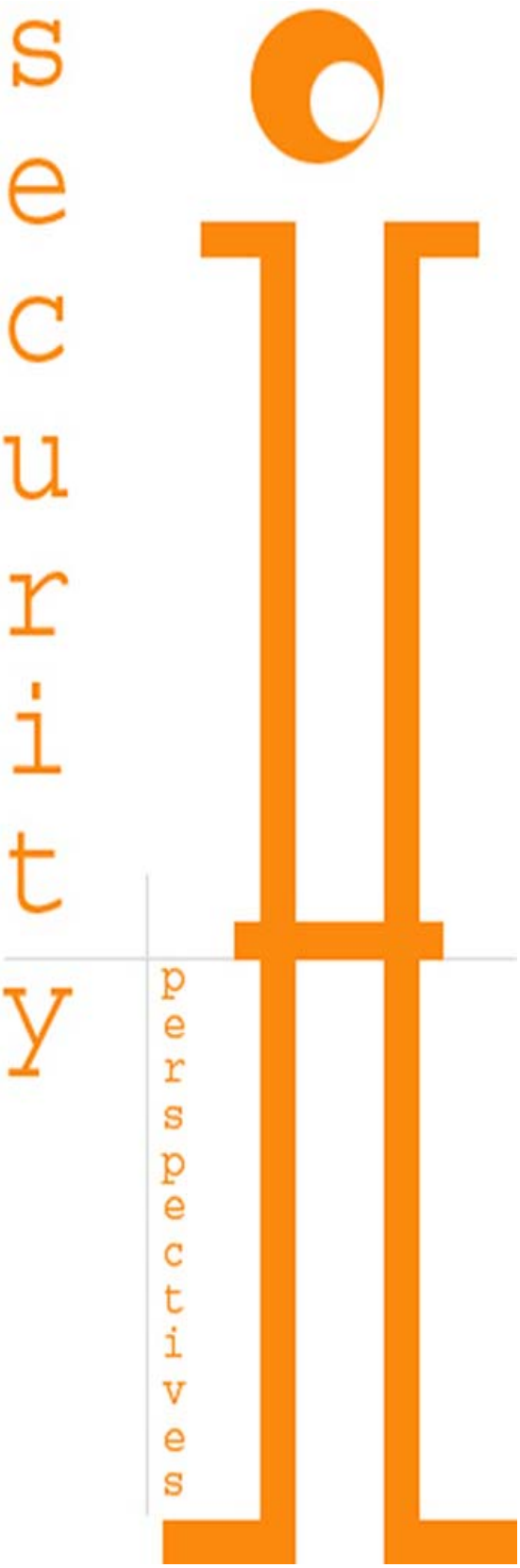
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CONTENTS

Letter from the Editorial Committee

The second issue of the *Human Security Perspectives* is dedicated – due to the timelessness of the topic and this years ETC Summer Academy 'Human Security and Human Rights: A Special Focus on Post-Conflict Situations' – to 'Human Security and Human Rights in Conflict and Post-conflict Situations'.

The authors of this issue approach the issue of 'Human Security and Human Rights in Conflict and Post-conflict Situations' from a practical as well as theoretical point of view:
Yuka Hasegava tells of her practical experience as programme officer for the UNHCR sub-office in Kabul, Afghanistan. **Markus Uitz** investigates the problem of the extra-territorial application of trafficking in arms regulation by concentrating on the traffic regulations for arms in the United States (US). **Christian Wlaschütz** focuses on the conflict in Columbia based on Herfried Münkler's concept of 'new wars'. The topic how political insecurity leads to wars and conflicts is analyzed by **Edith Marko-Stöckl** – by focusing on the case of the Krajina Serbs. **Maddalena Vivona** concentrates on the debate on the absolute character of the prohibition of torture. Finally, **Reiner Steinweg** presents the idea of the establishment of an early-action capacity of the UN - United Nations Commission on Peace and Crisis Prevention (UNCOPAC).
And **Murat Cemrek** analyzes another form of conflict, the headscarf conflict in Turkey.

Sincerely,
The members of the Editorial Committee

The UN Peace Operation and Protection of Human Security: The Case of Afghanistan

Yuka Hasegawa

The current UN peace operations encompass peacekeeping, humanitarian, human rights, development and political functions. Underpinning the linkages among those different functions is the concept of human security. This essay illustrates the dilemmas in the protection of human security and the need to develop the human security context further through a case study of the UN peace operation in Afghanistan.

I. Introduction

In the following essay, I will illustrate the issues facing human security in practice and, in further develop a strategic application, using as an example the micro level human security needs found by the UN peace operation in Afghanistan during 2002.[1] The UN-intervention in Afghanistan signifies the new direction towards more robust peace operations as envisaged in the so-called Brahimi report[2]. As peacekeeping operations have developed to peace operations with the emphasis on the linkages of different functions[3], complex challenges have emerged: The UN intervention must now address both macro and micro

[1] The author has worked as a programme officer for the sub-office Kabul, UNHCR between January 2002 and May 2003. The author's field work and observations are reflected in the case study. However, the views expressed here are of the author's personal observations not those UNHCR and any other institution or organisation.

[2] Panel on UN Peace Operations (A/55/305-S/2000/809), *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, 21 August 2000 <www.un.org/peace/reports/peace_operations> All websites occurring in this essay were last checked on 1 November 2004.

[3] The Conflict, Security and Development Group, *A Review of Peace Operations: A Case for Change*, Kings College, London, 2003, at pp. 40-41.

level[4] issues; the military-civilian relationship must be considered; and the tensions exist within the civilian mandate concerning humanitarian, political, human rights and development components. In short, the main issue arising from those linkages is that the conflict resolution space is increasingly bearing political and militarized characters, implying the shift in emphasis on impartiality and neutrality.

Furthermore, the focus on the current multi-level and multi-sector peace operations requires a concept which can bind them together. In this sense, human security, which includes human rights, humanitarian, development and socio-political elements, is often referred to. What is needed is to place human security within the conflict resolution framework, as the ultimate goal of UN peace operations is the resolution and transformation of conflicts.

II. Human security in conflict resolution

The Human Security Commission Report puts human security as a core strategy for the UN system of conflict intervention.[5] Human Security in this report, is defined as "*to protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment*"[6]. While the details of human security remain to be developed beyond the 1994 UNDP definition, the Commission Report presents the notion that human security strategy should include protection and empowerment and that human security includes not only human rights and humanitarian laws but also wider socio-political issues not restricting itself to a purely legalistic approach nor specific labels such as human rights and development. However, the Commission Report does not propose a clear application of the human security strategy to the UN peace operations in dealing with violent conflict. In developing a practical application of human security, especially in the context of the UN peace operations, it is useful to examine human security in conflict resolution.

In the field of conflict resolution, human security is still an understudied area. A point of departure in linking human security and conflict resolution can be sought through Burton's human needs theory.[7] The conceptual parity between human security and human needs is apparent: one may argue that human security is a concept which roots itself in human needs. By examining debates around human needs theory, I would propose that human security can be enriched.

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[4] Macro level here points to national and regional levels and micro level to provincial and individual levels.
[5] Commission on Human Security, *Human Security Now: Protecting and Empowering People*, Commission on Human Security, New York, 2003.
[6] Commission on Human Security, *Human Security Now: Protecting and Empowering People*, at p. 4.
[7] J. Burton, *Conflict: Resolution and Prevention*, St. Martine's Press, New York, 1990.

Although there is not enough space to go into the details of this approach within the scope of this essay two relevant points can be summarized. The first point is the question of setting a hierarchy of needs. It is recognized that the hierarchy of needs could be established on the context specific basis, as the universal definition of such a hierarchy could be counterproductive[8]. The second relevant point is the identification of satisfiers of human needs. By identifying satisfiers which can be of different degrees, it is argued that human needs can become measurable.[9] Thus, the concept can be made operational.

Applying the above mentioned human security in armed violent conflict, conflict resolution must focus on fulfilling human security. Therefore, one could hypothesize that the human security hierarchy may be established and 'satisfiers' to minimize human insecurity should be identified in the context of UN peace operations. The setting of hierarchy could then be linked to timeframes, prioritizations and the role of different actors (i.e. the third party and indigenous). By applying those parameters, human security may then become a strategic and analytical framework.

III. The case of Afghanistan – human security at the micro level

Let us now turn to a very brief sketch of the situation in Afghanistan in 2002 in order to apply the conceptual tools identified above[10]. The period focused on here relates to the immediate needs in the transitional period between conflict and post-conflict phases.

At the macro level[11], following the Bonn Agreement, the UN peace operation under United Nations Assistance Mission in Afghanistan (UNAMA) has been engaged in institution-building together with the interim government of Afghanistan, taking a light footprint approach.[12] A two-pillar structure of

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[8] C. Mitchell, *Necessitous Man and Conflict Resolution: More Basic Questions About Basic Human Needs Theory*, and J. Galtung, International Development in Human Perspective, in J. Burton (ed.), *Conflict: Human Needs Theory*, Palgrave Macmillan, London, 1990.

[9] C. Mitchell, *Necessitous Man and Conflict Resolution: More Basic Questions About Basic Human Needs Theory*, and J. Galtung, *International Development in Human Perspective*, in J. Burton (ed), *Conflict: Human Needs Theory*, at pp. 166-171.

[10] The overall situation in Afghanistan after the US bombing in October 2001 and subsequent international intervention in 2002 until now has been extensively reported and documented; thus, those details are not discussed here.

[11] For a study of the macro level human security in Afghanistan see: R. Barnett, *Afghanistan and Threats to Human Security*¸ 2001 <www.ssrc.org/sept11/essays/rubin.htm>.

[12] For the latest study of the peace operation in Afghanistan see: The Conflict, Security and Development Group, *A Review of Peace Operations: A Case for Change*, Kings College London, 2003, at pp. 325-368.

UNAMA was established as an umbrella mechanism for the various UN agencies: Pillar one covered political and human rights issues and pillar two humanitarian issues. The related activities to the protection of human security at this level included those of the different donor governments[13], the Afghan Human Rights Commission[14] and the agencies such as ICRC and UNHCR which have also been mandated for specific elements of protection. In parallel, the United States coalition troops were engaged in combat operations and the International Security Assistance Force (ISAF) operated only within and around Kabul city to maintain a level of stability.

At the micro level, the general population faced a lack of infrastructure as a result of destruction and decay during the 23 years of the conflict. The population faced insecurity and uncertainty in having no shelter, water, and income (thus no food). Much of the agricultural land were mined and/or neglected. Although, there were some schools and medical facilities, they were far from being adequate. In the remote areas, the coalition force was operating including sporadic air raids.

In such a insecure, prevailing environment, one important area of human security identified at the micro level[15] concerns physical security.[16] Securing and protecting one's physical safety is difficult and complex. Although various proved to be degrees of administrative mechanisms were left and/or put into place, the effectiveness of those have not been comprehensive and in some areas close to non-existent. Prevalence of criminal activities meant that there was a reliance on the available weapons for self-defense purposes. An informal mechanism of protection by the 'commanders' was often the only source of physical protection as opposed to formal forms of protection such as the police force. There were a lack of a modern judicial system: the traditional means of conflict resolution at the village level was based on *sharia* law and the local *shura* (council). The existence of mines also threatened physical security. Similarly, there was no formal social welfare system functioning apart from the ones provided by the NGOs and other organizations and through cultural and social norms of charity. This environment leaves most of the population extremely vulnerable.

How then should the satisfiers of physical security be sought? One should keep in mind that some satisfiers would be feasible in the short-term but

[13] For example, Japan was associated with demobilisation and Germany with police training.
[14] N. Niland, *Justice Postponed*, in A. Donini, N. Niland and K. Wermester (eds), *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan*, Kumarian Press Inc., USA, 2004, at p. 75.
[15] The case study is based on the situation in the Central region of Afghanistan and mainly concerns the rural areas.
[16] M. Robinson, *Bring Security to Afghanistan; Expand the International Force*, International Herald Tribune, 12 March 2002 <http://www.globalpolicy.org/security/issues/afghan/2002/0312robinson.htm>.

others can only be found in the long-term. In the case of Afghanistan, material assistance was almost readily available as aid was pouring in. The international assistance in the form of humanitarian assistance focused on water, shelter, income-generation, health and education. At the same time, while implementing the immediate relief, issues related to more fundamental human insecurity were encountered. For example, while responding to water needs, one might find the traditional resource issue between two villages as the underlining cause of insecurity. In the stage of transition where disarmament has not been carried out, the notion of self-defense is linked to readily available arms and where local administration and law enforcement is lacking, such conflicts could easily escalate into armed clashes. The material assistance could not be provided to volatile areas as the organizations could not access those areas. In other words, physical insecurity prohibited material assistance as well as possible protection of the population.

Faced with physical insecurity, how and what should be the role of the UN peace operation to address those protection issues and contribute to finding satisfiers to the insecurities? In providing material assistance, its role is perhaps a relatively simple and necessary one. At the macro level, where state-building is at stake, its role can be clearly defined within a mandate. However, in dealing with micro level insecurity, it becomes apparent that there were different understandings among practitioners. Physical insecurities at the individual level have elements of both criminal and socio-cultural issues such as discrimination. Culture and group identity are also linked to the issue of physical security. Some practitioners working at this level considered that protecting physical security required those outsiders to play a role, whereas others felt that the outsiders did not have sufficient knowledge and understanding to be involved at this level and the issues should be left to local actors to deal with.[17] Above all, the actions which could be taken to protect and satisfy physical security were extremely limited. Moreover, the notion that the international presence can somewhat curtail insecurity appears to be unfounded.[18] If such presence alone is not enough to prevent the exacerbation of human insecurity, what would then be the necessary role and function of the UN?

IV. Findings

Peace operations at the macro level are engaged in institution-building, whereas at the micro level, immediate needs for human security must be addressed through both material assistance and protection. A vacuum of governance and the time lag between the macro and micro level activities makes the role of the UN significant yet difficult especially during the transitional phase at

[17] Those confusions were beyond the question of mandate.
[18] This is shown in the number of attacks against the UN and NGO workers as well as continuing insecurity and incidents at the local level despite the international presence.

the micro level. The application of the human security concept in practice as illustrated above may be used to identify the areas in need of further development.

First, a strategic setting of the human security hierarchy would help to operationalise protection of human security. It leads to the understanding of inter-linkages among the different elements of human security. During the transitional phase, physical security can be a starting point. For example, without physical security, no provision of material assistance would be possible. In turn, causes of physical insecurity can be linked to issues such as unemployment, disarmament and the culture of violence which must be addressed continuously in the mid to long-term. At the micro level, what is feasible (such as provisions of material assistance) tends to dominate the satisfiers for human security rather than what is necessary. This trend should be reversed towards a more needs-based approach. The way to map out human security must be devised carefully so as to put emphasis on the real concerns of people and avoid prescriptive approaches and over politicization. Once framed in a hierarchy, human security at the micro level could be delivered in a much more comprehensive and effective way.

Secondly, in making human security operational, the linkages between the macro and the micro level must be taken into account. Time lag between institution building at the macro level and the real-time needs at the micro level significantly affect short-term human security. Here the inherent problem is in the tension between immediate needs and long-term solutions. Human insecurity at the micro level affects stability as a whole. At the same time, certain measures such as institution-building and the establishment of legal frameworks at the macro level must be put in place to ensure overall human security. The timing for addressing the past human rights abuses at the macro level must be well calculated so that it does not diminish the level of stability and does not undermine immediate micro level needs for physical security. Within a strategic hierarchy, those two levels must be connected.

Most importantly, the example of Afghanistan illustrates confusion and dilemmas related to the role of the UN in the protection of human security. As we focus on the human security, the UN peace operation is also inevitably involved at the micro level. Faced with immediate human insecurity, however, we encounter difficulties in defining a common understanding of the limitations of outside interveners and the complementarity and the linkages between protection and empowerment.

V. Conclusions

I have argued here that the human security can be made operational using the conceptual tools of human needs. By applying a strategic framework of human security to peace operations, the effectivity of third party interventions

can be enhanced.[19] In order to be effective, human security hierarchy must be placed within a conflict resolution framework.

Human security within a conflict resolution framework also leads to the debate on the characteristics of the UN conflict intervention especially impartiality and neutrality issues. In the case of Afghanistan, a complex dimension was added as a result of the presence of active military forces. Could the UN compromise its impartiality and neutrality by association with the use of force and could it be effective in the protection of human security without maintaining its impartiality and neutrality? All of the above pose challenges for further studies on human security.

[19] I have focused in this essay on the protection of human security by the UN; this study must also be complimented by the studies of the empowerment for human security and the roles of the local actors.

