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THE IX INTERNATIONAL CONFERENCE FOR YOUNG RESEARCHERS "FACING CHALLENGES OF MODERN ARMED CONFLICTS THROUGH THE LENS OF IHL: NEW ACTORS, NEW TASKS, NEW SOLUTIONS"

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FOREWORD

The Russian-Armenian University in partnership with the Delegation of the International Committee of the Red Cross (ICRC) in Armenia annually organizes Yerevan International Conference for Young Researchers on International Humanitarian Law. The 9-th edition of the Conference marked with the slogan *"Facing Challenges of Modern Armed Conflicts Through the Lens of IHL: New Actors, New Tasks, New Solutions*", was held in Yerevan, Armenia from November 10 to November 12, 2016.

The Conference is aimed at creating a sustainable platform for young researchers to discuss the challenges of modern armed conflicts from the perspectives of the International Humanitarian Law, International Human Rights Law and International Criminal Law.

The First Conference took place in April 2007 and since then became one of the most significant events held in Armenia in the sphere of International Law and particularly International Humanitarian Law.

The first eight editions of the Conference hosted young researchers from almost all the CIS countries, as well as from Brazil, Czech Republic, Estonia, Georgia, Hungary, India, Iran, Israel, Italy, Netherlands, Poland, Peru, Switzerland, United Kingdom and United States of America. During the events broad range of topics such as Status of Private Military Companies and Private Security Companies under International Humanitarian Law, The Status of Non-Privileged Categories of Persons Participating in Armed Conflicts (Unlawful Combatants, Mercenaries, Terrorists, Pirates), Status of Participants of Modern Armed Conflicts, War Crimes and their Contemporary Interpretation, Implementation of IHL Norms and War Crimes and Crimes against Humanity Repression, Interaction between International Humanitarian Law and International Human Rights Law, IHL compliance mechanisms were debated. The best research papers presented during the previous editions of the Conference, as well as the current one, were and will be published in a special volume. A survey conducted among former participants, revealed that more than 80 % of former participants intend to return to the Conference. The stated confirms once again that the objective of the Conference, which was creation of a solid forum for young researchers involved in the International Humanitarian Law, International Human Rights Law and International Criminal Law, has been achieved. The forum is recognized and continues to enlarge the scope of the topics discussed and countries participating.

Organizing Committee of the Conference
October 2017, Yerevan, Republic of Armenia

THE STATUS OF FOREIGN FIGHTERS UNDER INTERNATIONAL HUMANITARIAN LAW

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Abstract

Although the phenomenon of "foreign fighters" is not new, a reported recent increase in their numbers and in the range of countries from which they originate, the groups they join, their motivations and subsequent paths have highlighted the complicated nature of this issue and raised concerns across the world. Yet the legal obligations, as well as the exact level of legal protection these individuals enjoy once they join an ongoing conflict, are not entirely clear. In particular, International Humanitarian Law (IHL), which aims at protecting the basic rights of individuals and groups affected by armed conflicts, does not provide specific guidance on what status they might be entitled to and, consequently, how they should be treated. The present chapter seeks to shed some light on this matter by reviewing the main IHL treaties, their commentaries, judicial decisions rendered by international tribunals and relevant scientific contributions. It will do so by looking at IHL applicable in International Armed Conflicts (lACs) and in Non-International Armed Conflicts (NIACs), as the status these two branches of IHL confer to captured fighters is rather different.

Who are Foreign Fighters?

In The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad, Hegghammer proposes a refined four-pronged definition of a "foreign fighter".

"I build on this formulation [Malet's definition] and define a foreign fighter as an agent who

(1) has joined and operates within the confines of an insurgency;
(2) lacks citizenship of the conflict state or kinship links to its warring factions;
(3) lacks affiliation to an official military organization; and
(4) is unpaid.

These four criteria set foreign fighters apart from other types of violent actors who cross borders. Criterion (4) excludes mercenaries, who are paid and follow the highest bidder, whereas the primary motivation of foreign fighters is of idea logical, often religious, nature. Criterion (3)excludes soldiers, who are usually salaried and go where their generals send them. Criterion (2) excludes returning diaspora members or exiled rebels, who have a preexisting stake in the conflict."[1]

There are various definitions of this phenomenon as well, but from the perspective of the present paper, Hegghammer's is the most appropriate.

The Status of Foreign Fighters in IACs

The protective component of IHL is essentially based on the distinction between various categories of people that might be involved in or become affected by hostilities. In IACs, the main distinction is between "civilians" and "combatants". Civilians are entitled to immunity from attack

1 Colgan and Hegghammer, *Islamic Foreign Fighters: Concept and Data*, Montreal, 2011, p.6.

(unless and for such time as they take a direct part in hostilities),[2] to protection from the effects of military operations and to benefit from specific assistance activities. Combatants, on the other hand, have the right to participate directly in hostilities[3], yet they are also liable to attack during the entire duration of the conflict, unless they are *hors de combat* or otherwise fall into the power of an adverse party.[4] In the latter case, they are entitled to the status of prisoner of war (POW) and can be detained. GC III enumerates in detail the rights and protections granted to POWs, who must be humanely treated at all times. Yet it must be recalled that it does not contain a definition of combatant. Rather, it includes a set of criteria that must be complied with by anyone who, after falling into the power of an adverse party, wishes to acquire POW status. It is inferred that whoever possesses such status is also a lawful combatant. Hence, Article 4 of the Convention states that

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

The Convention does not contain any indication that foreign nationality could prevent the obtainment of combatant (and POW) status. It is true that some provisions appear to suggest that individuals who have fallen into the hands of the enemy and claim POW status should have a different nationality than that of their captor.[5] Yet nothing appears to ban foreign nationals (who are not nationals of the enemy State) from the right to be recognized as POWs.[6]

The issue to be assessed is thus whether foreign fighters might fall under one of the listed categories of individuals entitled to POW-and hence combatant-status. Starting from sub-para (1), one may state that it does frequently happen that national armies include battalions of foreign-born individuals in their official ranks, the French Foreign Legion in the French army or the Nepalese Gurkhas in the British army being prominent examples. Obviously, their nationality notwithstanding, these individuals are fully-fledged combatants endowed with all privileges connected to such status.

Paragraph 4A(2), on the other hand, attempts to introduce legal protection mainly to the benefit of members of partisan movements active in occupied territories, yet its protection also

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2 AP I, article 51(3).
3 AP I, article 43(2).
4 AP I, article 41.
5 GC III, article 87.
6 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 2005, p. 393.

covers other groups engaged in an IAC. The granting of combatant status, however, is subordinated to the fulfillment of a number of conditions. The first of these is a certain degree of organization of the group itself. With respect to the amount of organization required, the Conference of Government Experts discussing the adoption of the Convention generally agreed that a group claiming to fall under the category envisaged by Article 4A(2) "[…] must have the principal characteristics generally found in armed forces throughout the world particularly in regard to discipline, hierarchy, responsibility and honour".[7] Second, the group must belong to a party to the conflict i.e. there must be a *de acto* relationship between such group and one of the States engaged in the war. This relationship may result from a tacit agreement or be the object of an official declaration.[8] Thirdly, the group must be commanded by a person responsible for his subordinates. The provision does not require the commander to be military; hence this role can be played by a civilian. A fourth condition requires the members of such groups to distinguish themselves by carrying a "fixed distinctive sign recognizable at a distance", thus reaffirming the principle of distinction. The distinctive sign should be worn constantly and be identical for all the members of the group. A fifth condition prescribes that members of the group carry arms openly. As with the previous one, this criterion purports to ensure distinction between combatants and civilians. Finally, they have to conduct their operations in accordance with the laws and customs of war. It is however recognized that the concept of "laws and customs of war" is rather vague and susceptible to developments as the forms of warfare evolve. As to the degree of respect they owe to the above rules, the ICRC contends that members of the forces in consideration have to respect the Geneva Conventions to the fullest extent possible.[9]

All six listed conditions have to be fulfilled by the group. The first three (organization, belonging to a party to the conflict, being under a responsible command) must be satisfied by the group as a whole, while the last three (having a distinctive sign, carrying arms openly, complying with the laws of war) ought to be fulfilled by the group and by each of its members.[10]

Turning to the characterization of foreign fighters under the above legal framework, one clearly realizes that if they are incorporated into the armed forces of one of the parties to the IAC, they ought to be considered as combatants and, therefore, to be entitled to the full protection of GC III in case of capture. Incorporation into the armed forces might happen before the conflict erupts, or occur during hostilities. Turning to the possible qualification of foreign fighters as members of other militias and members of other volunteer corps one must ascertain whether such groups have complied with the six criteria laid down in Article 4A(2). This determination is obviously highly contextual, and depends on the knowledge of facts and circumstances that cannot be easily verified.

The Status of Foreign Fighters in NIACs

In NIACs, foreign fighters can either join the rebel armed groups or the armed forces of the State on whose territory the conflict unravels. Beginning with the first situation, one must stress that no special status is bestowed on fighters that have taken up arms against the incumbent government. In the absence of combatant or POW status in such conflicts, individuals that rebel against the State

7 Pictet, *Commentary to Geneva Convention (III)*, 1960, p. 58.
8 Ibid., p. 57.
9 Ibid., p. 61.
10 Lapidoth, *Qui a droit au statut de prisonnier de guerre*, 1978, p.178.

can be apprehended, tried and sentenced as common criminals, based on the domestic law of the captor State.[11] These principles also hold true when insurgents have foreign nationality, although such factor might play a role in the judicial treatment of captured individuals.

Discussing the applicability of Common Article 3, the ICRC Commentary affirms that the Article does not protect an insurgent who falls into the hands of the opposing side from prosecution in accordance with the law, even if he has committed no crime except that of carrying arms and fighting loyally.[12] But does the criteria of nationality influence the way he should be treated? Common Article 3 demands that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

Notably, the criterion of nationality does not appear among those on the basis of which discrimination is barred, although the addition of the words "any other similar criteria" suggests that it might be read into the provision. Indeed, the ICRC stresses that nationality should not be used to justify inhuman treatment, as it would be in contrast with the spirit of the Geneva Conventions "to avail oneself of the fact that the criterion of nationality had been set aside as a pretext for treating foreigners, in a civil war, in a manner incompatible with the requirements of humane treatment".[13] Yet, when it comes to trying individuals who have taken part in hostilities, nationality may be held to be an aggravating or a mitigating circumstance. During the negotiations leading to the adoption of the provision, the ICRC proposed the inclusion of "nationality" within the list of prohibited grounds for discrimination. However, its proposal was strongly opposed by the United States and France, with the latter stating that "[i]t might be perfectly legal for a government to treat insurgents who were its own nationals differently from foreigners taking part in a civil war", as the latter "might be looked on as being more guilty than nationals of the country concerned, or they might, on the other hand, be treated less severely or merely regarded as subject to deportation."[14] Hence, it is again the domestic law of the State affected by the conflict which determines what kind of legal treatment foreign fighters are entitled to, provided that the result does not amount to inhuman treatment as spelled out in Common Article 3.

Of particular interest to the present analysis is the contention that respect for IHL by the armed non-State actor is a requisite for the very existence of a NIAC. This would obviously imply that groups who consistently disregard the *jus in bello* applicable in internal conflicts would not be considered as a party to the conflict and that their members would not be protected by *jus in bello* rules. Yet is seems safe to say that such a stance has little traction in current IHL. When looking at the nature of the conflict that took place in 1998 between the armed forces of the Federal Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA), the ICTY had to address the defence's contention that the fighting did not constitute an armed conflict.[15] The accused argued that military operations conducted by the FRY forces were not aimed at defeating the KLA but at

11 Henckaerts and Doswald-Beck, 2005, p. 611.
12 Pictet 1960, p. 40.
13 Ibid., p. 41.
14 Diplomatic Conference1949, Final Record, Vol. II B, p. 334.
15 ICTY, *Prosecutor v. Limaj*, IT-03-66-T, Judgement of 30 November 2005, paras 169-170.

carrying out "ethnic cleansing" in the rebel province. The Trial Chamber rejected the argument stating that the determination of the existence of an armed conflict is based solely on the intensity of the conflict and organization of the parties, and that "the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant."[16]

Things stand differently with respect to foreigners who have joined the regular armed forces of a State that is confronted with an armed rebellion reaching the scale of a NIAC. These individuals would obviously not be in breach of the laws of the State they are fighting for and could, therefore, not be tried for mere participation in hostilities. A fitting example would be represented by the alien citizens that have been enlisted in governmental armed groups during the armed conflict between the Ukraine and the separatists in the Eastern part of the country in 2014-2015. The "Azov Battalion", for instance, has welcomed many foreign nationals and appears to be an integral part of the Ukrainian law enforcement machinery.[17]

Conclusion

A perusal of international norms and standards has revealed that the foreign nationality or origin of individuals who travel to a conflict area to participate in an armed conflict might have an actual impact on their status, which should, however, not be overstated. With respect to IACs, foreign fighters could be or could become fully-fledged members of the armed forces of one of the belligerent States. In this case, their nationality is immaterial and they should be granted POW status under GC III. In the alternative, they could be considered members of "other militias and members of other volunteer corps" who belong to a party to the conflict. In this case they would be entitled to POW status only if they were found to comply with the six conditions set forth in Article 4(2) of GC III.

Turning to NIACs, one should mention that foreign fighters could join either the ranks of the armed forces of the incumbent State or the armed non-State actors which are rebelling against it. It seems that in neither case does nationality have any impact on the status of the fighters, although with respect to the second category it might be an element that States take into consideration in assessing the criminal law consequences attached to participation in hostilities. Also, it appears that the motivations and tactics of non-State actors have no bearing on the existence of a NIAC.

16 Ibid.

17 See Ministry of Internal Affairs of the Ukraine, "The Separatists Fired on a Bus with Fighters of the "Azov" Special Police Battalion", 7 May 2014.

INTERNATIONAL LAW PROTECTING THE ENVIRONMENT DURING ARMED CONFLICT: GAPS AND OPPORTUNITIES

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Abstract

International humanitarian law and International environmental law are International law spheres which are probably the most important ones for the survival of the whole humanity. Jean Gordon, a Red Cross worker during World War II, said that "we need to <…> stop wasting our resources on killing people and destroying the environment". As far as IHL admits that it is impossible to stop wars, it is also impossible to save each single tree during armed conflicts. Nevertheless, IHL deals with environmental protection. The question is whether IHL effectively protects the environment. In this case, "effectively" means with no significant gap to fulfil.

To reach the aim of this paper we would meet the following research objectives. Firstly, we would analyze how IHL protects environment. This part of the research paper could be divided into three elements: examining specific rules, general principles and providing with examples (case study). Secondly, we would try to answer the question how International criminal law is trying to help by making an observation on International criminal court dealing with ecological crimes. Thirdly, we would attempt to find gaps and opportunities to fulfil them.

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To begin with, articles 35[2] and 55[3] of the Additional Protocol I to Geneva Conventions can be regarded as specific rules protecting environment during armed conflict of international character

[1]A People's Movement to End All War: Quotes. Date Views 08.11.2016 www.worldbeyondwar.org/quotes

[2]Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June, 1977 [Protocol I].Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Bern, Federal

(IAC). In accordance with rules 44,45 of Customary international humanitarian law made by ICRC (the Study), they are also customary norms applicable to IAC and arguably to non-international ones (NIAC)[4]. At first glance they seem to overlap to some extend but, as Commentary of 1987 to Protocol I states, "while article 35 broaches the problem from the point of view of methods of warfare, article 55 concentrates on the survival of the population"[5]. We should also emphasize that in both articles there is widespread, long-term and severe damage threshold. The common opinion of legal scholars is that this threshold is "high and relatively difficult to interpret and apply"[6]. Moreover, a significant role in this is played by the Convention on the prohibition of military or any hostile use of environmental modification techniques from 10 December 1976 (ENMOD Convention). It prohibits the use "in military or any other hostile of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party"[7]. While Protocol I applies to environmental warfares, the scope of ENMOD Convention is limited to geophysical ones. For instance, the use of environmental modification techniques could lead to phenomena such as cyclones, earthquakes and tornado storms. Furthermore, here the threshold is lower as the widespread, long-term and severe requirements are alternative characteristics. We also would like to pay attention to the fact that before 1970s there were no specific rules regarding environmental protection in war time.

As far as the widespread, long-term and/or severe threshold is a core threshold used in all protecting environment in time of war documents, it is tremendously important to interpret these terms strictly. Getting ahead of ourselves, we should mention that the Rome Statute of International Criminal Court (ICC) also uses these terms, while according to article 22(2) the definition of a crime shall be strictly construed and shall not be extended by analogy[8]. The main problem of the definition is not so much absence of any official authentic or legal interpretation as the difference in opinions how to interpret these terms in different treaties. In travauxpreparatoires to Protocol I "long-lasting" is determined as "lasting for decades"[9]. In Understandings to ENMOD"long-lasting" is defined as "lasting for a period of months, or approximately a season"; "widespread" as "encompassing an area of several hundred square kilometres";"severe"as" involving serious or

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Department of Foreign Affairs, 1978. Article 35.3 (Basic rules): It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

[3]Ibid, article 55 (protection of the natural environment): 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited.

[4] Study on customary international humanitarian law, conducted by the International Committee of the Red Cross (ICRC). Cambridge University Press, 2005.

[5]Commentary of 1987 to Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June, 1977, §2133.

[6]Beyerlin, U. and Th. Marauhn.International Environmental Law.Hart publishing, 2011.P. 414.

[7]Convention on the prohibition of military or any hostile use of environmental modification techniques.Adopted by Resolution 31/72 of the United Nations General Assembly on 10 December 1976.

[8]Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN doc. A/CONF.183/9 as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999 in PCNICC/1999/INF/3 [Rome Statute].

[9]Report of Committee III, Second Session (CDDH/215/Rev.1; XV, 263), in H.S. Levie, Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 2 (Oceana Publications, 1980). Pp. 276–277.

significant disruption or harm to human life, natural and economic resources or other assets"[10].So at least by the example of interpreting "long-lasting" we see a vast difference. Whether while applying to the threshold taken from Protocol I we would use the first or the second above-mentioned interpretation is also an open question. It seems that the states intentionally blur the terms to keep policy space as in Understandings it is emphasized that "it is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement"[11]. We argue that as far as all these treaties use the same terms for the threshold, only one interpretation could be used in the end. This is due to the fact that according to Vienna convention on the law of treaties"treaty shall be interpreted in accordance with the ordinary meaning"[12] and, logically, there could be only one ordinary meaning. Thus, if these provisions would be finally used on international level we will witness the battle between interpretations to take a final legal decision.

