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Jacob W.F. Sundberg

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HUMANITARIAN LAWS OF ARMED CONFLICT IN SWEDEN: LOOKING AT THE SOCIALIST CAMP

by

JACOB W. F. SUNDBERG*

I. SWEDEN — A COUNTRY SURROUNDED?

THE INHABITANTS OF A country with the military-geographical location of Sweden should find it natural, one would think, to consider extensively the political and legal-philosophical message of the world which surrounds the country, most conspicuously to the east and to the south, and, by navies below the horizon, less conspicuously to the north and to the west. Everywhere is the Socialist Camp — a not unlikely adversary in some future conflict. In Sweden, however, there prevails a surprising reluctance to discuss the realities of the Camp. To say the least, such discussion is up-hill work. Looking for the reasons why, a few things stand out. Many top people suffer from the Hammarstiölet complex: they need the Socialist assent to their international designs and feel that they cannot afford to upset the leaders in the Camp. Mass media are massively uninterested. With few exceptions, the scholarly world looks resolutely the other way. A Royal Academy may even refuse to publish the papers of one of its own members if he has addressed too directly the issues which Swedes would prefer did not exist.¹

What happens in a scientific academy is, of course, the most extreme expression of this don't-rock-the-boat mentality. However, when the same mentality permeates Swedish society in general and the mass media in particular, it comes to influence deeply Swedish thinking on a number of international law points. For instance, while there is, in Switzerland, a vivid discussion of what neutrality signifies in a post-war world dominated in so many ways by the United Nations Organization and whether neutrality is reconcilable with UN membership,² Swedes feel very uncomfortable discussing such issues at all, in spite of their UN membership and all their talk about neutrality. Swedes prefer not even to mention the Swiss and the Austrian discussion of the issues.³

*Professor of Jurisprudence, University of Stockholm.

¹This was the fate of the Swedish version of the paper which the author (who in 1967 was elected corresponding member of *Kungl. Orlogsmannasällskapet*) contributed to the Professional Studies Conference on the Humanitarian Laws of Armed Conflict at the Naval War College, Newport, R.I., 26-28 November 1979, and which he subsequently submitted for publication in the Academy periodical *TIDSKRIFT I SJÖVASENDET*.

²See, e.g., Henggeler, "Ist das schweizerische Neutralitätsstatut mit der Uno Mitgliedschaft vereinbar?", *Neue Zürcher Zeitung*, 3 December 1982, p. 25; Diez, "Stellungnahme des Departements für Auswärtige Angelegenheiten." *Id.*

³A comparative discussion of the legal issues in the Swiss, the Austrian and the Swedish neutrality claims was offered in my article, Sundberg, *Neutralitet — finns det?*, 1971 *SVENSK JURISTTIDNING* 321, 338 ff.

One would believe a citation cartel had been set up.⁴ Mass media however, — as I will shortly try to prove — have seen to it that most Swedes do not even know about the issues.

The mass media world is not easy to fathom. You may be able to indicate what was written, you may have a feeling about what was *not* written, but the burden of proof weighs heavily upon the observer who is rash enough to venture a statement that something *is* so in mass media. I believe I can show, however, by a rather simple device that has a bearing upon the theme of this article, the very anti-legalist attitude of Swedish mass media.

Legal issues facing prisoners of war have been made to surface in the general debate by some specific international cases. This happened when the triumphant Socialist forces put Colonel Callan and his men to trial in Luanda, Angola, as “mercenaries” in 1976. It happened again when Captain Alfredo Astiz was taken prisoner of war by the British in the Falklands war in 1982, reviving interest in his involvement in the previous Argentinian troubles where he was accused of having practiced torture, one of the alleged victims being a young Swedish woman, Dagmar Hagelin. If you compare first class Swedish press coverage with that of corresponding English and American papers, it stands out how massively uninterested the Swedish mass media were in the legal issues which were given prominent coverage in the Anglo-American press.⁵ In all likelihood, the legal issues were not even understood by the Swedish mass media people and consequently ignored — just as the laws of neutrality and the legal concepts of the Socialist Camp have been deliberately ignored.

This background makes it an intensely interesting but delicate task for a Swedish scholar to address problems arising from the Additional Protocols signed in Geneva in 1977, relating to the humanitarian laws of armed conflict.⁶

but it failed to inspire any further discussion. No Swedish work dealing with neutrality is listed in the guide Regner, SVENSK JURIDISK LITTERATUR III (Stockholm 1980), p. 34, covering the period 1971-1978. The only attempt otherwise to come to grips with the UN problem seems to be the second edition of N. ORVIK, THE DECLINE OF NEUTRALITY 1914-1941, (2d. ed. 1971) which has a new chapter called “Non-Alignment and Neutrality Since 1952.” Ørvik is of Norwegian descent.

