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Civilian Sanctuaries: An Impractical Proposal

1 Israel Year Book of Human Rights 335 (1971)

Certainly, one should always take a positive stance with respect to any practical and workable proposal aimed at increasing the protections afforded the civilian population in time of armed conflict. Despite that premise, which is basic to any consideration of the law of armed conflict, or perhaps because of the restrictive adjectives “practical and workable” which have been, and must be, used, it appears necessary to cast a negative vote with respect to a well-intentioned, but impractical, proposal first made by the Secretary-General of the United Nations in 1969 and greatly elaborated upon by him in 1970.

On December 19, 1968, by Resolution 2444 (XXIII), the General Assembly of the United Nations requested the Secretary-General to study and prepare a report on the subject of “Respect for Human Rights in Armed Conflict.” He did so, his staff producing A/7720, November 20, 1969 (hereinafter referred to as the “1969 Report”). On December 16, 1969, by Resolution 2597 (XXIV), the General Assembly requested the Secretary-General to continue his study and to submit a further report on the same subject. Once again he did so, his staff producing A/8052, September 18, 1970 (hereinafter referred to as the “1970 Report”).

In the 1969 Report eight paragraphs (145-52) were devoted to the subject of “civilian refuges or sanctuaries.” In March, 1970, during the course of a Panel which included the United Nations official actually responsible for the preparation of that Report—the Director of Human Rights Division of the United Nations Secretariat, the present writer, in passing, questioned the practicality of the proposal for large-scale civilian sanctuaries.¹ This adverse comment, which really did not rise to the category of criticism, may well have inadvertently contributed to the fact that the 1970 Report expanded the coverage on the subject from eight to forty-three paragraphs (45-87). It is the purpose of this paper to demonstrate the impracticality of the proposal for such civilian sanctuaries and the actual lack of need for such a device if there is compliance with already well-established norms of the law of armed conflict, perhaps amplified in the light of currently available and foreseeable methods of conducting such conflict.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

Some discussion in depth of the proposal contained in the two Reports is essential for an understanding of the problem. The basic proposal was originally advanced in the following language:

The difficulties which are attendant on arriving at a practically useful definition of what constitutes a legitimate military objective have led to the consideration of other solutions which might effectively increase the protection afforded to civilians in armed conflicts. One method might be to gather and place under shelter as large a part of the civilian population as possible, especially women, children, the elderly, the sick and those who do not participate in the armed conflict, nor contribute in any way to the pursuit of military operations. This might be achieved by adopting and developing, on a larger scale than provided at present, a system of safety zones which would offer special protection and even immunity from attack.²

The purpose of the proposal for large-scale civilian sanctuaries was subsequently more clearly drawn when the 1970 Report stated:

The civilian sanctuaries would therefore be established to draw the attention of the belligerents to the presence in a given area of persons whom they are already obligated to respect, protect or refrain from injuring. In effect, refuges or sanctuaries might assist in facilitating the observance by the belligerents of the obligations incumbent upon them.³

Both of the Reports recognized the need for numerous safeguards in order to ensure the successful operation of the civilian sanctuaries and to prevent their misuse. These safeguards were gathered together into the following four propositions:

1. The necessity for the designation and recognition of civilian sanctuaries in peacetime before hostilities have aroused animosity and suspicion;⁴
2. Restrictions on the selection and use of such sanctuaries;⁵
3. Special identification markings for the sanctuaries and the personnel serving in them;⁶ and
4. A system of control and verification.⁷

It appears to the present writer that the mere enumeration of these few requirements, which is far from exhaustive, demonstrates the lack of feasibility of the proposal.

The idea of civilian sanctuaries did not emerge full-blown from the Secretary-General's brow.⁸ It is not even the application of existing ideas and norms to a totally new concept. It is merely the elaboration and extension of an existing system of protection, which was designed for comparatively small groups of individuals and for comparatively small areas of real estate, to potentially very large segments of the population and potentially enormous portions of the land mass of a belligerent nation. As the 1969 Report points out,⁹ the doctrine of the "open city," which has been elsewhere defined as "an undefended city, open to occupation by enemy forces without harm to the inhabitants,"¹⁰ originated in the customary law of war and was codified in the Fourth Hague Convention of 1907.¹¹ Thus, the entry of the Germans into Paris in June, 1940, during World War II, has been termed "a classical example of the application of the [1907] Hague Rules of Land Warfare."¹² During that same War, the "open city" doctrine failed to provide protection to the civilian populations in the cases of Belgrade, Zagreb, and Ljubliana in 1941 and in the case of Rome in 1943.¹³ Three very small neutralized zones were apparently established in Jerusalem in 1948, but these probably did not result from an application of the "open city" doctrine.¹⁴

