp. 195–207.

30. **'The Falkland Crisis and International Law'**, *Nordisk Tidskrift for International Ret* (now *Nordic Journal of International Law*)(1982) pp. 129–163.

31. **'The Impact of Developing States on International Customary Law Concerning Protection of Foreign Property'**, *Scandinavian Studies In Law* (1980) pp. 99–132.

3. Articles in Swedish

1. **'The Role of Regional Organisations in International Security Policy'**, *(Regionala organisationers roll i den internationella säkerhetspolitiken)* in O. Engdahl and C. Hellman (eds.), *Responsibility to Protect – folkrättsliga perspektiv*, Försvarshögskolan, Stockholm, 2007, pp. 163–193.

2. **'Åland as an International Legal Subject: Today and in the Future'**, *(Åland som internationellt subjekt: idag och i framtiden)* in H. Jansson (ed.), *Vitbok för utveckling av Ålands självbestämmanderätt*, Mariehamn, 2007, pp. 33–49.

3. **'Charles XII and International Law'**, *(Karl XII och folkrätten) Svensk Juristtidning* (2006) pp. 589–600.

4. **'Strindberg, International Law and the Dissolution of the Union'** [between Norway and Sweden], *(Strindberg, folkrätten och unionsupplösningen)*, in *Strindbergiana*, Yearbook, Atlantis, Stockholm 2006, pp. 123–131. Also published in *the Royal [Swed-*

ish] Academy of Letters, History and Antiquities, Yearbook 2006, pp. 107–115. (August Strindberg (1849–1912) is one of the most influential Swedish authors.)

5. **'The Early History of Human Rights. From Ancient Times to the French Revolution'**, *(De mänskliga rättigheternas tidiga historia: Från antiken till den franska revolutionen) The Royal [Swedish] Academy of Letters, History and Antiquities*, Yearbook 2004, pp. 181–201.

6. **'The Autonomy of Åland debated'**, *(Ålands självstyrelse under debatt) Internationella studier*, Nr 1 (2002) pp. 103–107.

7. **'A Right of Armed Self-defence Against International Terrorism?'**, *(En rätt till väpnat självförsvar mot internationell terrorism?) The Royal Swedish Academy of War Sciences Proceedings and Journal*, 2001:6, pp. 153–164, also published in *Juridisk Tidskrift*, Nr 2 (2001–2002) pp. 241–251.

8. **'The Pinochet Case and Swedish Legislation'**, *(Pinochet-målet. Folkrätten och svensk rätt)* with Professors Lars Hjerner and Said Mahmoudi, *Svensk Juristtidning* (2000) pp. 325–339.

9. **'Strindberg and International Law'**, *(Strindberg och folkrätten) Svensk Juristtidning* (1999) pp. 656–670. (August Strindberg (1849–1912) is one of the most influential Swedish authors.)

10. **'On the Legal Importance of the Peace of Westphalia. Some Annotations on a 350th Anniversary'**, *(Om Westfaliska fredens folkrättsliga betydelse: Några anteckningar vid ett 350-årsjubileum) Svensk Juristtidning* (1998) pp. 721–741.

11. **'From Bologna to Maastricht. Some Points in the European History of Private International Law'**, *(Från Bologna till Maastricht. Några nedslag i den internationella privaträttens europeiska historia)* in *Rättsvetenskapliga studier tillägnade Carl Hemström*, De Lege, Juridiska fakulteten vid Uppsala Universitet, Uppsala, 1996, pp. 41–65.

12. **'On the Development of Maritime Neutrality – Some Reflections Prompted by a Manual on Naval Warfare'**, *(Om den marina neutralitetens utveckling – några reflexioner i anledning av en sjökrigsmanual) Journal of the Royal Swedish Naval Society*, 1996:3, pp. 177–185.

13. **'Foreign and Security Policy'**, *(Utrikes och säkerhetspolitik)* in 5 *Publica EU: Kommentar till EG-rätten*, Norstedts Juridik, 1996, 50:3–10.

14. **'Sweden and the Law of Neutrality – From Hugo Grotius to Carl Bildt'**, *(Sverige och neutralitetsrätten – Från Hugo Grotius till Carl Bildt) Svensk Juristtidning* (1995) pp. 425–438.

15. **'Neutrality contra Collective Security'**, *(Neutralitet contra kollektiv säkerhet)* in *The Royal Swedish Academy of War Sciences Proceedings and Journal*, 1992:6, pp. 423–429.

16. **'Submarine Operations and International Law'**, *(Ubåtsoperationer och folkrätt)* in *Festskrift to Lars Hjerner, Studies in International Law*, Stockholm, 1990, pp. 63–92.

17. **'Immunity and Submarines – Once More'**, *(Immunitet och ubåtar än en gång) Svensk Juristtidning* (1985) pp. 68–72.

18. **'Dag Hammarskjöld and International Law'**, *(Dag Hammarskjöld och folkrätten) Svensk Juristtidning* (1982) pp. 433–460.

19. **'International Law and Diplomatic Protection'**, *(Folkrätten och diplomatskyddet) Civilt försvar* (Maj/Juni 1980) pp. 96–98.

20. **'Humanitarian Intervention in Uganda?'**, *(Humanitär intervention i Uganda?) Internationella studier*, 1979:5, pp. 15–16.

21. **'The Legal Institution of Reprisals and the Diplomatic Conference on the Laws of War'**, *(Det folkrättsliga repressalieinstitutet och diplomatkonferensen om krigets lagar) Svensk Juristtidning* (1978) pp. 481–503.

4. Articles in Newspapers

The sovereignty of Serbia must give way. Svenska Dagbladet, 22 February 2008. Serbiens suveränitet måste ge vika.

Never-ending debate leads to a legal vacuum. Svenska Dagbladet, 20 February 2008. Långbänk leder till folkrättsligt vakuum.

Ethics outweigh law. Svenska Dagbladet Under strecket, 30 November 2007. Moralen väger tyngre än juridiken.

Ove Bring warns against disproportionate use of force: Turkish invasion in Iraq is against international law. Expressen, 27 October 2007. Ove Bring varnar för oproportionerligt våld: Turkisk inmarsch i Irak strider mot folkrätten.

Ove Bring on the deference of the Minister for Foreign Affairs towards China. Bildt's praise in the UN takes problems too lightly. Expressen, 2 October 2007. Ove Bring om utrikesministerns undfallenhet gentemot Kina: Bildts FN-beröm är lättvindigt.

Russian gas pipeline in contravention of the UN Charter. Dagens Nyheter Debatt, 28 November 2006. Ryska gasledningen strider mot FN-stadgan, with Professor Bo Huldt and Rear Admiral Claes Tornberg.

Who pays for the devastation? [On Israel's bombing of Lebanon and Hizbollah's rocket attacks on Israel]. Svenska Dagbladet Brännpunkt, 27 November 2006. Vem betalar förödelsen?

A trader in nuclear merchandise. Svenska Dagbladet Under strecket, 4 August 2006. Handlare i nukleära varor.

International passivity may be fatal. Svenska Dagbladet, 19 July 2006. Omvärldens passivitet kan bli ödesdiger.

Chemical terror is a real threat to the world. Svenska Dagbladet Under strecket, 14 July 2006. Kemisk terror ett reellt hot mot världen.

Charles XII on trial. Svenska Dagbladet Under strecket, 23 October 2005. Karl XII ställd inför rätta.

Annan shares Hammarskjöld's moral pathos. Svenska Dagbladet Under strecket, 29 July 2005. Annan delar Hammarskjölds moraliska patos.

Myths about Israel's wall. Yes to the barrier – if it were on Israeli territory. Dagens Nyheter Debatt 24 July. Myter om Israels mur. Folkrättsexpert: Ja till barriärbygget – om det låg på israelisk mark.

The fight against terrorism gone astray. Svenska Dagbladet Under strecket, 27 October 2004. Kampen mot terrorn på avvägar.

The destruction of Dresden re-evaluated. Svenska Dagbladet Under strecket, 29 July 2004. Dresdens förstörelse omvärderad.

Definition correctly applied in The Hague. Svenska Dagbladet, 27 November 2003. Definitionen rätt tillämpad i Haag.

War threatens UN credibility. Sweden should take an initiative for an extraordinary meeting of the UN General Assembly. Dagens Nyheter Debatt, 29 March 2003. Kriget hotar helt rasera FN:s trovärdighet, with Professors Per Cramér and Said Mahmoudi.

Continued Debate on the Autonomy of Åland. Ålandstidningen, 8 February 2002. Ålands självstyre under fortsatt debatt.

Legal expert sets a time limit for the USA: No occupation by ground troops. Dagens Nyheter Debatt, 20 October 2001. Folkrättsexpert sätter tidsgräns för USA: "Marktrupper får inte ockupera".

Indiscriminate attacks are always prohibited by international law. Svenska Dagbladet Analys. 18 August 2001. Urskillningslösa angrepp är alltid folkrättsligt förbjudna.

The thought of independence looms on Åland. Svenska Dagbladet Under strecket, 19 August 2001. Tanken på självständighet hägrar på Åland.

Should Kissinger be put on trial? Svenska Dagbladet Under strecket, 31 May 2001. Bör Kissinger ställas inför rätta?

The guilt of Nations can be atoned for by money. Svenska Dagbladet Under strecket, 24 January 2001. Nationernas skuld sonas med pengar.

When are humanitarian interventions legitimate? Svenska Dagbladet Under strecket, 20 December 2000. När är humanitära interventioner legitima?

Lack of arms control in Iraq may be permanent. Svenska Dagbladet Under strecket, 31 August 2000. Frånvaron av vapenkontroll i Irak kan bli permanent.

A critical look at war criminals tribunals. Svenska Dagbladet Under strecket, 29 June 2000. Kritisk granskning av tribunaler mot krigsförbrytare.

Government is ducking the issue of necessary force. Svenska Dagbladet Brännpunkt, 21 June 2000. Regeringen duckar för nödvändigt våld, with co-members of the Swedish Helsinki Committee: Leif Ericsson, Gustaf Lind, Gerald Nagler, Percy Bratt, Arne Ruth and Robert Hårdh.

Pinochet and the politics of dictatorship. Svenska Dagbladet Under strecket, 26 May 2000. Pinochet och diktaturens politik.

Norway misintrepreted tele-agreement: Norwegian government lacks legal support for its view of the shareholders' agreement. Dagens Nyheter Debatt, 21 December 1999. Norge

tolkade teleavtalet fel. Folkrättsexperten Ove Bring om Telia-Telenor-affären: Norska regeringen saknar juridiskt stöd för sin syn på aktieägaravtalet.

[Former Prime Minister] Ingvar Carlsson's condemnation of Nato odd. Svenska Dagbladet Brännpunkt, 15 April 1999. Ingvar Carlssons fördömande av Nato märkligt.

Human rights – a problematic anniversary. Svenska Dagbladet, 10 December 1998. Mänskliga rättigheter – ett jubileum med problem.

Progress at a standstill [Human Rights]. Aftonbladet, 3 December 1998. Utvecklingen har gått i stå.

Neutrality inconsistent with EU membership. Svenska Dagbladet Under strecket, 6 August 1998. Neutralitet oförenlig med medlemskap i EU.

Cooperation more important than neutrality. Dagens Nyheter Debatt/Repliken, 4 May 1997. Samarbete viktigare än neutralitet.

Neutrality is passé. The phasing out of the Swedish policy of neutrality is already in progress. Dagens Nyheter Debatt, 21 April 1997. Neutraliteten passé. Utfasningen av Sveriges neutralitetspolitik pågår redan, skriver professor.

50 years since the Nuremberg verdicts. A historical lesson. Expressen, 1 October 1996. Mitt i Expressen. I dag är det 50 år sedan Nürnbergdomarna. En historisk läxa.

EU vacillating in the Rushdie affair. Svenska Dagbladet, 16 July 1996. EU vacklar i Rushdieaffären.

Passivity is not good enough. International law expert criticises Sweden. Dagens Nyheter, 22 July 1995. Passivitet duger inte. Folkrättsexpert kritiserar Sverige.

We ourselves decide our policy of neutrality. Svenska Dagbladet Debatt, 20 May 1994. Neutralitetspolitiken bestämmer vi själva.

Recognitions are not at odds with international law. Croatia's lack of control over its territory a consequence of external threats. Svenska Dagbladet Brännpunkt, 31 January 1992. Erkännandena inte på kant med folkrätten. Kroatiens bristande kontroll av sitt territorium en följd av yttre hot.

The War Resolution – an innovation. Criticism of the UN Security Council is unfounded. Dagens Nyheter Debatt, 13 February 1991. Krigsresolutionen en innovation. Kritiken mot FN för beslutet i säkerhetsrådet är oberättigad.

UN Security Council must have a right to seek new solutions. Svenska Dagbladet Brännpunkt, 15 March 1991. FN-rådet måste ha rätt att söka nya lösningar.

A UN thought that works. Svenska Dagbladet Analys, 26 August 1990. FN-tanke som fungerar (with Professor Göran Melander).

International law hiding behind domestic politics? Svenska Dagbladet Brännpunkt, 26 February 1975. Folkrätten skymd av inrikespolitiken?

"Tough old boys" – outside the laws of war? Swedish guerrilla units may mean extra suffering for civilians. The laws of war are written for regular troops. Svenska Dagbladet Brännpunkt, 27 November 1974. "Sega gubbar" – utanför krigets lagar? "Sega gubbar" eller

svenska gerillaförband kan medföra extra lidanden för civilbefolkningen. Krigets lagar är skrivna för reguljära trupper.

The USA, Vietnam and international law. Göteborgs Handels- och sjöfartstidning, 23 May 1972. USA, Vietnam och folkrätten.

The Vietnam War and International Law. Göteborgs Handels- och sjöfartstidning, 9 May 1972. Vietnamkriget och folkrätten.

5. Examples of Book Reviews

Bring's reviews are informative and clear, but never without comments or reflections. They are most often evidence of his particular interests. Below are a few examples:

Stephen C. Schlesinger, 'Act of Creation: The Founding of the United Nations', in 24 *Australian Yearbook of International Law*, 2004, pp. 257–260.

Comment: In this review Bring sheds the light on the role of the Australian Minister for External affairs Herbert Vere Evatt during the 1945 San Francisco Conference. He also highlights the contribution of small states and the Latin American Group in relation to what became the final version of Article 51 of the UN Charter.

Bertrand G. Ramcharan, 'The Security Council and the Protection of Human Rights', in 22 *Nordisk Tidsskrift for Menneskerettigheter* (Nordic Journal of Human Rights) Nr 1 (2004) pp. 88–90.

Comment: Bring expresses appreciation of Ramcharan's book, but notes that he, as an international civil servant, is careful (too careful, according to Bring) not to mention states and individuals by name. Bring also identifies a number of important European Court of Human Rights cases that are not referred to in Ramcharan's book.

Martti Koskenniemi, 'The Gentle Civilizer of Nations, The rise and fall of international law 1870–1960' in 138 *JFT, Tidskrift utgiven av Juridiska Föreningen i Finland*, rg. 4–5 Häftet, (2002) pp. 439–544.

Comment: This is a detailed presentation of Koskenniemi's book and its relation to Koskenniemi's seminal work: 'From Apology to Utopia. The Structure of International Legal Argument' 1989. He presents Koskenniemi's thoughts and his reasons for writing the historical exposé. Bring concludes his appreciative review by travestying the German author Hans Fallada: *Was nun, kleiner Mann?*

Geir Ulfstein, 'The Svalbard Treaty', in *Tidskrift for Retsvitenskap*, Nr 3 (1997) pp. 557–564.

Comment: In this very dense and positive review, Bring focuses on theory of treaty interpretation and the demilitarisation provisions in the Svalbard Treaty.

W. Heintschel von Heinegg, 'Der Aegis-Konflikt. Die Abgrenzung des Festlandsockels zwischen Griechenland und der Türkei und das Problem der Inseln im Seevölkerrecht', *Netherlands International Law Review* (1990) pp. 279–281.

Comment: Bring expresses appreciation of von Heinegg's thorough work and focuses on his discussion of customary law.

Chapter 3

Legal Restraints on the Use of Armed Force

*Hans Blix**

1. The Current Landscape of Armed Conflict

There is some good news for a world longing for peace:

- The number of *interstate wars* is reported to have gone down. Civil wars currently account for the major part of the use of armed force.[1]
- The fear of a showdown between the two blocks that stood against each other has subsided after the end of the Cold War;
- The ambition to ensure *security for states* against threats and attacks from the outside has been complemented and expanded to a much broader ambition to ensure *security for individuals* against threats of hunger, natural and environmental disaster, violence and oppression – even by their home states.

Regrettably, there is also bad news:

- The world's *annual military expenditures* are currently at some 1.2 trillion US dollars;[2]
- The use of armed force is not infrequently threatened, for instance, by declarations that 'all options are on the table';
- More states have declared that they do not exclude *first strikes* with the nuclear weapons they possess;
- Millions of people continue to suffer the consequences of political violence and internal armed conflicts.

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* Under-Secretary of State in 1976 and was appointed Minister for Foreign Affairs in 1978. He served as Director General of the International Atomic Energy Agency between 1981–1997 and as Executive Chairman of the UN Monitoring, Verification and Inspection Commission between 2000–2003. In 2003, Dr. Blix was appointed Chairman of the Weapons of Mass Destruction Commission which published its report *Weapons of Terror* in June 2006.

1 Human Security Report (University of British Columbia, Vancouver, 2005) Part V, accessed from <www.humansecurityreport.org/index.php?option=content&task=view&id=28&Itemid=63>, visited on 23 March 2008; *cf.* Jean-Marie Guehenno in The International Herald Tribune, 12 September 2005.

2 *SIPRI Yearbook 2007: Armaments, Disarmament and International Security* (Oxford University Press, 2007) Chapter 8.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 21–38.

In spite of the reduced risk of war between states, peace remains vulnerable in the new millennium.[3] It thus remains as desirable as ever to identify factors that may help to prevent or restrain any future use of armed force between states. These factors are of various kinds.

The number of conflicts regarding *borders* has been reduced. Through recognition – by agreement or otherwise – of land borders between states and of sea borders resulting from the UN Convention on the Law of the Sea and other conventions the geopolitical division of the world has moved toward greater stability. Further, the emancipation of practically all colonies has put an end to an era of much armed struggle for independence. What sometimes remains a source of conflict – even armed conflict– is borders arbitrarily drawn in colonial times.

Another reason for the reduction of interstate wars may be that frictions caused by efforts to expand the domination of *religion and ideology* no longer remain likely to cause armed conflicts between states. The much talked about 'wars of civilizations' will not be shooting interstate wars – but could comprise acts of terrorism.

A most important reason for a reduction in armed interstate actions is probably the rapidly growing economic and environmental *interdependence* of states. Between closely intertwined state communities many people and enterprises develop an interest to maintain peace. The European Union is based on this belief. It is reasonable to think, further, that arms control and disarmament may reduce tension and the risk of conflicts, while arms races, for instance in space, may increase the risk of armed conflicts.

A growing international fabric of bilateral, regional and multilateral *legal rules* results from the interdependence but also leads to habits of solving differences through negotiation and agreement. An expansion of the already significant scope for the judicial solution of differences in the trade and economic field (*e.g.*, within the WTO) would reduce the number, longevity and potential gravity of conflicts in this field. All these factors are rightly the subject of wide study.

It remains relevant also to examine how far rules directly restraining the use of armed force have developed over time and how effective they are now. The nascent international norms to strengthen the security of the individual by stressing the duty of states to protect and the role of the international community to intervene – in the last resort by force – to ensure security against gross violations are not discussed in this article.[4] It is devoted primarily to rules aiming at the *security of states* against threats and attacks from the outside. The currently relevant rules are found in the UN Charter. A quick review of the history leading up to these rules, a discussion of their current *status* and of factors possibly affecting their *development* are the subjects of this article.

3 In an article of 10 August 2007 in the International Herald Tribune, Henry Kissinger writes that "in the public dimension, something approaching Cold War attitudes is re-emerging".

4 *See Redefining Sovereignty and Intervention (The Responsibility to Protect)*, *Report of the International Commission on Intervention and State Sovereignty* (International Development Research Center, Ottawa, 2001).

2. The Emergence of Restraints on the Use of Armed Force

Early customary international law did not prohibit rulers to go to war but the demand for some justification for opening hostilities was raised early in history. That notions on 'just war' developed at a time when the Catholic Church claimed supremacy over worldly rulers is not surprising. Ian Brownlie cites *St Augustine* (A.D. 354–430) as saying: "Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizen or to restore what has been unjustly taken by it. Further that kind of war is undoubtedly just which God Himself ordains."[5]

Machiavelli (1492–1550), as one might expect, was less demanding. Brownlie cites him as saying: "that war is just which is necessary and every sovereign entity may decide on the occasion for war".[6]

It may be noted parenthetically that despite the existence of different concepts and terms in the UN Charter the old fashioned concept cited is still used. In reply to a question put to him President Bush unhesitatingly affirmed that the Iraq war was 'a war of necessity', not one of 'choice'.

2.1 Restrictions in the Use of Means and Methods of Warfare

The second half of the 19th century and the turn of the century saw a forceful development of rules that were based on the premise that wars will be fought and that sought to outlaw conduct that was cruel and, at the same time, not rationally needed from a military standpoint for the pursuit of the war. Today such efforts – termed *jus in bello*, the *laws of war* or *human rights in armed conflicts* – are mostly and rightly seen as seeking mitigation of some of the horrors of war.

2.2 Preludes to Legal Restraints on the Use of Armed Force

Even though in the 19th century the Church was no longer able to impose the notion of just war and the right to go to war was, accordingly, seen as unrestricted, the view was stressed that war should be *a means of last resort*.[7] The conventions adopted at the Hague Peace Conferences did much to promote and facilitate the *settlement of disputes* by arbitration and other peaceful means and one convention adopted in 1907 prescribed that the opening of hostilities should be preceded by a declaration of war or ultimatum *specifying the reasons*.[8]

Another Convention adopted in 1907 (the so called *Porter Convention*) clearly signalled that armed force should not be used for some narrow economic reasons:

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5 Iain Brownlie, *International Law and the Use of Armed Force by States* (Clarendon Press, Oxford, 1963) p. 5.

6 *Ibid.*, p. 11.

7 *Ibid.*, pp. 19 *et seq.*

8 T. Gihl, *Om Freden och Säkerheten*. (Norstedts, Stockholm, 1962), p. 304. *Cf.* Article 10(1) of the Non Proliferation Treaty, which requires a state withdrawing from the treaty to include in its withdrawal notice 'a statement of the extraordinary events it regards as having jeopardized its supreme interests'.

> "The Contracting Parties agree not to have recourse to armed force for the recovery of *contract debts* claimed from the Government of one country by the Government of another country as being due to its nationals." "The undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award."[9]

Reading this 100 year old convention we realize that the *global attitude* to the use of armed force has changed quite a bit since the convention was adopted. It had evidently not been out of question for a government to send a gunboat to some poor debtor country demanding that it pay its debts. Today gunboats are not sent to defaulting countries to collect contract debts. Such defaults are more likely to result in the dispatch of rescue boats from the World Bank or the IMF. Currently, a more likely use of gunboats – or aircraft carriers – is to back up demands that a state stop enrichment of uranium.

Modern means of communications and vastly increased international trade and finance have resulted in a process of accelerating integration. During this period the modest first treaty restraints on the resort to the use of armed force between states began to develop, notably the *Covenant of the League of Nations*, and the *Briand Kellogg Pact*.

These instruments have been analysed by many writers and they will not be commented upon here. Regrettably, neither these legal restraints nor the disarmament efforts of the League period helped to prevent the march to the Second World War. Rather than dwelling on this phase I shall jump to the next one and discuss the collective security concept laid down in the UN Charter and how it was crippled during the Cold War.

3. The United Nations

The Charter of the United Nations adopted at the end of the Second World War marked a conceptual and organizational leap forward in the efforts to restrict the use of armed force and advance the idea of 'collective security'.

Article 2(4) of the Charter *prohibited the threat or use of force* against the territorial integrity and political independence of any state. This was not to be just a toothless rule admonishment. The Security Council was authorized to *intervene* – if need be with military force – to stop aggression or threats to or breaches of the peace and member states undertook in Article 25 "to accept and carry out the decisions of the Council in accordance with …the Charter".

In practical terms, upholding the ban on the use of armed force was made dependent on the five victors in the Second World War: China, France, the Soviet Union, the UK and the US. These states – the P5 – were given permanent seats in the Council and the Charter prescribed that their consent would be needed for all deci-

9 Article 1, The Hague Convention II Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, The Hague, 18 October 1907, accessed from <www.yale.edu/lawweb/avalon/lawofwar/hague072.htm>, visited on 23 March 2008. Emphasis added.

sions of substance. Decisions and action by the Council could thus be blocked by the *veto of any one of the P5* and it was to be expected that the Council would be unable to agree on any action taken against the use of force exercised or threatened by anyone of these five states or their allies.

In a bipolarised world this meant that states could not look for protection in action by the Council. As before, they had to protect themselves through *individual or collective self-defence* – a right that was explicitly preserved in Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, *until the Security Council* has taken measures necessary to maintain international peace and security. …"[10]

On paper the reliance on the 'inherent' right of individual or collective *self-defence* looked like an exception, valid only until the Security Council could take action. However, the exception became the main rule; NATO and other alliances – not the UN – could hold shields of protection. During the Cold War the common security system devised in the UN Charter to protect members against violations of Article 2(4) of the Charter was mostly *inoperative* against transgressions that occurred and that more directly engaged any one of the P5.

An exception was the case of North Korea's aggression against South Korea in 1950 – seen as a war by proxy. Here, the Council was able to take a decision authorizing an armed response for the very special reason that the Soviet Union was absent from the Council in protest against China's representation through the Nationalist Government. A similar UN response is not likely to occur. No P5 state would ever again leave its Council seat empty and risk a formal decision that it would deem strongly negative to its interests.

Nevertheless, both during the Cold War period and subsequently there have been many cases in which what appeared like *prima facie* violations of Article 2(4) met with Security Council reactions in which legal reasoning was tempered by *pragmatism* and by what seemed equitable in the particular circumstances. Thomas M. Franck devotes a meticulous study to a fairly large number of such cases.[11] The conclusion that emerges from his analysis is that the Security Council administration of Article. 2(4) is one in which an 'international law of equity' is allowed to prevail to blunt the categorical rules of a common (UN Charter) law:

> "…while the UN system aims to substitute its collective security for traditional state reliance on unilateral force, it has had some success in adjusting to a harsher reality. In particular, it has acquiesced, sometimes actively, at other times passively, in the measured expansion of the ambit for discretionary state action and has done so without altogether abandoning the effort evident in Article 2(4) to contain unilateral recourse to force. It has sought balance, rather than either absolute prohibition or license."[12]

10 Emphasis added.

11 T. M. Franck, *Recourse to Force – State Action Against Threats and Armed Attacks* (Cambridge University Press, 2002), p. 50 and pp. 52–17.

12 *Ibid.*, p. 171.

One need not agree with Thomas Franck's reading of every-one of the cases analyzed. A less understanding reading than his could in some cases be that the Council simply passed judgments that ignored the rule of the Charter. In the main, however, his conclusion is convincing.

4. The Gulf War 1991

With the end of the Cold War and the end of the East-West ideological conflict a fundamental practical premise for the Council's action changed to the better. Unanimity or at least *consensus* between the five permanent members of the Council was *no longer unlikely.* The most spectacular case occurred in 1990, when Iraq attacked and occupied the state of Kuwait.

President Bush the elder built an international coalition of states, including Arab states, and in 1990 the Security Council authorized military action to oust the Iraqi forces from Kuwait. The action could be legally justified on two grounds: as an act of collective self-defence by Kuwait and other states against an armed attack and as action authorized by the Security Council against an act of aggression.

The action caused euphoria in the UN and the world. It was felt that following the long paralysis during the Cold War the security system and the Charter might now come to function as originally envisaged at San Francisco. President Bush the elder spoke about *'a new international order'.* Sceptics felt some doubts about the reliability of this order and, indeed, in the course of the 90's there developed differences in the way various P5 members of the Security Council followed up sanctions and inspections in Iraq. A case in point were the bombings carried out by the US and UK in 1998 as a punishment for Iraq's lack of cooperation with UN inspectors.[13]

The differences between the P5 in the Security Council on how to deal with Iraq were just barely resolved in December 1999 with the adoption of SC Res. 1284 that created UNMOVIC (United Nations Monitoring, Verification and Inspection Commission). As will be discussed below, they erupted again – with a vengeance – in 2003, when the US and some allied states intervened with armed force in Iraq without the authorization of the Security Council.

The bombings by NATO in Kosovo in 1999 was another case in which serious disagreement between the permanent members of the Security Council resulted in failure to cement the common international order supposedly born in 1990.

5. The Kosovo Case (1999)

In the case of Serbia's measures of suppression in the province of Kosovo the permanent members of the Security Council long sought to maintain a common line. In March 1998 the Council condemned the excessive use of force by Serbian police, expressed support for greater autonomy and self-government of Kosovo and, acting under Chapter 7 of the UN Charter, decided on an arms embargo. However, when after a meeting at Rambouillet in France in March 1999 Yugoslavia had rejected a pro-

13 For critical comments on the legality of the bombings, *see* P. Wrange, 'The American and British Bombings of Iraq and International Law', 39 *Scandinavian Studies in Law* (2000) pp. 491–514.

posed settlement giving Kosovo greater autonomy, NATO began air strikes against Yugoslav military units in Kosovo, and then there was no longer agreement between the P5 in the Council.

It was not in dispute that the humanitarian situation in the province was grave. Many hundreds of thousands of Kosovars had fled or were displaced and Yugoslav troops carried out 'ethnic cleansing'. Nevertheless, Russia, China and some other states felt that the NATO action without authorization by the Council was in flagrant violation of the Charter and could constitute a dangerous precedent. However, a draft resolution presented by Russia and declaring the action a violation of the Charter was rejected by 12 votes to 3.

The states supporting the action did not present a common legal justification. The US declared that the action had been taken only 'reluctantly'. The UK underlined that it was an exceptional measure to prevent an overwhelming humanitarian catastrophe.[14]

Two observations may be made. First, the use of armed force without the authorization of and, indeed, against the will of some permanent members in the Security Council was seen as illegal by these members and several other states. Yet, the action followed widespread sense of shame in the international community for having shown inaction during massacres in Bosnia and, earlier, genocide in Rwanda. Condemning the action (the bombing) designed to stop another case of citizens being terrorized in their own state proved difficult even though it had ignored the need for a Council authorization.[15]

The clash in the case of Kosovo between the ban on a use of armed force without Security Council authorization, on the one hand, and the widespread support for armed action gave strong impetus to a new reading of the UN Charter. The view was taken that while the Charter protects states against attacks, states have a duty under the Charter to protect their own citizens, and if they fail in this duty the UN must enforce it – in the very last resort by the use of force.[16]

The doctrine has warm support in many quarters although it is far from clear that this support will invariably translate into action that may be costly both in lives and resources. The doctrine is meeting some resistance especially among developing countries as a possible new ground for intervention by strong industrial states. That resistance is likely to be shown also against attempts to ignore the need for Security Council authorizations of the use of force against a state that is failing to protect, but is terrorizing its own citizens.[17]

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14 *See* Franck, *supra* note 11, *pp.* 166–167.

15 Much has been written about it. *See, for instance*: T. Meron, 'The Humanization of International Law', in *The Hague Academy of International Law Monographs* (Brill, Leiden, 2006).

16 *See* 'The Responsibility to Protect' report of the International Commission on Intervention and State Sovereignty, p. 1; and R. Zacklin, 'Beyond Kosovo: The United Nations and Humanitarian Intervention', 41 *Virginia Journal of International Law*, no. 4, and O. Bring, 'Folkrätten efter Kosovo: Sammanbrott eller utveckling?' in O. Bring and S. Mahmoudi, *Internationell våldsanvändning och folkrätt* (Norstedts Juridik, Stockholm, 2006).

17 For a comprehensive account of the historical development of the concept 'humanitarian intervention' *see* O. Bring, *FN-stadgan och världspolitiken* (Norstedts Juridik, Stockholm, 2002) pp. 126–147.

6. The US 2002 Doctrine on Preemptive and Preventive Armed Action and the Iraq War of 2003

The rule requiring unanimity among the P5 members in the Security Council and having as objective to prevent – or at least de-legitimising – Security Council action opposed by one of them had a simple rationale. Such action could lead to direct conflict – in the worst case, armed conflict – between them. The red light that a threat of a superpower veto could flash against a possible Security Council resolution might be a procedural warning of blocking action on the ground. During the Cold War the preparation of an action similar to that undertaken by NATO in Kosovo could have posed some risk of superpower confrontation. A reason why the action was undertaken was presumably that ignoring Security Council authorization – including Russian assent – was deemed to carry little risk as by 1999 Russian military power had declined. In addition, it was hard to believe that the action, while opposed by Russia, injured important Russian interests.

6.1 The US National Security Doctrine of 2002 Ignoring the UN Charter

Before the terrorist attacks on the United States on 11 September 2001 and even many months after the attacks, leading officials in the US while suspicious of Saddam Hussein, held the view that on the whole Iraq did not constitute a 'threat to the peace'. Saddam was 'locked in his box'. After the terror attacks, however, in tandem with a growing interest within the US administration in 'regime change' in Iraq, the – erroneous – conviction grew that Iraq did retain weapons of mass destruction (WMD) and was even resuscitating a nuclear program. A resolve to remove Saddam strengthened.

On 17 September 2002, a new *US National Security Strategy* gave support to and arguments for possible preemptive actions against terrorist organizations and 'rogue states'. In an overview it declared that "The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to *help make the world not just safer but better*…"[18] On the legality of preemptive strikes[19] it had the following to say:

> "For centuries, *international law* recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an *imminent threat* – most often a visible mobilization of armies, navies, and air forces preparing to attack."

18 The National Security Strategy, September 2002 (2002) Sec. I, accessed from <www.whitehouse.gov/nsc/nss/2002/index.html>, visited on 23 March 2008. Emphasis added in this and other quotations from this document.

19 The Strategy rightly uses the term 'preemptive' for armed action against an imminent attack. However, it also seeks to fit under that same term action to avert a 'sufficient' threat even when there is uncertainty as to time and place of an enemy's anticipated attack. Most writers would call such action against non-imminent threats 'preventive'. When in this article reference is made to the broader concept asserted in the Strategy, the term 'preemptive' (preventive) is used.

> "*We must adapt the concept of imminent* threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They rely on … the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning."[20]

The central message was that

> "The United States has long maintained the option of *preemptive actions* to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction – and the more compelling the case for taking *anticipatory action* to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act *preemptively*."[21]

The Strategy went on to explain that in order to support preemptive options, the US will "build better, more integrated intelligence capabilities to provide timely, *accurate information on threats*, wherever they may emerge…"[22]

It was thus realized that if 'counterattacks' were to be made before attacks had occurred there would be a crucial need to justify them – in the domestic sphere as well as internationally – by 'accurate information on threats'. It is somewhat ironic to read this line from September 2002, a period when the intelligence services and governments in the US and UK were remarkably negligent in critically examining the accuracy of evidence, preferring to read available information as supporting the preconceived notion of an acute threat requiring armed action. For instance, a letter from the UK to the President of the Security Council transmitting an intelligence dossier of 24 September 2002 asserted that "based on significant amounts of new intelligence, it shows clearly how Iraq has developed chemical and biological weapons, has acquired missiles capable of attacking neighbouring countries with these weapons and has persistently tried to develop a nuclear bomb". It went on to report that "even now, Iraq is still making arrangements to conceal its weapons of mass destruction programmes".[23]

The *foreword* to the dossier by Prime Minister Blair contained the famous – or infamous – passage about Iraqi military planning allowing for "some of the WMD to be ready *within 45 minutes* of an order to use them". However, differing from a similar US dossier published at about the same time the UK document suggested a linking of further actions to Iraq's response to the UN: The foreword stated that "the [UN] inspectors must be allowed back in to do their job properly; and that if he [Saddam] refuses, or if he makes it impossible for them to do their job, as he has done in the past, the international community will have to act".

The inspectors of UNMOVIC and the IAEA were, in fact, let in by Iraq in November 2002. They carried out many hundreds of inspections, including dozens of

20 Emphasis added.

21 Emphasis added.

22 Emphasis added.

23 The dossier is accessible at <news.bbc.co.uk/nol/shared/spl/hi/middle_east/02/uk_dossier_on_iraq/html/full_dossier.stm>, visited on 23 March 2008.

sites suspected by intelligence agencies. They reported no finds of weapons of mass destruction. They cast doubt upon some of the evidence advanced to prove the existence of WMD but, as proving the negative – that there were no WMD – was hardly possible, they did not exclude the possibility. On 19 March 2003, the invasion was launched. A resolution that might have implicitly authorized the action was withdrawn in the face of the evident impossibility of passing. The majority of members in the Security Council – as in the General Assembly – wanted more inspections.

6.2 Justifications for the War

The rhetoric leading up to the armed intervention had been geared by the US and UK to show Iraq as a threat justifying armed action by the threatened states acting in self-defence or on the basis of an authorization by the Security Council. Also after the intervention this line of reasoning has remained the chief justification – at the public and political level. In the US, the attack thus clearly fell within the category of preemptive (preventive) action that was described in the US 2002 doctrine.[24]

Acceptance or rejection of the asserted right to unilateral preemptive or preventive use of armed force in the case of Iraq is evidently of relevance to the *future standing of the UN prohibition of the use of armed force*. The question will be discussed below. At this point it should be noted, however that *internationally* other arguments than an alleged right to unilateral preemptive (preventive) action – notably alleged prior authorizations by the Security Council – were stressed as legal justification for the 2003 intervention in Iraq. It is tempting to think that in the international sphere the US deliberately avoided resting its case on a right to preemptive (preventive) action for two reasons. First, because asserting such a right for the United States and its allies would carry the implication that other states, too, could make use of it. Second, the UK would not be ready to assert it as a legal precept.

Some arguments have been offered in support of the armed intervention perhaps more with the aim of 'legitimising' the action than as formal legal justifications. Thus it has been said that a purpose of the armed action was to *oust a brutal regime*, to reintroduce respect for *human rights* and to establish a *democracy* that could be a model in the Middle East. While it is clear that the ousting of Saddam Hussein was a great gain, the aim of establishing democracy and human rights in Iraq through war and occupation would hardly have sufficed as a legal basis for armed action without Security Council authorization. This was not a Kosovo case of overwhelming and sudden human disaster. Neither the US Congress nor the UK parliament would have approved unilateral armed action on that ground, and even the later UN doctrine of a duty to protect human rights would not have provided authority for such an action without Security Council support.[25]

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24 For comments on the reasoning behind the invasion, *see* M. Jacobsson, 'The Use of Force and the Case of Iraq', in particular 'The run-up', and 'The decision to engage in military operations and the differences in views' 11.3, 11.4 *Peace and Security* (2004).

25 *See* the Report of the Secretary-General's High-level Panel on Threats, Challenges and Change. A more secure world: our shared responsibility (2004), p. 65, accessed from <http://www.un.org/secureworld>, visited on 23 March 2008.

6.3 Legal Justification Advanced at the International Level for the Iraq War

It is striking that the *legal justification stressed at the international level* for using armed force against Iraq in 2003 without Security Council authorization – the violation by Iraq of Security Council resolutions – seems to be relatively little discussed outside the professional worlds of the UN and the international law. Is it because it has sounded contrived or too technical?

Although after a decade of sanctions against Iraq, hardly any state but Kuwait in the Middle East considered Iraq 'a threat to the peace', it was within the power of the Council to determine that Iraq's conduct constituted such a 'threat'. However, the Council was not about to do this and the question facing the US, the UK and its allies was rather whether *individual members* of the Council could at any time take armed action against Iraq without an explicit new resolution, claiming that they were so authorized under earlier Security Council resolutions. Indeed, the question was whether they could so argue even when it was clear that a majority of the Council would not accept such a resolution and was opposed to armed action. The US took this view already in November 2002 holding that SC Resolution 1441 that was then adopted was not necessary to give individual members authority to take armed action. When faced with the impossibility of getting even an implied authorization for armed action from the Security Council in March 2003 the UK publicly sided with the US – albeit, with substantial internal reservations as shown below.

After the war, Dr. Condoleezza Rice, pointing to years of Security Council resolutions, suggested that the states launching the war were "upholding the authority of the Council…" The idea sounds somewhat puzzling: states that had refrained from submitting to vote a resolution that they realized could not pass, would nevertheless have had the authority that they could not persuade the Council to give them.

Further, if the US and the UK and other states in the 'alliance of the willing' deemed that *they* were at liberty without new explicit authorization by the Council to intervene by force to 'uphold' the authority of the Council, presumably one would have to conclude that China, France and Russia and allies of these states could have taken action *they* deemed appropriate to uphold the same authority.[26]

It is hard to avoid the conclusion that a decision by the Council authorizing the war was required and that no permission slips of unlimited duration had been handed to individual members of the Council in connection with resolutions from 1990, 1991 or even 2002. Nevertheless, this was the main legal line presented.

Yet, at a press conference just before the war, on 17 March 2003, while silent on any alleged right to preemptive (preventive) action, Secretary of State, Colin Powell referred to earlier Security Council resolutions as the legal basis for the armed intervention. The UK used the same argument but apparently with zero legal conviction. Lord Goldsmith, the UK Attorney-General, stated on 17 March 2003 that "the authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the Charter

26 Pointing to the risk to the 'global order' that such reasoning would entail the Report of the Secretary-General's High-level Panel on Threats, Challenges and Change (2004) states: "Allowing one so to act is to allow all.", p. 63, para. 191.

which allows the use of force for the express purpose of restoring international peace and security."[27]

However, in an extensive written secret memorandum of 7 March to the British Prime Minister, Lord Goldsmith had examined what he termed the 'key question', whether SC Resolution 1441 (2002) revived the authorizations to use force that had been granted by earlier SC Resolutions, notably 678 (1990). He noted that the Law Officers had earlier advised that this could be possible though it would require the SC to decide on the matter.[28] He remained of the view that the "safest legal course would be to secure the adoption of further resolution to authorize the use of force".[29] Nevertheless, having heard the arguments of the US Administration he accepted that "a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorization in 678 without a further resolution".[30]

Lord Goldsmith's extreme discomfort at delivering this no doubt eagerly desired sentence is evident in the explanation given in the next paragraph that throws light on more cases than that at hand:

> "30. In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But a 'reasonable case' does not mean that if the matter ever came before a court I would be confident that the court would agree with this view…"

6.4 A Right to Preemptive (/Preventive) Action

In the public debate the armed intervention in Iraq in 2003 was most commonly justified as a preemptive/preventive action in line with the claim that was made for such a right in the US National Security Strategy of 2002. In the 2004 American election campaign both candidates took the view that the US must be able to take preemptive action in certain situations. However, a difference between them was that Senator Kerry said that such action would have to stand up to a 'global test', while President Bush ridiculed any idea of what he termed a 'permission slip' from anybody. In the 2008 Presidential race, Senator Obama went further than Senator Kerry and expressed a view that did not put him on collision course with the dominant interpretation of Article 51 of the UN Charter: He would "not hesitate to use force, unilaterally if necessary, to protect the American people or our vital interests whenever we are attacked or imminently threatened".[31]

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27 Written answer to a parliamentary question. Hansard, House of Lords 17 March 2003, Column WA3.

28 *Ibid.*, para. 9.

29 *Ibid.*, para. 27.

30 *Ibid.*, para. 29.

31 *Foreign Affairs*, July/Aug, (2007).

From an international perspective there is a need to examine whether the right of preemptive (preventive) armed action – anticipatory self-defence – asserted in the US 2002 Strategy is compatible with the limited right of self-defence permitted under Article 51 of the UN Charter. The Article stipulates that nothing in the Charter impairs "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security…"

On the face of it the rule is simple and straight-forward. When the attack occurs you see it and you are fully entitled to act in self-defence. It was written with old fashioned wars in mind. Thomas Franck offers critical comments on it. He writes: "At San Francisco, …it is beyond dispute that the negotiators deliberately closed the door on any claim of 'anticipatory self-defence', a posture soon to become logically indefensible by the advent of a new age of nuclear warheads and long-range rocketry…".[32]

The authors of the 2002 US Strategy studiously refrained from citing or even mentioning the UN Charter. However – as noted above – they referred to international law and their formulation of the 2002 US Strategy suggests they believed that the action they recommended was not compatible with that law. As noted above they submitted that the concept of 'imminent threat' needed to be adapted to fit a wider right to preemptive (preventive) armed action than they believed existed.[33]

How much the concept of 'imminent threat' would need to be adapted to satisfy the needs seen by the authors of the 2002 US Strategy is not explained with any precision. President Bush is quoted as saying that when a threat is 'imminent' it is too late. He has referred to 'a growing danger' as sufficient. The 2002 US Strategy emphasizes the gravity of 'emerging threats' rather than their imminence: "The greater the threat, the greater is the risk of inaction – and the more compelling the case for anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."

As discussed above, Thomas Franck shows that already during the Cold War difficulties of interpretation of the UN Charter rules regarding the use of armed force and self-defence followed from new types of conflicts in the shape of subversive actions and wars by proxy. The Security Council was also found often to have been more pragmatic than legalistic in its view of the rule. Nevertheless, this pragmatism and the new types of military threats that have emerged do not necessarily lead to a conclusion that Article 51 of the Charter has become obsolete and must now be revised or drastically reinterpreted, as would follow from the 2002 US strategy and as is argued by some scholars, especially in the US.[34] However, most governments and scholars oppose this line. A recent study reports that "few legal scholars and only militarily powerful States seem to be ready to support the idea of anticipatory self-defense. Even fewer are inclined to acknowledge a right to use force preemptively when there is no imminent danger of an armed attack!"[35]

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32 Franck *supra* note 11, p. 50.

33 See The National Security Strategy, *supra* note 18, p. 10: "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries".

34 For references *see* Weiner, *infra* note 37, p. 438.

35 *See* O. Beckman, *Armed Intervention* (Lund, 2005) p. 67; *see also* Brownlie's discussion in

Interestingly, in his memorandum of 7 March 2003, the UK Attorney-General[36] recognizes that "force may be used in self-defence if there is an actual or imminent threat of an armed attack" but rejects such a right in other cases:"… in my opinion there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future … this is not a doctrine which, in my opinion exists or is recognized in international law."

The many authorities accepting a right to preemptive – anticipatory – self-defence under Article 51 against an attack that is 'imminent' mostly cite the 19th century *Caroline* case which stated as a precondition for the exercise of the right that no other means than armed action would deflect the imminent attack and further required that the action in self-defence must be proportionate.[37]

It is not difficult to imagine situations in which defence would appear reasonable against an armed attack that seems 'imminent' but has not yet 'occurred'. For instance, it would be reasonable to intercept a fleet of foreign bombers or naval vessels even before it enters national space toward which it is heading. However, in recent times those who have favoured a freedom to take armed preemptive action have probably not devoted much thinking to the *Caroline* case nor, probably, about rules of international law generally.

Thinking about preemptive action has been linked more to theoretical nuclear superpower duels. The argument appears to have been that if one superpower were deemed to be preparing a nuclear strike to erase the adversary's whole nuclear arsenal, it would be reasonable to act preemptively to prevent it by erasing the potential attacker's whole arsenal.[38]). Given that it is considered practically improbable that a nuclear power's whole arsenal could be erased, the continued existence of a second strike capability should offer sufficient deterrence against a nuclear attack. It is hard to see why Article51 of the UN Charter should be read so as to become more tolerant to a preemptive nuclear missile attack. When the question of evidence is considered the idea of allowing preemptive (preventive) nuclear strikes becomes even more unattractive.

Before an attack is actually irrevocably taking place observations can only be made from which *intentions* can be inferred. Could satellite observed activities at a potential adversary's missile sites qualify as 'imminent attack' justifying preemptive action? Prudence would suggest a reading of the rule on self-defence that would require more solidly based evidence of imminent attack.

International Law and the Use of Force by States (London, 1963) and O. Bring, *Nedrustningens Folkrätt* (Norstedts Juridik, Stockholm, 1987) p. 73.

36 Attorney General note to the PM: html version, accessed from <http://www.number-10.gov.uk/output/Page7445.asp>, visited on 23 March 2008.

37 A. Weiner, 'The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?' 59 *Stanford Law Review* (2006) p. 439.

38 *See* Weiner, *supra* note 37, p. 437.

6.5 Defence Against Weapons of Mass Destruction in the Hands of 'Rogue States' and Terrorists

The US 2002 doctrine does not actually discuss the question of preemptive (preventive) action between established nuclear weapon states. Rather it *advocates* that the rule on self-defence be 'adapted' to allow a wider freedom of armed action against 'rogue states' and 'terrorists' than just when they pose an imminent threat. It is possible but by no means certain that such potential adversaries would not be deterred from making armed attacks by the risk of a second retaliatory strike.

Nevertheless, to take a concrete and current example, would it be reasonable to suggest that the right of self-defence under Article 51 should be interpreted to allow states to launch attacks in 'anticipatory self-defence' on Iranian installations designed for the enrichment of uranium? The argument would be that there was an Iranian intention to develop nuclear weapons and to use them. Implying a right to preventive action President Bush has stated that "all options are on the table". Others imply the same by saying that there would be only one thing worse than bombing Iran and that is an Iranian bomb. In the case of Iraq, Dr. Condoleezza Rice made the famous statement that there is no need to wait for the 'smoking gun' to become a 'mushroom cloud', implying that the right of taking preemptive action in the case of a nuclear weapons program arises long before a weapon is tested. In the case of Iran she has explicitly alluded to a right of self-defence.

However, while the Security Council has declared the Iranian program a 'threat to international peace and security', governments have generally not supported the view that any armed action could be taken – whether in anticipatory self-defence or on the basis of a Security Council authorization.

No doubt there are many different reasons for this, chief among them perhaps the certainty of painful Iranian responses. Another reason may well be that in the eyes of many countries in the world such action would lack legitimacy and might even appear to be a violation of the UN Charter, as they read it. Whatever they may think of an Iranian nuclear weapon they may not wish to endorse an extensive right of anticipatory self-defence and may not even see the Iranian program as an 'imminent threat'.

Anticipatory self-defence was actually argued as justification for Israel's attack in 1981 of the Iraqi research reactor *Osiraq*.[39] The argument was rejected at the time and the action was condemned by the Security Council. Much later and following the mapping of the Iraqi nuclear weapon program the Israeli action received approval in some quarters. However, if in 1981 the research reactor constituted a nuclear threat, it was a rather distant one. Moreover, the modifications required in the reactor for plutonium production would have been visible to inspectors and to French technicians present. Further, a reprocessing plant would have been needed to separate the plutonium contained in the spent fuel. It might well be argued that if the reactor had not been destroyed and if Iraq had pursued this path, the world might well have concluded already in the 1980s that Iraq had weapons ambitions and avoided the shock discovery in 1991.

39 For comments on the *Osiraq* case, *see for instance* Franck, *supra* note 11, p. 105 and Weiner, *supra* note 37, p. 441.

The UN Secretary-General's High-level Panel on Threats, Challenges and Change explicitly discussed the case of the acquisition, with allegedly hostile intent, of nuclear weapons-making capability. While the Panel considered that "a threatened State, according to long established international law can take military action as long as the threatened attack *is imminent*"[40] it saw the acquisition of a nuclear weapons-making capability as a non-imminent threat and rejected any right to anticipatory – preventive – self-defence. There would be time to submit the matter to the Security Council, which could authorize suitable action including, in the last resort, military action. Even in the case that the Council remained unwilling or unable to remove the alleged threat, the Panel rejected unilateral armed action, stating: "… in a world full of perceived potential threats, the risk to the global order … is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to act so is to allow all." "We do not favour the rewriting or reinterpretation of Article 51."[41]

In his report *In Larger Freedom* then UN Secretary-General Kofi Annan concurred with the advice of the Panel. Thus, while in his view Article 51 fully covers the right for states to use armed force in self-defence against *imminent threats*, for responses to *non-imminent threats* he points to the power of the Security Council. Mindful that the Council must exercise its judgment whether or not to authorize or endorse the use of military force he urges it to come to a common view on

- how to weigh the seriousness of the threat (i.e. determine under Article 39 whether there is a 'threat to the peace' that would allow it to authorize the use of armed force);
- the proper purpose of the proposed military action;
- whether means short of the use of force might plausibly succeed in stopping the threat;
- whether the military option is proportional to the threat at hand; and
- whether there is a reasonable chance of success.

The Secretary-General also agreed with the Panel that the Security Council should adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force.[42]

6.6 Problems and Prospects

To sum up the situation:

- The US 2002 Strategy and the Bush administration have taken the view that the US may use armed force without any authorization by the Security Council in order to avert a threat that it perceives, and that it may proceed to such action even if the threat is not perceived as imminent – provided that it is seen as sufficiently grave.

40 Emphasis added.

41 Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, *supra* note 25, p. 63, paras. 191 and 192.

42 *See* UN Doc A/59/2005 (21 March 2005), Sec. E.

- The doctrine does not seem to have bipartisan support in the US, and the UK government received legal advice before the 2003 action against Iraq not to rely upon it as regards non-imminent threats.
- The High-level Panel that advised the Secretary-General took the view that a state had the right under Article51 of the UN Charter to take armed action in anticipatory self-defence in the face of imminent threats. It rejected the idea that such right could exist in cases of non-imminent threats. In these cases there was time for Security Council consideration and tolerating action without Council authorization would put global order at risk. It saw no reason for revision or reinterpretation of the Charter.
- The Secretary-General followed the advice of the Panel including its recommendation that the Security Council should adopt a number of principles to be followed in future consideration of action in cases of non-imminent threats.
- While a number of writers in the US have supported the extensive right to self-defence claimed in the US 2002 doctrine, most writers, whether in the US or elsewhere, only accept that the right of self-defence under Article 51 of the UN Charter extends to imminent threats of attack.
- One American writer argues that there is less reason today than during the Cold War to seek to try to extend the right to take armed action without Security Council authorization. He notes that in the case of the threats that seem to have prompted the new doctrine – the threats from 'rogue states' and terrorists – the interests of the permanent members of the Security Council are more converging than competing. Action based on authorization by the Security Council, he says, "carries with it greater legitimacy, greater prospect for success, and less danger of destabilizing error or abuse" than action based on doctrines that expand the right of states to use force unilaterally."[43]
- The division of views as to what actions allegedly taken in self-defence and not authorized by the Security Council are allowed under Article 51 of the UN Charter is not likely to be resolved by the Council adopting a resolution containing guidelines. Members of the Council traditionally seek to keep their hands free. This does not necessarily mean that they would ignore the recommended guidelines.
- It is possible that over time reactions in the Security Council and General Assembly may come to lend authority to some – equitable – reading of Article 51 and deny legitimacy to and raise the costs of other readings. Until this happens the landscape of legal controversy remains and cases may arise again in which some members may claim that armed action they have taken is in self-defence allowed under Article 51 of the Charter, while others denounce it as illegal.

There is something paradoxical about the criticism of the Security Council as failing in its function when not authorizing the use of armed force against Iraq in 2003 or failing later to adopt biting sanctions against Iran. After the end of the Cold War the Council has not been dysfunctional and automatically prevented from action by the threat or use of vetoes. Large numbers of peace-keeping operations have been started

43 Weiner, *supra* note 37, p. 416.

and not so few decisions are taken by consensus in the Council. The lack of support in the Council for a resolution that would have implied an authorization of the 2003 Iraq war prevented a UN stamp of approval of a war that in the view of most governments should not have been launched.

The current US administration has shown impatience with this and other cases of reluctance among members of the Security Council to authorize certain harsh actions. Perhaps this reaction is a result of the US having become the lone superpower and feeling entitled to support in its efforts to act as a sheriff in an unruly world and free to shoot without strict legal restraints. However, the sheriff is not omnipotent. For success and for legitimacy his actions depend upon the support of many other states.

It is striking that the strongest efforts to loosen the legal restraints to use armed force unilaterally are linked to threats perceived in the acquisition or development of modern weapons and other means of mass destruction, notably nuclear weapons or the capability to produce them, long distance missiles and tools for space war. With rapid and widespread development of technical capability more and more states – and perhaps non-state actors – will be able to join the now technically advanced states in producing and handling such weapons and tools.

The answer to this slowly growing risk of proliferation is not likely to lie in efforts to expand a right to unilateral armed action to enforce non-proliferation and an ever growing US military capability. It is more likely to lie in garnering the cooperation of all in efforts to free the whole world from weapons of mass destruction and the means of delivering them. Such efforts must be combined with work to further develop the United Nations, including reforms to make the Security Council more representative and, thereby, give it greater authority and legitimacy.

Chapter 4

Individual Responsibility under National and International Law for the Conduct of Armed Conflict

*Iain Cameron**

1. Introduction

Ove Bring has over the years devoted much attention, as diplomat, teacher and researcher, to the subject of humanitarian law. I thought it fitting to write a chapter in this *festskrift* to Ove, on the subject of individual responsibility for breaches of the international laws of armed conflict. The subject is large and complicated.[1] The applicable law is also fragmented: there are now many treaties governing different aspects of the conduct of armed conflict. Moreover an understanding of national criminal law is also necessary. Even where states accept the same obligations to criminalize particular behaviour, and to prosecute suspected offenders, they apply different jurisdictional rules regarding the extent to which they are prepared to apply their criminal law to acts committed outside of their territory.

The subject is also something of a 'moving target' and this makes it even more difficult. Humanitarian law has developed considerably in the last 15 years, and is still

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1 For a fuller discussion *see* the major study of state practice made by the ICRC, J.M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, vol. I Rules*, (Cambridge University Press Cambridge, 2005). Henckaerts and Doswald-Beck responsibility for violations (Rule 149); the obligation to make full reparation (Rule 150); individual criminal responsibility (Rule 151); command responsibility (Rules 152–153); the duty to disobey a manifestly unlawful order (Rule 154); criminal responsibility for superior orders (Rule 155); war crimes (Rule 156); universal jurisdiction over war crimes (Rule 157); national prosecution of war crimes (Rule 158); amnesties at the end of non-international armed conflicts (Rule 159); non-applicability of statutory limitations to war crimes (Rule 160); international co-operation in the investigation and prosecution of war crimes (Rule 161). *See also* A. Obote-Odora, *The Judging of War Criminals: Individual Criminal Responsibility under International Law*, (University of Stockholm, Stockholm, 1997), S. R. Ratner and J. S. Abrams, *Accountability for Human Rights atrocities in international law: Beyond the Nuremberg Legacy*, (Clarendon, Oxford 1997) and E. Van Sliedregt, *Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Cambridge University Press, Cambridge, 2003).

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 39–60.

in the process of being developed by the adoption of treaties, and by the case law of national and international tribunals.

The subject is a moving target in another sense because the nature of warfare is changing, and this obviously influences the types of offences which are committed. The applicability of the laws of armed conflict depends upon the legal definition of an 'armed conflict' being satisfied. However, with the rise of non-territorial, transnational so called 'asymmetrical' conflicts, between those categorized as 'terrorists' and regular forces, the line between war and peace, and zones of war and zones of peace, is unclear.

In the circumstances, it is not possible to cover the subject as a whole. The purpose of my chapter is simply to sketch out the development of individual responsibility, and make some critical comments.

2. A Brief Historical Overview of Individual Responsibility for Breaches of the Law of Armed Conflict

Lawyers, like generals, have a tendency to prepare for the future by trying to avoid the mistakes of the past. New types of threat often take them by surprise. The laws of armed conflict, as with most of international law, have come into being in a piecemeal fashion. Treaties have been designed to deal with the gaps in protection which have become apparent during the last conflict. To understand the present system of individual responsibility for breaches of humanitarian law it is therefore necessary to know something of its history, and so I will begin by noting some of the most important developments in this respect. Having said this, it is important to avoid the error of historicism: in this case, the idea that we are progressing inexorably through the growth of legal regulation to a higher degree of compliance with the law, and/or a higher degree of civilization.

While armies have routinely massacred defeated enemies and pillaged, raped and murdered the civilian population, the history of warfare in the middle ages and onwards to the beginning of the nineteenth century also gives many examples of war leaders who punished, at least periodically, acts of vengeance committed by their soldiers in conflicts against combatants *hors de combat*, or atrocities committed against the civilian population.[2] Restraint in warfare, and punishment of those who did not practice restraint, was also advocated by certain classical writers, such as Grotius[3] and Gentili.[4] Military leaders could have good pragmatic reasons for following such moral, humanist rules, inter alia the importance of maintaining discipline in one's own forces, attempting to secure reciprocity of treatment of ones' own combatants and trying not to alienate too much the civilian population of occupied territory. But in general it is

2 T. Meron, *War Crimes Law Comes of Age*, (Oxford University Press, Oxford, 1998), pp. 1–121.

3 H. Grotius, *De Jure Belli ac Pacis, Libri Tres*, vol. II, Book II, Translation, The Classics of International Law, (Carnegie Endowment for International Peace, Washington, 1925). *See also* O. Bring, 'Hugo Grotius and the Roots of Human Rights Law' in J. Grimheden and R. Ring (eds.), *Human Rights Law: Essays in Honour of Göran Melander*, (Kluwer, Leiden/Boston, 2006).

4 Gentili, *De Jure Belli: Libri Tres*, The Classics of International Law (Carnegie Endowment for International Peace, Washington, 1931) p. 257. *See also* Meron, *supra* note 40, pp. 122–130.

safe to say that military leaders tended to be lenient as regards crimes committed by their own forces. When generals treated their own soldiers like cannon fodder, few tears were shed when brutalized soldiers took their revenge on captured enemy, or for that matter, the civilian population of the enemy.

I consider that the idea of international legal restraints on the conduct of warfare begins with the creation of modern international law, in the late 19th century, and that the concept of individual legal responsibility could not really be said to be established before the Nuremburg trials in 1946.[5] The International Military Tribunal (IMT) at Nuremberg stated, that 'crimes against international law are committed by men, not by abstract entities; and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[6] The criminal acts of the victors went unpunished. The General Assembly of the UN reaffirmed the principles established by the IMT.[7]

As is well known, the Geneva Conventions of 1949[8] like the earlier 1929 Conventions,[9] are based on protecting different categories of people: the wounded on land, the wounded and shipwrecked at sea and prisoners of war (PoWs). However, the 1949 Conventions added a fourth category, the civilian population of occupied territories. These different categories are defined, and detailed rules are set out specifying the duties of states in conflict, *vis-à-vis* other state parties. Violation of these rules constitute breaches of the laws of war. However, some breaches (*e.g.*, hostage taking and reprisals against the civilian population) are obviously much more serious than others (*e.g.*, delaying a PoW's letter). The 1949 Geneva Conventions laid down special duties in relation to certain particularly serious offences against protected persons, whether committed by nationals or non-nationals. These include wilful killing, torture and inhuman treatment, wilfully causing great suffering or serious injury to body or health, and certain violations of the basic rules for the conduct of hostilities.[10] States have an obligation to train troops so as not to commit grave breaches. They must also instruct their military commanders to prevent or put an end to 'grave breaches' and to take steps against persons under their authority who are guilty of such offences.

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5 Ove cites earlier precedents such as the (very) half-hearted German prosecutions of German war criminals after World War I, but does not appear to consider this to be evidence that the principle existed in international law in 1918, contenting himself with stating that these trials formed "a useful basis for the development of international criminal law" O. Bring, *International Criminal Law in Historical Perspective*, 2nd ed., (Juridiska fakulteten, Stockholm: 2002), p. 15.

6 *France et al.* v. *Goering et al.*, (1946) 23 IMT 1, [1946] Annual Digest 202.

7 GA Res. 95 (I) 1946.

8 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949, 75 UNTS 85, Geneva Convention (III) Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135, Geneva Convention (III) Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287. As of 5 December 2007, the four Geneva Conventions had 194 parties. <www.icrc.org/ihl.nsf/>.

9 For ease of access I refer to texts contained on the ICRC site, see respectively at <www.icrc.ch/ihl.nsf/FULL/280?OpenDocument> and <www.icrc.ch/ihl.nsf/FULL/300?OpenDocument> <www.icrc.ch/ihl.nsf/FULL/305?OpenDocument>.

10 GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 47.

Following World War II, some German war criminals who avoided capture at the end of the war, or were released in error, managed to escape to countries from which they were not extradited.[11] The 1949 Conventions thus explicitly recognize that all state parties, not simply the states in conflict with each other, have a duty to respect *and ensure respect* for the laws of war. In particular, all States Parties must search for persons accused of having committed or having ordered the commission of 'grave breaches', regardless of the nationality of the perpetrator or the place of the crime, and bring these persons before their own courts, or hand them over for trial to another state which has sufficient evidence to put them on trial.

The regulation of internal conflicts was more controversial, states not wanting their hands tied in such matters (especially as many of the Western powers still had colonies, and conflicts in these were regarded as internal in nature).[12] Some minimum rules as regards internal conflicts were set out in Common Article 3 of the Geneva Conventions.[13] However, no explicit provision was made for international responsibility for violation of such rules. The supervisory mechanism for compliance with the rules of internal conflicts was – deliberately – made very weak. The 1949 Conventions, like their predecessors, build on the concept of a 'protecting power' i.e. neutral states appointed by the warring states to oversee the latters' compliance with the treaties. Having said this, they also instituted a (secondary) role for the International Committee of the Red Cross (ICRC) as a monitor of parties' compliance with their commitments.

The immediate aftermath of World War II also saw the adoption of the Genocide Convention.[14] Individual responsibility is provided over acts of genocide in either wartime or peacetime. However, this was not made a crime of 'universal jurisdiction',

11 A notable example was Adolph Eichmann, who was eventually kidnapped by Israeli agents, brought to Israel, tried, convicted and executed for crimes against the Jewish people (crimes against humanity). Eichmann, District Court of Jerusalem, 12 December 1961, 36 ILR 5-276.

12 Since 1945, internal conflicts have greatly outnumbered international conflicts. For ongoing conflicts see the Uppsala Conflict Project which identified 17 major armed conflicts going on in 2006, including several in states party or signatory to the ICC Statute (below). *See SIPRI Yearbook 2007* (Oxford University Press, Oxford, 2007), pp. 79–93.

13 This provides that 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'. It moreover prohibits '(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.

14 Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277. The Convention has 134 parties and two signatories, UN Treaty Collection Online. The status of genocide as an international crime was unanimously confirmed in G.A. Res. 96 (I) (1946). The adoption of the convention owes much to the work of Rafael Lemkin. See R. Lemkin, 'Genocide as a crime under international law', 41 *American Journal of International Law* (1947) pp. 145–151. On the convention generally see W. A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press, Cambridge, 2000).

meaning a crime punishable by any state (or, in practice, any of the states ratifying the treaty). Instead, it was deliberately provided in Article 6 for only territorial jurisdiction over acts of genocide, meaning that only the state where the act was committed was competent under the treaty to punish the act. In addition, it was stated that, an international criminal court which might be established was competent to punish the crime of genocide. However, the creation of a permanent international criminal court was, putting it mildly, a distant prospect at the time.

The colonial wars/wars of national liberation and the 'proxy' wars of the Cold War, in the 1950s, 1960s and early 1970s meant that, once again, the nature of warfare changed, thus creating new serious gaps in legal regulation of conflict. The lobbying of the ICRC, and like-minded states, finally resulted in two new treaties supplementing the 1949 Conventions concluded in 1977.[15] Protocol I deals with international conflicts. It adds new 'grave breaches' to the list.[16] Notable in this respect is that grave breaches now included breaches resulting from a failure to act when under a duty to do so (Article 86(1)) and violations of several new obligations as regards the methods and means of conducting warfare, thus overlapping the 'Hague rules'. An example of this is violations of the 'principle of distinction' as regards the civilian population.[17]

Protocol II deals with internal conflicts but the continued reluctance of states to bind their hands in such conflicts meant that regulations, and prohibitions are much less, as compared to international conflicts. The Protocol does expand the minimum duties of humane treatment set out in Common Article 3. For example, Article 6 forbids summary 'justice' against rebels by laying down minimum safeguards of judicial procedure for people charged with offences committed in connection with the armed conflict and Article 13 provides that 'the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. However, Protocol II does not explicitly provide for individual responsibility for *violating* the obligations in the treaty.

One final treaty that should be mentioned here is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.[18] This is notable because it, like the Genocide Convention, blurs the line between humanitarian and human rights law (considered further below). It prohibits torture both in time of war and in time of peace. It requires states to criminalize acts of torture, prosecute

15 Protocol I additional to the Geneva Conventions of 12 August 1949 Relating the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, (hereinafter 'Protocol I') Protocol II additional to the Geneva Conventions of 12 August 1949 Relating the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 513 (hereinafter 'Protocol II'). As of 22 April 2008 Protocol I had 167 parties, and Protocol II 163 parties, *see* <www.icrc.org/ihl.nsf/>.

16 Protocol I, Articles 11 and 85.

17 Article 51 provides *inter alia* that '4. Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction'.

18 24 ILM 535 (1985). The Convention has at present 145 states parties see <www2.ohchr.org/english/bodies/ratification/9.htm>.

suspected offenders and permits all contracting states to exercise jurisdiction over acts of torture, where these acts are committed in the territories of other contracting states.

Lastly in this brief historical overview, the most notable developments as regards individual responsibility are a result of the case law of the temporary war crimes tribunals established by the UN Security Council in 1993 and 1994 respectively for war crimes in former Yugoslavia (ICTY)[19] and Rwanda (ICTR)[20] and the entry into force of the Rome Statute of the International Criminal Court (ICC).[21] The case law of the ICTY and ICTR and the creation of the ICC are so significant that they are treated in separate sections, but before doing so, something should be said about the parallel developments which have been occurring in human rights law, and the conditions for applicability of international humanitarian law.

3. Human Rights Law, Armed Conflicts and Individual Responsibility

Three points can be made as regards the relevance of general human rights treaties to the present topic. The first is that these treaties continue to apply in time of international or internal conflict. However, just as many states allow for the suspension of parts of their constitutions in emergency situations so too do most of the general human rights treaties. So called 'derogation' provisions can be found in the European Convention on Human Rights (ECHR), Article 15, the International Covenant on Civil and Political Rights (ICCPR), Article 4, and the American Convention on Human Rights (ACHR), Article 27.[22] The derogation clauses list narrow list of non-derogable rights and allow derogation only to the extent strictly required by the exigencies of the situation. It may seem strange that rights such as the right to life continue to apply in a war, however, the approach taken by organs established to supervise the application of these conventions, is in practice to treat humanitarian law as *lex specialis* in determining whether or not deaths were 'lawful' consequences of military operations and thus permissible limitations on the right to life.[23]

19 SC Res. 827 on Establishing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 ILM 1192 (1993) (as amended by Security Council resolution 1166 of 13 May 1998).

20 SC Res. 955 establishing the International Tribunal for Rwanda, 33 ILM 1598 (1994).

21 Rome Statute of the International Criminal Court, 37 ILM 999 (1998). At the time of writing, the treaty has 105 parties. Ratification Status, at <www.iccnow.org/countryinfo/worldsigsandratifications. On the statute see generally A. Cassese *et al.*, (eds.), *The Rome Statute of the International Criminal Court* (Clarendon Press, Oxford 2000), O. Treffterer, *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, Berlin, 1999) and D. McGoldrick, *et al.*, (eds.), *The Permanent International Criminal Court* (Hart Publishing, Oxford 2004).

22 The Banjul (African) Charter on Human and Peoples' Rights, 1981, 21 ILM 58 and the the Covenant on Economic, Social and Cultural Rights ICESCR 1966, 999 UNTS 171 have no derogation provisions.

23 *See*, *e.g.*, the judgment of the European Court of Human Rights in *Isayeva* v. *Russia*, No. 57950/00, 24 February 2005, the Inter-American Commission on Human Rights, in the *Tablada* case, report No. 55/97, case No. 11.137, (30 October 1997), <www.cidh.oas.org/annualrep/97eng/Argentina11137.htm>; and the IACtHR case of *Las Palmeras* v. *Colombia*, Preliminary Objections. Judgment of 4 February 2000, Series C No. 67,

Secondly, the case law of the supervisory organs has interpreted the right to life as covering police/security operations which could result in loss of life. For example, in the landmark case of McCann and others v. UK,[24] the European Court of Human Rights (ECtHR) found a violation of Article 2 on the basis that an operation in which British soldiers supposedly attempted to arrest terrorist suspects (when all three suspects were shot dead) had been insufficiently well planned. The principle in this case has been followed and developed in a number of Turkish cases, so as to require not simply careful advance planning and implementation of a security operation, but clear and detailed investigation of any incident leading to deaths *and prosecution* of soldiers or policemen held to be responsible.[25] A similar approach has been taken as regards prosecution of those suspected of torture.[26]

Thirdly, the case law of the supervisory organs has found that states are bound by their human rights obligations, not simply in their territories, but also in areas where their security forces are operating. The case law of the UN Human Rights Committee provides that the protection of the ICCPR can apply in the case of military occupation of territory,[27] as well as in the situation when security forces, or 'irregulars' are sent outside the territory to commit anti-terrorist acts.[28] A similar approach has been taken by the Inter-American Commission on Human Rights.[29] As regards the ECHR, the case law of the ECtHR is more ambiguous (and more subject to criticism). It indicates that there can, exceptionally, be situations in which extraterritorial acts of state can give rise to responsibility under the Convention (and so, depending on the circumstances, a duty of prosecution).[30] In the *Bankovic* case,[31] which concerned the NATO bombing

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<www.corteidh.or.cr/seriec_ing/seriec_67_ing.doc>, 11 November 2006. The continued applicability of human rights treaties, and the lex specialis approach has been confirmed by the ICJ in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, paras 155–157, <www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

24 27 September, 1995, A/324.

25 *See*, *e.g.*, *Aktas* v. *Turkey*, No. 24351/94, 24 April 2003.

26 *See*, *e.g.*, *Aksoy* v. *Turkey*, 18 December 1996, para 98.

27 *See e.g.*, Concluding Observations on Israel (1998) (CCPR/C/79/Add.93) "the Covenant must be held applicable to the occupied territories and those areas of Southern Lebanon and West Bekaa where Israel exercises effective control". This was also confirmed by the ICJ in the 'Wall' opinion, *supra*.

28 *See* the views adopted by the Human Rights Committee on Article 6 of the ICCPR on 29 July 1981 in the cases of *Lopez Burgos* v. *Uruguay* and *Celiberti de Casariego* v. *Uruguay*, nos. 52/1979 and 56/1979, paras 12.3 and 10.3 respectively. The HRC also stated in its Concluding Observations on Iran (1993) (CCPR/C/79/Add.25 para. 9) that the Fatwa on Salman Rushdie and threats to execute it outside the territory of Iran entails state responsibility under the ICCPR.

29 *Coard et al.* v. *the United States*, decision of 29 September 1999, Report No. 109/99, Case No. 10.951, paras 37, 39, 41 and 43.

30 *See*, in particular, *Loizidou* v. *Turkey*, 23 March 1995 (preliminary objections), A/310, *Loizidou* v. *Turkey*, 18 December 1996 (Merits). The ECtHR also consider that acts of *e.g.*, the security forces in a State Party to the Convention (A) in arresting a suspect in another state, even a non-State Party (B), can give rise to Convention responsibility, when the arrest is with the acquiesance etc. of *B. Ocalan* v. *Turkey*, No. 46221/99, 12 May 2005.

31 *Bankovic, Stojanovic, Stoimenovski, Joksimovic and Sukovic* v. *Belgium, the Czech Republic, Den-*

of the TV station in Belgrade during the Kosovo conflict, the ECtHR sitting as a Grand Chamber indicated that Convention responsibility for military operations would nonetheless require, at least, the exercise of a level of control over the territory analogous to that of a state (which was lacking, as the NATO 'control' extended, at most, to control over Serbian airspace). In the later case of *Issa and others* v. *Turkey*,[32] which concerned alleged Turkish responsibility for the deaths of a number of Kurdish shepherds in an anti-terrorist incursion into Northern Iraq, the ECtHR nonetheless stated that accountability in such situations stemmed from the fact that Article 1 of the Convention could not be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory.[33] On the other hand, where troops are operating as part of a UN authorized force, even while under national command, the Court, again sitting as a Grand Chamber, this time in the *Behrami* case, seems to consider that responsibility lies with the UN rather than with the troop contributing state.[34]

4. The Applicability of International Humanitarian Law

In a war, soldiers are supposed to do that which is regarded as the most serious crime of all in time of peace, namely to kill other people. It is obviously vital to be able to say when the conditions for this reversal of the normal rules of civilized behaviour are fulfilled. The 1949 Conventions apply, according to Common Article 2, "to all cases 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 of them [and] 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". In a case where several states are in conflict, and one is not bound by a particular convention, all the other states are still bound by it in their mutual relations.

However, a problem with the definition was when a conflict could be said to be over. Protocol 1 therefore provided that "the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter" (Article 3(b)).

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mark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the UK, No. 52207/99, 12 December 2001.

32 No. 31821/96, 16 November 2004.

33 Paras 69 and 71. Reconciling *Issa* with *Bankovic* is not entirely easy.

34 *Behrami* v. *France* and *Saramati* v. *France, Germany and Norway*, Nos. 71412/01 and 78166/01, 31 May 2007. This decision seems to be motivated by pragmatism (namely the risks that states will not contribute troops to peace keeping operations, and/or the risk of the Court being swamped with cases) rather than logic. Troops are not, in practice, under UN command. Nor is it usually possible to sue the UN. And, at least in states which do not take constitutional law seriously, claims made before the courts of the troop-contributing state regarding rights violations will likely be met by the defence that Security Council resolutions have precedent over national human rights standards. *See Al Jedda* v. *Secretary of State for Defence*, the Times, 12 December 2007. Further discussion of this issue is outwith the scope of the present chapter.

The fact that the Geneva Conventions are applicable does not mean that all acts of violence being committed in the territory of a Party to a conflict are governed by the Conventions. Ordinary crimes, murder, rape etc. continue to occur in wartime, and so a "sufficient nexus must be established between the alleged offence and the armed conflict"[35]

As already mentioned, Common Article 3 attempted to lay down minimum rules for internal armed conflicts. However, these, and the conditions for a resistance/guerrilla movement being entitled to invoke the protection of this Article, remained to be defined. This was done in Article 1(1) of Protocol II which states that it applies to conflicts which take place in the territory of contracting state "between its 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". Article 1(2) provides that it "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature".

Although these conditions may seem to have solved the problem it should be stressed that, even if these conditions for the applicability of Protocol II are objectively satisfied, the government can nonetheless deny that this is the case and refuse to apply it. The government will not want to grant the forces they are fighting against, whether these are called 'rebels' or 'terrorists' the 'legitimacy' of being seen as combatants. But there will be little incentive for the rebels to give up, if they know they will be treated as criminals and executed for treason.

Another thorny problem is whether *rebel forces* can be bound by Common Article 3 and Protocol II. Treaty obligations bind states, but arguably a group in effective and continuing control of territory should be seen as being bound by fundamental principles of humanitarian law.[36]

Even assuming that a state is prepared to follow its obligations, the (relatively) neat theoretical model of applicable laws sketched out above can become very messy and difficult in practice. A so called 'complex emergency' involving natural disasters necessitating foreign humanitarian assistance, recurring internal conflicts, and covert or open involvement of foreign military 'advisers' and combat forces can involve the successive application of different legal regimes to the same actors as well as the simultaneous application of different legal regimes to different actors.

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35 *Prosecutor* v. *Tadic*, Case No. IT-94-1, 7 May 1997 (Trial Chamber) and 15 July 1999 (Appeal Chamber) (hereinafter, *Tadic case*). Trial chamber para. 573.

36 *See*, *e.g.*, L. Zegveld, *Accountability of armed opposition groups in international law*, (Cambridge University Press, Cambridge, 2002); ILC Articles on State Responsibility (Article 10), GA Res 56/83 (2002) (dealing with 'backdating' of responsibility for an entity which later achieves governmental/state power); C. Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements', in H. Fischer *et al.* (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection. Festschrift für Dieter Fleck* (Berliner Wissenschafts-Verlag, Berlin 2004), pp. 573–591; Henckaerts and Doswald-Beck (*supra* note 1), 299.

5. The Ad Hoc Tribunals and their Case Law on Individual Responsibility

The case law of the ICTY and the ICTR has developed almost every aspect of international humanitarian law considerably.[37] In the short space available in this chapter I will mention only two matters, both also relevant as regards the ICC. First, responsibility for war crimes in internal conflicts, and second the conditions under which a military commander can be held responsible for violations.

As mentioned above, individual responsibility at international law for violations of the laws of armed conflict in internal conflicts was deliberately left unclear by Protocol II in 1977. In this sense, Article 4 of the ICTR Statute was a breakthrough, in that it expressly provided for jurisdiction over a list of very serious offences in an internal conflict.[38] This was quickly followed by the ICTY Appeal Chamber decision in the first case it had to deal with, *Tadic*. Here, the ICTY was faced with the problem of how to categorize the conflict in former Yugoslavia: as internal or international.[39] The Appeals Chamber ruled that, even if the conflict was internal in nature, the ICTY had jurisdiction to try the perpetrator as a violator of the 'laws and customs of war' (Statute Article 3). In other words, the ICTY considered that there were laws and customs of war applicable to internal armed conflicts and individual criminal responsibility under international law for violating these.[40]

As regards individual criminal responsibility in general, the ICTY Statute provides in Article 7(1), that "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime". The Statute also provides that heads of state, government officials, and persons acting in an official capacity are not immune under this provision.

The *Tadic* case was also notable for its use of what has become known as the 'joint criminal enterprise' mode of establishing responsibility. The prosecutor has attempted to cope with the difficulties of proving involvement in offences when there is little documentation, and the facts are disputed, by (simply put) first proving that there is a

37 This case law is usefully summarized in Human Rights Watch, *Genocide, War Crimes, and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*, <www.hrw.org>.

38 These were listed as violations of Common Article 3 and Additional Protocol II which "shall include, but shall not be limited to: (a)Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) Threats to commit any of the foregoing acts."

39 *Ibid.* For discussion *see e.g.*, T. Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts', 322 *IRRC* (1998), pp. 29–56.

40 Appeal Chamber, paras 126–128. *See also Prosecutor* v. *Kupreskic*, ICTY Trial Chamber, 14 January 2000, paras. 521–530.

joint plan to commit offences, and that the particular accused has been aware of his participation in this joint plan.[41]

Another obvious problem in any conflict is that of establishing a chain of responsibility. When an order issued by a general to 'neutralize a threat' has filtered down to platoon level, it may well have become 'kill everyone in the area'. Military commanders have on occasion argued that troops which committed atrocities were not acting on orders. For example, the Japanese general Yamashita argued that he had not ordered, nor had knowledge of, the crimes committed by his troops, inter alia, the murder of thousands of civilians in the Philippines in the closing stages of World War II.[42] The majority of the US Supreme Court, sitting on appeal from the military tribunal of first instance, found that Yamashita had had a duty to take the measures necessary to control his troops, and Yamashita was later hanged for war crimes.

Article 87 of Protocol I codifies the customary rules by providing for command responsibility. The rule has been further clarified in the ICTY case law. In the *Celebici* case,[43] the ICTY defined the following as components of superior responsibility: (1) a superior-subordinate relationship; (2) the command/superior must have known or had reason to know that the subordinates were committing crimes; and (3) must have failed to take necessary and reasonable measures to prevent and punish them. The Trial Chamber in *Celibici* emphasized that the relationship must be one of 'effective control', suggesting that superiors may engage criminal responsibility even in informal structures as long as there exists an effective command. Further, a superior may be responsible not only for giving unlawful orders to commit a crime, but also for failing to prevent a crime or to deter the unlawful behaviour of its subordinates through punishment. Moreover superior responsibility may extend, according to the Trial Chamber, 'not only to military commanders but also to individuals in non-military positions of superior authority'.[44]

6. Individual Responsibility in the ICC Statute

The ICC Statute is the most significant development in individual responsibility for war crimes since the adoption of the Geneva Conventions in 1949. It creates a permanent international court with jurisdiction over four types of offence committed in the territories of contracting states, or by contracting states' nationals, namely violations of the laws of war during international and internal conflicts, genocide and 'crimes against humanity'. Although the ICC Statute only binds States Parties, under Article

41 The JCE doctrine involves watering down individual responsibility, and is thus not uncontroversial. *See*, *e.g.*, K. Ambos, "Joint Criminal Enterprise and Command Responsibility" 5(1) *Journal of International Criminal Justice* (2007), pp. 159–183.

42 In re Yamashita, 327 US 1 (1946). For discussion of the case and liability for omissions generally *see* A. Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2002), pp. 203–211.

43 *Prosecutor* v. *Delalic et al.*, Trial Chamber II, case no. IT-96-21, 16 November 1998.

44 *Ibid.*, paras. 355–363. On command responsibility generally see L. Aspegren, 'Befälsansvar: Några anteckningar om command responsibility enligt internationell straffrätt', *Juridisk tidskrift* (2001–02) pp. 456–465, J. A Williamson, 'Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda', 13 *Criminal Law Forum* (2002) pp. 365–384.

13, the Security Council may, acting under Chapter 7, establish ICC jurisdiction over a non-party, by referring a situation to the Prosecutor. This has so far happened once, in relation to Darfur.[45] The other situations presently in the ICC docket have been referred by the State Party most concerned.

As regards war crimes committed during non-international armed conflicts, Article 8(2)(c) criminalizes the acts enumerated in Common Article 3 while requiring that the acts involved be 'serious'. Article 8(2)(e) supplements this by providing that some of the acts listed as serious violations of the laws and customs of war when committed in international armed conflict also constitute war crimes in non-international armed conflicts.[46] Notably, violations of the principle of distinction are not specifically stated to be war crimes in non-international armed conflicts.

The Article defines non-international armed conflict as a protracted armed conflict on a state's territory between state forces and organized armed groups, or between organized armed groups. It thus differs from the definition given in Protocol II, in requiring protracted armed conflict on the one hand, but not requiring either responsible commanders, or control of a part of the territory. It also recognizes that, in reality, there may be no 'governmental' and 'rebel' forces: just warring groups, with civilians getting in the way. Article 8(2)(c) can thus be said to complete the developments begun in the ICTY and ICTR.

The ICC jurisdiction over genocide and crimes against humanity is also significant in that it recognizes that, in practice, there is no neat division between 'peacetime' situations involving massive violations of human rights and internal conflicts. Instead what is necessary is a minimum set of standards applicable in all situations.[47] In the *Tadic* case, the ICTY outlined the necessary elements of crimes against humanity as requiring that the actions of the accused be linked geographically and temporally with the armed conflict, that those actions "comprise part of a pattern of widespread or systematic crimes directed against a civilian population, and that the accused must have known that his actions fit into such a pattern".[48] A single act may qualify as long as there is a link with the widespread or systematic attack against a civilian population. Even acts committed for purely personal motives can be crimes against humanity when committed in the context of widespread and systematic crimes. Article 7 of the ICC Statute defines a crime against humanity as an act committed as part of a "widespread or systematic attack against any civilian population, with knowledge of the attack". No specific intent is necessary. The perpetrators need not intend to participate in the attack, nor must they realize that the act is in furtherance of a policy.

45 SC Res. 1593 (2005).

46 Article 22(3) indicates that customary international law can contain a longer list of offences.

47 *See also* in this respect UN Commission On Human Rights, Fundamental standards of humanity, Report of the Secretary-General submitted pursuant to Commission resolution 2000/69, 57th session 12 January 2001 E/CN.4/2001/91.

48 *Tadic* Appeal Chamber (*supra* note 35) para. 644, para. 659. For useful overviews of the development of the concept of crimes against humanity, and comments on the extent to which the Statute can be said to be codificatory in this regard, *see* M. McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes Against Humanity', 22 *HRQ* (2000), pp. 335–403 and A. Cassese *et al.*, *The Rome Statute of the ICC: A Commentary*, vol. 1, (Oxford University Press, Oxford, 2002), pp. 510–521.

The ICC Statute identifies several categories of individuals who may be held responsible for crimes under international law. Article 25 provides that individual criminal responsibility exist for those individuals who commit, attempt to commit, order, solicit, induce, aid, abet, assist or intentionally contribute to the commission of a crime within the Court's jurisdiction. In addition, incitement to commit genocide is prohibited. Article 27 provides that the Statute applies to all persons without distinction, including on the basis of official capacity such as head of state, member of Government or elected representative. Under Article 28, military commanders and other superior authorities are responsible for crimes committed by subordinates under their control. At the same time, Article 33(1) of the Statute states that superior orders shall not relieve a person of criminal responsibility unless the subordinate was under a legal obligation to obey the order and did not know that the order was unlawful, and the order was not manifestly unlawful. Orders to commit genocide or crimes against humanity are, according to Article 33(2), manifestly unlawful.

7. Individual Responsibility at National Criminal Law

As already mentioned, international and national criminal law are intertwined. States other than the states in which conflicts are taken place may wish to, or feel obliged to, prosecute alleged offenders. Conflicts often spill over to neighbouring states. And states need not be geographical neighbours to be involved in each others' conflicts. Almost every state in the world has groups of nationals whose ethnic origin lies in another state, whether they came as immigrants or asylum seekers. Where that other state is experiencing an internal conflict, these groups can easily be actively drawn into that conflict, and begin supporting guerrilla/terrorist groups in a variety of ways, including volunteering to serve in armed groups.[49] And money can also be a motivation. Mercenaries participated in the Yugoslavia conflict. Finally, there is also the possibility of such crimes being committed as part of a peace-keeping or peace enforcement effort. Thus, it is easy to see how someone can escape justice in the territorial state, by returning to his or her state of nationality, from which extradition may be barred (as in the case in Sweden, as shown below). But non-nationals can also make their way to another state usually to seek asylum. Of course, such people can be denied refugee status under Article 1F of the Refugee Convention,[50] so the duty of non-return (*non-refoulement*) does not apply to them. But such a duty can also exist under a human rights treaty if the suspect faces the death penalty or torture or inhuman treatment.[51] The ICC may lack jurisdiction over the offender, and is anyway only

49 Interestingly, the existence of a diaspora has been identified as one of the prime risk factors for conflict. See P. Collier, *Economic causes of civil conflict and their implications for policy*, the World Bank, 2000. See further M. Fullilove, *World wide webs: Diasporas and the International System* (Lowy Institute, Sydney, 2008).

50 Convention Relating to the Status of Refugees, 1951, 189 UNTS 150. This is a simplification. For a discussion of the application of the 'exclusion clauses' *see* the special supplementary issue of the *International Journal of Refugee Law*, vol. 12 (2000).

51 *E.g.*, Article 3 of the ECHR (as interpreted in *Soering* v. *UK*, 7 July 1989, A/161 and *Chahal* v. *UK*, 15 November 1996) and Protocol 6 of the ECHR.

likely to be interested in the 'big fish'. Thus, a state where a suspect is present will often be faced with the option of releasing him or her or attempting to prosecute him or her.

Here however, there is a legal problem. The ICC Statute does not require states to extend their jurisdiction over *extraterritorial* offences of genocide, crimes against humanity and war crimes in internal conflicts. Contracting states' duties under the Statute are largely limited to assisting the ICC in transferring offenders, providing evidence etc. The issue is whether such an extension of jurisdiction is required, or at least permitted, by international law.

The question of the permissible extent of jurisdiction over crimes against humanity is still open. The Arrest Warrant case before the International Court of Justice (ICJ) concerned a Belgian arrest warrant issued against the then Foreign Minister of the Democratic Republic of Congo.[52] The ICJ considered that, before *national* courts, serving Foreign Ministers (and heads of state) are entitled to claim complete immunity from jurisdiction. However, the issue whether the jurisdictional claim as such was in breach of international law was not decided. Belgium later altered its laws to require governmental permission to prosecute but did not abandon its jurisdictional claim to try extraterritorial crimes against humanity.

