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Support for a Humanitarian *Jus in Bello*

Maintenance of the distinction between *jus in bello* (law of war) and *jus contra bellum* (law against war) is crucial for the effectiveness of the former. The efficacy of the laws of war depends upon their being supported regardless of who started the war or for what reason. Questions about aggression and self-defense, about whose cause is just, must be considered a separate subject in order for combatants and civilians to be protected and assisted. It is of central importance, therefore, to examine the degree of support for this traditional distinction manifested at the recently concluded Geneva Diplomatic Conference on Humanitarian Law.[1]

It is hardly sufficient to note that two Protocols additional to the Geneva Conventions of 12 August 1949 were adopted at that Conference and from this to conclude that there was widespread support for a humanitarian *jus in bello* entirely separate from any concern about causes of war and motivation of fighters.[2] In theory, the Protocols could contain concepts violating the traditional distinction. In fact, that very charge was levied by certain delegations at the Conference. Also in fact, attacks on the distinction did occur.

This brief essay will outline Conference developments on three issues: a general and explicit assault on the traditional distinction by the Democratic Republic of Vietnam; an alleged assault on the distinction by third world and socialist states in their support for the adopted article on "material field of application" of Protocol I on international armed conflict; and a clear assault on the distinction concerning humanitarian protection of mercenaries.

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[1]The Conference convened in 1974, ran until 1977, and was preceded by meetings of individual and governmental experts hosted by the International Committee of the Red Cross (ICRC). Its further origins are usually traced to resolutions of the Red Cross Conference and to resolutions emanating from the United Nations Teheran Conference on Human Rights.

[2]Final Act of the Conference, 10 June 1977.

The DRVN and Humanitarian Law

At the 1974 session of the four-session Conference, the DRVN tabled a document indicating clearly its rejection of humanitarian *jus in bello* as a body of law separate from questions of aggression and self-defense.[3] In this author's view, the proposal constitutes the most explicit rationale thus far available for that state's behavior in the Vietnam war toward detained American personnel. For the DRVN, the traditional separation of two bodies of law dealing with violence "has proved to be inadequate" and "a flagrant anomaly." Humanitarian law has to be integrated with *jus contra bellum*. The traditional concern for equal rights and impartiality is "outdated" because of "the absence of a concept of justice." The highest purpose of humanitarian law should be to fight imperialism. That law should also condemn aggression. One specific result of this approach is that "all those who commit international crimes related to armed conflicts and who are caught in the act shall not be entitled to prisoner-of-war status." Thus if one fights for "imperialism," one is not protected under humanitarian law. And so on.

This attitude, negating entirely a *jus in bello,* traditionally accepted for more than a century, indicates why the DRVN failed to observe many of its legal obligations under the Third Geneva Convention of 1949, to which Hanoi was, and is, a party; and why its behavior in the Vietnam war was not made legal by its reservation to Article 85 of the Third Convention pertaining to the end of prisoner-of-war protection upon conviction for war crimes.[4]

The more generally significant point about the DRVN's position at the Diplomatic Conference is that the position failed to muster support. Neither the Soviet-led group nor the People's Republic of China (in the one session it attended) supported Hanoi's stand. Likewise, Third World states and national liberation movements did not support the DRVN despite their pronounced sympathies for anti-imperial efforts. Several representatives referred to the DRVN document in debates on mercenaries. But, in general, the document became a dead letter; not even the DRVN spoke in its favor, such was the distance between its contents and sentiment in the Conference.

Wars of National Liberation

In 1974 a draft article was adopted in commission which emerged un-

[3]CDDH/41. This DRVN document consists of a five-page statement of "Basic Considerations," followed by seven pages of detailed amendments to the draft Protocol presented by the ICRC.

[4]Debates about Hanoi's reservation to Article 85 are legalistic, missing as they do the overriding approach to such questions found in CDDH/41. The fact remains, as Professor Howard Levie has so well demonstrated, that Hanoi's behavior toward American pilots was not legal since under socialist reservations a detained combatant must be *convicted* of war crimes before, in their view, the protection of the Third Convention ceases.

changed from the final plenary in 1977 pertaining to the "material field of application" of Protocol I on international armed conflict. This first article specified the material or factual situation covered by the Protocol. As such it defined international war. A number of delegations, mostly if not entirely Western, charged that this article interjected considerations on just wars into *jus in bello.* These delegations asserted that in the light of Article 1 certain wars, "in which peoples are fighting against colonial domination and alien occupation and against racism regimes in the exercise of their right of self-determination," were international because of the "just" cause pursued. Said to be cast aside was the traditional definition of international war based on actors involved (states) and territory (international boundary crossed).