Elaborating on earlier Geneva Conventions, each of the four 1949 Conventions provides for protected areas of one character or another: hospital zones;¹⁵ prisoner of war camps;¹⁶ neutralized zones;¹⁷ and internment camps.¹⁸ The 1954 Hague Convention¹⁹ contains provisions setting up an elaborate system for the protection of areas containing cultural monuments. And, finally, the so-called *Draft Rules* disseminated by the International Committee of the Red Cross in 1956²⁰ have a number of provisions on the subject of sanctuaries.

In summary, various types of protected zones for different categories of noncombatants, emerging from the "open city" doctrine, have existed for a considerable period of time. All of these protected zones have been restricted to comparatively small land areas, perhaps a few thousand square yards or meters, at most a few square miles or kilometers, intended to afford protection to a city and its civilian population, to a hospital, its patients, and staff, to a prisoner of war or internment camp and its inmates, to a museum and its attendants. The Secretary-General's proposal would greatly enlarge this concept. It proposes protected zones on a grand scale: not thousands of square yards or meters, but thousands and hundreds of thousands of square miles or kilometers; not the noncombatant personnel of a hospital, or of an internment camp, or of a museum, or even of a city, but a very large part of the population of the nations engaged in hostilities.²¹ Laudable and idealistic as the proposal obviously is, it unfortunately appears to be completely impractical in the world in which we live.

The problems involved in obtaining acceptance of and in implementing the proposal appear to this writer to be insurmountable. Can anyone believe that today's nations and their governments could reach agreement, even in peacetime, either on a bilateral or on a multilateral basis, exempting large portions of their respective territories from all types of attack in the event of war?²² Can anyone believe that such nations would remove from, and prohibit the subsequent introduction into, the zones so designated of every type of industry and activity which could in any way contribute to a war effort?²³ Can anyone believe that in this age of nuclear weapons and "quick" wars, a nation would, at the outset of hostilities, be in a position to devote the necessary energy, manpower, and equipment to the task of moving millions of its civilians into the neutralized zones?²⁴ Can anyone believe that nations at war would be in a position to devote the necessary energy, manpower, and equipment to the task of providing logistic support for millions of its citizens who would necessarily be nonproductive insofar as the war effort is concerned?²⁵ Can anyone believe that, human nature being what it is, the worker who stays on his job in support of the war effort can be successfully separated from his wife and children?²⁶ Can anyone believe that any nation at war will voluntarily and actually deprive itself of an urgently needed resource by moving into a neutralized zone a great mass of potential labor, even though it be women, children, and the elderly?²⁷ Can anyone believe that today's nations will accept "a system of control and verification" in the persons of foreign observers stationed within their territory in time of war?²⁸ Can anyone believe that the huge areas involved, the impossibility of really effective control and verification, and the pressures of wartime requirements, would not result in massive evasions of the restrictions and improper usage of the neutralized zones?²⁹ Can anyone believe that the nations of today would accept any such proposal without an escape clause such as the "imperative military necessity" clause of the 1949 Geneva Conventions?³⁰ Can anyone believe that a nuclear nation, envisioning the eventuality of defeat, would not use the neutralized zones as a basis for blackmail? These are but a few of the many questions raised by the Secretary-General's proposal, to each and every one of which this writer would give a negative answer.

Is there an alternative to the Secretary-General's proposal for large-scale civilian sanctuaries for the protection of the civilian population? There most certainly is, and it is not only more feasible, but it is much more likely to be acceptable to the community of nations. That alternative is as follows:

First, full-scale application of and compliance with the already existing restrictions on allowable military objectives, modernized as necessary to meet present-day requirements. What is needed is not new norms, but compliance with existing norms. For example, target-area bombing certainly violated the

principle of the military objective, but it was used by both sides so generally during World War II that the principle practically ceased to exist. It must be revived. Again, and perhaps somewhat peripherally, the Protecting Power is already available to do all that the Secretary-General would have a Commissioner-General or Observer-General do during time of actual hostilities—but in not one of the scores of hostilities which have occurred since the end of World War II has this extremely valuable international institution been called into action.

