20. Jahrgang
1/2007

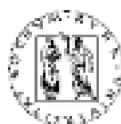
Volume 20
1/2007

ISSN 0937-5414
G 10364

Humanitäres Völkerrecht
Informationsschriften

Journal of International Law of Peace and Armed Conflict

Institut für Friedenssicherungsrecht
und Humanitäres Völkerrecht



Herausgeber:

Deutsches Rotes Kreuz e.V., Generalsekretariat, Carstennstraße 58, 12205 Berlin-Steglitz, Tel. (0 30) 8 54 04-0, Fax (0 30) 8 54 04-4 50, Internet: www.drk.de

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ISSN 0937-5414

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Erscheinungsweise vierteljährlich; Inlands-Abonnementpreis jährlich EUR 33,00 (inkl. MwSt. 7 % und Porto und Versand); Auslands-Abonnementpreis jährlich EUR 42,50 (inkl. Porto und Versand); Einzelheftpreis Inland: EUR 7,90 (inkl. MwSt. 7 %, zzgl. Porto und Versand EUR 1,28); Einzelheftpreis Ausland: EUR 18,20 (inkl. Porto, Versand und Bankgebühren).

Bestellungen unter DRK-Service GmbH, Geschäftsbereich Verlag, Berliner Straße 83, 13189 Berlin, Tel. (0 30) 47 90 04-50, Fax (0 30) 47 90 04-54, E-Mail: verlag@drkservice.de

Das Abonnement kann nur schriftlich mit einer Frist von drei Monaten zum Jahresende beim Verlag gekündigt werden.

Verlag:

DRK-Service GmbH, Geschäftsbereich Verlag, Berliner Straße 83, 13189 Berlin, Tel. (0 30) 47 90 04-50, Fax (0 30) 47 90 04-54, E-Mail: verlag@drkservice.de

Druck:

Mediengruppe UNIVERSAL, Kirschstraße 16, 80999 München, Tel. (0 89) 54 82 17-0, Fax (0 89) 55 55 51, Internet: www.universalmedien.de

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Journal of International Law of Peace and Armed Conflict (JILPAC)

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13. DRK-Kurs im Humanitären Völkerrecht

Berlin, 05. - 11. August 2007

Der Kurs richtet sich vorrangig an Jurastudenten höherer Semester, an Rechtsreferendare und andere junge Juristen, die ihre Kenntnisse im humanitären Völkerrecht vertiefen möchten. Unter entsprechenden Voraussetzungen sind auch Studierende und junge Absolventen anderer Fachbereiche herzlich willkommen. Da einzelne Kursteile in englischer Sprache stattfinden, sind gute Englischkenntnisse die Bedingung für eine Teilnahme. Der Kurs beinhaltet Vorlesungen und Gruppenarbeiten zu den grundsätzlichen und aktuellen Themenstellungen des humanitären Völkerrechts.

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Prof. Dr. Dr. h.c. mult. Knut Ipsen,
eh. Präsident des Deutschen Roten Kreuzes, Berlin - angefragt

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Das Humanitäre Völkerrecht und die Menschenrechte
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Die Arbeit des Auswärtigen Amtes im Bereich des Humanitären Völkerrechts
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Der Kurs wird vom Deutschen Roten Kreuz, Generalsekretariat unter Mitwirkung des Instituts für Friedenssicherungsrecht und Humanitäres Völkerrecht der Ruhr-Universität Bochum veranstaltet und findet in Berlin statt. Die Teilnehmerzahl ist auf 25 begrenzt.
Die **Teilnehmergebühr** für den Kurs beinhaltet Dokumentationsmaterial, Unterbringung in Doppelzimmern sowie Verpflegung und beträgt 300,00.

Bewerbungen mit Lichtbild, die Angaben zur Person – insbesondere Nachweise über erbrachte Studien- bzw. Examensleistungen – enthalten, richten Sie bitte **bis 30. Mai 2007** an:
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Editorial

Religions- bzw. Weltanschauungsfreiheiten sollen dem einzelnen Menschen die Ausübung seines Glaubens ohne Beeinträchtigungen garantieren. Dem Grunde nach geht es um ein respektvolles Miteinander, in dem die Rechte und Präferenzen eines jeden gewahrt werden. Man möchte also meinen, dass damit ein Schritt in Richtung Frieden gemacht wurde. Dass dem nicht so ist, zeigen die bewaffneten Auseinandersetzungen der letzten Jahre, in denen religiöse Aspekte eine gewichtige Rolle spielen. Eisa Al-Enizy geht diesem Zusammenhang in seinem Artikel näher auf den Grund. Nach einem Überblick über Religions- und Glaubensfreiheiten wendet er sich deren Schutz sowohl in Friedens- als auch Kriegszeiten zu.

Die zwei folgenden Beiträge befassen sich mit den Auswirkungen des Balkankrieges. Frank Selbmann beleuchtet zunächst die Verfahren vor dem Internationalen Gerichtshof für das ehemalige Jugoslawien wegen Missachtung des Gerichts. Dabei geht es um kroatische Journalisten, die die Namen von besonders geschützten Zeugen publik gemacht haben und daraufhin vor dem Gerichtshof angeklagt wurden. Ulf Häußler diskutiert anschließend in seinem Beitrag welche rechtlichen Rahmenbedingungen die Aktivitäten der KFOR-Truppen innerhalb des Kosovos bestimmen.

Weitere Artikel befassen sich mit der Frage, inwieweit Durchsetzungsmechanismen des Menschenrechtsschutzes – insbesondere die Inter-Amerikanische Kommission für Menschenrechte und der Inter-Amerikanische Gerichtshof für Menschenrechte – für die Implementierung des humanitären Völkerrechts von Nutzen sind. Ein hochaktuelles Thema wird mit der „transitional justice“ in Nachkriegsgesellschaften aufgegriffen.

Im Verbreitungsteil plädiert Christian Lentföhr für eine Rückbesinnung auf die Verbreitungsarbeit. Auch in den heutigen bewaffneten Konflikten verhindern die Regeln des humanitären Völkerrechts das Leid vieler Menschen. Aus diesem Grunde spricht er sich dafür aus, verstärkt die Inhalte und nicht nur die Existenz der Genfer Konventionen und anderer Normen des Völkerrechts weitestgehend publik zu machen.

Natürlich enthält auch diese Ausgabe, wie gewohnt, einige Buchrezensionen.

Zuletzt erlaubt sich die Redaktion wiederum den Hinweis, dass alle Beiträge in den Humanitäres Völkerrecht – Informationsschriften die Meinungen der Autoren reflektieren. Die Redaktion identifiziert sich nicht notwendigerweise mit deren Positionen.

Die Redaktion

Religious Rights and the Freedom of Belief in Peacetime and in Times of Armed Conflicts

Eisa Al-Enizy*

Es wurde nie für möglich gehalten, dass die Religions- oder Weltanschauungsfreiheiten jemals einen Kriegsgrund darstellen würden. Im Gegenteil, sie wurden allen Menschen gewährt und von allen respektiert, die Feinde eingeschlossen. Leider ist dieser Schutz in den letzten Jahren oftmals verletzt worden. Religiöse Gegensätze sind eine viel zitierte Ausrede zur Führung von Kriegen geworden. Menschen werden gezwungen ihre Religion zu ändern oder ihren Glauben aufzugeben beziehungsweise einen anderen vorzutäuschen, nur um vor Verfolgung sicher zu sein. Des Weiteren sind Religionsführer und Gebetsstätten oftmals Hauptziele von militärischen Angriffen. Dieser Artikel zielt darauf ab, den juristischen Schutz den internationales Recht Religion, religiösem Personal und Gebetsstätten – sowohl in Friedens- als auch Konfliktzeiten – gewährt, zu untersuchen.

Der erste Teil erläutert wie sich der Schutz von Religionsrechten über die Jahre verändert hat. Im zweiten Teil wird die Definition von Religions- und Glaubensfreiheit im internationalen Recht dargelegt. Zudem wird versucht, die Begriffe Religion und Glaube näher zu definieren. Der dritte Teil konzentriert sich auf den Schutz von Religion und Glaubensfreiheiten in Friedenszeiten, wobei auch die Schutzmechanismen beleuchtet werden. Teil vier hingegen beschäftigt sich mit diesem Schutz in Kriegszeiten. Dabei wird vor allem auch die Wichtigkeit von Religion in Zeiten eines bewaffneten Konfliktes deutlich gemacht. Schließlich wird im fünften Teil die Rechtsprechung der internationalen Strafgerichtshöfe hinsichtlich Religions- und Glaubensfreiheit untersucht. Abschließend wird dargelegt, wie Religionen eine friedliche Beziehung von Nationen erhalten könnten und wie Gläubige aus allen Ländern sich in Liebe begegnen sollten und Amtsträgern beziehungsweise Individuen nicht gestatten sollten religiöse Angelegenheiten für politische Interessen zu missbrauchen.

1. Introduction

The protection of religious rights is not a new matter. In the Greece of the city-states, great pan-Hellenic sanctuaries such as Olympus, Delos, Delphi, and Dodone were recognised as sacred and inviolate (*ieroi kai asuloi*). Acts of violence were prohibited within their walls, and a vanquished enemy could claim sanctuary there.[1] In medieval Europe, codes of chivalry saved churches and monasteries from harm.[2] In the fourth century, "full protection was accorded by *Allah* and His Prophet *Mohammed* to the Christian inhabitants of Najran regarding their life, land, nationhood, property, and wealth, even to those who are residing as their dependents in the vicinity villages of Najran and to those living in Najran and outside the country, their priests, monks, churches, and everything whether great or small."[3] Similarly, Prophet *Mohammed* and his successor Qualifah *Abo Baker* warned Muslim combatants not to kill religious personnel or destroy worship houses.[4] As long as Jews and Christians did not commit acts of war or provide physical assistance to the enemies, they were allowed to live safely, practicing their daily life among Muslims in Medinah (Saudi Arabia) more than fourteen hundred years ago. However, Muslims killed the Jews of Koraithah as they had provided the enemies with physical support in order to attack Muslims.

Religious personnel was also protected. For example, in Europe, restrictions were imposed over the participation of religious personnel in the armed conflict. The norms of the Catholic Church established two related prohibitions over religious personnel of the Church: clergy were not to be targeted in military campaigns, and they were not allowed to actively engage in warfare.[5]

Unfortunately, in recent years this protection in times of armed conflict was violated on numerous occasions. Religion was used as an excuse to defeat other nations. For example, *Slobodan Milosevic* led a severe war against Muslims in the ex-Yugoslavia, where thousands of Muslims were buried alive, tortured, and mosques were demolished or targeted. Similarly, in Palestine, religious personnel were hunted and mosques targeted. The Holy mosque, Al-Aqsa, was burned in 1969.[6] And in early 1994, *Dr. Baruch Goldstein* at-

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1 P. Ducrey, *Le traitement des prisonniers de guerre dans la Grèce antique, Des origines à la conquête romaine*, Éditions E. de Boccard, Paris, 1968, pp. 295-300.

2 H. Coursier, "Étude sur la formation du droit humanitaire", (1951) 389 *Revue Internationale de la Croix-Rouge* 370-389; (1951) 391 *Revue Internationale de la Croix-Rouge* 558-578; (1951) 396 *Revue Internationale de la Croix-Rouge* pp. 377, 562, and 937-968 (in French only).

3 A. Yusuf Yakub, *The Book of Land Tax*, quoted in Letters of Hadrat Abu Bakr Siddiq, translated by Hafiz Muhammad Adil, International Islamic Publishers, Karachi, 1984, pp. 31-32.

4 First Qualifah Abo Baker (573-634) is said to have told his army that they would encounter pious people who lived in monasteries to serve God in seclusion, and would have given orders to leave them in peace, not to kill them and not to destroy their monasteries. A. Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire*, Pedone, Paris, 1997, p. 449.

5 S. Lunze, "Serving God and Caesar: Religious Personnel and their Protection in Armed Conflict", (2004) 86.853 *International Review of the Red Cross* 69-70.

6 Palestine Facts, Israel 1967-1991, available at <http://www.palestinefacts.org/pf_1967to1991_alaqsa_fire_1969.php>, 10 October 2005.

tacked Muslims praying in Hebron's Cave of the Patriarchs, thereby killing 35 innocent worshippers.[7] In Sudan, the civil war that took place between the South and the North of the country was also based on religious pretexts. According to some sources, the Islamic Sudanese government refused to share the resources of the South with the Christian inhabitants of this part of Sudan. Christian and other non-Muslim families continued to be captured, sold into slavery, and converted forcibly to Islam.[8] The success, to obtain autonomous government, in the South, encouraged Western Sudanese, in Darfur, to raise similar claims against the central government.

Even more sadly, 11 September and the ensuing "war on terror" led to an increasing number of attacks against both religious persons and buildings.

Osama Bin Laden, the mastermind of the 11 September 2001 attacks on the World Trade Center, in New York, and on the Pentagon, in Washington D.C., used Islam as a pretext to legitimise such attacks. As a response, US President *George W. Bush* waged a war against terrorism, thus severely harming Muslim nations around the world. He used the term "Crusade" to describe his war on terrorism.[9] As a result, hate crimes were committed against Muslims around the world, especially in the US and the United Kingdom. Since then, Muslims and Islamic properties have been subjected to a certain number of violations. Muslims were illegally captured, imprisoned, and prevented from enjoying their basic civil rights. Properties were illegally traced, seized, and frozen or confiscated. Finally, the Holy Qoran was humiliated in Guantanamo Bay and in Israeli prisons.[10] Various religious groups, including minorities, were targeted around the world. More specifically, certain Shiite as well as Sunni religious figures were subjected to criminal attacks in Iraq.[11]

Moreover, buildings such as synagogues, churches, temples, and mosques became the target of military attacks. Synagogues were attacked on 11 April 2002, in Djerba (Tunisia)[12] and on 15 November 2003 in Istanbul (Turkey). Churches were targeted in Iraq on 2 August, in Islamabad (Pakistan) on 11 September 2004[13] and 25 December 2002, and in India on 21 May as well as on 8 and 25 June 2000.[14]

As a rule, using religion as a pretext to wage a war that achieves political goals is completely unacceptable, and, furthermore, unlawful according to international law. The goal of this article is to examine the legal protection provided by international law to religion, religious personnel, and worship places, in both peacetime and in times of armed conflict.

Section 2 examines the definition of religious rights and freedom of belief in international law; Section 3 focuses on the protection of religious rights and freedom of belief in peacetime; Section 4 surveys the protection of the religious rights and freedom of belief in times of armed conflict; Section 5 addresses the jurisprudence of the international criminal courts pertaining to religious rights and freedom of belief.

2. The Definition of the Religious Rights and Freedom of Belief in International Law

What is the definition of a religion and belief? Are they subjected to international law? Does international law give them the appropriate interest and concern? The next section aims to answer all these questions.

2.1. Attempts to Define Religion and Belief

The "effort to define religion is as old as the academic study of religion itself."[15] However, controversy between religions' followers and believers presents the major obstacle for the appearance of an accepted international definition of religion and belief. Therefore, no generally accepted definition of religion exists and probably never will exist.[16] Accordingly, "human rights law avoided defining religion, and save its expansion to include "belief." The "capacious definition of religion at international law left it largely to individual states and individual claimants to define the boundaries of the regime of religious rights."[17]

According to the jurisprudence of human rights mechanism, religion is defined as "views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established."[18] Similarly, the European Court of Human Rights confirms that religion rights adopted by Article 9 of the Convention for the

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7 M. Juergensmeyer, "The Power of Religion": in *The Terrorists Who Long For Peace*, (1996) 20 *Fletcher Forum of World Affairs* 1.

8 P.G. Danchin, "U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative", (2002) 41 *Columbia Journal of Transnatinal Law* 60.

9 M. Perez-Rivas, *Bush Vows to Rid the World of 'Evil-Doers'*, 16 September 2001, <http://www.cnn.com>, 10 October 2005.

10 Center International Press, "Amidst Angry Reactions: 'Majeddo' Prisoners on Hunger Strike Following Desecration of Holy Quran", 6 August 2005, <http://www.ipc.gov.ps>, 10 October 2005.

11 Turks.US, "Iraqi Sunnis Blame Shiite Militia for Assassinations", 19 May 2005, <http://www.turks.us/article.php?story=20050519070336418>, 10 November 2005; Washington Times, 21 February 2005, <http://washingtontimes.com/upi-breaking/20050221-015222-8698r.htm>, 9 November 2005.

12 Columbia Newsblaster, "German Question Man in Tunisian's Synagogue Explosion", <http://www1.cs.columbia.edu/nlp/newsblaster/archives/2002-04-18-06-44-58/web/summaries/04_18_02_42.html>, 26 July 2005.

13 "Massacring Christens of Iraq", <http://www.nineveh.com/massacring_the_christens_of_iraq.htm>, 4 September 2005.

14 International Institute for Counter-Terrorism, *Serial Church Blasts In India – The Real Culprits*, 23 July 2000, <http://www.ict.org.il/articles/articledet.cfm?articleid=121>, 28 July 2005.

15 W.E. Arnal, Definition, in GUIDE TO THE STUDY OF Religion 22 (Willi Braun & Russell T. McCutcheon eds., 2000).

16 W. Fallers Sullivan, "Judging Religion", (1998) 81 *Marquette Law Review* 454: See also, N. Stinnett, "Defining away Religious Freedom in Europe: How Four Democracies Get Away With Discriminating Against Minority Religions", (2005) 28 *Boston College International and Comparative Law Review* 429.

17 J. Witte, Jr., Introduction to RELIGIOUS HUMAN RIGHTS IN A GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES XVII (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

18 United Nations Human Rights Commission, Freedom of Thought, Conscience and Religion, 48th Sess., at 35, article 18, gen. cmt. 22, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

Protection of Human Rights and Fundamental Freedoms (ECHR) covers not only the world's most recognized religions, but also a "precious asset for atheists, agnostics, skeptics, and the unconcerned."[19]

Despite the fact that the term "religion" remains undefined as a matter of international law,[20] religion maintains its position as a spiritual need for humans. This need reflects on the relation or lack thereof[21] between the individual and his/her God. From an international law perspective, this relationship should be drawn by the individual or by groups of individuals to meet their spiritual needs.

International humanitarian law (IHL) also provides for a definition of "religion." For example, a broad definition of the term "religion" was adopted by the commentators of the San Remo Manual. They assert that a "religious mission" covers voyages undertaken for missionary and 'perhaps' humanitarian work organised by religious orders, but exclude *expressis verbis* missions using force or advocating the use of force for religious ends.[22] Accordingly, all personnel and properties engaged in a humanitarian mission, whether exercised by humanitarian or religious groups, warrant protection. However, should they use force, then they lose this protection.

Likewise, religious personnel, as defined in article 8(d), of the 1977 Protocol I Additional to the Four Geneva Conventions of 1949 (API), are those who do not engage in the use of force,[23] so any spiritual support provided to the needy can be classified as a religious mission. Unfortunately, this is only an indirect definition of "religion."

Enjoying religious rights should not, in any case, conflict with others human rights. For example, the idea, called by some fanatic Muslims, of Islamic domination around the world, violates international law inasmuch as it prevents other individuals from believing in other religions or to change their Islamic faith. Similarly, the freedom of expression, such as the publication of caricature designs of the Prophet *Mohammad*, in February 2006, in Danish Newspapers, should not conflict with religious rights.[24]

2.2. The Content of Religious Rights and Freedom of Belief

Religious rights and freedom of belief can be examined under five umbrellas: the right not to be subject to any sort of discrimination, the right to establish and maintain religious places, children's rights, minority rights, and the exceptional limits to such rights.

2.2.1. Non-Discrimination Right

The majority of international law instruments prohibit discrimination based on religion grounds.

Religious discrimination is defined by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief as "any distinction, exclusion, restriction, or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights, and fundamental freedoms on an equal basis."[25] Accordingly, States should deal with individuals without any consideration to their religions or beliefs. Therefore, any discrimination is unlawful and its legal effect must be abolished.

Non-discrimination in terms of religion and belief[26] should encompass the right of every one to believe or not to believe, to believe in what and whom, and to change his/her religion or belief at any time.

2.2.1.1. The Right to Have a Religion and to Freely Believe without Discrimination

Every one has the right to have a religion and to believe freely without discrimination. Individuals might practice this right individually or with others, a right established in the majority of human rights' instruments.

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[19] *Kokkinakis* v. *Greece*, Application No. 14307/88, Judgment 25 May 1993.

[20] T.J. Gunn, "The Complexity of Religion and the Definition of 'Religion' in International Law", (2003) 16 *Harvard Human Rights Journal* 190.

[21] Some scholars describe the belief of any sort, including atheism, or what one might call the absence of belief, as a kind of religious liberty. *Ibidem*.

[22] *See* San Remo Manual on International Law Applicable to Armed Conflicts at Sea, International Institute of Humanitarian Law, Cambridge University Press, Cambridge, 1995, p. 133. See also J. Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, Vol. 1, Johns Hopkins Press, Baltimore, 1909, p. 618.

[23] "[M]ilitary or civilian persons such as chaplains who are exclusively engaged either temporarily or permanently in the work of their ministry (spiritual assistance) and attached to the armed forces or to medical units, medical transports, or civil defense organizations." Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Conflicts (Protocol I), opened for signature Dec. 12, 1977, reprinted in D. Schindler & J. Toman, The Laws of Armed Conflicts, 2nd edition, 1981, p. 551, article 8(d). See also J.-L. Hiebel, *Assistance spirituelle et conflits armés*, Geneva, Henry Dunant Institute, 1980, p. 355.

[24] The Journal of Turkish Weekly, "Insulting of Islam or Freedom of Expression", <http://www.turkishweekly.net/news.php?id=25400#>, 2 February 2006.

[25] United Nations General Assembly, Resolution 36/55: Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. A/36/684 (1981), article 2.

[26] United Nations General Assembly, Resolution 217A(III): Universal Declaration on Human Rights, UN Doc. A/810, 12 December 1948, article 2 [hereinafter UDHR]; United Nations General Assembly, Resolution 2200A (XXI): International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966), article 2, 23 March 1976 [hereinafter ICCPR]; United Nations General Assembly, Resolution 2200A (XXI): International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 (1966), 3 January 1976, article 2 [hereinafter ICESCR]; Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, 28 July 1951, article 3; Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1955), 4 November 1950, article 14 [hereinafter ECHR]; Additional Protocol 12 to the ECHR, article 1; American Convention on Human Rights, 1144 U.N.T.S. 123, 22 November 1969, article 1 [hereinafter IACHR]; African Charter of Human Rights and People's Rights, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1982), reprinted in 21 I.L.M. 58 (1982), 27 June 1981, article 2; Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 7 December 2000, article 21 [hereinafter European Charter]; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 25, article 2(1); Cairo Declaration on Human Rights in Islam, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993), 5 August 1990, article 1; The Arab Charter on Human Rights included in the final report of the Summit of the League of Arab States of 22-23 May 2004. An English translation of the Charter prepared by the Office of the High Commissioner for Human Rights is reproduced at 12 IHRR 893 (2005), article 2.

Principle 18 of the Universal Declaration of the Human Rights (UDHR) provides that "everyone has the right to freedom of thoughts, conscience and religion; this right encompasses freedom to change one's religion or belief, and freedom, either alone or in the community, to manifest one's religion or belief in teaching, practice, worship and observance."[27] The UDHR also explains that both thoughts and their factual manifestations, expressed by the practice and acts of believers, fall within the scope of this right. Although the legally binding effect of the UDHR is argued in international law,[28] there are other binding international instruments which prohibit discrimination, based on religion.

For example, article 20(2) International Covenant on Civil and Political Rights (ICCPR) provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Accordingly, State members must enact legislations that eliminate all kinds of discrimination, including laws to protect one's freedom of religion.

In addition, regional European instruments prohibit religious discrimination as well: article 9(1) ECHR and article 10(1-2) of the 2000 Charter of Fundamental Rights of the European Union. Unfortunately, the latter requires that such a right be recognised in accordance with the national laws, as a result of which the protection of religious rights might be brought a step back. For example, in a secular country such as France, national legislations impose limits on religious manifestations and education. On the American echelon, Article 12 IACHR provides that "[e]veryone has the right to freedom of conscience and of religion," a right confirmed in Article 3 of the American Declaration of the Rights and Duties of Man.[29] Unfortunately while the American Convention is binding, it provides only for the protection of the right of conscience and belief. In contrast, the non-binding Declaration provides the right to profess a religious faith, and to manifest and practice such right.

2.2.1.2. The Right to Change the Religion

Freedom of belief encompasses the right to change this belief or to switch religions, without discrimination. Accordingly, if States only allow certain individuals or group of individuals the right to change their belief or to switch religion, they are violating the principle of discrimination.

Likewise, if they do not allow individuals to change religions, they act in contravention of this right. For example, most Buddhist States impose limitations on minority faiths within their borders, sometimes in a dramatic fashion. In Bhutan, both proselytism by citizens of non-Buddhist faiths and also religious conversions are prohibited.[30] Similarly, most Islamic legal systems make it semi-impossible to convert to other religions. All Islamic countries historically imposed anti-apostasy laws on their Muslim citizens:[31] the penalty for conversion out of Islam was death in most Muslim States.[32] At the present time, and under international pressure, no Islamic State can apply the death penalty against Muslim converters to other religions. On 25 March 2006, Afghanistan did not apply such penalty against a citizen who converted to Christianity.[33]

The right to change one's religion, as envisaged in the draft article 18 UDHR, explains why Saudi Arabia abstained from voting in favor of the UDHR.[34] This attitude was rejected by article 10 of the Islamic Declaration for Human Rights which provides that "Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism." Another regional experience that dealt with religious rights is the American one. The IACHR entrenches the right to change religion in article 12 according to which religious rights "include[s] freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private."

The international experience is reflected on the national level. For instance, the national legal system of Kuwait grants, by virtue of the constitution, the right not to be subject to any kind of discrimination. Article 26 of the 1962 Kuwaiti Constitution provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Further, article 29 of the Kuwaiti Constitution confirms article 26, when it requires all governmental bodies and citizens to avoid all kind of discrimination, including based on religion, within the territory of Kuwait. Accordingly, if non-Muslims have the right to convert their belief to Islam, Muslims should, legally, have the right to convert their belief to other religions or belief.

2.2.2. Establishing and Maintaining Religious Places

In order to practice, most believers need to use a particular place of worship, which must be established, respected, and maintained. In this regard, article 6(a) of the Declaration on

[27] UDHR, *supra* note 26, article 18.

[28] M. Alwan, *Human Rights Under the Focus of National Legislations and the International Instruments*, Kuwait Law School Ed., Kuwait, 1989, pp. 124-127.

[29] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 p. 17 (1992).

[30] Department of State, Annual Report on International Religious Freedom 2001, 2001, p. 507.

[31] D. Gartenstein-Ross, "No other Gods before Me: Spheres of Influence in the Relationship Between Christianity and Islam", (2005) 33 *Denver Journal of International Law & Policy* 250.

[32] A. Ala Mawdudi, *The Punishment of the Apostate according to Islamic Law*, (Syed Silas Husain & Ernest Hahn trans.), p. 17, <http://answering-islam.org.uk/Hahn/Mawdudi/>, 1994.

[33] Cnn.com, Afghan convert released, 28 March, 2006, <http://www.cnn.com/>.

[34] T. Mahmud, "Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice", (1995)19 *Fordham International Law Journal* 87.

the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief provides that worship places should be allowed to be "establish and maintain places for these purposes." Worship places belong to all the believers, and do not belong to the country in which they are located. Therefore, it is the international community's responsibility to assure their safety.

Just recently, churches were allowed to be built in some Muslim countries, such as Saudi Arabia. Up to the moment of the preparation of this paper, synagogues and temples did not exist in most Islamic countries, an absence that can be attributed to the dearth of believers or their lack of power.

Despite the Islamic form of the Kuwaiti legal system,[35] religious groups such as Hindus, Sikhs, and Christians can freely practice their religions and beliefs in Kuwait.

2.2.3. Children's Freedom of Religion

Spiritual needs are not only provided for adults. Children as well have spiritual needs, religious rights, and freedom of belief. In pursuance of article 24 of the Covenant of the Political and Civil Rights, no one should prevent a child from his/her religious rights and freedom of belief, or subject him/her to discrimination in enjoying such rights or freedom.[36]

However, only parents or guardians have the rights to interfere in this choice. Indeed, parents and guardians can somehow supervise their children's religious rights and freedom of belief. Article 13(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that parents and guardians have the liberty and freedom before the State "to ensure the religious and moral education of their children in conformity with their own convictions." Similarly, article 5(1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief declares "The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up." This right was regionally approved as well; for, both article 12 IACHR and article 2 of the Protocol 1 of the ECHR endow parents with a broad liberty regarding the child's religious rights.

Yet, parents have also duties inasmuch as article 5(3) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief requires that children "be brought up in a spirit of [...] respect for freedom of religion or belief of others."

2.2.4. Religious Minorities' Rights and Freedom of Belief

Another group that benefits from religious rights are religious minorities. Generally, their protection under international law is linked to the fact that they constitute a minority group. Minorities, including religious ones, are protected by international law. A minority is a group of individuals numerically less than the majority and lacking power on the State level. Its members not only share common ethnical, religious, and/or linguistic characteristics, which are different from the rest of the nation, but also show a feeling of solidarity among its members.[37] Under article 27 ICCPR "minorities […] shall not be denied the right, […] to practice their own religion."[38]

2.2.5. Exceptional Limits to Religious Rights and Freedom of Belief

International human rights are often combined between individual interests and State interests. However, the interests of States, as legislator of international law, are predominant. This dominance was found in the adoption of a derogation clause that allows certain States to derogate from certain human rights under particular circumstances and for a limited period of time provided the derogations fulfill the principle of proportionality and are subject to international scrutiny and review.[39]

As far as religious rights are concerned, it is very important to illustrate the difference between (core rights) the freedom of thought, conscience and religion on the one hand, and (non-core rights) the freedom to manifest religion or belief on the other. No limitations upon the freedom of thought and freedom to profess a religion or belief are permissible.[40] In contrast, the freedom to manifest one's religion or belief may be subject to restraints imposed to safeguard other human rights and the various societal interests recognised by international human rights' instruments.[41]

Accordingly, States may derogate from non-core religious rights and freedom of belief only in two cases: 1) During war or public emergencies, and 2) in order to protect national security, public health, safety, morals or the right and freedom of others.[42] The majority of international instruments agree upon the fact that, in order to safeguard the society and the public, non-core religious right might be restricted only in

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35 Kuwaiti Constitution, <http://www.majlesalommah.net/>, promulgated 11 November 1962, article 2.

36 Article 24 of the ICCPR provides that "[e]very child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State".

37 C. Francesco, Study on the Rights of Persons Belonging to Ethic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev. I, New York, United Nations(1991).

38 ICCPR, *supra* note 26, article 27.

39 R. Higgins, "Derogations Under Human Rights Treaties", (1976-77) 48 *British Year Book for International Law* 282-283.

40 K.J. Partsch, "Freedom of Conscience and Expression, and Political Freedom", in L. Hendin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York, Columbia University Press, 1981, at 213-214.

41 *Ibid.,* at 214.

42 T. Mahmud, *supra* note 34, at 92.

limited circumstances. This limitation is set forth in article 12 of the African Charter (AC), article 9 ECHR and article 12 IACHR.

A national measure taken within this frame by the Saudi authorities is, for example, to limit the number of Muslim pilgrims of each country by a certain quota so as to keep public order, safety, and health under control.

However, the religious rights of certain categories of persons, such as refugees, are specifically cared for in times of emergencies. For instance, article 4 of the 1951 Refugee Convention of 1951 provides that "[t]he Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion." The same article also recognises that refugees' children should not be prevented from access to religious education despite their vulnerable situation.

Individuals seek religious rights as part of their freedom of thinking. But, do States have religion? And if yes, how would such religion reflect on the State's attitude on the religious rights and freedom of belief?

2.3. The Importance of Religion in International Affairs

Some States declare themselves as religious regimes. For example, the constitutions of Saudi Arabia and Iran adopt Islam as the main source for legislation.[43] In contrast, Kuwait as an Islamic country, states that Islam is one of the sources of legislation.[44] Other examples pertaining to other religions are the Vatican that is historically a Christian State and Israel that was founded as a Hebrew State. In contrast, other States, such as Turkey and France, prefer to separate religion from the State.

Undoubtedly, such religious positions influence the State's relationship with the international community. For example, most Muslim countries, until recently, refused to establish diplomatic relations with Israel. Further, they established on 25 September 1969 the Organisation of the Conference Islamic (OCI).[45] It is described as an Islamic organisation, created to achieve Islamic goals, the liberation of Palestine, the return of Al-Aksa Mosque, and accept only Muslim members.

High ranking religious personnel take part in solving international crises. For example, *Pope John Paul II* asked the former Iraqi president, *Saddam Hussein*, and the American President, *George W. Bush*, to avoid the war on Iraq in 2004. He also intervened in 2002 to solve the stand off situation in the Church of the Nativity.[46] Similarly, governments can use local religious communities to relieve international tension. For instance, the Australian government used the private initiative of *Taj Al-Din Al-Hilali*, an Australian Muslim leader who visited Iraq in June 2005, in order to assist in the release of *Douglas Woods*, an Australian hostage kidnapped in Iraq on 30 April 2005.[47]

The importance of religion in international affairs and, hence, the ever-growing need to ensure the effective protection of religious rights is best seen in the light of recent events. Alleged or real violations of religious rights may indeed lead to breaches of the international peace and security, and a climate of fear and revenge. Religious violations will "[…] amount […] kindling hatred between peoples and nations."[48] On 7 July 2005, in revenge for the United Kingdom's intervention in Iraq, some fanatic Muslims blew up buses and subways in London. In Iraq, the insurgency is still kidnapping and attacking foreign citizens, and members of the armed forces.

In this light, it is necessary to examine the legal instruments protecting religious rights, both in times of peace as well as in armed conflict.

3. Religion Protection and Freedom of Belief in Peace Time

Legal instruments pertaining to religious rights in peacetime can be classified in specialised and general instruments.

3.1. Specialised Instruments Protecting Religious Rights and Freedom of Belief

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Religious Rights Declaration) of 1981 grants every individual the right of religion and freedom of belief. It describes religious rights and freedom of belief as "fundamental elements in human's conception of life".[49] The preamble of the Declaration requires not only that religious freedom be granted, but also guaranteed.[50] Warranting religious freedom requires

[43] Article 1 of the Saudi Constitution provides that "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution," Saudi Constitution, March 1992; Article 12 of the Iranian Constitution provides that "The official religion of Iran is Islam and the Twelver Ja'fari school, and this principle will remain eternally immutable. Other Islamic schools are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites." And article 4 of the Iranian Constitution provides that "[a]ll civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the wise persons of the Guardian Council are judges in this matter." Iranian Constitution, 24 October, 1979, articles 4, 12.

[44] Article 2 of the Kuwaiti Constitution provides that "The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation." Kuwaiti Constitution, *supra* note 35, article 2.

[45] The Organization of Conference Islamic, <http://www.vic-info.org/InternationalOrganizations/IO-OIC.htm>, 10 October 2005.

[46] Sergio Minerbi, The Vatican and the Sandoff at the Church of the Nativity, Jerusalem Center for Public Affairs, <http://www.jcpa.org/jl/vp515.htm>, 15 March 2004.

[47] Al-jazeera.com, Wood released following Muslim Imam's intervention, 15, June, 2005, <http://www.aljazeera.com/me.asp?service_ID=8856>.

[48] Declaration on Religion Rights, *supra* note 25, preamble.

[49] *Ibid.*, article 1.

[50] *Ibid.*, preamble.

a positive attitude from the local authorities, such as providing for holidays, Sundays in Christian countries, Saturdays in the Hebrew State, and Fridays in Muslim countries. So, abstaining from intervening in the freedom of religion does not totally exclude States from their responsibility regarding the violations of religious rights and freedom of belief. Therefore, laws and regulations should be enacted and enforced to assure such rights and freedom. For instance, in 22 February 2005, when bombers blasted the 1000-year-old Imam *Ali al-Hadi* mausoleum, in a provocative assault that roused tens of thousands of Iraqi Shiites into angry protests and deadly clashes,[51] the Iraqi authorities guaranteed religious rights by imposing, in Baghdad and three other provinces, a daytime curfew to protect all of its citizens.[52]

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief also asserts that the UN Charter and other relevant UN instruments prevail over any religious pretext that might call for launching an attack or waging a war.[53] Therefore, no armed conflict can take place based on religious basis. The repetitive call of *Osama bin Laden* and his assistants for Muslims to use force against non-Muslim nations,[54] abrogates the content of this rule. Religious groups are required not only to abstain from violating this rule, but also to participate in reaching world peace, social justice, and friendship among nations.[55] The UN Secretary General can use religious values in favour of maintaining international peace and security.[56] For instance, appointing international religious figures as mediators or special envoys in religious conflicts can solve international religious conflicts. The Denmark-Muslim crisis, escalated, after the publication of the Prophet *Mohammed*' (Peace and Prayers of God upon Him) cartoons, then ended after the efforts of Muslim personnel. A dialogue conference took place in Copenhagen (Denmark) on 10 March 2006 between Muslim preachers and Danish experts to approach both sides of the issue.

Unfortunately, since this document is only a Declaration adopted by the General Assembly, i.e. it is not legally binding upon member States, but is more a kind of political declaration.

The Muslim-Danish crisis of February 2006[57] triggered discussions about whether current international instruments sufficiently protect religious rights and the freedom of belief. Until a specialised instrument can pave the way to understanding, general instruments may play the role.

3.2. General Instruments Protecting Religious Rights and Freedom of Belief

The general instruments can be classified into universal and regional instruments.

3.2.1. Universal Instruments

Four universal instruments, the UDHR, the ICPCR, the ICESCR, and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) protect religious rights and freedom of belief.

Article 18 UDHR entrenches religious rights as the right of freedom of thinking on the basis that believing is part of one's thinking abilities, therefore, every human should enjoy this right. Since this ability is not fully available to children, their parents or guardians are allowed to direct such religious rights and freedom of belief in the child's favour.[58]

Despite the fact that the UDHR was unanimously adopted by the General Assembly, a body that cannot issue binding resolutions, it is nonetheless considered customary international law. Unfortunately it lacks international enforcement.[59]

A legal binding instrument is article 18 ICCPR[60] which provides that "[e]veryone shall have the right to freedom of thought, conscience and religion […] include[ing the] freedom to have or to adopt a religion or belief of his choice […]." This instrument neglected to explicitly provide the right to change one's religion, thanks to Saudi's efforts.[61] Member States of the ICCPR are bound to respect its content as an international treaty. Further, the Commission on Human Rights was enabled "to receive and consider […] communications from individuals claiming to be victims of violations of any of the rights set forth in the covenant."[62] However, States can prevent individuals from enjoying such protection by delaying or avoiding the ratification of the optional protocol.

Likewise the ICESCR[63] is an international treaty binding upon all ratifying States. Yet, its provision pertaining to religious rights goes a step further inasmuch as it creates a connection between such rights and education, which can promote understanding, tolerance, and friendship among

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51 Washington post.com, Bombing Shatters Mosque In Iraq: Attack on Shiite Shrine Sets Off Protests, Violence, 23 February 2006; p. A01.

52 "Baghdad Goes under Curfew", 24 February 2006, <http://www.Aljazeera.net>.

53 Declaration on Religion Rights, *supra* note 25, preamble.

54 Osama bin Laden Tapes broadcasted by Aljazeera.net on 11 February 2003 and 15 April 2004.

55 Declaration on Religion Rights, *supra* note 25, preamble.

56 Article 33 (1) of the UN Charter provides that "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

57 EU Business, "Danish PM says cartoon row pits EU against Muslims", <http://www.eubusiness.com/Institutions/060221182047.6xfceq7a>, 21 February 2006.

58 UDHR, *supra* note 26, article 18.

59 H. Hannum, "The Status of The Universal Declaration of Human Rights in National and International Law", (1995/1996) 25 *Georgia Journal of International and Comparative Law* 298.

60 ICCPR, *supra* note 26, article 18.

61 N. Lerner, "Proselytism, Change of Religion, and International Human Rights", (1998) 12 *Emory International Law Review* 511.

62 Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 171, article 2 (1966), available online at <http://www.unhchr.ch/html/menu3/b/a_opt.htm>, 7 October 2003.

63 ICESCR, *supra* note, article 2.

religious groups.[64] Such an environment in early educational stages may eliminate hate among religious groups and stabilise respect among them. Accordingly, a number of educational systems are under revision, such as in Pakistan,[65] where several fanatic Muslims were educated.[66] The non-discrimination tenet requires that fighting fanatism should not be limited to a certain religion or a group of believers, but fanatism should be fought in all social and political contexts.

Last but not least, the Genocide Convention[67] protects religious groups as well. Article 2 specifies that genocide "means [...] acts committed with intent to destroy, in whole or in part [...] a religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." Unfortunately, Muslims in ex-Yugoslavia, and Christians in Sudan were victims of such crimes that took place in peacetime, as well as in times of armed conflict. The lack of international instruments, especially in the criminal protection of religious rights and freedom of belief, was behind the surcharge over the Genocide Convention. Most religious violations against religious personnel fall directly under the jurisdiction of the Genocide Convention. It became urgent to adopt a specialised instrument that protects and criminalises violations committed against religious rights and freedom of belief.

Remarkably, and in contrast to the previous universal instruments which only target States as potential violators of religious rights, this instrument does not distinguish in the case where the crime was committed by "constitutionally responsible rulers, public officials or private individuals."[68]

3.2.2. Regional Instruments

Regional instruments that set forth the religious rights and freedom of belief are the European Convention for Human Rights (ECHR), the Inter-American Convention for Human Rights (IACHR), the African Charter of Human Rights and People's Rights (ACHR), and the Cairo Declaration on Human Rights in Islam (CDHR).

Article 9 ECHR, which warrants religious rights and freedom of belief, can be enforced by the European Court for Human Rights following a State or individual's complaint.[69] Despite this possibility, few cases were brought up before the court.[70] The caricatures of Prophet *Mohammed*, broadcasted by the Danish media, during 2006, can be examined by the European Court, because it violates article 34 of the ECHR. Especially that Denmark is a member to the ECHR since 3 September 1953.

Similarly, article 12 IACHR provides protection for religious rights and freedom of belief.[71] The IACHR goes beyond the protection of the ECHR, inasmuch as it grants aliens, by virtue of article 22(8), the right not to be deported or returned to a country where their lives or freedom may be threatened as a result of their religious belief. Accordingly, the protection is not limited to local harm or threat, but also protection from international sources.

