Contemporary Challenges to the Implementation of International Humanitarian Law

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Introduction

The problem of how to deal with prisoners of war is not a new one; even the Old Testament calls for humane treatment of those captured in the course of armed conflict.[1] The issue has assumed significant contemporary relevance as a result of developments in Iraq and Afghanistan. Rights of prisoners/detainees during armed conflict is governed by the Law of Armed Conflict (formerly referred to as the Laws of War), or what is probably better known today as International Humanitarian Law. There is an obligation on all states and armed forces to ensure that international humanitarian law is upheld. This involves a responsibility to disseminate information and educate populations, but especially members of armed forces, regarding the principles of international humanitarian law. This branch of international law has always come under pressure during armed conflict, and the current conflicts taking place in Iraq and Afghanistan are no exception.

In ancient times the concept of prisoners of war was unknown. Captives were regarded as part of the spoils of victory, and they were frequently killed, enslaved, or held for ransom. Not surprisingly, prisoners of war have traditionally been among the most vulnerable groups in situations of armed conflict. Their treatment is a question with which the laws of war have been particularly concerned. Their detention is a form of permissible internment, and it should come as no surprise to learn that the laws governing armed conflict lay down detailed rules for their protection. This article examines the origins of the laws of war and their relationship to international human rights law, with particular reference to the protection provided to prisoners of war.

A serious obstacle confronting those charged with ensuring compliance with the norms of humanitarian law is to make the rules establishing such norms accessible and relevant to those most responsible for their implementation, *i.e.*, the soldiers on the ground. The language of the international instruments in question is often obtuse and unintelligible. The principles enshrined in these instruments, when combined with a "dumb down" approach for classroom instruction, are often presented in a half-hearted and "touchy-feely" way that makes the instructors and principles involved appear out of touch with reality. Best has described the situation as follows:

> It cannot be said that books in this field are lacking. The international law of war … has become something of a boom industry in the legal realm and raises a regiment of professional experts. The way in which those experts write about it and debate it

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1 See 2 Kings, 6:21–22.

> among themselves, however, is not often directly communicable to all the others who also have pressing interests of their own in the subject and who, some of them, also write and confer increasingly about it, conscious that, beyond the legal experts they may happily have contact, are many from whom they are cut off.[2]

What are the Laws of War or International Humanitarian Law?

International humanitarian law constitutes one of the oldest branches of public international law. Its two main branches are referred to as the law of the Hague and the law of Geneva. The law of the Hague regulates the means and methods of warfare. It is codified primarily in the Regulations Respecting the Laws and Customs of War on Land ("the Hague Regulations") annexed to the 1907 Hague Convention IV ("the Hague Convention"). These govern the actual conduct of hostilities during armed conflict, such as the selection of targets and permissible weapons for use against the enemy.

The law of Geneva is codified primarily in four conventions adopted in 1949, and these are known collectively as the Geneva Conventions for the Protection of War Victims.[3] Their aim is to protect certain categories of persons, which include civilians, the wounded, and prisoners of war. Significant aspects of the law of the Hague and the law of Geneva were merged in a common treaty regime in the 1977 Protocols Additional to the Geneva Conventions: one relating to the victims of international armed conflict ("Protocol I"), and the other to the victims of non-international armed conflicts ("Protocol II").[4]

Among the equivalent and interchangeable expressions—the "Laws of War," the "Law of Armed Conflict," and "International Humanitarian Law"—the first is the oldest. The expression "laws of war" dates back to when it was customary to make a formal declaration of war before initiating an armed attack on another state. Nowadays the term "armed conflict" is used in place of war, and while the military tend to prefer the term "law of armed conflict," the International Committee of the Red Cross ("ICRC") and other commentators use the expression "international humanitarian law" to cover the broad range of international treaties and principles applicable to situations of armed conflict. It also includes a number of rules of customary international law. The fundamental aim of international humanitarian law is to establish limits to the means and

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[2] Geoffrey Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994), 10. An example of a more accessible read is A.P.V. Rogers, *Law on the battlefield,* 2nd ed. (Manchester: Manchester University Press, 2004) (1999).

[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (Geneva II); Geneva Convention Relative to the Treatment of Prisoners of War 1949 (Geneva III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (Geneva IV).

[4] See generally *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1946* (Geneva: International Committee of the Red Cross; M. Nijhoff, publishers, 1987).

methods of armed conflict, and to protect non-combatants—whether they are the wounded, sick, or captured soldiers—and civilians.[5]

International Humanitarian Law: Background

The norms regulating the conduct of combatants in times of conflict are not only of ancient origin, but they are also found in diverse cultures on many continents.[6] Up until the end of the nineteenth century, the treatment of prisoners of war varied a great deal depending on the nature of a conflict, the parties involved, and its geographical location. The killing or enslavement of prisoners was often linked to the failure to distinguish between combatants and non-combatants, and the obligation to distinguish themselves from civilians remains one of the fundamental rules that combatants must adhere to in order to be treated as prisoners of war.

The 1785 treaty of friendship between Prussia and the United States was one of the first international treaties to contain the obligation of the contracting parties to protect prisoners of war. Later, during the American Civil War, President Lincoln adopted the Lieber Code.[7] This contained detailed rules for the protection of, *inter alia,* prisoners of war.[8] What was really remarkable about this code is that it was introduced unilaterally in the course of a protracted and bitter civil war when the Union government was intent upon defeating the Confederacy and ensuring that no foreign state would recognize it as legitimate. Despite the threat to the Union, Lincoln still had the foresight to introduce a comprehensive set of humanitarian rules governing the conduct of hostilities. Even today the rules of international humanitarian law applicable in internal armed conflict are not as extensive as those applied by the Union Army at the time. Not surprisingly, the Code had a significant impact on later attempts by European states to formulate similar rules.

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5 See C. Greenwood, "The Relationship of *Ius ad Bellum* and *Ius in Bello,*" *Review of International Studies* 9 (1983); Hans-Peter Gasser, *International Humanitarian Law - An Introduction*, trans. from German by S. Fitzgerald and S. Mutti (Haupt: Henri Dunant Centre, 1993); S. Nahlik, "A Brief Outline of International Humanitarian Law," *International Review of the Red Cross* (July-August 1984); and F. Kalshoven, *Constraints on the Waging of War* (Geneva: ICRC, 1987).

6 Ibid. Greenwood, "The Relationship of *Ius ad Bellum* and *Ius in Bello;* Hans-Peter Gasser, *International Humanitarian Law - An Introduction;* Nahlik, "A Brief Outline of International Humanitarian Law"; Kalshoven, *Constraints on the Waging of War;* and J. Simpson Study, *Law Applicable to Canadian Forces in Somalia 1992/93* (Ottawa: Public Works and Government Services Canada, 1997), 13.

7 In 1861, Francis Lieber, a professor of political science and jurisprudence at Columbia University in New York, prepared a manual based on international law (the Lieber Code), which governed the Union Army during the American Civil War (1861-65). See D. Schindler and J. Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents,* 3rd ed. (Dordrecht: Nijhoff, 1988), 3.