Also, as you may have already noticed, there is no specific legal norm protecting environment during non-international armed conflicts.The rule 43 of the Study can confuse you as it refers to both types of armed conflicts, but if you take a closer look at its content you will see that it is just about general principles' applicability to environmental protection. The wording of ENMOD Convention also shows clearly that is applicable only in time of IAC.It seems completely unfair as the conflict's type matters neither for environmental status itself nor for people suffering from environmental harm. Nevertheless, it is understandable why states do not wish to include this provision in the list of their IHL obligations. ICRC in the Study tries but unsuccessfully so to prove the existence of international customs corresponding to above-mentioned treaty provisions in conditions of NIAC[13].Thus, in situation of NIAC belligerents can rely only on general IHL rules and sometimes on indirect protection (when environment is, for example, an object indispensable to the survival of the civilian population).

As a rule, environment is a civilian object and enjoys protection under general IHL rules, too. It means that belligerents should maintain principle of distinction, proportionality, prohibition of indiscriminate attacks, precaution. In the Studyone can find, for instance,proportionality principle in rule43[14]. Such kind of protection has no foregoing threshold but it leaves a gap for attacks justified by a military necessity. Furthermore, the problem with the principle of proportionality is that as it is formulated in article 51(5)(b) the collateral damage has to be foreseeable: "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"[15]. With regard to environmental protection, it is more difficult

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[10] The texts Of the Understandings in connection with the ENMOD Convention were transmitted by the Committee Of the Conference on Disarmament in Geneva to the UN General Assembly on September 2, 1976, and are reprinted in Hearing Before the Committee on Foreign Relations, US Senate, 95th Congress, Second Session, on the ENMOD Convention, 3 October 1978, Washington, D.C., US Gov't Printing Office, 1978. Pp.11—12.

[11] Ibid.

[12]Vienna Convention on the Law of Treaties.Done at Vienna on 23 May 1969.Entered into force on 27 January 1980.United Nations, Treaty Series, vol. 1155.P. 331.Article 31.

[13]The Study, supra note 5, rule 45.

[14] Supra note 5.

[15]Protocol I, supra note 2, article 51(5)(b).

to predict environmental damage than that caused to other civilian objects especially when it becomes apparent only in a long term.With respect to principle of distinction, it is important to notice that environment is not always a civilian object. Often environment can be considered as an object of double usage. For example, it is unclear whether a river which is used as a source of water by civilians and as a transport way by military enjoys general rules protection.

Moreover, environment can also be considered in some cases as a property which is protected under article 147 of Geneva Convention IV[16] and as an object indispensable to the survival of the civilian population which enjoys protection under article 54 of Protocol I[17]. However, article 147 of Geneva ConventionIV seems to fail to effectively defend the environment as a property. It is aimed at protecting civilian property bearing in mind that it could be rebuild so it allows to attack the property in event of military necessity. So, as general principles of IHL, such legal norms do not respect specific environmental nature.

Turning to practice, we should highlight that the most famous cases referring to environmental destruction are Vietnam War (1955–1975) and Persian Gulf War (1990–1991). After Vietnam War the ENMOD Convention was set up; this speaks for itself. After destroying Kuwait's oil infrastructure and flooding oil into the Gulf, even the so-called "black rain" was blackening the sky. What is less evident but seems more impressive is the fact that after the war many people found themselves suffering from diseases which led to the introduction of the term Gulf War Syndrome. It is used to describe "this collection of medically unexplained chronic symptoms"[18].Nevertheless, due to political reasons "Iraq is being held accountable for its war crimes through reparations, and not through trials"[19].That is why the role of international courts and tribunals is so important – it is the only way to give war criminals real imprisonment. Reparation system seems completely ineffective in retaining offenders from perpetrating their crimes again. Leaders of countries or armed forces which usually commit those crimes would not pay reparation themselves. It is a burden of citizens of the states, mostly of innocent civilians. Therefore we would refer to armed conflict in Yugoslavia which led to establishing International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY). In Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia in paragraph 14 it is stated that "the NATO bombing campaign did cause some damage to the environment"[20]. NATO attacked chemical plants, oil installations, used uranium projectiles and cluster bombs. There are scientists, such as American-based research group, Institute for Energy and Environmental Research (IEER), which claim with confidence that the NATO bombing of Yugoslavia breached IHL and caused long-term environmental damage[21]. However, the authors of the final report came to a conclusion that Prosecutor "should not commence an investigation into the collateral environmental damage caused by the NATO bombing campaign" as "it would appear

[16]The Geneva Conventions of August 12, 1949, International Committee of the Red Cross, Geneva, pp.153–221.
[17]Protocol I, supra note 2, article 54.
[18]Cancer and Gulf War Veterans. Date Views 08.11.2016 www.cancer.net/blog/2014-11/cancer-and-gulf-war-veterans
[19]ArkinM.W.,Durrant D., Cherni M. On impact : modern warfare and the environment a case study of the Gulf War.Greenpeace, 1991.P. 24.
[20]ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, para 14.
[21]Long-term environmental damage due to NATO bombing in Yugoslavia. Date Views 08.11.2016 www.wsws.org/en/articles/2002/12/yugo-d10.html

extremely difficult to develop a prima facie case upon the basis of these provisions"[22] (meaning articles 35(3) and 55 of Protocol I). So, this small chance to make justice served for environmental criminals was missed.

International criminal law does not remain a mystery. To date, Rome Statute has only one provision protecting environment in times of armed conflict but only as a collateral damage (article 8(2)(b)(iv))[23] and it was never used. However, the existence of this provision itself is a great historical shift as it is the first and the only international treaty which establishes individual criminal responsibility for environmental damage[24].We should also emphasize that here the threshold is the same as in Protocol I, in other words, cumulative. Moreover, the provision takes into consideration proportionality principle saying that the damage has to be "clearly excessive in relation to the concrete and direct overall military advantage anticipated"[25]. What the term "clearly" means is completely uncertain. Besides, it adds an "overall" characteristic to Protocol I wording. We agree that to some extent it "broadens the scope of military advantages which may be taken into account to the effect that a broader range of advantages may be considered on the basis of the military situation taken as a whole, not only for the particular point where the attack is launched"[26].On the other hand, the good news is that in accordance with Elements of Crimes[27]the conduct could comply with this article even if there is no environmental damage at all; it is considered a war crime since a criminal committed attack knowing that it could cause such damage which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. In addition, this provision as one may guess applies only to armed conflicts of international character, opposite to most of norms which are used in both types of conflicts.

The issue about ICC and environment is discussible especially now as in the Policy paper on case selection and prioritisation from 15 September 2016 Prosecutor of ICC declared that "the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land"[28]. All mass media introduced this news as ICC would pay more attention to environmental crimes as crimes against humanity but not as war crimes[29]. However, as onecould conclude from the given extract, Office of Prosecutor simply shows

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[22]Supra note 15 at para 15.

[23] Rome Statute, supra note 9, article 8(2)(b)(iv): 'war crimes' means: intentionally launching an attack in the knowledge that such attack will cause <…>widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

[24]SeeБогуш Г.И., Парамонова С.Л. Экологические преступления в Статуте Международного уголовного суда: современность и перспективы // Уголовное право и экология: поиск гармонии. Материалы международной конференции. Краснодар, 2011.С. 181.

[25] Rome Statute, supra note 23.

[26]The Rome statute of the International Criminal Court : a commentary / edited by Antonio Cassese. Volume I. Oxford University Press, 2002.P.399.

[27]The Elements of Crimes are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the ICC, First session, New York, 3–10 September 2002 (UN publication, Sales No. E.03.V.2 and corrigendum), part II.B. The Elements of Crimes adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the ICC, Kampala, 31 May–11 June 2010 (ICC publication, RC/11) .

[28]Office of the Prosecutor of ICC.Policy paper on case selection and prioritisation. 15 September 2016. Para 41.

[29]See, for instance, ICC widens remit to include environmental destruction cases. Date Views 08.11.2016. www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases; Is environmental destruction a crime against humanity? The ICC may be about to find out. Date Views 08.11.2016.

its will to prosecute for environmental crimes and, as we see in paragraph 7[30], to cooperate and provide assistance to States dealing with some types of environmental crimes. Neither the policy paper in whole nor the given quotes take into account the crimes' division on crimes against humanity and war crimes so it is reasonable to figure out that the Prosecutor would mark out environmental war crimes, too. In any case, even if this new policy concerns only crimes against humanity, it is useful for bringing environmental war crimes to trial. In this case the committed crime should comply with two contextual elements: the conduct should take place in the context of and was associated with an armed conflict and should be part of a widespread or systematic attack against a civilian population. With respect to the above described example when contextual elements overlap, it seems that the policy could fulfil important gaps. Naturally, it would happen solely in case if it would not become just "a sleeping beauty" which was intended to solve only a Cambodia situation. For instance, article 54 of Protocol I[31] fails to cover situations of scorched earth strategy when a belligerent destroys its own property which might be useful for an opponent (for example, "Ranch Hand" operation during war in Vietnam). In general, when belligerent damages its own environment international criminal law comes to help. ICC could effectively solve such kind of cases using this new policy.

So, we can figure out main gaps of IHL environmental umbrella. Firstly, there is a very high and unclear widespread, long-lasting and/or severe threshold. Secondly, general principles applicability functions only when environment is a civilian object protecting which is more important than a military advantage. Thirdly, there is complete absence of specific rules concerning NIAC. Fourthly, it is bafflingly complex to make offenders bear individual criminal responsibility or even any responsibility. And as one may notice, some issues like the weapons causing environmental effects, general international environmental treaties' applicability in war time as well as debates regarding what is "natural environment" are excluded from this paper. Therefore even more gaps could be figured out.

To fulfil these gaps we can propose the following decisions: interpreting exactly and making lower the widespread, long-lasting and (or) severe threshold is of crucial importance. It may be done in the form of setting up a provision on use of term so far as we argue that there can be only one interpretation of the threshold even setting up the definitions in Elements of Crimes to the Rome Statute. As regards NIAC problem, it is common knowledge that IHL protection in such type of conflicts is weaker than in other ones so it would be utopian to suggest an adoption of legal instruments dealing with protection of environment during NIAC in the near future.However, we consider it useful to have more official international disputes on NIAC problem as it could give us at least opinion juris. Then, we would propose transformation of the Rome Statute's environmental provision into a practical instrument by making a threshold alternative and defining all vague terms in the Elements of Crime as was suggested before. In addition, States may try to use soft law and through, for instance, General Assembly, make a resolution forbidding use of environment as a

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www.washingtonpost.com/news/worldviews/wp/2016/09/16/is-environmental-destruction-a-crime-against-humanity-the-icc-may-be-about-to-find-out/; International Criminal Court: Crimes Against the Environment Are Crimes Against Humanity. Date Views 08.11.2016. futurism.com/international-criminal-court-crimes-against-the-environment-are-crimes-against-humanity.

[30] Policy paper on case selection and prioritisation, supra note 23 at para 7.

[31] Protocol I, supra note 2, article 54.

military object unless it is justified by military necessity. It seems significant for us as unless environment would lose most of general IHL rules protection.

To conclude, IHL fails to protect environment effectively. Specific rules' threshold is too high and vague to apply while general rules are used regardless of specific environmental nature. International environmental law is a modern law sphere so we hope that it would develop greatly as time passes. We argue that this topic is a cornerstone in environmental protection as destruction of environment in time of war usually undermines all efforts taken in peacetime.

INNOVATION OR DISRUPTION? THE ROLE OF HUMAN RIGHTS TREATY MECHANISMS IN ENSURING REPARATIONS FOR INTERNATIONAL HUMANITARIAN LAW VIOLATIONS

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Abstract

In post-conflict situations, reparations are often among the most pressing issues to be resolved. They are one of the key instruments for implementing international humanitarian law (IHL) once violations have taken place, and can play a role in deterring future breaches by strengthening the credibility of IHL.

However, international mechanisms to implement reparations for IHL violations are few and far between. Reparations issues are therefore often resolved in an *ad hoc* manner, and the objectives of enforcing the law, assigning responsibility for violations, and ensuring redress to victims are left highly dependent on political discretion. Further, the IHL legal framework for reparations is still relatively rudimentary. It contains considerable normative gaps, particularly regarding non-international armed conflicts, the responsibilities of non-state actors, and the rights of individual victims of IHL violations.

Human rights treaty mechanisms (i.e. UN treaty bodies and courts/commissions based on regional human rights treaties) have gained prominence as international for a for assigning responsibility for violations of international law in armed conflict situations, and determining the resultant reparations to individuals and groups. For better or worse, these bodies often examine situations where IHL is applicable, and have increasingly dealt with this body of law. Some parties have identified human rights mechanisms as promising and innovative avenues for IHL implementation, while others have raised concerns about the potential disruption of IHL's universality and coherence, as well as its specificity and primacy in armed conflict. More general concerns also exist about individual reparations in situations of mass violence, and what impact this may have on collective justice processes.

The hypothesis of this paper is that precedents and entry points exist in the current jurisprudence and practice of human rights treaty mechanisms, which can serve to inspire further development of the IHL framework on reparations, as well as more effective IHL implementation through these bodies. Given the recent failure of States to agree on an international IHL monitoring mechanism at the International Conference of the Red Cross/Red Crescent, the search for alternative and effective ways to implement IHL – including reparations – is ever more important.

This paper examines the issue by considering some of the legal gaps in the IHL reparations regime and the criticisms raised regarding IHL implementation through human rights mechanisms (identified above) in light of the jurisprudence and practice of international human rights treaty mechanisms. Particular emphasis will be placed on examples which can indicate potential future directions for filling these legal gaps and addressing concerns about IHL implementation through human rights bodies. Finally, some conclusions will be drawn regarding the prospects for human rights treaty bodies to contribute to developing and implementing the IHL reparations regime.

INTRODUCTION

Background

"Innovation versus disruption" - a somewhat trendy theme in business parlance[1] - is also an image which roughly illustrates the main currents of thought on implementing international humanitarian law (IHL) through human rights mechanisms. Some commentators identify these for a as promising, innovative avenues for IHL implementation,[2] including on the issue of reparations.[3]Others appear to view them as potentially disruptive forces, raising concerns that implementation of IHL by human rights bodies could compromise its universality and coherence, as well as its specificity and primacy in armed conflict.[4]

On the issue of reparations –a key aspect of post-conflict IHL implementation – the question can be raised whether there is much to be disrupted in the first place. The IHL legal framework is rudimentary on this topic, and significant gaps have been identified regarding non-international armed conflict, the responsibilities of non-state actors, and the right of individuals to reparation.[5]Furthermore, international IHL reparation mechanisms are lacking,[6] national courts have been reluctant on this issue,[7] and *ad hoc* inter-State processes are discretionary and highly

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[1] See e.g. Caroline Howard, "Disruption vs. innovation: what's the difference?",*Forbes*, 27 March 2013, http://www.forbes.com/sites/carolinehoward/2013/03/27/you-say-innovator-i-say-disruptor-whats-the-difference (all websites accessed 7 November 2016). This paper uses the terms "innovation" and "disruption" merely for illustration, and does not apply these concepts according to any scientific definition.

[2] See e.g. ICRC, 'Improving Compliance with International Humanitarian Law – ICRC Expert Seminars: Summary Report' (ICRC, Geneva 2003) at15; Toni Pfanner, 'Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims', *International Review of the Red Cross*, Vol. 91, No. 874, June 2009, at 309 – 313; Christine Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies', *Virginia Journal of International Law*, Vol. 47 (2006-2007) at 895 – 896; Hans-Joachim Heintze, 'On the relationship between human rights law protection and international humanitarian law' *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, at 798; Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', in Institute of International Humanitarian Law, *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict*, Proceedings of the 28th Round Table on Current Problems of International Humanitarian Law, Sanremo, 2-4 September 2004,at 70 – 71; Dominik Steiger, "Enforcing International Humanitarian Law through Human Rights Bodies", in Heike Krieger, *Inducing Compliance with International Humanitarian Law - Lessons from the African Great Lakes Region* (Cambridge University Press, Cambridge 2015) at 263.

[3]Pfanner, above note 2, at 313; Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, at 515; Francoise Hampson and Ibrahim Salama, 'Working Paper on the relationship between human rights law and international humanitarian law', UN Doc. E/CN.4/Sub.2/2005/14, 21 June 2005, par. 20.

[4] See e.g. some participants' views expressed in ICRC, 'Strengthening legal protection for victims of armed conflicts', Report for the 31st International Conference of the Red Cross/Red Crescent (ICRC, Geneva 2011), at 12; ICRC, 'Improving Compliance', above note 2,at 15 – 16; Emanuela-Chiara Gillard, 'Promoting Compliance with International Humanitarian Law', Chatham House, October 2016, at 2 https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-10-05-promoting-compliance-ihl-gillard.pdf

[5]ICRC, 'Strengthening legal protection', above note 4, 13; HeidyRombouts, PietroSardaro&StefVandeginste, 'The right to reparation for victims of gross and systematic violations of human rights', in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia, Antwerp 2005)at 364 – 365.

[6]Fleck, 'Priorities', above note 2, at 72; Zegveld, above note 3, at 514; Pfanner, above note 2, at 310.

[7]Emanuela-Chiara Gillard, 'Reparations for Violations of International Humanitarian Law', *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, at 537;Zegveld, above note 3, at 507 – 513.

dependent on political will.[8]It could rather be argued that this area is potentially ripe for innovation through the complementary application of human rights norms by more accessible treaty mechanisms. The Van Boven/Bassiouni Principles,[9] which aim to establish common reparations principles for both gross human rights violations and violations of IHL, already provide a framework for greater convergence between IHL and IHRL in this regard. However, disruption concerns also exist in this sense, as the suitability of individual reparations in situations of mass violence is questioned.[10]

Three factors make it more relevant than ever to assess the role and potential of human rights treaty mechanisms in implementing and developing IHL, particularly on reparations. Firstly, for better or for worse, petitioners will continue to call upon human rights mechanisms to examine cases in conflict contexts and make findings on reparations, as few other fora are available to them.[11] Secondly, based on expert consultations, the ICRC has identified the need to strengthen IHL implementation mechanisms (including reparative ones), and has named reparations as a key area for development of the law.[12]Thirdly, debate appears stalled for now on whether this development should take place through a specific IHL-based mechanism, as States recently failed to agree on creating such a forum.[13]

Hypothesis

A number of criticisms of IHL implementation through human rights mechanisms, as well as gaps in the IHL reparations regime, have been identified above on the basis of academic literature and expert reports on IHL implementation. The hypothesis of this paper is that in human rights bodies' approach to reparations issues (including those in armed conflict contexts), practices exist which can be highlighted as models for addressing these criticisms and filling these gaps. Such practices may allow human rights mechanisms to implement IHL more effectively, as well as to further develop the IHL legal framework on reparations.