However the human rights' protection within the IACHR is weaker than the one in the ECHR and "undermines the enforceability."[72] According to article 33 IACHR the Inter-American Commission and the Inter-American Court have enforcing powers.[73] However, individuals and groups of individuals' complaints can only be brought before the Inter-American Commission with whom member-states can choose not to cooperate with its investigations.[74] As a counterpoise, the commission is entitled to refer the case before the Inter-American Court, which can also be seized by State parties.[75] In other words, this system gives perpetrators, who violate religious rights and freedom of belief, the chance to escape justice.

Unlike the American and European organisations, the Organization of the African Union did not consider human rights protection in its goals until the African Charter was adopted in 1981. Its article 8 provides that "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."[76] By using the term "shall" article 8 of the African Charter provides

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64 Article 13 ICESCR provides that "education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups."

65 AFX News Limited, "Pakistan's Musharraf Tightens Control over Islamic Schools' Militancy", <http://www.forbes.com/home/feeds/afx/2005/07/22/afx2151839.html>, 22 July, 2005.

66 See resolution of the General Conference of the UNESCO No. 3C/Resolution 15, Paris 3-21 October, 2005, para. III(4)

67 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, 9 December, 1948, [hereinafter Genocide Convention].

68 *Ibid*., article 4.

69 Article 33 of the Additional Protocol 11 to the ECHR provides that "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party." Article 34 provides that "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right." Protocol No. 11 of 11 May, 1994 (Europ. T.S. No. 155) articles 33 and 34, available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

70 One of the rare decisions was *Kokkinakis* v. *Greece* in which the Court held that the State's conduct violated article 9 ECHR. The case involved the criminal conviction of a Jehovah Witness for proselytism. European Court of Human Rights, *Kokkinakis* v. *Greece*, *supra* note 19.

71 IACHR, *supra* note 26, article 12.

72 A.H. Robertson, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, New York, Manchester University Press, 1982, pp. 104, 144-145.

73 IACHR, *supra* note 26, article 33.

74 IACHR, *supra* note 26, article 44; D.L. Shelton, "The Inter-American Human Rights System", in C. Humana (ed.), *Guide to International Human Rights Practice, World Human Rights Guide*, New York, Oxford University Press, 1983, at 122-23, 131.

75 IACHR, *supra* note 26, article 61(1).

76 African Charter of Human Rights and People's Rights, *supra* note, article 8.

extreme respect for religious rights, where governments are bound to guarantee such rights. However, the absence of enforcing mechanisms paralyses the effectiveness of the protection of religious rights on the African continent. A semi-judicial body, the African Commission on Human and Peoples' Rights, functions within the African system and has privileges over a judicial body.[77] Fortunately, a protocol establishing a human rights court was adopted in Addis Ababa in 1998 and entered into force in 2004,[78] thereby strengthening the protection of human rights on the African continent.

Article 18(a) of the Cairo Declaration,[79] which was adopted in 1990 within the Organization of the Islamic Conference (OIC), declares that "[e]veryone shall have the right to live in security for […] his religion […]." As recent explosions and killings in some parts of the Islamic regions illustrate religious differences may threaten human security and life as well. Unfortunately, the Cairo Declaration is not legally binding and, thus, cannot be enforced upon the member States of the OIC. The Islamic regions are currently thinking about issuing a legal binding instrument to assure the respect of religious rights and freedom of belief. A judicial body with an international jurisdiction over all cases that involve Islamic issues and with exceptional enforcing power should also see the light in the near future.

4. Religion Protection in Times of Armed Conflict

The protection of religious rights is not only limited to peacetime, but also covers times of armed conflict, when international humanitarian law (IHL) applies.

4.1. Religious Rights according to International Humanitarian Law

Most religious violations in times of armed conflict take place in conflicts having a religious character, such as the one that occurred on the territory of the former Yugoslavia. More recently, one may pinpoint that the civil war between Sunnis and Shiites in Iraq is replete of attacks committed against Sunni or Shiite holy places.[80] IHL assures the protection of religious rights and freedom of belief with regard not only to individuals, but also to religious buildings. For instance, when a Mosque is destroyed, or an Imam is mistreated or killed, this harms Muslims around the world. Similarly, targeting a Church or a priest will hurt Christians around the world. IHL is in charge to protect certain groups of individuals and properties, including the religious personnel and properties, which create a liaison between IHL and religious rights and freedom of belief.

4.2. The Importance of Religion in Times of Armed Conflict

First, the importance of religion in times of armed conflict must be stressed inasmuch as religious personnel can play a major role in relieving humans from the effects of the armed conflicts. The victims of armed conflict beside physical needs also spiritual ones. In a combat environment, "chaplains draw closer to servicemen and women, and their hidden desire for spiritual stability. Troops make use of the services provided by religious personnel who share their situation and live under the same circumstances, but devote themselves to the spiritual well-being of those troops."[81] Most of the world military forces create a special brigade specialised in providing religious and spiritual assistance to the servicemen. In the United States, "[c]haplains have officially been a part of the American military for the last 229 years. On 29 July 1775, during the Revolutionary War, the fledgling country officially recognized military chaplains and appropriated money to fund them as part of the military."[82] The Israeli military involves chaplains and religious affairs officers among military personnel.[83] In most of the Kuwaiti military units, there are Imams, who take care of the religious matters of their units. All religious personnel and properties are subject to the IHL protection.

4.3. The Religious Elements Subject to IHL Protection

Religious personnel, properties, and worship places are protected by IHL through the basic principle of "distinction" between combatants and military targets, on the one hand, and civilians and civil objects on the other (religious, political, and social structures fall thereunder).[84]

4.3.1. Religious Rights and Freedom of Belief

The first known law of war, the Lieber Code, provides in article 37 that "[t]he United States acknowledge and protect, in

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[77] C. Heyns, "The African Regional Human Rights System: The African Charter", (2004) 108 *Pennsylvania State Law Review* 686.

[78] Organization of the African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights (I) Rev. 2 (1998).

[79] Cairo Declaration on Human Rights in Islam, *supra* note.

[80] J. Fleishman, "Sectarian Tension in Iraq Grows as Bombing at Mosque Kills", *Los Angeles Times*, 10 January 2004, at A3. See also C. Nickerson, "Blast Kills Soldier, 3 Iraqis Near Mosque", *Boston Globe*, 6 December 2003, at A10; J. Fleishman, "Gunmen Attack Baghdad Mosque", *Los Angeles Times*, 6 September 2003, at A8.

[81] J.-L. Hiebel, "Droit de l'aumônerie, droit de l'assistance spirituelle", (1974) 1 *Annuaire français des droits de l'homme* 535.

[82] W.J. Hourihan, A Brief History of the United States Chaplain Corps: Pro Deo Et Patria, chapters 1-7 (William J. Hourihan ed., 2004), available at <http://www.usachcs.army.mil/HISTORY/Brief/TitlePage.htm>, 5 March, 2004.

[83] N.L. Zucker, The Coming Crisis in Israel: Private Faith and Public Policy, Cambridge University Massachusetts, MIT Press, 1973, pp. 146-151, available at <http://www.geocities.com/alabasters_archive/orthodoxy_military.html>, 1973.

[84] Article 5 of the Convention (IX) concerning Bombardment by Naval Forces in Time of War provides that "[i]n bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes."; Article 48 of the Additional Protocol I to the Geneva Conventions of 1949 provides that "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." 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.

hostile countries occupied by them, religion and morality."[85] Using both the terms religion and morality avoids any question related to the definition of religion since morality covers broader issues. Accordingly, religion and morality are subject to protection. However, some of the American armed forces, especially in Afghanistan and Iraq, act in controversy with such protection. Similarly, articles 13 and 27 of the Fourth Geneva Convention[86] (GC IV), which applies to occupied territories, prevent all kind of distinction, based on religion, among the populations of the countries in conflict. Thus, protection should not be provided or prevented on the basis of religious differences, but on the basis of personal needs. The armed conflict in the former Yugoslavia witnessed flagrant discrimination from Serbs against Muslims, and vice-versa. Further, article 27 GC IV assures the respect of religious convictions and the rights of protected persons to practice their religion by providing them with the necessary locations and materials for such practice. Iraq as an occupied territory witnessed severe violations to religious rights and freedom of belief.[87]

Furthermore, article 93 GC IV specifically grants internees certain religious rights while article 37 GC III[88] offers similar protection to POWs and great latitude was given to religious personnel to freely fulfill their mission.[89] In contrast, and according to the Kuwaiti released detainees of Guantanamo, religious rights and freedom of belief were not guaranteed on the island.

According to the American authorities, the detainees of Guantanamo were granted all their religious rights and freedom of belief. The Presidential order regarding the detainees of Guantanamo Bay naval station on the island of Cuba assures the "free exercise of religion in consistent with the requirements of such detention."[90] However, the situation on the ground is far from complying with this order inasmuch as, for example, the detainees were prevented from choosing their own religious personnel.[91] Finally, a report of the UN Commission on Human Rights urged the United States to close the Guantanamo detention centre.[92]

4.3.2. Religion Personnel

Undoubtedly, religious rights and freedom of belief are related to the protection of religious personnel.

Seeking to relieve spiritual suffering and the physical pain of the victims was behind the protection granted to medical and religious personnel.[93] Articles 17 GC IV and 15 (5) Additional Protocol I (API) give both religious and medical personnel the same rights. Indeed, as much as the human body needs medical relief in times of armed conflict, it needs spiritual relief as well. As a result, in pursuance of article 33 GC III religious personnel can be captured to serve their captive combatants. In this regard, the ICRC recommends one religious personnel per 1,000–2,000 POWs.[94] Any extra number of religious personnel should be released. Pursuant to articles 33 and 35 GC III, they can freely exercise their usual activities within the POWs' camp and must be granted all the necessary facilities to practice their religious duties.

Unfortunately, religious personnel are targeted during international and non-international armed conflicts. For instance, during the Palestinian-Israeli conflict, Israel targeted religious personnel, such as Sheikh *Ahmed Yaseen*.[95] During the conflict in the former Yugoslavia, a considerable number of religious personnel were killed.[96] The civil war in Iraq was not far from such a situation, where a great number of religious personnel, Shiite and Sunni were targeted.[97]

The present protection offered by international law does not meet the expectations of religious personnel. They risk their lives, in most cases for a volunteer mission. Therefore, if international law does not afford them the necessary protection that assures their safety and encourages others to join such task, one day no one will fill in the role of religious personnel. As a result, some religious personnel seek to obtain diplomatic immunity, especially during their mission.

4.3.3. Religious Properties

Additionally, IHL defends religious properties from military attacks. Unfortunately, the latest armed conflicts testify that such protection was violated on numerous occasions. Count-

85 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863.

86 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, 12 August 1949.

87 "Marine's Killing of Wounded, Unarmed Man in Fallujah Mosque Sparks Probe, Controversy", *Hamilton Spectator* (Ontario, Canada), 17 November 2004, at A12.

88 Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, 12 August, 1949.

89 Article 37 GC III provides that "[w]hen prisoners of war have not the assistance of a retained chaplain or of a prisoner of war minister of their faith, a minister belonging to the prisoners' or a similar denomination, or in his absence a qualified layman, if such a course is feasible from a confessional point of view, shall be appointed, at the request of the prisoners concerned, to fill this office."

90 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of 13 November 2001, 66 U.S. Federal Register 57.833, article 3(d).

91 E. Kraft Bindon, "Entangled Choices: Selecting Chaplains for The United States Armed Forces", (2004) 56 *Alabama Law Review* 251.

92 United Nations Commission for Human Rights, Resolution No. E/CN.4/2005/NGO/136, 1 March 2005.

93 S. Froifevaux, "L'humanitaire, le religieux et la mort", (2002) 84.848. *International Review of the Red Cross* 785; API, *supra* note 84, article 15(5).

94 International Committee of the Red Cross, "La Rétention et la relève du personnel sanitaire et religieux, accords-types et commentaires", (1955) 37 *International Review of the Red Cross* 10.

95 See the official communiqué by the IDF spokesman issued by the Israel Ministry of Foreign Affairs, "IDF Strikes Kills Hamas Leader Ahmed Yassin", 22 March 2004, available at <http://www.mfa.gov.il/>, 1 June 2004.

96 "Serb troops rounded up 150 women, children, and old people, in Novo Selo, a village near Zvornik, and forced them into the local mosque. They challenged the Imam Memic Suljo, to desecrate the mosque, make the sign of the cross, eat pork and finally to have sexual intercourse with a teenage girl. Suljo refused all these demands and was beaten and cut with knives." R. Gutman, "Unholy War; Serbs Target Culture, Heritage of Bosnia's Muslims", *Newsday* (Nassau and Suffolk Edition), 2 September 1992, p. 3.

97 L. Jacinto, "Murder in the Mosque, U.S. at a Loss After Killing of Senior Iraqi Shiite Cleric", *ABC News*, 14 April 14 2003, available at <http://abcnews.go.com/sections/world/Primetime/iraq_shia030414.html>, 24 June 2004.

less churches, mosques, synagogues, temples, and cemeteries were destroyed during armed conflicts. Particularly, during the conflict in the former Yugoslavia about 1,000 mosques, 483 Catholic churches, and 470 Serbian Orthodox churches were damaged or destroyed.[98] Similarly, in March 2001, the Buddhas of Bamiyan were destroyed in Afghanistan under the Taliban governance.[99] There is no doubt that targeting such valuable properties aims at the collective consciousness of the concerned people.

Religious property enjoys a threefold protection since it is protected per se as well as by virtue of being a civilian property and cultural property.

4.3.3.1. Religious Properties Protected as Worship Places

The principle of distinction between military targets and civilian objects is the main source of protection for worship places.[100] This principle is embedded both in treaty law, such as articles 8 and 17 of the Brussels Declaration,[101] articles 27 and 56 of the 1907 Hague Regulations,[102] articles 48, 52, and 53 (a) API,[103] and article 16 APII)[104] as well as in customary international law.

The usage of the terms "as far as possible" and "willful damage" gives member States latitude to escape responsibility. Indeed articles that offered protection without referring to such terms, are described as being more restrictive.[105] Members States can argue that the offered protection was afforded as far as it was possible and that the damage was not willful.

One of the main reasons for worship places to be targeted is that often, besides being a prayer place, they are used as shelters. "Historically, churches afforded sanctuary to those seeking refuge."[106] In August-September 2005, synagogues were used as shelter for settlers who opposed evacuation from Israeli settlements, which did not prevent the Israeli army from evacuating them. Worship places can only be targeted if military necessity can be demonstrated.[107]

4.3.3.2. Religious Properties Protected as Cultural and Historical Properties

Further, some religious properties, such as the Church of Saint Mary in Bethlehem in Palestine, the Al-Aqsa Mosque in Israel, and Mecca in Saudi Arabia, possess cultural and historical value. IHL assures the protection of cultural and historical properties. Since customary and treaty law grant immunity to buildings dedicated to religion, charitable purposes, and historic monuments. In particular, article 27 of the 1907 Hague Regulations[108] declares that "[…] all necessary steps must be taken to spare, as far as possible, buildings dedicated to […] historic monuments". However, the expression "necessary steps" is rather unclear and hence, may lead to contradictory interpretations.

The need to protect cultural buildings specifically led to the adoption in 1954 of an entire convention dedicated to the Protection of Cultural Property. First, it must be noted that the preamble recognises that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind." Indeed, the deliberate destruction of monuments, places of worship, and works of art is a sign of degeneration into total war, and can be described as the "other face of genocide."[109] Similarly, Article 4(1) of the Convention of the Protection of Cultural Property, requires member states "[t]o respect cultural property [...] by refraining from any use of the property [...] for purposes which are likely to expose it to destruction or damage." This article does not offer sufficient protection to cultural properties as it is directed to member States only, meanwhile excluding those which refused to ratify this legal instrument. Moreover, article 4 requires member States to "refrain from," thereby imposing a negative obligation rather than a positive one, which would have provided better protection. Extreme protection was accorded to the cultural properties by article 9

[98] T. Warrick, "Investigation by the United Nations Commission of Experts into the Destruction of Cultural Property", *Carnegie Foundation Symposium*, September 1994, <http://www.icomos.org/usicomos/Publications/Newsletters/1994_Issues/1994_no_7_8.htm>, 2 May 1994.

[99] I. MacWilliam, "Plans to Rebuild Bamiyan Buddhas", at BBC News, <http://news.bbc.co.uk/1/hi/world/south_asia/1790674.stm>, 30 January 2002.

[100] API, *supra* note 84, article 48.

[101] Declaration of Brussels Concerning the Laws and Customs of War, adopted by the Conference of Brussels, 27 August 1874, articles 8 and 17. The Declaration can be found in L. Friedman, THE LAW OF WAR: A DOCUMENTARY HISTORY, Vol. 1, pp. 194-203 (1972).

[102] Article 27 provides that "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." Similar rule is included in article 56 of the same instrument. Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 October, 1907, 36 Stat. 2277, 75 U.N.T.S. 287, articles 27 and 56, [hereinafter Hague Regulations of 1907].

[103] API, *supra* note 84, article 52 (3).

[104] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December, 1977, 1125 U.N.T.S. 609.

[105] *See,* the International Committee of the Red Cross Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, para. 2072.

[106] W.A. Logan, "Criminal Law Sanctuaries", (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 323, f.n. 16.

[107] GC IV, *supra* note 87, article 53; GC IV, *supra* note 87, article 16; Hague Regulations of 1907, *supra* note 102, article 27.

[108] Regulations Concerning the Laws and Customs of War on Land, annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907, article 27.

[109] Thus, the Nazi regime ordered the systematic destruction of all synagogues, Jewish schools and cultural centers, monuments and even cemeteries that could testify to the Jewish presence on the territory of the Reich and in occupied Europe. Books and works of art produced by Jewish scientists, writers and artists were taken from the libraries or museums and destroyed. Only in Prague did the Nazis preserve the synagogues, the Jewish cemetery and the Jewish town hall (also called Josephov town hall), because they planned, by an ultimate act of cynicism, to create a "museum of the extinct Jewish race," which would have testified, by contrast, to the extent of the destruction of all traces of Judaism across Europe. F. Bugnion, "The Origins and Development of the Legal Protection of Cultural Property in the Event of Armed Conflict", 14 November 2004, <http://www.icrc.org> under Humanitarian Law, Protected Persons and Properties, Cultural Property.

of the Convention of the Protection of Cultural Property which provides these with immunity. This immunity can be withdrawn only in exceptional cases.[110]

Article 53 AP I[111] pertaining to international armed conflict again formulated in negative terms prohibits three kinds of acts: "(a) of hostility directed against the historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; c) to make such objects the object of reprisals." Similar protection is reaffirmed in article 16 AP II[112] pertaining to non-international armed conflicts.

Sadly, this legal protection did not prevent damages to religious properties which occurred in the former Yugoslavia[113] and in Iraq as well as in Israel and on the territory of Palestine.[114]

4.3.3.3. Religious Properties Protected as Civil Objects

In addition, according to general rules pertaining to IHL, civilian properties are immune from being targeted, unless the necessities of war so demand. This principle of distinction between military objectives and civilian properties underlies most of the laws and customs of war; it is not only enshrined in The Hague Regulations (articles 23(g) and 25) and the articles 48 and 56 API, but also in customary international law and, thus, applicable in any armed conflict.[115]

Civilian objects are defined in article 52 (1 and 2) API as those "objects which are not military objectives [and] 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." Accordingly, worship places can be classified as civilian objects immune from military attacks, unless used for military purposes.

5. The Role of the Criminal Tribunals in the Protection of the Religious Rights and Freedom of Belief

Basic human rights, such as religious rights and freedom of belief, including the rights to practice, are, as depicted above, assured by international law. Furthermore, all States are obliged to assure, individually[116] or commonly,[117] the respect of human rights, as they are *erga omnes* rules binding on all States.[118]

The Security Council, which is, on behalf of the United Nations,[119] permitted to enforce human rights standards, has displayed an increased willingness to interpret human rights abuse as a threat to the peace, thus permitting action under Chapter VII of the Charter.[120] The Security Council thereby established two international criminal tribunals that played a considerable role in enforcing religious rights notably in relation to crimes based on the violation of the non-discrimination principle and the crime of genocide.

During the last three decades, State responsibility shows a flagrant failure to prevent violations against religious rights and freedom of belief. This is why a new trend towards the criminal responsibility is strongly appearing in religious rights. Moreover, an increasing number of international criminal courts are being established, thereby contributing to the jurisprudence on the protection of religious objects and personnel.

5.1. The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The Former Yugoslavia was the field of grave violations of, amongst others, religious rights and freedom of belief. As a result of the 1992 report of the Commission of Experts[121] concluding that there had been grave breaches to IHL, including "ethnic cleansing, mass killing […] and destruction of cultural and religious properties,"[122] Resolution 808 (1993)[123] was issued by the Security Council, establishing the International Criminal Tribunal for former Yugoslavia (ICTY). The ICTY was established to prosecute all persons responsible for such violations on the territory of the former Yugoslavia since 1991.[124] On 27 May 1993, the Security Council unanimously adopted the Statute of the ICTY.[125]

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[110] The Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 U.N.T.S. 215, available at <http://www.unesco.org>, article 11.

[111] API, *supra* note 84, article 53.

[112] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 U.N.T.S. 609.

[113] See The Institute for the Protection of the Cultural-Historical and Natural Heritage of the Republic of Bosnia and Herzegovina, EUR. PARL. DOC. (ADOC 6999) (1994), p. 46; Report on a Fact-Finding Mission on the Situation of the Cultural Heritage in Bosnia-Herzegovina and Croatia, 30 May – 22 June 1994, Eur. Parl. Ass. Rep. Doc. AS/Cult/AA, 27 June 1994, pp. 8-9; M. Wallenfels, "A Current Case: The Destruction of the Last Mosques in Banja Luka on 8 September 1993", (1993) 4 *Humanitäres Völkerrecht-Informationsschriften* 217.

[114] See the Report on a Fact-Finding Mission on the Situation of the Cultural Heritage in Bosnia-Herzegovina and Croatia, *supra* note 115, at 8.

[115] N. Barrett, "Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos", (2001) 32 *Columbia Human Rights Law Review* 443.

[116] GC IV, *supra* note 87, article 146.

[117] GC IV, *supra* note 87, article 148.

[118] P.G. Danchin, *supra* note 8, p. 77. See International Court of Justice, *Barcelona Traction, Light and Power Co.* (*Belgium* v. *Spain*), 1970 I.C.J. para. 4, 32, 5 February 1970.

[119] Charter of the United Nations, 26 June 1945, entered into force on 24 October 1945, 59 Stat. 1031, T.S. No. 973, 3 Bevans 1153, article 24 (1).

[120] C.J. Le Mon & R.S. Taylor, "Security Council Action in The Name of Human Rights: From Rhodesia to the Congo", (2004) 10 *University of California Davis Journal of International Law and Policy* 208.

[121] United Nations Security Council, Resolution 780 (1992), UN Doc. S/RES/780 (1992), 6 October 1992.

[122] United Nations Security Council, UN Doc. S/25274, 9 February 1993.

[123] United Nations Security Council, Resolution 827 (1993), UN Doc. S/RES/827 (1993), 25 May 1993.

[124] *Ibid.*, article 1.

[125] United Nations Security Council, Resolution 808 (1993), UN Doc. S/RES/808 (1993), 22 February 1993, [hereinafter ICTY Statute].

The ICTY has jurisdiction over war crimes and namely the "seizure of, destruction, or willful damage done to institutions dedicated to religion, charity, and education,"[126] thereby covering worship places, Mosques, Churches, Synagogues, and Temples. Furthermore, article 4 of the Statute provides that the tribunal can prosecute "persons committing genocide,"[127] concurrently adopting the definition enshrined in the genocide convention. As explained earlier, targeting a group of people as well as destroying their spiritual and religious heritage, based on their religion or belief, may be interpreted as genocide.[128] Muslims in the former Yugoslavia were subject to organised genocide and ethnic cleansing,[129] which clearly falls within the scope of the ICTY Statute. Finally, article 5 gives the tribunal the power to examine the "persecutions on […] religious grounds" as a crime against humanity.[130] The ICTY interpreted a number of acts as persecution committed on religious ground.

The ICTY was able to consider a number of cases relating to the protection of religious rights. For example, in the *Tadic* case, the defendant was sentenced to twenty years for "committing various acts of persecution [persecution on political, racial and/or religious grounds] as a crime against humanity."[131] In a similar case, the court charged *Dragan Nikolic* of persecuting "detainees [at Susica camp] on political, racial, and religious grounds. The accused persecuted Muslims and other non-Serb detainees by subjecting them to murders, rapes and torture,"[132] and sentenced him for 23 years of imprisonment.[133]

5.2. The International Criminal Tribunal for Rwanda (ICTR)

The ICTR was established by Security Council Resolution 955 (1994) to examine serious violations of IHL, crimes against humanity and genocide committed within the territory of Rwanda. The Statute of the ICTR repeats *verbatim* in article 2 the definition of genocide found in the genocide convention and, hence, violations based on religious difference may be prosecuted by the ICTR as genocide.

It should be noted that the ICTR attempted to define a religious group in the context of the crime of genocide, it states that "[t]he religious group is one whose members share the same religion, denomination, or mode of worship."[134] The question that must be posed is what protection might be provided to those who do not follow any religion (i.e., atheists or agnostic.)

Most of the violations falling within the competence of the ICTR were based on ethnic and not religious grounds. However, the tribunal had the chance to examine cases related to religious rights and freedom of belief. For example, in the case *Prosecutor* v. *Rukundo*, the ICTR declared that the defendant, a former religious personnel in the Rwandan Armed Forces, had acted in an incompatible way to his position and duties.[135] *Rukundo* was charged with genocide and crimes against humanity for murder and extermination, and allegedly issuing orders to attack Tutsi refugees who had fled to church facilities,[136] but not yet sentenced. Another example can be found in the case of *Juvenal Kajelijeli*, where the suspect was charged for committing "Crimes Against Humanity, Persecution on Racial, Political, Religious Grounds Pursuant to Article 3(h) of the Statute."[137] This charge was dismissed by the ICTR.[138] However, on 1 December 2003, the accused was sentenced for committing other crimes to life, a sentence reduced to forty–five years by the Appeal Chamber,.[139] Moreover, the ICTR sentenced *Ferdinand Mahimana* and *Jean-Bosco Barayagwiza* to life imprisonment.[140]

In another case, *Hassan Ngeze*, the owner and editor of a local newspaper "Kangura," who instigated the killing of Tutsi civilians, was sentenced to life imprisonment as he found responsible for committing "extermination on [...] religious ground."[141] For example, he published articles inciting to ethic hatred and violence, conducted a campaign against the Arusha Accords which stipulated power sharing with the Tutsi minority, and, between January and December 1994, he published lists of names of the members of Tutsi population and moderated Hutus to be eliminated.

5.3. The International Criminal Court (ICC)

The Statute of the International Criminal Court (ICC), adopted in Rome on 17 July 1998 is, among others, charged to protect "those non-confessional, non-combatant military personnel who carry out a similar function",[142] such as religious personnel. In addition, religious buildings are subject to the protection of the ICC statute inasmuch as article 8

[126] *Ibid.*, article 3 (d).

[127] *Ibid.*, article 4.

[128] F. Bugnion, *supra* note 111.

[129] Lisa L. Schmandt, "Comment, Peace With Justice: Is It Possible for The Former Yugoslavia?", (1995) 30 *Texas International Law Journal* 348.

[130] ICTY Statute, *supra* note 128, article 5 (h).

[131] The ICTY, *The Prosecutor* v. *Dusko Tadic* a/k/a "Duke", Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997, para. 74. The ICTY, *The Prosecutor* v. *Dusko Tadic*, Case No. IT-94-1-R, The Appeal Chamber, 31 January 2000, para. 32.

[132] ICTY, *Prosecutor* v. *Dragan Nikolic*, Case No. IT-94-2-S, Trial Chamber II, 18 December 2003, para. 66-67.

[133] *Ibid.*

[134] ICTR, *The Prosecutor* v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Chamber I, 2 September 1998, para. 514.

[135] ICTR, *The Prosecutor* v. *Emmanuel Rukundo*, Case No. ICTR-2001-70-I, Judgment, 27 March 2003, paras 6 and 7.

[136] *Ibidem*.

[137] ICTR, *The Prosecutor* v. *Juvenal Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber II, 1 December 2003, para. 21.

[138] It is alleged that the accused commanded, organized, supervised and directly participated in attacks against Tutsi, and that he ordered and witnessed the rapping and other sexual assaults on Tutsi females. *Ibid.*, paras. 20, 926 and 942.

[139] *Ibid.*, paras. 968.

[140] ICTR, *The Prosecutor* v. *Ferdinand Nahimana & Jean-Bosco Barayagwiza & Hassan Ngeze*, Case No. ICTR-99-52-T, Trial Chamber I, 3 December 2003.

[141] *Ibid.*, Count 7.

[142] Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, September 2002, Official Records, U.N. Doc. ICC-ASP/1/3, Part. II B, p. 145, note 56, pp. 3-10.

criminalises "[i]ntentionally directing attacks against buildings dedicated to religion [...] or charitable purposes."[143]

The ICC protection is not limited to premises only. Individuals as well are subject to the protection of the Statute. Article 6 ICC Statute, which reiterates the definition of genocide encapsulated in the genocide convention and the statutes of the *ad hoc* international tribunals, criminalises any attack directed against individuals based on religious differences.

In 2004 the Security Council, acting under Chapter VII UN Charter, formed a committee to report on the situation in Darfur, Sudan.[144] The report encouraged the Security Council to request the ICC to launch investigations into the case, which it did in March 2005.[145] The incumbent Muslim government of Sudan is suspected of committing crimes against Christian Sudanese of Darfur.[146] Fifty-one persons are alleged to be responsible for violations of numerous provisions of the ICC Statute and, thus, should be soon interrogated by the Prosecutor of the ICC. If the investigations reveal that violations were committed against religious rights and freedom of belief, it is likely that the perpetrators will be sentenced and punished pursuant to the ICC statute. The Sudanese government established its national criminal court for war criminals to prosecute suspected personnel,[147] and allegedly to escape international jurisdiction which is only subsidiary to national jurisdiction. If the standards of justice used by Sudan do not meet the international community's expectations, then the ICC may take over the cases.

6. Conclusion

All religions call for a peaceful relationship with other believers. Moreover, all agree on the value of humans, worship places, civil and religious properties. Therefore, religion should not be used or accepted to be used as a pretext to wage war. Muslims should love their Christians and Jewish brothers and vice versa.

During armed conflicts, neither religious personnel, nor religious properties, nor worship places should be targeted, unless they are used for military purposes. Before evacuating the Gaza strip in August-September 2005, Israel destroyed everything except synagogues, which, unfortunately, were severely damaged by the Palestinians once the Israeli troops had left. This shows the lack of respect for each others' holy places.

International law cares for religious rights and freedom of belief in peacetime as well as in times of armed conflict. However, in practice, such protection does not meet the needs of religious personnel and properties worldwide. Internal laws of individual States are often in conflict with religious rights and freedom of belief, and further are being subject to violations. Violations committed against religious rights, properties, or personnel should be criminalised *per se*, and not only as war crimes, crimes against humanity, or genocide. A specialised instrument is needed so that, independently, it can protect these religious rights and freedom of belief.

Specialised international conventions assuring the respect of all religions should be concluded, signed, and ratified by all States. Criminalising States and individuals who use religious pretexts as an excuse to wage war or commit international crimes against religious properties or personnel should be entrenched in such conventions.

Moreover, an international organisation should be created to assure the religious rights and the freedom of belief, the immunity of religious personnel and properties around the world in peacetime, and in times of armed conflict. Within this organisation, a judicial body should be specialised to examine cases involving encroachments upon religious rights in peacetime and in times of armed conflict. Experts within this organisation should be capable of investigating and settling religious differences in peacetime, assisting the ICRC in times of armed conflicts, and harmonising their effort in favour of the needy and victims.

Despite the pressure that took place in the recent years against religious rights and freedom of beliefs, in Sudan, former Yugoslavia, Great Britain, Egypt, United States, Saudi Arabia, and Israel, it is hoped that there will exist a healthy environment for the cohabitation of religions. During the meetings in the General Assembly in September 2005, leaders raised the issue of respecting religious rights and freedom of belief. *Pervez Musharraf*, the Pakistani president declared on 15 September 2005 that "[i]t must not be allowed to engender a clash of civilizations- a clash between Islam and the West."[148] The establishment, in JFK Airport in New York, of three worship places next to each other, mosque, church, and synagogue, is also promising of a positive future in the relationship between believers and non-believers.

When human or natural catastrophes take place, such as Hurricane Katrina, Earthquake in Iran, or a suicide bomber in Jerusalem, ambulances with a Red Cross, a red or green crescent, or the Star of David work side by side to save human lives. In view of this, we should continue to work to improve relations among nations, teaching new generations to value and respect not only living and working together, but also respecting each others religious and cultural values. ■

[143] Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, entered into force 1 July 2002, arts. 8(2)(b)(ix) and 8(2)(e)(iv). This prohibition applies to acts committed in connection with both national and international armed conflict.

[144] United Nations, Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/60.

[145] United Nations Security Council, Resolution 1593 (2005), UN Doc. S/RES/1593, 31 March 2005.

[146] K. Khan, "Refugee Conditions in Darfur Worsening, CWS Urges for More Action", *The Christian Post,* 7 October 2008, <http://www.christianpost.com/article/africa/230//refugee.conditions.in.darfur.worsening.cws.urges.for.more.action/1.htm>, 10 October 2005.

[147] BBC News, "Sudan Sets up War Crimes Tribunal: Sudan Has Set up a Special Court to Try those Accused of War Crimes in the Darfur Region", 14 June, 2005, <http://news.bbc.co.uk/2/hi/africa/4091146.stm>.

[148] Pervez Musharraf, *Pakistani President Speech before the GA of the UN*, 15 September 2005, <http://in.rediff.com/news/2005/sep/15pmun1.htm>, 20 September 2005.

Die Verfahren wegen „Contempt of Court" gegen Journalisten vor dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien und die Pressefreiheit

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The following article assesses the contempt of court cases against six Croatian journalists before the International Criminal Tribunal for the former Yugoslavia. The journalists revealed the identity of two protected witnesses who testified in the *Blaskic* case. The author gives an overview over the offence of contempt of court in the Rules of Procedure and Evidence of the ICTY. He further argues that the ICTY should use self-restraint in the contempt-cases against journalists. In the proceedings the ICTY has to respect the safeguards of human rights instruments, namely article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1. Die *Contempt*-Verfahren vor dem ICTY gegen kroatische Journalisten

1.1. Hintergrund

Im Jahr 2005 wurden vor dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien (ICTY) Anklagen gegen fünf kroatische Journalisten sowie einen ehemaligen Mitarbeiter des kroatischen Geheimdienstes und Berater des ehemaligen kroatischen Präsidenten *Franjo Tudjman*, der mittlerweile ebenfalls als Journalist arbeitet, wegen *Contempt of Court* erhoben.[1] Einer der Journalisten weigerte sich zur ersten Anhörung vor dem ICTY zu erscheinen, wurde vor laufenden Kameras verhaftet und an den ICTY überstellt.[2] Daraufhin intervenierte der Beauftragte für die Freiheit der Medien der OSZE beim Präsidenten des ICTY und forderte diesen zur Freilassung des Journalisten auf.[3] Der Haftbefehl wurde nach der Anhörung durch die Strafkammer aufgehoben. Die Journalisten hatten in den Jahren 2000 bis 2004 in verschiedenen kroatischen Zeitungen die Identität von zwei Zeugen offen gelegt. Diese hatten im Strafverfahren gegen den bosnisch-kroatischen General *Blaskic*, in Sitzungen von denen die Öffentlichkeit ausgeschlossen war, ausgesagt. Die Identität der Zeugen wurde aufgrund von Anordnungen des Gerichtes geheim gehalten. Weiterhin hatten die Journalisten Auszüge aus den seinerzeit der Öffentlichkeit nicht zugänglichen Protokollen der Zeugenaussagen veröffentlicht. Der Fall *Blaskic* gilt als Testfall für die Bereitschaft Kroatiens, die Mitverantwortung für Verstöße gegen das humanitäre Völkerrecht, die in den 90er Jahren in Bosnien-Herzegowina begangen wurden, zu übernehmen. *Blaskic* wurde wegen Kriegsverbrechen und Verbrechen gegen die Menschlichkeit in Zentralbosnien, unter anderem dem Massaker im zentralbosnischen Ahmici am 16. April 1993, dem über 100 Einwohner des Dorfes zum Opfer fielen, angeklagt. Der Prozess gegen *Blaskic* ist untypisch für die Praxis des ICTY, da die Beweismittelgewinnung besonders kompliziert war.[4] In der ersten Instanz wurde *Blaskic* zu einer 45-jährigen Haftstrafe verurteilt.[5] Da nach dem Tod des ehemaligen kroatischen Staatspräsidenten *Tudjman* die offizielle Politik Kroatiens gegenüber dem ICTY geändert wurde, konnte die Verteidigung im Verfahren vor der Rechtsmittelkammer neue Beweismittel vorlegen. Mit diesen konnte sie nachweisen, dass es parallele Kommandostrukturen, auf die *Blaskic* keinen Einfluss hatte, gab. *Blaskic* wurde daher überwiegend entlastet und die Haftstrafe auf neun Jahre reduziert.[6] Die Anklagebehörde versucht seitdem eine Wiederaufnahme des Verfahrens zu Lasten des Angeklagten zu erreichen. Bei den Zeugen, die im erstinstanzlichen Prozess gegen *Blaskic* im Jahr 1997 bzw. 1998 aussagten, handelte es sich zum einen um einen niederländischen SFOR-Offizier, zum anderen um den jetzigen kroatischen Staatspräsidenten *Stjepan Mesic*. Die Tatsache, dass *Mesic* im *Blaskic*-Verfahren ausgesagt hatte, galt unabhängig von den Veröffentlichungen seit langem als offenes Geheimnis und war somit allgemein bekannt. Im Übrigen räumte *Mesic* nach seinem Amtsantritt im Jahr 2000 mehrfach ein, dass er als Zeuge ausgesagt habe und gab Details seiner Zeugenaussage selber bekannt.[7] Im Zuge der Berichterstattung über die Verfahren gegen die Journalisten wurde der Name *Mesic* auch in der internationa-

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1 *Contempt of Court* kann mit Missachtung des Gerichts übersetzt werden.

2 Siehe *V. Wengert*, Kroatien: Vor laufender Kamera festgenommen, unter: http://www.diepresse.com (am 17. Oktober 2005).

3 Siehe Press Release, OSCE Media Freedom Representative asks Hague Tribunal to Release Croatian Journalist sowie Letter from OSCE Representative on Freedom of the Media, *Miklos Haraszti*, to the President of the ICTY, HE *Theodor Meron* unter http://www.osce.org/item/16565.html (am 12. Juni 2006).

4 Vgl. *J. Hagan*, Justice in the Balkans – Prosecuting War Crimes in the Hague Tribunal, Chicago 2003, S. 224 f. So hatte sich der Gerichtshof mit der Frage auseinanderzusetzen, in welchem Umfang Staaten verpflichtet sind, Beweismaterial vorzulegen, vgl. dazu die Grundsatzentscheidung The Prosecutor v. *Tihomir Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108*bis* v. 29. Oktober 1997.

5 The Prosecutor v. *Tihomir Blaskic*, Judgement, ICTY-95-14-T v. 3. März 2000.

6 The Prosecutor v. *Tihomir Blaskic*, Judgement, ICTY-95-14-A v. 29. Juli 2004, zum *Blaskic*-Urteil *H. Meiertöns*, Superior Responsibility and *mens rea* – The Appeals Chamber Decision in the *Blaskic*-Case, in: Humanitäres Völkerrecht – Informationsschriften 1 (2005), S. 53.

7 *J. Anderson*/*G. Jungvirth*, *Mesic*: Hero or Traitor?, Tribunal Update No. 437, 27. Januar 2006, unter http://www.iwpr.net (am 12. Juni 2006).

len Presse genannt.[8] Schließlich hob die Rechtsmittelkammer des ICTY im Januar 2006 die Schutzmaßnahmen für beide Zeugen auf und veröffentlichte die Namen.[9]

1.2. Der Gegenstand der Verfahren

1.2.1. Das Verfahren *Marijacic* und *Rebic*

Das Verfahren *Marijacic* und *Rebic* betrifft die Offenlegung der Identität des niederländischen SFOR-Offiziers *Johannes van Kuijk.* Am 18. November 2004 erschien ein Artikel in der kroatischen Zeitschrift *Hrvatski List* über die Zeugenaussage *van Kuijks* vor dem ICTY. Dieser wurde von *Ivica Marijacic,* dem damaligen Chefredakteur der Zeitung, geschrieben. Im Zusammenhang mit diesem Artikel erschien ein Interview mit *Markica Rebic*, der sich dazu bekannte, diese Informationen weitergegeben zu haben. *Rebic* ist ehemaliger Geheimdienstmitarbeiter und nunmehr Mitherausgeber der Zeitschrift *Hrvatski List*. Beiden wurde vorgeworfen, willentlich in die Tätigkeit des Gerichts eingegriffen zu haben. *Marijacic* habe die Identität eines geschützten Zeugen preisgegeben und Auszüge aus dessen Zeugenaussage veröffentlicht. *Rebic* habe die Informationen weitergegeben. Mit Urteil vom 10. März 2006 wurden *Marijacic* und *Rebic* wegen *Contempt of Court* gemäß Regel 77(A)(ii) der Verfahrensordnung des ICTY zu einer Geldstrafe von jeweils 15.000 EUR verurteilt.[10] Die Befugnis zur strafrechtlichen Verfolgung von *Contempt of Court* ergäbe sich aus der inhärenten Zuständigkeit des Gerichtshofes. Der objektive Tatbestand sei durch die Weitergabe der Informationen bzw. durch deren Veröffentlichung erfüllt. Das Gericht habe am 16. Dezember 1997 wirksam die Durchführung einer nicht-öffentlichen Sitzung angeordnet. Unerheblich sei, dass die Rechtsmittelkammer am 16. Januar 2006 die Schutzmaßnahmen aufgehoben habe. Beide Angeklagten hätten vorsätzlich gehandelt. *Marijacic* argumentierte, es sei das Recht der Allgemeinheit, Informationen über die Verfahren vor dem ICTY zu erhalten, betroffen. Dazu stellte die Kammer im Urteil fest, die Strafkammern hätten gemäß dem ICTY-Statut das Recht, die Öffentlichkeit bzw. die Presse von der Strafverhandlung auszuschließen. Soweit erforderlich, könne auch die Veröffentlichung von nicht-öffentlichen Dokumenten verboten werden. Auch das Argument *Rebics*, *van Kuijk* als holländischer Offizier sei nicht gefährdet gewesen, wäre nicht überzeugend. Ob ein Zeuge gefährdet sei, könne nicht von Dritten bewertet werden. Allein entscheidend sei die Anordnung von Schutzmaßnahmen durch die Strafkammer. Die Frage der Gefährdung könne nicht auf Tatbestandsebene berücksichtigt werden, aber Einfluss auf das Strafmaß haben. Auf der Strafzumessungsebene sei zu Lasten der Angeklagten zu berücksichtigen, dass die Veröffentlichung zur Aussageverweigerung anderer Personen vor dem ICTY führen könne. Die Missachtung schwäche das Vertrauen in die Schutzmaßnahmen des ICTY. Weiterhin solle eine Abschreckung erfolgen, um in ähnlichen Fällen eine Wiederholung zu vermeiden. Die Rechtsmittelkammer des ICTY bestätigte die Entscheidung mit Urteil vom 27. September 2006.[11] Der Gerichtshof habe die inhärente Zuständigkeit zur Strafverfolgung von *Contempt of Court.* Regel 77(A)(ii) der Verfahrensordnung gewähre die Möglichkeit, jede Person, die willentlich eine Anordnung des Gerichtshofes missachte, wegen *Contempt* strafrechtlich zu verfolgen. Dies sei auch gemäß Art. 22 des ICTY-Statuts erforderlich, um das Mandat des Gerichtshofes zu erfüllen. Auch den Feststellungen der Strafkammer zur Tatbestandserfüllung stünden keine Bedenken entgegen. Selbst wenn der Grund für die Geheimhaltung nicht mehr existiere, so bestehe die logische Grundlage der Entscheidung, dass eine Information geschützt sei, bis die Geheimhaltung ausdrücklich aufgehoben werde, fort.