8 The Lieber Code, Articles 49–59, in Schindler and Toman, *Laws of Armed Conflict*.

After the piecemeal development of humanitarian law at the end of the nineteenth century and the start of the twentieth century,[9] the experience of World War II made the shortcomings in the legal regulation of this field all too apparent. This realization lead to the adoption in 1949 of the four Geneva Conventions for the Protection of War Victims.[10] The adoption of the Conventions, coupled with the earlier well-developed body of Hague law governing the conduct of hostilities by armed forces, meant that traditional inter-state wars—or "armed conflicts," to use the language of the Conventions—were now well regulated, at least in theory.[11] The phrase "armed conflict" was employed to make it clear that the Conventions applied once a conflict between states employing the use of arms had begun, whether or not there had been a formal declaration of war.[12]

The actual codification and promotion of international humanitarian law has been undertaken primarily by the ICRC in Geneva. It can be argued that the UN should have played a more significant role in this regard, but the UN system was carefully designed to make war illegal and unnecessary.[13] Nowhere in the UN Charter is the concept of war mentioned. Having rendered the concept of the classical "war" redundant, it might have seemed unduly pessimistic for the UN to set about regulating that which it had legislated out of existence. It was not surprising, then, that the International Law Commission of the UN (a body of experts named by the General Assembly and charged with the codification and progressive development of international law), declined the task when it came to considering the codification of humanitarian law in 1949. It was believed that if the Commission at the very beginning of its work were to undertake this study, public opinion might interpret its action as showing a lack of confidence in the efficiency of the means at the disposal of the UN for maintaining

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9 1899 saw the adoption of a treaty that made the principles of the 1864 treaty applicable to the wounded and shipwrecked at sea. In 1906, the 1864 treaty was revised, and in the following year the 1899 treaty was amended along the same lines. In 1926, a convention on the treatment of prisoners of war was adopted. See Kalshoven, *Constraints on the Waging of War*, 9–10.

10 See note 2 above.

11 Art. 2 common to all four Geneva Conventions of 1949; see *The Geneva Conventions of 12 August 1949 - Commentary: III Geneva Convention* (Geneva: ICRC, 1960), 20–23.

12 See C. Greenwood, "Scope of Application of Humanitarian Law," 42–43. It should be noted that common Article 3 of the Conventions did outline minimum provisions that must be applied in situations of non-international armed conflict or internal conflict within a state.

13 T. Franck and F. Patel, "Agora: The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: 'The Old Order Changeth,'" *American Journal of International Law* 85, 63. See also C. Greenwood, "The Concept of War in Modern International Law," *International and Comparative Law Quarterly* 36 (1987). For general background on the UN and humanitarian law, see C. Bourloyannis, "The Security Council of the United Nations and the Implementation of International Humanitarian Law," *Denver Journal of International Law and Policy* 20:2 (1992): 335–55; and G. Abi-Saab, "The United Nations and International Humanitarian Law - Conclusions," *Actes du Colloque International de l'Universite de Geneve* (1996).

peace.[14] In this way, the responsibility to codify and improve the principles fell upon the ICRC.

As the majority of armed conflicts in the Cold War period did not approximate to inter-state wars of the kind envisaged by traditional humanitarian law, certain obvious gaps in the legal regulations governing armed conflicts remained.[15] The adoption of the Conventions marked a break with the past in that Article 3, which was common to all four Conventions, sought to establish certain minimum standards of behavior "in the case of armed conflict not of an international character" which reached a certain (undefined) level of intensity. While of modest scope, this was a radical development.[16] Unfortunately, limitations to its application remain, as states often deny that internal problems have risen to the required level of "armed conflict" (a term that Article 3 does not attempt to define), or that the conflict in question is in some other way not governed by the Conventions.[17] In an attempt to address these and other issues, Additional Protocols I and II were adopted in 1977.[18]

Protocol 1 applies to international armed conflict, and brought what was often referred to as "wars of national liberation" within the definition of international conflicts.[19] Protocol II, on the other hand, did not apply to all non-international armed conflicts, but only to those that met a new and relatively high threshold test.[20] Despite the time and effort that was involved in drafting and ratifying the Protocols, the result was less than satisfactory, especially from the point of view of classifying armed conflicts to determine which Protocol, if any, would apply in a given case. The applicabil-

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[14] S.D. Bailey, *Prohibitions and Restraints on War* (Oxford: Oxford University Press, 1972), 92.

[15] The 1999 Report of the Secretary-General on the Protection of Civilians in Armed Conflict makes depressing reading; see UN Secretary-General's Report on the Protection of Civilians in Armed Conflict, S/1999/957, 8 September 1999.

[16] G. Aldrich, "The Laws of War on Land," *American Journal of International Law* 94 (2000): 42–59, at 59.

[17] See G. Aldrich, "Human Rights in Armed Conflict: Conflicting Views," *ASIL Proc.* 67 (1973): 141–42; and R. Baxter, "Some Existing Problems of Humanitarian Law," in *The Concept of International Armed Conflict: Further Outlook*, Proceedings of the International Symposium on Humanitarian Law (Brussels, 1974).

[18] See generally *Commentary on the Additional Protocols*, 33 and 1319.

[19] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol 1), Art. 1(4). This saved captured guerrilla fighters who met certain conditions from trial and potential execution for actions committed in the course of liberation wars, by granting such captives prisoner-of-war status. See C. Greenwood, "Terrorism and Protocol I," *Israel Yearbook of Human Rights* 19 (1989).

[20] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 1(1). See B. De Schutter and C. Van De Wyngaert, "Coping with Non-International Armed Conflicts: The Borderline Between National and International Law," *Georgia Journal of International & Comparative Law* 13 (1983): 285.

ity of Protocol II is quite narrow, and this helps explain in part why so many states are party to it.

If the broader picture of the development of humanitarian law over the last two decades is examined, it is evident that, in addition to their contribution to the regulation of non-conventional warfare, the 1977 Protocols are significant in two other respects. First, Protocol I represents the fusion of Hague law and Geneva law in that it not only includes provisions designed to protect the civilian population and those *hors de combat*,[21] but also sets out new rules on the conduct of hostilities based on the principle of proportionality.[22] Secondly, both protocols represent a merger to a certain degree of humanitarian law with its younger cousin, international human rights law, in that they incorporate detailed and explicit human rights guarantees, drawn directly in some instances from the International Covenant on Civil and Political Rights.[23] As a result, the Additional Protocols have blurred the distinction between what was traditionally seen as international humanitarian law, which emphasized generic rights determined according to the status of certain participants or other groups caught up in an armed conflict, and the more individual-based rights, which form the core of international human rights law.

Human Rights and Humanitarian Law

Human rights and humanitarian law have different historical and doctrinal origins.[24] Previously, scholars assumed that one or the other regimes was applicable in a given conflict situation, depending on the categorization.[25] However, Meron has pointed to a dangerous lacuna that may exist if and when the applicability of both regimes is denied.[26] Although humanitarian law was originally intended to govern situations of

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[21] See, for instance, Articles 52–56.

[22] See especially Articles 57–58.

[23] For instance, the fair trial guarantees in Protocol 1, Art. 75 and Protocol II, Art. 6 are clearly based upon, though are not identical to, those in Art. 14 of the ICCPR. For a discussion of this point see S. Stavros, "The Right to a Fair Trial in Emergency Situations," *International and Comparative Law Quarterly* 41 (1992): 343.