Methods

This paper will test its hypothesis by examining the identified criticisms and gaps in light of the jurisprudence and practice of UN human rights treaty bodies and regional human rights treaty mechanisms. Relevant jurisprudence and practice will be identified through literature on IHL implementation and reparations, as well as database searches. Cases will be selected according to their relevance for IHL implementation (i.e. connection to armed conflict), and/or their engagement with the issue of reparations. Particular attention is devoted to elements which may constitute "good practices", i.e. which show potential to address the criticisms and gaps in question. Finally,

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[8]Zegveld, above note 3, at 523; Gillard, 'Reparations', above note 7, at 550 – 551.

[9] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147 of 16 December 2005 (Annex) (hereinafter Van Boven/Bassiouni Principles).

[10]See e.g. Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' *Tulane Journal of International and Comparative Law*, Vol. 10, 2002, at 170 – 180; Pierre D'Argent, 'Des règlementscollectifs aux règlementsindividuels (collectivisés)?: La question des réparationsencas de violation massive des droits de l'homme', *International Law FORUM du droit international*, Vol. 5, No. 1, 2003, at 24.

[11]Hampson and Salama, above note 3, par.49.

[12]ICRC, 'Strengthening legal protection', above note 4, at 11.

[13]International Committee of the Red Cross (ICRC), 'No agreement by States on mechanism to strengthen compliance with rules of war', News Release (Switzerland), 10 December 2015, https://www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war

conclusions will be drawn regarding human rights mechanisms' potential to contribute to implementing and developing the IHL reparations regime.

SECTION I: CRITICISMS

(a) Implementation of IHL through human rights mechanisms may undermine IHL's universality and coherence

Concerns have been raised that implementation of IHL through human rights mechanisms may lead to fragmentation through "regionalization".[14] It is believed that this could undermine IHL's coherence and universality,[15] presumably through "normative regionalism", i.e. "'[r]egionalism as the pursuit of geographical exceptions to universal international law rules".[16]

It is difficult to examine these concerns in light of concrete examples, as these are not evident from the literature. This issue will therefore be examined through doctrine on the nature of the universality of IHL, as well as the nature of reparations specifically. Finally, some examples will be given of how human rights treaty mechanisms have mitigated the risk of fragmentation.

i) The nature of IHL's universality

The universality of IHL is an important factor underlying its authority and acceptance. This universality is understood to relate to the widespread ratification of treaties and the customary status of IHL rules. It also relates to IHL's reflection of the basic values of all civilizations, and even its acceptance by individuals and non-state parties.[17]The application of IHL rules by regional mechanisms would seem to support rather than undermine the universality of IHL on all of these levels, as it shows that IHL is viewed as legitimate, relevant and binding in all of these regional systems.

Of course, a common understanding of clear standards is important for ensuring compliance.[18]However, the default in international law is auto-interpretation by States, as only a small number of disputes ever reach a judicial mechanism.[19] It can be supposed that this phenomenon is even more pronounced in IHL, which has no specific universal implementation mechanism that can issue public, authoritative interpretations.[20] As almost 200 High Contracting Parties interpret and apply the Geneva Conventions to determine their own conduct, it is difficult to accept that pronouncements by regional human rights mechanisms would be capable of fragmenting a coherent, universal system of IHL application. Indeed, some scholars have cited concrete judicial

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[14] ICRC, 'Improving Compliance', above note 2, at 15 – 16; see also Gillard, 'Promoting Compliance',above note 4, at 2.

[15]ICRC, 'Strengthening legal protection', above note 4, at 12.

[16]Martti Koskenniemi, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law', Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, pp. 108 – 109..

[17]Frédéric Mégret, 'The Universality of the Geneva Conventions', in Andrew Clapham, Paola Gaeta & Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, Oxford 2015) at 670 – 671.

[18]Steiger, above note 2, at 270.

[19] Michael Waibel, 'Interpretive Communities in International Law', in Andrea Bianchi, Daniel Peat & Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, Oxford 2015)at 156 – 157.

[20] For an exceptional example of the ICRC publicizing its legal position on a situation, see Peter Maurer, 'Challenges to international humanitarian law: Israel's occupation policy',*International Review of the Red Cross*, Vol. 94, No. 888, Winter 2012, at 1503.

application in individual cases as an important factor for effective IHL implementation.[21] It is also relevant to note that previous attempts at normative regionalism in other areas of international law have been deemed unconvincing.[22]

ii) The nature of reparations

In examining the fragmentation of international law, Koskennieminotes that regionalism may also be understood as variation in local, context-sensitive implementation of legal rules, rather than a conflict in content of the rules.[23]On the issue of reparations particularly, it has been viewed as difficult to make generalizations regarding the means of implementation, and a universal system of reparations has been deemed unfeasible on this basis.[24]In light of the above, it seems unlikely that the universality of IHL would be adversely impacted by regional implementation of reparations.

iii) Possible mitigation measures

Finally, it should be noted that in any event, regional human rights treaty mechanisms have shown the capacity to mitigate the risk of diverging interpretations by referring to each other's jurisprudence.[25]The UN Human Rights Committee has also contributed to dialogue between the universal and regional spheres by pronouncing itself on the relationship between the ICCPR and the ECHR.[26] Finally, further harmonization may also be assured through reference to global soft law standards as an interpretive guide. On reparations, a number of human rights bodies have referred to the Van Boven/Bassiouni Principles, which cover both human rights and humanitarian law violations.[27]

(b) Implementation of IHL through human rights mechanisms may undermine IHL's specificity and primacy in armed conflict

A great deal of concern about human rights bodies' involvement in IHL implementation revolves around the arguments that these bodies lack either the expertise or the mandate to apply IHL as *lexspecialis* in armed conflict.[28] Their application of solely human rights norms in armed

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[21] David Weissbrodt, 'The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law', *University of Pennsylvania Journal of International Law*, Vol. 31, Issue 4, Summer2010, at 1190; Robert Kolb, *Advanced Introduction to International Humanitarian Law*, (Edward Elgar, Cheltenham, UK/Northampton, USA 2014), at 188; CordulaDroege, 'Elective Affinities? Human Rights and Humanitarian Law' *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, at 542 – 546.

[22]Koskenniemi, above note 16, at 110 – 111.

[23]*Ibid*., at 111 – 112.

[24]Rombouts et al, above note 5, at 495 – 496.

[25] See e.g. Council of Europe/European Court of Human Rights, "References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights", Research Report, 2012, http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf; *Zimbabwe NGO Forum v. Zimbabwe*, African Commission on Human and People's Rights (ACommHPR), Comm. No. 245/02, 15 May 2006, par. 145 – 147; *Bámaca-Velásquezv. Guatemala*, Inter-American Court of Human Rights (IACtHR), Judgment (Merits), 25November 2000, par. 140.

[26] E.g. UN Human Rights Committee (UNHRC), 'Concluding Observations of the Human Rights Committee: Sweden', CCPR/C/SWE/CO/6, 2 April 2009, par. 5.

[27] E.g. *Mocanu v. Romania*, European Court of Human Rights (ECtHR), Application Nos. 10865/09, 45886/07 and 32431/08, Judgment, 17 September 2014, par. 7; *Kholodova v Russia*, UNHRC, Comm. No. 1548/2007, 1 November 2012, par. 10.5, fn. 11; UNHRC, ' Concluding observations on the second periodic report of Nepal', CCPR/C/NPL/CO/2, 26 March 2014, recommendation C(d); UN Committee Against Torture (UNCAT), 'Concluding Observations of the Committee Against Torture: Colombia', CAT/C/COL/CO/4, 4 May 2010, par. 25.

[28] See e.g. ICRC, 'Improving Compliance',above note 2, pp. 15 – 16.

conflict may lead to outcomes that diverge from IHL.[29]It is believed that this may create confusion in armed forces and set impracticable standards,[30]as well as undermining the primacy of IHL in armed conflict.[31]

Indeed, the European Court of Human Rights and the UN Human Rights Committee(UNHRC) have both been noted for their reluctance to invoke IHL explicitly.[32] The African Commission on Human and People's Rights (African Commission) has also been criticised for referring to IHL without a clear analysis of its relationship to IHRL.[33]

The situation is different in the Inter-American human rights system. The Inter-American Commission found that it was empowered to apply IHL directly as *lexspecialis*,[34]while the Court considered that it could use IHL to interpret human rights. The Court further found it could observe that certain conduct violates both human rights and IHL, even if it could not directly declare a State responsible for the IHL violation.[35] Thus, in an approach which it has subsequently followed consistently,[36]the Court considers itself empowered to examine the IHL/IHRL relationship in concrete cases and apply IHRL accordingly. In this way, it has the possibility to maintain the specificity of IHL in armed conflict situations.

However, it is not clear that the practice of the other regional courts is evolving in this direction. The African Court of Human and People's Rights missed its first opportunity to apply IHL in *African Commission v. Libya*,[37]even though an African Union decision viewing IHL as applicable was cited in the provisional measures judgment.[38] The case concerned detention in armed conflict, and thus the application of IHL as *lex specialis* could have affected the outcome.[39]

In more recent cases, the European Court of Human Rights has been more willing to expressly refer to IHL to interpret human rights obligations, and award reparations on this basis.[40] This has

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[29] See e.g. Noam Lubell, 'Challenges in applying human rights law to armed conflict', *International Review of the Red Cross*, Vol. 87, No. 860, December 2005, at 743 – 744.

[30]Byron, above note 2, at 892.

[31] ICRC, 'Strengthening legal protection',above note 4, at 12.

[32] William Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya', *European Journal of International Law*, Vol. 16, No. 4, 2005, at 746; Lubell, above note 29, at 742 - 744; Weissbrodt, above note 21, at 1232 – 1244.

[33]Faustin ZacharieNtoubandi, 'Comment – enforcement of international humanitarian law through the human rights organs of the African Union', in Krieger, above note 2, at 307 – 308.

[34]*Arturo RibónAvilan v. Colombia*, Inter-American Commission on Human Rights (IACommHR), Case 11.142, Report No. 26/97, 30 September 1997, par. 132; *Juan Carlos Abella v. Argentina*, IACommHR, Case 11.137, Report No. 55/97, 18 November 1997, par.157 – 171.

[35]*Bámaca-Velásquezv. Guatemala (Merits)*, IACtHR, above note 25, par. 207 - 209.

[36] See e.g. *Case of the "Mapiripán Massacre" v. Colombia*, IACtHR, Judgment, 15 September 2005(Merits, Reparations, and Costs), par. 114 – 115; *Case of the Ituango Massacres v. Colombia*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006, par. 179 - 183. See further Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', *European Journal of International Law* Vol. 21,No. 3, 2010, at 593.

[37]*African Commission on Human and Peoples' Rights v. Libya*, African Court on Human and People's Rights (ACtHPR), Application No. 002/2013, Judgment, 2 June 2016, par. 77

[38]*African Commission on Human and Peoples' Rights v. Libya*, Application No. 004/2011, ACtHPR, Order for Provisional Measures, 25 March 2011, par. 21.

[39]Ntoubandi, abovenote 33, at307 – 308.

[40]*Varnava v. Turkey*, ECtHR, Application Nos.16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, par. 185 (reference to IHL relating to missing persons) and 225 (reparations); *Hassan v. UK*, ECtHR, Application No. 29750/09, 16 September 2014, par. 35 – 37 (reference to ICJ jurisprudence on IHL/IHRL relationship), 77, 102 – 111 (interpretation and application); *Benzer v. Turkey*, Application

been particularly evident in cases where issues of control over territory are being considered.[41]However, the Court has also refrained from addressing IHL arguments in other potentially relevant cases.[42]

Generally, UN treaty bodies have interpreted their mandates restrictively to include only the human rights treaties they monitor.[43]However, the UNHRC has become more explicit in including IHL when analysing thematic issues in its General Comments[44] and country situations in its Concluding Observations.[45]This approach is also present in the work of some other UN treaty bodies.[46] Further, the UNHRC has found itself competent to address a clash between the ICCPR and a UN Security Council resolution.[47]This shows that the UNHRC may consider the relationship between the ICCPR and other international law where the claim is based on a conflict of laws, although it is likely to take a strict approach to derogations from human rights obligations.[48]

Thus, it appears that apart from the Inter-American Court, the practice of human rights mechanisms overall tends to support the criticism that they do not sufficiently consider the specificity (i.e. *lex specialis* nature) and primacy of IHL in armed conflict. However, examples exist which indicate that it is possible for human rights mechanisms to do more in this direction. In this regard, it should be noted that the founding document of the African Commission and the jurisprudence of the European Court of Human Rights appear to leave room for considering international obligations external to their founding treaties, including IHL.[49]As for the UNHRC, its pronouncements on the IHL/IHRL relationship in its General Comments, as well as specific

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No. 23502/06Judgment (Merits and Just Satisfaction), 12 November 2013,par. 89 (reference to Common Article 3 of the Geneva Conventions), par. 184 (reference to customary IHL), par 223 – 248 (reparations); *Esmukhambetov v. Russia*, ECtHR, Application No. 23445/03, Judgment, 29 March 2011, par. 76 (reference to the Second Additional Protocol to the Geneva Conventions), 213 & 216 (reparations).

[41]*Al-Jedda v. UK*, ECtHR, Application no. 27021/08, Judgment, 7 July 2011, par. 107 – 110; *Al-Skeini and others v. UK*, ECtHR, Application no. 55721/07, Judgment, 7 July 2011, par. 89 – 94; *Jaloud v. Netherlands*, ECtHR, Application No. 47708/08, 20 November 2014, par. 90 – 92; *Sargsyan v. Azerbaijan*, Application No. 40167/06, Judgment,16 June 2015, par. 94 - 95; *Chiragov v. Armenia*, ECtHR, Application No. 13216/05, Judgment, 16 June 2015, par. 96 – 97.

[42] E.g. *Arkhestov v. Russia*, ECtHR, Application no. 22089/07, Judgment, 16 January 2014, par. 71 (in this and a number of cases based on similar facts, the court did not address applicants' arguments that the conduct in question was prohibited by IHL).

[43]Pfanner, above note 2, at 310.

[44]See e.g. UNHRC, 'General Comment 29: States of Emergency (article 4)', CCPR/C/21/Rev.1/Add.11 (2001), par. 3, 9, 11& 16.

[45]See e.g. UNHRC, 'Concluding observations on the fourth periodic report of Israel',.CCPR/C/ISR/CO/4, 28 October 2014, par. 5.

[46]See e.g. Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined fifteenth and sixteenth periodic reports of Colombia', CERD/C/COL/CO/15-16, 25 September 2015,par. 11 – 12;Committee on Economic, Social and Cultural Rights, 'Concluding observation: Israel', E/C.12/ISR/CO/3, 16 December 2011, par. 36; Committee on the Elimination of Discrimination against Women, 'Concluding observations: Israel', CEDAW/C/ISR/CO/5, 5 April 2011, par. 12 – 13;Committee on the Rights of the Child, 'Concluding observations: Democratic Republic of the Congo', CRC/C/15/Add.153, 9 July 2001, par. 6.

[47]*SayadiandVinck v. Belgium*, UNHRC, Comm. No. 1472/2006, 22 October 2008, par. 7.2.

[48] See further Weissbrodt, above note 21, at 1201 – 1202.

[49] African Charter on Human and People's Rights, adopted 27 June 1981, entered into force 21 October 1986,21 ILM 58 (1982), Article 61; *Hassan v UK*, ECtHR, above note 40, par. 102. The African Court on Human and People's Rights, on the other hand, is mandated only to apply "the Charter and any other relevant human rights instruments ratified by the States concerned" (Protocol to the African Charter on Human and People's Rights on Establishment of an African Court on Human and People's Rights, adopted 9 June 1998, entered into force on 25 January 2004, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Article 7).

recommendations in its Concluding Observations, provide an ample basis of analysis to justify interpreting the ICCPR in light of IHL in individual cases.[50] Therefore, these mechanisms do not appear to be constrained in principle from following an approach similar to that of the Inter-American Court.

(c) Individual reparations claims may be incompatible with situations ofmass violence such as armed conflict

The aftermath of large-scale violence often involves tensions between remedying the situation of affected individuals, and ensuring that the situation of the society as a whole can be resolved. In such contexts, the appropriateness of international human rights mechanisms' individualized approach to reparations has been questioned. Concerns have been expressed that such an approach may lead to selective justice, as only a few victims may have their cases heard while thousands of others remain without redress.[51]Tomuschat also warns of the economic impact of mass financial compensation on the affected population as a whole (in the case of internal conflicts) or on the civilian population of the responsible State (in the case of inter-State conflicts).[52]Authors expressing these concerns favour globalized, collective settlements, as these are viewed as more suitable for balancing private and public interests and ensuring equal treatment of victims.[53]

In post-conflict situations, it is clear that individual reparations claims cannot be a substitute for a collective settlement process.[54] This is especially the case for international mechanisms, which are not intended as a substitute for domestic remedies. Nevertheless, the practice of some international human rights mechanisms has shown that they have not been blind to the collective aspect of situations of mass violence. In particular ‚non-monetary measures such as satisfaction and guarantees of non-repetition are important means of reparation when it comes to addressing broader, systemic situations.[55]Human rights treaty mechanisms have made use of these methods in order to have a reparative impact beyond individual petitioners. Particular mention should be made of the Inter-American Court's jurisprudence on collective reparations for indigenous communities in conflict contexts.[56] The African Commission has also ordered broad collective measures to address a situation of armed conflict.[57]Such measures supplement individual reparation, and are an important means of mitigating its potentially selective and disruptive impact.[58]

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[50]Weissbrodt, above note 21, at 1233.
[51]Tomuschat, above note 10, 170 – 173; D'Argent, above note 10, at 24 (on individual claims more generally).
[52]Tomuschat, above note 10, 174 – 180.
[53]Tomuschat, above note 10, 180; D'Argent, above note 10, at 24.
[54]See e.g. Dieter Fleck, 'The Role of Individuals in International Humanitarian Law and Challenges for States in Its Development', in Michael N. Schmitt & Leslie C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (Naval War College, Newport USA 1998) at 128.
[55]Gina Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations', *Human Rights Law Review*, Vol. 13, No.3, 2013, at 520.
[56]E.g. Case of the *Moiwana Community v. Suriname*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, par. 197; Case of the *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations), 19 November 2004, par. 93 - 111.For further analysis on collective reparations, particularly in the practice of the IACtHR, see Friedrich Rosenfeld, "Collective Reparations for Victims of Armed Conflict", *International Review of the Red Cross*, Vol. 92, No. 879, September 2010, at 731 – 746.
[57]*Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, ACommHPR, Communications 279/03-296/05, 27 May 2009, par. 229.
[58] Rosenfeld, above note 56, at 745 – 746.