⁴Citation cartels become prevalent in Swedish legal literature in the 70s.

⁵A research project focusing on the discrepancies in coverage, and attempting to explain the Swedish anti-legalism, is under way at the Faculty of Law, University of Stockholm. The researcher, Miss Ann-Cathrine Nilsson, has felt able to submit the conclusions in the text, ahead of completing the study.

⁶INT'L. COMM. OF THE RED CROSS [I.C.R.C.], PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUG. 1949 (1977), [hereinafter cited as ADDITIONAL PROTOCOLS]. Adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, these Protocols purport to provide for the protection of civilians, prisoners of war, civil defense personnel, medical personnel, and medical transports. The Protocols also prohibit the use of certain methods and means of warfare, and provide for the punishment of war criminals.

These Protocols are “additional” to the four existing Geneva Conventions of 1949. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

At the outset, the Geneva Conference which produced these Protocols was dominated by "the Vietnam syndrome."⁷ In no country — not even the Soviet Union — was the foreign policy so exclusively geared to securing victory for the Communists in Vietnam as in Sweden.⁸ It was inevitable that this should make a deep imprint on the Swedish participation in the Geneva Conference. The disastrous consequences of the victory of May 1, 1975, only worked to reinforce among Swedes an iron will to insist that the foreign policy commitment had been right all along.⁹ As a side effect the consequences of Sweden's military-geographical location were completely overshadowed by the preoccupation with Vietnam.

The Geneva Conference was very much run by Dr. Hans Blix who later, by political accident, became for a while the Foreign Minister of Sweden. As a result, Sweden is one of the countries that has ratified the Additional Protocols, and the Swedish authorities have worked hard to implement them. Support having been called in from abroad at an early stage, a British political scientist, Dr. Adam Roberts, Lecturer in International Relations at the London School of Economics, was commissioned by the Swedish authorities to contribute a study on "Occupation, Resistance and Law."¹⁰ The implementation work started with setting up a government committee — *Folkrättskommittén* — charged with taking care of the matter. In the Cabinet Protocol of June 29, 1978, by which the Committee was created, it was requested to consider Dr. Roberts' results.¹¹ Presumably because Swedish experts had turned out to be rather skeptical, one Norwegian citizen, Professor

⁷The expression is fetched from Reed, *Laws of War: The Developing Law of Armed Conflict — Some Current Problems*, 9 CASE W. RES. J. INT'L L. 17, 21 (1977).

⁸The Swedish commitment was reported to have forced the Soviet Union to make an even greater support effort than they had intended. See E. CARLSSON, GÖTEBORGS HANDELS OCH SJÖFARTSTIDNING, (1973), referring to "well-informed sources in Hanoi."

⁹Feeling trapped by the predictable (and predicted) massacre of close to three million people in Cambodia, half a million in concentration camps in Vietnam, and another half a million preferring to risk their lives at sea to enduring the "social progress" in Vietnam, Swedes in general have preferred to look the other way (although joining the criticism of Israel for not having predicted and prevented the massacres in the Palestinian camps in Lebanon which took place during the summer of 1982 carried out by Christian Falangist personnel). Consequently, in Sweden today there is nothing to match the effort of leftists in Finland to find out what really took place in Cambodia, resulting in the publication of the semi-official report *KAMPUTCHEA IN THE SEVENTIES* (1982) (financed by the Finnish Ministries of Foreign Affairs and of Education, the Academy of Finland, and others).

¹⁰See A. Roberts, *Occupation, Resistance and Law — International Law on Military Occupation and Resistance*, FÖRSVARETS FORSKNINGANSTALT HUVUDAVDELNING I (1980). Incidentally, the same problem was addressed in the United States by the publication at about the same time of my own study, Sundberg, *Belligerent Occupation and the Geneva Protocol, 1977: A Swedish Perspective*, 42 LAW & CONTEMP. PROBS. 67 (1978). The most extensive study on these matters in Sweden was authored by the holders of the three chairs in International Law, Professors Halvar Sundberg (Uppsala), Hilding Eek (Stockholm) and Erik Fahlbeck (Lund), in 1956 under the title *THE NORWEGIAN PURGE*, H. EEK, E. FAHLBECK, & H. SUNDBERG, DEN NORSKA RÄTTSUPPGÖRELSEN — RESPONSUM OCH UTREDNING, (1956) (Institutet för offentlig och internationell rätt nr. 18).