Breaking the Law for Security? The Extra-territorial Application of Trafficking in Arms Regulations

Markus Uitz

This essay focuses on the extra-territorial application of trafficking in arms regulation by concentrating on the traffic regulations for arms in the United States (US). The author discusses the non-conformity of International Traffic in Arms Regulations (ITAR)[1] and the Export Administrative Regulations (EAR)[2] with international law and then deals with their setting in the general context of modifications in international relations.

I. Introduction

Extra-territorial application of national laws is largely perceived as a neo-colonial attempt to spread specific value systems to other countries through the means of law. Obviously, the usual suspect for this behavior pattern are the United States of America. Their unilateral boycott of Cuba, for instance, has been a milestone example in international commercial relations.[3] The extra-territorial application of antitrust laws is a second illustration for a field where extended jurisdictional claims prevalently occur.[4] Whereas in the first case a

[1] The ITAR can be found in the: Code of Federal Regulations (C.F.R), Title 22, Subchapter M, Parts 120 through 130 (22 C.F.R. 120-130).
[2] The EAR can be found in the: Code of Federal Regulations, Title 15, Subchapter C, Parts 730 through 774 (15 C.F.R. 730-774).
[3] The current provisions can be found in the according sections of 22 U.S.C (U.S. Code).
[4] The application of antitrust legislation to foreign facts has in fact the longest history in United States (US) extraterritorial legislation. Since 1945 US courts have constructed various theories to make federal antitrust law applicable in these cases. Other fields, such as security, pre-trial discovery and export legislation, followed later but are often based on similar theories.

nation was excluded from international traffic, antitrust laws are targeting private undertakings. The first case gives rise to a large amount of criticism, gaining more control over multinational enterprises seems to be a fundamental issue for a large number of people.

In the field of weapon exports, these areas regularly collide as security issues always involve fundamental public and economic interests. States take action against companies involved in arms trafficking and most of us agree *prima facie* that this in fact constitutes a significant duty for public action. But what if the measures taken collide with general principles of international law? Are such proceedings always condemnable? In other words, the question pursued will be whether infractions of international law can bear positive effects that could render them licit if not desirable.

The legal background that will be discussed in this text are the traffic regulations for arms in the United States (US) as they are far reaching and commonly criticized. The two main regulatory provisions in this area are the ITAR and the EAR. It needs to be stressed that the focus will not be put on the problem of extraterritorial application of laws in general and how courts and arbitrary tribunals should deal with them, but rather on how changes in the international environment should be treated when considering general principles of international law. To meet this task, the non-conformity of ITAR and EAR with international law will be shown in the first part. The second part will deal with their setting in the general context of modifications in international relations in order to answer the initial question.

II. The extraterritorial application of US law is not compliant to international law…

A. The International Trafficking in Arms Regulations and Export Administration Regulations…

To support national security policy, the export of items with possible military application is controlled under US law as it is under most national laws. Depending on their nature as well as on the nature of the underlying business transaction, different US authorities may be competent. Together with the US Department of the Treasury, the Department of Energy and the Nuclear Regulatory Commission, export regulations are enforced by the US State Department and the US Department of Commerce.

The State Department is responsible for the control of permanent and temporary export and temporary import of defense articles and defense services. The Arms Export Control Act (AECA) founds the legal basis for this task. The ITAR, transferring power from the president to the Department of State, carries out the implementation of this Act. Defense articles are products, which are

designed or modified for military use[5] and which are enumerated in the United States Munitions List.[6] In addition to the articles themselves, ITAR also controls related technical data as well as assistance in their use. Such assistance is called a defense service. [7]

Similar to AECA and ITAR, EAA[8] founds a legal basis for the president's rights in the control of exports but which the EAR has transferred to the Department of Commerce. Most commercial items are regulated by EAR even if so called 'dual-use'-goods (goods of both commercial and military or proliferation applications) are its main regulatory target. Such items include commodities, software or technology, such as clothing, building materials, circuit boards, automotive parts, blue prints, design plans, retail software packages and technical information. A detailed enumeration can be found in the Commerce Control List where 10 overall categories are subdivided in the same five product groups each.[9]

B. …are not compliant with general principles of international law and the UN Charter

A particular problem of these two regulatory statutes arises from their definition of "*re-export*". While the Department of the Treasury defines this term according to general trade customs as "*the export of imported goods without appreciable added value*"[10], the EAR defines "*re-export*" as "*an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country; or release of technology or software subject to the EAR to a foreign national outside the United States*"[11].

According to this definition, actors other than US citizens and transactions outside the US territory can be subjected to US law. But probably the most important as well as most intriguing consequence is that even actions carried out by non-US citizens outside the US and considered as lawful under foreign jurisdictions, could and actually are sanctioned by US courts. It is needless to say that this subject matter initiates and substantiates claims of juridical imperialism by many suffering financially from being obliged to follow rules that are not obviously applicable and difficult to understand.

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[5] See 22 C.F.R. 120.3 for the designation policy of defence articles.
[6] The United States Munitions List is established by 22 C.F.R. 121.1.
[7] 22 C.F.R. 120.9.
[8] 50 U.S.C. 2401-2420.
[9] 15 C.F.R. 774.
[10] As explained in the International Trade Terms on the International Trade Data System furnished by the Treasury Department.
See: <http://www.itds.treas.gov/glossaryfrm.html> All websites occurring in this essay were last checked on 1 November 2004.
[11] 15 C.F.R. 734.2 (b) (4).

But not only private undertakings smart under an extraterritorial application of US export legislation. Generally speaking, all countries disapprove such conduct as extraterritorial application is considered to be a violation of their national sovereignty. Member states of the European Union (EU) and EU institutions often express their disagreement publicly as the following example proves: "*The opposition of the European Community and its member states to any extraterritorial application of national legislation is beyond question. That is why we have always rejected the United States action aimed at involving third states in the application of commercial measures that fall exclusively within the foreign or security policy of the United States. […] We believe that such measures violate the general principles of international law and the sovereignty of independent states*"[12].

Of course, the difficulties underlying these issues are due to their economic and political relevance. Most of the time, the state parties to such a conflict act as political allies but as economic rivals. The relationship between the EU and the US exemplifies this argument. Obviously, both parties make use of such methods and, as a matter of fact, the EU uses extraterritorial application of its laws as well[13].

III. …but it reflects current changes in the organization of international society

A. In the conflict between civil society and civil warfare…

Extra-territorial use of national laws has prerequisites that can be associated with the process of globalization. Intensifications of transnational interactions lead to increasing awareness of cause-and-effect chains lying beyond the sphere of influence of a nation state. As a consequence, nation states transfer some of their duties to private organizations in order to assure complete maintenance. One of these challenged areas of state sovereignty is considered as the core of the nation state - its monopoly on the legitimate use of violence.

Private companies taking an active part in worldwide conflicts have become common. Charged by governments or other enterprises, it often remains unclear whether theses enterprises perform security services or should be treated as mercenaries.[14] Worldwide trafficking in arms and technology in its broader

[12] Extract from a speech at the General Assembly of the UN from a Belgian representing the EU in 1993: UN Doc A/48/PV. 48 (23 November 1993), at p. 10.
[13] Compare for example the cases M.1069, *MCI/ World Com*, 8.7.1998 or M.1845, *AOL/ Time Warner*, 11.10. 2000.
[14] For the distinction between private security companies, private military companies and mercenaries see: Beyani Chaloka and Lilly Damian. *Regulating Private Military Companies. Options for the UK Government*, 2001 <http://www.international-alert.org/pdf/pubsec/reg_pmc.pdf>.

sense, including all dual-use related know-how, is essential to these undertakings. Usually founded by senior ex-officers of worlds leading armies, their expertise is the source for the export of classified technology. Proliferation of weaponry and potential security threatening knowledge to the most instable areas of our planet are the consequence.

Another defiance for the nation state is the appearance of a civil society operating worldwide. Through new communication technology, information about the world can be transferred to its most remote parts with short delays. As recent events have shown, the world's economic system and its growing predominance are among the main points of resistance for a large number of people. Unfortunately, matters often get mingled. State initiatives in conflict areas are associated with economic interest and the veritable economic actors are left out of the range of vision.

More and more, the cultural hegemony of the US is questioned and their official discourse challenged. Often, US officials are perceived as liars whenever culture and values are integrated into debate. Although this is true for arms traffic export controls, these reproaches often bare foundations. Export controls, for instance, have considerable consequences for US industry and enforcement of these provisions is strongly criticized in the industry: The double tracked way of regulations, as seen in Part I, makes it difficult to asset implications correctly. Excessive control of intellectual property issues makes it difficult for foreign companies to deal with US companies and thus puts US export orientated industry branches at a disadvantage. China provides perhaps the best and certainly the most timely example for the difficulty of coordinating multilateral technology controls in the new global environment. After the Cold War, the US and many of its Western allies have adopted different strategies to integrate China in global trade. Some no longer view China as a threat and have consequently liberated or abolished their dual-use export restrictions for commerce with China, rendering many US export controls unilateral.[15]

B. …principles in international law must reflect current changes

Globalization leads to an increase of trans-border trade. Together with an augmentation in personal and capital mobility as well as technology development, new business branches have been created. Solutions to satisfy the extended demand for security are requested and companies bridge this gap in the market by providing soldiers, weapons and technology. Pressure on governments to guarantee the life of soldiers in action and the growing awareness of terrorism

[15] For the European position towards China and Asia see: Prodi Romano, *The First Commission of the New Europe*, Speech at the European Parliament, SPEECH/04/225, 5 May 2004
<http://europa.eu.int/rapid/searchAction.do>.

in the public eye leads states to use mercenary firms as well. At the same time, the end of the Cold War period offers further possibilities through new partners. Aspects concerning non-proliferation of technology that played an important role during the Cold War now are placed behind economic postulates.

Consequently, a multilateral approach that worked under the Cold War threat is often not possible. In the field of non-proliferation, softer treaties like the Wassenaar Agreement[16] have replaced the Coordinating Committee on Multilateral Export Controls (COCOM) regime.[17] With too few and too soft regulations in international law, unilateral extensions of national laws are perceived as a possible solution. The effects of the globalization process facilitate arguing in favor of such extensions as can be shown in US law. One of its fundamental rules is the effects principle, first developed for antitrust purposes.[18] According to this doctrine, US law is applicable to foreign acts if they have a substantial effect on the US market. Converted to suit other fields of law, this theory allows a subsumption of virtually every case under US law, for most authors on globalization would agree that every action has effects everywhere.

At the same time, the interaction between security issues and economic issues is growing more profound as we have already stated. This is together with the reasons given due to the changing nature of military products. Whereas in the past, they where especially fabricated for military purposes, nowadays of-the-shelf products are favored by army procurement.[19] Therefore, the gap dividing military and non-military goods becomes smaller and effective export control more difficult.

The extra-territorial application of very strict unilateral export controls as a possible solution faces one major problem. How can we allow one country to export its legal rules if we simply do not know if they are any good? As soon as we consider unilateral measures, we must omit the possibility of one-sided appreciation of facts. This point constitutes one of the main critics against US foreign policy. Nevertheless, several areas exist where an international consensus can be found but which lack legal enforcement. Regrettably, these areas mostly concern human security and human rights where the necessity of many regulations is commonly agreed on but which require implementation.

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[16] Waasenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, 19 December 1995
<http://www.wassenaar.org>.

[17] The Coordinating Committee on Multilateral Export Controls (COCOM) is a NATO committee founded to prevent the export of Western goods and technologies to the Eastern Block countries.

[18] Compare US vs. Aluminium Co. of America, 148 F. 2nd establishing the effects doctrine in 1945.

[19] As specially designed goods take a long time to be developed and produced, goods designed for civil application are chosen and adapted for military use.

IV. Conclusion

Despite the fact that US export legislation is in a crisis and internal revision seems inevitable to boost US economy, the question whether infractions of international law by the extra-territorial application of these regulations can be justified must still be posed.[20] If we support the nation state's struggle for more control over economic issues, we have to admit that resounding instruments will be needed. If we want human rights and human security being enforced by the nation state, we have to allow the state to take effective measures in this regard. Extra-territorial application of arms traffic regulations becomes thus necessary wherever some states do not demand export controls to ensure a global enforcement of arms bans. Naturally, unilateral measures always contribute to strengthen the right of the strongest, but we must not forget that international consensus prevails in the majority of areas concerning military implications of human security as we can see, for instance, in the adoption of the UN Convention against the Recruitment, Use, Financing and Training of Mercenaries[21].

It should not be the primary aim of international law to help violators of principles stated in these conventions by allowing them to betake themselves to state sovereignty. Instead, those values must be unilaterally enforceable, if necessary. In the conflict between law and fundamental, commonly agreed values, we must not allow atrocities to be committed and human security to be challenged by reposing ourselves on the comfortable pillow of established but outdated principles of law that run against established values. As law has to serve human needs, changes must be considered to allow every human being to live in freedom from want and freedom from fear.

[20] See the Special Edition: Center of International Trade and Security of the University of Georgia, *Trade, Technology, and Security in the 21st Century*, in The Monitor, vol. 6, no. 2, 2000, pp. 3-36
<http://www.uga.edu/cits/publications/monitor.htm>.

[21] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 72nd General Assembly plenary meeting, 4 December 1989, A/RES/44/34
<http://www.un.org/documents/ga/res/44/a44r034.htm>.

New Wars and their Consequences for Human Security Case Study: Colombia

Christian Wlaschütz

This essay describes a few characteristics of Herfried Münkler's concept of 'new wars' and applies it to the Colombian conflict. The author focuses on the consequences of such wars for human security by naming the principal groups of victims in Colombia. The main emphasis of the article lies on the momentous interrelation between economic profit and violence, which prolongs the conflict and thus the human suffering.

I. Introduction

At the end of the 20th and the beginning of the 21st century, armed conflicts show(ed) characteristics which clearly distinguish them from classical wars between states. Herfried Münkler, a German political scientist, outlined some typical elements in his book 'Die neuen Kriege' ('The New Wars')[1].

First, I would like to provide some general information about this new generation of wars by summarizing Münkler's most important thoughts. Then I intend to introduce the armed conflict in Colombia as an example for his concept. In this context it is of paramount importance to emphasize the humanitarian and social consequences of such wars. Finally, I am going to analyze the Colombian peace process and draw a few conclusions for the settlement of 'new wars' in general.

[1] Münkler, Herfried, *Die neuen Kriege*, Reinbek, Hamburg, 2002.

II. The concept of 'new wars'

The concept of 'new wars' has been developed to understand the differences in wars between states and those within a society. At first sight the latter could be called civil wars, but applying this traditional term some of the main characteristics of 'new wars' remain excluded. In civil wars two or more parties fight for power and government. Although civil wars can last a long time, they usually end, when one of the combatant parties reaches positions of power and governs the state.

'New wars' in contrast are not mainly about political power, but are caused by particular and private interests of warlords, drug or armdealers etc. Since they would lose most of their income sources, those parties have no interest in ending the war. It is quite obvious that this aspect has devastating effects on the humanitarian situation of an affected society.

Münkler differentiates between various particularities of 'new wars'. The most essential for a better understanding are:
Privatisation: Whereas previously wars were so expensive that only states were able to wage them, nowadays armed conflicts without the objective to prevail militarily against a regular hostile army can be maintained with small and relatively cheap weapons. [2]
Asymmetrisation: Wars between states were symmetrical wars, meaning that two political entities, which were considered as equally sovereign, entered war against each other. Parties in asymmetrical wars tend to avoid big battles or decisive confrontations with their enemy. Instead they direct violence against the civil population with the sole aim to create an atmosphere of constant fear and thus a permanent source of income and/or a place of retreat. Consequently, the civil population gets directly involved into the armed conflict and becomes the target of adversary groups. The distinction between combatants and non-combatants is momentously extinguished.
Independence of martial violence: This means that martial violence gets out of the control of regular military forces. The state has lost its monopoly on warfare. Violence is applied by parties, which are not interested in symmetrical patterns of warfare. This has severe consequences for international law as it exists today. Münkler concludes that even the recently founded International Criminal Court (ICC) does not address these factors. [3]
In my opinion Münkler fails to distinguish between the jurisdiction of the ICC and possible problems in its implementation. The ICC was established to prosecute genocide, war crimes and crimes against humanity committed by individuals no matter if they are state-representatives or non-state actors. The Statute of

[2] Münkler exhaustively describes not only the development of expensive and heavy arms, but also the necessity to train military forces for an extended period. Both were not possible for private warlords.
Münkler, Herfried, *Die neuen Kriege*, at p. 105 cont.
[3] Münkler, Herfried, *Die neuen Kriege*, at p. 42.

the Court explicitly states that the notion of war crimes applies not only to international but also to internal wars.[4] Thus in theory the court is an efficient instrument to prosecute all perpetrators of atrocities regardless of their status as members of an official army or a group of mercenaries. However, only the future will show, if the court can enforce its mandate in practice and overcome obvious problems, such as the lack of a police-force, which makes it entirely dependent on state-cooperation. Moreover, the ICC is an instrument of ex-post prosecution, but not necessarily an effective strategy to prevent 'new wars'.