In addition, some human rights mechanisms have provided a check on the adequacy of collective transitional processes when confronted with an individual claim arising from such a context.[59]This may contribute to ensuring that such processes do not entirely override individual rights. Human rights treaty bodies have also monitored national collective processes more broadly, as well as recommending their establishment.[60] In some situations, it has even been observed that international litigation played a role in effectively catalysing such processes.[61]

SECTION II: GAPS

It has been noted that IHL "broaches the reparation issue in general terms and in a manner that is incomplete."[62] Indeed, IHL treaty provisions on reparation are sparse,[63] and often refer to reparations implicitly or indirectly.[64]Three main gaps have been identified in the IHL reparations regime. Firstly, as treaty law, it is only applicable in international armed conflicts. Secondly, relevant treaty and customary rules identify only States as duty-bearers. Thirdly, these rules do not clarify whether individuals may claim reparation.[65]

However, IHL is not a self-contained system, and remedies for violations may therefore also be found in other systems.[66]Indeed, the duty to make reparation in IHL is considered to correspond to the principle of public international law that a breach of an international obligation entails a duty of reparation.[67]Human rights treaty mechanisms have interpreted their reparative powers broadly, also based on the general applicability of this principle, and have applied them in armed conflict contexts. It is therefore worth considering how their practice may further inform the development of IHL on issues where IHRL is more specific or up-to-date.[68]

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[59]E.g. *Katwal v Nepal*, UNHRC, Comm. No. 2000/2010, 5 May 2015, par. 6.3.; *Chaulagain v. Nepal*, UNHRC, Comm. No. 2018/2010, 28 October 2014, par. 6.3.

[60]See e.g. UNHRC, 'Concluding Observations: El Salvador', CCPR/C/SLV/CO/6, 27 October 2010, par. 7; UNHRC, 'Concluding observations on the fifth periodic report of Peru', CCPR/C/PER/CO/5, 27 March 2013, par. 12.
UNCAT, 'Concluding Observations of the Committee Against Torture: Colombia', above note 27, par. 25; UNCAT,'Concluding Observations: Sri Lanka', CAT/C/LKA/CO/2, 15 December 2005, par. 16.

[61] See examples in Peter Van der Auweraert, *Reparations for Wartime Victims in the Former Yugoslavia: In Search of the Way Forward*, International Organization for Migration, Geneva, 2013, at 19.

[62]ICRC, 'Strengthening legal protection', above note 4, at 13.

[63] Only the First Additional Protocol to the Geneva Conventions provides that parties violating the Protocol or Conventions will be "liable to pay compensation" (Article 91). This echoes Article 3 of the 1907 Hague Convention Concerning the Laws and Customs of War on Land, which is considered to be "customary law for all nations". See Yves Sandoz, Christophe Swinarski& Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC / MartinusNijhoff , Geneva 1987), at 1053; Jean-Marie Henckaerts& Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I – Rules* (ICRC / CUP, Geneva 2005), available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul, Rule 150.

[64] The 1949 Geneva Conventions prohibit High Contracting Parties from absolving themselves or each other of liability for grave breaches (First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148).

[65]ICRC, "Strengthening legal protection", above note 2, 13; Rombouts et al, above note 5, at 364 – 365.

[66] Marco Sassòli, 'State responsibility for violations of international humanitarian law', *International Review of the Red Cross*, Vol. 84, No. 846, June 2002, at 418.

[67] Sandoz et al, above note 63, at 1055 - 1056; *Case concerning the Factory at Chorzów*, Permanent Court of International Justice, Judgment (Merits), 13 September 1928, Series A, No. 17, at 29; International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', Annex to General Assembly Resolution 56/83, 12 December 2001, Article 31.

[68] On the possibility of such an interaction between IHL and IHRL, see Marco Sassòli, 'Le droit international humanitaire, unelexspecialis par rapport aux droitshumains ?' in Andreas Auer, AlexandreFlückiger& Michel Hottelier

(a) Reparations in non-international armed conflict

The above treaty provisions relating to reparations do not cover non-international armed conflict.[69] The ICRC Customary IHL Study considers that the duty of reparation also binds States with regard to violations of the IHL of non-international armed conflicts, as in general public international law.[70] However, IHL implementation mechanisms are seen as particularly underdeveloped when it comes to non-international armed conflict.[71] Therefore, given the nature of non-international armed conflicts, implementation will mainly be left to domestic mechanisms.[72]As human rights treaties prescribe the right to a remedy, treaty mechanisms may then be called upon to evaluate or recommend national measures, as well as interpret relevant obligations. The UNHRC has called upon State parties to non-international armed conflicts to make reparation in individual cases,[73] as well as more generally in concluding observations.[74] Other mechanisms have also awarded reparations in cases arising from such contexts.[75] In the process, they have confirmed, implemented and given content to the obligation to make reparation in non-international armed conflicts in light of complementary IHRL. However, a key remaining question in such contexts is the responsibility of non-state actors, which will be addressed below.

(b) Responsibility of non-state actors

The IHL treaty provisions on reparations do not address obligations to non-State actors.[76] The corresponding customary rule, as expressed in the ICRC Customary IHL Study, also clearly addresses States.[77] The commentary to this rule mentions some isolated cases in which reparations have been sought from armed opposition groups. However, it does not find that a rule has yet developed regarding the responsibility of such groups, and notes that the consequences of such a responsibility would in any case be unclear.[78]

(eds), *Les droits de l'homme et la constitution, Etudes enl'honneur du Professeur Giorgio Malinverni* (Schulthess, Geneva 2007) at 389 - 392.

[69]ICRC, "Strengthening legal protection", above note 4, 13; Droege, above note 21, at 546.

[70]Henckaerts&Doswald-Beck, above note 63, Rule 150 and commentary. This view is further supported inSassòli, 'State responsibility', above note 66, at 418,and Fleck, 'Priorities', above note 2, at 72.

[71]Pfanner, above note 2, at 310.

[72]Henckaerts&Doswald-Beck, above note 63, commentary to Rule 150.

[73]See e.g. *Traoré v. Côte d'Ivoire*,UNHRC, Communication No. 1759/2008, 17 January 2011, par. 7.9.; *Sharma v.Nepal*, UNHRC, Comm. No. 1469/2006, 28 October 2008, par. 9.

[74] See e.g.UNHRC,'Concluding Observations: Central African Republic',CCPR/C/CAF/CO/2, 27 July 2006, par. 8.

[75] See e.g. *Bámaca-Velásquezv. Guatemala*, IACtHR, Judgment (Reparations and Costs), 22 February 2002,par. 29 (context) & 196 (reparations); *Case of the "Mapiripán Massacre" v. Colombia*, IACtHR, above note 36, par. 278, 288, 298 – 318; *Case of the Massacres of El Mozote and nearby places v. El Salvador*, IACtHR, Judgment of 25 October 2012 (Merits, Reparations and Costs), par. 142 (context), 240 – 204 (reparations); *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, ACommHPR, above note 57, par. 229; *Abdulkhanov& others v Russia*, ECtHR, Application No. 22782/06, Judgment, 3 October 2013, par. 50 (context) and par. 67 – 68 (reparations); *Özkan et al. v. Turkey*, ECtHR, Application No. 21689/93, Judgment, 6 April 2004, par. 85 (context), 494 – 495 & 500 – 501 (reparations).

[76] Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond', *International and Comparative Law Quarterly*, Vol. 40, No. 4, 1991, at 847 – 848.

[77]Henckaerts&Doswald-Beck, above note 63, rule 150.

[78]*Ibid*., commentary to Rule 150

The complementary body of IHRL offers little to clarify this situation. While there is a growing recognition of context-dependent IHRL responsibilities on non-state parties to a conflict,[79] these are even less clear than the responsibilities of such parties under IHL. As for non-state actors' responsibility for reparations, there has possibly been even less practice in the field of human rights, as human rights treaties clearly indicate States as duty-bearers, and the mandate of associated human rights mechanisms is limited accordingly.[80]Therefore, this appears to be a particularly difficult gap for international human rights mechanisms to fill.

The situation is less problematic when there is a nexus between of direction or control between a State and the non-state actor, as it is then possible for a human rights mechanism to hold a State accountable for the non-state party's actions under the general rules of attribution of State responsibility.[81]A more difficult issue is the responsibility of non-state parties opposing a State, i.e. armed opposition groups. Rose has argued that a norm is emerging whereby States can be held responsible for non-State actors' conduct based on a duty of due diligence.[82]This has occurred under the influence of jurisprudence of the Inter-American Court,[83]which has been followed by the African Commission.[84] The European Court of Human Rights has also recognized similar positive obligations.[85]Applied to armed conflict, this seems to align with Sassòli's view that a duty of due diligence can arise from the obligation to ensure respect for IHL.[86]

This approach may ensure greater possibilities for redress for victims. However, it does not address the criticism that human rights treaty mechanisms' lack of mandate to hold non-State actors accountable may result in a "one-sided" approach.[87]While this is difficult to solve under existing mandates, a few indirect attempts have been made to address the issue. The Inter-American Commission has highlighted the responsibilities of both non-State and State parties in a conflict situation, even though it could only make formal orders towards the State.[88]It has also referred to agreements between the State and a non-state actor in a reparations judgment.[89]The African Commission has gone further and addressed recommendations directly to a secessionist group.[90]It has been suggested that this was motivated by the Commission's "traditional fixation on the preservation of sovereignty and territorial integrity of the State".[91]It remains to be seen whether States would agree with such a paradoxical approach in other contexts.

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[79] Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, United Nations, New York 2011, at 24 – 25.
[80] See ICRC, 'Improving Compliance', above note 2, at 24.
[81]International Law Commission, above note 67, Article 8.
[82] Cecily Rose, 'An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors', *Hastings International and Comparative Law Review*, Vol. 33, No. 2, 2010, at 310.
[83]*Velásquez Rodriguez v. Honduras*, IACtHR, Judgment, 29 July 1988, par. 172 – 185.
[84]*Zimbabwe NGO Forum v. Zimbabwe*, ACommHPR, above note 25, at par. 145 – 164 (no violation was found on this point).
[85]*Mastromatteo vs. Italy*, ECtHR, Application No. 37703/97, Judgment, 24 October 2002, par. 89 – 97 (no violation found).
[86]Sassòli, 'State responsibility', above note 66, at 412.
[87]Byron, above note 2, at 883.
[88]*Avilan v. Colombia*, IACommHR, above note 34, par. 131; *Juan Carlos Abella v. Argentina*, IACommHR, above note 34, par. 176 – 179.
[89]*Bámaca-Velásquezv.Guatemala(Reparations and Costs)*, IACtHR, above note 75, par. 80.
[90]*Kevin MgwangaGunme and others v. Cameroon*, ACommHPR, Communication 266/03, 27 May 2009, par. 215.2
[91]Bekker, above note 55, at 524.

(c) Right of individuals to reparation

An individual right to reparation has likewise been identified as a gap in IHL.[92]It does not appear in treaty texts, and scholars are divided on the existence of such a right in customary IHL. The ICRC Customary IHL Study notes a "growing trend" towards individual reparation, but stops short of stating that such a right is part of customary IHL.[93]Kalshoven supports an individual right to reparation on the basis of the *travauxpréparatoires* of the Hague Regulations and Geneva Conventions.[94] Others are not convinced, owing to a lack of State practice and/or the reluctance of national courts to grant individual reparation.[95]According to Sassòli, individuals have a substantive right to reparation under IHL, but lack procedural standing.[96] The Van Boven/Bassiouni Principles assert such a right(as well as corresponding state duties) with regard to serious violations of IHL.[97]However, as expressed by Fleck, "[r]ights of the individual are decisively expressed by the manner and extent to which claims may be pursued",[98] and in practice, it is clear that victims of IHL violations are most often denied a domestic forum to seek reparations.[99]

In contrast, a right to individual reparation is much more firmly anchored in IHRL,[100] not least because of human rights treaty provisions recognizing an individual right to a domestic remedy, and the competence of treaty mechanisms to award individual reparation.[101] This has allowed victims of IHL violations to obtain redress which would otherwise have been unavailable.[102] Indeed, human rights treaty mechanisms have produced an extensive case law in this regard.[103] In addition to the non-international armed conflict cases cited above,[104]the recognition of extra-territorial state responsibility by most mechanisms also opens up possibilities for individual victims of violations in international armed conflict situations.[105]

However, following international armed conflicts, individuals have been frequently impeded from obtaining reparations by the doctrine of sovereign immunity.[106] It is notable that in one such case, neither the ECHR nor the UNHRC was willing to interfere with a national decision on this point.[107]The ECHR also did not dispute a national court's decision that it was not competent to

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[92]ICRC, "Strengthening legal protection", above note 4, at 13; Rombouts et al, above note 5, at 362.
[93]Henckaerts and Doswald-Beck, above note 63, Rule 150& commentary.
[94]Kalshoven, above note 76, at 830 – 832, 847.
[95]D'Argent, above note 52, at 13; Pfanner, above note 2, at 279; Tomuschat, above note 10, at 178.
[96]Sassòli, 'State responsibility', above note 66, at 419.
[97]Van Boven/Bassiouni Principles, above note 9, Principles 2 & 11.
[98] Fleck, 'The Role of Individuals', above note 54, at 128.
[99]Zegveld, above note 3, at 507.
[100]*Ibid*., at 497.
[101]Rombouts et al, above note 5, at 367 - 369; Gillard, "Reparations", above note 7, at 536; Droege, above note 21, at 546.
[102]Steiger, above note 2, at 268 – 269
[103]For an exhaustive overview of the reparations jurisprudence of international human rights treaty mechanisms, with a focus on armed conflict, see Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, Cambridge 2012) at 44 – 85.
[104] See above notes 73 - 75.
[105]See e.g. *Jaloud v Netherlands*, ECtHR, above note 41, par. 140 – 153; *Casariego v. Uruguay*, UNHRC, Comm. No. 56/1979, 21 July 1981, par. 10; *Coard et al v. United States*, IACommHR, Case 10.951, Report No. 109/99, 29 September 1999, par. 37.
[106]Gillard, 'Reparations', above note 7, at 537.
[107]*Kalogeropoulou and others v Greece and Germany*, ECtHR, Application No. 59021/00, Admissibility Decision, 12 December 2002; *Sechremelis and others v Greece*, UNHRC, Comm.No. 1507/2006, 25 October 2010, par. 10 – 11.

grant individual reparations for acts of war.[108]Thus, it does not appear that human rights treaty mechanisms are prepared to remove traditional domestic obstacles to reparation directly.

CONCLUSION

It may be said that in some areas of their practice relating to reparations, human rights treaty mechanisms have made valuable innovations. These may not only counter some criticisms of their implementation of IHL, but even contribute to solving some of the problems envisaged by critics. This is particularly evident in the area of interaction with collective reparations processes, as human rights treaty mechanisms have shown the potential to both catalyse and complement these processes. In other areas, such as the universality of IHL, it appears that there is at least no reason to fear significant disruption through the regional implementation of reparations. Rather, the concrete implementation of IHL by (quasi-)judicial human rights treaty mechanisms may contribute to its credibility and effectiveness.

On the specificity of IHL, the overall practice of human rights treaty mechanisms still does not appear to have overcome criticism. This is despite the example of the Inter-American system, as well as some growing (yet inconsistent) tendencies towards explicit use of IHL in other mechanisms, which do not seem to be impeded by their mandates. These developments indicate the possibility for human rights mechanisms to maintain the specificity of IHL through a more transparent and nuanced analysis of legal obligations. However, this would demand more explicit IHL implementation by human rights bodies, rather than less.

Regarding the gaps in the IHL reparations regime, human rights treaty mechanisms have allowed space for important innovations and clarifications, as well as a forum to realize this development. This has particularly been the case in the areas of non-international armed conflicts and the individual right to reparation. However, this work of IHL development cannot be left to human rights treaty mechanisms alone, given the limitations of their mandates and the parameters of general international law. This is especially clear regarding the responsibilities of non-State actors, although some human rights mechanisms' attempts to approach this issue may merit further consideration in the interim. Such limitations demonstrate that further developments from within the system of IHL are still needed in order to strengthen the framework of reparations for IHL violations, as well as their implementation.

[108]*Markovic and others v. Italy*, ECtHR, Application No. 1398/03, Judgment, 14 December 2006, par. 103 – 116.

PRINCIPLES AND RULES OF INTERNATIONAL HUMANITARIAN LAW PROTECTING WATER, SANITATION AND ENERGY DURING THE CONDUCT OF HOSTILITIES

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Abstract

Recent developments on International Human Rights Law (IHRL) have contributed to the recognition of the right to water, sanitation and energy as specific Human Rights or as elements of the right to an adequate standard of living, even if the protection entailed by such recognition is still fragile. In time of armed conflict, when disregard to Human Rights is usually widespread, water reservoirs, sanitation pipes and energy networks often are targeted as strategic. In these times, International Humanitarian Law (IHL) presents several norms on the duty to respect and protect facilities that provide essential services for human life and dignity. The paper's objectives are to illustrate principles and rules of IHL protecting water, sanitation and energy, and to discuss challenges related to the interaction between IHL and IHRL in protecting these basic needs and their respective enforcement.

The paper is comprised of a short introduction, four sections and a conclusion. The first section presents definitions of water, sanitation and energy for the purpose of the study.

The second section presents relevant general principles applicable to the protection of these needs under IHL, including the principle of humanity, the principle of distinction, the principle of military necessity, the principle of proportionality and the prohibition to cause superfluous injury and unnecessary suffering.

The third section presents more specific rules of IHL that relate to the access to water, sanitation and energy, in particular, relevant rules for the protection of these needs and rules governing means and methods of warfare. Among relevant rules on the protection to water, sanitation and energy are those on the protection of civilian property as such, on objects essential for the survival of the civilian population, on the protection of the natural environment and on the protection of works and installations containing dangerous forces. Among relevant rules governing means and methods of warfare are those on the starvation of civilians, on indiscriminate attacks, on acts of terror among the civilian population, on use of poison, on chemical and biological weapons, on booby traps, land mines, remnants of war and cluster munitions, and on nuclear weapons. The paper applies each of these to cases and circumstances related to access to water, sanitation and/or energy.

The fourth section debates the interaction between the application of these principles and rules to Human Rights norms related to the protection of these needs. It also presents challenges for enforcing both these bodies of law in this respect, something the conclusions present as essential for concerns related to the protection of human life and dignity not only during armed conflict, but also in time of peace subsequent to the general close of hostilities.

The paper will be a condensed and updated version of a paper drafted in late 2009 as a requirement to the course on Economic, Social and Cultural Rights in Armed Conflict by Professor Eibe Riedel (with the assistance of Gilles Giacca). The course was taken as part of the Master of Advanced Studies on International Humanitarian Law at the Geneva Academy of International Humanitarian Law (IHEID/UNIGE), from 2009 to 2010.