¹¹Regrettably, Dr. Roberts had no command of the Scandinavian or Finnish languages and could read neither German nor Russian. Consequently, his contribution had to be based exclusively on the literature published in English, and he was forced to forego any insight into the discussion that had taken place in the local languages. Paradoxically, that discussion is mirrored in my earlier article. See, Sundberg, *supra* note 9.

Atle Grahl Madsen, was asked to serve on the Committee as expert in international law. Grahl Madsen, at that time, held the professorship of International Law at the University of Uppsala, Sweden. In 1980, Commander Torgil Wulff — another member of the Committee — was appointed honorary doctor at the same university. The extensive Committee membership — 17 people — joined in enthusiastic support of Dr. Blix' achievements.

The first result of the Committee work was a report, published in 1979, with a compilation of international law documents.¹² This report has a telling preface, expressing the don't-rock-the-boat mentality. In making no mention of the perception of International Law in the Socialist Camp, the report corresponds closely to the *Manual on International Law for the Armed Forces*, that was issued in 1970, a work of Commander Wulff and Professor Stig Jägerskiöld.¹³ I found, at that time, reason to criticize this Manual for exactly that very shortcoming.¹⁴ In meeting the criticism, Commander Wulff made a startling confession: If my criticism was to be taken seriously, almost every page of the Manual would have to be rewritten.¹⁵ *Mutatis mutandis* the same evidently applies to the 1979 report. It cannot be considered very helpful when you consider a conflict involving Socialist Camp powers.

In the following I will discuss with an eye on specific Swedish difficulties, some of the problems hiding in the Geneva Protocols. After an introductory section dealing with the problem of treaty compliance, I will focus on two cases which should show how one's vision can be limited by one's background without knowing it. This should bring out the differences between an American perception, a Swedish perception, and a Socialist Camp perception. Much too often it is the perception of the other party that is missing in your own analysis. Hopefully, an exercise like this will contribute to a better understanding.

II. THE PROBLEM OF TREATY COMPLIANCE

Let us look for a moment at *Article 80* in Protocol I.¹⁶ The 2nd paragraph looks like this:

The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

The natural way to do this would seem to be by including the relevant

¹²Konventionssamling utgiven av folkrättshkommitten, *Krigets Lagar, Folkrättsliga konventioner gällande under krig, neutralitet och ockupation*, 1979 STATENS OFFENTLIGA UTREDNINGAR 73.

¹³S. JÄGERSKIÖLD AND T. WULFF, *HANDBOK I FOLKRÄTT UNDER NEUTRALITET OCH KRIG*, (1970). This manual was approved by the Commander in Chief in December 1970. A second edition carrying the same title but authored by Torgil Wulff alone, was published in 1980. It does not seem to have received the approval of the Commander in Chief.

¹⁴Sundberg, *En handbok i folkrätt för svenska krigsmakten?*, 1972 TIDSKRIFT I SJÖVÄSENDET 205, (Institutet för offentlig och internationell rätt n.r. 36).

¹⁵Wulff, *Olika tokningar av folkrätten*, 1972 TIDSKRIFT I SJÖVÄSENDET 384, 387 ff.

¹⁶ADDITIONAL PROTOCOLS, *supra* note 6, Protocol I, art. 80, para. 2.

provisions of the treaties in the penal law of each country. But that approach is not without problems.

Many people envisage what is spelled out in international treaties as a body of law common to all nations. But the penal law of modern countries does not correspond to this notion. It is positivist. There is only the penal law of each nation.

When you engage in an armed conflict, undisputably there will be committed many acts that correspond to what is called, in the penal code, murder, assault, unlawful deprivation of liberty, and so forth. In the law of nations, there are doctrines to the effect that acts of war are not, as a matter of principle, unlawful as such, although they may coincide with the descriptions of crimes in the penal codes. The joining of these international law doctrines with the penal codes of the various countries thus is a matter of the greatest interest.