Before concluding this first general part I would like to add one more characteristic, which is very important in order to understand the length of the conflict in Colombia: Münkler points out that these 'new wars' are fuelled with resources for their continuation from the outside. That means that the parties involved are closely related to what Münkler calls "*channels of the shadow-globalization*"[5]. Thus the traffic of drugs, arms and other illegal goods provides them with sufficient means to prolong a low intensity war.

III. A short introduction into the conflict in Colombia

The objective of this chapter is to show the degeneration of an originally political conflict to a 'new war'.

The history of Colombia has been characterised by a process of consolidation of a democratic political system and by periods of violence.[6] For evident reasons I am focusing on this latter aspect now. In the early stage, the violence was caused by sharp divisions between two political parties – the Conservatives and the Liberals. After the assassination of the Liberal leader Jorge Eliécer Gaitán in 1948, Liberals and Conservatives fought each other brutally – the 'era of violence', which lasted from 1948 to 1965, started. Particularly the Conservatives committed repressions throughout the whole society. As a reaction to that Liberals and Communists began to organize self-defence groups, which later were transformed into guerrilla forces. In 1964 around 100 armed groups operated in Colombia. Both parties maintained links of different intensity to them, so that the state monopoly of force virtually ceased to exist.

In this context the foundation process of the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia, FARC) is most illuminating. According to their own myth, its foundation was

[4] Comp. Articles 1 and 8 of the Rome Statute of the International Criminal Court: <http://www.un.org/law/icc/statute/romefra.htm> All websites occurring in this essay were last checked on 1 November 2004.
[5] Münkler, Herfried, *Die neuen Kriege*, at p. 21.
[6] The historical overview is taken from: International Crisis Group, *Colombia's Elusive Quest for Peace,* Latin America Report, no. 1, March 26th 2002 <http://www.icg.org//library/documents/report_archive/A400594_26032002.pdf>.

the reaction to a brutal attack of regular military forces against the district of Marquetalia. This prompted the self-defense groups to transform into guerrilla forces with the ideological backing of the Communist Party and financing of Moscow. At that time the FARC not only intended to topple the regime and push back US-influence, but also aimed at radical socio-economic reforms, especially in the agrarian sector. This explains the strong support of peasants, the FARC initially enjoyed. Nevertheless only in the 1980s the FARC obtained a national profile after distancing itself from the Communist Party.

Another guerrilla group was founded almost simultaneously – the Ejército de Liberación Nacional (National Liberation Army, ELN). It had close ties to Cuba and integrated students and supporters of the liberation theology. In comparison to the FARC it has always remained a rather small group. Even smaller guerrilla groups were the maoist Ejército Popular de Liberación (Popular Liberation Army, EPL) and the urban Movimiento 19 de Abril (19th April-Movement, M-19).[7]

In the same measure as the guerrilla groups financed themselves more and more through extorsions and kidnappings, landowners, drug barons and other potential victims of kidnapping created at the beginning of the 1980s armed defence forces, the precursors of the Autodefensas Unidas de Colombia (United Self-Defence Groups of Colombia, AUC) known as the paramilitaries.[8] These groups were financed and armed by the Colombian military trying to use them as counter-insurgency forces. The territories 'cleaned' from guerrilla-forces were sold to drug bosses and paramilitary leaders. This was the beginning of an internal war aiming at the protection of territories and resources, illegal drug cultivations and paths of arm-trafficking of the respective armed groups. Political objectives became more and more irrelevant to understand the continuation of this war.

IV. The consequences for human security

In this essay I would like to call attention to the specific risks for human security posed by 'new wars', taking as example the Colombian conflict.

Human security is a concept introduced into international relations in order to combine already existing concepts like human rights or human development. It focuses on the safeguarding of comprehensive security of human

[7] M-19 (Movimiento 19 de Abril, 19th April-Movement) traces its origins to the allegedly fraudulent presidential elections of 19 April 1970, in which the populist party of the former military dictator Rojas Pinilla, the National Popular Alliance (Alianza Nacional Popular-Anapo), was denied an electoral victory.
See: <http://www.onwar.com/aced/chrono/c1900s/yr70/fcolombia1972.htm>.

[8] This umbrella organization of all the 'Self-Defence Groups of Colombia' was founded in 1997.

beings, including dimensions such as personal, economic, social or cultural security. The objective of such a concept must be to protect the physical integrity, the material surviving and the conditions for the development of the potentiality of individual human beings. It is thus complementary to the above mentioned well known concepts and therefore not an alternative.

In the case of a conflict it is evident that human security is endangered in various forms. On the one hand human life is at stake, on the other the whole society suffers from sustainable and long-lasting consequences, such as misery, starvation, militarization of society etc. In regard to Colombia it must be shown first that this conflict can be defined as a 'new war'. In my opinion there are various characteristics, which point in this direction. As I elaborated in the historical overview, guerrilla groups, which in the beginning pursued political objectives have transformed into mere armed defence-forces of economic enterprises. Both guerrilla and paramilitary leaders are involved in the drug and arm business and consider it necessary to defend their areas of influence. The number of members of the respective armed groups range from 3.500 (ELN) to over 20.000 (FARC).[9] Obviously the government is not able to control those private forces; large territories ceased to be administered by public institutions.

Each of the parties tries to maintain authority in their respective territory by establishing a 'management of fear' among the civil population.[10] This indicates a main difference between previous wars between states and those between private parties. The integrants of the armed groups do not gain their subsistence from a central and public authority; they rather take what they need and what they want from the civil population. Thus the war remains quite cheap for their leaders and the combatants depend on it to ensure their living – the fatal interrelation between violence and subsistence comes into existence.[11] One obvious result is the tax system introduced by the armed groups, as soon as they bring a territory under their control.

As a consequence they are not interested in concluding the war by causing considerable loss among their enemies, but only in protecting their zones of drug cultivation and their sources of income. The income is also provided by relations to commercial partners from the outside, i.e. international organized crime. These external resources guarantee the continuation of the conflict by guaranteeing permanent flows of profit for all the parties. This open war economy has considerable consequences for a peace process which should be demonstrated below.

As a conclusion it can be stated that virtually all the criteria for a 'new war' enumerated above are fulfilled. The next step is to shed light on the humanitarian consequences of this conflict pattern.

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[9] International Crisis Group, *Colombia's Elusive Quest for Peace*, at p. 9 cont.
[10] Münkler, Herfried, *Die neuen Kriege*, at p. 29.
[11] Münkler, Herfried, *Die neuen Kriege*, at p. 29.

The most evident result is the permanent insecurity of people living in the zone of influence of one of the combating groups. The constant threat of being displaced, harrassed or assassinated without protection obviously constitutes a situation of strain. The pressure to contribute economically to the subsistence of the combatants substitutes the regular voluntary economic balance of producing, selling and buying by a system of forced material deliveries. A system of intimidation and sanctions stabilizes this kind of 'taxes'.

Whenever the occupying power is forced to retreat by another conflict party, the zone is cleaned of alleged collaborators of the former power. Either blacklisted citizens are executed, or a part of or the whole local population must leave their community within a fixed time-frame. The NGO Consultoria para los Derechos Humanos y el Desplazamiento (Consultancy for Human Rights and Displacement, CODHES) calculates that around 2.900.000 citizens were displaced from 1985 to 2003 with a sharp increase since 2000.[12] This high number of internally displaced persons (IDPs) constitutes a big challenge particularly to the urban centers, where the IDPs ressort to. A study of the World Food Programme revealed that 80% of the IDPs live in conditions of extreme poverty without access to sufficient nutritional food.[13] At the same time the access to other social facilities like hospitals and schools is very limited for IDPs. The unemployment rate is extremely high among IDPs. All those factors contribute to increasing social tensions in the urban centers.

As stated above 'new wars' are cheaper than the traditional inter-state-wars. The military equipment consists of light arms, machine guns and anti-personnel mines. The latter constitute an increasing threat both in rural and in urban zones in the measure as the conflict between the different groups gains intensity. More and more the civil population is affected by the diffusion of landmines, especially in rural areas, where agricultural activities are hampered.

One very important aspect while speaking about human security is the existence of illicit crop cultivations. They are often contested between the different armed groups and therefore a source for a negative impact on the population. Among them ranks not only internal displacement, but also the effects of aerial fumigation. There is evidence that the latter destroys not only illicit, but also licit crops and consequently the economic base of a big number of peasants[14]. The result of an investigation analyzing the health effects of the fumigation implemented by the Ecumenic Commission of Human Rights (CEDHU), Servicio Paz y Justicia/Ecuador (SERPAJ) and others is quite alarming: Laboratory tests

[12] International Crisis Group, *Colombia's Humanitarian Crisis*, Latin America Report, no. 4, July 9th 2003, at p. 2 <http://www.crisisweb.org//library/documents/report_archive/A401043_09072003.pdf>.
[13] World Food Programme/Colombia, *Vulnerabilidad a la Inseguridad Alimentaria de la Población Desplazada por la Violencia en Colombia* (Bogotá, June 2003) quoted in: International Crisis Group, *Colombia's Humanitarian Crisis*, at p. 6.
[14] International Crisis Group, *Colombia's Humanitarian Crisis*, at p. 11.

proved that women exposed to fumigations suffer a much higher probability of cancer and/or aborts because of cell-damages.[15]

Münkler mentions one of the most tragic consequences of cheap new wars, which is the recruitment of child soldiers.[16] The motivation for children and young people to join the armed groups is not limited to subsistence. Münkler exhaustively describes the increase of social reputation and the experience of power carrying a machine gun as even more attractive motives to serve as combatant. They are often the most feared participants of 'new wars' because of their lack of inhibitions to exercise violence. Thus a high number of massacres are committed by young soldiers. In Colombia there are different numbers of involved children. They range from 6.000 to 7.000, however it constitutes a widespread problem.[17] Apart from voluntary joining a fighting group, there is a lot of forced recruitment. This is one of the most important motives to leave the home-village.

'New wars' tend to expand in space and to develop into transnational conflicts. Therefore one of the most dangerous developments is the regionalization of the Colombian conflict. During my internship with UNHCR in Northern Ecuador in 2002 I witnessed the increase of refugees coming in from Colombia. The consequences were public discussions about the possible inflow of armed members of the conflict parties mixed with refugees, which led to public resentment towards Colombians and to a very strict handling of asylum-recognitions.

Another consequence was the militarization of the border between Ecuador and Colombia. Thus the Colombian conflict has an immediate impact on the neighbour states. This is increased by the US-sponsored 'Plan Colombia' initiated in 2000. The plan with a budget of US $ 7,5 billion aims at supporting the counter-narcotics policy of the US principally by increasing military help to Colombia. The Bush administration included the neighbour countries and designed the Andean Regional Initiative, which consists of a strong military, but also of social and economic components. After 09/11 the global 'war against terror' directly affected Colombia, because the US-administration put every armed group on the list of terrorist organizations.[18] These circumstances obviously rendered negotiations more difficult and increased the danger of an armament race between the different groups.[19]

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[15] Comisión Ecuménica de Derechos Humanos (CEDHU), Servicio Paz y Justicia (SERPAJ-Ecuador) et alii (ed.), *Frontera: Daños genéticos por las fumigaciones del Plan Colombia*, Quito, Marzo 2004.

[16] Münkler, Herfried, *Die neuen Kriege*, at p. 137 cont.

[17] Worldwide there are around 300.000 child soldiers.
Delacampagne, Christian, *Die Geschichte der Sklaverei*, Artemis&Winkler-Verlag, Düsseldorf, Zürich, 2004, at p. 299.

[18] International Crisis Group, *Colombia's Elusive Quest for Peace,* at p. 12 cont.

[19] The context and the effects of the Plan Colombia and the Andean Regional Initiative are broadly described in: Vargas, Alejo, *El Plan Colombia y la Iniciativa Regional Andina: Equivocada Respuesta al Problema Insurgente y poca Eficacia en la Lucha*

The US-military base in Manta/Ecuador is regularly used for fumigation flights. Together with the strong military presence at the northern part of Ecuador and persistent allegations of Venezuelan support for the FARC this indicates a strong probability that the neighbour countries will be involved more closely in the Colombian conflict. Considering the social instability of both countries a spill-over of an armed conflict could have destabilizing effects for the whole region.

V. What to do about a 'new war'?

Since the consequences of a 'new war' for human security are terrible, the question of how to deal with such a war is of utmost importance. As mentioned above there are various aspects, which do not foster a peaceful and quick solution of such conflicts: the unwillingness of the parties to end the conflict; the material dependance of the combatants on the continuation of the conflict; the profits made by the leaders, the intransparency of the involved parties and the causes for the conflict etc.

Analyzing the role of third parties or mediators, Münkler names two incentives to finally make progress in the peace process: the introduction of a supreme power, which convincingly threatens to exterminate the conflict parties militarily, or the potential availability of huge material resources in case of a peace agreement. In the latter case the conflicting parties should be persuaded to enjoy the so called peace dividend. As alternative to negotiation solutions Münkler mentions the possibility of military interventions, which are motivated by the high costs of the continuation of the conflict (spill-over, refugees, international crime, formation camps for terrorists etc.).[20]

In the case of Colombia previous peace negotiations failed to deliver a lasting agreement. In the 1980s a traumatic development for the FARC has certainly diminished its motivation to get involved in further peace processes. After the political branch of the FARC, the Unión Patriótica, had achieved a good result in the elections of 1986, its members were virtually exterminated by the paramilitary forces. The same happened to the political wing of M-19 after the elections of 1990.[21]

The last peace process up to now was initiated by President Andrés Pastrana in 1998, when he even ceded a demilitarised zone as big as Switzerland to the FARC in order to establish a safe negotiation area for them. Pastrana made the process a personal concern, but failed to involve third parties. The FARC on the contrary managed to hold the demilitarised zone under their control until

contra el Narcotráfico, in Montúfar, César, Whitfield, Teresa (ed.), *Turbulencia en los Andes y Plan Colombia*, Quito, 2003, at p. 141-178.

[20] Münkler, Herfried, *Die neuen Kriege*, at p. 28 and 224 cont.

[21] International Crisis Group, *Colombia's Elusive Quest for Peace*, at p. 5 cont.

February 2002. In the end it was clear that the zone was used to cultivate illicit crops and to hide victims of kidnappings. After various attempts to achieve a ceasefire agreement, the peace talks came to an end on 20 February 2002, when Pastrana ordered the army to retake the zone. Pastrana himself failed to present a comprehensive strategy for the negotiations and was strongly critized for that.[22]

His succesor Álvaro Uribe, a hardliner, intensified the war against the insurgents and a comprehensive peace process seems out of view at the moment. Rather it seems that the option of an indirect intervention by the US (Plan Colombia etc.) is more appealing to the Colombian government.

VI. Conclusion

The war in Colombia demonstrates the complex mixture of political, economic and private interests at stake, which render every peace process so complicated. Apart from the Colombian example I would like to emphasize the new challenge for humanitarian law, which is the legal framework to protect human security. Private combatants even though they are bound by existing norms of individual responsibility can hardly be prosecuted, since they officially do not belong to any political entity.

The humanitarian consequences of the 'new wars' are terrible throughout the world, whether in Congo, Sudan or in Afghanistan. The destabilization of whole regions, particularly if weak states are concerned, is a realistic danger of the future. To prevent this and the consequent loss of human life and security is one of the most immediate tasks of the international community.

[22] International Crisis Group, *Colombia's Elusive Quest for Peace*, at p. 20 cont.
For a profound analysis of the 1998-2002 peace negotiations, see: Isacson, Adam, *Was Failure Avoidable? Learning from Colombia's 1998-2002 Peace Process*. The Dante B. Fascell North-South Center Working Paper Series, no. 14, March 2003 <http://www.miami.edu/nsc/publications/pubs-WP-pdf/WP14.pdf>.

The Making of Ethnic Insecurity: A Case Study of the Krajina Serbs

Edith Marko-Stöckl

The author of this essay tries to reveal how political entrepreneurs create insecurity which lead to wars and conflict – by focusing on the case of the Krajina Serbs.