[24] See T. Meron, "The protection of the human person under human rights and humanitarian law," *UN Bulletin of Human Rights 91/1* (1992): 33–45. See also L. Doswald-Beck and S. Vite, "International Humanitarian Law and Human Rights Law," *International Review of the Red Cross* 293 (1993); and *Minimum Humanitarian Standards, Report of the Secretary-General,* Doc. E/CN.4/1998/8, 5 January 1998.

[25] See T. Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument," *American Journal of International Law* 77:3 (1983): 580–606, at 602.

[26] Ibid.; see also T. Meron, *Human Rights in Internal Strife: Their International Protection,* (Cambridge: Grotius, 1987), 3-49; T. Meron and A. Rosas, "A Declaration of Minimum Humanitarian Standards," *American Journal of International Law* 85 (1991): 375–81; and Commission on Human Rights, "Minimum humanitarian standards - Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities," UN Doc. E/CN.4/1998/87, 5 January 1998.

armed conflict between states, it has become increasingly important in the regulation of internal armed conflict.[27] Human rights, on the other hand, originated in the intra-state relationship between the government and the governed, and are intended to protect the latter against the former, regardless of nationality.[28] But humanitarian law is also concerned with protecting basic human rights during armed conflict and other situations of violence. Humanitarian law does not just bind armed groups operating with the imprimatur of a state—other armed groups (and the individuals belonging to them) are also bound by its provisions.[29] The application of such principles in non-international armed conflicts in not linked to the legitimacy of armed groups.[30] The ICRC position is that humanitarian law principles, recognized as part of customary international law, are binding upon all states and all armed forces present in situations of armed conflicts.[31] In recent years, various Security Council resolutions have called upon "all the parties to the conflict" to respect international humanitarian law.[32]

The International Court of Justice, in its *Advisory Opinion on Nuclear Weapons*, looked at the relationship between international humanitarian law and human rights law.[33] The Court affirmed that they are two distinct bodies of law, and that human rights law continues to apply in time of war unless a party has lawfully derogated from

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[27] See also C. Greenwood, "Scope of Application of Humanitarian Law," 39–49; and D. Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols," *Recueil des cours* 163 (Hague Academy, 1979): 153–56.

[28] T. Meron, *Human Rights in Internal Strife*, 29.

[29] See "Armed conflicts linked to the disintegration of State structures," *Preparatory document for the first periodical meeting on international humanitarian law*, 19-23 January 1998 (Geneva: ICRC, 1998), 8. See also C. Greenwood, "International Humanitarian Law and United Nations Military Operations," *Yearbook of International Humanitarian Law* 1 (Dordrecht: Kluwer, 1998), 3–34, esp. 7–9.

[30] It is the identification of the relevant legal prescription in the given context that is of central concern; see H. McCoubrey and N. White, *International Organizations and Civil Wars* (Aldershot: Dartmouth, 1995), 67.

[31] D. Shagra and R. Zacklin, "The Applicability of International Humanitarian Law to United Nations Peacekeeping Operations: Conceptual, Legal, and Practical Issues," in Palwankar (ed.), *Symposium on Humanitarian Action and Peace Support Operations – Report (Geneva: ICRC, 1994)*, 39 at 40. *Symposium*, 40. See also F. Kalshoven, "The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit," *Yearbook of International Humanitarian Law* 2 (Dordrecht: Kluwer, 1999), 3–66, esp. 38 onwards; and ICRC Resolution XXXVII of the 20th International Red Cross Conference, Vienna, 1965, in Schindler and Toman, *The Laws of Armed Conflicts,* 259.

[32] For example, see Resolution 814, 26 March 1993, para. 13 (Somalia); and Resolution 788, 19 November 1992, para. 5 (Liberia).

[33] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 226 (1996). See generally L. Boisson de Chazournes and P. Sands, eds., *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999); and a number of articles in *International Review of the Red Cross* 316 (1997), esp. C. Greenwood, "The Advisory Opinion on nuclear weapons and the contribution of the International Court of Justice to international humanitarian law," 65–75.

them. The effect of this is that international humanitarian law is to be used to interpret a human rights rule and, conversely, in the context of the conduct of hostilities, human rights law may not be interpreted differently from humanitarian law.[34] In this way there has been significant overlap and convergence of humanitarian and human rights law, and the strict separation of the two is not always conducive to providing the maximum protection to victims.

Prisoners of War and the Geneva Conventions

Common Article 2 of the Conventions states that the Conventions apply "to all cases of declared war or any other armed conflict which may arise between one or more High Contracting Parties."[35] This was intended to cover as broad a range of armed conflict as possible.

The Third Geneva Convention of 1949 governs the treatment of prisoners of war. This applies to situations of international armed conflict such as occurred in Afghanistan with the commencement of military operations by the United States against the Taliban and Al-Qaeda organization, or the situation in Iraq after the commencement of hostilities by Coalition forces. During World War II, the treatment of Allied forces captured by the Japanese was appalling, and so too was the treatment by German forces of captured Russians on the Eastern Front. These and similar atrocities led to the adoption in 1949 of the Third Geneva Convention Relative to the Treatment of Prisoners of War.

This Third Geneva Convention contains 143 articles and a number of annexes. It attempts to provide legislation to cover every facet of the prisoner of war regime, and to provide for all the situations and contingencies that arose for prisoners of war during World War II. While essential to provide for the proper treatment and safety of such prisoners, some administrative measures in the Third Convention could be dispensed with without seriously impacting the life and well being of prisoners of war.[36] However, other provisions are absolutely essential, but the fundamental question is how to determine entitlement to prisoner-of-war status in the first place.

The key to this Convention is Article 4, since it defines the people who are entitled to prisoner-of-war status. It is this provision that is at the heart of the controversy regarding the status of the captured Taliban and Al-Qaeda fighters currently detained at the prison camp in Guantanamo Bay by the United States. Article 4 was discussed at length during the diplomatic conference in 1949 that led to the adoption of the Geneva Conventions. It was considered essential that the text be explicit and easy to understand, so as to avoid the problems that arose with regard to partisan fighters during

[34] L. Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons," *International Review of the Red Cross* 316 (1997): 35–55 esp. 45.

[35] See *Commentary, III Geneva Convention*, 22–23. Both the U.S. and Afghanistan are parties to the Geneva Conventions.

[36] For example, Articles 70, 71, 76, and 77 relating to correspondence.

World War II, and that it leave no doubt as to the categories of combatants covered by the Third Convention.

The category of combatants entitled to claim the privilege of prisoner-of-war status was expanded upon in the 1977 Additional Protocol I to the Geneva Conventions. This supplemented the Third Convention, mainly by its elaboration of who is (and who is not) entitled to the status of combatant and prisoner or war, and by providing further fundamental guarantees under Article 75 that lay down several minimum rules of protection for the benefit of all those who find themselves in the power of a party to an armed conflict.[37] It reiterated the general rule that although combatants are obliged to comply with international humanitarian law, violations of those laws shall not deprive combatants of their status as combatants or of their right to be prisoners of war.