Second, the law of air warfare, if any now exists, should be elaborated upon and codified³¹ The extreme reluctance of nations to establish recognized and accepted international rules in this very vital area is really incredible. For example, all governments express horror at the mere suggestion that any other nation, then engaged in hostilities, has resorted to “terror bombing”—the bombing of nonmilitary objectives and of the civilian population in order to destroy enemy morale and to bring an adversary to its knees on the home front when it has not been possible to do so on the battlefield. The 1923 Hague Rules of Air Warfare³² and the ICRC’s 1956 Draft Rules specifically proposed such a prohibition,³³ but many years later that proposal is still in limbo. Here, too, World War II practices have, unfortunately, probably negated the principle of the military objective.

Third, the initiation of some system of effective sanctions against belligerents who violate the principle of the military objective. Such a system of sanctions has been drafted and accepted with respect to individual violators of the 1949 Geneva Conventions.³⁴ There is no reason why some such system cannot be devised for nation violators as well as individual violators of the principle of the military objective, once that principle has been resurrected.

In summary, it is suggested that the existing law of armed conflict, elaborated as may be necessary, particularly in the area of air warfare, if complied with (and with additional methods to be established for enforcing compliance), can provide the civilian population with the protection which it requires and to which it is already entitled under existing norms; and that it can do this much more readily than can the elaborate and impractical proposal advanced by the Secretary-General of the United Nations in his 1969 and 1970 Reports on “Respect for Human Rights in Armed Conflict.”³⁵

Notes

1. Levie, “Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals during Armed Conflict,” Working Paper for the Fourteenth Hammarskjöld Forum, *When Battle Rages, How Can Law*

Protect? (Carey ed. 1971). The present writer's comments concerning the proposal are contained in the Working Paper (at page 27) and in the comments (at page 70).

2. Para. 145 of the 1969 Report. As already mentioned in the text, and as will be enlarged upon later in this paper, the writer considers that the difficulty is *not* in defining legitimate military objectives, but in securing compliance with existing prohibitions against attacks on what would generally be conceded (except, of course, by the attacker) to be nonmilitary objectives. Lists of legitimate military objectives, such as those contained in Hague Convention No. IX of 1907, art. 2, 2 *Am. J. Int'l L.* 146 (Suppl. 1908), could easily be brought up-to-date by a list such as that contained in the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (hereinafter referred to as *Draft Rules*), which were disseminated by the International Committee of the Red Cross (ICRC) in 1956.

3. Para. 56 of the 1970 Report. It has been suggested that civilian sanctuaries may actually be defined affirmatively (the identification of those areas which are free from attack) or negatively (the identification of those areas which are subject to attack, all nonlisted areas being protected). Stillman, "Civilian Sanctuary and Target Avoidance Policy in Thermonuclear War," 392 *The Annals* 116, 121-22 (1970). This is really but another way of stating the proposition set out in the preceding note.

4. Para. 149 of the 1969 Report; para. 53 of the 1970 Report.

5. Para. 150 of the 1969 Report; paras. 55 and 58 of the 1970 Report.

6. Para. 151 of the 1969 Report; para. 71 of the 1970 Report. This is not really a safeguard in the same sense as the others.

7. Para. 152 of the 1969 Report; paras. 80 and 82 of the 1970 Report.

8. Nor from the brow of the Director of the Human Rights Division!

9. Para. 146.

10. Stillman, *op. cit. supra* note 3, at 117.

11. Regulations Attached to the Hague Convention No. IV of 1907, art. 25, 2 *Am. J. Int'l L.* 90, 97 (Suppl. 1908).

12. Stillman, *op. cit. supra* note 3, at 118.

13. *Ibid.* For some reason the author omits any reference to the declaration of Manila as an open city in 1942.

14. Desmet, *Les lieux de refuge comme moyen de protection des populations civiles contre les bombardements aeriens* 4 (unpublished ms., 1961). Similarly on at least two occasions prior to World War II arrangements were made restricting attacks against specific portions of urban areas: the northeast quarter of Madrid in November 1936 and the "Jacquimot Zone" in Shanghai in August 1937. *Id.* at 3-4. Castrén, *The Present Law of War and Neutrality* 176-77 (1954).