Introduction

Water, sanitation and energy are amongst the most essential needs for modern human life, and are particularly vulnerable during armed conflicts. Access to each of these is intertwined with access to the other two. Thus, water is generally essential to provide proper sanitation facilities, for hydroelectric-power supply and to the functioning of thermal and nuclear plants. Electric energy is necessary for pumping sewage systems, water distribution and irrigation. Proper sanitation systems are a condition for preserving potable water.

Access to water, sanitation and energy is a requirement for the achievement of human rights, including the rights to an adequate standard of leaving, to food and to health, and even to life. Other rights, such as to education, religion and freedom of movement can also be directly affected by restriction of access to water, sanitation and energy.

Recently, the rights to water and sanitation have been recognized as separate human rights[1]. Energy is considered an element of the right to adequate housing[2].

During hostilities these rights are frequently endangered. Though International Human Rights Law (IHRL) continues to apply, it is useful to understand International Humanitarian Law's (IHL) contribution to adequate protection of these resources during conflict.

This paper aims at discussing IHL on conduct of hostilities as protecting water, sanitation and energy and related human rights. Part-I presents definitions of water, sanitation and energy for the purpose of the study. Part-II introduces relevant general principles and rules of IHL as applied for the protection of these resources. Part-III briefly concludes these.

1. Water, Sanitation and Energy

This part interprets these concepts in light of IHRL-related definitions for better framing IHL rules protecting them.

Water is here understood generally as "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses"[3] including religious, agricultural and economic purposes. Water may also be protected as part of the environment itself (*e.g*. the marine environment).

Sanitation is "the safe management of human excreta" and associated hygiene[4]. It shall include "physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity."[5]

Energy is here understood as the availability of electric energy generation and transmission of public goods, capable of providing sufficient and affordable energy services, in a non-discriminatory way for basic needs related to agricultural productivity, economic activity, health

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[1] UNGA (United Nations General Assembly), 'The Human Right to Water and Sanitation', Doc A/RES/64/292, 28 July 2010; UNGA, 'The human rights to safe drinking water and sanitation', Doc A/RES/70/16, 17 December, 2015.

[2] CESCR (Committee on Economic, Social and Cultural Rights), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), Doc. E/1992/23, 13 December 1991, para.8(b).

[3] CESCR, General Comment No. 15 (2002) on the right to water, E/C.12/2002/11; UNGA, 2015,para.2).

[4] UN-Water, Tackling a global crisis: International Year of Sanitation 2008, available at https://esa.un.org/iys/docs/IYS_flagship_web_small.pdf, last accessed on 4 November, 2016,p.10.

[5] UNGA, 2015, para.2; see also HRC, Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, A/HRC/12/24, 1 July 2009, para.2.

facilities and safety of the civilian population. It includes energy for cooking, heating, lighting[6], water and sanitation pumping.

With these definitions in mind we proceed to the paper's more substantial section.

2. General Principles and rules of IHL applicable to the conduct of hostilities

Before proceeding to specific rules, we first list five general principles of IHL.

2.1 General Principles

IHL cardinal principles[7], of humanity, distinction, military necessity, proportionality, and the prohibition to cause superfluous injury or unnecessary suffering are particularly instrumental for the purpose of protecting water, energy and sanitation.

The principle of humanity is a manifold foundational principle which exercises constitutional functions in International Law[8]. The *Martens Clause* is an expression of the principle exercising the "integration function"[9]. It establishes that in cases not covered by IHL specific provisions, human person remains protected by the fundamental principles of humanity and the dictates of public conscience[10]. This makes the "*Lotus* principle" whereas "restrictions upon the independence of States cannot be presumed"[11] not applicable under IHL. Therefore, in the absence of specific IHL rules regarding water, sanitation and energy, minimum standards of human dignity in both international armed conflicts (IAC) and non-international armed conflicts (NIAC) still apply[12].

The principle of distinction establishes that parties to an armed conflict must "distinguish between the civilian population and combatants and between civilian objects and military objectives, and accordingly, direct their operations only against military objectives"[13]. Military objectives are members of the enemy's armed forces who are not *hors de combat* and those objects which by their nature, location, purpose or use make destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage[14].

Under international law, "**necessity"** is a situation precluding the wrongfulness of an act not in conformity with an international obligation, when the act is the only way to safeguard an essential interest against a grave and imminent peril and does not seriously impair an essential interest of the Party to which the obligation exists, including the international community as a

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[6] CESCR, 1991, para.8(b).

[7] ICJ (International Court of Justice), Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, ICJ, 1996(a), p.257.

[8] VASCONCELOS NETO, Diego V., The Principle of Humanity as a General Principle of Law and Its Constitutional Functions in Public International Law, LAMBERT Academic Publishing, Saarbrüchken, 2014, p.114.

[9] VASCONCELOS NETO, 2014, pp.126-128.

[10] Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Preamble. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP-II), 8 June 1977, Preamble.

[11] PCIJ (Permanent Court of International Justice), The Case of the S.S. "Lotus", Judgment No. 9, PCIJ, Ser. A., No. 10, 1927, p.18.

[12] UNSG (United Nations Secretary General)**,** United Nations Minimum humanitarian standards: Analytical report of the Secretary General submitted pursuant to Commission on human Rights resolution 1997/21, UN Doc. E/CN/1998/87,para.99.

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP-I), 8 June 1977[13],Arts.48; 52.

[14] AP-I, Art.52(2); HENCKAERTS, Jean-Marie & Louise DOSWALD-BECK, Customary International Humanitarian Law, Cambridge University Press, 2005, vol.I , hereinafter CIHL, Rule.1(pp.3-8) & Rule.7(pp.25-29).

whole[15]. Reliance on necessity is excluded from various provisions of IHL. The extent to which "**military necessity"** is acceptable for precluding the wrongfulness of *prima facie* violations of IHL will depend on how it is formulated in the primary rule[16].

The **principle of proportionality** is a foundational principle of IHL[17] that prohibits attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated[18]. "Even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack"[19]. The proportionality test entails balancing between the incidental losses anticipated and the gain in weakening the enemy[20]. Other unlawful purposes should not be added to the equation.

The principle prohibiting **superfluous injury and unnecessary suffering**[21] constrains means and methods of warfare. The only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy[22]. For achieving this it would suffice to put the greatest possible number of combatants *hors de combat*[23]. This object would be "exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable", and, hence, prohibited by the laws of humanity.

2.2 Rules on the Protection of Water, Sanitation and Energy from the Effects of Hostilities

Few IHL rules apply directly to water, sanitation and energy as such. One instrument with provisions applicable to water is the 1997 Convention on the Law Relating to the Non-Navigational Uses of International Watercourses[24], though it merely clarifies that IHL principles and rules apply to watercourses and related objects, a fact self-evident since "the right of belligerents to adopt means of injuring the enemy is not unlimited" (Hague Regulations,Art.22). An *a contrario* conclusion "would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare"[25].

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[15] see ILC (International Law Commission), Responsibility of States for International Wrongful Acts, Adopted as annex to UNGA Res.56/83, 12 December 2001(a), hereinafter RSIWA, Art.25.1.

[16] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, In: **Yearbook of the International Law Commission**, 2001(b), vol. II, Part Two , p.84.

[17] Supreme Court of Israel, Beit Sourik Village Council v. The Government of Israel, HCJ 2056/04, 30 May 2004, available at: http://www.refworld.org/docid/4374ac594.html, accessed 4 November 2016.

[18] AP-I, Arts.51(5)(b);57; CIHL, Rule.14 (pp.46-50).

[19] ICJ, 1996, Sep. Op. Judge Higgins, p.587.

[20] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight. Saint Petersburg, 29 November to 11 December 1868.

[21] Regulations Concerning the Laws and Customs of War on Land, Annex to Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, available at Schindler, D. & Thomas, J (eds.), The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents, Leiden/Boston, Nijhoff Publishers, 4th ed., 2004, pp.60-87, (Hague Regulations), Art.23(e); AP-I,Art.35.2; (CIHL,p.244)).

[22] Saint Petersburg Declaration.

[23] The expression should be read as including military objects.

[24] Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997.

[25] ICJ, 1996,p.259.

Another attempt to codify rules related to water in armed conflicts is Chapter X of the ILA's Berlin Rules on Water Resources[26]. This non-binding declaration restricts itself to restating the application of *status quo* IHL general rules to water and related facilities, falling short of a comprehensive analysis[27].

This section provides a more detailed description of rules on the protection of objects related to water, sanitation and energy against the effects of hostilities, and enumerates constraints on certain means and methods of warfare of particular interest due to the risk they pose to these resources.

2.3 Relevant Rules for Protection of Water, Sanitation and Energy

In this section I discuss the protection of these resources as protection of (1) civilian property as such, (2) objects indispensible for the survival of the civilian population, (3) the natural environment, and (4) works and installations containing dangerous forces.

2.3.1 The protection of civilian property as such

According to AP-I "civilian objects shall not be the objects of attack or of reprisals"[28]. This rule applies equally to civilian property and other non-military objects.

Other IHL provisions specifically protect private property against effects of hostilities. The Hague Regulations expressly prohibit Parties to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war"[29]. This is a rule of customary IHL for both IAC and NIAC[30].

Destruction or seizure of property is a war crime under the grave breaches provisions when it constitutes "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly"[31]. Destroying or seizing the enemy's (or adversary's) property unless such destruction or seizure be imperatively demanded by the necessities of war is a war crime for both IAC and NIAC[32].

Water reservoirs, in particular hydroelectric dams, have constantly been attacked in situation of armed conflicts. In World War-II the British Royal Air Force "Dambusters" squadron was responsible to destroy dams. The attacks over these installations were justified on grounds of "probable moral and economic effects", including affect "supply of industrial and household water" and "energy output" and "possibility of a shortage of drinking water, the risk of disease and the inability of the fire services to deal with incendiary attacks" [33]. Controversial at the time[34], today

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[26] ILA (International Law Association), Berlin Rules on Water Resources, Res.No.2/2004 of the 71st Conference of the International Law Association, Berlin, Germany, 16 to 21 August 2004, available at http://www.ila-hq.org/en/committees/index.cfm/cid/32, last visited 04 November 2016.

[27] See discussion on SASSÒLI Marco & Antoine A. BOUVIER, How does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice of International Humanitarian Law, ICRC, Geneva 2006, p.729.

[28] AP-I, Art.52(1).

[29] Hague Regulations. Art.23(g).

[30] CIHL, Rule.50 (pp.175-177).

[31] Geneva Convention for the amelioration of the conditions of the wounded and sick in armed forces in the field, 12 August 1949 (GC-I),Art.50; Geneva Convention for the amelioration of the conditions of the wounded, sick and shipwrecked members of armed forces at sea, 12 August 1949 (GC-II), Art.51; Geneva Convention relative to the protection of civilian persons in times of war, 12 August 1949 (GC-IV), Art.147.

[32] Rome Statute of the International Criminal Court, 17 July 1998, Arts.8.2(b)(xiii);8.2(e)(xii).

[33] JONES, Tobin, 617 Squadron – The Operational Record Book, No date of publication (ND), available at http://s310295659.websitehome.co.uk/dambusters/drupal/docs/recordbook.pdf, last visited on 04 November 2016, pp.8-14.

these attacks would be in breach of the principle of distinction for being an attack against civilian property, in particular the civilian water, sanitation and energy distribution systems.

Strictly related to the protection of civilian property, including energy sources, is the prohibition of pillage. Pillage is the "forcible taking of property by an invading or conquering army from the enemy's subjects"[35]. Different from seizure or confiscation, pillage involves taking of property "for private or personal use"[36].

Pillaging of villages for fuel is common in many armed conflicts. *E.g.*, former child soldier Ishmael Beah describes how during the conflict in Sierra Leone, he used to invade villages whenever his division was short on fuel to pillage it for energy generators with the aim of watching Rambo movies for fostering their war thirst[37].

The prohibition of pillaging is foreseen in treaties[38] and is a long-lasting rule of customary IHL[39]. Pillage is a war crime in both IAC and NIAC[40].

2.3.2 Objects essential for the Survival of the Civilian Population

An IHL provision that expressly protects water is AP-I's that prohibits to attack, destroy, remove or render useless objects indispensible to the survival of the civilian population, including "drinking water installations and supplies and irrigation works", for the specific purpose of denying them to the sustenance value to the civilian population or to the adverse Party, whatever the motive[41]. The rule is binding under customary IHL for both IAC and NIAC[42]. AP-I's list of objects essential for the survival of the civilian population is merely illustrative and should be interpreted in the "widest sense, in order to cover the infinite variety of needs of populations in all geographical areas"[43]. Objects necessary for distributing energy for heating systems and cooking under certain circumstances might also be necessary for the survival of the civilian population. So are sanitation systems, since in the absence of proper sanitation, epidemics can severely affect the health and survival of civilian populations.

The threshold of protection here is higher than that offered to civilian objects in general. Even in the case of objects being used for the direct support of military action, actions shall not be taken against them which may be expected to leave the civilian population with such inadequate food or water to cause its starvation or force its movement[44].

During the 1991 Persian-Gulf War, the USA and its allies bombed at least 11 Iraqi major power-plants. Since Iraq is mostly flat, water distribution sewage treatment is dependent on pumping energy. In the first week of war both distribution and treatment plants halted operations

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[34] SANDOZ, Yves, Christoph SWINARSKI & Bruno ZIMMERMANN, (editors), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para.2000.
[35] Black's Law Dictionary, 5th ed., West Publishing, 1979, p.1033.
[36] ICC (International Criminal Court), Elements of Crime, The Hague, 2011,pp.139;150)
[37] BEAH, Ishmael. **A Long Way Gone: Memoirs of a Boy Soldier**. New York: Sarah Crichton Books, 2007.
[38] GC-IV (Art.33), AP-II (Art.4(2)(g)).
[39] CIHL, Rule.52(pp.182-185).
[40] ICC Statute, Art.8(2)(b)(xvi)); Art.8 (2)(e)(v).
[41] AP-I, Art.54.2.
[42] CIHL, Rule.54(pp.189-193).
[43] SANDOZ et al, 1987, para.2102-2103.
[44] AP-I, Art.54.3.

due to lack of electricity. Millions of people were left without safe drinking water and sanitation[45]. Even if these energy plants were supporting Iraqi war efforts, these attacks likely violated IHL's protections to objects essential for the survival of the civilian population.

The rule was also claimed to be violated during NIAC. Concerning the situation in the Democratic Republic of Congo, the UNSC president recalled *"*the unacceptability of the destruction or rendering useless of objects indispensable to the survival of the civilian population, and in particular of using cuts in the electricity and water supply as a weapon against the population."[46] Targeting water and electricity systems were, in the statement, recognized as objects indispensable to the survival of the civilian population.

2.3.3 Natural Environment

Water in particular is also protected by the provisions concerning the natural environment. Protecting the environment is amongst the most ancient rules constraining warfare: ranging from proscribing poisoning of wells in some traditional African laws[47] to prohibiting the destruction, cutting or burning of fruitful and palm trees in Sharia-Law[48].

In 1992, the protection of the environment during armed conflicts has been reiterated by the Rio Declaration[49] (Principle.24) and the UNGA[50]. IHL general principles of distinction, military necessity and proportionality apply to the natural environment[51] in both IAC and NIAC[52].

During the Vietnam War defoliant Agent-Orange and other means and methods caused widespread harm to the environment. This and the rise of environmental conscious fostered by the 1972 Stockholm Declaration[53] pushed the drafters of AP-I to include the following provision (Art.55) in the protocol[54]:

1. *Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.*
2. *Attacks against the natural environment by way of reprisals are prohibited.*

AP-I also prohibits employing means and methods which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment, even if this does not immediately affect the civilian population, as it is likely to have long-lasting indiscriminate effects[55].

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[45] AZIZ, Chirstine; Evaristo P. OLIVEIRA & Jost WIDMER, Iraq: the water tragedy. In: **Forum: war and water**, ICRC, Geneva, 1998, p.74.
[46] UNSC (United Nations Security Council), Statement by the President of the Security Council on the situation concerning the Democratic Republic of the Congo, S/PRST/1998/26, 31 August 1998.
[47] See session 0 below.
[48] ZAGH, Ben A. Islam et droit international humanitaire, In: **IRRC**, vol.722, March-April 1980, p.67.
[49] 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) (1992).
[50] UNGA, Protection of the Environment in Times of Armed Conflict, A/RES/47/37, 25 December 1992.
[51] ICJ,1996(a), p.242.
[52] CIHL, Rule.43(pp.143-146).
[53] 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, A/Conf.48/14/Rev.1(1973).
[54] TIGNINO, Mara. Reflections on the Legal Regime of Water during the Vietnam War, Presented at the **Fifth Pan-European International Relations Conference** (Section 31, Panel 8),The Hague, 9-11 September 2004.
[55] AP-I, Art.35(3). See SANDOZ et al, 1987, para.2134.

Adopted in the same year as the Protocols to the GCs, the ENMOD Convention[56] prohibits such techniques when "having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party". ENMOD defines "environmental modification techniques" as techniques for changing – through deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including *inter alia* its hydrosphere. These include those intended to cause tidal waves, rain and snow[57].

The prohibition of means and methods of warfare which are intended to or may be expected to cause widespread, long-lasting and severe environmental damage is not subject to questions of military necessity and proportionality. Such considerations cannot justify damages that reach this threshold - prohibition is absolute[58]. This is why the threshold of cumulative proof of widespread, long-lasting and severe damage was required. In the particular case of environmental modification techniques the threshold is lower since it requires a disjunctive test of the three requirements, implied in its use of "or" and not "and"[59].

The ICC Statute introduces a proportionality test between the damage and the military advantage anticipated for the purpose of considering the conduct as a war crime (Arts.8(2)(b)(iv)). Such test is presumably only applicable for criminal and not State responsibility[60].

All feasible precautions to avoid or at least minimize incidental damage to the environment shall be undertaken, especially in cases of IAC or of NIAC with transboundary environmental impacts[61]. Such precautions shall be taken even in case of lack of scientific certainty of the effects on the environment of military operations[62].

Though sanitation and energy are not the direct object of the natural environment, attacks on sewage treatment systems or energy resources (*e.g.* oil drilling camps) can result in serious damages to the environment, including widespread, long-lasting and/or severe environmental damage.

Following the invasion of Kuwait, Iraqi forces torched and destroyed Kuwaiti oil wells, causing disastrous consequences to the marine environment of the region, breaching and becoming liable under international law[63]. This was not an isolated fact in the region. During the 1980s Iraq-Iran war, in both sides of the conflict, oil refineries and storage tanks were targeted, including in cases where these were close to important water courses/works/installations resulting in serious environmental damages[64].

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[56] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), Geneva, 18 May 1977, Art.I.1.

[57] ENMOD, Art.II. See SANDOZ et al, 1987, para.1454.

[58] CIHL, pp.151-158; ILA, 2004, Rule.52.