This was a provision the United States was most anxious to ensure was included in the Additional Protocol, owing to its own experiences in Korea and Vietnam, where U.S. military personnel captured by the enemy were deprived of prisoner-of-war status on the grounds that they had committed war crimes.[38] Under the Third Geneva Convention and the Additional Protocol, prisoners of war may still be tried by a competent court or tribunal for crimes. However, this is not a reason to deny them prisoner-of-war status in the first place. In fact, the Conventions are specifically intended to protect prisoners and detainees from mistreatment under those circumstances. Although the United States has not ratified Additional Protocol I, many of its provisions are considered to be part of customary international law, and are therefore binding on all states.

Prisoners of War: Rights and Obligations under the Geneva Convention

A 1980 United States Department of Defense publication—*Prisoners of War: Rights and Obligations under the Geneva Convention*—intended for the use of military personnel refers to the leading role the United States has played among the world's nations in developing and expanding the rights and responsibilities of prisoners of war and their captors.[39] Fear of mistreatment is the greatest single deterrent to surrender. Furthermore, atrocities embitter and strengthen the will of the enemy, encouraging prolonged resistance. The publication appeals to the self-interest of military personnel, under the possibility that they too may be prisoners of war seeking humane treatment some day.

However, it is the paragraph dealing with the "Enemy in Your Hands" that is most enlightening. It states that the United States requires its military forces to obey the Geneva Conventions, and that this has been the policy even when the enemy has blatantly violated the Conventions and has refused prisoner-of-war status to captured Ameri-

[37] See *Commentary on Additional Protocols*, 861.

[38] See G. Aldrich, "Prospects for the United States Ratification of Additional Protocol 1 to the 1949 Geneva Convention," *American Journal of International Law* 85 (1991): 1–12, at 8.

[39] *Prisoners of War: Rights and Obligations under the Geneva Convention* (DoD GEN-35A) (Washington: Department of Defense, 1 March 1980.

cans. Even in such circumstances, it says that the United States has found it better to continue to apply the Geneva Conventions rather than to descend to the enemy's level. It calls on all U.S. personnel to "treat anyone you capture humanely and in accordance with the Conventions."[40] Later, under the heading "Making the Convention Work," the document acknowledges that full compliance with the Third Geneva Convention is not always easy, especially in the heat of battle. Nevertheless, the United States expects compliance by all its military service personnel as its national reputation and soldiers' well being are at stake.

This statement was issued by the United States Secretary of Defense some twenty years ago; one can only speculate as to what the current secretary, Donald Rumsfeld, would make of his predecessor's instructions. Under Common Article 1 of the Third Conventions, the United States has agreed to "respect and ensure respect for the Convention in all circumstances."[41]

Adherence to the Geneva Convention will not preclude charges of war crimes or other serious offences being brought against individuals detained, if sufficient evidence is available to support such charges. The Conventions do not require placing detainees in luxury cells or ignoring the security threat that such prisoners may continue to pose even in captivity; they merely require according them the basic human rights that the bitter experience of past conflicts has led the majority of states to conclude is appropriate. However, Article 5 of the Convention is absolutely clear in one respect: prisoners are to be accorded the protection of the Convention until their status has been determined by a "competent tribunal."[42] Only such a tribunal of the capturing state (detaining power) may determine whether a person is entitled to be a prisoner of war or not. The U.S. Department of Defense document reiterates that everyone who is captured or detained during an armed conflict should therefore be treated as the Third Convention requires, until a proper tribunal can try his or her case.[43]

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[40] Ibid.

[41] *Commentary, III Geneva Convention*, 17–18.

[42] Ibid., 73–78. In Canada, for example, the Minister of National Defense, pursuant to Section 8 of the Geneva Conventions Act, adopted specific regulations in 1991 respecting the determination of the entitlement of persons detained by the Canadian Forces to prisoner-of-war status. Section 4 of the regulations stipulates that a competent tribunal shall consist of one office of the Legal Branch of the Canadian Forces.

[43] *Prisoners of War: Rights and Obligations,* 4.

Right to Humane Treatment

It is prohibited to treat prisoners of war inhumanely or dishonorably.[44] Although there is no definition of what constitutes inhumane treatment, this is a basic theme of the Geneva Conventions.[45] Furthermore, what are regarded as the principle elements of humane treatment are listed in Article 13, and further guidance can be found in the relevant international human rights instruments. The detaining power must protect the prisoners at all times, and reprisals or discrimination against prisoners are expressly prohibited.[46]

The question of whether the measures taken in transporting the detainees constitute inhumane or dishonorable treatment is worthy of proper investigation, but the relevant articles of the Convention are only applicable to prisoners of war. Amnesty International has noted that keeping prisoners "incommunicado, sensory deprivation, and the use of unnecessary restraint and the humiliation of people through tactics such as shaving them" are all classic techniques employed to break the spirit of individuals ahead of interrogation.[47] Even if the detainees are found by a competent tribunal not to be prisoners of war under the Third Convention, then they will at least be entitled to the protections afforded by the Fourth Geneva Convention for the Protection of Civilians.[48] Furthermore, international human rights law will apply to all categories of prisoners.[49]

There is a requirement to provide prisoners of war with "living conditions" of a comparable standard to those of the forces of the detaining power who are accommodated in the same area.[50] This is clearly not the case in Guantanamo Bay, and it would present the United States with obvious practical and security dilemmas. Nevertheless,

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[44] Articles 13 and 14, Third Geneva Convention. On the treatment of POW's during the Iran/Iraq war, see Memorandum from the ICRC to the States Party to the Geneva Conventions of August 12, 1949, concerning the conflict between Islamic Republic of Iran and the Republic of Iraq, Geneva, 7 May 1983; and second Memorandum of 10 February 1984. On the rights of prisoners in general, see N. Rodley, *The Treatment of Prisoners Under International Law*, 2nd ed. (Oxford: Oxford University Press, 1999), 277–308.

[45] Article 12, First and Second Convention; and Article 27, Fourth Convention. The term is taken from the Hague Regulations and the two 1929 Geneva Conventions.

[46] Articles 13 and 16, Third Geneva Convention.

[47] Amnesty International, Press Statement, 22 January 2002.

[48] See *Prosecutor v. Delalic and Others*, Case No. IT-96-21-A, Trial Chamber, 16 November 1998, paras. 236–277. This confirmed the view that there is no intermediate status; nobody in the hands of the enemy can be outside the law, and must fall under the purview of one of the Conventions (para. 271).

[49] The relevant provisions include the International Covenant on Civil and Political Rights, Article 75 of Additional Protocol 1; and the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (which the U.S. has ratified).

[50] Article 25, Third Convention. See also *United States of America, Plaintiff v. Manual Antonio Noriega, Defendant,* United States Court for Southern District of Florida. Opinion by William M. Hoveler, 8 December 1992 (808 F. Supp. 791, 1992).

the requirement constitutes the minimum acceptable standard.[51] Interestingly, photographs of the detainees that caused such an outcry in Europe and highlighted the issue of the prisoners may have been in breach of the prohibition on making prisoners of war objects of curiosity.[52]

Right to Interrogate Prisoners of War

It is a common misconception that the only information that you can obtain from a prisoner of war is his or her serial number, date of birth, rank, and name. In fact, this is the only information a prisoner of war is obliged to give to the detaining power under the Third Convention, but there is nothing that prohibits interrogating prisoners to learn more.[53] It is acceptable under such circumstances to offer inducements, and even to trick prisoners into supplying information. Any form of torture, whether physical or psychological, is prohibited, and the overall duty to treat all prisoners of war humanely continues throughout the period of internment or detention. This reflects the practical application of the Convention to armed conflict, and prisoners of war are often a source of valuable intelligence on enemy morale and deployment—for example, Iraqi prisoners of war during the Gulf War were a useful source of information. The need to interrogate detainees is therefore not a reason for not granting them prisoner-of-war status.