1.2.2. Die Verfahren *Krizic*, *Seselj*, *Margetic* und *Jovic*

Die weiteren Verfahren betreffen den Komplex der Offenlegung der Identität des kroatischen Präsidenten *Mesic* und dessen Zeugenaussage vor dem ICTY.[12] *Mesic* war der letzte Präsident des Präsidiums der SFRJ und früherer Vertrauter des kroatischen Präsidenten *Tudjman*. Zum Zeitpunkt seiner Aussage war er Oppositionspolitiker und hatte sich mit *Tudjman* überworfen. *Mesic* machte zunächst am 19. April 1997 gegenüber der Anklagebehörde des ICTY eine Aussage. Diese wurde dem damaligen Präsidenten *Tudjman* sowie der Presse zugespielt, worauf *Mesic* und seine Familie Drohungen erhielten.[13] *Mesic* sagte danach vom 16. bis zum 19. März 1998 im Strafverfahren gegen General *Blaskic* vor einer Strafkammer des ICTY aus.[14] Die Strafkammer ordnete an, dass die Vernehmung *Mesics* in nicht-öffentlicher Sitzung erfolgen solle.[15]

Zwischen dem 27. und dem 30. November 2000 veröffentlichte die kroatische Zeitschrift *Slobodna Dalmacija* Auszüge aus der Stellungnahme *Mesics* vom 19. April 1997 und legte seine Identität sowie die Tatsache, dass er auch später im *Blaskic*-Prozess ausgesagt hatte, offen. Am 1. Dezember 2000 ordnete die Strafkammer gegenüber *Slobodna Dalmacija* sowie einer weiteren Zeitschrift ein Verbot des Abdrucks der Zeugenaussage *Mesics* und anderer geschützter Zeugen an und wies darauf hin, dass Verstöße als *Contempt of Court* geahndet werden können.[16] Obwohl die Anordnung der Zeitschrift *Slobodna Dalmacija* zugestellt wurde, veröffentlichte diese weiterhin Auszüge aus den Protokollen. Am 26. November 2004 publizierte die Zeitschrift *Hrvatsko Slovo* Teile der Protokolle und nannte in diesem Zusammenhang den

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[8] Siehe *Wengert,* a.a.O. (Fn. 2).

[9] The Prosecutor v. *Tihomir Blaskic*, Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v. *Marijacic* & *Rebic* Case, IT-95-14-R v. 16. Januar 2006 und Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v. *Seselj* & *Margetic* Case, IT-95-14-R v. 24. Januar 2006.

[10] The Prosecutor v. *Ivica Marijacic* & *Markica Rebic*, Judgement, IT-95-14-R77.2.

[11] The Prosecutor v. *Ivica Marijacic* & *Markica Rebic*, Judgement, IT-95-14-R77.2-A.

[12] Protokoll, einsehbar unter http://www.un.org/icty/transe14/980316IT.htm (am 12. Juni 2006).

[13] *Ibid*., S. 7078 ff.

[14] *Ibid*., S. 7086.

[15] *Ibid*., S. 7088.

[16] The Prosecutor v. *Tihomir Blaskic*, Order for the Immediate Cessation of Violations of Protective Measures for Witnesses v. 1. Dezember 2000.

Namen *Mesics*. Am 2. Dezember 2004 erging eine Anordnung des Gerichts an alle Mitarbeiter der Zeitschrift *Hrvatsko Slovo*, wonach die Veröffentlichungen zu unterbleiben hätten.[17] Die Zeitschrift veröffentlichte daraufhin die Anordnung gemeinsam mit einem Artikel, der die Identität *Mesics* wiederum offen legte. Am 4. Dezember 2004 zeigte einer der Betroffenen, *Domagoj Margetic*, gegenüber dem ICTY an, dass er nunmehr der Chefredakteur der neu gegründeten Zeitschrift *Novo Hrvatsko Slovo* sei. Obwohl er in der Anordnung des Gerichts persönlich genannt werde, erkenne er diese nicht an. Am 10. Dezember 2004 veröffentlicht er in *Novo Hrvatsko Slovo* weitere Auszüge aus dem Protokoll der Zeugenaussage. Die Anklagebehörde erhob zwischen April und August 2005 wegen dieser Vorwürfe Anklage gegen die verantwortlichen Redakteure *Jovic*, *Seselj*, *Krizic* und *Margetic*. Im September 2005 stellte die Anklagebehörde den Antrag, die Verfahren zu verbinden.[18] Am 21. Dezember 2005 lehnte die Strafkammer Anträge *Jovics* und *Krzics*, in denen diese die Zuständigkeit des Gerichts rügten, ab. In der ständigen Rechtsprechung sei anerkannt, dass der ICTY über die inhärente Zuständigkeit zur Verfolgung von *Contempt of Court* verfüge.[19] Nachdem die Rechtsmittelkammer die Schutzmaßnahmen gegen *Mesic* im Januar 2006 aufgehoben hatte, wurden die Protokolle vollständig auf der Webseite des ICTY veröffentlicht.[20] Dem Antrag der Anklagebehörde auf Verbindung gab das Gericht nur bezüglich der Veröffentlichungen im Jahr 2004 statt. Der Fall *Jovic*, der die erste Namensnennung im Jahr 2000 betrifft, sollte getrennt verhandelt werden. Daraufhin zog die Anklagebehörde die Anklagen in Sachen *Seselj*, *Krizic* und *Margetic* zurück.[21] Als Argument führte sie unter anderem verfahrensökonomische Gründe an. *Jovic* wurde mit Urteil vom 30. August 2006 gemäß Regel 77 (A) (ii) der Verfahrensordnung schuldig wegen der Begehung von *Contempt of Court* gesprochen und zu einer Geldstrafe von 20.000 EUR verurteilt.[22] Die Kammer stützte sich dabei auf ihre inhärente Kompetenz zur Verfolgung von *Contempt of Court*. Der objektive Tatbestand sei durch die Veröffentlichung der Protokolle erfüllt. Auch habe *Jovic* Kenntnis von der Geheimhaltungspflicht gehabt. Es komme nicht darauf an, dass Präsident *Mesic* besser geschützt sei als andere Zeugen, sondern ausschließlich auf den vorsätzlichen Verstoß gegen eine Anordnung des Gerichts. Auch habe der Angeklagte, nur weil er Journalist sei, nicht das Recht Anordnungen des Gerichts zu missachten. Der Gerichtshof habe gemäß Art. 20 Abs. 4 des ICTY-Statuts das Recht Verfahren unter Ausschluss der Öffentlichkeit durchzuführen, bestimmte Beweismittel vertraulich zu behandeln und gefährdete Zeugen zu schützen. Diese Anordnungen würden das Recht auf freie Meinungsäußerung in legitimer Weise einschränken. Die Äußerungen *Mesics*, dass er im Fall *Blaskic* ausgesagt habe, seien jedoch strafmildernd zu berücksichtigen. Dies könne dahin gehend ausgelegt werden, dass zumindest ein Teil der Schutzmaßnahmen nicht mehr erforderlich sei. Jedoch habe *Mesic* den Inhalt der Zeugenaussage nicht selbst preisgegeben. Strafverschärfend sei zu berücksichtigen, dass eine Veröffentlichung in insgesamt 22 Ausgaben erfolgte. Weiterhin diene eine Bestrafung zur Abschreckung.

2. Rechtsgrundlagen für die Anklagen wegen *Contempt of Court*

2.1. Der Begriff des *Contempt of Court*

Der Begriff *Contempt of Court* entstammt dem angloamerikanischen *common law*. *Contempt of Court* umfasst dort mehrere Tatbestände, wie Verstöße gegen Veröffentlichungsverbote über laufende Gerichtsverfahren, Missachtung des Gerichts, Einschüchterung von Zeugen oder Prozessparteien, Nichtbefolgung gerichtlicher Anordnungen und sonstige Eingriffe in schwebende Gerichtsverfahren.[23] Dem kontinentaleuropäischen Recht ist das Konzept des *Contempt of Court* unbekannt.[24] Jedoch gibt es beispielsweise auch im deutschen Recht neben der Möglichkeit der Verhängung sitzungspolizeilicher Maßnahmen gemäß § 176 ff. GVG den rechtspolitisch umstrittenen Straftatbestand des § 353 d StGB, der ebenfalls verschiedene Veröffentlichungsverbote enthält.

2.2. Der Straftatbestand des *Contempt of Court* in Regel 77 der Verfahrensordnung des ICTY

Die Verfahrensordnung des ICTY enthält einen Tatbestand des *Contempt of Court*. Dieser stellt gemäß Regel 77(A) folgende Handlungen unter Strafe:

– die unberechtigte Weigerung eines Zeugen, Fragen zu beantworten;
– die Offenlegung von Informationen, in Kenntnis der Tatsache, dass eine Anordnung der Kammer verletzt wird;
– die Nichtbefolgung einer Anordnung der Kammer, vor dieser zu erscheinen oder Dokumente vorzulegen, ohne ausreichende Entschuldigung;

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[17] The Prosecutor v. *Tihomir Blaskic*, Order for the Immediate Cessation of Violations of Protective Measure for Witnesses, IT-95-14-A v. 2. Dezember 2004.

[18] The Prosecutor v. *Josip Jovic*, *Stjepan Seselj*, *Marijan Krizic*, *Domagoj Margetic*, Consolidated Indictment, IT-95-14R.77.3, R77.4, R77 v. 12. September 2005.

[19] The Prosecutor v. *Josip Jovic*, Decision to Deny the Accused *Josip Jovic's* Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment, IT-95-14 & 14/2 R 77, Abs. 9 f; The Prosecutor v. *Marijan Krizic*, IT-95-14-R77.4, Decision to Deny the Accused *Marijan Krizic's* Preliminary Motion to Challenge Jurisdiction, Abs. 10 ff.

[20] Siehe Protokoll, a.a.O. (Fn. 12).

[21] Vgl. Prosecutor v. *Stjepan Seselj*, *Domagoj Margetic*, *Marijan Krizic*, Decision on the Prosecution Motion to Withdraw the Indictment v. 20. Juni 2006, IT-95-14-R77.5. Jedoch wurde am 30. August 2006 eine weitere Anklage gegen *Domagoj Margetic* erhoben, IT-95-14-R.6. Der im ersten Verfahren nicht anwaltlich vertretene *Margetic* stellte nach Verfahrenseinstellung die Namen aller geschützten Zeugen im Fall *Blaskic* ins Internet. Er gab an, dass er die Liste von einem Mitarbeiter der Anklagebehörde zur Vorbereitung seiner Verteidigung erhalten habe.

[22] The Prosecutor v. *Josip Jovic*, Judgement, IT-95-14 & IT-95-14/2-R77.

[23] *H.-J. Bartsch*, Contempt of Court und die Grenzen der Pressefreiheit, in: Europäische Grundrechte Zeitschrift (1977), S. 464.

[24] Siehe *M. Bohlander*, International Criminal Tribunals and their Power to Punish Contempt and False Testimony, in: Criminal Law Forum 12 (2001), S. 91, 94 f.

– die Bedrohung, die Einschüchterung, die Verletzung oder die Bestechung bzw. die anderweitige Einflussnahme auf Zeugen, einschließlich ehemaliger oder potentieller Zeugen sowie
– die Bedrohung, die Einschüchterung, die Verletzung oder die Bestechung bzw. die anderweitige Einflussnahme auf andere Personen, um zu verhindern, dass diese eine Anordnung des Gerichts befolgen.

Weiterhin werden Anstiftung und Versuch zum *Contempt of Court* unter Strafe gestellt.[25] Als Strafe ist derzeit eine Geldstrafe von bis zu 100.000 EUR beziehungsweise eine Haftstrafe bis zu sieben Jahren oder beides vorgesehen.[26] Der Gerichtshof hat außerdem die Möglichkeit, wegen *Contempt* verurteilte Verteidiger von Verfahren vor dem ICTY auszuschließen.[27] Daneben gibt es einen Straftatbestand des Meineids in Regel 91 der Verfahrensordnung. Mit beiden Tatbeständen wird neues materielles Strafrecht geschaffen. Aufgrund der Formulierung und des Strafrahmens handelt es sich bei den *Contempt*-Regelungen nicht lediglich um administrative Bestimmungen.[28] Der *Contempt*-Tatbestand des ICTY ist wesentlich strenger als der des Internationalen Strafgerichtshofes. Dessen Statut und Verfahrensordnung sehen lediglich Freiheitsstrafen von bis zu fünf Jahren bzw. Geldstrafen vor.[29] Bislang wurden vor dem ICTY gegen insgesamt 19 Personen Verfahren wegen *Contempt of Court* eingeleitet: Betroffen waren Strafverteidiger, die bewusst gefälschte Beweismittel in den Prozess einführten und Zeugen beeinflussten[30] bzw. die die Identität eines geschützten Zeugen preisgegeben hatten;[31] weiterhin Angeklagte und Dritte, denen die Einschüchterung von Zeugen vorgeworfen wurde,[32] sowie ein Zeuge im *Milosevic*-Prozess, der sich weigerte, während der krankheitsbedingten Abwesenheit des Angeklagten mit seiner Zeugenaussage fortzufahren.[33]

2.3. Inhärente Zuständigkeit des ICTY zur Bestrafung von *Contempt of Court*?

Wie dargelegt, beruht die Strafbarkeit von *Contempt of Court* nicht auf dem Statut des ICTY selbst, sondern auf einer Regel in der Verfahrensordnung. Hier liegt der Unterschied zum Internationalen Strafgerichtshof, wo Delikte gegen die Rechtspflege in Art. 70 und die Möglichkeit der Verhängung administrativer Maßnahmen wegen sonstigen Fehlverhaltens in Art. 71 des ICC-Statutes selbst festgelegt sind. Dies wirft die Frage nach der Befugnis des ICTY zur Verfolgung dieses Delikts auf. Der ICTY wurde aufgrund der Resolution des UN-Sicherheitsrates 827 vom 25. Mai 1993 gegründet.[34] Er ist zuständig für die Verfolgung schwerer Verletzungen des humanitären Völkerrechts, die seit dem Jahr 1991 auf dem Gebiet des ehemaligen Jugoslawien begangen wurden.[35] Weder bei der Aufdeckung der Identität von geschützten Zeugen noch bei der unerlaubten Veröffentlichung von Sitzungsprotokollen handelt es sich um Verletzungen des humanitären Völkerrechts. Eine explizite Befugnis zur strafrechtlichen Ahndung von *Contempt of Court* enthält das Statut nicht. Art. 15 ICTY-Statut gewährt den Richtern lediglich die allgemeine Befugnis, in der Verfahrensordnung Maßnahmen zum Schutz von Opfern und Zeugen zu treffen.[36] Aufgrund der Ermächtigungsgrundlage in Art. 15 ICTY-Statut haben die Richter des ICTY die Verfahrensordnung am 11. Februar 1994 erlassen und bis zum September 2006 39-mal ergänzt. Der Tatbestand des *Contempt of Court* wurde dabei fünf Mal geändert. Eine in der Literatur vertretene Auffassung kommt zu dem Ergebnis, dass keine Befugnis des ICTY zur strafrechtlichen Verfolgung von *Contempt of Court* bestehe, weil sich eine ausdrückliche Befugnis zur Schaffung von Strafrecht nicht aus dem ICTY-Statut ergibt.[37] Dagegen geht der ICTY in seiner ständigen Rechtsprechung davon aus, dass er eine inhärente Zuständigkeit zur Strafverfolgung von *Contempt of Court* besitze.[38] Für diese Auffassung sprechen einige Argumente. Der ICTY kann nur ordnungsgemäß arbeiten, wenn potentiell gefährdete Zeugen darauf vertrauen können, dass ihre Identität nicht preisgegeben wird, und wenn sonstige wirksame Maßnahmen zum Schutz von Zeugen ergriffen werden. Für die generelle Zulässigkeit der Strafverfolgung von *Contempt of Court* spricht auch, dass es in allen Rechts-

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[25] Regel 77 (B) der Verfahrensordnung.

[26] Regel 77 (G) der Verfahrensordnung.

[27] Regel 77 (I) der Verfahrensordnung.

[28] *A. Klip*, Witnesses before the International Criminal Tribunal for the former Yugoslavia, in: Revue Internationale de Droit Pénal 67 (1996), S. 267, 276.

[29] Vgl. Im Einzelnen *Bohlander*, a.a.O. (Fn. 24), S. 109.

[30] The Prosecutor v. *Dusko Tadic*, Judgement on Allegation of Contempt against prior Counsel *Milan Vujin*, Judgement IT-94-1-A-R77 v. 31. Januar 2000.

[31] The Prosecutor v. *Zlatko Aleksovski*, Judgement on Appeal by *Anto Nobilo* against Findings of Contempt, IT-95-14/1-AR77 v. 30. Mai 2001. Das Verfahren betraf ebenfalls den *Blaskic*-Prozess. *Anto Nobilo*, der Verteidiger *Blaskics*, hatte versehentlich die Identität eines geschützten Zeugen bekannt gegeben, wurde erstinstanzlich wegen *Contempt of Court* verurteilt, jedoch von der Rechtmittelkammer freigesprochen.

[32] Vgl. z.B. The Prosecutor v. *Beqa Beqaj*, Judgement on Contempt Allegations, IT-03-66-T-R77 v. 27. Mai 2005.

[33] The Prosecutor v. *Slobodan Milosevic*, Contempt Proceedings against *Kosta Bulatovic*, Decision on Contempt of the Tribunal, IT-02-54-R77.4 v. 13. Mai 2005.

[34] UN Doc. S/RES/827 (1993), 25. Mai 1993.

[35] Art. 1 ICTY-Statut.

[36] Ausführlich zur Problematik des Zeugenschutzes vor dem ICTY: *S.R. Lüder*, Der Schutz von Zeugen im Recht des Jugoslawien-Strafgerichtshofs und im nationalen Recht, in: *H. Fischer / S.R. Lüder* (Hrsg.), Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof, Berlin 1999, S. 138 ff.; *C. Chinkin*, The Protection of Victims and Witnesses, in: *G. Kirk McDonald/O. Swaak-Goldmann*, Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts, Den Haag 2000, S. 455 ff.; *P. Wald,* Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal, Yale Human Rights & Development Law Journal 5 (2002), S. 220 ff.; *W. Lobwein*, The Work of the Victims and Witness Section of the International Criminal Tribunal for the former Yugoslavia, in: *G. Theissen/M. Nagler* (Hrsg.), Der Internationale Strafgerichtshof, 5 Jahre nach Rom, Berlin 2004, S. 67 ff.

[37] *A. Klip*, a.a.O. (Fn. 28), S. 276; *ders*. Anm. zu Decisions Relating to the False Testimony of *Opacic*, in: *A. Klip / G. Sluiter*, Annotated Leading Cases of International Criminal Tribunals, Antwerpen u.a. 1999, S. 225; ebenfalls kritisch *K. Ambos*, Internationales Strafrecht, München 2006, § 7, Rn. 266.

[38] Vgl. Judgement on Allegation of Contempt against prior Counsel *Milan Vujin*, a.a.O. (Fn. 30), Abs. 18; Judgement on Appeal by *Anto Nobilo* against Findings of Contempt, a.a.O. (Fn. 31), Abs. 38; The Prosecutor v. *Beqa Beqaj*, Judgement on Contempt Allegations, a.a.O. (Fn. 32), Abs. 9; The Prosecutor v. *Ivica Marijacic & Markica Rebic*, a.a.0. (Fn. 10), Abs. 15.

systemen Straftaten zum Schutz der Rechtspflege gibt.[39] Jedoch ist zu beachten, dass durch den *Contempt*-Tatbestand neues materielles Strafrecht geschaffen wird. Zunächst ist unter dem Gesichtspunkt der Gewaltenteilung bedenklich, dass die Richter, die über die Strafbarkeit im Einzelfall entscheiden, den Tatbestand des *Contempt of Court* selbst definiert haben. Weiterhin ist das Prinzip *nullum crimen sine lege* zu beachten. Der UN-Generalsekretär hat in einem Bericht, der die Grundlage für die Schaffung des ICTY bildete, festgestellt, dass dieses Prinzip bei der Verfolgung von Verstößen gegen das humanitäre Völkerrecht gelte. Daher seien lediglich Straftatbestände anwendbar, die Bestandteil des Völkerrechts sind.[40] Dies muss ebenso für Handlungen gegen die Rechtspflege gelten. Im Bereich des *Contempt of Court* gibt es kein einschlägiges Völkergewohnheitsrecht.[41] Daher ist auf andere Völkerrechtsquellen abzustellen.[42] Hier ist anhand rechtsvergleichender Untersuchungen zu überprüfen, ob es einen allgemeinen Rechtsgrundsatz i.S.d. Art. 38 Abs. 1 lit. c) IGH-Statut gibt, aus dem eine Strafbarkeit für die jeweilige Handlung abgeleitet werden kann.[43] Es ist somit nicht ausreichend festzustellen, ob der ICTY die generelle Kompetenz zur Bestrafung von *Contempt of Court* hat. Vielmehr ist von der Strafkammer für jede Fallgruppe zu prüfen, ob es einen gleichgelagerten Straftatbestand in allen bedeutenden Rechtssystemen gibt. Während die Frage der Bedrohung und Einschüchterung von Zeugen und des Meineids wohl relativ einfach zu beantworten sein wird, werden bezüglich von Tatbeständen, die Geheimhaltungspflichten betreffen, größere Unterschiede bestehen. Insoweit ist zweifelhaft, dass ein allgemeiner Rechtsgrundsatz hergeleitet werden kann, wonach die Offenlegung der Identität von Zeugen eine strafrechtliche Sanktionierung nach sich zieht.[44] Eine dezidierte Auseinandersetzung mit dieser Frage lassen die bislang ergangenen Entscheidungen des ICTY in Sachen *Marijacic* und *Rebic* sowie *Jovic* vermissen.

Insgesamt bleibt zunächst festzuhalten, dass der ICTY die grundsätzliche Befugnis hat, Straftaten gegen die Rechtspflege zu verfolgen. Jedoch ist in jedem Einzelfall zu überprüfen, ob sich der entsprechende Tatbestand aus den allgemeinen Rechtsgrundsätzen herleiten lässt. Die mit den Strafverfahren gegen Journalisten befassten Kammern versäumen es hier, zwischen allgemeiner Zuständigkeit des Gerichtshofes zur Verfolgung von *Contempt of Court* und der Verankerung des jeweiligen Tatbestandes im Völkerrecht zu unterscheiden. Diese Probleme ließen sich umgehen, wenn man die Delikte durch nationales Straf- bzw. Berufsrecht, in den vorliegenden Fällen also in Kroatien selbst, verfolgen würde.[45]

2.4. Erforderliche Begrenzung durch Verträge zum Schutz von Menschenrechten

2.4.1. Prüfung der *Contempt*-Tatbestände an den Vorgaben völkerrechtlicher Verträge zum Schutz von Menschenrechten

Sollte sich eine Strafbarkeit des hier diskutierten Veröffentlichungsverbotes aus den allgemeinen Rechtsgrundsätzen ableiten lassen, wäre auf einer weiteren Ebene zu prüfen, ob es Begrenzungen des Tatbestandes durch die Vorgaben völkerrechtlicher Bestimmungen zum Schutz von Menschenrechten, insbesondere Art. 19 des Internationalen Paktes zum Schutz bürgerlicher und politischer Rechte und Art. 10 Abs. 1 der Europäischen Menschenrechtskonvention (EMRK) gibt. Beide Verträge sind für den ICTY nicht direkt anwendbar.[46] Das ICTY-Statut enthält auch, anders als Art. 21 Abs. 3 des ICC-Statuts, keine explizite Regelung, wonach die Auslegung des Rechts mit den international anerkannten Menschenrechten vereinbar sein müsse. Jedoch ist auch der ICTY an allgemein anerkannte Menschenrechtsgarantien gebunden.[47] Dies erkennt er in seiner ständigen Rechtsprechung an und zieht daher in seinen Erwägungen regelmäßig die Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte (EGMR) und des UN-Menschenrechtsausschusses heran. Betroffen sind hier in der Regel Fragen des *Fair Trial* und der Rechte des Angeklagten.[48] Die vorliegenden Verfahren bilden jedoch die Besonderheit, dass nicht Verfahrensrechte, sondern Fragen der Informations- bzw. Pressefreiheit berührt sind. Der EGMR hatte bereits mehrfach zur Frage der Vereinbarkeit von Maßnahmen wegen *Contempt of Court* mit Art. 10 Abs. 1 EMRK zu entscheiden. Im *Jovic*-Urteil werden zwar die einschlägigen Menschenrechtsverträge genannt.[49] Die Strafkammer versäumt es allerdings, sich mit der Rechtsprechung des EGMR auseinanderzusetzen.

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39 Siehe *J.-A. Frowein / G. Nolte / K. Oellers-Frahm / A. Zimmermann*, Investigating Powers of the International Criminal Tribunal for the former Yugoslavia vis-à-vis States and High Government Officials, Amicus Curiae Brief submitted by the Max-Planck-Institute for Comparative Public Law and International Law, Max-Planck Yearbook of United Nations Law 1 (1997) S. 349, 394.

40 Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, Abs. 34.

41 Judgement on Allegation of Contempt against prior Counsel *Milan Vujin*, a.a.O. (Fn. 30), Abs. 14.

42 Grundlegend zur Entstehung völkerstrafrechtlicher Normen *K. Ambos*, Der Allgemeine Teil des Völkerstrafrechts, Berlin 2002, S. 40 ff.

43 Vgl. *C. Kress*, Zur Methode der Rechtsfindung im Allgemeinen Teil des Völkerstrafrechts, Zeitschrift für die gesamte Strafrechtswissenschaft 111 (1999), S. 608.

44 So sieht im deutschen Strafrecht § 353d Nr. 1 StGB lediglich eine Strafbarkeit von Veröffentlichungen über Verhandlungen, bei der die Öffentlichkeit wegen der Gefährdung der Staatssicherheit ausgeschlossen war, vor, *H. Tröndle / T. Fischer*, StGB, 53. Auflage München 2006, § 353d, Rn. 2. In den hier diskutierten Fällen geht es jedoch ausschließlich um Zeugenschutz. § 353d Nr. 3 StGB regelt ein Veröffentlichungsverbot für Anklageschriften. Anklageschriften des ICTY sind jedoch der Öffentlichkeit spätestens ab der Verhaftung des Angeklagten zugänglich.

45 Ebenso für den Bereich der Aussagedelikte *A. Klip*, a.a.O. (Fn. 28), S. 278.

46 Allerdings gab es bereits erfolglose Beschwerden zum EGMR, in denen die Zusammenarbeit von Vertragsparteien der EMRK mit dem ICTY gerügt wurde, siehe EGMR, *Naletilic* ./. Kroatien, EuGRZ 2002, S. 143; EGMR, *Milosevic* ./. Niederlande, in: Europäische Grundrechte Zeitschrift (2002), S. 131. Grundlegend zu möglichen Konflikten der Statute der Internationalen Strafgerichtshöfe mit der EMRK *L. Caflisch*, The Rome Statute and the European Convention on Human Rights, in: Human Rights Law Journal 23 (2002), S. 1 ff.

47 Vgl. Report of the Secretary-General, a.a.O. (Fn. 40), Abs. 109.

48 So im Verfahren gegen *Slobodan Milosevic* die Frage, ob dem Angeklagten ein Pflichtverteidiger beigeordnet werden darf, siehe The Prosecutor v. *Slobodan Milosevic*, Reasons for Decision on Assignment of Defence Counsel, IT-02-54-T, v. 22. September 2004, Abs. 43 f. und Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, IT-02-54-AR73.7 v. 1. November 2004, Abs. 17.

49 The Prosecutor v. *Josip Jovic*, a.a.O., (Fn. 22) Abs. 23.

2.4.2. Das Verhältnis des Interesses der Öffentlichkeit an umfassender Information zu den Rechten des Zeugen

Die erste Grundsatzentscheidung des EGMR zur Frage des *Contempt of Court* ist das *Sunday Times*-Urteil.[50] Nach Auffassung des EGMR sind gerichtliche Anordnungen wegen *Contempt of Court* nicht *per se* rechtswidrig, nur weil dieses Institut keine Entsprechung in anderen Rechtsordnungen als im *common law* habe. Vielmehr sei eine Einzelfallprüfung vorzunehmen, ob die jeweilige Maßnahme gerechtfertigt ist.[51] Der EGMR hat im *Sunday Times*-Urteil die Frage der Vereinbarkeit eines Publikationsverbotes mit Art. 10 Abs. 1 EMRK auch am Interesse der Öffentlichkeit an der Verbreitung von Informationen gemessen.[52] Das Verfahren betraf jedoch keinen strafrechtlichen Fall, sondern ein gerichtlich angeordnetes Veröffentlichungsverbot für die Dauer eines Schadensersatzprozesses. Anders als im *Sunday Times*-Fall ist bei der Preisgabe der Identität eines geschützten Zeugen auch das Interesse des Zeugen an der Geheimhaltung zu berücksichtigen. Dieses wird regelmäßig Vorrang gegenüber dem Interesse der Öffentlichkeit an umfassender Berichterstattung haben, handelt es sich doch bei anonymen Zeugen in der Regel um Opfer, die in manchen Fällen auch heute noch um ihr Leben fürchten müssen, wenn sie vor dem ICTY aussagen. Auch wird diesem Interesse durch die Veröffentlichung des Urteils Genüge getan. Anders verhält sich die Sache jedoch im Fall der Zeugenaussage *Stjepan Mesics.* Hier bestand wohl zum Zeitpunkt der Veröffentlichung kein Interesse des Zeugen an der Geheimhaltung. Schließlich hatte *Mesic* in der Öffentlichkeit selbst über seine Zeugenaussage berichtet. Auch besteht durch den politischen Wechsel in Kroatien keine Gefährdung *Mesics* mehr. Dass kein Bedürfnis zur Aufrechterhaltung der Schutzmaßnahmen mehr existiert, stellte auch die Rechtsmittelkammer in ihrer Entscheidung vom 24. Januar 2006 fest.[53] Diese Problematik wäre nicht erst im Rahmen der Strafzumessung zu berücksichtigen gewesen, sondern im Rahmen der Frage, ob der entsprechende Tatbestand durch Art. 10 Abs. 1 EMRK einschränkend auszulegen ist. Weiterhin ist zu berücksichtigen, dass *Mesic* zwischenzeitlich Präsident Kroatiens geworden ist und daher das Interesse der Allgemeinheit an der Information besonders zu gewichten ist. Denn es ging in der Aussage auch um besonders sensible Fragen wie Absprachen *Slobodan Milosevics* und *Franjo Tudjmans* bezüglich einer geplanten Aufteilung Bosnien-Herzegowinas zwischen Kroatien und Serbien.[54]

Was die Identität des niederländischen Offiziers betrifft, wäre bei der Entscheidung ebenfalls zu berücksichtigen gewesen, dass wohl kein Interesse am Fortbestand der Zeugenschutzmaßnahmen bestand.[55]

2.4.3. Kein Schutzbedürfnis bei bereits bekannten Tatsachen

Ein Problem, das sich zumindest im Verfahren gegen *Josip Jovic* stellt, ist die Tatsache, dass es in Kroatien ab einem bestimmten Zeitpunkt, unabhängig von den Veröffentlichungen als allgemein bekannt galt, dass *Stjepan Mesic* im *Blaskic*-Prozess ausgesagt hatte. Der EGMR hat die Frage der Verbreitung bereits bekannter Tatsachen im so genannten *Spycatcher*-Fall erörtert, der ebenfalls ein gerichtliches Veröffentlichungsverbot betraf. Dort kam er zu dem Ergebnis, dass ein gerichtlich angeordnetes Veröffentlichungsverbot nicht grundsätzlich gegen Art. 10 Abs. 1 EMRK verstößt.[56] Allerdings läge ein Konventionsverstoß vor, wenn dieses aufrechterhalten werde, nachdem die betroffene Information ihre geheime Natur verloren habe.[57] Daher wäre von der Strafkammer zu untersuchen gewesen, ab wann die Tatsache, dass *Stjepan Mesic* als Zeuge im *Blaskic*-Prozess aussagte, bekannt war. Eine Strafbarkeit für die Namensnennung nach diesem Zeitpunkt scheidet aus. Bezüglich der veröffentlichten Protokolle hätte in jedem Einzelfall untersucht werden müssen, ob es sich zum Zeitpunkt der Veröffentlichung bereits um allgemein bekannte Tatsache handelte.

3. Fazit

Die Verfahren gegen Journalisten wegen *Contempt of Court* werfen vielfältige Fragen nach dem Spannungsverhältnis des Zeugenschutzes vor internationalen Strafgerichten und dem Anspruch der Allgemeinheit, über die Verfahren informiert zu werden, auf. Zwar mag es den Angeklagten in diesen Verfahren nicht primär um die Informationsfreiheit gegangen sein. Der Vorgang stellt sich auch als Versuch dar, den kroatischen Präsidenten *Mesic*, einen Befürworter des ICTY, zu schwächen.[58] Auch mag es generell ein berechtigtes Interesse geben, Dritte von der unberechtigten Preisgabe der Namen geschützter Zeugen abzuschrecken. Dies gilt insbesondere in Verfahren, wo Zeuginnen und Zeugen, die vor dem ICTY aussagen, um ihr Leben fürchten müssen. Dennoch stellt sich die Frage, ob in den besprochenen Fällen eine Anklageerhebung unbedingt erforderlich war. Dies gilt umso mehr, als die Verfahren die Unterstützer des ICTY in Kroatien schwächen.[59] Die Verfahren wegen *Contempt of Court* gegen Journalisten binden auch Ressourcen, die anderweitig dringender benötigt worden wären. Denn der ICTY soll aufgrund der vom UN-Sicherheitsrat beschlossenen Beendigungsstrategie bis zum Jahr 2010 seine gesamte Tätigkeit abschließen.[60] Weiterhin versäumen es die bislang ergangenen

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[50] EGMR, Times Newspaper Ltd. ./. Vereinigtes Königreich, in: Europäische Grundrechte Zeitschrift (1979), S. 386. Die Strafkammer zitiert im Urteil gegen *Jovic* lediglich die vorausgegangene Entscheidung der Europäischen Kommission für Menschenrechte in gleicher Sache.

[51] *Ibid.*, S. 389.

[52] *Ibid.*, S. 390.

[53] Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v. *Seselj* & *Margetic* Case, a.a.O. (Fn. 9).

[54] Protokoll, a.a.O. (Fn. 12), S. 7093 ff., insbesondere S. 7132 ff.

[55] Vgl. Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v. *Mariajacic* & *Rebic* Case, a.a.O. (Fn. 9).

[56] EGMR, Observer und Guardian ./. Vereinigtes Königreich, in: Europäische Grundrechte Zeitschrift (1995), S. 20.

[57] *Ibid.*, S. 22.

[58] Siehe *J. Anderson / G. Jungvirth*, a.a.O. (Fn. 7).

[59] Vgl. *T. Cruvellier*, ICTY: An Alarming Decision for the Freedom of Press, in International Justice Tribune, Nr. 43. v. 27. März 2006, S. 1.

[60] UN Doc. S/RES/1534 v. 26. März 2004.

Urteile eine grundlegende Aussage darüber zu treffen, inwieweit die Strafbarkeit der Aufdeckung der Identität geschützter Zeugen bzw. der wissentliche Verstoß gegen Anordnungen eines Gerichts aus den allgemeinen Rechtsgrundsätzen hergeleitet werden kann.[61] Weiterhin wäre zu berücksichtigen gewesen, dass die Verbreitung ehemals geheimhaltungsbedürftiger Informationen, soweit diese bereits anderweitig der Öffentlichkeit bekannt gemacht worden sind, durch Art. 10 Abs. 1 EMRK geschützt ist. Das Ziel, durch eine Verurteilung andere Personen vor neuen Veröffentlichungen abzuschrecken, wurde ebenfalls nicht erreicht. Dies zeigt der Fall *Margetic*, der unmittelbar nach Verfahrenseinstellung die Namen weiterer geschützter Zeugen veröffentlichte. ■

[61] Der Beauftragte für die Freiheit der Medien der OSZE schlägt zur Auflösung des Konflikts vor, Regel 77 der Verfahrensordnung dahingehend einzuschränken, dass lediglich die unbefugte Weitergabe, nicht aber die Veröffentlichung durch Dritte, die diese Information erhalten haben, unter Strafe gestellt wird, Letter from OSCE Representative on Freedom of the Media, a.a.O. (Fn. 3).

KFOR: Current Legal Issues

Ulf Häußler*

Nach über sieben Jahren ist die KFOR-Friedenstruppe der NATO fest im Kosovo verankert und trägt nachhaltig zur Stabilisierung der Region bei. Die in dieser Zeit eingetretenen Veränderungen haben sich auch in geänderten Rechtsfragen niedergeschlagen, die mit der Erfüllung des Auftrags von KFOR verbunden sind. Einerseits hat KFOR nach und nach den Schwerpunkt seiner Auftragserfüllung verlagert, andererseits verfügt Kosovo inzwischen über eine nahezu vollständige eigene Rechtsordnung sowie über zunehmend stabile und an Effektivität gewinnende Institutionen. KFOR ist unbeschadet der veränderten Lage unverändert dazu autorisiert, die robusten Aspekte des Mandats aus Resolution 1244 (1999) des VN-Sicherheitsrats zu nutzen. Hierzu gehört, dass KFOR Personen in Gewahrsam nehmen kann, die das sichere Umfeld oder KFOR selbst gefährden. Gemäß einer – unter merkwürdiger politischer „Begleitmusik" entstandenen – Abrede mit dem Europarat darf dessen Antifolterkomittee Einrichtungen von KFOR besuchen, in denen Personen in Gewahrsam gehalten werden.

Im Übrigen erfüllt KFOR seinen Auftrag einschließlich des Unterstützungsauftrags zugunsten der zivilen Präsenz (UNMIK) in situationsangemessener Weise. Mit einem Konzept, das den abgestuften Einsatz von nicht letalen Wirkmitteln bis hin zu Waffen(systemen) vorsieht, schützt KFOR u.a. Kulturgut, religiöse Stätten und UNMIK-Einrichtungen. Eine – begrenzte – Unterstützung kosovarischer Stellen, z.B. im Umgang mit streunenden Tieren und illegalem Holzeinschlag, kommt hingegen nur noch ausnahmsweise in Betracht.

Schließlich wirft die Rechtsstellung von KFOR bekannte Fragen auf: die Friedenstruppe selbst genießt absolute Immunität, d.h. beispielsweise auch Freiheit von Besteuerung; für ihr Personal gelten vorrangig KFOR-Befehle, die – soweit möglich – den gebotenen Respekt für die lokale Rechtsordnung zum Ausdruck bringen. Auch zivile Vertragspartner genießen funktionale Immunität.

Preliminary Remarks and Introduction

Seven years after the adoption of UNSCR 1244 (1999) the international security presence established by this resolution – KFOR – is well entrenched in Kosovar reality. The setback caused by the March 2004 upheavals might still function as a writing on the wall yet does no longer seem to have much significant practical meaning. Necessary adjustments have been made at all relevant levels. For instance, the amended German Statute Implementing the Chemical Weapons Convention now expressly authorises German peacekeepers to use riot control agents in threatening situations where the use of firearms is considered disproportionate to the threat addressed. Likewise, KFOR has refined its contingency plans and enhanced the framework for both day-to-day and emergency co-operation with UNMIK and the Kosovo Police Service (KPS).

The operations of KFOR deal with an overall situation in Kosovo which is different from both 1999 and 2004 in many respects. Changes pertain to practical realities of daily life and such legal and institutional facts as the growth of Kosovo's legal order, the consolidation of its government institutions, and the acquisition of an increasing share in the province's governance by the inhabitants of Kosovo. To give some brief examples, Kosovo's infrastructure is improving slowly but steadily and housing conditions are getting better (mainly because many Kosovar expatriates invest some money back home). UNMIK has issued regulations concerning more or less all aspects of governance; these regulations have increasingly often promulgated legislation adopted by the Kosovo Assembly. Kosovo's public institutions are gaining reputation, with the Kosovo Protection Corps certainly still being the best-reputed thereof. Notwithstanding this positive development various challenges remain. Pending the politi-

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cal settlement of the status of Kosovo the root cause of instability continues to exist. Kosovo is virtually barred from participation in the globalised economy, the flows of foreign investment do not reach it, and unemployment remains high. Although the determination of Kosovo's status would not solve all its problems it might add a good deal of perspective to people's daily lives and thus reduce what open or latent threats to durable peace continue to exist. Without a status settlement, it is possible to maintain a secure environment in Kosovo but it will hardly be possible to improve the situation to reach the level of sustainable stability.