Elsewhere this author has analyzed this debate at some length.[5] Suffice it here to say that Article 1 of Protocol I can be entirely understood without reference to just wars, aggression or self-defense. Violent action against "colonial domination and alien occupation and against racist regimes" blocking "self-determination" can be considered, factually speaking, international situations to which the international laws of war should apply. Colonialism is, after all, an international process in fact. Portugal needed to engage in intercontinental action to establish and maintain African colonies; it needed international support (from NATO) to do so; and it faced international opposition (including internationally supported and executed violence) in so doing. It is, therefore, not factually unreasonable to have regarded violence in support of liberation for Mozambique *et. al.* as constituting international armed conflict. Similar arguments could reasonably be made—based on material facts—regarding the international nature of foreign domination (i.e., Turkey in Cyprus; Israel in the Golan). And the United Nations Security Council has already determined that the racist regime in Rhodesia is an international subject matter and comprises a threat to international peace and security (and who can reasonably deny the international nature of the violence involving Rhodesia?).

The above paragraph is not to say that third world states at the Conference —supported by the Soviet-led coalition—were simply interested in accurately linking international law to international facts. Their language was often the language of the just war. They did want increased status—as conferred by law—for liberation movements and their "freedom fighters." They did want to bind Rhodesia, South Africa, and Israel with more legal restrictions. And much of the Third World did not want more international law to regulate internal wars in *their* nations—wars which were frequently as international in fact as wars of national liberation against colonialism, occupation, or racism

[5] *The 1974 Conference on Humanitarian Law: Some Observations,* 69 A.J.I.L. 77 (1975).

blocking self-determination.[6] The Third World was clearly trying to use "humanitarian law" to impede Rhodesia, South Africa, and Israel, and to promote the cause of the PLO, PAC, and ANC.

But almost all states seek to tailor humanitarian law to their interests. Nuclear states make announcements protecting the nuclear option from the rules of the Geneva Conventions and Protocols. States that rely on conventional military force protect the effective use of that option. And, in the last analysis, it is relatively easy to understand Article 1 of Protocol I without reference to "just war" ideas. One can admit with accuracy that the situations described as international armed conflicts by Protocol I are indeed international in fact, and then apply the rules of the Protocol to all paties equally. No deviation from a humanitarian *jus in bello* traditionally conceived and supported is involved.

Mercenaries

Much of the Third World—and the East Europeans—seemed at times to regard mercenaries as beyond the pale of humanitarian concern.[7] At the second session of the Conference in 1975, the Nigerian representative had said: "It was to be hoped that the term [in a Norwegian proposal pertaining to protection of fighters] did not mean mercenaries, for they had no right to protection, even out of humanitarian consideration."[8] Likewise did India[9] and the Ivory Coast,[10] among others, regard mercenaries as not worthy of humanitarian protection and assistance.

The Eastern Europeans spoke at length in support of this Third World position. A long statement by the Ukrainian delegate was, if anything, even more sweeping in its denunciation of mercenaries than statements by third world states.[11] The Eastern Europeans also proposed to exclude explicitly mercenaries from humanitarian protection under Protocol II on internal war,[12] although this effort did not succeed.

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[6]An anlaysis of third world opposition to more law on non-international armed conflict, is set forth in the present writer's *Legal Regulation of Internal War: The 1977 Protocol on Non-International Armed Conflict,* to be published.

[7]For background see Henry W. Van Deventer, *Mercenaries At Geneva,* 70 A.J.I.L. 811 (1976).

[8]CDDH/III/SR.34, 24 March 1975, p. 30.

[9]*Ibid.*, p. 29.

[10]CDDH/III/SR.36, 25 March 1975, pp. 2-3.

[11]CDDH/III/SR.34. The Ukrainian delegate stated, *inter alia,* "The draft Protocols ought to indicate that mercenaries did not benefit from the status of combatant and should be regarded as criminals, with all that entailed. . . . It was now established in the Protocols that there were three main categories of combatant, namely regular armed forces, national liberation movements and mercenaries. To accord mercenaries the safeguards offered to the other categories would be contrary to the rules of existing international law and also to the resolutions of the United Nations General Assembly and the Security Council."

[12]*See* the Ukrainian statement in CDDH/I/SR.34, 16-17.