Professor Johs. Andenaes¹⁷ has this to say on that count:

In formulating a penal provision, not every special circumstance which may be of importance in characterizing the prohibited act can be taken into consideration. Thus, it sometimes happens that an act is covered by the description of a penal provision, but nevertheless is not punished. A ground of impunity exists. § 233 imposes punishment upon "anybody who causes a person's death, or is accessory thereto." This may seem clear enough. But by its terms the enactment applies not only to the usual murderer, but also to . . . the soldier who kills the enemy in wartime. Numerically these legalized homicides have played a much larger role than criminal ones in Europe during the past century.¹⁸

The doctrine of justification which we meet here belongs to the general part of the penal law. The general part, again, was a creation of the nineteenth century when the problems common to most crimes in the continental European penal codes were brought together for regulation in such a part. The problems of justification were among them, but they seldom received more than fragmentary codification. Andenaes elaborates:

Not all grounds of impunity are set out in the Code. . . .

To decide whether an act falls within a penal provision but should be treated as nonpunishable because of some special ground of impunity, or regarded as outside the statutory provision in the first place, may be a matter of discretion in many instances.¹⁹

Turning now to Sweden, the surprising thing is that there is no provision in the penal code that says explicitly that acts of war are not criminal homicides.

¹⁷J. ANDENAES, *THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY* (1965).

¹⁸*Id.* at 143.

¹⁹*Id.* at 143-44.

If, under Swedish law, war is a ground of impunity, that is at best something implicit. The matter came to a head when the Ombudsman was asked by a Communist sympathizer to see to it that penal action was taken against a Swedish citizen who, having enlisted in the U.S. Army, had killed enemies in the course of combat duty in Vietnam. The Ombudsman said: "A participant in war who kills in combat an enemy is, in principle, according to international law doctrines, not liable to punishment for such act."²⁰

It is easy to agree with the Ombudsman. But the paucity of the argument advanced in support of the combat action of the young Swede illustrates also Professor Andenaes' statement that the whole thing is "a matter of discretion in many instances."

Having this in mind one should recall that the Socialist Camp has long developed a number of well-conceived Marxist doctrines, often entered into the constitutions, which render service in the same or perhaps a better way than does the Ombudsman's reasoning.²¹

Consequently, ensuring observance of the Convention and the Protocols is, it would seem, more a problem of allowing the treaty in defense against criminal action, than using the treaty as a ground of incrimination. One may say though, that by using the treaty as a ground for incrimination, the conclusion is strengthened that acts of war somehow implicitly benefit from a special ground of impunity. In the following sections, I will try to illustrate how it works in the Swedish setting.

These basic difficulties, of course, do not detract from the value of having a good command of the contents of the Additional Protocols. On this point too, the Swedish Committee has been active. In pursuance of its general policy it was determined to weed out, from all teaching positions and from all mention in bibliographies, the skeptics whatever their previous contributions. By order of January 27, 1981, the Commander in Chief ordered that all personnel should have received, before July 1, 1983, such instruction in international law as was necessary to enable them to fulfill their combat duties in times of war.²² The critical discussion being prevented and the only people remaining available being the members of the Committee, they undertook graciously to perform this duty of instruction.

III. POLICE ACTION AND TRANSFORMATION THEORY

In the aftermath of the Nuremberg trials, Sweden introduced a provision in the Penal Code, now to be found in Chapter 22, § 11 of the Penal Code of 1962. It reads in part:

²⁰JO dnr 1518/68, (Aug. 23, 1968).

²¹A discussion of such matters is to be found in XI Congress of the International Association of Penal Law, *General Report on the Unlawful Seizure of Aircraft*, 6 ARKIV. FOR LUFTTRET 1, 50-52 (Oslo, 1974).

²²Utbildning i folkrätt inom försvarsmakten, TFG nr 810018, (January 27, 1981),

A person, who in the conduct of war, by using means of warfare likely to cause unnecessary suffering or by misusing the Red Cross sign, or otherwise, acts in a manner contrary to existing treaties with foreign powers or to generally recognized principles of international law, shall be sentenced for crime against international law to imprisonment for at most four years; . . .²³

The section continues in the same style.

This is a legislative technique with interesting properties. The Swedish Bill for the ratification of the Additional Protocols says that it follows from the legislative technique that has been used in Chapter 22, section 11, of the Penal Code, that once Sweden has ratified the two updating Protocols (which is now done), these provisions will in principle also cover violations of the Protocols.²⁴ This means that the Protocols are immediately applicable to the armed forces in case of war. Moreover, they apply to everybody and not only to the military.