Release and Repatriation

Since detaining prisoners of war amounts to a form of permissible internment, it is appropriate that the Third Convention should deal specifically with what happens to the prisoners after hostilities have ceased. Article 118 provides that all prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. Somewhat surprisingly, there is no express commentary on the direct repatriation of able-bodied prisoners while hostilities continue. Nevertheless, during the Vietnam War, American servicemen were released to "anti-war groups" in the United States, and during the Falklands/Malvinas conflict a number of repatriations took place before hostilities ceased. Article 117 provides that no repatriated person may be employed on active military service, and this seems to have been respected by both sides in the Falklands conflict.[54]

The question of involuntary repatriation has been an issue in a number of recent conflicts. After the Korean, Vietnam, Iran-Iraq, and Second Gulf Wars, a number of prisoners refused repatriation. Some prisoners faced the very real prospect of persecu-

[51] This principle of assimilation is to be found in a number of articles of the Convention; see *Commentary*, *III Geneva Convention,* 192 and *passim*.

[52] Article 13, Third Convention.

[53] See Article 17, Third Geneva Convention; and H. Levie, *Prisoners of War in International Armed Conflict* (Newport: U.S Naval War College, 1978), 108. On the rights of prisoners in general, see N. Rodley, *Treatment of Prisoners Under International Law*, 46–106.

[54] H. McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (Aldershot: Dartmouth, 1990), 107–9.

tion upon arrival in their homeland, and this did happen to many Ukrainian prisoners of war who fought with the German army and were repatriated at the end of World War II. In such situations, the ICRC has a crucial role to play to ensure that the detaining power is not imposing repatriation on unwilling prisoners, nor using the excuse that prisoners do not want to be repatriated in order to circumvent its obligations under the Convention. This issue must be decided on an individual basis by an independent body such as the ICRC. The official position of the United States is that prisoners have a right to decide about their own repatriation, and each prisoner must consent to repatriation rather than being forced to return.[55]

A crucial question in the context of the campaign in Afghanistan and the hostilities in Iraq is when can hostilities be said to have ceased, thus triggering the general duty to release prisoners of war. The phrase "without delay" in the first paragraph of Article 118 indicates that the obligation to release prisoners arises immediately after the cessation of actual hostilities, and is not dependent upon the corresponding conduct of the enemy. President Bush has declared war on terrorism, and he has warned the American public to expect a long campaign. The Convention does not provide any guidance on how it can be determined that the hostilities have actually ended. One preferred formula is if neither side expects a resumption of hostilities.[56] There is no requirement for a formal armistice or peace treaty; what matters is the actual or *de facto* cessation of hostilities, provided they are unlikely to resume within a reasonable period. This has the effect of permitting the belligerent parties to make a subjective assessment of the intention of the enemy, but, since hostilities cannot be ruled out completely in the future, the mere fact that they *could* be resumed is not sufficient to prevent or delay repatriation. Given the ideological dimension of the current conflict, the question of the cessation of hostilities will be especially problematic. However, with the establishment of a new government in Kabul, and the end of bombing and conventional military operations by the United States and its allies, it will be difficult to argue that active hostilities against the Taliban have not ceased. Similarly, the formation of the Interim Iraqi Government, and the adoption of UN Security Council Resolution 1546 (2004), has changed the situation in Iraq.[57] However, the level of violence in Iraq suggests that there is an ongoing armed conflict taking place there.

The duty to repatriate does not prevent prisoners of war against whom criminal charges—including charges of war crimes or crimes against humanity—are pending from being detained beyond the cessation of active hostilities.[58] This provision refers to specific individuals who have been indicted, and it does not justify the denial of the

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[55] U.S. Department of Defense, *Conduct of the Persian Gulf War - Final Report to Congress*, Appendix 0-20, April 1992.

[56] G. Schwarzenberger, *International Law* (London: Stevens, 1968), 723; and *A Manual of International Law*, 5th ed. (London: Stevens, 1967), 215–6.

[57] Adopted 8 June 2004.

[58] Article 119, para. 5, Third Convention. Article 82 provides that prisoner-of-war status does not protect detainees from criminal offences that are applicable to the detaining powers' soldiers.

right of repatriation on the basis that some among the prisoners may have been involved in war crimes. Prisoners of war cannot be held on mere suspicion, in the hope or expectation that evidence may be found in the future that will allow the initiation of legal proceedings. If the United States has evidence against any of those detained in Cuba, then it may begin proceedings to hold them accountable for their alleged crimes. In the meantime, such prisoners need not be repatriated at the end of hostilities.[59]

Conclusion

There is an issue of self-interest for all states and military forces in ensuring the proper treatment of all prisoners. Even the Irish Defense Forces have experienced ill treatment as prisoners in the former Congo, and others have been captured and brutally killed in southern Lebanon. At the end of the first Gulf War, the United States claimed that the treatment of enemy prisoners of war in United States custody constituted the best compliance with the Third Geneva Convention in any conflict in history. This was a fitting tribute to the United States and coalition forces. The Department of Defense Report concluded that measures to comply with the Conventions had no significant impact on planning and executing military operations. In fact, encouraging the surrender of Iraqi military personnel may have speeded and eased operations.[60]

While the principles and basic rules of international humanitarian law may be considered to represent fundamental values that have met with almost universal acceptance, peacetime efforts to implement them at the national level are nonetheless insufficient.[61] In fact, it is often a marginal item in military training programs.[62] Consequently, these rules of law are not as well known or understood as they should be by those who must apply them, especially the members of the armed forces.

In order to be able to count upon being treated according to humanitarian principles in a conflict, all parties must be prepared to demonstrate a willingness to respect those principles. Reciprocity, while not a legal requirement, is a practical necessity. A primary consideration in developing the principles of humanitarian law was the self-interest of the most protected class of person under the original rules: the combatant. Adherence to the principles of international humanitarian law is not a threat to the security or national interests of the United States. The detaining power can still interrogate and prosecute prisoners of war without infringing upon the Third Convention. On 26 January 2002,

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59 Cf. Articles 115 and 119; see *Commentary: Third Convention*, 534–37 and 553–57.

60 *Conduct of the Persian Gulf War - Final Report to Congress,* L-17.

61 Louis Geiger, "*Armed forces and respect for international humanitarian law: Major issues,"*Symposium on Humanitarian Action and Peacekeeping Operations Report, (Geneva: ICRC 1994), 60.