KFOR operates in a situation characterised by these (and associated) practical realities. Its situation and threat assessments, its estimates concerning possible developments and what response to them might be appropriate, have always been – and continue to be – influenced by the current operational environment. In the light of the changing situation KFOR's operational center of gravity has shifted within the range of its principal tasks. In particular, the principal tasks derived from KFOR's responsibility to suppress renewed hostilities are less significant[1]. Rather, KFOR's responsibility to establish and maintain a secure environment dictates its remaining principal tasks which pertain to still existing (latent) threats to international peace and security which might be rooted in possibly still existing paramilitary capabilities or the ability to generate such capabilities. Apart from that KFOR conducts, or is prepared to conduct, operations within the range of its supporting tasks.

This essay will discuss the impact of KFOR's changing operational environment on its legal framework on the basis of topical examples. The examples chosen reflect both policy and field levels; they indicate how a peacekeeping force can maintain its effectiveness and efficiency on its progressive way to mission accomplishment. For obvious reasons this essay will discuss open source information only. It seems appropriate to recall, in this context, that, in accordance with para 7 of UNSCR 1244 (1999), NATO and troop contributing states established KFOR „with all necessary means to fulfil its responsibilities". Acting upon this authorisation, NATO has transformed the responsibilities defined in para 9 of UNSCR 1244 (1999) at its internal level by way of adopting and continuously updating the Operation Plan (OPLAN) under which KFOR operates (hereinafter referred to as 'the Balkans OPLAN'). This – classified – OPLAN does not only integrate KFOR in NATO's command and control structures[2]. It also specifies what means are at KFOR's disposal in defining, *inter alia*, the framework of the use of force in the Annex that sets out the KFOR Rules of Engagement.

1. Policy Level: Operational Detentions

Since its early days, KFOR has targeted individuals whose behaviour or capabilities pose a threat to either its mission as defined by UNSCR 1244 (1999), or its personnel or assets. Where militarily necessary[3], KFOR detained the individuals concerned and held them so long as necessary to sufficiently reduce or remove the threat in question. In addition, in accordance with its responsibility to conduct certain supporting tasks pending the proper functioning of the international civil presence in Kosovo (UNMIK) and local security sector agencies (in particular KPS), KFOR was initially also involved in criminal law enforcement. Asked for a legal basis of both kinds of detention operations, various individual responsibilities specified in para 9 of UNSCR 1244 (1999) were relied upon. Yet, initially neither KFOR nor other relevant actors made an effort to differentiate between detentions coming within the ambit of KFOR's responsibilities for the secure environment and force protection on the one hand, and for law and order on the other hand.

From a NATO perspective, detaining authority was granted at policy level by the North Atlantic Council's approval of the Balkans OPLAN. COMKFOR has supplemented the relevant rule[4] in his pertinent Detention Direc-

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[1] Note, however, that the press in Kosovo reported on multiple occasions in summer 2006 that the Republic of Serbia were deploying police reservists in the north of Kosovo to support irredentist tendencies of some municipalities thereabouts. It is needless to say that such rumours, regardless whether true or not, may have seriously destabilising effects because they imply Serb non-compliance with the terms and conditions concerning cease-fire and disengagement, of the Military Technical Agreement between the International Security Force („KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia of 9 June 1999 as endorsed by UNSCR 1244 (1999).

[2] Most troop contributing states have transferred operational control (OPCON) on NATO. The 2006 edition of the NATO Glossary of Terms and Definitions defines OPCON as follows (NATO document AAP-6 (2006) at 2-O-2): „The authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control."
Compare the definition of OPCON in the „Department of Defense Dictionary of Military and Associated Terms" (Joint Publication 1-02 as amended through 31 August 2005 at 389sq.): „Operational control is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. Operational control includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. (…) Operational control normally provides full authority to organize commands and forces and to employ those forces as the commander in operational control considers necessary to accomplish assigned missions; it does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training."

[3] The authorisation under para 7 of UNSCR 1244 (1999) to establish KFOR with „all necessary means" uses terminology of international humanitarian law („necessary" – military necessity; „means" – means of warfare, viz., in the context of robust peacekeeping, coercion) and must hence be so interpreted as to cover the use of all means (and methods of their employment) acceptable from an international humanitarian law perspective provided that the use of such means is operationally necessary to accomplish KFOR's mission, the responsibilities associated with it, and the tasks derived therefrom. Cf. chapter 6.2 (concerning the external dimension of command responsibility in peace missions) of the present author's study „Ensuring and Enforcing Human Security" (Wolf Legal Publishers, Nijmegen, 2007).

[4] Detention authority is usually granted by way of activation of the pertinent ROE template. This may involve such amplifications as deemed necessary by the authorising Commander – usually the competent Strategic Commander (in the case of KFOR this is the Supreme Allied Commander Europe – SACEUR) – and the approving military and political bodies (it is consolidated NATO practice that the Military Committee or the Defence Planning Committee and the North Atlantic Council approve NATO OPLANs).

tives[5]. In addition, KFOR's Multinational Brigades (as they originally were) or Task Forces (as they now are), respectively, have issued such Standing Operating Procedures as deemed necessary to implement pertinent COMKFOR Detention Directives and ensure appropriate training and rehearsal of personnel that might be involved in detention operations.

Over time, KFOR detentions have become a matter of concern not only because of the perceived unclarity concerning their legal basis. Apart from their legality, their legitimacy was even more severely questioned in the light of certain aspects of the Guantánamo Bay detention practices which have caused an increasingly critical perception of detention operations conducted by armed forces as such. It is beyond the scope of this essay to deal with the details of related criticism by e.g. Amnesty International and the comments made by the Human Rights Committee[6]. From the practical perspective it seems more appropriate to discuss the arrangement made by NATO and the Council of Europe concerning visits of the latter's Committee for the Prevention of Torture to KFOR detention facilities. This issue arose after Serbia and Montenegro had become a member of the Council of Europe, and subsequently acceded to most human rights instruments concluded under the auspices of this organisation[7]. Considering that the Security Council reaffirmed „the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region (…)" in UNSCR 1244 (1999) it is beyond doubt that Kosovo has not (yet) ceased to be a province of Serbia and, in particular, still forms part of its territory. On that basis any action taken by government authorities of the state of Serbia in Kosovo would be subject to review by relevant treaty bodies and the European Court of Human Rights – only that there are no longer any such authorities in Kosovo. The only agencies exercising public authority in Kosovo are those established by UNSCR 1244 (1999), viz. in particular the international presences: KFOR and UNMIK[8]. Their actions, based on that mandate, can hardly be attributed to the state of Serbia because it has no means of influencing them. Rather the Kosovo mandate has fully and completely suspended the authority of Serbia to exercise its (hitherto) sovereign rights in Kosovo.

Taking this effect of UNSCR 1244 (1999) into account it is pretty doubtful whether human rights instruments binding upon Serbia can be applicable to actions taken in an official capacity in Kosovo. The jurisprudence of the European Court of Human Rights rather confirms than removes these doubts. Its interpretation of the notion of „jurisdiction" has made this term become the key to applicability of human rights instruments *ratione loci*. This interpretation is based on effective exercise of authority. It would, accordingly, support the view that the absence of effective authority over a certain territory would lead to the suspension of a state's human rights obligations in this territory[9]. Since only states have legal personality it is them and not their respective territories who are obligated under human rights treaties.

The workaround devised at field level by UNMIK and the Council of Europe supports the view that the ratification, by Serbia of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was without prejudice to that Convention's applicability to Kosovo *ratione loci*[10]. The use of language that basically repeats core parts of the Convention[11] demonstrates that the Agreement rather than Serbia's accession to the Convention was constitutive for the Committee's right to visit UNMIK detention facilities and that the Council of Europe considers detentions carried out by the international presences attributable to UNMIK (the United Nations) or KFOR (NATO), respectively. With regard to KFOR, policy documents presented by the Committee for the Prevention of Torture and press releases of the Secretary General of the Council of Europe reinforce this assessment. On 10 January 2006, the CoE Secretary General requested „immediate and unlimited access to all KFOR detention facilities in Kosovo", making remarks about possible „skeletons in the KFOR cupboard"[12]. The report of the Committee for the Prevention of Torture concerning its visit to Serbia and Montenegro (issued 19 July 2006) contained the passage, following a reference to the agreement with UNMIK, that –

> „Before the CPT can commence its activities in Kosovo, similar arrangements of a binding nature must be concluded with the North Atlantic Treaty Organization (NATO) on the subject of places of detention in Kosovo administered by NATO."[13]

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[5] Earlier on, COMKFOR Detention Directive 042 specified the conditions and procedures for the exercise of KFOR's detaining authority. This directive has been replaced by COMKFOR Detention Directive 006.

[6] For a detailed discussion see chapters 9 („Exercise of Authority: Legitimacy of Operational Detentions") and 10 („Oversight of Exercise of Authority: Review of Individual Cases of Operational Detention" of the present author's study „Ensuring and Enforcing Human Security" (Wolf Legal Publishers, Nijmegen, 2007).

[7] The Federal Republic of Yugoslavia joined the Council of Europe on 3 April 2003 and ratified the European Convention on Human Rights on 3 March 2004. It also ratified the European Convention for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment on 3 March 2004.

[8] Kosovo's Provisional Institutions of Self-Government operate under the political direction and control of UNMIK. From the perspective of international law, their decisions are, accordingly, attributable to UNMIK, i.e. the United Nations – as evidenced by the fact that statutory law adopted by the Kosovo Assembly is promulgated by the SRSG as an annex to an UNMIK regulation.

[9] See para 77 of Opinion no. 180/2004 on Human Rights in Kosovo rendered by the Venice Commission established by the Council of Europe – CDL-AD (2004)033 – for a similar assessment.

[10] By way of agreement with the Council of Europe UNMIK has granted the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment a right of access to its detention facilities in Kosovo. The Committee may pay „visits to any place in Kosovo where persons are deprived of their liberty by an authority of UNMIK", except for „places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis" under humanitarian law. See Article 1 (2) & (3) of the Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on technical arrangements related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 23 August 2004.

[11] For instance, UNMIK has agreed that – „[t]he Committee shall (…) examine the treatment of persons deprived of their liberty in Kosovo with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment (…)" (Article 1 (1) of the said Agreement).

[12] CoE press release 006(2006), available at http://www.coe.int (visited 12 December 2006).

[13] CoE document CPT/Inf (2006) 18, at p. 13 n. 1, available at http://www.coe.int (visited 12 December 2006).

When an arrangement was made at a later stage, the CoE Secretary General announced that –

> „We have succeeded in resolving a long-standing anomaly in the human rights enforcement in Kosovo. This arrangement [with NATO] will help us to ensure that there are no exceptions to the absolute prohibition of torture or inhuman or degrading treatment throughout the 46 member states of the Council of Europe.“[14]

While it is hard to believe that the Committee for the Prevention of Torture would indeed have felt unable to visit UNMIK detention facilities in the absence of NATO's consent to visiting KFOR detention facilities the press releases indicate that the Committee's remark was meant to put NATO under political pressure rather than to establish a sound legal position. In the light of my own experience it is beyond imagination that the organisation that protected peace and security, freedom, liberty and human rights against the military threat to which the free world was exposed during the Cold War, has made core contributions to stop the atrocities in the former Yugoslavia, and supports peace and stability in the Balkans, would engage in similar activities – as, unfortunately, implied in both announcements made by the CoE Secretary General.

2. Field Level: Principal Tasks

This section of the present essay will focus on contingency planning and framework operations. Originally, the principal tasks derived from the responsibilities specified in UNSCR 1244 (1999), viz. to enforce the cease-fire and disengage the opposing forces (para 9(a)), and to demilitarise the Kosovo Liberation Army (KLA) (para 9(b)) used to define KFOR's center of gravity. Currently, the focus rests on maintaining a secure environment which has – according to practice if not by necessary implication – become an integral part of KFOR's responsibility to establish a secure environment for the return of displaced persons and refugees, the operations of UNMIK, the establishment of Kosovo's transitional administration, and delivery of humanitarian aid (para 9(c)). In addition, KFOR is responsible for „[e]nsuring the protection and freedom of movement of itself, the international civil presence, and other international organizations“ (para 9(e)).

2.1 Protecting and Defending Property with Designated Special Status (PRDSS)

The 2004 upheavals (and again the incidents of violence in February 2007) have demonstrated that it is rather easy for certain actors to mobilise considerable numbers of individuals and make them join demonstrations based on such interethnic motives as involve the likelihood of, *inter alia*, interethnic violence. While it might be a matter of debate whether such demonstrations would *per se* represent an obvious military or paramilitary threat to international peace and security as translated into KFOR's responsibilities, the mobilisation mechanism which is their *conditio sine qua non* definitely does. From a legal perspective, suppressing any inter-ethnic violence emerging from such demonstrations is as much within the range of KFOR's principal tasks as suppressing the mobilisation mechanism. KFOR action in such situations is, accordingly, not only a feasible option because KFOR has the means and capabilities needed but also an option that enjoys both legitimacy and, unless executed in an excessive[15] manner, legality.

KFOR action dealing with possible or actual inter-ethnic violence tackles the military or paramilitary threat represented by such violence. As COMKFOR rightly observed, „KFOR's role is not to steer police missions: UNMIK-P and KPS are performing that masterly“[16]. KFOR's concept for protecting and defending Property with Designated Special Status (PRDSS) – the concept of blue and red boxes – reflects both the military or paramilitary nature of the threat ultimately represented by inter-ethnic violence and the fact that usually most of those acting violently do not resort to combatant style activities. The concept of blue and red boxes is a paradigm for KFOR's approach to the changing operational environment, namely the improvements made by UNMIK Police and KPS[17]. KFOR demonstrated this concept during a rehearsal at Djakovica on 23 August 2005, which saw the presence of the abbot of Decani Monastery, members of the international missions and organisations in Kosovo, representatives of Kosovo institutions, Kosovo Protection Corps (KPC), UNMIK and KPS as well as journalists and TV. Following this rehearsal, the concept of blue and red boxes was the subject-matter of a detailed internet report:

„According to the new military strategy of KFOR sites there will be two zones around cultural heritage – the blue and red box. Within the wider, blue box UNMIK police in cooperation with KFOR and Kosovo local police would first try to establish order and defuse violence. In case that riots continue KFOR soldiers armed with anti-riot shields and helmets will get involved and try to repulse the attackers using rubber bullets, tear gas and water canons. In case of further escalation of violence additional troops and armor vehicles will be deployed shortly. Parallely with these efforts the rioters will be constantly called to withdraw. In this scenario representatives of the local administration will be called upon to show responsible stance and address the rioters.

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[14] CoE press release of 19 July 2006, http://www.coe.int (visited 12 December 2006).

[15] Note that according to international humanitarian law means of warfare must not be used in an excessive manner. Adapted to the framework of peace missions this means that means of coercion must not be used excessively, either.

[16] COMKFOR Press Conference of 10 June 2005, webposted at www.nato.int/kfor/inside/2005/06/i050613b.htm (visited 09 November 2006).

[17] In June 2005, COMKFOR summarised this approach as follows:
„KFOR should progressively let the floor to police, focusing on hot potential spots with our concept of „blue and red boxes“, preventing direct attacks to the main patrimonial sites, unfixing some force-consuming military and non-military tasks (like escorts and guards), and using quick reaction forces ready to intervene in order to ease the freedom of movement and the returns that are the key points.“ COMKFOR Press Conference of 10 June 2005, webposted at www.nato.int/kfor/inside/2005/06/i050613b.htm (visited 09 November 2006).

In case that rioters manage to reach the site which is under particular KFOR protection the Commander-in-chief may give „red-box" activation order. Red box comprises the very site, property and persons within the perimeter of the patrimonial site. According to the new KFOR strategy and more flexible national rules of engagement KFOR soldiers are authorized to use lethal weapons against individuals who try to break into the red box."[18]

KFOR has launched a comprehensive information operations campaign concerning the concept of blue and red boxes, including leaflets and posters that encourage inter-ethnic tolerance and explain the basic operational scheme underlying the concept. The presence of press and TV journalists at the rehearsal at Djakovica supported this campaign. The internet report summarises KFOR's public information rather accurately[19].

The concept of blue and red boxes is not limited to cultural heritage and religious locations It aims to enhance the protection of any key site designated by COMKFOR as PRDSS[20] by establishing a cordon of increasingly impermeable zones around it[21]. Unless activated by COMKFOR, the boxes are dormant (even at those key sites where permanent guard posts are established). Red boxes comprise the objects designated for protection and their immediate surroundings; in case of activation they will be defended against entry of unauthorised individuals. The blue boxes comprise a designated area around each red box. Activation of red boxes includes activation of blue boxes which will thereupon be protected against unauthorised entry. The notion of protecting, as opposed to defending, implies a lower level of countermeasures in case of attempted or actual intrusions. As demonstrated in Djakovica, usually crowd and riot control measures involving the use of riot control agents and non-lethal weapons will be used in order to protect a blue box. By way of contrast, defending of red boxes might involve the use of deadly force if such force is considered necessary and commensurate with the threat it is to responds to. From a legal perspective, the concept of blue and red boxes contains amplification and guidance concerning, *inter alia*, the ROE governing the use of crowd and riot control means, and firearms (viz. deadly force). Note that self-defence, including extended self-defence, is not affected by these ROE[22]; certain violent acts (e.g. the use of 'Molotov Cocktails', firearms, rocket-propelled grenades, or mortars) might hence trigger the use of deadly force in self-defence regardless of whether committed in a red or blue box or even from outside of either.

The notion of 'deadly force' as contemplated in NATO ROE refers to force that *is* not deadly *per se* but that *may be* deadly. „Shoot to kill" is but one option. Rather, the authorisation of deadly force permits soldiers to „shoot to incapacitate" the individuals to whose threatening behaviour they respond. Even with this qualification, however, from the legal perspective the red box involves a couple of delicate issues. The concept of blue and red boxes does not resolve the controversial question of whether soldiers may shoot with the intent to kill in order to defend property. Moreover, it is also debatable what response to an intrusion of a red box would be below the threshold of excessiveness – in particular whether such an intrusion may automatically trigger the use of firearms against the intruder.

Any decision to use deadly force has major human rights ramifications. Technically, the human rights question is whether the right to life can be so limited as to have less weight, either generally speaking or on the basis of a case-by-case assessment, than the competing public interest. If one considers an object designated for protection in its capacity as 'property' alone, 'life' might indeed always represent the stronger of the interests at issue. In my view, however, the side-effects of acts damaging or destroying such 'property' on the peace process supported by KFOR must also be taken into due consideration. As far as cultural heritage and religious locations are concerned, they usually serve, *inter alia*, the preservation of the collective identity of the group whose culture or religion they symbolically represent. Respect for such objects represents respect for the members of the group concerned – and is crucial to the peace process if the group in question is vulnerable. It follows that in the absence of such respect substantial peace will hardly grow. Peace missions must ensure and, if necessary, enforce such respect in accordance with their mandate to support the reconciliation of the receiving state's society. For the purposes of KFOR that means that designations of cultural heritage and religious locations for protection are hardly accidental or based on a simple assessment that designated objects have the attributes of particularly valuable property. To recall but one publicly known example of an object designated for protection and integrated in the concept of blue and red boxes:

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[18] KiM-Info Newsletter 23-08-05 – KFOR demonstrates its determination to defend patrimonial sites in Kosovo, webposted at http://www.kosovo.com (visited 09 November 2006).

[19] Note also that further particulars of KFOR's concept of red and blue boxes were explained, though in brief, to the press. Cf. the statement by then KFOR spokesperson Colonel De Kersabiec at an international press conference: „It is up to COMKFOR to decide, but you know, for example the main sites, high value sites, but it is up to COMKFOR to decide if we will implement and activate this zone. For the moment, there is no zone, no zone at all. Even there are some points which are guarded, there is no red or blue box for the time being. It could be activated on some spots, specific spots, in case of problem around. But for the moment, there is no such blue and red box." UNMIK Press Briefing Notes 31 August 2005 (unofficial transcript), webposted at www.unmikonline.org/DPI/Transcripts.nsf/0/BC459BA4BE73A26EC125706F00274DB2/$FILE/tr310805.pdf (visited 09 November 2006).

[20] In accordance with KFOR's responsibility to protect the international civil presence (para 9(e) of UNSCR 1244 (1999)) this may also involve designation of UNMIK sites as PRDSS if so requested by the SRSG.

[21] Note, however, that protecting and defending sites in support of UNMIK (para 9(f) of UNSCR 1244 (1999)) would qualify as a supporting rather than a principal task. Protecting UNMIK sites (para 9(h) of UNSCR 1244 (1999)), by way of contrast, would arguably be within the ambit of KFOR's principal tasks. – These examples indicate that the delineation of principal and supporting tasks is a matter of pragmatism rather than doctrine.

[22] Rules of Engagement in NATO operations do neither constitutively authorise nor limit each soldier's inherent right of individual self-defence; as they stand they do not affect extended self-defence in cases of serious violence either. For an assessment of the interaction of Rules of Engagement and self-defence see chapter 7.2.1.1 („Hostile Act, Hostile Intent, and Self-Defence") of the present author's study „Ensuring and Enforcing Human Security" (Wolf Legal Publishers, Nijmegen, 2007).

Decani Monastery, for instance, has been declared UNESCO World Heritage and it is, accordingly, much more than simply a valuable property item[23]. As a result, it is well possible to imagine scenarios in which the interest to protect cultural heritage and religious locations will have more weight than the right to life of an individual who threatens the integrity of such property with designated special status. It is, however, unlikely that such greater weight can be attached to cultural property in an abstract and general manner, viz. unrelated to an assessment of the situation to which the use of deadly force would respond.

It follows for the use of firearms against intruders of red boxes that there cannot be, and there is not, an automaticism that makes soldiers pull the trigger the very moment in which an intrusion happens. While it is hard to imagine that an individual emerging from a rioting crowd and intruding the red box would not pose a threat to the object designated for protection it is equally hard to conclude that an individual who neither belongs to, or is otherwise associated with, the crowd would necessarily be similarly dangerous merely because he or she so intrudes the red box. Even if soldiers tasked with defending a red box may presume that intruders are threatening the integrity of the property designated for protection this presumption must always be rebuttable, and even a quick assessment of the situation must address all factors that might trigger such rebuttal.

To conclude, it should be noted that to date KFOR has only rehearsed the concept of blue and red boxes. It is to be hoped that this concept has sufficient deterrent effect to prevent it from ever having to be employed.

2.2 Framework Operations

Among the principal tasks of a peacekeeping force, framework operations serve such purposes as maintaining an up-to-date picture of the situation in the area of operations, reducing the likelihood of the materialisation of identified potential threats to the secure environment, and suppressing on-scene any such threats as materialise in spite of the preventive and pre-emptive efforts made. Repressive action is, as a result – and in compliance with the principle of proportionality – the last resort. Many preventive and pre-emptive measures employed by peace missions are based on the visibility of peacekeeping forces throughout their area of operations. Visibility can be secured by forward deployment in a couple of decentralised field camps or surveillance posts, or by way of patrols[24]. In addition, peacekeeping forces usually establish vehicle checkpoints (VCPs) to monitor movements and to check on non-compliant items such as weapons of war or means likely to be used to e.g. incite inter-ethnic violence. Visibility can also be achieved by small teams operating outside field camps and maybe even living with the local population such as EUFOR ALTHEA's Liaison and Observation Teams (LOTs) or KFOR's Liaison and Monitoring Teams (LMTs)[25].

Patrols and checkpoints do not *per se* have major legal ramifications. The authority entrusted in peace missions to maintain a secure environment with all necessary means covers stopping individuals, establishing their identity, and searching both them and items in their possession. This authority also covers seizure and destruction of items endangering mission personnel or assets, or the mission as such. The limitation of the human rights thus affected – freedom of movement, privacy, and property – may be justified in accordance with the peacekeeping mandate even if it is not as comprehensive as to authorise the use of „all necessary means“. The use of force – viz. a limitation of the protection of life and limb – in order to compel compliance with the requests of personnel on patrol, at a vehicle checkpoint, or a field post will, as a matter of principle, be authorised in applicable Rules of Engagement.

Depending on the overall threat level and the number of weapons in the area of operations, the units of peace missions also conduct weapons harvest operations. Such operations can also be conducted jointly by Multinational Specialised Units (or Integrated Police Units) and civilian law enforcement agencies. The Multinational Specialised Units (MSUs) established within KFOR are composed of military police with military status who are involved in some law enforcement tasks in their sending states, in particular the Italian Carabinieri, an Estonian Army Platoon, and the French Gendarmérie Nationale[26].

3. Field Level: Supporting Tasks

Peacekeeping forces provide a broad range of support to civilian international organisations, local government agencies, non-governmental organisations (NGOs), individual civilians or groups of civilians, and cultural property. Although supporting tasks have much in common with peacetime domestic inter-agency co-operation of armed forces and civilian government institutions they are more than the act of simply providing a service. A peacekeeping force will only perform supporting tasks if doing so is congruent with its mandate, viz. in particular if it serves such purposes as institution-building in, or stabilising the government responsible for, its area of operations. The KFOR mandate does not spell out whether KFOR may provide support to UNMIK on the basis of its own assessment as to UNMIK's needs or may on-

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[23] See http://whc.unesco.org/en/list/724 for the designation of Medieval Monuments in Kosovo as world heritage (visited 12 December 2006). In summer 2006, the KFOR detachment tasked with guarding Decani Monastery on a 24/7 basis displayed the blue and red box signs openly during an operational rehearsal.

[24] This may involve foot and mounted patrols, with a broad variety of options available concerning both the number of personnel patrolling and, in case of mounted patrols, the kind and number of vehicles used.

[25] On KFOR's LMTs see COMKFOR'S Address to Students at Pristina University at http://www.nato.int/kfor/inside/2005/07/i050725a.htm (visited 12 December 2006).

[26] See http://www.nato.int/kfor/kfor/msu.htm (visited 12 December 2006). The European Union has launched its equivalent to the MSU, the Integrated Police Unit (IPU), within the framework of its Common Foreign and Security Policy. Italy, Spain, France, the Netherlands, and Portugal contribute personnel and assets to the IPU.

ly provide such support as requested[27]. In practice, COMKFOR and the SRSG have made (classified) arrangements concerning core issues such as e.g. support to certain aspects of law enforcement. The following examples will highlight the range of support desired by some actors within Kosovo, and a legal assessment of the limits of KFOR's mandate concerning supporting tasks.

3.1 Stray Animals

According to estimates, several millions of stray animals – mainly dogs – are on the move in the Balkans, of which some 200,000 live their homeless lives in Kosovo. Reportedly, some of these pitiful creatures become dangerous and aggressive towards human beings for instance if they move around in groups or if they are hungry. Children might be particularly endangered by aggressive stray dogs or cats. In addition, these animals can be vectors of diseases such as rabies, echinococcus, and the like. At earlier stages, many Kosovar municipalities used to arrange for local hunters associations to shoot stray animals. Moreover, according to some – unverified – sources KFOR is said to have been involved in similar activities. Be that as it may; some Kosovar municipalities have indeed sought to get KFOR involved in shooting dangerous stray animals[28].

The question of whether KFOR may, from a legal perspective, perform any supporting tasks related to the dangers arising from the presence and/or behaviour of stray animals, must be assessed in the light of its mandate with a special focus on recently adopted relevant legislation. Apart from the question of co-ordination with UNMIK and any practical ramifications the shooting of stray animals with weapons of war (as opposed to hunting weapons) might have, any request to that extent would involve delicate rule of law and good governance questions. In effect, in requesting KFOR to shoot stray animals Kosovar municipalities try to circumvent their legal obligations deriving from pertinent legislation, and to initiate action that is beyond the scope of their competencies (viz. action that, if performed by their own personnel, would be *ultra vires*). The legal framework for dealing with stray animals is contained in the Veterinary Law (2004/21) and the Law on Animal Welfare (02/L-10). The Veterinary Law determines that „Municipal Authorities shall undertake (…) the catching of stray dogs and cats and, if necessary, their euthanasia", viz. the „painless killing in necessary cases for the purpose of preserving public health"[29]. The Law on Animal Welfare supplements these rules. It provides that only „a veterinary or another competent person", namely personnel of the Kosovo Veterinary and Food Service (KVFS), of „public security authorities"[30], or Animal Welfare Officers, may kill animals[31]. As a result, Kosovar municipalities are charged with matters of stray animals, and have clearly defined competencies and tasks. Considering that nothing indicates that they are genuinely unable or under-resourced to perform these tasks it can hardly be part of KFOR's mission to intervene in such matters, nor would it comply with the spirit of good co-operation between KFOR and UNMIK were KFOR indeed prepared to intervene in such matters unilaterally.

3.2 Illegal Woodcutting

In the early days after operation Allied Force trade in firewood was a rather promising economic activity in Kosovo. Even in these days firewood is an important source of heating in those regions of Kosovo where alternative energy sources are not, or not easily, available; it is also used as a supplementary source of heating in other regions. Soon after the closure of operation Allied Force certain groups – perceived as syndicates of organised crime by some – started to cut wood in forests owned by the state of Serbia or the (then still existing) Federal Republic of Yugoslavia. Rumour had it that woodcutters were usually armed, including with hand-grenades, and used to seal off the areas where they performed their activities with barbed wire. Moreover, the word was out that part of the money raised with trade in illegally cut wood was being used for small arms deals. It is obvious that from an operational perspective such rumours alone indicate the existence of a threat to the secure environment which involves – at the very least – the potentiality of the formation of a group that could easily empower itself with paramilitary capabilities (firearms, hand-grenades) and a paramilitary command and control structure (organised syndicates). As a result, the rumours summarised were sufficient justification for KFOR action against illegal woodcutting within the range of KFOR's principal tasks derived from its responsibilities to deter renewed hostilities and demilitarise armed Kosovo Albanian groups (para 9(a) & (b) of UNSCR 1244 (1999)). But would similar considerations apply were illegal woodcutting activities unrelated to the potentiality of the formation of a paramilitary group?

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27 KFOR is responsible for „[s]upporting, as appropriate, and coordinating closely with the work of the international civil presence" (para 9(f) of UNSCR 1244 (1999)). It is arguably within KFOR's margin of appreciation to determine on its own initiative whether it is „appropriate" to support UNMIK yet KFOR would still have to co-ordinate its support with UNMIK. By way of contrast, Article VI(3) of Annex 1A to the Dayton Agreements expressly renders the performance of supporting tasks by the peacekeeping force in Bosnia and Herzegovina conditional on a request made by the beneficiary of such support.

28 Apparently there have been instances where KFOR has provided overall security to a hunting association that went about shooting stray dogs. In such cases, it would be paramount for KFOR to know that the hunting association's activities are in full compliance with relevant Kosovar law.

29 See Section 13 and the Definitions Section of the Veterinary Law. By way of contrast, Article 8.4 of the Law on Animal Welfare requires the Ministry of Agriculture, Forestry and Rural Development to determine „cases in which it shall be permissible to kill animals, and the manner in which such killing may take place", and the „person by whom the animal may be killed". The context in which this provision is placed suggests, however, that it is meant to apply to slaughtering rather than killing stray animals. In a similar manner, Article 10.2 of the Law on Animal Welfare provides that „[a]ggressive animals (…) may be killed (…) where they present risk to human and animal health (…)„. It is submitted that these rules are immaterial to the matter at issue.

30 The notion of „public security authorities" is not defined in either the Veterinary Law or the Law on Animal Welfare; not even the Constitutional Framework for Provisional Self-Government in Kosovo (UNMIK Regulation 2001/9) contains a definition. It should nevertheless be beyond doubt that KPS and UNMIK Police qualify as „public security authorities".

31 Articles 8.1 and 15 of the Law on Animal Welfare; concerning the KVFS see also Article 5.1 of the Law on Animal Welfare.

Apart from force protection concerns that might prevail in individual confrontational situations, the unauthorised possession of weaponry and the cutting and theft of wood from public premises are crimes punishable under the Criminal Code of Kosovo. Preventing and, should need be, suppressing such activities is a matter of law enforcement. In their capacity as a civilian responsibility, law enforcement tasks must be performed by the KPS and UNMIK Police (cf. para 11(i) of UNSCR 1244 (1999)). KFOR could still get involved, yet only within the range of its supporting tasks (para 9(d) of UNSCR 1244 (1999)). As a result, KFOR action concerning illegal woodcutting in a law enforcement framework would require co-operation between KFOR and UNMIK (para 9(f) of UNSCR 1244 (1999)). It follows that Kosovar actors are not in a position to request KFOR support except through the appropriate UNMIK channels.

4. KFOR's Legal Status

Usually, the status of military forces operating on foreign territory is defined in a more or less detailed status of forces agreement[32]. The unique situation that preceded the deployment of KFOR was not favourable to concluding such an agreement though. It took considerable time before COMKFOR and the Special Representative of the United Nations Secretary-General (SRSG) agreed on the details of the international presences' status[33]. UNMIK transformed this agreement into Kosovar internal law by adoption of Regulation 2000/47 „on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo" dated 18 August 2000. It should be highlighted in this context that COMKFOR and the SRSG have issued the Joint Declaration as equal partners, as recognised in the preambular paragraph of UNMIK Regulation 2000/47 that specifies that the regulation was issued "[f]or the purpose of implementing, within the territory of Kosovo, the Joint Declaration".

According to the Joint Declaration, „KFOR, its property, funds and assets shall be immune from any legal process" (Section 2.1), and KFOR personnel (unless locally recruited) shall be „[i]mmune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo" (Section 2.4(a)) and „[i]mmune from any form of arrest or detention other than by persons acting on behalf of their respective sending States" (Section 2.4(b)). Moreover, „KFOR contractors, their employees and sub-contractors shall be immune from legal process within Kosovo in respect of acts performed by them within their official activities pursuant to the terms and conditions of a contract between them and KFOR" (Section 4.2).

These immunities express the recognition, by the SRSG[34], of the fact that KFOR has absolute immunity within Kosovo, and that KFOR personnel and KFOR contractor personnel enjoy functional immunity. These immunities do not, however, create a legal vacuum in which arbitrary action could be taken. In accordance with consistent practice concerning international peace missions, status of forces agreements, and diplomatic relations, KFOR is bound, through the NATO chain of command, by UNSCR 1244 (1999) as implemented by the North Atlantic Council and supplemented by relevant general principles of international humanitarian and human rights law, and its own and contractor personnel must respect domestic Kosovar legislation unless the exigencies of the mission dictate otherwise[35].

From a practical perspective, issues related to these immunities arise from time to time. The following examples will highlight how such issues can be addressed from a legal perspective.

4.1 KFOR Immunity: Taxation by Municipal Authorities

The international presences in Kosovo are by far the wealthiest actors in the area. That might have inspired some Kosovar municipalities to devise creative ways of how to raise additional revenue. Some municipalities have tried to claim Value Added Tax (VAT) for imported goods used in the course of CIMIC projects. Obviously, such claims have no legal basis whatsoever. KFOR's immunity from „*any* legal process" (emphasis supplied) includes immunity from the legal process of taxation of its property, funds and assets.

4.2 Functional Immunity: KFOR and Kosovar Speed Limits

When KFOR entered Kosovo in July 1999 there was virtually no regulatory framework for road traffic. In addition, many roads were in a poor condition and few all-weather tarred roads existed in rural areas. To reduce the risks for both KFOR drivers and such members of the civilian population as might be affected by KFOR road traffic, COMKFOR introduced specific speed limits for KFOR vehicles in a Standing Operating Procedure (SOP). While these speed limits have remained unchanged since, the competent civilian authorities have introduced a variety of speed limits on their own behalf. Not surprisingly, these speed limits often differ from those established by COMKFOR for KFOR vehicles – sometimes they allow for more, sometimes for less speed. Where civilian authorities have introduced lower

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[32] On the various legal issues pertaining to status of forces agreements see Part II of Dieter Fleck (ed.) The Handbook of the Law of Visiting Forces (2001).

[33] Joint Declaration on the status of KFOR and UNMIK and their personnel, and the privileges and immunities to which they are entitled, dated 17 August 2000.

[34] UNSCR 1244 (1999) has established KFOR and UNMIK as equal partner missions and has not created a hierarchy between them. As a result, the SRSG has no authority to define the scope of KFOR immunities of his or her own right.

[35] Section 2.2 of the Joint Declaration specifies that „(a)ll KFOR personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General insofar as they do not conflict with the fulfilment of the mandate given to KFOR under Security Council resolution 1244 (1999)„. By way of contrast, „KFOR contractors, their employees and sub-contractors shall not be subject to local laws or regulations in matters relating to the terms and conditions of their contracts" (Section 4.1). KFOR contractor immunity is, accordingly, more limited than KFOR personnel immunity.

speed limits than COMKFOR adherence to the latter limit might not only result in road danger being caused by KFOR vehicles but could also create the impression on the part of the civilian population that KFOR personnel are speeding and hence both jeopardise KFOR's reputation and encourage bad road manners of civilian drivers. Some subordinate commanders have, accordingly, used the authority delegated by COMKFOR to impose lower speed limits than those specified by the relevant SOP, and ordered KFOR personnel under their command and control to adhere to civilian speed limits provided that they are lower than the relevant KFOR speed limit. In doing so, they have contributed to the spirit of respect for local laws.

4.3 KFOR Contractor Immunity: Border Crossing Issues

Some troop contributing states rely on contractors for various purposes, including transport of certain supplies from home supply bases to the field camps of their KFOR contingents. Upon crossing the administrative boundary line (from Serbia) or border (from Albania, Macedonia, or Montenegro) into Kosovo, some contractor personnel have repeatedly experienced attempts to treat them like just any other importer of goods.

On the one hand, border police personnel have attempted to open sealed KFOR contractor containers based on allegations that KFOR or KFOR contractor vehicles had been used for smuggling purposes at an earlier stage. Immunity from legal process in respect of acts performed by KFOR contractors within their official activities pursuant to the terms and conditions of relevant contracts covers any legal process related to crossing the Kosovar border or administrative boundary line, respectively. Considering that not only relevant NATO policies and troop contributing state legislation but also the notion of respect for local laws require KFOR to prevent illicit activities from being committed by its contractors or their personnel, border police officials may call KFOR military police and ask them to investigate any cases of suspected smuggling or the like. On the other hand, following the occurrence of cases of 'bird flue' in 2005, the Kosovar authorities introduced a mandatory biological decontamination program for trucks entering Kosovo at border and administrative boundary line crossing points. Truck drivers are required to pay a lump sum allowance for the decontamination of the tyres of their trucks. While Kosovar authorities can arguably require KFOR contractors to participate in the mandatory biological decontamination program they must respect their immunity from legal process in respect of acts performed by them within their official activities to the extent that they may not charge the lump sum.

Conclusion

Once well entrenched in their areas of operation, peace missions have to deal with increasingly different challenges than at their initial stages. The KFOR example shows that notwithstanding remaining threats to the secure environment the growth of institutions and a legal order – i.e. initial successes of institution-building and restoring (or introducing) the rule of law – exposes a peacekeeping force to a growing body of domestic law to which it, its personnel and contractors, must pay respect, and to unconventional ways of interaction with, or surprising requests from, the newly established institutions. Moreover, policy-dominated issues play an important role where peacekeeping forces retain part of the robust posture (although not resort to the means whose use might be necessary in a case of contingency) associated with their mandate.

Regardless of the adaptation of KFOR's center of gravity, the examples discussed reinforce the insight that in making decisions, military commanders must duly consider the operational legal framework governing the mission among the factors defining the situation to which operation plans respond. Commanders must reflect the legal dimension of the military campaign they direct at all stages. Operational success will be enhanced if peacekeeping forces respect domestic law in receiving states while maintaining their status and authority derived from the mandate and status of forces arrangement. ■

The Inter-American Commission and the Court of Human Rights: Enforcement Mechanisms of International Humanitarian Law?

Carolin Söfker*

Der Artikel behandelt die Frage, inwieweit man die Organe des inter-amerikanischen Menschenrechtssystems auch als Durchsetzungsorgane des humanitären Völkerrechts bezeichnen kann. Dabei untersucht die Autorin relevante Entscheidungen der Kommission und des Gerichtshofes, in denen die beiden Menschenrechtsorgane Stellung dazu genommen haben, ob sie humanitäres Völkerrecht anwenden können und wenn ja, ob durch direkte Anwendung oder indirekt im Wege einer Interpretation.

Von besonderer Relevanz sind hierbei die Entscheidungen der Kommission im Fall *La Tablada* und des Gerichtshofes in den Fällen *Las Palmeras* und *Bámaca-Velásquez*, wobei über die Bedeutung des zuletzt genannten Falles Uneinigkeit besteht.

1. Introduction

The discussion during the last years and decades about the relation between human rights law and international humanitarian law (IHL) did not only lead to the issue of the relation between the various international law conventions, but also to the question whether human rights bodies, such as regional human rights courts, could apply IHL.

The former question has been more or less decided since the International Court of Justice (ICJ) in its Advisory Opinion on the lawfulness of the Threat of Use of Nuclear Weapons has confirmed the applicability of human rights during armed conflicts and has qualified IHL as *lex specialis* in relation to human rights law.

The latter question, however, is still highly contentious and of crucial importance since IHL does not provide a selection of implementation mechanisms comparable to those provided by the system of human rights law. This article does not take up the discussion whether the human rights organs should in any event apply IHL or which practical problems arise in such cases. Rather, this article concentrates on the question whether the Inter-American Human Rights Commission and Court as organs of a well developed regional human rights system already apply IHL next to the Inter-American Convention on Human Rights and, therefore, can be conceived as an enforcement mechanism of IHL.

2. Development within the Decisions of the Commission and the Court

2.1. Triggering Motive of the Discussion: The *La Tablada* and the *Las Palmeras* cases

The Commission began to deal with the question of the applicability of IHL in 1987 when the Commission examined the case of *Disabled Peoples' International et al.* v. *United States*.[1] In the Annual Report in 1997 the Commission came to the result that in the case *Avilán et al.* v. *Colombia*[2] (killing of 11 citizens as a result of an armed confrontation between members of the Colombian army and an armed dissident group) as well as in the case *Hugo Bustíos Saavedra* v. *Peru*[3] (death of a journalist and injuries suffered by his colleague as a result of an attack upon them by the Peruvian military) the States in question had violated the American Convention as well as Common Article 3 of the Geneva Conventions. The Court indeed stated or, at least, based its judgement on the premise that the conflicts were internal armed conflicts, and, thus, IHL applicable.[4]

Yet, it was *Abella* v. *Argentina*[5] (29 deaths during an attack by 42 armed individuals on the barracks of an Infantry Regiment at La Tablada, in Buenos Aires province) that appeared to be of crucial importance in the development of the jurisprudence of the Inter-American human rights organs. Although the Commission decided against a violation of Common Article 3 in terms of content, the Commission came to the interim result that IHL applied. Its reasoning was based on the fact that the armed confrontation between both armed groups fulfilled the demands of the threshold set in Common Article 3[6] and that the Commission had the competence to apply IHL.[7] Concerning this latter result, the Commission "went to great pains to justify"[8] the applicability of IHL due to the opinion of the

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1 IAComHR, *Disabled Peoples' International et al.* v. *United States*, Application No. 9231, 22 September 1987.