15. 1949 Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, art. 23 and Annex I, 75 U.N.T.S. 31; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 23, 75 U.N.T.S. 85; and 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 14 and Annex I, 50 *Am. J. Int'l L.* 724 (Suppl. 1956).

16. 1949 Geneva Convention Relative to the Treatment of Prisoners of War, art. 23, 47 *Am. J. Int'l L.* 119 (Suppl. 1953).

17. Art. 15, Civilians Convention, *op. cit. supra* note 15.

18. Art. 83, Civilians Convention, *op. cit. supra* note 15.

19. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240. This Convention and art. 15, Civilians Convention, *supra* note 15, supplied most of the ideas which are included in the Secretary-General's proposal. Understandably, the Report was compelled to concede the existence of substantial differences between the protection of cultural property and the protection of the civilian population. See para. 79 of the 1970 Report.

20. *Op cit. supra* note 2.

21. In its para. 54, the 1970 Report admits that, desirable as it would be to shelter *all* "those civilians taking no part in the hostilities and in no way contributing to the war effort," as a practical matter this would be impossible "due to limitation of accomodation and other circumstances."

22. Para. 150 of the Report points out that "the demarcation of certain territories as safety zones should not entail any military benefits, direct or indirect, for any of the parties to the conflict." It is difficult to conceive of any demarcation of protected territory which a putative enemy would not consider benefit-giving to its disadvantage.

23. To say the least, any such effort would result in a complete dislocation of the normal civilian economy.

24. Para. 150 of the 1969 Report would compound this problem as it states that "the safety zones . . . would not be centres of important means of communication or transport."

25. The comment contained in the previous note is equally applicable here.

26. Experience during World War II in such countries as the United Kingdom demonstrated the difficulty inherent in attempting to separate families.

27. In modern warfare labor is almost as essential as armaments; and every individual, male or female, young or old, capable of aiding in the overall productive effort is an asset whose productivity will be demanded and required by the warring nation.

28. Para. 82 of the 1970 Report refers to "the inspectors and experts with . . . immunity and access to the area concerned, . . . the right of communication, including the use of a special code whenever necessary . . ." In the light of the conspicuous lack of success encountered during the past two decades in attempting to negotiate even the simplest means of on-the-ground verification during peacetime, this proposal appears to be particularly naive and unrealistic. The frequent inability of the ICRC to function (North Korea and North Vietnam are but two pertinent examples) is an index of what could be expected if, indeed, such a provision could be successfully negotiated.

29. In an area of hundreds or thousands of square miles, it would certainly not be too difficult to establish many covert facilities which would actually produce war materials, entirely apart from the fact that many such items have valid nonmilitary uses. And who is to say that a civilian school for, say, garage mechanics is not producing trained personnel for the military forces?

30. Each of the 1949 Geneva Conventions, *op. cit. supra* notes 15 and 16, contains common Art. 8 which provides, in part:

. . . They [the representatives of the Protecting Power] shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

A similar restriction also appears in other provisions of these Conventions. The 1954 Hague Cultural Convention, *op. cit. supra* note 19, refers, in art. 11(2), to "exceptional cases of unavoidable military necessity."

31. On this subject, see the thought-provoking article of DeSaussure, "The Laws of Air Warfare: Are There Any?" 23 *Naval War College Rev.*, No. 6, at 35 (1971); reprinted in 5 *The International Lawyer* 529 (1971). See also Levie, *op. cit. supra* note 1, at 21-29.

32. 17 *Am. J. Int'l L.* 245 (Suppl. 1923); 32 *id.* 12 (1938); Greenspan, *The Modern Law of Land Warfare* 650 (1959).

33. Art. 6, Draft Rules, *op. cit. supra* note 2.

34. Arts. 49, 50, 129, 146, 1949 Geneva Conventions, *op. cit. supra* notes 15 and 16.

35. The present writer is not alone in doubting the wisdom and practicality of civilian sanctuaries as proposed by the Secretary-General. See, for example, Stillman, *op. cit. supra* note 3, at 117, 121, and 123; Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflict," *The Law of Armed Conflict* 20-21 (Carnegie End., 1971); and Rubin, "Informal Summary of Personal Reactions to U.N. Doc. A/8052" (ms., Am. Soc. Int'l L., 1971). In the discussion following the presentation of this paper at the Symposium, Colonel Draper indicated that the proposal had met with a rather tepid reception at the ICRC's Conference of Government Experts held in Geneva in May-June, 1971.