62 See generally David Lloyd-Roberts, "Training the armed forces to respect international humanitarian law: The perspective of the ICRC Delegate to the Armed and Security Forces of South Asia," *International Review of the Red Cross* 319 (1997): 433; and Yves Sandoz, "Respect for the Law of Armed Conflict: The ICRC's Observations and Experiences," International Seminar on International Humanitarian Law in a New Strategic Environment: Training of Armed Forces, Stockholm, 17–18 June 1996.

the United States Secretary of State broke rank and called on the Bush Administration to apply the Geneva Conventions to all prisoners. It later agreed to apply the Conventions, but not to grant all detainees prisoner-of-war status.[63] However, the Geneva Conventions do not provide for discretionary benevolence. They recognize two basic categories of persons in the context of armed conflict: the civilian and the combatant. They also establish a rule that it is not for the military forces that capture prisoners to determine their status under the Conventions; this must be done by a "competent tribunal." In particular, it is not for a Secretary of Defense or his/her equivalent to make this determination unilaterally.

There is a certain appeal in the simplistic argument that, since "terrorists" do not play by the rules, then why should U.S. or other forces do so? The answer is straightforward: you abide by the principles because they are the law, and because it is the right thing to do. Furthermore, two wrongs never make a right. It is certain that United States soldiers will at some point in the future need the protection provided by international humanitarian law. If the U.S. decides to ignore the law, then it can expect its enemies to do likewise. It will also add to the pervading lawlessness in places like Iraq and Afghanistan. Since the adoption of the Lieber code, over the years the United States has done more than many other states to ensure that humanitarian principles are respected during armed conflicts. In the long term, it has the most to lose if it is not seen to uphold the highest standards.

Humanitarian law represents fundamental principles of humanity, and applies to all those involved in armed conflict. It must be respected in all circumstances, regardless of the existence or nature of the armed conflict. After one hundred years of law making, the primary objective must not be a new law, but ensuring compliance with and effective implementation of the laws already in existence.[64] It is the responsibility of all states and parties to armed conflicts to ensure that all personnel undergo systematic training in humanitarian law, and that standing operating procedures be drawn up to deal with violations when they occur.

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[63] *The Irish Times*, 8 February 2002.

[64] Christopher Greenwood, *International Humanitarian Law and the Laws of War,* Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899 (May 1999), 3 (para. 1.6), quoting Sir Franklin Berman.

Energy Resources of the Caspian Region and the Significance of Turkey for Europe's Energy Security

Gourban Alekperov [*]

Turkey's strategic position as a country located between Orient and Occident, situated on the emerging route between East and West, has been among the most significant factors highlighted by the extensive research literature focusing on the country's intention to join the European Union. In this context, of course, Turkey's strategic importance for the West is also pointed out—the country's status as the "Western fortress" in the Middle East, a region shaken by constant disturbances. The term "security" not only includes military and economic components, but, increasingly, also a secure supply of essential resources of energy. This essay will focus on this final aspect.

Energy Resources in the Caspian Region and their Significance for Europe

With the collapse of the Soviet Union, nine former USSR republics in the Caspian region—Russia, Armenia, Azerbaijan, Georgia, Turkmenistan, Kazakhstan, Kyrgyzstan, Uzbekistan, and Tajikistan—gained their independence and were individually given the rights and duties of sovereign states. Most of the countries of this region, including Iran, which is also among the states abutting the Caspian Sea, have rich oil and gas resources at their disposal. Since in recent years the quantities of these resources have become the subject of political polemic and of so-called "oil diplomacy" in these respective countries, one can only speak of relative numbers at best. According to various estimations, the proven oil reserves in the region are somewhere between two and seven billion tons. These estimations also conclude that the Caspian region contains about five to ten percent of all the oil reserves in world. For the purpose of comparison, it must be mentioned that Saudi Arabia alone has more than twenty-five percent of all proven oil reserves on the planet at its disposal. In the area of gas reserves, the Caspian region accounts for only three to five percent of global reserves. In sum, in the case of the Caspian region, one cannot speak of a new or another Persian Gulf, even if some authors would love to see their respective home countries arise as a new Kuwait or Oman.

According to these estimations, one can see that the energy resources of the Caspian region are on the same level as those of the North Sea. Maybe there is one little difference: the actual development of the energy resources of the North Sea, which form the primary reserves of the European Union, is much more advanced. In the case of the Caspian region, there possibly exist up to 28 billion tons of oil reserves as well

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as enormous natural gas reserves (in addition to the already proven reserves) waiting for development and exploitation.

The comparison to the North Sea does not come out of the blue. Due to these resources, the European market's dependence on supplies from the Gulf region and from Russia was significantly reduced during the 1980s and until the end of the 1990s. However, the fact that there is an asymmetry between the available resources and the high volume of production is a problem for Europe for which a solution has to be found within the next decade. This is necessary in order to avoid the development of dependency on a single supplier. Furthermore, calculations in terms of energy policy also have to take into account the increasing demands of Southeast Asia. This region, with its dynamic economic development, will probably become the major importer of energy sources from the Persian Gulf region.

In such a case, the significance of the Caspian region for Europe will increase. Even if the European Union, with its fifteen member states, can live today—at least in the short or medium term—without exploiting the energy sources of the Caspian region, the situation will change dramatically after the accession of thirteen new member states. The majority of the new EU member states can be characterized by a high degree of unilateral dependency on energy supplies from Russia. This fact—as well as various other factors, such as the possibility of political instabilities in the Caspian region—was already noticed by the EU commission in the mid-1990s. The EU commission, demanding a more active EU engagement policy in the Caspian region, summarized its approach to the region in the following way:

- Support for independence and territorial integrity of the newly established states in the region;
- Consolidation of democratic institutions and human rights as a basis for security and peace;
- Decreasing the number of conflicts by means of political and economic reforms, which highlights the importance of the European Union as an impartial donor and partner for investment and commerce;
- Support for economic transformation in accordance with the principles of sustainability and environmental responsibility;
- Active participation of one's own economy in the decision-making processes with respect to investment, energy, and mining as well as with regard to future pipeline routes;
- Development of a stronger profile of the European Union in the entire region through a more intensified political dialogue.

Table 1 clearly shows the dependency of the new candidates for EU membership on imported energy:

Table 1: Percentage of energy imports from Russia among the candidates for EU membership (1998, in percentage)

Country	Oil (%)	Gas (%)
Bulgaria	98.5	99.7
Estonia	85.4	100
Latvia	105.4	106.4
Lithuania	87.8	100.0
Malta	99.9	0.0
Poland	96.6	66.8
Rumania	43.9	25.3
Slovakia	99.8	99.1
Slovenia	108.6	99.2
Czech Republic	99.8	99.1
Turkey	90.1	94.6
Hungary	80.9	72.4
Cyprus	98.8	0.0

In 1998, the European Council agreed upon a common declaration on the European Union's engagement in the Caspian region. In this document, aside from the main focus (which was on the energy sector), the paragraph on the routes of the pipelines is particularly remarkable, because here the EU distances itself from the geopolitical and geo-strategic way of thinking and leaves the strategic decisions on the pipelines largely up to commercial calculations made by the affected corporate groups.

The European Energy Charter is one of the most important instruments of EU policy toward the Caspian region. It was signed by the EU and fifty-one countries in December 1991. The basic idea of the Charter was to create favorable conditions for incipient economic development in Eastern Europe and the former Soviet Union. The final plenary meeting of the European Energy Charter Conference, which was held in Lisbon on 16–17 December 1994, passed the European Energy Charter Contract. The signatories of this contract included, beside the EU member states, all Eastern European countries, the members of the Commonwealth of Independent States (CIS), Japan, and Australia. The U.S. and Canada were granted observer status. The contract came into force on 16 April 1998, when the thirtieth ratification document was filed.