I. Introduction

On 29 June 2004 Milan Babić, the president of the self-declared, but internationally never recognized 'Republic of the Serbian Krajina', was found guilty by the United Nations International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY). He was sentenced to 13 years imprisonment[1]. He had pleaded guilty "*to persecutions on political, racial, and religious grounds, a crime against humanity ...*"[2].

In the court's judgement, Babić's role in the campaign of persecution was characterized as follows:
"*Babić made ethnically based inflammatory speeches during public events and in the media that added to the atmosphere of fear and hatred amongst Serbs living in Croatia and convinced them that they could only be safe in a state of their own"* [3].
"*... and by his speeches and media exposure prepared the ground for the Serb population to accept that their goals could be achieved through acts of persecution*".[4]

[1] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *Prosecutor vs. Milan Babić*, Case No. IT-03-72.
[2] *Prosecutor vs. Milan Babić*, para. 10.
[3] *Prosecutor vs. Milan Babić*, para. 24g.
[4] *Prosecutor vs. Milan Babić*, para. 61.

How could this happen? The Croatian Serbs, who constituted 12% (= 600.000) of the total population[5], had been a traditional stronghold for Tito's Communists. Apart from a great number of Serbs living in Zagreb, they mainly inhabited the area around Knin, Kordun and Banija (at the western and northern border to Bosnia) as well as the regions of Western and Eastern Slavonia (the plains northeast of Zagreb stretching around the borders of north-eastern Bosnia to Vojvodina). But these regions were not exclusively inhabited by Serbs. In the regions of Knin, Kordun and Banija, Serbs constituted around 67%, in Slavonia only 20 to 30%. In total only 61% of all Serbs living in Croatia were settled on the territory of the later 'Republic of the Serbian Krajina'[6].

The old Četnik strongholds around Knin, Obrovac and Benkovac were especially sensitive to the new nationalistic tones coming from Belgrade, whereas those Serbs living in Lika, Kordun and Banija had a strong Partisan tradition and therefore were (in the beginning) not so prone to Serbian nationalism coming from Belgrade. And it was around Knin that the first Serb demonstrations against the Zagreb government took place on the occasion of the 600th anniversary of the 'Battle of Kosovo Polje' in 1989[7]. Thus in the first multiparty elections of May 1990, most Serbs voted for the former Communists. The landslide victory of Tudjman's HDZ (the Croatian Democratic Union), changed things dramatically. By securing 40% of the votes cast, the HDZ won two thirds of the seats in the Sabor, the Croatian Parliament.

With a future Croat independence in the air - which actually was declared on 25 June 1991 - a spiral of insecurity and fear had started since the elections in May 1990. And the Croats, especially the Tudjman government, bore the risk of a conflict. It seemed to be worth the risk given the dominance they wanted to achieve: The state of the Croats with the Serbs becoming a minority group with minority rights.

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[5] Serbs had lived in Croatia for centuries, when they had fled the Ottoman advance in the Balkans. Here they were welcomed by the Christian Habsburg Emporers, who tried to establish a fortified frontier to meet the Ottoman attacks. This military frontier, the so-called vojna krajina, first was established around Karlovac. As the area was totally depopulated by the wars, new settlers, among them a great number of Orthodox Serbs, were granted free land without manorial obligations and exempted from feudal dues for a certain time in exchange for military service. When Slavonia and Vojvodina were liberated from Ottoman rule at the end of the 17th century, the military frontier was extended eastward, and again a great number of Serbs settled there, side by side with Catholic Croats.

[6] Holm Sundhaussen, *Der Gegensatz zwischen historischen Rechten und Selbstbestimmungsrechten als Ursache von Konflikten: Kosovo und Krajina im Vergleich*, in Philipp Ther and Holm Sundhaussen (eds), *Nationalitätenkonflikte im* 20. *Jahrhundert. Ursachen von inter-ethnischer Gewalt im Vergleich* (Forschungen zur osteuropäischen Geschichte, Bd. 59), Wiesbaden, 2001, at pp. 19-35, 20-21.

[7] See: Marcus Tanner, *Croatia. A Nation Forged in War*, New Haven – London, 2001, at p. 218-219.

The Croatian Serbs' demands for autonomy (first cultural, then territorial and finally secession) escalated into armed upheavals. Thus in summer 1990 a kind of national mobilization started around Knin, where Milan Babić was mayor at that time. Serb policemen for example denied the authority of the new Croatian government by refusing to wear the new uniforms with the Crotian emblem. By blocking the streets of this area with trees (the so-called 'log-revolution'), the Serbs prevented the Croat forces from entering this territory in order to re-establish law and order. For the first time the Yugoslav Army intervened on behalf of the revolting Serbs by preventing for example Croat helicopters to fly into the area.

After the proclamation in October 1990 of Serb autonomy by a newly created Serb National Council, in February 1991 - five months before Croatia declared its independence from Yugoslavia - the independent 'Serbian Republic Krajina' (= Republika Srpska Krajina/ RSK) was proclaimed, which at that time enclosed the rebellious regions around Knin. Later the self-proclaimed Serb Autonomous Districts (SAO) Western Slavonia and SAO Slavonia, Baranja and Western Srem joined the RSK.

In spring the first fights between Serb militias and Croat police forces, who wanted to re-establish Croat authority, had started in the area of Knin (Plitvice). Finally the uprising was 'exported' to Slavonia (Pakrac). When in May Croatian policemen as well as Serbs were killed after fights in Borovo Selo, near Vukovar at the Danube, war became inevitable. In September 1991, open war between the armed forces of the new state Croatia and Croatian Serbs, who were passively and finally even actively supported by the Yugoslav Army (JNA), was waged. Within a short time the Croatian Serbs had occupied a third of Croatian territory. Vukovar, a multicultural city with a Croat, Serb, Ukrainian, Slovak and Ruthenen population, became the 'sad' symbol of this war: although the Croat population of this East Slavonian town had resisted the siege of Serbian militias which were supported by the JNA, it was finally overrun and flattened in November 1991. Thousands of Croats were forced to leave their homes and to flee. In total, an estimated 330.000 Croats fled the Serb occupied territories; 6.651 deaths were officially counted with another 13.700 'missing'. 210.000 houses had been destroyed[8]. And we all became acquainted with a new term: 'ethnic cleansing'.

In January 1992, a cease-fire was negotiated by the UN. Both parties had agreed on stationing UN-peacekeeping troops (UNPROFOR), but no refugees were allowed to return to their homes or would dare do so. With the end of the Bosnian war in 1995 and dwindling Serbian power, the Croat Army reconquered ('Operations Storm and Flash') the Serb held regions in Krajina and Western Slavonia within two weeks. Now a new stream of refugees was forced

[8] Tanner, *Croatia. A Nation Forged in War,* at p. 278.
Tim Judah, *The Serbs. History, Myth & the Destruction of Yugoslavia*, Yale Nota Bene, New Haven – London, 2000.

to leave their homes: about 300.000 Serbs fled to Serbia and Bosnia and so far only a few wanted or were able to return home. Only the Serb controlled area of Eastern Slavonia, which, according to the Erdut Agreement, stayed under UN-administration, was peacefully integrated into Croatia in 1998.

Before the Tribunal, Babić had expressed his remorse: "*I come before this Tribunal with a deep sense of shame and remorse. I have allowed myself to take part in the worst kind of persecution of people simply because they were Croats and not Serbs. Innocent people were persecuted; innocent people were evicted forcibly from their houses; and innocent people were killed. Even when I learned what had happened, I kept silent. Even worse, I continued in my office, and I became personally responsible for the inhumane treatment of innocent people*"[9].

What were the reasons that 'ordinary people' like Babić started to persecute their neighbours just because they were Croats? They spoke the same language and had peacefully lived in their villages, hamlets and towns at least since 1945. Was it the different religion? Croats being Roman Catholics, Serbs being Orthodox? However, this was not a war of faiths.

Stuart J. Kaufman identifies three necessary conditions for the likelihood of an ethnic war occurring:

1) the existence of myths justifying ethnic hostility;
2) the presence of ethnic fears about the survival of a group;
3) the opportunity for the ethnic group to mobilise and fight[10].

But an ethnic war is only likely, if these preconditions lead "*to rising mass hostility, chauvinist mobilisation by leaders making extreme symbolic appeals, and a security dilemma*"[11]. If only one of these elements is missing, an ethnic war can be avoided. In the Krajina, however, all elements were present, thus war seemed to have been inevitable.

II. The presence of ethnic fears about the survival of a group – security dilemma

In addition to Kaufman's 'symbolic politics theory' another approach seems applicable. Following the emotional approach by Roger D. Petersen, fear can be a main reason for an ethnic attack[12].

[9] *Prosecutor vs. Milan Babić*, para 83.
[10] Stuart J. Kaufman, *The Symbolic Politics of Ethnic War*, Cornell University Press, Ithaca and London, 2001, at p. 30-34.
[11] Kaufman, *The Symbolic Politics of Ethnic War*, at p. 34.
[12] Roger D. Petersen, *Understanding Ethnic Violence. Fear, Hatred, and Resentment in Twentieth-Century Eastern Europe*, Cambridge University Press, 2002, at p. 24.

With the collapse of the post-Tito Yugoslavia to come and the landslide victory of the nationalistic HDZ of Franjo Tudjman in the first free elections in May 1990, Croatian Serbs, and especially their (sometimes self-declared) leaders, got a sense of national marginalization. With Croatian independence aspirations in the air, they feared a rearrangement of ethnic status hierarchies by changing sovereignty relations. This feeling was aggravated by the draft of the new Croatian Constitution which declared Croatia the national state of the Croats and the other nations. By this wording ('others'), Serbs in Croatia were afraid of becoming second class citizens, whereas the Constitution of 1974 had declared Croatia the state of the Croat nation, the Serb nation and the other minorities. Up to this time Serbs in Croatia could rely on their double identity as Yugoslavs and Serbs, with Belgrade the centre of the state and the nation. But after 40 years of Communism, not to speak of the first Yugoslavia, 'Yugoslavs' had no tradition of rule of law, nor any experience nor confidence in legal security.

The defence measures of one group seemed to endanger the other group and vice versa. Ordinary citizens became nationalistic fighters. The nationalistic elites and the paramilitary groups came to instrumentalize this fear of ordinary men for their goals[13].

III. The existence of myths justifying ethnic hostility

This feeling of insecurity and fear, which had beset the Serbs in Croatia, mainly arose from the symbolic level. Riding on a wave of victory, Tudjman and the HDZ engaged in Croat nationalism and frightened more and more Serbs who increasingly became antagonistic. In his campaign, especially with regard to the wealth of his emigré constituency[14], Tudjman did not show much remorse for the Ustaša victims. He stated that the NDH-state was *"not only a quisling organisation and a Fascist crime, but was also an expression of the Croatian nation's historic desire for an independent homeland*"[15].

With the draft of the new Croat constitution, Serbs got the feeling that another national defeat was dawning. The draft was presented on 28 June 1990, the Vidovdan, the day of Serbia's defeat by the Turks on Kosove Polje in 1389. And especially after 1989, St. Vitus day had become the heyday of Serbian nationalism, when Milošević had gathered one million Serbs on Kosove Polje to celebrate the 600th anniversary of this battle. But this national defeat was only on a symbolic and emotional level, as the new Croat constitution, which finally was enacted in December 1990, in reality had no consequences for the Serbs, neither

[13] Petersen, *Understanding Ethnic Violence*, at p. 225.
[14] See Laura Silber and Allan Little, *Yugoslavia Death of a Nation*, Penguin Books, New York et al, 1997, at pp. 82-87.
[15] Tanner, *Croatia. A Nation Forged in War*, at p. 223 citing Stipe Mesić, *Kako smo rušili Jugoslaviju*, Zagreb 1992, at p. 8-9.

socially, politically nor culturally[16]. The Serb propaganda must have been really happy with this constitution. Now Mislosevič and the SDS (Serb Democratic Party) could pretend that the 'young Croatian democracy' was a masked "*Agenda to restore the NDH (Nezavisna Država Hrvatska) and cart the Serbs off to another Jasenovac*"[17]. Very late, in December 1991, when war was almost over, Croatia enacted a Minority Law to ensure the rights of the Serbs, which had been strongly recommended by the European Union.

In the eyes of the Serbs, Croat nationalism had culminated in the re-introduction of the Sahovica, the traditional, century-old Croat chess-board flag. For the Croats the Sahovica was the symbol of the century-old dream of Croat independence and statehood, for the Serbs of Croatia, however, it was the bloody symbol of the Ustaša-State of World War II[18]. After the collapse of the Yugoslav Kingdom and the German occupation in 1941 a fascist German puppet state, the Independent State of Croatia (NDH) was installed by the Nazis. This so-called Ustaša-State, which incorporated large parts of Bosnia-Herzegovina, aimed at creating an ethnically 'clean' Croatia. Thus hundreds of thousands of Serbs were expelled, others were forced to convert to the Catholic faith, but above all, thousands were murdered, many in the notorious concentration camp Jasenovac. In an atmosphere so full of fear and probably even hate, the impression of the picture showing Tudjman kissing the Sahovica, the hated symbol of the Ustaša state, must have been horrifying for many Serbs.

Since the middle of the 1980s a Serb-Croat propaganda war on the figure of victims of that time was waged. Thus whereas the Serbs pretended that in Jasenovac alone 500.000 to 700.000 Serbs had been murdered, Tudjman, a historian himself, always strongly minimalized the number of deaths in Jasenovac[19]. The latest independent research estimates that around 600.000 people fell victim to the war on the territory of the Ustaša-State and less than 100.000 people were killed in Jasenovac[20].

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[16] See Sundhaussen, *Der Gegensatz zwischen historischen Rechten und Selbstbestimmungsrechten*, at pp. 19-35.

[17] Tanner, *Croatia. A Nation Forged in War,* at p. 231.

[18] 'Ustaša' meaning insurgent, rebellious. The movement was founded by Ante Pavelić in reaction to the royal dictatorship (1929), aiming at the foundation of a Great Croatian State.
Holm Sundhaussen, *Ustaše,* in E. Hösch, K. Nehring and H. Sundhaussen (eds), *Lexikon zur Geschichte Südosteuropas*, Böhlau UTB, Wien-Köln-Weimar, 2004, at p. 718 cont.

[19] In 1978 Tudjman had given an interview to an Croatian emigré newspaper (*Hravatska Država*), where he stated that during the war in all camps 60.000 people (Serbs, Gypsies and Croats) had lost their lives: *"... that is a huge and terrible number and a crime ... but I am against this number being multiplied 10 times to 600.000 in Jasenovac alone, solely and only to exaggerate the collective and permanent guilt of the Croatian people."* Tanner, *Croatia. A Nation Forged in War,* at p. 205.

[20] Hansgerd Göckenjan, *Unabhängiger Staat Kroatien*, in: *Lexikon zur Geschichte Südosteuropas*, at p. 707 cont.

Since 1989, the Serb population increasingly was exposed to a nationalistic media bombardment, with the Ustaša time and the atrocities committed against Serbs becoming the prime topic. For months the Serbian TV stations, especially in Serbia proper, over and over had played documentaries about the Croatian Ustaša-regime and the genocide it had committed on the Serbian population. Thus above all, the myth of the Ustaša and Jasenovac were the key in the Croatian-Serb drama of the 1990s. But it was not only the media. In the notorious 'Memorandum' of the Serbian Academy of Sciences of 1986 which had castigated the alleged genocide of Serbians in Kosovo, it also stated that "*but for the period of the existence of the NDH, Serbs in Croatia have never been as threatened as they are now*"[21].

The anti-Croat-propaganda was successful. The Krajina Serbs could not withstand it: Serbs were beset by a feeling of (ethnic) insecurity vis-à-vis Croats and Croatia. Manipulated by the Serb media, the Krajina Serbs were driven by fear, be it from imagination or reality. The Serb newspapers had "*fanned the flames of hysteria about a new Ustashe government in Zagreb*"[22].

In his trial at the ICTY, Babić presented himself as a victim of this media campaign. He stated that "*... during the events, and in particular at the beginning of his political career, he was strongly influenced, and misled by Serbian propaganda, which repeatedly referred to an immanent threat of genocide by the Croatian regime against the Serbs in Croatia, thus creating an atmosphere of hatred and fear of the Croats*"[23].

Even the Prosecution asserted that Babić: "*only became radicalised through moves of the political leaderships both in Belgrade and Zagreb and a large-scale and sophisticated Serbian media campaign to revive peoples' old fears and insecurities, leading to separation of communities along ethnic lines and resulting in violence of the dominant ethnic group against others*"[24].