2 IAComHR, *Avilán et al.* v. *Colombia,* Case No. 11.142, Report No. 26/97, 30 September 1997, para. 202.

3 IAComHR, *Hugo Bustíos Saavedra* v. *Peru*, Case No. 10.548, Report No. 38/97, 16 October 1997, paras. 63, 88.

4 IAComHR, *supra* note 2, para. 131; *supra* note 3, para. 58.

5 IAComHR, *Abella* v. *Argentina case* (so called "Tablada case"), Case No. 11.137, Report No. 55/97, 18 November 1997.

6 *Ibid.,* paras. 154-156.

7 *Ibid.,* paras. 178-179.

8 L. Moir, "Decommissioned? International Humanitarian Law and the Inter-American Human Rights System", (2003) 25.1. *Human Rights Quarterly* 5 191.

State of Colombia. First, the Commission mentioned articles 29(b), 25 and 27(1) of the Convention, which, in its opinion, provides for the application of IHL. Second, it used the argument of the overlap of human rights law and IHL to justify the direct application of the latter. Additionally, the Commission pointed to the first advisory opinion of the Court from which the Commission concluded that the Court had already accepted the application of IHL.[9]

These arguments mentioned by the Commission in *La Tablada* were criticised in the literature. Especially, *Liesbeth Zegveld* refuted every single argument and came to the result that neither the aforementioned Convention nor the overlap of human rights law and IHL or the jurisprudence of the Court support the decision of the Commission regarding the applicability of IHL by the organs of the Inter-American Convention on Human Rights.[10]

Her position should reasonably be followed since there is no legal basis for the direct application of IHL provided by the Inter-American Convention: neither article 27(1) nor the articles 29(b) and 25 of the Convention refer to the direct application of IHL. Rather, these articles concern cases in which other international conventions have to be considered to identify a violation of the American Convention.

Nevertheless, in various cases brought before the Commission in 1999, it continued to adopt the same stance regarding the possible applicability of IHL.[11] The only exception was in *Coard* v. *United States*,[12] in which the Commission found that the detention was "incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to article 78 of the Fourth Geneva Convention"[13] and came to the conclusion that the detention "did not comply with the terms of articles I, XVII and XXV of the American Declaration".[14] Consequently, in its conclusion, the Commission did not find a violation of the Fourth Geneva Conventions, although the Commission noted in its considerations that the detention was not compatible with the Fourth Geneva Convention.

However in 2000, when the Inter-American Court dealt for the first time with the question of the applicability of IHL, the Court clearly decided against the opinion of the Commission in the Preliminary Objection concerning the *Las Palmeras* case. The Court declared that neither the Commission nor the Court itself had the competence to apply IHL directly.[15] It justified this decision with the argument that the American Convention "has only given the Court competence to determine whether the acts or the norms of the states are compatible with the Conventions itself and not with the 1949 Geneva Conventions"[16] and concerning the competence of the IAComHR, the Court declared that "it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission […] should refer specifically to rights protected by that Convention."[17] Thus, within in a few years, the two organs of the Inter-American Human Rights system came to absolutely different results concerning the same question. The decision of the Court did not find only supporter in the literature. This decision was also criticised, especially by *Fanny Martin,* who explained that the decision of *Las Palmeras* runs contrary to the evolution in the practice in the American system. She even mentioned that the decision of the Court lacks "peut-être un peu d'audace".[18]

Nevertheless, this judgment of the Court influenced the subsequent decisions of the Commission. While initially, in the case *Monsignor Oscar Arnulfo Romero y Galdámez* v. *El Salvador*,[19] (it concerned the extra-judicial execution of the Archbishop of San Salvador by members of the Salvadoran armed forces acting as a death squad during the civil war in El Salvador) the Commission hesitated to do so, it eventually seemed to follow the Court's line by deciding that "El Salvador has violated article 4 *in conjunction with* the principles codified in Common Article 3 of the Geneva Conventions."[20] The wording of this statement is not seen as a clear position to the judgments of the IACourtHR[21] and is comparable to the formulation in the case *Coard* v. *United States* in which the Commission used the wording "as understood with reference to".[22] One can only speculate about the reasons which led the Commission to choose this expression: perhaps it explicitly wanted to leave open whether it has decided to follow the Court directly in its opinion or whether it persists in its opinion and, therefore, contradicts the Court. But finally, this question can be left open because in the later case *Rio-Frío Massacre*[23] the Commission was clearer in its decision: it only found a violation of article 4(1) of the Convention, although the petitioners also alleged State responsibility for Common Article 3 of the Geneva Conventions.[24] The Commission used Common Article 3 only to find out whether there was a violation of the American Convention.[25] With this decision, the Commission therefore adapted itself to the view of the IACourtHR that a direct application is not possible and turned to an indirect application of IHL.

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9 IACourtHR, Advisory Opinion OC-1/82, 24 September 1982.

10 L. Zegveld, "The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada case", (1998) 324 *International Review of the Red Cross* 505-511.

11 IAComHR, *Lucio Parada Cea et al.* v. *El Salvador*, Case No. 10480, Report No. 1/99, 27 January 1999; *Jose Alexis Fuentes Guerrero et al. v. Colombia*, Case No. 11.519, Report No. 61/99, 13 April 1999; *Ignacio Ellacuría, S.J.* v. *El Salvador*, Case No. 10.488, Report No. 136/99, 22 December 1999.

12 IAComHR, *Coard* v. *United States*, Case No. 10.951, Report No. 109/99, 29 September 1999.

13 *Ibid.*, para. 57.

14 *Ibid.*, para. 61.

15 IACourtHR, *Las Palmeras* v. *Colombia,* Preliminary Objections, 4 February 2000 (Series C No. 67).

16 *Ibidem*, para. 33.

17 *Ibidem*, para. 34.

18 F. Martin, "Application du droit international humanitaire par la Cour interaméricaine des droit de l'homme", (2001) No.844 *International Review of the Red Cross* 1038.

19 IAComHR, *Monsignor Oscar Arnulfo Romero y Galdámez* v. *El Salvador,* Case No. 11.481, Report No. 37/00, 13 April 2000.

20 *Ibid.*, para. 72; emphasis added.

21 L. Moir, *supra* note 8, at 16.

22 IAComHR, *supra* note 12, para. 57.

23 *See* IAComHR, *Corporación Colectivo de Abogados "José Alvear Restrepo"* v. *Colombia*, Case No. 11.654, Report No. 62/01, 6 April 2001.

24 *Ibidem*, para. 83.

25 *Ibidem*, para. 53, 54.

2.2. The *Bámaca-Velásquez* case as a Turning Point?

With the decision of the Court in the case of *Bámaca-Velásquez*[26] (a guerrilla combatant was captured during a battle, tortured, and then murdered by the military) the position of the Court concerning the applicability of IHL became less clear and has been assessed differently so that the role of the two organs concerning the enforcement of IHL is again contentious.

In this case, the Commission asked the Court to decide about a violation of several articles of the American Convention, especially articles 3, 4 and 5, of articles 1, 2 and 6 of the Inter-American Convention to Prevent and Punish Torture as well as of Common Article 3 of the Geneva Conventions.[27] In its final judgment, the Court declared that there was a violation of articles 1, 3, 4, 5, 7, 8 and 25 of the American Convention and articles 1, 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.[28]

The decision as a whole is interpreted and assessed differently: *Lindsay Moir*, for instance, considered that "the Court reiterated its decision in the *Las Palmeras case*",[29] whereas *Hans-Joachim Heintze* declared that in this case the IACourtHR reached a different decision than in the *Las Palmeras* case.[30]

At first glance, concerning the final judgment of the case, the Court did not come to a different decision than in the *Las Palmeras* case: as seen above, the Court did not assert a violation of Common Article 3 explicitly. Yet, in spite of this, especially the explanations concerning Common Article 3 within the Chapter XVII of the judgment point to differences in relation to the *Las Palmeras case*. Thus, it is questionable whether a direct application of IHL is the difference, as claimed by *Hans-Joachim Heintze*.[31]

On the one hand this seems to be possible because the Court stated that "the State did not comply with the general obligations of article 1(1) of the American Convention in connection with the violations of the substantive rights indicated in the previous decision of this Judgment".[32] And within its previous considerations, in Chapter XVII of the judgment, it had examined a violation of article 1(1) in relation to Common Article 3 of the Geneva Conventions.[33] This may indeed point to a direct application of IHL by the Court.

On the other hand, the Court also used expressions which may be interpreted against a direct application: First, within the above mentioned considerations in Chapter XVII the Court did not come to the result that there is a violation of article 1(1) in relation to Common Article 3, although it began its examination from this starting point and titled this chapter "violation of article 1(1) in relation to Common Article 3". Rather, it concluded this chapter with the statement that the State violated article 1(1) in relation to articles 4, 5, 7, 8 and 25.

Second, within the examination of Chapter XVII, the Court declared that "[…] it can *observe* that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, Common Article 3."[34] The significance of the expression that the Court "can *observe* that certain acts also violate other international instruments" is at first glance ambiguous and the wording of this statement alone could point to a direct application. But it has to be read in context with the previous part of the sentence "the Court lacks competence to declare that a State is internationally responsible for the violations of international treaties that do not grant it such competence".[35] So the expression "observe" can, in this context, only point to an indirect application of IHL. Consequently, it can be ruled out that in this judgment the Court applied directly IHL rules.[36]

The central significance of the case *Bámaca-Velásquez* and therefore also its difference to the *Las Palmeras* case does not result from the question about the direct or indirect application of IHL.[37] Rather, the importance results from the question whether the State concerned is still obliged to protect people from inhuman treatment even during armed conflicts. The Court answered this question with the statement that "instead of exonerating the State from its obligations to respect and guarantee Human Rights, this fact obliged it to act in accordance with such obligations. Therefore, […], confronted with an internal armed conflict, the State *should* grant those persons who are not participating directly in the hostilities […], human treatment, without any unfavourable distinctions."[38]

This statement read in conjunction with the aforementioned makes clear that the Court found a way to use the convergence between human rights and IHL by considering the latter in its examination so as to improve the protection of people affected by armed conflicts. In contrast, in its judgment of the *Las Palmeras* case of 6 December 2001, the Court did not refer to IHL at all[39] and thus, the *Bámaca-Velásquez* case contains, in fact, a different decision concerning the application of IHL. With this decision, the Court began to take IHL into consideration in order to ascertain violations of the American Convention. However, the Court still

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26 IACourtHR, *Bámaca-Velásquez v. Guatemala,* Judgment of November 25, 2000 (Series C No. 70).

27 *Ibid.*, para. 2.

28 *Ibid.*, para. 230.

29 L. Moir, *supra* note 8, at 208.

30 H.-J. Heintze, "Las Palmeras v. Bámaca-Velásquez und Bakovic v. Loizidou? Widersprüchliche Entscheidungen zum Menschenrechtsschutz in bewaffneten Konflikten", (2005) 18.3. *Humanitäres Völkerrecht, Informationsschriften* 179.

31 *Ibid.*, at 179.

32 IACourtHR, *supra* note 26, para. 230.

33 *Ibid.*, para. 203.

34 *Ibid.*, para. 208; emphasis added.

35 *Ibid.*, para. 208.

36 *Ibid.*, para. 208; sharing the Court's opinion as to this point: Judge Sergio García Ramírez in his separate concurring opinion on the merits of the *Bámaca-Velásquez case*, para. 23.

37 In agreement: Sergio García Ramírez in his concurring opinion to the judgment of IACourtHR, *supra* note 26, para. 24.

38 IACourtHR, *supra* note 26, para. 207 (emphasis added).

39 IACourtHR, *supra* note 15, especially paras. 32-47.

does not agree with the first decisions of the Commission since it has not stated a violation of the Common Article 3 in its final conclusion of the judgment.

In sum it can be stated that even though the decision about the *Bámaca-Velásquez* case at first glance contains several indications for a direct application of IHL, this case does not constitute a turning point in the practice of the Court. It only confirms the possibility of an indirect application.

2.3. Ensuing Decisions

In recent years, the Commission was again confronted with cases concerning human rights violations during armed conflicts and, thus, with the question about the integration of rules of IHL in its decision on the merits.

One interesting case in this context is the case against Colombia submitted by different human rights organisations.[40] This litigation concerns the bombing of Santo Domingo by a helicopter of the Colombian Air Force which, according to the petitioners, resulted in the killing of 17 civilians and more than 25 wounded.[41] This case has not been decided on the merits, yet. But the petitioners used as an argument for a violation of the American Convention "that the victims were non-combatant civilians who were unarmed and that there was no military necessity or legitimate justification for the attack"[42] and, therefore, clearly referred to IHL. Hence, it is probable that the Commission will pay some attention to this consideration and perhaps confirms its decision in the case *Rio-Frío Massacre* by interpreting the articles of the American Convention in the light of IHL.

Additionally, the Report on the Demobilisation Process in Colombia contains hints that the Commission will not change its chosen way concerning the indirect application of IHL: within this report the Commission stated that "the norms of interpretation of the American Convention require that the organs of protection – the Inter-American Commission and the Inter-American Court – consider higher standards of protection provided for in other treaties ratified by the State. Those treaties include […] the Geneva Conventions of 1949 and their Additional Protocols of 1977".[43] In contrast to statements in older reports of the Commission, for example in the Third Report on Colombia,[44] the Commission does not use the term "apply" anymore, but the wording "consider" which leads to the assumption that the Commission will also indirectly apply IHL in future cases.

But the most substantial case in this point is the case *Gregoria Herminia, Serapio Christian, and Julia Ines Contreras* v. *El Salvador* (forced disappearance of three children captured by members of the military of the armed forces of El Salvador) in which the Commission declared – considering that some of the facts alleged had occurred in the context of an armed conflict – that the Commission "must still analyse the obligation of the State that emanate from the Convention *in light of* the provisions of IHL, which will be used in the interpretation as *lex specialis*."[45] By using the term "in light of" the Commission clearly refers to an indirect application.

At the same time, this is again a confirmation that the *Bámaca-Velásquez* case cannot be understood as the beginning of the direct application of IHL by the Court since the Commission did not feel inclined as a reaction to the Court's decision to once more change its decision practice and return to a direct application.

Any further elucidating decisions of the Court concerning this issue have not been made since the *Bámaca-Velásquez* case. So it remains to be seen in which way the Court will decide in future cases and if the *Bámaca-Velásquez* case can finally be seen as at least one step towards a direct application of IHL.

3. Conclusion

The identified indirect application of IHL by the Court and the Commission does not meet the requirements of the formal term "enforcement mechanism" since it generally demands a direct application. But from a practical point of view even such an indirect application can be seen as a way of enforcement: even though a violation of IHL is not explicitly mentioned in such judgments, violations of IHL by States can be prosecuted and condemned since every right provided by IHL can be referred to rights provided by human rights law. Consequently, the human rights organs can officially examine violations of the American Convention on Human Rights whereas they in fact adjudicate whether violations of IHL have occurred.[46]

And instead of overinterpreting the chosen practice as a direct application it must be kept in mind that the indirect application of IHL is the only way of application provided by the Inter-American Convention since the Convention does not give the competence to the Commission and the Court to apply directly IHL. If the Commission and the Court would directly apply IHL they would exceed their competences and their jurisdiction would be open to attack.

By an indirect application the Inter-American human rights organs make the most of their given competences: on the one hand, they obey the formalities so as to heighten the chance of being accepted by the States in question, and on the other hand, they "enforce" IHL in practice under the guise of an indirect application.

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[40] For example *Comisión Interfranciscana de Justicia, Paz y Reverencia con la Creación* and *the Comité Regional de Derechos Humanos „Joel Sierra"*.

[41] IAComHR, *Santo Domingo* v. *Colombia*, Petition No. 289/2002, Report No. 25/03, 6 March 2003.

[42] *Ibid.*, para. 8.

[43] IAComHR, Report on the Demobilization Process in Colombia, 2004, Chapter II, para. 13.

[44] IAComHR, Third Report on Colombia, 1999, Chapter IV, para. 12.

[45] IAComHR, *Gregoria Herminia, Serapio Christian, and Julia Ines Contreras* v. *El Salvador*, Petition No. 708/03, Report No. 11/05, 23 February 2005, para. 20 (emphasis added).

[46] In the end, this possibility is the consequence of the accepted applicability of human rights law during armed conflicts.

Seeking Justice in Post Conflict States: Any Answers or Just More Questions?

Bronwen Jackman*

Es geht um Gerechtigkeit, Wahrheit und Wiedergutmachung. Dies wirft viele Fragen auf. Dieser Artikel setzt sich mit internationalen juristischen Mechanismen auseinander, die dazu dienen, Nachkriegsgesellschaften in der Umbruchphase zu assistieren. Zunächst werden das Konzept der „Gerechtigkeit" und seine Verbindungen mit Wahrheit und Wiedergutmachung analysiert.

In einem weiteren Schritt wird dargelegt, wie in Nachkriegsgesellschaften Recht gesprochen wird. Das Augenmerk wird dabei auf den Konzepten von „transitional justice" liegen. Die wichtigsten Aspekte sind dabei die Rechtsstaatlichkeit, die Anwendung internationalen Rechts und die Errichtung von Wahrheitskommissionen. In Zeiten, da Konflikte und der Zerfall von sozialen bzw. institutionellen Strukturen immer häufiger auftreten, ist zunehmend von Bedeutung wie Gerechtigkeit sichergestellt werden kann. Nach einem Konflikt bleibt immer die Frage: Wie soll der Wiederaufbau eines Staates unter den Gesichtspunkten von Wahrheit und Gerechtigkeit begonnen werden?

1. Introduction

The issues are justice and truth and reconciliation. The issue is what is the role of justice? And what is its relationship with and to truth? What do we consider to be justice? Does justice exist for restorative purposes or for retributive reasons? Is it a concept fixed in nature or can we consider justice as a concept relevant to its circumstances and effects? Is it a universal concept, holding universal truths applicable to universal situations, or is justice more 'situation' specific? Is justice affected by cultural specificities or universal in its application? And what role does justice have in peace building in post conflict societies? Finally, how is it affected? After the genocide crimes of World War II the world hoped that it had ensured, after the Nuremberg Trials, that such atrocities were not again to be committed, and if they were, that punishment would ensure justice was done for the victims. The devastating reality has been that since then there have been many instances of genocide. While it is possible for us to focus on the Holocaust, we fail to account for those war crimes since then that have resulted in millions of victims, killed, raped and tortured.

This article will discuss the international legal mechanisms used and established to assist post conflict countries in transitional periods. The idea of 'justice' and its relationship with truth and reconciliation in post conflict nation states will be analysed. It will also discuss the methods in which justice is delivered in post conflict nation states. The focus of this article will be upon concepts of transitional justice, justice delivered by 'a rule of law', by international law application and by methods such as truth commissions. The issue of how justice is effected, or delivered, is becoming increasingly important as conflict, war, genocide, demolition of existing social and institutional structures, are increasing in frequency and intensity. However, after the conflict the question remains, how do states rebuild themselves in the pursuit of truth and justice?

1.1 The Jurisprudence of Human Rights

In 1948 the United Nations General Assembly adopted the Declaration of Human Rights. Thus a global institution would be instigated to offer protection and supervision of human rights.[1] Problematically, and perhaps rather obviously, this gives rise to claims of universality that may not be relevant to all United Nation member states. It also arguably puts forward an implied statement that if a state is not part of such a universal system then it is not interested, and has no commitment to, human rights law.[2] It is also somewhat problematic due to the nature of a universal idea of what constitutes human rights. For instance, such rights are more often allied intrinsically with religious and philosophical ideas and ideals. Further, such rights are relationally close to political ideologies. So whether a state has a teleological affiliation with a jurisprudence of communitarianism or extreme liberalism, may have a bearing on that states interpretation of exactly what constitutes a human right. Over the centuries there have been varied theories of rights including those owing their origins to Marxism, Socialism and Liberalism, to name a few, culturally specific ones. *Otto* calls these rights the first generation human rights and maintains that there is now a 'third generation' of rights propounded by third world states, which she claims are collective rights of people to economic

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[1] Dianne Otto, "Everything is Dangerous: Some Post structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law" (1999) 1 Australian Journal of Human Rights 2. Otto acknowledges any contention about the universality of human rights but endeavors to open up different ways, by reference to different theoretical approaches, to transformation of the human rights discourse.

[2] Ibid at 2.

independence and development.[3] These rights, still transforming themselves, are inclusive of concepts of peace and environmental sustainability.

If considered thought is given to the development of differing types of rights then it is interesting to suggest how controversial and again, how state specific, such rights can be. Globally, it appears there is no particular definition of a standard set of rights that all can agree upon. Is a considered right of a 'third world' country, with its focus on collective and economic rights any less of a 'human right', in the context in which most authors conceptualise and about which they write and analyse?

However, in the context of this discussion I will be referring to those sets of rights as set down in international law in the period since World War II. The relevance of the preceding comments is to suggest that it may be that a re-definition of international human rights may better serve the concepts of truth and justice and hence reconciliation if it can be broadened to encompass such 'third world'[4] rights. After all, compliance with current international law, such as the Universal Declaration of Human Rights 1948, the UN Genocide Convention adopted on 11 December 1948, and the Twin Covenants of 1966, have not been universally adopted by all sovereign states nor complied with at all times by signatory states. I would argue it is too simplistic to say that the fault merely lies with state sovereignty. It may well be a failure for some states to incorporate a spirit of inclusiveness.

1.2 The Declaration of Human Rights and the Twin Covenants

The amasing precepts as stated in the Universal Declaration of Human Rights, written after the shock of human rights abuses in post World War II, are to be more than commended. They are indeed an incomparable framework for justice, international co-operation, individual rights, state rights and one could say international hope. It has been suggested the enactment of these precepts were very much a response to the world's shock at the atrocities explicitly described at the Nuremberg Judgement of 1946, September 10th, pursuant to the 8 August proclamation of the Nuremberg Charter.[5] Since then, the world has witnessed the growth of international law, and the enactment of human rights laws with the all important Twin Covenants. These, of course, were enacted to reflect both civil and political rights, favoured by Europe and America, and economic and social rights favoured by communist countries.[6] Importantly, some countries further signed the Optional Protocol on the Civil Rights Covenant. This Protocol allows individual victims to appeal to the Human Rights Committee if they have suffered human rights abuses.[7]

There is no doubt that there is a global will, in most instances and least in rhetoric, to ensure that human rights abuses are recognised and punished according to law. Many states have adopted international treaties and covenants into their domestic legislation. Not always in the entirety of the legislation but often in the spirit. It is still true though that state sovereignty will often prohibit total adoption into domestic law of international rules, but at least often the spirit is strong. That is until a situation occurs domestically that does not allow governments to even follow the spirit of such internationally adopted principles.[8]

It has been the hope over the years of human rights lawyers, non government organisations and individuals, that international law will provide a just, universal system of legal rule that will assist in the obtaining for all states a standard, and consistent mechanism, by which law can be administered. In effect, the signing and ratification of international treaties will give rise to a presumption of international customary law. It should be stated though that compliance with such laws has always been difficult in the breach.

How justice is delivered, and the type of justice chosen in a particular circumstance, is reflected in the ability of individual societies to move forward to healing and reconciliation. Formal methods of justice, those under the rule of both international and domestic law, deliver a certain type of justice. This is often founded upon rules of evidence and punishment on breach. It is very focussed on the perpetrator and his/her or their punishment, so that victims can feel that justice is done. This is very much a paradigm of punishment, with hopefully a retribution that includes compensation. This type of justice is formal in its application and result, and has the advantage of absolute identification and blame of the perpetrator. It is retributive justice and a paradigm with which many countries are familiar. It does, most obviously, have its distinct limitations. The foremost limitation is justice so delivered requires financial resources, sound legal institutions, and an intact independent judiciary. Its other limitation, closely allied, is that in many post conflict societies there are no existing social structures within which retributive justice can be delivered.

Further, even if there are adequate resources available to ensure efficacious delivery of formal justice, there are issues of timeliness, identification of perpetrators and surrounding support mechanisms for the delivery of justice. The issue of timeliness is an important one. Failure to quickly identify perpetrators and bring them to justice means that justice is not done. If perpetrators are quickly identified and trialled then the focus is purely on punishment with little time or money spent on the victims.

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3 Ibid at 2.

4 The author is not at all comfortable with the use of the expression 'third world rights', nor the expression 'developing countries'. So, in the absence of an appropriate phrase (with which she is comfortable), the use of parentheses is adopted.

5 G. Robertson, *Crimes Against Humanity,* Penguin Books, Allen Lane, 2002.

6 G. Robertson, *Crimes Against Humanity,* Penguin Books, Allen Lane, 2002, pp 132.

7 G. Roberston, *Crimes Against Humanity,* Penguin Books, Allen Lane, 2002, pp 52-53.

8 It is outside the scope of this discussion to examine in any detail the inter relationship between domestic laws and their international counterparts. Suffice it to say, that in Australia we have arguably experienced a failure by government to comply with our domestic legal commitments to international law with the instigating of mandatory detention and our failure to commit to international legal precepts in relation to refugees.

Another important element in the process of formal justice is the idea of accountability. While accountability is inherently seen in judicial mechanisms its importance to the victims is immeasurable. There is a relationship between justice and accountability that is inseparable to the administration of justice. It does, however, require sound social hierarchies and financial resources. It also, in international law, requires political will and cooperation, which is most often lacking for various reasons. And what of truth? The purpose of formal delivery of justice is to, through rules of evidence and procedure, obtain the truth of a situation in order to identify and punish a perpetrator.

One of the primary limitations of formal justice systems, and one very much evident in the former Yugoslavia post war criminal trials, is the immunity afforded to Heads of States, an issue later discussed in relation to the war crimes tribunal in the former Yugoslavia.[9]

Therefore, in many post conflict states the delivery of formal, retributive justice is highly problematic and often not at all satisfactory. There are, though, other ways to approach the issue of justice and truth. Ways that offer a more victim centred and appropriate way. This paper examines how several states have dealt with post war atrocities and the need to see justice done but at the same time move forward into a constructive societal rebuilding. Two states, the former Yugoslavia and Rwanda have, in pursuit of a formal justice, used the mechanisms of the International Criminal Court to deal with human rights abuses.[10] The power and purpose of such a tribunal is to punish the perpetrators. The power of these Tribunals lies in the ICC Statute which sets out the powers of the Court and the Prosecutors. Other States, such as South Africa and East Timor have elected to use Truth Commissions to deal with nations human rights abuses. While these are very different mechanisms for justice, truth and reconciliation, they are arguably both effective, although not without their problems. There is an argument that they are not, however, mutually exclusive in their approach to justice (an issue to be explored in the forthcoming thesis).[11] They do, however, have distinctly different mandates under law.

1.3 The ICC and the Formal Role of Justice

Under the 1998 Rome Statute, one hundred and twenty nations elected to sign a statute to create the International Criminal Court. It was a step forward for the prosecution and punishment of international war crimes, genocide and crimes against humanity.[12] It was founded on the *jus cogens* principle, that peremptory norms can bind all persons regardless of nationality or identity. In many ways it signalled the beginning of a new international legal order. Unfortunately, it has been a victim of national sovereignty and national recalcitrance. A fact directly contrary to the principle of *jus cogens*. The court's jurisdiction is found either by permission from the Security Council under Chapter VII of the UN Charter or by the consent of the state wherein a defendant has committed a crime.

However, there are a number of fundamental difficulties which arise in relation to the jurisdiction of the ICC. Its jurisdiction is wide, and extends to genocide, war crimes and crimes against humanity.[13] Unfortunately, several nations have refused to ratify the Statute. Predictably, the refusal was based on the principle of state sovereignty, and an unwillingness to allow citizens to be prosecuted by the ICC. However, these nation states contend that a part of their reluctance to support and commit to the ICC relates to the fact that it really is an international court of limited jurisdiction.[14] It is limited because of its ineffectiveness to prevent war crimes, crimes against humanity and genocide because its jurisdiction is limited to crimes committed by a citizen or crimes committed in the territory of a signatory state. Additionally, a part of the jurisdiction of the ICC is to only exercise its jurisdiction when national courts are not able or are unwilling to do so.[15]

Therefore, state sovereignty is the excuse adopted to justify the lack of political will to ensure a universal and international response to war crimes against humanity and genocide. That is not to say that there have been no positive outcomes from *ad hoc* war crimes tribunals, or from the ICC itself. Rather, it is disappointing that an opportunity for legal global governance has failed to some extent. However, some analysis of the Tribunals' effectiveness in prosecution of war crimes is worthy of attention. The following are a few international perspectives on this issue.

2.1 The Yugoslav Tribunal

The International Criminal Tribunal for Yugoslavia (ICTY) was established in 1993 by a United Nations Security Council resolution. Its mandate was to prosecute war crimes and crimes against humanity in the former Yugoslavia since 1991. Its jurisdiction included the right to indict war crimes, including crimes of genocide, but not to impose a death penalty.[16] This particular feature is mirrored in the jurisdiction of the ICTR, which has in turn (in Rwanda) led to criticisms by Rwanda nationals that a provision prohibiting a death penalty is contrary to Rwanda's sovereignty, where a death penalty is allowed for certain crimes. Additionally the

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9 S. Grosscup, "The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice" (2004) 32:2 Denver Journal of International Law and Policy 356, 365-37.

10 J. Philpot, "Colonisation and Injustice: The International Criminal Tribunal for Rwanda" (1997) 31 *Canadian Dimension* 8; D. Roche, "Truth Commission Amnesties and the International Criminal Court" (2005) 45 British Journal of Criminology 565.

11 D. Roche, *supra,* note 10, p 565.

12 G. Robertson, *Crimes Against Humanity,* Penguin Books, Allen Lane, 2002 pp 346-348.

13 G. Robertson, *Crimes Against Humanity,* Penguin Books, Allen Lane, 2002, p 353.

14 N. Green, "Stonewalling Justice: U.S. Opposition to the ICC (World in Review) (International Criminal Court), (2004) 26.2 Harvard International Review (Summer 2004), p 34.

15 G.Robertson, *supra,* note 14, p 350.

16 S. Grosscup, "The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice" (2004) 32:2 *Denver Journal of International Law and Policy* 355; G.Robertson, supra note 14, p 136; P.Wald, 'Punishment of War Crimes by International Tribunals' (2002) 69 *Social Research* 1119.

ICTY has no police force of its own and must depend on the cooperation of states to assist in procedures relevant to arrests, the obtaining of witnesses and the incarceration of those persons prosecuted[17]. The Tribunal has been subject to much criticism from various quarters. Comments about its political biases, its failure to indict many of those responsible for human rights violations as well as its extraordinarily slow response to prosecutions, have all indicated a level of dissatisfaction, disappointment and frustration by many commentators.

The shock the world felt at the humanity crimes in the Balkans was only matched by the incomprehensibly slow response by the world and the United Nations to the hundreds of thousands of deaths that occurred. There was a desire, by the international community, to see the perpetrators publicly punished.

The enforcement of formal legal processes and procedures requires substantial resources of both finance and personnel. The application of the rule of law within a structure such as the ICTY, is time consuming, expensive and perpetrator oriented. The time alone taken to ensure an arrest, the collection of relevant data to the charges and the compilation of witness statements and availability is problematic. It is also easy to overlook the difficulties faced by victims in this process. The complexities of a post conflict society, in the case of the former Yugoslavia, were daunting. The ethnic alignments and differences were complex and centuries old. *Grosscup*[18] comments that in order to understand the ICTY we need to look at its predecessor the Nuremburg Tribunal. Interestingly, a major departure point between the two tribunals is the fact that one was very much victor's justice while the other had no victors at the time of the tribunal's establishment.[19] However, it has to be noted that in many ways this perception has carried over to the ICTY as well. This affects the perceptions of transparency and accountability that are essential to the application of the rule of law in criminal prosecutions. If the decisions of a tribunal are not perceived, and accepted, as neutral then their effectiveness is diminished and the public's perception of justice is tarnished.

In many ways, this is the most important criticism of any war crime tribunal, except for that conducted at Nuremburg. Public confidence in the law depends upon fairness, which includes neutrality, justice, transparency and accountability. If any of those elements are not present, or even if they are but in a weakened state, then public confidence declines. This in turn has a direct affect on the efficacy of the delivery of justice.

The need for justice is obvious and perpetrators have to be punished, or to make amends. So, the question is with the ICTY, how was justice served and how efficacious were its processes? One commentary suggests that as of 2004, 80 defendants were indicted, thirty trials were conducted, ten appeals were heard and seven persons are serving prison sentences.[20] The importance in those high profile arrests and convictions should not be overlooked. It is not acceptable in the eyes of the international community to commit crimes of genocide and human rights abuses and it can not be denied that these prosecutions, albeit not unproblematic, send a message to the world at large that there is a mechanism for punishment at an international level, for those who breach certain moral precepts.[21] An important point that can not be overlooked is that from a traditional justice point of view, many countries in post conflict situations can not afford to conduct and run prosecutorial trials. Apart from a question of resources there may be no existing legal structures in which to conduct these trials. The fact that there exists an international criminal court at least offers an opportunity for some justice to be delivered. Criminal tribunals also offer one method for a country making a transition from one regime to a more democratic and equitable society, a means of achieving some faith in the rule of law. As *Kreitz* suggests[22], war crimes tribunals can help emerging democracies discover the advantages of a strong legal system. A caveat on this comment though is that while *Kreitz's* comment is true, many states do not have any where near the resources to sustain a strong, equitable judicial system. Additionally they may also have social complexities that may prevent full cooperation and indorsement of a legal system immediately after protracted conflicts. Also, it may well be that some nations choose to investigate other conflict management processes additional to those more formal ones. The relationship between justice and reconciliation is complex. All post conflict models need to be examined and analysed in terms of their contextual application, as well as their need for sovereignty and dignity.

In the Balkans the number of potential domestic prosecutions is enormous. It has been suggested that anywhere between 20,000 and 50,000 possible prosecutions exist. No domestic courts in any nation, let alone one torn apart by war, can deal with such numbers. It therefore begs the question of whether, as *Wald* suggests, war crimes tribunals may not be the only mechanism for post conflict justice, that potentially there is a role for truth commissions as well as more formal legal processes. These comments suggest that in some instances international war crime tribunals are the only realistic alternative as they allow an international, slightly more removed forum, for victims of crimes against humanity. National courts would never be able to sustain such a burden. As well, persons still involved closely in their communities may not feel comfortable giving evidence in a local forum.[23]

The prosecution of indicted high profile persons by the ICTY has given rise to many questions as to the efficacy of international legal means to seek justice. It can be argued, that in this case, truth and reconciliation are rarely discussed as

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17 P. Wald, *supra* note 17, p. 119.

18 S. Grosscup, *supra* note 17, p. 361.

19 A. Rigby, *Justice and Reconciliation: After the Violence,* Lynne Rienner Publishers Inc, 2001, p.1.

20 P. Wald, Patricia, "Punishment of War Crimes by International Tribunals" (2002) 69 Social Research 1119(17).

21 P. Wald, Patricia, "Punishment of War Crimes by International Tribunals" (2002) 69 Social Research 119(17).

22 Neil J Kreitz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington: USIP) 1995.

23 P. Wald, *supra* note 22, p 1119(17).

either part of the justice seeking process or as an end result. In fact, very little of the literature on the ICTY refers to the concepts of truth and reconciliation. It may be that these are an implied aspect to the seeking of justice, but I would have to argue that were that the case then the attempt has been clumsy and ineffective in the extreme. Perhaps the stage was too big, the issues too complex, or perhaps it was the fact that the failure of the United Nations and the rest of the international machinery was too slow and cumbersome. More likely it was too caught up with ideas of sovereignty and a belief that never again could such atrocities occur in Europe. Be that as it may, examples of human rights abuses could have been found in other countries. The fact is the world did not react in time and the post conflict mechanisms for justice have, arguably, been less than satisfactory. Many of the criticisms can also be levelled to a large extent directly at another international attempt to respond to crimes of genocide in another part of the world.

2.2 Rwanda and the ICTR

In 1994 a genocide which killed an estimated 500,000 people occurred in the South African country of Rwanda.[24] Not only did the international community fail to respond in time but the UN Security Council failed to reinforce its contingent already there. As well, unfortunately that contingent had a limited mandate. In 1994 the UN Security Council created an international criminal tribunal to prosecute those responsible for the genocide. Following this Chapter VII of the UN Charter established the ICTR. Then, in 1995 the first indictment for genocide was issued by Judge *Richard Goldstone*. By 1996 genocide suspects incarcerated numbered over 92,000.

Apart from interesting differences between the jurisdictional mandates of the ICTY and ICTR, the ICTR and the national courts of Rwanda have concurrent jurisdiction and the ICTR has primacy over the national courts.[25] This allows those being prosecuted for serious violations of international humanitarian law to be prosecuted at either level.

The powers and limitations of the tribunal and the ambit of its jurisdiction is adequately discussed in *The Prosecutor v Jean Paul Akakesu:* case No. ICTR 96-4-T.[26] This particular case is important in that it widens the ambit for cases of rape in war to be included in the definition of genocide. The Tribunal held that "genocide is characterised by the factor of particular intent to destroy a group". The crime of rape during war can arguably fit this criterion. This, it can be argued, is one of the ways that the application of more formal and traditional methods of justice may offer long term benefits to the strengthening of international law in the future. Law changes through its application and interpretation, so a wider, more inclusive definition of what constitutes rape in war may result in long term changes to the international rule of law. Rwanda is interesting for other reasons allied to the former comments. Some of the case law offers a challenge to international law itself as it shows the problems encountered when there is an attempt to balance one state's rights of self determination against another's duty to intervene. Thus, it allows great scope for discussion on sovereignty and its relevance in international law. It also allows for analysis of the scope of international law and its limitations which may lead to a choice of other justice seeking mechanisms. It is suggested that after the lessons of the Holocaust, the former Yugoslavia and Rwanda, that there is a need for a strong body of international law now more than ever.[27] Human rights abuses require intervention. What is most telling and certainly worthy of discussion and attention is *Arbour's* comment that "The purpose of the courts is not to reconstruct fallen states after war and insert whatever laws they deem appropriate, but to implement a universal body of law to secure *justice* (my italics) for victims in those fallen states". It has to be noted that this is more than a monumental task. In many ways it is precisely indicative of the reasons that formal legal institutions face difficulties in post conflict peace building. Apart from the obvious problems of adequate financial and social resources, post conflict states may prefer to maintain that very sense of self determination that sovereignty implies. In order for what *Arbour* is proposing to work, there would have to be international precepts or laws that all courts on a domestic level in all states would have to accept, endorse and to which they would adhere. Even if that were possible, and the ambit of these laws was, according to the stated international covenants, laws or declarations, pertinent to those crimes of genocide, human rights abuses and so forth, then there will still be obvious clashes of domestic and international law. It may be the brave new world order, but whose? *Arbour* goes on to argue that the ICTR must remain cognisant of the limits of its power and continue to gain the respect of the international community, and that, traditionally immunity from massive human rights violations has been the rule while "accountability has been the rare exception". The advantages though of such brave attempts at international law lie in the fact that it is through the case law developed in criminal tribunals that international law will grow and thrive. These tribunals tell the world that someone is watching and that accountability is required and is mandatory. However, the limitations are clear and there must be room for processes of justice and reconciliation that maintain aspects of self determinism. Again, as with its counterpart the ICTY, the ICTR tribunal was not without its problems or criticisms. The sheer number of those in prison awaiting indictment for the crime of genocide meant that the tribunal and local courts were overwhelmed. Although, the fact that the tribunal's constitution was comprised of judges from the UN General Assembly and went to great lengths to ensure that it was not to be seen as 'victor's justice', as a response to the problems

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[24] Prosecuting Genocide in Rwanda: The ICTR and National Trials" July 1997) Human Rights First.

[25] Ibid.

[26] In this case the ICTR held that rape could be considered a crime of genocide. For an excellent discussion on the implications of such a decision refer to Lyons, Margaret A, 'Hearing the Cry without Answering the Call: Rape, Genocide, and the Rwanda Tribunal' [2001] 28 *Syracuse Journal of International Law and Commerce* 99.

[27] Justice Louise Arbour, "Access to Justice: The Prosecution of International Crimes: Prospects and Pitfalls", 1 Wash. U. j. Urb & Contemp. L. 13, 16 (1999) in M. Lyons, "Hearing the Cry Without Answering the Call: Rape, Genocide, and the Rwandan Tribunal", Syracuse Journal of International Law and Commerce (1999) 28:99, 108.

of numbers awaiting trial, Rwanda established a system of village tribunals to assist in bringing genocide suspects to justice.[28] The 'gagaca' courts were established in 2000 to assist the problem of excessive delays. It must be noted that one of the elements in established judicial systems globally, as a part of the rule of law, is that persons accused should be brought to trial expeditiously. Failure to do so is seen as a failure to do justice to the accused. So, in that way the 'gacaca' system offered an expeditious delivery of justice that was needed. However, again, this was not without any problems. The hope was that these tribunals would assist in the rebuilding process of Rwanda. In fact, it has been stated that a culture of impunity was not to be condoned or assisted or else the violence in Rwanda would never end.[29] Consequently there was a substantial investment in the establishment of gacaca tribunals. In part this was a direct response to the problems encountered through the delivery of justice in the ICTR. These problems included investigative bias, corruption of judges, intimidation of witnesses, weak defence counsel or absence of defence counsel, and political pressure".[30] Added to this, the large number of those awaiting trial would result in a ridiculously lengthy time frame for trial. In response, the Rwandan government suggested ways of transforming the traditional community based conflict resolution mechanisms called 'gacaca'.[31] This system is comprised of persons of integrity being elected by the relevant districts or provinces.[32] This allows the detainees, except for those accused of category 1 crimes[33] being brought before a tribunal and in front of an entire community.[34] Somewhat analogous to the model employed by South Africa, an unusual aspect of these tribunals is that provision is made for truth telling.[35] Thus those persons who confess before the tribunals, and their respective communities can have their penalties reduced.