But we also have a civilian side and there the rule is the opposite — or at least it is being said that the rule is the opposite (because such statements do not go unchallenged in legal scholarship).²⁵ The Supreme Administrative Court in 1974 rendered a judgment attempting to make the alleged rule stick. The pivotal passage of the judgment reads like this:

An international agreement to which Sweden has adhered is not directly applicable in the domestic administration of justice: instead, those legal provisions that are to be found in the treaty must be included in a Swedish statute in order to be valid law in our country (*transformation*). There has been enacted no such statute of transformation with regard to Art. 2 of the Additional Protocol of March 20, 1952, to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, no duty has arisen for the School Board to comply with the rules of the Additional Protocol in its activities.²⁶

Thus, one rule says that the military is subject to all the provisions of all existing treaties to which Sweden is a party, but on the civilian side, you have exactly the opposite principle that says that no civilian authority is supposed to know anything about the treaty obligations of Sweden. Evidently, this is a rather dramatic situation.

When is Chapter 22, § in force? The answer to this question is that the provision applies in case of war. However, it has been noted that war is illegal

²³See, THE PENAL CODE OF SWEDEN, Chap. 22, § 11 (T. Sellin, trans. 1972).

²⁴Proposition 1978/79:77, p. 47.

²⁵A recent and extensive study is authored by B. Malmlof and M. Mellqvist and published in Chapter 2 of the volume STUDIER KRING EUROPA-KONVENTIONEN UTGIVNA AV INSTITUTET FOR OFFENTLIG OCH INTERNATIONELL RÄTT (Institutet for offentlig och internationell rätt nr 47), 43-56.

²⁶Judgment of the *Regeringsrätten* on June 28, 1974, in the so-called *Ranea Case*, 1974 REGERINGSRÄTTENS ARSBOK, 121.

according to the principles underlying the United Nations Organization, so there cannot be a "war" in the legal sense.²⁷ Wisely enough, therefore, an extra provision has been introduced saying that the section will also enter into force when the Government says so.

Police forces tend to be militarily very useful in a pacific country like Sweden. The police forces are on constant alert, they are well adapted to their weapons, they shoot fast and hit the target. In realization of this and attempting to increase the efficiency of the armed forces, the Swedish police was in 1943 integrated with the military forces. However, in the wake of the Vietnam War it became outmoded to be part of the military forces. This new sentiment found a sympathetic response within the framework of the Council of Europe. In addition to this more general movement, various police unions in Europe turned out to be against the police forces being part of the military establishment.

As a result there was introduced in Sweden in 1979 a report proposing that the police forces should be taken out of the military establishment and should be made civilian forces.²⁸ Roughly speaking, it is proposed that the police should only answer for inner security and public order. Various political crises have prevented the proposal from leaving the stage of a report only. However, it would seem useful in this context to consider what the proposal may mean in the context of the Swedish transformation theory²⁹ and the Additional Protocols. In particular, Protocol II calls for consideration.

Protocol II is applicable as soon as armed conflict takes place between Swedish armed forces and other armed groups which, "under responsible command, exercise such control over a part of [Swedish] territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II]."³⁰ But the Protocol shall *not* apply to "situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts."³¹

This raises certain problems. If the military strikes at and subdues armed groups of a guerilla character, perhaps one may hope that the Protocols will be respected — at least if the military is well disciplined and the call for instruction and education has been adequately met. But "the activity of minor groups," wrote Commander Wulff in 1972, "has nothing to do with wars of liberation and can be met by police action."³²

A skeptic may doubt that the difference between the latter type of armed

²⁷See, U.N. CHARTER arts. 2, 33-37.

²⁸*Polisen i totalforsvanet, Betankande av 1975 ars polisutredning*, 1979 STATENS OFFENTLIGA UTREDNINGAR 75.

²⁹See, *supra*, text accompanying note 26.

³⁰ADDITIONAL PROTOCOLS, *supra* note 6, Protocol II, art. 1, para. 1.

³¹*Id.*, para. 2.

³²Wulff, *supra* note 15, at 386.

conflicts and "wars of liberation" is always so striking as some believe. Wulff, it is true, was of the opinion that "in a society like the Swedish one with a well developed Democratic government and a progressive social reform work, the possibilities are very small that a bigger group can be made to participate in such an action [as a 'war of liberation']."³³ The Government Bill pursues the same line of thinking: national wars of liberation were "a type of conflict that we are not likely to experience in our country";³⁴ consequently, giving more protection to guerilla soldiers was welcomed from the Swedish side. It should not be left out of sight, however, that in Finland, a country much similar to Sweden, the Second World War brought the experience of Communist guerilla movements fighting their own government in that country. During the height of the Vietnam War, the Swedish Minister of Foreign Affairs tied the Swedish Government to the principle "that the social progress and the national struggle for liberation . . . may not be met by military violence."³⁵ Seen in this perspective, it was not permissible to fight by military means the small units, a thousand or so, who were fighting as "forest guerillas" in the Rusko woods outside Turku, Finland, and in other places for "social progress and national liberation from the imperialist yoke of Capitalism."³⁶ The faith implicit in the Bill seems less than convincing in a country having progressed, under the impact of the Vietnam and the Chile propaganda, to every third student at the University of Uppsala pleading allegiance to Communism.