But this historic trauma has never been healed, there was no historic research on this topic, not to speak of reconciliation. Until the 1980s, the history of the inter-ethnic war of the 1940s was not a topic at all, neither for the professional historians nor for the population. 'Bratstvo i Jedinstvo' (brotherhood and unity) had been the main ideology of Tito- and post-Tito-Yugoslavia, thus aiming to secure a peaceful ethnic coexistence of the ethnic groups. In Communist Yugoslavia Serbs and Croats had lived relatively peacefully side by side until the 1980s. The national question, especially the Serb-Croat conflict which had plagued the Yugoslav Kingdom and eventually led to the Ustaša atrocities during World War II, was declared solved by Tito. Any nationalistic expression therefore had been firmly suppressed by Tito, such as the Croatian Spring of

[21] Tanner, *Croatia. A Nation Forged in War*, at p. 212.
[22] Tanner, *Croatia. A Nation Forged in War*, at p. 231.
[23] *Prosecutor vs. Milan Babić*, para. 24g.
[24] *Prosecutor vs. Milan Babić*, para. 90.

1971. The ethnic question was put into the historic refrigerator by the Communist system, where it waited to be defrosted in the 1990s. Another myth, officially nursed by the Communist Party was the myth of the victorious Partisan liberation struggle. By this myth, that has been nourished in schools ever since the war, generations of young Yugoslavs of all ethnic groups became acquainted with the pathos of war, whereas the civic ethnic wars which went parallel to the 'heroic' (Partisan) liberation struggle were never made a central theme in the official historiography. A 'vacuum of memory' (Höpken)[25], of official memory, was produced which waited to be filled by nationalistic ideas in the late 1980s. Thus it was the private memories of the atrocities (committed by all nations) which were kept alive in 'oral history'. By keeping alive the official myth of the brave Partisan struggle, the Communists also kept alive the other wars, the ethnic wars during World War II. Croats and Serbs therefore had a 'terrifying oral history' of violence[26]; memories of old scores waiting to be settled. Almost any Serb family in Croatia had its story of atrocities suffered during the Ustaša-regime. But how could this turn into fighting with mass killings? There must also be the opportunity for ethnic groups to mobilise and fight. This opportunity was given by the support of Milošević and the JNA.

IV. The opportunity for the ethnic group to mobilise and fight

After the elections in May 1990 and with the dissolution of Yugoslavia in progress, the SDS rapidly extended its organizational net in the Serbian populated areas. So-called 'Mitings' were organised with hundreds of participants, sometimes thousands. Serbs were emotionalized by national pathos and myths[27]. Thus, when Babić announced the birth of the Serbian National Council, 120.000 Serbs gathered[28].

With the dissolution of Communist Yugoslavia in progress, the 'new' Croatia, not yet independent but on its way to freeing itself from Belgrade centralism, was too weak to establish law and order in the rebellious Serb regions. All attempts by the Croat police forces to disarm the Serbs failed. On the contrary, the arming of the Serbs, strongly supported by the JNA, advanced. In addition, when open fighting started, the Serbs were supported by the Yugoslav Army, first passively by preventing the Croat forces to enter Serb held territory,

[25] Wolfgang Höpken, *War, Memory and Education in a Fragmented Society: The Case of Yugoslavia*, in East European Politics and Societies, vol. 13, no. 1, Winter 1999, at p. 202.
[26] Petersen, *Understanding Ethnic Violence*, at p. 72.
[27] Hannes Grandits and Carolin Leutloff, *Diskurse, Akteure, Gewalt – Betrachtungen zur Organisation von Kriegseskalation am Beispiel der Krajina in Kroatien 1990/91*, in Wolfgang Höpken and Michael Riekenberg (eds), *Politische und ethnische Gewalt in Südosteuropa und Lateinamerika*, Böhlau, Köln-Weimar-Wien 2001, at pp. 227-259, 233 cont.
[28] Tanner, *Croatia. A Nation Forged in War*, at p. 232.

and finally even by open armed action with weapons, infrastructure, and even soldiers.

All these actions fitted perfectly into Milošević's Greater Serbian plans. After Milošević himself had given up all hopes for a united Yugoslavia to survive, the Serb regions of Croatia neighbouring the Serb populated regions of Bosnia Hercegovina became of strategic importance for his plans of a Greater Serbia. Thus starting with August 1990, a parallel institutional structure was established in Krajina which answered directly to Slobodan Milošević. It was comprised of members of the Ministry of Interior of Serbia, the State Security Service of Serbia, the SDS of Croatia and policemen in the Serbian municipalities in Croatia. "*Through the parallel structure, Milošević manufactured incidents, which provoked reaction and fear among the Serbs, including Milan* Babić, *and intensified intervention by the Croatian police. This spiralled up into intolerance, violence, and eventually war*"[29]. But there were also provocations on the Croat side like in Borovo Selo in East Slavonia, where radical Croats fired rockets on the town. Although this incident only caused property damages, it radicalised the atmosphere. When the frightened Serb population asked for help, the Serb ultra nationalistic Vojislav Šešelj sent his volunteer militia, which finally got involved in fights with Croatian policemen and killed 12 Croats[30].

V. The role of the elites

Chauvinistic leaders, 'ethnic entrepreneurs', played an important role in the Serb-Croat conflict on both sides. According to the emotion-based approach of Petersen, the structural changes accompanying the collapse of Yugoslavia, the rearrangement of ethnic status hierarchies by changing sovereignty relations, the composition of the police and political positions, can lead towards resentment and therefore ethnic violence[31]. In the Croat/Serb case, the Serbs traditionally were overrepresented in the Croat Police since Communist times, which was a constant grievance for the Croats. Now the Croat government started to build up a new Special Police with only Croats filling the ranks. With the Serb elites fearing a loss of influence and power in the new Croat 'national state', it was their resentment which triggered the fear of the masses, by appealing to the group and to solidarity[32].

Moderate Serb leaders, who were negotiating with the Croat government in 1990, increasingly were sidelined by nationalistic hardliners. Babić was such a case of an ambitious ethnic entrepreneur. An ordinary dentist by profession, Babić first became mayor of the little town of Knin. By and by he expanded his

[29] *Prosecutor v. Milan Babić*, Case No. IT-03-72-I, Factual Statement, Case No. IT-03-72-I, para. 16.
[30] Grandits, *Diskurse, Akteure, Gewalt,* at pp. 253 cont.
[31] Petersen, *Understanding Ethnic Violence,* at pp. 25, 225-231.
[32] Petersen, *Understanding Ethnic Violence*, at pp. 229-231.

political influence by means of the so-called Knin-Initiative and was supported by Belgrade and Milošević. He became President of the Serbian National Council, President of the Executive Council of the so-called 'Serbian Autonomous District Krajina', later President of the 'Republic of Serbian Krajina' (RSK) and finally Prime Minister of the RSK[33]. In an interview for the investigators of the Prosecution of the ICTY, Babić characterized himself as follows: *"Maybe I could describe it as ethno-selfishness and that's probably what I also became – an ethno egoist, a person who exclusively wanted to see to the interests of people to which I belonged and that my emotions and feelings decreased and I became less sensitive and I neglected the interests and the suffering of other peoples, at that time the Croatian people"*[34].

VI. Conclusions

The structural changes of the dissolution process of Yugoslavia triggered a spiral of insecurity and fear. All governmental restraints became weak and unsure, especially in the ethnic relations, where the majority-minority-relationship was newly organized. Thus the Croatian Serbs of the Krajina and Slavonia got the feeling of political and ethnical marginalization. In an atmosphere of distrust and hate even the survival of the ethnic group seemed endangered. This and a number of further preconditions like the existence of myths justifying ethnic hostility, and the opportunity for the ethnic group to mobilise and fight led to mass hostility. But especially in the case of the Krajina and Slavonian Serbs, both sides, the Serbs as well as the Croats are to blame for this spiral of insecurity. Croat nationalism in the wake of the elections and the national independence to come, triggered Serb reaction. Negotiations came too late and were torpedoed by nationalistic elites on both sides. And it was especially the chauvinist elites who spurred this spiral of insecurity to foster their political goals. Croatia, the state of the Croats versus Greater Serbia, including all Serbs on the territory of (former) Yugoslavia became the political mottos.

[33] *Prosecutor v. Milan Babić*, Indictment, para. 3.
[34] *Prosecutor v. Milan Babić*, para. 70.

A Souvenir from Iraq

Maddalena Vivona

The publication of Iraqis detainees abused by U.S. military police officers this year shocked people all over the world. The author analyze the theories and policies surrounding the prohibition of torture and its absolute character in general and in the particular case of Abu Ghraib.

I. Introduction

This year the publication of some souvenir pictures taken by U.S. military police officers on their days in the Abu Ghraib prison, shocked people all over the world. However, the debate on the possibility of using techniques of interrogation, that under normal circumstances are considered torture, cruel, inhuman or degrading treatment or punishment began some time before the Abu Ghraib case: the debate entered the public discussion a few months after the US declaration of war against terror that followed the events of 9/11.

This kind of debate is not new: it appears from time to time in countries with higher domestic instability and in connection with threats posed by terrorist movements. The fact that civilians are often the target of terrorist attacks, raises the necessity of states to gain information about the identities and plans of terrorist movements. It is under this circumstances where the question of who has to be secured comes up: if one the one hand the state aims to protect itself and its citizens from the menace posed by terrorist movements, from the other hand the burdens posed by the prohibition of torture limit state's action in order to preserve the physical and psychological mistreatment of every human being, irrespective of what they are or supposed to be.

If in international law the general value of the prohibition of torture is not under discussion, voices are rising in favour of the abolition of its absolute character, due to necessity reasons. Moreover it is in the practice of state, especially in the field of intelligence interrogation techniques, that the notion of torture is stretched and its burdens are set under proof in order to break the resistance of persons in custody and to gain vital information from them.

The purpose of this article is to analyse the theories and policies surrounding the absolute character of the prohibition of torture in general and in the case of Abu Ghraib in particular, and to outline the importance of a human security approach to the issue.

II. The prohibition of torture and the war against terror

Since September 11, many voices are rising in favour of a 'softer' interpretation of the prohibition of torture. In November 2001, a famous American lawyer used the so called 'ticking bomb' scenario[1] to convince that the use of methods of interrogation, that would under normal circumstances be considered a form of torture, are allowed in cases of emergency. Let us imagine that there is a bomb about to explode and the police capture a suspect that could reveal where the bomb is placed, but refuses to disclose this information. The police officers have already tried to find out where the bomb is, but the suspect is not keen to collaborate. What should the police officers do? Should they try to obtain the information with every possible means or should they obey the law?

Dershowitz starts from the presumption that in this case the police officers are likely to torture the suspect: he is convinced that people are tortured every day in dark and silent rooms all over the world. In his opinion, the only possibility to give some form of guarantee to the tortured is to apply these interrogation techniques openly, with accountability and with the approval of the competent authorities. Furthermore, he suggests the introduction of 'torture warrants' to put strong burdens of proof on the government in order to demonstrate the necessity to administer acts of torture. [2]

This 'ticking bomb' scenario became a reality in Germany in September 2002 when an 11 year-old child was kidnapped by a young law student. The police captured the kidnapper, and one of the police officers, worried about the fate of the child, threatened the suspect with torture if he did not reveal the place where the child was kept. The threat was successful, but unfortunately when the police arrived, Jacob von Metzler was already dead. Also in this case, voices rose to justify the conduct of the police officer: the foundation of his legal excuse was, another time, identified in the institute of necessity, anchored in § 34 of the German Penal Code[3].

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[1] Alan Dershowitz, *Is There a Torturous Road to Justice?*, in Los Angeles Times, 8 November 2001, from the online edition
<www.latimes.com>.

[2] Interview of Alan Dershowitz and Ken Roth to the CNN, 3 March 2003
<http://www4.cnn.com/2003/LAW/03/03/cnna.Dershowitz>.

[3] Paragraph 34 of the German Penal Code (Strafgesetzbuch) states that "*Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr für Leben, Leib, Freiheit, Ehre, Eigentum oder ein anderes Rechtsgut eine Tat begeht, um die Gefahr von sich oder einem anderen abzuwenden, handelt nicht rechtswidrig, wenn bei Abwägung der widerstreitenden Interessen, namentlich der betroffenen Rechtsgüter und des Grades der ihnen*

In Israel, the discussion about the use of 'moderate physical pressure' in the interrogation of Palestinian suspects came to the light already in the ´80s. The use of torture was never justified. However, the Landau Commission[4] sought a balance between the interrogation needs and rights of suspects by drawing Article 22 of the Israelis Penal Law, which exempted authors of acts committed in conditions of 'necessity'[5] from criminal responsibility.

In a landmark ruling, the Israeli Supreme Court banned interrogation methods inconsistent with the prohibition of torture. The argument, that the situation of Israel could be considered a situation of necessity in which the state has to choose 'the lesser of two evils', namely the application of 'moderate physical pressure' in order to obtain vital information about terrorist activities, was withdrawn by the Supreme Court. The Court argued that the institute of necessity[6] *"… does not possess any additional normative value. It can not authorize the use of physical means to allow investigators to execute their duties in circumstances of necessity."*[7]

III. Interrogation techniques at the detention facilities of Abu Ghraib and Guantanamo Bay

The situation of Iraqi prisoners in Abu Ghraib was denounced not only by the International Red Cross in its report of February 2004, but also by the findings of the so-called 'Taguba Report'. Major General (MG) Taguba was appointed in January 2004 by the United States Central Command (CENTCOM)

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drohenden Gefahren, das geschützte Interesse das beeinträchtigte wesentlich überwiegt. Dies gilt jedoch nur, soweit die Tat ein angemessenes Mittel ist, die Gefahr abzuwenden".

[4] The Commission of Inquiry into Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (also called Landau Commission from the name of its first chairman, the former High Court Chief Justice Moshe Landau) was set up in May 1987 to define the boundaries of what is permitted to the interrogator and mainly what is prohibited to him. See also Niels Uildriks, *Torture in Israel*, in Human Rights Review, 2000, at p. 87.

[5] A situation of 'necessity' was defined in Art. 22 of the Israelis Penal Code as a situation *"which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person...[or] of others whom he was bound to protect"* Furthermore article 22 bound the use of force to the principle of proportionality: *"Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided"*.

[6] In penal law the necessity is defined as *"a constrain on the will, whereby a person is urged to do that of which his judgement disapproves, and is thereby excused from responsibility which might be otherwise incurred"*. *Necessity*, in Mozley and Whiteley´s, *Law Dictionary*, Butterworths, Dublin, 2001.

[7] Israel Supreme Court, the Public Committee against Torture in Israel and alii vs. State of Israel et alii, 15 July 1999, HJC 5100/94, para. 36 <http://62.90.71.124/eng/verdict/framesetSrch.html>.

as an Investigator Officer to conduct an informal investigation into all facts and circumstances surrounding reports of suspected abuse of detainees in Iraq, to inquire into detainees escape and accountability lapses. MG Taguba had also been asked to gain a more comprehensive and all encompassing inquiry into the conduct of operations within the 800th Military Police Brigade.

MG Taguba reported that "*numerous incidents of sadistic blatant and wanton criminal abuses were inflicted on several detainees."*[8] He further argued that "*this systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force…"*[9].

MG Taguba found evidence, through written confessions provided by several suspects, written statements provided by detainees and witness statements, that detainees were punched, slapped and kicked; military police personnel jumped on their naked feet, they videotaped and photographed naked male and female detainees; they forcibly arranged detainees in various sexually explicit positions for photographing; they forced detainees to remove their clothing and kept them naked for several days and time; they forced naked male detainees to wear women's underwear; they forced groups of male detainees to masturbate while being photographed and videotaped; they arranged naked male detainees in a pile and then jumped on them; they positioned a naked detainee on a box, with a sandbag on his head, and attached wires to his fingers, toes and penis to simulate electro-shock, they wrote 'I am a Rapist' on the leg of a detainee alleged to have forcibly raped a 15 years old fellow detainee, and then photographed him naked; they placed a dog chain or strap around a naked detainee's neck while a female soldier was posing for the picture; a male MP guard had sex with a female detainee; they used military working dogs to intimidate and frighten detainees, which, in a least one case, bit and injured a detainee severely; they also took pictures of dead Iraqi detainees.[10]

A. Status of detainees held in Afghanistan, Guantanamo and Iraq and applicable international norms

Regarding the status of the prisoners held in Guantanamo and in Afghanistan, the President of the United States repeatedly affirmed that Talibans and Al Quaeda individuals were not entitled of the status of prisoner of wars (POWs).[11] The main reason brought by the United States administration was that if the Taliban forces were to be considered as a militia or as an armed force of an

[8] Article 15-6 Investigation of the 800th Military Police Brigade (hereinafter: Taguba Report), at p. 16, <http://www.cbsnews.com/htdocs/pdf/tagubareport.pdf>.
[9] Taguba Report, at p. 16.
[10] Taguba Report, at p. 17.
[11] Secretary of Defense Memorandum of 19 January 2002; Memorandum of the Office of the Assistant Attorney General of 7 February 2002 in relation of the Status of Taliban Forces under article 4 of the Third Geneva Convention of 1949.

unrecognized power, they were not entitled to POW-status because they did not met the necessary requirements under art. 4 of the Third Geneva Convention.[12]

On October 2001, the Central Commando (CENTCOM) Commander issued an order instructing that the Geneva Conventions were to be applied to all individuals captured in Iraq in accordance with their traditional interpretation.[13] The distinction is of relevance because in the case of the Iraqi prisoners the norms of the Geneva Conventions are applied, while in the case of the Taliban and Al Qaeda detainees only the other international obligation of the United States applied.