The jurisdictional claim is closely linked with the content of the offences in question. States have no difficulty in accepting, for example, piracy as an offence of universal jurisdiction, but forced evacuation of, or even massacres of, ethnic minorities or ordering bombardments of civilian targets is often official policy in a conflict. There are many such conflicts going on, even in Parties to the ICC Statute. Conceding extraterritorial jurisdiction over crimes against humanity or crimes committed in internal conflicts will mean that the potential radically increases for the courts of one state sitting in judgment over the 'ordinary' acts of officials in other states. Moreover, with an extensive notion of command responsibility, senior officials – Foreign Ministers, Presidents – can be held responsible. There are few, if any foreign ministries, which want the sort of problems that this will cause for normal interstate relations.[53]

On the other hand, states are understandably reluctant to say this. Instead, the debate is put in legal terms of insufficient state practice to create custom, or the need for the presence of the accused in the territory to constitute jurisdiction, or an extensive approach is taken to the issue of state immunity for official acts, and so on. Still, as far as internal conflicts are concerned, states have really conceded the principle. Protocol II involves a duty to criminalise war crimes in internal conflicts. The Protocol is widely ratified. Admittedly, the Protocol does not explicitly provide for extraterritorial

52 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo* v. *Belgium*), judgment (merits) as found at <www.icj-cij.org>, (hereinafter cited as: *Arrest Warrant* Case (2002)). The issue of jurisdiction has arisen in another application, Certain Criminal Proceedings in France (*Democratic Republic of the Congo* v. *France*) <www.icj-cij.org>.

53 Not surprisingly, some of the strongest critics belong to the category of former senior officials. *See*, *e.g.*, H.A. Kissinger, 'The Pitfalls of Universal Jurisdiction' 80 *Foreign Affairs* (2001), pp. 86–98. German human rights groups attempted to have a prosecution brought against *inter alia* former US Secretary of State Donald Rumsfeld for ordering torture of detainees in Iraq, 2007. For a discussion *see* F. Jessberger, 'Settling Accounts for Torture in Abu-Graib – Lessons from the "Rumsfeld Case" in Germany in K. Nuttio (*ed.*), *Festshrift in Honour of Raimo Lahti*, (Forum Iurus, Helsinki, 2007).

jurisdiction, but there is persuasive case law from the ICTY and some national courts that such jurisdictional competence exists at customary international law.[54]

Thus, while it is debatable whether the Geneva Conventions 'grave breaches' regime applies to offences committed in internal conflicts in the sense of obliging states other than the territorial state to hunt down, prosecute and punish offenders present on their territories, I consider it to be without doubt that there is now a permissive rule to this effect allowing them to do so,[55] and correspondingly, that territorial states cannot claim that a prosecution of an offender in another state violates the principle of non-intervention.[56]

In conclusion on this point, I will give an example of substantive and jurisdictional claims in Sweden. Crimes against humanitarian law are provided for in Chapter 22, section 6 which refers to grave breaches ('svåra överträdelser') of humanitarian treaties. Chapter 22, section 6a and 6b, adds the specific offences of unlawful possession of chemical weapons or anti-personnel mines. The section had been subject to a major redrafting in 1986. The *travaux préparatoires* to the amendment do not specifically state that it was intended to include breaches of Common Article 3 and Protocol II.[57] However, the objective wording of the section undoubtedly can include crimes committed in internal conflicts, and this is supported by a systemic interpretation – that the section is meant as a supplement to the normal material offences of murder etc., allowing more severe punishment of offenders. Moreover, the section also refers to serious breaches of 'generally recognised humanitarian principles' (i.e. customary international law principles) and the list of specific acts set out in the section is expressly stated to be non-exhaustive. Thus, interestingly, Chapter 22 section 6 creates an offence at Swedish law, but the content of the offence is defined by – developing – international law.[58]

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54 Henckaerts and Doswald-Beck (*supra* note 1), pp. 3651–3662; W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, (TMC Asser Press, The Hague, 2006). For other discussions of doctrine and state practice (admittedly largely from common law perspective) *see* Amnesty International, Universal Jurisdiction: the Duty to Enact and Enforce Jurisdiction 1 September 2001, at <www.web.amnesty.org/ai/nsf/recent/ior53/017/2001>; Human Rights Watch, Universal Jurisdiction in Europe, June 2006, <www.hrw.org> and S. Macedo (*ed.*), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, (Princeton University Press, Princeton, 2003).

55 This is also Ferdinandusse's opinion (*ibid.*). Support can also be found for this in states' reactions to the ICC Statute. For a discussion, *see e.g.*, H. Satzger, 'German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes Against International Law' 2 *International Criminal Law Review* (2002), p. 261; and K. Cornils, National Implementation of International Criminal Law in Nuttio, *supra* note 53.

56 It is clear that the principle applies to jurisdictional claims. What is unclear are its limits. *See*, *inter alia*, I. Cameron, *The Protective Principle of International Criminal Jurisdiction*, (Aldershot, Dartmouth, 1994), pp. 343–45, and the EU and UN GA response to the US 'Helms Burton' legislation, Council Reg No 2271/96, Protecting Against the Effects of the Extra-territorial Application of Legislation Adopted by a Third Country, 1996 OJ (L309) 39, GA Res 51/22, 6 December 1996.

57 *See* SOU 1984:56, pp. 297–301 and Prop. 85/8:9, p. 133.

58 This construction can be criticized on a number of grounds, in particular, legal certainty. The official government inquiry appointed to bring Swedish law in line with its commit-

There is also some support in case law for holding that the section applies to both internal and international conflicts. There have been very few attempts to bring prosecutions under this section, but in the one case which has so far led to a conviction, the Stockholm district court considered that the section applied to both types of conflict.[59]

As regards jurisdiction, the relevant rules are to be found in Chapter 2 of the Swedish Criminal Code. The standard rule of extraterritorial jurisdiction in section 2 allows for jurisdiction over nationals (section 2 para. 1, p. 1 and 2), or aliens (section 2 para. 1, p. 3) who happen to be present in Sweden, but requires double criminality, i.e. that the act in question be criminal in both Sweden and where it was committed. Double criminality is interpreted to mean *in concreto*, meaning that justifications and excuses which might exist in the place of commission will mean that double criminality is lacking. This can obviously cause problems in states where government forces commit atrocities and can invoke laws or practices excusing or justifying *e.g.*, homicide when this occurs in the course of a security operation.

However, section 3 sets out eight additional circumstances in which the Swedish courts have unconditional jurisdiction to try offences committed abroad against Swedish law. By contrast to section 2 para. 1, p. 3, these provisions can form the basis of an extradition request. For present purposes, only four of these need be noted. The first of these are crimes committed by members of the Swedish military forces in an area where these forces are present and crimes committed by anyone in an area occupied by Swedish military forces on active service (p. 2). The second are crimes committed by employees of the Swedish military forces or the Police while serving abroad (p. 3). These two points thus provide unconditional jurisdiction over inter alia Swedish peacekeeping or peace-enforcement personnel who may have committed offences abroad.

The third is p. 6: hijacking, ship, aircraft or airport sabotage and attempts to commit such offences, crimes against international humanitarian law (meaning Chapter 22, section 6), unlawful possession of chemical weapons or mines and perjury before an international court.

Fourth and finally there is p. 8: crimes punishable by a minimum of four years imprisonment. When the double criminality rule was introduced in 1972, it was felt to be unacceptable that a Swede or domiciled alien who had committed a very serious crime abroad might be able to escape punishment because of the absence of double criminality *in concreto*,[60] e.g., because of the availability of a *crime passionnel* defence to murder in the *locus delictus*. Thus, unconditional jurisdiction was retained over certain very serious offences, namely murder (Chapter 3, section 1), manslaughter (Chapter 3, section 2), kidnapping (Chapter 4, section 1), aggravated rape (Chapter 6, section 1), aggravated robbery (Chapter 8, section 6), aggravated arson or destruction (Chapter 13, sections 2 and 3) and genocide (Genocide Convention Act, 1964:169). Thus

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ments under the ICC Statute (which has not yet been acted on) has proposed a much more detailed regulation of humanitarian offences for this very reason. Internationella brott och svensk jurisdiction SOU 2002:98.

59 *Public Prosecutor* v. *Arklöf*, Stockholm district court, Mål nr. 4084-04, judgment 2006-12-18, pp. 52–57. Having said this, a district court decision in Swedish law generally speaking has no precedent value.

60 *See*, *e.g.*, Prop. 1972:98, p. 57.

there is unconditional Swedish jurisdiction over most of the worst crimes which can be committed during internal conflicts or, more generally, in the course of government repression, and there is no need to show a nexus to an internal conflict. Nor, indeed, need one prove the pattern of activity necessary to show a crime against humanity (attack directed against the civilian population etc), either under customary international law or the ICC Statute. The very wide jurisdictional claim made in p. 7 can obviously cause problems from foreign policy perspective. It is, in fact, wider than the Belgian legislation at issue in the Arrest Warrant case, and the Commission of Inquiry appointed to propose changes in the law in order to fulfil the requirements of the ICC Statute has recommended the inclusion of presence of the offender on Swedish territory, or governmental permission to prosecute, in order to avoid disputes with foreign states.

In the circumstances, one can ask why there have been so few prosecutions.[61] Part of the answer is that Sweden is, geographically, somewhat 'off the beaten track'. The US Secretary of State for Defence, to take a topical example of a person some people would like to prosecute for war crimes, rarely if ever stops off at Stockholm Arlanda on his way to other European capitals. On the other hand, Sweden accepts every year a (relatively) large number of refugees, some of whom can be suspected of involvement in war crimes or crimes against humanity. The standard interviews made of all asylum seekers by the Migration Authority may give rise to suspicions against a given person, but credible testimony identifying them as offenders or linking them to specific offences will often be lacking. Another reason is the – until relatively recently – decentralised system of prosecution of international crimes in Sweden combined with police and district prosecutors unfamiliarity with international criminal law. The procedural and substantive complications in investigating international crimes should not be underestimated, notwithstanding the Swedish principle of the free evaluation of evidence, which generally speaking will make it easier to gather proof. This is especially so where the authorities of the territorial state are reluctant to cooperate, or actively are against cooperation. Where crimes have been committed by semi-organized militia groups, documentation is likely to be totally lacking. Where there is a well-functioning military command structure, the fact that a war crime has occurred may be clearer, but the individual culprits will still often be unknown. Without access to military records, faceless bomber pilots or tank gunners cannot be identified.[62] Without access to the place where the crime was committed it may be impossible to check whether a witness' testimony is reliable.

Proposals have recently been made in Sweden for a greater degree of specialisation in investigating and prosecuting suspected war criminals.[63] However, the situa-

61 For earlier Swedish investigations see I. Cameron, 'Swedish International Criminal Law and Gross Human Rights Offences', in P. Asp *et al.* (eds.), *Flores juris et legum: Festskrift till Nils Jareborg* (Iustus Uppsala, 2002).

62 For a discussion of this problem from the perspective of the ad hoc tribunals *see e.g.*, J. K. Coogan, 'The Problem of Obtaining Evidence for International Criminal Courts' 22 *HRQ*. (2000), pp. 404–430 and F. Harhoff, 'Legal and practical problems in the international prosecution of individuals', 69 *Nordic Journal of International Law* (2000) pp. 53–61.

63 Åklagarmyndigheten, *Internationella förbrytare i Sverige: Att spåra upp, utreda och lagföra förövare av folkmord, brott mot mänskligheten, krigsförbrytelser och vissa andra grova internationella brott, Återblick – Utblick – Inblick – Framåtblick*, Stockholm, 2007. A greater pooling

tions in which the courts are able to convict alleged offenders from other countries while maintaining the necessary high standards of proof beyond a reasonable doubt are still likely to be rare.

8. Some Sceptical Concluding Remarks

Apart from the evidential difficulties sketched out above, thus far, the picture which has been given is encouraging. There are huge problems still, but the process seems to be one of a gradual filling of gaps in protection, and a slow movement away from impunity to (more of) the rule of law on the international plane.[64] This, as mentioned, risks committing the error of historicism, so now it is time for some scepticism.

There are several arguments made for creating the ICC, criminalizing at national law war crimes in internal conflicts and crimes against humanity and actually prosecuting suspected offenders. These can be summarized as deterrence, ending impunity, retribution and creating the conditions for reconciliation between and within societies and the reestablishment of peace by individualizing responsibility. Other factors which have been taken up are the reestablishment of the dignity of the victims, the need to provide a clear historical record of atrocities and the perpetrators' acceptance of punishment as a first step in their rehabilitation.

There are relatively few justifications given for the creation of the ICTY and ICTR in their case law, but then, it is not their job to question their *raison d'être*.[65] But some of the leading textbooks in international criminal law say little or nothing about these either.[66] It seems to be taken for granted that the arguments mentioned above are valid. The undeniable fact of massive human rights abuses in many parts of the world today seems to be taken as reason enough for creating the ICC.

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of resources in the Nordic states would also be sensible. In this respect it can be noted that the EU has attempted to make prosecution of foreign war criminals more effective by means of improved information exchange. See the Council Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, OJ L 167 26 June 2002.

64 Recent years have also seen the creation of ad hoc 'hybrid' national/international criminal courts established to try war crimes and crimes against humanity as part of peace settlements in Sierra Leone and Cambodia. See, respectively Security Council resolution 1315, 14 August 2000, Agreement for and Statute of the Special Court for Sierra Leone, 16 January 2002, <www.icrc.ch/ihl.nsf/-FULL/605?OpenDocument> and <http://www.eccc.gov.kh/english/cabinet/law-/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf>. For discussion *see* C. Romano *et al.* (eds.), *Internationalized Criminal Courts*, (Oxford University Press Oxford, 2004). Another development which should be mentioned here is S.C. Res. 1757, 2007 establishing the UN Special tribunal for Lebanon, although this does not have jurisdiction over 'core' crimes.

65 *See*, however, *Prosecutor* v. *Kupreskic*, trial chamber, 14 January 2000, para. 848. *See* further the preamble to the ICC statute.

66 Cassese, *supra* note 42, and K. Kittichaisaree, *International Criminal Law* (Oxford University Press, Oxford, 2001) say almost nothing about the justifications. G. Werle, *Principles of International Criminal Law*, (TMC Asser Press, The Hague, 2005) devotes just over two pages to the purposes of punishment.

But there is little or no support amongst criminologists and criminal lawyers for the proposition that simply criminalizing conduct works to deter an offender.[67] What is known as 'general deterrence' works, if at all, only under special circumstances, in relatively ordered (and law-abiding) societies. In particular, as far as war crimes are concerned, peer group pressure, exhaustion, the brutalization conflict involves, stress, fear of the enemy and fear of immediate disciplinary and other punishment for refusing to carry out an order all tend to encourage the commission of atrocities. The prospect of perhaps being subject to a trial many years later in another country or before the ICC in The Hague will not realistically operate to restrain junior ranks, or even, probably, more senior ranks.

Moreover, the value of the imposition of individual criminal responsibility can itself be questioned. Where a large section of the society has participated in an atrocity, such as occurred in the Rwandan genocide, attempting to individualize guilt seems inadequate, or even wrong. As Koskenniemi has put it, individual responsibility in such cases can mean collective impunity.[68]

From the perspective of the victim, the power of a criminal trial to reestablish the dignity of the victim and/or give her or him a sense of closure is not at all clear. To ensure a fair trial, it is necessary to allow questioning of witnesses, or even a tough cross-examination ripping apart testimony. It seems at least as likely that testifying, and being cross-examined, will reopen terrible wounds as providing closure. In any event, the closure claims are, like the arguments that individualizing responsibility contributes to reconciliation, matters which are most suitably left for psychologists and social anthropologists to answer. As regards the latter claims, the balance between 'reconciliation' and 'justice' is not an easy line to draw and can be assumed to differ from culture to culture and time to time. It should also be remembered that forgiveness in some religions can only come from God, not the victim.[69] As concerns the historical record argument, while the courtroom may at first sight seem an appropriate place to settle a dispute, in that procedural fairness reigns and both sides have the time and resources to pick holes in each other's stories, a trial is a special type of discourse, which focuses on only the legally relevant 'evidence' and so excludes as much material as it includes. As all trial lawyers know, the legal truth as established by the court is not necessarily the actual truth.[70]

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67 For a discussion of general deterrence in the context of ICTY sentencing *see* B, Griffin, 'A Predictive Framework for the Effectiveness of International Criminal Tribunals' 34 *Vand JTL* (2001), p. 405. *See also* T. J. Farer, 'Restraining the Barbarians: Can International Criminal Law Help?' 22 *Human Rights Quarterly* (2000), p. 90 and, *in particular*, I. Tallgren, 'The Sensibility and Sense of International Criminal Law' 13 *European Journal of International Law* (2002), p. 562.

68 M. Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck YB UN Law* (2002) p. 1.

69 Thanks to Tomislav Dulic for helpful comments on this point.

70 Koskenniemi, *supra* note 68. I think the argument is easier to support if it is phrased more modestly (as Werle does) in terms of making subsequent falsification of history more difficult. As Ove put it on the subject of the mass killings of Armenians, full agreement among historians may never be obtained, but enough is known for us to be able to call it genocide. This is not to say that this need, or should be, decided in a legal document (speech to Conference organized by Levande historia 30 January 2007).

What is left? Retribution is left, but this does not fit in so well with Western liberal thinking: we seem to want more out of punishment than simply punishing for the sake of it.[71] And if retribution is the point, the cynic might say, can this not be done a lot cheaper? The ICTY and the ICTR have cost a lot of money. The ICC will cost even more.

It might seem paradoxical that the Nordic states, which domestically have tended, on the whole, to take a relatively sound, and sceptical, approach to criminalization, have been eager proponents of criminalization on the international level.[72] But the legislators in the Nordic states know that complicated social problems cannot be solved by only using the criminal law, and it is foolish, and wrong, to try do so – even if they too occasionally fall for the temptation of doing just this.[73]

Is this too much scepticism? In one sense, it gives a false picture to see enforcement of humanitarian law (and one can add, crimes against humanity) as *simply* the imposition of individual responsibility. As the German *Manual on Humanitarian Law in Armed Conflicts* notes, there are many factors that can induce parties to an armed conflict to counteract breaches of the law and to enforce observance of its rules. These include considerations for public opinion, reciprocal interests of the parties to the conflict, maintenance of discipline, fear of reprisals, penal and disciplinary measures, fear of payment of compensation,[74] the involvement of protecting powers, international fact finding, the activities of the ICRC, diplomatic activities of states, national implementing measures, dissemination of humanitarian law and finally, the personal moral responsibility of the individual.[75]

However, I think that it is a sign of the growing maturity of international criminal law as a discipline that criminal lawyers, with their greater understanding of the limits of the criminal law, are devoting serious attention to it. I also think that the subject gains from some healthy scepticism. Unless the goals of international criminal law are 'downsized', disenchantment and depression will set in when these goals are obviously not being met, despite amended national laws, education programmes for national

71 J. Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law', 12 *Finnish Yearbook of International Law* (2001), pp. 249–267.

72 I stress 'relatively sound' from a British perspective. Nordic criminal lawyers are – naturally – more critical. *See* N. Jareborg, 'Kriminalisering som ultima ratio regis', in *Inkast i straffområdet* (Iustus, Uppsala, 2006), and C. Lernestedt, *Kriminalisering: problem och principer* (Iustus, Uppsala, 2003).

73 I will content myself with referring to only one work on this huge theme, N. Jareborg, 'Vilken sorts straffrätt vill vi ha? Eller Om defensiv och offensiv straffrättspolitik', in *Inkast i straffområdet* (Iustus, Uppsala, 2006).

74 Even if a state prosecutes its offenders this does not mean that it is absolved of state responsibility for acts in breach of international law. The topic is complicated. *See generally* GA Res. 56/83 on Responsibility of States for internationally wrongful acts and J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, text and commentaries*, (Cambridge University Press, Cambridge, 2003). *See also* the *Case Concerning the Application of the Convention On the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*) 2007, <www.icj-cij.org>.

75 Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts*, Bonn 1992, chapter 12, commented version by D. Fleck *et al.* (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (1995).

police and prosecutors and a shiny new building for the – already – hundreds of staff employed at the ICC. The deterrence argument in particular has been heavily overplayed. The existence of well-functioning courts to impose individual responsibility does not deter crimes of violence in Sweden and the ICC will not deter the commission of core crimes. If we want to deter the commission of core crimes, we have to speak – as we do at national law – of a battery of different measures, economic, social, environmental, educative etc. taken primarily at national levels, in the states and territories where these core crimes are being committed. The tactics, strategies and mixes of measures will vary according to the conditions and cultures in the states and territories in question. Bearing in mind the enormity of this task, it is hardly surprising that we have baulked before it. If the existence of the ICC is used as an excuse not to do anything about these underlying problems, then this is bad. But this is not the same thing as being against the creation of the ICC. I see at least one major positive potential in the ICC, namely the role ICC indictments can play in 'marking' certain military leaders and regimes as under suspicion of having committed core crimes. In doing so, this should contribute to national and international pressure on democratic states which support such regimes, militarily, politically or economically, or permit their multilateral companies to do so, to end such support.

As regards national enforcement of individual responsibility, this has several values. At the very least, it will make travel more difficult for member of regimes suspected of committing core crimes, except for those able to claim state immunity. But it obviously also has a value as regards encouraging one's own military forces to follow basic civilized standards. Even with the military forces of democratic states, compliance with the laws of war can never be taken for granted. As the nature of warfare changes, the underlying factors inducing compliance also change.[76] This is seen clearly in the US 'war against terror'. The present US administration has engaged in a practice of 'rendition' handing detainees over to be tortured in other countries. It has detained hundreds of people without trial arguing that Al-Qaeda fighters are not entitled to the protection of the Geneva Conventions as they are 'unlawful combatants'.[77] Some of these detainees appear to have been subjected to treatment in the course of interrogation which, at least, is inhuman or degrading. One can counter this by arguing that, as those purporting to act for Al-Qaeda has shown no inclination to follow the most basic laws of war (the principle of distinction, taking of prisoners etc.) then why should US and allied forces obey such laws. And why should we impose individual responsibility if they do not? Much could be written, and has been written, about this counter-argument, but to put it very simply, it misses the point. Human rights, and in this sense the individual rights in humanitarian law too, are not seriously meant to deter the 'bad guys' from doing bad things. They are to stop the 'good guys' from doing bad

76 For a discussion *see* H., Münkler, 'The Wars of the 21st Century,' 85 *IRRC* (2003), pp. 7–21.

77 The legal position of Guantanamo Bay detainees was finally clarified by the US Supreme Court in *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006) which ruled by a majority that the President was not free to disregard the Geneva Conventions. The response was that Congress enacted the Military Commissions Act of 2006 (S.3930) which maintains the concept of 'unlawful combatants' and the possibility of trying them by military courts.

things.[78] Nobody, of course, regards themselves as belonging to the 'bad guys', but I would say, again, putting it very simply, that the good guys are those that obey the rules and the bad guys are those who do not. Here, as in much else, Hollywood has a lot to answer for! The idea certainly has come from somewhere that you can be a good guy and still (seriously) break the rules – and torture is about as serious a breach as you can have. Even worse, there seems to be an idea that the good guys *have* to break the rules to get anything done. This attitude is, putting it mildly, destructive of international law, and it will certainly not make the world a better place, either in the long term or even the short term. The job of trying to persuade the people who perceive of themselves as the good guys not to do bad things, has been the most important part of the work of humanitarian lawyers like Ove Bring. This job occasionally entails telling one's friends that they are behaving unacceptably. While I have expressed a lot of scepticism, in the end I am in absolutely no doubt about the value of this work. And when we see the laws of armed conflict and the imposition of individual responsibility for breach of these (backed up, hopefully by the ICC) as aimed mainly at 'us' rather than 'them' then their value becomes clearer.

78 *See*, *e.g.*, R. Dworkin, 'Terror and the Attack on Civil Liberties', 50(17) *NY Review of Books*, November 6, 2003.

Chapter 5

Reflections on the Security Council and Its Mandate to Maintain International Peace and Security

*Hans Corell**

1. Introduction

During my tenure as Under-Secretary-General of the Legal Affairs and the Legal Counsel the United Nations from March 1994 to March 2004, the question of Iraq was a constant companion. There were, however, three instances where I was more deeply involved than 'normal': the negotiations of the Memorandum of Understanding between the United Nations and Iraq in 1996 to implement Security Council Resolution 986 (1995) – the Oil-for-Food Programme (OFFP); the Secretary-General's negotiations with President Saddam Hussein in February 1998 for the purpose of getting access for the UN weapons inspectors to the President's palaces; and the aftermath of the attack on Iraq by the United States and the United Kingdom in March 2003.

The aim of this paper is, first, to share some of my personal experiences relating mainly to one of these events, the 1996 negotiations. The foremost objective is to reflect, based on those and other UN experiences, on the way in which the Security Council fulfils its mandate to maintain international peace and security.

2. The Memorandum of Understanding for the Implementation of the Oil-for-Food Programme

Already at an early stage, the Security Council realised that the effects of the sanctions regime that it had introduced might negatively affect the population of Iraq. In Resolutions 706 (1991) and 712 (1991), the Council had therefore decided to establish a programme which would allow Iraq to sell oil under UN supervision for the purpose of among other things purchasing humanitarian goods for the Iraqi population.

The decisions by the Security Council needed 'arrangements and agreements' for its implementation. The Secretary-General had requested Kofi Annan, who was then

* Ambassador and head of the Legal Department of the Swedish Ministry for Foreign Affairs 1984–1994. From 1994–2004, he was Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations. He is presently a consultant at Sweden's largest law firm Mannheimer Swartling.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 61–74.

the UN Controller, and later my predecessor Carl August Fleischhauer to negotiate with the government of Iraq for this purpose. However, these rounds of negotiations, the latest held during the summer of 1993, were unsuccessful.

The Council then decided to change the concept somewhat and eventually, on 14 April 1995, adopted Resolution 986 (1995). But it was not until January 1996 that the Iraqis were prepared to enter into negotiations on how to implement this Resolution.

I was then contacted by Secretary-General Boutros Boutros-Ghali, who explained that he had had several contacts with the Iraqis and that they were now prepared to engage in negotiations. I was to lead the UN delegation. The government of Iraq had appointed their former UN Ambassador Abdul Amir Al-Anbari, now their Ambassador to UNESCO, to lead their delegation.

Then started an intense period that was to end by the signing of a Memorandum of Understanding (MOU) on 20 May 1996. The negotiations were held in four distinct phases in February, March, April and May 1996. In all, the delegations met for some 50 sessions.

I was assisted by a delegation of UN colleagues and by an interdepartmental working group. On my delegation were also experts in oil trading and banking. These experts were necessary because of the complex oil trading and banking arrangements that were necessary to implement the Programme and which to a large extent deviated from ordinary practice. The UN monitoring meant that the parties to the contracts for oil sales and purchase of goods would not be allowed the normal freedom of contract.

On his part, Ambassador Al-Anbari was assisted by a similar delegation.

The negotiations immediately attracted tremendous interest from the media. Both sides were concerned not to create speculations about the progress of the talks that could have an impact on the oil market. Furthermore, because of the considerable material we had to go through it was also obvious that the results of a day's negotiations in many instances would be fairly technical and maybe not so significant for the final outcome of the negotiations. We therefore decided to issue very formal press statements after every day's negotiations.

The press nevertheless waited in the foyer, and Al-Anbari complained that he always had to fight his way through the gathering of journalists because they were able to anticipate when he was to depart from the building, whilst I could choose to leave later and avoid meaningless encounters with the press; there was really not much to tell.

Resolution 986 was obviously the point of departure in the negotiations. We soon found that some of the work that had been done in the negotiations on the basis of earlier resolutions could be used. But our main concern soon focused on something else. In reading Resolution 986, my collaborators and I wondered whether the Security Council had realised the complexity of the operation that they had entrusted to the Secretariat.

One obvious conclusion was that normal practice with respect to conclusion of contracts on oil sales or purchase of humanitarian goods could not be applied. Complex systems for monitoring of the contracting, overseeing of the loading of the oil at Mina el-Bakr or Ceyan, and inspecting the delivery of, and distribution of, humanitarian goods would have to be necessary elements of the arrangements.

What concerned us most was that the UN had no means of investigating violations of the arrangements by actors at the national level. In particular, we were concerned that the pricing arrangements might allow for kickbacks that could not be

detected in any other way than through criminal investigations at the national level. The UN is not vested with such power.

Halfway through the negotiations a very unpleasant event occurred. One day I was informed by Secretary-General Boutros Boutros-Ghali that the Americans were in the possession of a copy of the draft of the MOU and that they had views on its wording. I was extremely concerned and wondered how this had happened. I did not believe that anyone in my delegation would have leaked the text. The only other person on the UN side that had access to the text apart from the members of my delegation was the Secretary-General himself. For obvious reasons, he had to be kept informed.

I did not believe that the Iraqis would have given the text of the Americans. But maybe they had communicated it to Baghdad and that the communication had been intercepted?

The Secretary-General instructed me to include in the draft MOU suggestions that the Americans would make. These proposals were eventually delivered by Ambassador Edward (Skip) Ghnem of the US Mission to the UN. Ghnem was a professional diplomat who I held in very high esteem. He was clearly embarrassed when he came to see me, not least because some of the suggested amendments were very detailed and basically editorial. He excused himself and said that the document had been given to 'some gnome' in Washington who was responsible for the detailed proposals.

Anyone who has negotiated an international agreement knows that the text of such a document can be quite awkward, partly because the language is not the mother tongue of all parties, partly because of the complexity and delicacy of the subject matter. But I had no choice. My instructions from the Secretary-General where clear: I had to present the amendments to the Iraqi delegation.

When this happened, Al-Anbari got extremely upset. "With whom am I negotiating?" was his reaction. In the past, when there had been matters in the negotiations that were particularly delicate, I had asked to see Al-Anbari privately in my office. This was such a situation, and I suggested that we meet just the two of us in my office to discuss what had happened. So we did.

I actually had a very good relation with Al-Anbari across the negotiating table. But when we came into my office on this occasion he was really upset and even threatened to leave the negotiations. I explained to him that I fully understood that he was upset. But I added that there was another person in the room who was even more upset, and that was me. I told him that I felt extremely embarrassed and added that in view of the circumstances our skills as diplomats and negotiators were really put to the test.

After a moment I suggested that he calm down and study the text. He did, and it did not take long before I discovered the trace of a smile on his face. He had come to the conclusion that many of the amendments suggested were simply not relevant to the substance of the text. They did not matter. We then decided to work together to identify the substance, if any, in each specific amendment. Eventually, we returned to the negotiating table and continued our work.

Later, through Boutros Boutros-Ghali's book *Unvanquished*, I learned that it was he who had given the text to the Americans and the British.[1] I had of course suspected

1 B. Boutros-Ghali, *Unvanquished: a U.S. – U. N. Saga*, (Random House, New York, 1999), pp. 259–260.

this, but in a sense I did not wish this to be true. He also claims that he had discussed this step with Al-Anbari. This I find strange, since I doubt that Al-Anbari would have reacted the way he did if he was already familiar with the move that the Secretary-General had made. This does of course not exclude that the Secretary-General discussed the matter with Al-Anbari after the event or that the latter approached the Secretary-General directly to complain over what had happened and that it is this conversation that Boutros Boutros-Ghali recalls when he writes about his conversation with the head of the Iraqi delegation.

Under all circumstances, I am sure that the members of my delegation will remember my extreme concern when I first discussed this matter with them, expressing the hope that none of them had done this. To me, it was important to act with independence and impartiality. But, of course, any specific instructions from the Secretary-General had to be observed.

I might interject here that what had occurred was an important lesson which I remembered when I advised Secretary-General Kofi Annan during his negotiations with President Saddam Hussein in Baghdad in February 1998 in order to gain access for the UN weapons inspectors to the presidential palaces. My advice was that the Secretary-General not allow a syllable of the draft agreement with the Iraqi President outside a very small core group within the UN delegation present in Baghdad.

I was informed that the Americans at a very high level attempted to get hold of the text of the agreement before the Secretary-General signed it with Deputy Prime Minister Tariq Aziz on 23 February 1998. But Kofi Annan refused. Also for this reason it was a tremendous achievement on his part when the Security Council eventually 'endorsed' the agreement.[2] To me one thing is clear: the Baghdad negotiations would not have survived an American interference of the kind that occurred in the negotiations of the MOU in the spring of 1996.

However, returning to 1996, in all fairness I believe that Boutros Boutros-Ghali's personal involvement behind the scenes before and during the negotiations of the MOU was a determining factor in bringing them to a successful end. I recall the euphoria in the UN, both among member states and within the Secretariat, when Al-Anbari and I had signed the MOU on 20 May 1996. At long last the Iraqi population would receive the humanitarian goods that they so badly needed.

But, in a sense, this was only the beginning. All of a sudden the Secretary-General and the Secretariat were faced with the task of making the arrangements necessary for the implementation of the OFFP. The difficulties in identifying the bank that was to hold the escrow account, the oil inspectors and overseers, the goods inspectors and so forth have been amply described in the reports of the so-called Volcker Committee.[3]

2 SC Res. 1154, para. 1, (2 March 1998): "*Commends* the initiative by the Secretary-General to secure commitments from the Government of Iraq on compliance with its obligations under the relevant resolutions, and in this regard *endorses* the memorandum of understanding signed by the Deputy Prime Minister of Iraq and the Secretary-General on 23 February 1998 (S/1998/166) and *looks forward* to its early and full implementation;" It is a different matter that Saddam Hussein broke this agreement a few months later.

3 The Independent Inquiry Committee Into the United Nations Oil-for-Food Programme.

This is not the place to go deeper into what was later called the Oil-for-Food Scandal. I refer to the reports and the findings of the Volcker Committee. Surely, the Secretariat could have done better in administering this enormous programme, which lasted for seven years with a turnover of 65 billion US dollars. As a UN official who was involved in making these arrangements I am deeply concerned and offended that a few persons within the Organisation were suspected of crimes related to the OFFP and that two of them have been convicted. Not only were their acts criminal in a general sense. Through this behaviour the perpetrators provided a platform for the notorious UN critics from which they could criticise the Organisation and, indeed, the Secretary-General personally.

In my view, this criticism is highly unfair. Furthermore, as it appears from the reports of the Volcker Committee, the real scandal was caused by Member States themselves, among them those who were most vocal in their criticism of the UN. As I have pointed out in another context,[4] one should ask why the Security Council did not wish to discuss the reports from the Secretariat about suspicions that the OFFP was circumvented and that Saddam Hussein was lining his pockets. And why is not more focus directed on the states and enterprises that are suspected of having provided Saddam Hussein with kickbacks?

Another extremely serious question that has not been investigated and answered properly is where the remaining funds in the Oil-for-Food Account went when the OFFP was terminated.[5] This sum amounted to some eight billion US dollars. In accordance with a decision by the Security Council, this amount was handed over to the US administration as occupying power in Iraq in 2003 to be used for the benefit of the Iraqi people.[6] There is yet no satisfactory answer to the question where these eight billion US dollars ended up.

3. The Security Council Must Live up to Its Mandate

3.1 Reflections Based on the Implementation of Security Council Resolution 986

The purpose of sharing these few personal experiences mainly relating to the negotiation of the MOU for the implementation of Security Council Resolution 986 is to give a flavour of what goes on behind the scenes in much of the work in which the UN Secretariat is involved. They could also serve as an illustration to the way in which Member States and in particular Members of the Security Council sometimes behave. The question is what can be done to improve the functioning of the Organisation.

4 H. Corell, 'Who Needs Reforming the Most – the UN or its Members?,' 76 *Nordic Journal of International Law* (2007) No. 2–3, pp. 265–279.

5 *See* para. 17 of SC Res. 1483 (2003). The Development Fund for Iraq was in reality controlled by the US and the UK as occupying powers under unified command (the 'Authority'), *see* para. 13 of the Preamble of the Resolution.

6 *See* Development Fund for Iraq – Statement of Cash Receipts and Payments – For the period from 22 May 2003 to 31 December 2003 (with Independent Auditors' Report), <www.globalpolicy.org/security/issues/iraq/dfi/2004/0715receipts.pdf>, visited on 5 February 2008.

As already mentioned there was much discussion within my delegation during the negotiations of the MOU to implement resolution 986. Were the members of the Council really aware of the complexity and the scope of the task that they had laid upon the UN Secretariat? To monitor the entire sale of oil by one of the world's leading oil exporting nations, to identify a bank in which an escrow account could be arranged where the proceeds of this oil sale could be safely kept, to monitor the purchase of humanitarian goods, the nature of which would have to be identified in the process, and the ensuing banking arrangements, to select inspectors to certify that the goods purchased was actually delivered and that it arrived safely at the intended destinations – all this was an enormous task.

In addition, as an international organisation the UN does not have the same means as national authorities to monitor activities of this nature, including by conducting criminal investigations in case there are suspicions of violations of applicable rules and arrangements.

Seen in a more general perspective, the question is whether the members of the Security Council pay sufficient attention to the practical aspects of arrangements that they consider. In this particular case, the intention was to alleviate negative effects of a sanctions regime that the Council had imposed upon a country of some 25 million inhabitants.

In addition, the Council had divided the responsibility for the implementation of Resolution 986 between itself and its Sanctions Committee, on the one hand, and the Secretariat on the other in a very unfortunate manner. It was also sad to note that members of the Security Council were not always fulfilling in a satisfactory manner their own obligations under resolutions that they had themselves adopted.

The negative effect of this behaviour was an aggravating factor in a situation where the responsibility for the implementation of the resolution was shared as described. Suffice it to quote the Volcker Committee when it delivered its definitive Report on the overall management and oversight of the Oil-for-Food Programme: "However, responsibility for what went wrong with the Programme cannot be laid exclusively at the door of the Secretariat. Members of the Security Council and its 661 Committee must shoulder their share of the blame in providing an uneven and wavering direction in the implementation of the programme."[7]

It is true that the Report directs serious criticism against the UN Secretariat for its management of the Programme, and obviously the Secretariat could have done better. But it goes without saying that the behaviour of the members of the Council, combined with the constant blaming of the Secretariat for not being up to standards, was disastrous both for the execution of the Programme and for the standing of the UN in the eyes of the world.

Obviously, the UN administration needs strengthening. However, if in the future the Council would consider establishing arrangements of a similar nature and magnitude, it is to be hoped that the Council seeks more expert advice before the arrangements are launched. And, needless to say, if the arrangements are to succeed it is a *sine*

7 <www.iic-offp.org/story07Sept05.htm>, visited on 5 February 2008. Reference is made in particular to Volume II, Chapter 3 the Report 'The Security Council – Response to Surcharges and Kickbacks'.

qua non that the members of the Council scrupulously abide by the arrangements that they themselves have adopted.

3.2 Reflections with Respect to Peacekeeping and Peace Enforcement Missions

The lessons from Resolution 986 could also be viewed in a more general perspective. The question is whether the members of the Council are prepared to respect their own decisions and contribute to the efforts that are a precondition for a successful execution of those decisions.

A case in point is resolutions on peacekeeping and peace enforcement missions where substantial troop contributions are necessary for the implementation of the same. The problem has been discussed in more general terms in the context of the modalities for cooperation between the members of the Council and members of troop contributing countries that do not have a seat on the Council.

A realistic approach is necessary here. In many cases it is clear that for various reasons a troop contribution by any one of the permanent five members of the Council would not be appropriate. These members could then be tempted to negotiate among them and present to the other members of the Council arrangements that require troops that by definition would have to be provided by other states. Are these latter states prepared to make such contributions? That question should be examined at an early stage through open discussions and consultations between the Council and prospective troop contributing states.

I believe that it is fair to say that experiences demonstrate that the Council might be well advised to be more open when considering whether and how to intervene in a situation where international peace and security are threatened or where there would otherwise be a reason for the Council to intervene to fulfil the responsibility to protect. With respect to the latter responsibility reference should be made to the Summit Resolution, in which the Assembly stated:

> "In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[8]

In this context, the criteria presented by the High-level Panel on Threats, Challenges and Change might be of assistance. It is recalled that the Panel suggested that the Council, in considering whether to authorise or endorse the use of military force, should always address – whatever other considerations it may take into account – at least the following five basic criteria of legitimacy: (a) the seriousness of the threat, (b) the question of proper purpose, (c) the question whether the action is the last resort, (d) the question whether the means are proportional, and (e) the question whether there is a balance of consequences.[9]

8 *See* UN Doc. A/RES/60/1, para. 139.

9 UN Doc. A/59/565, para. 207.

Even if those criteria have not been expressly endorsed by the UN General Assembly, as was the intention of the Panel, they should nevertheless be of assistance to make clear both to the Council itself and to the general public what the possibilities are for the Council to intervene in a credible manner in a particular situation.

In this context the criterion last mentioned is of particular interest. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction? Needless to say this criterion would be a determining factor when the Council considers whether any UN member state would be prepared to contribute troops to the operation and when possible troop contributing states make their own assessment.

3.3 Reflections with Respect to Observance of Human Rights Standards

The question of observance of human rights standards by the Security Council has arisen specifically in relation to targeted sanctions, *i.e.* sanctions directed against physical or legal persons. Unlike sanctions of a more general nature, targeted sanctions are based on the activities or behaviour of these persons themselves.

This question has triggered a rather intense debate relating specifically to the designation or listing of individuals and entities suspected of having terrorist connections.[10] Such listings are done in accordance with procedures established under Security Council Resolution 1267 (1999).

In the Summit Resolution the General Assembly actually saw fit to "call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions".[11]

The present system is laid down in the Guidelines of the 1267 Committee for the Conduct of its Work, last amended on 12 February 2007.[12] By way of example, according to Section 8 of these Guidelines, the Committee considers de-listing requests that have been brought to its attention and reaches its decisions by the consensus of its 15 Members, in accordance with its usual decision-making process. There is no appeal. In my view, such a system cannot in the long run be considered to fulfil the human rights standards of which the UN should be the champion.

On 30 March 2006, the Watson Institute for International Studies issued a White Paper that had been elaborated after a process supported by the governments of Switzerland, Germany, and Sweden.[13] The paper contained several recommendations relating to listing, procedural issues, and options for a review mechanism. In the report, the Institute noted that the issues at hand are both legal and political. It further rec-

10 *See inter alia* B. Fassbender, 'Targeted Sanctions', <www.un.org/law/counsel/Fassbender_study.pdf>, visited on 5 February 2008, and I. Cameron. 'Protecting Legal Rights: On the (in)security of Targeted Sanctions' in P. Wallensteen and C. Staibano (eds.), *International Sanctions: Between Words and Wars in the Global System* (Frank Cass, New York, 2005) pp. 181–206.

11 *See* UN Doc. A/RES/60/1, para. 109.

12 <www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>, visited on 8 February 2008.

13 *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, <http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf>, visited on 8 February 2008.

ognised that, given the extraordinary nature of the Security Council's role in promoting international peace and security, some margin of appreciation of flexibility in interpretation as to what constitutes effective remedy is appropriate. Ensuring fair and clear procedures in the UN sanctions process would, according to the Institute, strengthen the effectiveness and credibility of the targeted sanctions instrument.

It is easy to agree with the Institute. And, basically, I have no problem with the recommendations.[14] However, I believe that it is appropriate to highlight in this context some of the points that I made when I was given the opportunity to participate in the process. I do so, bearing in mind one of the conclusions of the so-called *Brahimi report*, namely that the Security Council must be told what it needs to hear, and not what it wants to hear.[15]

Looking at the past activities of the Security Council, it is notable that it has as far as possible avoided to get involved with individuals. But the Council has to make up its mind. Either the Council deals with individuals, which it can very well do under the UN Charter, or it does not. If the Council chooses to deal with individuals, then it must observe the standards that apply under international law when individuals are affected by decisions by political or administrative organs, in particular human rights standards. This applies in particular to the remedy that individual physical or legal persons must have if their civil rights and obligations are at issue. The following could be mentioned as an example.

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) could be taken as a point of departure at the global level. At the regional level reference could be made to Article 6 of the European Convention on Human Rights (ECHR).

According to Article 14 of the ICCPR; "in the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Article 6 of ECHR prescribes that "in the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

In the preparations of the White Paper a survey had been made of European cases. It was noted that it may only be a question of time until a regional or national court in Europe arrives at the conclusion that listing people in the way the Council does could amount to a violation of international human rights norms, unless the individual has a remedy that meets the standards prescribed by the Articles just quoted.

In the process it was noted that the survey demonstrated a reluctance on the part of the European courts to assess UN practices in a substantial way. The conclusion was that the courts show that they are well aware of the existing hierarchy and the special position of the UN and especially that of the Security Council.[16] It was noted, how-

14 *See* White Paper, 4.

15 UN Doc. A/55/305 – S/2000/809.

16 *See* Court of First Instance of the European Communities: *Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin Abdullah Kadi* v. *Council of the European Union and Commission of the European Communities*, Judgments in Case T-306/01 and Case T-315/01. *See also for example* European Court of Human Rights (sitting as Grand Chamber): Decision on 2 May 2007 as to the admissibility of Application no. 71412/01 by *Agim BEHRAMI and Bekir BEHRAMI* against *France* and Application no. 78166/01 by *Ruzhdi*

ever, that the courts had also made it quite clear that in case of clear and flagrant human rights violations they will act.

In my view, the Security Council should act with utmost prudence in this field. There is a clear possibility that the courts will react if the listings are seen as arbitrary or if there is a persistent impossibility of being de-listed. The effect of such listings is that the persons in question cannot access their bank accounts, pay their rent, etc. Even if 'humanitarian exceptions' can be made, such a remedy would not be sufficient in the long-term perspective. The Council should therefore take as a point of departure that persons simply cannot be kept on sanctions lists for long periods of time without access to an independent and impartial court.

The question must of course be put whether there is an unconditional right to access to such a court in the situations regulated by Article 14 of the ICCPR and Article 6 of the ECHR. At the national level, exceptions are permissible in the following situations:

Article 4, para. 1 of the ICCPR:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Article 15, para. 1 of the ECHR:

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. "

In strictly legal terms, these provisions are not directly binding on the Security Council. However, the point is often made that when the UN acts in this field, the Organisation and its organs should take care to observe meticulously the standards that are required from its members.[17]

Certainly, the courts in Europe realise that the Security Council must have some margin of appreciation. However, the question is how wide this margin is, in particular

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SARAMATI against *France, Germany and Norway*, <www.cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Article%20%7C%20103&sessionid=5214441&skin=hudoc-en>, visited on 5 February 2008.

17 This was certainly Secretary-General Kofi Annan's reason for asking the UN Office of Legal Affairs to vet the legislation to be promulgated in Kosovo and East Timor when these provinces were governed by the UN.

in view of the very limited possibilities for exception laid down in the two provisions just quoted – 'threatens the life of the nation'.

Admittedly, it is not easy to draw a clear distinction here. And one cannot draw too far-reaching conclusions on the basis of existing case law. In this situation the most relevant question becomes what standards the Security Council should set for itself. Should the Council allow itself to come anywhere near a situation where the legality of its resolutions or effects thereof are called in question? Are 'we the peoples' instead not entitled to expect that the Council acts in such a manner that it does not risk being found in violation of international human rights standards?

It is imperative that regional or national courts do not start second-guessing Security Council Resolutions. The system of collective security laid down in the UN Charter and the obligations that flow from the Charter and the hierarchy established by its Article 103 should be observed scrupulously by all, including by national and regional courts and, regrettably one must add, also by the members of the Council. But in case of a conflict between a Security Council Resolution and its effects, on the one hand, and international standards of fundamental human rights on the other, one cannot exclude that a court would rule against the Council. Needless to say, this would have very serious consequences for the credibility of the Council and, indeed, for the United Nations as an organisation. The Council should therefore be very careful when it decides how to proceed in the present situation.

If the conclusion is that the situation that the Security Council attempts to address does not allow exceptions similar to what would be permitted under the two provisions previously quoted, the inevitable conclusion is that indefinite listing of persons in the manner that is now practiced requires that the persons listed have access to an independent and impartial court as a last resort. It goes without saying that preliminary assessments and decisions on de-listing must be taken by a committee or other organ under the Council or by the Council itself.

Among the recommendations in the White Paper there are options presented for a review mechanism, among them the establishment of an ombudsman institution. Certainly, different mechanisms should be developed. However, I do not believe that mechanisms falling short of an independent and impartial court would be sufficient since they do not meet the standards required, in particular if the final ruling is left to the Council.

Access to court can be given either at the national or the international level. There might also be regional options, but such would probably be too complex.

The option of access to a court at the national level would require that the listing is done at the request of a particular state and that this state takes responsibility for the fact that the person in question is listed. Under this option, the person listed would have access to the courts in the state in question, and in case such a court would rule in favour of the individual, there would be an obligation to de-list the person which must be observed by the Council. This might also entail an obligation for the state in question to pay damages to the individual in case the listing was found arbitrary.

This option is however problematic. It would entail an element of individual states influencing the Council in a manner that is not customary. Furthermore, it might lead to abuse at the national level, where listings could be used as a tool to persecute political opponents. The question whether the courts in such a state are independent and impartial could also be raised.

The other option is that the Security Council establishes the judicial institution itself. Here, one can seek guidance in the way in which the United Nations Administrative Tribunal (UNAT) was established.[18] Needless to say, judges on such a tribunal should be professional judges with demonstrated ability to perform on the bench at the national level.

From the very notion 'independent and impartial court' follows that the rulings of such a court must be binding also on the organ that has established the same, just as is the case at the national level in a state under the rule of law.

As a matter of fact, this matter is solved as far as the United Nations is concerned. After the establishment of UNAT the General Assembly asked the International Court of Justice to give an advisory opinion on the effects of awards of compensation made by this Tribunal. The question asked by the Assembly was the following (a second question asked is irrelevant in this context): "Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?"

In its Advisory Opinion of 13 July 1954 the Court replied that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.

Needless to say, the establishment of a court by the Security Council needs careful analysis. In particular, attention must be given to the specific problems that will arise with respect to those who appear before the tribunal, viz. the status of individuals appearing before it in the territory of its host state.

Obviously, these matters are highly complex. But it should be evident that the Security Council simply cannot afford to take the risk that regional or national courts some time in the near future find that the present system of listing individual physical and legal persons is in violation of international human rights standards.

The following quotation could serve as a lodestar. It is from the Madrid Agenda, adopted on 11 March 2005 by the Club of Madrid (an organisation of former heads of state and government in democratic states) to remember and honour the victims of the terrorist attacks in that city the year before on the same day: "Democratic principles and values are essential tools in the fight against terrorism. Any successful strategy for dealing with terrorism requires terrorists to be isolated. Consequently, the preference must be to treat terrorism as criminal acts to be handled through existing systems of law enforcement and with full respect for human rights and the rule of law."[19]

18 *See* GA Res. 351 (IV) (9 December 1949).

19 <www.summit.clubmadrid.org/agenda/the-madrid-agenda.html>, visited on 5 February 2008.

4. Concluding Remarks

To someone who almost on a daily basis has reason to seek guidance in the UN Charter, the document becomes a constant reminder of the time when the Charter was negotiated. Based on the experiences of two world wars, the engineers behind the Charter managed to negotiate a document that has actually stood the test of time very well. It is therefore easy to agree with the conclusion of the High-level Panel on Threats, Challenges and Change when they draw the following conclusion with respect to the Charter:[20]

> "We believe, however, that the Charter as a whole continues to provide a sound legal and policy basis for the organization of collective security, enabling the Security Council to respond to threats to international peace and security, both old and new in a timely and effective manner. The Charter was also farsighted in its recognition of the dependence of international peace and security on economic and social development."

One can well understand those who argue that the Charter reflects the geopolitical situation after the Second World War and that it needs reforming. This applies in particular to the composition of the Security Council.

However, I do not believe that one should be too easily impressed by these assertions. The challenges facing the Security Council will nonetheless be the same, at least until more states have joined the family of democracies. Personally, I do not believe that an enlarged Council would be better placed to address the issues on the Council's agenda.

The problem rests at a different level which must always be borne in mind: the behaviour of the Member States on the Security Council has to change. The respect for the Council is sometimes seriously undermined because of the way its Members act, in particular when states from which one has reason to expect better flagrantly violate the Charter, as was the case when Iraq was attacked in March 2003.

Leaving the period of the Cold War aside and focusing on the time after the fall of the Berlin wall, one would have thought that the Council would have found a new atmosphere that could generate trust among states. However, many events after the early 1990s demonstrate that there is yet a long way to go. At the same time, the threats against international peace and security are many and of a magnitude and complexity that mankind has never experienced before. Therefore, the role of the Council, which according to Article 24 of the UN Charter has the primary responsibility for the maintenance of international peace and security, has become even more important.

It would be wrong, however, to look only to the negative aspects. There are also positive developments that should be kept in mind. In particular, the fact that the Council is now prepared to discuss respect for human rights and the rule of law should be noted.[21] But pledges to respect rules, resolutions and presidential statements ring hollow if the states do not live up to their commitments. Those who engage in work

20 UN Doc. A/59/565, para. 301.

21 *See in particular* UN Doc. S/PRST/2006/28. *See also* <www.un.org/News/Press/docs/2006/sc8762.doc.htm>, visited on 5 February 2008.

to enhance the rule of law around the world are all too familiar with the constant reference from the auditorium to 'double standards'. This has to come to an end.

Some believe that this is an idealistic view. Maybe so, but it is the only way forward. Otherwise there is a clear risk that the state community will relapse into the primitive behaviour of the past – a behaviour that so often led to conflict and human suffering. It is hard to imagine the scale of suffering that would be the result if there would be a major conflict in the future.

The Security Council simply has to overcome its internal differences and take the lead based on a strict adherence to international law and, in particular, to the UN Charter.

Chapter 6

National Sovereignty and Responsibility for Spent Nuclear Fuel

*Per Cramér**

1. Introduction

Since the end of the Second World War the dualism between civilian and military applications of nuclear technological knowledge has been a central issue for international political debate. In the focus of this debate stands the tension of the known destructive power of military applications, illustrated by Hiroshima and Nagasaki, and the perception that civilian applications can be a source of energy supply for humanity.

This Janus-faced character of nuclear technology constitutes the basis for the development of multilateral regulation and co-operation that started during the latter part of the 1940s. The challenge facing political decision makers was, and still is, to create legal and administrative structures that further applications within the civilian sphere, while curtailing and phasing out applications within the military sphere. Despite the creation of a comprehensive regulation this objective has not been reached, and the fundamental dilemma is still with us. Furthermore, this dilemma has been accentuated by the ambition in an increasing number of states to develop a capacity for civilian nuclear energy production, a development that might be accelerated through the advancing consciousness of global warming.

The tension existing between hope and threat of nuclear energy is mirrored in the debates on principles for the responsibility of spent nuclear fuel which contains fissile materials that can be useful in both military and civilian applications of nuclear technology.[1]

The objective of this chapter is partly to investigate to what extent existing multilateral regulation affects national competence to develop exclusively national systems for the disposal of spent nuclear fuel. Moreover, the analysis includes a forward looking perspective, taking into account arguments and initiatives for the development of

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1 The typical composition of used nuclear fuel from a light water reactor is: Uranium 94,5%, Fissile products 4,3%, Neptunium 0,055%, Plutonium 1, 086%, Mericium 0,053% and Curium 0,006%. J. Wallenius, 'Nyttiggörande eller kvittblivning' in M. Andrén and U. Strandberg (eds.), *Kärnavfallets politiska utmaningar* (Gidlunds förlag, Stockholm, 2005) pp. 101–115, 103.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 75–100.

multinational repositories for the final disposal of spent nuclear fuel, and calls for limitations on sovereignty concerning national control over the final stages in a civilian nuclear fuel cycle.

These initiatives constitute a challenge to the national positions of several states, such as Sweden, France and Finland, all of which have enacted national laws prohibiting the disposal of foreign spent nuclear fuel within their territories.[2] This principle of exclusive national responsibility has a clear political logic: the political choice of whether or not to develop a civilian nuclear industry lies within national sovereignty. If the choice for such a development is made, there follows a responsibility for handling the spent nuclear fuel. The responsibility is reciprocal and thus has an exclusive national character – no state is under an obligation to handle foreign spent nuclear fuel. In addition, it should be noted that the principle of exclusivity has increasingly been perceived as being a precondition of mustering local acceptance for the localisation of facilities for final disposal of spent nuclear fuel.

1.1 The first Initiatives for Multilateral Regulation – The Baruch Plan and the Soviet Counter Proposal

The importance of preventing a nuclear arms race while simultaneously stimulating the development of civilian applications of nuclear technological knowledge was discussed at the tripartite meeting between the US, Soviet and British ministers of foreign affairs held in Moscow in December 1945. At that meeting an agreement was reached to create a special UN Commission to further such a development. This new institution, the UN Atomic Energy Commission, began its activities in January 1946. In its mandate, adopted by the UN General Assembly, it was stated:

> "The Commission shall proceed with the utmost despatch and enquire into all phases of the problem, and make such recommendations from time to time with respect to them as it finds possible. In particular the Commission shall make specific proposals.
> a. For extending between all nations the exchange of basic scientific information for peaceful ends;
> b. For control of atomic energy to the extent necessary to ensure its use only for peaceful purposes;
> c. For the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction;
> d. For effective safeguards by way of inspection and other means to protect complying States against the hazards of violations and evasions…"[3]

From an American perspective it was clear that the military nuclear monopoly constituted an intermittent position of strength. The establishment of a multilateral regulation for the application of nuclear technological knowledge was therefore seen to be of

2 Finland; Kärnenergilag 1987/990, para 6b. France; Loi 91-1381 relative aux recherches sur la gestion des déchets radioactifs. Sweden; Lag om kärnteknisk verksamhet, SFS 1984:3, para. 5a.

3 'Commission's terms of reference', Article 5, UNGA Res. 1, 24 January 1946.

vital national interest.[4] In concrete terms it was proposed that the US should transfer its nuclear technological knowledge to an international organisation of supranational character with the objective of furthering the development of civilian applications, most importantly energy production. In addition, a system for control and verification was to be established in order to guarantee that no states made use of nuclear technology for military applications.[5]

This initiative was soon developed into a concrete proposal, presented in June 1947.[6] The central element in the so-called Baruch plan was the establishment of an International Atomic Development Authority. This supranational institution was to be given control, or ownership, in relation to all civilian nuclear energy activities that potentially could be used for military purposes. After such a control system had been established the US was prepared to accept total nuclear disarmament.

The Baruch plan included the setting up of a system for control and verification backed up by sanctions. Decisions within this system would be taken by a qualified majority, without any power of veto for the permanent member states of the Security Council. Taking into account the fact that the Western Powers had a clear majority in all UN committees, the Moscow administration held the view that the power of veto constituted a necessary instrument to uphold equal negotiating power within the mind-set of the Cold War bilateral balance of power.[7] Consequently, there were no realistic possibilities of gaining Soviet acceptance of the Baruch plan.

A counter-proposal, presented by the Soviet administration in June 1946, advocated the reversed order of development: international control over nuclear installations would first be established after a total nuclear disarmament had taken place. The process would thus start with the conclusion of a multilateral treaty prohibiting the use and production of nuclear weapons and a duty to destroy existing nuclear arsenals within three months of the treaty's effect.[8] If realised, this Soviet initiative would have led to the American monopoly on nuclear arms being instantly erased. Consequently, it was turned down by the US and its allies and the question of regulating the use of nuclear technological knowledge became deadlocked. The Soviet Union conducted its first nuclear test detonation in September 1949, the UN Atomic Energy Commission terminated its activities in December the same year and the world faced the beginning of a nuclear arms race.

4 *See* E. Turlington, 'International Control of the Atomic Bomb', *AJIL* (1946) pp. 165–167.

5 'Report on the International Control of Atomic Energy', Publication 2498, (US Govt Printing Office, Washington DC, 1946).

6 'The Baruch Plan presented to the UN Atomic Energy Commission', June 14 1946. <www.atomicarchive.com/Docs/Deterrence/BaruchPlan.shtml>.

7 *Cf.* Firmage *et al.*, 'The Treaty on Non-proliferation of Nuclear Weapons', *AJIL* (1969) pp. 711–746, at pp. 713–714.

8 *See* further, *History of Soviet Foreign Policy 1945–1970*, (Progress Publishers, Moscow 1974) pp. 108–118; B.G. Bechhoefer, *Post-war Negotiations for Arms Control*, (The Brookings Institution, Washington DC, 1961) B. Goldshmidt, 'A Forerunner to the NPT? The Soviet Proposals of 1947', *IAEA* (Bulletin 28/1 1986) pp. 58–64.

1.2 From Atoms for Peace to the Establishment of IAEA

It was not before the first détente between the two superpowers that came about after the ceasefire on the Korean peninsula and Stalin's death in March 1953, that the political preconditions for a regulation of the use of nuclear technological knowledge were at hand. The need for establishing a multilateral regulation was underlined by the development of increasingly powerful military applications, which was demonstrated by the detonations of thermonuclear devices by the US in November 1952 and by the Soviet Union in August 1953.

In December 1953 the US administration presented, in comparison with the Baruch plan, a less ambitious initiative for the dissemination of civilian nuclear technological knowledge before the UN General Assembly – the *Atoms for Peace Plan*.[9] Behind this initiative was the understanding that the US nuclear arms monopoly had been broken and that a continued proliferation of nuclear weapons constituted a threat against humanity. Against this background the US administration declared its principal support for nuclear disarmament through negotiations within the UN framework.[10]

In itself, the *Atoms for Peace Plan* only indirectly concerned itself with nuclear disarmament. Its primary objective was to further the development of civilian applications of nuclear technological knowledge. The core of this initiative was a reciprocal dissemination of knowledge in combination with the establishment of an intergovernmental structure controlling the use of this knowledge. Through this control, the development of new national nuclear arms programs were to be prevented and a starting point for a future phasing out of existing nuclear arsenals established. The special fissile materials, most importantly plutonium and highly enriched uranium, which would be made available as a consequence of the foreseen disarmament, were to be put under international control and transformed into civilian nuclear fuel. The plan included a concrete proposal for the establishment of a functional international organisation under the UN umbrella with the task of promoting the development of civilian nuclear energy projects. This US initiative soon gained an international acceptance.

The hopes expressed in the potential for civilian applications of nuclear technology were at that time in history growing and characterised by limitlessness and lack of objection – a situation clearly demonstrated at the international conference on the peaceful uses of atomic energy held in Geneva in August 1955.[11]

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9 'Dwight D. Eisenhower's Address to the United Nations General Assembly, December 8, 1953' Congressional Record, vol. 100, January 7 1954, pp. 61–63, reprinted in P.L Cantelon (eds.), *The American Atom, A Documentary History of Nuclear Policies* (University of Pennsylvania Press, Philadelphia, 1991) pp. 96–104.

10 In January 1952 the General Assembly, by its Resolution 502 (6), had created the United Nations Disarmament Commission under the Security Council with a general mandate on disarmament questions. However, the negotiations on nuclear disarmament soon became blocked and it met only occasionally after 1959. In June 1978 a successor Disarmament Commission (UNDC) was established as a subsidiary organ of the General Assembly, composed of all Member States of the United Nations, 'Final Document of the Tenth Special Session of the General Assembly', 30 June 1978.

11 More than 2,000 scientists from 70 nations participated at the conference. Summing up, the President of the Conference, Homi Bhabha predicted: "…atomic energy could first, provide the energy necessary to enable the under-developed countries to reach the standard

2. The International Atomic Energy Agency

Based on the ideas of the *Atoms for Peace Plan*, as developed in international negotiations, the International Atomic Energy Agency, IAEA, was established in 1957 as a functional intergovernmental organisation within the UN structure.[12] It soon gained wide membership, which today totals 144 states.[13] The IAEA statute was given the format of framework treaty, setting up the objectives for the organisation, establishing common principles, institutions and attributing powers to these institutions to take decisions in order to attain expressed objectives. As the fundamental objective, the Agency was "to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world."[14]

Directly linked to these supportive operations, the IAEA was also given the task of controlling Member States by ensuring that they did not use nuclear technology or materials provided through the organisation for military applications.[15] As a result, the new organisation was entrusted with the task of enforcing a line of demarcation between military and civilian applications of nuclear technology, a duty that would be expanded through the coming into force of the Non-Proliferation Treaty (NPT) in 1970.[16]

The statute also opened the way for Member States to give the IAEA direct control over fissile materials with military applications. By this means, plutonium and highly enriched uranium, resulting from a foreseen decommissioning of the nuclear arsenal, would be transformed into nuclear fuel under the control of the organisation. The vision was that the IAEA would help to forge swords into ploughshares in the process of nuclear disarmament. However, the Member States failed to muster the necessary common political will to accomplish this vision. Instead, the number of Nuclear Weapons States increased and the world had to experience the effects of an escalating nuclear arms race between East and West.

3. The Non-proliferation Treaty

The statute of the IAEA did not regulate the use of nuclear technology for military applications. Such a regulation came into being in 1970 through the Treaty on Non-Proliferation of Nuclear Weapons (NPT). The NPT established fundamental rules on the use of nuclear technological knowledge that today are binding for the 189 signa-

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of living of the industrialized countries, and secondly, enable the entire world to maintain a constantly rising standard of living for very many decades, and possibly for several centuries. For the full industrialization of the under-developed areas, for the contuation of our civilization and its further development, atomic energy is not merely an aid; it is an absolute necessity." Proceedings of the International Conference on the Peaceful Uses of Atomic Energy, held in Geneva 8–20 August 1955, (United Nations, New York, 1956–1958), vol. 16, p. 33.

12 Statute of the International Atomic Energy Agency 1957 UNTS 3988.

13 The number of Member States as of 30 March 2007, see IAEA INFCIRC/2/Rev.64

14 Statute of the International Atomic Energy Agency, 1957 UNTS 3988, Article 2.

15 Statute of the International Atomic Energy Agency, 1957 UNTS 3998, Article 2, 3(5) and 12.

16 Treaty on Non-proliferation of Nuclear Weapons, 1970 UNTS 10485.

tory states. The basic structural principle of the NPT is to separate civilian and military applications of nuclear technology into different spheres and to establish a non-permeable line of demarcation between those spheres.

A second starting point for the system established by the NPT was a freezing of the proliferation of nuclear weapons to the situation at hand when the Treaty came into being in combination with a long-term objective of total nuclear disarmament. The NPT thereby established a fundamental asymmetry between its parties: the five states that had conducted nuclear test detonations before 1 January 1967 were established as legal Nuclear Weapon States (NWS)[17] with an obligation to pursue negotiations on nuclear disarmament in good faith.[18] The five NWS are prohibited, directly or indirectly, from transferring their control over nuclear weapons to Non-Nuclear Weapon States (NNWS). They are furthermore prohibited from giving any form of support to the development of nuclear weapons in NNWS.[19]

By way of corresponding obligations, the NNWS are obliged to refrain from control over nuclear weapons or pursuing activities with the objective of developing a nuclear arms capacity.[20] These absolute restrictions concerning the military applications of nuclear technological knowledge are balanced by a reconfirmation of the right of *all* states to develop and maintain a civilian nuclear industry: "1. Nothing in this Treaty shall be interpreted as affecting the *inalienable* right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles 1 and 2 of the Treaty."[21]

This national sovereignty within the civilian sphere of application was explicitly reconfirmed and clarified in the final document of the 2000 Review Conference concerning the application of the NPT: "…[T]he Conference confirms that each country's choices and decisions in the field of peaceful uses of nuclear energy should be respected without jeopardizing its policies or international cooperation agreements and arrangements for peaceful uses of nuclear energy and its fuel-cycle policies."[22]

Accordingly, it is within the sovereignty of each state, without discrimination, to develop a civilian nuclear industry and to choose the design of the nuclear fuel-cycle including its final step. Thus, the states are free to apply a principle of exclusive national responsibility for the handling of spent nuclear fuel. For NNWS this sovereignty within the civilian sphere of application is only limited by the absolute prohibition against any activities within the military sphere of application.

17 Treaty on Non-proliferation of Nuclear Weapons, 1970 UNTS 10485, Article 9.

18 Treaty on Non-proliferation of Nuclear Weapons, 1970 UNTS 10485, Article 6: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

19 Treaty on Non-proliferation of Nuclear Weapons, 1970 UNTS 10485, Article 1. Through the Security Council Resolution 1540 (2004) this prohibition is also extended to cover the proliferation of nuclear weaponry to non-state actors.

20 Treaty on Non-proliferation of Nuclear Weapons, 1970 UNTS 10485, Article 2.

21 Treaty on Non-proliferation of Nuclear Weapons, 1970 UNTS 10485, Article 4(1). (Italics added.)

22 '2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear weapons, Final Document', NPT/CONF.2000/28, vol. 1, p. 1, p. 8.

3.1 Verification and Control

In order to establish an efficient verification and control of the obligations established by the NPT, the NNWS are obliged to accept that their civilian nuclear programmes are monitored in order to guarantee that the demarcation line between legal civilian, and illegal military applications, is upheld. The task to execute this verification and control activity has been entrusted to the IAEA.[23] In order to establish a legal framework for these activities all NNWS are obliged to conclude specific agreements on safeguard measures with the Agency.[24] A model agreement was presented in 1967.[25]

According to the 1967 model agreement the IAEA mandate only covers declared facilities. Inspections have to be notified in advance. In light of the development during the early 1990s, especially the failure to detect the clandestine Iraqi military nuclear programme, this system was increasingly seen as insufficient. In order to redeem these insufficiencies the IAEA, in 1997, presented a model agreement for more far-reaching control measures, the so-called Additional Protocol.[26] In addition to this contractually-based control activity the UN Security Council, on several occasions, has entrusted the IAEA *in casu* to control nuclear technological activities in specific NNWS suspected of violating the fundamental obligations of the NPT.[27]

3.2 The Balance between Nuclear Weapon States and Non-Nuclear Weapon States in the NPT.

Of special importance for the understanding of the NPT is the way that asymmetry between NWS and NNWS has been ameliorated in order to gain a multilateral

23 Treaty on Non-proliferation of Nuclear Weapons, 1970 UNTS 10485 Article 3(2). A good presentation of IAEA's verification and control activities is to be found in the report presented by the organisation to the 2000 NPT Review Conference, 'Activities of the International Atomic Energy Agency relevant to Article III of the Treaty on the Non-proliferation of Nuclear Weapons', NPT/CONF 2000/9.

24 Treaty on Non-proliferation of Nuclear Weapons, 1970 UNTS 10485 Article 3(4).

25 'The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons', IAEA INFCIRC/153 (Corrected). In 2006 IAEA Safeguards were applied for 162 states, *see* "IAEA Safeguards Statement for 2006", <www.iaea.org/OurWork/SV/Safeguards/es2006.pdf>. The verification and control measures according to these agreements are based upon the NNWS in question declaring the holdings of fissile materials within existing nuclear technological facilities. This declaration is confirmed by IAEA and functions as a point of reference for monitoring that fissile materials with potential military applications are not diverted.

26 'Model Protocol Additional to the Agreements(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards', IAEA INFCIRC/540 (Corrected). This includes expanded obligations of declaring the holdings of fissile materials and an acceptance of more far-reaching controls. In November 2006, 79 agreements according to the additional protocol had been concluded, *see* 'Strengthened Safeguards System: Status of Additional Protocols', 23 November 2006, IAEA, <www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html>.

27 These decisions have been based upon the UN Charter Chapter VII and possess the character of sanctions. *See* as examples SC Res. 687 (1991) concerning Iraq and SC Res. 1696 (2006) concerning Iran.

acceptance of the Treaty. It should initially be underlined that the NNWS acceptance of the prohibition on the acquisition of nuclear weapons came into being under the precondition of the long-term objective that total nuclear disarmament should take place, and that such asymmetry was temporary.[28] This long-term objective of the NPT was reconfirmed in the final document of 1995 NPT Review and Extension Conference when the validity of the Treaty was extended indefinitely.[29] In the final document from the 2000 NPT Review Conference it was furthermore stated:

> "The Conference recalls that the overwhelming majority of States entered into legally binding commitments not to receive, manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices in the context, inter alia, of the corresponding legally binding commitments by the nuclear-weapon States to nuclear disarmament in accordance with the Treaty."[30]

In a longer term perspective, the fact that this foreseen disarmament process has not come true constitutes a potential threat to the legitimacy of the regime set up by the NPT.[31]

Furthermore, the confirmed sovereignty in the civilian sphere of the application of nuclear technological knowledge constitutes a prerequisite for the NNWS to accept the monopoly, albeit temporarily, given to the NWS in the military sphere.[32] At the 2000 Review Conference it was also explicitly confirmed that the sovereignty for all states to develop civilian nuclear energy programs constitutes a fundamental objective of the NPT.[33] The attraction of the NPT for NNWS is moreover strengthened by the

28 *Cf.* Firmage *et al.* (eds.), "The Treaty on Non-proliferation of Nuclear Weapons", *American Journal of International Law* 1969, pp. 711–746, pp. 732–733: "The single most important provision of the Treaty, however, from the standpoint of long-term success or failure of its goal of proliferation prevention is Article VI … The Nuclear-weapon states cannot ask of the Non-nuclear weapon states their eternal forbearance from the acquisition of nuclear weapons while the former maintain a position of immense power over the latter by reason of such weapons. The Treaty will have continued adherence only if negotiations bring meaningful agreements to end the nuclear arms race and some movement toward nuclear disarmament." *See* further O. Bring, *Nedrustningens folkrätt*, (Norstedts Juridik, Stockholm, 1987) pp. 146–147.

29 '1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons Final Document', 'Decision 2 Principles and objectives for nuclear non-proliferation and disarmament', NPT/CONF.1995/32 (part1).

30 '2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear weapons, Final Document', NPT/CONF.2000/28, vol. 1, part p. 2.

31 This situation is well illustrated by the inability of the parties to the NPT to reach agreement on any material questions at the 2005 review conference. *Cf.* the final report of the Commission on Weapons of Mass Destruction: 'Weapons of Terror, Freeing the World of Nuclear, Biological and Chemical Arms', Stockholm 2006, pp. 24–25, 62–66, 94–109.

32 *Cf.* M.I. Shaker, *The Nuclear Non-Proliferation Treaty, Origin and Implementation 1959–1978*, (Oceana Publications, London, Rome, New York, 1980) vol. 1, pp. 293–315. H. Müller, 'Peaceful uses of nuclear energy and the stability of the non-proliferation regime', in B. Schmitt (ed.), *Effective non-proliferation*, 77 Chaillot Paper, Institute for Security Studies (Paris, 2005) pp. 43–65, 46–47.

33 '2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear weapons, Final Document', NPT/CONF.2000/28, vol. 1, part 1, p. 8.

obligations for all states to contribute to the widest possible dissemination of equipment, materials and technological knowledge for the peaceful use of nuclear energy. Specifically, those states that command the resources necessary to contribute to the development of nuclear energy technology are obliged to contribute to civilian nuclear energy programs in NNWS with due regard to be taken of the needs of developing countries.[34]

In practice the transfer of nuclear technology to NNWS has developed both on the multilateral and the bilateral level. The multilateral transfer has to a large extent been administered and co-ordinated by the IAEA Department of Technological Cooperation. In doing this, the Agency is obliged to exercise controls to ensure that its assistance activities are diverted from military applications.[35] In addition, the technologically advanced states that export equipment and fissile materials have independently, albeit in coordination with IAEA, established forms of cooperation on common principles for export with reference to their interpretation of the NPT – *The Zangger Committee*[36] and *The Nuclear Suppliers Group*.[37] It could be argued that the develop-

34 Treaty on Non-proliferation of Nuclear Weapons, Article 4(2). Compare the parallel regulation in the Statute of the International Atomic Energy Agency, Article 3(1–2). In his analysis of the negotiating history of the NPT, Shaker describes this part of the Treaty as a compensatory measure for those states that have waived their right to develop a nuclear arms capability. M.I. Shaker, *The Nuclear Non-Proliferation Treaty, Origin and Implementation 1959–1978*, vol. 1, pp. 375–376.

The importance of a controlled dissemination of nuclear technological knowledge for the development of a civilian nuclear energy industry in NNWS was explicitly underlined in the final document of the 2000 NPT review conference: '2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear weapons, Final Document', NPT/CONF.2000/28, vol. 1, part 1, pp. 11–12.

35 *See* Statute of the International Atomic Energy Agency, 1957 UNTS 3988, Article 2, 3(5) and 12 according to which the IAEA is obliged to exercise controls securing that the organisation's assistance for civilian nuclear energy projects is not used for military applications.

36 The Zangger Committee deals with the export control of equipment or materials for production of special fissile materials covered by the NPT, Article 3(2).The Committee has defined a more precise definition of the goods covered by this provision and established principles for the export these to NNWS. The guidelines agreed upon establishing three conditions for supply: a non-explosive use assurance, an IAEA safeguard requirement and a retransfer provision which require the receiving state to apply the same conditions when re-exporting the concerned items. The activities of the Committee started as informal communications in 1971. Since then it has been given an increasingly formal character and its updated lists of goods judged to fall under the definition in the NPT Article 3(2) is regularly published by the IAEA in the INFCIRC/209 series. In December 2007 36 stated participation in this co-operation, including all the NWS. For further information *see* <www.zanggercommittee.org>.

37 Nuclear Suppliers Group (NSG) was primarily formed as a reaction to the first Indian nuclear test detonation in 1974 which made it evident that the export of civilian nuclear technology could be used for military applications. The activities of the group were intensified in the 1990s when it became clear that existing export controls had not prevented Iraq from developing a clandestine nuclear arms programme. The NSG has developed two sets of guidelines for exports, one set governing the export of items that are especially designed for nuclear use and one set governing the export of nuclear-related dual-use products. In December 2007 44 stated their participation in the co-operation, including all the NWS. For further information about the NSG *see* <www.nuclearsuppliersgroup.org/> and

ment of these systems for export controls shows that the nuclear suppliers are moving away from the basic bargain underpinning the NPT – that states would refrain from nuclear armament in exchange for active disarmament by the NWS and a commitment by those states to facilitate international civilian nuclear co-operation.

3.3 Nuclear Proliferation and Non-state Actors

Worries about terrorists gaining access to nuclear materials date to the 1970s as illustrated by the adoption in 1980 of the Convention on the Physical Protection of Nuclear material.[38] At the beginning of the 21st century, most importantly after the terrorist attacks in New York and Washington DC on 11 September 2001, the risk of proliferation of nuclear capacity to non-state actors has become a primary question for the perception of security threats in most states.[39] This aspect of the proliferation issue is not directly covered by the NPT, which is based upon the intergovernmental paradigm. Against this backdrop the Security Council, 28 April 2004, adopted a resolution concerning the proliferation of weapons of mass-destruction to non-state actors. The resolution obliges all states to refrain from providing any form of support to non-state actors that attempt to gain control over nuclear weapons.[40] Thus, this resolution supplements the NPT with reference to non-state actors. It should furthermore be noted that the resolution obliges all states to develop and maintain effective physical protection measures.[41]

In this connection it should also be noted that the UN General Assembly 2005 adopted a draft for an International Convention for the Suppression of Acts of Nuclear Terrorism that entered into force in April 2007.[42] This convention requires the signatory parties to criminalise a series of acts connected to nuclear terrorism and to engage in co-operation and mutual assistance with respect to the objectives of the convention.

IAEA INFCIRC/539/Rev.1, 29 November 2000. The guidelines adopted by the NSG are regularly published by the IAEA in the INFCIRC/254 series.

38 Convention on the Physical Protection of Nuclear Materials, 3 March 1980, 1987 UNTS 125, entered into force 8 February 1987.

39 *Cf.* 'The National Security Strategy of the United States of America', 17 September 2002 <www.whitehouse.gov/nsc/nss.pdf> and the security strategy of the European Union 12 December 2003, 'A Secure Europe in a Better World', <www.consilium.europa.eu/uedocs/cms_data/docs/2004/4/29/European%20Security%20Strategy.pdf>. *See also Weapons of Terror, Freeing the World of Nuclear, Biological and Chemical Arms* (Stockholm, 2006) pp. 83–87.

40 SC Res. 1540 (2004) para. 1: "…all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery."

41 SC Res. 1540 (2004) para. 3.

42 International Convention for the Suppression of Acts of Nuclear Terrorism, New York 14 September 2005, <untreaty.un.org/English/Terrorism/English_18_15.pdf.>.

4. IAEA and the Regulating of Handling of Spent Nuclear Fuel

Spent nuclear fuel contains special fissile materials that, after enrichment, can be used for military applications. Accordingly, spent nuclear fuel is to be accounted for in accordance with the Safeguard agreements concluded with the IAEA. However, up until the end of the 1970s the question of handling spent nuclear fuel was only given marginal additional attention, most importantly through the development of standards on radiation safety applicable for nuclear rest products.[43] This limited interest for questions concerning spent nuclear fuel had several different reasons. During the pioneering developing phase of the industry it was natural that a focus was given to reactor development. The volume of nuclear rest products was limited and these were predominantly seen as a resource for future use. During the 1960s, there was a strong belief within the IAEA, and its dominating Member States, that plutonium-fuelled Breeder reactors would substitute the uranium-fuelled light water reactors within the foreseeable future. Such a development would lead to a strong increase in the demand for plutonium, which could be produced through reprocessing spent nuclear fuel from light water reactors. In addition, there existed a general perception that the highly radioactive rest substances resulting from reprocessing would find practical applications in medical technology and food preservation.[44] In later stages, when the visions of Breeder reactors were postponed, the debate tended to focus on reprocessing spent nuclear fuel from light water reactors to Mixed Oxide Fuel[45] containing plutonium for use in light water reactors. Thus, up until the 1970s, the fundamental idea in most states with a national nuclear energy industry was that spent nuclear fuel, after reprocessing, would re-enter the fuel cycle.

A large part of the radioactive waste products that could not be reprocessed was dumped at sea. In order to monitor these activities the IAEA in 1961 established a special unit to analyse the effects of dumping on the marine environment.[46] Among the Member States of the OECD sea-dumping, from 1977 until its termination in 1983, was co-ordinated by the OECD Nuclear Energy Agency, NEA. The Soviet Union/Russia continued the dumping of radioactive waste at sea for another decade.[47]

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43 The IAEA adopted its first recommendations on radiation safety in 1961. Since then these have been successively amended and revised. *See* "Status of the IAEA Safety Standards, December 2007", <www-ns.iaea.org/downloads/standards/status.pdf>.

44 *Cf.* "Proceedings of the International Conference on the Peaceful Uses of Atomic Energy", held in Geneva 8–20 August 1955, vol. 16, p. 34. For a Swedish perspective *see* the public investigation 'Atomenergien' SOU 1956:11, pp. 13–25, 73.

45 Mixed oxide fuel, MOX, is a blend of oxides of plutonium, natural uranium and reprocessed uranium that behave similarly to low enriched Uranium fuel. MOX fuel is thus an alternative to low enriched uranium fuel used in light water reactors that dominate commercial nuclear power generation. One attraction of MOX fuel is that it is a way of disposing of surplus plutonium, which otherwise would remain a nuclear proliferation risk.

46 The International Laboratory of Marine Radioactivity. The unit, located to Monaco, has successively expanded its activities. In 1991 it was renamed The Marine Environment Laboratory.

47 A detailed account of the dumping of radioactive waste at sea is to be found in 'Inventory of Radioactive Waste Disposals at Sea', IAEA-TECDOC-1105, IAEA, (Vienna, 1999). In 1985 the OECD established a moratorium on the dumping of radioactive waste at sea, IMO Res LDC.21(9). A general ban on depositing radioactive waste at sea entered into force

The priority given to recycling of spent nuclear fuel underwent a radical shift during the 1980s. A central factor was the decision by the US administration in 1977 to adopt a moratorium on the development of Breeder reactors and recycling facilities. Recycling was abandoned and substituted by a principle of direct disposal of spent nuclear fuel.[48] This change in the US policy was motivated by several factors. A proliferation of recycling technology, and an increased production of plutonium, was perceived as increasing the threats of an uncontrolled proliferation of nuclear weapons.[49] In addition, the economic rationality in developing large scale recycling facilities was increasingly questioned. This was especially so when the high expectations in relation to the development of technology for the Breeder reactor had not been met and the existing recycling facilities had experienced a number of accidents leading to leaks of radioactive substances – which put the safety of the technology into question.[50] A large number of NNWS with civilian nuclear energy programs, such as Sweden,[51] soon followed the shift in the American line of policy while certain states, most importantly several NWS, the Soviet Union, Great Britain and France chose to continue developing closed nuclear fuel cycles including the reprocessing of spent nuclear fuel.

This political shift from a closed to an open fuel cycle where the final step is permanent disposal of the spent nuclear fuel led to the question of designing and financing final disposal facilities and soon gained relevance for the activities of the IAEA.

4.1 The Development of Regulations Concerning the Handling of Spent Nuclear Fuel and Highly Radioactive Waste

The handling of spent nuclear fuel was included in the general convention concerning physical protection of nuclear materials developed by the IAEA in the early 1980s.[52] The objective of this convention was to strengthen physical control over fissile materials in order to further the effectiveness of the NPT. The method established by the

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in 1994. This was done through amendments of Appendix 1 and 2 to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London 1972, <www.londonconvention.org/documents/lc72/LC1972.pdf>, IMO Res. LC.51(16).

48 This new principle for the handling of spent nuclear fuel was codified in national law in January 1983, Nuclear Waste Policy Act; <www.ocrwm.doe.gov/documents/nwpa/css/nwpa_2004.pdf>.

49 Concerning this shift in US policy *see*: J. Nye, 'Non-proliferation – A Long-term strategy', *Foreign Affairs* (1978) pp. 601–623; F.N. von Hippel, 'Plutonium and Reprocessing of Spent Nuclear Fuel', 239 *Science* (2001), pp. 2397–2398.

50 Accidents leading to leakage of radioactive substances had taken place at installations in Hanford (USA), Winscale (Great Britain) and Kyshtym (Soviet Union). *See* A. Aarkrog: 'A Retrospect of Anthropogenic Radioactivity in the Global Marine Environment', *Radiation Protection Dosimetry* (1998) pp. 23–31.

51 In Sweden recycling as a method of handling spent nuclear fuel was gradually abandoned during the 1970s. The plan to build a national recycling facility was scrapped in 1971 for economic reasons, *see* Ds Ind 1971:1 'Upparbetning av kärnbränsle'.

52 'The Convention on the Physical Protection of Nuclear Material', Vienna 26 October 1979, IAEA INFCIRC/274/Rev.1. By 14 September 2007 the Convention had been ratified by 130 states <www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf>.

convention is primarily an obligation to criminalise the theft of nuclear materials and to co-operate in fighting such crimes. The convention also reconfirms the inherent right of all states to develop and maintain civilian nuclear energy programs.[53]

Increasing volumes of spent nuclear fuel, in combination with the inability of states to develop systems for effective final disposal has led the IAEA, since the 1990s, to give increasing attention to specific questions concerning the handling of spent nuclear fuel and highly radioactive waste. In concrete terms this led in 1990 to the adoption of a Code of Practice on the International Transboundary Movement of Radioactive Waste.[54] This instrument, not legally binding, is based upon the principle of national responsibility and, accordingly, on the principle that all states have the right to prevent importation of spent nuclear fuel and radioactive waste.[55]

The principle of national responsibility is reconfirmed in the multilateral Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, which was developed by the IAEA in 1997 and entered into force on 18 June 2001.[56] Its objective was to establish basic principles and minimum standards for safety. The convention is based upon the principle of national responsibility; that the ultimate responsibility for ensuring the safety of spent fuel and radioactive waste management lies with the State.[57] As a consequence of this principle, it is also reaffirmed that any state has the right to ban the import into its territory of foreign spent fuel and radioactive waste.[58] It is furthermore recognised that the definition of the fuel cycle policy "rests with the State, some States considering spent fuel as a valuable resource that may be reprocessed, others electing to dispose of it".[59] Thus, the convention mirrors the inherent sovereignty of states to develop civilian applications of nuclear technological knowledge as expressed in the NPT Article 4.[60]

However, in the preamble, the convention also opens the way for multinational solutions guided by a state-based proximity principle:

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53 *The Convention on the Physical Protection of Nuclear Material*, preamble (i): RECOGNIZING the right of all States to develop and apply nuclear energy for peaceful purposes and their legitimate interests in the potential benefits to be derived from the peaceful application of nuclear energy.

54 *The Convention on the Physical Protection of Nuclear Material*, Vienna 21 September 1990, IAEA INFCIRC/386.

55 Code of Practice on the International Transboundary Movement of Radioactive Waste: "3. Basic principles; International transboundary Movement; (1) It is the sovereign right of every State to prohibit the movement of radioactive waste into, from, or through its territory."

56 *The Convention on the Physical Protection of Nuclear Material*, Vienna 5 September 1997, IAEA INFCIRC/546. By 4 April 2007 the Convention had been ratified by 45 states, <www.iaea.org/Publications/Documents/Conventions/jointconv_status.pdf>.

57 *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*, preamble (6).

58 *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*, preamble (12).

59 *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*, preamble (7).

60 Compare above under 3.2.

> "Convinced that radioactive waste should, as far as is compatible with the safety of the management of such material, be disposed of in the State in which it was generated, whilst recognizing that, in certain circumstances, safe and efficient management of spent fuel and radioactive waste might be fostered through agreements among Contracting Parties to use facilities in one of them for the benefit of the other Parties, particularly where waste originates from joint projects."[61]

4.2 IAEA Policy with Regard to Multinational Responsibility for Spent Nuclear Fuel

Even though the relevant legal instruments developed by IAEA concerning the handling of nuclear waste and spent nuclear fuel are based upon the principle of national sovereignty, and national responsibility, ideas for multinational solutions have nevertheless been offered on several occasions in the policy discussions within the Agency.

The first proposal in this vein of thinking was developed in the late 1970s. In 1975 the IAEA, as a consequence of the discussions at the NPT Review Conference that year,[62] initiated a study on the establishment of regional nuclear fuel cycle centres. In the conclusions of this study it was argued that such centres ought to be established through intergovernmental agreements.[63] The proposal was motivated by proliferation considerations as well as economic and technological scale advantages and was met by a positive response by many states. However, it did not become reality. The main reason was that many states with a national nuclear energy industry, led by the US, during the 1970s had abandoned the closed fuel cycle in favour of direct final disposal of spent nuclear fuel. Moreover, at this time British BNFL and French COGEMA had established a large reprocessing capacity and a dominating position for commercial reprocessing services. Thus, the structural preconditions for the establishment of regional fuel cycle centres were not at hand.[64]

The report was followed up by an expert group within the IAEA, which was given the task of investigating the possibilities of establishing multinational storage facilities for spent nuclear fuel. In its report, published in 1982, the expert group concluded that there existed no demand for such solutions in the foreseeable future.[65] Nei-

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61 *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*, preamble (11). There exists a clear tension between the first and second part of this sentence. The second clause was added after the Director General of the IAEA, Hans Blix, had expressed concern that the convention should not be seen to bar international storage or disposal approaches. *See* M. Hibbs, 'Examine International Repository, Blix Urges Fuel Cycle Symposium', *Nuclear Fuel*, (19 June 1997) pp. 15–16.

62 *Cf.* '1975 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Declaration', NPT/1975/Final: "…regional or multinational nuclear fuel cycle centres may be an advantageous way to satisfy, safely and economically, the needs of many States, while at the same time facilitating protection and the application of safeguards."

63 V. Meckoni, *et al.*, Regional Nuclear Fuel Cycle Centres: IAEA Study Project, IAEA-CN-36/487 (IAEA, Vienna, 1977).

64 *Cf.* F. Berkhout, 'International Regulation of Nuclear Fuel Cycles: Issues for East Asia', PARES (1997) p. 7. <www.nautilus.org/archives/papers/energy/BerkhoutPARES.pdf>.

65 'Final Report of the Expert Group on International Spent Fuel Management', IAEA-ISFM/EG/26 (Rev1), (IAEA, Vienna, 1982).

ther did a parallel initiative to establish multinational storage facilities for plutonium under IAEA administration gain support among Member States.[66]

After 1982, the discussions concerning multilateral approaches to the final stage of the nuclear fuel cycle within the IAEA lost impetus and were not revived before the end of the Cold War.[67]

In the early 1990s a working group was established with the task of evaluating the preconditions for the establishment of multinational disposal facilities for spent nuclear fuel. The group finished its work in 1995 but its final report was not published until 1998.[68] This report argued in favour of international approaches primarily due to economic and technologic scale advantages, especially for states with a limited national nuclear energy industry. In addition it was argued that international approaches would enhance radiation safety and environmental protection.[69] It is notable that security or non-proliferation arguments were absent in the conclusions of the report.

The security policy argument in favour of multinational approaches to the disposal of spent nuclear fuel gained importance after the terrorist attacks in Washington DC and New York on 11 September 2001. Thereby a new interest in promoting multinational approaches was awakened, a development that is well-mirrored in a statement by the Director General of the IAEA, Mohamed ElBaradei, at the General Conference of the Agency in 2003:

> "Our consideration should also include the merits of multinational approaches to the management and disposal of spent fuel and radioactive waste. Not all countries have the appropriate conditions for geologic disposal – and, for many countries with small nuclear programmes for electricity generation or for research, the financial and human resource investments required for research, construction and operation of a geologic disposal facility are daunting. Considerable economic, safety, security and non-proliferation advantages may therefore accrue from international co-operation on the construction and operation of international waste repositories. In my view, the merits and feasibility of these and other approaches to the design and management of the nuclear fuel cycle should be given in-depth consideration. The convening of an Agency group of experts could be a useful first step."[70]

66 'Expert Group on International Plutonium Storage – Report to the Director General', IAEA-IPS/EG/140(Rev.2), (IAEA, Vienna, 1982).