Should it be up to the police to subdue such movements, the provisions in Protocol II will enter the picture.

When the police are concerned, there is a notable difference between being a civilian and being a military man. If you are a civilian, you are allowed to use tear gas; if you are a military man, you are not.³⁷ Let us assume that the Swedish police will be allowed civilian status. Following the reasoning of the Supreme Administrative Court,³⁸ it does not need to consider the 1925 Protocol in their operations, because there is no transformation statute, and according to the Government Bill, no such statute is needed.³⁹ As long as they are military men, however, pursuant to Ch. 22, sec. 11 of the Penal Code, they are bound by the Protocol (provided that the chapter has been declared in force).

³³*Id.*

³⁴Proposition 1978/79:77 s 39.

³⁵61 SNABBPROTOKOLL FRAN RIKSDAGSDEBATTERNA 16 (1972).

³⁶S.H. RATANEN, SOM POLITRUK I FINLAND, (Helsingfors 1958), 89 ff.

³⁷Proceedings of the Seventy-Second Annual Meeting of American Society of International Law, *Should Weapons of Dubious Legality be Developed?* 72 AM. SOC. INT'L LAW, 26, 27-29 (Remarks of Michael John Matheson), 30-36 (Remarks of Hans Blix); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, TIAS No. 8061, 94 L.N.T.S. 65.

³⁸*See, supra* text accompanying note 26.

³⁹*See, supra* text accompanying note 24.

The latter solution prevails so far. But the exercise is a reminder that in many countries of the world, treaty law is not the law of the land and consequently does not perform even half the wonders that people sitting in a country that proclaims treaties as the law of the land believe will take place due to a new treaty.

IV. PRISONERS OF WAR AND SOCIALIST CAMP RESERVATIONS

Let us now turn to prisoners of war. Here, too, a limited vision may easily corrupt the understanding of how this set of rules operates in practice.

The Marxist conception of law — which of course is the only permissible one in the Socialist Camp — is of the universal kind. It is valid for all persons everywhere. It includes a total conception of Law and State. That means all law, including international law! All states, including the United States and including Sweden! The Marxist message is, as it has been phrased by Professor Gray Dorsey (the message is certainly still correct, although it was put together by Dorsey on the basis of now slightly outdated Soviet manuals):

Every people and every nation has a right to self-determination. Self-determination consists of a people or nation throwing off the imperialist control of the bourgeois class. A people or nation that has thus exercised its right of self-determination is then independent and equal with every other people. When equal independent peoples or nations form a state, popular and national sovereignty merge with state sovereignty, and any subsequent attempt to induce a change in the social system or government in that state is an infringement of state sovereignty. However, any people or nation that has not exercised such self-determination [i.e., throwing off the control of the bourgeois class imperialists] still has the right to do so, and any subsequent attempt to induce a change of the social system or government in that state is not an infringement of the sovereignty of that state.⁴⁰

This is *self-determination*, a key word.

Furthermore, in Marxist thinking the Marxist theory is universal. It includes a conception of Law and State, and that again includes a conception of the penal law. Now, penal law, in the Marxist conception, is an instrument for the repression of dangerous individuals. There is no question of justice or anything like that: penal law is only a political instrument and it is going to be used to suppress dangerous individuals. But dangerous individuals are not all of the same kind. There appears a difference between the one who is active in the private law field, and the one who is active in the public law field. The petty thief is of the first kind, the *political offender* of the second kind. When it comes to classifying who is the more dangerous of the two, well, then there

⁴⁰Dorsey, *Towards World Perspectives of Philosophy of Law and Social Philosophy*, CONTEMPORARY CONCEPTIONS OF LAW, paper contributed to World Congress of Philosophy of Law and Social Philosophy Contemporary Conceptions of Law, Basel (1979), 28.

is no doubt about it: the political offender is the more dangerous one. So, as regards offenders in the private sector, the Socialist conception of law allows a very generous, and very tolerant approach; indeed, it is not really necessary to punish the offender at all, because under the prevailing theory he is merely under the influence of bad habits inherited from the bourgeois times. When it comes to the political offender, on the other hand, he is a very dangerous one. He is therefore the one who should be hit harder by the penal law.⁴¹ And the *prisoner of war* is, by definition, the most dangerous among political offenders. I am not sure that this is realized everywhere. Sometimes I am inclined to think that some people abhor the idea of making people realize it.