It is obvious that the aim of this system is to both expedite trials and remove those incarcerated for lengthy periods and to involve the communities in establishing the truth, with a view to promoting reconciliation. While these are specific advantages, it has to be noted that the potential to compromise principles of justice is disturbing. Human rights groups and advocates have indicated the most pressing problems.[36] These are the lack of separation between prosecutor and judges, lack of legal counsel, no legally reasoned verdict, enormous possibilities for self recrimination. In short, equality, impartiality and defence provisions are lacking. Although in a response to such accusations, it could be argued that the practice of formal justice can also lead to a violation of human rights. The length of trials and the time for detention of those awaiting trials is contrary to human rights obligations as well. So, if neither system is perfect in the practice of justice, perhaps there is room for both. It does appear that a large percentage of Rwandan communities are in favour of gacaca tribunals, not the least because they offer a substantial level of community involvement and a chance for truth telling and exploration for forgiveness by community members. Interestingly, there has been some positive response by the 'judicial defenders' employed in Rwanda.[37] These are paralegals (Danish) who have been involved in defending, counselling and representing victims of the genocide in the Rwandan courts. In an optimistic and thus gratifying comment the Danish centre for Human Rights stated that despite the difficulties faced by the judicial defenders, including risk to their own lives and that of their families, that it has been "a vision which animated our part of Rwanda's struggle for justice" and which to some extent has prevailed.[38] They also suggest that although there have been operational challenges to the system, it can succeed if it is interlinked on several levels. That is it must succeed in functioning and it must have legitimacy. In many ways, the link here is obvious but it may be argued that the first link must be its legitimacy. In order for these community tribunals to obtain and maintain legitimacy there need to be sufficient resources available to support the structures. For instance, money for training the judges, administrative staff to maintain files of the hearings and written decisions would all be essential. In fact, legitimacy of gacaca tribunals is primarily dependent upon operational funding and commitment. Another aspect to legitimacy are the links between this and truth and fairness which in turn depends on funding from international communities which in turn will insist that human rights meet an acceptable standard.[39] An analysis of the effectiveness of these tribunals will involve an examination of whether they have enhanced the potential for truth telling and reconciliation and the degree to which various stakeholders or power brokers, be they individual or state, have intervened to affect the tribunal efficacy.

In judging the effectiveness of either the ICTR or the gacaca tribunals it must be stated that under international law, Arti-

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[28] United States Institute of Peace, "Rwanda: Accountability for war Crimes and Genocide", Special Report 13 1995. For a sound discussion on the notion of 'victor's justice see S Grosscup, "The Demise of Head of State Immunity", (2004) Denver Journal of International Law and Policy 355.

[29] P. Uvin, *The Gacaca Tribunals in Rwanda* (2002) <http://www.idea.int/publications/reconciliation/uplaod/reconciliation_chap07cs-rwanda.pdf> 8 August 2005; G. Gahima, "Re-Establishing the Rule of Law and Encouraging Good Governance", (2002) 55th Annual DPI/NGO Conference.

[30] Ibid, p. 3.

[31] Ibid, p. 3.

[32] F. Morrill, "Reconciliation and the *Gacaca:* The Perceptions and peace Building Potential of Rwandan Youth Detainees", (2004) Online Journal of Peace and Conflict Resolution, 6,1.

[33] Category 1 crimes include those persons whose criminal acts or participation places them among the organizers, incitors, supervisors of genocide or crimes against humanity. These persons are subject to judgment by ordinary courts. Category 2 comprises persons whose criminal acts place them among the authors or accomplices in murder of grave offences resulting in death. This group is judged by a District Gacaca Court Category 3 include persons whose criminal acts or participation render them liable for other grave offences in which there was no intention to cause the death of a victim. This group is judged by a category Secteur Gacaca Court.

[34] P. Uvin, supra, n. 30.

[35] F. Morrill, supra, n 33.

[36] S. Babalolas and S. Gabisireges, Perceptions *about the Gacaca Law in Rwanda: Evidence from a Multi-Method Study* (2001) Johns Hopkins University-Centre for Communication Programs <http://www.jhuccp.org/pubs/sp/19/Englih/ch3.shtml> at 23 August 2005.

[37] F. Kerrigan, "Some Issues of Truth, Justice and Reconciliation in Genocide Trials before Gacaca Tribunals in Rwanda" (2004) 8 *African Studies Quarterly* 1.

[38] F. Kerrigan, supra, n. 38, p 1.

[39] Ibid, 4, 5.

cle 2 of the ICCPR, victims of genocide have a right to a remedy. However those rights are served and met involves restoration of dignity to the victims of genocide. The interesting feature of an examination of the approaches taken to post genocide justice, truth and reconciliation lies in the complexity of the ethnic relationships, the involvement of post colonial interests and the response (or lack of from time to time) by the international community. The attempt to establish mechanisms that involve a wider ambit than a purely formal system of justice is to be applauded. The issues of truth and reconciliation are essential elements in the pursuit of justice. Indeed justice includes not only the notion of punishment but needs to include restorative aspects.[40] In Australian law, as in many other jurisdictions, the saying that 'justice not only must be done but seen to be done' holds true.

3.1 South Africa – Truth And Reconciliation

One of the most positive outcomes following the establishment of the *ad hoc* International Criminal Tribunals for Rwanda and the former Yugoslavia, under their individual rules of procedure and evidence, was to ensure that victims of crimes against humanity were not to be overlooked. Allied with the provisions in the Rome Statute of the International Criminal Court 1998, the status of victims was improved.[41] However, these had their short comings and alternative methods of justice and truth finding were explored throughout the 1980's onwards. As *Garkawe* argues, it was felt that truth commissions, as an alternative to more formal justice methods, would allow a more sympathetic environment for victims who would be able to tell their stories and consequently find themselves in a more sympathetic and supportive environment.[42] South Africa, for reasons historical, political and certainly religious elected to, in the wake of democratic changes to the long standing apartheid regime, employ a Truth Commission as a chosen model for reconciliation and justice. In a historical series of events, South Africa saw the then President, *FW de Klerk* lift a ban on the African National Congress (ANC) and similar organisations, release *Nelson Mandela* from prison, and sit down and arrange a series of meetings for all parties concerned to 'chart a path toward a new democratic non-racial South Africa'.[43] Following democratic elections in 1994 *Nelson Mandela* was elected President of South Africa. Faced with the problems of a newly emerging democratic nation, the country was struggling with the insurmountable difficulties of how to deal with the human rights abuses and those who had committed them who still in some cases held positions of authority, and acknowledge the need for victims' justice and the need to move forward into reconciliation and healing. In 1995 following the Promotion of National Unity and Reconciliation Act, the framework for a truth and reconciliation commission (TRC) was established and signed. The final clause in the South African Constitution reads:

"The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions of strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for 'ubuntu'[44] but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past".

In light of this commitment, the establishment and efficacy of the South African Truth and Reconciliation Commission needs to be examined. The hope and ambit of most truth commissions appears to include several elements. Among these is the need for truth telling, to see that truth telling contributes to justice,[45] that justice is delivered, (this requirement, if fulfilled allows human rights lawyers and bodies to accept that there is a level of transparency and accountability in the commission's processes), and to ensure a large degree of public involvement and governmental accountability. The TRC had an enormous mandate to fulfil and the Act, within a two year time frame originally, required that four issues were completed. These were to establish a comprehensive picture of the causes and results of human rights violations; to assist in granting amnesty to persons who applied for it; to present victims with a forum to tell their stories and apply for compensation; and to write a comprehensive report on the violations of human rights.[46] To this end, the Commission was comprised of three parts: the Human Rights Violation Committee, a Reparation Committee and, somewhat controversially, an Amnesty Committee. The latter committee distinguished the TRC from other commissions in other countries.[47] Additionally, the idea of 'pardon for the many rather than punishment for the few' has almost become the norm in transitional societies emerging from conflict.[48] This is in line with the idea that justice has a restorative element necessary if former foes are to live together. It is easy to see just how useful the paradigm of restorative justice as found in truth commissions such as the TRC, can be. Where the lines between conflicting parties are blurred, and where in many cases perpetrators themselves can become victims, the paradigm of formal justice may exacerbate problems rather than aid them. South Africa was unusual in the fact that rarely does a minority group, with its inherent privileges, ne-

[40] Fullerton, Patrick, 'Trying Genocide through Gacaca' [2003] *Liu Institute for Global Issues, Vancouver,* Canada.

[41] S Garkawe, "The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights", (2003) MULR 14, p. 3.

[42] Ibid.

[43] A Rigby, *Justice and Reconciliation: After the Violence,* Lynne Reinner Publishers, 2001, p. 123.

[44] The meaning of the term 'ubuntu' derives from the January 2002 arrests of Laurien Ntezimana and Didace Muremangingo of Ubuntu. The arrests occurred from the unauthorised publication by the Modest and Innocent Association (AMI) of a criticism of the government.

[45] P Hayner, *Unspeakbale Truths: Confronting State terror and Atrocity,* Routledge New York and London, 2001, p. 23.

[46] A Rigby, *supra,* n. 44, p. 127.

[47] L Graybill; K Lanegram, (2004) 8 African Studies Quarterly 6.

[48] Ibid, 1.

gotiate itself out of power as well as transferring, in a relatively peaceful fashion, that power to the ethnic majority.[49]

A criticism of the TRC is that there was both simultaneously a large degree of public exposure of the Commission and at the same time a lack of knowledge about what it actually did.[50] Buur's paper refers to the work of *Priscilla Hayner*, the foremost exponent of comparative studies on truth commissions. *Buur* also comments that the comparative study of truth commissions relies on 'the proposition that norms, actions and representations' are basically the same, so that what a truth commission should do and what it does are not totally aligned.[51] Further, he states that *Hayner* does not deal with this lack of transparency. In fact, he states that commissions do nothing but 'portray a global truth'.[52] In response, it could be argued that at least *Hayner* offers a starting point for any analysis of truth commissions. In fact, her focus on the issue of truth and justice is invaluable. *Priscilla Hayner* argues that truth commissions can even strengthen the application of the rule of law in developing democratic states, if they are properly empowered and can help a state meet international legal obligations.[53]

This argument is in direct opposition to those who maintain that truth commissions fall short, whichever way we look at them, because in cases of human rights violations, there is a duty to prosecute and investigate human rights breaches. Further, crimes of genocide and torture place an obligation on states to criminally prosecute perpetrators. It is argued that not to do this undermines the rule of law and sends a message of a culture of impunity. While the merits of this view are clear, the complexities of rebuilding post conflict states can prohibit this as an ideal. It can in turn be suggested that the TRC fulfilled at least part of this requirement of justice by the level of transparency of its public hearings and the extensive publishing of its findings. After all, one essential element in a functioning rule of law is the need for transparency and accountability. The TRC has endeavoured to do this. What it did though was, controversially, offer amnesty in certain circumstances. The reasons for this are clear. South Africa made a distinct choice. By offering amnesty it was not denying the truth of events but was insisting on reconciliation. Of course, it may be argued, that this provision was only possible in its application because of the high profile people who were promoting it. While *Orentlicher* (1991) maintains that criminal prosecutions enforce the supremacy of institutions thus offering a strength to emerging democracies, it could be suggested that the TRC has also done this to a certain extent. Citizen participation in democratic processes is essential in a democracy. By allowing truth telling and narrative in the pursuit of justice, people can feel an ownership of the processes towards reconciliation and healing. Of course, a necessary element to public confidence is reparation for past crimes. If this is inadequate or absent public confidence will diminish only to be replaced by cynicism and anger.

What needs to be kept in mind is that we are examining transitional means of obtaining justice. Hopefully, means that will ensure a serious level of self determination for states. Overt punitive methods of seeking justice are perpetrator oriented and may not be possible. The issue of justice in transitional states is 'do we focus on the victim or the perpetrator' and how do we do this as well as comply with international standards of human rights requirements? (*Garkawe*: 2003).

The effectiveness of the TRC has been analysed (Journal of Black Studies: 2004) and some interesting conclusions reached.[54] All participants believed that the TRC was effective in bringing to light the truth, although the Afrikaners perceived this to be less so than the English and certainly the Xhosa. In contrast to this, all three groups perceived that the commission was far less effective in assisting reconciliation, with the English perceiving it the least effective. As to the legitimacy of the Commission to conduct the hearings, the Xhosa agreed it was, while the Afrikaners and especially the English disagreed. This may indicate the historical origins and preferences for a traditional judicial system governed by the rule of law. To questions as to the overall effectiveness of the TRC, the Xhosa perceived and responded positively to the TRC processes. This may be a useful study when applied to other emerging democratic states in transition.

One of the criticisms of the TRC's amnesty provisions is that they actually violated victims' rights because they prohibited a right to 'retributive justice' by focusing on the restorative aspect. This argument makes certain assumptions however. These include that victims have a right to chose their justice, that there are sufficient resources available institutionally to offer a prosecutorial formal option and that victims' rights to reparation are taken away without access to criminal processes. The arguments based on these assumptions also require a jurisprudential response and investigation on the nature of justice. I would argue that such concern about the removal of victims' rights is viewed here through a linear, myopic view of rights. First we need to establish exactly what are the 'rights' that are being examined, and exactly what are their ideological premises. Perhaps people view some rights as more important than others. For instance, they may prefer a 'right' to an emerging democratic society to include justice, retribution and compensation. Or they may view, in the same circumstances, a 'right' to reconciliation, truth leading to justice as being as important. We can not make assumptions on a particular society's view of rights. That is a self determination matter. We can encourage human rights compliance by assisting developing democracies in their own legal processes during transitional phases.

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49 H Adam, "Contradictions of liberation: truth, justice and reconciliation in South Africa", (1996) 24-26 Journal of Business Administration and Policy Analysis, p. 108.

50 L Burr, "Monumental History: Visibility and Invisibility in the Work of the South African Truth and Reconciliation Commission", (1999) Paper presented at TRC: Commissioning the Past, p. 1.

51 Ibid, p. 2.

52 P Hayner, Human Rights Quaterly (1994) 652.

53 P Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001) Routledge, p. 105.

54 Jay A Vora, Erika Vora, Journal of Black Studies, Vol 34 (2004) 301-322. This study compared the responses between three ethnic groups in South Africa to the effectiveness of the Truth and Reconciliation Commission. The groups chosen were the Xhosa, Afrikaners and the English.

It can not be under estimated just how difficult 'transitional' phases are, nor how unique each transition will be.[55] What needs to be acknowledged and assisted is that emerging democratic nations have to choose between the need for vengeance and punishment and the need for peace and rebuilding. In other words, the choice is between restorative and retributive justice. At least this has been the debate. It may be useful now, to ascertain whether it is possible to have both and whether this can be achieved. The importance of any means of justice lies in the end result. It should ensure that future abuses of human rights do not occur and should assist in rebuilding a society. So there is no reason both retributive and restorative means to achieve justice can not be employed.[56]

3.3 Justice In Timor-Leste

For purposes of this discussion, some background information is included here to facilitate understanding of the events in Timor which led to our current interest in the role of restorative justice in that country. In 1999, in New York, an agreement was signed between Indonesia and Portugal as to the status of the Territory of East Timor which had been, since 1974, subject to civil war between those inhabitants who favoured independence and those whose alliances were pro-Indonesian. The result after 1974 was that Portugal withdrew and Indonesia placed military troops into East Timor and claimed it as its 27th Province. In 1998 Indonesia, in a series of discussions with the General Assembly of the United Nations, proposed a limited authority for East Timor within Indonesia. In 1999, by Resolution 1246 the United Nations Mission to East Timor (UNAMET) was established to oversee a transition period during which the people of East Timor would eventually decide for themselves. In 1999 thousands of people were registered to vote and in August 1999 an overwhelming number exercised that rights to vote for independence. Bloodshed and violence quickly followed instigated by pro-integration militias. With little response from the Indonesian government as many as 500,000 persons were displaced from their homes and many were killed. A Security Council mission to Jakarta obtained assurances from Indonesia that the offer of assistance to control the situation would be accepted. A multinational force (INTERFET) under the command structure of a member state (Australia) was authorised to restore peace and security. Following this large scale humanitarian efforts ensued. In October 1999 the UN Security Council established the United Nations Transitional Administration in East Timor (UNTAET) to assist the transition to independence. In 2000 command of military operations was transferred to a UN peace keeping force while UNTAET began to reorganise the future government. This resulted in the establishment of various portfolios including finance, police, economic affairs and justice. In 2001 the people went again to the polls to elect an 88 member Constituent Assembly with its mandate to rewrite the Constitution and to establish frameworks for future elections. In 2002, April 14th *Xanana Gusmao* was appointed president elect of East Timor.[57]

During the years 1975 and 1999 and during the period of Indonesian occupation, human rights breaches and abuses occurred along with extreme ongoing violence. The United Nations, in 1999, sponsored a program of justice aimed to investigate and prosecute the most serious crimes. This meant serious crimes would be prosecuted by a Serious Crimes Unit (SCU) under the General Prosecutor for Serious Crimes (DGPSC) and were to be tried by the Special Panels for Serious Crimes (SPSC). An *ad hoc* Human Rights Court was formed in Indonesia to try international crimes committed by Indonesian functionaries.

As *Hirst* and *Varney*, in their assessment of the serious crimes processes in Timor-Leste state, the process of justice in East Timor was one of lack of planning and lack of effective support. More damning is their comment that "these shortcomings signalled the level of commitment to the justice process shown by the UN, the international community, and the Timor-Leste government".[58]

The history of seeking justice in Timor-Leste has involved the use of judicial and non judicial mechanisms. The establishment of the SPSC, with its universal jurisdiction over crimes of genocide, war crimes and torture, has been fraught with difficulties. Most of these are similar to other states such as Rwanda and relate to problems of resources both financial and non financial. Added to this a lack of co-operation from the Indonesian government in relation to extradition of accused persons and the reluctance of Indonesia to bring to trial its nationals, has meant that the SPSC faced severe difficulties, although it continued to try to bring to trial those indicted of serious crimes. The unit closed in May 2005 and its effectiveness will warrant closer examination in time.[59]

A non judicial mechanism to assist issues of violence was considered to be necessary. In 2001, by UNTAET regulation 2001/10, the current Commission for Reception, Truth and Reconciliation was established.[60] The commission is an independent national mechanism to assist in the process of reconciliation between Timor Leste. A part of its mandate was to establish the truth about human rights violations between 1974 and 1999. Structurally, it was headed by 5-7 national commissioners nominated by the people and its mandate included truth telling, community reconciliation and the obligation to report and make recommendations following the report. An extremely interesting feature of CAVR was its

[55] P K Rakate, "Transitional Justice in South Africa and the Former Yugoslavia – a Critique", (1999) TRC Commissioning the Past, Workshop Johannesburg 11-14 June, p. 6.

[56] Ibid.

[57] "On the establishment of a Commission for Reception, Truth and Reconciliation in East Timor", UNTAET reg. 2001/10.

[58] M Hirst and H Varney, "Justice Abandoned? An Assessment of the Serious Crimes Process of east Timor", (2005) International Centre for transitional Justice, p. 1.

[59] M Hirst and H Varney, "Justice Abandoned? An Assessment of the Serious Crimes Process of East Timor", (2005) International Centre for Transitional Justice, p. 26.

[60] F.B. Ximenes, "The Unique Contribution of the Community-Based Reconciliation Process in East Timor"(Paper developed as part of the transitional Justice Fellowship Programme, co-hosted by the International Centre for transitional Justice and the Institute for Justice and Reconciliation, May 28, 2004), p. 14.

mandate to support the reception and integration of individuals who have caused harm to their communities by committing minor crimes.[61] The clarification this offers communities through the process of truth telling involves both victim and perpetrator in a realistic move towards reconciliation. In contrast to the provisions in the TRC in South Africa, it appears that the mandate for this commission is more transparent and realisable. *Fausto Belo Ximes* also elaborates the importance of CAVR in the repatriation of refugees suspected of having committed crimes.[62] He makes the point that while some would obviously have committed serious crimes most were forced by Indonesian militia to leave their homes. The CAVR allows them to tell their stories to their communities and to be reintegrated. Such an opportunity assists in minimising violence and reprisals and has the advantage of alleviating strain on institutional resources.[63]

The issue of self determination needs some comment here. Any mechanism for the pursuit of justice, be it through international law and *ad hoc* tribunals, or through truth and reconciliation commissions, or indeed an amalgam of both requires that the chosen mechanism satisfies requirements of accountability and transparency with a view to reconciliation and repatriation of a transitional state. It must, in a large measure, satisfy the international legal requirements. How to achieve this is best dealt with by the state concerned, with the aid of other interested parties (which should be the international community) and with a view to self determination. Articles 1(2), 55 and 56 of the International Covenants on Human Rights 1966; Article 20 of the African Charter of Human and Peoples Rights 1981, the Declaration on the Granting of Independence to Colonial Countries and Peoples and States according to the Charter of the United Nations and endorsed by the International Court of Justice, all state that people have a right to self determination. This right now occupies an identifiable place in international law. In 1971 the International Court of Justice in the *Namibia Case* held: "The subsequent development of international law in regard to non self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determining applicable to all of them."[64]

This judicial position was strengthened in 1991 when Portugal instituted proceedings against Australia before the International Court of Justice as an objection to a treaty between Australia and Indonesia over the exploitation of the "Timor Gap".[65] The Court recognised the normative status of self determination and the inclusiveness in the meaning of the concept to include economic factors and to elevate the norm to the status of a human right. The importance of this can and should be reflected in the rights of states to choose the ways they seek justice in transitional periods. A holistic view must be encompassed in any post conflict rebuilding. Law has a role to play in that. How the rule of law is applied is to be decided.

4.1 Concluding Comments

Transitional justice is a complex and complicated ideal. There are various ways of approaching the difficulties faced by states in rebuilding after atrocities, violence and human rights abuses have been committed. The question of whether a state should punish perpetrators through formal and international means of justice or through a more victim centred approach of truth and reconciliation commissions is a matter, I would argue, dependent upon many varying factors. These include finances, international commitment both at a local and international level, the provision of assistance by those countries that have better resources with which to assist, as well as the social and cultural requirements of the individual state. A nation's right to self determination requires support and assistance. But not every state wants international interference by other states. Besides, it can only be noted that unless international criminal bodies have adequate resources and are staffed with a real international commitment to see formal justice effected, then application of the rule of law can only lead to lack of justice, or to justice poorly applied. Justice poorly applied results in increasing violence, frustration and lack of cooperation. Nor is it victim centred and may not serve the needs of a state with complex ethnic difficulties. If we approach conflict resolution with the rule of law it must be served by resources, in tact legal institutions, accountability and transparency and must enjoy judicial independence. These are ideals in the administration of justice that the rule of law requires. Transitional states are not likely to be in the position to enjoy many of these requirements at all. So something needs to be done. The various models of transitional justice researched here all offer something positive on which to build. It is important to critically balance the weaknesses against each other and more formal methods of seeking justice. Then, the positive elements in each model need to be collected and suggestions offered as to a model of restorative justice that works for other transitional states. Although it must be noted that each state has its own individual requirements and it will not be a case of 'one model fits all'. ■

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61 F.B. Ximenes, "The Unique Contribution of the Community-Based Reconciliation Process in East Timor"(Paper developed as part of the transitional Justice Fellowship Programme, co-hosted by the International Centre for transitional Justice and the Institute for Justice and Reconciliation, May 28, 2004).

62 Ibid at p. 17.

63 Ibid at p.18.

64 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) [1971] ICJ Reports 16 at 31.

65 G. Naldi, "The East Timor case and the role of the International Court of Justice in the evolution of the right of peoples to self determination" (1999) 4 AJHR.

Bewaffnete Konflikte und humanitäres Völkerrecht

Christian Lentföhr*

This article is meant to assist national dissemination officers answering the question, whether it is still worth dealing with International Humanitarian Law. Although the existence of the Geneva Conventions is well known to the public, we have to admit that the rules are constantly being breached. We are currently facing a renewal of the discussion whether the purpose of an armed conflict or the violation of minimum standards may justify the means of reaction. But we have to focus on the uncounted cases in which the minimum standards of Humanitarian Law have protected victims from suffering and being harmed. This demonstrates that there still is an urgent need to defend these rules. Whereas many NGOs acknowledge this fact the Geneva Conventions seem to be increasingly forgotten at the basis of the Red Cross/Red Crescent movement. Such a lack of knowledge is the soil for the violation of the provisions of the Conventions. Not only does the author discuss these issues, but he also presents figures of wars and victims since World War II. At the same time the article includes a broad overview of the various conventions of International Humanitarian Law and why they are still valid today.

1. Weshalb brauchen wir Verbreitungsarbeit?

Nur wenige völkerrechtliche Verträge sind so bekannt wie die Genfer Rotkreuz-Abkommen zum Schutze der Kriegsopfer. Ihr Sinn ist, der Menschlichkeit unter allen Umständen, auch in Kriegszeiten, Raum und Geltung zu verschaffen.

Der Schutz des Menschen als solcher, mag er als Verwundeter oder Kranker, als Schiffbrüchiger, Kriegsgefangener oder als hilfsbedürftige Zivilperson Opfer eines Krieges geworden sein, ist die alleinige und ausschließliche Aufgabe dieser Abkommen und der beiden Zusatzprotokolle. Irgendwelche Zwecke, die auf anderen Gebieten liegen, sind ihnen fremd.

Jeder, der sich intensiv mit diesen Verträgen befasst, stößt immer wieder auf die Frage: „Hat es denn überhaupt noch einen Sinn, sich mit den Genfer Abkommen abzugeben? Die raue Wirklichkeit spricht doch eine ganz andere Sprache und kümmert sich nicht das Geringste darum.“

Diese Frage ist nicht leicht zu nehmen: tatsächlich gibt es eine Fülle von glaubwürdigen Berichten und manchen von uns mögen solche Fälle aus eigenem Erleben bekannt sein, in denen die Abkommen in beispiellos erschütternder Weise missachtet wurden. Zu nennen sind beispielsweise die Bürgerkriege in Afrika, in denen das zweite Zusatzprotokoll, das Mindeststandards der Menschlichkeit in nationalen bewaffneten Konflikten bewahren will, in eklatanter Weise missachtet wurden.

Trotzdem enthält diese Frage einen schweren Irrtum und einen geradezu verhängnisvollen Kern![1]

Was zunächst die Verletzungen angeht, so ist uns bewusst, auch in Zukunft nicht davor bewahrt zu sein, dass immer wieder zwingende Bestimmungen dieser Konventionen missachtet werden. Wir sind Realisten genug, um dies zu erkennen.

Der verhängnisvolle Kern an diesem Gedanken wäre, zu übersehen oder zu verschweigen, dass die Vielzahl der Fälle überwiegt, in denen durch die Einhaltung der Rotkreuz-Abkommen großes Leid verhütet oder verringert worden ist.

Keine Regierung dieser Welt, sei sie demokratisch oder diktatorisch, kann sich öffentlich schwerste Menschenrechtsverletzungen vorwerfen lassen.

Doch wir kommen um die Feststellung nicht umhin, dass Menschenrechtsorganisationen wie Amnesty International diese Bedeutung des humanitären Völkerrechts erkannt haben und öffentlich auf die Einhaltung des Völkerrechts pochen. Demgegenüber geht in der Rotkreuzorganisation selbst die Kenntnis des humanitären Völkerrechts in der Breite zunehmend verloren.

Aber auch die Völkerrechtler des Roten Kreuzes müssen sich fragen, ob der Grundsatz der absoluten Neutralität es nicht gestattet, ähnlich wie die Menschenrechtsorganisationen öffentlich Position zu beziehen?

Dabei bleibt zu beachten, dass die Genfer Abkommen, weil sie sich nur mit dem Schutz der Einzelperson befassen, gegen das Lebensinteresse keines Staates verstoßen, sondern umgekehrt ihre Einhaltung im wahren Interesse jedes Staates liegt. Diese ständige Sorge um die Einhaltung ist der tiefere Grund dafür, dass viele gut gemeinte Vorschläge in die Abkommen nicht aufgenommen werden konnten. Die gleiche Erkenntnis zwingt dazu, die Bestimmungen der Abkommen exakt zu erfassen und nicht allzu extensiv auszulegen. Die kluge Anwendung durchsetzbarer Normen ist besser als die uferlose Ausdehnung nichtverwirklichungsfähiger Bestimmungen.

Bereits in Friedenszeiten muss die Kenntnis der grundlegenden Gedanken der Rotkreuz-Abkommen Gemeingut aller

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[1] Anton Schlögel, *Die Genfer Rotkreuz-Abkommen vom 12. August 1949, Einführung*, 8. Auflage, Schriften des Deutschen Roten Kreuzes, Bonn, 1988.

Bevölkerungsschichten sein. Die Unkenntnis bestimmter Rechte und Pflichten ist der beste Boden für ihre Verletzung.

Ein Beispiel: Sollten nachrichtendienstliche Informationen durch einzelne Mitarbeiter des deutschen Bundesnachrichtendienstes tatsächlich an amerikanische Geheimdienste im Irak-Konflikt weitergegeben worden sein, so kann juristisch kein ernsthafter Zweifel bestehen, dass Deutschland nach den Grundsätzen der völkerrechtlichen Verantwortlichkeit zu einer Konfliktpartei im Irak-Konflikt geworden ist. Damit ist Deutschland auch an die Einhaltung der Genfer Abkommen und der beiden Zusatzprotokolle, wie auch an die Überwachung ihrer Einhaltung gebunden.

Uns allen sind die Presseaufnahmen von der Folterung irakischer Kriegsgefangener in amerikanischen und britischen Militäreinrichtungen, ebenso wie die inzwischen unbestrittenen Gefangenenflüge – auch über deutsches Territorium mit Wissen der Bundesregierung – bekannt. Ebenso ist bekannt, dass diesen Gefangenen Mindestrechte nach den Genfer Abkommen, etwa dass ihr Aufenthaltsort jederzeit bekannt zu sein habe, verweigert werden.

Das absolute Verbot der Folterung oder der Geiselnahme aus den Genfer Abkommen, um zwei populäre Beispiele zu nehmen, sollte im Geiste der Abkommen keine Entschuldigung mehr zulassen, auch nicht etwa die Berufung auf einen dienstlichen Befehl.

Deshalb sieht sich das humanitäre Völkerrecht heute einer zweiten Fragestellung ausgesetzt: Soweit in den Abkommen absolute Verbote enthalten sind, gibt es ihnen gegenüber in Zukunft wirklich keinerlei Rechtfertigung?

Damit werden längst überwunden geglaubte Gedanken über die Rechtfertigung des Krieges als Mittel der Politik erneut diskutiert. Es kann nicht übersehen werden, dass unter dem Eindruck des 11. September 2001 die Anhänger des Gedankens einer „neuen Gerechtigkeit“ zunehmen.

Das Rote Kreuz sollte diese Diskussion nicht den Regierungen und anderen Nichtregierungsorganisationen überlassen, sondern in dem Bewusstsein seines Sonderstatus als Hüter der Genfer Abkommen und als Völkerrechtsubjekt aktiv und in Kenntnis der Vorschriften an der Diskussion teilhaben.

Der Menschlichkeit unter allen Bedingungen Geltung zu verschaffen, ist ein lohnendes Ziel.

2. Kein Tag ohne Krieg

Die Welt ist nach 1945 nicht friedlicher geworden. In den 60 Jahren seit dem Zweiten Weltkrieg ist so gut wie kein Tag vergangen, an dem nicht irgendwo in der Welt gekämpft wurde. Auch nach dem längsten und blutigsten Konflikt der Geschichte mussten immer wieder Tausende oder gar Millionen ihr Leben lassen, wenn politische oder wirtschaftliche Auseinandersetzungen mit Gewalt ausgetragen wurden. Sieht man von der Antarktis ab, dann ist Australien der einzige Kontinent, auf dessen Boden nie ein Krieg stattfand.

Dabei fällt auf, dass nach 1945 vor allem die Entwicklungsländer die Leidtragenden der militärischen Gewalt waren. Nachdem der Kalte Krieg dem europäischen Kontinent zum ersten Mal eine dauerhafte Periode von Frieden und Wohlstand gebracht hatte, erschien erst das Auseinanderbrechen Jugoslawiens den traditionellen Krieg auf europäischem Boden wieder zu beleben. Allein in Bosnien-Herzegowina kamen 90.000 Menschen ums Leben.

Dann beendeten die Anschläge auf New York und Washington vom 11. September 2001 eine lange Periode ohne Angriffe auf das Territorium der Weltmacht Amerika und rückten den islamistischen Terrorismus in den Mittelpunkt der Weltpolitik.

Ganz anders verlief die Entwicklung in der Dritten Welt. Viele Staaten in Asien, Afrika und Lateinamerika, oft gerade erst in die Unabhängigkeit entlassen, erlebten Bürgerkriege, Waffengänge gegen Nachbarn oder militärische Interventionen der Supermächte. Betrachtet man nur beigelegte Konflikte, dann war Ostasien die Weltregion, in der von 1945 bis 2005 die meisten Menschen in Konflikten getötet wurden – fast zehn Millionen.

Nicht besser erging es den Menschen in Afrika. Zu Hunger und Armut kamen auf diesem Kontinent immer wieder lange Konflikte mit hohen Opferzahlen. Der schlimmste war der Kongo-Krieg von 1996 bis 2003. Etwa vier Millionen Menschen sind in dieser Auseinandersetzung umgekommen, an deren Beilegung sich nun auch die Bundeswehr in diesen Tagen des Juli 2006 beteiligt. Besonders viele Tote gab es außerdem im angolanischen Bürgerkrieg (1,5 Millionen) während der Sezession Biafras von Nigeria (eine Million) und bei den Massakern von Hutus an Tutsis in Ruanda (allein 800.000 Opfer von April bis Juni 1994).

Die neue zentrale Konfliktregion der Weltpolitik ist der Nahe Osten mit dem Irak. Aber auch in der Vergangenheit gab es schlimme Konflikte in dieser Region: den Krieg zwischen Iran und dem Irak (500.000 Tote), den Kampf zwischen Kurden und der irakischen Regierung (105.000) und natürlich den Palästina-Konflikt mit seinen traurigen Höhepunkten: den Sechs-Tage-Krieg (zwei 20.000), den Jom-Kippur-Krieg (16.000) und den Libanon-Krieg (mit nachfolgenden Konflikten bis heute 30.000 Tote).[2]

3. Bewaffnete Konflikte und humanitäres Völkerrecht[3]

Schon der Zweite Weltkrieg ließ die dringende Notwendigkeit einer Revision des Kriegsrechtes erkennen. Jedoch ließen die neugegründeten Vereinten Nationen die Chance einer Revision ungenutzt verstreichen, da das Kriegsrecht in Anbetracht des Gewaltanwendungsverbotes der UN-Charta an Bedeutung verloren habe.

Wie sehr diese Einschätzung die tatsächliche Entwicklung verfehlte, zeigt nicht bloß der Umstand, dass es seit dem

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[2] Alle Zahlen FAZ, Kein Tag ohne Krieg, 30.03.2006 m.w.N.

[3] Weiterführend: Knut Ipsen, Völkerrecht, 3. Auflage, C.H. Beck, 1990.

Ende des Zweiten Weltkrieges nicht ein einziges Jahr ohne bewaffnete Konflikte gegeben hat. Die so genannte Bush-Doktrin griff nach dem 11. September den Gedanken des gerechten Krieges wieder auf und hat ihn, wenn nicht schon mit dem Einsatz in Afghanistan, spätestens mit dem Irak-Krieg umzusetzen versucht.

Vor diesem Hintergrund gingen die Initiativen zu einer Fortentwicklung des Kriegsrechtes und Humanitären Völkerrechtes vornehmlich von dem Internationalen Komitee vom Roten Kreuz aus:

1. das I. Genfer Abkommen zur Verbesserung des Loses der Verwundeten und Kranken der Streitkräfte im Felde vom 12.8.1949

2. das II. Genfer Abkommen zur Verbesserung des Loses der Verwundeten, Kranken und Schiffbrüchigen der Streitkräfte zur See vom 12.8.1949

3. das III. Genfer Abkommen über die Behandlung der Kriegsgefangenen vom 12.8.1949

4. das IV. Genfer Abkommen zum Schutz der Zivilpersonen in Kriegszeiten vom 12.8.1949

5. die UNESCO-Konvention zum Schutz von Kulturgut bei bewaffneten Konflikten vom 14.5.1954

6. die beiden Zusatzprotokolle vom 12.12.1977 zu den Genfer Abkommen vom 12.8.1949,

a) das Protokoll I über den Schutz der Opfer internationaler bewaffneter Konflikte

b) das Protokoll II über den Schutz der Opfer nicht-internationaler bewaffneter Konflikte

7. des Übereinkommen über das Verbot oder die Beschränkung des Einsatzes bestimmter konventioneller Waffen, die übermäßiges Leiden verursachen oder unterschiedslos wirken können; dieses Übereinkommen umfasst das Protokoll I über nicht entdeckbare Splitter, Protokoll II über das Verbot oder die Beschränkung des Einsatzes von Minen, Sprengfallen und anderen Vorrichtungen, Protokoll III über das Verbot oder die Beschränkung des Einsatzes von Brandwaffen, 1980

8. das Übereinkommen über das Verbot der Entwicklung, Herstellung, Lagerung und des Einsatzes chemischer Waffen und über die Vernichtung solcher Waffen, 1993

9. das Protokoll über blindmachende Laserwaffen, Protokoll IV zum Übereinkommen von 1980

10. das Übereinkommen über das Verbot des Einsatzes, der Lagerung, der Herstellung und der Weitergabe von Antipersonenminen und über deren Vernichtung, 1997

11. das Statut des Internationalen Strafgerichtshofes, 1998

12. das Fakultativprotokoll zum Übereinkommen über die Rechte des Kindes betreffend die Beteiligung von Kindern an bewaffneten Konflikten, 2000

Diese Regelungen des im bewaffneten Konflikt anwendbaren Rechtes sind – unbeschadet seiner Geltung – an der Wirklichkeit zu messen, auf die sie bezogen sind.

Neue Waffen, Trägersysteme und Kommunikationstechniken haben den Wirkungsgrad und die Intensität des Waffeneinsatzes in den letzten Jahrzehnten erhöht und durch die Möglichkeiten der Zielauswahl erheblich erweitert. Dies gilt für die zwischenstaatlichen Auseinandersetzungen ebenso wie für die Mehrzahl der bewaffneten Auseinandersetzungen nicht-internationalen Charakters.

Eine weitere wesentliche Veränderung ist bei der Verknüpfung der Kampfhandlungen in den räumlichen Dimensionen des bewaffneten Konfliktes zu beobachten. Das militärische Instrumentarium der meisten Staaten weist heute die technischen und führungsmäßigen Voraussetzungen für einen nahezu perfekten Kampf der verbundenen Waffensysteme auf. Einsätze hochbeweglicher Landstreitkräfte sind in aller Regel von Aufklärung- und Kampfeinsätzen der Luftwaffe begleitet. Seekriegsoperationen ohne Luftaufklärung und Luftschirm gehören der Vergangenheit an. Hinzu kommt als vierte Dimension die militärische Nutzung des Weltraums zur Aufklärung.

Mehr denn je musste die Fortentwicklung des Kriegsrechtes, um seiner Funktion in den mit Waffengewalt ausgetragenen Konflikten der neueren Zeit zu entsprechen, die strikte Abhängigkeit der Anwendung kriegsrechtlicher Normen von dem herkömmlichen völkerrechtlichen Kriegsbegriff beseitigen. Der Kriegsbegriff wurde deshalb durch den Begriff des bewaffneten Konfliktes nahezu vollständig ersetzt.

Die gleich lautenden Artikel 2 der vier Genfer Abkommen von 1949 tragen diesem Umstand bereits Rechnung, indem sie anzuwenden sind „in allen Fällen eines erklärten Krieges oder eines anderen bewaffneten Konflikts, der zwischen einem oder mehreren hohen Vertragsparteien entsteht, auch wenn der Kriegszustand von einer dieser Parteien nicht anerkannt wird“. Der Anwendungsbereich der Zusatzprotokolle ist mit dem Anwendungsbereich der Genfer Abkommen deckungsgleich. Umstritten ist jedoch, unter welchen Voraussetzungen im Einzelnen ein Konflikt als bewaffnet und als international zu kennzeichnen ist.

Der internationale bewaffnete Konflikt beginnt mit der Erstanwendung von Waffengewalt zwischen den Konfliktparteien. Dies bedeutet, dass bereits die erste und geringste bewaffnete Schädigungshandlung gegenüber dem völkerrechtlich geschützten Bereich des Konfliktgegners als primäre Rechtsfolge die Geltung der einschlägigen Rechtsnormen bewirkt.

Der internationale bewaffnete Konflikt endet mit der faktischen Einstellung der Handlungen, auf die das für ihn geltenden Sonderrecht bezogen ist. Dies beinhaltet nicht nur, dass jeglicher Waffeneinsatz beendet wird, sondern auch, dass alle durch die Waffeneinsätze beigefügten Zustände, wie z. B. die Besetzung des gegnerischen Territoriums, die Festhaltung von Kriegsgefangenen und die Internierung von Zivilpersonen beseitigt worden sind. Solange eine der Konfliktparteien auf gegnerischem Hoheitsgebiet Besatzungsgewalt ausgeübt, gelten hierfür die einschlägigen Normen, insbesondere das vierte Genfer Abkommen.

Das Recht des internationalen bewaffneten Konflikts unterscheidet zwischen erlaubten und verbotenen Schädigungshandlungen, und obgleich sich das kodifizierte Recht im Wesentlichen auf Verbote beschränkt, bedeutet diese Unterscheidung nicht, dass alle Schädigungshandlungen, die nicht verboten sind, erlaubt sind. Das Konfliktrecht kennt vielmehr Generalklauseln, die gebieten, jede einzelne bewaffnete Schädigungshandlung der Prüfung zu unterziehen, ob sie erlaubt oder verboten ist.

Artikel 35 Abs. 1 Zusatzprotokoll I legt fest, dass den Konfliktparteien kein unbeschränktes Recht in der Wahl der Methoden und Mittel der Kriegführung zusteht. Aus diesem Grundsatz folgt, dass nicht nur die einzelnen Verbotsnormen Schranken für bewaffnete Schädigungshandlungen bilden, sondern dass sich auch aus dem im allgemeinen Konfliktrecht zum Ausdruck kommenden Normzweck, etwa dem Prinzip der Mobilität und dem Schutz der Zivilbevölkerung, Einschränkungen ergeben.

Artikel 36 Zusatzprotokoll I verpflichtet die Staaten, bei der Prüfung, Entwicklung, Beschaffung oder Einführung neuer Waffen oder neuer Mittel oder Methoden der Kriegführung festzustellen, ob ihre Verwendung stets oder unter bestimmten Umständen durch dieses Protokoll oder durch eine andere auf die hohe Vertragspartei anwendbare Regel des Völkerrechts verboten wäre.