The major objectives of the Energy Charter were:

- To guarantee equal treatment among domestic and foreign investors in each of the signatory states, and to ensure the unhampered repatriation of profits;

- To enforce WTO rules in the fields of customs and customs tariffs, even in countries that are not members of the WTO;
- To guarantee secure oil transportation, with a special emphasis on the prohibition or interruption of shipments due to political reasons;
- To set up an International Court for the purpose of dispute settlement. The fact that the contract has not yet been ratified by Russia does not reduce the importance of its position as a bulwark against the threat of a general politicization of the development of natural resources and their conveyance in the Caspian region. However, it would be desirable that the most important regional oil producer, i.e., Iran, should be included in the Energy Charter. Up to now, this country was strictly excluded from all negotiations within the framework of the Energy Charter.

The European Union's intention is to establish closer links, based on contracts, with all successor states of the former Soviet Union. For this purpose, the EU has offered them a certain type of "mixed agreements," the so-called partnership and cooperation agreements (PCAs), which create a general framework for cooperation despite the absent element of prospective EU accession. The PCAs with the successor states of the former Soviet Union in the Caspian region consist of political and commercial sections. The commercial part of any given PCA may already have come into force, by means of an interim arrangement, before the final ratification of the PCA itself. The broad field of cooperation opened up by a PCA extends from mercantile trade, monetary transactions, and the protection of investments, and reaches as far as the protection of intellectual property.

In addition, the EU cooperates with the states of the region within the framework of the so-called TACIS program (Technical Assistance to CIS countries). In this context, the INOGATE project (Inter-State Oil and Gas to Europe), being part of TACIS, is of high importance for energy policy in the region. This regional TACIS project is aimed at the reconstruction, modernization, and rationalization of transnational oil and gas pipelines in the Commonwealth of Independent States in general, and in the Caspian region in particular. The cost for the program is approximately fifty million ECU. The goal of the INOGATE project is to develop a number of comprehensive, negotiable proposals in order to enable investments for new pipeline routes, which may be added to those already existing. For this purpose, INOGATE began with the evaluation of the existing supply networks and an assessment of the feasibility of certain infrastructure projects. The program also helped with respect to questions concerning the contract and, for the first time, in 1997, it invested in a number of smaller projects for the redevelopment of important border areas where human and environmental environment were at risk, in order to guarantee continuous energy supply.

The Problem of the Export Routes for Caspian Oil

The Caspian Sea, which is really the world's largest lake, has no access to the open sea. This factor, as well as its huge distance from companies that manufacture oil rigs and technical equipment for oil conveyance, increases the production costs for Caspian oil. The EU—as the already mentioned declaration of the EU Council has made clear—places priority on the economically reasonable and cost-efficient solution of the problem, and has started distancing itself from the geopolitical rivalries that have arisen over the export routes for Caspian oil.

The already existing pipelines—the Baku-Novorossiysk and Baku-Supsa routes (the so-called "Early Export Pipelines")—with their combined transportation capacities of three billion tons per year correspond to today's conveyance-mass in the Azerbaijan sector of the Caspian Sea. The increase of oil production to fifty billion tons per year, as scheduled for the year 2005, requires more robust transportation capacities. For this purpose, a main export pipeline (MEP) is being planned to run from Baku to Georgia, and then to the Turkish harbor Ceyhan on the Mediterranean. At the OSCE summit in Istanbul on 18–19 November 1999, the heads of state and government from Azerbaijan, Georgia, and Turkey, with U.S. President Clinton present, signed an agreement on the construction of the Baku-Ceyhan pipeline.

But the economic efficiency of this pipeline, with a flow capacity of up to sixty billion tons per year, is being strongly questioned, because it is uncertain whether Azerbaijan on its own can guarantee the ratability of the pipeline. We can expect that a rentable total function of the pipeline can be achieved by redirecting part of Kazakhstan's oil production over the Baku-Ceyhan route. Until the year 2005, Kazakhstan will provide ten billion tons of oil per year for this purpose. This amount of exports shall be increased up to twenty billion tons per year in the course of the next years.

When the CPC pipeline (which runs from the Tengiz field in Kazakhstan to Novorossiysk in Russia) was opened in the summer of 2001, with a flow capacity of more than 60 billion tons, the possibilities for the realization of the Baku-Ceyhan project became even more questionable. Nevertheless construction for this project had been scheduled to begin in the summer of 2002. The leadership role in the construction consortium was held by British Petroleum. We can expect that the Russian company Lukoil will also participate in the construction work of the pipeline, but this has been strictly denied by representatives of this company.

Other realistic options for the transportation of Caspian oil are linked to plans to build pipelines from Burgas in Bulgaria to Alexandroupolis in Greece, and from Constanza in Romania to Trieste in Italy. In both cases, the solution relies on the shipment of oil over the Black Sea to the respective harbors (Burgas and Constanza), and then further transportation over a network of pipelines. A similar pipeline was constructed from the Ukrainian Black Sea port Odessa to Brody in Western Ukraine, which was finished at the end of 2001.

Regarding the transportation of gas resources in the Caspian region, a number of pipeline projects have been designed so far, but they are still waiting to be carried out.

The main regional exporter of gas, Turkmenistan, is still highly dependent on Russian transportation networks. This fact delays the development of the country's export capacities, and also has a negative impact on its economic development. The U.S. embargo policy against Iran does not have any positive effect in this respect either. As a result, the only non-Russian pipeline—regardless of U.S. protests—today crosses Iranian territory (Okarem-Kord-Kuy pipeline). However, the capacities of this pipeline are not sufficient to accommodate the scheduled increase of exports. Recently, the deadlocked proposal of a trans-Caspian gas pipeline from Turkmenistan across Azerbaijan and Georgia to Turkey (parallel to the Baku-Ceyhan oil pipeline) has again been strongly pushed by the Turkmen. After the overthrow of the Taliban regime in Afghanistan, the almost forgotten pipeline project from Turkmenistan to Afghanistan and Pakistan has also once again been put on the table.

Today, Azerbaijan is the second largest exporter of gas resources from the Caspian region. The most important route for exporting Azerbaijani gas will, after the completion of the gas pipeline from the Schah-Deniz field in the Azerbaijan sector of the Caspian Sea, run from Tiflis in Georgia to Erzurum in Turkey. The projected flow capacity of this pipeline will be six billion cubic meters per year.

The Question of the Legal Status of the Caspian Sea

One of the most important obstacles on the road to the broader industrial development of export capacities in the Caspian region has been the unclear legal status of the Caspian Sea. The existing agreements based on international law consist of two agreements that were signed between the Soviet Union and Iran in 1921 and 1940. These agreements are limited to the question of shipment and fishing. Nevertheless, the former superpower USSR considered the Astara (Azerbaijan)-Hasan-Kuly (Turkmenistan) line as the border of its own sector in the Caspian Sea.

With the decline of the Soviet Union, the question of the legal status of the Caspian Sea became extremely contentious, particularly when considered with regard to fossil fuels. Without previous consultations with its neighbors, Azerbaijan signed the so-called "contract of the century" with some well-established Western oil companies to cover the production work in its own sector of the Caspian Sea. Since the adoption of the constitution in 1995, Azerbaijan has viewed this sector as part of its own state territory.