Certainly, if the prisoner of war is the political offender *par préférence*, one would like to know how that can be reconciled with the prisoner of war privilege.

The privileged treatment of prisoners of war essentially goes back to the end of the eighteenth century. It goes indeed back to the passage where Jean Jacques Rousseau wrote:

War, then, is not a relation between men, but between states; in war individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers; not as members of their country, but only as its defenders. In a word, a state can have as an enemy only on another state, not men, because there can be no real relation between things possessing different intrinsic natures.⁴²

One had the right to kill the defenders of a state as long as they bore arms, but when they surrendered they ceased to be enemies or instruments of the enemy and became men. Their killing was unnecessary to achieve the purpose of the war, i.e., the destruction of the enemy state.⁴³

The success of this theory is very much explained by the fact that it harmonized perfectly with what the state looked like in the nineteenth century, the Liberal, nightwatchman state. The paradox of the situation is, of course, that today when war is as total as the government being fought against, this privilege remains. The chivalrous attitude finds its most manifest expression in the Geneva Convention Relative to the Treatment of Prisoners of War of 1949.⁴⁴ That is a paradox!

But Socialist Governments' ways with prisoners of war cannot reflect a very chivalrous attitude, due to their basic conception of the relationship between

⁴¹Cf. H. BERMAN & J. SPINDLER, *SOVIET CRIMINAL LAW AND PROCEDURE — THE RSFSR CODES*, 31 (1966).

⁴²J. ROUSSEAU, *THE SOCIAL CONTRACT* (M Cranston, trans. Penguin, 1968) 56 (1762).

⁴³This attitude is reflected in Decree of May 4, 1792 of the French National Assembly Concerning Prisoners of War, the contents of which are ascribed to the influence of Rousseau and Montesquieu by Howard Levie. Levie, *Documents on Prisoners of War*, NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, Vol. 60, 10 (1979); cf. A. ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR* 57 (1976).

⁴⁴Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 6.

Law and State. The prisoner of war is the political offender *par préférence*. It should be recalled that in the Stalin era, prisoners of war were the big source of forced labour.⁴⁵ The German prisoners of war in the Soviet Union were almost all put through Russian proceedings in which they were sentenced for having killed Russian citizens and having destroyed Russian property, which was very definitely illegal according to the Russian penal laws.⁴⁶ Of course, it remains illegal, unless international law somehow allows a defense.

At this point, we must ask: what about the prisoner-of-war-convention? The answer is that the Geneva Convention Relative to the Treatment of Prisoners of War, signed July 27, 1929,⁴⁷ was never adhered to by the Soviet Union. The matter was not even discussed during the war.⁴⁸ As a result, in these trials international law was not allowed as a defense. So these prisoners of war were just sentenced and sent to the forced-labour camps in Siberia where they remained until 1955.⁴⁹

Looking at the American experience with their military people being taken prisoners of war in Korea, the following passage in a Congressional Report should be recalled: "The Korean War made crystal clear that when our Nation was engaged in hostilities with a Communist Far-Eastern country, the question of 'prisoners of war' presented new and unprecedented problems."⁵⁰ It is not necessary here to elaborate further, but there is more in that Report. The U.S. Admiral Stockdale returning from North Vietnam, had first hand experience of this. He put it as follows: "As POWs who were treated not as POWs but as common criminals, we sailed unchartered waters."⁵¹

The Socialist Camp states have all made reservations to Article 85 in the Third Convention of 1949.⁵² This Article proclaims that

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.⁵³

These benefits to which the article refers, may seem slightly limited, such

⁴⁵Cunningham, *The Origins and Development of Communist Prisoner of War Policies*, JOURNAL OF THE ROYAL UNITED SERVICES INSTITUTE FOR DEFENSE STUDIES, 38, 39 (1974).

⁴⁶See R. MAURACH, DIE KRIEGSVERBRECHERPROZESSE GEGEN DEUTSCHE GEFANGENE IN DER SOWJETUNION, (1950); and P. CARÉLL & G. BÖDDEKER, DIE GEFANGENE. LEBEN UND ÜBERLEBEN DEUTSCHER SOLDATEN HINTER STACHELDRAHT, 354 ff. (1980).