67 It should, however, be noted that the Nuclear Energy Agency of the OECD, NEA, in 1987 presented a report on possible international approaches to the use of radioactive disposal facilities. The report identified a number of economic arguments in favour of such a development. However, the authors concluded that the question was raised too early and that further investigations were not rational at the moment. *See* 'International Approaches to the Use of Radioactive Disposal Facilities, A Preliminary Study', (OECD-NEA, Paris 1987).

68 'Technical, institutional and economic factors important for developing a multinational radioactive waste repository', IAEA-TECDOC-1021, (IAEA, Vienna, 1998).

69 'Technical, institutional and economic factors important for developing a multinational radioactive waste repository', pp. 12–13.

70 'Statement to the Forty-seventh Regular Session of the IAEA General Conference 2003', 15 September 2003. <www.iaea.org/NewsCenter/Statements/2003/ebsp2003n020.html>. *See also* M. ElBaradei, 'Towards a Safer World', *The Economist*, (16 October 2003).

The line of thought in this statement is also found in the report concerning possible scenarios for the establishment of multinational repositories for radioactive waste and spent nuclear fuel published by the IAEA in October 2004.[71] This report takes its starting point in the 1997 Joint Convention. It is noted that all states participating in a multinational project must compulsorily have adhered to the convention. It is furthermore noticed that certain states lack the economic and technological resources necessary to develop and maintain national final repositories and for other states, with a limited waste problem, the development of exclusive national facilities is economically irrational. The report argues that it is rational for such states to enter international agreements on the establishment and operation of multinational repositories. The multinational solutions would thus be a complement to exclusively national programs for disposal of spent nuclear fuel and, accordingly, there would be no conflict between the establishment of the principle of national responsibility and the development of multinational depositories. In addition to the motives related to economic and technological scale advantages this report put a high emphasis on the proliferation issue, especially with regard to non-state actors:

> "Non-proliferation is traditionally associated with actions that deter and prevent the diversion of fissile materials or equipment that can be used in nuclear weapons. Prior to the terrorist attacks on the USA in September 2001, non-proliferation of weapons-grade nuclear material was arguably the primary security concern associated with nuclear facilities. However, since then, the threat of terrorist attacks against nuclear facilities that could result in the release of nuclear debris into the atmosphere and the unauthorised removal of dangerous radioactive material that could be used in radioactive dispersal devices has greatly expanded security concerns. Today, security includes actions to deter terrorist attacks, or acts of sabotage, against reactors, repositories, at-reactor or away-from-reactor spent fuel storage facilities, or spent fuel storage containers during transports.
>
> Multinational repositories could make the security and safeguard benefits of geological disposal available to more countries and could therefore enhance global security."[72]

The authors of the report finally presented a number of scenarios on how multinational repositories could come into being. The scenario presented as the most likely was where a state that already developed a national repository capacity would supply the disposal service to other states. In this connection it was underlined that the greatest challenge for such a development would be the need to gain socio-political acceptance in the host country.[73]

71 'Developing multinational radioactive waste repositories: Infrastructural framework and scenarios for co-operation', IAEA-TECDOC-1413, (IAEA, Vienna, 2004).

72 'Developing multinational radioactive waste repositories: Infrastructural framework and scenarios for co-operation', pp. 20–21.

73 'Developing multinational radioactive waste repositories: Infrastructural framework and scenarios for co-operation', pp. 28–43.

A further concrete initiative from the IAEA concerning the development of multinational disposal installations for spent nuclear fuel is to be found in the expert report on possibilities for multilateral approaches to the nuclear fuel cycle, published in February 2007.[74] This report is a result of the initiative taken by the Director General of the IAEA in 2004 and takes the specific issue of non-proliferation as its starting point.[75] In its introduction the authors state that the three most proliferation sensitive stages of nuclear fuel is the production of fuel, the handling of fissile materials and the final disposal of spent nuclear fuel. The report argues explicitly in favour of an increased use of multilateral approaches to the nuclear fuel cycle, including the establishment of international facilities for final disposal of spent nuclear fuel. In addition to enhancing the control of the NPT regime, such a development would, according to the report, be rational from a technological and economic perspective. The greatest foreseen obstacles for materialising an establishment of multinational installations for final disposal of spent nuclear fuel are, not surprisingly, identified to be of a political and institutional character:

> "The final disposal of spent fuel is a candidate for multilateral approaches. It offers major economic benefits and substantial non-proliferation benefits, although it presents legal, political and public acceptance challenges in many countries. The Agency should continue its efforts in that direction by working on all the underlying factors, and by assuming political leadership to encourage such undertakings."[76]

In this connection it is emphasised that international disposal facilities should be established through intergovernmental agreements and that the most likely development is that already established national facilities are transferred to international authority.[77] The report also underlines that the establishment of multinational instal-

74 'Multilateral Approaches to the Nuclear Fuel Cycle: Expert Group Report submitted to the Director General of the International Atomic Energy Agency', IAEA INFCIRC/640, (IAEA, Vienna, 2005).

75 The point of departure of the report echoes a statement by the Secretary General, Mohamed ElBaradei, to the Board of Governors 8 March 2004: "…that the wide dissemination of the most proliferation-sensitive parts of the nuclear fuel cycle – the production of new fuel, the processing of weapon-usable material, and the disposal of spent fuel and radioactive waste – could be the 'Achilles heel' of the nuclear non-proliferation regime. Here again, it is important to tighten control over these operations, which could be done by bringing them under some form of multilateral control, in a limited number of regional centres. Appropriate checks and balances could be used to preserve commercial competitiveness, to control proliferation of sensitive information, and to ensure supply of fuel cycle services. I am aware that this is a complex issue, and that a variety of views exist on the feasibility or possible modalities of such a multilateral approach. However, I believe that we owe it to ourselves to examine all possible options available to us." Introductory Statement to the Board of Governors by IAEA Director General Dr. Mohamed ElBaradei", (IAEA, Vienna, 8 March 2004), <www.iaea.org/NewsCenter/Statements/2004/ebsp2004n002.html>.

76 'Multilateral Approaches to the Nuclear Fuel Cycle: Expert Group Report submitted to the Director General of the International Atomic Energy Agency', p. 93

77 'Multilateral Approaches to the Nuclear Fuel Cycle: Expert Group Report submitted to the Director General of the International Atomic Energy Agency', p. 103.

lations for final disposal does not mean a limitation on the sovereignty of states to choose an exclusive national solution. Thus, the report's proposal does not induce an alteration of the principle of national responsibility: "To be successful, the final disposal of spent fuel (and radioactive waste as well) in shared repositories must be looked at as only one element of a broader strategy of parallel options. National solutions will remain a first priority in many countries. This is the only approach for States with major nuclear programmes in operation or in past operation."[78]

4.3 A Short Conclusion Concerning the IAEA Position Concerning Multilateral Approaches to the Disposal of Spent Nuclear Fuel

The international regulation concerning the final stage of the nuclear fuel cycle that has been developed by the IAEA, most importantly the 1997 Joint Convention, is based upon the principle of exclusive national responsibility for spent nuclear fuel. This should be seen as a reconfirmation of the inherent sovereignty of all states to develop civilian applications of nuclear technological knowledge as spelled out in the NPT, Article 4.

Since the 1990s the IAEA has initiated a number of reports and investigations on the possible establishment of multinational installations for final disposal of spent nuclear fuel. These reports have put forward a series of arguments in favour of such a development. The economic and technological scale advantages are a recurrent theme with a special address to states with a limited nuclear energy industry. Against the backdrop of increased terrorist activities by non-state actors and the increasing number of states that have declared their intentions to develop a national nuclear energy industry, the arguments linked to the risks of nuclear proliferation have gained importance during the 2000s. The political and public acceptance challenges facing a decision to localise international installations are perceived as being the main hindrances to the prescribed development.

The IAEA, as an organisation, has never taken a clear stance on the issue of the establishment of multinational disposal facilities for spent nuclear fuel. The obvious reason for this is the lack of a common political will among the Agency's Member States on this question. Only a few Member States officially have declared an interest to participate in a multinational solution. Most Member States remain undecided while a third group of states have expressed a clearly negative position. This third group includes Finland, France and Sweden – three states that have gone far in developing national systems for the handling of spent nuclear fuel, including the development of installations for final disposal. This critical attitude is primarily motivated by the perception that discussions about multinational disposal facilities might endanger the legitimacy of the national programs that are under development.[79] From a Swedish perspective it can be noted that the country, in its national reports to the IAEA con-

78 'Multilateral Approaches to the Nuclear Fuel Cycle: Expert Group Report submitted to the Director General of the International Atomic Energy Agency', p. 93.

79 'International Storage and Disposal Facilities – Considerations in the IAEA context', presented at Nuclear Cooperation Meeting on Spent Fuel and High-level Waste Storage and Disposal, Las Vegas 2000, <eed.llnl.gov/ncm/session3/Dyck_IAEA.pdf>.

cerning the implementation of the Joint Convention, consequently has underlined that exclusive national responsibility for spent nuclear fuel, and that foreign spent nuclear fuel may not be disposed of in Sweden, constitute a fundamental principle for Sweden's nuclear energy policy.[80]

Nevertheless, it seems that the IAEA has made it its mission to seek to establish a consensus concerning the conditions for the establishment of multinational approaches for the nuclear fuel cycle, including installations for the final disposal of spent nuclear fuel. The political decision to participate in such co-operative structures lies, however, within national political sovereignty. This approach leads to the position of there being no conflict between the principle of national responsibility and participation in a multinational project for final storage. The idea put forward by the IAEA reports is rather that national responsibility would be executed by participation in international co-operation. Furthermore, the IAEA reports carefully emphasise that multinational installations would not be a substitute for, but rather a complement to, national programs.

Finally, it should be noted that a number of states have declared their interest in further exploration of the possibilities of developing multinational systems for final disposal of spent nuclear fuel. Among them are Belgium, Bulgaria, Hungary, Latvia, Lithuania, the Netherlands, Norway, Switzerland, South Korea and Taiwan.[81] In these states, arguments based upon economic and technological rationality seem to have been decisive. Within a number of different regional groupings further investigations into the issue are taking place.[82]

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80 'Sweden's second national report under the Joint Convention on the safety of spent fuel management and on the safety of radioactive waste management – Swedish implementation of the obligations of the Joint Convention', DS 2005:44, p. 12: "Fundamental principles… 4. Each country is to be responsible for the spent nuclear fuel and nuclear waste generated in that country. The disposal of spent nuclear fuel and nuclear waste from nuclear activities in another country may not occur in Sweden other than in exceptional cases."

81 'Developing multinational radioactive waste repositories: Infrastructural framework and scenarios for co-operation', p. 1.

82 For example, it could be mentioned that ARIUS (Association for Regional and International Underground Storage) has the objective of examining further initiatives for the establishment of international facilities for final storage of spent nuclear fuel. Membership of ARIUS consists of national agencies for nuclear waste management in Belgium, Bulgaria, Hungary, Italy, the Netherlands, Slovenia, Switzerland, Lithuania and Japan. <www.arius-world.org>.

Closely connected to the operations of ARIUS is the study of the feasibility of the establishment of European regional repositories financed by the European Commission, 6th Framework Program: SAPIERR Support Action: Pilot Initiative on European Regional Repositories. The SAPIERR-project is administered by the Ljubljana University, Slovenia, and includes partners in thirteen other European states (Austria, Belgium, Bulgaria, Croatia, Czech Republic, Hungary, Italy, Latvia, Lithuania, the Netherlands, Romania, Slovakia and Switzerland). The objective of the project is to evaluate the economic, security policy and radiation safety aspects of a regional final disposal solution including these states. In the final report of the project it was recommended that a common regional disposal facility should be established for those European states with limited amounts of spent fuel and nuclear waste to handle. This conclusion is based upon economic rationality. <www.sapierr.net/files1/Documents/SAPIERR%20WP%20D7%20Final%20Report.pdf>.

5. Should Certain States be Denied Responsibility for Spent Nuclear Fuel?

In the contemporary debate concerning the development of the Iranian nuclear energy program, the question of national responsibility for spent nuclear fuel has been given a somewhat new dimension. The legal starting point in this debate is the right of all states to develop a civilian national nuclear energy program, which is confirmed in the NPT to which Iran is a party as a NNWS.[83] This right should be interpreted in the light of the absolute prohibition for NNWS to develop and control an armed nuclear capacity and the obligation to accept IAEA safeguards of civilian nuclear activities.[84] When Iran did not fully accept the conditions for effective IAEA safeguard measures concerning the demarcation line between civilian and military applications of nuclear technology, the international distrust in the absence of military ambitions of the national nuclear energy program increased. This distrust was echoed in a binding resolution adopted by the UN Security Council in July 2006.[85] In its preamble this resolution confirmed the sovereign right of all states to develop, research, produce and use nuclear energy for peaceful purposes without discrimination on condition that these activities are conducted in conformity with NPT Articles I and II. Referring to information provided by the IAEA, Iran was called upon to take the steps required by the IAEA Board of Governors in order to build confidence in the exclusively peaceful nature of its nuclear program, including the suspension of all enrichment-related activities.[86] When Iran, according to the IAEA, failed to comply with these demands[87] the Security Council decided upon limited economic sanctions, primarily concerning the supply of all items that could contribute to Iran's enrichment, reprocessing or heavy water-related activities.[88]

Under the pressure of sanctions an understanding concerning the modalities of resolution of the outstanding issues was concluded between Iran and the IAEA in August 2007.[89] The development of increasingly effective IAEA safeguards with respect to the Iranian nuclear programme has been made public by the IAEA in consecutive reports by the Director General, the last published in November 2007.[90] In

83 Treaty on Non-proliferation of Nuclear Weapons Article 4(1): "Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty."

84 Treaty on Non-proliferation of Nuclear Weapons Article 2.

85 SC Res. 1696 (2006), 31 July 2006.

86 SC Res. 1696 (2006), para. 1–2.

87 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran', GPV/2006/64 (IAEA, 14 November 2006).

88 SC Res. 1737 (2006), para 3. The resolution also estabished targeted economic sanctions, including the freezing of the financial assets of a number of identified individuals and entities. These economic sanctions were expanded in March 2007, SC Res. 1747 (2007).

89 Communication dated 27 August 2007 from the Permanent Mission of the Islamic Republic of Iran to the Agency concerning the text of the 'Understandings of the Islamic Republic of Iran and the IAEA on the Modalities of Resolution of the Outstanding Issues', INFCIRC/711 (IAEA, 27 August 2007).

90 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council Resolutions 1737 (2006) and 1747 (2007) in the Islamic Republic of Iran', GOV/2007/58 (IAEA, 17 November 2007).

this report it is concluded that the Agency has been able to verify the non-diversion of declared nuclear material in Iran. However, Iran has not fully complied with the Security Council's demands for confidence-building activities, most importantly the suspension of enrichment and heavy water activities.[91] At the time of writing, the sanctions were still in force.

In the debate concerning the Iranian nuclear programme it has on several occasions been put forward concrete proposals to guarantee Iran a supply of nuclear fuel in combination with an obligation for Iran to return the spent nuclear fuel for recycling or final disposal. The objective of such a solution is to increase international trust in the peaceful character of the Iranian nuclear program while Iran would not be denied the right to develop a nuclear energy industry.[92]

On a generalised level, these lines of thinking have to an increasing extent been brought up in the international political debate.

President Bush, in a speech on 11 February 2004 to the National Defence University, presented an outspoken initiative in this vein of thinking. Bush argued that the NPT had a loophole in the sense that it allowed states to *produce nuclear material that can be used for military applications*. Accordingly, he called on the members of the NSG to refuse the sale of reprocessing or enrichment equipment to any state that did not already possess full-scale enrichment and reprocessing plants. This exclusive concentration of enrichment and reprocessing should, according to Bush, be balanced by a guarantee given to all states concerning the supply of nuclear fuel.[93]

If realised, this proposal would mean the establishment of an internationalised control of the civilian nuclear energy development under strong dominance by the NWS and a number of technologically advanced NNWS within the NSG. By this means, the multilateral structure established within the framework of the IAEA would most certainly be marginalised. The propositions to deny certain states access to the technology necessary for the development of a complete nuclear fuel cycle, in exchange for guaranteed supplies of nuclear fuel, would furthermore inevitably lead to an internationalisation of responsibility for the final disposal of spent nuclear fuel and/

91 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council Resolutions 1737 (2006) and 1747 (2007) in the Islamic Republic of Iran', pp. 8–9.

92 A Russian proposal along these lines of thinking was rejected by the Iranian government in March 2006 with reference to Iran's sovereign right to develop a civilian nuclear energy capacity, 'Iran Rejects Russia's Proposal on Uranium', *Washington Post*, (13 March 2006). In October 2006 representatives of the Iranian government presented a somewhat similar initiative. According to this a consortium dominated by state-controlled French companies, Eurodif and Areva would be given responsibility for the production of enriched uranium in Iran, 'Iranian Proposes France to Enrich Iran's Uranium', *Washington Post*, (3 October 2006).

93 'Remarks by the President on Weapons of Mass Destruction Proliferation', Fort Lesley J. McNair – National Defense UniversityWashington, DC 11 February 2004. <www.whitehouse.gov/news/releases/2004/02/20040211-4.html>, p. 4: "…The world's leading nuclear exporters should ensure that states have reliable access at reasonable cost to fuel for civilian reactors, so long as those states renounce enrichment and reprocessing. Enrichment and reprocessing are not necessary for nations seeking to harness nuclear energy for peaceful purposes. The 40 nations of the Nuclear Suppliers Group should refuse to sell enrichment and reprocessing equipment and technologies to any state that does not already possess full-scale, functioning enrichment and reprocessing plants."

or highly radioactive waste in an established Nuclear Fuel Cycle State. According to which criteria and conditions the localisation of such installations should take place is a question that remains unanswered. It should in this connection be noted that so far no state has declared its willingness to accept the final disposal of foreign spent nuclear fuel within its territory.

From a legal perspective, this proposed model for strengthening the non-proliferation regime is based upon giving NPT Article IV a restrictive interpretation. Such an interpretation means that NNWS, alternatively Non-Nuclear Fuel Cycle States, only have a right to the production of nuclear power, not including the right to conduct nuclear technological research and development as well as the construction and running of installations for a complete fuel cycle. Such a right is, according to this interpretation, reserved for the NWS and already established Nuclear Fuel Cycle States. This restrictive interpretation of the NPT Article IV would mean a fundamental shift in the balance of duties and rights between NWS and NNWS, alternatively the development of a new controversial asymmetry between Nuclear Fuel Cycle States and Non-Nuclear Fuel Cycle States. It is clear that such a shift lacks support in the treaty text as well as in the negotiating history. This proposed restrictive interpretation furthermore contradicts the declaration concerning the interpretation of Article IV adopted by the parties at the NPT Review Conference in 2000.[94] The question of reinterpretation of NPT Article 4 was brought up at the 2005 NPT Review Conference where no multilateral acceptance for such a development could be reached.[95]

Nevertheless, the idea of limiting access to proliferation-sensitive technology for NNWS, in combination with assurances of fuel supply services and the establishment of a limited number of international enrichment, reprocessing and disposal facilities, has resulted in the formulation of a number of proposals presented in the doctrine.[96]

A more concrete initiative to attain an internationalisation of the fuel cycle under control of a limited number of technologically-advanced states was presented by the US administration in 2006 under the name Global Nuclear Energy Partnership, GNEP.[97] The initiative takes its starting point in the US National Security

94 *See* above under 3. *Cf.* H. Müller, 'Peaceful uses of nuclear energy and the stability of the non-proliferation regime', i B. Schmitt (ed.), *Effective non-proliferation*, 77 Chaillot Paper, Institute for Security Studies, Paris 2005, pp. 43–65, T. Rauf and S. Simpson, 'The Nuclear Fuel Cycle: Is It Time for a Multilateral Approach?', *Arms Control Today*, (December 2004), <www.armscontrol.org>. W. Walker, 'Weapons of Mass Destruction and International Order', 370 *Adelphi Paper* (ISS London 2004) pp. 27, 67–72.

95 As an illustration of polarisation *see* 'Strengthening implementation of article IV of the Treaty on the Non-Proliferation of Nuclear Weapons Working paper submitted by the United States', NPT/CONF.2005/WP.57, 'Peaceful use of nuclear energy Working paper submitted by the Islamic Republic of Iran for Main Committee III', NPT/CONF.2005/WP.50.

96 *See* as examples: P. Riley, 'Justification of the continued development of the peaceful use of nuclear power', *Int J. Nuclear Law* (2006) pp. 1–10, p. 7, J.S Choi and T.H. Isaacs, *Changing Perspectives on Non-proliferation and Nuclear Fuel Cycles*, (Lawrence Livermore National Laboratory 2005), UCRL-CONF-211009, G. Perkovich *et al.* 'Universal Compliance. A strategy for Nuclear Security', 8 *Carnegie Endowment for International Peace* (Washington 2004) pp. 47–51, 78.

97 <www.gnep.energy.gov>.

Strategy[98] and its objective is to promote nuclear energy on a global scale by making reactor technology and fuel services available to users while avoiding the transfer of proliferation-sensitive technologies or special fissile materials. Under this initiative the US intends to co-operate closely with states that have developed advanced civilian nuclear energy programs. One aim of the GNEP is to develop and deploy advanced reactors and new methods to recycle spent nuclear fuel through the application of transmutation. However, the partnership also has as its objective to provide a program for the export of technology and fuel services, under which a number of technologically advanced senior partner states would provide fuel and reactors to a number of junior partner states, on condition that they refrain from fuel cycle activities.[99] The senior partners would guarantee the supply of fuel and take the spent fuel back for recycling. Thus the GNEP is an attempt to establish a regime for fuel leasing that is so attractive for the junior partners that they will waive their right to develop complete national fuel cycle capacities, a right that is recognised in the strategy document.[100] It should, however, be noted that the GNEP is silent on the question of responsibility for final disposal of highly radioactive waste or spent nuclear fuel.

So far the GNEP has attracted 21 partners including the fuel cycle states of France, China, Japan, Russia, the UK and USA.[101]

6. Concluding Remarks

The fundamental international regulation of the use of nuclear energy is to be found in the NPT of 1970. This treaty establishes a demarcation line between the civilian and military spheres for the application of nuclear technological knowledge. Within the military sphere only five NWS can act legally with an open commitment to pursue negotiations that would lead to nuclear disarmament. Within the civilian sphere of application the inalienable right of all states to develop, research, produce and use nuclear energy without discrimination is reconfirmed. This reconfirmed sovereignty

98 The National Security Strategy of the United States of America, 16 March 2006, p. 29: "We will build the Global Nuclear Energy Partnership to work with other nations to develop and deploy advanced nuclear recycling and reactor technologies. This initiative will help provide reliable emission-free energy with less of the waste burden of older technologies and without making available separated Plutonium that could be used by rogue states or terrorists for nuclear weapons. These new technologies will make possible a dramatic expansion of safe, clean nuclear energy to help the growing global energy demand."

99 'Global Nuclear Energy Partnership Strategic Plan', GNEP-167312, Rev. 0 Department of Energy, January 2007, <www.gnep.energy.gov/pdfs/gnepStrategicPlanJanuary2007.pdf>.

100 Global Nuclear Energy Partnership Strategic Plan, GNEP-167312 Rev 0, U.S. (Department of Energy, January 2007), p. 3: "One challenge we face is that all nations that have signed the NPT retain the right to pursue enrichment and reprocessing for peaceful purposes in conformity with article I and II of the Treaty. GNEP seeks to develop advanced fuel cycle technology for civil purposes, centered in existing fuel cycle states that would allow them to provide fuel services more cheaply and reliably than other states could provide indigenously."

101 As of February 2008 the following states had signed the GNEP Statement of Principles: China, France, Japan, Russia, and the United States – as original partners – as well as Australia, Bulgaria, Canada, Ghana, Hungary, Italy, Jordan, Kazakhstan, Korea, Lithuania, Poland, Romania, Senegal, Slovenia, United Kingdom and Ukraine.

within the civilian sphere of applications constitutes a fundamental condition for acceptance of the asymmetrical NPT regime among the NNWS. A further incentive for NNWS to accept and comply with the NPT are to be found in the provisions on peaceful nuclear assistance. The task of monitoring the demarcation line between civilian and military applications and to ensure that it is not transgressed by NNWS has been entrusted to the IAEA, which has also been given the responsibility of supporting the development of the peaceful use of nuclear energy. The NPT does not have built-in mechanisms for situations of non-compliance. In a case of non-compliance with IAEA safeguards, the Agency's Board will report to the UN Security Council, which may decide upon sanctions. Accordingly, it follows from the NPT that all states are sovereign, within the limits set by international commitments, in developing and applying nuclear fuel cycle solutions according to national political priorities. This sovereignty is confirmed in the IAEA Joint Convention of 1997, which is based upon the principle of national responsibility and reconfirms the right of every state to deny final disposal of foreign spent nuclear fuel and radioactive waste. This does not, however, preclude states from concluding agreements on the establishment of common facilities in one of them for the benefit of all. A number of states in the vanguard when it comes to developing final repositories for spent nuclear fuel and highly radioactive waste, such as Finland, Sweden and France, apply a principle of exclusive national responsibility. This principle has been seen as being essential in order to gain legitimacy for the concrete localisation of national repository facilities.

The idea of exclusive national responsibility for the handling of spent nuclear fuel and highly radioactive waste has, however, been increasingly challenged over the past decade.

The central element in the system of safeguards in order to secure the compliance of the NPT is to establish control over special fissile materials with potential military applications, most importantly plutonium and highly enriched uranium, throughout the fuel cycle, including its final stage. Since the early 1990s the risk of proliferation has gained new concrete dimensions with references to actions by non-state actors and suspicions that civilian nuclear programs in certain states include secret ambitions to develop nuclear arms. This perceived threat has been accentuated with increasing numbers of states declaring their intentions of developing nuclear energy programs, thereby gaining nuclear technological knowledge and infrastructures that might be used for military applications. In order to meet this new perception of increased threat two different principal lines of thought concerning measures for strengthening the non-proliferation regime can be found in the international political debate.

The first line of thought has mainly been developed in discussions and reports within the framework of the IAEA. It builds on a belief that states can be convinced of the rationality of participating in regional co-operation with the objective of establishing multinational facilities for the proliferation-sensitive steps of the nuclear fuel cycle, including its final stage. This internationalisation would thus be based upon states voluntarily choosing to rely on an assured nuclear fuel supply and the handling of spent nuclear fuel rather than on developing their own capabilities. Thus, the rights under NPT are not formally limited but exercised in common by a group of states. In addition to arguments relating to the need to counteract increased threats of proliferation, the IAEA proposals have been motivated by economic and technological scale advantages. Concerning the establishment of multinational repositories, the need to

muster local political and public acceptance is perceived to be one of the major challenges.

The second line of thought, chiefly presented by the US administration, has a compelling character and is motivated by security policy rationality. The core idea is that NNWS, alternatively Non-Nuclear Fuel Cycle States, would not be allowed to gain control over the technology necessary for a full nuclear fuel cycle – enrichment, recycling and final disposal of spent fuel and highly radioactive waste. As a result, internationalisation would take place where a limited number of Nuclear Fuel Cycle States would have a responsibility to ensure the supply of fuel and to take care of spent fuel through recycling or final disposal, or both. The concrete meaning of this responsibility, and its distribution within the group of Nuclear Fuel Cycle States, is an outstanding issue not easily resolved.

To limit the rights of certain states to develop national nuclear energy programs that include national control over the proliferation-sensitive steps of the fuel cycle is probably not possible from a legal or political perspective. This would mean that the asymmetry between NWS and NNWS would be accentuated, or that a new precarious asymmetry between Nuclear Fuel Cycle States and Non Nuclear Fuel Cycle States would be established. From a legal perspective this would mean a fundamental change in the meaning of NPT Article 4. From a theoretical perspective such a change could be accomplished either by a renegotiation of the NPT or a declaration on the interpretation of Article 4 accepted by all the signatory states. Taking into account the importance of Article 4 in order to strike a balance acceptable to the NNWS, it is probably extremely difficult to reach a consensus on a development that significantly shifts this balance to the detriment of most NNWS. This would probably require that the NWS accept binding obligations on nuclear disarmament within set timeframes in accordance with NPT Article 4. Furthermore, this in turn would require binding commitments of nuclear disarmament by those states that have not acceded to the NPT and control nuclear arsenals. The political probability of such a development in the foreseeable future is remote. If instead the distinction between Nuclear Fuel Cycle States and Non-Nuclear Fuel Cycle States is established through export controls administered by the NSG, the discrimination established against the Non-Nuclear Fuel States could be seen as an infringement of NPT, Article 4(2). Consequently, legitimacy for the NPT among states denied access to nuclear technology would be likely to erode and the risk would increase for them to choose to withdraw from the treaty. Moreover, the role of the IAEA as the pivotal institution entrusted to safeguard the world from proliferation would be marginalised. An imperfect multilateralism would be partly substituted by a selective plurilateralism.

Thus in the contemporary international debate there exists a widespread perception of increased threats of nuclear proliferation with calls for an increased internationalisation of the nuclear fuel cycle, including final disposal of spent nuclear fuel. Even though these initiatives might lack concretion, all states that conduct nuclear energy production must pay strict attention to the arguments presented and formulate a position. In this connection it should be noted that the threat of plurilateral action from NWS might generate motives for NNWS to strengthen the multilateral IAEA structure by concluding agreements on common facilities under IAEA supervision.

Finally, it should be stressed that the debate concerning the establishment of multinational repositories presupposes an open nuclear fuel cycle where spent nuclear

fuel is directly disposed of. In a longer time perspective this type of fuel cycle might be abandoned by many states. The idea of a closed fuel cycle based upon recycling of spent nuclear fuel, separating plutonium for future use as fuel in Breeder reactors, was abandoned by most states in the early 1980s. This shift was primarily motivated by proliferation concerns – that the dissemination of recycling technology and increased production of plutonium posed a threat to the NPT regime. However, so far the open fuel cycle has not been finalised in any state and only few states are conducting concrete projects for the establishment of repositories for final disposal of spent nuclear fuel. This unsatisfactory situation has led to new concerns about risks of proliferation. Since the late 1990s it seems that a potential new shift in the preference for nuclear fuel cycle by several states has begun to develop, once again calling for reprocessing of spent nuclear fuel, using the not yet commercialised transmutation technique. This proposed technological shift promises greatly reduced volumes of highly radioactive waste that has to be disposed of – however, there will still be a need for repositories with extreme long-term stability.

The funding for research on transmutation technologies has lately been considerably increased in the USA as well as in the European Union and its Member States. In the light of the prospects for global warming, and increasing competition for fossil fuels, the hopes welded to the promises of this foreseen technological development have increased rapidly over the past few years.

However, a fuel cycle involving transmutation technology includes a number of proliferation-sensitive steps, including plutonium separation. Thus the arguments raised against reprocessing in the 1970s will resurface and gain in validity.[102] In combination with extremely high investment costs, this fact generates strong arguments for future internationalisation of the nuclear fuel cycle. The concrete US proposal for a Global Nuclear Energy Partnership constitutes an initiative to create such a structure dominated by the established nuclear fuel cycle states. Even if this approach is based upon voluntary agreements, it would shift the delicate balance of the NPT in favour of the NWS that dominate the GNEP.

Furthermore, in this envisaged future technological context it seems clear that in order to maintain a wide loyalty to the NPT an internationalisation of the nuclear fuel cycle has to take place on a multilateral level, within the framework of the IAEA and not through decrees made by a collective of a few established nuclear fuel cycle states.

Finally, the obvious has to be mentioned: The most effective measure to strengthen the non-proliferation regime, and to minimise the risks of expanding civil nuclear energy programs being clandestinely developed for military applications, is clearly the scrapping of existing nuclear arsenals under international supervision and control. Could it be that the development of civilian applications of nuclear technological knowledge requires such a step? If such a step in its turn requires an internationalisation of the responsibility for spent nuclear fuel and highly active radioactive waste, it is likely that political and social acceptance of the localisation of multinational installations would be at hand.

102 F.N von Hippel,'Plutonium and Reprocessing of Spent Nuclear Fuel', 293 *Science* vol. 293 (2001), pp. 2397–2398.

Chapter 7

The Developing Relationship Between Law and Politics in the United Nations Human Rights Council

*Gudmundur Eiriksson**

The 2008 Annual Meeting of the American Society of International Law explored the topic 'The Politics of International Law'. The organisers of the Annual Meeting posed certain questions about this relationship in the following terms: "Critics contend that international law is really the deployment of power politics, and that resolving disputes under the auspices of international law in a judicialized forum serves only to 'launder' the rule of the powerful. Admirers of internationalism and international institutions, on the other hand, contend that the legalization of power has a civilizing effect that leads to some of the most effective forms of law-making."[1]

The establishment of the United Nations Human Rights Council in 2006 and its activities in its first years give occasion for an analysis of the relationship between politics and the law in the human rights work of the United Nations. The intent, at least in some quarters, behind the new institutional structure was to minimise the 'political' aspects evident in the work of the former Human Rights Commission. The United Nations General Assembly, in the preamble to its resolution establishing the Council, recognised "the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization".[2] Against this background, it is instructive to analyse the situation so far in order to try to identify whether there is any evidence of a move towards addressing the shortcomings of the Human Rights Commission in this connection.

I shall be discussing, as a kind of 'case study', the work of the Preparatory Committee for the Durban Review Conference, that is, the body charged with organising a review conference, to be convened in 2009, on the implementation of the Durban Declaration and Programme of Action adopted at the World Conference against Rac-

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1 *See* <www.asil.org/events/am08/about.html>.

2 UNGA resolution 60/251 of 15 March 2006.

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ism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, from 31 August to 8 September 2001.[3]

The organisational meeting of the Preparatory Committee was held in Geneva from 27 to 31 August 2007.[4] The first substantive session of the Committee will take place from 21 April to 2 May 2008. Of course, given the preliminary nature of the work thus far, no firm conclusions can be set out. However, it is clear that the results of the Preparatory Committee's work, and of the Review Conference itself, will provide one of the earliest opportunities to evaluate whether the installation of the new Council will, indeed, lead to the 'elimination of double standards and politicization' in the consideration of human rights issues.[5]

It will be recalled that the 2001 Durban Conference was held in a highly charged atmosphere where the interaction between law and politics was clearly evident. It is noteworthy for having concluded only three days before 11 September 2001, and the follow-up work cannot be analysed except in the context of measures taken, both under United Nations auspices and by individual states, to combat terrorism. In her message on the occasion of Human Rights Day 10 December 2001 Mary Robinson, then United Nations High Commissioner for Human Rights, said:

> "2001 also saw the World Conference against Racism. From 31 August to 8 September, thousands of people from around the world met in Durban, South Africa, to elaborate strategies for combating racism and intolerance. Durban was an honest, if at times painful, global dialogue about some of the most searing issues facing humanity. At Durban the world confronted complex issues of the past and the present. The historic gathering made it plain that the scourge of racism crosses all national and cultural boundaries. Durban launched a renewed global alliance against racism and gave it a solid anti-discrimination agenda to work with.
>
> In the aftermath of 11 September and the international response to terrorism, this anti-discrimination agenda is even more crucial. It should be an integral part of efforts to safeguard against any erosion of human rights standards that might flow as an unintended consequence of measures to counter terror."[6]

In developing the relationship between politics and law, the first question to be considered is how one defines a political versus a legal process. Here, by politics, I refer simply to the use of power to achieve defined aims. Now, power takes many forms. The purest and most acceptable in the modern day is the democratic process, with the will of the majority prevailing (ideally, tempered by the regard for the legitimate rights

3 The United Nations General Assembly, in its resolution 61/149 of 19 December 2006, requested the Human Rights Council to undertake preparations for this event. The Human Rights Council, in its resolution 3/2 of 8 December 2006, decided that the Human Rights Council would act as the Preparatory Committee for the Durban Review Conference.

4 A draft unedited text of the Report of the Committee on its first session can be found in United Nations document A/CONF.211/PC.1/L.3, <http://portal.ohchr.org/portal/page/portal/HRCExtranet/WG-PREPCOMDURBAN/PreprComDraftUneditedReport(110907).doc>.

5 *See* UNGA resolution 60/251, *supra* note 2.

6 <www.unhchr.ch/huricane/huricane.nsf/(Symbol)/HR.01.113.En?OpenDocument>.

of the minority). The other extreme is the unaccountable dictator. In between, there is a wide variety of paradigms identifying power, as exercised on the basis of race, religion, economic strength, etc. In a simplified version of the United Nations context which I am addressing, the exercise of power and thus the political process is guided by two factors: first, an overwhelming majority of voting power of developing states in the General Assembly and other open-ended bodies; and, second, the overwhelming proportion of funding of United Nations activities by developed countries. The former element is exacerbated in smaller representational bodies. As regards the Human Rights Council, for instance, the formal voting strength of Western countries was diminished as compared with its predecessor (this may or may not matter, given the fact that they were already in the minority).

In many United Nations activities, a knee-jerk reaction on individual issues is for the majority to authorise expenditures to be paid for by the minority. In reality, however, in a more sophisticated analysis, it must be acknowledged that all states pay at least lip service to the need for efficiency and sustainability and in any event to the long or medium-term danger that the major contributors would cease to participate. This factor is even clearer in the case of human rights activities because of the large role played by voluntary contributions, to Trust Funds, etc., in addition to financing from the official budget of the United Nations. In the very specific context of the Durban Review Conference, the power relationship is affected by the possibility of the developed countries deciding not to participate, choosing to 'pull the plug', as it was rather inelegantly put to me in a private conversation at the Preparatory Committee meeting. There is a real risk that individual states or groups of states will decide not to participate in the process.

I turn now to some theoretical constructs. By way of introducing the most prominent aspect of the law/politics relationship, let me quote my mentor, Professor Louis Henkin, one of the great human rights scholars. He wrote: "[T]he distinction between law and politics is only a part-truth. In a larger, deeper sense, law *is* politics".[7] He seeks to depolarise any perceived dichotomy, pointing out that laws are developed through a political process as a way of regulating conduct in society for the general good. In the international human rights context, the political process is one of state law-making. All the instruments that form the basis of our work are constructed through this process. Thus, to the extent that one feels that there is something lacking in the legal regime, then the activation of a political process to fill the gaps must be welcomed. This is a synergetic aspect of the relationship and is potentially positive, while other aspects are more negative, in my reading.

I turn now to the distinction between the 'political' and the 'apolitical'. 'Justice is blind', it is said, hopefully. In our context, this relates to a distinction between the work of politicians (in the United Nations context, this means the representatives of states) and that of experts. Referring back to the discussion that led to the establishment of the Human Rights Council, there was an attempt to foster more expert debate, the expectation being that the further removed from the archetypal political organ, the

7 L. Henkin, *International Law: Politics and Values* (Martinus Nijhoff Publishers, Dordrecht, 1995) pp. 4–5, *as excerpted in* L. R. Damrosch *et al.* (eds.), *International Law: Cases and Materials* (American Casebook Series, West Wadsworth, St. Paul, Minnesota, 2001) pp. 1–2.

General Assembly, the less political the debate. It is too early to be definitive, but the interactions in the General Assembly in 2006 around the presentation of the first report of the Human Rights Council seem to demonstrate that there are elements that do not want to relinquish the political role. More generally, this distinction relates to the character of various expert bodies – Special Rapporteurs, etc. One refinement of the distinction is the relationship with the United Nations Secretariat, in the human rights context specifically with the High Commissioner for Human Rights and her Office. Quite typically, and perhaps euphemistically, to refer a task to the High Commissioner is to self-define it as non-political. But what is the reality on these questions discussed here? In the Preparatory Committee meeting, there were two relevant manifestations. The first related to the role of the work of Special Rapporteurs in the preparatory process for the Durban Review Conference. It turned out that it served the interests of one political grouping to engage the contribution of one of the United Nations Special Rapporteurs and not another, and, for another political grouping, vice versa. Secondly, a decision to appoint the High Commissioner to be the Secretary-General of the Review Conference was to be qualified by denying her any 'political' function. A specific task that she was given, to prepare a questionnaire on the implementation by states of the Durban Declaration and Programme of Action, was to be subjected to political control or guidance by way of supervision by the Bureau of the Committee.[8]

Finally, I shall turn to the way in which the political process affects the human rights protection system by the twin tasks of resource allocation and prioritisation. I think it is fair to say that many states seek to set the human rights agenda in the United Nations context to centre on certain topics or actors with the aim of diverting attention from their own legal obligations. This was 'standard operating procedure' in the Human Rights Commission and efforts were designed in the structure of the Human Rights Council to make this less possible. We shall see how successful this becomes. As for the Durban Review Conference, there exists a clear effort on the part of many states to direct attention to Islamaphobia and other consequences of the so-called war on terror. It remains to be seen whether and to what extent this will affect the debate on the more traditional racial discrimination issues.

Prioritisation is closely linked to resource allocation. In the context of the activities being discussed here, this relates to deciding on the tasks on which the resources of the High Commissioner are to be used, without any express willingness to meet more tasks with more resources. This can only raise suspicions as to the underlying agenda. In a broader context, alas, this phenomenon is evident throughout the international human rights system, examples being the resource needs of the European and Inter-American Human Rights Courts and, it can be expected, the African Court on Human and Peoples' Rights.

As noted above, it is too early to make a definitive critical assessment of the work of the Human Rights Council and the interactions between law and politics within that organ. This topic thus remains within the realm of 'what the law should be', as with many other issues addressed in this work, or even, in a much more optimistic sense, 'what politics should be'.

8 *See* Decision PC.1/10 (b), in Report, *supra* note 4, Annex III.

Chapter 8

The Future of Human Rights Law in Peace Operations

*Ola Engdahl**

1. Introduction

The law on peace operations includes parts of the law on collective security as well as that of international humanitarian law, and, as in the case of this article, human rights law. Ove's interest and knowledge of these issues are well known and have provided a source of inspiration, and information, not only for me, but also for his other colleagues at the National Defence College as well as for the numerous officers attending his lectures. This article will focus on a trend in peace operations where such operations are endowed with the responsibility of carrying out traditional state functions, such as the right and duty to conduct house searches, to set up checkpoints and detain individuals.

The examples of IFOR/SFOR/EUFOR[1], KFOR[2], ISAF[3], INTERFET[4], UNMIK[5], are clear evidence of this trend. UNMIK could be regarded as a particular operation where responsibility for carrying out state functions has been taken the furthest but this article will deal with those operations that have included a substantive military component. If such military forces were to be part to an armed conflict the applicable legal framework would be the international humanitarian law. However, since peace operations forces are seldom part to an armed conflict, this begs the question of what precise legal framework would apply to the conduct of military forces in the vast majority of all peace operations. In this discussion, it will be argued that human rights law is generally applicable to such operations. It is not a question of *if* the peace operation in question has the authority, or not, to carry out state functions

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1 SC Res. 1031 (1995). Council Decision 2004/803/CFSP of 25 November 2004 on the launching of the European Union military operation in Bosnia and Herzegovina, OJ L 353/21 (2004).

2 SC Res. 1244 (1999).

3 SC Res. 1386 (2001).

4 SC Res. 1264 (1999).

5 SC Res. 1244 (1999).

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(this authority comes from the Security Council mandate) but rather *how* they are to be conducted.

The question of applicability of human rights law in peace operations has been addressed in various forums but as yet no uniform view exists regarding this question. The inadmissibility decision by the European Court of Human Rights (ECrtHR) in the *Behrami* and *Saramati* cases (May 2007) is particularly troublesome. Here, the Court avoided the opportunity of providing guidance to the contracting parties to the European Convention on Human Rights (ECHR) on how they should balance their duties under that Convention with operational requirements flowing from United Nations Security Council (UNSC) resolutions. This is all the more important, given that the Court did not reject applicability of the ECHR in peace operations. It is the purpose of this article to look beyond this decision and to analyse areas of possibility, and pitfalls, for human rights law in peace operations. The bottom line is that states have no authority to violate human rights law within their own territories and should therefore not be allowed to do so outside their territories. This article argues that the Court should have declared itself to be competent and taken subsequent responsibility to provide the necessary judicial review for acts and omissions in peace operations.

First, the question of extraterritorial application of human rights treaties will be considered followed by a brief recapitulation of the *Behrami* and *Saramati* cases. The next chapter will analyse the *Behrami* and *Saramati* cases in relevant parts and argues that the Court should have declared itself competent.

2. Extraterritoriality of Human Rights Law

The ECrtHR has in a series of cases interpreted the term 'jurisdiction'.[6] It has confirmed that the responsibilities under the ECHR can also apply outside the territory of contracting states.[7]

In the much accentuated *Bankovic* case the claimant held that those who died during the bombing of the TV-tower in Belgrade in the NATO-led intervention of Kosovo in 1999 came within the jurisdiction of the states responsible for the bombing.[8] This case, which concerned the right to life, was decided on the interpretation of the term 'jurisdiction'. The ECrtHR emphasised that the jurisdiction of a state normally was confined to the territory of that state and only exceptionally applied extra-

6 Article 1 of the ECHR states: "Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Rome 4 November, 1950, ETS 5-1950.

7 In the *Loizidou* case the ECrtHR stated: "… the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration." *Loizidou* v. *Turkey*, Judgment, para. 62 1996-VI (1996). *See also* Case of *Ilascu and others* v. *Moldova and Russia*, para. 314 (2004).

8 *Bankovic and others* v. *Belgium et al.*, Admissibility Decision, para. 64, Reports 2001-XII (2001).

territorially. The NATO-led operation controlled the air space above Kosovo but did not have any troops on the ground. A major difference certainly exists between a local administration (*Loizidou* case) and the controlling of air space. The Court also rejected the argument that the control that the states participating in the air operation exercised could lead to jurisdiction within the meaning of the ECHR.

The claimant argued, however, that the level of jurisdiction could be proportional to the level of control exercised in every specific situation of extraterritoriality. The Court did not find this argument convincing and held that Article 1 of the Convention did not support an interpretation where the Convention's rights and freedoms "can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question".[9] The Court accordingly rejected the claimant's position that the obligation to guarantee the rights and freedoms of the Convention could be proportional to the level of territorial control.

In the *Issa* case the relatives of several shepherds killed in northern Iraq brought a case against Turkey to the ECrtHR. It was not disputed that Turkish security forces had conducted military operations in the area where these people died. In contrast to the *Loizidou* case it was not a question of 'overall control' although there were close to 30 000 soldiers engaged in the operation. Jurisdiction in the meaning of the ECHR could, according to the Court, include areas temporarily under the effective control of a member state. Individuals in this area during the relevant time would thus fall within the controlling state's jurisdiction.[10]

The Inter-American Commission on Human Rights has also taken the opportunity assessing the extraterritorial applicability of both the American Convention on Human Rights and the American Declaration of Human Rights.[11] The Commission found that both instruments applied extraterritorially. The American Commission emphasised the criteria of 'authority' and 'control' more than the standard of effective control applied primarily by the ECrtHR.[12]

The UN Human Rights Committee has on several occasions stated that the International Convention on Civil and Political Rights (ICCPR) applies extraterritorially. According to Article 1 the contracting states are under an obligation to ensure

9 *Ibid.*, para. 75.

10 Case of *Issa and others* v. *Turkey*, Judgment, para. 76 (2004). It turned out to be impossible to decide due to lack of evidence. *See* para. 80. *See also Öcalan* case, where Öcalan come within Turkey's jurisdiction when he came under effective Turkish authority after being handed over to Turkish officials at the Nairobi Airport. Case of *Öcalan* v. *Turkey*, Judgment, para. 91 (2005). Both these cases happened outside the regional context of the ECHR and it seems clear that this could not be an objection to the applicability of the ECHR.

11 The American Convention states in Article 1 that the parties "undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms", American Convention on Human Rights (1969) 22 November 1969 1144 UNTS 123. American Declaration of the Rights and Duties of Man, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

12 Inter-American Commission on Human Rights, Report No. 109/99, Case 10.951, *Coard et al.* v. *United States*, para. 37 (1999) and *Armando Alejandre Jr. And Others* v. *Cuba* ('Brothers to the Rescue') § 25. Report No. 86/99 (1999).

the rights in the Convention to anyone 'within the territory and jurisdiction'.[13] It indicates that for individuals to reside within the protective regime of the ICCPR they must be on the territory of a member state. The Committee, however, has interpreted the scope of application of the ICCPR as 'within the territory *or* jurisdiction'.[14]

In the Committee's General Comment No. 31 (2004) it stated the following regarding the extraterritorial application of the ICCPR, with special consideration in relation to peace operations:

> "… the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals […] who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, *such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation*."[15]

The extraterritorial application of human rights law has also been subject to the assessment of the International Court of Justice. The Court stated in its Advisory Opinion regarding *The Wall* (2004) in Israel that the ICCPR is applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[16] The Court confirmed this position in the case of *Congo* v. *Uganda* (2005).[17]

In conclusion, it is quite clear that human rights law, although primarily territorial in its application, is not exclusively so. How then is it possible to reconcile the far-reaching human rights obligations that fall upon a state with the practical problems of implementation of such obligations when acting extraterritorially? Is it at all possible for states to ensure that human rights are enjoyed by the local population in an extraterritorial context? Before continuing it should be noted that the question so far only concerns the extraterritoriality of human rights law when states exercise effective con-

13 "Each Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant" Article 2 of the International Covenant on Civil and Political Rights (1966), 19 December 1966, 999 UNTS 171.

14 Human Rights Committee, General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum, para. 4 UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) (emphasis added). It should be noted, however, that not all states share this interpretation. The USA follows the text of the Convention and does not support an interpretation that creates extraterritorial obligations. *See* Human Rights Committee, Considerations of Reports Submitted by States Parties under Article 40 of the Covenant, Third periodic reports of States parties in 2003, USA, UN Doc. CCPR/C/USA/3, Annex 1, 28 November 2005.

15 Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant. The Nature of the General Legal Obligation Imposed on States to the Covenant, CCPR/C/74/CRP.4/Rev.6, April 2004, para. 10 (emphasis added).

16 Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of the International Court of Justice, para. 111 (2004).

17 *Democratic Republic of Congo (DRC)* v. *Uganda*, International Court of Justice, 19 December 2005, paras. 216–220.

trol over territory or persons, or authority over such persons. Human rights obligations of states participating in peace operations are discussed in succeeding chapters.

It must be recognised that states, even in situations where they exercise effective control over a foreign territory, do not exercise the same authority over that territory as they do over their own. It could therefore be held that a disproportionate burden for states would result – such as Turkey in the *Issa* case, with only a temporary exercise of effective control over territory to guarantee the whole of the ECHR rights and freedoms. The ECrtHR allowed for a contextual interpretation when it stated the following in the *Cyprus* v. *Turkey* case:

> "Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the *entire range* of substantive rights set out in the Convention and those additional Protocols which she has ratified."[18]

The fact that Turkey exercised such effective control, through a local administration, meant that according to the Court its jurisdiction included the entire range of the Convention's rights. *É contrario* one could draw the conclusion that if Turkey had not exercised effective control through a local administration, but only temporary effective control over a part of a foreign territory, Turkey would not have been under an obligation to secure the entire range of the Convention's rights. This line of argument follows that which the Court stated regarding the fact that the Convention does not impose impossible burdens on member states.

Regarding the duty of member states to protect individuals from third party violence the Court has repeatedly stated this principle:

> "… the scope of the positive obligations must be interpreted in a way which *does not impose an impossible or disproportionate burden on the authorities*. […] For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, *judged reasonably*, might have been expected to avoid that risk."[19]

A state cannot reasonably be expected to exercise the same authority during extraterritorial operations as it does on its own territory. It therefore seems unreasonable to require a member state to guarantee the entire range of the Convention's rights when *de facto* it is not in a position to do so. But when states exercise effective control over

18 Case of *Cyprus* v. *Turkey*, Judgment, para. 77 (2001) (emphasis added).

19 R. Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans *et al.* (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp 2004) p. 106 (emphasis added).

individuals and intervene in their lives, then states have an obligation to "take measures within the scope of their powers which, judged reasonably, might have been expected" to avoid violations of the rights of people under the Convention.

The Court appeared to condemn such an approach in the *Bankovic* case when it stated: "the wording of Article 1 does not provide any support for the applicant's suggestion that the positive obligation in Article 1 […] can be divided and tailored in accordance with the particular circumstance of the extraterritorial act in question".[20] According to the Court such argumentation would mean that "anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of the Article 1 of the Convention."[21] Instead an alternative interpretation could require a 'direct and immediate link' between the state's extraterritorial actions and the impugned violation of an individual's right.[22] This would mean the obligations of states would be limited to guarantee the rights of individuals affected in various ways as a result of their tasks.[23]

A possible interpretation would be that it is only when effective control is established that it is possible to apply the Convention proportional to the level of that control. In the *Bankovic* case the Court did not consider that the threshold for effective control had been reached and it was therefore not possible to 'divide and tailor' the positive obligation in Article 1 in accordance with the particular circumstances. However, once effective control is established it should be possible to apply the Convention's rights proportional to that control. Such an approach could meet both the interests of member states in not being required to perform an 'impossible or disproportionate burden' during extraterritorial operations and that of applying basic human rights law extraterritorially.

3. Behrami and Behrami and the Saramati Cases

For the first time a case concerning the applicability of the ECHR in a peace operation came before the ECrtHR.[24] In the case of *Behrami* and *Behrami*, a boy named Gadaf Behrami died following the detonation of an unexploded NATO bomb during its air campaign in 1999. The explosion occurred in an area controlled by KFOR through a

20 *Bankovic*, *supra* note 9.

21 *Ibid.*

22 Lawson, *supra* note 19, p. 104.

23 Cerone presents a possible model where states' negative duties apply extraterritorially but their positive obligations are dependent on the form and level of the effective control exercised by the state. Cerone finds that this model is supported by the fact that a state's positive obligations on its own territory are limited by what reasonably can be expected by the state. He claims: "Due to the very nature of negative obligations, states would be bound by those obligations only to the extent they affirmatively acted with the relevant sphere. Similarly, positive obligations would apply only in circumstances in which it would be reasonable for the state to take affirmative steps in light if its level of authority, control, and resources." J. Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law', *Center for Human Rights and Global Justice Working Paper*, no. 5 (2006) p. 32.

24 *Behrami and Behrami* v. *France* (Application no. 71412/01) and *Saramati* v. *France, Germany and Norway* (Application no. 78166/01).

multinational brigade led by France. The boy's father approached Kosovo Claims Office, holding that France was responsible for clearing the area from mines and unexploded ordnance. His claim was rejected on the grounds that since 5 June 1999, it had been the responsibility of the UN to clear the area. Before the ECrtHR, the claimant held that France had violated the right to life (Article 2 of the ECHR). In the *Saramati* case the claimant held that his right to freedom and security (Article 5 of the ECHR) had been violated due to the fact that he had been detained between 13 July 2001 and 26 January 2002. His right to a fair trial had also been violated since he had not had access to court. According to the claimant the troop-contributing states of France, Germany and Norway, which in different ways had been involved in the detention, failed to guarantee ECHR rights to individuals in Kosovo.[25]

In these cases the ECrtHR needed to address the situation where member states put state organs (military contingents) at the disposal of an international organisation for the purpose of maintaining international peace and security. The Court examined the law on responsibility of states and international organisations and the relation between the Convention and the UN Charter.

The Court initially stated that that it was beyond doubt that Kosovo was under the effective control of an international presence and that this presence exercised the public powers that would normally be exercised by the Government of the FRY.[26] The Court therefore took the view that the question to a lesser extent concerned the extra-territorial application of the Convention, but more importantly as to whether the Court was competent *ratione personae* to examine the respondent states' contribution to the international presence which exercised the control.[27]

The Court established that the UNSC had identified the situation in Kosovo to be a threat to international peace and security in accordance with Article 39 of the UN Charter by adopting Resolution 1244 (1999). The Resolution enabled the establishment of an international security force (KFOR) and a civil administration (UNMIK).[28] The Court concluded that the UNSC was "delegating to willing organisations and member states the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command."[29] UNMIK was the subsidiary UN organ established by the Secretary-General.[30]

The key question, according to the Court, was whether or not the UNSC retained ultimate authority and control, with only the delegation of operational command. It considered that this delegation model was an established substitute for the Article 43 agreements never concluded.[31] The Court listed the following factors as

25 The case against Germany was withdrawn as it had not been possible to establish any involvement of German officers in the arrest of Mr. Saramati. *Ibid.*, para. 64.

26 *Ibid.*, para. 70.

27 *Ibid.*, paras. 71–72.

28 *Ibid.*, paras. 128–9.

29 *Ibid.*, para. 129.

30 *Ibid.*

31 *Ibid.*, para 133.

crucial for establishing whether or not the UNSC retained authority and control: 1) Chapter VII allowed the UNSC to delegate in accordance with Resolution 1244; 2) the power was a delegable power; 3) the delegation was prior and explicit in the Resolution itself; 4) The Resolution put sufficiently defined limits on the delegation. The mandate was adequately precise "as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed." It was recognised that some provisions were broad, but this was in the nature of such an instrument as its role was not to interfere with the detail of operational implementation and choice; 5) The leadership of the military presence was required to report to the UNSC, thereby allowing the UNSC to exercise its overall authority and control.[32]

According to the Court, the UNSC exercised authority and control while NATO, through the KFOR Commander down to the multinational brigades and to the Troop Contributing Nations (TCNs), exercised operational command.[33] The claimants had argued that the influence of TCNs undermined operational command. Such TCN influence included *inter alia*, their exclusive retention of criminal jurisdiction over the military forces as well as disciplinary powers. Their contributions were voluntary and they could decide at any time to withdraw from the operation in question. The Court recognised the TCN influence but stated that the important question was not whether NATO exercised *exclusive* command but rather if it was *effective*. The Court also held that it did "not find any suggestion or evidence of any actual TCN orders concerning, or interference in, the present operational (detention) matter."[34] It continued by declaring that despite the TCN influence, NATO did in fact exercise effective command over relevant operational matters and that the UN retained ultimate authority and control.[35] KFOR thus exercised lawfully delegated power, under Chapter VII, of the UNSC and the action in question was in principle to be attributed to the UN. The fact that UNMIK was a subsidiary organ of the UN meant that in principle the acts and omissions of UNMIK were attributable to the UN.[36]

After finding that the acts and omissions were attributable to the UN the Court examined the issue of whether or not it was competent *ratione personae*. The Court had held earlier, in its *Bosphorus* judgment, that a state was not prohibited by the Convention in the transfer of sovereign powers to an international organisation. Even if such transfer of power was a consequence of the necessity to comply with international legal obligations, the state retained responsibility under Article 1 of the Convention, for all acts and omissions of its organs. However, if such acts or omissions were taken or made in compliance with its obligations flowing from its membership of an international organisation and where the organisation in question protected fundamental rights in a manner that at least could be considered equivalent to that which the Convention provided there was a presumption that the state had not departed from its obligations under the Convention. This presumption could be rebutted if in any given case it was considered that the protection of Convention rights was manifestly defi-

32 *Ibid.*, para 134.

33 *Ibid.*, para 135.

34 *Ibid.*, para. 139.

35 *Ibid.*, paras.139–140.

36 *Ibid.*, para 143–4.

cient. In such case the interests of the Convention's role as a 'constitutional instrument of European public order' in the field of human rights would prevail.[37]

In this respect the Court first established that the Convention needs to be interpreted in the light of relevant rules and principles of international law applicable in formal relations between its contracting parties including Articles 25 and 103 of the UN Charter. The thrust of the argument, however, is devoted to the primary responsibility of the Security Council to maintain international peace and security:

> "Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself."[38]

The Court found that the *Bosphorus* case was different in the way that the act in question had been implemented by the respondent state itself on its own territory. Even though the legal basis of the act was an EC Council Resolution, which in turn, applied a UNSC Resolution, the Court did not find that any question arose as to its competence *ratione personae* in relation to the respondent state. The present case, where the acts and omissions were attributable to the UN, was thus clearly distinguishable from the *Bosphorus* case both in terms of responsibility under Article 1 of the Convention and the Court's competence *ratione personae*. The Court, therefore, by a majority decision declared that the applicant's complaints were incompatible *ratione personae* with the provisions of the Convention.[39]

4. A Missed Opportunity?

Why did the Court miss this opportunity of developing the applicability of the Convention's rights and freedoms for states participating in peace operations?[40] These questions are of such fundamental importance that the Court ought to have taken its responsibility to hammer out the criteria for applying the Convention in peace opera-

37 *Ibid.*, para 145.

38 *Ibid.*, para 149.

39 *Ibid.*, para. 152.

40 The Court has already applied its position in subsequent cases: *Ilaz Kasumaj* v. *Greece*, Decision of 5 July 2007, Application No. 6974/05; *Slavisa Gajic* v. *Germany*, Decision of 28 August 2007, Application No. 31446/02; *Dusan Beric and Others* v. *Bosnia and Herzegovina*, Decision of 16 October 2007, Application Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/ 05, 1185/05, 20793/05 and 25496/05.

tions. This is especially so as the Court did not say that member states are not bound by their duties under the Convention. As one commentator noted, the position of the Court "removes a rather large sphere of State activity from its scrutiny."[41]

The approach by the Court to ascertain whether the acts and omissions were attributable to the UN is open to criticism on several accounts. The use of 'overall control' criteria instead of 'effective control' criteria found in Article 5 of the ILC Draft Articles on Responsibility of International Organisations is difficult to understand.[42] It contravenes established practice of UN peace operations where the UN does not regard itself as being responsible for acts committed by operations authorised to be commanded by other international organisations.[43] Cassese also finds that the Court appears to have moved beyond standards of effective control stipulated in Article 5 of the ILC Draft Articles and instead applied the criteria of 'overall control'.[44] Cassese argues however, that the decision by the Court in the *Behrami* and *Saramati* cases is evidence of the functionality of the 'overall control' test. It was not necessary to prove that the acts were conducted on specific instructions or directions from the international organisation. Instead, the overall control test led to the finding that acts and omissions were attributable to the UN. While Cassese does not say that the effective control test had led to another decision he means that the overall control test "may prove more helpful than that of 'effective control'".[45]

Moreover it is not clear why the Court chose to ascertain whether the acts and omissions were attributable to the UN. It could as well have referred to the rules of state responsibility in which to find out if the acts were attributable to the respondent states. However, the Court acknowledged that TCNs may also have a separate responsibility. The reference by the Court that it had not found that the TCNs had interfered in operational matters may *é contrario* mean that if it had done so then the acts and omissions may be attributed to those states instead of the UN. Similar reasoning should apply were TCNs to violate human rights law when conducting typical TCN

41 A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', *Human Rights Law Review*, Advance Access (2008), p. 17.

42 The commentary to that article states: "[t]he criterion for attribution of conduct […] is based according to article 5 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal".

43 Note in this respect, the statement by the United Nations Secretary-General to the Prime Minister of Rwanda: "… insofar as 'Opération Turquoise' is concerned, although that operation was 'authorized' by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to 'Opération Turquoise'." International Law Commission, Third report on responsibility of internatinal organizations, UN Doc., A/CN.4/553, (13 May 2005), para. 41 ('Opération Turquoise' was established by Security Council Res. 929 (1994)).

44 A. Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18:4 *European Journal of International Law* (2007) pp. 649–668, p. 667.

45 Against the background of the ICJ Judgment in the *Genocide* case he finds that the 'effective control' test used in the *Nicaragua* case only applies for attribution to a state for the conduct of single private individuals and that 'overall control' is a more functional test when it concerns organized armed groups and military units.

tasks, such as disciplinary matters or exercising criminal jurisdiction over its forces. If a member of the military contingent of a TCN is suspected of a crime in a host nation and the TCN in the course of its investigation maltreats a local witness, that act must be attributed to the TCN and not the UN. Another example could be where force is used to protect civilians, even though, no such task exists in the mandate.

The overall control criterion applied by the ECrtHR widens the definition of UN operations to include, as well, those operations where command is delegated to another entity. This decision may affect how future peace operations, based upon a mandate from the UNSC, are conducted and managed from the UN perspective. An interesting aspect in this regard is that the Court's definition of a UN operation does not seem to be in accordance with the definition of a UN operation set out in the Convention on the Safety of United Nations and Associated Personnel (Safety Convention). The definition in the Safety Convention refers to UN operations conducted under UN authority and control, although it was not meant to include operations contracted out to another organisation or state. The authors of the Safety Convention were not willing to widen the applicability of the Safety Convention in that respect. The inclusion of associated personnel is evidence of this.[46]

Notwithstanding questions of control and attribution, the Court should have declared that it was competent *ratione personae* on the basis that when member states to the Convention transfer operational command over their forces to an international organisation the principle from the *Bosphorus* case should apply. To distinguish these cases based upon attribution and thereby to declare itself incompetent seems to be too narrow an interpretation and, at least, to contravene the spirit of the *Bosphorus* case. In that case the Court needed to strike a balance between the fact that the Convention does not prohibit the transfer of power to an international organisation and the fact that "a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations."[47]

To reconcile these two positions the Court found that state actions in compliance with legal obligations flowing from their membership in an international organisation is justified as long as the organisation concerned could offer an equivalent protection of the Convention's rights that the Convention provides. In such situations there was a presumption that the state had not departed from its obligations under the Convention. This presumption could be rebutted if in a given case it was considered that the protection of the Convention rights was manifestly deficient.

It is true that participation in peace operations is voluntary but when operational command has been transferred, the military contingent is under an 'international legal obligation' to follow a lawful order from higher command.[48] It may be that the transfer of operational command is not equivalent to the transfer of such powers, as was central

46 O. Engdahl, *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International Law*, (Martinus Nijhoff Publishers, Leiden, 2007) pp. 214–233.

47 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi (Bosphorus Airways)* v. *Ireland* [GC], no. 45036/98, para. 153.

48 Sari, *supra* note 41, pp. 18–19.

in the *Bosphorus* case. However, the Court did not address this particular aspect. In this respect it is interesting to note the views of the International Law Association:

> "In the case of the existence of an international obligation for States not only to respect but also to "ensure" (International Humanitarian Law) or "secure" (European Convention on Human Rights) such respect, there is a conventional legal obligation for Member States to ensure through adequate supervision that IO-s act within the constraints of applicable law. It is also argued that a similar obligation exists under customary international law. A transfer of powers to an IO cannot remove acts of the IO from the ambit of control mechanisms established by particular treaties nor can it exclude the responsibility of the States who transferred powers to an IO."[49]

The realisation of the powers of the UNSC in peace operations is dependent upon the fact that states contribute forces to particular operations. The transfer of operational command over these forces is thus a necessary condition for the UNSC to achieve the aim of international peace and security through peace operations. The transfer of operational command is moreover made with the full knowledge that the organisation is not a party to any human rights treaties. On the basis of the *Bosphorus* ruling it could therefore be argued that unless the TCNs limit the right of international organisations to command their troops, so that that their human rights obligations are respected, the TCNs retain their responsibility under Article 1 of the Convention, for all acts and omissions of its organs.

The approach of the Court in the *Behrami* and *Saramati* cases seems to be too narrow. The Court ought to have made clear that ECHR member states cannot avoid their obligations when they participate in peace operations. To declare itself incompetent leaves a large and important area of state activity without proper judicial review. Rather, the role of the Court is of the utmost importance in providing a proper balance between competing interests. It needs to take into consideration practical difficulties of implementing the Convention in an extraterritorial context and to evaluate whether operational requirements based upon a mandate from the UNSC does in fact conflict with the human rights obligations of TCNs.

The *Al-Jedda* case is illustrative in this respect. In December 2007, the United Kingdom House of Lords issued its judgment in the *Al-Jedda* case.[50] Mr Al-Jedda had been detained in Iraq in October 2004 by UK forces operating as part of the multinational force authorised by the UNSC in its resolutions 1511 and 1546. He claimed that his right to liberty under ECHR Article 5(1) had been violated. Despite obvious similarities between the resolutions authorising the multinational force in Iraq and

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49 International Law Association, Berlin Conference (2004), 'Accountability of International Organisations', *International Law Organizations Law Review* 1:221–293, p. 244. (footnotes omitted). See also Peter Rowe, 'The Impact of Human Rights Law on Armed Forces, where he holds that "The treaty regime of a particular human rights instrument is unlikely to accept that a participating State can be permitted to pass its responsibility under that treaty to another State or to an international organisation, such as the United Nations or NATO." P. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, Cambridge, 2006) p. 236.

50 *R (on the application of Al-Jedda) (FC) Appellant* v. *Secretary of State for Defence* (Respondent) [2007] UKHL.58.

resolution 1244 authorising KFOR[51], the majority found that the detention of Mr Al-Jedda was attributable to the UK and the House of Lords were required to rule on whether or not his detention was a violation of his rights under Article 5(1) of the ECHR. It was evident that a conflict existed between a duty to detain on the basis of UNSC Resolution 1546 and the duties contained within the provisions of the ECHR. There was thus a need to reconcile those opposing interests. According to Lord Bingham, the solution lay in ruling "that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention".[52]

The inadmissibility decision in the *Behrami* and *Saramati* cases cannot be interpreted to mean that states are not bound by their human rights obligations in peace operations. The presumption must then be that these obligations continue to apply. The effect of not applying human rights law in peace operations would moreover leave troops without a proper international legal framework on *how* their tasks should be carried out. If peace operation forces are involved in armed conflict international humanitarian law applies (there would certainly be no argument against that). Why then would these forces be able to act outside the legal framework applicable in peace when the forces conduct their operations within a peace-time context? The UNSC resolution only establishes a right to act but the human rights law (or the international humanitarian law if that is the case) regulates how the acts should be implemented. The Court ought to have declared itself competent to review the acts of TCNs when they transfer operational command over their troops to an international organisation, unable to offer an equivalent protection of human rights, to carry out traditional state functions on its behalf.

It is interesting to note that TCNs seem to have acknowledged a responsibility for human rights law in certain peace operations. In the ISAF operation Sweden is in the process of concluding a bilateral agreement with Afghan authorities to the effect that prisoners handed over by its military contingent must be treated in accordance with basic human rights standards. Several states have already concluded such agreements.[53] Is this evidence of an emerging state practice in peace operations? Or will it be confined to the ISAF operation? A more natural approach, if one agrees with the third party states in the *Behrami* and *Behrami* and the *Saramati* cases, would have been to have an agreement between the UN and the Afghan authorities. Or is it that these states felt obliged, with the act of handing over prisoners to the local authorities being attributable to the UN, to honour their human rights obligations when acting on behalf of the UN?

Another point of interest is the position of Sweden regarding the applicability of human rights law in the SFOR operation in Bosnia and Herzegovina in 1999. On a direct question from the Swedish Legal Adviser at the Nordic Polish Brigade on the

51 See the judgment of Lord Roger who points out the similarities between resolutions 1511 and 1546 and 1244 and argues that the ECrtHR would hold the case inadmissible in accordance with its judgment in the *Behrami* and *Saramati* cases, para. 111.

52 *Al-Jedda* case, *supra* note 50, para. 39.

53 Denmark, Canada, United Kingdom, the Netherlands and Norway. *See*, *Afghanistan Detainees transferred to torture: ISAF complicity?*, Amnesty International Nov. 2007.

applicability of human rights law in the operation the Department of International Law at the Ministry for Foreign Affairs issued the following text:

> "… national contingents are bound by conventional and customary human rights law. The duty to respect human rights is applicable for all state organs not only in a state's own territory, but also in the territory of other states. Consequently, human rights law is binding for national contingents participating in the SFOR operation in Bosnia and Herzegovina, and governs the relation between SFOR and the civilian population there."[54]

The general language of the text implies that the Swedish position is not limited to the SFOR operation but should be given a general meaning. The Swedish Armed Forces also act in the presumption that they have a duty to respect human rights law in peace operations.[55]

5. Conclusion

Human rights law clearly has the potential to apply outside the territories of states. This is dependent on effective control over territory or persons or when authority over persons is exercised. There are some differences between the human rights conventions but also striking similarities in this respect. There is, however, a need to guide states on the balance between the duties of the conventions and the practical difficulties of applying these duties in an extraterritorial context. It could not mean that states have exactly the same requirements as they have in their own territories if they are not in a position to exercise the same authority. What is considered to be a disproportionate or impossible burden for states when they act outside their own territories? When is the effective control of such a nature that the whole range of human rights and freedoms should be secured?

The ECrtHR avoided the opportunity of guiding the ECHR member states on how that Convention should apply in peace operations. It creates an insecure situation and leaves the door open for different interpretations ranging from applying the Convention in its entirety to non-applicability of the Convention. The intervening states made not so subtle hints that if the Court were to declare itself competent to hear the case, these states needed to consider whether or not they could participate in future peace operations. This position is clearly based upon a misunderstanding. As the ECrtHR stated in the *Behrami* and *Saramati* cases, the ECHR could not be interpreted and applied in a legal vacuum. It must take into consideration the important task of the UNSC. However, this should not mean that the Court declares itself incompetent. Rather it means that the Court has an important and delicate task to hammer out the balance between competing interests, such as those duties under the ECHR on the one hand, and possible conflicting operational requirements based upon a mandate from the UNSC, on the other. It is precisely the role that a Court

54 On file with the author.

55 *Military Strategic Doctrine* (Militärstrategisk doktrin) Försvarsmakten Stockholm (2002) p. 44 and *Legal Orientation* (Juridisk orientering) Information from the Legal Department, Swedish Armed Forces No. 1 2008, pp. 16–18.

should have. The possibility of judicial review is, moreover of the utmost importance for those individuals affected by the acts undertaken by peace operation forces.

Furthermore, from a policy perspective it seems wise to apply fundamental human rights law. Disregard for human rights law may have negative effects on the operation as a whole. If it is perceived that a particular peace operation does not respect human rights law it may be difficult to convey the message that the host state must implement human rights law in their national legislations and to train local military and police forces in human rights law. A well balanced view on the applicability of human rights law would facilitate achievements to reach the desired end state and would most probably in a long perspective function as a force protection measure.

Chapter 9

Sense and Sensibility in Sentencing – Taking Stock of International Criminal Punishment

*Frederik Harhoff**

1. Introduction

The purpose of punishment is to impose a meaningful sanction on the perpetrator of an accomplished crime. But is it ever possible to translate fully an accomplished crime into a meaningful sanction? The answer to this tedious question, of course, depends largely on what is meant by 'a meaningful sanction'. But the question extends into the very core of penal law – namely, the purpose and process of punishment. What, in other words, is the relationship between the nature and context of the crime on the one hand, and the punishment on the other?

While this relationship is fairly well researched in *domestic* legal theory (although the answer may still be unclear!), little attention has been devoted to the correspondence between crimes and sanctions at the *international* level. It falls beyond the scope of this short article to introduce novel and much needed research into the matter. Instead, I shall offer a few observations on international sentencing based respectively upon the practice of the two UN Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). These two Tribunals are mandated to prosecute persons for genocide, crimes against humanity and war crimes under international law; for the sake of convenience, I shall in this article simply refer to all of these as 'war crimes'.

The sentencing principles developed so far by the Tribunals in respect of war crimes are of course derived from the principles in domestic law. However, it is relevant to note initially that we are dealing here with punishment of distinct crimes in two separate and different legal systems, namely *domestic* law and *international* law. It is appropriate to remind that not only are there significant differences between these two legal systems in terms of their jurisdiction and origin, equally significant differences also exist between war crimes and peacetime crimes in terms of their scope and

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O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 121–140.

context. These differences are essential to the analysis of the triangular relationship between (a) the *reasons* and *purposes* in international law for the punishment of crimes, (b) the *nature* and *context* of international crimes, and (c) the impact of the crimes on society as a whole and on the victims in particular. How do these elements affect one another, and is it at all possible to compare the punishment of peacetime crimes in a domestic context with the punishment of war crimes by international tribunals under international law? Those are some of the topics for consideration that this article will discuss.

In every legal system, the judicial process of enforcing the law by imposing penal sanctions on criminal perpetrators is founded on a highly complex interaction between social, psychological, historical and cultural factors. While Judges are busy seeking the '*material truth*' in order to establish the facts of a case as accurately as possible (for without such accuracy the constituent facts cannot be subsumed correctly under the law, and justice would be flawed), legal sociologists have long since shown that finding the material truth in a judicial context involves a sophisticated interpretation and reconstruction of the entire background and all the elements surrounding the crime, including the selection of certain parts thereof while neglecting others. This is what they call the '*material reality*'.[1] Grasping the material reality in a domestic setting is already difficult enough, if I am not mistaken. Understanding the material reality in international law is a much more demanding endeavour, for which I accord the highest and humblest respect.

Wherever the rule of law applies, criminal sanctions must always be *predictable* for the offender and reasonably *proportional* to the offence. In most national jurisdictions adhering to the rule of law, criminal courts have developed sentencing practices that seek not only to satisfy these basic concerns, but also to do so in line with the region's history and culture. This is important to bear in mind, for it reminds us that law is and must always remain an integral part of the prevailing traditions and values in the particular society in which justice is administered.

On the international level, however, the sentencing practice has not yet reached a dependable stage of predictability and proportionality; this practice, and the theory behind it, is still in the making, as are the norms of international criminal legal procedure governing the admission and evaluation of evidence, or the determination of guilt. Accordingly, this article will also take a closer look at the judicial process whereby sentences are determined under international criminal law by international criminal tribunals that are competent to prosecute individuals for genocide, crimes against humanity and war crimes.

2. Different Purposes of Punishment for Different Crimes in Different Contexts?

Although the legal and criminological studies of the purposes of punishment are far too comprehensive to be meaningfully reflected in this short article, some of the main

1 *See e.g.*, T. Mathiesen, 'Retten i samfunnet – en innføring i retssociologi', 5th ed. (Pax Forlag, Oslo 2005) p. 31; M. Foucault, *Power/Knowledge*, (Harvester Press Ltd, Brighton, 1980) p. 131.

features of the contemporary theoretical framework are nevertheless useful to draw up for the examination of the process of international criminal sentencing.

In almost all domestic jurisdictions, two main purposes have been identified as reasons for punishment, namely the retrospective purpose of *retribution* and the forward-looking purpose of *prevention*. In many jurisdictions, additionally, *rehabilitation*, *restoration* and most recently *reprobation* (or censure) are also referred to in criminological theory as leading sentencing objectives; some of these, in turn, may be broken down into two or more sub-categories – for example, prevention a sub-division into *general prevention* (deterrence) and *special prevention* (incapacitation).[2]

Indeed, these same objectives are in some measure also relevant for the examination of international sentencing, and they will be addressed in further detail below. However, they must be considered with an important *caveat*, because war crimes are, by their very nature and the context in which they are committed, quite different from peacetime crimes. My point here is that the theoretical framework developed for rationalising and justifying punitive action against individual perpetrators of a felony in conditions of peace under domestic law is inadequate to capture the contextual implication of (i) large scale crimes committed on (ii) national, ethnic, ideological or religious grounds by (iii) civil leaders or military commanders (at various levels) against (iv) exceptionally vulnerable victims in the (v) context of an armed conflict characterised by (vi) extreme and general fear and (vii) absence of civil order. But what are the legal implications of this observation?

Contemporary criminological theory, for instance, contemplates the significance of the mental process by which a perpetrator balances his personal advantages in committing the crime against the risks of being exposed and ultimately convicted, hence the notion of the perpetrator's 'unfair advantage'.[3] In a wartime context, however, I doubt if any such concerns are pertinent to or even considered by, say, a high-ranking military commander who orders the execution of 500 civilian detainees, or the torching of an entire village or the destruction of a religious building. Nor do I believe that the warden of a detention camp who beats a detainee to death or tortures and rapes a detained woman has any thought for his personal advantage in so acting; it is much more about submission to the collective pressure to inflict maximum damage and fear on 'the enemy' personified in the shape of anonymous enemy individuals with whom the perpetrators rarely have any personal relationship or issue – other than the fact that they are 'enemies', and in their hands.

What drives a military commander to commit a war crime in the context of an armed conflict is presumably very different from the motives of person who robs a bank in peacetime or who beats up the lover of his partner in a jealous frenzy. A quick look at the persons who stand accused before international criminal tribunals uncover

2 *See e.g.*, J. Gardner, 'Crime: in Proportion and Perspective', in Ashworth & Wasik (eds.), *Fundamentals of Sentencing Theory* (Clarendon Press, Oxford, 1998) pp. 31–52; and A. Bottoms, '5 Puzzles in von Hirsch's Theory of Punishment', in *ibid.*, pp. 77–95.

3 *See* M. R. Reiff, *Punishment, Compensation and Law; A Theory of Enforceability* (Cambridge University Press, 2005). The idea here is that the perpetrator saves for himself the possibility of an unfair advantage by committing the crime without being caught. If he gets away with it, he will have the benefit of enjoying the fruits of the crime without having to pay the price or deliver the countervailing service normally required for law-abiding citizens. That is known as the 'unfair advantage'.

some significant features: they are generally (with exceptions, of course) well-educated and mature persons in responsible civilian or military positions. They are rarely career criminals or violent by nature. They are usually driven by nationalist, ideological or religious motives rather than by personal emotions or petty greed - although many of them have not avoided greatly enriching themselves through their crimes during the conflict in question. They rarely act alone but typically in concert with other perpetrators sharing a common criminal purpose against 'the enemy'; and by the time they have served their sentences, there is little risk of relapsing into similar criminal activity.

Let us then consider briefly the contextual elements that support this assumption that the context and nature behind a war crime are different from those of a peacetime crime. For one thing, the *lack of legal and societal order* in modern armed conflicts and the *general fear and terror* which reign throughout society in times of war would appear to be a relevant factor to include in the understanding of the commission of war crimes; both factors are likely to affect the perpetrator's capacity of rational judgement. Most armed conflicts are sparked and nourished by *ethnic, nationalist, ideological or religious tensions* embedded in the history and culture of the region, and these tensions are also essential to grasp in understanding the drive behind such horrendous crimes. One has only to think of the significance that the Serbian defeat at the battle of Kosovopolje in June 1389 still has for the perception of the Serbian Nation's right to Serbian lands to realise the importance of history and culture. No other element that I can think of has pervasive and inflammatory effects similar to the impaired pride of a nation in the course of its history; the sceptre is raised again and again in pursuit of recognition and vindication of inherent rights illegally deprived, or compensation for humiliation unjustly suffered. The *massive scale of the crimes* is another dimension that would appear to distinguish the nature of war crimes from 'ordinary' peacetime crimes, and the same goes for the generally *larger time span* and the *wider geographical area* over which war crimes are frequently committed. War crimes also include an aspect of *collective enemy perception* that demonises the picture of the adversary and facilitates the evil doing – '*us and them*' – which is normally absent in single peacetime crimes. Altogether, these aspects appear to impel into the mind of the perpetrators a feeling of commanding necessity in the (misperceived) interests of self-defence and vindication of 'inherent rights'.

These differences in motive and nature suggest a revision in our understanding of the purposes for the punishment of war crimes. If indeed the circumstances of a peacetime crime are inherently different from those of a war crime, should the purposes for punishing each of these two crimes then also be different? Or, to put the same question in a different manner: should the character and context of a crime determine the purpose of the sentence? Not necessarily.

Retribution and prevention may still form important reasons for the punishment of a war crime, as might rehabilitation, restoration and reprobation, but the circumstantial differences would suggest a different interpretation of these purposes when it comes to the punishment of atrocities committed on a massive scale. In principle, the purposes for punishing a crime are independent of the disposition and circumstances of the crime in the sense that they apply universally regardless of the nature of the crime. However, the weight and interpretation of these purposes may vary according to the character and context of the criminal act, and this is the postulate of this article. I shall now move on to show how the purposes differ.

2.1 Retribution

Punishment, as already indicated, has to be predictable and proportional; these are universal requirements for sentencing. Retribution is consistently referred to in both ICTY and ICTR judgements as an important, if not compelling ground for punishment, so one might expect that the punishment of war crimes should be both predictable and proportionate. However, neither of these requirements is currently satisfied in respect of war crimes, or at least not fully satisfied.

As far as the *predictability* of punishment is concerned, the prospect of international prosecution is still rather dim (although for the armed conflict in the former Yugoslavia, the UN ICTY was established well before the war was over), and considerable uncertainty still prevails regarding the meting out of sentences (although the practice of the two UN Tribunals does seem to show some regularity, cf. below).

As for the *proportionality* of punishment, the picture is equally obscure. In every national jurisdiction, the crime of murder is considered a serious crime with sentences ranging between 12 years to life imprisonment. If this sentencing range was designed to cover a single or perhaps a few murders in peacetime, then how do we administer a meaningful sentence to the perpetrator of mass scale killings of hundreds or even thousands of innocent victims committed in armed conflict? I can find no reasonable answer to this question, except to say that for the purpose of punishing mass atrocities committed in wartime, it is probably impossible to make the punishment – indeed any punishment – fit that sort of crime.[4]

If this is true, then one might suspect that downright punitive retaliation becomes the leading purpose for the sentencing of a mass scale war crime. We punish these crimes because there *has* to be some sort of sanction (*punitur quia peccatum est*) and because we cannot put up much longer with the *de facto* or *de jure* impunity of these crimes, but the original element of proportionality is lost and the retributive purpose hence acquires a purely retaliatory meaning. This may be seen as a civilised way of saying that heinous crimes of this scale and nature may draw a reaction from society which, at least in part, resembles revenge: the perpetrators of war crimes have to suffer for what they have done, and suffer hard. As International Law has advised against both capital and corporal punishment, and since we have not yet devised any other suitable type of sanction, the only penalty that remains available is imprisonment. So we put them away for a very long time. That is the logic as far as I can tell.

Yet the UN Human Rights Committee reminds us in its general comments to Article 6 of the 1966 UN International Covenant on Civil and Political Rights (CCPR) that *no penitentiary system shall be only retributory* and that it should essentially seek the reformation and social rehabilitation of the offender.[5] However, this civilised approach is difficult to maintain in the context of war crimes. In any case, the CCPR's recommendation that penitentiary systems should not be exclusively retributory

4 Even where an accused pleads guilty to such heinous crimes as genocide, ICTY Chambers have been reluctant to reduce the sentence as much as suggested by the Parties for the reason that "once a charge of genocide has been confirmed, it should not simply be bargained away"; *see Momir Nikolić*, 2 December 2003, ICTY, Sentencing Judgement IT-02-60/1-S, para. 65.

5 General Comment, UN Human Rights Committee, 21/44, 47 Session, 1992, UN Doc. CCPR/C/21/Rev.1/Add.3 (1992).

appears to be irreconcilable with the hard fact that war crimes are punished for exactly that purpose.

2.2 Prevention

General prevention suggests that, out of fear that they may be prosecuted for this at a future time, civil leaders or military commanders in the next armed conflict will think twice before ordering a massacre of civilians or the forcible deportation of a part of the population in an operation of ethnic cleansing. Perhaps they will, but as pointed out by Harmon and Gaynor, the warlords in Iraq or the members of the Janjaweed militia in Darfur are unlikely to pay any attention to such concerns; international humanitarian law is hardly present in their minds and they are probably much more afraid of falling into the hands of their enemies than ending up before an international criminal tribunal at some later stage; indeed, the massacres at Srebrenica occurred almost two years after the Tribunal was established, so the risk of international prosecution, apparently, did not prevent the perpetrators from proceeding with the plan to execute 7,000 male Muslim detainees.[6] If anything, Harmon and Gaynor argue, international prosecution of war crimes may at the most have an impact on NATO and other Western military commanders in selecting targets and weapons for future bombing missions. In short, general prevention does not make much sense in respect of punishment of war crimes. *Koskiennemi* amply supports this view by adding that if war crimes are rooted in an evil part of the human mind that "exceeds the bounds of instrumental rationality and seeks no objective beyond itself", then the element of deterrence is no longer part of the equation.[7] And even if one were to assume that such evil and irrational behaviour could perhaps be tamed, he adds, the prospect of punishment would be unlikely to deter future atrocities, since these same atrocities were arguably committed in pursuit of *a higher good* such as the legitimate defence of the *Vaterland*, a greater Serbia, the Empire, Democracy, Freedom, a Better World or whatever pretext is adduced in support of the right to fight to the end for these ideals.

Harmon's and Gaynor's observations about the impact on NATO commanders draws our attention to another aspect of international punishment, namely the suggestion that the norms underlying international prosecution of war crimes are really designed to fit perpetrators of the same cultural background as that shared by the community in which these norms were developed – that is, basically the culture of Western democracies. This is not to say that International Humanitarian Law (IHL) does not apply universally to all commanders in all cultures worldwide, but it is obvious that there is a difficulty or at least a difference in perception of the norms of IHL among, say, members of Al Qaeda fighting a jihad against infidels, or suicide bombers in the Middle East. To the extent to which these members are at all aware of the demands of IHL, they will have reasons to set aside these requirements that are not easily understood in the West. From the point of view of international law, of course, these reasons

6 *See* M. B. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes', 5 *Journal of International Criminal Justice* (2007) p. 695. The authors are employed with the Office of the Prosecutor at the ICTY.

7 *See* M. Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law* (2002) p. 1 *et seq*.

are not and indeed cannot be acceptable, but that is beside the point. The reality is that at the moment, the compelling nature of the protection afforded during armed conflict to civilians and civilian objects under IHL is not honoured equally in all cultures.

As much as one might perhaps agree with this sombre view, the general deterrent effect of international prosecution cannot, and indeed should not, be readily signed off. Even if NATO commanders were really the only individuals to henceforth accept additional legal limits to their range of action during combat operations – in order to comply with the norms of international humanitarian law – that is in itself one little step further towards an increased adherence to these norms.

Yet international prosecution and punishment of war crimes may still have a wider impact. If it becomes generally recognised over time that tyrants, dictators, ministers, generals, radical nationalists and suchlike can no longer rely on the *de facto* impunity for war crimes which hitherto has allowed most war crimes to go unpunished, then there is a chance, however small, that these perpetrators might actually think twice before they proceed to commit or order war crimes.[8] We should not forget that the quest for international prosecution of war crimes is still a very recent phenomenon; it will take time before the concept is fully absorbed worldwide.

There is, in addition, the general deterrent effect that punishment of the commander may have on his *subordinates*. In a military context, issues such as loyalty, obedience and honour normally play a significantly stronger role than in civilian life where the lines of command are less rigid and compelling. For the members of a corps, a division or a brigade, the international conviction and punishment of their commander for war crimes in which they themselves took part may eventually have a collectively cooling and deterrent effect, even if the subordinates may tend at first to show him their support out of (misperceived) solidarity.

Almost all of the sentencing judgements rendered by the two UN Tribunals refer in some way to the deterrent effect as being one of the *main purposes of punishment*, although the Appeals Chamber has made it clear that general deterrence should not be given undue weight in the sentencing process.[9] However, it is not entirely clear what the Appeals Chamber really meant to say by this caution, or indeed what prompted its inclusion. Very likely, the Appeals Chamber might have wished to warn against exaggeration of the importance of general deterrence because of the uncertainty that remains in relation to the question of *who* exactly would be deterred in the future by today's conviction of a military commander. Otherwise, the Appeals Chamber might have wanted to remind us that it remains uncertain *if* indeed the risk of international prosecution and punishment would have any deterrent effect on com-

8 It could be argued, in response to the point made above on Srebrenica, that those responsible for the Srebrenica massacres were not deterred by the prospect of prosecution by the UN Tribunal in The Hague because at that time, the Tribunal had barely become operational; it was not until the fall of 1995 that the Tribunal had been sufficiently staffed and could begin to work efficiently, and it was still widely believed at the time that it would never get off the ground; so why bother? What this argument suggests, nevertheless, is that those responsible for the Srebrenica massacres *might* perhaps have acted differently if they had realised the possibility that they could actually be prosecuted later on by the Tribunal for ordering the killings.

9 *See*, *e.g.*, *Tadić*, 26 January 2000, ICTY, Appeals Judgement, IT-94-1-A, para. 48; and *Žejnil Delalić et al.*, 20 February 2001, Appeal Judgement, IT-96-21-A, para. 801.

manders in relation to war crimes. Nemitz suggests that the Appeals Chamber might also have viewed general deterrence as being only secondary to other sentencing purposes, such as 'just deserts' (what the offender rightly deserves), or that the Chamber might have been of the opinion that a convicted perpetrator should never be sentenced more severely just in order to deter others from committing similar crimes in the future.[10] Whatever the reason for the Appeals Chamber's cautionary approach to the general deterrent purpose might be, the fact remains that this purpose is extremely difficult to measure and apply in practice – hence the caution.