The United States ratified the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in November 1994. The United States, however, made a reservation in relation to Article 1, which defines the notion of 'torture'[14], and in relation to Article 16,

[12] Article 4 A of the Third Geneva Convention Relative to the Treatment of Prisoners of War states that *"Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:*
1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
(a) That of being commanded by a person responsible for his subordinates;
(b) That of having a fixed distinctive sign recognizable at a distance;
(c) That of carrying arms openly;
(d) That of conducting their operations in accordance with the laws and customs of war."

[13] Independent Panel to Review Department of Defense Detention Operations, *Final Report*, August 2004, pp. 79-83.

[14] In relation to Article 1 the United States affirmed that in order to constitute torture
"(a) … an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.
(b) … acts [should be] *directed against persons in the offender's custody or physical control.*
(c) That with reference to article 1 of the Convention, the United States understands that `sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the

which defines 'cruel, inhuman or degrading treatment or punishment' by deferring to the current standard of the 8th Amendment of the United States Constitution. As a consequence the United States are bound in the interpretation of the concept of cruel, inhuman or degrading treatment or punishment just to the extent of the United States Constitution. The same applies for the provision of the International Covenant on Civil and Political rights related to the prohibition of torture.

Although the interrogation of the detainees took place outside the territory of the United States, U.S. personnel were bound by federal law. In the Torture Statute (§ 2340 of title 18 of the United States Code) torture is defined as an *"act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control"*[15], while severe mental pain or suffering means *"the prolonged mental harm caused by or resulting from— A) the intentional infliction or threatened infliction of severe physical pain or suffering; B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; C) the threat of imminent death; or D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."*[16]

B. Techniques of interrogation

Guidelines for intelligence interrogation of detainees are provided by the Field Manual 34-52, which is the standard source for the interrogation doctrine within the Department of Defense. The authorities of Guantanamo, however requested in October 2002 the approval of stronger interrogation techniques because the interrogation resistance of the detainees increased and because the rules in force limited *"the ability of the interrogators to counter advanced resistance"*[17].

United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.
(d) That with reference to article 1 of the Convention, the United States understands that the term `acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.
(e) That with reference to article 1 of the Convention, the Unites States understands that non compliance with applicable legal procedural standards does not per se constitute torture."

[15] United State Code, Title 18, § 2340.

[16] United State Code, Title 18, § 2340.

[17] Memorandum for Commander, Joint Task Force 170, *Request for Approval of Counter-Resistance Strategies*, of 11 October 2002,

In a memorandum, dated 11 October 2002, the techniques of interrogation were divided into three categories: already in the second category techniques like deprivation of light and auditory stimuli, removal of clothing, forced grooming, use of detainees individual phobias to induce stress are present. The third category was applicable just with the approval of the Commanding General and in very particular circumstances to help interrogate exceptionally resistant detainees. Those very particular techniques comprehend: *"1) the use of scenarios designed to convince the detainee that death or severely painful consequence are imminent for him and/or his family; 2) exposure to cold weather or water (with appropriate medical monitoring); 3) use of wet towel and dripping water to induce the misperception of suffocation; 4) use of mild, non injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing"*[18].

The Department of Defense considered the proposed interrogation techniques lawful because they were not in violation of the 8th Amendment of the United States Constitution or the Federal Torture Statute. The Department of Defense based its argument on the Supreme Court jurisprudence *"so long as the forced used could be plausibly have been thought necessary in a particular situation to achieve a legitimate governmental objective and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing arm the proposed techniques are likely to pass constitutional muster"*[19].

Particularly interesting is also the affirmation few lines below that some of the techniques would constitute per se a violation of the Uniform Military Code, namely art. 128 (Assault) or art.134 (Communicating a Threat): for this reason the Department of Defense suggested the interrogators to obtain a permission or immunity in advance from the competent authority[20].

The Secretary of Defense approved the use of additional techniques suggested in Guantanamo, but rescinded the majority of them in January 2003 and submitted the remaining more aggressive techniques to his personal approval. The Final Report of the Independent Panel to Review Department of Defense Detention Operations stated that these techniques were used just two times in order to gain important and time-urgent information.[21] He also suggested also the establishment of a working group on interrogation techniques.

<http://www.globalsecurity.org/security/library/policy/dod/d20040622doc3.pdf>.

[18] Memorandum for Commander, Joint Task Force 170, *Request for Approval of Counter-Resistance Strategies*, of 11 October 2002, at p. 2 and 3.

[19] Memorandum for Commander, Joint Task Force 170, *Legal Brief on Proposed Counter-Resistance Strategies*, of 11 October 2002, at p. 5, <http://www.globalsecurity.org/security/library/policy/dod/d20040622doc3.pdf>.

[20] Memorandum for Commander, Joint Task Force 170, *Legal Brief on Proposed Counter-Resistance Strategies*, of 11 October 2002, at p. 5.

[21] Independent Panel to Review Department of Defense Detention Operations, *Final Report*, August 2004, at p. 8.

On 16 April 2003, the Secretary of Defense promulgated a list of approved interrogation techniques limited for use at Guantanamo.[22]

In Iraq the only interrogation guidance was the Field Manual 34-52, but, as stated in the report of the Independent Panel *"interrogators and lists of techniques circulated from Guantanamo and Afghanistan to Iraq"*[23]. On 14 September 2003, LTG Sanchez signed a Memorandum authorizing interrogation techniques beyond Field Manual 34-52: five of them were also beyond those approved for Guantanamo. The new policies were, however, considered too aggressive and rescinded a month later.

IV. Conclusion

On 22 October 2004, Sgt. Ivan Frederick, the highest-ranking of the eight soldiers charged with the abused of detainees at Abu Ghraib, was sentenced to eight years in prison, reduction in rank to private, forfeiture of pay and a dishonourable discharge. Frederick testified that he acted in part under the direction of two interrogators[24], but the defence council was unable to prove the involvement of the chain of command in ordering the treatment of the detainees. In Court, the question whether the events of Abu Ghraib were to be considered as acts of few 'bad apples' or the result of a systematic pattern of conduct by the military was resolved in favour of the first solution.

What however is left to the conclusion of this article is to give an answer to the question: should a situation of necessity, as the one posed by a ticking bomb scenario, be enough to justify an act of torture, cruel, inhuman or degrading treatment?

For this purpose, I think it is necessary to take a step back in the past and to see which reasons led to the creation of the prohibition of torture. Torture was not banned to avoid acts of sadism, but to prevent its use as a penalty and as a mean to obtain information or confessions in the criminal proceeding from individual that were not even found guilty for a criminal offence.

The misuse of the penal institute of necessity to justify some form of torture, which, this is is important to stress, has never been accepted in the international community, will bring us back, back to the time of the inquisitor Masini, where the good of the single individual was postponed to the good of the society.

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[22] Secretary of Defense, *Memorandum on Counter Resistance Techniques in the War on Terrorism*, 16 April 2003 <http://www.globalsecurity.org/security/library/policy/dod/d20040622doc9.pdf>.

[23] Independent Panel to Review Department of Defense Detention Operations, *Final Report*, August 2004, p. 9.

[24] Jakie Spinner, *MP Gets 8 Years for Iraq Abuse*, online edition of the Washington Post of 22 October 2004 <http://www.washingtonpost.com/wp-dyn/articles/A51044-2004Oct21.html>.

Prävention ist eine Frage des Zeitpunkts.

UNCOPAC – ein Vorschlag zur Stärkung der Early-Action-Kapazität der Vereinten Nationen[1]

Reiner Steinweg

In seinem Essay stellt Rainer Steinweg das Modell einer UN Kommission für Frieden und Krisenprävention vor: die UN Commission on Peace and Crisis Prevention – UNCOPAC.

I. Einleitung

In der Vergangenheit hat die internationale Gemeinschaft auf sich anbahnende Krisen, die das Potential zum Völkermord oder zur Massenvertreibung bargen, häufig gar nicht oder viel zu spät reagiert, nämlich erst dann, wenn bildlich gesprochen die Flammen schon aus dem Dach schlugen. Ruanda, Kosovo, Ost-Timor und der Sudan sind traurige Beispiele dafür. Der renommierte österreichische Staatsrechtler Felix Ermacora Mitglied der Europäischen Kommission für Menschenrechte und der UN-Menschenrechtskommission, soll Anfang der 90er Jahre Ibrahim Rugova, dem Anführer des damaligen gewaltlosen Widerstands der Kosovoalbaner, erklärt haben, erst müsse Blut im Kosovo fließen, ehe die internationale Staatengemeinschaft ‚etwas tun' könne.

Bei dem, was dann in solchen Fällen ‚zu tun' wäre, wird bisher fast ausschließlich an internationale Militäreinsätze gedacht, oder allenfalls an Wirtschaftssanktionen wie im Irak nach dem zweiten Golfkrieg. Obwohl seit dem

[1] Abdruck aus: Friedensforum Heft zur Friedensarbeit vom Österreichischen Studienzentrum für Frieden und Konfliktlösung (2004/5-6), at p. 36-38 (mit Genehmigung des Autors).

Ende des vergangenen Jahrhunderts infolge der großen menschengemachten Katastrophen seit dem Ende des Ost-West-Konflikts das Bewusstein für die Notwendigkeit von Gewaltprävention international stark gewachsen ist, wird immer noch mehr in ‚Schnelle Eingreiftruppen' investiert als in zivile Instrumente der Krisenprävention.

Tatsächlich sind die Gewährleistung der Menschenrechte und der Sicherheit von Leib und Leben die Schlüssel zur Gewaltprävention. Wenn sie massenhaft gefährdet sind, ist über kurz oder lang mit bewaffneten Konflikten zu rechnen. Militante Gruppierungen, politische Eliten und ‚charismatische' Führer, die die Ängste und Bedrohungsgefühle von Bevölkerungen für ihre (Macht-) Ziele zu schüren und zu funktionalisieren verstehen, finden sich immer. Prävention sollte daher nicht erst dann einsetzen, wenn die politische Funktionalisierung bereits auf Hochtouren läuft, sondern bevor sie greift. Dazu bedarf es jedoch eines ausgefeilten Instrumentariums sowohl der Früherkennung als auch, noch wichtiger, der wirksamen Verknüpfung von *early warning* mit zentralen politischen Institutionen.

Häufig wird, auch von hervorragenden Fachleuten und UN-Kennern, die Ansicht vertreten, das Problem sei nicht *early warning*, sondern *early action*. In der Tat gab es in den genannten Fällen großer menschengemachter Katastrophen frühzeitige Hinweise und Warnungen aus NGO-Kreisen und von einzelnen Journalisten und Wissenschaftlern. Der im Folgenden vorgestellte Vorschlag beruht jedoch auf der These, dass es nicht nur der an dieser Stelle der Debatte immer ins Feld geführte ‚Mangel an politischem Willen' und die Angst von Regierungsvertretern vor Machtverlust sind, die rechtzeitiges nicht-militärisches Eingreifen von außen in absehbar katastrophale Krisen verhindern. Mindestens von gleicher, wenn nicht größerer Bedeutung sind vielmehr zwei andere Faktoren: das Fehlen ‚institutioneller Schienen' zwischen der Früherkennung und den internationalen Machtzentren sowie generell mangelndes Vorstellungsvermögen und Wissen über die Möglichkeiten ziviler, *nicht*-militärischer Gewaltprävention auf den höchsten politischen Ebenen im allgemeinen wie auch im je besonderen Fall.

Mit ‚institutionellen Schienen' ist zweierlei gemeint: 1. ein Mechanismus, der gewährleistet, dass frühe Warnungen vor möglichem Genozid und Verbrechen gegen die Menschlichkeit rechtzeitig in den ‚'politischen Prozess' gelangen, also nicht nur in Memoranden stehen[2], sondern auch in den zuständigen politischen Gremien behandelt werden müssen, und 2. die Schaffung einer Rechtslage, die bestimmte Formen nicht-militärischen Einwirkens von außen auch dann legitimiert, wenn die Regierungen betroffener Länder es aus Prestige-

[2] Der finnische Botschafter bei der ständigen OSZE-Konferenz in Wien sagte dem Verfasser im Jahre 2001, dass in den Jahren vor dem Kosovokrieg in fast jedem Memorandum zur Situation auf dem Balkan auf die großen Gefahren im Kosovo hingewiesen wurde. Dennoch verhielt sich die internationale Gemeinschaft wie Kleinkinder es tun, die meinen, wenn sie sich die Hand vor die Augen halten oder die Bettdecke über den Kopf ziehen, sei auch die gefürchtete Wirklichkeit verschwunden.

gründen oder Parteilichkeit möglichst weit hinauszuschieben versuchen und zu diesem Zweck die Gefahr herunterspielen oder verneinen.

Der Vorschlag wurde unter der Abkürzung UNCOPAC in Umlauf gebracht und bisher von 30 NGOs sowie von zahlreichen Friedens-, Politik- und Völkerrechtswissenschaftlen und -wissenschaftlerinnen, einer ansehnlichen Zahl von PolitikerInnen und MitarbeiterInnen zivilgesellschaftlicher Einrichtungen unterschrieben[3]. Die Abkürzung steht für United Nations Commission on Peace and Crisis Prevention. Was ist gemeint?

II. Kernpunkte des Vorschlages

Die United Nations Commission on Peace and Crisis Prevention (UNCOPAC) soll auf der Basis systematisch ausgewerteter Frühwarnungen in konkreten Fällen detaillierte Empfehlungen für frühzeitige nicht-militärische Präventionsmaßnahmen an die Generalversammlung, den Sicherheitsrat und den Generalsekretär der Vereinten Nationen aussprechen und regelmäßig über ihre Umsetzung berichten. Sie soll alle Weltregionen repräsentieren und nach dem Prinzip der gender-balance zusammengesetzt sein. Die 20 Mitglieder der Kommission sollen durch NGOs, die bei den Vereinten Nationen akkreditiert und in den Bereichen Krisenprävention, Konfliktbearbeitung, Peacebuilding/Friedenskonsolidierung, Menschenrechte, Friedenserziehung, Friedenswissenschaft oder humanitäre Hilfe tätig sind, in einem zweistufigen Verfahren nominiert und von der Generalversammlung der UN gewählt werden. Die Vorgeschlagenen sollen jedoch nicht die NGOs repräsentieren, sondern hoch angesehene Personen des öffentlichen Lebens sein. Dagegen sollen die NGOs das Recht haben, zu Krisengebieten, in denen sie tätig sind, Anträge zur Befassung bei UNCOPAC zu stellen, und sie können umgekehrt von der Kommission konsultiert werden, die sie auch in regelmäßigen Abständen schriftlich und mündlich über ihre Entscheidungen und Erfahrungen informiert.

Einige dieser Punkte bedürfen der Erläuterung:

1. *Verknüpfung mit den weltweit bestehenden Frühwarneinrichtungen und -projekten*: Die Kommission soll regelmäßig von den derzeit rund 25

[3] Siehe auch die United Nations Commission on Peace and Crisis Prevention (UNCOPAC) Website: Von dieser Website können alle Originaltexte der ‚Initiative Pro UNCOPAC' in englischer und deutscher Sprache heruntergeladen werden: 1. eine ausführliche *Begründung* des Vorschlags (‚Einladung zur Debatte') mit Hinweisen auf seine Entstehungsgeschichte; 2. der Entwurf (1st draft) eines mit der UN-Charta kompatiblen *Statuts* für eine United Nations Commission on Peace and Crisis Prevention; 3. eine Kurzfassung von beidem (diese auch in etwa 20 anderen Sprachen); 4. ein Aufruf zur Unterstützung des Vorschlags; 5. die aktuelle Liste der den Vorschlag unterstützenden NGOs und Einzelpersonen.
Siehe: <www.pro-uncopac.info> All websites occurring in this essay were last checked on 1 November 2004.