⁴⁷Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846, (Replaced by: Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 6.)

⁴⁸R. MAURACH, *supra* note 46, at 20; A. ROSAS, *supra* note 43, at 57.

⁴⁹For detail, see P. CARÉLL & G. BÖDDEKER, *supra* note 46 at 363.

⁵⁰*Inquiry into the U.S.S. Pueblo and EC-121 Plane Incidents, Report of the Special Subcommittee on the U.S.S. Pueblo of the Committee on Armed Service, House of Representatives, 91st Cong., 1st Sess. 1684 (1969).*

⁵¹Stockdale, *Experiences as a POW in Vietnam*, 1975 NAVAL WAR COLLEGE REVIEW, 5.

⁵²See, e.g., I.C.R.C., THE GENEVA CONVENTIONS OF AUG. 12, 1949: COMMENTARY 423-25 (Pictet ed. 1960).

⁵³Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 6, art. 85.

as not being executed on the spot, or being allowed to receive gift parcels. There may, however, be another benefit going with the Convention although it is not spelled out but only implicit: impunity in criminal proceedings based on the international law doctrine of acts of war. Governments having made reservations to this Article remain able to apply their penal law — in the Stalin tradition — to prisoners of war. Prisoner of war status will not prevent such trials from taking place.

At the new Geneva Conference, nothing was changed in this respect. The matter was raised by Art. 65 of Draft Protocol I.⁵⁴ The Soviet delegation explained:

As the Soviet delegation understands Article 65, its effects do not extend to war criminals and spies. National legislation should apply to this category of persons, and they should not enjoy international protection. We should like to recall in this connection the reservation which the USSR made to Article 85 of the 1949 Geneva Convention on the treatment of prisoners of war.⁵⁵

The delegation concluded: "The position thus taken by the USSR remains unchanged."⁵⁶

One may consequently fear that the treatment a prisoner of war may expect in the hands of a Socialist Camp power is no better than the one that is afforded the "mercenary" condemned in Art. 47 of Protocol I.⁵⁷ It testifies to the difficulties facing the Swedish Committee that it has felt that the Swedes can do without any information on this point in the Report. Judging from the discussion of the Angola trial and the case of Captain Astiz in Swedish mass media,⁵⁸ the Swedish general public would be overly optimistic if they expected to get more information on the point from media.

V. CONCLUSION

The purpose of the present contribution has been to present some viewpoints on some of the key issues addressed at the Diplomatic Conference. There is no denying that advances have been made, perhaps important ones. Yet some of the solutions arrived at no doubt call less for praise than for surprise. Those surprised may ask how such an enormous effort as this monster conference taking place after such prolonged preparations gave such a yield.

The monster congress itself provides most of the answer. A gathering of people of this type is simply incapable of achieving results which will always

⁵⁴I.C.R.C. DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTION OF 12 AUG. 1949, art. 65 (1973).

⁵⁵6 DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, OFFICIAL RECORDS 277 (1978).

⁵⁶*Id.*, at 278.

⁵⁷ADDITIONAL PROTOCOLS, *supra* note 6 Protocol II art. 47, para. 1: "A mercenary shall not have the right to be a combattant or a prisoner of war."

⁵⁸*See, supra* text accompanying notes 4-5.

stand up to critical intellectual analysis. It is easy to join George H. Aldrich when he summarizes: "For everyone involved, there is a growing conviction that the multilateral law-making conference is the least efficient and most difficult machinery ever developed by the art of diplomacy."⁵⁹ In this setting, what a solution really meant became much less important than the headway it could make at the monster congress. And after the congress, the whole advantage could be lost by important countries adding reservations or refusing to sign.

Translating results of this kind into practical implementation in a local setting, the glamour of the "consensus in the international community" quickly fades away. The party is over: it is time for realities. The first and foremost reality of a state is its location. That will not change, whatever your sympathies and antipathies. The location normally determines what people are to be faced as allies or adversaries. Their perception of the world and how it works belongs to the reality of the location. To understand that is of the greatest importance. It has been my hope to have contributed something to that understanding.

⁵⁹Aldrich, *Establishing Legal Norms Through Multilateral Negotiation: The Laws of War*, 9 CASE W. RES. J. INT'L L. 9 (1977); cf. J. Sundberg, *The Wisdom of Treaty-Making Treaties. A Glance at the Machinery Behind the Production of Law-Making and A Case Study of the Hague Hijacking Conference of 1970*. 1972 SCANDINAVIAN STUDIES IN LAW, 283 (1972).