Thus the deterrent effect of sentencing seems to have preserved some of its persuasive connotation, but again for a slightly different reason and with a slightly different meaning. Compared with the preventive purpose of punishing 'ordinary' crimes, the difference here is that, unlike earlier times, the punishment of high-ranking war criminals is now a real possibility *because of* the current war crimes trials. While for an 'ordinary' crime such as theft, the risk of punishment is and was *always* a possibility, unaffected by the preceding conviction of a thousand thieves, the future punishment of war crimes is enhanced *by the very fact* that international war crimes tribunals are now operating, are in place and readily available. It is true that the ICC is still far from enjoying universal support, but it is the *possibility* and the associated *risk* that matters; the ICC will still gain wider jurisdiction as more states ratify the Statute, and other regional criminal tribunals may still see the light of day.[11] For the first time in history, the international prosecution of individuals under international law for war crimes before international tribunals has become a real risk for military and civilian commanders who lack the courage and wisdom to abstain from committing, preventing or punishing war crimes.

Thus in themselves, the significance of international criminal trials is that they encourage further prosecution and punishment of war criminals – not only on the international level, but also on the domestic level, and *this* is really the essence of their general deterrent effect, scant as it may be. If the international community fails to bolster its support for international criminal tribunals and does not provide them with sufficient means and universal jurisdiction to prosecute war criminals, then the general preventive effect vanishes. This aspect of international punishment of war crimes thus has a distinct self-enforcing element that is no longer called for to justify the punishment of peacetime crimes.

In addition, it must be recalled that international prosecution of war crimes is part of a wider attempt not only to disseminate and promote compliance with international humanitarian law, but also to enhance respect and credibility at a much more general level for *international law as such*, and ultimately for some World order sustained by trust in the rule of law. Ultimately, of course, one might hope that international prosecution of war crimes will support the development of a culture of *respect* for

10 *See* J. C. Nemitz, 'The Law of Sentencing in International Criminal Law: The Purpose of Sentencing and the Applicable Method for the Determination of the Sentence', 4 *Yearbook of International Humanitarian Law* (2001) pp. 87–127.

11 As of 1 March 2008, 106 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 29 are African states, 13 are Asian states, 16 are from Eastern Europe, 23 are from Latin America and the Caribbean, and 25 are from Western Europe and other states.

the norms of IHL and the rule of law, rather than just *fear* of the consequences of disregarding these norms. As the Trial Chamber observed in the sentencing judgement of *Ranko Češić*:

> "With regard to general deterrence, imposing a sentence serves to strengthen the legal order, in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions. Nonetheless, imposing upon one person a higher sentence merely for the purpose of deterring others would be unfair to the convicted person, and would ultimately weaken the respect of the legal order as a whole. Therefore, as cautioned in the *Tadić* Sentencing Appeal Judgement, the Trial Chamber has taken care to ensure that, in determining the appropriate sentence, deterrence is not accorded undue prominence."[12]

The *special* or *individual* preventive purpose of punishment is also unconvincing, for there is almost no indication of any risk that *these* particular perpetrators will commit similar crimes again. Incapacitation of the offender, to be sure, will certainly prevent him from committing more crimes for as long as he is imprisoned, but for most of the perpetrators of mass atrocities during wartime, the probability of recidivism after being convicted and having served his sentence is very small. For one thing, the context of armed conflict in which they committed, ordered or assisted in the commission of such crimes will likely have ended by the time they are released, and the incentive to repeat the crimes would thus have disappeared. Even in the unlikely event that the particular conflict were to be still continuing by the time the convicted perpetrators were freed, such persons would hardly be able to return to similar positions where they could repeat such crimes anew.

2.3 Rehabilitation

While the UN Covenant on Civil and Political Rights includes 'reformation and social rehabilitation of the offender' as one main objective of imprisonment, the Chambers at both UN Tribunals have been reluctant to accept the purpose of rehabilitation as a ground for sentencing.[13] What long-term imprisonment can do to rehabilitate these perpetrators is probably very little, if anything, for it is unlikely that they will fundamentally change their minds about the causes for which they fought and risked their lives. For any commander in armed conflict, I assume, the prospect of sacrificing the reasons for the fight is tantamount to giving up the meaning of his or her existence.

It is ironic to observe that in many cases, the recourse to armed violence in pursuit of the higher goals for which the war was waged have turned out to be counter-productive. The most blatant example of this is the recent independence of Kosova from Serbia; had the Serbs fared with less aggression and sought instead to strengthen the

12 *See The Prosecutor* v. *Ranko Češić*, 11 March 2004, ICTY, Sentencing Judgment, IT-95-10-S, para. 26.

13 Article 10(3) of the CCPR reads: "The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their *reformation and social rehabilitation*. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." (Italics added.)

province's political autonomy and economic development in full respect of the ethnic rights of the Kosovar Albanians, Kosova might perhaps still have been a part of Serbia today. But for the extreme radical defenders of the Serbian cause to realise this and come to terms with the possibility that their actions were wrong because they merely led to further disintegration of Serbia rather than keeping the country intact is quite unlikely in view of who the perpetrators are. They have spent their entire lives for their Serbian nationalist cause and are not easily disposed to giving it all up.

There is, however, one group of war crime perpetrators for whom rehabilitation makes sense, namely the group of offenders who chose to *plead guilty* to the charges pressed against them. At both UN Tribunals, the Common Law practice of entering into plea agreements has been adopted, and this has enabled 20 out of 53 convicted persons to lay down their defence and plead guilty – albeit with the cost-reducing benefits of a plea agreement by which the Prosecutor would withdraw parts of the indictment and recommend a lighter sentence in return for the full cooperation of the accused. Even if, irrespective of the guilty plea, the victims of the crimes and family members of those killed knew all too well about the crimes committed, and even though the guilty plea might not bring about a full account of the events, the public and official *recognition* of the crimes by the perpetrator might nevertheless provide some form of closure.[14]

One prerequisite for the Chamber's acceptance of these guilty pleas is the showing of *unconditional remorse* on the part of the accused, and this calls for a change of mind that resembles rehabilitation: the accused truthfully accepts that he was wrong and offers to apologise genuinely to his victims. In these cases, the ICTY has normally reduced the sentence that it would otherwise have imposed had the accused not pleaded guilty.

Yet again, rehabilitation of the offender in these instances is not mainly achieved as a result of the more lenient sentence, but rather of the conviction itself – that is, of the perpetrator's admission of guilt. One cannot, of course, exclude the possibility that some of those who pleaded guilty did so for purely selfish and cynical reasons (to get off the hook at a cheaper price), but still they would have to appear in public as having abandoned their cause, and that might in itself represent an embarrassing sacrifice. Most of those who have pleaded guilty before the ICTY have done so in a manner that convinced the Judges of the genuine and truly remorseful nature of their pleas. As the sentencing of *Momir Nikolić* shows, however, the Trial Chamber may be unwilling to reduce the sentence for an accused who pleaded guilty, but who did not show true remorse and did not appear to be wholly truthful.[15]

14 *See Momir Nikolić*, 2 December 2003, ICTY, Sentencing Judgement, IT-02-60/1-S, para. 145.

15 *Ibid*, para. 156. The Trial Chamber sentenced Nikolic to 27 years of imprisonment, which exceeded the 20 years proposal agreed by the Parties. The Trial Chamber therefore granted him the right to appeal the sentence, which he did. The Appeals Chamber then reduced the sentence to 20 years of imprisonment.

2.4 Restoration

Restoration is an equivocal term encompassing the multitude of aspects that have to do with the attempt to remedy – through punishment – the suffering of all those who were affected by crimes. This is most important for the *direct* victims who need to overcome the fear, the shame and the traumas invoked by their ordeals, and for the *indirect* victims who yearn to know the truth about what happened to their loved ones. However, neither of these aspects can really be alleviated by imposing a sentence on the perpetrator; even the harshest of sentences on perpetrators will never make the direct victims' nightmares and traumas disappear, nor will it allow the indirect victims to know the fate of their husbands, brothers, sons or parents. Thus in relation to victims, any restorative effect is probably limited. It is interesting to observe in this respect that almost all of the Tribunals' sentences have provoked reactions from the victims' organisations that sentences were too lenient; for the victims to forgive is probably just as difficult as it is for the offenders to accept responsibility and show remorse.

One cannot ignore the fact, however, that neither of the Statutes of the two UN Tribunals provide any direct relief for victims. In the Rules of Procedure and Evidence adopted by both Tribunals, a few provisions are found to enable victims, pursuant to a judgement finding the accused guilty of a crime that has caused injury to them, to bring an action in a *national* court or other competent body to obtain compensation for their injuries, but the Tribunal itself does not have jurisdiction to entertain such claims. After a judgement of conviction, furthermore, Chambers may order restitution to the rightful owners either of the property or the proceeds thereof.[16] To my knowledge, however, none of these Rules has ever been applied in practice. In contrast, Article 68 of the ICC Statute provides for legal standing (subject to certain conditions) for victims in the trials against the persons who are accused of having caused injury to them. This may enable the victims to voice their concerns and lay down their claims for restoration directly before the ICC's Trial Chamber. Time will show how this is going to work out in practice.

Although this new right for victims to gain status as an independent party to the ICC trials is widely seen as a significant improvement, the underlying question of whether international prosecution can bring reconciliation to a war-torn society still remains obscure. I sometimes wonder. Both the two UN Tribunals and the ICC are slated for being *too remote*, both geographically and culturally, to have any positive impact on the reconciliation process in the countries where crimes took place.[17] Moreover, it is claimed that victims do not understand why trials take so long (the trials are *too slow*), and that the war-torn communities in question are unable to follow the proceedings closely enough to appreciate the quality of the judgements (the sentences are

16 *See* Rules 105-06 of the ICTY Rules of Procedure and Evidence, and Rules 104-05 of the ICTR Rules.

17 *See* for instance the commentary in the International Herald Tribune on 29–30 March 2008 by Christopher M. Gosnell, a former legal officer at the ICTY and ICTR. His point is that criminal justice in practice is an intensively face-to-face business and that the ICC is therefore too remote to gain any real impact.

too lenient); even governments sometimes fail to understand this.[18] Criticism of this kind, in my view, is misperceived for it fails to reflect the whole picture: a single global Court cannot, logically, be close to all conflicts, and there are indeed good reasons for not seating an international Tribunal directly in the territory of the country where crimes were committed, including concerns for security and impartiality of the Tribunal's judges, staff and premises. Moreover, the international criminal prosecution of individuals for war crimes is still in its infancy; much will look different in 30 or 40 years from now. Be that as it may, the significance of the testimonies given by witnesses and victims before an international Court should not be underestimated, for few things are more important to the process of reconciliation and healing than *public recognition* of crimes and the human suffering they entailed. In this respect, at least, the trials before international criminal Tribunals can be said to bring some support to the process of reconciliation and peace through justice. On the other hand, neither of the two UN Tribunals nor the ICC, for that matter, have means at their disposal to actively support this process as a sort of follow-up to their convictions of war criminals.

Apart from having parts of the proceedings broadcast in the local media, the Tribunals have established 'outreach-programmes' whereby information about the Tribunals is disseminated to public and private institutions in the 'recipient' country. Occasionally, the ICTY has arranged for public conferences near the scenes of crimes in Bosnia and Herzegovina in the aftermath of judgements, at which representatives of the Prosecution and Defence have offered insights into the details of particular cases and exposed themselves to questions from the audience, including many of the victims. These conferences have been well attended, but they have not been held regularly and no real encounter between victims and perpetrators has ever been attempted in cases where the accused pleaded guilty. If properly handled, a meeting between the convicted (guilty-pleading) perpetrator and (some of) his victims could possibly provide some much desired information to the latter about the fate of the missing or the details of the crime, while allowing the perpetrator to express remorse directly to the victims – and for them to accept his apologies. This would certainly boost the reconciliation process and represent a major breach in the judicial wall between the proceedings in The Hague and the reconciliation on the ground in the former Yugoslavia. But that is, unfortunately, far beyond the Tribunal's mandate.

On a more general level, the *public* as a whole may have an interest in seeing that justice is being done to convicted perpetrators, because it may to some extent restore their faith in the justice system. It has, undoubtedly, an enlightening effect to see that war criminals are brought to book. This is particularly important for the public faith in the international justice system, whose failure to break the *de facto* impunity culture in domestic jurisdictions had become all too obvious. If civilian populations in conflict areas can be led to trust, through international prosecutions, that war crimes are indeed punishable, then the chances of getting away with such crimes may diminish, for there is then a greater probability that the public outcry will be heard both at home and by the international community. As the Trial Chamber noted in its sentencing

18 Note the criticism expressed directly by the Croatian Government against the Appeals Chamber's judgement in the trial against *Mile Mrkšić, Veselin Šlivančanin and Miroslav Radić* ('the Vukovar Three') for the Serbian-led massacre of hundreds of Croatian civilians after the fall of Vukovar in June 1992.

judgement of *Momir Nikolić*, the two UN *ad hoc* Tribunals for the former Yugoslavia and Rwanda were established precisely in the hope that this commitment would promote respect for the rule of law globally.[19]

2.5 Reprobation

The idea of reprobation, or censure, as a sentencing purpose in respect of war crimes is to punish the perpetrators with a view to furthering public condemnation or stigmatisation of these crimes; that might indeed be a prudent way to prevent their commission anew.[20] But war crimes are often referred to in public as 'inevitable' or 'natural' by-products of armed conflict, as if there is really nothing one could do to prevent their recurring in the next armed conflict; the attitude is usually one of passive acceptance. Could reprobation perhaps create enough public pressure to drive the perpetrators to exert some self-control or self-censure?

Reprobation seeks to counter this passive, defeatist attitude by invoking the moral grounds for which no human being should *ever* be lured into accepting that war crimes are just 'inevitable' or in some way 'excusable' as the necessary cost of a war. If humanity means anything, it is the fundamental idea that every human being is endowed with dignity and an inalienable right to protection of its integrity.

However, perpetrators of war crimes defy that very idea in the worst possible manner, namely by inflicting pain on others for no other reason than that the victim belongs to 'the enemy'. Part of the purpose of prosecuting these most heinous offences before international tribunals is therefore to raise the moral awareness in the public against such crimes, thereby seeking to further public insistence that war crimes are at all times wholly unacceptable and disgraceful and *can never* be justified.

Perpetrators of war crimes have a choice in the act – they *could* have chosen not to commit or order the crime. In this respect, reprobation is perceived as being a factor that might facilitate the potential offender's choice in refraining to make the wrong decision – a sort of self-censure – because he has himself become increasingly aware of the immorality of the act, and because he might fear condemnation from society if he went ahead and perpetrated the crime.

There has (probably) never been an armed conflict that did not include the commission of war crimes, but that is not a valid argument to excuse these offences or to back away from maintaining that war crimes – under all circumstances – are strictly prohibited and must be punished. Stigmatisation of war criminals for their immoral and inhumane acts, of course, is habitually challenged by the opposite view: that the perpetrators were really heroes who dared stand up to defend the nation and only did what was necessary to preserve and protect the nation's pride.

However true this might be, it would still make good sense to appeal to the public conscience and the better moral judgement in society as a whole in order to increase pressure on military commanders and civil leaders to comply with IHL standards.

19 *See Momir Nikolić*, ICTY, 2 December 2003, Sentencing Judgement, IT-02-60/1-S, para. 59.

20 *See Blaskić*, 3 March 2000, ICTY, Trial Chamber's Judgement, IT-95-14-T, paras. 761–64.

Among the secondary purposes adduced in support of the international prosecution of war crimes, in my view, are those of reprobation.

3. Interpreting the Sentencing Practice of the UN Tribunals

Under the Statutes of both Tribunals, the penalties to be imposed are limited to *imprisonment*, and the Chambers respectively have recourse in this regard to the general practice regarding prison sentences in the Courts of the former Yugoslavia and Rwanda.[21] In imposing sentences, Chambers are to take into account such factors as the gravity of the offences and the individual circumstances of convicted persons.[22] The Rules of Procedures adopted by both Tribunals then add that the Chambers must also take into account any *aggravating* and *mitigating* circumstances, including the substantial cooperation with the Prosecutor before or after conviction.[23]

Notwithstanding the fact that the final sentence in each case is always a distinct product of the proceedings in each particular trial against each individual accused, some general sentencing guidelines have indeed been developed in the practice of the Tribunals. However, many accused and outsiders have held that the sentencing practice of the Tribunals is completely obscure and suffers from a deplorable lack of consistency and transparency; comparisons are brought to show that the perpetrator of 100 killings in one case was only sentenced to X number of years while another perpetrator in another case was sentenced to many more years for the killing of only 50 persons, etc. In my view, this criticism is not only unfounded, it is also wrong. When one takes a closer look at the sentences imposed by the ICTY and clears them of individual circumstances relating to each individual case, a consistent sentencing pattern emerges that leaves little doubt about a commonly shared perception among the Judges of the levels of sentencing. Two features in this perception are conspicuous.

First, as I see it, there is a division into three or four roughly categorised levels of sentencing according to the *gravity* of the criminal conduct of the accused, taken together. Whether it is actually three or four levels depends upon whether the second and third levels are held together as one single category ('the middle level') or split into two. This rough categorisation, to be sure, is *not* based upon any scientific analysis of all the sentences imposed by the Tribunal but rather emerges as a subjective impression derived from an overall assessment of the Tribunal's practice. From my interpretation there emerges the following picture:

– The lowest level ranges from *3 to 6–8 years of imprisonment* and covers single or small scale criminal conduct in which genocide is not included (*i.e.* only violations of the laws and customs of war and of the Geneva Conventions (war crimes

21 The Appeals Chamber has held that sentences in excess of the maximum range of imprisonment under Ex-Yugoslavian law does not violate the *nulla poena sine lege* principle, since the defendants must have been aware that their acts were in violation of IHL and thus punishable by the most severe sentences; *see* '*Čelibići*', 20 February 2001, ICTY, Appeal Judgement, IT-96-21-A; *The Prosecutor* v. *Žejnil Delalić et al*, *supra* note 9, paras. 816–17; and *Kunarac* (*The Prosecutor* v. *Dragoljub Kunarac et al.*), 12 June 2002 ICTY, Appeal Judgement, IT-96-23 & 23/1-A, para. 377.

22 *See* Article 24 of the ICTY Statute and Article 23 of the ICTR Statute, respectively.

23 *See* Rule 101 of the ICTY Rules and also Rule 101 of the ICTR Rules.

proper), and crimes against humanity), and where (a) the number of victims as well as (b) the temporal and territorial scope of the crimes is limited and where (c) the perpetrator has not acted with any degree of cruelty towards his victims.

- The next level of sentencing ranges from *8 to 20–22 years of imprisonment* and covers the lower half of the middle sentencing category. Crimes at this level would ordinarily still not include genocide, but this level of sentencing will be relevant to offences featuring a higher number of victims, some extended temporal or territorial scope and involvement of brutality, cruelty or recklessness.
- The third sentencing level ranges from *22 to about 35 years of imprisonment* and constitutes the upper half of the middle category. Criminal conduct on this level may include genocide and will be relevant to offences committed against a large number of victims over an extended period of time in a wider geographical area and with a high degree of brutality, cruelty or recklessness.
- The fourth sentencing level ranges from *about 35 years to life imprisonment* and covers all criminal conduct for which the gravity exceeds the third level.

Most convicted persons fall into levels 2 and 3, which is why one might see these two levels as one single category. However, it is my interpretation that there is a dividing point in the middle of that category, around 20–22 years of imprisonment, a sort of *Schmerzgrenz* of gravity in respect of the offender's criminal conduct which distinguishes the *very* serious criminal acts from the *extremely* serious criminal acts, over and above which there is only a residual category of sentencing up to life imprisonment reserved for the few remaining cases of criminal conduct that are so repulsive that no sentence would make sense anyway.

It is difficult to say whether this dividing point was developed in light of the obligation in the Statute to "have recourse to the general practice regarding prison sentences in the Courts of the former Yugoslavia" (Article 24, par. 1 of the ICTY Statute). However, it may be of interest to note that the applicable law in the former Yugoslavia in 1991–95 provided for a maximum of 20 years imprisonment for the most severe crimes, *in lieu* of a death sentence.[24]

Secondly, as I interpret the sentencing practice, there is a tendency to impose harsher sentences on the lower and higher ranked perpetrators whereas the group of middle level ranking offenders appears to have been sentenced more leniently. This begs the question of how the lower, middle and higher ranking groups are defined, respectively, but I shall abstain here from going into a detailed discussion of this matter; in essence, the *lower* level typically covers the direct perpetrators of the crimes on the ground, acting either on their own or following orders, whereas the *middle* level includes the responsible military or civil commanders who organised the commission of crimes in pursuance of directions or a wider plan set out by the *higher* level perpetrators – that is, the supreme military commanders or the top civil leaders.

I would like to remind that this observation regarding the tendency to punish the lower and the higher echelons of the hierarchy of perpetrators more severely is wholly independent of my interpretation of the *level of sentences* as shown above. It is, in other words, entirely possible that a low ranking perpetrator can be sentenced at the highest level, or that a supreme military commander be punished at the lowest sentencing level

24 *See* Article 38, para. 2, of the Criminal Code of the SFRY, adopted in 1976.

– it all depends upon the particular features of each individual case. As a general reservation, I also need to remind readers that my observation on consistency in sentencing lower and higher ranking perpetrators more severely than middle level perpetrators only applies to cases where trials have been completed and where no special circumstances could confuse the picture. Guilty pleas and cases where humanitarian or similar exceptional grounds may have affected the sentence, in other words, are not included in this categorisation.

My observations on sentencing higher and lower ranking offenders more severely compared with middle level ranking perpetrators is obviously subject to various interpretations. One approach might be to conclude that the Tribunal's sentencing practice is systematically flawed in that it allows the middle level ranking accused get away with lesser punishment than they really deserve, taking into account their commanding authority and their duty to prevent or punish. This critical assessment goes on to compare the mid-level commanders with the ill-fated lower ranking offenders who are punished more severely but who carried less responsibility.

Another, and in my view a more comprehensive way of looking at it, is to *combine* the offenders' authority with direct personal involvement in crimes and the degree of cruelty and recklessness with which they acted. In this perspective, one might better understand why lower ranking offenders may end up in the higher levels of sentencing; they were the ones who actually performed the killings, the cruel beatings, the bestial and degrading rapes, the forcible deportations, the destruction of religious sites and the burning and looting of private homes, and who saw and heard the victims suffer, all of which was carried out without any sign of mercy or compassion.

Another relevant factor is the mode of liability for which they are prosecuted. What explains this tendency is the significant difference between cases where the accused is charged as a *direct perpetrator* under Article 7(1) of the Statute on the one hand, and where he is charged exclusively as a *commander* under Article 7(3) of the Statute. This provision establishes criminal responsibility for commanders who *knew or should have known* that the crimes in question were committed or were about to be committed by his subordinates, but nevertheless failed to *prevent* the crimes or *punish* the perpetrators afterwards. Commanders charged under Article 7(3), in other words, did not order the crimes or otherwise took any direct part in their commission. Punishment for command responsibility exclusively under Article 7(3) therefore entails a lesser degree of culpability than direct participation in the commission of crimes under 7(1), including the ordering thereof, and this is what is reflected in the Tribunal's sentencing practice for those mid-level commanders. Only a few high-level commanders are actually charged under Article 7(3), so it is really *the mode of participation* that is the relevant factor to consider in respect of sentencing, rather than the *rank* held by the perpetrator.

Many of the middle level ranking offenders were only charged under Article 7(3) of the Statute and are, by virtue of this very fact, charged with a mode of participation that involves a lesser degree of culpability than the direct commission, cf. above. This will explain why the middle level ranking perpetrators appear to have been sentenced more leniently than their subordinates, but that is an incorrect assumption. To the extent to which the middle level ranking accused are convicted of committing crimes either under Article 7(1) alone or under this provision in combination with Article 7(3), they are sentenced just as severely as anyone else on the same level of authority

convicted of direct commission. What may have led to the erroneous assumption of more lenient treatment of mid-level commanders, in other words, is the fact that some were only charged under Article 7(3).[25]

As for the supreme commanders in the high-level category, most of them are charged under both Article 7(1) and Article 7(3) which suggests that they – on the same footing as the low-level offenders charged under Article 7(1) – would receive harsher sentences for their *direct commission* in the form of having ordered the crimes, devised the overall criminal enterprise and not least for having set the whole plan in motion.

4. Meting out Sentences

The common starting point for the determination of an appropriate sentence is the assessment of the *gravity of the offences*. This is considered in each case prior to and independently of any aggravating and mitigating circumstances relating to the individual accused. The Chamber's assessment of the gravity of offences will enable the Chamber to set a general level of the sentence. Once that level is determined, the Chamber will then be able to adjust the sentence within the span of imprisonment provided for on that level, according to the particular aggravating and mitigating factors.

Aggravating factors, to be sure, must be proved *beyond a reasonable doubt*. Chambers have systematically pointed in this respect to such factors as: the level of involvement of the accused as a direct perpetrator under Article 7(1) as a collaborator or an aider or abettor; his voluntary, willing or enthusiastic role in the commission of the crimes; his rank or position; the number and vulnerability of the victims and the impact of the crimes upon them; the scale and duration of his criminal conduct; the recklessness, cruelty or depravity of the crimes; the degree of premeditation of the offences; and the discriminatory intent with which the accused perpetrated the crimes. The weight accorded to each of those factors depends upon the particular circumstances of each case, and they only apply to each case to the extent to which they are relevant.[26] They do not, in other words, necessarily have to be considered together.

Mitigating factors, by contrast, are not to be proved beyond reasonable doubt but only *on the balance of probability*; this difference is upheld in order to ensure the rights of the accused, including the right to a fair trial. In their practice, Chambers have identified a number of mitigating factors, such as the good conduct of the accused dur-

25 It could perhaps be suggested that even where the mid-level commanders may have ordered all or some of the crimes to be committed by their subordinates, these commanders were typically neither direct participants to the madness on the ground, nor the chief architects thereof. It is the physical application of sheer cruelty that explains why the subordinate, in the end, may deserve a harsher sentence than the commander. I cannot completely exclude that this view might sometimes be considered, but my guess is that it would carry only marginal importance.

26 It is important to note that *the gravity of the offences* – as a separate assessment – *cannot* be taken into account as an aggravating factor, because it has already been considered once for the purpose of determining the level of sentence. Even if there is a degree of overlap between the *gravity of offenses* and the listed *aggravating* circumstances, the gravity aspect cannot be considered twice as a separate factor.

ing the commission of the crimes (*e.g.* if he tried to prevent the crimes but was forced to participate, or if he provided assistance to the victims); his good conduct in the UN Detention Unit; his voluntary surrender (as opposed to his hiding out to abscond from justice); his prior criminal record relevant to the international war crimes charges; his substantial co-operation with the Prosecution; his age and health condition; his expression of remorse; his guilty plea and his willingness to tell the truth (if indeed he pleaded guilty); his time spent in pretrial detention (unless he deliberately dragged it out); and his family situation. Again, those factors are only considered and given due weight to the extent that they are relevant to each individual case – the 'family factor', for instance, has never been considered or given any weight in any of the ICTY's sentencing judgements, as far as I am aware.

When all of these determinations and factors are considered and given appropriate weight, the Chamber may then proceed to finally decide upon the sentence. However, one last test must be made at this stage, namely to ensure that the sentence is not (a) inconsistent with the Tribunal's practice in other cases, and (b) capricious or excessive.[27] After this test, the sentence is determined. The lowest sentence ever given to a convicted person before the ICTY (apart from acquittal) is 2,5 years for persons convicted under Article 7(1), and 2 years for a person convicted under Article 7(3) only. The maximum sentence is life imprisonment, which has been imposed twice by the ICTY, but frequently by the ICTR.

5. Concluding Remarks

Almost all possible characterisations of the Tribunal's sentencing policy and practice have been voiced in public, ranging from the Tribunal being far too lenient on criminals, to being too severe, or to handing down sentences that are really meaningless and have no effect. Harmon and Gaynor, for instance, argue strongly against lenient sentences and recommend stricter terms, with guidelines established in order to strengthen the process and thus make it more transparent.[28] In this latter proposal they are joined by Nemitz, who also seems to support the idea of making the sentences more proportional to the gravity of the offences (meaning, presumably, that the sentences should be tougher).[29]

One must not forget, however, that the development of a sentencing policy for the international prosecution of war crimes before international criminal tribunals is still only in the making; the ICTY, for instance, has made less than a hundred judgements on war crimes to date, and the ICTR even less. It is beyond doubt that both Tribunals will continue to devote much attention to the sentencing issue – especially as they are both coming towards the end of their existence and now sit with the heaviest cases on the docket. But sentencing is a very delicate process – especially in international war crimes trials because of the extremely complex nature of the *material real-*

27 *See* in respect of the consistency requirement, *Zdravko Musić* in the '*Čelibići*' (*The Prosecutor* v. *Žejnil Delalić et al.*), 20 February 2001, ICTY, Appeal Judgement, IT-96-21-A, paras. 756–57; and for the non-capricious and non-excessive requirement *Jelisić* (*The Prosecutor* v. *Goran Jelisić*), 5 July 2001, ICTY, Appeal Judgement, IT-95-10-A, para. 96.

28 Harmon and Fergal, *supra* note 6, p. 711.

29 Nemitz, *supra* note 10.

ity. I am not sure that the adoption of binding and more detailed sentencing guidelines will prove to be of much use – over and above the principles that have already been set out by the Appeals Chamber. I would warn against adopting too strict and narrow rules on sentencing, for two reasons.

First of all, such binding and detailed guidelines will undoubtedly restrict the latitude which Judges need in order to take into account factors that are not included in the guidelines, or to give them another weight or consideration than that prescribed by such guidelines. To take away that freedom and turning sentencing into a verifiable mathematical process will, in my view, endanger the entire exercise. Sentencing is not, and indeed should not be, a mechanical application of detailed rules to a judicial finding of guilt; rather, it must always retain the flexibility to make unusual or controversial determinations, simply because the very act of putting someone away behind bars for years represents a manifest infringement (albeit a well deserved one) upon one of the most revered human rights – freedom of movement. If the sentencing practices of the two ad hoc Tribunals are not well received in the public eye, which is probably true to some extent, then the Tribunals must do more to *explain* what they are doing. But I do not see the point in creating new binding and detailed guidelines in order to overcome the quest for a better public perception of the sentencing process. As the title of this article suggests, sentencing is a course of action that requires both sense and sensibility. That is not necessarily achieved by adopting more rules and stricter guidelines.

Secondly, I find that the public view of the sentencing practices of the two ad hoc Tribunals is misperceived. In my view, the Tribunals are actually doing well when it comes to their sentencing. If one takes a closer look at the practice, as I have suggested in this article, it may be seen that there *is* in fact a consistent pattern in respect of (a) the levels of sentencing set against the gravity of the crimes, and (b) the sentences imposed on persons who are convicted of direct commission under Article 7(1) of the Statute against those who are convicted of command responsibility under Article 7(3), respectively. Other patterns may still be discovered and developed as the Tribunals wrap up their work, but at least in respect of the most crucial aspects – the gravity of crimes and the modes of commission – a clear and convincing pattern can be shown.

As for the severity of sentences, I respectfully take issue with Harmon's and Gaynor's (and possibly also Nemitz' ?) suggestion that tougher sentences should be imposed in international war crimes cases. I do not believe that stricter sentences will have the slightest effect on the victims' willingness to accept the sentences imposed by the Tribunals more readily, for the victims are neither impartial in the matter, nor are they in a position to assess all the evidence that was brought during trial. I also do not believe that increasing the sentencing level will have any effect on general deterrence; the sentences are severe enough as they are and it is, as pointed out above, the *conviction* itself that provides the substance of the general deterrent effect, rather than the *sentences* as such. Of course, prison sentences for mass atrocities must be severe, but it is my contention that the sentencing levels currently developed by the Tribunals do not need to be increased in order to achieve the preventive, retributive, restorative and reprobative effects claimed by Harmon and Gaynor – for the simple reason that it is doubtful whether these effects are really operative in relation to the international prosecution of war crimes. If at all they provide meaning in the international context, in other words, a general increase of sentencing levels will have little or no impact.

If anything, I would recommend that the future Tribunals and the ICC devote more attention to the reconciliation process by somehow ensuring controlled communication between perpetrator and victim. Old wisdom requires enemies to talk to each other and address their concerns if they wish to move on.

These considerations form only part of a much broader issue, namely whether international criminal trials can be conducted on the same terms and levels of human rights protection as those applicable before domestic Courts in, say, developed democracies. On the face of it, at least, there seems to be a variety of aspects by which international trials would appear to fall far short of meeting the same standards as required in domestic law. International trials arguably last far too long. They are conducted in isolation from the culture of the parties to the conflict. They rely very heavily on oral testimonies by witnesses whose recollection is necessarily affected by both trauma and the distance of time to the actual events. Much of the evidence is circumstantial. Trials are conducted in an embryonic hybrid legal system somewhere between Common Law and Civil Law. The system includes, among other things, admission of documentary evidence without any possibility for the defence to cross-examine the authors of such evidence, and which allows for taking judicial notice not only of adjudicated facts from other trials, but also of documents admitted into evidence in other trials (!) – to mention just a few such aspects.

The point to be made on this observation is that much legal and criminological research and good legal thinking still needs to done and many resources must still be vested before we can begin to see the final shape of a viable international criminal legal procedural system which will uphold respect for the rule of law and enable the international community to ensure prosecution of the most heinous crimes in a manner that satisfies the demands not only for finding the *material truth*, but also for inclusion of the *material reality* in the judicial process. It is an impressive enterprise.

Chapter 10

Submarine Operations and International Law

*Wolff Heintschel von Heinegg**

1. Introduction

Submarine operations are dealt with in the 1936 London Protocol on Submarine Warfare[1] and, marginally, in certain provisions of the 1982 UN Convention on the Law of the Sea (UNCLOS)[2]. At first glance, international law has not kept pace with technological development or with the increased importance of the submarine for a variety of security and defence purposes. Of course, it is a commonplace that any law, especially international law, will in most cases lag behind new developments. Still, it is interesting to observe that states, while willing to agree upon rules on almost all aspects of land warfare, have been more than reluctant to agree on international treaties regulating the use of methods and means of naval warfare.

However, according to the position taken here, at present there is no need for a comprehensive treaty – and there be will no change – in the near or distant future.[3] On the one hand, naval operations in general, as well as submarine operations in particular – whether in peacetime or wartime – are governed by an impressive set of customary rules and principles of international law as well as by treaties, if applicable. On the other hand, calls for a codification of the law of naval operations are all too often motivated by an unrealistic belief in the power and effectiveness of regulatory approaches. Moreover, they are the result of a deeply-rooted belief in the necessity of the legal regulation of a subject-matter that is not fully comprehended. Hence, such calls are based more upon ignorance than on a sober analysis of reality.

It is not the task of the present contribution to criticise such empathic approaches to international law. In many cases the desire to control the methods and means of warfare by explicit regulation is quite understandable because the armed forces and

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1 1936 London Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 173 LNTS (1936–1937) pp. 353–357.

2 United Nations Convention on the Law of the Sea, 10 December 1982, UN Doc. A/CONF.62/122 and Corr.

3 *Cf.* J.A. Roach, 'Legal Aspects of Submarine Warfare', 6 *Max Planck Yearbook of United Nations Law* (2002) pp. 367–385, 384.

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producers themselves, by exaggerated secrecy, have contributed to an unnecessary mystification of military means, and in particular of the submarine and its weapons systems. In this discussion it will be asserted that in order to analyse the law applicable to submarine operations it is not necessary to gain knowledge of technical details. Furthermore, it will become evident that the whole spectrum of contemporary submarine operations is governed by rules that, on the one hand, limit such operations and, on the other, are flexible enough to enable modern naval forces to perform effectively their various tasks in security and defence operations.

2. Submarine Operations – Past and Present

Methods and means of naval warfare have long since been used to achieve comprehensive control of sea lines of communication (sea control) and to prevent the enemy from using the sea for military or economic purposes (sea denial). At the beginning of the 20th century submarines, in addition to surface platforms, were but a further means of pursuing these aims. While the arrival of the submarine had a considerable impact on long-standing doctrines of maritime strategy[4] most states planned to use it against enemy surface forces and for coastal defence purposes.[5] Although it soon became evident that because of their limited speed submarines were inferior to surface platforms, Germany, at the beginning of the First World War did not change the original conception. After an initial failure in 1915 Germany did not turn to unrestricted submarine warfare until 1917 – that is, Germany used its submarine fleet almost exclusively against enemy and neutral merchant shipping.[6] However, Germany suffered severe losses because the United Kingdom had armed its merchant vessels and had ordered them to ram surfaced German submarines or to report their positions.[7]

In view of that experience the German Naval High Command, at the beginning of the Second World War, did not attach great importance to submarines but concentrated upon surface platforms. Accordingly, submarines were not employed against merchant shipping until May 1940. In that year, Admiral Dönitz introduced the so-called 'pack tactic' of several submarines attacking enemy convoys simultaneously. Enemy trade suffered heavy losses. Still, the use of German submarines as 'commerce

4 According to Alfred Thayer Mahan (*The Influence of Sea Power upon History*, 1889) sea control and sea denial presuppose the build-up of superior surface forces. For a long period in history this was certainly true because the great sea powers could not be challenged by smaller states. However, with the arrival of the submarine and later of the aircraft maritime strategies had to be adapted to the new situation. *Cf.* G. Till, *Maritime Strategy and the Nuclear Age* (2nd ed., St. Martin's Press, New York,1984) pp. 8 *et seq.*, 203 *et seq.*

5 *Cf.* K. Lautenschläger, 'The Submarine in Naval Warfare, 1901–2001", 11 *International Security* (1986–1987) p. 101.

6 Altogether 11.2 million of ship tonnage was sunk. *Cf.* B. Herzog, *60 Jahre Deutsche U-Boote* (JF Lehmanns, Munich, 1968) pp. 67 *et seq.*; C.E. Fayle, *Seaborne Trade* (John Murray, London, 1924) pp. 465 *et seq.*

7 In the First World War, Germany lost 178 submarines. *Cf.* Lautenschläger, *supra* note 5, p. 122. For the First World War practice *see* J.W. Garner, *International Law and the World War* (Longmans, Green & Co, London, 1920) pp. 371 *et seq.*; A. Gayer, 'Summary of German Submarine Operations in Various Theatres of War', 52 *United States Naval Institute Proceedings* (April 1926) pp. 621–659.

raiders' proved a failure.[8] Submarines, when surfaced, were detectable by high-frequency radar at a distance beyond the range of their torpedoes. In addition, the UK had succeeded in acquiring the German secret code and was thus able to gain a rather accurate picture of the deployment area. With the entry of the US into the Second World War and with the increased use of convoys, German submarines were incapable of sinking the tonnage necessary to inflict lasting damage on the economies of the Allies. While the 1,171 German submarines commissioned between 1935 and 1945 sank 14 million tons, German submarine losses totalled 784.[9]

The only successful deployment of submarines against enemy trade in the Second World War occurred in the Pacific.[10] This success was not due to the superiority of the US naval and air forces but rather to shortfalls by the Japanese Naval High Command, which ignored the safety and security of its merchant fleet. Hence, Japanese merchant vessels were not equipped with the means necessary for defence against submarines, and their crews were only poorly trained.[11]

Despite limited success as a means of economic warfare during the two world wars, the use of submarines against merchant shipping continued to form a part of operational planning.[12] However, this does not mean that today submarines would be employed predominantly against enemy and neutral commerce. Submarines are highly sophisticated and expensive weapon platforms and most countries would be rather hesitant to use them against merchant shipping. In view of the improvements in propulsion and ship electronics, and the fact of their capability to launch missiles when submerged, today's submarines have become an important multi-mission component capable of conducting covert operations in forward regions. Accordingly, "submarine missions include gathering surveillance data, communicating tactical information, controlling the surface and undersea battlespace, and delivering strike weapons or special operations forces ashore in contingencies".[13] Moreover, submarines are a most effective tool in anti-submarine warfare – both in coastal or deep sea areas.[14] Therefore

8 *See* H. Sohler, 'U-Bootkrieg und Völkerrecht', *Marine-Rundschau* (Beiheft 1, September 1956) pp. 13 *et seq.*; N.J. Gilbert, 'British Submarine Operations in World War II', 89 *United States Naval Institute Proceedings* (March, 1963) pp. 73–81; W.T. Mallison Jr., *Submarines in General and Limited Wars* (United States Government Printing Office, Washington D.C., 1968) pp. 75 *et seq.*, 113 *et seq.*; J. Keegan, *The Price of Admiralty* (Penguin Books, New York, 1988) pp. 213 *et seq.*

9 *Cf.* Herzog, *supra* note 6, pp. 209 *et seq.*; Lautenschläger, *supra* note 5, p. 122.

10 *See* Mallison, *supra* note 8, pp. 87 *et seq.*; C. Blair, *Silent Victory: The U.S. Submarine War against Japan* (J.B. Lippincott Company, Philadelphia, 1975) pp. 16 *et seq.*; J.D. Alden, *The Fleet Submarine in the U.S. Navy* (Naval Institution Press, Annapolis, 1979) pp. 249 *et seq.* For a contemporary assessment *see* the testimony of Admiral Nimitz before the Nuremberg Tribunal, 40 I.M.T. pp. 109–111.

11 Lautenschläger, *supra* note 5, pp. 119 *et seq.*

12 *Cf.* J.E. Talbott, 'Weapons Development, War Planning and Policy: The U.S. Navy and the Submarine', 37 *Naval War College Review* (1984) p. 55 *et seq.*

13 Federation of American Scientists, *Submarine Warfare*, available at <www.fas.org/man/dod-101/sys/ship/submarine.htm>, last visited 27 February 2008.

14 Keegan, *supra* note 8, p. 275, believes: "In a future war the oceans might appear empty … swept clear both of merchant traffic and of the navies which have sought so long to protect

the primary roles and missions for submarines are surveillance and intelligence, special operations, precision strikes, battle group operations, and sea denial,[15] or, according to Lautenschläger: "During the twentieth century, technological developments have given submarines six generic capabilities of significance. These six capabilities – coast defense, naval attrition, commerce warfare, projection ashore, fleet engagement, and assured destruction – remain the basic roles of submarines in naval warfare today."[16]

In future, the role of the submarine as a means of economic warfare will continue to decrease. They are an important component of an integrated battle space and perfectly suited for wartime and peacetime Intelligence, Surveillance, and Reconnaissance (ISR), for special operations purposes, for long-range precision strikes against sea (surface and subsurface) and land targets, and for all purposes of sea denial. Modern submarines are capable of launching long-range torpedoes, such as the MK 48, anti-ship missiles (TASM) with a range of more than 250 nautical miles, and land-attack missiles (TLAM). The latter was proved during Operation Desert Storm in 1991, and by attacks against terrorist camps in Afghanistan.[17] Moreover, they carry all types of mines that can be laid in deep and littoral sea areas.

3. Peacetime Law

While the focus will be on the wartime uses of submarines and the respective legal framework – that is, the law of armed conflict (4.) – the peacetime rules of international law applicable to submarines and submarine operations cannot be ignored (3.). The use of submarines is not limited to times of armed conflict. They are an important component of ISR operations and are thus of significant relevance for national and multinational security and defence policy purposes. It is therefore important to touch briefly on the law as to their legal status (3.1.) and to their right of navigation in different sea areas (3.2.). Finally, in view of their probable importance for peacekeeping operations authorised by the United Nations Security Council, a few thoughts will be devoted to the possibility of a modification of the applicable peacetime rules through a decision under Chapter VII of the Charter (3.3.).

3.1 Legal Status of Submarines and Unmanned Underwater Vehicles (UUVs)

It is generally recognised[18] that submarines are warships in the sense of Article 29 UNCLOS. Accordingly, they "have complete immunity from the jurisdiction of any

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it against predators. Yet the oceans' emptiness will be illusory, for in their deeps new navies of submarine warships, great and small, will be exacting from each other the price of admiralty."

15 FAS, *supra* note 13.

16 K. Lautenschläger, *supra* note 5, p. 102.

17 *See* the references given by Roach, *supra* note 3, p. 383.

18 *See*, *inter alia*, Office of the Chief of Naval Operations, US Dept. of the Navy, *The Commander's Handbook on the Law of Naval Operations* (Naval Warfare Pub. No. NWP 1-14M, Edition July 2007) para. 2.2.2; German Navy, *Commander's Handbook – Legal Bases for the Operations of Naval Forces* (Bonn, 2004) p. 86.

State other than the flag State".[19] Under customary international law the sovereign immunity of warships must be respected in all sea areas – whether high seas, territorial seas, archipelagic waters, or internal waters.[20]

It is an unsettled matter as to whether the foregoing principle also applies to unmanned underwater vehicles (UUVs).[21] In the case of UUVs being remotely navigated, in particular when controlled by a platform enjoying sovereign immunity, they could be considered to be an integral part of the controlling platform and would thus share the platform's legal status. However, if UUVs navigate autonomously (AUVs) they can hardly share the legal status of another platform. Moreover, they are not "manned by a crew which is under regular armed forces discipline" and therefore they do not qualify as warships *strictu sensu*. However, in most cases UUVs are engaged exclusively in government, non-commercial service. Hence, they must be considered to be sovereign immune craft, as with any other item belonging to or exclusively used by a state. Hence, all UUVs as such, whether navigating under the control of another platform or autonomously, enjoy sovereign immunity.[22] This finding, of course, is without prejudice to concurring rights of coastal states whose territorial sovereignty may be violated by an UUV.

3.2 Freedom of Navigation

Today there should be a general consensus that Articles 88 and 301 UNCLOS do not preclude military uses of the high seas that have long since been considered part and parcel of the customary freedoms of the high seas.[23] Accordingly, submarines, like all warships, enjoy the rights of freedom of navigation and of conducting military exercises, ISR operations etc. Of course, they must pay due regard to the rights enjoyed by the navigation and aviation of other states. In addition, submarines enjoy the rights of innocent passage (subject to the requirement to navigate on the surface and to show

19 Article 95 UNCLOS.

20 NWP 1-14M, *supra* note 18, para. 2.2.2.

21 *Ibid.*, para. 2.3.5: "UUVs are either autonomous or remotely navigated and may be launched from surface, subsurface, or aviation platforms. The sea services may employ UUVs for a wide variety of missions, including, but not limited to: ISR, MCM, ASW, Surveillance, Inspection/Identification, oceanography, communication/navigation network nodes, payload delivery, information operations (IO), time critical strike, barrier patrol (homeland defense, antiterrorism/force protection), and barrier patrol (sea base support)."

22 *Ibid.*, para. 2.3.6: "USVs and UUVs engaged exclusively in government, noncommercial service are sovereign immune craft. USV/UUV status is not dependent on the status of its launch platform."

23 R. Wolfrum, 'Restricting the Use of the Sea to Peaceful Purposes, Demilitarization in Being?', 24 *German Yearbook of International Law* (1981) pp. 200–241; T. Treves, 'La notion d'utilisation des espaces marines à fins exclusivement pacifiques dans le nouveau droit de la mer', 26 *Annuaire française de droit international* (1980) pp. 687–699, 687 *et seq.*; W. Heintschel von Heinegg, 'The United Nations Convention on the Law of the Sea and Maritime Security Operations', 48 *German Yearbook of International Law* (2005) pp. 151–185, 152.

their flag[24]), of transit and of archipelagic sea lanes passage (in 'normal mode'[25]).[26] In the exclusive economic zones (EEZ) of third states submarines enjoy the same rights as in high sea areas but must pay due regard to the sovereign rights enjoyed by the respective coastal state.

Again, the question arises whether UUVs in the same manner enjoy these passage rights. The fact that they are to be considered sovereign immune craft does not necessarily mean that they are entitled to the rights of innocent, transit, or archipelagic sea lanes passage. Rather, it is to be expected that the majority of coastal states would not easily consent to a passage by underwater (or surface) vehicles that were not manned. With particular regard to innocent passage they may well rely upon Article 19, para. 2, lit. (f) UNCLOS and consider UUVs 'military devices' that may be neither launched nor recovered and, *a fortiori*, may not navigate independently in their respective territorial seas. In this context it should, however, not be forgotten that the requirement of warships being manned by a crew under military discipline originates from the prohibition on privateering dating back to the 1856 Declaration of Paris.[27] The fact that this requirement has found its way into Article 29 UNCLOS neither precludes other seagoing vehicles in exclusive government service from enjoying sovereign immunity nor does it imply that only those vessels manned by a (civilian or military) crew are entitled to the navigational rights recognised by UNCLOS and the corresponding customary law. Furthermore, unmanned vehicles have for some time been in use by both governments and the shipping industry. While it is conceded that UUVs are a rather new phenomenon and that as yet there probably exists no general practice contributing to the emergence of a customary rule specifically dealing with UUVs, such vehicles remain what they are: vessels. Since coastal states, in their territorial seas, are not entitled to adopt or enforce laws or regulations applying to "the design, construction, manning or equipment of foreign ships"[28] they may not prevent innocent passage by UUVs. *A fortiori*, the same holds true with regard to transit and archipelagic sea lanes passage. Therefore the navigational rights of UUVs can be summarised as follows:

> "Customary international law as reflected in the 1982 LOS Convention gives vessels of all nations the right to engage in innocent passage as well as in transit passage and archipelagic sea lanes passage. The size, purpose, or type of cargo is irrelevant. The same rules apply to USV and UUV transit and navigation. USVs and UUVs retain independent navigation rights and may be deployed by larger vessels as long as their

24 Article 20 UNCLOS.

25 Articles 39, para. 1, lit. (c), and 53, para. 3, UNCLOS both refer to "navigation in normal mode", *i.e.*, in the case of submarines, to navigate submerged. *See also* NWP 1-14M, *supra* note 18, paras. 2.5.3.1, 2.5.4.1; German Navy's Handbook, *supra* note 18, pp. 85 *et seq*.

26 For a summary of navigational rights enjoyed by submarines *see* Roach, *supra* note 3, pp. 371 *et seq*.

27 Declaration Respecting Maritime Law, Paris, 16 April 1856.

28 Article 21, para. 2 UNCLOS. This is different if such laws and regulations "are giving effect to generally accepted international rules or standards". However, such international rules and standards are not applicable to vessels enjoying sovereign immunity.

employment complies with the navigational regimes of innocent passage, transit passage, archipelagic sea lanes passage as applicable."[29]

Another problem would arise were submarines (and UUVs) to be engaged in ISR activities. Within foreign territorial sea areas there exists a general prohibition of 'research or survey activities'.[30] While all ships, including submarines, are entitled to make use of their electronic equipment for navigational purposes, there remain some grey areas, especially with regard to the use of active sonar systems. If, however, the use of the sonar is essential for the safety of passage it is not prohibited by international law.[31] In all other cases the coastal state may object to the use of a ship's electronic equipment. If a submarine does not comply with coastal nation regulations that conform to established principles of international law and disregards a request for compliance that is made to it, the coastal nation concerned may require the warship immediately to leave the territorial sea, in which case the warship in question would be compelled to do so immediately.[32]

Research or survey activities may be carried out from sea areas beyond the outer limit of the territorial sea. If, however, the coastal state has exercised its right under Article 56 UNCLOS to regulate marine scientific research in its EEZ, again, the potential for dispute increases with regard to permissible activities by foreign submarines. It should be emphasised in this context that the coastal state may not unduly restrict or impede the exercise of the freedom of navigation. Since all warships, including submarines, enjoy the high seas freedoms and other internationally lawful uses of the seas related to those freedoms the existence of an EEZ in an area of submarine operations is not, in itself, an obstacle to the gathering of information or to other legitimate uses of the seas.

3.3 Submarines Engaged in Missions Authorised by the UN Security Council

In principle, the aforementioned restrictions on submarine operations will continue to apply in a peacekeeping or peace support operation unless the parties concerned have explicitly consented to a deviation. The applicable rules and principles of the international law of the sea may, however, be modified by a decision of the UN Security Council when acting under Chapter VII of the UN Charter.[33] Either the Council explicitly authorises the use of submarines, within the respective territorial sea, for intelligence and other purposes, or it confines itself to authorising the use of 'all necessary means' to accomplish a given task. If mission accomplishment were to be jeopardised by the said restrictions under the law of the sea they would become inapplica-

29 NWP 1-14M, *supra* note 18, para. 2.5.2.5.

30 Article 19, para. 2, lit. (j) UNCLOS.

31 German Navy's Handbook, *supra* note 18, p. 70.

32 Article 30 UNCLOS.

33 This is not the place to discuss the applicability of Chapter VII to peacekeeping operations. There is, however, general consensus that the Security Council may, in the case of a so-called 'robust' peacekeeping operation authorise 'all necessary means' for mission accomplishment.

ble. For example, submarines would be allowed to transit the territorial sea submerged, to remain in those sea areas, or to conduct ISR operations exceeding what is necessary for the safety of navigation.

4. Law of Naval Warfare and Neutrality at Sea

As we have seen, submarines are capable of conducting a wide variety of missions, both in peacetime and in wartime. As regards the wartime rules of international law applicable to submarine operations, of course, the 1936 London Protocol is of importance. It should, however, not be forgotten that the legality of the submarine as a means of naval warfare was far from being undisputed both in the late 19th century and in the first half of the 20th century. Moreover, those regions where submarines may legitimately operate during armed conflicts have undergone considerable modification since the end of the Second World War. When engaged in attacks against targets on land the question arises of whether and to what extent submarines are bound by the 1907 Hague Convention IX[34] or by the 1977 Additional Protocol I[35]. When engaged in sea denial operations during armed conflict, it is to be scrutinised which methods and means may legitimately be used by submarines and whether the duty to render assistance to those *hors de combat* must be interpreted in the light of the vulnerability of surfaced submarines.

4.1 Legality and Legal Status of Submarines

In the circular note proposing the programme of the First Hague Peace Conference (1899) one of the subjects suggested by Count Mouravieff was: "4. Prohibition of the use in naval battle of submarine or diving torpedo-boats, or of other engines of destruction of the same nature …"[36]

In the final vote[37] the majority of delegates either clearly rejected that proposal or made their consent dependent upon a unanimous adoption. Those delegates unwilling to agree upon a prohibition emphasised the usefulness of submarines for defensive purposes.[38] Those in favour of a prohibition wished to preserve the superiority of the surface naval forces of their respective countries. Great Britain, in particular, endeavoured to abolish the submarine, which it considered a threat to its navy. Although, at

34 Convention (IX) Concerning Bombardment by Naval Forces in Time of War, 18 October 1907, printed in A. Roberts and R. Guelff, *Documents on the Laws of War* (Oxford University Press, Oxford, 2001) pp. 112 *et seq*.

35 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS (1979) pp. 3 *et seq*.

36 Russian Circular Note Proposing the Programme of the First Conference, St. Petersburg, 30 December 1898, printed in J.B. Scott (ed.), *Reports to the Hague Conferences of 1899 and 1907* (At the Clarendon Press, Oxford, 1917) pp. 2 *et seq*.

37 *See* J.B. Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (Oxford University Press, New York, 1920) pp. 367–368.

38 *See* the summary given by Mallison, *supra* note 8, pp. 32–33.

the 1907 Hague Peace Conference, the subject was not pursued any further – and despite the fact that "the 1907 Conference recognized by necessary implication the lawful combatant status of … submarines"[39] – Great Britain, at the beginning of the First World War, for a short period did not treat captured crews of German submarines as prisoners of war.[40] It abandoned that practice after Germany retaliated by denying captured British officers full prisoner of war status.

The draft Submarine Treaty adopted at the 1921–1922 Washington Conference provided for submarines, when visiting and searching merchant vessels, to be bound by the same rules as surface warships. In the event of a violation of those rules the submarine's personnel were to be reduced to the status of unlawful combatants or pirates. Since the French Government declined to ratify the 1922 Submarine Treaty, neither a prohibition on the submarine nor an acknowledgment, under the said conditions, of submarine crews being regarded as pirates, became part of international law.[41]

Further efforts to outlaw the submarine – partly co-sponsored by the US – followed but all ended in failure.[42] The only provision remaining was Article 22 of the 1922 Washington Treaty that ultimately became the 1936 London Protocol.[43] While the 1936 Protocol has had a considerable impact on the law of submarine warfare, it has neither rendered submarines as being an illegal means of naval warfare nor has it made submarine warfare impossible.

Rather, submarines are now warships proper. So long as they meet the requirements of the definition laid down in Article 29 UNCLOS and in the corresponding customary rule, they are lawful combatants and thus entitled to actively take part in hostilities at sea.[44] This includes combat activities against enemy military objectives as well as prize measures against enemy and neutral merchant vessels.

As regards UUVs, it is here that UUVs must be distinguished from manned submarines. While it is beyond doubt that in armed conflict UUVs may be used for ISR and targeting purposes, as well as for attacks against legitimate military objectives, they are neither designed for nor capable of making use of the full spectrum of prize measures. Visit, search and capture are measures that are of necessity limited to warships (and military aircraft) proper – that is, manned by a crew and under the command of a commissioned officer.

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39 *Ibid.*, p. 34.

40 *Ibid.*

41 *Ibid.*, pp. 41 *et seq.*

42 *Ibid.*, pp. 43 *et seq.* The 1937 Nyon Arrangement and the 1937 Geneva Agreement Supplementary to the Nyon Arrangement were limited to the situation of the Spanish Civil War and had no lasting impact on the development of the law governing submarine operations. *See* L.F.E. Goldie, 'Commentary on the 1937 Nyon Arrangement', in N. Ronzitti (ed.), *The Law of Naval Warfare* (Martinus Nijhoff, Dordrecht, 1988) pp. 489 *et seq.*

43 *Supra* note 1. The impact of the London Protocol on submarine warfare is discussed *infra* 4. d).

44 NWP 1-14M, *supra* note18, paras.7.6, 7.10; German Navy's Handbook, *supra* note 18, p. 149.

4.2 Region of Submarine Operations

Apart from the 1936 London Submarine Protocol and the 1949 Second Geneva Convention,[45] only the 1907 Hague Conventions VII[46], VIII[47], IX[48], XI[49] and XIII[50] deal with specific aspects of naval warfare. The only rules – negatively – defining the legitimate area of naval operations during armed conflict are contained within Hague Convention XIII. According to Article 1, belligerents are "bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality". Article 2 strictly prohibits "any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power". Moreover, "belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries" (Article 5). There is, however, no clear definition of the term 'neutral waters'. In addition, Hague XIII was adopted at a time when there were only two sea areas: a territorial sea not exceeding three nautical miles and, beyond the outer limit of the territorial sea, the high seas. These difficulties can be easily overcome if one takes into consideration the development of customary international law that was considerably influenced by the international law of the sea. The respective rules are reaffirmed in the San Remo Manual[51] and in the ILA Helsinki Principles[52]. They apply equally to surface warships and submarines, including UUVs.[53]

Under customary international law, belligerent measures may, of course, be taken in those sea areas where belligerent states enjoy territorial sovereignty – that is, in their internal waters, in their territorial seas, and, where applicable, in their archipelagic

45 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS (1950) pp. 85 *et seq*.

46 Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships of 18 October 1907, printed in Roberts and Guelff, *supra* note 34, pp. 97 *et seq*.

47 Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907, printed in Roberts and Guelff, *supra* note 34, pp. 105 *et seq*.

48 *Supra* note 34.

49 Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War of 18 October 1907, printed in Roberts and Guelff, *supra* note 34, pp. 121 *et seq*.

50 Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War of 18 October 1907, printed in Roberts and Guelff, *supra* note 34, pp. 128 *et seq*.

51 International Institute of International Humanitarian Law, *San Remo Manual on International Law applicable to Armed Conflicts at Sea*. *See also* the Explanations to the Manual in L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press,1995).

52 Helsinki Principles on the Law of Maritime Neutrality, *Final Report of the Committee on Maritime Neutrality*, International Law Association, Report of the 68th Conference (Taipei, 1998) pp. 496 *et seq*.

53 NWP 1-14M, *supra* note 18, paras. 7.3.2 *et seq*.

waters.[54] However, *vis-à-vis* the shipping and aviation of third (neutral) states, they are under an affirmative obligation not to suspend or otherwise hamper transit passage or archipelagic sea lanes passage.[55] There is no prohibition on conducting naval warfare on the high seas. Despite allegations to the contrary,[56] neither the peaceful uses clauses of the UN Law of the Sea Convention nor international state practice have contributed to the emergence of a rule of international law restricting the parties of an international armed conflict at sea to their respective internal waters and territorial sea areas. In view of the special legal status of the Area and in view of the rights that neutral states continue to enjoy on the high seas, belligerents are, however, obliged to pay due regard to those aspects and to refrain from interference if that is both feasible and reasonable.[57] The same considerations apply if belligerent measures are taken in the EEZ or on the continental shelf[58] of third (neutral) countries. Here, again, there is no prohibition on belligerent measures but merely an obligation to pay due regard to the legitimate sovereign rights that neutral coastal states enjoy in those sea areas.[59]

Certainly, the parties to an international armed conflict at sea are prohibited both from taking belligerent measures within neutral waters or using them as a sanctuary.[60] Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters of neutral states as defined by UNCLOS and by the respective rules of customary international law.[61] Neutral states may, if they consider this essen-

54 This was already laid down in Article 2 of Hague Convention XIII (*supra* note 50). For a detailed analysis of the area of naval warfare *see*, *inte alia*, H.B. Robertson Jr., *The 'New' Law of the Sea and the Law of Armed Conflict at Sea* (Newport Paper No. 3, 1992).

55 San Remo Manual, *supra* note 51, para. 27.

56 Based upon the concept of 'limited war' especially O'Connell took the position that belligerents are restricted to their respective territorial sea areas. *Cf.* D.P. O'Connell, 'International Law and Contemporary Naval Operations', 64 *British Yearbook of International Law* (1970) pp. 19–85.

57 San Remo Manual, *supra* note 51, para. 10 lit. (b) and para. 36: "Hostile actions on the high seas shall be conducted with due regard for the exercise by neutral States of rights of exploration and exploitation of the natural resources of the seabed, and ocean floor, and the subsoil thereof, beyond national jurisdiction." *See also* Helsinki Principles, *supra* note 52, para. 3.1.

58 *E.g.*, by the use of ground mines.

59 San Remo Manual, *supra* note 51, para. 34: "If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, *inter alia*, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf." *See also* Helsinki Principles, *supra* note 52, para. 4.

60 Hague Convention XIII, *supra* note 50, Articles 2 and 5; San Remo Manual, *supra* note 51, paras. 14 *et seq.*; Helsinki Principles, *supra* note 52, para. 2.1; NWP 1-14M, *supra* note 18, paras. 7.3.2 *et seq.*; German Navy's Handbook, *supra* note 18, pp. 130 *et seq.*; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, 2004) paras. 13.7 *et seq.*

61 *Ibid. See also* Roach, *supra* note 3, p. 374.

tial for their security or for the safety of navigation, close their neutral waters to belligerent warships and auxiliary vessels. Other than in times of peace such closure may comprise the neutral state's entire territorial sea and may last for the duration of the international armed conflict. The only restriction that the neutral state has to observe *vis-à-vis* the parties to the conflict is the principle of impartiality.[62] If, however, neutral waters form part of an international strait or of an archipelagic sea lane, the neutral state concerned is not permitted to prohibit belligerent warships, auxiliary vessels and military aircraft from transiting such waters.[63]

4.3 Attacks on Targets Ashore

Cruise missiles, such as the TLAM, that can be launched from a submarine for attacking targets ashore are a relatively new development in weapons technology.[64] Still, this new role for the submarine does not mean there is a necessity for adapting or modifying the existing law.

Attacks against targets on land (naval bombardment) are not dealt with explicitly in the San Remo Manual. This is partly due to the fact that this subject was considered to be already covered by the respective provisions of the 1977 Additional Protocol I.[65] Indeed, especially the provisions of Part IV, Section I Additional Protocol I (*i.e.* Articles 48–67) on the protection of civilian populations against the effects of hostilities, according to its Article 49, para. 3, apply to "any sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea … against objectives on land". The famous dispute between Rauch and Meyrowitz on the applicability of Additional Protocol I to naval warfare should have been rendered obsolete.[66] It should be kept in mind, however, that not all states are bound by the Protocol. Then the question arises of whether the provisions of the 1907 Hague Convention IX constitute customary international law. Most writers seem to agree on that.[67] Moreover, it is generally accepted that belligerents, including naval surface and subsurface forces, are prohibited from launching attacks on civil-

62 San Remo Manual, *supra* note 51, para. 19: "Subject to paragraphs 29 and 33, a neutral State may, on a nondiscriminatory basis, condition, restrict or prohibit the entrance to or passage through its neutral waters by belligerent warships and auxiliary vessels." *See also* Helsinki Principles, *supra* note 52, para. 2.3.

63 San Remo Manual, *supra* note 51, paras. 23–30; Helsinki Principles, *supra* note 52, para. 2.4; Roach, *supra* note 3, p. 374.

64 *See* Roach, *supra* note 3, p. 383.

65 While this view is shared by most writers, O'Connell seems to take the position that naval bombardment is governed by both, Hague Convention IX and AP I. *See* D.P. O'Connell and I.A. Shearer (eds.), *The International Law of the Sea* (Clarendon Press, Oxford 1984) pp. 1130 *et seq.*, 1139.

66 *See* E. Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare* (Berlin, 1984) pp. 57 *et seq.*; H. Meyrowitz, 'Le protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime', 89 *Revue Générale de Droit International Public* (1985) pp. 243–298, 243 *et seq.*

67 *See*, *inter alia*, H.B. Robertson Jr., 'Commentary on Hague Convention IX', in Ronzitti, *supra* note 42, pp. 161 *et seq.*

ian populations as such and are obliged to distinguish between legitimate military targets and civilians or civilian objects. Furthermore, the prohibition on indiscriminate attacks[68] and the obligation to take all feasible precautionary measures[69] are binding on all naval forces, irrespective of the area being targeted.[70] In view of the accuracy of submarine-launched missiles, even when targeted over the horizon, these belligerent obligations will not in most cases pose insurmountable problems.

4.4 Sea Denial

Sea denial – preventing enemy naval forces from using the seas – represents an important objective for submarines. Such missions range from attacks on enemy naval forces to mine-laying operations and, if necessary, to interference with enemy or neutral merchant shipping. As in the case of attacks on targets ashore the general principles of the law of armed conflict on target discrimination and precautions in attack apply to all armed hostilities at sea.[71] Additionally, there exist rules of international customary and treaty law that apply specifically to methods and means of naval warfare, such as the 1856 Paris Declaration[72] on blockade and prize measures as well as the treaties mentioned earlier.[73]

4.4.1 Targeting Enemy Military Objectives at Sea

Submarines are equipped with a variety of sophisticated sensors and other electronic devices that enable them to positively identify legitimate military objectives. Torpedoes, in particular, are highly discriminating weapons, the use of which will not normally result in a violation of the principle of discrimination or of other rules of the law of armed conflict.[74] The same holds true for submarine-launched cruise missiles (TASMs) and other projectiles provided that they are equipped with sensors or are employed in conjunction with external sources of targeting data sufficient to ensure effective target discrimination.[75] Hence, the main task of attack submarines during the course of armed conflict – neutralisation of enemy surface and subsurface forces –

68 Article 51 Additional Protocol I.

69 Articles 57 and 58 Additional Protocol I.

70 For the applicability of these principles and rules *see* NWP 1-14, *supra* note 18, paras. 5.3.2, 5.3.3; German Navy's Handbook, *supra* note 18, pp. 160, 165, 170 *et seq.*; UK Manual, *supra* note 60, paras. 13.24 *et seq. See also* Roach, *supra* note 3, pp. 375 *et seq.*

71 For the applicability of the principles of target discrimination in relation to armed hostilities at sea, *see* UK Manual, *supra* note 60, paras. 13.24 *et seq.*; NWP 1-14M, *supra* note 18, paras. 8.1 *et seq.*; German Navy's Handbook, *supra* note 18, pp. 164 *et seq.*; San Remo Manual, *supra* note 51, paras. 38–46.

72 *Supra* note 27.

73 *Supra* notes 45–50.

74 According to the San Remo Manual, *supra* note 51, para. 79, torpedoes must "sink or otherwise become harmless when they have completed their run". *See also* UK Manual, *supra* note 60, para. 13.51; NWP 1-14M, *supra* note 18, para. 9.4; German Navy's Handbook, *supra* note 18, p. 186.

75 NWP 1-14M, *supra* note18, para. 9.10; UK Manual, *supra* note 60, para. 13.50; German Navy's Handbook, *supra* note 18, p. 188.

while governed by the general principles of target discrimination, will in most cases not be prevented by the applicable law.

Specific rules come into operation where submarines are deployed for mine warfare purposes. Mines are a legitimate means of naval warfare and are used for denying sea areas to the enemy in order to enforce a blockade[76] or to defend home or allied coastlines and ports. Mines can also be used for channelling international shipping.[77] Once laid, they would bind enemy forces, which would be placed under considerable pressure to take the necessary measures to counter the threat posed. Irrespective of the operational or strategic aims pursued, however, the laying of naval mines is subject to the limitations laid down in Hague Convention VIII[78] and/or applicable *qua* customary international law.[79] These rules and principles apply to all generations of naval mines, irrespective of the platform from which they are laid. It should be noted in this context that the aforementioned rules and principles also apply to the submarine-launched mobile mine (SLMM)[80] but not to the 'enCAPsulated TORpedo' (CAPTOR)[81]. The latter is not governed by the law of mine warfare at sea but rather by the rules applicable to torpedoes.[82]

4.4.2 Zones

While it is certainly not true that there are only 'submarines and targets' the question remains of whether submarine warfare could profit from a rather disputed method of naval warfare – the so-called exclusion zone. On the one hand, such zones could facilitate target identification and would contribute to a better protection of innocent shipping. On the other hand, the establishment and enforcement of an exclusion zone would imply more than inconveniences for neutral shipping that would be barred from important sea routes.

76 An example is the blockade of Haiphong that was enforced by military aircraft and by naval mines. *See* F.B. Swayze, 'Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam', 29 *JAG Journal* (1977) pp. 143–173.

77 For current strategies of mine warfare *see* R.F. Hoffmann, 'Offensive Mine Warfare: A Forgotten Strategy?', 103 *United States Naval Institute Proceedings* (May 1977) pp. 143–155; V. Spindeldreher *et al.*, 'Minenkriegführung in Vergangenheit und Gegenwart', *Marineforum* (1980) pp. 235–241; C.F. Horne III, 'New Role for Mine Warfare', 108 *United States Naval Institute Proceedings* (November 1982) pp. 34–40; W. McDonald, 'Mine Warfare: A Pillar of Maritime Strategy', 111 *United States Naval Institute Proceedings* (October 1985) pp. 46–58.

78 *Supra* note 47.

79 For an analysis of the legal framework applying to naval mines *see* W. Heintschel von Heinegg, 'The International Law of Mine Warfare at Sea', 23 *Israel Yearbook on Human Rights* (1993) pp. 53–76.

80 The SLMM is a torpedo-like weapon that, after being launched by the submarine, can travel several miles to a specific point where it sinks to the floor and activates its mines sensors. It is particularly useful for blockading a port or a narrow sea area.

81 The CAPTOR only in the first stage could be considered a mine. If activated by an enemy submarine, however, it is nothing but a torpedo that homes in on its target independently.

82 *Cf.* the Explanations to paras. 80 *et seq.* of the San Remo Manual in Doswald-Beck, *supra* note 51, p. 169.

A study of various military manuals shows that the San Remo Manual and the Helsinki Principles assert that, in principle, an exclusion zone is a legitimate method of naval warfare.[83] There is, however, general consensus that in the establishing of an exclusion zone a belligerent cannot be absolved of its duties under the law of naval warfare.[84] Probably the best and most current statement on exclusion zones can be found in NWP 1-14M:[85]

> "Because exclusion and war zones are not simply free fire zones for the warships of the belligerents, the establishment of such a zone carries with it certain obligations for belligerents with respect to neutral vessels entering the zone. Belligerents creating such zones must provide safe passage through the zone for neutral vessels and aircraft where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral state and, unless military requirements do not permit, in other cases where normal navigation routes are affected. For this reason, the Total Exclusion Zone announced by the United Kingdom and the Argentine declaration of the South Atlantic as a war zone during the Falklands/Malvinas conflict both were problematic in that they deemed any neutral vessel within the zone without permission as hostile and thus liable to attack. Likewise, the zones declared by both Iran and Iraq during the 1980s Gulf War appeared to unlawfully operate as 'free fire zones' for all vessels entering therein."

Accordingly, an exclusion zone may be established and enforced with a view to protecting high-value targets, to contain the geographic area of the conflict or to keep neutral shipping at a safe distance from areas of actual or potential hostilities. An exclusion zone may not be established with the sole purpose of facilitating the difficult target identification process of submarines or of establishing a free fire zone.[86]

Some doubts as to the correctness of the latter finding could exist in view of the rules on exclusion zones contained in the UK Manual. The very title of the section obscures rather than clarifies the law in relation to the British position on zones. Of course, one could conclude from the context that maritime exclusion zones and total exclusion zones are but subcategories of the overall concept of 'security zones'. Still, according to paragraphs 13.77[87] and 13.77.1[88], security zones seem to serve other pur-

83 UK Manual, *supra* note 60, paras. 13.79.1, 13.80; NWP 1-14M, *supra* note 18, para. 7.9; German Navy's Manual, *supra* note 18, pp. 157 *et seq.*; San Remo Manual, *supra* note 51, paras. 105–106; Helsinki Principles, *supra* note 52, para. 3.3.

84 San Remo Manual, *supra* note 51, para. 105.

85 NWP 1-14M, *supra* note 18, para. 7.9. For a comprehensive study of this method of naval warfare *see* further R. Jaques (ed.), *Maritime Operational Zones passim* (Newport, 2006).

86 It should be recalled that the Nuremberg Tribunal (1 *IMT* p. 313) was very clear on that point: "Yet the Protocol made no exception for operational zones. The order of Dönitz to sink neutral ships without warning when found within these zones was therefore, in the opinion of the Tribunal, a violation of the Protocol."

87 "Security zones may be established by belligerents as a defensive measure or to impose some limitation on the geographical extent of the area of conflict. However, a belligerent cannot be absolved of its duties under the law of armed conflict by establishing zones in such a manner that they adversely affect the legitimate uses of defined areas of the sea."

88 "Maritime exclusion zones and total exclusion zones are legitimate means of exercising the

poses than maritime and total exclusion zones. While both are directly related to self-defence, the former may be established in order to "impose some limitation on the geographical extent of the area of conflict". The latter is restricted to self-defence purposes. It is far from clear precisely which purpose maritime exclusion zones and total exclusion zones might serve. Have they been included as mere reminiscences of the 1982 Falklands War? It should be borne in mind that neither of the zones established in that conflict were meant to restrict the area of operations. As is well known, the *General Belgrano* – a legitimate military objective – was sunk outside the TEZ.[89] In view of that precedent, maritime exclusion zones and total exclusion zones are obviously not meant to confine belligerent operations to a given sea area.

It should also be considered that there are other measures that a belligerent might legitimately adopt in order to bar a given sea area to neutral and enemy shipping. Although some of the zones established and enforced during the two world wars were nothing but extensive (and probably excessive) minefields, there is today general agreement that mine areas are to be distinguished from exclusion zones because the use of naval mines is governed by a specific legal regime. Such minefields, if reasonable in extent and with the safety of innocent navigation provided for, are in accordance with the law of naval warfare.[90] The latter also holds true with regard to blockades. According to the well-established rules and principles of the law of armed conflict on blockades, a blockade is a belligerent operation aimed at preventing vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation. The purpose of establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. If effective and if properly declared the legality of a blockade is beyond doubt.[91] Finally, exclusion zones must be distinguished from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.[92] As rightly pointed out in NWP 1-14M:

> "[w]ithin the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area

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right of self-defence and other rights enjoyed under international law. However, in declaring the zones, the exact extent, location, duration, and risks associated should be made clear in accordance with paragraph 13.78."

89 The sinking of the *Belgrano* triggered some confusion because the British TEZ had been misunderstood as a geographical restriction of the area of naval warfare. For the historical facts *see* D. Rice and A. Gavshon, *The Sinking of the Belgrano* (London, 1984).

90 *See* the reference *supra* note 76.

91 *See*, *inter alia*, San Remo Manual, *supra* note 51, paras. 93–104. For an analysis of the contemporary law of blockade *see* W. Heintschel von Heinegg, 'Naval Blockade', in M. N. Schmitt (ed.), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday*, (Naval War College, Newport, 2000) pp. 203–230.

92 San Remo Manual, *supra* note 51, para. 108; Helsinki Principles, *supra* note 52, para.3.3. *See* further D. Stephens, 'Law of Naval Warfare and Zones', in Jaques, *supra* note 85, pp. 4–2 *et seq*.

> or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic."[93]

4.4.3 Submarines as 'Commerce Raiders'

As already mentioned, modern submarines will in most cases be tasked with genuinely military missions. Still, there is sufficient evidence to show that many navies continue to envisage the use of submarines against enemy and neutral shipping. If that were to occur, the rules of the 1936 London Protocol would come into operation.[94] This means that "[i]n their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject".[95] It must be emphasised, however, that the London Protocol only deals with prize measures taken against enemy or neutral merchant vessels. Accordingly, the limitations of the Protocol applying to the sinking of merchant vessels, that is, the placing of passengers, crew and the ship's papers in a place of safety, are applicable only to those cases where a merchant vessel is destroyed as prize. Such destruction must be clearly distinguished from attacks against merchant vessels that have become legitimate military objectives.[96] Two situations where a merchant vessel becomes a legitimate military objective is provided for explicitly in the Protocol itself: persistent refusal to stop on being duly summoned to do so, or active resistance to visit and search.

Moreover, in 1922, after the negotiations of the Submarine Treaty,[97] the Italian delegate stated that the term 'merchant ship' was to be understood as referring to 'unarmed merchant vessels' only.[98] During the 1930 London Naval Conference a commission of lawyers made it abundantly clear that "the expression 'merchant vessel', where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel".[99] Finally, the

93 NWP 1-14M, *supra* note 18, para. 7.8. *See also* UK Manual, *supra* note 60, para. 13.82; German Navy's Handbook, *supra* note 18, pp. 107 *et seq*.

94 While the majority of writers agree with this finding the contrary position is taken by O'Connell, *supra* note 56, p. 52: "The truth is that the requirements of the London Protocol are to be observed only in the situation where the submarine can act with minimal risk on the surface. Since that situation is now an ideal hardly ever in practice to be realized, one is compelled to draw from the Doenitz trial the conclusion that submarine operations in time of war are today governed by no legal text, and that no more than lipservice is being paid in naval documents to the London Protocol."

95 Rule 1 of the 1936 London Protocol. *See also* UK Manual, *supra* note 60, para. 13.31; San Remo Manual, *supra* note 51, para. 45.

96 *Cf.* the Explanations to paras. 139 of the San Remo Manual in Doswald-Beck, *supra* note 51, pp. 209 *et seq*.

97 *Supra* note 41 and accompanying text.

98 *See* the references in Mallison, *supra* note 8, p. 42, fn 84.

99 Documents of the London Naval Conference 1930 (His Majesty's Stationary Office, London, 1930) p. 443.

Nuremberg Tribunal, in the case against Admiral Dönitz, was "not prepared to hold Dönitz guilty for his conduct of submarine warfare against British armed merchant ships".[100] The Tribunal also explicitly referred to the British convoy system, to the integration of "merchant vessels into the warning network of naval intelligence", and to the announcement of the British Admiralty of 1 October 1939 "that British merchant ships had been ordered to ram U-boats if possible".[101]

Today, there is widespread agreement that both, enemy and neutral merchant vessels, may be attacked on sight if they

- engage in belligerent acts on behalf of the enemy;
- act as an auxiliary to an enemy's armed forces;
- are incorporated into or assisting the enemy's intelligence gathering system;
- sail under convoy of enemy warships or military aircraft;
- refuse an order to stop or actively resist visit, search or capture; or
- otherwise make an effective contribution to the enemy's military action.[102]

A merchant vessel engaged in any of the aforementioned activities is, by its use or purpose, making an effective contribution to the enemy's military action. And since their neutralisation will, in those circumstances, regularly offer a definite military advantage they may be attacked on sight – that is, without prior warning. Since there is no differentiation between surface and subsurface vessels[103] merchant vessels that have become legitimate military objectives may be attacked by submarines with all means available, provided that the basic rules and principles of target discrimination, especially the prohibition on excessive collateral damage, are observed.

There is, however, a division of opinion as to the exhaustive character of those situations where enemy merchant vessels become legitimate military objectives. According to NWP 1-14M enemy merchant vessels are liable to attack if they are "integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment".[104] While it is not absolutely clear what is meant by 'war-sustaining' there are reasons to believe that, according to the US position, enemy merchant vessels may be targeted for the sole reason that they are engaged in exports of products, such as oil, the revenues from which would enable the enemy to continue or sustain its war effort. It must be emphasised that the only legitimate method in naval warfare for preventing exports from leaving enemy territory is by way of naval blockade. Even prize measures, especially those directed against the carriage of contraband, may be taken against enemy imports only.[105] Other states have not taken up the US approach on 'war-sustaining effort' which, thus, cannot be considered to be

100 1 *IMT* p. 312.

101 *Ibid.*

102 San Remo Manual, *supra* note 51, paras. 60 and 67; NWP 1-14M, *supra* note 18, paras. 8.6.2.2 and 7.5; UK Manual, *supra* note 60, paras. 13.41 and 13.47; German Navy's Handbook, *supra* note 18, pp. 273 *et seq.*, 329 *et seq.*

103 *Supra* note 95.

104 NWP 1-14M, *supra* note 18, para. 8.6.2.2.

105 *See*, *inter alia*, San Remo Manual, *supra* note 51, para. 148.

customary in character. Only if a considerable number of states were to follow the US example, including those states whose interests are specifically affected, would an attack on enemy merchant vessels engaged in exporting important goods be in conformity with the law of naval warfare. Since, for the foreseeable future, such a course of conduct is rather unlikely, neither surface warships nor submarines are permitted to target enemy merchant vessels integrated into the enemy's war-sustaining effort.

Accordingly, submarines may very well be employed in a 'commerce raider' role if enemy or neutral merchant vessels are to be considered legitimate military objectives. If, however, merchant vessels continue to enjoy protection against attack (not against capture as prize!) submarines will only in exceptional circumstances be in a position to make use of the right to destroy a captured merchant vessel as prize. Apart from strategic submarines, most submarines currently in use by naval armed forces would not be in a position to place passengers, crews and ship's papers into a place of safety because they are simply too small to take on board passengers. Moreover, they would, in order to comply with their obligations under the 1936 London Protocol, have to surface and would thus become extremely vulnerable to enemy attack. Therefore, and in view of the fact that the exclusion zone device may never be made use of in order to establish a 'free fire zone'[106], it is more than doubtful whether submarines will be employed for the purpose of visiting, searching, or capturing enemy or neutral merchant vessels.

4.5 Obligation to Rescue

As regards the obligation to rescue it has to be kept in mind that there exist two separate legal bases. On the one hand, there is Article 18 of Geneva Convention II.[107] On the other hand, a duty to rescue is contained within the 1936 London Protocol.

To start with the latter, it needs to be re-emphasised that the obligation to place passengers, crew and ship's papers in a place of safety must be complied with only before a captured merchant vessel is destroyed as prize.[108] Strictly speaking this does not represent an obligation to rescue, since those to be put in a place of safety would not yet be in a situation of distress. Rather, it is a precautionary measure a belligerent must take if he decides that a prize is too important to allow it to continue its journey, and if capture at sea or diversion to an own or allied port is impossible.[109] If the commander of an intercepting submarine feels unable to comply with that obligation he is obliged to abstain from any further action against the merchant vessel.[110] It also needs

106 *Supra* notes 84 *et seq.* and accompanying text.

107 *Supra* note 45.

108 *Supra* note 96 and accompanying text.

109 It is this situation the Nuremberg Tribunal (1 *IMT* p. 313) had in mind when it determined: "The argument of the Defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Dönitz is guilty of a violation of the Protocol."

110 *Ibid.*

to be emphasised that such an obligation does not exist in the case of persistent refusal to stop on being duly summoned to do so, or of active resistance to visit and search. Neither does the obligation exist if a merchant vessel has become a legitimate military objective.

Article 18 Geneva Convention II provides: "After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled." It follows from Article 13 Geneva Convention II that this obligation is not owed to members of enemy armed forces only. It also applies, *inter alia*, to persons accompanying armed forces, for example, civilian contractors on board a warship, and to members of crews, including masters, of merchant vessels.[111] It therefore makes no difference whether an enemy warship or an enemy (or neutral) merchant vessel has been sunk.[112] However, Article 18 may not be interpreted as obliging naval commanders to search for and rescue survivors 'at all times'. Such an obligation only exists for land warfare.[113] In naval warfare the obligation comes into operation 'after each engagement' only. The duration of such an engagement will depend upon the circumstances ruling at the time but it is quite obvious that an engagement is not necessarily terminated as soon as a vessel has been sunk. Moreover, belligerents are obliged only to take all 'possible' measures. This is of specific relevance for submarines as clearly shown by the ICRC commentary:

> "Of course, one cannot always require certain fighting ships, such as fast torpedo-boats and submarines, to collect in all circumstances the crews of ships which they have sunk, for they will often have inadequate equipment and insufficient accommodation. Submarines stay at sea for a long time and sometimes they neither wish nor are able to put in at a port where they could land the persons whom they have collected. Generally speaking, one cannot lay down an absolute rule that the commander of a warship must engage in rescue operations if, by doing so, he would expose his vessel to attack."[114]

While it is clear that submarine commanders are not obliged to engage in search and rescue operations if that would imply an unreasonable risk for the ship, this does not mean that they are relieved of any obligation whatsoever. If available, survivors must be provided with the means necessary to enable them to await rescue or to reach a coast.[115] Whether or not there also exists an obligation to contact a hospital ship, rescue craft, or other ship in the vicinity would again, depend upon the circumstances ruling at the time. This question must be answered in the negative if the use of the sub-

111 For the historical background *see* J.S. Pictet, *Commentary on the II Geneva Convention* (International Committee of the Red Cross, Geneva, 1960) pp. 98 *et seq*.

112 *Ibid.*, p. 131.

113 Article 15, para. 1, Geneva Convention I provides: "At all times, and particularly after an engagement … "

114 Pictet, *supra* note 111, p. 131.

115 *Ibid.*

marine's communications systems would either put the submarine at risk of attack or jeopardise the mission accomplishment.

5. Concluding Remarks

Apart from Article 20 UNCLOS and the 1936 London Protocol, which is considerably limited in scope, there are no rules of naval warfare exclusively designed for submarine operations. As seen, the lack of specific rules will in most cases not lead to considerable problems. The law applicable to surface warships also applies to submarines. The fact that submarines are not in a position to act in exactly the same manner as surface vessels is owing to their special design, and is certainly not a sufficient justification for any claim to adapt or modify the existing rules and principles of international law. This holds true for both peacetime and wartime rules. The vulnerability of submarines when surfaced is more than compensated by the many advantages resulting from their mode of operation.

The only aspect of submarine operations that might be in need of clarification is the use of UUVs. This relates to their legal status – autonomous or independent? – as well as to the question of navigational rights in peacetime and wartime. The latter aspect, in particular, is far from being settled. It is, at present, impossible to predict the reaction of neutral coastal states in cases where they encounter a belligerent UUV in their territorial seas or in their archipelagic waters.

Still, this is no sufficient ground for justifying a codification of either the law of naval warfare and of neutrality at sea in general or of the customary rules and principles applicable to submarine operations in particular. The most likely outcome of any such codification effort will be that those states whose interests are specifically affected, for example, the US and the PRC, will either remain absent or refuse to become a party to the envisaged treaty.

Hence, any codification would, at best, be counterproductive. It would, according to the position taken here, also be unnecessary because the few parts of the law applicable to submarine operations that may be considered unclear can easily be specified in military manuals or in unilateral declarations of a binding or non-binding character.

Chapter 11

Occupation and Sovereignty – Still a Useful Distinction?

*Martti Koskenniemi**

1.

Reality, we are told, is putting international law under pressure. In particular, new forms of violence and warfare are undermining the formal rules and institutions of international humanitarian law (or less euphemistically the 'laws of armed conflict'). There is a need of new and unorthodox measures to engage equally unorthodox enemies operating within the expanding gray zones between peace and war. Much has been written about the challenges to humanitarian law emerging from the privatization of warfare by terrorists and private security companies, the hybrid nature of military action between traditional peacekeeping and formal war, new forms of internal violence, psychological and cyber-warfare and so on. The principal point of concern has been the apparent inability of the formal distinctions of international humanitarian law – particularly the law of the four Geneva Conventions of 1949 and the Additional protocols of 1977 – such as those between war/peace, internal/international, combatant/non-combatant and so on to capture the fluidity of today's battlefield reality. On the contrary, it has often seemed that to stick to such distinctions will undermine the ability to respond effetely to some of the more important threats. The distinctions cannot have more force that the purpose for which they were introduced. If they positively thwart those purposes, what possible reason might there be for keeping them?

My intention is not to participate in this general discussion.[1] Instead, I will focus on one traditional concept, namely belligerent occupation, and I will outline the stakes for different actors for the blurring of the boundary between *that* notion and that of its apparent obverse, territorial sovereignty. Despite the important role that the law of occupation plays in the corpus of international humanitarian law, there have not been many cases in the decades since World War II where it would have been applied as a result of a declaration to that effect by a belligerent party. Apart from the Israeli occu-

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1 The best analysis is D. Kennedy, *War and Law* (Princeton University Press, 2006) to which this discussion is greatly in debt.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 163–174.

pation of the West Bank and Gaza, and the early stages of the occupation of Iraq by the US-led coalition in 2003–2004, there are no cases of formally declared occupation – and even those two are far from school examples. There are many reasons for why a power undertaking military operations outside its own territory might want to refrain from adopting the status of an occupying power under the Fourth Geneva Convention but the principal among these is surely that this would limit its own liberty of action while providing no guarantee that it would do the same to the adversary that might continue to undertake operations from the relative safety of hiding amongst the civilian population.[2] Becoming an occupying power might, in this respect, seem to constitute a trap

Nevertheless, it cannot be denied that the notion of belligerent occupation is deeply embedded in the ideological firmament of international law. This presumes a stark contrast between the normality of peace and the exception that 'war' (or 'armed conflict') is understood to constitute to it. When territory is seized in connection with operations under armed conflict, 'sovereignty' on the territory is put in abeyance and is replaced by the temporary legal status of 'occupation'. The distinction sovereignty/occupation thus translates the all-important distinction between 'peace' and 'war' into the language of territorial authority. This translation is assumed to have a significant legal impact. Where sovereignty denotes full, plenary authority, occupation (as an exception to it) is limited to the specific rights, powers and privileges that the occupier enjoys as laid out in the Fourth Geneva Convention and in customary law. Whereas 'sovereignty' does not look beyond itself – that is to any moment of future transcendence – 'occupation' anticipates the restoration of sovereignty after the conclusion of the peace treaty.[3]

It is readily understandable why it appears so important to make a clear distinction between these two modes of territorial authority. 'Sovereignty' stands for order inside the territory as well as in the relations between that and other territories – indeed it is the principal notion through which 'order' has been approached in Western legal and political thought at least since the Peace of Westphalia, 1648. Although its meaning has been often debated and its moral significance has been sometimes put to doubt, no other notion has taken its place to address the basis and identification of territorial authority. By contrast, 'occupation' signifies the absence of a stable order in a territory, and permanent institutions exercising it. It is an intermediate status that accepts the fact of the collapse but aims to limit its consequences and to prepare the ground for the re-establishment of order and sovereignty in the future. To be an 'occupying power' is precisely not to be a 'sovereign'. Where a sovereign is by definition not legally accountable to anyone, an 'occupying power' is accountable to the population and to the external world by reference to the specific rules and principles that govern occupation under international humanitarian law.

2 *See* the review of occupations since the 1970s by E. Benvenisti, *The International Law of Occupation. With a New Preface by the Author* (Princeton University Press, 2004), pp. 149–190.

3 Benvenisti, *ibid.*, pp. 3–6.

2.

Now there is a number of ways in which the apparently basic and relatively straightforward distinction between the tranquil normality of sovereignty and the exceptional moment of belligerent occupation has been put to question. Let me mention five.