Frühwarneinrichtungen sowie von regional tätigen NGOs informiert werden und ist gehalten, bei Anzeichen bedenklicher Entwicklungen Handlungsvorschläge zu erarbeiten und die Frühwarneinrichtungen und NGOs darüber zu unterrichten, dass sie ein entsprechendes Verfahren eingeleitet hat.

2. *‚Empfehlungen' und ihre Ausführung*: Die Kommission kann die erarbeiteten Vorschläge im Wesentlichen[4] nicht selbst durchführen oder veranlassen; dazu wäre ein viel größerer Apparat erforderlich. Dennoch wäre die Einrichtung der Kommission ein großer Schritt in Richtung faktischer Prävention. Ihre ‚Empfehlungen' würden
   - einen offiziellen Anlass für frühzeitiges nicht-militärisches internationales Handeln (*early action*) liefern,
   - höchst offiziell den derzeit immer unklaren Zeitpunkt markieren, von dem an es geboten ist,
   - ein gut durchdachtes situationsbezogenes Konzept unter Berücksichtigung aller verfügbaren Erfahrungen zur Verfügung stellen und dadurch
   - insgesamt die im konkreten Fall oft strittige Legitimation für *early action* erhöhen.
   - Die bloße Existenz einer solchen Institution würde außerdem bei angemessener Ausstattung einen enormen Stimulus für die Entwicklung alternativer, nicht-militärischer Vorstellungen Konzepte für die Bearbeitung ethnischer, religiöser und sozialer Spannungen, also insgesamt einen Beitrag zur Zivilisierung der Weltpolitik darstellen.

   Wenn es im konkreten Fall Regierungen gibt, die aufgrund ihrer innenpolitischen Situation willens und in der Lage sind, etwas zu tun - und das ist vielleicht doch öfter der Fall als es den Anschein hat - dann verschafft ihnen UNCOPAC die Legitimation dafür, die beispielsweise für den Kosovo Anfang der 90er Jahre eindeutig fehlte. Der Generalsekretär der UN hätte es auf jeden Fall leichter, Regierungen oder, je nach Sachlage, private-public partnerships für konkrete, gut durchdachte Einsätze zu motivieren.

3. *Vereinbarkeit mit der UN-Charta*: Der Vorschlag hält sich streng im Rahmen der gegebenen UN-Charta. Denn bis diese reformiert wird, so ist zu befürchten, muss die nächste große Weltkatastrophe hereingebrochen sein. Die UNCOPAC nimmt keinerlei Kompetenzen wahr, die allein dem Sicherheitsrat zustehen, sondern bewegt sich weit unterhalb der

[4] Einzige Ausnahme: Die Kommission soll Beobachtermissionen ernennen und/oder entsenden können, sofern andere internationale Organisationen wie die Organisation für Sicherheit und Zusammenarbeit (OSZE) dies nicht bereits von sich aus unternommen haben.

Ebene, die im Sicherheitsrat verhandelt wird[5]. Sie kann und darf daher auch keinerlei Zwangsmaßnahmen anordnen. Dem Vorschlag liegt jedoch die begründete Hoffnung zugrunde, dass eine solide handelnde Kommission mit der Zeit ein so hohes Ansehen erwirbt, dass die politisch Verantwortlichen in den Regierungen freiwillig den Empfehlungen der Kommission nachkommen, da unübersehbare Vorteile damit verbunden sind[6].

4. *Unabhängigkeit der Kommission und Einfluss der Zivilgesellschaft*: Sehr wichtig war den Autorinnen und Autoren[7] des Vorschlags, eine Konstruktion zu finden, die die Kommission politisch unabhängig von den Regierungen macht, insbesondere von jenen, in deren Ländern sich Entwicklungen abzeichnen, die zu Genozid oder Verbrechen gegen die Menschlichkeit führen könnten. Auch wenn die letzte Auswahl und die Ernennung der Kommissionsmitglieder durch die Generalversammlung erfolgt und erfolgen muss, da es eine UN-Kommission sein soll, macht es eine Differenz ums Ganze, ob die Kandidaten von Regierungen oder aus der Zivilgesellschaft heraus nominiert werden. Eine Veränderung der Interaktionsstruktur zwischen der Staatenwelt und der Zivilgesellschaft steht auf der Tagesordnung[8], und der UNCOPAC-Vorschlag versteht sich als ein Beitrag dazu. Denn immer mehr Nicht-Regierungsorganisationen sind in den für Gewaltprävention bedeutsa-

[5] Fälle von bereits zugespitzten Krisen bzw. von Entwicklungen, in denen Präventionsmaßnahmen nicht gegriffen haben, bleiben nach wie vor ausschließlich dem Sicherheitsrat vorbehalten.

[6] In Europa werden inzwischen Entscheidungen europäischer Institutionen und Gerichte in aller Regel respektiert und umgesetzt, obwohl sie über keinerlei direkte Sanktionsmacht und eigene Durchsetzungsorgane verfügen.

[7] Autorinnen und Autoren des Vorschlages sind: *Michael Bouteiller,* Rechtsanwalt, ehemaliger Bürgermeister von Lübeck; Dr. *Franz Leidenmühler*, Institut für Völkerrecht der Universität Linz und Gemeinderat der Stadt Linz; *Ingrid Lottenburger,* ehemalige Landtagsabgeordnete in Berlin, Vorsitzende der Helsinki Citizens Assembly, Berlin; Prof. *Mohssen Massarat*, Universität Osnabrück, Fachbereich Sozialwissenschaften, Mitbegründer der deutschen ‚Koalition für die Frieden'; *Frieder Schöbel*, Vorstand des Friedenszentrums e.V. Braunschweig; *Heide Schütz,* Vorsitzende des Frauennetzwerks für Frieden, Bonn; Dr. *Reiner Steinweg,* Friedensforschung Linz (Außenstelle Linz des Österreichischen Studienzentrums für Frieden und Konfliktlösung, Stadtschlaining); *Peter Vonnahme*, Verwaltungsrichter in München, Mitglied von International Association Lawyers against Nuclear War (IALANA).

[8] Der kürzlich veröffentlichte Bericht des von Kofi Anan eingesetzten *Panel of Eminent Persons on United Nations-Civil Society Relations* unter dem Vorsitz des früheren brasilianischen Präsidenten Fernando Henrique Cardoso argumentiert ganz in diese Richtung. Im Vorschlag Nr. 6 heißt es z. B.: „*The General Assembly should permit the carefully planned participation of actors besides central Government in its processes.*" Mit diesem Grundsatz, der sich im Bericht in vielen Detailvorschlägen niederschlägt, tragen die „*eminent persons*" der von ihnen konstatierten „*growing importance of civil society in international debates*" Rechnung.
See: <www.un.org/reform/a58_817_english.doc>.

men Feldern verantwortlich tätig und nehmen erfolgreich - z.B. im Rahmen von postconflict-peacebuilding Programmen einzelner Regierungen - Aufgaben wahr, die von Regierungsorganisationen z.T. kaum erfüllt werden können. Es erscheint daher sinnvoll, sie auf geregelte und maßvolle Weise auch in internationale Entscheidungsfindungsprozesse einzubinden, die die Gewaltprävention betreffen, und so ihre Kompetenzen noch besser zu nutzen - ohne sie zu überfordern und das UN-System in Frage zu stellen oder gar ‚revolutionieren' zu wollen.

5. *Legitimation der NGOs*: Der Vorschlag trägt dem Einwand Rechnung, dass NGOs nicht gewählt, also nicht demokratisch legitimiert sind. Die Kommission ist daher nicht als Vertretung von NGOs konzipiert. Auch den NGOs gegenüber hat sie, bei aller sachlich gebotenen Kooperation, unabhängig zu sein. Die von den Autoren vorgeschlagene Vorschrift, dass die NGOs, die sich am Nominierungsverfahren beteiligen dürfen, bei den UN akkreditiert sein müssen, stellt zugleich eine hohe Hürde und ein notwendiges Auswahlkriterium dar[9]. Nur bedeutenden internationalen NGOs ist bisher diese Akkreditierung gelungen.

6. *Angemessene Ausstattung*: Die Wirksamkeit des Vorschlags steht und fällt mit der Ausstattung eines solchen Gremiums, und dies dürfte wegen der damit verbundenen Kosten der am meisten kontroverse Punkt werden: Der Statutentwurf sieht zusätzlich zu den 20 Kommissionsmitgliedern 50 MitarbeiterInnen mit wissenschaftlicher und praktischer Erfahrung in etwa 20 relevanten Fachgebieten vor (Artikel 16, Sekretariat). Das ist angesichts der notorischen Finanznot der UN eine sehr hohe Hürde. Diese Aufwendungen stellen jedoch nur einen Bruchteil jener Kosten dar, die täglich weltweit für militärische Krisendämpfung aufgebracht werden. Die Einrichtung der Kommission würde dazu beitragen, ein Vielfaches dieser Kosten einzusparen. Es ist also eine Frage der politischen Einsicht und der Prioritätensetzung, ob der Vorschlag finanziell realisiert werden kann.

7. *Verhältnis von UNCOPAC zu anderen UN-Einrichtungen und Dienststellen, die sich mit Gewaltprävention befassen*: Gelegentlich wird gegen den Vorschlag eingewandt, dass es ja bereits Abteilungen der UN gibt, die sich mit Krisenprävention beschäftigen wie z.B. die ‚Political Unit' beim Generalsekretär und die bestehende Kompetenzen-Vielfalt der UN, von außen oft als ‚Dschungel' wahrgenommen, durch eine eigene Kommission für Gewaltprävention noch verzweigter werden könnte.

[9] Der Cardoso-Bericht enthält einige Vorschläge, wie die Akkreditierung in Zukunft einfacher und übersichtlicher gestaltet werden könnte.
Siehe: Panel of Eminent Persons on United Nations – Civil Society Relations <www.un.org/reform/a58_817_english.doc>.

> Das Problem liegt indessen darin, dass für diese Institutionen Prävention nur eine Aufgabe unter anderen ist, was auch von Kofi Annan in seinem Bericht vom Juni 2001 zur ‚Verhütung bewaffneter Konflikte' gesehen wurde. Die Frage der Gewaltprävention hat im gegenwärtigen politischen Weltsystem objektiv, und zunehmend auch subjektiv, d.h. im Bewusstein der politischen Akteure, einen so hohen Stellenwert, dass sie unbedingt einer zentralen Einrichtung bedarf, die ausschließlich den damit verbundenen Fragen gewidmet ist und dadurch innovativ wirken kann. Das muss nicht bedeuten, dass die anderen Einrichtungen ihre Präventionskompetenzen abzugeben haben. Vielmehr setzt der Vorschlag auf Synergieeffekte. Für UNCOPAC dürften genügend Aufgaben im o.g. Sinne übrig bleiben, selbst wenn alle bisher mit Einzelaspekten des Problems befassten Einrichtungen ihre Kompetenzen behalten. Schon jetzt versucht die ‚Initiative pro UNCOPAC' einen Beitrag dazu zu leisten, dass sich eine zivile Netzwerkstruktur entwickelt, die sich komplementär zur Staatenwelt verhält und Ansprechpartner für sie sein kann[10].

III. Schlussfolgerungen

Zusammenfassend: Die Frage nach der Sicherung von Human Security und Human Rights *in* (armed) Conflicts ist zu ergänzen durch die Frage nach ihrer Sicherung in Konflikten *bevor* sie einen kriegerischen Charakter annehmen. Nicht Konflikte an sich bedrohen die Menschenrechte und die Sicherheit der Zivilbevölkerung, sondern der Modus ihrer Austragung. Darauf kann die internationale Gemeinschaft Einfluss nehmen, wenn sie sich die dafür nötigen Voraussetzungen schafft. Der Vorschlag UNCOPAC trägt der faktischen Entwicklung und Bedeutung zivilgesellschaftlicher Einrichtungen und Initiativen der letzten 15 Jahren in diesem Feld Rechnung. Er könnte zugleich eine erhebliche Stärkung der Fähigkeit der VN bewirken, die menschlichen, politischen und ökonomischen Kosten von Konflikten zu senken, die regelmäßig dann eskalieren, wenn der richtige (frühe) Zeitpunkt versäumt wird, an dem zivile Anstrengungen noch möglich sind, um den Konflikt in friedliche Bahnen zu lenken. Im Kosovo wäre dies 1992/93 noch möglich gewesen, wurde aber nicht versucht –

[10] Siehe hierzu die Website: Global Partnership for the Prevention of Violent Conflict: <http://www.gppac.org>.
Die Initiative Pro UNCOPAC ist Partner dieses Prozesses und arbeitet aktiv an der Interaktion zwischen UN und zivilgesellschaftlichen Organisationen. Während eines ein-Tages Working Group Treffens (am 21 Juli 2004) hatten Delegierte von NGOs, Regierungen, der UN, der Welt Bank und Mitgliedern des Global Partnerships (ECCP) eine angeregte Diskussion über die Stärkung der UN-Zivilgesellschaft Beziehung in der Frage der Konflikt Prävention. Heide Schütz (Sprecherin von Pro UNCOPAC) hob die Notwendigkeit für neue Mechanismen und Strukturen in der Konflikt Prävention in Vereinbarung mit bestehenden hervor. Bevorstehende Treffen in New York und Genf werden die Konferenz "The Role of Civil Society in the Prevention of Armed Conflict", die im Sommer 2005 in New York, vorbereiten.

mit bis heute verheerenden Folgen. In Estland ist es dagegen mit großer, gemeinsamer bzw. komplementärer Anstrengung von internationalen Regierungs- und Nicht-Regierungsorganisationen gelungen[11]. UNCOPAC ist der Versuch, der derzeit herrschenden Willkür, in welchen Fällen solche Anstrengungen unternommen werden und in welchen nicht, eine systematische und kontinuierliche, international gebündelte Aufmerksamkeit entgegen zu setzen.

English abstract

In his essay Reiner Steinweg states that the question of ensuring human security and human rights *in* (armed) conflicts has to be complemented through the question of ensuring them *before* the conflicts become warlike. Not conflicts threaten human security and human rights, but their modus operandi. Hereon the international community can take influence, if the necessary preconditions are set. He focuses on a challenging new model for the prevention of violent conflict: on the United Nations Commission on Peace and Crisis Prevention (UNCOPAC).

As a contribution to the ongoing discussion on a democratic reform of the United Nations' structures, his paper proposes the creation of a UN body (as a subsidiary body of the General Assembly) in which all regions of the world shall be represented and put together by the principle of gender-balance. The 20 members of the Commission shall be nominated in a two-step procedure by NGOs which are accredited with the UN and are active in the field of crisis prevention, conflict resolution, peace building/peace consolidation, human rights, peace education and humanitarian aid, and shall be elected by the General Assembly of the UN. The proposed members shall not represent the NGOs, but shall be highly respected people of public life and the world's major cultures.

The United Nations Commission on Peace and Crisis Prevention shall:
"*- produce analyses and develop appropriate recommendations for the General Assembly and the Security Council on the necessity and urgency of early non-military intervention in crisis areas;*
- undertake a regular evaluation of crisis prevention measures;
- initiate and coordinate the institutionalization of peace education and conflict transformation worldwide, and
- have the right to inform the Security Council"[12].

[11] See: Hanne Birckenbach, *Warum kein Krieg? Ein Beitrag zur Kriegsursachenanalyse*, in Thomas Greven and Oliver Jarasch (Hrsg.), *Für eine lebendige Wissenschaft des Politischen*, Edition Suhrkamp, Frankfurt am Main, 1999, at pp. 151-165.
[12] UNCOPAC. A Model for the Prevention of Violent Conflict, Realizing the Intention of the UN Charter. See online at:
<http://www.pro-uncopac.info>.

UNCOPAC is also seen a way for the civil society to have a voice at the UN level. NGOs shall have the right to make applications to the Commission to deal with crisis in areas they are active. The Commission can also consult NGOs and NGOs shall regularly inform the Commission written and orally of its decisions.

The proposal of establishing UNCOPAC has so far been singed by around 30 NGOs as well as numerous Peace-, Politics and International Law scientists and members of civil society organization[13].
(For comprehensive information about UNCOPAC please see: www.pro-uncopac.info).

[13] For the list of supporters see:
<http://www.pro-uncopac.info/english/grafik/pdf/4.2_pdf.pdf> and <http://www.pro-uncopac.info/english/grafik/pdf/4.3_pdf.pdf>.