[59] BOUVIER, Antoine. Protection of the natural environment in time of armed conflict, In: **IRRC** no 285, 1991, pp.567-578.

[60] CASSESE, Antonio. International Criminal Law, Second Edition, Oxford, 2008, p.96).

[61] CIHL, pp.147-151.

[62] 1992 Rio Declaration, Principle.15.

[63] UNGA, International cooperation to mitigate the environmental consequences on Kuwait and other countries in the region resulting from the situation between Iraq and Kuwait, A/RES/46/216, 20 December 1991; UNGA, International cooperation to mitigate the environmental consequences on Kuwait and other countries in the region resulting from the situation between Iraq and Kuwait, A/RES/47/151, 18 December 1992; UNSC, Resolution 687 (1991), S/RES/687 (1991), 8 April 1991,para.16.

[64] UNSC, Report of the Secretary General on The mission to inspect civilian areas in Iran and Iraq which have been subject to military attack, S/15834 of 20 June 1983, Annex – Report of the mission .

2.3.4 Works and installations containing dangerous forces

The intentional release of dangerous forces, in particular with resort to water as a dangerous force, was historically a commonly used method of warfare: from Archimedes machines to the 1938 Chinese flooding of its territory to stop foreign invasion[65]. In World War-II, the "Dambuster" Squadron[66] attacks resulted in 1300 dead, 125 factories destroyed, 6500 head of livestock and 3000 hectares of cultivated land lost[67]. The widespread destruction of dams and dykes during the Korean and Vietnam wars gave rise to public opinions' reaction[68]. In the latter war, 661 dykes sections were allegedly damaged or destroyed by the USA[69].

Today, IHL prohibits "works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations" and objects in the vicinity thereof to be "the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.[…]"[70] or fundamentally impair the ecological integrity of waters[71]. Reprisals against works and installations containing dangerous forces are also prohibited[72].

The special protection to works and installations containing dangerous forces and objects in their vicinity only ceases in case where they offer "regular, significant and direct support" to military operations and if the attack is the only feasible manner to terminate such support[73]. Another requirement should cumulatively be observed for ceasing special protection of dams or dykes, *i.e.*, that they are used for functions other than containing actual or potential masses of water, *e.g.*, by forming part of a system of fortifications or of a road enabling the movement of troops[74].

Precautionary measures related to these objects include: those generally applicable for civilian objects - even if they are military objectives and lose their special protection; avoiding locating military objectives in the vicinity of such objectives; use of special distinctive sign to mark them and agreements providing additional protections for objects containing dangerous forces[75]. Similar precautionary measures are recognized by customary IHL to other installations containing dangerous forces, such as petroleum refineries and chemical plants[76].

The protections to these works and installations is important, for safeguarding access to water, sanitation and energy, even if incidentally based on the effects that are likely to arise from these attacks.

The destruction of a dam or dyke can cause the loss of stored water which is essential for supplying domestic, agricultural and industrial activity, as seen in the destruction of the Eden and Rohr dams in World War-II[77]. In countries which rely heavily on hydroelectric power, such attacks

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[65] SANDOZ et al, 1987, para.2142.
[66] JONES, ND. See above section 0
[67] BRICKHILL, Paul, The Dam Busters**,** Pan Military Classics, Pan Macmillan, 2009.
[68] CIHL, para.2144.
[69] WESTING, 1976, pp.57-58.
[70] AP-I, Art.56.1; AP-II, Art.14.
[71] ILA, 2004, Rule.52.
[72] AP-I, Art.56.4.
[73] AP-I, Art.56.2.
[74] AP-I, Art.56.2(a); SANDOZ et al, 1987, paras.2161-2162.
[75] AP-I, Arts.56.3;56.5-56.7.
[76] CIHL, Rule.42 (pp.139-142).
[77] JONES, ND.

may halt their whole supply of electricity through the loss of the stored water for moving the generators or by destroying the generators themselves. This threatens pumping for distributing water and evacuating sewage, as happened in Iraq on the initial stages of the 1991 Gulf War. The dangerous forces released from dams and dykes are also likely to destroy the network of canals and pipes of the water and sewage systems and power line corridors essential for distributing electricity. Attacks to nuclear facilities present a major risk of environmental contamination. The *Osiraq*/*Tammuz-1* plant was a light-water nuclear materials testing reactor near Baghdad, attacked three times by three different powers: in 1980 by Iran, in 1981 by Israel; and in 1991 by the USA. Between 1984 and 1988 Iraq bombed the Iranian Bushehr Nuclear Power-Plant 7 times[78].

It is not clear if any of these attacks resulted in serious radioactive contamination. However, the dramatic consequences of the 1986 Chernobyl and the 2011 Fukushima accidents give glimpses of what attacks to fully operating nuclear-energy-plants could amount to in terms of damages to the civilian population and the environment.

2.4 Means and Methods of Warfare

Direct or indirect protection for water, sanitation and energy can be provided by rules on means and methods of warfare, including on: (1) starvation of civilians, (2) indiscriminate attacks and (3) acts of terror against the civilian population, (4) poison, chemical and biological weapons; (5) booby traps, land-mines, remnants of war and cluster munitions; (6) nuclear weapons.

2.4.1 Starvation of civilians

Starvation of civilians as a method of warfare is prohibited for both IAC and NIAC under conventional and customary IHL[79]. As a method of warfare it is used deliberately as to annihilate or weaken the population[80].

The right to water is intrinsically related to the right to food, being necessary for food hygiene and preparation of foodstuff[81]. The official interpretation of the Convention on Non-navigational Uses of Watercourses recommends that in determining "vital human needs" (Art.10), "special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation"[82]. The right to food also requires access to water for food hygiene. The mandate of the Special Rapporteur on the Right to Food underlies linkages between the right to food and the right to water in concrete examples[83]. The Rapporteur has referred to instances of deliberate destruction of roof water tanks

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[78] SCHNEIDER, Berry R. Radical Responses to Radical Regimes: Evaluating Preemptive Counter-Proliferation, **McNair Paper 41**, Institute for National Strategic Studies, National Defence University, Washington DC, May 1995. pp.12-17; PERLUMUTTER, Amos; Michael I. HANDEL and Uri BAR-JOSEPH, Two Minutes over Baghdad, 2nd Edition, London, 2003; UNSC, Resolution 487(1981) S/RES/487, 19 June 1981.

[79] AP-I, Art.54.1; AP-II, Art.14; CIHL, Rule, 53 (pp.186-189); ILA, 2004, Rule.50.

[80] SANDOZ et al, 1987,paras.2089-2090.

[81] CESCR, 2002, pp.2-5.

[82] UNGA, Convention on the law of the non-navigational uses of international watercourses: Report of the Sixth Committee convening as the Working Group of the Whole, A/51/869, 11 April 1997.

[83] ECOSOC (UN Economic and Social Council), The Right to Food: Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler submitted in accordance with Commission on Human Rights resolution 2001/25, UN Doc. E/CN.4/2003/54, 10 January 2003, paras.36-51.

for households, groundwater wells and irrigation networks by Israeli soldiers in the Occupied Palestinian[84].

2.4.2 Indiscriminate attacks

Indiscriminate attacks are prohibited under treaty and customary IHL for both IAC and NIAC[85]. This rule is derived from the principle of distinction and prohibits attacks that are of a nature to strike military objectives and civilians or civilian objects without distinction by (a) not being directed against a specific military objective; or by employing means or methods of warfare (b) which cannot be directed against a specific military objective; or (c) the effects of which cannot be limited as required by IHL.

When there is no distinction between military objectives and civilian objects, water reservoirs and resources, energy electric power-plants and distribution networks, and sewage collecting systems and treatment facilities are likely to be negatively impacted or destroyed. *E.g.*, during 2008-2009 conflict with Hamas, Israel blurred the distinction between military objectives and civilian objects in Gaza. Then Israeli senior military officials affirmed: "There are many aspects of Hamas, and we are trying to hit the whole spectrum, because everything is connected and everything supports terrorism against Israel"; and "Hamas's civilian infrastructure is a very, very sensitive target. If you want to put pressure on them, this is how"[86]. By engaging in a "All-out war against Hamas" Israel committed several indiscriminate attacks either by not directing them against specific military objectives or by employing means and methods of warfare which cannot be directed against specific military targets, such as mortars in highly populated areas[87]. During the offensive water installations and sewage treatment plants were destroyed, including the Jabaliyah Namar water wells complex (depriving some 25,000 people from access to clean water with no clear military advantage) and the Gaza City al-Sheikh Ejlin wastewater treatment (releasing 200,000 cubic meters of raw sewage to agricultural land)[88]. In 2014, the destruction by Israel of the main power plant in Gaza and two sewage pumping stations in Zeitoun raised serious concerns of indiscriminate attacks by the IDF[89].

Carpet bombing attacks and attacks which violate the principle of proportionality are also prohibited indiscriminate attacks[90]. The adverse effects to water, sanitation and energy systems and

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[84] ECOSOC, The Right to Food: Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler submitted in accordance with Commission on Human Rights resolution 2001/25, UN Doc. E/CN.4/2002/58, 10 January 2002,para.103.

[85] (AP-I,Arts.51.4-51.5; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva (CCW), 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (CCW-Protocol-II), Art.3.3; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (CCW-Amended-Protocol-II), Art.3; CIHL, Rules.11-13 (pp.37-45); ILA, 2004, Rule.51.

[86] WITTE, Griff and Sudarsan RAGHAVAN, All-out war declared on Hamas, In: **The Washington Post**, 30 December 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/12/29/AR2008122900373.html, last accessed 06 November 2016.

[87] HRC (UN Human Rights Council), Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc.A/HRC/12/48, 25 September 2009 (Goldstone Report), pp.146-158.

[88] HRC, Goldstone Report, 2009, pp.206-210.

[89] HRW (Human Rights Watch), Gaza widespread impact power plant attack, 10 August 2014, available at https://www.hrw.org/news/2014/08/10/gaza-widespread-impact-power-plant-attack, last visited 06 November 2016

[90] AP-I, Art.51.5.

the consequence thereof, especially in densely populated areas, should be taken into account in assessing the legality of attacks that may fall under these kinds of indiscriminate attacks.

2.4.3 Terror among the civilian population

Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited under customary and treaty law for IAC and NIAC[91]. Frequently such acts are carried out affecting objects relevant for the present article.

During the World War-II, "Dambuster" Squadron attacks were justified as "exceptional opportunities for successful measures of political warfare" based on its "moral effects" on thousands of persons who would prey to rumors regarding possible shortage of drinking water and risk of disease[92].

In 1983 the USA produced and disseminated a "Psychological operations in guerrilla warfare" manual which recommended to the Nicaragua *Contras* methods of "implicit terror" against the civilian population. One of such methods was the cut of all lines of communication, such as cable, radio, messenger in occupying neutral or relative towns. This appeared to include targeting electric-power lines. The ICJ[93] found that through this manual, the USA encouraged the spread of terror among the civilian population, violating IHL.

The ICTY[94] found that, as a strategy of terror against the civilian population, Serbian forces shot individuals trying to fetch water at the Dobrinja River, effectively impeding the access to this resource to the besieged Sarajevo.

2.4.4 Poison, Chemical and Biological Weapons

Poison, in particular its use against water, has been an ancient means of warfare and is prohibited by many religions and cultures around the world[95]. Poison, chemical (including herbicides) and biological weapons can be disseminated through water, seriously threatening the access to water of large populations. Resort to these weapons is prohibited by IHL treaties and customary IHL and is a crime when done in IAC[96].

The 1993 Chemical Weapons Convention (CWC), the main instrument on the subject, has virtually universal acceptance[97]. The 1972 Biological Weapons Convention (BWC) binds most countries in the world committed not to develop, produce or stockpile bacteriological weapons[98].

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[91] AP-I, Art.51(2); AP-II, Art.13(2); CIHL, Rule.2 (pp.8-11).

[92] JONES, ND.

[93] ICJ, Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. ICJ Reports 1986, paras.117-122; 256-292(9).

[94] ICTY (International Criminal Tribunal for the Former-Yugoslavia), The Prosecutor v. Stanislav Galic, Judgment and opinion, 5 December 2003; IT-98-29-T , paras.352-356;597.

[95] MAYOR, Adrienne. Greek Fire, Poison Arrows & Scorpion Bombs: Biological and Chemical Warfare in the Ancient World, Overlook-Duckworth, 2008.; VAIDYA, Chintaman V. Epic India as Described in the Mahabharata and the Ramayana, Asian Educational Services, New Delhi, 2001, p.258; SASSÒLI & BOUVIER, 2006, p.121.

[96] Hague Regulations, Art.23(a); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925; Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993 (CWC); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972; CIHL, Rule.72 (pp.251-254); ILA, 2004, Rule.50; ICC Statute, Art.8.2(b)(xvii).

[97] OPCW (Organisation for the Prohibition of Chemical Weapons), Status of participation in the Chemical Weapons Convention as at 17 October 2015, S/1315/2015, 19 October 2015. Of the four UN Member States currently not part to the CWC, Israel is a signatory State and North Korea has affirmed its commitment to the elimination of such weapons. See CIHL, pp.256-261.

2.4.5 Booby traps, land mines, remnants of war and cluster munitions

The Convention on Conventional Weapons (CCW) and its protocols cover certain landmines and booby-traps[99] and explosive remnants of war[100]. Stricter regimes are imposed by the Ottawa[101] Dublin Conventions[102]. The weapons and ammunitions described in these treaties have in common two adverse aspects. First, their most likely effect on victims is the loss of limb or other permanent disabilities considered as superfluous injury and unnecessary suffering. Second, these weapons may remain where deployed for up to decades after they are used, becoming a permanent threat to the local inhabitants which might strike them by accident or out of awareness.

In Colombia, *e.g.*, anti-personal landmines have been often planted near watercourses, impeding access to drinking water, as in Bajo El Palo, Cauca[103]. In Laos, decades after being dropped, Cluster munitions continue to kill and maim, as was Mr. Dtar's case who lost his arms and eyesight from a cluster-bomb let in a river 40 years after it was dropped[104].

Cooperation against such weapons through these regimes exemplifies how IHL can contribute for ensuring the human right to water in post-conflict situations.

2.4.6 Nuclear Weapons

The Hiroshima/Nagasaki attacks demonstrated to the world the new weapon's destructive potential. Water, energy and sanitation were affected just like everything else. Even the mere testing of these weapons, outside any context of armed conflict, becomes an issue for safeguarding the natural environment, and in particular the marine environment.

An example was the 1954 USA's Hydrogen-Bomb test on the Bikini Atoll that caused radioactive contamination to regional fishermen and fisheries and small-island nations[105]. Since then, various treaties were adopted establishing nuclear free zones[106], including the Antarctic and Seabed treaties[107], which dealt more directly with the marine environment.

In 1968 the Non-Proliferation Treaty[108] was opened for signature. However, the UNSC permanent members and some other countries continued to perform nuclear tests. In 1996, the UNGA adopted a treaty aiming at banning all nuclear weapons' test explosion or any other nuclear

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[98] With Angola's accession to the convention on July 2016, only one State that had reserved its "no first use" right under the 1925 Convention and is not a party to the BWC, being very unlikely that any State may lawfully resort to it. See CIHL, p.257).

[99] CCW-Protocol-II, Arts.3;4;5;6.

[100] Protocol on Explosive Remnants of War (CCW-Protocol-V), 28 November 2003.

[101] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, 18 September 1997.

[102] Convention on Cluster Munitions (CCM), Dublin, 30 May 2008.

[103] ICRC, Colombia: Retos Humanitarios, Bogotá, 2016.

[104] CMC (Cluster Munitions Coalition), Real-Life Stories: Dtar, available at http://www.stopclustermunitions.org/en-gb/cluster-bombs/real-life-stories/overview/dtar.aspx, last visited at 06 November 2016.

[105] SASTRY, Prof. K.R.R., Hinduism and International Law, In: : **Recueil des cours de l'Académie de droit international de La Haye**, Vol.117, The Hague, 1966,p.585.

[106] E.g.

[107] Treaty of Tlatelolco, Treaty of Rarotonga, Pelindaba Treaty, Treaty of Semipalatinsk.Antarctic Treaty, Washington D.C., 15 October 1959; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof (Seabed Treaty), London, Moscow and Washington, 11 February 1971.

[108] Treaty on the Non-Proliferation of Nuclear Weapons, New York, 01 July 1968.

explosion. However, the treaty is unlikely to enter into force due to a very high threshold for such purpose[109].

Nuclear tests were questioned as violating international law before the ICJ in the 1970s, 1990s and 2010s, but in all cases the Court dismissed the complaints without discussing the merits[110].

Two advisory opinions have been requested to the ICJ concerning the nuclear weapons' use. The Court dismissed one[111], but answered the UNGA's request concerning the legality of the use or threat of nuclear weapons. In its Opinion the Court affirmed that "[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality". This includes considerations on damages to the marine environment and other water resources. The Court also reaffirmed the applicability to nuclear weapons of several IHL principles and rules, including the general obligation to protect the natural environment against widespread, long-term and severe environmental damage[112]. The Court's operative decision affirmed, *inter alia,* that by the President's casting vote:

> *the threat or use of nuclear weapons would generally be contrary to the rules of nternational law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;*

If read separately, the passage gives the impression that the Court ignores the difference of proportionality in *jus in bello* and *jus ad bellum*. However, from the full discussion by the Court one should understand that even in a case where "the very survival of a State would be at stake" the attack should still be proportionate in accordance with IHL. If the rule prohibiting widespread, long-term and severe damage to the environment is an absolute rule, in which no consideration of military necessity is possible, then, one may conclude that nuclear weapons may not be used in any occasion whatsoever if they cause damage to the environment which satisfy these three criteria cumulatively.

CONCLUSION

In order to apply IHL to water, sanitation and energy, access to these resources must be considered as separate human rights which are clearly interdependent, interrelated and indivisible. The protection of these resources during the conduct of hostilities must be guided by the principles

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[109] Comprehensive Nuclear-Test Ban Treaty, 10 September 1996. See Arts.I.1 and Art.XIV.

[110] ICJ, Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974; ICJ, Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974; ICJ, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court S Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France), ICJ Reports 1995; ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Judgment of 5 October 2016; ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Judgment of 5 October 2016; ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Judgment of 5 October 2016.

[111]) ICJ, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (b).

[112] ICJ, 1996, para.30-31.

of humanity, distinction, military necessity, proportionality and the prohibition to cause superfluous injury and unnecessary suffering. The protection of water, sanitation and energy is mandated by the specific rules on protection of civilian property as such, on objects essential for the survival of the civilian population, of the natural environment, and of works and installations containing dangerous forces. Other rules on means and methods of warfare may add to the protection of water, sanitation and energy from the effects of war, in particular the prohibition on the starvation of civilians; on indiscriminate attacks; on acts of terror among the civilian population; on poison, chemical and biological weapons; on booby traps, land mines, remnants of war and cluster munitions; and on nuclear weapons.