The first case is that of occupation by a belligerent state acting with or without the assistance of others (other states, international organizations) that has been victorious in a war against a tyrannical or otherwise unacceptable sovereign and sets up an interim administration to carry out 'regime change' in the occupied territory – the cases of Afghanistan and Iraq *par excellence*.[4] In this case, there is no intention whatsoever to return to the *status quo ex ante*. The whole point of the military action and the subsequent occupation is to transform the country: to give it a new constitution, elect new leaders, set up a new administrative and economic system detached from links to the collapsed sovereign and to see to it that the state apparatuses will support the objectives of the intervention also in the long run. To the surprise of some, the United States announced military occupation of Iraq, run by the Coalition Provisional Authority (CPA) in 2003.[5] On 28 June, 2004 direct rule of the CPA was ended and a new 'sovereign and independent' Interim Government of Iraq assumed the full responsibility and authority of the state. A transitional constitution came into effect two days later. But of course, here the distinction between 'occupation' (the moment before 28 June, 2004) and 'sovereignty' (the moment after 28 June, 2004) was a line drawn in water, a distinction without a difference. From the perspective of the Iraqi population, or indeed of much of Iraqi administration, and actual activities undertaken by US military and civilian authorities and co-operating Iraqi citizens, what had existed before continued in a largely unchanged form thereafter.

In wars for regime change, the distinction between occupation and sovereignty is erased practically by definition. It is the declared purpose of the military victor to seize the reins of government, including the highest constitutional powers, and enact a full-scale transformation in the political (and often social) structures of the territory. Developments in the past two decades provide many illustrations of this. Wars are no longer wars of annexation but for protecting human rights, saving failed states and 'regime change', involving multilateral (Western-led) forces acting often with the UN's blessing. For advocates of this type of warfare: "The modern occupant temporarily acts as a de facto sovereign of the occupied territory".[6] It is possible to theorise this by reference to the distinction between 'constituting' and 'constituted' powers and interpret the action of the occupier as those of a sovereign on whose power and political will everything about the constitution, including any question of its formal valid-

4 For two useful but assessments on completely opposing sides, *see* G. T. Harris, 'The Era of Multilateral Occupation', 24 *Berkeley J. IL* (2006), pp. 1–78 and N. Bhuta, 'The Antinomies of Transformative Occupation' 16 *European Journal of International Law* (2005), pp. 721–740.

5 For the initial (and in part still contuning) confusion, *see* J. C. Llorens, 'Libération ou occupation? les droits et devoirs de l'Etat vainqueur', in *L'Intervention en Irak et le droit international* (Paris, CEDIN I, Pedone 2004), pp. 221–223.

6 G. T. Harris, 'The Era of Multilateral Occupation', 24 *Berkeley J. IL* (2006), pp. 19, 21.

ity, is dependent. The occupant imagines itself as a trustee that transforms the constitutional order in view of what it sees as the long-term the interests of the population.[7]

A second somewhat analogous case is where territorial authority has been set up by the United Nations or other international organisation, such as the European Union, in order to oversee the orderly management of a territory after the collapse of state structures or other forms of public authority as a result of internal or external violence. Again, there has been much controversy over the justification, nature and extent of the wide-ranging authority (including legislative authority) of the UN Special Representative in Kosovo and in East Timor for example.[8] Especially when such operation is set up in the aftermath of a civil war, with involvement by external parties, it moves into a zone of authority somewhere between territorial sovereignty and traditional military occupation. Indeed, if one examines the logistic and normative problems faced by such operations, it seems quite pointless to distinguish the rules applicable to them from rules applicable to (belligerent) occupation. The interests of order and legitimacy seem indistinguishable in the two cases.[9] From the perspective of the population, such authority, especially when reinforced by heavy military component, may seem much like the office of a Governor-General in a colonial territory. The language used by international organisations does not, of course, refer to taking over 'sovereignty' but to (mere) temporary exercise of certain sovereign rights or 'functions'.[10] Yet, one may think, this is not altogether so different from the policies of most colonial powers in the late-19th century that also avoided formal annexation so as to limit the budgetary and administrative responsibilities that would have ensued from formal sovereignty.[11] In both cases, there is much talk about handing full sovereignty to the indigenous population once it has become 'ready' for it. Analysis of the extent of the powers of international government of territory, as well as the degree of local hostility, may likewise support the colonial analogy and in any case situate the operation in a zone between full sovereignty and occupation. The distinction between 'sovereignty' and the (mere) exercise of sovereign rights may be necessary for the legitimacy of this type of 'international government'. Applied to live experience, however, it may often seem merely a kind of juristic hair-splitting with little distance from ideological obfuscation.

A third and related development is the increasing conceptualisation of the regime of territorial occupation in terms of protecting the security and welfare of the population – in terms analogous or identical to the justification of sovereignty. Belligerent

7 Bhuta, *supra* note 4, pp. 737–9.

8 For the two cases, *see* O. Korhonen *et al.*, *International Post-Conflict Situations: New Challenges for Co-Operative Governance* (Erik Castrén Institute Research reports 18/2006, Helsinki, 2006), pp. 131–168 and generally *passim*.

9 For such 'convergence thesis', *see* S. R. Ratner, 'Foreign Occupation and International territorial Administration. The Challenges of Convergence', 16 *European Journal of International Law* (1995), pp. 695–720.

10 *See* SC Res. 1244 (1999) on Kosovo and 1272 (1999) for East Timor. *See also* A. Orford, *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003), *especially* pp. 126–143.

11 M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001), pp. 110–143.

occupation arose in the 19th century as a technique for managing the European territorial order.[12] Whatever the declared objectives of the powers, a conflict between them was above all a conflict between sovereigns, and it was the task of the law to protect sovereignty. This was to be done by striking a balance; the occupying power would be entitled to conduct operations from the occupied territory, but it was not entitled to change its status. The assumption was that the occupying state would have no other interest in the territory than the security of its troops and the orderly conduct of the war. But most 20th century war has been ideological and total: protecting sovereignty – including that of the occupied state – could not be the law's principal objective. The Fourth Geneva Convention of 1949 was no longer concerned with rights of the sovereigns. Instead, it seeks to provide for the welfare of populations finding themselves "in the hands of the party to the conflict or the Occupying Power of which they are not nationals" (Article 2). The occupying power may introduce changes in the government of the territory, but only provided that persons are not 'deprived of the rights provided by' the Convention (Article 47). This is a realistic law, no longer obsessed by formal status. The belligerent occupant becomes a trustee of the population, charged to administer the territory in view of the interests of the inhabitants.[13]

In a series of recent judgments, the Israeli Supreme Court, acting as High Court of Justice on the Occupied Territories, has strikingly affirmed this view. In addition to seeing to the security of the occupying power, the military authority must also protect the well-being of the people under occupation. In the *Beit Sourik* village case of 2004, for example, the Court observed that the measures taken to secure the occupation by the military commander "must be properly balanced against the rights, needs and interests of the local population".[14] In this and in other cases, the court has insisted on the application of a test of 'proportionality'. Any intervention by the occupying authority in the lives of the population must be strictly proportionate to the advantage gained by such intervention. This approach, it held, was "well anchored in the humanitarian law of public international law".[15] But it also emanated from "general principles of law, including reasonableness and good faith".[16] Proportionality was a "general problem in the law, both domestic and universal" it said, and added that "its solution is universal".[17] Hence it felt no scruple to refer to Israeli administrative law as well. With this, it defined its job like that of any court, assessing the activities of any authorities, exercising the mundane business of government over a population.[18] "The modern occupant", as Benvenisti puts it, has become a "heavily involved regulator".[19]

A fourth phenomenon that appears to put into question the fundamental nature of the occupation/sovereignty distinction lies in the increasing application of human

12 Bhuta, *supra* note 4, pp. 723–733.

13 Benvenisti, *supra* note 2, pp. 7–106.

14 The *Beit Sourik* case (HCJ 2056/04) para 34 (p. 18).

15 *Ibid.*, para 35 (p. 20).

16 *Ibid.*, para 36 (p. 21).

17 *Ibid.*, para 36 (p. 21).

18 I have discussed this in much greater length in M. Koskenniemi, 'Occupied Zone – a Zone of Reasonableness', *Israeli Law Review* (2008), forthcoming.

19 Benvenisti, *supra* note 2, xi.

rights law under military occupation. This has now been affirmed not only by human rights treaty bodies – including the Human Rights Committee[20] – but also the International Court of Justice in the 1996 *Nuclear Weapons* and the 2004 *Wall* opinions as well as the 2005 case on *Armed Activities* (*Congo* v. *Uganda*).[21] The jurisprudence of the European Court of Human Rights (ECHR) on the applicability of the European Convention under military occupation has fluctuated. Nevertheless, the Court recently affirmed that the Convention will apply to military activities:

> "…where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area outside its national territory … The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, though its armed forces, or through subordinate local administration".[22]

The relevant criterion for the application of human rights is not formal sovereignty but 'exercise of effective control'. For this reason, the Inter-American Court of Human Rights affirmed in 2002 that the Guantanamo detainees came under the Convention because they were "wholly within the authority and control of the United States Government".[23] The position of the Israeli High Court of Justice has been more equivocal – sometimes applying human rights arguments, sometimes limiting itself to humanitarian law. Yet, its most recent jurisprudence seems to indicate that formal applicability is one thing, and that the Military Commander is in any case called upon to safeguard the human rights of the population.[24]

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20 Thus, Paragraph 10 of General Comment No. 31 of the Human Rights Committee (adopted on 29 March 2004 (2187th meeting) states that: "…a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party … the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."

21 *See Legality of the Threat and Use of Nuclear Weapons*, ICJ Reports 1996 (I), p. 239 (para. 24); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para 106 and *Armed Activities* (*Congo* v. *Uganda*), ICJ Reports 2005, paras 215–221.

22 ECHR, *Issa* v. *Turkey* (31821/96) (30 March 2005), para. 69. But *see also R. (on the application of Al-Skeini)* v. *Secretary of State for Defence* (2004) EWHC 2911: [2005] 2. W.L.R. (QBD) Admin. But also critique in P. Leach, 'The British Military in Iraq – the Applicability of the *Espace Juridique* Doctrine under the European Convention on Human Rights', Public Law (2005) AUT, pp. 448–458.

23 Precautionary measures issued by the Inter-American Commission on Human Rights, Detainees at Guantanamo Bay, Cuba (12 March 2002).

24 *See* A. Gross, 'Human Proportions: Are Human Rights the Emperor's New Cloths of the International Law of Occupation', 18 *European Journal of International Law* (2007), pp. 9–28.

That the occupying authority is under an obligation to guarantee the human rights of the population is merely a special case of the law's increasingly 'realistic' focus on effective control instead of formal sovereignty. As the International Court of Justice put it in relationship with South Africa's action in Namibia: "Physical control of territory and not sovereignty or legitimacy of title is the basis of State liability for acts affecting other States."[25] Again, it is easy to understand the rationale of such a view. A state ought not to be able to escape from duties that befall it when it is acting in its own territory by 'relocating' its activity in some other territory, whether this be made legally or not.

This leads directly to the fifth example of the loss of a bright line between occupation and sovereignty, namely the shift of focus in the law from formal sovereignty to how it is *exercised*. Most of us today think of sovereignty functionally, deferring to its objectives – provision of security and welfare to the population. In the leading case on territorial sovereignty, the *Island of Palmas* from 1928, the arbitrator only tried to find out who had exercised effective power on the island, because only it enabled the protection of the rights of the inhabitants and the interests of the other states in that territory.[26] Since the early case of the *Nationality Decrees* of 1923, international lawyers have spoken of the 'relativity' of sovereignty, the way in which the extent of sovereignty is controlled by the normative environment around the state – the obligations that bind it.[27] This was long since accepted in the UN where the reservation of 'domestic jurisdiction' has become increasingly weak as a defence against international involvement in the way UN members are governed.[28] The development has now peaked in the debates since 2001 on the 'Responsibility to Protect' – the Canadian initiative to rethink the boundaries and force of sovereignty in terms of responsibility to the local population. It is now commonplace to say that sovereignty ought not to shield tyrannical governments. We respect it if it brings us valuable objectives, above all security, welfare, perhaps also human rights, 'good governance' and the 'rule of law'. If sovereignty were to endanger these, then as Western interveners in Kosovo in 1999 argued, there is surely no reason to respect it.[29] One need not be a militarist to think in this way. Functional interventionism underlies much of human rights law, and international trade and environmental law, all of which lift the veil of formal sovereignty so as to enable managing international problems in efficient ways.[30]

The Geneva system, like modern law, is anti-formalist: "Never mind status. All that counts is the existence of de facto power, whatever its origin or objectives, availa-

25 ICJ, *Namibia* case, Reports 1971 p. 54 (para 118).

26 *Island of Palmas* case, II UNRIAA, pp. 869–870.

27 PCIJ, *Nationality Decrees* case, Ser. B 4 (pp. 23–24). *See further* M. Koskenniemi, *From Apology to Utopia. The Structure of International legal Argument: Reissue with a New Epilogue* (Cambridge University Press, 2005), *especially* pp. 258–272.

28 *See e.g.*, M.S. Rajan, *The Expanding Jurisdiction of the United Nations* (Dobbs Ferry, Oceana 1982).

29 See further my The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law", 65 *The Modern Law Review* (2002), pp. 159–175.

30 For the argument in environmental law, *see* F. X. Perrez, *Cooperative Sovereignty. From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, The Hague, 2000).

ble to be controlled and directed and, above all, used for good purposes. Do not bind yourself beforehand; react to facts as they arise on the ground. Status should not constrain but liberate you." The allied occupation of Germany after the Second World War created a lively debate about where sovereignty stood, and what was the position of the allied powers. The distinction between sovereignty – that continued to exist in Germany – and the exercise of sovereign rights – that was vested in the Allied powers – was a useful way to get rid of Nazi rule, and to safeguard the emergence of a democratic Germany without burdening the occupying powers with all the responsibilities of full sovereignty.[31] Or think of the opposite case. From the end of the Second World War, until 1991, most of us dealt with the USSR as the territorial sovereign in the Baltic republics. I remember how striking it was to participate a few years later, in the mid-1990s, in a legal case in a Finnish court having to do with the enforcement of certain contracts made with Soviet authorities over assets situated in the Baltic republics. The Court held the contracts non-enforceable because they had been concluded by a military occupant.[32] What had looked like 'sovereignty' from 1940 onwards, turned out suddenly as (merely) 'occupation'. The two notions had lost all of their defining factual or formal character; they now became a part of a discourse of political approval and disapproval.[33]

In each of these five cases (and doubtless a number of others) it seems both impossible and somehow pointless or counter-productive to insist on a formal distinction between occupation and sovereignty. At best, they become descriptive markers on a sliding scale in forms of modern governance – one more stable than the other, perhaps, but without a difference inasmuch as the legal rights and duties associated with them are concerned. Against the functionalism of this new law, insisting on sovereignty (or indeed fighting occupation) will appear as an atavistic residue from some bygone nationalist ideology, identity politics, pre-modern myth and explosive irrationalism to be cured by the civilizing ethos: weighing the interests and balancing the needs of the concerned population – the cool reasonableness of modern management.

3.

Nor is this any postmodern extravaganza but respectful of the Western political tradition since Jean Bodin and the rise of natural jurisprudence, the Hobbesian dialectic of protection and obedience. Sovereignty did not arise as a philosophical invention but out of Europe's exhaustion from religious conflict. It was meant to serve the practical purpose of pacifying European societies internally and in order to extend into the international world a principle of peace and order, detached from suspect ideals of 'universal monarchy'. Of course, this understanding of sovereignty did not emerge

31 *See e.g.*, R. Jennings, 'Government in Commission', XXIII *British Yearbook of International Law* (1946), pp. 112–141.

32 *SKOPBANK* vs. *The Republic of Estonia*, (Helsinki City Court No. 496, 21 January 1998) reported in T. Långström, *Transformation in Russia and International Law* (Brill, Leiden, 2003), p. 195.

33 *See* M. Koskenniemi and M. Lehto, 'La succession d'Etats dans l'éx-URSS, en ce qui concerne particulièrement les relations avec la Finlande' XXXVIII *Annuaire francais de droit international* (1992), pp. 190–198.

overnight. The science of modern government began in the 16th century with the stated effort to guarantee *conservatio status* and *tranquillitas reipublicae*. Within a century, these objectives had been supplemented by the goal of the welfare of the people, *Glückseeligkeit* as 18th century German *Polizeywissenschaft* conceived it.[34] One need not go further than Samuel Pufendorf's *De jure naturae et gentium* of 1672 to find the unexceptional statement "The general law for supreme sovereigns is this: 'Let the people's welfare be the supreme law'".[35] Sovereignty did not invite deference owing to some transcendental value embodied by it. On the contrary, its historical and conceptual point was to look *away* from anything transcendental, into the actual power of secular rulers and to harness that power for the benefit of the population. Without power, there could be neither security nor welfare. Without power, also the bond between protection and obedience is broken and 'anarchy' will re-emerge.

From this perspective, then, there is no substantive difference between sovereignty and occupation. Instead, sovereignty now appears as a glorified form of occupation, an occupation that has begun to seem so stable and natural that we have forgotten from where it came, or how it consolidated itself. Yet, analytical thought would seem to insist, why take for granted something for the sole reason that it has become habitual? Even the most stable sovereignty must also have its dark side: which sovereignty, after all, did not begin its career in blood? In a time of remembering past wrongs, and calling for accountability, why would sovereignty be shielded? Surely – and this is what the five examples above seem to suggest – there is reason to judge sovereignty by its merits instead of being enchanted by its myths. Some sovereigns are doubtless more worthy of deference than others, and yet others are patently vicious. Surely such differences must have importance.

The same with occupation, but in reverse. Some occupation regimes are undoubtedly evil, but others perhaps not so. Once we part with the formal mystique of sovereignty there is no reason not to judge occupation, too, by its merits. This is what the practice of transformative occupation, or occupation by an international organization, after all, claims for its defence. Of course, it would be excellent if there were a stable and familiar sovereignty in a territory. But familiarity and stability are not conclusive as criteria for judging the acceptability of a form of authority. Colonial protectorates, for example, tended to be both stable and familiar once upon a time. And yet there is of course much more to be said about them. Such arguments strongly suggest that there is no good reason to make a firm distinction between sovereignty and occupation. Both are forms of territorial rule, to be adjudged by reference to what can be the only reasonable criterion, namely the provision of security and welfare to the population.

34 *See e.g.*, P. Preu, *Polizeibegriff und Staatszwecklehre. Die Entwicklung des Polizeibegriffs durch die Rechts- und Staatswissenschaften des 18. Jahrhunderts* (Göttingen, Schwartz, 1983).

35 S. Pufendorf, 'On The Law of Nature and of Nations', Bk VII, Ch 9 § 3, in Carr and Seidl (eds.), *Political Writings* (Oxford University Press, 1994), p. 242. *See also* M. Foucault, *Securité, territorire, population. Cours au Collège de France 1977–1978* (Gallimard/Seuil, Paris, 2004).

4.

These arguments emerge from what could be called 'reduction to purpose', the view according to which the significance of social arrangements, the criterion whereby they ought to be judged, is how they fulfil their purpose. That purpose, again, is understood to reside in the fulfilment of the wishes, desires, or preferences of the people – captured within the traditional formula of 'security and welfare'. From such perspective, there is indeed no real difference between sovereignty and occupation. The conventional international law distinction between the two notions would then appear as a kind of ideological smokescreen, the law's irrational capitulation to a single word – a myth, a taboo – as indeed the familiar critiques of sovereign statehood have suggested.[36]

This, however, is hardly the last word that can be said about the matter. The reduction to purpose in a functional world is itself a kind of ideology and relies on a myth – namely the myth of the transparency of the 'purpose'. It assumes our more or less unproblematic access to what it 'really' is that territorial rule ought to achieve and that once we know this, realising the stated purpose is a relatively straight-forward matter, best carried out by technical experts. This is not the place in which to engage in a fundamental critique of such a 'managerial mindset'.[37] Let me just sketch two sets of difficulties in it that highlight the political (instead of technical) nature of the assessment of forms of territorial rule.

A first relates to the difficulty of clearly seeing what the 'purpose' of a particular regime of territorial authority might be. Even if we agree that it ought to be formulated in terms of the provision of 'security and welfare', this leaves it open what we mean by those expressions. They have no automatic meaning. What they signify in particular situations refers back to assessments that are bound to differ between individuals and social groups. Some might think of 'security' in terms of security of ownership rights, the stability of a country's investment system, while for others it may mean guarantees for the maintenance of basic social welfare services. Such differences of interpretation lay behind the differing treatment that the measures taken by the Argentinean government in the course of its financial crisis in 1999–2002 received from different ICSID tribunals: was there or was there not an 'economic necessity' that justified the devaluation of the assets of foreign investors?[38] That 'security' is a contested concept has, of course, become strikingly evident in the assessment of the tightening security controls undertaken as part of the 'fight against terrorism'. Is 'security' better described as protection against terrorism, or the undisturbed exercise of individual rights and freedoms? That the 'welfare' or 'security' of one may be attainable only by encroaching on the 'welfare' or 'security' of another is a simply a truism. But it is

36 *See* my 'The Wonderful Artificiality of States', *Proceedings of the American Society of International Law* (1994), pp. 22–29 and *e.g.*, J. Bartelson, *The Critique of the State* (Cambridge University Press, 2001).

37 I have begun such critique for example, in my 'Constitutionalism, Managerialism and the Ethos of Legal Education' 1 *European Journal of Legal Studies* (2007), pp. 1–18.

38 For a discussion, *see* M. Weibel, 'Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*', 20 *Leiden Journal of International Law* (2007), pp. 637–648. However, I do not share the author's optimism about a better technique for striking, as he sees the task, of the 'balance' between the investor and the host state in the absence of a thorough *political* agreement on what is to be attained by investment law in the first place.

one that fundamentally complicates the assessment of any regime: whose 'security' and whose 'welfare' do we have in mind?

But even if there were no problem in determining what the right purpose of a territorial regime were, this in itself provides little clue as to how best to attain it and what out of a number of alternative policies might lead there. Eradication of poverty is undoubtedly a widely agreed objective and a criterion to judge a regime. But how should this be translated into particular measures? Is a restructuring operation under the guidance of the World Bank the right way to go about it? Or should we instead regulate the economy, nationalise key industries and limit foreign trade in view of key domestic concerns? Does democracy further a stable economic environment or does it, instead, provoke attacks on economic structures and operators?[39] Should one integrate in a global economy or instead refrain from such integration? Even if we agree on the need of social peace, we remain completely divided on whether that should be attained by tightening social control or by increasing political freedoms.

Now the point is not to say that such questions would be impossible to solve. Their resolution is part of everyday political debate and action. The point is to say that this is not 'simply' about the use of technical expertise but involves political assessment – 'prudence' in the classical vocabulary, the use of imagination and 'wisdom' without guarantee that everybody would agree in the end. Such decision-making cannot be oblivious to the conditions under which it takes place: Who is entitled to participate and how, under what rules and with what kind of accountability? In the ideal world of the managerialist, reserves of the world's best technical experts would be available somewhere to be always called upon to address problems irrespectively of when and where they arise. In this world, standard solutions and universal criteria of measurement would apply. In the real world, however, problems are 'political' in the specific sense that there is no technical, scientific, juridical or other language in which they would have 'already' been resolved so that the only questions would be limited to those of technical application. Here it is far from irrelevant *who* the decision-makers are and how can their decisions be contested.

Imagine, for example, that Israel developed the highest quality technologies of security- and welfare-production in the world (whatever that might mean) and that anything produced in Palestinian universities or think-tanks could come nowhere near the technical skill of those Israeli institutions. Imagine that Israel agreed to raise the standard of life and security in the West Bank and Gaza to levels that could not even be imagined if they were left under the status quo, but only on condition of attaining 'sovereignty' over those territories. Would this be sufficient to erase the distinction between Israeli 'occupation' and Israeli 'sovereignty'? The Palestinians would be hardly likely to agree. What should the law say? Should it just take the bargain offered by Israel as the only *rational* solution and apply it over the heads of the Palestinians and to their own good?

The rhetorical nature of this question might provide the beginnings of an answer. There is a way of social life that cannot be reduced to the aggregate of the individual objectives that people want to attain, a way in which a particular form of exercise of authority over a territory can and should be evaluated irrespectively of the outcomes it

39 *Cf.* A. Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (Doubleday, New York, 2003).

produces. Political authority is not simply about outcomes. It is also and perhaps above all about selfhood and relationship to others. There is an ideal of human individuality that takes the perspective of every individual's growing up and becoming part of a community that one has reason to think as particularly one's 'own' not only because that is where one has lived but because one has been a participant in its collective self-formation. This ideal of individuality looks upon social life not just as a platform for carrying out objectives such as security and welfare, or obeying those in power (which may often amount to the same thing) but as participation in collective decision-making about matters such as what 'security' and 'welfare' might mean today and which of their alternative forms of realization might appear appropriate, with the knowledge and resources that one is ready to think authoritative in the community of one's interlocutors, irrespective of what others might think of them.

This ideal has had many names in the history of politics: republicanism, *virtù*, self-government, citizenship, 'positive freedom', autonomy, 'Roman liberty', and so on. Such expressions highlight the character of collective life as a *project* – a set of institutions or practices through which the forms of collective life are constantly imagined, debated, criticised and reformed, over and again. The wish to participate in such a project remains without an expression, is defeated and lost in the suggestion to erase the distinction between 'sovereignty' and occupation. The 'reduction to purpose' cannot give an articulation to the process of self-formation in which one's preferences and 'purposes' are formed and re-formed in collective decision-making processes and in which they are not expected to remain stable over time. The reduction assumes human beings are born ready-made, with stable and unchanging preferences, always acting in view of maximisation of utility. This is a familiar image, of course, and powerful interests have a stake in our adopting that image of ourselves. But it is a limited, sad and passive image.

'Sovereignty' is just a word, of course, and its meaning varies by reference to the conceptual scheme in which it is used. As such, it is no more or no less worthy of defence than any other word. But one of its meanings is the one it receives in polemical confrontations over the sense and direction of 'globalisation' and 'empire', over the emergence of powerful transnational networks of private interest and the occupation of the spheres of national and international politics by economic and technical vocabularies with their accompanying expert systems and embedded preferences. In such contexts it expresses fear and anger about the diminishing spaces of collective re-imagining, creation and transformation of individual and group identities by what present themselves as the unavoidable necessities of a global modernity. In such a situation, sovereignty articulates the hope of participation in projects of individual and collective self-imagining, the thrill of feeling that one's life is in one's own hands. This is what sovereignty meant for those who struggled against theocratic rule in early modern Europe or invoked it to support de-colonization in the 20th century. Today, it stands obscurely as one representative of an ideal against which disillusionment is felt with the way political structures fail to open the door for such projects. In the context of military conflict, or rule by alien institutions, the claim for sovereignty looks beyond immediate costs and benefits or even the associated languages of measurement. To think of it as nothing but glorified occupation means failing to understand the difference between home and a place where one happens to live.

Chapter 12

The Second Lebanon War: Reflections on the 2006 Israeli Military Operations against Hezbollah

*Said Mahmoudi**

The military operation by Israel in Lebanon, which started on the morning of 12 July 2006 and ended on 14 August 2006, has several features that distinguish it from other recent armed conflicts. The hostilities were between a state and a paramilitary organisation operating from the territory of another state. This and many alarming reports of civilian losses and damage to civilian objects resulted in unusual attention and great concern from the international community.

As is the case with all military conflicts, the most relevant international law issues are those relating to the human rights obligations of the parties to the conflict and the compatibility of the conduct of the military operations with applicable international humanitarian laws. In response to accusations of human rights violations, two separate investigations were carried out after hostilities ended. The first was by a group consisting of three special rapporteurs from the UN Human Rights Council and a representative of the UN Secretary General,[1] who visited Israel and Lebanon between 7 and 14 September 2006 (hereinafter referred to as the Mission). The visit was at the invitation of the Governments of Israel and Lebanon. The Mission submitted its report (hereinafter referred to as the Report of the Mission) in early October 2006.[2]

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1 They were Philip Alston, the Special Rapporteur on extrajudicial, summary or arbitrary executions; Paul Hunt, the Special Rapporteur on the right of everyone to enjoyment of the highest attainable standard of physical and mental health; Miloon Mothari, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living; and Walter Kälin, the Representative of the Secretary-General on human rights of internally displaced persons.

2 Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Mission to Lebanon and Israel (7–14 September 2006), UN Doc. A/HRC/2/7 dated 2 October 2006.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 175–190.

The second investigation was carried out by a group of three lawyers appointed by the Human Rights Council.[3] This was pursuant to the Council's strongly worded Resolution S-21/1 dated 11 August 2006 condemning Israel for "gross and systematic human rights violations of the Lebanese people".[4] The Resolution provided for the establishment of an inquiry commission (hereinafter referred to as the Commission of Inquiry) with the limited mandate of investigating "the systematic targeting and killings of the [*sic*] civilians by Israel in Lebanon". The Commission's Report was published in November 2006.[5]

Given the limited mandates of the Mission and the Commission of Inquiry, neither of these reports addressed the issue of the legality of the use of force in the first place. In what follows this question as well as *jus in bello* aspects of the conflict will be touched upon. This will be followed by a reflection on the role and function of the Security Council in this conflict.

1. The Origin of the Conflict and Considerations of *Jus ad Bellum*

As regards the *casus belli* of the conflict, which was later termed by Israel as 'the Second Lebanon War',[6] the views of the parties, *i.e.* Israel and Hezbollah, diverge. According to Hezbollah, it was Israel that initiated the conflict by sending its soldiers into the Lebanese village of Ayta al-Sha'b, some 60 kilometres north of the Israeli border. The other view, adhered to by Israel and accepted by the majority of commentators,[7] was that Hezbollah, which had exercised control over the border between Lebanon and Israel since 2000, crossed the frontier, knocked out two Israeli Humvees, and abducted two soldiers. According to the same view, when Israeli forces chased the enemy in order to rescue the abducted soldiers, Hezbollah guerrillas destroyed their tank with a

3 They were João Clemente Baena Soares, Mohamed Chande Othman and Stelios Perrakis.

4 This resolution is generally considered to be one-sided. There is only one provision (operative para. 5) which indirectly refers to Hezbollah by urging *all* "concerned parties to respect the rules of international humanitarian law, to refrain from violence against the civilians in accordance with the Geneva Conventions of 12 August 1949". Eleven Western countries voted against the Resolution. Twenty-seven developing countries voted for.

5 Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2 dated 23 November 2006.

6 The operation was dubbed by Israeli Defence Forces as "Operation Change of Direction". Denomination of this armed conflict as the Second Lebanon War was formally decided by the Israeli Ministerial Committee for Symbols and Ceremonies in March 2007. This decision was endorsed by the Israeli Cabinet. Ynetnews, 25 March 2007 <www.ynetnews.com/articles/0,7340,L-3379605,0 0.html>. The First Lebanon War started in June 1982 with Israel's invasion of Lebanon following the assassination attempt against the Israeli ambassador in the U.K. The major part of the Israeli troops had left Lebanon by 1985, and withdrawal of the rest from southern Lebanon took place in June 2000.

7 Report of the Mission, particularly para. 7. The Report of the Commission of Inquiry also takes the same view (para. 40), as does the present study. Identification of one party as initiator of the use of force is significant for the establishment of the legality of the claim of self-defence. It has no bearing on the assessment of the conduct of hostilities, which is more important in the present case.

powerful mine. In all, eight Israeli soldiers were killed. Israel then responded with massive air strikes and artillery fire and later with a ground invasion of southern Lebanon.

Both Israel and Hezbollah in their accounts of how the hostilities started sought to justify their respective military operations as rightful self-defence. This assumption raises the question of whether the nature of the military clash, which was the starting point of the hostilities, could justify a fully-fledged use of force in self-defence in the sense of the UN Charter Article 51. There is no established standard in international law for deciding how grave a frontier incident should be to entitle one party to start a full-scale military operation on the basis of self-defence. The dominant view is that minor and incidental frontier clashes cannot normally be considered as being 'armed attack'.[8]

The International Court of Justice (ICJ) has in several cases opined that the intensity of the force used is decisive in distinguishing between 'armed attack' as understood in customary international law and in Article 51 of the UN Charter, on the one hand, and other forms of the use of force, on the other.[9] In the *Nicaragua* Case, the Court underlined the necessity of distinguishing the gravest forms of use of force – that is, those constituting armed attack, from other less grave forms.[10] More importantly, in the *Oil Platform* Case, the Court rejected the idea that a series of allegedly Iranian attacks against various American vessels or other interests in the Persian Gulf during the 1980–1988 War between Iran and Iraq cumulatively constituted a use of force grave enough to justify self-defence on the part of the United States.[11]

The opposite view has been expressed by a number of international lawyers who define 'armed attack' as *any* use of force irrespective of the level of intensity. For this group, the minor nature of an attack can be relevant only as evidence of honest mistake or the absence of intention to attack.[12] The significance of the element of intention in this context was also addressed by the ICJ in the *Oil Platform* Case.[13] The existence of intention to use force against another state seems to be a necessary, yet not decisive, factor. What is needed is evidence of intention combined with a rather high level of intensity. However, even when intention and a certain level of intensity are undoubtedly present, the targeted state's invocation of the right to self-defence is not usually taken for granted. States more often than not, even in the face of unequivocal evidence

8 Brownlie is of the view that sporadic operations by armed bands would seem to fall outside the concept of 'armed attack' in Article 51. I. Brownlie, *Principles of Public International Law* (Oxford University Press, 2003) p. 700.

9 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), 1986*, Judgment, Merits, paras. 191,195; *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, 2003, Judgment, paras. 51, 63–64 and 72.

10 *Nicaragua* Case, para.191.

11 *Oil Platform* Case, para. 64. *See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, ICJ, Advisory Opinion, paras. 139, 142, <www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4> and *Armed Activities on the Territory of Congo (Congo* v. *Uganda)*, 2005, ICJ, Judgment, Merits, p. 116, <www.icj-cij.org/docket/files/116/10455.pdf>.

12 E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', 55 *International and Comparative Law Quarterly* (2006) p. 966.

13 *Oil Platform* Case, para. 64.

of the aggressive intention of other states, make an overall assessment of all circumstances before invoking the right of self-defence to use force.

Since the mid-1980s, Israel has on several occasions bargained the release of Palestinian and Lebanese prisoners in its prisons against that of Israeli military personnel or civilians in captivity.[14] As late as in 2004 Hezbollah released one Israeli businessman and delivered the bodies of three Israeli soldiers against the release of 433 Palestinians and other Arabs. Prior to the armed conflict of 2006, Israeli Governments had regularly dealt with these intermezzi through diplomatic channels.[15] The relatively high number of Israeli casualties in the present case (eight soldiers) can of course be a reason for a stronger reaction. But more importantly, Israel's reaction should be seen in the broader context of a series of events that preceded the 2006 military operation against Hezbollah. The most conspicuous of these events was the operation by some members of the Palestinian Hamas movement, who had in June 2006 tunnelled from the Gaza Strip into Israel, killed two Israeli soldiers and captured a third. Their demand was to trade him for Palestinian prisoners held in Israel, a demand that was strongly rejected by Israel's new Prime Minister Ehud Olmer.[16]

Taking these events together, one may conclude that the intention of using force against Israel is almost beyond doubt. However, the intensity of the military entanglement of 12 July 2006, resulting in the deaths of eight Israeli soldiers, although greater than previous Hezbollah operations, was not at a level qualifying it as 'armed attack' in the sense of Article 51.[17] The said military entanglements were obviously more than 'normal' frontier incidents; but it is highly debatable whether they could justify a full-scale military reaction in self-defence in accordance with the requirements of the Charter. The fact that previous Israeli Governments had, with due regard to circumstances, preferred in similar cases to use diplomacy instead of force does not of course deprive that country of the right to self-defence if all conditions are fulfilled. It is nonetheless highly questionable whether all the requirements were really fulfilled in this case.

Another relevant issue is whether the status of the parties as states or as non-state actors may have any bearing on the establishment of the nature of the use of force as 'armed attack' in the sense of Article 51 of the UN Charter. Article 51 speaks of the right to self-defence in the case of an armed attack against a Member State. Although this provision makes no distinction between attacks by a state or by other entities, the dominant understanding based upon the negotiation history of the Charter has been

14 In 1985, some 1,150 Arab and mainly Palestinian prisoners were released against the release of three Israelis. It was followed by a similar swap of 123 Lebanese against two remaining Israeli soldiers.

15 For an account of the raids by Hezbollah and Israel's response, *see* <http://en.wikipedia.org/wiki/Israeli_MIA_prisoner_exchanges>; <mensnewsdaily.com/2006/08/09/why-hezbollah-attacked-israel/>.

16 This was compared during the armed conflict between Israel and Hezbollah with the rational reaction of the Indian Government to the blowing-up of a passenger train in Mombai on 11 July 2006, allegedly by Pakistani extremists. The explosion killed some 200 Indian civilians. *See* R. Falk, 'Lurching Toward Regional War in Middle East', *Today's Zaman*, 21 July 2006, <www.zaman.com/?bl=commentary&alt=&trh=20060721&hn=34951>. Pakistan strongly rejected any accusations and decided on 5 August 2006 to expel an Indian diplomat. India reciprocated immediately.

17 *Cf.* the argument of ICJ in the *Oil Platform* Case, *supra* note 11.

that 'armed attack' in this context is normally carried out by a state. One relevant question is thus whether attacks by a non-state actor such as Hezbollah can be equated with 'armed attack' by a state. This brings to the fore the question of the status of Hezbollah as an international actor and a party to an international armed conflict. The question is not unique and was debated in connection with the war in Afghanistan in October 2001 with respect to Al-Qaeda as a party to the conflict. It is also a topical issue with respect to Turkey's military operations during December 2007 – March 2008 against the Kurdish militant organisation PKK.[18]

Hezbollah came into existence in the early 1980s as a political and later a paramilitary organisation representing Shiite Muslims in Lebanon. It was officially established in 1985 with a political manifesto aiming at eradicating Western colonialism in Lebanon. Since its emergence in 1982, one of its declared objectives has been to end Israeli occupation of southern Lebanon. Even after the Israeli withdrawal from southern Lebanon in June 2000, Hezbollah retained this objective since the Shaaba farms, an area located on the Israeli side of the Golan Heights, are still under Israeli control. Lebanon considers that the farms form part of its territory. In the Israeli view the Shaaba farms, as part of Syrian territory, have been under Israeli occupation since 1967. Various representatives of Hezbollah have also repeatedly expressed the wish to destroy the state of Israel.[19]

Many developing countries, including most Arab and Muslim countries, consider Hezbollah as a resistance movement. This status was already recognised in the early stages of the movement's existence when Israel was occupying parts of Lebanon. Since 1992, Hezbollah has acted as an organisation consisting of a political party and a militia. It has had a significant presence in Lebanese political life. When military operations started, Hezbollah had 14 members in the Lebanese Parliament and two ministers in the Government. A few countries, notably the United States and the United Kingdom, consider Hezbollah to be a terrorist organisation. In international law, the distinction of Hezbollah as a resistance movement from its possible status as a terrorist organisation entails several consequences.[20] The most important is the right for a resistance organisation to use force against enemy military targets and to be governed by human rights law and the rules of international humanitarian law.

Since the terrorist attacks on the United States in September 2001, the US and some of its allies have expanded the scope of the application of self-defence to cover the fight against international terrorism.[21] The legal ground for such extension has nevertheless been challenged by some other states and more significantly by the Inter-

18 PKK (Kurdish Workers Party) uses its bases in Iraqi territory for launching military attacks against Turkey's regular army inside Turkish territory. Turkey has in recent months carried out a series of air strikes inside Iraq and even in a couple of occasions sent its ground troops into Northern Iraq. Turkish operations have generally been strongly objected to by both the central Government in Iraq and by the regional Government of Kurdistan in northern Iraq.

19 Report of the Commission of Inquiry, para. 35.

20 One such consequence is that Hezbollah considers its own fighters in Israeli prisons (and presumably also the Israeli military personnel in its own prison) as prisoners of war whereas Israel considers arrested Hezbollah fighters as terrorists.

21 As regards the position of the United States, *see* S. Mahmoudi, 'Self-Defence and International Terrorism', 48 *Scandinavian Studies in Law*, p. 210.

national Court of Justice in the 2004 Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.[22] It should be underscored that given the context of the American claim to self-defence against international terrorism, such use of force, if ever permissible, may be justified when terrorist activities targeting civilian population have caused significant casualties, and have an affiliation with a foreign state. In the present case under consideration, Hezbollah's military operations were directed against Israeli military personnel with relatively limited casualties.

Irrespective of the positions of other states *vis-à-vis* Hezbollah as a terrorist or resistance organisation, the Hezbollah operation against Israel on 12 July 2006, taken together with the chain of events preceding it, does not easily lend authority to the Israeli claim of self-defence against an 'armed attack' in the sense of Article 51. Nevertheless some Western countries, including the United States and the United Kingdom, took the position that Israel had the right to self-defence.[23] This was with due knowledge that the attack had been carried out by Hezbollah and not by Lebanon. 'Self-defence' in this context, *i.e.* against international terrorism, may be interpreted as an *appropriate reaction* to Hezbollah's hostile act. It may also be interpreted as a reference to that term's established connotation in international law as a full-scale military operation against an armed attack in the sense of Article 51. The latter case still lacks the general support of the majority of states.[24] This is despite the fact that military operations of non-state actors against foreign states from territories where the central Government is not able or willing to control such actors are becoming an increasing problem.

2. The Conduct of Hostilities and *Jus in Bello*

An issue closely related to the status of Hezbollah, to Israel's right to self-defence and to the applicability of international law to the conflict is the character of the hostilities as *international* armed conflict. The Government of Lebanon claimed that it had no

22 The Court in para. 139 of its Advisory Opinion, without taking a position on whether Security Council resolutions and statements of some states following the terrorist attacks of September 11 have led to the extension of self-defence to the fight against international terrorism, makes it plain that the requirement of attack *by another state* is pivotal to justifying the claim of self-defence. *See*, *supra* note 6.

23 The position of the United States was declared on several occasions, particularly at the G8 Summit in St. Petersburg on 15–17 July 2006. According to the reports, President Bush emphasised Israel's rights to self-defence and added: "Our message to Israel is defend yourself but be mindful of the consequences, so we are urging restraint." Australian Prime Minister John Howard said Hezbollah provoked the Jewish State into self-defence, <www.abc.net.au/news/newsitems/200607/s1687756.htm>. Germany and the United Kingdom took a similar position. The Swedish Prime Minister also underlined Israel's right to self-defence in an article in the Swedish daily Svenska Dagbladet on 15 August 2006, but at the same time made it plain that the military operations against Lebanon were "a completely disproportionate use of force".

24 A view shared by many authors after the US & the UK military operations in Afghanistan in response to September 11 attacks. *See*, *e.g.*, C. Gray, *International Law and the Use of Force*, (Oxford University Press, 2004) p. 160. Developments since then, particularly the jurisprudence of The Hague Court seem to have strengthened the authority of that view.

knowledge of the Hezbollah operation inside Israel. It could therefore not accept any responsibility for the attack since the Lebanese armed forces did not participate in any operations against Israel. Israel held the Lebanese Government responsible even though Hezbollah was outside the effective control of that Government. Although the actual hostilities took place between Israel and Hezbollah, there is a general consensus that the armed conflict was possessed of an international character. Both the Report of the Commission of Inquiry and the Report of the Mission[25] underline its international nature.

Despite the *sui generis* character of this international armed conflict as being actually between a sovereign state and a foreign paramilitary organisation, lack of political will in, or actual control by, the Lebanese Government does not exempt Lebanon from its obligations under international law.[26] Legal assessments of the conduct of the military operations generally consider Israel, Lebanon and Hezbollah as parties to the conflict.[27]

The start of hostilities on 12 July 2006 and its escalation in the following days, attracted unprecedented world attention. The main reason was the military imbalance between the parties to the conflict; Israel with highly efficient, modern and strong military forces on one side and Hezbollah with a rather limited capacity as to number of fighters, military equipments and resources on the other. The growing number of civilian casualties, particularly in Lebanon, constituted, of course, an added reason for international concern.

The military operation continued for 33 days and was brought to an end on 14 August 2006 pursuant to Security Council Resolution 1701.[28] According to some estimates it claimed 1,191 civilian victims in Lebanon and 43 in Israel. In addition, many people were injured in both countries and some 900,000 Lebanese and 300,000 Israelis were displaced. Moreover, tens of thousands of homes and much public infrastructure in Lebanon were damaged.[29] The distinctive trait of this international armed conflict was the excessiveness of the military operations against targets in Lebanon and the obviously intentional attacks on civilians. Reports from the ongoing conflict indicated regular and repeated breaches of international humanitarian law and human rights law. Violations mainly related to the principles of proportionality, necessity and distinction between military targets and civilian objects.

Both Israel and Lebanon are parties to major human-rights treaties, particularly the 1966 Covenants. They are at the same time bound by customary human rights law. This also applies to Hezbollah.[30] The two countries are also parties to the 1949

25 Report of the Commission, para. 55; Report of the Mission, para. 23. The latter mentions that the distinction between international and non-international armed conflicts is complex.

26 Report of the Commission of Inquiry, para. 67; Report of the Mission, para. 19.

27 This is clear from the references in. *e.g.* paras. 14, 19 & 22 of the Report of the Mission and particularly para. 9 of the Report of the Commission of Inquiry.

28 UN Doc. S/Res/1701 (2006), dated 11 August 2006.

29 The report of the Mission, paras. 8 and 9 and the Report of the Commission of Inquiry, paras. 75–81.

30 A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); Report of the Mission, para. 19.

Geneva Conventions, but only Lebanon is party to the 1977 Additional Protocols I and II to the Conventions. All the parties to the conflict are subject to customary international humanitarian law as well.[31] Whereas Israel was accused of violating the principles of distinction, proportionality and prohibition of indiscriminate attack, the main accusation against Hezbollah was the use of the civilian population in Beirut suburbs and in southern Lebanon. As regards the Israeli international law violations, the main cases relate to direct attacks on the civilian population and objects, attacks on civilian infrastructure, attacks on the United Nations Interim Force in Lebanon (UNIFIL), and the reckless use of certain weapons.

Israel's attacks on civilians and civilian objects were carried out both in southern Lebanon and the suburbs of Beirut. The reports of civil society groups such as Amnesty International and Human Rights Watch, the Report of the Mission and that of the Commission of Inquiry, contain detailed accounts of these onslaughts.[32] Perhaps the one single attack that attracted most attention occurred in the town of Qana on 30 July 2006. On that day, the Israeli air force bombed a three-storey building. Twenty-nine civilians including 17 children were killed. This attack provoked much reaction, including an emergency meeting of the Security Council in which the UN Secretary-General urged the Council to condemn it. Israel claimed that the building was used as a Hezbollah missile launch site, and was thereby a legitimate military target. Generally a similar argument was advanced with respect to all the other assaults on civilian objects.

As a matter of general rule, international humanitarian law requires that the parties to an armed conflict give effective and active advance warning of attacks that may affect the civilian population unless circumstances preclude this.[33] Israel in many cases gave advance warnings. However, these were rarely active or effective. Moreover, due to heavy bombing of roads, the civilians who were warned had scant chance of fleeing before air strikes started. The Mission criticised Israel and rejected arguments that buildings and the private houses of civilians were bombed because they served as launching or storage sites for rockets and hosted Hezbollah fighters. The Mission did not consider that the documents Israel provided were sufficient. It concluded that the validity of the claim that every target was a legitimate military objective could not be confirmed, and that therefore the widespread targeting of civilian houses in this case did not comply with international humanitarian law.[34]

Indiscriminate Israeli bombings were not limited to civilian houses, but extended to civilian convoys. In defending its indiscriminate attack on such convoys, Israel invoked the same argument, namely the suspicion that Hezbollah fighters were hiding among civilians. The problem in this case was that these convoys were carrying people following the Israeli warning of imminent bombing. Civilians had no choice but to leave. The Commission of Inquiry criticised Israel on this point, saying: "Even if there

31 J-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge University Press, 2004); Report of the Mission, para. 22 and note 22.

32 Report of the Commission of Inquiry, paras. 93–135; Report of the Mission, para. 48. For the reports of Amnesty International and Human Rights Watch, *see* the latter, note 22.

33 One such circumstance is when the element of surprise is essential. *See* the Report of the Commission of Inquiry, para. 151.

34 Report of the Mission, para. 46.

were Hezbollah members among the civilians who left the villages in convoys, this does not justify the attacks as they would be utterly disproportionate and beyond any concept of military necessity or the principle of distinction."[35] The Mission commented on the same point, and stated that in order to claim military necessity and to justify collateral civilian damage, "Israel would need to detail how many fighters were estimated to be among the civilians, the kind of material they were transporting, what precautions were taken to limit the impact of the strike on the civilians and the convoy, the concrete and direct military advantages anticipated at the time of attack and how they outweighed the expected civilian casualties…"[36]

Even medical personnel and health facilities were subject to Israeli attacks, which rendered the work of humanitarian agencies very difficult. The Israeli argument in defence of such attacks was the same as in the case of strikes on civilians and convoys. The Mission referred to the available reports about destroyed and severely damaged health facilities. After analysing the Israeli explanations, it concluded that "the health facilities and ambulances attacked were not legitimate targets. In this context it is important to stress that killing persons placed *hors de combat* is prohibited at any time and in any place whatsoever."[37]

Israeli assaults on the Lebanese civilian infrastructure caused enormous damage. They included attacks on bridges, roads, land transport networks, water facilities, TV and radio stations, factories and agricultural land. Israel's justification was that those facilities were also used by Hezbollah for military purposes. As dual-use objects they could be legitimately attacked. This justification was rejected by both the Mission and the Commission of Inquiry.[38] The Mission accurately criticised Israel by emphasising that under existing customary international law, as expressed in Article 52 of Additional Protocol I, the targeted objects must due "to their nature, location, purpose or use make an effective contribution to military action." According to the same rule, their partial or total destruction, capture or neutralisation, in prevailing circumstances must offer a definite military advantage. The requirement is thus an object-specific and context-specific assessment of each target rather than a general and categorical approach to all objects as has been the position of Israel.[39]

One of the most conspicuous attacks on Lebanon's civilian infrastructure was the bombing of fuel reservoirs at Jiyyeh power station on 14 and 15 July 2006. This power station supplied about 30 per cent of Lebanon's electricity needs. The repeated attacks, which were evidence of a premeditated and not an incidental act, led to the spillage of some 10,000 tonnes of oil into the Mediterranean Sea. According to the Commission of Inquiry, an estimated 10 km-wide oil slick covered 170 km of the Lebanese coastline.[40] Due to the blockade of Lebanese ports and harbours previously imposed by

35 Report of the Commission of Inquiry, para. 135.

36 Report of the Mission, para. 48.

37 *Ibid.*, para. 47. This is a reference to the common Article 3 in the Geneva Conventions, which prevents violence to life and person, in particular murder of all kinds of those placed *hors de combat* by sickness, wounds, detention, or any other cause.

38 Report of the Commission of Inquiry, paras. 136–148; Report of the Mission, paras. 49–51, 59–63.

39 Report of the Mission, paras. 49–51.

40 Para. 209.

Israel on 13 July 2006, no immediate assistance from other countries could be given. It was not until 7 September 2006 that Israel lifted the blockade and effective cleaning could start. Apart from the enormous effects of this damage on the life of the civilian population, its effect on the environment led the Commission of Inquiry to conclude: "Whether the attack was justified or not by military necessity, the fact remains that the consequences went far beyond whatever military objective Israel may have had."[41]

As regards criticised Israeli military operations, mention should also be made of the bombing of the UNIFIL post in Khiyam in southern Lebanon, killing four unarmed international observers from Austria, Canada, China and Finland. The bombing, which was described by UN sources as the use of a precision-guided aerial bomb, took place on 25 July 2006. The UN had contacted the Israelis several times during the same day to protest at the shelling and to call upon it to cease. Despite Israeli promises to halt the firing, it continued for six hours and resulted in the killing of the four UN soldiers. The UN Secretary-General condemned the attack as "apparently deliberate targeting". Israel rejected the accusation that the attack had been deliberate. The Israeli Prime Minister also deeply regretted it, which distinguishes this case from other cases of Israeli military operations during the 'Second Lebanon War'.[42] The matter was, however, taken up by the Security Council, whose president issued a statement requiring Israel to "conduct a comprehensive inquiry into this incident".[43] The Commission of Inquiry mentioned in its report that it had not found any justification for the direct attacks on UN positions, including those that resulted in the deaths of protected UN personnel.[44]

Another issue commented upon by both the Mission and the Commission of Inquiry was Israel's use of certain types of weapon and ammunition in the course of the hostilities. Of particular significance was the massive use of cluster bombs during the conflict and the effect of unexploded sub-munitions (bomblets) on the civilian population. According to the Mission, about 600 individual cluster bomb strike locations in built-up and agricultural areas had been recorded up to the end of September 2006. The total number of exploded and unexploded bomblets during the said period was estimated between 158,000 and 170,000. The Mission made its own estimates on the basis of available information on the type of cluster munitions used by Israeli forces and concluded that the most likely estimate should be between 850,000 and one million unexploded bomblets.

Although the use of cluster bombs is not illegal under existing international humanitarian law, the way they were used in this conflict gives rise to questions of legality. Israel defended their use by claiming that they were the most effective weapons against Hezbollah rocket launch sites. This explanation could perhaps be justified as a sound military rationale if the bombs had been used only against such sites. But to use them indiscriminately in areas occupied by large numbers of civilians is undoubtedly

41 Para. 220.

42 <www.pmo.gov.il/PMOEng/Archive/Press+Releases/2006/07/spokekofi260706.htm>.

43 For a detailed account of the attack, *see The Guardian*, 27 July 2006. *See also* Report of the Mission, note 7.

44 Report of the Commission of Inquiry, para. 19.

inconsistent with the principles of distinction and proportionality.[45] The expected long-term disproportionate effect of unexploded munitions on civilians is in itself enough to support the proposition that Israel in this respect has failed to comply with its obligations under international law. But a more disturbing fact is that the majority of cluster munitions were delivered in the final 72 hours of the conflict, both immediately before and after the adoption of Resolution 1701 by the Security Council requiring ceasefire. This is an added reason to call into question the legality of Israeli conduct in this conflict.

As regards Hezbollah, the point of departure was that the organisation did not consider itself bound by international humanitarian law. Although the Hezbollah leaders usually acknowledged in their public statements the distinction between civilians and combatants and between civilian and military objectives,[46] they argued that the principle of distinction was not absolute. Since Israel violated this principle, Hezbollah, it was argued, had mutually the right to disregard it as well. The Mission rightly observed that the notion that one party's violation of humanitarian law may justify that of the other, is called reprisal. And reprisals against civilians are absolutely prohibited.[47]

According to Israel, of more than 4,000 Hezbollah rockets fired, some 900 struck populated areas. Although according to the Mission a significant number of those rockets hit military targets, civilian casualties were considerable. Some, according to the Mission and based upon evidence provided by the Israeli authorities, were undoubtedly launched from civilian residential buildings in southern Lebanon. This is clearly a violation of international humanitarian law obligations.[48] Hezbollah was also accused of using human shields. Given the established definition of human shield in international law as an intentional collection of military objectives and civilians or persons *hors de combat* with the specific intent of preventing the targeting of those military objectives, the Mission could not confirm these accusations on the basis of the evidence provided by Israel.[49]

Although the number of humanitarian-law violations by Hezbollah was far lower than those of Israel, an overall assessment of the conduct of Hezbollah led the Mission to conclude that Hezbollah rocket attacks on Israeli civilians and civilian buildings and infrastructure were in violation of the applicable norms of international humanitarian law and of the principle of distinction.[50]

The Mission found in its general conclusions that "serious violations of both human rights and humanitarian law have been committed by Israel. Available information strongly indicates that, in many instances, Israel violated its legal obligations

45 *Ibid.*, paras. 247–267; *See also* Report of the Mission, paras. 52–57. The Commission of Inquiry examines the Israeli use of weapons in much more detail, but both instances are equally critical of the conduct of Israel in this respect.

46 This is a firm principle in Islamic law. *See* S. Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World', 7 *Journal of the History of International Law* (2005) pp. 55–68, note 19.

47 Report of the Mission, paras. 69–70.

48 *Ibid.*, paras. 58, 71.

49 *Ibid.*, para. 58.

50 *Ibid.*, para. 75.

to distinguish between military and civilian objectives; to fully apply the principle of proportionality; and to take all feasible precautions to minimize injury to civilians and damage to civilian objects."[51] The Commission of Inquiry came to a similar general conclusion, and stated that the excessive, indiscriminate and disproportionate use of force by Israeli forces "goes beyond reasonable arguments of military necessity and of proportionality, and clearly failed to distinguish between civilian and military targets, thus constituting a flagrant violation of international humanitarian law."[52]

With respect to Hezbollah, the general conclusion of the Mission was: "In many instances, Hezbollah violated the applicable principles of humanitarian law, in some cases by targeting the civilian population in northern Israel and in others by disregarding the principle of distinction."[53]

3. The Role of the Security Council

According to Article 24(1) of the UN Charter, the Security Council has "the primary responsibility for the maintenance of international peace and security". It is therefore expected that in situations such as the armed conflict under review, the Council becomes immediately seized of the matter and takes measures. This case was admittedly *sui generis* since the military operations were between a state and a foreign paramilitary organisation. This in itself may arguably have put even more pressure on the Council to react quickly. In such operations, it may be expected that the applicable legal rules will not be fully observed by the non-state actor even if in international law such actors are equally bound by existing laws. The risk of civilian casualties is therefore normally higher because of the possible abuse of civilian infrastructure for military purposes in order to compensate for imbalance in military resources. The authentic assessments of the conducts of the parties in the present case show, however, that the great majority of international law violations are attributable to Israel.

Even if the Council was unable to foresee the extent of the conflict's devastating effects on civilians at the outbreak of hostilities, the increasing and alarming reports of indiscriminate, disproportionate and intensive use of force against civilians and civilian objects should have reminded it of its prime responsibility to stop the conflict. In this context, one must not forget the initial plea of the Lebanese Government for a ceasefire on the very first day of hostilities. The Council met on 13 and 14 July 2006 to discuss the matter, but efforts to bring about a ceasefire were unsuccessful at that juncture due to the opposition of the United States and the United Kingdom.

One could argue that because of the privileged status of the five permanent members of the Security Council, they should have taken greater responsibility in working towards achieving the Council's primary objective. The opposition of the United States and the United Kingdom could well be construed as a violation of this duty. During the first weeks of the conflict, both states resisted all efforts to adopt a resolution for the cessation of hostilities. Both President George W. Bush and Prime Minister Tony Blair on different occasions expressed their support for the continued Israeli

51 *Ibid.*, para. 99.

52 Report of the Commission of Inquiry, para. 317.

53 Report of the Mission, para. 100.

operation against Hezbollah and publicly refused to stop the war before Hezbollah was defeated.[54] The efforts of several members of the Security Council to introduce a quick ceasefire were thus futile.[55] It was not until the last week of July and as a result of increased public pressure that the United States indicated its readiness to consider discussing the matter.[56] A draft resolution submitted jointly by France and the United States on 4 August was finally adopted on 11 August 2006, after several amendments proposed by the Arab League.

Faced with numerous calls for a ceasefire as hostilities continued, the United States representatives repeatedly argued that it was too early.[57] This was of course an indication that the military operations were against a terrorist organisation. As such, there was no hurry to adopt a resolution. One might argue that even if Resolution 1701 on ceasefire had been adopted earlier, the parties, particularly Israel, would probably not have abided by it. This may be a correct assumption, but does not exempt members of the Security Council from their duty to act as quickly as possible irrespective of the expected reaction of the parties. In many similar cases, the Council has ordered a ceasefire through a resolution, but it has been long before it has been accepted by the conflicting parties. One example is Resolution 598 on the armed conflict between Iran and Iraq. This was adopted in July 1987 but was accepted by Iran on 24 March 1988.[58]

It has often happened that the Security Council for various reasons has been unable to fulfil its obligations in time during a military conflict. In such cases even if the reason is disagreement among Council members the formal explanations are normally something else. It is unusual, if not rare, that a permanent member of the Council, even though at least one party to a conflict and a majority of states have pleaded for a ceasefire, expressly and emphatically opposes it. Given the qualifications of Hezbollah as a terrorist organisation according to the United States and the United Kingdom, it is of course understandable that both countries considered the Israeli military operations as a legitimate fight against international terrorism.[59] However, their active opposition to ceasefire proposals raises serious questions about their Charter-based

54 For a detailed account of the reasons for this position and the clarifying statements of the White House in this respect, *see* the analysis in *The Washington Post*, 21 July 2006, <www.washingtonpost.com/wp-dyn/content/article/2006/07/20/AR2006072001907.html>.

55 According to the news, the Security Council rejected on 15 July 2006 the pleas from Lebanon for an immediate ceasefire. The U.S. was reportedly the only member to oppose any action. *See* <www.democracynow.org/2006/7/17/headlines>.

56 <www.guardian.co.uk/politics/2006/jul/28/usa.israelandthepalestinians>.

57 John Bolton, the then US ambassador to the United Nations, in an interview with the BBC on 22 March 2007 said that before any ceasefire Washington wanted Israel to eliminate Hezbollah's military capability. According to him, an early ceasefire would have been "dangerous and misguided". He admitted that Britain joined the US in refusing to call for an immediate ceasefire, <news.bbc.co.uk/2/hi/middle_east/6479377.stm>.

58 UN Doc. S/Res/598 (1987), dated 20 July 1987. This resolution, unlike Resolution 1701, was expressly adopted on the basis of Chapter VII of the UN Charter.

59 President George Bush made a statement to this effect on ABC News on 30 July 2006 <www.abc.net.au/news/newsitems/200607/s1700569.htm> and then on CNN on 14 August 2006 <edition.cnn.com/2006/POLITICS/08/14/bush/index.html>.

responsibilities as permanent members of the Security Council. Here it is not the question of the passivity of a Council member to fulfil its legal obligations under the Charter, but its intentional violation of a legal duty by purposefully acting in contravention of and direct contradiction to that duty.

In addition to Resolution 1701 on ceasefire, the Security Council adopted two other documents in the course of the hostilities between Israel and Hezbollah. The first one was the Statement by the President of the Security Council on 27 July 2006 following the Israeli attack on UN posts in Lebanon and the killing of four UN soldiers. The document does not condemn Israel, and only calls upon that state to conduct a comprehensive inquiry into this incident.[60] The second document was the Statement by the President of the Security Council dated 30 July 2006 following the shelling by the Israeli Defence Forces of a residential building in Qana.[61] The Council statement deplored the loss of civilians, particularly children, in that attack. It also "calls for an end to violence, and underscores the urgency of securing a lasting permanent and sustainable ceasefire" – even though it had been unable even to discuss the urge for a ceasefire in the previous three weeks.

Generally, the Security Council's performance in dealing with the Second Lebanon War more than ever before calls into question the credibility of this organ as being the supreme representative guardian of international peace and security. Even if this credibility has not been so great, the way the Council acted in this present case makes discussion of a need for reform an urgent matter.

4. Assessment

The point of departure of this study has been that the Israeli military operation against Hezbollah was a response to Hezbollah's small-scale attacks on Israeli military posts for the purpose of taking some Israeli soldiers prisoners or abducting then. The main legal question is whether Israel's reaction can be interpreted as proper self-defence in the sense of article 51 of the UN Charter. It is submitted that the action of Hezbollah cannot be equated with 'armed attack' as the normal definition of this term suggests.

One may assume that when Israel, the United States, the United Kingdom and some other countries speak of self-defence in this context, they refer to a military response to international terrorism. The claim that it is possible to extend the international use of force to 'self-defence' against international terrorism has met serious challenges, particularly by the ICJ. Even if such extension is accepted, the strict requirements closely linked to the US military operations against Al-Qaeda in Afghanistan in 2001, *i.e.* large-scale damage to civilian population and active support of a foreign state, were absent in the present case. The Hezbollah attacks that were the reason for the start of Israeli military operations on 12 July 2006 targeted Israeli military personnel. Besides, the Government of Lebanon had evidently no role in the attacks. It is therefore difficult to readily accept Israel's claim of self-defence in the sense of Article 51, even if granted that Israel of course retained the right to deal with and make *proper* response to attacks that, falling short of 'armed attack', still inflicted damage on that country.

60 UN Doc. S/PSST/2006/34.

61 UN Doc. S/PRST/2006/35.

There are other reasons why accepting the self-defence argument becomes difficult. The most important is the actual conduct of the war. Israel's repeated, intentional, large-scale attacks on civilians in Lebanon adopted in almost all cases an offensive and even punitive (rather than defensive) character.[62] The impression of an offensive attack is corroborated by various statements by Israeli leaders before and during the operation. Some weeks earlier, Israel's Defence Minister had commented on the capture of an Israeli soldier by Hamas fighters, saying: "We will take *revenge* against anyone who injures the soldier and their leaders" (emphasis added).[63] In reaction to the capture of two Israeli soldiers by Hezbollah militia on 12 July 2006, Israel's Chief of Staff said: "If the soldiers are not returned, we will turn Lebanon's clock back 20 years."[64] The Hezbollah attacks and the capture of the Israeli soldiers were characterised by the Israeli cabinet as an act of war to which Israel would respond *aggressively* and harshly.[65] The language used in these statements can hardly be interpreted as indicating an act of self-defence according to international law. This is why some commentators tend to consider the Israeli operations as an act of aggression even though there is no conclusive evidence for the existence of the core element of aggression, namely a premeditated act.[66] The deliberate and indiscriminate attacks on civilians and civilian objects inside Lebanon can also be regarded as being the collective punishment of civilians for Hezbollah's raid on Israeli military posts.[67]

The conduct of hostilities as documented and commented on by the Mission that was invited by Israel and Lebanon to visit the two countries, and by the Commission of Inquiry established by the Human Rights Council, witnessed many grave violations of human rights and international humanitarian law. Israel's share of these violations, according to these reports and those of the civil-society organisations, is far greater than Hezbollah's. A formal argument that Israel normally invokes for its possible human-rights violations during armed conflicts is the existence of the state of emergency. This was originally declared in May 1948 at the time of the establishment of Israel and is still in force. Even if some human rights documents, under certain strict conditions, admit derogations in times of emergency, this possibility should be used as an exception, and when the derogating measures are absolutely necessary and are lifted as soon as the public emergency or armed conflict ceases.[68] Such derogation clauses are anyhow, limited to human rights obligations and are not applicable to international humanitarian law obligations. There are no legal justifications for grave violations such as indiscriminate and disproportionate attacks on civilians.

62 V. Kattan, 'Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defense?', 14 *Human Rights Brief* (2006) p. 29.

63 Quoted in I. Fisher, 'Israel's Defense Minister Faulted by Left and Right', *The New York Times*, 26 June 2006.

64 Quoted in *Guardian*, 13 July 2006. <www.guardian.co.uk/world/2006/jul/13/israel-andthepalestinians.lebanon1>.

65 The text of the Communiqué is available at <www.iseco.org.tw/20060713_1.doc>.

66 It was the view of *i.a.* Lebanon's representative in the United Nations, <daccessdds.un.org/doc/UNDOC/GEN/N06/432/41/PDF/N0643241.pdf?OpenElement>.

67 *Cf.* Report of Commission of Inquiry, para. 25.

68 Report of the Mission, para. 15.

International law violations by both parties to the conflict are extensively reported and very well documented. The alarming reports of intentional attacks on civilians led the UN High Commissioner for Human Rights, Louise Arbour, to comment on the risk of war crimes and to warn both parties of the consequences of such crimes.[69] Even if at least some violations of international law in this conflict might qualify as war crimes, there seems little possibility of prosecuting such crimes when committed in the context of the Middle East conflict.

One of Israel's main arguments in justifying excessive force was the uniqueness of the conflict in that it was between a sovereign state and a terrorist organisation. This would allegedly justify derogation from strict application of intentional humanitarian law. Irrespective of the qualification of Hezbollah as a resistance movement or terrorist organisation, the argument of uniqueness of the military operation as a ground for deviation from applicable laws is flawed. The Mission rightly mentioned in its report that "the principles of humanitarian law are entirely applicable to this conflict and deviations from these principles cannot be justified on the basis of the alleged novelty or distinctiveness of this conflict."[70]

The 'Second Lebanon War' certainly has a lot in common with all other international armed conflicts. One common feature is that both parties have evidently failed to comply with their legal obligations. In some cases, they were evidently responsible for violations of existing rules. Israel is unquestionably responsible for serious violations of its international law obligations. Another common feature is the great damage to civilians and civilian objects, caused at least in some cases by deliberate and indiscriminate attacks on civilians.

However, a distinguishing feature is that the conflict was between a modern, well-organised and presumably responsible state on the one hand and a non-state actor, an organisation that cannot be party to any relevant international agreements, on the other. Still, the great majority of serious violations are attributed to the proper international actor: Israel. In retrospect and in possession of the facts about the incomprehensible damage intentionally inflicted on civilians in this conflict, one wonders whether the international humanitarian legal rules developed to contain such tragedies have any function. Even international criminal law does not seem to provide a satisfactory answer given the remoteness of the possibility of prosecuting any actor in this conflict for war crimes or other violations of international humanitarian law. One wonders thus how applicability of legal rules can regularly be insisted upon if the rules can be dispensed with in certain cases to justify political goals. The Israeli operation against Hezbollah in Lebanon was not only a military failure, but also a failure of international law.

69 She expressed her views in an interview with an American radio station on 21 July 2006, <www.npr.org/templates/story/story.php?storyId=5572468>.

70 Report of the Mission, para. 98.

Chapter 13

Cluster Munitions, Proportionality and the Foreseeability of Civilian Damage

*Timothy L. H. McCormack & Paramdeep B. Mtharu**

1. Honouring Ove Bring

I first met Ove Bring in The Hague in December 1993 when he and I both participated in an expert roundtable on national implementation of the then recently concluded Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.[1] I have remained firm friends with him ever since and am delighted to contribute to this *liber amicorium* in his honour.

There were several reasons why I instantly warmed to Ove in a chilly Hague winter. He is one of those rare international lawyers who is a true expert in the field of arms control and disarmament. Many academic lawyers have little interest in or have rarely attempted to understand the technical aspects of various categories of weapons – a prerequisite for expertise in the field. Christopher Greenwood once suggested to me that the technical aspects of the field make it easy to make mistakes or to expose ignorance and I certainly agree with him.[2] Ove is no novice and every time he inter-

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* Tim McCormack is the Foundation Australian Red Cross Professor of International Humanitarian Law and the Foundation Director of the Asia Pacific Centre for Military Law (APCML) at the Melbourne Law School. It is Tim who has enjoyed the close friendship with Ove Bring since 1993 and it is he that writes the prefatory comments to this chapter in the first person singular form. Paramdeep Mtharu is a research assistant with the Geneva International Centre for Humanitarian Demining and a Senior Fellow with the Asia Pacific Centre for Military Law. This chapter is based upon an APCML Report prepared by the authors for the Review Conference of the Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed Excessively Injurious or to have Indiscriminate Effects, 7–17 November 2006 and entitled 'Expected Civilian Damage and the Proportionality Equation: International Humanitarian Law and Explosive Remnants of War'. We remain grateful to Cathy Hutton for her insightful comments on this chapter.

1 Opened for signature 13 January 1993; 32 ILM 800 (entered into force 29 April 1997) and more commonly known as the Chemical Weapons Convention.

2 One example of a basic mistake is in Geoffrey Robertson's *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Books, London, 1999) where the author refers to the three categories of weapons of mass destruction as "nuclear, ballistic and chemical" rather than nuclear, *biological* and chemical at p. 181.

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vened in our discussions in The Hague he spoke with authority. I learnt much from him then and have enjoyed many lengthy conversations since on this subject of shared professional commitment.

Ove and I also share many other professional interests – particularly in relation to the historical development, the substantive rules, the responsible implementation and the effective enforcement of international humanitarian law (IHL). For many years we have both been committed to serving the various arms of the International Red Cross Movement and also to promoting understanding of and respect for the *jus in bello* within our national and other foreign militaries. After all, military forces are literally the frontline for the implementation of international humanitarian law, and the choices that military commanders and their subordinates make about this body of law have life and death consequences in the theatre of conflict. I have found Ove Bring's principled approach to teaching and research within the Swedish National Defence College inspirational in my own efforts to establish the Asia Pacific Centre for Military Law at the Melbourne Law School in collaboration with the Australian Defence Force Legal Service.

These shared professional interests of course only tell one part of the story. I was instantly drawn to Ove Bring because he is charming and personable, he is genuinely interested in other people and he values relationships, he has a great sense of humour and is thoroughly enjoyable company. That meeting in The Hague initiated a deep and enduring friendship laced with many happy Nordic and Antipodean shared experiences and I remain grateful to the editors of this volume for their kind invitation to honour him in this way.

The central issue of concern here is the extent to which mid to longer term damage to the civilian population caused by the use of cluster munitions is foreseeable and ought to be taken into consideration in the proportionality calculus. Our intention is to briefly outline the background to the identification of the issue, to explain the current legal test for proportionality and to identify arguments for and against inclusion of mid to longer term damage to the civilian population as part of the proportionality calculus.

2. Origins of This Chapter

In 2005 national delegations to the Working Group on 'Explosive Remnants of War' ('ERW') of the 'Group of Governmental Experts' ('GGE') of the States Parties to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ('CCW') were invited to answer a questionnaire on the extent to which states considered general principles of international humanitarian law relevant to the particular problem of explosive remnants of war and to explain measures undertaken at the national level to implement those general principles. As national delegations returned their responses to the questionnaire, the Asia Pacific Centre for Military Law ('APCML') was asked to review the responses and report findings back to the Working Group. In March 2006, the APCML tabled its *Report on States Parties' Responses to the IHL Questionnaire* ('the Report') for consideration at the thirteenth session of the Working Group.

The rule on proportionality was identified by 97 per cent of Respondent States as relevant to the use of munitions that may result in explosive remnants of war ('ERW').[3] Such an overwhelming level of acknowledgement is indicative of the view that proportionality is a key obligation affecting states' decisions on target and weapons selection – including in relation to the choice of weapons likely to cause ERW.

A number of state responses highlighted the issue of whether a military commander is required to consider the expected longer term harm caused to the civilian population and civilian objects as a result of ERW when undertaking the proportionality assessment. This question has remained a matter of debate internationally. Some government experts and legal scholars argue that long term effects cannot be taken into account because they are too remote and therefore incapable of assessment. On the other side of the debate other governmental experts, legal scholars, and international and non-governmental organisations argue the importance of factoring both the short and longer term effects of ERW into the proportionality equation because the harmful effects on the civilian population are foreseeable and have been demonstrated in successive conflicts to have devastating consequences.

Proportionality assessments by military commanders have taken on greater significance since the establishment of the International Criminal Court and the increasing scrutiny of the conduct of military operations. The issue is not so much whether the International Criminal Court will try military commanders for alleged violations of the proportionality equation but rather the existence of an increased international expectation that parties to a conflict will comply with international humanitarian law accompanied by calls for accountability in the face of perceived failures to do so. Many States Parties to the Rome Statute have enacted implementing legislation to incorporate the crimes in the Statute into their own domestic criminal law and compliance with domestic criminal law obligations is an understandably important issue for national militaries. Most non-States Parties to the Rome Statute also have domestic criminal law obligations with which their respective militaries must comply.

A number of responses to the IHL Questionnaire highlighted the need for further discussions on the issue of expected longer term harm and the proportionality equation. As a result, the Asia Pacific Centre for Military Law was asked to prepare a second paper examining the debate surrounding foreseeability and the rule on proportionality.[4] This chapter draws heavily upon the material in that second paper although here the focus is more explicitly upon the particular problem of cluster munitions than it is on the more general issue of ordnance which has failed to explode.

Protocol V of the CCW deals with the general problem of explosive remnants of war – remnants which can be created by any of three ways: the abandonment of explosive ordnance; the failure of explosive ordnance to detonate on impact with the target; and explosive ordnance which is intended not to explode and remains operable by design. The latter category could include anti-personnel mines, naval mines, booby-

3 T.L.H. McCormack *et al.*, *Report on States Parties' Responses to the IHL Questionnaire* (Asia Pacific Centre for Military Law, 2006) p. 17.

4 *See* T.L.H. McCormack and P. Mtharu, *Expected Civilian Damage and the Proportionality Equation: International Humanitarian Law and Explosive Remnants of War* (Asia Pacific Centre for Military Law, 2006). For text of paper see: <www.apcml.org/documents/un_report_exp_civilian_damage_1106.pdf>, visited on 13 April 2008.

traps and other similar devices.[5] The deployment of such weapons is subject to additional legal regulation and so the discussions of the ERW problem in the CCW context have not focussed upon this particular category of ERW. Consequently, we will not consider the application of the rule on proportionality to attacks utilising such weapons. The first source of ERW mentioned here – abandoned explosive ordnance – is not used in a military attack and so is not subject to the rule on proportionality. In discussing the proportionality rule then, we will focus exclusively upon the use of explosive ordnance in an attack in circumstances where some of the ordnance fails to explode and, as a consequence, creates both mid and longer term damage from ERW. The broader focus of Protocol V covering not only cluster munitions but all weapons types reflected a determination on the part of some states to avoid an exclusive CCW focus upon cluster munitions. Consequently, CCW discussions about the particular problem of the foreseeability of civilian harm arising from the subsequent detonation of initially unexploded submunitions had to be addressed in the general context of the use of weapons which are likely to cause ERW and not exclusively on the particular problem of cluster munitions. The only weakness of this approach is that submunitions from cluster weapons are, overwhelmingly, the dominant source of civilian loss of life from ERW.[6] To imply otherwise by reference to a generic category of 'those weapons likely to cause ERW' is misleading. In this chapter we are free to unequivocally and categorically declare that unexploded submunitions from cluster weapons are the real problem and that, consequently, an exclusive focus upon these weapons is both necessary and appropriate.

Our focus here on the application of the rule of proportionality to the particular problem of unexploded submunitions is only one narrow aspect of the broader issue of the application of general rules of international humanitarian law to the military use of cluster munitions. The rule on proportionality also applies to expected civilian damage and expected loss of civilian life from exploding submunitions deployed in close physical proximity to civilians and civilian infrastructure. In addition, the general prohibitions on wilful targeting of the civilian population and on indiscriminate attacks apply as much to the use of cluster munitions as they do to any other type of weapon. Also the rule on precautions in attack and the prohibitions on the use of weapons which cause superfluous injury or unnecessary suffering and on wilful long-term, widespread and severe damage to the environment all apply to the use of cluster munitions.[7] The specific focus here is a narrow issue within a much broader complex matrix of issues.

We ought also to clarify that our intention in focussing on the foreseeability of civilian harm is not to argue the case for the adequacy of existing international humanitarian law and, in so doing, obviate the need for, and the desirability of, a specific multilateral treaty prohibition on cluster munitions. Instead, our intention is to identify a

5 This is not intended to be an exhaustive list.

6 For an explanation of cluster munitions, of different types and or different methods of delivery *see* Handicap International – UK's helpful website with links to written reports on the effects of these weapons, <www.handicap-international.org.uk/page_347.php>, visited on 10 April 2008.

7 For a more detailed discussion of these rules and their application to weapons which are likely to cause ERW *see* McCormack *et al.*, *supra* note 3.

current international issue about which there is extensive discussion and some disagreement and to offer our own views in relation to it.

3. The Proportionality Calculus

3.1 Understanding the Proportionality Calculus

It is a basic rule of international humanitarian law that the parties to a conflict must ensure respect for, and the protection of, the civilian population and civilian objects in an armed conflict. Parties must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives. Military operations must only be directed at military objectives. This basic rule is incorporated in Article 48 of Protocol I of 1977 Additional to the Geneva Conventions of 1949[8] but also applies as a rule of customary international law to all parties to armed conflicts whether or not they are party to Additional Protocol I. On the basis of this fundamental rule, the wilful targeting of civilians or civilian property in armed conflict is a war crime.

International humanitarian law allows attacks on military objectives but prohibits any attack which fails to discriminate between military objectives and civilian objectives. Such attacks are labelled 'indiscriminate' and include attacks: not directed at specific military objectives; which employ means or methods of combat which cannot be directed at specific military objectives; or which employ means or methods of combat producing effects otherwise prohibited by international humanitarian law. The prohibition on indiscriminate attacks is incorporated in Article 51(4) of Additional Protocol I but is also an accepted rule of customary international law. Again, the perpetration of an indiscriminate attack, like the wilful targeting of civilians and/or civilian property, also constitutes a war crime.

It is accepted as a matter of law that in directing attacks at legitimate military objectives, some incidental loss of civilian life and/or damage to civilian property may occur. In an attempt to impose limitations upon the level of acceptable incidental civilian suffering, international humanitarian law articulates a proportionality formula as the test to determine whether or not an attack is lawful. The formula is articulated in Article 51(5)(b) of Additional Protocol I as a prohibition on: "[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

This proportionality rule is recognised as customary international law, and is reflected in the International Committee of the Red Cross (ICRC) Customary Law Study.[9] It is codified in Article 51(5)(b) of Additional Protocol I, and repeated in Article 57(2). The CCW treaty itself recognises the proportionality obligation in Article 3(8) of Amended Protocol II in relation to the use of mines, booby-traps and other

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('Additional Protocol I').

9 *See* Rule 14 in J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005) Volume I: Rules, p. 46.

devices. Furthermore, the prohibition, with the additional requirement that the incidental loss be 'clearly' excessive, is also included in the Rome Statute of the International Criminal Court such that any attack which violates the rule constitutes a war crime for which perpetrators should be held criminally responsible.[10]

It is important to note that proportionality as a general principle arises in a number of different contexts, both in relation to the international legal regulation of the resort to military force (*jus ad bellum*) as well as in the international legal regulation of the conduct of military operations (*jus in bello*).[11] For the purposes of this chapter our focus is upon the articulation of the rule on proportionality as it relates to civilian damage incidental to an attack on a legitimate military objective. The rationale for this rule is to limit the suffering of the civilian population and does not apply to combatants or military objectives. To the extent that an attack is directed at military objectives with no expected loss of civilian life or damage to civilian property, this particular rule on proportionality is not applicable. That does not mean, however, that a military commander is entitled to use unlimited force. The basic rule that 'a party's right to choose methods or means of warfare is not unlimited'[12] applies in all situations.

3.2 Applying the Proportionality Calculus

The articulation of the rule on proportionality in a number of legal instruments clearly expresses an obligation upon military commanders to conduct a proportionality assessment when planning an attack. There is an additional requirement to cancel or suspend an attack if circumstances change since the attack was planned and it becomes apparent that the rule will be breached.[13]

The formulation of the proportionality test incorporates a margin of appreciation in favour of military commanders. Commanders are not to be judged on the basis of an *ex post facto* assessment of the *actual* loss of civilian life and/or damage to civilian property weighed against the *actual* military advantage gained from the attack. Instead, the test to be applied is the *expected* loss of civilian life and/or damage to civilian property weighed against the *anticipated* military advantage.[14] Military commanders have to reach their decisions on the basis of information that is available to them at the time of the attack.[15] Their decisions cannot subsequently be judged on the basis of information which comes to light after the attack has occurred.

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10 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

11 For an excellent discussion of this relationship *see* J.G. Gardam, 'Proportionality and Force in International Law', 87 *American Journal of International Law* (1993) p. 391.

12 *See* Additional Protocol I, Article 35(1).

13 Additional Protocol I, Article 57(2)(b). This is a rule of customary international law, and is therefore binding on states not party to Additional Protocol I.

14 This test of *expected* civilian damage weighed against *anticipated* military advantage is articulated in Additional Protocol I, Articles 51(5)(b) and 57(2)(a)(iii).

15 Algeria, Australia, Austria, Belgium, Canada, Egypt, Germany, Ireland, Italy, the Netherlands, New Zealand, Spain, and the United Kingdom have all made declarations to this effect.

The Al Firdus Bunker case illustrates the importance of the correct test for the rule of proportionality. The Al Firdus Bunker was identified by US forces as a legitimate military objective during the 1991 Gulf War. The US claimed that the bunker was camouflaged, its perimeters were protected by barbed wiring, and access points were guarded by armed sentries. On the basis of information collected by planners, the military commander made an assessment that the bunker was a legitimate military objective and, on application of the rule on proportionality, determined that the incidental damage to civilians would not be excessive in relation to the military advantage gained. The objective was bombed. It was subsequently and tragically discovered that, along with its military function, the bunker was also being used by civilians as sleeping quarters at night time and three hundred civilians were killed as a result of the attack.[16]

US authorities determined that there had been no violation of international humanitarian law because the information available at the time had allowed the military commander to make a reasonable assessment that the target was a legitimate military objective and that the expected loss of civilian life and/or damage to civilian property was not disproportionate to the expected military advantage. The lawfulness of the decision of the military commander to authorise the attack cannot be judged upon the actual loss of civilian lives resulting from the attack. The legal test is the *expected* loss of civilian life and, in the absence of any knowledge of the civilian use of the bunker, the military commander did not violate the rule of proportionality.

4. Factoring in Mid to Longer Term Consequences of Unexploded Submunitions: Arguments Against

In 2002 Christopher Greenwood suggested that it is only the immediate risk from ERW which can be an issue in the proportionality equation because there are too many factors which are incapable of assessment at the relevant time. He asserted that the proportionality test has to be applied on the basis of the information available to the military commander at the time of the attack:

> "If, for example, cluster weapons are used against military targets in an area where there are known to be civilians, then the proportionality test may require that account be taken both of the risk to the civilians from submunitions exploding during the attack and of the risk from unexploded submunitions in the hours immediately after the attack. It is an entirely different matter, however, to require that account be taken of the longer-term risk posed by ERW, particularly of the risk which ERW can pose after a conflict has ended or after civilians have returned to an area from which they had fled. The degree of that risk turns on too many factors which are incapable of assessment at the time of the attack, such as when and whether civilians will be permitted to return to an area, what steps the party controlling that area will have taken to clear unexploded ordnance, what priority that party gives to the protection of civilians and so forth. The proportionality test has to be applied on the basis of information reasonably available at the time of the attack. The risks posed by ERW once the

16 Judge Advocate General's School, US Army Charlottesville, *Operational Law Handbook* (2001) p. 9.

> immediate aftermath of an attack has passed are too remote to be capable of assessment at that time."[17]

William Boothby clarified Greenwood's argument stating that: "[h]e is pointing out that the commander has to base his decision on the information available to him, that risks posed by ERW in the immediate aftermath of an attack in areas where there are known to be civilians may also need to be considered, but that thereafter those risks are too remote to be capable of assessment at that time".[18]

Boothby further argues that the attacking commander will conduct his proportionality assessment with regard to 'tangible factors' such as: "[T]he military advantage to be anticipated from the attack … the damage to be expected to the civilian buildings in the village and their contents, so far as is known … whether any civilian persons are known to have stayed in the village and the losses they may be expected to suffer during and in the immediate aftermath of the attack, including from unexploded munitions."

Boothby argued that the existence, and extent, of any longer term ERW risks cannot be included in the equation because they depend on variables such as: whether the civilian population wishes to return early to the village; whether this early return will be permitted; whether civil authorities can and do influence the behaviour of the population; what proportion of the population will return and precisely when; whether unexploded ordnance ('UXO') will be marked, and cleared by the party in control of the territory in conformity with Protocol V norms before such return is permitted; whether the civilian population will receive ERW risk education as contemplated in Protocol V; whether the civilian population will heed and implement that advice; and whether particular members of the civilian population will have contact with 'dud' munitions so as to cause them to explode.[19]

It is willingly conceded here that military commanders cannot be required to take into account the 'unknowable' – that only that which can be expected as a consequence of a particular attack can be included in the proportionality equation. Any unexpected consequences of an attack obviously cannot be factored into the equation. While we do not then fundamentally disagree with Greenwood and Boothby, we do question whether it is possible to be as absolute as they appear to be in dismissing expected longer term consequences for the civilian population of weapons which cause ERW when assessing proportionality.

In discussing proportionality in relation to the rule on feasible precautions Boothby observed that: "Expectation, on which this rule centres, is not the same as reasonable foreseeability. An outcome may be foreseeable but undesired. Precautions may be taken with a view to that outcome being prevented, but it may remain a pos-

17 Christopher Greenwood, CCW/GGE/I/WP.10 (23 May 2002). We first learnt of Greenwood's paper from William Boothby's *Cluster Bombs: Is There a Case for New Law?* (Harvard Program on Humanitarian Policy and Conflict Research (HCPR), Harvard University, Fall 2005) p. 29. Boothby himself cites a Landmine Action UK Report which quoted from Greenwood's paper to the Group of Governmental Experts on Explosive Remnants of War in Geneva.

18 *Ibid.*, p. 30.

19 *Ibid.*, p. 31.

sibility, even though undesired and indeed unlikely. It must therefore be regarded as reasonably foreseeable, but is definitely not the expected outcome."

Boothby seems to equate outcomes that are 'reasonably foreseeable' with those that are 'possible', though undesired and unlikely. In contrast, his interpretation of 'expected' outcomes seems to be those which are both desired and likely. We certainly agree that the meaning of the 'expected' incidental loss of civilian life or damage to civilian property weighed against the 'anticipated' concrete and direct military advantage are the critical issues in this debate.

5. Factoring in Mid to Longer Term Consequences of Unexploded Submunitions: Arguments for

5.1 The Meaning of 'Expected' Civilian Damage

Both Greenwood and Boothby identify factors which they suggest would be incapable of assessment by a military commander at the relevant time. As mentioned above, these include factors such as whether civilians will be prevented from entering the area, and whether clearance of the UXO will take place in line with Protocol V.

A military commander may not have precise answers to these questions at the time he/she has to decide whether or not to authorise an attack. However the commander must take into account the information available to him/her in order to make a reasonable judgment. Charles Garraway, writing of the rule on proportionality, has suggested that "there is no mathematical formula. It requires a good faith assessment based on the information from all sources which is reasonably available to [the commander] at the relevant time."[20] Whenever the use of weapons likely to cause ERW is contemplated in residential areas or in areas otherwise known to be frequented by the civilian population, assessments of expected civilian damage ought to take account of the consistent conclusion of numerous reports and studies carried out by international and non-governmental organisations, many of which include data on percentages of munitions which fail to explode and the effect of such unexploded ordnance on civilian populations. This wealth of information ought not only to project the expected civilian damage from the proportion of weapons which are likely to explode on impact, but also the expected civilian damage from the proportion of munitions which are expected to fail to explode. Obviously the greater the amount of ordnance used, the greater the number of munitions (or submunitions) which will fail to explode, the greater the ERW problem resulting from an attack and the greater the threat to the civilian population in the vicinity of the attack.

In its discussion of the rule on proportionality the UK Manual of the Law of Armed Conflict states that:

> "In deciding whether an attack would be indiscriminate, regard must also be had to the foreseeable effects of the attack. The characteristics of the target may be a factor here. Thus if, for example, a precision bombing attack of a military fuel storage depot is planned but there is a foreseeable risk of the burning fuel flowing into a civilian

20 C. Garraway, *How Does Existing Law Address the Issue of Explosive Remnants of War?* CCW/GGE/XII/WG.1/WP.15 (15 December 2005).

> residential area and causing injury to the civilian population which would be excessive in relation to the military advantage anticipated, that bombardment would be indiscriminate and unlawful, owing to the excessive collateral damage."[21]

With this guidance in mind, it could be argued that some of the factors 'incapable of assessment' as described by Greenwood and Boothby would also be present in this scenario. Factors such as what proportion of the civilian population will return and when; and whether some or all of the burning fuel might be extinguished before it reaches the residential area could also vary in this particular example. However this scenario is provided in the Manual on the Law of Armed Conflict as an example of an attack that could be 'indiscriminate and unlawful'. Interestingly, the Manual utilises the language of 'foreseeable risks' as the test for expected incidental civilian damage and not the language preferred by Boothby – that the effects are both 'desired and likely'.

If Boothby is correct that 'expected' civilian damage must be more than that which is a mere possibility and only incorporates that which is 'desired and likely', the possibility exists for military commanders to avoid responsibility for their decisions on the basis that the effects of a particular attack were simply undesired. There is a danger here in raising the bar of responsibility too high. If 'expected' means more than that which is a mere possibility, it surely also means something less than that which is intended. In criminal law parlance we speak of recklessness where the alleged perpetrator does not intend a particular result but is recklessly indifferent as to its occurrence. This is a different standard of criminal responsibility than the lower threshold required for negligence because recklessness is still based upon the subjective awareness of the individual perpetrator. Negligence, by contrast, is based upon the more objective criterion of 'reasonable foreseeability'. A military commander may not want to see particular results flow from the choice of weapons and the selection of specified targets but responsibility does not only relate to what the individual commander hoped for. Instead, responsibility also extends to include expected consequences to which the commander was recklessly indifferent.