How Could the Rights to Education and Representation Challenge National Security? The Headscarf Conflict in Turkey Revisited

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Starting with 1980s, the protests of Turkish pious women to receive higher education with headscarf and their zealous effort in the success of the Islamist parties fostered the anxiety of the secularists, specifically the military. This culminated within the 28 February process and the events after Merve Kavakçı had been elected as a veiled parliamentarian. This paper analyzes how these developments were perceived as a challenge to the secular establishment of the state and became a matter of national security.

I. Introduction

Women, though symbol of Kemalism[1] having granted them suffrage in 1934 earlier than many Western countries, experience ill-treatments in contemporary Turkey, the unique secular Muslim country with notorious human rights records.[2] The human rights abuses against women vary from official laxity, if not negligence, in the implementation of their legal rights to existence of 'honor crimes', the killing of a woman by her male relatives for dishonoring her family by the perception of an inconvenient behavior affiliated with her sexual chastity and virginity.[3] The demand of pious Turkish woman to be in the public sphere

[1] The Turkish official ideology inspired from Mustafa Kemal Atatürk, the founder of the Turkish Republic, is based on his authoritarian modernization, read as Westernization, with special reference to secularism and nationalism.

[2] Yeşim Arat, *Women's Rights as Human Rights: The Turkish Case*, in Human Rights Review, vol. 3, no. 1, pp. 27-34, at p. 28.

[3] For further information, see the latest report of Amnesty International (AI), *Turkey: Women Confronting Family Violence*, 2 June 2004

crystallized in the protests to receive higher education in veiled attire and the events after Merve Kavakçı's election as a headscarved parliamentarian. This paper is about how these demands were perceived as a challenge to the secular establishment of the state and became a matter of national security.

II. The historical background of the headscarf conflict in Turkey

The identity of women in Republican Turkey has always been molded through the conflict between Islam and Kemalism which has been the *"project of civilization by which the local patterns and the traditional values are dismissed and devalorized"*[4] to homogenize the society for the sake of the evolving nation-state. In this context, Islam, the legitimatizing basis of the previous Ottoman state, was demoted not to challenge the state-centric secular national identity. Thus, the Kemalist reforms of the 1920s and 1930s not only ameliorated the social status of women, but politicized them in creating a devoted body of female citizenry to elevate Turkey to the level of contemporary, read as Western civilization. Identifying women as the transmitters of the new national identity, Kemalists emphasized the modernization of women for the benefit of the Republican regime. The veil, having rooted within Islamic piety, in such a framework, was informally discouraged as a symbol of traditional and backward bondage despite no clear enforcement on the women's attire because Atatürk did not interfere in the women's clothing style unlike his contemporary Westernizers.[5]

Historically, the first veiling controversy reportedly happened in 1968 when Hatice Babacan, a female student of the Ankara University Theology Faculty, was dismissed for wearing a headscarf at school. However, the main controversies emerged with the 1980s when a considerable mushrooming in the number of veiled students attending universities, 'the castles of modernity'[6] started. The Islamist women became further visible in public sphere challenging Kemalism's relegation of the religion into the private sphere. This went hand in hand with the slight but significant change in the cultural atmosphere of the country when the official ideological taboos were demystified by the language of difference[7] and the settlement of relatively liberal economics and politics. Turk-

<http://web.amnesty.org/library/index/engeur440132004> All websites occurring in this essay were last checked on 1 November 2004.

[4] Nilüfer Göle, *Secularism and Islamism in Turkey: The Making of Elites and Counter-Elites*, in Middle East Journal, vol. 51, no. 1, pp. 46-58, at p. 46.

[5] Reza Shah of Iran and King Emanullah Khan of Afghanistan banned the veil which paved the way to immediate radicalism. Ironically, formal pressure on veil in the Turkish case also resulted in similar radicalism in the post-1980 period.

[6] Nilüfer Göle, *The Forbidden Modern*, University of Michigan Press, Ann Arbor, 1996, at p. 84.

[7] Fuat E. Keyman, *On The Relation between Global Modernity and Nationalism: The Crisis of the Hegemony and the Rise of (Islamic) Identity in Turkey*, in New Perspectives on Turkey, vol. 13, no. 3, pp. 93-120, at p. 111.

ish-Islamic Synthesis (TIS)[8] legitimating military junta before public in the early 1980s, also helped smooth Kemalist authoritarian secularist aspects elevating Islam to be the most significant element of Turkish identity.

In 1982, the Council of Higher Education (YÖK) banned the wearing of the headscarf by regulation. As a result of the increasing protests, the YÖK later allowed *türban*, a kind of headscarf covering the head but neither neck nor shoulders, as an intermediary solution. However, the Islamic-oriented female students showed their refusal to be within the limits of the YÖK in their mass protests at the expense of losing their university education. This enabled Islamist movements for more mass support and public visibility crystallized in women's protests for higher education with headscarf. In 1988, Turkish Grand National Assembly (TBMM) passed a law permitting to cover head and body on the basis of religious faith. This law abrogated the YÖK's other regulation of the same year banning also *türban*. Nevertheless, the then President Kenan Evren[9] appealed to the Constitutional Court for the amendment of the law and the Court repealed the law stating that the veil is a *political symbol* rather than a requirement of religious faith and thus should not be permitted in universities. In 1989, the right to decide on the issue was left to the individual universities, which provided a temporary solution while keeping the problem intact.[10]

II. *28 February process* and *Merve Kavakçı* case

In the 1990s, the veiling controversy erupted as a significant front within the confrontation between Islamists and military, the staunch praetorian guardians of the Turkish Republic who perceive headscarf as the *ideological uniform of fundamentalism*. The veiled women became more and more visible and militant than they had ever been before through their sit-ins in demonstrations and even death-fasts. They were also the invisible hands behind the electoral victories of the Islamist Welfare Party (RP) in the 1994 local and 1995 general elec-

[8] The TIS was constructed by a group of conservative scholars organized in the Aydınlar Ocağı (Intellectuals' Hearth) arguing that Islam had a special attraction to Turks due to supposed similarities between pre-Islamic Turkish society and Islamic civilization including a sense of justice, monotheism, belief in the immortal soul, and a strong emphasis on family life and morality. This group of people conceptualized religion as the essence of Turkish culture and asserted that the Turkish nation was best represented in the triangle of family, mosque and barracks. However, according to their approach, this representation was ruined as a consequence of imitating the West blindly. In order to overcome this defect, the state should take an active role in formal education and support development of national music, literature and visual arts.

[9] Evren Kenan was the Chief of the military staff who led the 1980 coup d'état and acted as the State President until the 1982 constitutional referendum when he was elected as the President of the Republic and served at this post until 1989.

[10] Elisabeth Özdalga, *The Veiling Issue, Official Secularism and Popular Islam in Modern Turkey*, Curzon Press, Richmond, 1998, at pp. 41-46.

tions and its consecutive senior partnership in the short-lived coalition government with the True Path Party (DYP) from July 1996 to June 1997. The RP had approximately one million female members who constituted one fourth of its total registered members. These women did not hold any official position neither in the local nor in the central party organization upper echelons, except the women branch, but they worked restlessly during the electoral campaigns. Thus, the decree of extrajudicial precautions, including steps vis-à-vis headscarf, proposed by military generals in the National Security Council (MGK) meeting on 28 February 1997 hit especially the RP and its benevolent women. This *post-modern coup d'état* both accelerated the Chief Public Prosecutor of the Republic, Vural Savaş[11] to file a case against the RP on 21 May 1997 for its closure and the forced resignation of the then PM Necmettin Erbakan on 17 June 1997, after eleven months of government. Consequently, the RP was closed on 17 January 1998 by the Constitutional Court decision including Erbakan's five year political ban. This proved the invisible legitimacy of military interference on civilian authority and fragility of Turkish democracy far away from cultivating robust human rights, specifically in terms of representation.

These developments titled the following era as the *28 February Process* in which clear violations vis-à-vis the freedom of belief happened to be routine practices due to arbitrary attitudes towards pious people, especially on veiled women. Ironically, the priority of national security determined by the military predominantly shifted from the struggle with the separatist Kurdish rebels having murdered numerous civilians and security officers to Islamists, so the veiled women. This shift was boldly declared by the military generals. In February 1998, headscarf was also forbidden in classes, except Koran courses, in Prayer Leader-Preacher High Schools (IHLs) and the YÖK stiffened the ban by a regulation on universities not to enroll students delivering headscarved photos for their university identity cards. This resulted in more than 1.000 legal cases in Turkish courts awaiting results. Then, on 11 October 1998, three million people performed the greatest massive civil disobedience act in Turkish history, human chain, all throughout Turkey, demanding freedom to education with headscarf. This protest was big enough to overshadow the vivid celebrations of the 75th anniversary of the Turkish Republic on 29 October 1998.

Beside the ban on headscarf in the universities and the state offices, a further development deepened the problem following the renewal of the Turkish Parliament after the 18 April 1999 elections. On 2 May 1999, at the inaugural day of the renewed Parliament, Merve Kavakçı - the computer engineer graduate from Texas University- who was elected the pro-Islamic Virtue Party (FP) - the moderate successor of the closed RP- ticket from Istanbul, attempted to take her oath of office with her headscarf. When Kavakçı entered the meeting hall of the parliament wearing her headscarf and a long loose coat that hid her figure, the

[11] He claimed that the Islamist Welfare Party (RP) became the focus of the activities against the principle of secularism of the Constitution and accused the RP of bringing the country into brink of a civil war.

reaction against her was so explosive and pervasive that the TBMM temporarily ceased to function. Her fellow FP members stood and cheered while she was taking her seat in the parliament before the members of the minority center-right parties' wordless inaction. Deputies of the Democratic Left Party (DSP) banged on desks and stood shouting *"Merve get out!"* while gathering in a crowd in which the female members of the DSP stood to the front as examples of legitimate female members of the Turkish parliament. Kavakçı sat in silence, looking tense and left the assembly without taking the oath. Prime Minister Bülent Ecevit declared in a harsh manner: *"Everyone in Turkey has the right to wear whatever they like in their private lives. But the General Assembly of Parliament is not within the bounds of anyone's private life. Those in state life should obey the rules and regulations of the state. Parliament is not the place to challenge the state"*[12].

Nesrin Ünal, another veiled deputy from the Nationalist Action Party (MHP), before the inaugural ceremony, said that though she wanted very much to wear the headscarf in Parliament, she would follow the instructions of her party leadership and attend parliamentary sessions bareheaded, if necessary. She behaved in line with her previous statement and came to oath-taking ceremony in a modest woman's suit without her headscarf. She was immediately cheered by the secularist parliamentarians and praised by the secularist press, though condemned even by the religious sections of her party. At the same time and the following days outside of the Parliament, secular citizens, especially women, took to the streets in protests condemning Kavakçı and invoking the name of Mustafa Kemal Atatürk as a religious hymn for protection against this *threat* to the state. The television news and newspapers were covered by these demonstrations and meetings in which the main theme *"Turkey is secular and will remain secular"* voiced by secular crowds who gave a visit to the mausoleum of Atatürk in Ankara to display their devotion to his secularist principles. The protesting secular people assumed that Kavakçı's act was such a preliminary step of changing Turkish political regime into a Sunni version of Iran. Within days of all these protests either in the TBMM or outside, President Süleyman Demirel identified her as an 'agent provocateur' working for foreign powers though he did not specify the identity of these foreign powers. Parallel to Demirel's statement, it was claimed that she was an agent of Iran, Saudi Arabia, Hamas or Hezbollah, even though Kavakçı had earlier criticized Iranian government about its negligence on freedoms. Various secular media agents as well as politicians condemned Kavakçı as the 'puppet' of Necmettin Erbakan and even the Islamic circles and some sections of the FP identified the issue as a mistake starting with her candidacy for the elections particularly at a time when the military has strengthened its upper hand in the internal politics.

Afterwards, when it was discovered that Merve Kavakçı had become a United States citizen prior to the elections without obtaining official permission

[12] *Turkish Daily News*, 3 May 1999 <http://www.turkishdailynews.com>.

of Turkish authorities for dual citizenship, she was conveniently stripped of her Turkish citizenship through a government decree, which also meant she would lose her parliamentary seat. Her U.S. citizenship was evaluated as proof to Demirel's accusation on her while ignoring her preference for a secular country citizenship rather than any Muslim populated one. Despite Kavakçı filed a suit against the government's decision to revoke her Turkish citizenship, the Council of State, the highest court dealing with state administrative affairs, rejected this appeal on 8 February 2000 while closing the door effectively for her to return her seat as parliamentarian. Kavakçı's lawyer Salim Özdemir stressed that this was a political decision rather than a juridical one. Consequently, Kavakçı has applied to the European Court of Human Rights (ECtHR) after exhausting her last right of appeal to the Supreme Court for final review of her case. Recently, ECtHR requested a defense from the Turkish government regarding her case. Last but not the least, her marriage with a Turkish citizen helped her to receive Turkish citizenship again, but she did not get her Parliamentarian seat back[13].

Briefly, Merve Kavakçı, in a determined way, defended her 'democratic' right to wear her headscarf and represent the Turkish population in the TBMM despite the massive uproar in the Parliament and the protests everywhere. She said *"*[*t*]*his cloth that covers the heads of the most honored mothers and wives of our martyrs is being shown as an obstacle to Merve Kavakçı before entering parliament."*[14] She underlined that she has been chosen with her headscarf, and represented some 70% of women in Turkey covering their head. She claimed that nothing in the rules regulating the Parliament prevented her from wearing her headscarf since the rules only stated that she should wear a suit without mentioning a head cover. Then, the Chief Prosecutor of Republic, Vural Savaş who had already obtained the closure of the predecessor RP, put down an investigation about her if *"inciting hatred among the people with respect to religion"* (the Article No. 312/2 of the Turkish Penal Code) followed by his file demanding the permanent closure of the FP, which resulted in its closure on 22 June 2001.[15]

[13] Turkish governments respectively encouraged people to receive another citizenship, preferably Western countries, and even distributed *Pink Card* to ones who have to give up their previous Turkish citizenship in order to receive German citizenship. The Pink Card allowed its holder to benefit all the Turkish citizenship rights with the impunity of responsibilities leading a source of conflict between Turkey and Germany. Moreover, Turkish governments have never been strict on people about informing of their new double citizenship. Thus, Kavakçı's case shows hypocrisy of the Turkish state.

[14] Hidir Goktas, *Headscarf Turk MP Vows to Battle Secularists*, Reuters, 3 May 1999.

[15] Kavakçı's case resembles experience of Leyla Zana, Kurdish-origin MP after October 1991 general elections. Ms. Zana had also become the target of protests following her short Kurdish statement, after her oath-taking ceremony, wishfully demanding the peaceful cohabitation of Kurdish and Turkish people within a democratic framework. Immediately, the Parliament lifted her parliamentary immunity and, on 8 December 1994, she was convicted on charges of treason and sentenced to 15 years of imprisonment by the Ankara State Security Court. This prompted her European Parliament's 1995 Prize for the Defence of Human Rights.

III. Conclusion

Consequently, what is at stake about the headscarf in Turkey is the clash between the secular nationalist identity as the bearer of cultural homogenization and the revitalization of the claims of difference as Muslim identity. The female body in this context has been overpoliticized, which oriented headscarf to be evaluated as the flag of fundamentalism rather than cover of pious Muslim women. Although one can easily observe women in headscarves of different sorts in Turkey, the secular establishment has banned wearing of headscarves in the public sphere, including universities due to its alleged political content. Turkish Kemalist elite, led by the military, has regarded the veil as the symbol of political Islam and hidden fundamentalism whose supposed goal is to establish an anti-democratic government based on Sharia Muslim Canon Law. Finally, when Merve Kavakçı attempted to take her oath of office wearing a headscarf in line with her religious beliefs, she drew attention as an index of political Islam penetrating the Westernized secular realm of the TBMM.

Turkish Kemalist elite have been harsh in violation of the basic human rights of education and representation by dictating women to unveil. Thus, they also easily abused freedom of belief, which intensified major human rights concerns about Turkey on the international agenda. The headscarf problem in the public sphere remains deadlock today because of Kemalist elite's reluctance to step further for solution and the civilian governments' hesitance to face military anxiety. This is clear in Recep Tayip Erdoğan's preference, the Islamic-rooted PM served in the upper echelons of RP and VP, having his veiled daughters sent abroad to continue their higher education. The international pressure, however, especially the European Union (EU), incrementally has triggered Turkey in promoting human rights standards, which permit women to voice their demands louder. Briefly, we could be hopeful about the termination of such violations of human rights as Turkey adopts the EU's *acquis communitaire* insofar its desire for membership. Thus, as much as Turkish authoritarian secular political establishment liberalizes in such a framework, this will permit veiled students to receive higher education and participate in the public sphere more thereafter.