From the Russian point of view, the Caspian Sea was defined as a lake, so that each littoral country had a right over the national twelve-mile zone extending out from its own coastline. Azerbaijan rejected this Russian proposal because this would have meant, in the first place, the loss of the rights to the Azerbaijan offshore fields that lay outside the twelve-mile zone.

Nevertheless, Azerbaijan's President Aliyev and Russia's President Putin reached an agreement featuring a model for dividing the sea bottom into various sectors and governing the general use of the waters of the Caspian Sea in the Baku Declaration, signed on 9 January 2001. Nevertheless, it is frequently pointed out that the final solu-

tion of the question of the sea's status can only be achieved through a common agreement by all countries in the Caspian littoral.

The current situation with respect to the question of the legal status of the Caspian Sea was the subject for a summit of the heads of state and government of the abutting countries (Azerbaijan, Turkmenistan, Russia, Kazakhstan, and Iran) in Turkmenistan's capital Ashgabat on 23–24 April 2002. Even just before the summit, the positions were relatively clear. On the one hand, one could observe a tendency toward reaching a common understanding between Azerbaijan, Kazakhstan, and Russia on the basis of the previous agreements according to the principle of the "general use of the water surface and division of the sea bottom into a number of sectors." Generally speaking, Turkmenistan was not opposed to this solution, but the question of the oil fields, which was disputed between Azerbaijan and Turkmenistan, prevented an agreement with the other countries. Such an agreement was also prevented by Iran's claims, according to which the sea bottom was to be divided on a pro-rated basis among all littoral countries, i.e., each of them would receive twenty percent.

The summit did not lead to any long-lasting result. On the contrary, tensions rose, and were articulated in emotional statements by several politicians. The Turkmen president Saparmurat Niyazov made threatening gestures to the other participants by saying that there is a "smell of blood in the Caspian Sea." The events of July 2001, when an Iranian gunboat ran off a BP geological research boat with its entire crew from the part of the Caspian Sea claimed by Iran, shows that these threats were not far from becoming reality.

However, there have also been approaches to a pragmatic solution, such as, for example, the Russian-Kazakh attempt to arrive at a juridical segmentation of the northern part of the Caspian Sea. As a result, the presidents of Russia and Kazakhstan, Putin and Nazarbayev, signed the additional protocol to the (6 July) 1998 agreement between the Russian Federation and Kazakhstan over the segmentation of the northern part of the Caspian Sea on 13 May 2002. The goal of the additional protocol was to execute the rights of sovereignty with respect to the exploitation of national resources. This protocol codifies the geographical coordinates of the modified center line and partition in the northern part of the Caspian Sea between Russian and Kazakhstan. President Nazarbayev characterized this protocol as a positive example of a pragmatic approach toward solving this problem. It must be noted that, without a legal solution of the question of ownership in the Caspian Sea, it is impossible to speak of the stable development of the region's existing natural resources.

Turkey, European Energy Security, and the Caspian Region

As was already mentioned above, Turkey is heavily involved in a number of pipeline projects allowing the transportation of Caspian energy resources to the world market. Beside the sole financial profit out of transit fees, these projects also help to create numerous jobs and to significantly improve the country's own energy supply.

The various pipeline projects are, of course, also linked to the geopolitical calculations of some powers involved. For example, the U.S. favors the route from Baku in Azerbaijan to Georgia, and then further on to Turkey's harbor Ceyhan at the Mediterranean Sea, a route that circumvents Russia. Despite the fact that many observers have doubts over the cost-effectiveness of this pipeline route, Washington's "Ambassador to the CIS" during the Clinton administration, Stephen Sestanovich, emphasized in 1998 that U.S. policy in the Caspian region is far from being limited to economic interests, and that decisions are also made from a strategic standpoint. To simplify, this strategy can be outlined as follows: First, the pipeline links the regional ally of the United States, Turkey, with two other Western-oriented countries in the Southern Caucasus, Georgia and Azerbaijan, and helps improve the U.S. presence in the entire Caspian region. Second, bypassing Russia bolsters the political and economic independence of the states in the region from their former imperial power. Third, transporting the region's resources without using the low-priced Iranian pipelines increases the isolation of the theocratic regime in Teheran, and also helps avoid any increasing Iranian influence in the Muslim republics of the former USSR.

In the light of the recent rapprochement between the West and Russia, particularly after the creation of the NATO-Russia Council (which gives specific rights to Russia in the political decision-making process within NATO), Turkey and Russia's positions may eventually converge. The quasi-alliance relationship that has become possible between both countries could also initiate further cooperation in the area of petroleum and natural gas pipelines, or even lead to coordinated activities in the fields of regional politics and military cooperation. The official visit of the Turkish General Chief of Staff Hüseyin Kivrikoglu to Russia, and the coordinated activities of the Turkish and Russian presidents with respect to the Kashmir question, can be seen as first signs of such a development. However, at the moment it is too early to give a detailed assessment of their significance.

The Caspian region has become very important for Turkey due to the fact that there is a cultural and linguistic contiguity of the peoples living there. Turkey's relationship with Azerbaijan may be seen as an example. As a consequence, Turkey has helped Azerbaijan set up its own armed forces, and has shown solidarity with this country during its confrontation with its neighbor Armenia in the conflict over the enclave Nagorno-Karabakh. This solidarity went so far that the Turkish government closed down all checkpoints to Armenia until the Armenian army had finally withdrawn its troops from the occupied Azerbaijani territory.

Today, from Turkey's perspective, there are three important tasks to be accomplished in the Caspian region that would legitimize its long-lasting presence and position in the region. First, there is the task of large-scale investment in the Azerbaijani energy industry. Therefore, the Turkish oil company Turkish Petroleum owns 6.75 percent of all shares of the so-called "Contract of the Century," which covers the exploitation of the oil fields in Azerbaijan.

Second, there is the task of pursuing infrastructure projects such as the construction of oil and gas pipelines from Baku to Georgia and then further to Ceyhan and Erzurum.

The volumes of the gas supplies exported across Turkey will increase significantly in case of the possible realization of the TCP project. Despite American objections, Turkey proceeds with its cooperation with Iran in this domain. Since 2001, Turkey has been receiving gas from there through the Tabriz-Ankara pipeline.

Third, Turkey will assume its coveted role as an energy transport hub, and its importance for Europe's energy supply will increase when all these projects are completed. It will play a distributing function in the so-called "Southern Gas Ring" that is projected by the EU, and, consequently, promote the diversification of the sources of supply (as intended by the EU). As a result, there are also plans to link the Turkish, Greek, and Italian gas networks within the next years. The traditional gas suppliers for the EU have been Russia, Algeria, and Norway. The projected network will enable the newly independent states of the Caspian region to export more gas to Europe.

The projected pipelines will also be significant for Turkey's plans to diversify its own sources of energy. Today, the Russian company Gazprom supplies seventy percent of the Turkish gas demand. In twenty years, domestic demand will increase up to eighty-two billion cubic meters, as estimated by the Turkish Ministry of Energy. We can anticipate that in the coming years Turkish imports of energy resources will exceed by far the domestic demand, so that part of the import could be used for export.