5.2 Expected Longer Term Military Advantage

Military planners and commanders regularly take into account not just the expected short term military advantage but also the longer term military advantage. Judith Gardam makes this observation in commenting upon the coalition approach to the proportionality calculus in Operation Desert Storm to forcibly remove Iraqi forces from Kuwait. Her assertion was that: "[I]t appears that military advantage was calculated on a cumulative, rather than case-by-case, basis as required by the Protocol [Additional Protocol I]. That is, the attacks on such targets as water treatment and power plants were assessed in terms of their contribution to the weakening of the overall military forces of Iraq, rather than by taking into account the long – and short – term civilian casualties and balancing this factor against direct immediate military advantage."[22]

21 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, Oxford, 2006) para. 5.33.4.

22 Gardam, *supra* note 11, p. 409.

This tendency by the military to anticipate mid to longer term military advantage was also demonstrated in the recent conflict in southern Lebanon. According to the Report to the UN Human Rights Council of the members of the Mission: "One [Israeli] government official acknowledged that cluster bombs were used in part to prevent Hezbollah fighters from returning to the villages after the ceasefire."[23]

The deliberate choice of cluster munitions on the basis of an expected dud rate which will leave sufficient numbers of unexploded submunitions so as to deny enemy combatants access to the target area may well produce an expected concrete and direct military advantage. That expected advantage is a mid to longer term advantage. It is not an advantage expected from the immediate results of the attack but subsequent to that attack as a consequence of the spread of unexploded submunitions. However, here, as with expected mid to longer term civilian damage, there are just as many variables which make a precise calculation of military advantage impossible. The effectiveness of a military strategy for area denial in southern Lebanon depends upon uncertain variables such as: the number of unexploded submunitions; the precise areas in which those unexploded submunitions actually fall; whether the Lebanese authorities will attempt to prevent Hezbollah's access to southern Lebanon despite the unexploded submunitions in 'the hope of precluding' future Israel military incursions; whether unexploded submunitions will be marked and cleared by Lebanon (or other states and/or international agencies) in conformity with Protocol V norms before such return is permitted.

Our argument is that, in undertaking the requisite proportionality assessment, the expected mid to longer term civilian damage must be taken into account just as the anticipated mid to longer term military advantage is also taken into account. The military commander who authorises significant deployment of cluster munitions must expect that some civilian residents of the target area will attempt to return to their villages and to re-work their agricultural plots and that incidental civilian damage will inevitably occur as contact is made with unexploded submunitions. The proportionality assessment may well be that the expected military advantage outweighs the expected civilian damage. But the important issue here is that the expected civilian damage must be taken into account – that it is unacceptable for the expected military advantage to be based on a longer timeframe while limiting the expected quantification of civilian damage only to the immediate effects of the attack itself.

According to the Report to the UN Human Rights Council of the members of the Mission: "As these [cluster bomb] sites were often located in civilian built up or agricultural areas the long term effects of these weapons on the civilian population should have been obvious."[24]

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23 United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Lebanon (7–14 September 2006), UN Doc A/HRC/2/7, paras. 55 and 56.

24 United Nations General Assembly, Human Rights Council, Mission to Lebanon (7–14 September 2006), UN Doc A/HRC/2/7, paras. 55 and 56.

Upon ratification of Additional Protocol I many states made declarations of interpretation in relation to Articles 51–58 to the effect that 'the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack'.[25] It may well be understandable for militaries to interpret the anticipated concrete and direct military advantage broadly but to take a restrictive approach to the 'expected incidental loss of civilian life, injury to civilians, damage to civilian object or a combination thereof'.[26] Appealing though this interpretative approach may be, nothing in the wording of the proportionality formula itself supports the approach. To the extent that mid to longer term civilian damage resulting from an attack is expected, such damage should be taken into account in the application of the proportionality equation just as the campaign-wide military advantage is.

The notion that unexploded ordnance has long-term deleterious consequences for a civilian population is already well known and an accepted principle for all States Parties to the Ottawa Treaty. In the relevant part of the Preamble to that treaty, States Parties are: "Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement."[27]

The Geneva International Centre for Humanitarian Demining has characterised this part of the Preamble as reflective of States Parties' implicit understanding that 'proportionality extends over time'.[28]

We are not suggesting here that the expected mid to longer term civilian damage will automatically or inevitably be excessive in proportion to the anticipated military advantage. Instead the argument here is that in applying the proportionality equation, the expected longer term effects as well as the expected immediate and short–term effects on the civilian population ought to be taken into account.

Over the past few years, since the issue of ERW has been under discussion, international and non-governmental organisations have been conducting research into the

25 This particular wording is taken from the Italian Statement of Interpretation to its Ratification of Additional Protocol I & II on 27 February 1986 printed in A. Roberts and R. Guelff (eds.), *Documents on the Laws of War* (Oxford University Press, Oxford, 2000) pp. 506–507.

26 *See* V. Wiebe, 'The Drops that Carve the Stone: State and Manufacturer Responsibility for the Humanitarian Impact of Cluster Munitions and Explosive Remnants of War', *Legal Studies Research Paper Series, University of Thomas School of Law* (2004) p. 14. *See also*, Gardam, *supra* note 11, p. 407 where the author claims that the lack of definitional precision for tests such as that for proportionality "operates in the interests of the military rather than that of civilians".

27 Paragraph 1 of the Preamble, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of and on their Destruction, opened for signature 18 September 1997, 36 ILM 1507 (entered into force on 1 March 1999) ('*The Ottawa Land Mines Convention*').

28 GICHD Argument, taken from: Geneva International Centre for Humanitarian Demining, *Report on States Parties' Responses to the Questionnaire, International Humanitarian Law & Explosive Remnants of War: A Critique by the Geneva International Centre for Humanitarian Demining* (1 March 2006) p. 2.

deleterious effects on the civilian population of ERW, in particular cluster munitions. There now exists a wealth of information to substantiate a direct correlation between numbers of munitions deployed, dud rates and the loss of civilian life and/or damage to civilian property. The most recent, devastating example of this reality is continuing to unfold in southern Lebanon.

6. Field Data on the Mid to Longer Term Effects of Unexploded Submunitions

It is our view that data from past conflicts helps inform the likelihood of future effects for the application of the proportionality assessment. Decisions about expected harm to civilians or damage to civilian objects from unexploded submunitions ought to include consideration of the effects of such weapons in the past.

International and non-governmental organisations have undertaken extensive research into the harm to civilians caused by unexploded submunitions and into examining the factors which determine this harm.

The United Nations Institution for Disarmament Research ('UNIDIR'), for example, has concluded that:

> "Concerns remain about the adequacy of existing international humanitarian law to sufficiently deal with problems associated with the use of cluster munitions. There are increasing calls from civil society, non-governmental organisations and international organisations to do something about the humanitarian impact of cluster munitions, and there are actions being taken by states. This has been accompanied by a growing body of literature of the short- and long-term effects of cluster munition use on civilian populations."[29]

A number of studies have analysed data from multiple conflicts which consistently demonstrated the dangers to civilians from unexploded submunitions. These reports have analysed data from conflicts including those in Afghanistan, Albania, Bosnia and Herzegovina, Cambodia, Chad, Chechnya/Russian Federation, Croatia, Eritrea, Ethiopia, Iraq, Kosovo, Kuwait, Lao Peoples Democratic Republic, Montenegro, Morocco, Saudi Arabia, Serbia, Sierra Leone, southern Lebanon, Sudan, Syria, Tajikistan, and Vietnam.[30] A common conclusion from each of these reports is the

29 R. Cave *et al.*, *Cluster Munitions in Albania and Lao PDR: The Humanitarian and Socio-Economic Impact* (United Nations Institute for Disarmament Research, Geneva, 2006) p. 2.

30 *See* Handicap International, *Fatal Footprint: The Global Human Impact of Cluster Munitions*, (Preliminary Report, November 2006); Human Rights Watch, *Cluster Munitions a Foreseeable Hazard in Iraq* (Human Rights Watch Briefing Paper March 2003); T. Nash, *Foreseeable Harm: The Use and Impact of Cluster Munitions in Lebanon: 2006* (Landmine Action, (UK) Report, October 2006); Human Rights Watch, *First Look at Israel's Use of Cluster Munitions in Lebanon in July – August 2006* (Briefing Paper presented by Steve Goose to the 15th Session of the Convention on Conventional Weapons Group of Governmental Experts, Geneva, 30 August 2006); B. Rappert and R. Moyes, *Failure to Protect: A Case for the Prohibition of Cluster Munitions* (Landmine Action (UK) Report, August 2006); Human Rights Watch, *Cluster Munitions: Measures to Prevent ERW and to Protect Civilian Populations* (Memorandum to Delegates to the Convention on Conventional Weapons Group of Governmental Experts on Explosive Remnants of War, Geneva, 10–14

inevitability of civilian damage from large numbers of unexploded submunitions deployed in residential or agricultural areas.

There are invariably different circumstances prevailing in relation to specific military attacks in each of the conflicts listed above. It is also true that dud rates vary even for the same category of weapon, let alone for different weapons. For example UNIDIR has reported that:

> "[T]he United Kingdom Explosive Ordnance Disposal (EOD) unit of the Multi-National Brigade (Centre) found that the failure rate of BLU97 was 7.1% and BL755 submunitions was assessed at 11.8%. In a reply to a written question in the British Parliament the failure rate of BL755 was given at 6%. Failure rates for BLU97 and BL755 submunitions have also been put at 20% in other studies, while in Kuwait the failure for the MK118 was as high as 30–40%, and while in Kosovo the overall failure rate for all types of cluster submunitions has been given at 5–30%. In Albania the overall failure rate of NATO submunitions was between 20–25% (leaving approximately 30–60 unexploded bomblets per munition depending upon the type), and between 30–35% for Yugoslavian (Serbian) munitions (leaving approximately 80–100 unexploded bomblets per munition. It should be noted that, when questioned, deminers in Albania were extremely reluctant to specify failure rates of cluster submunitions."[31]

Despite the different circumstances prevailing in different conflicts and the variation in dud rates of particular submunitions, there are commonalities in every study. Civilian damage inevitably flows from the unexploded submunitions which are the constant legacy of extensive use of cluster munitions in residential or agricultural areas. The recent use of cluster munitions in southern Lebanon illustrates the harsh reality. Reports consistently conclude that Israeli military forces deployed as many as 1.2 million submunitions in the final 72-hour period before the implementation of the ceasefire.[32] The sheer volume of cluster munitions dropped on and fired into southern Lebanon has produced a humanitarian tragedy as the civilian population has attempted to rework agricultural land and to rebuild villages and towns in the affected areas. Physical maiming, loss of limbs and death among the civilian population is now an ongoing and recurrent legacy of the Israeli barrage in late 2006. It is not the case that only international humanitarian agencies and foreign governments have criticised the Israeli use of cluster munitions.

The Winograd Comission, headed by Justice Winograd, formerly of the Israeli High Court of Justice, has devoted a separate Annex of its authoritative official enquiry into the Israeli conduct of the military campaign in southern Lebanon to the

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March 2003); *Explosive Remnants of War: Unexploded Ordnance and Post-Conflict Communities* (Landmine Action (UK), 2002); R. Moyes and T. Nash, *Cluster Munitions in Lebanon* (Landmine Action, (UK) Report, 2005).

31 R. Cave *et al.*, *supra* note 28, p. 10. This information was also confirmed by Richard Moyes from Landmine Action (UK) in Comments from R. Moyes, *Testing of M85 Submunitions* (Landmine Action UK, London, August 2006).

32 *See*, for example, T. Nash, 'Foreseeable Harm', *supra* note. 30, pp. 7–11.

extensive deployment of cluster munitions.[33] In that Annex the Winograd Commission conceded that the use of cluster munitions *per se* is not illegal under current international law and that the Israeli Defence Force did use cluster bombs in southern Lebanon against Hezbollah military targets.[34] However, the Commission also found that "the cluster bomb is inaccurate, it consists of bomblets that are dispersed over a large area and some of the bomblets do not explode [on impact] and can cause damage for a long period afterwards". Because of these problems as well as a lack of clarity about the use of cluster munitions by the Israeli Army "particularly in areas where civilians had fled and were likely to return", the Commission recommended that Israel re-evaluate its future use of cluster munitions.[35]

7. Conclusions

Although the focus in this chapter has been on expected civilian damage in the proportionality equation it is not intended to create the impression that other rules of IHL are irrelevant to the use of cluster munitions. As the APCML Report on the IHL Questionnaire indicates,[36] CCW Respondent States identified the rule of distinction, the prohibition on indiscriminate attacks, the obligation to take precautions in attack, the obligation to protect the environment from widespread, long term, and severe damage, and the prohibition on the use of weapons that cause superfluous injury or unnecessary suffering as also relevant and extremely important legal obligations.

It is our view that some civilian damage is inevitable when cluster munitions are deployed against military targets in residential or agricultural areas. Even if all civilians have fled the area of operations, the inevitability of a proportion of submunitions which fail to explode will guarantee some civilian loss of life when the civilian population returns to their homes and their fields. This assertion is consistently supported by all data collected from past conflicts. Although the precise number of submunitions which will fail to explode cannot be known and the precise number of civilian deaths and civilian casualties cannot be predicted, it does not follow that the inevitable civilian damage from unexploded submunitions is, therefore, unexpected. Damage to civilian property and civilian deaths will inexorably flow from the use of such weapons and this inevitability must be factored into the proportionality equation.

The most recent example of the inevitability of civilian damage from unexploded submunitions is continuing to occur in southern Lebanon. We agree with one conclusion of the members of the Mission to Lebanon and Israel in their recent report to the UN Human Rights Council that the deleterious impact on the civilian population from unexploded submunitions in southern Lebanon was to be expected:

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33 The Committee Investigating Events on the Front in Lebanon 2006: *Winograd Committee, Second War in Lebanon, Final Report. The Fourth Section: Different Topics. Appendix: The Use of Cluster Bombs in the Second War in Lebanon* ('Winograd Report') p. 495. Translation from Hebrew by Y. Yoaz, 'Winograd: Current use of cluster bombs not in line with int'l law' *Ha'aretz*, 1 February 2008: <www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=949975>.

34 Winograd Report, pp. 496–498.

35 Yoaz, *supra* note 33.

36 McCormack *et al.*, *supra* note 3.

> "The justification given … for the use of cluster bombs is that they were the most effective weapon against Hezbollah rocket launch sites. The argument is, in the abstract, compatible with a military rationale for the use of anti-personnel cluster bombs, as the radius of damage extends to the size of a football field and thus is able to neutralize mobile rocket launchers. … Israel could not reasonably have been ignorant of the fact that the submunitions dispersed by cluster munitions have a high failure (dud) rate. In effect, then, the decision was taken to blanket an area occupied by large numbers of civilians with small and volatile explosives."[37]

We explained earlier that our intention here was not to argue for or against a multilateral treaty prohibition on cluster munitions. However, we cannot avoid observing the perverse irony that Israel's decision to deploy massive quantities of cluster munitions in the last days of the military operation in southern Lebanon may well be the catalyst for the expeditious conclusion of a specific treaty ban on this category of weapons. Israel's apparent reckless disregard for the rule of proportionality by ignoring the mid to longer term civilian damage from unexploded submunitions makes it more difficult for other states to argue that the general rules of international humanitarian law adequately cover the use of cluster munitions and obviate the need for any additional specific treaty prohibition.

37 United Nations General Assembly, Human Rights Council, Mission to Lebanon (7–14 September 2006), *supra* note 23.

Chapter 14

Sacrificial Violence and Targeting in International Humanitarian Law

*Gregor Noll**

1. Introduction

In general terms, international humanitarian law (IHL) does not prohibit military action resulting in a loss of civilian life. To the extent its rules on the protection of civilians and their property are followed, the incidental cause of civilian loss is legal. Why is this? The not so naïve answer is that contemporary military operations would be made too difficult if attempted under legal norms that left no room for civilian casualties. Such severe constraints were as undesirable for states developing *ius in bello* throughout history as the total absence of constraints. That apart, incidental and lawful civilian losses within the framework of IHL could be seen as being indispensable signs in a symbolic order restraining violent conflicts within communities. The purpose of this discussion is to seek to outline how this possibility might be researched in a future, more comprehensive work. In selecting the concept of targeting as an area of interest, I believe that I am close to an archetypical norm on the curbing of violence in relation to the laws of war. What follows will outline two distinct steps.

First, I shall explore the central norms on targeting in contemporary IHL, as the ultimate point of a historically grown body of thought on the lawful killing of certain civilians. This reading of the law emphasises its central ambiguities, and tries to lay bare the chains of equivalence between military objective and civilian death that it constructs. A central concern is the open question of the civil-political objective to be pursued through IHL-abiding war. All this will be done in the consecutive Section 2.

Second, to argue that casualties are perceived as being necessary preconditions for peace in an international community, I introduce a theory explaining how the causation of *incidental* death of civilians, rather than the wilful death of enemy combatants, plays a pacifying role in the symbolic order of international law. I wish to examine targeting norms as part of a contemporary victimisation ritual, offering the civilian casualty in exchange for divine appeasement of an international community. This approach draws on the work of René Girard, explaining how communal violence is contained through ritual acts of sacrificial killings. This projection of Girardian theory

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on IHL norms will be effected in Section 3. A brief conclusion will be drawn in Section 4.

2. Lawful Sacrifice: Civilian Casualties and the Laws of War

In the general history of the state, warfare techniques moved from armies confronting one another in a delimited battlefield to omnipresent conflict in diversified forms, carried deep into the urban hinterland of warring parties. In statistical terms, internal conflicts have become more frequent, and all types of armed conflict were to become proportionally more lethal for civilians. At the beginning of the 20th Century, some 90 per cent of conflict losses were of combatants. This number dropped to 50 per cent in the Second World War, and is now down to 20 per cent.[1]

Confronted with such statistics, laymen might well be excused for doubting the mitigating effects of IHL. A frequent and familiar response by IHL lawyers is to point to poor implementation[2], to mourn the absence of powerful monitoring mechanisms,[3] or to call for additional norms to catch up with new warfare technologies. At the other end of the spectrum, critical legal scholars have indicted IHL for complicity in the atrocious conduct of warfare. The latter argument is paradigmatically stated in frequently quoted and rather defeatist articles by af Jochnick and Normand[4]:

> "A critical understanding of international law compels a re-evaluation of the role of law in deterring wartime atrocities. By endorsing military necessity without substantive limitations, the laws of war ask only that belligerents act in accord with military self-interest. Belligerents who meet this hollow requirement receive in return a powerful rhetorical tool to protect their controversial conduct from humanitarian challenges."[5]

Neither can a future IHL escape its atrocious implications:

> "[T]he capacity of the laws of war to subvert their own humane rhetoric carries an implicit warning for future attempts to control wars: the promotion of supposedly

1 M. Kaldor, *New and Old Wars. Organized Violence in a Global Era*, 2nd ed., (Polity Press, Cambridge, 2006), p. 107.

2 See, *e.g.*, D. Fleck, "International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law", 11 *Journal of Conflict and Security Law* (2006) 179–199.

3 See *e.g.*, N. Quevinet, "The Varvarin Case: Excerpts of the Judgment of the Civil Court of Bonn of 10 December 2003, Case No. 1 O 361/02", 3 *Journal of Military Ethics* (2004) 178–180, describing how victims of a NATO air raid were denied the right to sue Germany on the basis of IHL norms as paradigmatic of the lack of redress in IHL.

4 C. af Jochnick and R. Normand, "The Legitimation of Violence: A Critical History of the Laws of War" 35 *Harvard International Law Journal* (1994) pp. 49–95 and "The Legitimation of Violence: A Critical Analysis of the Gulf War" 35 *Harvard International Law Journal* (1994) pp. 387–416. See also T. W. Smith, "The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence", 46 *International Studies Quarterly* (2002) pp. 355–374, critiquing recent warfare from a similar position as Jochnick and Normand.

5 af Jochnik and Normand, *supra* note 4, pp. 49–95, p. 58.

> humane laws may serve the purpose of unrestrained violence rather than of humanity."

Here, the authors rather overstate their point. Accepting that IHL cloaks military necessity and an economy of force[6], violence remains subjected to this necessity and economy. It can therefore hardly be 'unrestrained' behind the IHL veil.

Mégret casts it as a codification of colonial politics.[7] Drawing *inter alia* on the historical example of Japan, he concludes that the laws of war live off exclusionary dynamics severing 'civilized' Europeans and 'non-civilized' colonial peoples.

> "The laws of war… can be seen as having been historically one – in fact probably one of the foremost – instruments of forced socialization of non-Western nations into the international community, one whereby non-Western peoples have been called upon to wage war on the West's terms, by adopting Western military mores (thus almost inevitably reinforcing Western supremacy)."[8]

Ultimately, the postcolonial and CLS critiques rest on ideas of political domination. True to their roots in American CLS, af Jochnick and Normand point out the importance of IHL in mustering 'the public support for war'.[9] The laws of war ultimately impede the proper functioning of participatory democracy at the domestic level. The ideas of true democracy and humanity beyond the ruses of IHL hover over their work. Mégret, however, avoids unmasking and idealising. Rather, the original sin of the coloniser has infested history, and the colonial encounter "reverberate[s] through and inform[s] our understanding of the categories of international humanitarian law".[10] af Jochnick and Normand's critique projects powerful elites deceiving the demos supposed to control the last empire. Mégret's story, though, is different. An historical process of exploitation has migrated into the body of law and is constantly restaged in it. There is, so it seems, simply no cognitive alternative for those living after the colonial encounter.

It is exactly this point that I believe needs to be further researched, even beyond the postcolonial frame. As affirmed in IHL doctrine, the purpose of IHL is not to minimise civilian casualties. How exactly does the law condition our cognition of violence? In contrast to the benevolence of traditional readings, one might say that IHL purports to regulate how death and injury is lawfully caused. How does IHL train and socialise us to injure and kill in the 'right' way? As I shall attempt to demonstrate, does this mean first and foremost to injure and kill with a salvaging 'right intent'? In the following, I will examine certain norms of IHL in an attempt to substantiate that they form a system regulating lawful casualties, produced with the 'right' intent.

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6 S*upra* note 4, p. 54.

7 F. Mégret, "From 'Savage' to 'Unlawful Combatants': a Postcolonial Look at International Humanitarian Law's 'Other'", in Anne Orford, *International Law and its Others*, Cambridge University Press, Cambridge 2006, pp. 265–317.

8 *Supra*, p. 308.

9 af Jochnick and Normand, *supra* note 4, p. 59.

10 Mégret, *supra* note 7, p. 269.

Historically, the restraining force of IHL sprang from two principles. As described by the then UK Parliamentary Under-Secretary of State, Ministry of Defence, in the context of the 1991 Gulf War: "The Hague Regulations of 1907 and customary international law do … incorporate the twin principles of distinction between military and civilian objects, and of proportionality so far as the risk of collateral civilian damage from an attack on a military objective is concerned".[11] The 1977 Protocol I Additional to the Geneva Conventions (API) contains a number of interlocking norms specifying these obligations in treaty law. With its 167 ratifications, the Protocol has become a commonly used point of reference, although states contributing decisively to the development of practice in contemporary warfare have not ratified it.[12]

The norms in question are contained in Part 4, Section 1. When read in sequence suggested below, they identify step-by-step those ways where lawful victims are cognisable.[13] Here are the single steps determining a class of victims whose injury is legal under API.

2.1 A Distinct Intent

The first step pivots on Article 48, positing the "basic rule" that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives". Article 51.1 adds that the "civilian population as such, as well as individual civilians, shall not be the object of attacks". Article 51.4 adds a prohibition on indiscriminate attacks, and further provisions exemplify or flesh out the implications of the basic rule.

A strange couplet of concepts operates in the civilian-military dichotomy drawn up in these norms. 'Civilian' qualifies the term 'objects' (here to be understood as 'something material that may be perceived by the senses' or 'the end point of' attack[14]). By contrast, the adjective 'military' does not qualify an object, but an 'objective', alluding either to a 'strategic position to be attained' or a 'purpose to be achieved by a military operation'[15]. This terminological nuance is of some significance, which the

11 UK House of Lords Debates, vol. 531, *WA 43*: 22 July 1991.

12 ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 21-Jan-2008*, <http://www.icrc.org/IHL.nsf/(SPF)/party main treaties/$File/IHL and other related Treaties.pdf> (visited on 10 February 2008). Note the important exceptions of states as the US, Turkey, India, Iran and Iraq, which have not ratified AP I.

13 See *e.g.*, Schmitt's description of the relationship between the principle of proportionality and the prohibition on attacks against other than military objectives: "It is important to understand that the proportionality principle is a restriction on attacks that is additional to the principle limiting them to combatants and military objectives." M. Schmitt, "Precision Attack and International Humanitarian Law", 87 *International Review of the Red Cross* (2005) pp. 457–8.

14 Search result for the term 'object', *Merriam Webster Dictionary* contained in the *Encyclopaedia Britannica Online*, Academic Edition (visited on 16 February 2008).

15 Search result for the term 'objective', *Merriam Webster Dictionary* contained in the *Encyclopaedia Britannica Online*, Academic Edition (visited on 16 February 2008).

ICRC Commentary apprehensively negates.[16] While making civilians the end point of attack is expressly prohibited, the law remains silent on the potential *civilian objective* pursued by an attack. That is, none of the named rules explicitly or implicitly proscribe attacks that may serve a civilian purpose to be achieved. What if something beyond the body of the civilian casualty were to be intended as the end point of attack? Certainly, Article 51.2 proscribes "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population". But what if the sense of terror is merely a secondary purpose, or indeed has no purpose at all? What if the objective were a change in cognition by the body politic of the demos?[17]

2.2 The Nodal Point: Military Advantage

In the second step, this group of lawful casualties is further fixed through the concept of 'military objective'. Article 52.2 reads as follows:

> "Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[18]

The wording of the definition of military objects in API does not necessarily reflect the approach taken by all states. While the US Army and Air Force reflect the Additional Protocol I wording, the Navy and Department of Defence documents substitute 'enemy's war-fighting or war-sustaining capability' for 'military action'.[19] It has been

16 The ICRC Commentary first explores the English and French meaning of the terms 'object/objet' and 'objective/objectif' in paras 2007–2010. While the results are analogous to mine, the Commentary draws a manifestly absurd conclusion in para 2010: "There is, however, no doubt that in this article both the English and French texts intended tangible and visible things by the word 'objective', and not the general objective (in the sense of aim or purpose) of a military operation; therefore the extended meaning given by the Dictionnaire Robert is not included in this article." Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949*, (ICRC, Geneva, 1987).

17 Morale bombing debates in and after the Second World War or regime change intervention campaigns, for all their difference in operational terms, provide examples of this desire.

18 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter API), 8 June 1977, contained in D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Fourth Rev. and Completed Ed., 2004), p. 651.

19 See *The Military Commander and The Law*, 8th ed. (Maxwell AFB, AFJAGS Press, 2006) p. 614 <http://milcom.jag.af.mil/milcom2006-complete.pdf>; *The Law of Land Warfare*, FM 27-10 (1976) ch. 2, para. 40 c <http://atiam.train.army.mil/portal/atia/adlsc/view/public/296783-1/fm/27-10/Ch2.htm#s4>, *United States Commander's Handbook on the Law of Naval Operations*, 21 NWP 1-14M (October 1995) para. 8.1.1, at 8-1 <www.nwc.navy.mil/ILD/NWP%201-14M.htm>; *Department of Defence Military Commission Instruction No. 2*, 30 April 2003, para. 5 D 3 <www.dod.gov/news/May2003/d20030430milcominstno2> (visited on 26 February 2008).

pointed out, and refuted, that this might broaden the category of military objects. We believe that it is sufficient for our argument to take issue with the allegedly more restrictive position of the quoted definition in Article 52.2.

Within that norm, civilians are defined by reference to combatants, and civilian objects are defined solely by not being military objectives. The wording of Article 52.2 relates a 'military objective' to objects which 'make a contribution to military action' and whose destruction would offer 'a definite military advantage'.[20] Accordingly, we have reached the point where the body of IHL norms on civilian protection seemingly culminates.[21]

The interpretive openness of these terms rebounds on the negatively defined categories of 'civilian objects'. It emerges at this point that the concept of 'civilian objects' fatally trails the concept of 'military advantage'. When read in conjunction with the principle of distinction and its ancillary norms, this rule does not in itself take a stand on the inflicting of harm on civilians, provided that such harm is the consequence of an attack pursuant to military advantage.

In this way, any person deciding on targeting is taught cognitively to organise the territory and population as extensions of military advantage. Lawful violence may harm civilians and civilian objects to the extent that they are cognitively subsumable under military objectives. The extent to which the person in question could describe enemy territory and population in terms of military advantage would determine the extent of lawful targeting choices at the disposal of that person.[22]

IHL lives off the idea that military objectives may be clearly and distinctively separated from civil-political objectives. Since industrialisation has subjected the whole of a territory and its population into the war fighting effort, this idea is no longer tenable. If the drafters of the 1977 API nonetheless used a conceptualisation of warfare adapted to the pre-industrial battlefield, this must embody particular reasons. One would be outright manipulation in the veiling of the confluence of military and civil-political objectives. I do not believe that such a blatant exercise of manipulation would have gone unnoticed by drafters and the international public. Therefore, I would rather consider that a double reference to the normative power of military advantage and to international law (as enacted in Article 52.2) was deemed intuitively plausible by both drafters and public. This sense of plausibility needs to be properly understood, unless we wish to remain subjected to the sacrificial order of IHL.

20 This raises the question of whether military advantage is tactical only (which would restrict the extent of lawful civilian losses) or strategic (which would expand the extent of lawful civilian losses).

21 Further references to military advantage, albeit with different adjectives, are in Articles 51.5.b and 57.2.a.iii and b. The ICRC Commentary states that "[t]he documents of the Diplomatic Conference do not contain any indication about the reasons why different expressions were preferred. One is therefore left to analyze the meaning of the words used" (para. 2027).

22 The obligation on the attacker to embark on this cognitive process is further bolstered by the prohibition on indiscriminate attacks in Article 51.4 API.

2.3 The Sacrificial Logic of Proportionality

The third step introduces a norm making it necessary to establish that an attack will not cause excessive incidental loss. Article 51.1.b proscribes as indiscriminate any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[23]

Article 57.2.a.iii reflects this principle when obliging the attacker to take precautions:

> "With respect to attacks, the following precautions shall be taken:
> …
> refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"

This rule expressed in these two norms is often referred to as the principle of proportionality. This is odd, since the law itself does not use the term. Certainly nothing within the wording of the quoted piece commands a balancing on a gradually escalating scale between military advantage and civilian loss to take place. Rather, the rule opens latitude for non-excessive civilian casualties and merely prohibits attacks that are likely to exceed its imagined limit. This latitude is where sacrifice occurs – beyond this, it is murder.

The ICRC Commentary reflects the critique levelled against the principle of proportionality at the Diplomatic Conference deliberating the final text of API, or on later occasions: "The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance." The wording of the two proportionality norms would support this critique. As illustrated earlier, neither is there any ceiling for civilian casualties elsewhere in API. Surprisingly, the authors of the ICRC Commentary make a bizarre claim on the tenability of the critique related in this quote:

> "This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 '(Basic rule)' and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive

23 In recasting this rule as an indictable war crime, Article 8(2)(b)(iv) of the ICC Statute modifies 'excessive' with the adjective 'clearly' and 'military advantage' with 'overall'. It could be the case that the drafters of the ICC believed that these clarifications mirrored the common interpretation of the proportionality principle as expressed in API. Or they might have consciously heightened the conceptual thresholds of API for pragmatic reasons. It has been contended that an analogous rule exists in customary law. ICRC Study….. pp. 46–50. Rule 14 states: 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.'

> civilian losses and damages. Incidental losses and damages should never be extensive."[24]

Nothing in the wording of Articles 48 and 51.1 and 2 mandates such a conclusion. It is utterlystrange that the authors of the well-respected Commentary lend themselves to this formulation, unless one chooses to understand it as a plea and not as an interpretation of valid law. This veiling of the options opened by the law has a distinct function, which we shall revert to later.

But how are we to make sense of the cognitive operation prescribed in Articles 51.1.b and 57.2.a.iii? When pondering the relationship between anticipated civilian casualties and anticipated military advantage, IHL scholars have noted the incommensurability of the two categories.[25] If we accept that military objectives ultimately serve the achievement of a civilian objective, then the two categories indeed are commensurable in their contribution to the achievement of that civilian objective.[26] Civilian casualties are excessive when they negatively affect military advantage. This is the case when the extent of civilian casualties is such as to counter the achievement of a civilian objective. As the achievement of military objectives ultimately is a means to the goal of achieving a civilian objective, any action detracting from the achievement of a civilian objective also detracts from the achievement of military objectives. Therefore, civilian loss and military gain have become commensurable. Civilian losses are excessive when they detract from the achievement of a civilian objective.

Here, then, is the chain of equivalence constructed so far, setting out the rule according to which civilians may be lawfully killed: anticipated military advantage can be projected onto an object, thereby making it cognisable as a military objective, which may then be lawfully attacked regardless of civilian casualties, so long as the latter remain within a limit determined by the value of military advantage anticipated. Military advantage is affected negatively by civilian casualties if the latter negatively affect the civil-political objective of warfare. Staging an attack that must be anticipated to negatively affect the civil-political objective of warfare due to the extent of civilian casualties is thus prohibited by Articles 51.1.b and 57.2.a.iii.

This puts further emphasis on the issue of the civil-political objective of warfare.

3. The Civil-Political Objective of Sacrificial Appeasement

Wars are fought not for the sake of fighting, but of winning them. Without any doubt, the historical compromise inscribed into IHL norms reflects the pursuit of a double objective: as little violence so as not to cause a momentary excess of suffering, and as much violence, so as not to cause the protraction of suffering. This is the required context for tackling and pursuing civil-political objectives. It is an issue discussed in a con-

24 ICRC Commentary, *supra* note 16, para. 1980. Regrettably, the Commentary does not relate the sources of this critique.

25 See, *e.g.*, Schmitt, *supra* note 13, p. 457, asking the rhetorical question "how does one compare dissimilar values (civilian harm and military gain) at all, let alone over time in different combat situations and across cultures?"

26 The assumption of a civilian objective also makes good the strange conceptual asymmetry of the rule of distinction, as explained in Section 2.1 above.

fusing manner by IHL lawyers, often by drawing on the historical example of morale bombing during the Second World War. On this point there exists a curious degree of disagreement and miscommunication among experts of IHL. W. Hays Parks is perhaps representative in his desire to outlaw morale bombing 'as such'[27] while retaining latitude for affecting the will of the enemy government or population:

> "Wars are fought to change the will of others. Except in the most dictatorial societies, the will of the nation is affected by the will not only of its military but that of its civilian population. Attack of enemy military objectives has the collateral effect of affecting the will of the national leadership, the military and the civilian population. Nothing in the law of war prohibits influencing each ancillary to attack of objects meeting the definition of military objective contained in Article 52(2), of Additional Protocol I."[28]

This boils down to the conclusion that morale bombing is acceptable as an ancillary to targeting in conformity with IHL, but not as an end in itself. Again, everything seems to hinge on the right intent of the commander.

At most, we may infer from the Hays Parks quote that the civil-political objective of the war is negatively defined in IHL rules. The cognitive structures in central norms on civilian protection are in themselves not sufficient to cogently explain what function civilian casualties possess in the process of violent appeasement. This obscurity can only be addressed by a theory explaining how casualties are related to the civil-political objective of winning a war. If we understand rational war fighting bound by IHL as a means of keeping the use of violence as short and controlled as possible, a vista to such a theory opens. Based upon a survey of anthropological literature, French philosopher and literary critic René Girard has analysed such 'curative and preventative procedures' against unfettered violence as being

> "imbued with religious concepts – both the rudimentary sacrificial rites and the more advanced judicial forms. Religion in its broadest sense, then, must be another term for that obscurity that surrounds man's efforts to defend himself by curative or preventative means against violence."[29]

This obscurity perseveres in the contemporary age of secularisation, and can be tracked in the functioning of legal institutions:

> "It is that enigmatic quality that pervades the judicial system when that system replaces sacrifice. This obscurity coincides with the transcendental effectiveness of a violence that is holy, legal, and legitimate successfully opposed to a violence that is unjust, illegal, and illegitimate."[30]

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27 W. Hays Parks, 'Asymmetry and the Identification of Legitimate Military Objectives', in W. Heintschel von Heinegg, and V. Epping, (eds.) *International Humanitarian Law Facing New Challenges Symposium in Honour of Knut Ipsen*, Springer 2007, pp. 65–116, p. 116.

28 *Supra*, p. 115.

29 R. Girard, *Violence and the Sacred* (Johns Hopkins University Press, Baltimore, 1977), p. 24.

30 *Ibid.*

I would like to emphasise two aspects, which shall prove relevant for the question raised in this article. First, Girard speaks of *violence*[31]; and, more particular, of violence as a way of keeping man's violence within bounds. This suggests that bounded violence is to be distinguished from violence bounding it. Projected back upon my argument, it implies that the obscurity of IHL rules should be seen not merely as products of inconsistent drafting, but as productive sites in a transcendental order producing the right form of violence in warfare. This violence would then be capable of subduing an everlasting and anarchic violence, of terminating the war and bringing forth peace.

Second, Girard emphasises the role of obscurity and enigma, and links it to the law. Obscurity possesses a distinct function in his analysis of violence, and Girard finds it to be present even in cases where violence could be successfully established as 'holy, legal and legitimate', thereby attaining 'transcendental effectiveness'. As IHL represents a 'curative and preventative means', it falls neatly within the Girardian use of the term 'religion'. Provocative to some, this could be discarded as a definitional caprice, were it not for the suggestion that religion puts obscurity into productive use. If we follow Girard, and read IHL as religion, its incompleteness, its obscurity turns into a necessary precondition for the law's 'transcendental effectiveness' in containing violence. That suggestion would be difficult to accept for lawyers used to thinking in terms of predictability.

So what is Girard's point? A foundational assumption in his work is that we are driven by a desire of that which our fellow humans desire. This *mimetic desire* spreads, spawns rivalry, conflict and, ultimately, violence. The use of violence does not end the cycle of desire, though. Rather, it sets off retributive violence, which triggers further retribution, and so forth. In the long run, this *contagious* violence will threaten the continued existence of a community. In *Violence and the Sacred*, Girard explores a coping mechanism. By directing intra-community violence onto a surrogate victim and sacrificing him or her, this threat is externalised, eliminated with the victim, and the community emerges reappeased. It would be a mistake, though, to project this back upon IHL by understanding one warring state as a Girardian community, and its enemy as a potential sacrificial victim. This would not take into account the centrality of distinguishing between enemy combatants and enemy civilians, and the importance of killing members of the 'right' category. Rather, one should see the warring states as members of a community of states, which has drawn up treaties to regulate and fortify their communal affairs. The appeasement produced by the sacrifice of a surrogate victim is beneficial not only for the victorious state, but also for its subdued enemy, because both are saved from a perpetuating and unfettered violence.

Girard describes this victim as a *scapegoat*, who is a replacement for the potential victims of retributive violence, and innocent in the sense that he or she bears no responsibility for the escalating violence.[32] The residual group of civilians that may be

31 More than a century ago, Sorel remarked that the "problems of violence still remain very obscure", which can be taken as an involuntary confirmation that the central condition for the functioning of generative violence thrived in 1906, as well as in 1969, when Arendt approvingly quoted Sorel. G. Sorel, *Reflections on Violence*, "Introduction to the First Publication" (New York: 1906, 1961), 60, as quoted in Arendt, *On Violence* (Harcourt & Brace San Diego, 1969) p. 35.

32 "[S]ociety is seeking to deflect upon a relatively indifferent victim, a "sacrificeable" victim, the violence that would otherwise be vented on its own members, the people it most desires

lawfully killed under IHL are a materialisation of the scapegoating mechanism in IHL. Civilian casualties are characterised by their innocence, that is, their political incapacity, as Helen M. Kinsella has argued in an impressive genealogy of the conception of civilians in IHL.[33] They are outsiders in the community of states, because their fate does not affect the civil-political objective of warfare – that is, appeasement.

The 'vitality as an institution' of sacrificial mechanism, Girard believes, "depends on its ability to conceal the displacement upon which the rite is based"[34] – that is, the displacement of violence from the real victims of retributive violence to the scapegoat victim. The impulse of jurists to 'fill out the void' left by the letter of the law (exemplified in the excess of the ICRC Commentary discussed in Section 2.3 above) or by conjuring *lex ferenda* might be one of the collusive strategies covering up the displacement upon which the rite is based. Filling out the void is the lawyer's contribution to the act of scapegoating. This displacement is the source of the "obscurity that surrounds man's efforts to defend himself by curative or preventative means against violence" discussed above.

It provides the link to religion, and the concept of the *sacred*, which Girard forges into a centrepiece of his theory. The scapegoat, the sacrificial victim, appears to be simultaneously the cause and resolution of conflict, and his killing leads to the 'miraculous consequence' of peace. How can this be?

> "If it is true that the community has everything to fear from the sacred, it is equally true that the community owes its every existence to the sacred. For in perceiving itself as uniquely situated outside the sphere of the sacred, the community assumes that it has been engendered by it; the act of generative violence that created the community is attributed not to men, but to the sacred itself. Having brought the community into existence, the sacred brings about its own expulsion and withdraws from the scene,

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to protect." Girard, *Violence and the Sacred*, p. 4. "The celebrants" of the sacrificial process "do not and must not comprehend the true role of the sacrificial act. The theological basis of the sacrifice has a crucial role in fostering this misunderstanding. It is the god who supposedly demands the victims; he alone, in principle, who savors the smoke from the altars and requisitions the slaughtered flesh. It is to appease his anger that the killing goes on, that the victims multiply." Girard, *supra* note 29, p. 7.

33 "To be innocent in war, in the terms set by the laws of war, is to be deficient or lacking in a multitude of ways that in the end, implicitly, if not explicitly, cites an incapacity for politics. Indeed, the 'harmlessness' of the civilian in the 1949 IV Convention and Additional Protocol I continues to cite this incapacity if, attending to Carl Schmitt, we identify harmlessness with nonpolitical. Accordingly, the rights and protections offered cannot be, as Jacques Ranciére refers in regard to human rights, '*experienced* as political capacities.' 112 Indeed, what I illustrated is that it is *not* political capacities which inform the extension of rights and protections of international humanitarian law, but is instead a celebration of Christian mercy, charity, and love, and a valorization of suffering, distress, and weakness. Equally significant, an incapacity for politics is also, at least for Aristotle, an incapacity to become fully human. This is not benign, for it shows how the rights and protections of international humanitarian law are genealogically derived from or grounded in what some might call 'subhumanity'. What this portends is that international humanitarian law requires and produces 'subhumanity' as the predicate for extending recognition of its rights or offering its protections." H. M. Kinsella, "Gendering Grotius: Sex and Sex Differences in the Laws of War", 34 *Political Theory* 2006 pp. 161–191, p. 185.

34 Girard, *supra* note 29, p. 285.

> thereby releasing the community from its direct contact. … A total separation of the community and the sacred would be fully as dangerous as a fusion of the two. Too great a separation can result in a massive onslaught of the sacred, a fatal backlash; then, too, there is always the risk that men will neglect or even forget how to implement the preventive measures taught them by the sacred itself as a defense against its own violence."[35]

For this reason, Girard's theory is a theory of generative violence, a violence engendering the community, and, in the moment of crisis, re-engendering it miraculously through the sacrificial act.[36] To conceal the displacement of the victim role is essential for its functioning. This displacement is effectively hidden by the sacrificial rite, and integrated into belief structures, into ideas of a divine visitation of the community.[37] The habit of describing the dead civilian scapegoat as a 'casualty' bears witness to how the sacrificial rite of targeting clears involved individuals of responsibility and allocates it with the divine instead. This is an essential precondition for appeasement, both according to the logic of the sacred described by Girard, and the logic of an economy of warfare. The suffering of the scapegoat casualty is valorised. In constructing a chain of equivalence between that scapegoat casualty and military advantage is precisely what IHL sets out to achieve.

4. Conclusions

IHL is a body of norms offering violent ways of preventing and curing violence. I have attempted to understand the objective of IHL in a novel way, drawing on its political-theological core. In a divine economy of force, it entreats the sacred to annihilate an innocent, politically incapacitated civilian casualty in exchange for the cessation of violence and the secured existence of the community of state sovereigns. Those hoping for a more humane IHL should perhaps hope for a less divine one instead.

35 Girard, *supra* note 29, p. 282.

36 "Polarized by the sacrificial killing, violence is appeased. It subsides. We might say that it is expelled from the community and becomes part of the divine substance, from which it is completely indistinguishable, for each successive sacrifice evokes in diminishing degree the immense calm produced by the act of generative unanimity, by the initial appearance of the god. Just as the human body is a machine for transforming food into flesh and blood, generative unanimity is a process for changing bad violence into stability and fecundity." Girard, *supra* note 29, pp. 280–281.

37 "All sacrificial rites are based on two substitutions. The first is provided by generative violence, which substitutes a single victim for all the members of the community. The second, the only strictly ritualistic substitution, is that of a victim for the surrogate victim. As we know, it is essential that the victim be drawn from outside the community. The surrogate victim, by contrast, is a member of the community. Ritual sacrifice is defined as an inexact imitation of the generative act." Girard, *supra* note 29, p. 284.

Chapter 15

J.-J. Rousseau and the Law of Armed Force

*Allan Rosas**

1. Introduction

Legal orders have not learned how to cope without authorising, and thus regulating, the use of force, including armed force. At the international level, wars used to be considered a legitimate means of resolving disputes, even outside situations of self-defence. During the 20th century, the international legal regulation of armed force has undergone profound change, while its use is still permitted in a number of situations. The following four 'stages' can be discerned:[1]

Four stages in the international regulation of armed force

	Ius in Bello	*Ius ad Bellum*
International armed conflicts	1	2
Internal armed conflicts	3	4

The first stage can here be situated in the Westfalian order of sovereign and independent states, culminating in the codification of the laws and customs of war, subsequently termed international humanitarian law applicable in armed conflicts, as from the second half of the 19th century.

As to the second stage, important limitations on the right to resort to armed force were introduced by the Covenant of the League of Nations, the Kellogg-Briand Pact

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1 A. Rosas, 'The Decline of Sovereignty: Legal Aspects', in J. Iivonen (ed.), *The Future of the Nation State in Europe* (Edward Elgar, Aldershot, 1993) p. 136; A. Rosas, 'Towards Some International Law and Order', 31 *Journal of Peace Research* (1994) p. 132; A. Rosas, 'Construing International Law and Order', in J. Petman and J. Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff Publishers, Leiden, 2003) p. 91.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 219–230.

of 1928 and the UN Charter and reaffirmed and reinforced by the introduction of the concepts of 'crimes against peace' and 'crimes of aggression'.[2]

The third stage refers to Article 3 common to the four Geneva Conventions of 1949 relating to the protection of victims of war and Protocol II of 1977 additional to the said Geneva Conventions as well as the extension, through the statutes of international and internationalised criminal courts, of international jurisdiction to crimes committed in internal armed conflicts and even internal situations short of armed conflict.[3] In this context, one can also mention the applicability of a set of basic human rights in situations of public emergency, including armed conflict.[4]

While these developments are rather self-explanatory, the fourth stage requires some elaboration. Traditionally, the prohibition on armed attacks has been limited to interstate relations. Today, an emerging 'right to democratic governance' and the internal aspects of the right to self-determination pose a challenge to this assumption. Arguably, force should be used by a government against its own citizens only to combat criminality and attacks against the democratic system of governance, whereas upholding a dictatorial regime by force would be illegitimate. The population may in such a situation have a right of resistance.[5] It goes without saying that the precise content of such a principle, and the legal remedies available to make it operational, are open to debate.

In particular, such a principle does not necessarily authorise military interventions by third states. The controversy about the legitimacy of the military overthrow of the Iraqi regime in 2003 attests to the uncertainties surrounding the use of force in operations not authorised by the UN Security Council undertaken to protect the population concerned (and it has to be added that 'regime change' was, at most, presented as a subsidiary justification for the Iraqi operation, and that the precise role of the Security Council is in this case also open to debate).[6]

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2 Article 6 of the Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945; Article 5 of the Statute of the International Criminal Court, Rome, 17 July 1998.

3 Reference may be made to the statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court and a number of 'internationalised' criminal courts and bodies (such as Sierra Leone, East Timor, Kosovo, Cambodia) and L. C. Green, 'Criminal Responsibility of Individuals in Non-International Armed Conflict', 45 *German Yearbook of International Law* (2002) p. 82. On the 'internationalised' tribunals *see* C. P. R. Romano *et al.* (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press, Oxford, 2004).

4 *See e.g.*, A. Rosas, 'Public Emergency Regimes: A Comparison', in D. Gomien (ed.), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Scandinavian University Press, Oslo, 1993) p. 165.

5 I have developed this thesis, *e.g.*, in A. Rosas, 'Article 21', in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Commentary*, Second revised edition (Martinus Nijhoff, The Hague, 1999) pp. 440–442; Rosas, 'Construing International Law and Order', *supra* note 1, pp. 95–98.

6 On the Iraqi operation *see e.g.*, I. Jonstone, 'US-UN Relations after Iraq: The End of the World (Order) As We Know It?', 15 *European Journal of International Law* (2004) pp. 813–838, with references.

While a number of questions thus remain, it is undeniable that many normative developments support a 'right to democratic governance'. These include Article 21 of the Universal Declaration of Human Rights of 1948, Articles 1 and 25 of the International Covenant on Civil and Political Rights of 1966, the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights of 1993 as well as UN institutional practice, in application and interpretation of the UN Charter.[7]

It can, of course, be countered that the implementation and enforcement of these and other similar norms are fragmentary, at best. But the same criticism can to a certain extent be levelled against all the four normative categories outlined above. As is well known, the compliance record of the international regulation of armed force leaves much to be desired. But for the purposes of the present contribution, it suffices to register the above-mentioned basic trends in treaty law and 'soft law', without further precision as to norm content or state or UN practice.

As the title of this contribution suggests, my main objective is to relate all this to the writings of *J.-J. Rousseau* (1712–1778) in order to explore to what extent, if any, the normative developments of the 20th century outlined above were, some 250 years earlier, presaged by one of the greatest thinkers of our times. The observations of Rousseau on the nature of war and the conduct of hostilities (and thus on the *ius in bello*, to apply the terminology of the above matrix) have not escaped the attention of international lawyers.[8] His comments on the avoidance of war and armed force and the possibilities of guaranteeing a perpetual peace have received much less attention.[9] In the following, I shall discuss the relevance of Rousseau for both the *ius in bello* and the *ius ad bellum*. Finally, some comments will be made on the relation between the two concepts as they stand today, in the broader context of international law and international human rights law.

2. J.-J. Rousseau: A General Profile

Without entering into a discussion on the writings of Rousseau in general, it is useful to mention some features that seem particularly relevant for his views relating to questions of war and peace.

It should be recalled, at the outset, that Rousseau did not represent the legal profession (whatever its precise contours in 18th century Europe) although he could be seen as a constitutional lawyer in the widest sense of the term. But as a true generalist,

7 *See* the references in *supra* note 5 and A. Cassese, *International Law* (Oxford University Press, Oxford, 2001) p. 371. On the practice of the UN Security Council in general *see*, *e.g.*, E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford, 2004).

8 *See e.g.* A. Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* (Finnish Academy of Science and Letters, Helsinki, 1976; reprint published by the Institute for Human Rights, Åbo Akademi University, Turku, 2005) pp. 51, 57; H.-P. Gasser, *International Humanitarian Law: An Introduction* (Henry Dunant Institute, Geneva, 1993) p. 7.

9 *But see* A. Rosas, *The European Union as a Federative Association*. European Law Lecture 2003, Durham European Law Institute (University of Durham, Durham, 2004) pp. 1–3; Rosas, 'Construing International Law and Order', *supra* note 1, pp. 89–90, 109–110.

he also displayed the features, *inter alia*, of a philosopher, political scientist and historian (notably *Discours sur les sciences et les arts*, *Discours sur l'origine et les fondemens de l'inégalité parmi les hommes* and *Du contrat social*), theologian (*Lettre à Voltaire sur la providence*, *Emile* and *Lettres écrites de la montagne*) pedagogue (*Emile*), novelist (*La nouvelle Héloïse*), composer and musical theorist (including *Dissertation sur la musique moderne* and the opera *Le devin du village*) and botanist.[10]

His writings include a number of observations on the law as the expression of the general will and on the political constitution of states (*Du contrat social*) as well as proposals and views on constitutions for Corsica and Poland (*Projet de constitution pour la Corse, Considérations sur le gouvernement de Pologne*).

Rousseau also nurtured plans to complement his political and constitutional writings, notably those of the 'Social Contract', by one or more studies on international law, including the law of war.[11] He in fact started work on a larger treatise (*Institutions politiques*), including a study of the law of war (*Principes du droit de la guerre*) and some remarks on confederations as a means of ensuring permanent peace in Europe, but most of the preliminary manuscript going beyond the 'Social Contract' seems to have been destroyed.[12] The Foreword to the 'Social Contract' consists of the following passage: "This little treatise is part of a larger work which I undertook many years ago without thinking of the limitations of my powers, and have long since abandoned. Of the various fragments that might have been taken from what I wrote, this is the most considerable, and the one I think the least unworthy of being offered to the public. The rest no longer exists."[13]

In the context of a query on the possibilities of a small republic (which Rousseau thought best equipped to preserve the sovereign rights of the people) defending itself against foreign aggressors, he observed that he had intended to show how the defensive strength of a large people could be combined with the free government and good order of a small state: "This is what I intended to do in the remaining part of this work, when, in dealing with foreign relations, I should have come to the subject of confederations. This subject is entirely new, and its principles have yet to be established."[14]

And he ends the 'Social Contract' with the following remarks:

10 On Rousseau as a botanist, *see e.g.*, M.-V. Howlett, *Jean-Jacques Rousseau. L'homme qui croyait en l'homme* (Gallimard, Paris, 1989) pp. 106–113.

11 *See e.g.*, S. Stelling-Michaud, 'Introduction sur Écrits sur l'abbé de Saint-Pierre', in J.-J. Rousseau, *Oeuvres completes III – Du contrat social – Écrits politiques* (Éditions Gallimard, La Pléaide, 1964) pp. CXXV, CXXXIX.

12 *See e.g.*, Note made by the editors to the Foreword of 'Du contrat social', Rousseau, *supra* note 11, p. 1431.

13 J.-J. Rousseau, *The Social Contract*. Translated and introduced by M. Cranston (Penguin Books, London, 1968) p. 47. For the original French version *see* Rousseau, *supra* note 11, p. 349.

14 Rousseau, *supra* note 13, p. 143 (Book III, Chapter 15; the quoted part is in a footnote). The original French version in Rousseau, *supra* note 11, p. 31. *See also* J.-J. Rousseau, *Emile, or On Education*. Introduction, translated and notes by A. Bloom (Penguin Books, London, 1979) p. 466.

> "After setting out the true principles of political right,[15] and trying to establish the state on the basis of those principles, I should complete my study by considering the foreign relations of the state, including international law, commerce, the rights of war and conquest, public law, leagues, negotiations, treaties and so forth. But all this would represent a new subject too vast for my weak vision; and I ought always to keep my eyes fixed on matters more within my range."[16]

Such modesty has not left us entirely bereft of traces of Rousseau's ideas about questions of war and peace. The 'Social Contract' contains important passages on the nature and conduct of war, and fragments of his thinking on international law and the law of war as well as the possibilities of a permanent peace, including through confederations and '*une bonne association fédérative*', can be found in several of his works or manuscripts.

Before embarking upon a discussion of these ideas, it may be useful to say a word about Rousseau's theory of law. Was he a positivist or a natural lawyer, and was he writing *de lege lata* or *de lege ferenda*?

Rousseau is, in fact, difficult to locate in such conceptual contexts, which is only natural considering both his professional background and the times he was experiencing. He certainly believed in the necessity of positive law, which should be the expression of the general will. Only a state ruled by law could be called a republic, governed by the public interest. But not all laws were just and the lawgiver should strive to achieve harmony between positive and natural law. And discussing the classification of law, Rousseau added to the three main sorts of law, namely constitutional law, civil law and criminal law, a fourth, "the most important of all, which is inscribed neither on marble nor brass, but in the hearts of the citizens" – namely morals, customs and belief.[17]

Natural law did exist but it had to be translated into positive law to become effective.[18] The problem with international law was that there was no positive law, accompanied by sanctions. The monarchs or other rulers of states tended to do what was in their interests and paid little or no heed to natural law.[19] Rousseau sometimes wrote as an 'empirical social scientist',[20] 'taking men as they are' while he certainly was also a constitutionalist and political philosopher, taking 'laws as they might be'.[21] But because international law, and the law of war, could not be transformed into positive

15 In the French original, 'droit politique', Rousseau, *supra* note 11, p. 470.

16 Rousseau, *supra* note 13, p. 188 (Book IV, Chapter 9).

17 Rousseau, *supra* note 13 (Book II, Chapter 12) p. 99. *See also* Rousseau, *Emile*, *supra* note 14, p. 473: "But the eternal laws of nature and order do exist. For the wise man, they take the place of positive law. They are written in the depth of his heart by conscience and reason" (*see also* pp. 85, 235).

18 *See also* Cranston, Introduction to Rousseau, *supra* note 13, pp. 38–39.

19 J.-J. Rousseau, 'Que l'état de guerre nait de l'état civil', in Rousseau, *supra* note 11, p. 610; J.-J. Rousseau, 'Considérations sur le gouvernement de Pologne et sur sa réformation projettée', in Rousseau, *supra* note 11, p. 1037. *See also* Stelling-Michaud, *supra* note 11, p. CLI.

20 Cranston, *supra* note 18, p. 37.

21 The two quotations from Rousseau, *supra* note 13, p. 49 (Introduction to Book I).

law, he hesitated on what to say on the possibilities of injecting a degree of humanity into international relations and achieving a lasting peace. It is to his more specific comments on questions of war and peace that I shall now turn.

3. Rousseau and the *Ius in Bello*

Rousseau's most elaborate published observations on the law of war were made in the 'Social Contract'. These observations, however, were not offered in the context of a theory of international relations and international law but as part of his criticism of *Grotius* and others, who had held, among a series of arguments presented to justify slavery, that as the vanquished in war could be killed, they could *a fortiori* be made slaves.[22]

In refuting such a 'terrible right of massacre', Rousseau observed, in criticism, of course, also of *Hobbes*, that men are not naturally enemies and that wars are conflicts over things, not quarrels between men.[23] Private wars cannot exist in civil society, where everything is under the authority of the law: "War, then, is not a relation between men, but between states; in war individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers; not as members of their country, but only as its defenders. In a war, a state can have as an enemy only another state, not men, because there can be no real relation between things possessing different intrinsic natures."[24]

This general characterisation led to a call to respect both the rights of the civilian population and prisoners of war:

> "Even in the midst of war, a just prince, seizing what he can of public property in the enemy's territory, nevertheless respects the persons and possessions of private individuals; he respects the principles on which his own rights are based. Since the aim of war is to subdue a hostile state, a combatant has the right to kill the defenders of that state while they are armed; but as soon as they lay down their arms and surrender, they cease to be either enemies or instruments of the enemy; they become simply men once more, and no one has any longer the right to take their lives. It is sometimes possible to destroy a state without killing a single one of its members, and war gives no right to inflict any more destruction than is necessary for victory."[25]

We have here in a nutshell the basic philosophy underlying the laws and customs of war, as they came to be codified some 100 years later. Rousseau was not, of course, the only one to propagate such principles. Earlier, the writers of the 16th and 17th centu-

22 Rousseau does not mention that Grotius mitigated his harsh statements, based upon classical writings, by referring to more lenient practices which had emerged among Christian nations, Rosas, *supra* note 8, p. 52.

23 Rousseau, *supra* note 13, pp. 55–58, quotation at p. 57. *See also* Rousseau, 'L'état de guerre', *supra* note 20, p. 601.

24 Rousseau, *supra* note 13, p. 56 (Book I, Chapter 4).

25 *Ibid.*, p. 57. Original French version Rousseau, *supra* note 11, pp. 357–358. *See also idem*, 'Fragments sur la guerre', Rousseau, *supra* note 11, pp. 614–615.

ries, such as Grotius, while acknowledging a right in principle to kill and thus also to enslave the vanquished, hastened to add that practice in wars between civilised nations had moved in another direction, sparing civilians and military prisoners as far as possible.[26]

Writing in the mid-18th century, Rousseau expressed a more 'modern' approach, to some extent also reflected in the writings of certain other philosophers such as *Montesquieu* (1689–1755) and international lawyers such as *Bynkershoek* (1673–1743) and *Vattel* (1714–1767).[27] The distinction between just and unjust wars gradually lost its relevance for the application of the laws and customs of war. Both parties to a war had to respect these laws and customs, irrespective of the cause of the war itself. States that stayed outside the war adopted a position of neutrality.[28] In such a system, combatants could not be punished for the mere fact of having served the enemy army as soldiers. If they surrendered, they had to be treated humanely as prisoners of war and released at the end of hostilities.[29] In the passage quoted above, Rousseau did not express himself on the feudal remnants of state practice concerning prisoners of war, such as a limited place for ransom, and considerable differences in value between military ranks when exchanges of prisoners took place, which could still be witnessed during the 18th century.[30] But one has to assume that he would have applauded the decisions of revolutionary France to prohibit ransom and to introduce formal equality between military prisoners for the purposes of exchange or release.[31]

It has to be recalled that Rousseau made the above remarks as part of his criticism of Grotius' defence of slavery and the 'rights' of people to relinquish their freedom and become the subjects of a king. According to Rousseau, force alone bestows no right ('might does not make right') and renouncing freedom "is to renounce one's humanity, one's rights as a man and equally one's duties".[32] And so the principles on the nature of war and rightful conduct in war Rousseau espoused "were not invented by Grotius, nor are they founded on the authority of the poets; they are derived from the nature of things; they are based on reason".[33]

But perhaps Rousseau did not here limit himself to express a normative stance as it were *de lege ferenda* but might also have been influenced by existing state practice as

26 Rosas, *supra* note 8, pp. 50, 52.

27 *Ibid.*, pp. 49–51.

28 *See also* M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company, Helsinki, 1989) pp. 81, 95 and M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, Cambridge, 2002) pp. 83–88.

29 In Rosas, *supra* note 8, p. 73, I have summarised the general principles relating to prisoners of war as expressed in military manuals, treaties and draft treaties of the second half of the 19th century.

30 Rosas, *supra* note 8, p. 54.

31 But a distinction could still be made between officers and the rank and file in the actual treatment of prisoners of war, Rosas, *supra* note 8, pp. 54–55. On the contribution of the French Revolution to the laws and customs of war in general *see* J. Basdevant, *La revolution française et le droit de la guerre continentale* (Paris, 1901).

32 Rousseau, *supra* note 13, pp. 53, 55.

33 *Ibid.*, p. 57.

reflected in peace and other treaties and the interpretations of an emerging customary law advanced by legal authorities. He in fact points out that the principle that war is not a relation between men but between states "conforms to the established rules of all times and to the constant practice of every political society".[34] The inaccuracy of this statement (established rules 'of all times' and constant practice of 'every' political society), which Rousseau certainly must have been aware of himself, was perhaps his way of strengthening a moral argument by a more realist-positivist one. It has to be recalled, on the other hand, that Rousseau does not seem to have regarded international law as being true positive law, as there were no sanctions against breaches. I have not come across any discussion on his part on the various military and other factors that can induce belligerent states to follow certain rules out of considerations of self-interest and common interest (military discipline, reciprocity, and so on).[35]

The above pronouncements of Rousseau clearly relate to wars between states rather than civil wars. One can assume that he would have accepted a harsh treatment of those who took up arms against a republic (a legitimate rule of law).[36] If, again, the prince or other members of the government usurp sovereignty and become tyrants, the social pact is broken and the ordinary citizens, "recovering their right by natural freedom, are compelled by force, but not morally obliged, to obey".[37] From these and other similar statements, it is difficult to draw any conclusions as to a *ius in bello* possibly applicable in non-international armed conflict. Perhaps one can assume that Rousseau would have preferred some restraints to apply, out of considerations of natural law.

4. Rousseau and the *Ius ad Bellum*

Rousseau's comments on the laws and customs of war are eloquent and can be deemed to have reflected by and large customary law as it stood or was at least emerging in the relations between the European States of the 18th century. His views in this regard were evolutionary rather than revolutionary, however. But was Rousseau stopping there, advocating restraints in war but viewing war as an inevitable and at least on certain conditions legitimate way of resolving disputes and conflicts between states, thus reflecting a general approach to war prevalent in the 18th and 19th centuries?

It should be noted at the outset that Rousseau, while detesting violence, had no direct practical experience of war. His interest in questions of war and force arose as part of his reflections on the role of civil society, private property and technological and scientific progress in the history of humankind (*Discours sur les sciences et les arts, Discours sur l'origine et les fondemens de l'inégalité parmi les homes*).[38] As noted above, his basic thesis was that, in a state of nature, man was pacific. It was only with the creation

34 *Ibid.*, p. 56.

35 For a discussion of such factors *see* Rosas, *supra* note 8, pp. 134–140.

36 *See also* what Rousseau, *supra* note 13, p. 79, had to say about criminals in general: "since every wrongdoer attacks the society's law, he becomes by his deed a rebel and a traitor to the nation; by violating its law, he ceases to be a member of it; indeed, he makes war against it".

37 *Ibid.*, p. 133.

38 Rousseau, *supra* note 11, pp. 1, 109.

of private property and civil society that war entered into the picture. War was thus not an inevitable part of human nature.[39]

He was confronted more directly with the prospects for avoiding war altogether when he was invited to edit the manuscripts of *Abbé de St.-Pierre* (1658–1743) on a 'project for perpetual peace'. Rousseau hesitated, as the idea of the 'good Abbé' that perpetual peace could be achieved through a confederation of European States seemed unrealistic.[40] In the summary of the project that he finally edited, and more explicitly in a separate evaluation of the project published only after his death, he wondered why princes, who wanted to expand their power through external conquest and internal domination, would agree to confine themselves to what they already had.[41] It was doubtful whether there was a single prince who "without indignation" would accept the idea that he had to be just, not only with foreigners, but even with his proper subjects![42]

This being said, it is clear that Rousseau had a considerable sympathy for the ideas of Abbé de St.-Pierre, who had expressed the 'real' and 'common' interest of both princes and peoples. But preceding *Kant*,[43] Rousseau thought that the idea of a perpetual peace was not empirically possible, without addressing more fundamental problems of constitutional order.[44] He seems to have believed that peace could be achieved only through a confederation of sovereign peoples and their republics or, to use more modern terminology, a democratisation of societies.[45] While this was unlikely to happen in his lifetime, and the writings of neither Abbé de St.-Pierre nor Rousseau himself could convince princes of the virtues of a perpetual peace, the rulers would be forced to accept it "one day".[46]

It should be underlined that we are still here quite far from a *ius contra bellum*, expressed in legal terms. It should also be noted that Abbé de St.-Pierre, and to a large extent also Rousseau, seems to have approached the idea of a perpetual peace through the prism of a confederation of European States. Abbé de St.-Pierre envisaged a league of 18 European nations with a council and a system of common defence. Rous-

39 *See also* his manuscript on the state of war ('L'état de guerre'), Rousseau, *supra* note 11, p. 601.

40 M. Cranston, *The Noble Savage: Jean-Jacques Rousseau 1754–1762* (Penguin Press, London, 1991) pp. 25–28.

41 J.-J. Rousseau, 'Extrait du projet de paix perpétuelle de Monsieur Abbé de Saint Pierre', Rousseau, *supra* note 11, p. 563; *idem*, 'Jugement sur le projet de paix perpétuelle', *ibid.*, p. 591. *See also* the notes of the editors, *ibid.*, pp. 1540, 1551.

42 Rousseau, 'Jugement sur le projet de paix perpétuelle', *ibid.*, p. 593.

43 I. Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (Friedrich Nicolovius, Königsberg, 1795). On the importance of Abbé de St-Pierre and Rousseau for Kant, *see* Stelling-Michaud, *supra* note 11, pp. CXLIV–CXLV.

44 Rosas, *supra* note 9, p. 3.

45 Stelling-Michaud, *supra* note 11, pp. CXL–CXLI.

46 When three years before his death he learned that d'Alembert, in a meeting in the French Academy, had doubted that Rousseau would be able to convince the princes about the merits of a perpetual peace, he commented: 'Pas moi, mais ils y seront forces un jour', Stelling-Michaud, *supra* note 11, p. CXXXVII. *See also* Rosas, 'Construing International Law and Order', *supra* note 1, p. 110.

seau spoke of a 'good federative association' ('bonne association fédérative').[47] Whatever the precise nature of such an association, it is clear that he was here envisaging a sort of European public law rather than a universal norm. He was, in fact, presaging the European Union.[48]

Nevertheless, Rousseau, in expressing a moral condemnation of not only tyranny and despotism but also wars of conquest, is to be seen as one of the grandfathers of the *ius contra bellum* expressed, *inter alia*, in Article 2, paragraph 4, of the UN Charter. A people who want to be free cannot want to be a conqueror.[49] As was already noted above, he also seems to have accepted a right of rebellion against tyranny, while condemning the use of force to prevent the sovereign people from exercising their rights (category 4 in the above matrix). Rousseau, in fact, focused on the legitimacy of the internal constitutional order of states and his comments on the law of nations were, in a sense, subordinated to the republican and legal order he prescribed.

5. Concluding Remarks

It seems futile to speculate on what Rousseau would have said today about the relationship between the *ius in bello* and the *ius ad bellum*. There can be no doubt that his comments on the laws and customs of war were based upon the assumption that these laws and customs would apply equally to both belligerents. It will be recalled that he distanced himself from feudal concepts (which included just war considerations) and expressed, perhaps better than anybody else, a 'modern' notion of war as being a relation between states, where armed struggle should be limited to combatants bearing arms. His era was preoccupied with getting rid of notions of just and unjust wars rather than outlawing unjust ones.

The more revolutionary strand in his thinking, relating to wars of conquest and wars of aggression, nevertheless points to the future rather than to feudalism. His vision of a European public order and a federative association, which can be seen as a forerunner to the European Union, may today also serve as an incitation to think in terms of a universal constitutional order.[50] Such perspectives may bring us to the notion of an 'international armed police' to enforce international law and order.[51] The fairly recent armed operations undertaken in, say, the former Yugoslavia, Afghanistan and Iraq present some characteristics of armed police operations rather than interstate war. This, of course, is said without prejudice to the legality of those operations under the UN Charter and the *ius ad bellum*, the *ius in bello* or international human rights law. But if such operations are undertaken by the UN itself, or at least under its express authorisation, there are normally less concerns about their legitimacy.

47 Rousseau, *Emile*, *supra* note 14, p. 466. *See also* Stelling-Michaud, supra note 11, p. CXL.

48 Rosas, *supra* note 9, pp. 2–4.

49 Rousseau, 'Considérations sur le gouvernement de Pologne', *supra* note 19, p. 1013: "Quiconque veut être libre ne doit pas vouloir être conquerant".

50 For a discussion on the Universal Declaration of Human Rights of 1948 as one of the first markers of a future global constitutional regime *see* A. Rosas, 'State Sovereignty and Human Rights: Towards a Global Constitutional Project', 43 *Political Studies* (1995) p. 61.

51 Rosas, 'Towards Some International Law and Order', *supra* note 1.

In such scenarios, one begins to wonder about the relevance of the traditional *ius in bello*, even in its modernised version of 'international humanitarian law applicable in armed conflicts'. Has the time come to reassess the structure of the international normative framework regulating the use of armed force?[52] This obviously relates to the increasing overlapping, and intertwining, of humanitarian law and human rights law which has previously been observed for quite some time and which has also led to proposals for common minimum rules drawing upon both traditions.[53]

In fact, international criminal law as reflected in the statutes of international criminal courts and tribunals[54] covers crimes against the *ius ad bellum*, the *ius in bello* as well as international human rights law. This applies, in particular, to the Rome Statute of the International Criminal court of 1998, according to which the Court has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression (Article 5). And the concept of war crimes here includes serious violations of the laws and customs applicable in armed conflicts not of an international character (Article 8). Also international standards developed to strengthen the protection of victims of serious international crimes cover both gross violations of international human rights law and serious violations of international humanitarian law.[55]

While humanitarian law applicable in armed conflicts may apply to the operations of UN personnel as well, the special characteristics of UN peacekeeping, peace-enforcement, peacebuilding and humanitarian operations raise a number of questions as to what precisely is the law applicable in a given situation.[56] Concern over the safety of UN personnel led to the adoption, in 1994, of the Convention on the Safety of United Nations Personnel.[57] The Convention applies to operations undertaken "for the purpose of maintaining or restoring international peace and security" (Article 1(c))

52 *See also ibid.*, pp. 108–109, and C. Stahn, '*Jus ad bellum*', '*jus in bello*' … '*Jus post bellum*'? – Rethinking the Conception of the Law of Armed Force', 17 *European Journal of International Law* (2007) p. 921.

53 *See e.g.*, the Turku Declaration of Minimum Humanitarian Standards, adopted by an international expert meeting in Turku, Finland, on 2 December 1990, reprinted, *inter alia*, as UN doc. E/CN.4/Sub.2/1991/55 and in 85 *American Journal of International Law* (1991) pp. 377–381; 31 *International Review of the Red Cross* (1991) pp. 328–336 and M. Sassòli and A.A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (International Committee of the Red Cross, Geneva, 1999) pp. 519–523. *See also* Minimum Humanitarian Standards, Analytical report by the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, UN doc. E/CN.4/1998/87.

54 *See supra*, at notes 2–3.

55 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, resolution 60/147 adopted by the UN General Assembly on 16 December 2005 (UN doc. A/RES/60/147 of 21 March 2006). *See also* M. Heikkilä, *International Criminal Tribunals and Victims of Crime* (Institute for Human Rights, Åbo Akademi University, Turku, 2004).

56 *See e.g.*, Rosas, *supra* note 8, pp. 236–238.

57 The Convention was adopted by the UN General Assembly by resolution 49/59 of 9 December 1994 and it entered into force in 1999.

but it is not based upon a *ius in bello* approach.[58] The Convention, on the other hand, is not applicable to a UN operation authorised by the Security Council as an enforcement action under Chapter VII "in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflicts applies" (Article 2, paragraph 2).

In the latter type of military operation, humanitarian law is, in principle, applicable. Should this mean that all UN and other operations, "conducted in the common interest of the international community and in accordance with the principles and purposes of the Charter of the United Nations", should in all circumstances be governed by a principle of strict equality of the parties to the conflict? For instance, while persons guilty of gross violations of international law should enjoy human rights, should they be recognised as 'lawful combatants', with immunity from prosecution for resisting by force the international operation?[59] On the other hand, as *Ove Bring*, to whom this Festschrift rightly pays tribute, has pointed out, one could also envisage special rules to apply to international operations such as the NATO air campaign in Kosovo and Serbia in 1999.[60] These rules would be stricter than those rules on the distinction between military objectives and civilian objects that are to be found in Protocol I of 1977 additional to the Geneva Conventions of 1949. The idea would be that in international armed police operations, it is primordial that the operation in question is of a limited character and that the civilian population is respected and protected.

It is certainly unrealistic to envisage a complete overhaul of the international law that regulates the use of armed force. It is important to stress that in the transitional period that we seem to be witnessing, there is still a need to observe existing law, including the *ius in bello*, be it somewhat outdated, in situations to which it formally applies, so as to avoid a weakening of the standard of humanitarian protection.[61] But in the development of new instruments and standards, account should be taken of the fact that the concept of war has profoundly changed since the age of Rousseau. Present and future discussions about the international regulation of armed force should be seen in the context of a global constitutional order rather than the Westfalian system of sovereign and independent states. Rousseau, wherever he is now, will be watching these developments and discussions with a great deal of interest.

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58 For instance, according to Article 7, para. 1, UN personnel, their equipment and premises "shall not be made the object of attack or of any action that prevents them from discharging their mandate". An Option Protocol adopted by the UN General Assembly by resolution 60/42 of 8 December 2005 (UN doc. A/RES/60/42) extends the applicability of the Convention to operations undertaken for the purposes of delivering humanitarian, political or development assistance in peacebuilding and delivering emergency humanitarian assistance.

59 *See* M.H. Hoffman, 'Peace-enforcement Actions and Humanitarian Law: Emerging Rules for "Interventional Armed Conflicts"', 82 *International Review of the Red Cross* (2000) pp. 200–201, quoting the UN Secretary-Generals Bulletin on 'Observance by United Nations Forces of international humanitarian law' (ST/SGB/1999/13, of 6 August 1999), which avoids the concept of prisoner of war.

60 O. Bring, 'International Humanitarian Law after Kosovo: Is *lex lata* Sufficient?', 71 *Nordic Journal of International Law* (2002) p. 39.

61 Rosas, 'Construing International Law and Order', *supra* note 1, pp. 108–109; *idem*, Introduction to the Reprint of Rosas, *supra* note 8, pp. IV–VI.

Chapter 16

Secession, Self-determination of 'Peoples' and Recognition – The Case of Kosovo's Declaration of Independence and International Law

*Per Sevastik**

1. Introduction

In 17 February 2008 the Parliament of Kosovo issued a statement declaring "Kosovo to be an independent and sovereign State". At the same time the government of Kosovo submitted letters to 192 countries seeking formal recognition. The US, Britain, France and Germany responded immediately in favour of the announcement. Russia, Serbia, Moldavia, Romania and Cyprus quickly argued that the declaration, and its recognition, both contravened international law. Similar concerns were expressed by Greece, Slovakia and Spain. At the time of writing, only thirty-nine states have recognised Kosovo. A number of others have recognitions pending. Some twenty-one states announced that they would not recognise Kosovo. How the remaining states vote is still unclear. If the rate of recognition turns out to be high, the more likely it is that Kosovo will be admitted as a member of the United Nations. But for the time being that remains to be seen.

The recognition of Kosovo by some of the West's major powers appears to be increasing the hopes of secessionist movements across the world, at least judging by their websites.

The main question to be considered in this article is whether or not recognition of Kosovo will inspire secessionist movements throughout the world. Is it a unique case *per se*, hardly ever to be repeated? To arrive at an adequate assessment, the concepts of secession, self-determination, 'peoples' and recognition will be examined in order to understand whether or not this declaration of independence impedes or develops international law.

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2. Reference to Secession in International Law

The political rationale behind the 'right of secession' is to create moral support or legitimacy from which legal implication can derive. Political will or *opinio generalis* may create pressure on a state to grant independence, or for the international community to act in order to recognise the secessionist movement or entity as being entitled to independence or sovereignty.[1] This is often done, disregarding the opinions of the existing sovereign authorities. The ultimate goal for an entity seeking secession is to acquire recognition, which plays an important confirmatory role in the process of acquisition of statehood. Without this confirmatory role of states, secession will be considered to be a failure.

However, international law has so far taken a more or less formalistic approach as to the requirements of an entity seeking statehood. In order to pass from the condition of an entity unrecognised as a legal subject, to one of sought-after recognition on the part of other states, the body concerned must possess the relevant criteria of statehood. These criteria are to be found in Article 1 of the Montevideo Convention on the Rights and Duties of States, adopted on 26 December 1933. The oft-quoted Article 1 of the Convention mentions: (a) a permanent population; (b) a defined territory; (c) government; and (d) a capacity to enter into relations with other States. Though only ratified by a handful of American states, the Convention – at least Article 1 – is considered to reflect general customary international law. The criteria enumerated in the article are based upon the principle of "effectiveness among territorial units".[2] According to this principle the secessionist entity must demonstrate effective and independent political control over its territory. The EU in its recognition policy has also added, apart from the formal requirements, the requirement that an entity wishing to be recognised as a state must show, or at least be willing to show, respect for human rights and to ensure respect for the rights of minorities, as well as being willing to promote democratic development.[3] These are necessary criteria, but not sufficient ones for the establishment of a new territorial entity to emerge as an independent and sovereign state. In the interests of maintaining international stability "[t]here is a strong international reluctance to promote unilateral secessions or separation"[4] and without the consent of the existing state, from which the new entity is seeking secession, the international community has so far not granted secessionist territories the title of statehood.[5] Today there are numerous secessionist entities that have not been

1 *See*, for example D. Philpott, *In defence of self-determination Ethics* (The University of Chicago Press, 1995) pp. 105, 352, 363 and 371.

2 J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 2006) p. 45.

3 *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, <www.ejil.org/journal/Vol3/No1/art13.html>.

4 *Cf.* Report by A. Pellet 'Legal Opinion on Certain Questions of International Law Raised by Reference' reprinted in Bayefsky, *Self-determination in International Law* (Kluwer Law International, 2000) p. 116.

5 J. Crawford, 'The right of self-determination in international law: the development and future' in P. Alston (ed.), *People's rights* (Oxford University Press, Oxford, 2001) p. 55, *see also* by the same author 'State practice and international law in relation to secession', 69 *British Yearbook of International Law* (1998) pp. 85–86.

recognised as independent and sovereign states.[6] The principle of sovereign equality of states includes the recognition that the territorial integrity of the State is 'inviolable' as expressed in the GA Res. 2625 (XXV), the so called Friendly Relations Declaration of 1970.[7] Furthermore the Friendly Relations Declaration stipulates that any measures made to disrupt the territorial integrity of a state "is incompatible with the purpose and principle of the charter". Finally, the same Declaration specifies that states must refrain from any act aimed at the "disruption of the national unity and territorial integrity of any other State". The Friendly Relations declaration re-emphasises similar principles to be found in the UN Charter and is considered to reflect general customary international law. The position in the Declaration is not one of support for secessionist movements, and should restrain governments from premature recognition of them. Linking this issue to the right of peoples to self-determination concludes that it does not change the general rule. The provision in support of this view – the 'saving clause' – is to be found in the 1970 General Assembly Resolution 2625 (XXV)[8] specifying that the right of self-determination of peoples should not be construed "…as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".

3. Reference re Secession of Quebec and to the 'saving clause'

According to the reading of the 'saving clause' a state whose government represents the whole people living within its territory without distinction as to race, creed or colour, complies with the principle of self-determination with regard to its entire people and is entitled to the protection of its territorial integrity. In other words, people living in such a state, represented by a government that governs on the basis of equality, exercise the right of self-determination and are safeguarded against secession.

However, a reversed reading (i.e., an *a contrario* reading) of the 'saving clause'[9] implies that where a state does not comply with the principle of equal rights and self-determination of peoples, if a group of people, based upon race, creed or colour, within the state are denied any role in their own government, either through their own institutions or through the institutions of the state, then the clause triggers the reversed reading. The wider interpretation implies that it may be appropriate in extreme cases

6 J. Crawford, 'State Practice and international law in relation to unilateral secession', Expert opinion, *ibid.*, para 50, *see also* by the same author *The Creation of States in International Law* (Clarendon Press, Oxford, 2006) p. 403.

7 GA Res. 2625 (XXV), adopted 24 October 1970, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*.

8 *Ibid.*, principle 5, para. 7.

9 *See* R. Rosenstock 'The Declaration on Friendly Relations', 65 *American Journal of International Law* (1971) pp. 713, 732.

of oppression or in cases of gross violation of human rights, that international law permits the oppressed group of people in question to conduct "remedial secession".[10]

The most cited case in this regard that addresses this issue is the discussion that occurred before the Canadian Supreme Court in *Reference re Secession of Quebec*.[11] Even though the issue had no direct relevance in Canada, because it could not be argued that the people of Quebec were oppressed, or that Canada was not ruled by a democratic system representing the entire population belonging to the territory "without any distinction of any kind", the Supreme Court relied on the reversed reading of the 'saving clause'.

A number of questions were put to the court, including whether there was a right to self-determination under international law that would give Quebec the right to unilateral secession from Canada.[12] The Canadian Supreme Court found that the principle of self-determination had evolved "within the framework of respect for the territorial integrity of existing States".[13] A state whose government represents the whole of the "people or peoples resident within its territory, on the basis of equality and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity".[14] The Supreme Court concluded that no right of secession existed in the context of Canadian representative democracy and that "Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of proposed secession to the other parties to the federation".[15]

The Supreme Court recognised that the right of a people to self-determination might provide a right to secession "when a people is blocked from the meaningful exercise of the right of self-determination internally".[16] The Court continued by asserting that it was 'unclear' as to whether this proposition reflected an established international standard, and even if it did, and that the exceptional circumstances in which a right of secession might be recognised, did not exist.[17] The Court went on to say that the right to external self-determination only arose in "the most extreme cases and, even then, under carefully defined circumstances".[18] However, where a group of 'people' is systematically excluded, secession is a potential remedy of last resort, which in this case takes the form of the assertion of the right to unilateral secession.[19]

10 J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 2006) p. 119.

11 *Reference re Secession of Quebec* [1998] 2 SRC 217.

12 *Ibid.*, para. 83.

13 *Ibid.*, para. 127.

14 *Ibid.*, para. 130.

15 *Ibid.*, para. 151.

16 *Ibid.*, para. 134.

17 *Ibid.*, para. 135.

18 *Ibid.*, para. 123.

19 D. Orientlicher, 'Separation anxiety: international responses to ethno-separatist claims', 23 *Yale Journal of International Law* (1998) pp. 1, 49.

4. Reference to 'peoples' in International Law

The legal basis regarding claims of self-determination arises from the brief references of the 'principle of equal rights and self-determination of peoples' to be found in Articles 1(2) and 55 of the UN Charter. The UN Charter refers to 'people', 'State', and 'nation', without defining their meanings. In San Francisco in 1945 the UN Secretariat examined the terms and explained that the word 'nation' was broad enough to include colonies, mandates, protectorates and quasi-states. 'Nations' was used in the sense of all political entities, states and non-states, whereas 'peoples' referred to groups of human beings who might or might not comprise states or nations.[20] These Charter provisions have further been developed by a number of General Assembly resolutions and declarations to the point where 'self-determination' has been described as the "imperative right of peoples".[21]

Essential to the assessment of any claim of self-determination is to verify whether or not the particular claimants to such rights can be considered to be a people.

There is, however, no universally agreed definition of 'people' in international law. Self-determination is the collective right of 'peoples', which means that the addressee of the right of self-determination is the 'people' within a nation-state, not the individual members of the people. An individual or persons being a minority possess individual rights, not collective rights. The purpose of making this distinction in international human rights law is to avoid claims of self-determination or even secessionist outbreaks by minority groups in sovereign states.[22]

The Commission of Jurists established by the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Åland Islands between Finland and Sweden denied that self-determination constituted a legal right and that, more specifically, minorities had a legal right to dismember an existing state. The Commission concluded that "[t]he separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees".[23] The reference here to guarantees was provided for in the system of protection of minorities brought under the supervision of the League of Nations.

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20 UNCIO *Docs.* 18, 657–8.

21 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1971) ICJ Rep. 16, at 75.

22 *Cf.*, Articles 1 and 27 of the ICCPR, *see* B. Guimei, 'The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Right of Minority Nationalities', 3 *Chinese Journal of International Law, The Chinese Society of International Law* (2004), No. (Cumulative No 6) p. 445. However, the wording of Article 27 of the ICCPR "persons belonging to such minorities shall not be denied the right, in community with the other members of the group …" implies that the minority rights are rights that fall between collective rights and individual rights. *Ibid.*, p. 443, note 8, referring to J. Crawford, 'The Rights of Peoples' or Governments?', in J. Crawford (ed.), *The Rights of Peoples* (Clarendon Press, Oxford, 1988) p. 60.

23 Report of the Committee of Rapporteurs (Beyens, Calonder, Elkens), 16 April 1921: LN Council Doct. B7/21/681/106 [VII] 22–23.

The Canadian Supreme Court in *Reference re Secession of Quebec* also addressed the question of defining 'people' for self-determination. The Supreme Court made "clear that the francophone community of Quebec, and/or other groups within Quebec may include only a portion of the population of an existing State".[24] The Court noted that the "Quebec population certainly shared many of the characteristics (such as common language and culture) that would be considered in determining whether a specific group is a 'people' as do other groups within Quebec and/or Canada".[25]

'Peoples' in relation to the African Charter on Human and People's Rights may include groups within the state. The African Commission on Human and Peoples' Rights confirmed this interpretation in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights* v. *Nigeria*, where it refers to the 'Ogoni People' of Nigeria.[26]

Today, however, one could possibly conclude that there exists a general acceptance that the term 'people' in international law may be referred to as a group of people according to territorial criteria, within a state. The criteria to be applied to distinguish whether or not a group of persons are considered to be a 'people' include the notion of whether they regard themselves as being a 'people', enjoying 'some or all' of the following characteristics: (1) common historical tradition; (2) racial or ethnic identity; (3) cultural homogeneity; (4) linguistic unity; (5) religious or ideological affinity; (6) territorial connection; or (7) common economic life.[27]

However, the consequences of recognising a group of people within a state as a 'people' with the right of self-determination within a state are still not clearly determined in international law.

5. Reference to Secession as a Result of Gross Human Rights Violations

As seen from the discussion above, the Canadian Supreme Court noted that it remained unclear whether the 'oppression' proposition actually reflected an established international legal standard.[28] Cassese argues along this line by submitting the particular contention that the previously discussed 'saving clause' of the UN Declaration on Friendly Relations – originally inspired by the case of the apartheid regime in South Africa – would enable 'racial groups' to claim secession from the governing racist regime. Cassese concludes, however, that this entitlement has not developed into a

24 *Reference re Secession of Quebec* [1998] 2 SRC 217, para. 123.

25 *Ibid.*, para. 125.

26 *Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, Communication No. 155/96, in Fifteenth Activity Report of the African Commission on Human and Peoples' Rights 2001–2002, ACHPR/RPT. 15. paras. 1 and 62.

27 *See* Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO (1990), SNS-89/CONF.606/7; *see also* S. Joseph *et al.* (eds.), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2004) p. 142.

28 *See supra* note 24.

customary rule of international law, based upon the great importance attached by the international community regarding territorial integrity and sovereign rights.[29]

In the Åland Islands advisory opinion, the arbitrary Commission found that there was no right of secession in the absence of "a manifest and continued abuse of sovereign power to the detriment of a section of a population".[30]

In *Katangese Peoples' Congress* v. *Zaire* the African Commission on Human and People's Rights considered a communication, which requested, *inter alia*, that it recognised the independence of Katanga.[31] The Commission concluded that the request for independence for Katanga had no merit under the African Charter on Human and People's Rights. The Commission's conclusion was based upon the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire could be called into question. Furthermore, there was no evidence that the people of Katanga were denied the right of participation in Government, and they were therefore obliged to exercise a variant form of self-determination compatible with the sovereignty and territorial integrity of Zaire.[32]

A rare example in state practice relating to secession is the case of Bangladesh – the former East Pakistan – that gained independence through a secessional movement initiated by the Awami League that gained momentum in March 1971 through a brutal government policy of repression throughout the country. The arrest, torture and murder of political leaders followed, as well as the systematic and widespread killing of civilians. By the intervention of Indian forces the Awami League was permitted to establish de facto control over the territory of East Pakistan. There was little support for the Indian intervention in the UN, which remained silent on the issue of self-determination, addressing only the issue of the demand that the troops of India and Pakistan withdraw from the territories of each other.[33] Within one month, seven states had recognised the new State of Bangladesh. After seven months, forty-seven states had recognised the independent State of Bangladesh, which subsequently applied for UN membership and was admitted in 1974, two years after its submission.[34]

As previously mentioned, the predominant view in international law is that secession of any group within a state, on whatever grounds, even 'the most extreme cases and, even then, under carefully defined circumstances' should be considered with caution. This implies that while international law does not acknowledge a general right to secession, it is also generally agreed that it does not prohibit secession. International

29 A. Cassese, *Self-determination of peoples: a legal reappraisal* (Cambridge University Press, 1995) pp. 108–124.

30 Report of the Committee of Rapporteurs (Beyens, Calonder, Elkens), 16 April 1921: LN Council Doct. B7/21/681/106 [VII] 5–10.

31 *Katangese Peoples' Congress* v. *Zaire*, Communication No. 75/79, in Eighth Annual Activity Report of the African Commission on Human and People's Rights, 1994–1995, ACHPR/RPT/8th, Annex VI, para. 1.

32 *Ibid.*, paras. 27–28.