Wer nicht an einer bewaffneten Schädigungshandlung teilnimmt oder nicht mehr teilnehmen kann, darf auch nicht oder nicht mehr Objekt solcher Handlungen sein. Das Verbot der Waffenanwendung gegen die Zivilbevölkerung stellt jedoch diejenige Norm dar, die im Zweiten Weltkrieg wie auch seither am häufigsten missachtet worden ist. Gleichwohl besteht Einigkeit darüber, dass dieses Verbot einen allgemeinen Grundsatz des Völkerrechts darstellt. Es ist in Artikel 51 Zusatzprotokoll I kodifiziert, der Einsatz- und Waffenwirkensverbote enthält. Die Entwicklung, Produktion und Stationierung von Waffen wird durch das Verbot des unterschiedslosen Angriffes nicht geregelt. Dennoch handelt es sich um die zentrale Norm zum Schutz der Zivilbevölkerung.

Der Schutz der Verwundeten, Kranken und schiffbrüchigen Angehörigen der Streitkräfte sowie der Kriegsgefangenen ist in den I., II. und III. Genfer Abkommen geregelt. Dieser Schutz ist ausgerichtet an dem Grundsatz, dass gegen den wehrlosen oder die Waffen streckenden Gegner keine bewaffneten Schädigungshandlungen mehr vorgenommen werden dürfen, Artikel 51 Zusatzprotokoll I. Verwundete, Kranke und Schiffbrüchige sind unverzüglich zu bergen, vor Misshandlung zu schützen und zu versorgen.

Die Angehörigen des Sanitätsdienstes und seiner festen und mobilen Einrichtungen dürfen unter keinen Umständen angegriffen werden und sind jederzeit zu schonen und zu schützen. Bei Gefangennahmen kann das Sanitätspersonal seine Tätigkeit fortsetzen, bis diese von entsprechenden Einheiten der Gewahrsamsmacht übernommen wird.

Das Gefangenenrecht, im III. Genfer Abkommen geregelt, basiert auf dem Grundsatz, dass die durch den Kriegsgefangenenstatus geschützten Personen jederzeit mit Menschlichkeit behandelt werden müssen, Artikel 13 III. Genfer Abkommen.

Als eine der folgenschwersten Lücken hat sich im Zweiten Weltkrieg das Fehlen ausreichender Regelungen für die Rechtsstellung der Konfliktparteien bei der Besetzung fremden Staatsgebietes erwiesen. Diese Lücke wird durch das IV. Genfer Abkommen von 1949 in Ergänzung zu den Vorschriften der Haager Landkriegsordnung von 1907 geschlossen.

Im Falle einer Besetzung, auch einer Totalbesetzung, erlischt die Staatsgewalt des besetzten Staates nicht automatisch, sondern sie tritt so weit zurück, als die Besatzungsmacht die Regelungsgewalt an sich zieht. Bei der Besatzungsmacht liegt es also zu bestimmen, in welchem Ausmaß sie die öffentlichen Funktionen übernimmt und inwieweit sie sie weiterhin durch die Behörden des besetzten Staates ausüben lässt.

Zu den wichtigsten Pflichten der Besatzungsmacht gehört die Aufrechterhaltung der öffentlichen Ordnung und zwar, soweit kein zwingendes Hindernis besteht, unter Beachtung der Landesgesetze, Artikel 43 HLKO. Dies umfasst den Schutz des Privateigentums sowie der religiösen Überzeugung und Verhinderung von Plünderung sowie der Schutz der den Gottesdiensten, der Wohltätigkeit, dem Unterrichte, der Kunst und der Wissenschaft gewidmeten Anstalten. Die jüngsten Ereignisse im Irak-Krieg machen die Verantwortung und die Problematik dieser Vorschriften deutlich.

Bei Verletzungen des humanitären Völkerrechts wird das IKRK auf der Grundlage der bei seinen Schutz- und Hilfstätigkeiten gemachten Feststellungen auf vertraulicher Basis bei den zuständigen Behörden vorstellig. Handelt es sich um erhebliche und wiederholte Verstöße, die zudem klar nachweisbar sind, behält sich das IKRK das Recht vor, eine öffentliche Stellungnahme abzugeben. Dazu entschließt es sich jedoch nur, wenn es den Eindruck hat, dass eine derartige Bekanntmachung im Interesse der Betroffenen oder bedrohten Personen ist.

Alle Vertragsparteien der Genfer Abkommen sind zudem verpflichtet, die erforderlichen gesetzgeberischen Maßnahmen zur Bestrafung jener Personen zu ergreifen, die schwere Verletzungen der Abkommen begangen haben. Mit anderen Worten: Täter, die schwere Verletzungen begangen haben, also Kriegsverbrecher, sind jederzeit und überall strafrechtlich zu verfolgen, und Staaten müssen in eigener Verantwortung dafür sorgen, dass dies auch geschieht. Solche strafrechtlichen Verfolgungen können entweder durch die nationalen Gerichtshöfe der verschiedenen Staaten oder durch eine internationale Instanz erfolgen. Dies ist der Kontext, in dem der Sicherheitsrat der Vereinten Nationen die internationalen Kriegstribunale für das ehemalige Jugoslawien oder Ruanda einsetzte.

Command Responsibility and War Crimes

Rup C. Hingorani*

There has been raging debate around the world regarding command responsibility for war crimes. It seems that the more one talks about human rights, the more we hear about the commission of war crimes and violations of human rights in wartime. The world-wide spurt in the commission of war crimes, whether in Africa, Europe or in the Middle East, raises the suspicion that these war crimes may not be the product of individualised persons but organised at a higher level. The maltreatment of Afghan detainees at Guantanamo Bay in Cuba and of inmates of the Abu Ghraib prison in Iraq points at common a denominator, that commanders may be responsible for such widespread abuses. Further, the Haditha killings of 24 civilians in November 2005 sent alarm waves throughout the world.

Normally, it is the individual, who has committed the crime, who is also liable in criminal jurisprudence. He is supposed to have the *mens rea* – the guilty mind – which is essential in criminal law to attach liability. Indeed, there is no such thing as vicarious liability in criminal law. No third person is liable except the perpetrator of the crime. Nevertheless, a person may be liable in criminal law if he abets the commission of a crime or conspires to commit the crime although he may not be the actual wrongdoer. Similar rules apply to war crimes.

War crime trials are comparatively a new phenomenon of the twentieth century since the trend towards prosecuting such crimes only started after World War I. Everything was considered fair in love and war before that. A few stray cases may be traced from early trials but they can hardly be considered as precedent or trend-setters. They could not make any impact on the future course of action on the commission of war crimes and punishment at the latter stage.

The Leipzig trials after World War I were more a kind of shadow trials staged domestically within Germany all the more as the trials did not leave any imprint on subsequent violations.

In contrast, war crime trials did take place after World War II, notably in Nuremberg and in Tokyo. Some good rules emerged from these trials. Some bad rules as well. It was natural. After all, it was a one-man-show who acted as legislator, prosecutor as well as judge from the victor nations. And the accused were all from the defeated nations. It is difficult to believe that only the defeated nations had the monopoly of committing war crimes. But it is a hard fact to swallow. Yet, the world seems to be silent about it.

Significantly, a case on command responsibility, that later acquired seminal status, was reported after World War II. In the *Yamashita* case,[1] a Japanese General was condemned for his failure to control his troops that indulged in atrocities in the Philippines during World War II. He was condemned for his failure "to discharge his duty as Commander to control brutal atrocities and other high crimes against people of the United States and he thereby violated the law of war."[2] As for himself, he was not personally charged for committing atrocities. Yet he was found guilty by the U.S. Military Commission and sentenced to death, a decision upheld by the United States Supreme Court.[3]

The case was a typical instance of miscarriage of justice in the twilight of victory as it is clear from the speed with which the commander was charged, tried, and sentenced, all happening within three months between September and December 1945. Fortunately, the decision was widely criticized and rejected as a good precedent.

The Geneva Diplomatic Conference which took place in 1949 to discuss the four Geneva Conventions on war victims did not establish war tribunals although the Conventions refer to grave breaches of Conventions.[4]

When the My Lai (Vietnam) incident was exposed in the early Seventies, Captain *Medina's* or Lieutenant *Caley's* trials in the United States of American evoked more sympathy for them. The My Lai case was repeated in Haditha (Iraq) when United States marines killed twenty four civilians, including women and children in November 2005 while they were still in their night clothes. The incident was explained as collateral damage but it is thought that it may have occurred in reprisal to the death of their comrade – *Terrazas* – who was killed the previous night by improvised explosive device.

In 1972, when the Bangladesh government was perusing the possibility of prosecuting some prisoners of war for atrocities during the armed conflict opposing Bangladesh (then East Pakistan) to Pakistan, the world opinion was not in favour of such move. Instead, Bangladesh was threatened that it would not be recognised as a State if it sought to try some of the prisoners, including the commander. The idea was thus dropped.

War crime trials as well as the notion of command responsibility were again envisaged later, this time during the

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1 Trial of Yamashita, 4 War Crime Reports 1.

2 *Ibidem.*

3 *General Tomoyoki Yamashita*, 327 United States Supreme Court Reports 1, p. 25.

4 Articles 129-30 of the Geneva Convention (III) relative to the Treatment of Prisoners of War and Articles 146-47 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

1974–1977 debates when the two Additional Protocols of 1977 were being discussed and later adopted. As a result the principle of command responsibility is enshrined in articles 86 and 87 of Protocol I. Article 86(2) reads "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which would have enabled them to conclude in the circumstances at that time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." Article 87(1) adds that "The High contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, when necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol."

The conjoint effect of Article 86 and 87 is that the commander would be held liable if he "knew or had information" that any of his subordinates had committed or was about to commit a breach but did not take any steps to prevent or suppress such breaches or did not take any disciplinary action nor report the matter further up. The emphasis is that the commander should prevent or punish any commission of atrocities by his troops under his command if he believes that something is going wrong.

These articles remained unused until the nineties when mass scale atrocities were reported in Rwanda and in Bosnia-Herzegovina and later on in Kosovo. This resulted in the establishment of two *ad hoc* tribunals for war crime trials by the United Nations Security Council.[5]

Article 7 of the Statute of the ICTY deals with the responsibility of individuals as well as that of commanders. Article 7(3) is identical with Article 86(2) of Additional Protocol I inasmuch as it states: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

Apart from the *ad hoc* war crime tribunals which dwelt upon command responsibility, the Statute of the International Criminal Court, which was adopted in 1998, also refers in its article 28 to the principle of command responsibility.[6] These new rules indicate that superiors in military hierarchy cannot escape criminal liability on the ground that they were not perpetrators of atrocities personally but which were committed by the subordinates. Until recently, a commander was responsible for the acts of subordinates only in respect of paramilitary formations like militia, volunteer corps and resistance movements. There was no such requirement for commander of regular army formations. But the rules of the game seem to have changed.

Now a commander is criminally responsible if he does not prevent his forces (subordinates) from committing atrocities or take action against those who have committed the atrocities. For this, it is not necessary to prove the *mens rea* (guilty mind) of the commander as is normally required from perpetrators. His laxity or winking at the doings of subordinates can hence result in him being charged for violations of the rules of international humanitarian law. As a commander, he cannot afford to be negligent about the doings of his subordinates who may be committing atrocities. He has to be vigilant, lest he is not made liable. In military parlance, nothing moves in the camp without the command or connivance of the commander. The commander or superior who seeks to cover the violations committed by his/her subordinates is equally responsible.

Article 28 of the Rome Convention 1998 lays its emphasis on the phrase "effective command" or "effective authority" of the commander. While dealing with Article 28 of the Rome Convention, there could be dual authorities as was the case in Abu Ghraib prison: Brigadier General *Karpinski* was commandant of the prison and Major General *Miller* of GTMO was in charge of interrogations. It may also occur that there is one commander for administrative purposes and another for strategic purposes. Also question that must be answered is whether it is the unit commander or the other remote commanders in the hierarchy who would be held responsible. Perhaps, the hat would best fit the unit commander but the chain of command should equally be held responsible for protecting their subordinates from prosecution.

In other terms, this means that even remote commanders and political figures would face prosecution on the basis of criminal responsibility if the violations were perpetrated as part of a State policy as is thought to be in the cases of *Milosevic*, *Karadzic* and *Mladic*. These individuals are alleged to have been involved in ethnic cleansing in Srebrenica and other parts of the former Yugoslavia as a matter of State policy.

In turn, one must also examine the responsibility of subordinates for carrying out orders. While superior orders are no excuse, military culture does not tolerate indiscipline. The

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[5] United Nations Security Council, Resolution 827 (1993), UN Doc. S/RES/827 (1993), 25 May 1993 (former Yugoslavia); and United Nations Security Council, Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994 (Rwanda).

[6] "Article 28: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

superiors are thus spared while the subordinates are forced to fend for themselves. It is unfortunate that no commander has been prosecuted in connection with the alleged violations in Guantanamo and Abu Ghraib.

While war crime trials and commander's responsibility are welcome trends, accused are entitled to rules of natural justice. They are entitled to defend themselves and are to be considered as innocent until it is held otherwise by the concerned tribunal. Any initial indictment against them is not enough to condemn them before they are duly convicted by a competent tribunal. Unfortunately, some prefer summary trials for war crimes without giving the defendants the chance to defend themselves.[7]

Here a little caveat in respect of the media blaze should be made. In an age of electronic media, it is feared that persons are not granted proper protection against media prosecutors. Indeed, it is often noticed that the media projection of the accused and his exploits is pitted against the accused. It is, therefore, not in good taste to announce, for example, the "Death of a Tyrant" by referring to the process against an indictee. The press enjoys freedom of expression and is thereby allowed to spread news, yet not views which would usually regarded as contempt of court. News are matters of fact while views reflect one's personal opinion.

A commander who has been indicted under article 28 of the Rome Convention or a similar provision of the *ad hoc* tribunals may be detained under an order of the Tribunal as it is being presently done at the Hague. Detention of defendants is a gray area. Should it be an assigned prison or a designated detention centre under the management of the concerned tribunal is one of the issues that must be raised. It could also be like home arrest in the form of restrictions put on his/her movements. Long duration detentions should yet be avoided. Detention does not mean denial of normal facilities like regular medical check-up and, of course, medical treatment for any ailment. In fact, the accused's choice should be given preference.

A multiplicity of tribunals should be avoided. As far as possible, war crimes should now be tried by the present International Criminal Court established under the Rome Statute. Multiple tribunals may give rise to different rulings on the issue which may raise future controversies and cause greater confusion. There is need for consolidation and fusion of tribunals into a single court. Hence, efforts should be made to wind up *ad hoc* tribunals and bring them all together and, if possible, empower the International Criminal Court to exercise jurisdiction over their cases.

There is also need for maintaining some uniformity in indicting persons for war crimes. There should be no feeling that while some obvious abuses are overlooked, others are handled with zeal. The mighty and the weak should be treated equally and uniformly. The world is waiting for the indictment of the architects of the atrocities committed in the Guantanomo Bay and Abu Ghraib prisons as well as those that occurred in Haditha, Iraq. This may require widening the powers of prosecutor who should be more independent. ■

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

7 For example see J.P. Fletchor, "Trial by Farce", in *Times of India*, 1 April 2006, p. 14. The author argues that the defendants used the forum for propaganda purposes.

International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law. Volume I: Rules, Volume II (Part 1 and 2): Practice, Cambridge University Press, 2005, Volume I: 621 pages, Volume II: 4411 pages, ISBN 0-521-80899-5, US$ 450

Regine Reim*

Regeln des Völkergewohnheitsrechts habe es schon von jeher gegeben – Gewalt zu begrenzen sei grundlegendes Verständnis einer jeden Zivilisation, so Dr. *Kellenberger*, Präsident des IKRK, im Vorwort der vorliegenden Studie. Dr. *Yves Sandoz*, Mitglied des IKRK, geht noch weiter und tituliert das Humanitäre Völkerrecht als „gemeinsames Erbe der Menschheit".

In Zeiten, in denen weltweit alle Staaten den Genfer Abkommen von 1949 beigetreten sind, in denen eine Vielzahl aktueller kodifizierter völkerrechtlicher Verträge existieren, stellt sich die von der 26. Internationalen Konferenz des Roten Kreuzes und Roten Halbmonds (Genf 1995) beim IKRK in Auftrag gegebene umfangreiche und kostenintensive Studie nicht etwa der Frage, welche dieser Bestimmungen gewohnheitsrechtlichen Status erworben haben. Vielmehr geht die Analyse der Frage nach, welche internationale Übung über die bestehenden kodifizierten Regelwerke hinaus zu Völkergewohnheitsrecht avanciert ist.

Dies geschieht vor dem Hintergrund, dass völkerrechtliche Verträge mit gravierenden Mängeln behaftet seien. Zum einen bänden Verträge nur die Staaten, die sie ratifiziert hätten, wohingegen Völkergewohnheitsrecht für alle an einem bewaffneten Konflikt Beteiligten unabhängig von einer Ratifizierung bindend sei. Zum Zweiten sei das kodifizierte Recht insbesondere in Fragen nicht-internationaler bewaffneter Konflikte zu rudimentär und benachteilige damit die Betroffenen dieser Konflikte gegenüber denen von internationalen Konflikten. Das Völkergewohnheitsrecht sei hier ein wesentlicher ausgleichender Faktor. Nicht zuletzt helfe das Völkergewohnheitsrecht bei der Auslegung des Vertragsrechts.

Die Autoren betonen, dass die Studie lediglich eine Momentaufnahme darstelle, die den Beginn eines neuen Prozesses intensiverer Auseinandersetzung mit der Thematik markiere. Insofern zeigt die Analyse Punkte auf, in denen Handlungsbedarf angezeigt sei. So mangele es beispielsweise für nicht-internationale bewaffnete Konflikte – in Bezug auf bewaffnete Angehörige von Oppositionsgruppierungen – an einer Definition ihres Status als „Kombattanten" oder „Zivilperson" ebenso wie des Terminus „direkte Beteiligung am Konflikt".

Diese Überlegungen zugrunde legend ist die Studie in zwei Bände unterteilt. Band I basiert auf 161 ausformulierten Regeln des Völkergewohnheitsrechts. Unterteilt sind diese in sechs Kapitel: Unterscheidungsprinzip, geschützte Personen und Objekte, Methoden der Kriegsführung, Waffen, Behandlung von Zivilpersonen und nicht (mehr) am Konflikt beteiligter Personen, Implementierung. Jede der Regeln ist mit Erläuterungen versehen, die auf den entsprechenden Praxisteil verweisen, eine Kurzzusammenfassung ist vorangestellt und Details werden erörtert. Band II stellt die völkerrechtliche Übung anhand praktischer Bezüge zu den einzelnen in Band I formulierten Regeln dar. Die Darstellung geht von folgendem Aufbau aus: Verträge und andere Instrumente, Nationale Übung, Übung internationaler Organisationen und Konferenzen, Übung internationaler (Quasi-)Justizorgane, Übung der Bewegung des Internationalen Roten Kreuzes und Roten Halbmonds, Sonstige Übung. Die bewusst überschaubaren und praxisorientierten Anhänge zitieren die Internationalen Abkommen, verzeichnen den Status der Ratifizierung wesentlicher Abkommen in den einzelnen Staaten, listen relevante internationale Resolutionen sowie nationale Gesetzgebung und case-law auf.

Die Herausgeber fordern den Erfahrungen der Studie folgend eine verstärkte Einbeziehung der Regeln des Völkergewohnheitsrechts in die militärische Ausbildung, in nationale Gesetzgebung, die fachliche Debatte und die Verbreitungsarbeit insgesamt. Man müsse aktiv in den Prozess der Weiterentwicklung des humanitären Völkerrechts eingreifen und die geforderten Lücken sukzessive füllen – wohl wissend, dass das Rechtsgebiet immer der Realität hinterherhinken wird und seine hehren Ziele bei weitem nicht immer durchsetzbar sein werden.

Aus Sicht des Nutzers stellt sich die Studie – trotz des ersten Eindrucks aufgrund des immensen Umfangs – keinesfalls als theoretische Abhandlung zweifelhafter praktischer Verwendbarkeit dar, sondern vielmehr als sehr praxisorientiertes Handbuch, das auch jedem in der Verbreitungsarbeit Tätigen sehr ans Herz gelegt sei.

Eine Einführung in die Ziele und Methodik der Studie sowie einige zentrale Aussagen ist seitens der Herausgeberin *Jean-Marie Henckaerts* in der International Review of the Red Cross, Nr. 857/2005 erschienen (download unter http://www.icrc.org) ■

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Thilo Marauhn (Hrsg.), Internationaler Kinderschutz. Politische Rhetorik oder effektives Recht?, Tübingen 2005, 193 Seiten, € 44

Sven Peterke*

Thilo Marauhn, Inhaber des Lehrstuhls für Öffentliches Recht, Völkerrecht und Europarecht an der Justus-Liebig-Universität Gießen, weist eingangs des insgesamt sieben Beiträge umfassenden Buches zu Recht darauf hin, dass politische Rhetorik zum Thema Kinderrechte *en vogue*, die tatsächliche Lage unzähliger Kinder hingegen katastrophal ist. Das Spektrum der mit dem Thema „Internationaler Kinderschutz" verbundenen Fragestellungen ist äußerst groß. Dementsprechend erfassen die Beiträge – sie entstammen allesamt der vierten Gießener Ringvorlesung „Forum Juris Internationalis" aus dem Sommersemester 2003 – nur einige, wenngleich sehr wichtige Bereiche dieses Themas.

Den Auftakt macht *Rachel Harvey* mit ihrer lesenwerten Analyse über die „*International Efforts to Prevent the Use of Children as Instruments of War*". Der Kampf gegen den Missbrauch von Kindern im Rahmen

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bewaffneter Konflikte stellt sicherlich mit die wichtigste und zugleich augenfälligste Herausforderung auf dem Gebiet des Kinderschutzes dar. Die exponierte Stellung des Beitrags trägt diesem Befund Rechnung. Der Verfasserin gelingt es, auf rund 20 Seiten einen gut strukturierten, inhaltlich ausgewogenen sowie aktuellen Überblick über ein im Detail sehr komplexes Thema zu geben. Hierzu beleuchtet sie zunächst die Frage, warum Kinder im Umfeld von gewaltsamen Auseinandersetzungen rekrutiert und eingesetzt werden. *Harvey* erreicht ohne langwierige Ausführungen ihr Ziel, den Leser dafür zu sensibilisieren, dass sich das Thema nicht in der Problematik der Zwangsrekrutierung von Kindersoldaten erschöpft und gleichfalls keines ist, das dazu berechtigt, als reines „Dritte-Welt-Problem“ abgetan zu werden. Sodann folgt eine kluge Präsentation der Entwicklung der völkerrechtlich einschlägigen Rechtsgrundlagen, von den Genfer Abkommen von 1949 bis hin zur ILO-Konvention Nr. 182 von 1999 und dem Fakultativprotokoll zur Kinderrechtskonvention betreffend des Einsatzes von Kindern in bewaffneten Konflikten aus dem Jahr 2000. Den Schwerpunkt des Beitrags bildet schließlich die Analyse der Effektivität der rechtlichen Vorkehrungen. *Harvey* entlarvt am Beispiel der VN-Kinderrechtskonvention die von vielen Staaten betriebene Politik der Ratifikation menschenrechtlicher Verträge ohne die ernstliche Absicht, Rechtsmittel zu ihrer effektiven Durchsetzung zur Verfügung zu stellen. Beispielhaft ist, dass der VN-Ausschuss für die Rechte des Kindes bis *dato* weder Individual- noch Staatenbeschwerden entgegennehmen kann. Nach Ausführungen über die strafrechtliche Verfolgbarkeit der Verletzung internationaler Schutzstandards geht *Harvey* auch auf das oftmals effektivere Prozedere des „Naming und Shaming“ ein. Dies geschieht unter besonderer Hervorhebung der „1379 Liste“ des VN-Sicherheitsrates sowie der Alternativliste der „Coalition to Stop the Use of Child Soldiers“. *Harveys* schlüssiges Fazit ist, dass die Durchsetzbarkeit der Kinderrechte verbessert gehört (S. 19). Ihr Hinweis auf das Problem der Verfügbarkeit von Kleinwaffen, das sich als integraler Bestandteil der Problematik des Missbrauchs von Kindern in bewaffneten Konflikten darstelle, verdient ebenfalls nachdrückliche Zustimmung.

Yoshie Noguchi befasst sich mit dem – schon zahlenmäßig – kaum minder wichtigen Thema „*Protection of children against economic exploitation*“. Ihr Verdienst besteht vor allem darin, dem Leser die wichtigsten ILO-Standards in einer sehr übersichtlichen und umsichtigen Art und Weise zu erläutern. Sie schafft Sensibilität dafür, warum gewisse Abweichungen von den allgemeinen Standards für einige Entwicklungsländer im Hinblick auf das Verbot von Kinderarbeit bzw. im Hinblick auf leichte, gefährliche und riskante Tätigkeiten etc. bestehen. Tabellen erhöhen die Verständlichkeit dieser Spezialmaterie. *Nogushie* erläutert sodann, wie die ILO-Standards umgesetzt und von der Organisation überwacht werden. Im Gegensatz zur komplementären Kinderrechtskonvention besteht z.B. die Möglichkeit der Staatenbeschwerde (über Art. 26 ILO-Verfassung) und so genannter „Representations“, die (über Art. 24) von Arbeitgeberverbänden oder Gewerkschaften einem zu Empfehlungen berechtigten Gremium vorgelegt werden können, welches die eigentümliche Zusammensetzung der ILO widerspiegelt. Die Verfasserin vergisst nicht hervorzuheben, dass auch Gesellschaft und Wirtschaft hohe Verantwortung dafür tragen, dass die Arbeitskraft von Kindern nicht ausgebeutet wird, und geht auf entsprechende Initiativen ein. Die Frage der Effektivität der bestehenden Regelungen beantwortet sie durch Präsentation aktueller Zahlen. Um nur eine zu nennen: Unsägliche 186 Millionen Kinder befinden sich weltweit in Beschäftigungsverhältnissen, die dem strikten Verbot der Kinderarbeit unterliegen.

Von der universellen auf die regionale Ebene des Kinderschutzes führt *Dr. Martina Caronis* Analyse „*Das Recht des Kindes auf die familiäre Umgebung – aus der Perspektive der EMRK*“ (S. 43–72). Stilistisch und inhaltlich handelt es sich quasi um eine aktuelle und umfassende Kommentierung des Art. 8 Abs. 1 EMRK anhand der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR). Diese Regelung schützt u.a. das Familienleben – ein Begriff, den der EGMR weit auslegt, so dass auch *de facto* bestehendes Familienleben geschützt ist und der Schutz z.B. nicht davon abhängt, ob die Eltern verheiratet sind. Nach sorgfältiger Erläuterung des Inhalts des Rechts auf Achtung des Familienlebens und der daraus resultierenden positiven sowie negativen Verpflichtungen für den Staat, arbeitet *Caroni* im Hauptteil ihres Beitrags heraus, dass es kein absolutes Recht des Kindes auf ein Zusammenleben mit seinen Eltern gibt und insbesondere bei ausländerrechtlichen Sachverhalten das Kindeswohl im Wesentlichen im Rahmen von Güterabwägungen zum Tragen kommt. Hierzu unterscheidet die Verfasserin zwischen Eingriffen in familiäre Beziehungen zum Schutz des Kindes (z.B. Einschränkungen des Umgangsrechts) und, am Beispiel des Ausländerrechts, Beeinträchtigungen der familiären Beziehungen aus anderen Gründen als dem Kindeswohl (z.B. bei aufenthaltsbeendenden Maßnahmen gegen die Eltern oder den sorgeberechtigten Teil). Durch diese Vorgehensweise gelingt es ihr, den Leser mit den grundsätzlichen Problemen und den richtungsweisenden Entscheidungen des EGMR vertraut zu machen, so dass die „*Doppelrolle des Kindeswohls*“ (S. 71) mühelos nachvollzogen werden kann.

Mit *Nigel Lowes* Analyse „*The Best Interests of the Child? Handling the Problem of International Parental Child Abduction*“ wird auf die universelle Ebene zurückgekehrt. Der Verfasser führt zunächst vor Augen, dass die einseitige, grenzüberschreitende Verschleppung bzw. die Zurückbehaltung von Kindern für diese regelmäßig ein traumatisches Ereignis darstellen. Sodann wendet er sich den zwei maßgeblichen internationalen Konventionen aus dem Jahre 1980 zu, die sich des Themas der elterlichen Kindesentführung angenommen haben. Da die „Europäische Konvention über die Anerkennung und Vollstreckung von Entscheidungen über das Sorgerecht für Kinder und der Wiederherstellung des Sorgerechtsverhältnisses“ wegen ihrer bürokratischen und zeitaufwendigen Prozedere kaum praktische Bedeutung erlangt hat, legt *Lowe* den Fokus auf die „Haager Konvention über die zivilrechtlichen Aspekte internationaler Kindesentführungen“. Seine rechtlichen Ausführungen, u.a. zu den komplizierten gerichtlichen Zuständigkeiten, reichert *Lowe* durch behutsam präsentiertes Datenmaterial an. Sein Fazit ist, dass noch erheblicher Verbesserungsbedarf gerade im Hinblick auf die Geschwindigkeit der rechtlichen Handhabung dieser Fälle besteht, aber auch im Hinblick auf die effektive Durchsetzung der richterlichen Entscheidungen. Das gelte insbesondere für die Bundesrepublik Deutschland: „I think Germany along with a number of other States has work to do“ (S. 95).

Unter der Überschrift „*Grenzgänger: Internationale Adoption und Kinderhandel*“ behandelt *Dr. Hans-Jörg Albrecht*, Professor am Freiburger Max-Planck-Institut für ausländisches und internationales Strafrecht, eine Problematik, deren Bedeutung in Zukunft weiter zunehmen wird (S. 97–126). Hierzu skizziert er instruktiv die Ausgangslage, dass sich mit der steigenden Nachfrage nach ausländischen Adoptivkindern ein Markt etabliert hat, der sorgsamer staatlicher Überwachung und Regulierung bedarf. Dieser Markt, so zeigt der Verfasser auf, zieht auch Schwerstkriminalität an, die sich nicht allein auf Kinderhandel und das Verbrechen der Sklaverei beschränkt. Opfer seien insbesondere diejenigen Kinder und Eltern, die auf Grund von Armut besonders vulnerabel seien. Sie seien heute vornehmlich in der Dritten Welt zu finden (S. 106). *Albrecht*, der zahlreiche empiri-

sche Untersuchungen auswertet, gelingt ein ausgezeichneter Problemaufriss, der allein den Beitrag lesenswert macht. Sich der rechtlichen Seite der Problematik zuwendend, zeigt der Verfasser den Missstand auf, „dass international kein Konsens über die Rolle privater internationaler Adoptionen erzielt werden kann" (S. 118). Sodann beleuchtet er die strafrechtliche Kontrolle des Kinderhandels in Deutschland unter besonderer Berücksichtigung des Adoptionsvermittlungsgesetzes ohne zu vergessen, die praktische Relevanz dieser Regelungsmaterie zu hinterfragen. Als Reaktion auf die öffentliche Problematisierung des Themas Adoption und Kinderhandel haben einige besonders in der Kritik stehende Staaten den Schutz von Kindern zuletzt signifikant verstärkt. *Albrecht* erkennt, dass hiermit „neue Gelegenheiten für Korruption und problematische Adoptionsverfahren" (S. 124 f.) einhergehen und resümiert überzeugend: „Die Stärkung der rechtlichen Kontrolle des Adoptionsverfahrens kann zu einer Beschränkung der Kommerzialisierung, nicht aber zu ihrer Aufhebung führen" (S. 125).

Schließlich widmet sich *Peter Wilkitzki*, Ministerialdirektor im BMZ, dem Thema „*Mehr als ein stumpfes Schwert? Internationale Kooperation gegen die sexuelle Ausbeutung von Kindern*" (S. 127–138). Der Verfasser gibt zu verstehen, dass sexueller Missbrauch von Kindern, Kindersextourismus, Kinderhandel und Kinderpornographie Phänomene darstellen, die allein multikausal und multidimensional erklärbar sind. Sie seien oftmals eng verknüpft mit anderen illegalen Praktiken (wie z.B. Drogenkriminalität). Leider gerät seine Einführung in die Problematik recht kurz. Der Versuch, diese von einer faktischen Ausgangslage zu beleuchten, wird letztlich nicht ernsthaft unternommen. Stattdessen fragt *Wilkitzki* unverzüglich, welches Schwert zur Bekämpfung dieses Problemkomplexes zur Verfügung stehe (S. 128 ff.). Er beginnt seine Erläuterungen mit einem Abriss über die Entwicklung der einschlägigen StGB-Tatbestände der letzten 30 Jahre, um die Paradigmenwechsel aufzuzeigen, die sich in dieser Zeitspanne ereignet haben. Ob dies ein glücklicher Ansatz ist, das Thema der internationalen Kooperation aufzurollen, erscheint fraglich. *Wilkitzki* stellt sodann die rechtlichen Instrumente der internationalen Zusammenarbeit vor. Im Wesentlichen präsentiert er eine Beispielsliste von Übereinkommen, die auf multilateraler Ebene bestehen, und weist darauf hin, dass auch bilaterale (formelle und informelle) Vereinbarungen und Projekte bedeutsam sind. Eine schwerpunktmäßige Illustration der stattfindenden Kooperation ist nicht ersichtlich. Die Frage „Wie stumpf ist unserer Schwert in der Praxis" auf einer Seite abhandelnd, fragt der Verfasser sodann, wie es geschärft werden könne. Er beantwortet dies zunächst durch Wiedergabe von Gesetzesentwürfen. Das Thema der Kooperation verlassend, stellt *Wilkitzki* fest, dass die „Möglichkeiten des materiellen Strafrechts weitgehend ausgereizt" seien (S. 136). Zu den internationalen Instrumenten trägt er vor, dass „ihre effiziente (womöglich meint er: effektive) Umsetzung und Anwendung" (ebda.) entscheidend seien, und empfiehlt, die informelle Zusammenarbeit zu stärken. Er verliert sich aber wieder in Allgemeinplätzen wie „Sozialpolitik ist die beste Kriminalpolitik" (ebda.). Nach einer Warnung „vor einer Überschätzung der Möglichkeiten und Grenzen des Strafrechts und seiner general- und spezialpräventiven Wirkung [...]" appelliert *Wilkitzki* schlussendlich „an alle – [...] – Problembewusstsein zu entwickeln und zu schärfen und an der Bewältigung der Probleme mitzuwirken" (S. 126). Es bleibt der Eindruck, dass das Thema der internationalen Kooperation instruktiver hätte behandelt werden können und die Beibehaltung des Vortragsstils nicht immer empfehlenswert ist.

Der das Buch abschließende und mit über 50 Seiten längste Beitrag (S. 139–193) stammt aus der Feder von *J. A. Robinson*. Der Professor von der Universität Potchefstroom erläutert „*Children's Rights in the South-African Constitution*". Ohne die Verdienste dieses interessanten Beitrags schmälern zu wollen, sei lediglich darauf hingewiesen, dass es gewissermaßen eines Sonderinteresses des Lesers für die südafrikanische Rechtslage bedarf, so dass es an dieser Stelle verzichtbar erscheint, *Robinsons* Ausführungen eingehend darzustellen.

Festzustellen ist: Das Buch gewährt durch insgesamt qualitativ ansprechende Beiträge einen guten Überblick über das facettenreiche Thema des internationalen Kinderschutzes. Für die deutsche Leserschaft hätte diese Qualität erhöht werden können, indem z.B. in den englischsprachigen Beiträgen durch Fußnoten Hinweise darauf gegeben werden, welche deutschsprachigen Entsprechungen die jeweiligen Fachtermini (Konventionstitel, etc.) haben. Angesichts der Tatsache, dass € 44 für 193 Seiten auch auf dem Fachbuchmarkt einen beachtlichen Preis darstellen, jedoch nicht ein zusammenhängendes Werk, sondern Einzelbeiträge angeboten werden, für die das Interesse des Lesers sicherlich nicht gleich groß sein wird, ist fraglich, ob das Buch ein größeres Publikum erreichen kann. ■

Rachel Brett and Irma Specht (eds.), Young Soldiers: Why they Choose to Fight, Lynne Rienner, Boulder 2004, 192 pages, $ 17.95

Ruth Abril Stoffels*

Experience has demonstrated that something goes wrong in preventing children joining the army. Something is wrong also as far as demobilisation and reintegration processes are concerned. As a consequence, the rate of failure of these programmes is very high. What is more, most of the young soldiers re-join the army or fall into marginality.

Undoubtedly one of the chief problems lies in the fact that practitioners misunderstand the causes and circumstances that make a child join military groups. This particular issue is the main reason why this book is so interesting, for it breaks myths and sets new approaches.

The book tries to analyse the circumstances and nature of the decision to join the army or armed groups and the different types of choices made by Western young soldiers in contrast to young soldiers from other parts of the world. The comparison between different countries and contexts allow us to understand how things look from the perspective of these young soldiers themselves.

To do that, the authors use a methodology based on interviews with young soldiers from 10 different conflicts. Trying to elaborate an attractive and easy book to read, the authors maybe have gone too far by including long parts of these interviews in the analysis. As a consequence, the reader sometimes loses the sense of reasoning and the investigation seems to have less quality and depth than in fact it really has.

Over the one hundred pages that the main part of the book contains, the authors show us a sometimes hidden reality: that not always young soldiers are forced to join the army, sometimes they are volunteers.

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On the other hand, the authors focus on teenagers, a good point since most researchers often fail to deal with them and prefer to focus on child soldiers. It is also contended that international law does not offer them proper protection.

It is true, anyway, that some general or personal circumstances increase the vulnerability of the young in the option process and that the choice to join the armed forces is not completely free. Therefore, macro-social and micro-social factors such as family, friends, war context, education and economic situation are analysed from different angles.

First we see how the broad context influences the young soldiers' decision: the war context is analysed as *conditio sine qua non* but, unfortunately, this is not the only reason why adolescents decide to join the army. Other causes leading to such a decision are of a more indirect nature and include poverty, education, family and friend ties, politics and ideology, adolescence, as well as culture and tradition.

Yet, not all young boys living in the above mentioned context join the army. As a consequence, it is necessary to analyse the specific situations that have a more direct impact on the individual decision: insecurity, economic motivations, education, family and friends, parties to the conflict and group identity or political ideology.

Finally, the 'critical moment' in which the adolescent makes the choice is examined as a crucial factor that makes the difference for boys living in similar social and personal circumstances to decide to join the army.

As a conclusion, the authors challenge the distinction between forced and voluntary recruitment. Then it is important to see how international instruments consider the military involvement of the young people and if this 'free decision' to join the army is taken into account.

A separate analysis is carried out on girl soldiers due to the fact that different conditionings and motivations influence them and their decision. Unfortunately, one regrets that the analysis provided by the authors is rather untidy and asks more questions than it answers.

The book has two appendixes, the first one is devoted to research and methodological issues. This part is particularly interesting inasmuch as it gives the reader the possibility to appreciate the difficulties linked to the study of this issue and to understand the way in which the authors have arrived to such conclusions.

Finally, in appendix 2 we can find a profile of the conflicts in which the authors choose the interviewed persons. This appendix, in my opinion, is too short to give us enough important information on the context in which the young soldiers live. But it may be interesting for people being absolutely ignorant of what is happening in world today.

To sum it up, Brett and Specht wrote a very interesting book that offers us a lot of ideas to think about. It also raises several questions that must be borne in mind whenever we deal with young soldiers and elaborate effective demobilisation and reintegration instruments. ■

James M. Lutz and Brenda J. Lutz, Terrorism: Origins and Evolution, Palgrave Macmillan, Basingstoke 2005, 240 pages, £ 40

Noelle Higgins*

'Terrorism: Origins and Evolution' is a general introduction to the complex phenomenon of global terrorism. It is general in so far as it aims to give an overview of historical, ideological and political aspects of the topic and does not focus on one particular instance of terrorism or one particular terrorist group. However, it is also quite succinct in its description of terrorist groups from ancient times to modern day.

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Many people's understanding of terrorism was coloured post-9/11, with the focus firmly on Al-Qaeda and the 'war on terror'. However, terrorism is an ancient phenomenon which has been an almost ever-present plague on societies in disparate geographic and political situations for two millennia. It has taken different forms, has had different causes and varying results over the years. The best aspect of this book is that it emphasises the ancient roots of terrorism and ably demonstrates that terrorism is truly a global issue and not by any means limited to Islamic acts of terrorism aimed at the West. The authors explain in the preface to the book that "[t]he genesis for this work began with our concern that too much attention was being paid to terrorist actions in the Middle East and terrorism rooted in Islam. In point of fact terrorism is much more complex, and it has been a technique that is more widely present in the world. It is vitally important to understand the broader patterns of terrorism in today's world, and to begin to explore the significance of these patterns." (p. viii). Therefore, this work places the 9/11 attacks in context of the global phenomenon that is terrorism and for that reason it is to be commended.

The work consists of eleven chapters, dealing with various facets and instances of terrorism. Chapter 1, 'Terrorism Today and Yesterday' serves as an introduction to the subject and puts the topic in context for the reader. The following chapters are in chronological form, running from 'Terrorism in the Ancient World' in Chapter 3 through to 'From Marxism Back to Communalism' in Chapter 10. In between, all instances of terrorism across the globe in various periods throughout history, are analysed from 'The Middle Ages to the Renaissance' in Chapter 4, through 'Terrorism in the Age of Revolutions' in Chapter 5, 'The End of the Napoleonic Wars to World War I' in Chapter 6, 'Terrorist Groups between the Wars' in Chapter 7, 'The End of Empires and Terrorism' in Chapter 8 to 'The Rise of the new Left and the Failure of Communism: Increasing terrorism on a Global Scale' in Chapter 9. The book also contains an extensive bibliography of secondary sources which would be very helpful to anybody undertaking research on the topic of terrorism. A useful index is also included in the work which is also valuable for researchers.