Here was a clear case of interjecting considerations of motivation and basic cause into humanitarian *jus in bello.* Said the representative of ZAPU (Zimbabwe African People's Union), raising a rhetorical question about certain combatants: "Or were they mercenaries claiming the status of prisoners-of-war while they fought solely for ignoble causes of selfishness and greed?"[13]

Western delegations struggled against this trend, and largely through their efforts—with the American chief of delegation playing a central role—a compromise was reached. Mercenaries were not to be considered, legally, as either prisoners-of-war or other "combatants under Article 47."[14] But mercenaries were to be granted certain fundamental rights under Article 75 even if they were to be denied the rights of "prisoners-of-war" or other "combatants."[15] This arrangement is not found explicitly in the Protocol on international war. But the linkage was articulated, without challenge, by a number of Western delegations.[16] In 1977 the Nigerian delegate said: "While recognizing the fundamental guarantees provided for in the new Article [75] of Protocol I and not denying the common humanity which mercenaries shared with the rest of mankind, he did not think that such considerations could serve as a pretext for giving mercenaries the rights of combatants or prisoners-of-war in any situation of armed conflict."[17] The Canadian delegate sought to make the legislative history more clear by stating that he "welcomed the recognition by the Nigerian representative that mercenaries were entitled to the fundamental guarantees provided in Article [75]."[18] There was no challenge to this interpretation.

Conclusion

At the Geneva Diplomatic Conference on Humanitarian Law, there were indeed attempts to erase the traditional distinction between a humanitarian *jus in bello* and *jus contra bellum.* But none of these attempts succeeded, in the final version of the Protocols, in denigrating this traditional distinction so fundamental to an effective law-of-war. The most general attempt by the DRVN (by 1977 the Socialist Republic of Vietnam) got nowhere. The more limited at-

[13]CDDH/III/SR.36, 19.

[14]Article 47: Mercenaries. Paragraph 1. "A mercenary shall not have the right to be a combatant or a prisoner of war." In paragraph 2 there follows a six-part definition of a mercenary.

[15]Article 75: Fundamental guarantees. Paragraph 1. "In so far as they are affected by a situation referred to in Article 1 of this Protocol [material field of application], persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances. . . ." Three paragraphs follow detailing the minimum definition of humane treatment. The last paragraph alone entails ten specific norms.

[16]See the statements in CDDH/SR.41; and CDDH/SR.43.

[17]CDDH/SR.41, p. 23.

[18]*Ibid.*, p. 26.

tempt to put mercenaries beyond the pale did not succeed; they were afforded humanitarian rights even though symbolically they were assigned to a tertiary position behind prisoners-of-war and other "combatants." And Article 1 of Protocol I can be, and should be, understood without reference to causes of war.

Some of the states that were in the process of blurring the distinction between the two bodies of law submitted a proposal in 1975 apparently intended to "paper over" differences of opinion and reassure the West.[19] This proposed amendment expressed opposition to wars of aggression while paying lip service to traditional humanitarian law in principle. The proposal led nowhere, but it did support—on paper—the traditional distinction.

One can be pessimistic about the events at Geneva briefly examined here. It was clear that most governmental delegations did not regard humanitarian law as separate from *machtpolitik*. Certainly it was no reason for optimism to see lawyers and diplomats try to fashion humanitarian law to meet past, present, and future power struggles partly based on ideology and emotions. If lawyers and diplomats found it so easy to curtail their humanitarian impulse in the splendid isolation of this Diplomatic Conference, where interest from the press and even home capitals was mostly lacking, how much more likely would it be for that humanitarian impulse to be curtailed to the point of extinction on the battlefield.

Yet, from the legal perspective, a textual analysis of the Protocols, supported by an examination of their legislative history, reveals that the traditional distinction between *jus in bello* and *jus in contra bellum* is still intact. The greatest number of states at the Conference finally accepted that distinction, at least insofar as the law on the books is concerned. We still know little about the future behavior of the Socialist Republic of Vietnam (in the light of its early proposal); or about the People's Republic of China (in the light of its not attending the latter three sessions); or about the Democratic People's Republic of Korea (in the light of its silence on most issues at the Conference). But it is likely that most states will sign, ratify, or otherwise adhere to at least Protocol I on international armed conflict, in which case they will have reaffirmed and developed humanitarian *jus in bello* as traditionally understood.

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[19]CDDH/III/284. This 18-power draft, sponsored by the East Europeans plus Algeria, Egypt, Bangladesh, North Korea, Iraq, the PLO, and the Sudan, stated in part, "They [the High Contracting Parties] agree that the protections accorded by the Geneva Conventions on the protection of victims of war of 1949 and by this Protocol shall be extended without any discrimination to all victims of the conflict without regard to the causes espoused by the party to which they belong."