33 GA Res, 2793 (XXVI) of 7 December 1971; SC Res. 307 of 21 December 1971.

34 V. P. Nanda, 'Self-determination in international law', *Denver Journal of International Law and Polity* 2001–2002, pp. 325, 329–330.

law can be said to be neutral in this respect, balancing itself somewhere between reality and the principle of effectiveness. In other words, international law does not promote unilateral secession by granting a specific entitlement, but neither does it negate the "result of successful secession".[35] Or, as John Dugard and David Raič put it, there is considerable support for both positions. The right of self-determination is limited on the one hand by the right of territorial integrity of states and on the other by the position that the right of self-determination encompasses a qualified right of secession.[36]

6. Recognition – General Remarks

The ultimate goal of any secessionist movement is to acquire international recognition, thereby becoming a fully-fledged member of the international community, playing on equal terms – at least from a theoretical point of view – with all other states.[37] Though recognition is not necessary in order to achieve statehood, the worst thing that could happen for a secessionist movement is not to be recognised as a state, by other states, which would ultimately imply that secession would most likely be considered to be a failure. As put by the Canadian Supreme Court in *Reference re Secession of Quebec* "the validity of a would-be state in the international community depends, as a practical matter, upon recognition by other States".[38] A state can only achieve statehood if the seceding entity fulfils the criteria necessary to achieve statehood. Conversely "recognition may also be withheld where a new situation originates in an act which is contrary to general international law".[39] Disregarding the fact that official recognition is not formally required for a new state to acquire statehood (the declaratory view) recognition by a sufficiently large number of states is necessary (the constitutive view) otherwise the state in question could not realistically claim to be a state with all the corresponding legal rights and obligations of a state.[40]

7. The Case of Kosovo

Within the former Socialist Republic of Yugoslavia (SFRY) and under the Yugoslav Constitution of 1974 Kosovo became an autonomous province within Serbia. The ethnic constellation of Kosovo was composed of a majority of ethnic Albanians – 'Kosovars' (90 per cent) with a Serb minority (6 per cent) and other inhabitants made up of Muslims (2 per cent) Roma (1 per cent) and Turks (1 per cent). In 1989 the Serbian

35 M. Shaw, 'Re: Order in Council P.C. 1996–1947 of 30 September 1996' reprinted in Bayefsky, *Self-determination in international law* (Kluwer Law International, 2000) p. 125.

36 *See* J. Dugard and D. Raič, 'The role of recognition in the law and practice of secession', in M. G. Kohen (ed.), *Secession; International Law Perspectives* (Cambridge University Press, Cambridge, 2006) p. 109.

37 J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 2006) pp. 21–28.

38 *Reference re Secession of Quebec* [1998] 2 SRC 217, para.385.

39 R. Jennings and A. Watts (eds.), *Oppenheims International Law* (Longman Group, Harlow, 1992, 9th ed.) para. 54, p. 183.

40 J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 2006) pp. 19–28, *also supra* note 35 at p. 125.

Government ended the self-rule of Kosovo leading to an increase in human rights abuses.[41] In 1991 and 1992 Slovenia, Croatia, Macedonia and Bosnia, four out of six republics of the SRFY, declared independence. In 1992 the Federal Republic of Yugoslavia (FRY) succeeded the SRFY, and in 2003, the federation of Serbia-Montenegro succeeded the FRY. In 2006, Montenegro declared independence in accordance with the law of Serbia-Montenegro. Serbia declared itself the successor state later the same year.[42]

Throughout the 1990s Kosovar Albanians sought ways to restore autonomy or independence. A small CSCE mission was operative in Kosovo under a Memorandum of Understanding in 1992, but the FRY refused "to allow the continuation of the CSCE mission in Kosovo".[43] In 1997 Serbian police and the military intensified fighting in Kosovo and began detaining known opponents throughout Kosovo. In response, the Kosovo Liberation Army (KLA) began attacking federal security forces in 1997 and violence escalated throughout 1998.[44]

Security Council Resolution 1160, adopted in 1998, called "upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues" and expressed "its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-determination".[45] The Rambouillet Agreement, initiated by NATO in 1999, was expected to form the peace agreement between the FRY and the delegation representing the ethnic-Albanian majority population of Kosovo. The significance of the agreement was that Yugoslavia rejected provisions for NATO peacekeeping which ultimately led to a non-authorised bombing campaign against the FRY by NATO that same year. NATO military actions ended in June 1999 and NATO and the FRY concluded an agreement on military-technical matters. The UN Security Council passed Resolution 1244 "[r]reaffirming the commitment of all Members States to the sovereignty and territorial integrity of the republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act".[46] At the same time the Security Council reaffirmed "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo".[47] Resolution 1244 established, under UN auspices, an international and security presence in Kosovo. The military apparatus – KFOR – was deployed on 12 June 1999 when FRY forces withdrew from Kosovo.[48]

41 Kosovo Report, Independent International Commission on Kosovo (Oxford, 2002) pp. 33–49.

42 J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 2006) pp. 395–402, also C. J. Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition', 12 *The American Society of International Law*, 29 February 2008, issue 2.

43 SC Res. 855, 9 Aug 1993, para. 2.

44 J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 2006) p. 557.

45 SC Res. 1160, 31 March 1998, paras. 4, 5.

46 SC Res. 1244, 10 June 1999.

47 *Ibid.*

48 S/1999/672, annex.

For the next nine years the United Nations Interim Administration Mission in Kosovo (UNMIK) participated in the administration of Kosovo and at the same time negotiations were held in order to reach a conclusion on the disputed status of the territory.[49]

The former Finnish President, Martti Ahtisaari, (previous EU envoy) was appointed by the UN Secretary General as Special Envoy for Kosovo in 2005 to report on its future status. The Report of the Special Envoy, the Comprehensive Proposal for the Kosovo Status Settlement ('The Ahtisaari Plan') submitted in March 2007[50] concluded that reintegration into Serbia was not a viable option and that continued international administration was not sustainable. The report foresaw that independence with international supervision was the only realistic choice for Kosovo.[51] The report concluded that "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts".[52]

A final attempt was made to resume the mediation process by the EU/US/Russia negotiation troika. For four months from September 2007 negotiations continued between the Serbs and the Kosovar Albanians in an attempt to reach agreement on Kosovo's future status but the outcome was once again negative, culminating without resolution. Once the Contact Group reported the inevitable troika failure to the UN Secretary General on 10 December 2007, "the 'Quint' – France, Germany, Italy, the UK and the US – should despite Serbian and Russian opposition, promptly begin implementing a plan to orchestrate a peaceful transition culminating in Kosovo's conditional independence in May 2008".[53]

8. Kosovar Albanians; Interpretation of 'people'

Security Council Resolution 1244 (1999), adopted following the NATO intervention in the Federal Republic of Yugoslavia, refers to the need to establish the conditions under which "the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia".[54] References to 'people' are also to be found in UNMIK Regulation 2001/9, with the provision that "Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes".[55]

On the particular issue of 'people' the Canadian Supreme Court in *Reference re Secession in Quebec* argued that the meaning of 'peoples' was "somewhat uncertain". At various points in international legal history, the term 'people' has been used to signify

49 UNMIK/REG/1999/1, 25 July 1999, S/1999/987, 14.

50 S/2007/168/Add.1.

51 S/2007/168/ 10.

52 S/2007/168/ 15.

53 Kosovo Countdown: A Blueprint for Transition, <www.crisisgroup.org/home/index.cfm?id=5201>.

54 SC Res. 1244, 10 June 1999 Op 10.

55 UNMIK Regulation 2001/9, on a Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001, Article 1.1.

citizens of a nation state, the inhabitants in a specific territory that is being decolonised by a foreign power, or an ethnic group.[56]

The Commission of Jurists, in giving its advisory opinion on the legal aspects of the Åland Islands between Finland and Sweden, concluded that one could not treat a small fraction of a people as one would a people of a nation as a whole. This implied that the Swedish population on the Åland Islands, representing only a small fraction of the totality of the Swedish 'people' living on the mainland, did not have a strong case with reference to secessional claims – as, for instance, Finland had when it broke away from Russian dominance, containing an overwhelming majority of the Finnish people.[57]

The rationale behind the Commission's reasoning in the advisory opinion on the Åland Islands, treating the Swedish people's case as weak in relation to secessional claims, is equally applicable to the Kosovo case, where a predominantly Kosovar *Albanian* population with a unique historical, legal and linguistic attribute, inhabits an ethnic enclave within Serbia.

Granting secession to a homogenous ethnic enclave within another nation, as in the case of Kosovo, opens the door for a new interpretation of 'people', which is not restrictive in its implication but rather extensive in its interpretation of treating small fractions of 'people' as one would a nation as a whole.

9. Reference to Secession as a Result of Gross Violations in Kosovo

The Canadian Supreme Court found in *Reference re Secession in Quebec* that the right to external self-determination only arose in "the most extreme cases and, even then, under carefully defined circumstances".[58] The argument that triggered the secessionist move in Kosovo was the Serbian-escalated suppression of Kosovar Albanians starting with inhibiting and ending the self-rule of Kosovo, leading to an increase in human rights abuses. Security Council Resolution 1244 makes in its preambular part reference to "resolve the grave humanitarian situation in Kosovo" and expresses its "concern at the humanitarian tragedy taking place in Kosovo". It makes reference to UN Chapter VII, observing that the situation in the region "constitute(s) a threat to international peace and security". This was the reason (but without UN consent) that NATO intervened in 1999. However, when it comes to assessing violations of human rights it is not only a question of Serbs violating Kosovar Albanian rights but also of an increased variety of abuses on the part of Kosovar Albanians against Serbs.[59]

Equally important is to determine the temporal element relating to when such human rights violations took place. No current violations have occurred; rather the question relates to events that have happened in the past combined with the perception of the international community that the situation in Kosovo is still volatile, with no possibility of resolving the issue by domestic means.[60]

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56 *See supra* note 24 paras. 123–125.

57 *League of Nations Official Journal*, Sp Supp 4 (1920), 8.

58 *See supra* note 11, para. 123.

59 *See supra* note 41, p. 72.

60 *See* C. J. Borgen, *supra* note 42.

10. An Independent and Sovereign Kosovo

The international community is currently divided into three major groups. There are states that have approved Kosovo's statehood by conferring recognition – the US, and some major European and EU member-states. Then there are states unwilling to approve Kosovo as an independent and sovereign state – primarily Serbia, Russia, Moldavia and Rumania. The third group have not yet reached a decision one way or the other.

Adherents claiming the right to Kosovo's independence argue that resolution 1244 of 10 June 1999 ordered the Federal Republic of Yugoslavia (as it then was) to withdraw all of its troops from Kosovo and hand it over to the UN. A weakness in the resolution was that even though reference was made for a 'political solution' it did not specify what that solution should be, and there has not been any new Security Council resolution mandating independence for Kosovo.[61]

The EU's position with reference to resolution 1244 is that Kosovo's independence is within the spirit of the resolution, if not strictly within the letter. Before approving the EULEX legal assistance mission a EU memorandum indicated that a final status outcome regarding Kosovo's future was more compatible with the intentions of 1244 than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable. The document continued to assert that this approach "will enable rather than frustrate" the conclusion of the final status process envisaged in resolution 1244.[62]

An analysis of Resolution 1244 does not give any indications on Kosovo's secession. Operational paragraph 1, "Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2." A closer reading of the annexes indicates that both annexes are silent as to the governmental form of the final status. The annexes only indicate the establishment of an interim political framework agreement providing for sustainable self-government for Kosovo, and taking into account the territorial integrity of the Federal republic of Yugoslavia and the other countries in the region. Operational paragraph 11 (a) states that the international civil presence will promote the establishment, pending a final settlement, of substantial autonomy and self-government for Kosovo. As argued by Borgen, the substantial autonomy language is thus addressed in the status of Kosovo.[63]

Serbia and Russia argue that there was no UN Security Council resolution endorsing Kosovo's move and that further negotiations ought to have been encouraged in order to reach an agreement. Furthermore, the adherents denying Kosovo's independence argue that there is no legal ground for recognition since there is no agreement by Serbia to grant Kosovo independence, that there is no Security Council resolution authorising the alteration of Kosovo from Serbia and that independence is therefore illegal. Furthermore, Serbia and Russia also claim that SC Resolution 1244 itself grants no authority for independence. Reference is made to Operational para-

61 <news.bbc.co.uk/2/hi/europe/7244538.stm>.

62 P. Reynolds 'Legal furore over Kosovo recognition', BBC News (Feb 16, 2008) at <http://news.bbc.co.uk/2/hi/europe/7244538.stm>.

63 *See* C. J. Borgen, *supra* note 42.

graph 10, which authorises substantial autonomy for the people of Kosovo within the Federal Republic of Yugoslavia, implying that the reading of 1244 blocks independence.[64]

11. Concluding Remarks

The analysis above demonstrates that international law develops as a process.[65] The 'principle of equal rights and self-determination of peoples' to be found in the UN Charter have further been developed by a number of General Assembly resolutions and declarations to the point where 'self-determination' has been described as the "imperative right of peoples".[66] The concept of self-determination has developed as a "legal obligation in the process of decolonisation, to self-determination as a human right".[67] The prevailing view in international law still applies, that secession of any group within a state, on whatever grounds, even "the most extreme cases and, even then, under carefully defined circumstances" should be dealt with by proceeding with caution.[68] This implies that while international law does not acknowledge a general right of secession, it is also generally agreed that it does not prohibit secession. International law can be said to be neutral in this respect, balanced somewhere between reality and the principle of effectiveness. Thus "international law does not promote unilateral secession by granting a specific entitlement, but neither negates the result of successful secession".[69] There is considerable support for both positions that the right of self-determination is limited on the one hand by the right of territorial integrity of states, and on the other the position that the right of self-determination encompasses a qualified right of secession.

Kosovo's declaration of independence clearly balances between these two lines of thought and the normative support for this view is not to be found in Resolution 1244 but rather in the reversed interpretation of the 'saving clause' of the Friendly Relations declaration of 1970. Ultimately, international law is what states want it to be and in reality recognition plays an important confirmatory role in the process of acquisition of statehood. The forthcoming months will be determinate because they will either strengthen or weaken Kosovo's independence depending upon the number of recognitions acquired. The final checkpoint of recognition will be the eventual admittance of Kosovo to membership of the United Nations, which will be effected by decision of the General assembly upon the recommendation of the Security Council. However, Russia and China will, most likely veto any attempts to grant Kosovo membership in the United Nations.

64 <news.bbc.co.uk/2/hi/europe/7244538.stm>.

65 R. Higgins, *Problems and Process; International Law and How We Use it* (Clarendon Press, Oxford, 1994) p. 19.

66 *See supra* note 21.

67 *Supra* note 65, p. 114.

68 *See supra* note 18.

69 M. Shaw 'Re: Order in Council P.C. 1996–1947 of 30 September 1996' reprinted in Bayefsky, *Self-determination in international law* (Kluwer Law International, 2000) p. 125.

Whether or not the reaction of this latest secessionist movement opens a 'Pandora's box'[70] or boosts the hopes of secessionist movements throughout the world, or both, remains to be seen. What is certain is that there is room for both a restrictive view, and for a view to develop international law a step further.

70 "According to Hesiod, Pandora was the first women and created by Zeus to punish man after Prometheus had created and helped the human race. She came with a box or storage-jar in which all evils and diseases were stored, and when Prometheus's guileless brother Epimetheus married her and opened the box, all these escaped, leaving only hope at the bottom to be some alleviation of the troubles let loose upon the world", B. Radice, *Who's Who in the Ancient World* (Penguin, 1971).

Chapter 17

Fighting for Justice: Åke Hammarskjöld at the Permanent Court of International Justice

*Ole Spiermann**

1. Introduction

Hammarskjöld has been a household name for generations, immediately recognised and admired throughout a world sharing living memories of Dag Hammarskjöld (1905–1961). Other members of this internationalist family to be reminisced are Åke Hammarskjöld (1893–1937), Dag Hammarskjöld's older brother, and their father, Hjalmar Hammarskjöld (1862–1953). Ove Bring has written of Hjalmar Hammarskjöld that he and "his sons were groomed in a typical Swedish civil service tradition … where the concepts of 'duty' and 'responsibility' reflected time-honoured values".[1] It has been said that it was Åke Hammarskjöld "whom [Dag] Hammarskjöld resembled most in talent, intellect and temperament".[2] They both died prematurely in international service.

Åke Hammarskjöld was born on 10 April 1893.[3] Having graduated with university degrees in both philosophy (1914) and law (1917), he entered first the Swedish Ministry for Foreign Affairs and then, in 1920, the Secretariat of the League of Nations. Åke Hammarskjöld became intimately involved in the preparations for the Permanent Court of International Justice, to the active life of which he devoted the remaining part of his own professional life right up to his tragic death on 7 July 1937. As both international civil servant and world court registrar and judge, Åke Hammarskjöld outshone his contemporaries. In retrospect, he stands as one of the founding fathers of the Permanent Court as a ground-breaking institution.

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1 O. Bring, 'Dag Hammarskjöld and his approach to the United Nations, Collective Security and Intervention' (Speech delivered on 17 April 2005) p. 2, available at <www.swedenabroad.se/Page____54049.aspx>, visited on 24 March 2008.

2 A. L. Gavshon, *The Last Days of Dag Hammarskjöld* (Barrie & Rockliff, London, 1963) p. 192.

3 N. Hammarskjöld, *Ätten Hammarskjöld: Personhistoria och tidsbilder från tre hundra år* (Cederquist, Stockholm, 1915) p. 433.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 245–260.

The active life of the Permanent Court spanned over two decades (1922–1940) in the course of which an international judiciary emerged and the merits of international adjudication and international law when put into practice were explored. At the time of its establishment, the Permanent Court was the first standing court of potentially global competence. Its historical significance, as well as Åke Hammarskjöld's dedication to the project, is echoed in his own words from 1935 when the decay was already well under way: "The drawback of an experiment, carried on on this scale, is that it must succeed."[4] As a matter of fact, the Permanent Court did succeed. In the words of Sir Robert Jennings, "[i]t was the accepted success of that Court [i.e., the Permanent Court] that ensured the constitution of its successor",[5] that is, the International Court of Justice, the principal judicial organ of the United Nations.

2. Drafting the Statute of the Permanent Court

In 1920, the Council of the League of Nations had given effect to Article 14 of the Covenant of the League, according to which it fell upon the Council to formulate and submit to the Members of the League for adoption "plans for the establishment of a Permanent Court of International Justice". At the request of the Council, a first draft or draft-scheme of the Statute was finalised on 24 July 1920 by the Advisory Committee of Jurists.[6] The ten members of the Advisory Committee had convened at The Hague in the summer of 1920 where they were assisted by the Under-Secretary-General of the League of Nations, Dionisio Anzilotti, and his young assistant, Åke Hammarskjöld.

Some months before, Hammarskjöld had been appointed to the position in the Legal Section of the Secretariat of the League having the launch of the Permanent Court under Anzilotti's supervision as his main occupation. When the time came for the draft-scheme adopted by the Advisory Committee to be submitted to the Council of the League, Anzilotti told Sir Eric Drummond, the Secretary-General of the League, that Hammarskjöld "is quite well acquainted with every question discussed by the Committee and I regard his presence at San Sebastian [as] almost as necessary as mine".[7] According to James Brown Scott, who had accompanied the American member to the session of the Advisory Committee, "Mr. Hammarskjöld inherits a great name, and he seems destined to increase its lustre if health and years are added to ability and tact, poise and judgment".[8]

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4 Quoted from O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, Cambridge, 2005) (hereinafter referred to as the "*Rise of International Judiciary*") p. v.

5 R.Y. Jennings, 'The International Court of Justice after Fifty Years', 89 *American Journal of International Law* (1995) p. 493.

6 On the work of the Advisory Committee, *see* O. Spiermann, '"Who attempts too much does nothing well": The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice', 73 *British Yearbook of International Law* (2002) p. 187.

7 *Ibid.*, p. 191.

8 J. B. Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists* (Carnegie Endowment, Washington DC, 1920) p. 9.

Although the session of the Advisory Committee had been a significant personal success for Åke Hammarskjöld, it had not quite been a refreshing care-free summer on the North Sea. The session had made it painfully clear that real progress for the Permanent Court took hard work to the point of exhaustion, with particularly heavy demands on Hammarskjöld personally. At the opening of the session, Hammarskjöld had been disappointed that the Advisory Committee made objections to his long and detailed questionnaire, or 'draft of general agenda', reflecting his analysis contained in a memorandum previously submitted in the name of the Secretariat of the League.[9] A week into the work, Hammarskjöld remarked: "I get more convinced every day that the main features of my questionnaire should have been fixed by the Secretary-General and put before the committee as an obligatory agenda. I now see better than before that the order adopted in that questionnaire is the only possible one if a somewhat speedy result is to be obtained."[10] This was a reaction to the confused and slow start of the work with many storming meetings. In a report to his immediate superior at the Legal Section of the Secretariat of the League, Hammarskjöld wrote about the atmosphere at The Hague: "You want me to see the members, to have my meals with them and to get out of them what they may carry about of hidden treasure. I have not succeeded so far, and the funny part of it is that not one of the members has contrived to have his meals with any other member either. They probably think they have quite enough of one another during the meetings – so do I."[11]

An indication of Hammarskjöld subsequently becoming less pessimistic about the Advisory Committee's work was his letter to a member of the Legal Section of the Secretariat, with whom Hammarskjöld had been corresponding, mainly about organisational matters:

> "You think that I have too black an opinion of what is going on here. Of course it is possible, and I think anyone who sees the result will say that that has been so – because there will be a result. But you know as well as I do that when one sees how a work grows to a very large extent by sheer haphazard, how opportunities are disregarded, how every endeavour to bring about something like methodical work and logical order is met with contempt, then one must be a bit pessimistic when thinking of what might have been. The outcome of this Conference will not be such as to stand scientific criticism."[12]

Anzilotti and Hammarskjöld not only assisted the Advisory Committee of Jurists; they also followed the matter closely on its way through the political processes of the League. On 16 December 1920, the negotiations over the Statute came to a successful

9 The questionnaire is Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes* (1920) (hereinafter referred to as "*Procès-verbaux*") pp. 33–40.

10 Report of 22 June 1920 (II), *Hammarskjöldska Arkivet* 480. This archival material is kept as part of *Hammarskjöldska Arkivet: Åke Hammarskjöld, 1893–1937*, Kungliga biblioteket, Stockholm, Sweden. References are to box number.

11 *Ibid.*

12 Hammarskjöld to van Kleffens, 9 July 1920, *Hammarskjöldska Arkivet* 482.

end and the final Statute was appended to the Protocol of Signature Relating to the Statute of the Permanent Court of International Justice.[13]

3. Outlook for the Permanent Court

The Statute of the Permanent Court contained, in Article 38, a list of sources of international law, which has inspired theorists ever since. Still, it would have been odd had the debate in the Advisory Committee really produced a list of continued practical importance. Reflecting on the debate, Hammarskjöld noted that "[a]s a purely platonic discussion it was very interesting, but the practical value of it was certainly not great".[14] Hammarskjöld tended to emphasise the future role for the Permanent Court. In a publication issued by the League of Nations, but which was substantially a reproduction of a paper prepared by Åke Hammarskjöld, the following was said about the Permanent Court: "It is for the Court itself to make out what is international law, and it is in this domain that the jurisprudence of the Court will have its greatest importance as a means of codifying the law of nations".[15] Indeed, just as the final Statute was adopted, the Assembly of the League had rejected a resolution concerning Conferences for the Advancement of International Law, a less ambitious name than the previous Peace Conferences, which prompted Hammarskjöld to add that this decision "largely increases the importance of the rôle of the Court in creating International Law by its jurisprudence".[16]

This is not to say that, on Hammarskjöld's view, the new Permanent Court would dramatically change the course of the world:

> "The importance of the new Court for the development of international law and for the maintenance of peace rests, above all, upon its personal and material competence. The importance of the Court is great and should not be underrated. However, it would be dangerous to attribute to the Court an importance that could not belong to it. Upon exaggerated hopes or confidence would follow – as was the case with regard to the Permanent Court of Arbitration – the blackest scepticism. This scepticism would constitute a very great danger to the young institution and would jeopardise the blessings that the world is entitled to expect from its creation and activities.
> …
> To create little by little, by practical and successive solutions, a conscience of justice within the community of nations, and to make that community love the conception of justice, to compel nations to feel and appreciate the invaluable blessings of law, that is what those who are equally far from sharing the thoughtless enthusiasm of some, and the unwarrantable scepticism of others, may confidently expect from this new institution."[17]

13 6 LNTS 379.

14 Hammarskjöld to Van Hamel, 2 July 1920, *Hammarskjöldska Arkivet* 480.

15 League of Nations, *The Permanent Court of International Justice* (Genèva, 1921) p. 17; as for Hammarskjöld's role, *see ibid.*, p. 3, note 1.

16 *Ibid.*, p. 17.

17 *Ibid.*, p. 20.

This may be compared to what Hammarskjöld wrote some fourteen years later about the use of the decisions of the Permanent Court:

> "the *dicta* of the Court are almost always carefully limited to particular situations arising in concrete cases; and if one takes these *dicta* as a basis in estimating the Court's contribution to positive international law, there is always the risk of generalisations which may only correspond remotely to the Court's past and present views, to say nothing of the opinions it may adopt in the future. Many of the admirable works which have already been devoted to the Court's jurisprudence (in the continental sense of the word) have not succeeded in avoiding this danger."[18]

4. Establishing the Permanent Court

As the Protocol of Signature Relating to the Statute had entered into force at the time of the opening of the Second Assembly in September 1921, the first general election of judges took place on 14 September 1921. The two youngest candidates elected were Max Huber of Switzerland and Dionisio Anzilotti from Italy. They combined eminence in scholarship with practical experience, partly derived from the services rendered by them to their respective governments. On a bench composed mainly of professors and national judges they formed perhaps the most crucial and influential partnership in the history of the Permanent Court and its successor, the International Court of Justice.

Anzilotti and Huber benefited from intimate cooperation with Åke Hammarskjöld, who had prepared the preliminary session of the Permanent Court in early 1922 at which he appeared as its acting secretary. It was at this session that Åke Hammarskjöld was elected registrar, or chief officer, of the Permanent Court at the age of 28. It was, in Anzilotti's words, "impossible de trouver un autre candidat qui a une intelligence aussi élevée et à un dévouement aussi complet réunisse une connaissance de l'organisation de la Cour comparable à celle qu'en a M. Hammarskjöld".[19]

An important decision in the foundational period of the Permanent Court was the *Nationality Decrees* opinion delivered in 1923. It was the first decision in which Judge Huber took part. The request for an advisory opinion arose out of the promulgation of decrees in the French protectorates of Tunis and Morocco, designating certain individuals born within those territories as Tunisian and Moroccan subjects respectively. Another set of decrees had made them French subjects. Some of the affected persons (who were affected in the sense that they were conscripted into the French army) were British subjects, and the British Government brought the matter before the Council. Under Article 15(8) of the Covenant, the Council could not entertain a dispute if it arose "out of a matter which by international law is solely within the domestic jurisdiction". The Permanent Court was asked to advise on whether this provision applied to the specific dispute.

18 Å. Hammarskjöld, 'The Permanent Court of International Justice and the Development of International Law', 14 *International Affairs* (1935) p. 797.

19 Spiermann, *Rise of International Judiciary, supra* note 4, p. 142.

The Permanent Court stated that "in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain".[20] However, this was not the end of the *motifs*, and the true significance of the *Nationality Decrees* opinion lies in the reserved domain – 'the right of a State to use its discretion' – not holding up against the competence of the Council. According to the *motifs*, the reserved domain was "limited by rules of international law" so that if a state had undertaken treaty obligations, Article 15(8) "then ceases to apply as regards those States which are entitled to invoke such rules", the dispute taking on 'an international character'.[21]

It was of practical significance that, in the view of the Permanent Court, Article 15(8) was inapplicable where "the legal grounds relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council".[22] A higher threshold, for example an "opinion upon the merits of the legal grounds", would, the Permanent Court said, "hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes". On behalf of the French Government, Professor Lapradelle had made an exceedingly long speech on the merits of the dispute, which occasioned a brilliant reply by Sir Douglas Hogg representing the British Government.[23] Some years later, Hammarskjöld was reported as having said to a Danish diplomat that only in one case had the oral proceedings influenced the Permanent Court's decision, namely in the case of Hogg, due to a superior command of the factual and legal questions involved, as well as his common sense considerations.[24] The Permanent Court concluded that Article 15(8) did not apply to the dispute.[25]

The judges taking part in the majority had not agreed on the reasoning, and substantial parts of the draft prepared by Judge Huber in collaboration with Judge Anzilotti and Deputy-Judge Beichmann had been omitted.[26] In their final form, the *motifs* did not address the exact reason why a provisional conclusion as to the applicability of a treaty provision was seen as being sufficient to exempt an issue from the reserved domain. However, some years later Huber wrote about the drafting of the *Nationality Decrees* opinion:

> "Das Gutachten wurde von mir entworfen, und trotz starker – von mir, Anzilotti und Beichmann bedauerter – Streichungen ist es fast ganz das Produkt meiner Redaktion, auch in der endgültigen Fassung. Bei der Beratung zeigte es sich, wie wenig die Richter mit der inneren Struktur des Völkerbundpaktes wirklich vertraut waren; daher ihr Bestreben, die Erwägungen, die für die Kenner des Paktes ausschlaggebend, ihnen aber fremd waren, auszuschalten. So konnten Anzilotti, Beichmann und ich nur durch Drohung mit einem Sondergutachten erzielen, daß die für uns wich-

20 PCIJ Series B No. 4 (1923) p. 24.

21 *Ibid.*

22 *Ibid.*, p. 26.

23 *See* PCIJ Series C No. 2, pp. 155–191, 200–203, 206–211 and 245.

24 Spiermann, *Rise of International Judiciary*, *supra* note 432, p. 155, note 80.

25 PCIJ Series B No. 4 (1923) pp. 27–31.

26 Spiermann, *Rise of International Judiciary*, *supra* note 4, p. 158.

> tigsten Gedanken wenigstens in einer bis fast zur Unverständlichkeit komprimierten Form im Gutachten Platz fanden. Hammarskjöld hat nachher unsere Gedanken in einer Abhandlung in der 'Revue de Droit international de Vinewil' [*sic.*] klar dargelegt.[27]"

The article accredited to Åke Hammarskjöld was published under the pseudonym of 'Paul de Vineuil'. This commentator explicitly undertook to discern the rationale behind the loose test based upon merely provisional conclusions, "malgré le risque évident de mal interpréter les intentions de la Cour".[28] In 'Paul de Vineuil's' view, there were two main reasons: firstly, if the Council were to apply a stricter test it would have to go more into the dispute, thereby making Article 15(8) "une arme qui se retourne contre celui qui s'en sert"; secondly, since Article 15(8) referred to what "by international law" was solely a matter of domestic jurisdiction, a stricter test would have been a legal test approximating compulsory jurisdiction, which, according to this commentator, was why such a test would be contrary to "the system established by the Covenant for the pacific settlement of international disputes".[29]

It is remarkable that, as registrar, Åke Hammarskjöld made an attempt to add to the *motifs* a rationale that had been rejected, or at least suppressed, by members of the Permanent Court. Actually, Hammarskjöld's article had been sanctioned by President Loder in response to a blunt note in the American Journal of International Law, which had caused much ill feeling on the bench. Referring to the lengthy arguments of the French Government, the author had written that "the judges showed both their disapproval and their aptness for judicial functions by falling fast asleep".[30] The author had also noted that the judges had "little in common, except access to the same fund by way of compensation".[31]

More articles were produced by 'Paul de Vineuil' and in an attempt to persuade Manley O. Hudson, 'the chronicler of the World Court',[32] to follow 'Vineuil's' lead in his annual review articles on the Permanent Court's work, Hammarskjöld explained that "the Vineuil articles as a rule are written with the precise intention of indicating the angle from which the various decisions should be envisaged".[33] The articles were written to shed light on decisions of the Permanent Court which "have been very

27 M. Huber, *Denkwürdigkeiten, 1907–1924* (1974) p. 276 (the text was completed in 1927).

28 *See* Paul de Vineuil, 'Les leçons du quantrième avis consultatif de la Cour permanente de Justice internationale', 4 *Revue de droit international et de legislation comparée* (1923) p. 299.

29 *Ibid.*

30 C. N. Gregory, 'An Important Decision by the Permanent Court of International Justice', 17 *American Journal of International Law* (1923) p. 306.

31 In addition to the article by Hammarskjöld, Manley O. Hudson also made a reply upon request, *see* M. O. Hudson, 'The Second Year of the Permanent Court of International Justice', 18 *American Journal of International Law* (1924) p. 6 and 30, note 114.

32 M. Lachs, *The Teacher in International Law: Teachings and Teaching* (Nijhoff, The Hague, 1982) p. 100.

33 Hammarskjöld to Hudson, 21 August 1924 and 29 February 1924, both *Hudson Papers* 8.32. This archival material is kept as part of *Manley O. Hudson Papers*, Harvard Law School Library, Cambridge, Massachusetts, United States. References are to box and folder numbers.

widely misunderstood". 'Paul de Vineuil' did not merely point out the various misunderstandings: he provided his readers with a correct understanding of the decisions. In plugging the gaps in the *motifs*, 'Paul de Vineuil' selected a view from among the conflicting views that had cancelled out each other in the course of the deliberations. On most occasions the views of 'Paul de Vineuil' perfectly matched those of Judge Huber, with whom Hammarskjöld was on exceptionally good terms.[34] Some years later, having been elected an *associé* of the Institut de Droit International, Hammarskjöld revealed the true identity of 'Paul de Vineuil' in a bibliography submitted to the electors.[35] This signature was used once again in commenting on the Permanent Court's decisions in 1929, but in the interval Hammarskjöld adopted a more 'pseudonymous' one: 'Michel de la Grotte'.

Hammarskjöld's key role was regretted by some: in respect of the Permanent Court's first years of activity, Judge Nyholm, the Danish member of the Permanent Court, said that Hammarskjöld "on the basis of his evident professional Greffier capacity rules the whole court"[36], and despite the change of president in late 1924 when Huber became President of the Permanent Court, according to Judge Nyholm "[t]he whole court is in the hands of the Registrar".[37] In comparison, in his speech delivered upon his election as president in 1924, President Huber said that he was "heureux de savoir que le président de la Cour est très efficacement aidé par le Greffe, dont tous les membres, de haut en bas, nous rendent des services intelligents et dévoués, et qui est dirigé avec un rare talent par Monsieur Hammarskjöld".[38] According to Huber, Hammarskjöld also made considerable contributions during the deliberations.[39]

Hammarskjöld took an active role in relation to the revision of the Statute of the Permanent Court, which formed the subject of a Committee of Jurists convening in early 1929. At that time, Anzilotti had succeeded Huber as President of the Permanent Court and they both took part in the meetings of the Committee. Still, they had made it known that they did not see the need for a revision.[40] Indeed, they regarded the campaign as a scarcely veiled attack on the Permanent Court, and their opposition to the initiative, and possibly that of other judges as well, was quite strong. This was made clear in a publication in Hammarskjöld's own name in which the idea of '*la suprématie de Genève*' was rejected and a general '*réexamen*' of the Statute said to resem-

34 *See* P. Vogelsanger, *Max Huber: Recht, Politik, Humanität aus Glauben* (Frauenfeld, Stuttgart, 1967) p. 140 and M. Huber, *Denkwürdigkeiten, 1907–1924* (Orell Füssli, Zürich, 1974) pp. 185, 186 and 271.

35 *See* 32 *Annuaire de l'Institut de Droit International* (1925) p. 567.

36 Spiermann, *Rise of International Judiciary*, *supra* note 4, p. 213.

37 *Ibid.*, p. 214.

38 PCIJ Series C No. 7-I, p. 15.

39 M. Huber, 'In memoriam Åke Hammarskjöld (1893–1937)', in Å. Hammarskjöld, *Juridiction internationale* (Sijthoff, Leiden, 1938) pp. 19–20.

40 Committee of Jurists on the Statute of the Permanent Court of International Justice, *Minutes of the Session held at Geneva, March 11th–19th, 1929* (League of Nations Document C.166.M.66.1929.V, 1929) pp. 8 and 94.

ble "le jeu d'enfant qui consiste à démonter les jouets pour voir ce qu'il y a dedans".[41] One purpose of this publication, which had been approved by President Anzilotti and Judge Huber, had been to discourage individual members of the Permanent Court other than President Anzilotti and Judge Huber, the latter now occupying the position of Vice-President, from interfering with the work of the Committee of Jurists. The Protocol concerning the Revision of the Statute of the Permanent Court of International Justice was signed on 14 September 1929. It did not enter into force until 1936.

The 1920s saw the bench of the Permanent Court being moulded into international judges and the crystallisation of an international lawyer's approach to international legal argument, answering the questions referred from national law independently of particular national legal systems. There was a flow of grand statements in the 1920s that have occupied academics ever since and keep being referred to in the decisions of its successor and other international courts and tribunals. In these efforts Judge Huber and other members of the bench had been greatly assisted by Åke Hammarskjöld.

5. A Long Interlude

The second general election came up in 1930. No judge could continue unless re-elected. Having taken up the presidency of the International Committee of the Red Cross in 1928, Huber declined to stand for re-election. On the other hand, Anzilotti was re-elected. There were concerns that continuity would not be ensured. Before the general election, Huber had written to Moore, the original American member of the Permanent Court, about possible candidates:

> "I shall propose President Anzilotti and Mr. Hammarskjöld, because these two guarantee more than anybody else the continuity of jurisprudence between the old and the new Court. The re-election of Anzilotti seems to be certain, if he – as, I think, he does – accepts a candidature. On the other hand, the candidature of Hammarskjöld, because he does not belong to a Great Power, needs special support if he has to have a serious chance of being elected.
>
> Because you are fully acquainted with the very, very great services rendered by Hammarskjöld to the Court, I take the liberty of suggesting to you whether you might take into consideration a possible proposition of Hammarskjöld by the American group. If the candidature of Hammarskjöld would be supported by some of those groups to which actual or former members of the P.C.I.J. belong, it would become evident for the Assembly and Council that these nominations are based on special experience and are worth of special consideration. Few members of the electoral bodies are familiar with the interior working of the Court and no few may be inclined to underrate the work of a 'registrar'. For this reason it seems to be highly desirable that the immense work done by the Registrar in the background would be made at least indirectly recognizable to the electors.

41 Å. Hammarskjöld, 'La Cour permanente de Justice internationale à la neuvième session de l'Assemblée de la Société des Nations', 9 *Revue de droit international et de legislation comparée* (1928) pp. 676–677.

> I feel sure that you will not consider my letter as an inadmissible intervention in the business of other people; my suggestion is made only in the interest of the Court which will be considerably changed and which could therefore be in need of a young element which combines with an exceptional capacity of work a unique experience of the past of the Court."[42]

As it turned out, Moore and the American group did not nominate Hammarskjöld, but he received nominations from Japan, Latvia, The Netherlands, Sweden and Switzerland. He lost the last seat on the bench by a whisker to a South American so that, as a result, no Scandinavian candidate succeeded at the second general election. It brought in a new, numerous breed who were neither former national judges, nor professors in international law, but former diplomats. They were led by Sir Cecil Hurst and Henri Fromageot, who had been each other's equivalents at the Foreign Office and the Quai d'Orsay.

Manley O. Hudson wrote that the second general election had produced a bench that it "would be difficult to improve on", something that was soon questioned by Hammarskjöld in his private correspondence with Hudson.[43] There obviously was a personal side to Hammarskjöld's doubts. He had been defeated in the election and afterwards he had been too blunt at Geneva.[44] What is more, many newcomers objected to his attitude of '*la Cour c'est moi*'.[45] Hammarskjöld was convinced that his 'influence' would diminish, at least for some time, and he reminded Hudson that "the new Court contains, if I remember correctly, three ex-members of the Council and five ex-legal advisers to members of the Council".[46] To Anzilotti, Hammarskjöld wrote that "[m]y opinion is that the spirit of the Court will be entirely changed".[47] For his part, Anzilotti soon found himself "totalement isolé et dans l'impossibilité de faire quelque chose de bon" on the bench.[48] In a letter to his father, Hammarskjöld was even more frank. He wrote that the true regret was that the Permanent Court in its new composition would be subordinated to Fromageot-Hurst against which the relatively independent members, Anzilotti included, would not be able to assert themselves.[49]

This concern, even if exaggerated, echoed the worries shared by Judges Anzilotti and Huber when in 1929 Judges Fromageot and Hurst had first been elected to the Permanent Court. Their legal qualifications were not as such disputed, but it had been objected by Huber, among others, that "leur entrée simultanée dans la Cour peut-elle créer l'impression d'un certain parallelisme entre le Conseil de la Société des Nations

42 Spiermann, *Rise of International Judiciary*, *supra* note 4, pp. 298–299.

43 Hammarskjöld to Hudson, 29 October 1930 and Recano to Hudson, 15 November 1930, both *Hudson Papers* 113.10.

44 *See* Hammarskjöld's note, 27 September 1930, *Hammarskjöldska Arkivet* 486; *but see* Hammarskjöld's note, 13 September 1934, *Hammarskjöldska Arkivet* 502.

45 *See* Spiermann, *Rise of International Judiciary*, *supra* note 4, p. 311.

46 Hammarskjöld to Hudson, 29 November 1930, *Hudson Papers* 113.10.

47 Hammarskjöld to Anzilotti, 29 September 1930, *Hammarskjöldska Arkivet* 478.

48 Spiermann, *Rise of International Judiciary*, *supra* note 4, p. 323.

49 Hammarskjöld to [Hjalmar] Hammarskjöld, 30 September 1930, *Hammarskjöldska Arkivet* 30.

et la Cour".[50] They had developed a mutual understanding that had been of some political importance in the aftermath of the First World War. Perhaps they did not agree on more points of substantive law than lawyers in general, but their overarching conceptions of the Permanent Court's proper functioning were similar. They regarded the *motifs* of many of the past decisions as being too long and too theoretical. While in the 1920s the Permanent Court had founded an international lawyer's approach to international legal argument, the 1930s saw a disappointing, though perhaps not surprising, backsliding in many cases to a national lawyer's approach.

In Hammarskjöld's view, the *Customs Regime* opinion bore out his concerns about the Permanent Court in its new composition.[51] It was perhaps bad luck that in 1931 the Permanent Court in its new composition was requested to advise on the legality of a planned customs union between Germany and Austria. By 1931 the Great Depression had reached its peak. European statesmen remained incapable of quick action, with the exception of Germany and Austria. The *Customs Union* opinion was the most politically sensitive dispute to be referred to the Permanent Court. The question was whether the planned customs union was compatible with the obligations undertaken by Austria in Article 88 of the Saint-Germain Treaty and in a Geneva Protocol of 1922 not to 'compromise' or 'threaten' its 'independence' without the consent of the Council of the League of Nations.

A narrow majority of eight to seven advised that the planned customs union would be contrary to these treaty obligations of Austria. Seven of the judges in the majority supported the *motifs*, yet they did not agree as to the reasoning leading to their conclusion and so the *motifs* were brief and obscure to the point of being incomprehensible.[52] Judge Anzilotti, who also cast a vote for the advice, submitted a separate opinion in which he presented his own reasons for the result. His basic argument was that when interpreting treaty provisions the rationale behind which was political in character, then one had to take into account political aims.[53] The seven dissenters took advantage of the obscurity of the *motifs* and adopted an approach opposite to that taken by Judge Anzilotti. In essence, they declined to calculate the dangers to Austria's independence. This was considered a 'political' question.[54] They were not worried about in practice emptying the treaty provisions of content.

The *Customs Regime* opinion was a watershed in the history of the Permanent Court. It significantly damaged its reputation, finding itself accused of having turned a legal question into a political one. Under the pseudonym of 'André Becker', Hammarskjöld later reviewed all the Permanent Court's decisions delivered in 1930 and 1931, emphasising "cette … brièveté dans l'exposé des motifs qu'on a pu observer, d'une manière générale, dans les avis à partir de 1930".[55] This review also noted the '*profonds changements*' in the Permanent Court's composition that had taken effect in

50 Spiermann, *Rise of International Judiciary*, *supra* note 4, p. 312.

51 Hammarskjöld to [Hjalmar] Hammarskjöld, 7 October 1931, *Hammarskjöldska Arkivet* 30.

52 PCIJ Series A/B No. 41 (1931) pp. 52–53.

53 *Ibid.*, p. 68.

54 *Ibid.*, pp. 82 and 75.

55 A. Becker, 'La Cour permanente de justice internationale en 1930–1931', 13 *Revue de droit international et de legislation comparée* (1932) p. 563.

1930, Judges Fromageot and Hurst coming on to the bench.[56] At the time, in a letter to Hudson, Hammarskjöld explained why he had been so critical of Hudson's speaking of a bench that was hard or difficult to improve upon:

> "Of course I quite saw your reasons for striking that note; but my fear was – as I think I said at once – that if achievements of the Court thus ideally composed were subsequently severely criticized, the very statement that the composition could not be improved upon would inevitably be read as a somewhat sweeping condemnation of the whole institution, thus defeating its own object.
>
> And I am afraid that this is exactly what has happened, no matter whether the criticism is sound or not."[57]

An entire dimension of the proceeding was neglected by most commentators. Thus, Hammarskjöld wrote to Hudson that "[n]one of the explanations I have seen so far – whether simply straightforward and brutal or ingenious and complicated – is the correct one; but I suppose something has got to be said".[58] Although emphasising that "le délibéré 'est et demeure secret'"[59], 'André Becker' analysed the *Customs Regime* opinion in detail.[60] In Hammarskjöld's view, 'André Becker' wrote "something which strikes me as fundamentally accurate".[61] More than anything else, he put the advisory proceeding in the context of the Council's more comprehensive decision-making process. The consequence of all three opinions would have been, had the planned customs union not been abandoned by the Austrian and German Governments just before the advisory opinion was delivered, that the dispute would have been back on the Council's table. In particular, the dissenting opinion, on the face of it an unsophisticated exercise in treaty interpretation, held that the Council was better equipped to apply the treaty provisions in question.[62]

Characteristically, Hammarskjöld had changed the aim of his articles reviewing the Permanent Court's work. The articles on the years 1930 and 1931 were signed 'André Becker', and the articles on the two following years 'A. Engelsdoerfer'. While originally intended to correct misconceptions among commentators, the new articles written in a more secretive style took the approach of correcting the Permanent Court. The overall question was whether the practices of the Permanent Court in its old composition had been upheld, it being known that "[q]ui dit période de transition, dit

56 *Ibid.*, p. 524.

57 Hammarskjöld to Hudson, 18 January 1932, *Hudson Papers* 113.10.

58 Hammarskjöld to Hudson, 25 November 1931, *Hudson Papers* 130.11.

59 Becker, *supra* note 55, p. 549.

60 *Ibid.*, p. 554–555.

61 Spiermann, *Rise of International Judiciary*, *supra* note 4, p. 322.

62 In the *motifs*, it was noted that Article 88 of the Saint-Germain Treaty and the Geneva Protocol, "without imposing any absolute veto upon Austria, simply require her to abstain or, in certain circumstances, to obtain the consent of the Council of the League of Nations", *see* PCIJ Series A/B No. 41 (1931) p. 44; *see also* Judge Anzilotti's separate opinion, *ibid.*, pp. 57 and 69–70.

d'habitude période de crise".[63] The conclusion of 'André Becker' was that continuity had been broken,[64] while 'A. Engelsdoerfer' concluded that "d'une manière générale, la continuité existe" but "on a plutôt l'impression qu'il s'agit d'une coïncidence".[65]

The Permanent Court was influenced by the decaying political climate of the 1930s in various ways. For one thing, the Permanent Court's workload decreased. 'A. Engelsdoerfer' quoted 'M. A. Hammarskjöld, *Greffier de la Cour*' for the view that "l'année 1933 a été pour la Cour une année de désistements".[66] Three cases had been withdrawn earlier in 1933, and later, after the election of Judge Hurst as president, Germany's new government withdrew two more cases. There emerged a general trend of joining preliminary objections not concerning the Permanent Court's jurisdiction to the decision on the merits of the case, beginning with the *Prince von Pless* case in 1933.[67] One should not jump to the conclusion that the joining of preliminary objections to the merits as a general trend was witness to an extended conception of the Permanent Court's jurisdiction. Indeed, Hammarskjöld rather saw it as a result of 'impotence' at least on the occasion of the *Losinger* case between Switzerland and Yugoslavia.[68] The difficulties in drafting the judgment in 1935 in the *Oscar Chinn* case concerning river transportation in the Belgian Congo during the Great Depression made Hammarskjöld talk more about impotence.[69]

In an attempt at meeting budgetary restraints, Judge Fromageot proposed the publication of acts and documents relating to the decisions of the Permanent Court in Series C being suspended. He was not able, however, to win the support of his colleagues, who were satisfied with Hammarskjöld's explanation as to why Series C was essential, namely due to "a) le risque de voir publier des recueils non autorisés et incorrects; b) l'intérêt scientifique des publications dont il s'agit; c) l'autorité plus grande résultant pour les décisions de la Cour de la possibilité de les comparer avec les arguments présentés par les Parties".[70] Not least thanks to Hammarskjöld, the official publications of the Permanent Court were more comprehensive and arguably of a higher quality than those offered by the more recent international courts and tribunals.[71]

63 Becker, *supra* note 55, p. 538; *see also* A. Engelsdoerfer, 'La Cour de la Haye en 1932–1933', 15 *Revue de droit international et de legislation comparée* (1934) pp. 268–269.

64 Becker, *supra* note 55, p. 563.

65 A. Engelsdoerfer, 'La Cour de la Haye en 1932–1933', 16 *Revue de droit international et de legislation comparée* (1935) pp. 472–73.

66 *Ibid.*, p. 469.

67 *See also* PCIJ Series E No. 9 (1932–1933) p. 171 and PCIJ Series E No. 10 (1933–34) p. 161.

68 Hammarskjöld to [Hjalmar] Hammarskjöld, 22 June 1936 and 27 June 1936, both *Hammarskjöldska Arkivet* 30.

69 Hammarskjöld to [Hjalmar] Hammarskjöld, 30 November 1934, *Hammarskjöldska Arkivet* 30.

70 Spiermann, *Rise of International Judiciary*, *supra* note 4, p. 356.

71 *See also* M. O. Hudson, *The Permanent Court of International Justice, 1920–1942* (Macmillan, New York, 1943) pp. 307–308.

6. Judge Hammarskjöld

In 1936, at an election held to fill vacancies, Hammarskjöld was elected judge together with Manley O. Hudson. As a consequence, Hammarskjöld stepped down from his position as registrar of the Permanent Court, a position in which he had exercised more influence on the Permanent Court's work than most of its members. President Hurst had for a long time sought his election (although Hurst and Hammarskjöld would seem never to have developed a close relationship): "As Registrar he has become too powerful, and it would be good for the Court and for him that after thirteen and a half years of service as Registrar he should be elected to a judgeship. I cannot say that he is a popular person: he is formal and rigid, and possesses no sense of humour; but of his qualifications for the post I entertain no doubt."[72]

At the time of his election, some government representatives had apparently asked Hammarskjöld to bring back the 'old' Court,[73] and the new judges made interesting débuts in the *Pajzs, Csáky, Esterházy* case. The case involved the technical details of a series of agreements on agrarian reforms and nationalisation in the Balkan states, which had been concluded in order to end a deadlock in proceedings before various Mixed Arbitral Tribunals. It was decided by a majority of eight to six. Although the other five dissenters generally supported the dissenting opinion of Judge Hudson,[74] Judges Anzilotti and Hammarskjöld also had their reservations. They disagreed as to why the Permanent Court had jurisdiction to entertain the cases on appeal.[75] In addition, Judge Hammarskjöld wanted to cover many more aspects in his criticism of the *motifs* than the other dissenters.[76] In private, Judge Hammarskjöld admitted that only the third general election scheduled for 1939 could save the Permanent Court.[77]

Hammarskjöld died the following year. The Permanent Court sustained, in Hudson's words, 'a grievous loss'.[78] To Moore, Judge Hudson wrote that "[t]he youngest member of the Court – he was not yet 45 when he died – he was also the best informed with regard to its precedents and its history, and it will be difficult indeed to replace him".[79] Rather more to the point, Hammarskjöld could not be replaced.

Obviously, Åke Hammarskjöld could not have prevented the active life of the Permanent Court coming to an end in 1940 with German troops marching into The Netherlands. On the other hand, it seems equally obvious that the Permanent Court would have had a less active life prior to decay had the institution not included eminent jurists like Huber, Anzilotti and Hammarskjöld. In the history of the Permanent

72 Spiermann, *Rise of International Judiciary, supra* note 4, pp. 369–370.

73 Hammarskjöld to [Hjalmar] Hammarskjöld, 9 October 1936, *Hammarskjöldska Arkivet* 30.

74 PCIJ Series A/B No. 68 (1936) at 66 (van Eysinga), 67 and 71 (Judge Anzilotti), 72 (Judge Nagaoka), 86 (Judge Hammarskjöld) and 90 (Judge *ad hoc* Tomcsányi).

75 *See ibid.*, pp. 79, 68–69 and 86 respectively.

76 *Ibid.*, pp. 87–89.

77 Hammarskjöld to [Hjalmar] Hammarskjöld, 11 December 1936, *Hammarskjöldska Arkivet* 30.

78 M. O. Hudson, 'The Sixteenth Year of the Permanent Court of International Justice', 32 *American Journal of International Law* (1938) p. 1.

79 Spiermann, *Rise of International Judiciary, supra* note 4, p. 371.

Court and its successor, the International Court of Justice, no other Scandinavian rivals Åke Hammerskjöld, who indeed was second to none. At the first sitting of the Permanent Court after Hammarskjöld's death, the new president of the Permanent Court, President Guerrero, said:

> "I cannot, without profound emotion, speak of the cruel gap made in our number by the death on July 7th last of our colleague, M. Hammarskjöld. He was, as the first Registrar, associated with the work of the Court from its inception; with unwearying devotion, he gave without stint of his brilliant best to the service of the Court and of the ideals which it represents. When, a year ago, he was elected judge, he felt himself called to fulfil in another capacity the high task which had always been his life's ideal; but death struck him down. Innumerable messages of sympathy have shown us how fully everyone realizes the greatness of the loss suffered by the Court."[80]

7. Final Note

In the context of this *Festschrift*, and with a view also to Dag Hammarskjöld's outlook on neutrality, it seems opportune to dwell on Åke Hammarskjöld's position in relation to neutrality as it developed after the 1928 Briand-Kellogg Pact, or the Pact of Paris, outlawing war. This Pact was the subject of the Budapest Articles of Interpretation adopted by the International Law Association in 1934. Unsurprisingly, the Pact did not provide for the jurisdiction of the Permanent Court of International Justice established in 1921. Nevertheless, the Budapest Articles brought together some of the notable figures in the history of the Permanent Court (although not Francis B. Kellogg, who had been on the bench since the second general election in 1930).

The meeting had been chaired by Manley O. Hudson. In Budapest, Hudson had closed the session on the note that "[o]ur generation is attempting great things".[81] Not everybody agreed. Hersch Lauterpacht, the author of a highly theoretical work published in 1934, *The Development of International Law by the Permanent Court of International Justice*, found that the Budapest Articles "erred on the side of idealism".[82] According to Article 4(b) of the Budapest Articles, a party to the Pact was entitled to decline to observe towards a state violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in … to a belligerent". This provoked this reaction on the part of Lauterpacht: "Neutrality … may have lost its moral foundation; it may have ceased to be politically and economically feasible or tolerable; it may, as the result of legal development, have become a juridical anachronism. But this does not mean that it has ceased to be part of the law or that it can be removed from the law by the process of interpretation."[83]

To a certain extent, Lauterpacht's remark echoed Åke Hammarskjöld's intervention at the meeting in Budapest. Hammarskjöld had pointed to the necessity for laying down rules governing 'the status of non-belligerency' under the régime of the Pact. In

80 PCIJ Series C No. 82, p. 207.

81 *Report of the Thirty-eighth Conference of the International Law Association* (1934) p. 66.

82 H. Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', 20 *Transactions of the Grotius Society* (1934) p. 201.

83 *Ibid.*, p. 191.

the same breath, Hammarskjöld had defended this 'status of non-belligerency', a term chosen because not necessarily identical with the status of neutrality prior to the First World War:

> "For we who experienced neutrality from the inside may perhaps be pardoned if we hold that neutrality was not only the egoistic attitude to which reference was made … we considered it as a real mission, as a real international mission, and this in two directions. First we were profoundly convinced of the blessings of peace and we thought that it would be a good thing for the future of humanity if, in the sea of the Great War, a few islands of peace were maintained. We, moreover, thought, and that is the second direction, that in the general breakdown of the accepted principles of international law, it was the mission of some States to maintain as much as could be saved of those principles in order, after the end of the war, to offer them to all States, including the belligerents, as building material for the new order to be set up."[84]

No doubt, Åke Hammerskjöld's own 'real international mission' was the Permanent Court, in which neutrality, in a different sense, was quintessential to proper functioning. This is reflected in Max Huber's words on the occasion of Hammarskjöld's death:

> "Die höchste ethische Eigenschaft des Richters, die Unabhängigkeit des Urteils, besaß er vor allem vermöge seines hohen Pflichtgefühls. Als internationaler Beamter von dem Typ, den er repräsentierte, hatte er sich angewöhnt, sich über den nationalen Standpunkt zu erheben und auf das Gesamtinteresse der Staaten zu sehen. Er war auch frei von Vorliebe oder Vorurteil gegenüber andern Nationen, Rassen und politischen Systemen. Auch in den ersten Jahren der Tätigkeit des Gerichtshofes, als die durch den Weltkrieg aufgewühlten Gefühle selbst den Angehörigen neutraler Länder eine unbefangene Einstellung oft erschwerten, hat er sich in keine Ideologien und Ressentiments verstricken lassen."[85]

84 *Report of the Thirty-eighth Conference of the International Law Association* (1934), pp. 31–32 and *see also* Robert H. Jackson's address reproduced in 35 *American Journal of International Law* (1941) p. 356, note 5.

85 Huber, *supra* n. 39, pp. 24–25.

Chapter 18

Do We Need a World Court of Human Rights?

*Geir Ulfstein**

1. Introduction

The international human rights supervisory machinery has in recent years undergone a state of transformation. In 2006 the Human Rights Council replaced the United Nations Human Rights Commission. The Council in fact represents a formal upgrading since the Commission was under the Economic and Social Council (ECOSOC), whereas the Council is a sub-organ of the General Assembly. Moreover, while the Commission only met once a year, it was arranged that the Council would convene throughout the year.[1] The treaty body system established by the human rights conventions to monitor implementation of the treaty obligations is also under consideration. The UN High Commissioner for Human Rights has proposed a 'unified standing treaty body' as a substitute for the existing treaty organs.[2] Finally, negotiations are currently taking place about an optional protocol to the International Covenant on Economic, Social and Cultural Rights on the establishment of an individual complaints procedure.[3] These developments have prompted Manfred Nowak[4] and Martin Schei-

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1 General Assembly Resolution 60/251 (3 April 2006).

2 Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body (14 March 2006) (HRI/MC/2006/CRP.1). *See also* M. O'Flaherty and C. O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body', 7 *Human Rights Law Review* (2007) pp. 141–173, R. L. Johnstone, 'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body', 7 *Human Rights Law Review* (2007) pp. 173–201 and M. Bowman, 'Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform', 7 *Human Rights Law Review* (2007) pp. 225–251.

3 Human Rights Council Resolution 1/3 (29 June 2006) requesting the Chairperson-Rapporteur to submit a first draft optional protocol.

4 M. Nowak, 'The Need for a World Court of Human Rights', 7 *Human Rights Law Review* (2007) pp. 251–259.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 261–272.

nin[5] to propose the establishment of a World Court of Human Rights.[6]

A World Court of Human Rights as proposed by Nowak and Scheinin would be established by a separate treaty, and thus not require amendment of any existing human rights conventions. Each state could be given the opportunity of choosing the conventions to which the Court would be authorised to exercise judicial functions, and could even choose conventions that currently do not contain any complaints procedure. They could then opt out of the complaints procedure of the same conventions. Nowak suggests that such a Court could also be empowered to judge in relation to the legality of acts by non-state actors, such as inter-governmental organisations (for example, the UN, EU, the World Bank, the WTO and NATO) and multinational companies. It could impose reparations in cases of violations, and adopt binding interim measures. Scheinin submits that the proposed Court could be either a first instance or an appeals court for decisions taken by the treaty bodies.

In this paper I shall first discuss to what extent a World Court would contribute to overcoming the present weaknesses of the supervisory system. Furthermore, the relationship between a World Court, the regional human rights courts, the treaty mechanisms and the Human Rights Council will be examined. Such a Court may also raise questions of its legitimacy: should a World Court be allocated the powers to determine with binding effect the implementation of human rights conventions in the manifold political, economic and cultural conditions throughout the world? This leads up to the final question about the realism of the proposed World Court.

2. Weaknesses of the Supervisory System

The monitoring system is by the High Commissioner for Human Rights considered to face "serious challenges".[7] This is partly due to the increase in treaties, ratifications and the number of treaty bodies. But it is of no less importance that "many States accept the human rights treaty system on a formal level, but do not engage with it, or do so in a superficial way, either as a result of lack of capacity or lack of political will".[8]

Monitoring of implementation of human rights conventions is conducted through three different procedures: examination of state reports; consideration of individual complaints (interstate complaints have never been used at the global level); and, finally, inquiry into allegations of grave or systematic violations. The aim of a World Court of Human Rights would be to strengthen the effectiveness of individual (and possibly interstate) complaints.

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5 M. Scheinin, 'The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform without Amending the Existing Treaties', 6 *Human Rights Law Review* (2006) pp. 131–142 at p. 142.

6 Stefan Trechsel has earlier concluded that such a Court is 'neither desirable, nor necessary, nor probable', *see* S. Trechsel, 'A World Court for Hunan Rights?', 1 *Nw. U. J. Int'l Hum. Rts.* 3, <http://www.law.northwestern.edu/journals/JIHR/v1/3/>, para. 70.

7 Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2 (2006), para. 15.

8 *Ibid.*, para. 16.

The specific objectives of individual complaints are by the High Commissioner stated as follows:

> "With regards to individual complaints, *awareness* at the national level of the possibility of complaint among rights-holders, the *efficiency* of the procedures at the international level and the *quality* of the outcomes are key, as is the *willingness* of States Parties to implement views and make necessary legislative and policy changes to comply with their obligations."[9]

These concerns can be addressed under four headings:
- Visibility of the complaints mechanism
- Efficiency, i.e. costs involved and timeliness of output
- Quality, i.e. composition, procedures and outcome
- Effectiveness, i.e. implementation by states parties.

2.1 Visibility

As regards visibility, the High Commissioner states that:

> "Despite its achievements, the system is little known outside academic circles, Government departments and officials directly interacting with the system, and specialized lawyers and NGOs. The treaty body system is rarely perceived as an accessible and effective mechanism to bring about change. Victims of human rights violations and civil society actors are unfamiliar with the system's complex procedures or are unaware of its potential. Media coverage is poor and the use of treaty body jurisprudence by lawyers and national judicial systems is limited … The number of complaints filed with the Secretariat is low in comparison to the number of individuals living under the jurisdiction of States that have accepted individual complaints procedures, and most complaints are directed toward a minority of States parties."[10]

A World Court of Human Rights may become much more visible than the existing treaty bodies and attract much attention. The problem could rather be that the Court would suffer from a substantial overload, such as the current situation of the European Court of Human Rights.[11]

2.2 Efficiency

The High Commissioner is also worried about the efficiency of the treaty body system:

> "The growth in the number of treaties and ratifications has resulted in a steep increase in the workload of the treaty bodies and the Secretariat, backlogs in the con-

9 *Ibid.*, para. 10 (emphasis added).

10 *Ibid.*, para. 21.

11 *See* 'Report of the Group of Wise Persons to the Committee of Ministers', Council of Europe, November 2006.

> sideration of reports and individual complaints, and increasing resource requirements. At the same time, the treaty bodies have been under-resourced, and their meeting time has been insufficient to handle their workload. Individual complaints procedures are underutilized, but the time between submission of a complaint and pronouncement of a final decision currently averages 30 to 33 months, which severely challenges the system's ability to provide redress for serious violations of the rights of individuals. An increase in petitions would further delay the processing of individual complaints."[12]

The establishment of a World Court would probably, as a result of an increased caseload, require more resources. On the other hand, some resources might be gained to the extent that the Court substitutes the complaints procedures under existing treaty bodies. It is of great importance to ensure that such a Court is able to provide redress within reasonable time, since it would deal with violations of fundamental rights for individual human beings.

2.3 Quality

The High Commissioner asserts that experiences with the quality and independence of members of the treaty bodies have been mixed:

> "The visibility of the system is linked to the authority of the monitoring bodies, which depends on the quality of the monitoring process, its output and decision-making, as well as the perception of independence and fairness of the procedures employed. The experience of the current system suggests that treaty bodies, composed of part-time, unremunerated experts nominated by States parties from among their nationals and elected by States parties for fixed renewable terms, have been *uneven* in terms of expertise and independence, as well as geographical distribution, representation of the principal legal systems and gender balance. Competing demands have also meant that some treaty body members have been *unable* to devote the time required to the work of their Committees, and some have been unable to attend sessions. As there is no limitation on the number of terms members may serve, several members have served for *long and unbroken periods* … The *ultimate success* of any monitoring system, including of a unified standing treaty body, depends on the *calibre* and *independence* of the experts monitoring implementation of treaty standards."[13]

James Crawford considers that "the electoral process (like most such processes within the UN) is haphazard and takes limited account of qualifications".[14] Some members have continued to serve in government positions during their function in the Com-

12 Concept Paper, *supra* note 7, para. 18.

13 *Ibid.*, paras. 22 and 61 (emphasis added).

14 P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge, 2000) p. 9.

mittee.[15] Furthermore, the Human Rights Committee, as the most prominent complaints body, deals with complaints only on the basis of "written information made available to it by the individual and by the State Party concerned"[16] and does not allow oral presentations, examination of witnesses or experts, nor independent fact-finding.[17] There is no transparency in deliberations since the complaints are considered in "closed meetings".[18] As expressed by Henry J. Steiner: "[a]ll these provisions contrast sharply with characteristic requirements for judges and judicial process".[19]

If a World Court of Human Rights were to be established, it would differ in its composition from the existing treaty bodies by consisting only or pre-eminently of lawyers. What it loses in inter-disciplinary knowledge would be gained by its increased combined legal expertise. Consideration should be given to election procedures whereby parallels may be drawn with similar processes in other international courts, including regional human rights courts. The International Criminal Court has for example elaborated requirements on qualifications, nominations and election of judges.[20] The World Court would have full-time judges. Emphasis should also be placed on the need for procedures aiming at reliable assessment of the facts, oral presentations by the parties, and transparency.

2.4 Effectiveness

As regards the achievements of the individual complaints mechanisms, the High Commissioner refers both to the effects in individual cases and to the importance of jurisprudence developed:

> "Despite the fact that treaty bodies' decisions in this context are not legally binding, individual complaints procedures have often resulted in individual relief for victims. Through the decisions in individual cases, the Committees have also developed a body of jurisprudence on the interpretation and application of human rights treaties, which is referred to more frequently by national and regional courts and tribunals."[21]

Martin Scheinin gives a not too optimistic picture of the implementation of decisions based upon individual complaints to the Human Rights Committee. He submits that "[q]uite often, States simply choose to ignore the Views by not even reporting back to the Committee, let alone taking effective measures to remedy the human rights viola-

15 H.J. Steiner, 'Individual claims in a world of massive violations: What role for the Human Rights Committee?', in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* p. 28.

16 Optional Protocol to the International Covenant on Civil and Political Rights, Article 5(1).

17 H. J. Steiner *et al.*, *International Human Rights in Context: Law, Politics and Morals: Text and Materials* (Oxford University Press, Oxford, 2006) p. 892.

18 Optional Protocol Article 5(3).

19 Steiner, *supra* note 15, p. 29.

20 Rome Statute of the International Criminal Court, Article 36.

21 Concept Paper, *supra* note 7, para. 13.

tion established by the Committee".[22] But the "Views by the Committee contribute to the accumulation of case law on the substantive interpretation of the material human rights provisions of the Covenant. Hence they may serve as a source of inspiration and even authority for the domestic courts all over the world by clarifying the evolving meaning of human rights provisions."[23]

As argued by Henry Steiner in relation to the Human Rights Committee, adjudicatory bodies may be considered to have three functions: resolving individual cases, protecting rights through deterrence, and develop jurisprudence on interpretation of the relevant rules. He doubts, however, whether making the views of the Committee binding would improve compliance with its decisions: "It is indeed unclear whether an amendment to the protocol making views binding would improve the historically spotty record of compliance. The problem stems less from uncertainty over the formal effect of the view than from unyielding attitudes of the recalcitrant states, the gross and systematic violators."[24]

Philip Alston points out the significance of applying positive incentives, particularly in relation to developing states, and he draws parallels with the experience of the implementation of environmental agreements,[25] whereas Martin Scheinin suggests that the political backing of states parties and the political organs of the United Nations is equally important as the binding force of findings of the Human Rights Committee.[26]

It should be assumed that judgments from a World Court would carry more weight than decisions from supervisory bodies, even those from the Human Rights Committee. First of all, the decisions of the Court would be legally binding (*res judicata*). As regards another international court, the International Court of Justice, Constanze Schulte concludes that "[t]he overall record of compliance with ICJ judgments should be viewed as a positive one. Only on a few occasions have states openly and wilfully chosen to disregard the Court's judgments".[27] As to the status of non-binding decisions of human rights treaty bodies in national legal systems, the International Law Association's Committee on International Human Rights Law and Practice has concluded that "courts have noted that, while the treaty bodies are not courts, their findings are relevant and useful in some contexts. However, they have usually stopped short of concluding that they are obliged to follow treaty body interpretations, even in cases in which the treaty body has expressed a view on a specific case or law from the jurisdiction in question".[28] It is submitted by the Committee that the non-binding

22 M. Scheinin, 'The International Covenant on Civil and Political Rights', in G. Ulfstein *et al.* (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, Cambridge, 2007) p. 66.

23 *Ibid.*, p. 67.

24 Steiner, *supra* note 15, p. 30.

25 P. Alston, 'Beyond 'them' and 'us': Putting treaty body reform into perspective', in Alston and Crawford, *supra* note 14, pp. 523–525.

26 Scheinin, *supra* note 22, p. 69.

27 C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, Oxford, 2004) p. 271.

28 The International Law Association, 'Report of the Seventy-First Conference (Berlin)', (2004) p. 624.

character of the findings of treaty bodies may be a factor impeding the implementation of a decision in the domestic legal systems.[29]

In addition to the binding character of its judgments, a World Court would be expected to apply well-defined procedures and should be more able to overcome current deficiencies in the supervisory system, such as the qualifications and independence of its members, and lacking fact-finding and oral procedures. Its decisions may thus enjoy higher legitimacy and thereby acquire a stronger persuasive force.

Increased visibility and efficiency may also attract more cases and increase effectiveness in the sense that more people may gain access to the Court and have their rights determined within a shorter waiting time. But as already mentioned, a visible and efficient court producing judgments respected by states parties may also suffer detrimental consequences of its success in terms of overload. This may militate in favour of establishing a screening mechanism for the World Court and placing more emphasis on developing jurisprudence in the form of precedence, rather than in dealing with all cases that may fall within its jurisdiction.

3. Relationship to Regional Courts, Supervisory Mechanisms and Political Bodies

There has been much focus on the fragmentation of international law in recent years, including the views expressed by the United Nations International Law Commission.[30] The establishment of a World Court of Human Rights could be seen as a further step towards fragmentation of the international supervisory human rights system, and thus working in the opposite direction of the High Commissioner's proposal about a unified permanent treaty body.

The dangers of multiple supervisory organs and courts should not, however, be exaggerated. Rosalyn Higgins has pointed out "the tremendous efforts that courts and tribunals make … to be consistent inter se".[31] Through its case law, a World Court may in fact develop more consistency in the interpretation of human rights conventions by different organs and courts. Moreover, there are different ways of overcoming – or alleviating – challenges connected with fragmentation. First, states accepting the jurisdiction of a World Court could *denounce* the complaints procedure of human rights conventions, as proposed by Nowak and Scheinin. Second, competing jurisdiction may be avoided through *complementarity* – that is, that the complainant must choose between the mechanisms available, such as provided for in Article 35(2)(b) of the European Convention on Human Rights. Finally, the Court could be an appeals instance for decisions taken by treaty bodies, as suggested by Scheinin, or even for judgments by regional courts – that is, a principle of *hierarchy*. The establishment of a screening mechanism, as suggested above, may fit well with arrangements based upon

29 *Ibid.*, p. 635.

30 *See* the report from the International Law Commission, published as M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (The Eric Castrén Institute Research Reports 21/2007, Helsinki, 2007).

31 R. Higgins, 'A Babel of Judicial Voices', 55/4 *The International and Comparative Law Quarterly* (2006) pp. 791–805.

complementarity or the World Court as an instance for appeals. The combination of denunciation and screening may, however, leave the petitioners with lesser opportunities to have their case heard than today, and would thus merit further consideration.

It could also be claimed that there is not much need for a global human rights court in addition to the regional courts (except for Asia), and that the challenge should rather be to support the viability and effectiveness of the existing courts. But against this, it may be argued that the substantive scope of the regional human rights instruments does not cover all the human rights of the global conventions; a World Court would mean the only international human rights court available for the Asian region; the Court may give guidance to regional courts through its jurisprudence; and, finally, that a World Court of Human Rights would not prevent supporting the regional courts.

The establishment and use of international courts has in certain fields of law been seen as confrontational and counter-productive, particularly in areas concerning the protection of collective interests such as international environmental law.[32] The protection of human rights is a collective concern and both treaty bodies and political organs are relevant venues for addressing their implementation. But human rights are ultimately aiming at the protection of individual human beings. Consequently, affording the individual victims of human rights violations access to a complaints procedure – or better a court – should be seen as reflecting this individual aspect of human rights, which differs from that of, for example, climate change or arms control.

The establishment of a World Court could, however, entail a danger of disconnecting individual complaints from the dialogue and follow-up instituted as part of the examination of state reports. The challenge would be to establish an inter-action between the Court and the treaty bodies in the sense that these bodies should take on the task of follow-up – and not review – judgments by the Court in their examination of state reports.

A World Court of Human Rights should also be seen in the context of the political human rights organs of the United Nations, especially the Human Rights Council. Nowak emphasises that a main new feature of the Council is the Universal Periodic Review (UPR). As one of the purposes of establishing the Council was to depoliticise the former Commission, he argues that the UPR as a "peer review" system cannot "be meant to be an assessment of the human rights situation in States by other States. This would not only duplicate the work of treaty bodies and special procedures, it would also mean a major step backwards. The universal periodic review must, therefore, be understood as a follow-up mechanism similar to the one practised in the Council of Europe in relation to the European Convention on Human Rights (ECHR)."[33]

While the treaty bodies would represent the expert follow-up of World Court judgments, the Council should, as pointed out by Nowak, act as a political follow-up mechanism to the Court. As referred to above, the political backing of the UN organs is of crucial importance for the implementation of decisions by supervisory bodies, and

32 Ulfstein, *et al.*, *supra* note 22, p. 10. *See also* E. Hey, *Reflections on an International Environmental Court* (Kluwer Law International, The Hague, 2000) and O. K. Fauchald, 'Bør etablering av en internasjonal miljødomstol være et prioritert mål?' 31/2 *Kritisk Juss* (2005) pp. 109–131.

33 Nowak, *supra* note 4, p. 251 (footnote omitted).

would be important for ensuring the effectiveness of judgments from a World Court. Assistance to developing states may also be critical for their ability to implement such judgments. The Human Rights Council may have a pivotal role in both respects. The Council represents, however, an inherent danger of politicisation and the undermining of judgments by a World Court of Human Rights. While the procedural framework is in place for the Universal Periodic Review, it remains to be seen how the system will work in practice.[34]

4. Legitimacy of a World Court

It may be argued that a World Court of Human Rights should not be given the power to make binding judgments in contentious value-laden issues such as the rights of women, or homosexuals and other minorities, or the freedom of religion, in a world that is divided along geographical, political, social, cultural and religious lines.[35] The establishment of a World Court could also be seen as a further step in the legalisation of international human rights, at the expense of political approaches and dialogue.[36] Finally, it may be argued that the regional human rights courts face increasing scepticism because of their intrusion on national democracy, which would militate against the establishment of a World Court.[37]

As to the global diversity of values, the formal arguments would be that states have accepted the human rights standards, as contained in human rights conventions, by their adoption and ratification. The standards have furthermore been reaffirmed at global conferences such as the 1993 Vienna Conference on Human Rights ("the universal nature of these rights and freedoms is beyond question"). The 2005 World Summit declared that human rights are one of the three pillars, together with peace and security and development, of the United Nations and the foundations for collective security and well-being.[38] The Universal Periodic Review of the Human Rights Council is based upon "universality of coverage and equal treatment with respect to all States".[39] Hence, international human rights as contained in the legal instruments have been accepted in the representative national and international organs.

34 *See* Resolution 5/1 Institution-building of the United Nations Human Rights Council (18 June 2007).

35 *See* on universalism and cultural relativism: J. Steiner *et al.*, *International Human Rigths in Context* (Oxford University Press 2007) pp. 517–665.

36 *See* about legalisation of human rights: B. Cali and S. Meckled-García, *The Legalization of Human Rights* (Routledge, London, 2006).

37 The relationship between democracy and human rights has been discussed in government papers and academic debate in Norway and Denmark, *see* 'NOU 2003:19 Makt og Demokrati. Sluttrapport fra Makt- og Demokratiutredningen', I. E. Koch, *Menneskerettigheder og magtfordeling: Domstolskontrol med politiske prioriteringer* (Magtutredningen; Aarhus universitetsforlag, Aarhus, 2004) and I. E. Koch and J. Vedsted Hansen, 'International Human Rights and National Legislatures – Conflict or Balance?' 75 *Nordic Journal of International Law* (2006) pp. 3–28. On the consequences of adoption of the UK Human Rights Act 1998, *see* T. D. Campbell *et al.*, *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001).

38 General Assembly Resolution 60/1 World Summit Outcome, para. 9.

39 General Assembly Resolution 60/251 Human Rights Council, para. 5(e).

The establishment of a World Court of Human Rights would obviously represent a further legalisation of international human rights. But this is not an end in itself; its objective would be to serve the effective implementation of treaty obligations. Furthermore, criticism of regional courts has not been directed towards their very existence, but rather has concentrated on how they perform their function in interpreting the relevant regional instruments. The establishment of regional courts (except for Asia) should also be seen as recognition that the judicial channel is an acceptable and effective way of protecting human rights.

A World Court is meant to restrict national freedom: the Court's function is to ensure that states respect their international obligations. But, first, the Court should serve to implement obligations freely – and ideally democratically – entered into by the state. Furthermore, democratic values are not the only basis of legitimacy: the effective protection of individuals and minorities against a democratic majority is of equal importance, and should in fact be considered to be a constitutive element of democracy. International courts are also generally composed of respected and professional individuals and apply well-known procedures of high credibility – providing a further basis for legitimacy.

Of course, the possibility of having recourse to a World Court rendering binding judgments means less freedom for states to choose their own interpretations and adaptations. But several states are currently implementing the non-binding decisions by supervisory organs in good faith. Such states would have less difficulty in accepting binding judgments from a World Court. In fact, from their point of view, the situation may indeed improve, through the quality of the composition and procedure of a Court.

More reluctant states may be comforted by the need to exhaust local remedies before approaching the Court. It is also possible to establish the use of regional courts as a first instance. Both requirements may be seen as representing responses to the principle of 'subsidiarity'. This principle may be further strengthened by the use of a 'margin of appreciation' as applied by the European Court of Justice. This margin may be further extended in a global context due to the variations of cultures and political systems. But the Court should be cautious in not allowing a tendency towards lax control: its function would be intended to improve the protection of human rights. It should also see its responsibility as one of striving towards increased uniformity in the interpretation of human rights conventions through its jurisprudence.

In addition, it should be recalled that political organs such as the Human Rights Council would be able to express their views on international human rights standards – but not interfere in the judicial function of the Court. Finally, the proposals from Nowak and Scheinin allow states to choose the human rights conventions with which the Court would be delegated jurisdiction to judge in relation to the relevant state. This would leave room for states to await allocation of jurisdiction for certain conventions until they felt assured by the jurisprudence of the Court.

5. Is a World Court Realistic?

More effective international control of national implementation of human rights obligations is desirable and from this point of view a World Court of Human Rights should be welcomed. The establishment of a World Court of Human Rights may be justified by the fact that the protection of human rights is not only a matter of collec-

tive concern, but affects in the highest degree individuals and minorities. The timing is also good, with the newly established UN Human Rights Council and the debate on improvements to the treaty body system. The proposed Court would accord with a more general trend towards an increasing number of international courts. This may be seen not only as an aspect of the 'legalisation' of international law. Since the intention is to empower an international judicial organ in order to increase the respect for core values in the international community, it may even be regarded as a facet of the growing 'constitutionalisation' of international law.[40]

The establishment of a World Court would overcome several of the weaknesses of the current supervisory mechanisms, such as the lack of visibility, professionalism and independence of its members, procedural deficiencies, and – not least – the non-binding character of its decisions. Hence the Court may be expected to extend greater availability for petitioners, enjoy higher legitimacy and exert more influence in national legal systems.

The Court would at least in a transitional period add to the fragmentation of the human rights supervisory system. Furthermore, the respective functions of the Court, regional human rights courts, the treaty bodies, and the Human Rights Council as a political organ should be clarified. But although a World Court would formally represent a further fragmentation of the international human rights system, it should be expected that such a Court would promote substantive consistency through its jurisprudence. There are also different ways of overcoming the formal fragmentation through denunciation of the complaints procedures of existing treaty bodies, providing for complementarity, or hierarchy through an appeals procedure.

The problems of possible overload may be overcome by a screening procedure while respect for the different political, cultural and religious systems in the world could be accommodated through a principle of 'subsidiarity' in favour of regional courts, and the availability of a margin of appreciation. It is, however, of vital importance that screening and a margin of appreciation do not result in less availability of the complaints system, and that the Court is vigilant in its control of national implementation of human rights treaty obligations. The existing treaty bodies and the Human Rights Council should support the national implementation of judgments from the World Court through dialogue with the states, assistance and political backing.

The proposed World Court, however, faces difficulties in the sense that the global political climate in the human rights field is characterised by conflicts between different political systems, regions, cultures and religions, especially in the Human Rights Council. There is also increasing scepticism regarding what is seen as the expansive role of regional courts, such as the European Court of Human Rights. On the other hand, there are also positive signs, such as the recognition of human rights as being one of the three pillars of the United Nations at the 2005 World Summit and the upgrading of the Human Rights Council compared with the former Commission, by making it a permanent sub-organ of the General Assembly.

40 *See* for an overview, *e.g.*, R. St. John Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, Leiden, 2005).

As has been demonstrated, there are different modalities available to alleviate the concerns of the sceptics. Moreover, the suggested model is technically easier to realise than the High Commissioner's unified standing treaty body, since the establishment of the Court does not require amendments of existing human rights conventions. Finally, allowing states the option to choose the human rights conventions to which the Court should be given jurisdiction mean that states may await the Court's function and jurisprudence in practice before they commit themselves. It is important to seize this opportunity when the supervisory system is being assessed and debated to widen the focus, by also considering the establishment of a World Court of Human Rights.

Chapter 19

Neutrality, Impartiality and Our Responsibility to Uphold International Law

*Pål Wrange**

1. Ove Bring, Dag Hammarskjöld and Neutrality

Ove, in particular over the past two decades, has shown a great interest in the law of neutrality, both with respect to the law of armed conflict at sea and – perhaps most of all – how it relates to UN collective security. We worked together on the law of neutrality and the European Community at the Swedish Ministry for Foreign Affairs in the late 1980s, and as Ove supervised my thesis on neutrality doctrine, I also ventured to put him – or rather his texts – on the analytical couch, so to speak, to be examined along with those of Hersch Lauterpacht, Alfred Verdross, Paul Guggenheim, and others. In that process of close reading, I must confess, I came to appreciate even more the attractiveness of his views, which by and large I share as a doctrinalist.[1] Less than a year ago, our common interest culminated in book form, though not in the same book.[2]

Another interest of Ove has been the work of former UN Secretary-General Dag Hammarskjöld (1905–1961).[3] Dag Hammarskjöld was almost brought up on the law of neutrality. His father, Hjalmar Hammarskjöld, was an international lawyer of

* PhD, Principal Legal Adviser on International Law, Swedish Ministry for Foreign Affairs (on leave of absence). I would like to thank Erika de Wet for comments on an earlier draft.

1 I write 'confess', since the purpose of the analysis in the thesis was not to judge the arguments from a doctrinalist, *i.e.*, legal dogmatic point of view, but to analyse them from other perspectives.

2 O. Bring, *Neutralitetens uppgång och fall – eller den kollektiva säkerhetens historia* (Bokförlaget Atlantis AB, Stockholm, 2008), and P. Wrange, *Impartial or Uninvolved? The Anatomy of 20th Century Doctrine on the Law of Neutrality* (Dokumaten.se, Visby, 2007).

3 O. Bring, 'Dag Hammarskjöld and the Issue of Humanitarian Intervention', in J. Petman and J. Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff Publishers, Leiden, 2003) pp. 485–518; 'Dag Hammarskjöld and his approach to Collective Security and Intervention', lecture delivered at The Swedish Institute Alexandria, 5 May 2005, and Ove Bring, 'Dag Hammarskjöld och folkrätten', Svensk Juristtidning (1982) pp. 433–460.

O. Engdahl and P. Wrange (eds.), Law at War – The Law as it was and the Law as it Should Be
 ISBN 978-90-04-17016-2. pp. 273–292.

greatness who taught on the law of neutrality at the first summer course at The Hague in 1922.[4] Hammarskjöld senior was also prime minister of Sweden in 1914–1917, when he applied the law of neutrality so scrupulously in the First World War, that Swedish imports were hampered. As explained by his son, Hjalmar Hammarskjöld believed that "for a small country, international law, in the final analysis, is the only remaining argument, and that its defence is therefore worth sacrifices even in the egoistical interest of the country itself".[5] The Swedish public, however, was not impressed, and he was forced to resign.

Conspicuous coincidences apart, the most important reason for juxtaposing Dag Hammarskjöld and neutrality, and to do so in Ove's honour, is a different one. In my dissertation, I finished with a plea for impartiality, which was a discussion where I took my cues from such different people as Carl Schmitt (whose mind I will always admire as much as I will detest his politics) and Dag Hammarskjöld (whose supreme standards of ethics did match his intellectual capacity). I laid out some speculative thoughts on the future of neutrality, which were summarised in my final paragraph:

> Perhaps this is how I should end. There is not much room for integral neutrality under the 1907 Hague Conventions, and neutrality as abstention in the sense of staying aloof is no longer possible. However, be it in a liberal, anarchic, collective or regionalised system, there will always be a need for impartiality, call it neutrality or not.[6]

These ideas were quite rudimentary in the thesis, and, in fact, much of the discussion during the public dissertation defence circled around them. I vaguely promised to develop them further, at some time in the future. I need to make good on that, not least for my supervisor, Ove.

The more I think about it, a response would, in fact, involve most if not all aspects of my professional life in international law, and will have to await a future date to be

4 Hjalmar Hammarskjöld was Minister of justice in 1901–02, was appointed member of the Hague Permanent Court of Arbitration in 1904, was a delegate at the 1907 Hague Peace Conference, was a mediator and arbitration judge in several international disputes – including as the Chairman of the Court of Arbitration in the Casablanca affair, served as Chairman of the Committee of Experts for the Progressive Codification of International Law of the League of Nations during the 1920s, and was President of the International Law Association. O. Schachter, 'Dag Hammarskjold and the Relation of Law to Politics', 56 *American Journal of International Law* (1962) pp. 1–8, p. 1 note; O. Bring, 'Dag Hammarskjöld and the Issue of Humanitarian Intervention', *supra* note 3, p. 488; M. Fröhlich, *Dag Hammarskjöld und die Vereinten Nationen: Die politische Ethik des UNO-Generalsekretärs* (Ferdinand Schöningh, Paderborn, 2002) p. 108.

5 K. Falkman (ed.), *To Speak for the World: Speeches and Statements* by Dag Hammarskjöld, *Secretary-General of the United Nations* 1953–1961 (Atlantis, Stockholm, 2005) p. 38.

6 Wrange, *supra* note 2, p. 1051. Neutrality as abstention and as impartiality, when analysed *in extremis*, collapse into one another (Torrelli, *infra* note 19, pp. 31 ff; Wrange, *supra* note 2, p. 991), but as I will argue in section 3.3, it does matter where one starts the debate.

more fully developed.[7] However, this short piece[8] serves to provide a bridge between the dissertation and the rest of my international law life. It is an effort to elaborate a little on the intuition I have had for a couple of years, that reading Hammarskjöld would be relevant to the future of neutrality, and of international law.[9]

I will begin by briefly touching upon a few samples of neutrality discourse around the turn of the millennium (thus picking up where I left off in my thesis), then bring in Hammarskjöld and with him as a springboard analyse the concept of neutrality and give some hints of what might be its role in the future. I shall move from traditional neutrality in war to humanitarian affairs, to the international civil service to peacekeeping and then back to the position of third states in a war, before my argument ends in the field of professional ethics.

2. Neutrality Today

The law of neutrality is no longer spoken of very often. One author even asks, in his heading, "[i]s neutrality a really dead concept?" (he answers negatively), and notes that "neutrality has almost disappeared as a research object in international relations in this high time of norms, values, and identity".[10] But the continued validity and relevance – albeit limited – of the law of neutrality is still recognised.[11]

However, as implied, what interests me here – both intellectually and pragmatically – is the employment of neutrality in other, though related contexts, namely humanitarian affairs, international civil service and peacekeeping. Neutrality has been in these contexts for a long time,[12] but the discussion has taken on a particular relevance after the end of the Cold War. While neutrality for third states may be ignored as a legal regime (most states can ignore most armed conflicts most of the time), neutrality in the other three contexts is something that each actor has to take a stand on constantly.

What then does neutrality entail? Neutrality in traditional international law, in the context of international armed conflict, was a combination of abstention and impartiality, with the latter basically meaning equal treatment. Equality in treatment related foremost to those factors relevant to the licensing of arms export, while it was generally held to be less important if one party or the other was favoured in various

7 I have tried to present some ideas in 'Downtown, Midtown, Uptown, Review of Louis Henkin, "International Law: Politics and Values" and Thomas M. Franck, "Fairness in International Law and Institutions"', 68 *Nordic Journal of International Law* (1999) pp. 53–83 and in 'The Prince and the Discourse: On Commenting and Advising on International Law', in J. Petman & J. Klabbers (eds.), *Nordic Cosmopolitanism: Essays for Martti Koskenniemi* (Martinus Nijhoff Publishers, Leiden, 2003) pp. 33–47.

8 Which, in fact, was in principle conceptualised even before the dissertation defence.

9 That was not my original notion, of course. *See infra* note 28, which refers to Theo van Boven.

10 L. Goetschel, 'Neutrality, a Really Dead Concept?', 34 *Cooperation and Conflict* (1999) pp. 115–139, p. 132.

11 *See infra*, section 2.4.

12 As far as the ICRC is concerned, it goes back to the very start. G. Best, *War and Law Since 1945* (Clarendon Press, Oxford, 1994) p. 374.

other ways by the neutral government.[13] In the context of humanitarian operations, as well as that of civil service and peace operations, neutrality has the broader meaning of 'not taking sides in the conflict', as will be developed below. Neutrality within this understanding, however, does not exclude judgments on issues that are within the mandate of the respective organisation (the UN, the ICRC, etc), as we shall see.

2.1 Humanitarian Affairs

Humanitarian assistance is firmly linked to the law of neutrality. There are provisions within the 1949 Geneva Conventions as well as in the 1977 First Additional Protocol, which pertain to neutrality and humanitarian assistance.[14] These provisions invest neutrality with a valuable role and they provide a good political argument for state neutrality. Further, they offer a space where actions are non-political; humanitarian aid should never be regarded as being interference in an armed conflict. As we shall note later, the permanent neutrals have often justified their position with this link, Switzerland also by being the host of the ICRC.