Few of these provisions directly protect access to water, sanitation and energy. Some allow for considerations of military necessity, which has been applied by armed forces with very little regard to damages to water, energy, or sewage systems; some are likely to impose too high a threshold, as the prohibition on widespread, long-term and severe damage to the environment. The *martens clause* plays here an important role. Access to water, sanitation and energy has become a requisite for the exercise of human dignity. Hence, attacks which restrict populations' access to these resources should be condemned by the *universal juridical conscience* of humankind[113]. Combining IHL and IHRL norms is a way to avoid gaps in the protection of these fundamental resources.

[113] CANÇADO TRINDADE, A humanização do Direito Internacional, Del Rey, Belo Horizonte, 2006, p.225.

CLIMATE CHANGE AND THE LAW OF ARMED CONFLICT

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Abstract

The debate over the interconnection between climate change and the law of armed conflict is particularly noteworthy in the legal literature, as there happens to be a divergence among scholars on this question.[1] More specifically, one group of observers indicates that there is a lack of data in methodology which makes it complicated to see the connection between climate change and armed conflict.[2] On the other hand, another group of observers considers climate change as having the potential to substantially threaten international peace and order, and thereby, lead from individual-level violence to armed conflicts.[3]

The purpose of this article is therefore to analyze the way climate change may affect the international peace and security, thereby resulting on its way in conflicts and serious human rights violations, on the one hand, and how international humanitarian law may provide relief to the victims of climate change-related conflicts, on the other.

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Although some would still fail to heed the warnings, it is now ubiquitously acknowledged that climate change with its adverse consequences poses an ever-growing concern of the whole mankind.

Indeed, the First Assessment Report released by the UN Intergovernmental Panel on Climate Change (IPCC) suggests that climate change may result in wide-scale, global migrations that may stand to be the *'greatest single impact'* on world and human security.[4]

Such a report is not a mere happenstance. Indeed, over the past 100 years, the average temperature on the Planet Earth has been increasing conspicuously, resulting in different adverse effects on its way, and - as many scholars would pinpoint - leading to humanitarian disasters and conflicts hitherto unknown to mankind.

Here, it is of importance to indicate that in the light of the United Nations system the principal body charged with the maintenance of the international peace and security is the Security Council itself. Indeed, Article 24 of the UN Charter emphasizes such a responsibility. The question that may be of relevance here is whether the impact of climate change may compel the Security Council to undertake certain measures in relation to the threats posed by climate change. Interestingly though, the Security Council does not consider climate change to be one such threat. Moreover, there seems to be a divergence among states participating in the discussion on the matter. Nonetheless, the majority of states have recognized climate change as having the potential of posing a threat to the international peace and security.

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[1] C. Gray, Climate Change and the Law on the Use of Force, in: R. Rayfuse, S.V. Scott, International Law, pp. 219-222.
[2] J. Scheffran et al., Climate Change and Violent Conflict, 336 Science (2012).
[3] S. Hsiang et al., Quantifying the Influence of Climate on Human Conflict, 341 Science 12 (2013).
[4] 'Climate refugees'? Addressing the international legal gaps-Benjamin Glahn, International Bar Association.

At this, two questions arise:

Can climate change lead to conflicts, and

What role, if any, would IHL play in protecting civilians in climatechange-related conflicts?

Whereas the causes and reasons of any conflict are diverse and intricate, climate change may be a contributing factor to those conflicts in some situations. Not in vain is climate change now labeled as *'threat multiplier'*. It may play a causal role in conflict by placing a huge stress on the basic human needs of food, water and shelter which may be products of migration, rising sea levels, food insecurity and water scarcity. In fact, there have already been a number of precedents witnessing this phenomenon: climate change-related famine in China and Central Asia leading to conflict, escalation of local water conflicts in Tanzania and water scarcity in Yemen, along with many others.[5] Let alone the fact that climate change may further result in the melting of ice sheets in polar regions and in much greater proportions than we face at present, thereby giving way for new claims over territories and natural resources by States, and the possibility of resolving such claims by armed conflicts is by far not to be excluded.[6]

Views as to what regulations may have a play in these situations span the spectrum from environmental, refugee, asylum laws and IHRL to IHL. The latter may operate importantly in advancing protection of civilians in climate change-related conflicts involving state or government forces. In this relation three pillars are worth being pointed out by which IHL provides protection to victims in view of the consequences of climate change.

1. With respect to displaced persons, IHL entails a number of rights and obligations, including the obligation that *'in case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated*'.[7]

2. IHL requires facilitation of humanitarian relief for civilians in need. More specifically, Rule 55 of Customary IHL invokes, *'the parties to the conflict must allow and facilitate rapid and unimpeded relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.*[8]Here of great importance is the requirement of consent of the parties concerned to let the relief actions take place. It is to be noted that in the absence of such consent from the state party concerned, the organization would be barred from providing humanitarian relief. Nonetheless, it should equally be emphasized that such consent shall not be refused on arbitrary grounds. Furthermore, Rule 55 is closely interrelated with Rule 56 providing for the freedom of movement of humanitarian relief personnel which shall also be ensured.[9]

3. IHL prohibits the use of starvation of civilian population as a method of warfare along with the destruction of objects indispensable to their survival, such as irrigation infrastructure, foodstuffs, and agricultural areas.[10]

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[5]Climate Change, Conflict, and Human Rights: Nexus or Nonissue?" by Ben Small, Georgetown Journal of International Affairs, February 27, 2013.

[6] Climate Change Report, para. 76.

[7]"Climate Change and Human Security during Armed Conflict", Erik V. Koppe, Grotius Centre Working Paper 2014/030-IHL, pp. 3-5; Article 17 APII.

[8]*Ibid;* Article 70 AP I, Article 18 AP II.

[9]*Ibid.*

[10]Article 54 (2) AP I, Article 14 AP II.

The above-mentioned rules are applicable both to international and non-international armed conflicts.

Above all else, it is not to be forgotten that the operation of international humanitarian law in general and the aforementioned three pillars rest on a number of general but essential rules that are also of particular importance in relation to climate change-related conflicts. Those are the rules of distinction, proportionality, and precautions both in attacks and against the effects of attacks.

Thus, Article 48 of the Additional Protocol I states that 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'.[11] Further, Article 51 encapsulates the protection of the civilian population in the light of the proportionality in war, the prohibition of indiscriminate attacks, collateral damage to civilians in excess of military advantage, and the prohibition of attacks against the civilian population or civilians by way of reprisals.[12]And finally, Articles 57 and 58 provide for precautions in relation to military operations.

Conclusion

It is not to be denied that climate change is becoming an ever growing and expanding concern for the mankind. In the meantime, its impact is unique in its own way, since climate change is not restrained in relation to one or two regions, it covers the whole world, and exactly for that reason multinational cooperation calls for its need as never before. Different areas of international law may contribute to resolving various challenges posed by climate change-related infringements. As seen above, the law of armed conflict may provide certain protections against such infringements when the impacts of climate change-related infringements escalate to an armed conflict. However, it should equally be emphasized that when the matter comes to climate issues, the protection of the international humanitarian law itself becomes constrained by two major factors. First, since climate change is not a tool of war, international humanitarian law might be incapable of providing any defense for climate change-related conflicts, and second, in terms of climate change-related conflicts between non-state actors, civilians may suffer disproportionally, since the former are less likely to abide by IHL rules than states.[13]

[11]Article 48, Protocol Additional to the Geneva Conventions of 1949.
[12]*Ibid,* Article 51.
[13]*Supra*, note 5.

REPRESSION OF THE WAR CRIME OF ATTACKS AGAINST PEACEKEEPERS: WHO ARE PROTECTED?

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Abstract

The paper is focused on the major issue arising in the interpretation and litigation of the crime of attacks against persons and objects involved in peacekeeping missions. Particularly, it attempts to clarify who are those protected by Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome statute and Customary International Humanitarian Law (IHL) Rule 33 and what the limits of this protection are.

Attacks by and against peacekeepers, broadening of the tasks of peacekeeping operations, development of the concept of peace-enforcement and corresponding controversial legal framework peacekeepers operate in, brought two opposing sets of concerns that have been regularly raised by scholars and practitioners.

On the one hand, there is a concern for the safety and security of peacekeeping personnel operating in hostile environment and, on the other hand, there is a concern about uniform applicability of IHL to this kind of operations when they are involved in an ongoing armed conflict as combatants[1].

The paper attempts to illustrate that ICC Statute and customary IHL Rule 33 send us to the *jus ad bellum* sphere in order to check whether the character of the mission in question is compatible with the notion of "a peacekeeping mission in accordance with the Charter of the United Nations". To be recognized as such 3 elements must be determined: the mission has to be based on consent, it must be impartial and any use of offensive force must be prohibited. Once all three requirements are met one can judge whether the peacekeeping mission in question is still entitled to the special protection on a case-by-case basis. It implies a second layer of analysis that has to be compatible with general international humanitarian law rules and separated from *jus ad bellum* issues.

In conclusion, the paper argues that it is important to exclude from the protective regime any peace enforcing military operations and to protect the most vulnerable type of peacekeeping missions, those based on consensual, impartial, defensive operations. Those operations in no case should cross the threshold of direct participation in hostilities beyond limited allowance to personal defence and defence of vulnerable persons against imminent threat to their life and person, with due proportionality and necessity in the meaning of international human rights law. The notion of special protection of peacekeeping missions must therefore be interpreted in good faith in

[1]The term "combatant", unless explicitly mentioned, is used throughout the paper in relation to both IAC and NIAC situation, forthepurposesofconvenienceanddistinctionbetweengeneralcategoriesofciviliansnotparticipatingdirectlyinhostilitiesandfightingcombatants.

accordance with the ordinary meaning to be given to its constituent elements in their context and in light of the object and purpose of IHL[2].

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Blessed are the peacemakers, for they shall be called sons of God.
Matthew 5:9

Introduction

There are different definitions of peacekeeping, underlining different features of this complex and diverse phenomenon.[3]The term itself" is popularly used to designate a wide range of phenomena, often improperly referring to any international effort involving an operational component to promote the termination of armed conflict".[4]

However for the purposes of this introduction a peacekeeping operation will be preliminary defined as a military action[5] in the United Nations' system of collective security, which is

consent-based,

impartial,

aimed at preserving peace without or with only a very limited defensive use of force,

under either UN or regional organization's[6] control and command.

By definition peacekeeping missions are present in the highly difficult environments of a conflict situation. Attacks by and against peacekeepers, broadening of the tasks of the operations, development of peace-enforcement concept and corresponding controversial legal framework peacekeepers operate in, brought two opposing sets of concerns that have been regularly raised by scholars and practitioners.

On the one hand, there is a concern for the safety and security of peacekeeping personnel operating in a hostile environment and, on the other hand, there is a concern about uniform applicability of international humanitarian law (IHL) to this kind of operations when their personnel is involved in an ongoing armed conflict as combatants[7].

As a result we have two developments in international humanitarian law.

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[2]Such good faith interpretation would contribute to both, credibility of UN peacekeeping operations and to uniform and coherent application of IHL.

[3] United Nations, Department of Peacekeeping Operations, "*United Nations Peacekeeping Operations: Principles and Guidelines*", 2008 (hereinafter *Capstone Doctrine*), point 2.1., p. 18; B. Boutros-Ghali, *An agenda for Peace. Preventive Diplomacy, Peacemaking and Peacekeeping. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council 31 January 1992*; UN SCOR, 1992, UN Doc. A/47/277, S/24111, (1992), para 20: "Peacekeeping is the deployment of a United Nations presence in the field, hitherto consent of all the parties concerned, normally involving UN military and/or police personnel and frequently civilians as well."

[4] Diehl, P.F., Druckman, D., Wall, J., *International Peacekeeping and Conflict Resolution: A Taxonomic Analysis with Implications*, The Journal of Conflict Resolution, Vol. 42 (1998), p. 38

[5]It's true peacekeeping today normally includes significant civilian element in terms of personnel and tasks, however for the purposes of this research the most important thing is that diverse peacekeeping activity is formed around military core.

[6]Which is acting in accordance with the purposes, principles and limitations of the UN Charter.

[7] The term "combatant", unless explicitly mentioned, is used throughout the paper in relation to both IAC and NIAC situation, for the purposes of convenience and distinction between general categories of civilians not participating directly in hostilities and fighting combatants.

In some cases the military component of a peacekeeping/enforcement missions represents armed forces of a Party to the conflict in the meaning of international humanitarian law. That is to mean that they have right to participate in hostilities either in offence or defence and attacks against them are lawful acts of war.

In other cases peacekeepers are covered by protection afforded by international humanitarian law to civilians. They are allowed to use force in limited circumstances for defensive actions and attacks against them constitute war crimes.

The paper discusses the development of a relatively young customary IHL Rule 33, the one about special protected status of peacekeeping missions. I would also like to discuss the limits and content of the protective regime afforded by IHL to personnel of peacekeeping mission.

Practical importance of the research is seen in the light of the following facts:

On 12 October, 2015 the Prosecutor of the International Criminal Court requested authorization to initiate an investigation into the alleged war crimes in relation to the 2008 armed conflict in Georgia, including the crime of "intentionally directing attacks against Georgian peacekeepers by South Ossetian forces; and against Russian peacekeepers by Georgian forces". If confirmed, this would be the second pending ICC case on attacks against peacekeepers.

On 2July, 2015 the officials from the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) reported that five UN peacekeepers have been killed in an attack on their convoy in northern Mali and 45 peacekeepers have been killed in combat only in this mission since its inception in 2013.

On 28 March 2013, the UNSC extended the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and authorized the creation of the "Intervention Brigade". The Brigade is mandated to operate under the direct command of the MONUSCO force commander and has "responsibility of neutralizing armed groups" in the DRC. The Intervention Brigade's mandate was renewed on 28 March 2014, — "on an exceptional basis and without creating a precedent or any prejudice" — within the authorized troop ceiling of 19,815 military personnel. As reported, the robust military actions have been successful in changing the dynamic in eastern Congo by pushing back the rebels and providing a degree of stability to begin the reconstruction of functioning systems of government.

Those examples show that it is becoming increasingly important to draw the line between a lawful act of war and behavior which amounts to international crime.

The evolvement of the IHL rule on peacekeeper's protection. *Jus ad bellum vs. jus in bello*

After the end of the Cold War international community witnessed an unprecedented "peacekeeping boom"[8]. From 1988 to 1993 seventeen operations were launched by the Security Council[9]. Due to various reasons attacks against peacekeepers have also escalated in number and level of violence. The need for more robust protection[10] of the whole peacekeeping concept and

[8] See more in Malone, D.M., Wermester, K., *Boom and bust? The changing nature of UN peacekeeping*, International Peacekeeping, 7:4, 37-54, p. 38.

[9] By contrast no PKO was established in the period between 1978 and 1988.

[10] Hints of special status of UN personnel can already be found in the article 37 of the First Additional Protocol to the Geneva Conventions of 12 August 1949 (1977), which speaks about protected status of the signs, emblems or uniforms of the United Nations.

personnel in on-going operations led to the adoption of 1994 Convention on Safety of United Nations and Associated Personnel (Safety Convention). It criminalized attacks on UN personnel and even established a universal jurisdiction for this crime[11]. Later, the crime of directing attacks against peacekeepers was listed in Article 19 of the ILC Draft Code of Crimes against the Peace and Security of Mankind; the Statute of the International Criminal Court[12] put it in itslistof war crimes[13]. The fact that attacks on peacekeepers constitute a war crime was reasserted by ICRC and put under Rule Number 33[14] in the ICRC 2005 Customary International Humanitarian Law Study.

Despite the incorporation of the special protective regime in *jus in bello*one cannot ignore the fact that initially the protective status for peacekeepers has evolved in purely *jus ad bellum* sphere. Moreover, main legal tools that prescribe the behavior of peacekeeping forces and their status *vis-à-vis* parties to the dispute which they are helping to resolve do not belong to *jus in bello*. Those are mandates of the operations, UN conventions, UN SC resolutions, UN and regional organizations' self-binding instruments, regional arrangements.

At the same time it is a common truth that application of the international humanitarian law depends on the factual circumstances and behavior of the parties involved. It is undisputed that under *jus in bello* a combatant cannot be punished for attacking another combatant, in case he/she can be recognized as such. And this recognition does not depend on *jus ad bellum* peacekeeping mandates but only on facts on ground. The ICRC legal advisers continue to insist that mandates of the operations and legitimacy of a mission entrusted to international organizations are issues that "have no effect on the applicability of IHL to the peace operations"[15].

In my view the applicability of IHL is not disputed though; IHL *is* applicable, provided that there is a situation of armed conflict. The problem is *what rule* of IHL is applicable: the one on belligerent equality of two combatants attacking each other or the one on protection (Rule 33 CIHL).In 1995 Christopher Greenwood stated: "the laws of armed conflict make no special provision for U.N. forces." They do now. Depending on circumstances IHL sees a peacekeeper either as combatant or as a non-combatant, endowed with special civilian-like protection and this protection has to be established on the basis of *jus ad bellum* regulations. This is because if customary Rule 33 is accepted as it is, one should admit that the necessary conditions which trigger or deny its application lie outside IHL. Rule 33 includes major reference to the UN Charter, - the international constitution on the legality of the use of force, the essence of *jus ad bellum*, - which has to be respected for the peacekeepers not to lose their protection.

Thus, according to Rule 33 it is prohibited to direct "an attack against personnel […] involved in a peacekeeping mission *in accordance with the Charter of the United Nations*"[16]. As to

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[11] Convention on the Safety of United Nations and Associated Personnel, UN GA Res. 49/59, 9 December 1994, Articles 9-16 [Safety Convention].

[12]Statute of The Special Court For Sierra Leone, Article 4(b) "Other serious violations of international humanitarian law"

[13] Articles 8(2)(b)(iii), 8(2)(e)(iii) of the ICC Statute.

[14]Henckaerts, J.-M., Doswald-Beck, L., *Customary International Humanitarian Law*, Cambridge University Press (2005) Vol. 1, pp. 112-114.

[15] T. Ferraro, "*IHL Applicability to International Organizations Involved in Peace Operations*" in "International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility" 12th Bruges Colloquium, 20-21 October 2011, Collegium, College of Europe, No 42, Aututmn 2012, 15-22, p. 18

[16] J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press (2005) Vol. 1, p. 113.

the relevant scope of application the ICRC study comments: "this rule applies only to *peacekeeping forces* […] and, as a result, excludes forces engaged in *peace-enforcement operations* (emphasizes are added) who are considered as combatants bound to respect international humanitarian law[17]. **As it can be seen there are two major references to the jus ad bellum legal basis: a mission must be accordance with the UN Charter and it must be a peacekeeping mission not a peace-enforcement one.**

Much was written about the importance of *jus in bello/jus ad bellum* dichotomy and the need to keep these two concepts separate[18]; however, one should admit that IHL has gradually lost its independence and "it is hardly possible to fully expose the law relating to specific protection under IHL without taking into account many other areas of international law"[19]. This is even truer for peacekeeping operations and protection of their personnel.