Chapter 1 details the long history and ancient roots of terrorism and emphasises the fact that terrorism is not a modern phenomenon. The authors state that "[w]hat is probably more important than picking a point as the starting point (of terrorism) is a realization of the fact that terrorism today is a continuation of a basic idea that goes back millennia. Terrorism has endured for over 2,000 years because its practitioners have become able to adapt to changing circumstances and to exploit vulnerabilities in targets." (p.1) The second chapter tackles the very difficult task of defining terrorism. It also classifies various types of terrorism and looks at what causes terrorist acts. This chapter emphasises the difficulty that is inherent in defining the phenomenon of terrorism which has so many different forms and rationales. The definition of terrorism chosen by the authors in this chapter is quite broad, i.e. "Terrorism involves politi-

cal objectives and goals. It relies on violence or the threat of violence. It is designed to generate fear in a target audience that extends beyond the immediate victims of the violence. The violence involves an organization and not isolated individuals. Terrorism involves a non-state actor or actors as the perpetrator of the violence, the victims, or both. Finally, terrorism is violence that is designed to create power in situations in which power has previously been lacking (i.e., "the violence attempts to enhance the power base of the organization undertaking the action", and therefore covers very different types of actions and groups. One problem of defining terrorism which was not discussed in very much depth in the work is the issue of wars of national liberation. The authors comment that "[i]nternational accepted definitions are difficult to achieve because some countries have attempted to make sure that national liberation movements are not included in the category while other countries attempt to exempt dissident movements fighting dictatorial regimes or police states." (pp. 6-7) The issue of national liberation movements is briefly addressed again in Chapter 7 'Terrorist Groups between the Wars' where the authors comment that "[n]ational liberation struggles were important after World War I. Fighting between different groups occurred in many places, and in many cases foreign governments supported related ethnic groups in neighboring states and other opposition groups." (p. 66) The age-old adage of "one man's freedom fighter is another man's terrorist" has, in fact, always plagued attempts to define terrorism. Therefore, this issue could, I believe, have been addressed in more detail, e.g. an analysis of Article 1(4) of Additional Protocol 1 to the Geneva Conventions 1949, which deems wars of national liberation to be international armed conflicts and which was designated as a "law in the service of terror" by the US Defense Department's Undersecretary for Policy, Douglas Feith.[1] Acts committed by national liberation movements could be legitimate acts of war under Article 1(4) of the Additional Protocol, rather than acts of terrorism, but could at the same time fall within the ambit of the definition of terrorism chosen by the authors, and therefore, this issue could have been dealt with separately and / or in more detail in this work.

The book aims to give an overview of acts of terrorism that have been committed throughout all periods of recorded history in all places throughout the world. The reader is bombarded with facts as the authors move quickly from one instance of terrorism to another. While this may be a little overwhelming for the reader who sits and reads the book in one or two sittings, especially as it is so difficult to compare and contrast instances of terrorism that may have happened at the same time but in very different geographic locations for very different reasons, it is useful for the reader who wants an overview of the topic. The work also contains numerous tables that summarise the preceding chapter and examine the objectives, causes and results of all terrorist activities during the particular time period covered in that chapter. One criticism that may be levelled at the use of these summary tables, however, is in relation to the columns that deal with the casualties arising from the various instances of terrorism. The measurement of casualties is not uniform and in some instances can be very vague, e.g. in Chapter 10, there were "more than a thousand dead in thirty years of struggle" (p. 154) as a result of the IRA's campaign against the British. However, during the same period covered in this Chapter the KLA caused "relatively few deaths" (p. 155). A clearer and more transparent method of casualty measurement would definitely add to this survey.

Because of the fact that the authors' aim is to provide an overview of terrorism, the book naturally does not focus in depth on any one issue. Some of the comments made throughout the course of the book are however, too general and vague, e.g. in Chapter 7 'Terrorist Groups between the Wars' the authors comment that "[c]ommunal and ideological terrorism dominated this period, and sometimes the two were intermingled for the groups involved." (p. 75) With so many groups being discussed by the authors in this Chapter, from disparate backgrounds and locations, it is perhaps a little simplistic to be so general.

The authors comment in the last chapter of the book that "[t]he most obvious conclusion from the preceding pages is that terrorism will continue because it has worked in the past, because it requires few resources, and because it can be a very flexible technique." (p. 168) However, no real conclusions as to why instances of terrorism arise are drawn, nor is there an attempt to discuss any measures that have been taken to combat terrorism, e.g. the United Nation's Counter-terrorism Committee, which would perhaps have added to the piece, especially the conclusion.

All in all, however, this book will be welcomed by students and researchers undertaking projects on terrorism to provide a basic overview of the history of this complex phenomenon. ■

[1] *D.J. Feith*, "Law in the Service of Terror", (1985) 1 *National Interest* 36-47.

Guénaël Mettraux, International Crimes and the Ad hoc Tribunals, Oxford University Press, Oxford/New York 2005, 478 Seiten, $ 135

Anke Biehler*

Mit der rasanten Entwicklung des internationalen Strafrechts seit etwas mehr als einem Jahrzehnt haben sich auch die völkerrechtlichen Verbrechen (weiter) aus- und herausgebildet. Während der Sicherheitsrat bei der Schaffung der beiden *Ad hoc*-Tribunale quasi nur das Gerüst einer Definition der zu bestrafenden völkerrechtlichen Verbrechen vorgab, die die Gerichte durch ihre Rechtsprechung auszufüllen hatten bzw. haben (S. 5), sind diese bereits im römischen Statut zur Errichtung des internationalen Strafgerichtshofes genauer definiert. Dies ist unter anderem maßgeblich darauf zurückzuführen, dass bei den Verhandlungen über das römische Statut bereits auf die genauere Herausbildung völkerrechtlicher Verbrechen durch die Rechtsprechung der beiden *Ad hoc*-Tribunale zurückgegriffen werden konnte.

Guénaël Mettraux geht in seinem Mitte 2005 erschienenem Buch der Frage nach, wie die beiden *Ad hoc*-Gerichtshöfe für das ehemalige Jugoslawien und Ruanda durch ihre Rechtsprechung, den in ihren Statuten nur rudimentär vorgegebenen Rahmen der völkerrechtlichen Verbrechen ausgefüllt haben, ohne dabei neue völkerrechtliche Verbrechenstatbestände zu schaffen. Dazu mussten sie zunächst das anwendbare Völkergewohnheitsrecht bestimmen, wobei maßgeblich war, dass die Verbrechen bereits zum Zeitpunkt ihrer Begehung völkergewohnheitsrechtlich strafbar sein mussten. Die Tribunale durften nicht dem Versuch erliegen, „neue" Verbrechenstatbestände zu schaffen bzw. Handlungen zu bestrafen, die ungeachtet ihrer

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moralischen Wertung, zum Zeitpunkt ihrer Begehung (noch) nicht gewohnheitsrechtlich verboten *und* strafbar waren (S. 5 ff.). Der Autor, der als Associate Legal Officer am Jugoslawien-Gerichtshof (ICTY) gearbeitet hat und dort nun als Verteidiger arbeitet, tut dies mit großem Sachverstand und in sehr systematischer Weise, so dass sich die Zusammenhänge auch für den nicht mit der Materie vertrauten Leser leicht erschließen.

Das Buch gliedert sich in acht Teile. Der erste Teil untersucht die Frage, welche Verbrechen in die Zuständigkeit der *Ad hoc*-Tribunale fallen („subject-matter jurisdiction") und welches Recht von diesen anzuwenden ist. Dabei wird auch auf das Problem eingegangen, dass die Gerichte selbst entscheiden müssen, ob ein bestimmtes Verhalten zum Zeitpunkt der Tat völkergewohnheitsrechtlich strafbar war.

Der zweite Teil beschäftigt sich mit Kriegsverbrechen und schweren Verstößen gegen die Sitten und Gebräuche des Krieges („serious violations of the laws or customs of war"). Verbrechen gegen die Menschlichkeit („crimes against humanity") sind Gegenstand des dritten Teils, während der anschließende vierte Teil das völkerrechtliche Verbrechen des Völkermords untersucht. Hierbei geht *Mettraux* jeweils zunächst auf die Definition des jeweiligen Verbrechens in den Statuten des ICTY und des ICTR – und bezüglich des Völkermords auch auf die Definition des Nürnberger Kriegsverbrechertribunals und des Internationalen Strafgerichtshofs – ein, bevor er die sogenannten „Chapeau elements" der völkerrechtlichen Verbrechen und deren zugrunde liegende Handlungen („underlying offences") ausführlich darstellt. Besonderheiten der verschiedenen Tatbestände, wie etwa das Problem der Kriegsverbrechen im internen bewaffneten Konflikt oder die Teilnahme an Völkermordhandlungen, werden in eigenen Unterabschnitten so dargestellt, dass sie auch für Nicht-Experten leicht verständlich sind. Der Autor zeigt zudem, wie der völkerrechtliche Rahmen von den Tribunalen voll ausgeschöpft wurde und in welchen Fällen dies seiner Ansicht nach problematisch ist.

Der fünfte Teil hat die Teilnahme an völkerrechtlichen Verbrechen und individuelle strafrechtliche Verantwortlichkeit zum Gegenstand, während im sechsten Teil auf die Abgrenzung der drei völkerrechtlichen Verbrechenstatbestände zueinander, sowie auf die kumulative Verurteilung und Bestrafung („cumulative charging and cumulative sentencing") aufgrund der Erfüllung von mehreren völkerrechtlichen Verbrechenstatbeständen durch die gleiche Handlung eingegangen wird. Auf die schwierige Frage der Strafzumessung („sentencing") wird im vorletzten siebten Teil eingegangen. Die verschiedenen Formen strafrechtlicher Verantwortlichkeit und die Strafzumessung sind äußerst komplexe Themen, die eigene Monografien verdienen. Folglich können sie in einem Buch, das sich allgemein mit völkerrechtlichen Verbrechen vor den *Ad hoc*-Tribunalen beschäftigt, naturgemäß nur angerissen werden. Der Autor hat aber in Bezug auf diese beiden Kapitel auch keinen größeren Anspruch, sondern betrachtet diese Teile selbst lediglich als Einführung in eine schwierige Materie (S. xvi).

In den abschließenden Schlussfolgerungen des achten und letzten Teiles nimmt der Autor kritisch Stellung zu dem Problem der Durchsetzung der völkerrechtlichen Straftatbestände, da die Schaffung der beiden *Ad hoc*-Tribunale nicht dazu beitrug, dass Verbrechen nicht begangen wurden, sondern im Gegenteil durch sie das Ausmaß der Nichtbeachtung des humanitären Völkerrechts erst deutlich wurde. Andererseits könnten Gerichte nirgendwo die Begehung von Verbrechen unmöglich machen oder verhindern und so hätten die beiden Tribunale durch die Anwendung des humanitären Völkerrechts gezeigt, dass geltendes Recht nicht durch seine ständige Nichtbeachtung und Verletzung quasi „ungültig" würde. Daher sei die Existenz und die Rechtsprechung der *Ad hoc*-Tribunale ein eindrucksvoller Sieg des geltenden Völkerrechts. Es sei eine große Leistung der Rechtsprechung der Tribunale gewesen, bis dahin sehr vage, fast mythische völker- und völkerstrafrechtliche Regeln zu identifizieren, die potentiell universell anwendbar sind. Die Entscheidungen und Urteile des ICTY und des ICTR trügen auch dazu bei, dass einige unvorstellbare Verbrechen aufgezeichnet und so ohne Verzerrung in die Geschichte eingehen könnten. Schließlich zeige die Arbeit der Tribunale auch die Bereitschaft und den Willen der internationalen Gemeinschaft, völkerrechtliche Verbrechen wirklich zu verfolgen, und die grundlegende Bedeutung des Rechts.

Insgesamt besticht das Buch durch den klaren Untersuchungsgang, der Zusammenhänge deutlich macht, ohne dabei auf Details zu verzichten, seine übersichtliche Gliederung und der daraus resultierenden guten Lesbarkeit. Ergänzt wird es durch zahlreiche weiterführende Fußnoten, sowie ein reichhaltiges Literaturverzeichnis, das allerdings naturgemäß nur Literatur in englischer und französischer Sprache enthält. Trotz des hohen Preises ist das Buch daher allen, die sich mit den Tatbeständen völkerrechtlicher Verbrechen beschäftigen, Praktikern, Studenten und Wissenschaftlern uneingeschränkt zu empfehlen. ■

Yves Beigbeder: International Justice against Impunity – Progress and New Challenges, Martinus Nijhoff, Leiden 2005, 238 Seiten, € 75

Jan Erik Wetzel*

Die in den letzten Jahren festzustellende Vermehrung von gerichtlichen Institutionen, die schwere Verstöße gegen Menschenrechte und das humanitäre Völkerrecht verfolgen sollen, wird begleitet von einer mindestens eben so schnell wachsenden Zahl literarischer Aufarbeitungen. *Yves Beigbeder* hat ein weiteres Werk vorgelegt, das den Weg von Nürnberg über Den Haag nach Rom – und wieder nach Den Haag – nachzeichnet. Der Autor ist Professor in Genf und hat mehrere Aufsätze und Bücher zu verschiedenen Aspekten internationaler Organisationen geschrieben. Nach „Judging War Criminals: The Politics of International Justice" (1999) und „Judging Criminal Leaders: The Slow Erosion of Impunity" (2002) ist „International Justice against Impunity" (2005) sein drittes Buch zum Völkerstrafrecht. Dieses letzte Werk erscheint streckenweise auch als eine überarbeitete Neuauflage seiner Vorläufer. Neben einer Behandlung des Weltrechtsprinzips und der UN-Tribunale für das frühere Jugoslawien (ICTY) bzw. für Ruanda (ICTR) legt der Autor nun jedoch größere Schwerpunkte auf die sog. „gemischten" Straftribunale, den Internationalen Strafgerichtshof (IStGH), sowie in einem neuen Kapitel auf Bezüge zum Internationalen Gerichtshof (IGH).

Beigbeder beschreibt jeweils eine Form der modernen internationalen Strafgerichtsbarkeit, sowie den historischen Hintergrund, die Entstehungsgeschichte und die Inhalte der Gründungsstatuten der einzelnen Insti-

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tutionen. Auch erläutert er, soweit vorhanden, jeweils den aktuellen Stand und wichtiges Fallrecht. Insgesamt kommt er zu einer – kaum überraschenden – positiven Wertung der völkerstrafrechtlichen Entwicklungen des letzten Jahrzehnts, weist aber jeweils auch auf konzeptionelle und praktische Probleme hin. Nützlich sind Zusammenstellungen relevanter Basisinformationen in vier Tabellen sowie ein ausführlicher Index. Das Buch befindet sich inhaltlich auf dem Stand Herbst 2004. Insgesamt enthält es eine bis zu diesem Datum gute Gesamtschau der jüngeren Entwicklungen, die allerdings nicht besonders in die Tiefe geht.

Gleich zu Beginn des Buches formuliert *Beigbeder* die – in seinen Augen – größte „Schwachstelle" des Völkerstrafrechts: Obwohl grundsätzlich die einzelnen Nationalstaaten die Pflicht hätten, schwere Verstöße eigener Staatsangehöriger gegen das Völkerrecht zu ahnden, würde ihr nur selten nachgekommen. Der Autor, 1946 selbst Mitarbeiter des französischen Richters am Internationalen Militärtribunal (IMT) in Nürnberg, beurteilt daher im Ergebnis auch die Verfahren dort und in Tokio als mit Mängeln behaftet, da alliierte Taten nicht verfolgt wurden. Für seine These des fortwährenden Unwillens der einzelnen Staaten, ihre eigene Geschichte objektiv aufzuarbeiten und die Verantwortlichen zur Rechenschaft zu ziehen, führt er zunächst in einer historischen *tour de force* eine Reihe von Beispielen der letzten vierzig Jahre aus Asien, Afrika und Lateinamerika an, aber auch während der französischen Kolonialkriege und durch US-Truppen begangene Taten. So zieht sich der rote Faden des Buches bis in die jüngste Vergangenheit mit intensiven Betrachtungen zu Guantanamo Bay, Abu Ghuraib und dem Prozess gegen Saddam Hussein vor dem Irakischen Spezialtribunal. *Beigbeder* differenziert in diesem Abschnitt nicht zwischen z. B. dem Verhungernlassen 100.000er eigener Staatsangehöriger und den komplexen juristischen Problemen des sog. „Kriegs gegen den Terror". Ihm geht es mehr um das Prinzip der nach wie vor weit verbreiteten Straflosigkeit aus politischen Gründen. Als Lösung zieht sich durch das gesamte Buch sein Anliegen, diese mit den Mitteln des Völkerrechts überall und ungeachtet der Herkunft der Täter zu bekämpfen. Das Versagen der nationalen Justiz bedinge eine Verfolgung auf internationaler Ebene. *Beigbeder* macht keinen Hehl aus seiner kritischen Haltung gegenüber Recht und Politik der USA sowie seines Heimatlandes Frankreich. So berechtigt diese Kritik zum Teil auch sein mag, überschattet dieser Blickwinkel zuweilen jedoch den Gesamtansatz des Buches. Denn auch wenn politische Widerstände nach wie vor bestehen, so leugnet auch der Autor selbst nicht eine fortschreitende Akzeptanz des internationalen Strafrechts. Zuzustimmen ist dem Autor allerdings darin, dass trotz aller fundamentaler Fortschritte, die das Völkerstrafrecht seit Nürnberg und Tokio gemacht hat, die strafrechtliche Verfolgung nur ein Aspekt der Aufarbeitung sein kann, und dass man die Möglichkeiten dieser Gerichte, z. B. zur kurzfristigen Versöhnung beizutragen, nicht überschätzen darf.

Nach Auffassung *Beigbeders* sind die seit Ende der 90er Jahre festzustellenden Fortschritte vor allem Anklagen auf Grund des Prinzips der Weltstrafrechtspflege („Universal Jurisdiction") zu verdanken. Er geht davon aus, dass schon die Militärtribunale von Nürnberg und Tokio dieses Rechtsprinzip anerkannten, und dass es auch in der Schaffung von ICTY, ICTR und schließlich IStGH Niederschlag gefunden habe. Auch nennt er viele Beispiele für die Handhabung des Prinzips auf nationaler Ebene (das deutsche Völkerstrafgesetzbuch von 2002 bleibt allerdings unerwähnt). Zwar sei die Staatenpraxis bei Anklagen von Straftaten ohne Zusammenhang mit dem Verfolgerstaat noch uneinheitlich. Dennoch steht er diesem insbesondere von Menschenrechtsaktivisten proklamierten Prinzip insgesamt positiv gegenüber. Und trotz der Tatsache, dass ein Ansatzpunkt bisheriger Fälle ja gerade der Mangel an internationalen Strafgerichten war, sieht er im Weltrechtsprinzip auch weiterhin einen wichtigen Baustein des internationalen Rechtssystems. *Beigbeder* stellt das Weltrechtsprinzip an sich daher nicht in Frage, sieht in ihm aber derzeit eher noch ein wünschenswertes Ziel als eine rechtliche Realität.

Die folgenden Abschnitte beschäftigen sich jeweils mit den unmittelbar durch den UN-Sicherheitsrat geschaffenen Tribunalen zum früheren Jugoslawien und zu Ruanda. Die faktische Lage der Tribunale wird beschrieben, inklusive der „Completion Strategy" des UN-Sicherheitsrates seit 2002. Diese beiden Kapitel enthalten wenig Informationen, die nicht schon anderswo dargelegt wurden, verschaffen jedoch in gebotener Kürze einen schnellen Überblick. Einwände bezüglich der Erschaffung und Unabhängigkeit der Tribunale werden einzeln behandelt, aber im Ergebnis jeweils verneint. Der Autor setzt einen Schwerpunkt der rechtlichen Betrachtung beim ICTY auf die interessante Frage des „plea bargaining". Trotz einer im Grundsatz positiven Betrachtung konzediert er jedoch Anschlussschwierigkeiten, insbesondere bezüglich des zu verhängenden Strafmaßes. Im Hinblick auf das ICTR begrüßt er die zwischenzeitliche Fokussierung auf die Hauptverantwortlichen und die Aufwertung nationaler Aufarbeitungsmechanismen. Seiner Grundthese entsprechend beurteilt er jedoch das Verhalten der direkt betroffenen Staaten bei der Kooperation mit den UN-Tribunalen, sowie die Rolle internationaler Organisationen wie NATO, OAU und UN innerhalb der jeweiligen Konflikte sehr kritisch.

Ein interessanter Schwerpunkt des Buches liegt in der genaueren Betrachtung einer jungen Form der internationalen Strafgerichtsbarkeit, der sog. „gemischten" Tribunale. *Beigbeder* erläutert dies an den Beispielen Sierra Leone, Kambodscha und Osttimor (nicht aber Kosovo), wo besondere Strafgerichte bei personeller Zusammensetzung und anwendbarem Recht eine Kombination aus nationalen und internationalen Elementen aufweisen. Auch durch eine zumeist auf Konsensbasis erreichte Rechtsgrundlage und durch eine Ansiedelung am Ort der jeweiligen Grausamkeiten soll die nationale Seite gestärkt und so insbesondere die lokale Akzeptanz erhöht werden. Außerdem sollen sie billiger und schneller arbeiten als die UN-Tribunale. Gleichzeitig ist die ausschließliche Finanzierung dieser Tribunale durch freiwillige Zuwendungen ein großes Problem, wie zutreffend betont wird. Eine Begrenzung der Anklagen auf Personen mit der größten Verantwortlichkeit – im Gegensatz zu den UN-Tribunalen jetzt auch *de jure* – wird begrüßt. Das Fehlen einer Resolution des Sicherheitsrats nach Kapitel VII der UN-Charta in Fällen der Schaffung eines Gerichts durch bilateralen Vertrag wie in Sierra Leone und Kambodscha wird allerdings als nicht schwerwiegend beurteilt, da faktisch auch die UN-Tribunale Probleme mit der Kooperation anderer Staaten gehabt hätten. Im Falle des Sondergerichts für Sierra Leone werden auch dessen erste Grundlagenurteile aus dem Frühjahr 2004 dargestellt und die in ihnen angelegte menschenrechtsfreundliche Fortentwicklung des Völkerstrafrechts gelobt. U. a. wurden dort Amnestien oder – in einer Entscheidung zum damaligen liberianischen Präsidenten Charles Taylor – Immunitäten von Staatsoberhäuptern für schwerste Verbrechen als völkerrechtswidrig eingestuft. Auch wurde zum ersten Mal das Verbrechen der Zwangsrekrutierung von Kindersoldaten völkerrechtlich bestätigt. Im Ergebnis kommt *Beigbeder* zu einem relativ positiven – wenn auch vorläufigen – Urteil über das Sondergericht von Sierra Leone. Hierzu könnte man allerdings anmerken, dass schon aus den ersten Anklagen die weitgehende Nichtanwendung nationalen Rechts ersichtlich wurde, sowie, dass das Sondergericht keine jugendlichen Täter verfolgen würde, obwohl beides nach sei-

nem Statut möglich wäre. An diesen Stellen wird das Völkerrecht also keine Erweiterung erfahren, was im letzteren Fall aber auch stimmig ist, da Jugendliche in den seltensten Fällen „Täter mit der größten Verantwortlichkeit" sind.

Die „Außerordentlichen Kammern" zur Aufarbeitung des Völkermords in Kambodscha während des Khmer Rouge-Regimes 1975–79 werden sehr viel kritischer betrachtet. Dieses Tribunal ist schon seit 1997 in Planung, wurde aber nach langen Verzögerungen erst 2003 beschlossen und hat nun kürzlich mit seiner eigentlichen Arbeit begonnen. Die Kammern werden innerhalb des kambodschanischen Gerichtssystems und mit einer jeweiligen Mehrheit nationaler Richter errichtet, im Gegensatz zum Sondergericht in Sierra Leone und trotz großer Vorbehalte des UN-Generalsekretärs bei der Aushandlung des ebenfalls vertraglich festgelegten Statuts. Als weitere Probleme identifiziert *Beigbeder* die unklaren Regeln über gewährte Amnestien und über die Schlichtung von Streitigkeiten zwischen nationalem und internationalem Personal, sowie die äußert geringe Anzahl potentieller Angeklagter. Seine Bedenken haben im Juli 2006 leider Bestätigung gefunden: Nur drei Wochen nach der Einschwörung der Richter und Staatsanwälte starb ein weiterer der potentiellen Angeklagten in hohem Alter, nämlich der als „Schlächter" berüchtigte ehemalige oberste militärische Befehlshaber der Roten Khmer *Ta Mok*. Die „Special Panels" für schwere Verbrechen, die in Ost-Timor nach den Unruhen 1999 anlässlich des Referendums über eine Unabhängigkeit von Indonesien durch die damalige UN-Mission errichtet worden waren, werden nur kurz beschrieben. *Beigbeder* belässt es bei der Feststellung, dass Verfahren gegen die Hauptverantwortlichen an der Unwilligkeit der indonesischen Regierung gescheitert sind, hochrangige Personen auszuliefern. Allerdings weist die Arbeit der Panels, die 2005 nach Verfahren gegen fast 400 Personen zu einem Ende gekommen ist, noch eine Reihe weiterer interessanter Aspekte auf, wie etwa den Versuch, das noch junge im Rom-Statut kodifizierte Völkerstrafrecht in ein nationales Rechtssystem zu integrieren. Auch ist natürlich die Verfolgung der politischen Haupttäter äußerst erstrebenswert; jedoch kann etwa aus dem Blickwinkel der Opfer auch die Anklage rangniedrigerer Täter sinnvoll sein. *Beigbeder* will sich noch nicht festlegen, ob in diesen gemischten Tribunalen nur eine Übergangslösung auf dem Weg zu einer umfassenden Zuständigkeit des IStGH zu sehen ist, was dem Schlagwort der „transitional justice" eine weitere Dimension geben würde. Inzwischen kann aber wohl statuiert werden, dass diese neuen Gerichte trotz aller Unzulänglichkeiten im Einzelnen und ihren verschiedenen Ausformungen auch zukünftig eine tragende Rolle im Völkerstrafrecht spielen werden. So verhandelt die UN seit 2005 über gemischte Kammern für Burundi und Anfang 2006 wurde diese Option auch zur Aufklärung der Ermordung des libanesischen Ministerpräsidenten *Hariri* erörtert. Ist eine alternative Aufarbeitung für Konflikte vor In-Kraft-Treten des Rom-Statuts zwingend, so kann diese Option auch für aktuelle Problemlagen einen Mehrwert haben. Denn selbst der IStGH versteht sich nur als Nabe eines internationalen Systems des Völkerstrafrechts.

Mit dem IStGH als neuem Zentralelement des Völkerstrafrechts beschäftigt sich ein weiterer Schwerpunkt des Buches. Der institutionelle Rahmen des Rom-Statuts wird ausführlich erläutert, inklusive der sekundären Dokumente wie den Übereinkommen über die Zusammenarbeit mit den UN und über Privilegien und Immunitäten. Dieser Abschnitt enthält viele Details, die für einen Überblick nicht unbedingt notwendig sind, und erscheint etwas unstrukturiert. In materieller Hinsicht widmet sich der Autor vor allem den Schwierigkeiten der nach wie vor ausstehenden Definition von „Aggression" sowie der großen Bedeutung, die das Rom-Statut den Opfern zugesteht. Interessant ist die folgende eingehende Betrachtung der „Freunde und Feinde" des IStGH sowie der einzelnen Maßnahmen, die die USA in ihrer Gegnerschaft zu diesem Gericht initiiert haben. In diesem besonders lesenswerten Abschnitt werden die Haupteinwände der USA gegen den IStGH einzeln betrachtet und jeweils mit reichhaltiger Argumentation widerlegt. *Beigbeder* ist hierbei in seiner Analyse überzeugend, dass die Gegnerschaft der USA politisch motiviert, juristisch aber nicht gerechtfertigt ist.

Aus rechtlicher Sicht ebenfalls sehr instruktiv ist das zusätzliche Kapitel zu den Bezügen zwischen den einzelnen internationalen Strafgerichten und dem Internationalen Gerichtshof (IGH). *Beigbeder* demonstriert eine erhebliche potentielle Überlappung in den jeweiligen sachlichen Zuständigkeiten. Nicht nur der bekannte Streit über die „overall" (ICTY) bzw. „effective control" (IGH) sowie die Frage, ob bzw. welche Gerichte Resolutionen des UN-Sicherheitsrats überprüfen dürfen, gehören hierher; parallele Streitgegenstände wurden zuletzt auch beim (leider nicht erwähnten) IGH-Gutachten über die israelische Sperrmauer von 2003 sowie beim im Frühjahr 2006 mündlich verhandelten IGH-Fall Bosnien-Herzegowina gegen Serbien-Montenegro deutlich. Weiterhin kann man entgegen *Beigbeder* sehr wohl einen Widerspruch in der IGH-Entscheidung zum belgischen Haftbefehl von 2000 und der *Taylor*-Entscheidung des Sondergerichts für Sierra Leone aus 2004 sehen, sofern man die vom IGH formulierten Ausnahmen zur prinzipiellen Immunität hoher Staatsbeamter als im Grundsatz vom Konsens des Heimatstaates abhängig sieht. Im Ergebnis jedenfalls sind die Lösungsvorschläge *Beigbeders* überlegenswert, etwa in Form einer Öffnung der Gutachtenkompetenz des IGH für Institutionen außerhalb der UN.

Beigbeder hat mit „International Justice against Impunity" eine gut lesbare Gesamtschau über die verschiedenen aktuellen Formen der strafrechtlichen Verfolgung schlimmster Verstöße gegen das Völkerrecht vorgelegt. Wie der Klappentext selbst betont, soll das Buch kein rechtswissenschaftliches Lehrbuch sein, sondern einen verständlichen Überblick geben über einige Probleme, die der effektiven Durchsetzung des Völkerstrafrechts entgegenstehen. *Beigbeder* beleuchtet daher auch immer wieder den politischen Hintergrund oder auch die Rolle bestimmter Personen, also Aspekte, die in „rein" juristischen Werken oft zu kurz kommen. Allerdings fällt die Analyse zumeist kurz aus. Auch sind die mehrheitlich aus Presseartikeln und NGO-Berichten bestehenden Hinweise am Ende eines jeden Kapitels sowie die Bibliographie des Buches für eine akademische Nutzung zu spärlich. Mit dem Gebiet bereits vertraute Personen werden das Werk am ehesten auf Grund der vielen Fall-Beispiele und der übersichtlichen Zusammenstellung wichtiger Gesichtspunkte schätzen. Für weniger Vorgebildete bietet „International Justice against Impunity" einen guten und fundierten Einstieg. *Beigbeder* behält trotz seiner Sympathie für eine menschenrechtsfreundliche Fortentwicklung des Völkerrechts immer seine rechtswissenschaftliche Objektivität bei. Das Buch könnte daher etwa für NGO-Aktivisten besonders instruktiv sein. Zu wünschen gewesen wäre jedoch ein sorgfältigeres Lektorat. ■

Richard Caplan, International Governance of War Torn Territories: Rule and Reconstruction, Oxford University Press, Oxford 2005

Conor McCarthy*

Whether in Kosovo or East Timor, the Former Yugoslavia, Afghanistan or Sierra Leone, the extent to which the United Nations or other multilateral organizations have become intermeshed in the political, legal and economic administration of states or territories emerging from conflict has been a significant development of the post-cold war era. Indeed, this departure is perhaps all the more remarkable given the difficulty, cost and common political aversion to what is sometimes cast as a fundamentally 'neo-colonial' endeavour.[1] Unsurprisingly, the desirability, nature and effectiveness of this kind of intervention have proved to be highly controversial issues in both the international law and international relations discourses in recent years.[2] It is this debate to which Richard Caplan's thought-provoking and thoroughly researched work seeks to contribute.

In the main the book draws upon the author's extensive research concerning the operation of international administrations in the territories of the former Yugoslavia, particularly Eastern Slavonia, Bosnia Herzegovina (BiH) and Kosovo. Additionally, the author utilizes the experience of East Timor while under international administration. A thematic approach is adopted. The first part examines five of the main areas of operation of international administration- public order and internal security, the resettlement of refugees and internally displaced persons, civil administration, the building of local political institutions, and economic reconstruction and development. The second part analyses important challenges which confront these institutions: the planning of operations, the exercise of executive authority, accountability and exit strategies. In the opening chapter these events are placed into a brief political and historical context, while in the final chapter recent policy initiatives by states and international organizations to enhance the effectiveness of international administration are assessed.

Transnational territorial administrations, of course, often share an empirical commonality through the way in which they operate, the obstacles which they face, and the goals which they pursue. However, the origins of these institutional creations, the resultant normative framework in which they operate and the socio-political context which they seek to mould (and which, in turn, moulds them) are all often radically different.

A fundamental challenge, therefore, which a book addressing this subject matter has to face is how best to analyse and draw conclusions from the hugely varied types of territorial administrations that exist. At the outset Caplan seeks to distinguish a variety of forms of transnational administrative intervention from the international administrations with which he is primarily concerned in his work.

While acknowledging the common traits of many types of international administration the author distinguishes international administration strictly so-called from both administration during a military occupation, as for example in Iraq or Afghanistan, and administration as part 'state-building' or reconstruction. In a similar vein the author distinguishes international administration from peacekeeping and recent ambitious peace-building interventions.

The import of this distinction is severalfold. First, it forms the basis for the author's selection of those territorial administrations analysed and evaluated in the book. However the distinction is not of merely descriptive significance. Caplan also attaches a normative significance by contending that acknowledging the distinct, highly political, nature of international administrations is essential to properly understanding them as institutional creations. Moreover, he argues that, as a consequence of this intrinsically political quality, for an international administration to succeed its politicized identity must be acknowledged and its work must be guided by a political compass.[3] This argument runs as a leitmotif throughout Caplan's work.

This approach is both at once a strength and a little problematic. The advantage of this formulation is the way in which it enables the author to concentrate with a significant degree of specificity and detail on a particular group of transnational administrations. In evaluating these, the author skilfully explains and analyses complex and fluid situations in a concise yet nuanced manner, conveying important subtleties necessary for a proper understanding of the various forces which international administrations confront. The research is invariably thorough, drawing upon a very wide range of sources and providing the reader with a detailed multidimensional picture. This facilitates the author in convincingly elaborating the argument that often the success of international administrations, insofar as it occurs, owes as much, if not more, to context, than to operational practice. However, insights are also often provided into situations where careful strategic administrative interventions have proved successful in their own right.

On the other hand, on closer analysis it seems that the rather bright-line distinction that the author draws between various forms of transnational administration may not be as clear as it at first appears. In theoretical terms several rationales are offered as the basis for the view that those international administrations with which the author is concerned must be analysed as distinct creations. To take the example of military occupation, the author contends that the two forms of administration should be differentiated in that military occupation occurs without the authorization of the United Nations, whereas international administrations are accountable to an international organization.

However, the legal framework of military occupation is in fact applicable to those states engaged in administrative intervention in a foreign state even where the Security Council authorizes that intervention, unless the Council supervenes the relevant international legal instruments in its authorizing resolution.[4] Conversely, interventions not authorised by the Council can also be brought within its supervisory purview in the normal manner.[5] The point being

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1 See generally M. Berdal and R. Caplan, "The Politics of International Administration", (2004) 1 Global Governance 10.

2 Other notable recent works on this topic include R. Wilde, The Administration of Territory by International Organizations, Oxford, OUP, 2005; S. Chesterman, You, The People, The United Nations, Transnational Administration and State-Building, Oxford, OUP 2004.

3 R. Caplan, International Governance of War-Torn Territories, Oxford, OUP, 2005 p. 12.

4 Most notably Geneva Convention IV and the Hague Regulations (IV) 1907.

5 Security Council Resolution 1511, 15 October 2003, concerning Iraq post-invasion is arguably a good example of this. The official position of the British government is that the invasion was implicitly authorized by the Council. See Annex A Attorney General's www.ico.gov.uk/tools_and_resources/document_library/freedom_of_information.aspx > accessed 4 January 2007.

made here is not that there are not differences between these various administrations, but instead that often these are questions of extent, rather than principled differentiation.

At times this differentiated approach tends to obscure the commonality between the wide range of transnational administrations, and perhaps sometimes eclipses valuable lessons or analogies which could be drawn from a broader range of operational experience- good and bad. An alternative approach would be to view various types of international administration as a spectrum-exhibiting different degrees of international involvement, international accountability, domestic legitimacy and so forth along that spectrum. In this way the commonality of challenges faced by transnational administrations, and perhaps the comparative effectiveness of their responses becomes clearer.

Nevertheless, Caplan's work represents a very impressive contribution to scholarship on internationally sanctioned administration of territories emerging from conflict, skilfully combining carefully nuanced, and at times intricate, descriptiveness with structured and thought-provoking analysis. Perhaps the great strength of this work lies in the quality and depth of the research it provides on the important and complex international administrations on which it focuses, and the potential to use this research in drawing, where appropriate, insights applicable to other international administrations.

Alcidia Moucheboeuf, Minority Rights Jurisprudence, Council of Europe Publishing, Strasbourg 2006, 750 Seiten, € 80

Hans-Joachim Heintze*

Bei dem Buch handelt es sich um eine umfassende Darstellung der Entscheidungen globaler und regionaler Gerichtshöfe und Vertragsorgane zu Minderheitenfragen. Das Studium des ausgezeichnet und höchst übersichtlich gegliederten Buches zeigt, dass entgegen der allgemeinen Auffassung bereits eine sehr ausgefeilte und umfangreiche Spruchpraxis vor allem des EGMR, des Inter-Amerikanischen Menschenrechtsgerichtshofes und des UN-Menschenrechtsausschusses zu den Rechten von Minderheiten vorliegt. Untersucht werden vor allem das Vereinigungsrecht, das Diskriminierungsverbot, die Verfahrensgarantien, die Rechte auf Bildung, Mitwirkung, Meinungsfreiheit und der Schutz der Identität. Es zeigt sich, dass unabhängig von einer mit effektiven Durchsetzungsverfahren ausgestatteten Minderheitenkonvention die bestehenden Instrumente einen umfangreichen Minderheitenschutz bieten. Interessant ist, dass sich dieser Schutz nicht nur auf den Bereich der klassischen politischen Rechte bezieht, sondern auch sozioökonomische Aspekte einschließt (S. 553–588).

Zwischen dem völkerrechtlichen Minderheitenschutz und dem Recht der Völker auf Selbstbestimmung gibt es zahlreiche Berührungspunkte. Gleichwohl wirft dieser Fragenkomplex komplizierte rechtsdogmatische Fragen auf. Um so erfreulicher ist es deshalb, dass in dem Kapitel „Group Identiy“ (S. 375–398) auch auf das Selbstbestimmungsrecht eingegangen wird. Hier wird auf die wenig bekannte Entscheidungen der Afrikanischen Menschenrechtskommission im Fall Katagese Peoples Congress v. Zaire eingegangen, in der gefordert wird, dass Katanga sein Selbstbestimmungsrecht in Übereinstimmung mit der territorialen Integrität Zaires ausüben müsse (S. 382). Bekannter sind demgegenüber die Urteile des EGMR, insbesondere im vieldiskutierten *Loizidou*-Fall. Aber wenig Aufmerksamkeit hat bislang der Umstand erfahren, dass Richter *Wildhaber* in seinem Sondervotum ausdrücklich die türkische Argumentation zurückgewiesen hat, die Schaffung der Türkischen Republik Nordzypern (TRNC) sei Ausdruck des Selbstbestimmungsrechts gewesen, das zur Sezession berechtigt habe. Vielmehr weist er darauf hin, dass das Selbstbestimmungsrecht mit den Menschenrechten und der Demokratie verbunden sei und beide Verpflichtungen bei der Schaffung der TRNC nicht eingehalten wurden, so dass die internationale Nichtanerkennungspolitik gegenüber Nordzypern völlig berechtigt sei. Die Autorin hat noch weitere Entscheidungen ermittelt, die sich zum Verhältnis von Minderheitenschutz und Selbstbestimmungsrecht äußern. Dabei handelt es sich um die IGH-Gutachten zu Osttimor und zum Bau der israelischen Mauer in den palästinensischen Autonomiegebieten sowie zu Westsahara. Auch hier zeigt sich die Überlappung der Schutzbereiche von Rechten der Völker und Minderheitenrechten. Auch der UN-Menschenrechtsausschuss musste sich wiederholt mit den Rechten von Minderheiten und ihrer Beziehung zum Selbstbestimmungsrecht befassen. Leider nennt die Autorin hier nur Entscheidungen zu Fällen aus Italien, Frankreich und Kanada (S. 395 f.). Hier vermisst man den Fall *Apirana Mahuika* v. Neuseeland aus dem Jahr 2000, in dem in besonders überzeugender Weise das Verhältnis von Minderheitenschutz und dem Selbstbestimmungsrecht angesprochen wurde.

Dieser kleine Mangel ändert aber nichts an der Qualität des Buches, das einen ausgezeichneten Überblick über die Entscheidungspraxis gibt und hervorragend als Nachschlagewerk geeignet ist. Diese Eigenschaft wird durch eine einleitende Fallauflistung noch bekräftigt. Allerdings hätte man sich eine kurze Einleitung und ein Stichwortverzeichnis gewünscht. Da das Buch im Lichte einer umfangreichen neueren Praxis unbedingt fortgeschrieben werden sollte, könnte beides bei einer Neuauflage noch eingefügt werden.

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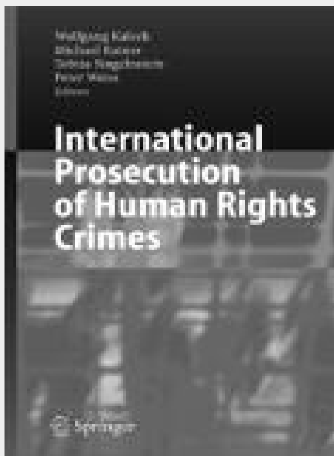

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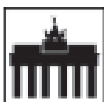

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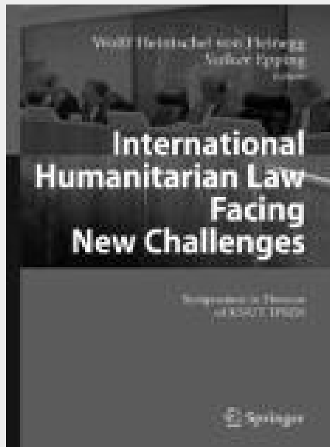

International Humanitarian Law Facing New Challenges

Symposium in Honour of Knut Ipsen

W. Heintschel von Heinegg, Europa-Universität Viadrina, Frankfurt/Oder, Germany; **V. Epping**, University of Hannover, Germany (Eds.)

Recent armed conflicts, whether international or non-international in character, are in many respects characterized by a variety of asymmetries. These asymmetries may be overstressed, sometime even abused, and ultimately virtually meaningless. Still, either as such or in conjunction with other developments, they seem to challenge the law of armed conflicts or: international humanitarian law. These challenges may very well compromise the very function of that body of law, which is to mitigate as far as possible the calamities of war. Thus, the law of armed conflict may be deprived of its fundamental function as an order of necessity because its legally binding directives will increasingly be disregarded for the sake of allegedly superior values.

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