But neutrality has a further specific 'humanitarian' meaning as one of the three main principles of the Red Cross.[15] The ICRC seems to apply the word 'neutrality' to cover mainly abstention from involvement in a dispute. It is defined thus: "In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature." It is further explained as being abstention from "acting in a way that could facilitate the conduct of hostilities by any of the parties involved".[16] Neutrality is the basis for humanitarian assistance, and the Red Cross does not in fact take a position with regard to the causes of a conflict.[17]

Beside this principle of neutrality (leaning towards abstention) there is the principle of impartiality, which the ICRC explains thus: "It endeavours to relieve the suffering of individuals, being guided solely by their needs [and] makes no discrimination as to nationality, race, religious beliefs, class or political opinions."[18] Impartiality hence

13 However, there were certainly limits; writers mostly found that participation in economic warfare on the side of one belligerent was prohibited. *See* Wrange, *supra* note 2, p. 1028.

14 *See*, *i.a.*, Articles 27 & 37 of the First Geneva Convention of 1949 (GCI), Articles 21 & 25 of GCII, Article 110 & 122 of GCIII, and Articles 24 & 59, GCIV, and Articles 9, 19, 31 & 22(2,a), 39(1), 64 & 69–71 of the 1977 Additional Protocol I.

15 *See* Article 4(1)(a), the Statutes of the International Committee of the Red Cross; <www.icrc.org/Web/eng/siteengo.nsf/html/icrc-statutes-080503>, visited on 31 January 2008.

16 *The Fundamental Principles of the Red Cross and Red Crescent* (ICRC, Geneva 1996), <www.icrc.org/WEB/ENG/siteengo.nsf/htmlall/p0513?OpenDocument&style=Custo_Final.4&View=defaultBody2>, visited on 12 March 2007.

17 In the hierarchy of principles of the Red Cross, this principle ranks just below impartiality. *See also* C. Ku and J. C. Brun, 'Neutralitv and the ICRC Contribution to Contemporary Humanitarian Operations', 10 *International Peacekeeping* (2003) pp. 56–72, p. 59. The principle of neutrality in humanitarian assistance was confirmed i.a. in UNGA resolution 43/131, along with humanity and impartiality, not only for the ICRC but also for services of other NGOs and states.

18 ICRC, *supra* note 16, *ibid*.

relates to the distribution of humanitarian assistance, disbursed only on the basis of the needs of the recipients. All humans, though not in comparable circumstances, have the same rights.[19] Both neutrality and impartiality imply an absence of the taking of sides, but they have different addressees – neutrality towards the belligerents, impartiality towards the victims.[20] However, impartiality also refers to the state of mind of someone making a judgment, and impartiality in ICRC doctrine covers this notion: "In other words, impartiality implies the objective scrutiny of problems and the 'depersonalization' of humanitarian work."[21]

According to Maurice Torrelli, the policy ('*politique*') of neutrality takes precedence over impartiality, because in order to fulfil its mission the ICRC has to retain the confidence of the parties, and therefore it cannot complain of breaches of humanitarian law.[22] It is neutrality as a principle, which permits the Red Cross movement to be universal.[23] However, 'the second generation' of humanitarian organisations, such as Médecins sans frontières and others, who 'pretend' to also pose as proponents of human rights, have abandoned this strict conception of neutrality and denounce violations of human rights and international humanitarian law.[24] A recent survey of humanitarian relief organisations in the United Kingdom revealed that neutrality has become something of a 'dirty word'.[25] The ICRC has therefore felt obliged to explain itself. As Pierre Krahenbühl notes, "[n]ot taking sides in a conflict does not mean being indifferent. The ICRC is not neutral in the face of violations of international humanitarian law … It strives to ensure that all those taking part in the hostilities respect humanitarian law. Neutrality is therefore a means to an end, not an end in itself."[26] And there are some actions towards which the ICRC cannot be neutral. In 1996, when the Fundamental Principles were last revised, the ICRC stated that it does make "public representations" "when it observes grave and repeated breaches of international humanitarian law [and] its confidential representations have been in vain and it considers that the only means of helping the victims is to ask for the support of the international community".[27]

19 As Torrelli explains, in distinction to the principled abstention "inherent in neutrality", impartiality (in the supply of assistance) is *relative* and dependent on the circumstances. M. Torrelli, 'La Neutralité en Question', 96 *Revue Générale de Droit International Public* (1992) pp. 1 *et seq.*, p. 40.

20 Torrelli, *supra* note 19, p. 38.

21 ICRC, *supra* note 16, *ibid.*

22 Torrelli, *supra* note 19, p. 40.

23 Torrelli, *supra* note 19, p. 39.

24 Torrelli, *supra* note 19, p. 31.

25 Ku and Brun, *supra* note 17, p. 62.

26 P. Krahenbühl, 'The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action', 81 *International Review of the Red Cross* (2004) p. 511 *et seq.*, p. 511.

27 ICRC, *supra* note 16, *ibid.* Recently, it has revised its policy slightly further in a 'non-neutral' direction; *see* 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', 858 *International Review of the Red Cross* (2005) pp. 393 *et seq.*, 395–398.

2.2 Neutrality and the Civil Servant

So, humanitarian neutrality means neutrality regarding the goals of the conflict but not in relation to international humanitarian law. I shall now pass to another field where the concepts of neutrality and impartiality have been heavily debated, and where they have also been connected with the neutrality of states – namely, the role of the international civil servant in general, and the position of UN Secretary General in particular. In a speech in 1961 Dag Hammarskjöld said this:

> "If a demand for neutrality is made … with the intent that the international civil servant should not be permitted to take a stand on political issues, in response to requests of the General Assembly or the Security Council, then the demand is in conflict with the Charter itself. If, however, 'neutrality' means that the international civil servant … must remain wholly uninfluenced by national or group interests or ideologies, then the obligation to observe such neutrality is … basic to the Charter concept of the international civil service …" And, "the international civil servant cannot be accused of lack of neutrality simply for taking a stand on a controversial issue when this is his duty and cannot be avoided."[28]

Furthermore, "the United Nations must oppose any policy in conflict with the principles of the Charter and must support a policy in accordance with those principles, not in a spirit of partiality, but as an expression of loyalty to the Charter. The attitude proper to the United Nations is thus not one of neutrality but one of active effort to further its most fundamental principles".[29] Theo van Boven favours Hammarskjöld's attitude of 'active efforts' – 'positive' neutrality, as Hammarskjöld once called it – but preferred to refer to it as impartiality, as did Manuel Fröhlich and Hammarskjöld's legal adviser, Oscar Schachter, and so shall I.[30]

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28 D. Hammarskjöld, 'The International Civil Service in Law and Fact', in D. Kay, *The United Nations Political System* (1967) p. 142 *et seq.*, p. 150, quoted from Falkman, *supra* note 5, pp. 98–100. For Hammarskjöld, this concept meant being "completely detached from any national interest or policy and based solely on the principles and ideals of the United Nations". *Ibid.*, p. 73.

Hammarskjöld's views have been commented on by many; *see*, for instance, P. Wallensteen, *Dag Hammarskjöld* 39 (1995). I have been inspired by T. C. van Boven, 'Some reflections on the principle of neutrality', in *Etudes est essais sur le droit international humanitaire et les principes de la Croix-Rouge en l'honneur de Jean Pictet* (ICRC Publications, Geneva, 1984), pp. 651 *et seq.* On Hammarskjöld's attitude to civil service in general, *see* M. Svegfors, *Dag Hammarskjöld: Den förste moderne svensken* (Norstedts, Stockholm, 2005) pp. 265 *et seq.*

29 Annual Report of the Secretary-General on the Work of the Organization, 1954, p. 328, cited from Fröhlich, *supra* note 4, p. 74.

30 *See* van Boven, *supra* note 28. (I do not, however, subscribe to his analysis of Hammarskjöld and the UN's and the ICRC's respective mandates. *See* Wrange, *supra* note 2, pp. 971–973.) *See also* Fröhlich, *supra* note 4, pp. 74 and 88. Schachter wrote that Hammarskjöld held that "the obligation of impartiality required in the first instance adherence to the principles of the Charter". O. Schachter, 'The International Civil Servant: Neutrality and Responsibility', in R. S. Jordan (ed.), *Dag Hammarskjöld Revisited: The UN Secretary-General as a Force in World Politics* (Carolina Academic Press, Durham, 1983) pp. 39–63, p. 47.

2.3 Peace Operations

The neutrality or impartiality of the Secretary-General was linked to the concept of neutrality of states in the sense that it was held to be useful or even necessary to have a Secretary-General from a neutral or non-aligned state (Sweden for Hammarskjöld, Burma for U Thant and Austria in the case of Kurt Waldheim).[31] Closely related to that was the concept of peacekeeping, developed by Hammarskjöld; it was an extension of the neutrality of the organisation as such, but also an activity particularly amenable to neutral countries, as will be discussed further in the next section. Ambassador Marianne von Grünigen of Switzerland explained this link in the 1970s: "To be compatible with the status of neutrality, peace-keeping operations must comply with certain conditions in order to guarantee that they do not bear any coercive elements. The most important conditions are the consent of the host State, the impartial function of the Force and the prohibition of coercive actions."[32] Above all, she emphasised, the force must "behave in such a way as not to take part in a conflict, which means that it must itself be of a neutral character".[33]

However, after the experiences of the 1990s, the concept of neutrality was excluded from the doctrine of peacekeeping. Kofi Annan observed that the United Nations had "learned that while impartiality is a vital condition for peacekeeping, it must be impartiality in the execution of the mandate – not just an unthinking neutrality between warring parties".[34] And the Brahimi Report on UN Peace Operations concluded in 2000 that "[i]mpartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement".[35] Dominick Donald explains that an "impartial entity is active, its actions independent of the parties to a conflict, based on a judgement of the situation; it is fair and just in its treatment of the parties while not taking sides. A neutral is much more passive; its limited actions are within restrictions imposed by the belligerents".[36] 'Neutral-

31 *See* Schachter, *supra* note 30, p. 44; S. Åström, *Ögonblick: Från ett halvsekel i UD-tjänst*, 2nd ed. (Lind & Co, Stockholm) p. 13.

32 M. von Grünigen, 'Neutrality and Peace-Keeping, in Antonio Cassese (ed.), *United Nations Peace-Keeping: Legal Essays* (Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands, 1978) pp. 125–153 p. 135.

33 von Grünigen, *supra* note 32, p. 137.

34 Quoted from D. Donald, 'Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century', 9 *International Peacekeeping* (2002) pp. 21–38, pp. 23–24.

35 UN Doc A/55/305 S/2000/809, p Donald, *supra* note 34, p. 26. In this context 'impartiality' is different from its traditional meaning of 'equal treatment', but there is still a connection. Equal treatment means treatment equal *under a certain regime*, and in the context of the traditional law of neutrality the regime in question is usually a national export regime, in the context of humanitarian operations the relevant regime is the criteria for delivery and in peace operations it is the UN Charter and the mandate of the operation.

36 Donald, *supra* note 34, p. 22. Baros, too, distinguishes between neutrality and impartiality: "[L]osing *neutrality* does not necessarily imply becoming *partial* in a certain conflict situation." "[N]eutrality implies a lack of support for one side in a conflict, which is an externally observable phenomenon, while someone's impartiality means the 'ability to act fairly because they are not personally involved in a situation'." M. Baros, 'The UN's Response to

ity' has been disconnected from 'impartiality' and has disappeared from the vocabulary of peacekeeping in both the Security Council and the General Assembly,[37] and this "certainly represents progress".[38] As one UN official put it: "After the Safe Havens, neutrality is a four-letter word …"[39]

2.4 Neutrality of States

So, we have talked about neutrality in humanitarian assistance, in international civil service and in peacekeeping, and have noted that impartiality seemed to be the favoured concept (even the ICRC conception of neutrality appeared to boil down to something similar to the impartiality practised in civil service and peacekeeping.) What of the traditional law of neutrality between states? von Heinegg confirms the continued validity of the law of maritime neutrality, in particular as updated in the San Remo Manual and the Helsinki Principles on the Law of Maritime Neutrality.[40] This law is applicable to "every international armed conflict at sea, at least insofar as the belligerents are taking measures affecting the shipping (and aviation) of third states".[41]

However, the scope of application, and perhaps also the content of the law, has been modified by the provisions of collective security. von Heinegg continues: "In view of the primary responsibility of the Security Council for international peace and security, in such a situation [where the Council has taken action under Chapter VII] there is no room for … neutrality."[42] Furthermore, after the post-Cold War triumph of the restricted interpretation of neutral duties in trade (only as regards governmental exports) and the willingness of states such as Switzerland to participate in sanctions, the law of neutrality seems to have been reduced to a bare minimum of abstention from military measures.[43] Nevertheless, this does not mean that neutrality has lost all importance.

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the Yugoslav Crisis: Turning the UN Charter on its Head', 8 *International Peacekeeping* (2001) pp. 44–63, pp. 53 and 54. Citation from BBC's English Dictionary. Emphasis in original.

37 Donald, *supra* note 34, p. 30.

38 Donald, *supra* note 34, p. 30.

39 Anonymous official, quoted in Donald, *supra* note 34, p. 32. The "safe havens", or "safe areas" referred to were declared in UN Security Council resolutions 819 and 824 for six towns in Bosnia and Herzegovina. As we know, what ensued was the genocidal killing of 7,000–8,000 men and boys after the fall of Srebrenica.

40 W. Heintschel von Heinegg, 'The Protection of Navigation in Case of Armed Conflict', 18 *The International Journal of Marine and Coastal Law* (2003) pp. 401–422, p. 403. *See* further L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), 'Helsinki Principles on the Law of Maritime Neutrality', Final Report of the Committee on Maritime Neutrality, *International Law Association, Report of the 68th Conference, Taipei* (London, 1998) pp. 496 *et seq*.

41 von Heinegg, *supra* note 40, p. 404.

42 von Heinegg, *supra* note 40, p. 405. von Heinegg refers to impartiality, but I deleted that from the quote to avoid confusion in this context, since he used the word 'impartiality' for 'equal treatment', as is the case in classical law of neutrality doctrine.

43 Ove has recounted this development convincingly in 'The Changing Law of Neutrality', in

As Goetschel puts it, in former times the most important realistic political function of neutrality was "to guarantee a country's political independence … to enable a country to maintain its basic trade relationships … [and to contribute to domestic] political cohesion".[44] In addition, neutrality served the general interest in containment. However, more interestingly for the purposes of my discussion, "neutrality also has an idealistic side … Neutral states were … subject to internal and external pressure to justify their policy … by some other fundamentals or ideas of 'grandness'."[45] Consequently, "[n]eutral states have always tried to underline their policy's usefulness for the international system".[46]

It is obvious that this connects neutrality in armed conflict to humanitarian assistance, the international civil service and peacekeeping. von Grünigen explained that "Secretary-General … Dag Hammarskjold … designed [peacekeeping] in such a manner as to induce the cooperation and participation of neutral States, thereby giving a new importance to permanent neutrality",[47] and she and other representatives of neutral countries have never tired of pointing out that neutrality may usefully lead to humanitarian action, good offices or mediation.[48]

This 'idealistic' role used to be a by-product or an argument for the legitimacy of neutrality, but not the core of the concept. However, as Torrelli expressed it, as policy, permanent neutrality has developed from the principle of abstention to become "a principle of action envisaged to construct peace", and impartiality is "manifested" as "universality".[49] Goetschel finds that while the "role conceptions of neutral states linked to their non-participation in a military conflict (realistic roles) have lost their significance",[50] the "idealistic" "roles and functions of neutrality may have become even more important on a concrete policy level than they were in the past".[51] This

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O. Bring & S. Mahmoudi (eds.), *Current international law issues: Nordic perspectives essays in honour of Jerzy Sztucki* (Norstedts Juridik, Stockholm, 1994) pp. 25 *et seq.*, p. 44.

44 Goetschel, *supra* note 10, p. 120.

45 Goetschel, *supra* note 10, p. 120. Goetschel cites P. Joenniemi, 'Neutrality beyond the Cold War', 19 *Review of International Studies* (1993) p. 289.

46 Goetschel, *supra* note 10, p. 121.

47 von Grünigen, *supra* note 32, p. 126. Further: "One can consider peace-keeping operations as a modern form of good offices" of Powers not participating in a given conflict, provided for in Article 3 of the First Hague Convention, of 18 October 1907. *Ibid.*, p. 135.

48 von Grünigen, *supra* note 32, p. 128.

49 Torrelli, *supra* note 19, p. 30.

50 Goetschel, *supra* note 10, p. 121.

51 Goetschel, *supra* note 10, p. 122. The doyen of Swedish diplomacy, and the perhaps leading policy-maker at the non-political level during of the Cold War era, Sverker Åström, said that many people, even within the Ministry, wanted to describe the policy of neutrality as morally superior, and that it actually mandated Sweden to criticise other countries. For Åström that was not the point. The policy of neutrality was determined by security policy. Nevertheless, it enabled Sweden to sometimes speak with a freer mind than allied countries, and as a neutral, Sweden could stand up for international law. As long as both parties to the Cold War could be criticised "according to the same values", criticism of this policy was easy to live with. Åström, *supra* note 31, pp. 12–13. What is interesting about this is that for many policy-makers, the idealistic role conception actually seemed to take over. Whether it remains fully as a second-nature of the foreign services of neutral (or 'ex-

requires an active promotion of peaceful relations and not "passive contemplation of injustice, violence, and oppression".[52] Switzerland, the arch-neutral, has revised its understanding of its role: There can be no neutrality between the community of states – or "the international community acting as a single entity" – and a state that severely disregards the international legal order.[53] For Switzerland, the participation in such measures is a matter of both the protection of its interests and the obligations of solidarity.[54]

2.5 Summary

Hammarskjöld's neutrality does not demand total indifference or inactivity, it only demands indifference towards that which is not relevant to the purpose of the organisation. In other words: the impartial civil servant, like the judge, shall be indifferent to all circumstances not relevant from the point of view of his official aims and purposes, be it to maintain peace or to uphold the law. Applied to humanitarian assistance and peacekeeping, the terms of the debate could thus be cast as a question of which factors should be relevant and which should not – that is, as a matter of impartiality. And, in such a discussion the distinction between, say, the ICRC and Médecins sans frontières or the UN would be one of focus rather than of kind – impartial in relation to whom and to what factors?

Some may ask if discourse on the principled role of the UN Secretary-General, peacekeepers and the ICRC is really relevant for states. However, there is no reason why Members of the Security Council – or, for that matter, the General Assembly – should be any less guided by the Charter than should the Secretary-General. There is no bar to transposing the guiding principles (or ethics; see *infra*) of an international institution to the plane of sovereigns. As I shall argue in the next section, governments are organs of the international society no less than the Secretary-General, and neutral – or ex-neutral' – governments have often acted as if they were just that (though not necessarily under that conceptual umbrella).

3. The Future

3.1 States as Upholders of International Law

What does this discussion on different conceptions of impartiality have to do with upholding international law? As Hedley Bull asserts, order in international society

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neutral') countries is doubtful, but that is not necessary for the normative argument of this article.

52 Goetschel, *supra* note 10, p. 124 Citation omitted.

53 'Bericht zur Neutralität: Anhang zum Bericht über die Aussenpolitik der Schweiz in den 90er Jahren vom 29 November 1993', section 412, <www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi.Par.0005.File.tmp/Bericht%20zur%20Neutralitaet%201993.pdf>, visited on 31 January 2008; Swiss Neutrality in Practice – Current Aspects. (Report of 30 August 2000 by the Interdepartmental Working Group).

54 'Bericht zur Neutralität', *supra* note 53, section 413.

builds on "a sense of common interests in the elementary goals of social life", and for that rules provide the guidance.[55] However, since an aggrieved state is often not in a position to effectively defend its right, the enforcement of the rules is uncertain.[56] I would like to relate this predicament to Georges Scelle's notion of *dédoublement fonctionnel* – that state organs (and the individuals managing them) have double functions, namely as organs of two or more societies, for instance where a national Parliament, which approves a treaty, thereby legislates not only for the national but also for the international society. This entails that national government participate in the administration of international society.[57]

That notion could also perhaps be detected in Hammarskjöld's thinking.[58] In his annual report of 1960, he wrote that "[t]he United Nations is an organic creation of the political situation facing our Generation. At the same time, however, the international community has, so to say, come to political self-consciousness in the Organisation".[59] He even spoke of "international constitutional law", which is still in "an embryonic stage".[60] The word 'constitutional', as employed by Hammarskjöld on several

55 H. Bull, *The Anarchical Society: A Study of World Order in World Politics* (Columbia University Press, New York, 1977) p. 67.

56 Bull, *supra* note 55, p. 72. Morgenthau was even clearer: "What for the legislative and judicial functions required elaborate proof is clear for all to see in the case of the executive function: its complete and unqualified decentralization." H. J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* 3rd ed., (Alfred A. Knopf, New York, 1961) p. 294. It can be mentioned that Morgenthau was very impressed with Hammarskjöld and emphasised "the intellectual and moral qualities of the holder of that office". Only a man of Mr. Hammarskjold's personality could have tried to do what he has tried to do in this respect, and have achieved what he has achieved. *Ibid.*, p. 495.

57 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* 1870–1960 (Cambridge University Press, Cambridge, 2002) p. 333. As Cassese explains, "since there were no institutions for lawmaking or execution with general competence, states exercise the functions of establishing, verifying and executing international law on behalf of the international collective. The two roles are not performed simultaneously, but in a Dr Jekyll and Mr Hyde fashion". A. Cassese, 'Remarks on Scelle's Theory of "Role-Splitting" (*dédoublement fonctionnel*) in International Law', 1 *European Journal of International Law* (1990) pp. 210–231, accessed from <www.ejil.org/journal/Vol1/No1/art10.html#TopOfPage>, visited on 31 January 2008.

Based in Kampala at the time of writing, I have not had direct access to Scelle's work. However, I feel confident that the reviews by Antonio Cassese, Pierre-Marie Dupuy and Martti Koskenniemi are accurate. At any rate, what is important is not whether I have understood Scelle correctly, but whether my understanding is fruitful.

58 Like Scelle, Hammarskjöld was influenced by "sociological theory". M. Fröhlich, 'The Quest for a Political Philosophy of World Organisation', in S. Ask and A. Mark-Jungkvist, *The Adventure of Peace: Dag Hammarskjöld and The Future of the UN* (Palgrave Macmillan, New York, 2006) pp. 130–145, p. 132. Hammarskjöld spoke of the "growth of social organisms" and a transition from an "institutional system of international coexistence" to a "constitutional system of cooperation". *Ibid.*, p. 134. There are similarities here to the Scelle student Charles Chaumont; *see* C. Chaumont, *Nations Unies et neutralité*, 89 *Recueil des Cours* (1956) pp. 1 *et seq.*, p. 46. Furthermore, Hammarskjöld was influenced by Scelle's compatriot Henri Bergson, and Fröhlich noted similarities between Hammarskjöld and Scelle's contemporary Maurice Hariou. Fröhlich, *supra* note 4, pp. 89 and 92.

59 Fröhlich, *supra* note 58, p. 134.

60 Falkman, *supra* note 5, p. 160.

occasions, stands for the existence of a constitution that provides "organs with different functions and a division of responsibilities representing a balance of power".[61] Under a domestic constitution, there are institutions tasked with applying and upholding the law. In the international system, common institutions have a much smaller role.

As far as can be ascertained, Hammarskjöld never said explicitly that governments have roles as organs of the international community, but I believe that he did hold that states have responsibilities to uphold international law. He often expressed the view that the processes of law and the principles of justice were necessary for a secure and decent international order.[62]

Now, according to traditional international legal doctrine, "the victim, and nobody but the victim, of a violation of the law has the right to enforce the law against the violator. Nobody at all has the obligation to enforce it".[63] However, that is changing. Like many others, Erika de Wet has noted the role that international law has given to states in the enforcement of its basic rules. The ICJ determined in the *Barcelona Traction* case of 1970 that some obligations are the concern of all states (*erga omnes*), and that all states can be held to have a legal interest in the protection of the corresponding rights.[64] Furthermore, Article 48 of the Articles on State Responsibility[65] gives individual states a role in enforcing "the international value system" by entitling states other than directly injured states to invoke responsibility in such cases. The Articles thus enable states to "complement in a decentralized fashion the existing, institutionalised mechanisms for enforcement of the core values of the international legal order".[66]

But some would suggest that there is even a duty for third states to that effect. The International Commission on Intervention and State Sovereignty launched the

61 Fröhlich, *supra* note 58, p. 135. Hammarskjöld even gave an address named 'Development of a Constitutional Framework For International Cooperation', in May 1960 at the University of Chicago Law School. The use of the word 'constitution' in this context was not novel; President Truman had used that word during the San Francisco Conference in 1945. B. Fassbender, 'The United Nations Charter as Constitution of The International Community', 36 *Columbia Journal of International Law* (1998) pp. 529–619, p. 531. To speak of the UN Charter as a constitution for the organisation is, of course, different from talking about it as the constitution of the international community (as the authors of A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (Vienna, 1976)). It is submitted that Hammarskjöld's view was closer to Verdross's and Simma's than to Truman's.

62 Schachter, *supra* note 4, p. 1. "Indeed, how could it ever become a living reality if those who are responsible for its development were to succumb to the immediate difficulties arising when it is still a revolutionary element in the life of society?" Falkman, *supra* note 5, p. 68. See also Bring, 'Dag Hammarskjöld och folkrätten', *supra* note 3.

63 Morgenthau, *supra* note 56, p. 294.

64 E. De Wet, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (2006) pp. 51–76, p. 54. *Barcelona Traction, Light and Power Company Ltd (Second Phase)* [1970] ICJ Rep 32. *See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.* 'Advisory Opinion 9 July 2004 para 155 ff available at <www.icj-cij.org>, visited on 31 January 2008.

65 Attached to UNGA RES/56/83.

66 De Wet, *supra* note 64, p. 69.

notion of "[t]hinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice". This means that national political authorities are responsible both internally to their own citizens and externally to the international community through the UN. (Furthermore, as I shall develop below, this notion entails that the agents of state are responsible as individuals for their acts and omissions.)[67] One may note here that the ICJ, in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, found that there was a duty for a state to prevent genocide, if it could thus "influence effectively", but that the Court did not elucidate exactly what measures such a state should take.[68] To that could be added treaty provisions such as common Article 1 of the 1949 Geneva Conventions ("… undertake to respect and to ensure respect for the present Convention in all circumstances"), Article 89 of the First Additional Protocol to the Geneva Conventions ("[i]n situations of serious violations … undertake to act jointly or individually …"), the preambular provisions in the Rome Statute for the International Criminal Court ("… their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation … [r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes") and Article 56 of the UN Charter ("[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of [respect for human rights]". And so on. These expressions both reflect and support a tendency for third states to enforce rules of international law, through decentralised and centralised (UN Security Council) collective countermeasures.[69] As Pierre-Marie Dupuy notes, this fits well with Scelle's scheme.[70]

Many state representatives would surely deny the suggestion that each state has an obligation to work for the upholding of international law in general, or even for the

67 *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (The International Development Research Centre, Ottawa, 2001) p. 13.

68 *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, judgment of 26 February 2007, p. 154, available at <www.icj-cij.org>, visited on 31 January 2008. *See* also A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', 18 *European Journal of International Law* (2007) pp. 695–713, pp. 697–706. This condition, of course, limits the *legal* obligation of a third state to prevent genocide, but it does not necessarily affect the moral judgment.

69 On countermeasures for third states, *see* N. White and A. Abass, 'Countermeasures and Sanctions' in M. D. Evans, *International Law*, 2nd ed. (Oxford university Press, Oxford, 2006) pp. 509–532, pp. 517–521. Christine Chinkin, who basically welcomes this development, is nevertheless concerned about the risk for diverse responses in decentralised enforcement. C. Chinkin, *Third Parties in International Law* (Oxford University Press, Oxford, 1993) p. 333.

Interestingly, in a publication by the Swiss Federal Council, the view is expressed that when the UNSC takes military measures under Chapter VII, the participating states act not as parties to a war but as organs for the enforcement of international law. 'Bericht zur Neutralität', *supra* note 53, section 412.

70 P.-M. Dupuy, 'Unité d'Application du Droit International à l'Echelle Globale et Responsabilité des Juges', 1 *European Journal of International Law* (1990), accessed at <www.ejls.eu/download.php?file=./issues/2007-12/DupuyFR.pdf>, visited on 31 January 2008.

fundamental rules invoked by the above-mentioned quotes. However, even though far from being uncontroversial as a legal proposition, it could still be a guiding principle as a moral imperative or as a political maxim, or both, at least when it comes to what Andreas Paulus has termed "the international 'public' law".[71] If so – and I think it should be so – to where would it lead?

3.2 Impartiality

As I discussed in my thesis, there are many conceptions of neutrality as an abstract idea, and, as has been more than implied *supra*, the most interesting one for the purposes of this discussion is neutrality as impartiality, or as objectivity on the basis of a recognised norm. This is the neutrality of a judge, so long as that judge adheres to a substantively determined law[72] (a figure that Hammarskjöld also referred to[73]), or to that of an international body, such as the Security Council, if it acts according to rules and principles, rather than caprice.[74]

Impartiality does not exclude action – on the contrary. However, any action by an impartial is based upon an assessment of the facts in the light of norms (be they legal rules or moral principles), and not with regard to the identity of the parties. That means that the impartial should be committed to principles.[75] This also means that while one should be impartial as to interests as such, after an analysis it may emerge that some interests are protected or even promoted on principle (such as the interests of a civilian population in an armed conflict), whereas other interests would be rejected on principle.

Consequently, impartiality should lead to abstention *a priori*, that is, before and at the time of the outbreak of the conflict in question, before one knows who is in the right.[76] *A posteriori*, by contrast, a position may well be taken – and perhaps should be (if there is a violation of a *jus cogens* norm of the "international 'public' law"). That posi-

71 "At least on paper, *jus cogens* and obligations *erga omnes* have indeed merged into a unified concept of an international 'community interest' or international 'public' law." A. L. Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation: An Attempt at a Reappraisal', 74 *Nordic Journal of International Law* (2005) pp. 297–334, p. 317.

72 *See* C. Schmitt, 'Übersicht über die verschiedenen Bedeutungen und Funktionen der innerpolitischen Neutralität des Staates', in C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles* (Berlin, 1940) p. 160.

73 Falkman, *supra* note 5, p. 100.

74 As Kaj Falkman wrote in the introduction to the collection of excerpts from Hammarskjöld, "[t]he superpower sees the UN as relevant only when it consents, while the UN security requirements imply neutrality in the sense of freedom from partial interests". Falkman, *supra* note 5, p. 36. Nevertheless, the Council sometimes does act in a principled manner in a credible common interest, as in the rightly celebrated resolutions 1325 and 1612 on women, peace and security and on children in armed conflict, respectively.

75 There is, however, no impartiality *between* principles, although there might be a need for balancing and pragmatism.

76 For some states it might be difficult to exercise impartiality, because they are tied up with one of the parties in an alliance. *Cf.* the US distinction between friends and allies. A friend is someone who shares your values, while an ally is someone who shares a certain goal.

tion might be to support one of the parties morally or materially, or to be more or less neutral (abstention and equal treatment).[77] For certain, once a decision has been taken to participate with economic, political, military or other means, the ensuing engagement may necessitate a measure of compromise, because of the need to be loyal to or coordinate with other members of a coalition. Nevertheless, even the participant in a coalition must allow a state to impartially assess consequential choices, for instance, the selection of targets in a bombing campaign.

For those who think that this sounds unrealistic in an interdependent world, it should be pointed out that this attitude does not preclude membership of a security organisation. Goetschel notes the increasing importance for states to "anchor their norms of behavior in international cooperation mechanisms".[78] Thus, the main task for neutrality today is to exercise its 'beliefs' for all Europe.[79] Indeed, Goetschel asserts that "[n]eutral states are predestined to becoming a credible moral instance of the EU's military crisis management".[80] And Hammarskjöld encourages us to stay independent even as members: "The concept of loyalty is distorted when it is understood to mean blind acceptance. It is correctly interpreted when it is assumed to cover honest criticism",[81] – and honest dissent, I would add.

3.3 Basis for Impartial Engagement

What does it mean, then, that a state should act on the basis of norms? Firstly, it covers norms that are already given, namely those of international law. Is it possible to ascertain what they say? Hammarskjöld asserted with confidence: "Of primary importance in this respect are the principles and purposes of the Charter which are the fundamental law accepted by and binding on all states. [They] are specific enough to have practical significance in concrete cases. The principles of the Charter are, moreover, supplemented by the body of legal doctrine and precepts that have been accepted by States generally … In this body of law there are rules and precedents that appropriately furnish guidance to the Secretary-General"[82] so that he can form "what may be called the independent judgment of the Organization".[83]

77 I believe that there is no necessary opposition between neutrality and institutions. To use a domestic analogy: In the modern, institutionalised state, citizens are best neutral and let the state take care of law and order. Therefore, even if citizens are non-neutral in their capacities as citizens of this order, they are neutral in their capacities as private individuals. Consequently, the opposition between neutrality and collective security appears only in a society in which there is still no central enforcement machinery and where law enforcement is dependent upon the participation of all or most states.

78 Goetschel, *supra* note 10, p. 132. Citation omitted.

79 Goetschel, *supra* note 10, p. 132.

80 Goetschel, *supra* note 10, p. 127.

81 Falkman, *supra* note 5, pp. 199–200.

82 Falkman, *supra* note 5, p. 91.

83 Falkman, *supra* note 5, p. 94. Although I am a rule-sceptic in theory, my own position is similar from the pragmatic point of view. *See* Wrange, *supra* note 2, pp. 42 *et seq.*

When states apply international law, all of the materials mentioned by Hammarskjöld do in fact provide guidance, if applied impartially, *bona fide*.[84] However, while legal rules have a special weight (Hammarskjöld stressed the binding character of law[85]), there are many situations where international law is silent or of little help. First of all, there are many situations in which international law actually empowers states as members of institutions that have the authority to take decisions that bind or otherwise affect other states in a way beyond the capacities of these member states qua single states.[86] In the situation of an armed conflict, a member of the Security Council has to decide how to vote within the wide – but not unlimited – discretion given by Articles 24, 39–51 and 103. Whether or not that is beneficial and acceptable depends upon whether or not that body acts as an impartial body on the basis of recognised norms.[87] Secondly, the law may leave a wide margin of appreciation for states in its application, or it may leave states freedom to do what they please within certain limits. Hence, in the absence of a binding decision by an authoritative organ, a state must choose between taking action against an aggressor or staying more or less neutral (support to the aggressor should be out of the question, as provided by law).

One therefore needs to go beyond black-letter law. Hammarskjöld "viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and direction of collective

84 Of course, this is not to say that the rules determine the outcomes in a logical way. I have written about this in other contexts, to a large degree building on the work of Martti Koskenniemi and David Kennedy. *See*, for example, 'En konversation utan innehåll? Folkrätten och CLS', 2 *Juridisk Tidskrift* (1990) pp. 256–270 and 'Från domstolssession till jamsession eller Martti Koskenniemi och juridikens slut', 64 *Retfærd* (1994) pp. 3–22.

85 Schachter, *supra* note 4, p. 2.

86 This is what has been called the 'secondary law' of the Charter, in line with the terminology of EC law. *See* Fassbender, *supra* note 61, p. 574.

87 As Ben Ferencz and Marcel Brus have averred, respectively, "the Security Council … will have to be guided by principles that will make its decisions and actions acceptable to the international community as a whole," and "the decisions of the Council should be in accordance with the principle of integrity", because "[i]t is the responsibility of the Council to uphold the principles of the international community, rather than to secure their individual interests." B. B. Ferencz, *New Legal Foundations for Global Survival: Security through the Security Council* (Oceana, 1994) p. 250; M. M. T. A. Brus, *Third Party Dispute Settlement in an Interdependent world: Developing a Theoretical Framework* (Martinus Nijhoff Publishers, Dordrecht, 1995) p. 176.

I have argued elsewhere that it is impossible for a Great Power to act in this way. *See* 'Kollektiv säkerhet', in P. Ahlin (ed.), *Tandlös eller tiger – sju uppsatser om FN* (Juristförlaget, Stockholm, 1995) pp. 147–189. A sorry illustration of the Security Council at its worst, is the passing of Resolution 1530 on the Madrid bombings. *See* T. O'Donnell, 'Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)' 17 *European Journal of International Law* (2006) pp. 945–968. *See* in particular the conclusions, at pp. 961–967.

By the way, it is not a coincidence that Scelle was particularly interested in the new phenomenon of international supervision by bodies composed of states. The difficult question was to determine when these individuals act in the national or in the common interest. Cassese, *supra* note 57.

action",[88] or some basic rules of international ethics.[89] This body of principles could influence the Security Council even within its discretionary mandate. Furthermore, as already suggested, while there is no hard and fast duty to assist a victim, the *erga omnes* and *jus cogens* character of certain norms certainly imply that states have some sort of responsibility to uphold such norms.

However, such a duty must always be weighed against other concerns, and while such a balancing is not an act of mathematics, principles assist. To assert this, however, is just the beginning of the exercise. For instance, if one formulates principles in terms of international responsibility, they might consist of respect for equal rights and legitimate interests of other states – to "act in good faith; observe international law; punish aggressors; observe the laws of war; … and so forth".[90] A cosmopolitan, humanitarian responsibility, by contrast, might provide that "statesmen first and foremost are human beings and as such they have a fundamental obligation not only to respect but also to defend human rights around the world".[91] While an internationalist, and probably also a cosmopolitan, might say, as does Charles Kegley, that "[i]ndividual interest cannot prevail over the larger collective good" and that "violators of law's prohibitions against aggression" must be policed,[92] Michael Walzer, the communitarian, reminds us that a decision by a state to engage in war "condemns an indefinite number of its citizens to certain death".[93] Hence, "[t]he same solidarity that makes noninvolvement at home morally questionable may well make it obligatory in the international arena: this group of men and women must save one another's lives first".[94]

88 Schachter, *supra* note 4, p. 2.

89 Fröhlich, *supra* note 4, p. 88. Kadelbach agrees, but remarks that this is a case of thin rather than thick ethics. S. Kadelbach, 'Ethik des Völkerrechts unter Bedingungen der Globalisierung', 64 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrrecht* (2004) pp. 1–20, p. 19.

90 R. H. Jackson, 'The Political Theory of International Society', in K. Booth and S. Smith (eds.), *International Relations Theory Today* (Polity Press, Cambridge, 1995) pp. 110–128, p. 116.

91 Jackson, *supra* note 90, p. 117. *Cf.* also "This general duty to help others is the most basic ground within common morality for interference in the internal affairs of one nation by outsiders, including other nations and international bodies." J. Boyle, 'Natural Law and International Ethics', in T. Nardin and D. R. Mapel (eds.), *Traditions of International Ethics* (Cambridge University Press, Cambridge, 1992) pp. 112–135, p. 123. *See* further A. Honneth, 'Is Universalism a Moral Trap? The Presuppositions and Limits of a Politics of Human Rights', in J. Bohman and M. Lutz-Bachmann (eds.), *Perpetual peace: essays on Kant's cosmopolitan ideal* (MIT Press, Cambridge, Mass, 1997) pp. 155–178, p. 172.

92 C. W. Kegley, Jr, 'Thinking Ethically about Peacemaking and Peacekeeping', in T. Woodhouse, R. Bruce and M. Dando (eds.), *Peacekeeping and Peacemaking: Towards Effective Intervention in Post-Cold War Conflicts* (Macmillan, London, 1997) pp. 17–38, p. 36.

93 M. Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (Basic Books, 1977) p. 236.

94 Walzer, *supra* note 93, p. 237. *Cf.* also: "In practice, and quite sensibly, we recognize degrees of obligation towards family, friends, acquaintances, fellow citizens, and so on, and as long as this recognition does not lead us to disregard the interests of those in the outer circles of our concern there is no reason to see this as immoral." C. Brown, 'International Political Theory and the Idea of World Community', in K. Booth and S. Smith (eds.), *International Relations Theory Today* (Polity Press, Cambridge, 1995) pp. 90–109, p. 96.

I have now left the comparatively safe terrain of international law for that of ethics – international ethics, which is an increasingly popular field. And this brings me to another notion of impartiality, namely that of the philosophical concept of 'moral impartiality', which in essence means that all interests should be accorded equal consideration, including – perhaps – those of the acting agent. This view is in contrast to that which accepts a loyalty to certain people – for instance, the population in the state of the government concerned.[95] This debate can neither be settled nor even begun here. But to show where it might lead, I would suggest that prudence on behalf of one's population in time of danger could be the basis for an acceptable principle,[96] whereas opportunistic deferral to a great power is not. Perhaps, to connect the *Genocide* judgment to a mild cosmopolitanism, one could at least prescribe the following: "[i]f you are the person in the best position to prevent something really awful, and it won't cost you much to do so, do it".[97]

To sum up, to be impartial involves more than just applying the law in good faith – it is to act so that one's actions can be rationalised in terms of universally applicable principles,[98] even beyond the law. And it is more than being 'principled', because the term 'impartiality' implies that the impartial subject is an institution of a society, whose rights and duties are, in fact, exercised by a human being, such as a judge.[99]

However, this is not to pretend to give practical advice on what to do in a given 'here and now'. To reason in terms of principles and impartiality can produce a number of different outcomes – some good and some bad.[100] It does not take hegemony out of the picture, nor politics.[101] But neither is it the case that arguments over legal rules or principles are always determined from some other privileged or meta-discourse, such as power or interests. Those are merely other terms, which also participate in discourses about what to do in a 'here and now'.[102] I therefore believe that an impartial reasoning, based upon law and the principles of ethics, will often contribute to other decisions, and sometimes better ones, than does reasoning in terms of power or interests. Concepts do not determine the answers, but they condition the possibilities for

95 See 'Impartiality', *Stanford Encyclopedia of Philosophy*, sections 2.3 and 4.1, <plato.stanford.edu/entries/impartiality/>, visited on 31 January 2008.

96 Kadelbach holds that strategic acting can be legitimate in cases where the opponent acts strategically and the protagonist acts to protect its population. Kadelbach, *supra* note 89, p. 16. I agree in essence, but would base even that on a principle.

97 K. A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (W. W. Norton & Company, New York, 2006) p. 161.

98 To say that something is universally applicable is not to say that it should always be applied, because contradicting principles may apply to the same situation.

99 The terms 'impartial body' and 'impartial institution' yielded 28,000 and 2,000 hits on Google, respectively (2 February, 2008), and the samples I looked at were relevant. By contrast, 'principled body' gave 289 hits – mostly or all irrelevant – while 'principled institution' gave 114. 'Principled policy' gave 8,170 hits, with a high degree of relevance.

100 Hammarskjöld expressed principles in terms of opposites and also recognised the tension between principles and concrete needs. Schachter, *supra* note 30, p. 49.

101 Which is not to say that it is even preferable to take politics out of the picture.

102 Certainly, power – or rather the instruments of power – is out there, but it is only through our conceptualisation of them that they have effects.

certain results – they limit somewhat the horizon of possibilities and increase the likelihood of certain outcomes. Adopting the language of universalisable norms will allow a more open discussion, and will disallow references to 'solidarity' with a certain party without explaining that that party actually is right or invocations of 'the national interest', without asking whether such an interest is justified.

3.4 Personal Responsibility?

In public discourse, governments generally do use altruistic or principled terms. My point, though, is that it is also incumbent on the single office holder to positively do this even in the actual deliberations. And this leads me to personal responsibility, indicated by the International Commission on Intervention and State Sovereignty. Scelle holds that the real subjects of international law are individuals, and it is ultimately they who perform the double role, including the upholding of international law.[103]

For the officeholder, the office could be a shield from responsibility. But, as I have suggested, the office can also be the mantle that carries responsibility. To me – and I am not unique in this respect – the position of public official is not any less morally relevant than that of a family man,[104] and to say anything else is to start to walk down the road that led to Auschwitz.[105] And that applies to any person serving in an office in any organ playing a part in the international community – whether the legal adviser in a Foreign Ministry, the advocate of an authoritative human rights NGO, or the CEO of a multinational company exercising de facto authority in a failed or corrupt state. (Ove has masterfully played two of these three roles, and has advised holders of the third one.) Is it not, when it comes down to praxis, in the last instance a question of professional ethics?

* * * * *

Few people have battled so intensively with these issues as did Hammarskjöld. For him, it was all to do with the office and the man or woman – the duties flowing from the office and lying with the incumbent – and the approach to "international life which … is concerned mainly with problems of personal ethics".[106]

In his personal diary, later published as *Vägmärken* (Markings), Hammarskjöld wrote: "You must know life, and be recognised by it, after your measure of transparency – after the measure of your ability to disappear as an end and remain just as a means."[107] As Ove noted, although Hammarskjöld on a general level accepted Kant's postulate that human beings can only be ends, not means, he applied the opposite

103 Cassese, *supra* note 57.

104 For a moving account of what that might mean, *see* the contribution by Hans Corell in this volume.

105 *See* Z. Bauman, *Auschwitz och det moderna samhället* (trans. G. Gimdal och R. Gimdal, Daidalos, Göteborg, 1989) pp. 240–241 and *passim*.

106 Dag Hammarskjöld cited from Fröhlich, *supra* note 4, p. 214.

107 D. Hammarskjöld, *Vägmärken* (Albert Bonniers förlag, Stockholm, 1963, 1999) p. 123. My translation.

guidelines for the governance of his own life – "namely by suppressing himself as a subject and striving to function as an object/means to achieve something".[108] I would add that it is only the human subject that can turn itself into a means rather than an end, and perhaps that is exactly what one does in assuming a public office, to the extent demanded by that office.[109]

How do you know whether or not you have responded adequately to such a calling? Hammarskjöld offers no answer because in the end, there is none: On the one hand, "the results of the inner dialogue are evident to all, evident as independence, courage and fairness in dealing with others, evident in true international service",[110] but on the other "[a] mature man is his own judge".[111] "[T]he final reply is not one that can be given in writing, but only in terms of life … The rest is silence."[112]

108 O. Bring, 'Dag Hammarskjöld and the Issue of Humanitarian Intervention', *supra* note 3, p. 514.

109 For Hammarskjöld himself, that went very far, of course.

110 Falkman, *supra* note 5, p. 205.

111 Falkman, *supra* note 5, p. 203.

112 Falkman, *supra* note 5, p. 205.

Chapter 20

The Diluted, Dismantled, Disjointed and Resilient Old Collective Security System *or* Decision-making and the Use of Force – the Law as it Could Be

*Inger Österdahl**

1. Introduction

The United Nations collective security system is made up of rules, on the one hand, relating to decision-making on the international use of force, and on the other, of rules relating to the substance of international law on the use of force. As we all know, decision-making on the use of force is centralised and resides within the UN Security Council. Furthermore, as to the substance of the rule on the international use of force we also know that there exists an absolute prohibition on its use by individual states, as expressed in Article 2(4) of the UN Charter.

Centralised decision-making is thus combined with a broad prohibition, to say the least, on the use of international force outside the framework of the UN Security Council. The broad prohibition on the international use of force is tempered by the equally well-known right to self-defence, as set out in Article 51 of the UN Charter should someone else first violate that prohibition. The right to self-defence is not intended to be exercised vis-à-vis military enforcement measures decided upon by the Security Council itself, but its application might well be validly claimed in the event of armed attack. The right to exercise self-defence as an exception to the absolute prohibition on the use of force in international law and will not be further pursued in this article – but rather the general rule on the international use of force.

The subject of discussion of this article will retain the division between the rule on decision-making, which will be defined as the procedural aspect of the rule on the use of international military force, and the substantive rule on when, and under what precise circumstances, the use of force is to be permitted in international law. The purpose of this discussion, on the one hand, is to penetrate further the current law and to

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investigate different possible combinations between distinct structural arrangements – that is, different rules relating to decision-making. On the other hand, its purpose is to examine different substantive rules on the use of force – that is, different rules relating to the breadth of the prohibition on the use of force, or objectives for which force may legitimately be undertaken. Justifications for the use of force referred to in the text attach to current law and practice, but in some cases such justifications go beyond what is currently regarded as being thinkable. Accordingly, this article presumes that no necessary connection exists between the rule on the centralised use of force and the broad prohibition on the unilateral international use of force currently reigning. A further presumption is that the two aspects of the rule on the international use of force considered to be fundamental, might logically be discussed separately. Thus the procedural and substantive dimensions may be elaborated upon individually, with one variation of one dimension not necessarily being tied to a particular variation of the other dimension of the rule, so that different combinations may be considered.

The perspective of this discussion will not seek either to retain the current system in its entirety, nor of considering the inevitability of throwing out the system completely, but to loosen the system's two main components from each other – thereby enabling discussion of different variations of the two components in relation to each other. The intention is not to find the ultimate formula for a new rule on the international use of force as to decision-making and substantive content, but rather to examine different possibilities and their consequences. Simply put, what would happen if one separated the two principal building blocks of the collective security system?

Consequently it is presumed, or perhaps hypothesized, that the decision-making locus does not necessarily generate a particular kind of substantive norm – and vice versa. Even if the starting-point of this article is that the issue of the decision-making locus is independent of the substantive content of the norm, this is one of its main underlying questions. A further question to be considered is whether or not the collective security system, with its broad prohibition on the use of force combined with a decision-making monopoly, would implode if one of the two components of the system were to be removed, or whether one of the components could remain even if the other disappeared. The most interesting question is whether the broad prohibition on the use of force could remain effective even if its institutional back up in the form of the Security Council disappeared, or whether the disappearance of the decision-making monopoly necessarily entails the erosion of the broad prohibition on the international use of force. It would be interesting but more difficult to investigate what the states would consider the most important aspect of the law on the use of force if they had to make a choice – the procedural rule on decision-making or the substantive rule on the use of force. What matters most to the states? Is it procedural or substantive rule?

The background to the discussion is what this author perceives as a currently ongoing transformation of the collective security system, away from the pure and principled original design, towards something else. This discussion should be viewed as an attempt to interpret current developments and their legal results as well as an effort to present alternative models in relation to the rule on the international use of force both in its procedural and substantive aspects.

This account will begin by listing a number of factors along the two different axes analysed. The factors will relate on the one hand to those actors involved in decision-

making on the international use of force, and the other to the breadth of the prohibition of the use of international force, including those purposes for which international military force might be permissible.

After an enumeration of the factors, different combinations of factors (one from each axis) will be analysed. Some combinations will seem more likely than others. This discussion will not include all theoretically possible decision-makers and all possible justifications of the use of force, but rather different types and examples. The aim is to exemplify rather than to exhaust. The composition and voting rules of the Security Council is a relevant aspect of the study of the procedural component of the collective security system. It is a question that precedes an analysis of the Security Council as a decision-maker on the use of force under the current rules. A study of different possible ways of composing the Security Council and different possible decision-making rules within the Council would add an important dimension to the study of the Security Council, or in fact the UN, as one of several decision-makers on the global scene. The membership and voting rules of the Security Council might in reality form a key question as to the capability of the Security Council in retaining its decision-making monopoly on the use of force.

Space, however, prohibits a study in depth of the Security Council, and the same consideration goes for the internal decision-making rules of other multilateral actors. Different internal decision-making rules could play an important role in terms of possibilities of variation and combination between actors and substance.

2. Varying Centralisation – Decision-makers

2.1 The Security Council

An obvious locus for decision-making on the international use of force is the only one to be legally recognised today, namely the UN Security Council. The transfer of some power of decision-making to the General Assembly has been discussed, but will not be considered an important enough alternative to the Security Council to be included in this article.[1]

2.2 Regional Organisations

The first step away from centralised decision-making on the use of force would be a system allowing for regional decision-making within those existing regional organisations committed to international peace and security, either in whole or in part.[2] Decision-making on the use of force in such organisations could be subject to the primacy of the Security Council, be on a par with the Security Council (the first come first

1 The Uniting for Peace procedure exists already and could be used frequently, but has not. (UN GA Res. 377 (V) (1950)). The General Assembly should be included in an in-depth study of possible decision-making procedures on the use of force within the UN.

2 On the relationship between the Security Council and regional organisations, *cf.* G. Lind, *The Revival of Chapter VIII of the UN Charter – Regional Organisations and Collective Security* (Department of Law, Stockholm University 2004) (diss.).

served principle) or have first choice before the UN Security Council.[3] Because of their importance, it would seem likely that regional organisations have moved from being subordinate to the Security Council in accordance with Chapter 8 of the UN Charter to being equal or even superior.

The degree of decision-making power of the regional organisations could be conditional upon the outcome of voting, if there has been any, in the Security Council. If, for instance, a large majority of members in the Security Council were in favour of an international military undertaking, and only one permanent member against, then the right to decide on the use of force might then reside in any regional organisation willing to use military force. Then, depending upon the views of the different members of the Security Council and the outcome of the voting in the Council, the transfer to a regional organisation of the right to decide could be made gradually more circumscribed, since resistance to the use of force would grow among members of the Security Council.

The right of regional organisations to decide upon the international use of force could also be made independent of the views of the members of the Security Council. Theoretically, even if all members of the Security Council, not just one or two, were in a particular situation against the international use of force, the right to decide on its use could nevertheless be transferred to a regional organisation, since the Security Council would not have taken its responsibility to act (protect).[4] If the Security Council decided in favour of the use of international force, however, it would retain the initiative for it would be highly impractical for a regional organisation to be granted the authority to decide upon the use of force independently, in parallel with the Security Council.

The same would apply vice versa. Had the regional organisation in question grasped the initiative under any of the variations of the institutional relationship existing between the regional organisations and the UN Security Council, it would have been impractical for the Security Council to decide on an international military operation independently of the regional organisation concerned. The most likely relationship between the Security Council and any regional organisation, given the great demand for action and the scarce resources currently available for the use of international military force, would seem to be one of mutual accommodation and cooperation

3 The AU has laid down its right to decide on humanitarian intervention in its Constitutive Act (2000) in Article 4(h), <http://africa-union.org>, *see* further A. Abass and M. A. Baderin, 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union', 49 *Netherlands International Law Review* (2002) pp. 1–38. The EU is somewhat vague on the issue of whether or not a UN Security Council authorisation is a necessary prerequisite of EU military action (*cf.* Article 11 of the Treaty on European Union (consolidated version C 325/5 24.12.2002; General Provisions on the Union's External Action item 24) Chapter 1 General Provisions on the Union's External Action (a new Article 10 A), and Chapter 2 Specific Provisions on the Common Foreign and Security Policy, Section 2 Provisions on the Common Security and Defence Policy, item 49): New Article 28a) of the Lisbon Treaty C 306/10 17.12.2007 (not in force)).

4 *Cf. The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa, Canada, 2001), accessed from <www.iciss.ca>.

irrespective of which organisation had the legal authority to decide on the international use of force in a particular situation.[5]

A further variation of the right of the regional organisations to use international force would be to make the right of regional organisations dependent on their proximity to the area of conflict – that is, the right or authority (and power) of the regional organisation concerned to decide upon the use of force would be stronger in direct relation to its geographical closeness. Also, it could be the case that regional organisations might only be authorised to use force within their own geographical borders. One could imagine 'regional', however, as opposed to 'universal' organisations, assembling states from different parts of the world without having any obvious geographical bias at all.

2.3 Ad Hoc Coalitions

After regional organisations, in terms of decentralisation, would come ad hoc coalitions of states – that is, temporary, informal non-institutionalised collective arrangements which may or may not be regionally based in a geographical sense. Seen from the point of view of actual state practice, as far as ad hoc coalitions under the authorisation of the UN Security Council are concerned, and sometimes without such authorisation, the coalitions have mostly not been regionally based but have assembled participants from different parts of the world with a common political attitude to the situation in question. Still, the geographical emphasis in all major ad hoc coalitions, so far, in terms of contribution of resources and manpower, has been Western Europe, Australia, and/or the United States.

Nigeria, together with other West African states within the Economic Community of West African States (ECOWAS), has been the one notable exception. It would be possible to imagine different rules relating to the necessary number and/or kinds of state involved in an ad hoc coalition in order for it to be entitled to decide upon the international use of force.

The purpose would be to strengthen the genuine multilateral character, the legitimacy and/or the efficiency of decision-making and the subsequent use of force of the ad hoc coalition, which in reality, even if labelled 'coalition' may be rather unilateral in character.

A radical form for ad hoc coalition – or perhaps not so 'ad hoc' – favoured by Tom Farer is a coalition of the regional great powers in order to effectively and legitimately take responsibility for world security.[6] This would resemble an expanded Security Council without the non-permanent members and the rest of the institutional framework embracing the current UN Security Council.

5 *Cf.* the developing cooperation between the UN and the EU (for instance, SC Res. 1778 (2007) on Chad).

6 T. Farer, 'Towards an effective international legal order: from coexistence to concert?', 17 *Cambridge Review of International Affairs* (2004) pp. 219–238.

2.4 Individual States

The next step away from the centralised power to use international military force would be to accord the right to individual states to decide on the international use of military force, unconditionally, or conditional upon the abstention or refusal of more centralised and multilateral agents to use force. This would herald a return to the situation reigning before the creation of the UN Charter collective security system.[7] Individual states, of course, already make decisions on the unilateral use of military force, but what is considered here is a possible legalisation of the unilateral use of force within the framework of an alternative system to the one prevailing today.

With resources in mind it would seem unlikely that there would be many purely unilateral decisions on the use of military force even if it were legalised. More likely we would see decisions made among likeminded countries in ad hoc coalitions, if decisions on the use of force were to be made outside the institutionalised frameworks of the established international and regional organisations to any large extent at all.

2.5 Private Warriors

Even further away from the centralised model of collective security would be to accord the right to decide on the use of international military force to non-state actors of different kinds. This would be a return to a situation even predating the liberal use of force model reigning in the 19th and early 20th centuries.

The actors here, for instance, could range between liberation or guerrilla movements, even terrorist organisations or criminal syndicates, and private security companies or private armies with political ambitions.[8] The 'private warriors' could also be private business enterprises – typically big multinationals – using armed force in order to protect their infrastructures, factories or investments or the natural or other resources they might exploit. What is intended here is primarily a truly international use of force in the sense of actors originating in one geographical place using force in or against actors from another state – that is, international in the traditional interstate sense. What is considered to be international, however, may be a question of definition in the way, for instance, that a civil war may be considered to be international within the framework of international humanitarian law in the case of an armed conflict between a national liberation movement and the sitting regime.[9]

In order to be international, the international use of force must not necessarily involve the state as such except in a territorial sense. The international use of force by

7 On the pre-UN Charter law on the use of force, see I. Brownlie, *International Law and the Use of Force by States* (Clarendon, Oxford, 1963); Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed. (Cambridge, University Press, Cambridge, 2005); T. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press, Cambridge, 2002).

8 *Cf.* P. W. Singer, 'Corporate Warriors – The Rise of the Privatized Military Industry and Its Ramifications for International Security', 26 *International Security* (2002) pp. 186–220.

9 Article 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <http://icrc.ch>. On war of national liberation as just war, *cf.* Y. Dinstein, *supra* note 7, pp. 68–70.

a non-state actor in one state against a non-state actor in another state is also conceivable, although, in comparison, the asymmetrical situation involving a one non-state actor on one side and a state on the other would for the time being seem much more likely.

Is it likely that the existing states will allow non-state actors to grow so strong as to fight themselves into the international legal system as lawful decision-makers and users of international force? If states have one thing in common it would seem to be to counteract non-state actors who threaten the monopoly of personality and sovereignty of states. Particular states may not be powerful enough, however, or they may benefit from cooperation with certain non-state actors. One could imagine criteria for non-state actors to fulfil before they would be accepted as international legal persons for use of force purposes.

2.6 Public-private Partnerships

It is also theoretically possible to imagine mixed decision-makers on the international use of force – that is, groupings including both state and non-state actors. This would be a possibility far removed from the current centralised and state-centred model for decision-making on the international use of force, but not further removed than a decision-making body made up entirely of non-state representatives, since pure non-statism would seem as far removed from a state-centred paradigm as one could get. In a way, a mixed decision-making body would be even further removed from a state-centred model, however, than would a purely non-state decision-making body. The strict differentiation in international law between the public and the private, the state and the non-state actor, would be even more challenged if the decision-making body were actually to be mixed.

3. Varying Liberalisation – Justifications

3.1 The Current Prohibition

The foregoing constituted a non-exhaustive list of theoretically thinkable actors that to a higher or lesser degree of probability could become legally recognised decision-makers on the use of international force within a legal system different from the collective security system of today.

In the next section we turn to the breadth of the prohibition on the use of force and the purposes for which the use of force may already be allowed, according to some observers, or where a possible development of the law could be under way. Thus, possible exceptions to the absolute and thereby very broad prohibition on the international use of force will be discussed, taking recent unilateral uses of international military force into account.

Irrespective of whether or not the recent instances of the unilateral use of international force are considered to be illegal deviations from the broad prohibition on the use of force, or considered to be signs of an emerging new rule, or already having established a new rule – that is, one or more exceptions to the prohibition of the use of force, the recent uses of force exemplify at least some purposes for which it has been exercised and in the view of the current author, such recent uses exemplify theoretically thinka-

ble emerging exceptions to the prohibition on the unilateral use of international force.[10] The discussion will also include some purposes for which international force has not been used, at least not explicitly.

This article starts with the presumption that the collective security system under the UN Charter constitutes the law in force and that consequently it has not (yet) been reversed and replaced by some other legal (sub)system. This implies a broad prohibition on the unilateral use of force as the main rule. In the view of this author the rule stands and is consequently not dead, even if the rumours of its death seem to become less and less exaggerated.[11] Perhaps it should also be admitted that this author sympathises with the broad prohibition on the international use of force.

If exceptions to the prohibition on the use of force were to emerge they would, precisely, most immediately constitute exceptions to the main prohibitive rule. In the long run the law could be transformed so that the main rule becomes permissive of the use of international force, perhaps with some exceptions relating to when the use of force is *not* allowed. Such a radical transformation of the law, however, should lie in the distant future. The most likely changes in the law on the use of force in the shorter term would be the development of lawful exceptions to the general prohibition of the unilateral use of force.

The use of military force – or its authorisation – by the UN Security Council is not directly relevant to the discussion here since the use of force by the Security Council makes up part of the legal system in force. The increased use, or authorisation, of force by the Security Council on a higher level of intensity and for an ever-increasing range of purposes may, however, be of indirect importance to the development of the law as to the unilateral use of force. As far as this article is concerned, the practice of the Security Council may be of indirect relevance, firstly, to the question of the acceptability on the whole of the international use of military force as 'politics with other means', and, secondly, to the different purposes for which it may be considered legitimate and eventually lawful to use military force.

The hypothesis is that a liberalisation of the use of force within the Security Council affects state practice outside the framework of the Security Council – and possibly eventually the law – in a similar direction. It may be difficult to see from the point of view of substance why the use of force should be allowed solely after a decision by the Security Council and not through a decision outside of it when the interveners and the purposes for which the intervention is undertaken may largely be similar. The purposes, moreover, may often be strongly laudable, such as the protection of civilians, delivery of humanitarian assistance, or the prevention or halting of genocide. Then the strict procedural argument is difficult to uphold alone.

The permeability of the institutional structures of the Security Council may also contribute to Security Council practice influencing state practice outside the Security

10 *Humanitarian Intervention – Legal and Political Aspects* (Danish Institute of International Affairs (DIIA), Copenhagen, 1999); *New Threats and the Use of Force* (Danish Institute for International Studies (DIIS), Copenhagen, 2005).

11 *Cf.* T. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States', 64 *American Journal of International Law* (1970) pp. 809–837; L. Henkin, editorial comment, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated', 65 *American Journal of International Law* (1971) pp. 544–548.

Council. The decisions formally taken by the Security Council are sometimes difficult to distinguish in reality from decisions taken by an ad hoc coalition or even from a unilateral decision.

3.2 Humanitarian Intervention

Although there is an absolute prohibition on the use of unilateral military force, unilateral military interventions have been undertaken on several occasions in recent years. The protection of human rights and the relief of grave human suffering have been some purposes for which the use of international military force has been invoked in recent years. Whether the stated reasons are the genuine reasons for the interventions will not be questioned here.

The reasons invoked for the military interventions may vary over time with respect to one and the same intervention, depending for instance on the changing circumstances during the course of the operation or the revelation of incorrect premises for the operation concerned, as in the case of Iraq in 2003.

The intervention by NATO in Kosovo in 1999 is the prime example of a recent intervention undertaken for the purpose of protecting human rights. The protection of human rights has also been invoked in the case of Iraq.[12] The protection of human rights was also invoked as one reason for intervention in the case of the US and UK intervention in Afghanistan in 2001, although self-defence was the overriding concern.

3.3 Regime Change

Closely related to the military intervention to protect human rights is a military intervention undertaken, for example, in order to restore a democratic system of government by installing an already elected leader who has been hindered from taking office, or by creating democracy from scratch – for instance, by removing the existing authoritarian political leadership and organising general elections. Arguments relating to the creation of democracy have been invoked in the context of the intervention by the US and the UK in Iraq.

The establishment of democracy has also been invoked as one reason for the military intervention in Afghanistan in 2001. Iran has been implicitly threatened with regime change intervention. Without its becoming a generally accepted reason for the unilateral international use of force, far from it, regime change intervention has at least become an established concept or figure of thought in the international political debate.

A more comprehensive variation of regime change is the use of military force in order to establish a democratic system of government, and in addition to construct or reconstruct a functioning public administration system or state apparatus in the country of intervention. This form of military intervention results in the foreign adminis-

12 *Cf.* S. Spiliopoulou Åkermark, 'Storms, Foxes, and Nebulous Legal Arguments: Twelve Years of Force Against Iraq, 1991–2003', 54 *International and Comparative Law Quarterly* (2005) pp. 221–235.

tration of the country in question for an unspecified time – a kind of temporary international take-over.[13]

Such a comprehensive administrative purpose has never been specifically stated as a reason for a unilateral foreign military intervention, although the international administration of states has been the result of the international use of force on several occasions. Iraq, after the intervention in 2003, again represents one example, but for a rather brief period, East Timor and Kosovo after 1999, are others, while Bosnia-Herzegovina after 1995 is a further example. Afghanistan after the 2001 intervention could be described as yet another example, although the extent of the international administrative involvement in that country is not as comprehensive as in some of the other examples cited.

In practice, unilateral action in such situations has always been combined with action or authorisation by the UN Security Council at some later stage of the operation so there has as yet been no purely unilateral international military intervention in order to install a new system for the public administration of a foreign state. The purpose of temporarily taking over the administration of a territory could still become a legitimate reason in principle, even for an exclusively unilateral foreign military intervention. But this remains to be seen in state practice. Regime change could be more or less broad in scope, and it could coincide generally with an intervention to protect human rights.

3.4 Weapons of Mass Destruction

Another purpose for the unilateral use of force invoked in recent years has been to remove the threat of weapons of mass destruction (WMDs). This was the prime, but non-existent, reason for the unilateral military intervention in Iraq in 2003. Although world opinion was greatly divided on the legitimacy, or otherwise, of averting the international threat posed by Iraq's alleged possession of weapons of mass destruction, the reason for doing so – to prevent an aggressive state from producing or using such weapons – arguably did meet with a certain amount of sympathy in parts of the state community. At least, it is considered here as a reason for the unilateral use of international military force – that is, as an exception to the prohibition on the use of force, which has the potential of developing into one recognised in law.

Currently, this reason for international military intervention is being brought forward in modified form with respect to Iran and the suspected plans of Iran for the development of nuclear weapons.

If the control arrangements instituted under the NPT Treaty in combination with the inspections by the IAEA are not considered sufficiently effective, and the threat of the spread of nuclear weapons is considered to be a serious enough threat against international security, and the Security Council does not manage to agree on military sanctions, it might be that unilateral military intervention is undertaken and

13 *Cf.* A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *American Journal of International Law* (2006) pp. 580–622; C. Stahn, '"Jus Ad Bellum", "jus in bello"…"jus post bellum"? – Rethinking the Conception of the Law of Armed Force', 17 *European Journal of International Law* (2006) pp. 921–943.

that a majority of the world's states would sympathise with such unilateral intervention in order to stop the spread of nuclear weapons.

The Iraqi precedent is likely to cause most countries to become sceptical in the short term to claims relating to the necessity of intervening militarily against countries alleged to be in possession of such weapons of mass destruction if considerable proof is not advanced beforehand.

Invoked in response to an alleged threat of the use of force by means of WMDs, the use of military force against suspected holders of them could be regarded as a legal form of self-defence in international law. If preventive anti-WMD intervention were to be considered as constituting a form of self-defence it would in principle form part of the current collective security system, and thus be legal in principle. In this contribution the law on self-defence is understood in the more narrow sense as the exercise of self-defence in a situation of actual or imminent – not future – armed attack.

Consequently, the unilateral use of military force against Iraq, or perhaps Iran, for instance, for the purpose of eliminating existing weapons of mass destruction or the capacity to produce weapons of mass destruction in the future, would not be considered to be an action in self-defence, but a unilateral use of military force, which *prima facie* violates the general prohibition on the use of force.

3.5 Territory

There are several other purposes for the international use of force that one could think of – imagination would be the only limit to such a list of possible purposes. Considering the current relative absence of international unilateral military expeditions, most imaginable purposes for the international use of force would seem rather unrealistic. One purpose additional to the ones actually invoked in recent years would be the conquest of new territory, resulting in a traditional aggressive war of conquest. Today this seems an unlikely purpose to become accepted in law. With growing populations and climate change, however, the scenario may soon seem less unlikely. Old territories might deteriorate and become unfruitful or flooded, for instance, with populations having to take refuge elsewhere. If they are not let in, military means might be necessary to gain access to new land.[14]

3.6 Natural Resources

Another possible purpose for the use of military force could be the conquest of the natural resources of other states. This reason for military intervention explicitly stated would also seem unlikely to become accepted at least at short sight. Natural resources of different kinds, and the access to natural resources, however, may very well become the subject of future conflicts in a way as yet unheard of, as the supply of natural resources becomes scarcer. Some natural resources are vital to the survival of human beings and if they become scarce then armed conflicts are more likely to arise. Coupled

14 *Cf.* for instance *Climate Change as a Security Risk*, German Advisory Council on Global Change (Earthscan, London and Sterling, VA, 2008); P. Haldén, *The Geopolitics of Climate Change – Challenges to the International System*, (The Swedish Defence Research Agency, Stockholm, 2007).

with the issue of natural resources, the traditional reason for the use of military force – the conquest of new territory – emerges as being increasingly realistic.

3.6 Water

Water is vital, and becoming more scarce. The use of military force in order to get access to it is also a conceivable future scenario, as well as a conceivable explicit reason for intervention. With climate change, lands are drying and water is becoming scarce and polluted.

3.7 Trade and Markets

Another thinkable purpose for the international use of force would be to keep trade routes open and ease international free trade and access to foreign markets. Or, inversely, one could imagine the use of force in order to stop the free trade and the undesired inflow and consequent competition from foreign products on one's home market.

3.8 Against NGOs

Another form for the use of force that is developing and which has been referred to earlier in the context of the different thinkable actors on the scene of the use of force is international armed force against non-state actors – that is, today primarily terrorists. This is already a reason for the use of force invoked openly and not hidden behind other and better sounding reasons.

The lawful use of force between two non-state actors is conceivable within a future legal model. As far as the possible purposes for the international use of force against non-state actors is concerned, what is intended is primarily the use of force by a state against a non-state actor – against non-state terrorism and possibly organised criminal groups should they become important enough. After the attack against the World Trade Center in September 2001, arguably, the unilateral use of international force against large-scale terrorist acts has been widely recognised as a lawful act of self-defence.[15] The use of military force cannot currently be considered to be a lawful form of self-defence in all instances of counter-terrorism, however, but such a rule could be developing given the current 'war on terror' mood.

As far as the use of force by non-state actors is concerned, either against states or against other non-state actors, it is conceivable that it may be undertaken for the same reasons largely as the use of force by states. Regime change intervention could be undertaken in order to install democracy as well as totalitarian regimes – according to the wishes of some non-state actors. As a generally accepted reason for a military intervention the installation of a dictatorship seems remote to say the least. The conquest of territory would be a logical reason to use force for a non-state actor wishing to become stronger and more state-like, or wanting to acquire resources of different kinds from its members.

15 *Cf.* SC Res. 1368 (2001) and the ensuing enormous debate in the legal doctrine on the right to self-defence against terrorism.

One reason for the use of international force that would seem exceptionally unlikely in the case of a non-state actor would be an intervention in order to stop the spread of WMDs if it were not in order to stop a competing non-state organisation from acquiring such weapons. In general, the international use of military force between non-state actors would seem less likely than the domestic use of force in a civil war situation. As non-state actors of different kinds and in different branches grow in numbers and size, the prospect of international wars between non-state agents becomes increasingly possible. If many states and even international organisations start turning to private security companies for fighting wars, then at least in practice, even if not formally, such wars will become reality.

4. Varying Combinations

4.1 The Axes

As mentioned, the two axes of this study are the procedural axis – on decision-making, and the substantive axis – on the content of the norm on the use of force. There are four large dimensions or types of combination that will be tested, briefly, in the following discussion: centralisation or non-centralisation of decision-making on the one hand and broad or narrow prohibition on the international use of force on the other. Each combination deserves an analysis in depth, but for reasons of space this contribution will have to limit itself to sketching what could be developed into a more detailed and thorough investigation. For the time being, the reader must develop further in his or her own mind the ideas merely suggested by the author. The reader might also consider thinking of and evaluating further possible examples of combinations than those suggested here.

Within these large dimensions the different actors will be considered to illustrate different degrees of centralisation, and the different purposes for which military force is used will illustrate different degrees of breadth of the prohibition on the application of military force, or, inversely, different numbers of justifications that are considered to be legal.

4.2 High Degree of Centralisation and Broad Prohibition on the Use of Force

This is the normative situation currently prevailing under the UN Charter where the Security Council has the decision-making monopoly on the use of force. This legal arrangement is possible, as we have seen, but it is being seriously challenged by state practice, and in the legal doctrine to the point where some observers question whether it can really be considered in force.[16]

It is the alternatives to this model that are of primary interest in this contribution, even if the conclusion proves to be that the original collective security model still stands in legal terms.

16 *Cf.* M. J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (Palgrave, New York, 2001); J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, Cambridge, 2004) pp. 27, 139, 187.

An expanding right of self-defence could lessen the degree of centralisation of decision-making and narrow prohibition on the use of force in practice. It is presumed here that the right of self-defence could hardly compensate either in theory or practice for the normative changes discussed below. The right to self-defence constitutes an exception to the broad prohibition on the use of force and is thus supposed to be construed narrowly, as exceptions are. One could introduce a broad or narrow right of self-defence as an additional variable in the discussion on different designs of a normative model of the use of force. This contribution, however, largely disregards the right of self-defence and focuses on the right to use force.

4.3 High Degree of Centralisation and Narrow Prohibition on the Use of Force

Is it imaginable that the rule on centralised decision-making on the international use of force is maintained simultaneously with a softened prohibition on the unilateral use of international force? One can imagine the absolute prohibition on the international use of force without the rule on the decision-making monopoly of the UN Security Council – that is, the rule relating to the content of the norm without the institutional backing – but is it possible to imagine the reverse, that the international use of force is not prohibited, at least not absolutely, in all situations, but that only the UN Security Council possesses the authority to make lawful decisions on the international use of force?

It would seem to be an unlikely normative development, but perhaps one could imagine a situation where it is generally considered that the international use of force for certain purposes is lawful, but that it is likewise agreed that the actual application of military force remains under the decision-making monopoly of the Security Council.

If there were to be such a normative change, the continued development would be near at hand that some degree of decentralisation of the power to decide on the use of force would follow as a second step, or that there would be a residual power to decide belonging to other actors, in particular the Security Council not managing to agree on a decision and it was considered by some actors that an international military operation was warranted.

As far as humanitarian intervention is concerned, a change in the law would not seem far away according to which it would be considered lawful to intervene after the Security Council had had its chance to decide on an intervention, but could not agree.[17]

17 Possibly subject to different conditions depending on the outcome of the vote in the Security Council, *cf. supra* section 2.2; *see also* O. Bring, 'Should NATO take the lead in formulating a doctrine on humanitarian intervention?' (where Bring's answer is yes!), 47 *NATO Review* (1999) pp. 24–27; O. Bring, *FN-stadgan och världspolitiken* (The UN Charter and World Politics), 4th ed. (Norstedts Juridik, Stockholm, 2002) pp. 310–314, in which Bring similarly is understanding towards the need to develop a doctrine for humanitarian intervention; and O. Bring and S. Mahmoudi, *Internationell våldsanvändning och folkrätt* (The international use of force and international law) (Norstedts Juridik, Stockholm, 2006) pp. 98–100, where Bring's approach to humanitarian intervention is more careful, in the context of Iraq 2003 this time. Greater scepticism towards humanitarian intervention was expressed by Bring in 'Humanitär intervention?' (Humanitarian interven-

As regard to military interventions for other purposes, whether a similar development could be imagined would depend upon their degree of political acceptability in principle among the states – and other possible international actors whose practice and *opinio juris* may become a more important source of law in time – and on the particular circumstances of the case in hand. One would have to investigate every possible justification for the use of force, one at a time, in order to be able to judge the likelihood of its becoming embraced by the community of states, and possibly other important actors. Among the possible justifications discussed earlier and in a world primarily made up of territorially-based states, the conquest of territory belonging to another state would seem to be the least likely justification to become accepted as law in the foreseeable future. Also, it is a purpose for which the Security Council itself has never, so far, authorised the use of force.

A variation of the situation with a high degree of centralisation of decision-making power and a narrow prohibition on the use of force could arise when certain states or organisations claim to carry out what the Security Council has actually decided, but has been unable or unwilling to take the responsibility for itself as far as its execution is concerned. This is the example of the so-called implicit authorisation. The underlying principle must be that once the Security Council has made its decision or taken its stand on the subject matter, the states or other organisations are entitled to carry through the decision in question or use the decision as a justification for military action if the Security Council itself does not use force. Implicit authorisation has been invoked as a justification for the international use of force in several instances, in Iraq during the 1990s, in Kosovo in 1999, and again in Iraq in 2003.

A final example of a possible system including a high degree of centralisation and a narrow prohibition on the use of force would be one where the Security Council would be reduced to examine the international use of force *ex post facto* and either endorse it or not.[18] Instances of the use of force that were not endorsed would be illegal, whereas those that were endorsed *ex post facto* would be considered to be legal. Even if the substantive prohibition on the use of force were to be narrow in this example, there would be some limits indirectly set by the practice of the Security Council. If the Security Council is locked by political disagreement, and is therefore unable to make any decision before the use of force, the *ex post facto* model could perhaps be a viable alternative.[19]

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tion?) *Internationella Studier* (1991) (Stockholm, Utrikespolitiska institutet) pp. 10–14, on the subject of the safe zones for the Kurds in Northern Iraq 1991; and outright antipathy in *Aggression, självförsvar och non-intervention* (Iustus, Uppsala, 1982) pp. 59–62.

18 *Cf.* H. Shue, 'Let Whatever is smouldering Erupt?', in A. J. Paolini *et al.* (eds.), *Between Sovereignty and Global Governance. The United Nations, the State and Civil Society* (MacMillan Press, Houndmills, Basingstoke, Hampshire, London; St Martin's Press, New York, 1998, pp. 60–84, pp. 75–77.

19 *Cf. The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty, supra* note 4, p. 54.

4.4 Low Degree of Centralisation of Decision-making and Broad Prohibition

One could imagine a situation where the substantive rule amounting to an absolute prohibition on the international use of force, such as the one in Article 2(4) of the UN Charter, remains in force – but where the rule on the monopoly on the decision-making of the UN Security Council disappears. The Security Council may be complemented by a number of other independent decision-makers without any hierarchical superiority on the part of the former, or the Security Council may disappear entirely as decision-maker. The Security Council as sole superior decision-maker could disappear either in practice because it is incapable of managing international peace and security, which would be the more likely development, or in law, if it is dissolved, which is unlikely.[20]

This would imply a system where the substantive prohibition on the international use of force exists without the institutional framework that surrounds and supports it today. There are many rules of international law that exist only in substantive form without any institutional system to look after their enforcement. Indeed, this is the normal situation to date in international law.

A decentralisation of the decision-making power on the international use of force with the Security Council becoming reduced to being one actor among many, or even disappearing altogether, in combination with a retention of the general prohibition on the use of force, would seem like the first step towards the development of a system also containing a narrowed prohibition on the use of force.

The increase in the number of actors considered to be lawful decision-makers could depend upon frustration with the Security Council's inability to agree on action, and thus its inability to take what most would regard as being constructive military action.

If it became generally accepted that more actors than the UN Security Council were entitled in principle to decide on the international use of force, one could still imagine, however, that the status quo remained with respect to the broad prohibition against the international use of force.

States may be still be hesitant towards narrowing the prohibition or providing it with permanent exceptions and they would most likely be unable to agree on the contents and extent of the alternatives to the current absolute prohibition, even if many of them were to consider some exceptions to the prohibition on the use of force to be warranted.

Arguably, the case of Kosovo could be cited as an example of a situation where the decision-making body, NATO, in itself was considered legitimate. The actual use of force could be considered unlawful, however, as a violation of the prohibition on the use of force. (Some would argue, on the contrary, that it was the purpose of the intervention – to reduce human suffering – that indirectly made NATO a legitimate decision-maker). And to that they would perhaps add that the NATO intervention in Kosovo could lawfully be justified as a humanitarian intervention. A third possibility would be to argue that NATO was an illegitimate/illegal decision-maker since the kind and reach of the action – humanitarian intervention and not self-defence outside

20 *Cf.* the Military Staff Committee (Article 47 of the UN Charter) which exists, but has never played any active role.

the NATO area – is not foreseen in the NATO treaty. Still, the actual intervention could simultaneously be regarded as being a lawful form of humanitarian intervention.[21]

A variation of the scenario where the UN Security Council remains a lawful decision-maker but among many, in combination with a preserved general substantive prohibition on the use of force, could be that of the Security Council losing its privileged status as one of always being entitled to use force for all purposes that can be contained within the UN Charter extensively interpreted (given a preliminary finding of a 'threat to the peace').[22] Such a development could entail that the Security Council could authorise the use of force for a more limited range of purposes than today, or even that the Security Council was reduced to lawfully using force on the same footing as individual states – that is, in the event of an armed attack. The UN collective security system would then turn purely and merely into an organisation of self-defence.

A system where the substantive prohibition on the use of force covers all potential decision-makers would be an extremely static system. On the one hand, it would rule out the use of military force in international relations almost completely and thus constitute an even stricter prohibition than the one in force today. It could be argued that such a rule would be more consistent with the purpose of the UN Charter to save succeeding generations from the scourge of war, although, as we all know, the use of armed force as such under the aegis of the Security Council was not foreign to the UN founders. On the other hand, although perhaps tempting in principle, it is unlikely that such a system would be sustainable.

There would be no actor entitled to use force preventively and imaginatively – in cases of threats to the peace – and no actor entitled to use force to penalise states that break the fundamental rules of the UN Charter, except as an act of self-defence. Any possibility of using force proactively as an instrument to manage international peace and security would disappear. The void left by the Security Council would no doubt be filled by others who would then transgress the general prohibition on the international use of force.

The role of the Security Council as *ex post facto* examiner of international interventions could also be imagined within the context of a low degree of centralisation and a broad prohibition on the use of force. Since the Security Council would have lost its superior position in the normative hierarchy in this model and the international use of force would be illegal anyway, except for self-defence, the value of the *ex post facto* evaluation would be merely political, either reinforcing the prohibition or giving political support to an intervention carried out in violation of the prohibition. Some kind of check on the actions of individual states and other actors would still remain.

Generally, *ex post facto* review by a global organ with or without legal significance would be more motivated the further the military action was removed from the current

21 *Cf. The Kosovo Report – Conflict, International Response, Lessons Learned, Independent International Commission on Kosovo* (Oxford University Press, Oxford, 2000).

22 K. Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future', 8 *Journal of Conflict and Security Law* (2003) pp. 15–70; M. Zambelli, *La constatation des situations de l'article 39 de la charte des Nations Unies par le Conseil de sécurité. Le champ d'application des pouvoirs prévus au chapitre VII de la Charte des Nations Unies* (Helbing & Lichtenhahn, Genève, Bâle, Munich, 2002).

default position of the decision-making monopoly of the Security Council and the general prohibition on the use of force.

A final variation of the combination of a decentralised system for decision-making on the use of force and a broad prohibition on the use of force in substance will be mentioned, and that is the one where the Security Council disappears altogether from the international scene, either in practice or in principle, or both. This is a similar scenario to the one described above where the Security Council was subjected to the same substantive prohibition on the use of force as individual states, and thus only entitled to use force in self-defence like situations, except that not even this function would remain if the Security Council disappeared entirely. Whether the disappearance of the Security Council would affect the breadth of the prohibition on the use of force is worth considering, but will have to be left open.

A possible development could be that the invoking of self-defence as a justification for the international use of force would increase, in order to ease the prohibitive straitjacket.

If, due to the remaining broad prohibition on the use of force, nobody was legally entitled to use international force proactively, preventively or punitively, it is likely that its use for allegedly self-defensive purposes would increase. Already today, despite the existence of the Security Council, the right of self-defence is being extended considerably by some states in order to legally justify doubtful uses of non-defensive international force.

4.5 Low Degree of Centralisation of Decision-making and Narrow Prohibition

In this model the decision-making monopoly of the Security Council has disappeared and other actors are at least equally entitled to make decisions on the international use of force.[23] The Security Council itself may still exist or it may not.

A narrow prohibition on the use of force means either that there are several exceptions to the general prohibition on the use of force or more extremely that the use of force is allowed if it is not prohibited in particular cases, a reversed presumption in comparison with the one prevailing today. This contribution takes the presumption of a general prohibition with fewer or more numerous exceptions as its point of departure. The development if carried to its extreme in the low centralisation-narrow prohibition model, however, would lead to the international use of force being generally allowed.

Within the space created by the combination of a low degree of centralisation and a narrow prohibition on the use of force there are certainly many different degrees to which a future scenario may distinguish itself from the current situation. The competence of other actors than the Security Council to decide on the use of force may still be quite circumscribed, or entirely unlimited and the purposes for which force may be applied may be very few, or they too may be almost unlimited.

The minimum change contained in this model is that a decision by the Security Council is not always and unconditionally necessary as a precondition for the lawful use of international force, and the unilateral use of international force – in addition to instances of self-defence – is not always and unconditionally forbidden. To increase

23 *Cf. supra* section 4.4.

the number of possible combinations even more, the breadth of the prohibition on the use of force could vary with the actor; some may be subjected to a broader prohibition whereas others may be freer. Such a model could be labelled 'modified centralisation', but then it would have to include the Security Council as an important decision-maker, perhaps even compulsory in some instances (otherwise there would be no centralisation to modify).

Among individual states the right to use force could be differentiated between different kinds of state, in line with recent developments where states are distinguished by reference to whether or not they are democratic, or rogue states or, presumably, good states, or whether they are failed states or, presumably again, intact states. The democratic, good and intact states could be freer to decide on the use of force whereas the non-democratic, rogue and failed states could be subject to a broad prohibition still. One additional requirement could be that the state should be of a certain importance as to size, military strength etc. in order to obtain the right to decide on the use of force.

The purpose for which a military intervention is carried out could also determine the range of actors who would be entitled to use international force; some purposes could allow a broader range of actors to use force whereas other purposes would entitle only a few to use it – one could call that 'modified breadth'. A very hypothetical example would be humanitarian purposes for which a broad range of international actors could be allowed to decide on the use of force in contrast to comprehensive regime change or securing access to vital natural resources for which purposes only a few would be reserved the right to use force.

It would seem as if the current loosening up both of the prohibition on the use of force and on the decision-making structure would logically find its conclusion in the combination of low centralisation and narrow prohibition, but as has already been hinted, this is far from certain and basically any development is thinkable except, judging from previous experiences, a strict centralisation to the Security Council combined with a strict prohibition on the use of force both being respected in practice.

Today, of the possible actors mentioned earlier, one would perhaps consider regional organisations – or, if not regional in the geographical sense, 'other non-universal organisations' and not necessarily ones focusing on issues of peace and security – and ad hoc, or lasting – coalitions of states, or individual states as the actors the most likely to gain an independent right to decide on the international use of force. Multilateral actors would perhaps be more likely than individual state actors to gain such a right.[24] As mentioned above, one could picture different kinds of interplay with the Security Council in decision-making, but the absolute monopoly of the Security Council to decide should be long gone in this part of the centralisation and breadth scheme.[25] The EU and as we have already seen, NATO, would be able and potentially willing to undertake international military interventions practically anywhere in the world. The ECOMOG has intervened in West Africa. The AU's, however rather futile, efforts to deal with a situation involving considerable human suffering can be followed in the case of Darfur, Sudan.

24 Although not all are convinced that multilateral actors are necessarily fairer than unilateral ones (*cf.* Shue, *supra* note 18, pp. 66–69).

25 *Cf.* section 2.2.

The different non-state actors would seem the least likely to gain decision-making power on the international use of force in the short term. On the other hand, the least likely often tends to come about.

The potential lawful justifications of the international use of force developing could relate to just about anyone, of which some have been listed earlier. However, a narrow range and a close connection to the protection of human rights and other humanitarian values would seem likely at short sight at least. The AU, again, has codified humanitarian intervention as a lawful justification of intervention as well as its own right to decide on a humanitarian intervention.[26]

5. Conclusion

The point of the matrix sketched in this contribution is to render possible a freer, less prejudiced discussion on the design of an international security system, collective or not. By loosening the relationship between the two main components of the current collective security system – the decision-making monopoly and the prohibition on the unilateral use of force – the intention behind the matrix is to facilitate new thinking through new and perhaps unexpected combinations of different decision-making rules and different substantive rules relating to the use of force. The matrix brings out a lot of detail. It begets many questions and allows considerations of both an empirical and a normative kind. It could be developed to include other dimensions as well, for instance the right to self-defence and some apologetic versus utopian elements relating to the potential discrepancy between practice and norm.

If one tries to pinpoint where in this matrix the law finds itself today, the combination of a high degree of centralisation of decision-making and narrow prohibition on the use of force would seem to be the most pertinent description. The idea of the UN Security Council as being the sole lawful decision-maker on the use of force (disregarding self-defence) has not been abandoned and states still turn to the Security Council for its blessing, or authorisation, of action. The remaining centralisation is fragile, however, and not much else is centralised than the actual adoption of the Security Council resolution.

The process leading up to the decision in the Security Council is not centralised, since the real preliminary decision to intervene is most likely taken elsewhere, and the execution of the decision to use force is largely decentralised as well in that states and other organisations than the UN take care of it. Still, the Security Council retains its normative grip on decision-making and constitutes the legalising and legitimating needle's eye.

On the substantive side, the range of purposes for which international armed force has been used in recent years has expanded considerably. True, most instances of the international use of force have occurred within the framework of an authorisation of the Security Council (if they have not been in self-defence) so in a strict sense the substantive law on the use of force is not affected. In practice, however, the broad range of purposes invoked both in the case of interventions authorised by the Security Council and on the occasion of unilateral interventions – in combination with a grow-

26 Article 4(h) of its Constitutive Act, *cf. supra* note 3.

ing preparedness to use force as a means of international action generally – bears witness to a narrowed substantive prohibition on the international use of force.

In the instances where individual states succeed in using the Security Council for their own purposes, one could argue that the degree of centralisation of decision-making is in fact low. In those cases, one could also argue that the legal wall that otherwise exists between the use of force with an authorisation of the Security Council and the unilateral use of force disappears as far as the development of new substantive law on the use of force is concerned.

Looking at developments in a positive spirit one could venture to say that a moderately well functioning and flexible balance of power has been achieved between the active and powerful states, the ad hoc coalitions and the regional organisations on the one hand and the passive, or reactive, and powerless Security Council on the other, whose authorising legitimacy the other actors nevertheless covet and who can be – indeed must be – helped by the other international actors in order for any action to be taken, even in its own name.

The balance of power – or precarious partnership – developing rests upon a continued and felt need for the approval of the Security Council of international military action in order for the action to be lawful and politically acceptable. Perhaps the role of needle's eye is what the Security Council can hope for in today's world; it remains the focal point in a decomposed, certainly, but still collective security system. The political legitimacy it creates, or refuses to bestow on certain enterprises, would seem to be the biggest asset of the Security Council so far. The global arena for deliberation and decision-making that it constitutes, even if decision-making only in a superficial formal sense, also warrants the continued working of the Security Council in the remnants of a more ambitious collective security system with which we now happen to live.

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