The problem is how wide can the *jus in bello* door be opened for the extra-IHL developments without undermining IHL universal application, based on principles of belligerent equality and facts on ground.

Those references do not clarify much in terms of afforded protection though but rather send us to even more complex and controversial areas of the international peacekeeping regulations.

Definition of "A peacekeeping mission in accordance with the Charter of the United Nations"

Problems start with the fact that there is nothing about peacekeeping in the Charter of the United Nations. Peacekeeping concept as such is an invention of the United Nations: it is neither mentioned in the UN Charter, nor was envisaged at the time of adoption of the UN constitutive document. Rare peacekeeping mandate mentions any specific part or provision of the UN Charter except for Chapter VII, when such a reference is mandatory for respective binding measures to be adopted. Both international courts that had to deal with legal basis of peacekeeping operations had to agree that the UN Charter itself is of no help and then turned to international practice, UN regulations and scholar interpretations. To cut a long story short, today, following the International Court of Justice,we assume that peacekeeping is somewhere there between the lines of Chapter IV (GA's recommendations for peaceful adjustment[20]), Chapter VI (peaceful settlements of disputes), Chapter VII (action with respect to threats to the peace, breaches of the peace, and acts of aggression) and Chapter VIII (regional organizations' undertakings) of the UN Charter.

What are the elements of a genuine peacekeeping mission? Following the Special court for Sierra Leone[21], ICC[22], as well as relevant UN documents[23]and scholars, one recognizes today that

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[17]Ibid., p. 114.

[18] J.S. Pictet *Development and Principles of International Humanitarian Law* (Dordrecht/Geneva: Martinus Nijhoff and Henry Dunant Institute, 1985) 14-15; F. Bugnion, "Jus ad bellum, jus in bello *and non-international armed conflicts*" (2003) 4 Yearbook of the International Humanitarian Law, 172; T. Ferraro, "*IHL Applicability to International Organizations Involved in Peace Operations*" in "International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility" 12th Bruges Colloquium, 20-21 October 2011, Collegium, College of Europe, No 42, Aututmn 2012, 15-22, p. 18.

[19] R. Kolb, "*The main epochs of modern international humanitarian law since 1864 and their related dominant legal constructions*" in K.M. Larsen, C.G Cooper, G. Nystuen (Ed.), Searching for a principle of Humanity in international Humanitarian Law, Cambridge University Press, 2013 at p. 53.

[20] UN Charter, articles 10 and 14.

[21]*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (RUF case), SCSL Appeals Chamber, Judgment of 26 October 2009 (SCSL 04 15 A) [hereinafter RUF Appeal Judgment]), para. 225.

for a mission to be characterized as peacekeeping it must be supported by three major pillars, which were developed for the very first armed peacekeeping mission back in 1956[24]. Those pillars are: the consent of the parties to the conflict, impartiality and non-use of force except for self-defence. Commentators refer to those principles as the "holy trinity" of peacekeeping[25]. The three principles distinguish a peacekeeping mission from peace enforcement operation. Let us explain each principle and analyze them in terms of their compatibility with relevant IHL concepts.

3.1. Pillar I: Consent.

Consent has important implications for both *jus ad bellum* and *jus in bello*.

From *jus ad bellum* point of view consent of the host state guarantees respect for the UN Charter and the principles of sovereignty and non-intervention. When it comes to a non-state party of an internal conflict traditional public international law in general and the UN Charter in particular tend to ignore them as subjects[26]. Moreover, any external contacts with an armed group fighting its own government may raise issues of certain degree recognition of such authorities and accusations of illegal interference in the domestic affairs of the state[27]. However, there is an exception for peacekeeping activity and position of organized armed groups' parties to non-international armed conflicts is usually clarified in advance.

From IHL point of view consent can be factual evidence that the deployment of a peacekeeping mission itself is not hostile, and does not entail resort to military force or occupation. IHL, which treats non-state armed groups as subjects rather than mere objects of international law[28], is not that cautious about agreements with NSAG as *jus ad bellum*, it even encourages contacts with non-state actors[29].

3.2. Pillar II: The second prerequisite: Impartiality.

Initially impartiality was generally mentioned together with the principle of neutrality[30]. For a long time the terms were used interchangeably, by default, without any contradictory outcomes in practice[31]. The neutrality/impartiality tandem was challenged due to two main developments.

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[22]*Prosecutor v. Bahr Idriss Abu Garda*, ICC Pre-Trial Chamber I, Decision on the Confirmation of Charges –Public Redacted Version of 8 February 2010 (ICC-02/05-02/09-243-Red) [hereinafter Abu Garda Decision on the Confirmation of Charges], para. 71.

[23] E.g. United Nations, Department of Peacekeeping Operations, "*United Nations Peacekeeping Operations: Principles and Guidelines*" 2008 (hereinafter *Capstone Doctrine*), p. 31; "*Report of the Panel on United Nations Peace Operations*", UN Doc. A/55/305-S/2000/809, 21 August 2000 (hereinafter the *"Brahimi Report"*).

[24]*UNEF: Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, UN GAOR, Thirteenth Session, Annex 1, UN Doc. A/3943 (1958), 9.

[25] Bellamy, A.J. Williams, P., Griffin S. "Understanding Peacekeeping", Polly Press (2010), p. 173.

[26]Tsagourias, N. Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension. Journal of Conflict and Security Law, 11 (3) (2006), 465-482, 470.

[27]Tsagourias, N. Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension. Journal of Conflict and Security Law, 11 (3) (2006), 465-482, 476.

[28] A. Roberts, S. Sivakumaran, *Lawmaking By Nonstate Actors: Engaging Armed Groups In The Creation Of International Humanitarian Law*, 37 Yale J. Int'l L. 107-152 (2012), 108-110, 118-124.

[29] GC I-IV, common article 3.

[30] Principle of neutrality was used not in the traditional legal sense, but more in the "moral sence". On this difference see Vagts, D.F., *The Traditional Legal Concept of Neutrality in a Changing Environment*, American University International Law Review 14, no. 1(1998), 83-102.

[31] Levine, D.H., *Peacekeeper Impartiality: Standards, Processes, and Operation*, Journal of International Peacekeeping, Volume 15, Numbers 3-4, September 2011 , 422-450, 425. Donald, D. *'Neutral is Not Impartial: The Confusing Legacy of Traditional Peace Operations Thinking,'* Armed Forces and Society , vol. 23 (2003), pp. 421-430.

First, passive behavior of peacekeeping forces was considered unacceptable in situations when peacekeepers witnessed gross human rights law and humanitarian law violations[32]. Peacekeepers were even blamed for invoking concepts of impartiality and neutrality, especially in relation to the tragic examples of Srebrenica massacre and genocide in Rwanda, where peacekeepers retained a passive role and did not take any measures in order to resist international crimes.

Second, the increasing complexity of the tasks assigned for peacekeepers (for instance "defence of mandate", "defence of civilian population", "preventing the resumption of violence", "maintaining security", etc.) imply the need of action, sometimes one sided and coercive.

Therefore, at some point it has become evident that neutrality is either undesirable, because it is equated to being unprincipled and not consistent with the peacekeeping goal, or is simply unreachable due to developed and complex practice. The neutrality principle was abandoned. Impartiality on the other hand survived and was interpreted as impartial adherence to predetermined set of rules, i.e. principles of the UN Charter and "*objectives of a mandate* [emphasis added] that is rooted in those Charter principles"[33].

Therefore, peacekeeping mandates area very important tool which helps to assess the impartiality of a mission and impartial execution of mandate.

From IHL point of view impartiality is important in order to underline and maintain the necessary truth that peacekeepers are protected since they do not represent a Party to the conflict.

Related ICRC practice to the customary rule 33 mentions the following 1978 ICRC's statement:

> *"To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that: A United Nations Force engaged to separate opposing armed forces is not a Party to the conflict … Located between opposing armed forces and* not being a Party to the conflict, *the United Nations Force has no enemy. Its situation is analogous to that of the armed forces of a* neutral *State."*

However, except for this 1978 year statement and 1987[34] ICRC commentary to the article 37 AP I[35] the author could not find any recent evidence that ICRC, being the primary guardian of IHL,

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[32] Duke S., *The United Nations and intraState conflict* , International Peacekeeping , Vol. 1, No. 4 (1994), pp. 375-393, p. 389. Betts R. K., *The delusions of impartiality* , Foreign Affairs, November-December 1994, pp. 20-33, p. 20; Donini A., *Beyond neutrality: on the compatibility of military intervention and humanitarian assistance*, The Fletcher Forum of World Affairs , Vol. 19, No. 2, Summer/Fall 1995, pp. 31-45, p. 44.

[33] United Nations General Assembly - Security Council, "*Report of the Panel on United Nations Peace Operations*", UN Doc A/55/305-S/2000/809, (2000) (hereinafter the "Brahimi Report"), para. 50.

[34] *I.e.* time when peacekeeping generally existed in its traditional indeed quite neutral and passive form.

[35] Which states that it is only a perfidy to feign UN emblems or uniforms in cases where the personnel of the United Nations have the status of neutral or protected persons, which is not the case when "members of United Nations armed forces intervene in a conflict as combatants, even when this is for peacekeeping purposes."

recognizes peacekeeping operations to be impartial or neutral in the sense ICRC understands it[36]. The contrary presumption is a common reality though[37].

Notwithstanding the fact that it is understandable that peacekeeping impartiality is a different term of art than humanitarian actor impartiality, scholars still raise valid concerns about the inherent limitations for impartiality because of the initial political nature of the UN and any regional security organization and because of the fact that peace-keeping as such is a military undertaking mandated to perform military tasks, which would inevitably affect parties to the conflict. Moreover a frequent argument is made that "In the perception of people as a whole, it is practically impossible to separate military operations completely from activities in the name of humanitarian principles when both are carried out under the UN flag."[38]

To sum up, today we are speaking about a broad understanding of impartiality which is at the same time inherently limited for the UN/regional organizations' political undertakings. Impartiality is normally understood as adherence to some set of rules which guide peacekeepers' attitude to the actors on ground. Therefore, peacekeeping mandates are very important to assess impartial execution of mandate, impartial character of which is guaranteed by the principle of consent of the parties.

3.3 Pillar III: Non-use of force, except for self-defence

The concepts of consent and impartiality despite a number of problems related to their actual application in practice do not as such pose serious threat to the IHL domain. The heart of peacekeeping/IHL controversy lies in this third pillar, the principle of defensive use of force, permitted for peacekeepers.

Along with the principle of impartiality self-defence has also changed dramatically since the first deployment of armed United Nations peacekeepers in 1956. Initially limited to personal self-defence and defence of the positions held by UN soldiers the notion then has subsequently included defence of the duties peacekeepers are tasked to discharge under the mandate of the Security Council[39].

To outline the scholarly discussion on the problem, the common denominator would be that almost everybody agrees that mandates that authorize to use force to "protect civilians" or "prevent civil war" are aimed too far and "the argument of self-defence cannot be relied upon indefinitely in

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[36] It must be noted though that the Capstone Doctrine acknowledges that "humanitarian actors also use the terms impartiality and neutrality as two of the fundamental principles of humanitarian action, along with humanity and independence. However, their meanings are different. It is important to be aware of these differences, in order to avoid misunderstandings. For the International Red Cross and Red Crescent Movement, in particular, impartiality means being guided solely by needs, making no discrimination on the basis of nationality, race, gender, class, or religious/political beliefs; while neutrality means to take no sides in hostilities or engage, at any time, in controversies of a political, racial, religious or ideological nature". Capstone Doctrine, p. 43.

[37] E.g. Studer M., *The ICRC and civil-military relations in armed conflict*, International Review of the Red Cross, No. 842, available at: http://www.icrc.org/eng/resources/documents/misc/57jr5r.htm, last consulted 22 August 2013; Sommaruga C., *Humanitarian action and peace-keeping operations*, International Review of the Red Cross, No. 317, available at: *www.icrc.org/eng/resources/documents/misc/57jnj7.htm* last consulted 22 August 2013.

[38]Studer M., The ICRC and civil-military relations in armed conflict, International Review of the Red Cross, No. 842, available at: http://www.icrc.org/eng/resources/documents/misc/57jr5r.htm, last consulted 22 August 2013.

[39]Capstone Doctrine, p. 34; Report of the Secretary–General on the Implementation of Security Council Resolution 340 (1973), of 27 October 1973, (S/11052/Rev.1), para 5.

order to escape the application of international humanitarian law"[40]. The international rule of good faith observance of international obligations in accordance with their ordinary meaning and in light of their object and purpose would be contrary to that.

3.3.1. IHL and self-defence

Common Article 1 to Geneva Conventions requests that parties have to respect conventions "in all circumstances". Right to self-defence in case it passes IHL thresholds and overlaps with *de-facto* situation of armed conflict can be regarded as one of these circumstances, which do not alter fundamental principles and rules of international humanitarian law. In IHL, irrespective of any motive whatsoever, if a required amount of force is used between organized[41] armed forces of two opposing organized parties it is applicable and the main consequence of such applicability is that IHL of IAC recognizes members of armed forces of a Party to a conflict, except for medical personnel and chaplains to be combatants[42], enjoying combatant privilege[43] to participate in hostilities. In NIAC as well for the principle of distinction between combatants and civilians to work there are elaborated criteria who and when can be considered to be a combatant. 2009 ICRC's interpretative guidance on the notion of direct participating in hostilities tried to clarify what international humanitarian law says concerning civilians directly participating in hostilities[44].

IHL explicitly gives possibility to limited self-defense to personnel of a medical unit or an establishment, providing that they do not lose their protection in case they are armed and use the arms in their own defense or in that of the wounded and sick in their charge. [45] Interestingly, despite the fact that medical personnel and chaplains regime of protection is almost equal the same right to self-defense does not exist in Geneva Convention's black letter for chaplains attached to the armed forces[46].

This fact as well as the fact that there is nothing explicit in IHL about inherent right of civilians to personal self-defense against unlawful attacksshows how cautious IHL is in distancing itself from any subjective elements that can cause confusion between factual circumstances of use of force and their justification.

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[40] O. Engdahl, "Protection of Personnel in Peace Operations: The Role of the 'Safety convention against the General Background of International Law", MartinusNijhoff Publishers, 2007, p. 103.

[41] The criterion of organization is also indispensable also for the IAC threshold, since members or armed forces, militias, volunteer groups have to have responsible chain of command. GC III, Article 4; AP I, Article 43(1).

[42] Article 43 AP II, Article 4 GC III, Customary Rule 3.

[43] It is worthy to mention that combatants in IAC possess combatant privilege, namely the right to directly participate in hostilities with immunity from domestic prosecution for lawful acts of war. Given the fact that generally troop contributing state retains exclusive jurisdiction over its forces, peacekeepers, who claim civilian status do not lose much in terms of combatant privilege which they strictly speaking do not possess.

[44] Indeed, Guidance distinguish between civilians who "directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis" from "members of the organized fighting forces of a non-State party" who are assuming a continuous combat function since they are involved "in the preparation, execution, or command of acts or operations amounting to direct participation in hostilities". Moreover, an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function *even before he or she first carries out a hostile act* [emphasis added]**.** *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, International Committee of the Red Cross (2009), p. 34.

[45] See GC I, Art. 22, and GC II, Art. 35.

[46] Article 22 of the GC I and article 35 of the GC II concern exclusively medical units, establishments, and hospital ships, which do not mention chaplains.

The right of limited self-defense, however, is recognized to be applicable along with IHL as a general principle of law[47] and it is agreed among scholars that individual self-defense, which is in line with human rights law and international criminal rights law limitations of imminent threat, necessity and proportionality, is still applicable for civilians and does not amount to direct participation in hostilities[48].

"As long as they are entitled" – an additional layer to be proven

After the brief introduction to the three pillars of a peacekeeping mission in accordance with the UN Charter, let us turn to Rule 33 one more time.

It states that **personnel and objects 1) involved in a peacekeeping mission in accordance with the Charter of the United Nations must be immune from attacks 2) "as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law".**

In my view, the wording implies that two layers of circumstances have to be proven.

First, a rule sends us to the domain of extra IHL regulations to make a decision on the character of a particular mission. Under those regulations the UN documents, mandates, rules of engagement are of primary relevance. Here the throughout assessment of relevant categories of consent, impartiality and permissible limit of use is done. Moreover, at this stage the extensive discussion on the limits of self-defense is not relevant. Self-defence can be interpreted as broadly as it is being interpreted by UN and regional organizations, this is their domain and if under jus ad bellum it is generally acceptable, let it be so.

This reasoning is in line with Special Court for Sierra Leone decision in *Hassan Sesay case*:

> *"In determining whether the peacekeeping personnel or objects of a peacekeeping mission are entitled to civilian protection, the Chamber must consider the totality of the circumstances existing at the time of the alleged offence, including, inter alia, the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.[49]"*

Should everything be in accordance with trifold test, this would mean that peacekeepers are entitled to the protection given to civilians. Then the wording "as long as they protected" reminds us that protection given to civilians is not absolute either. This protection in its turn has two aspects.

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[47] Statute of the International Court of Justice, article 38(1)(c).

[48] Nasu, H., *International Law on Peacekeeping: A Study of Article 40 of the UN Charter*, Martinus Nijhoff, Leiden, 2009, p. 180; Rancioni, F.; Ronzitti, N., *War by Contract:Human Rights, Humanitarian Law, and Private Contractors*, Oxford, Oxford University Press, 2011, p. 181. Boddens Hosang, H.F.R., *Personal Self-Defense and its Relationship to Rules of Engagement* in Gill, T., Fleck., D., (Ed.) Handbook of the International Law of Military Operations, Oxford, Oxford University Press, 2011, p. 430. Engdahl for instance mentions article 2 of European Convention on Human Rights conditions: O. Engdahl "*Protection of Personnel in Peace Operations: The Role of the 'Safety convention against the General Background of International Law*", Martinus Nijhoff Publishers, 2007, p. 102.

[49] *Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Special Court for Sierra Leone, Trial Chamber I, Case No. SCSL-04-15-T, Judgement of 2 March 2009, para. 234.

First, civilians are immune from attacks as long as they do not participate directly in hostilities[50]. Secondly, they lose this protection only for the duration of their participation[51]. The right to be again protected before and after such participation is another aspect of general protective regime afforded to civilians in armed conflicts. Here the whole discussion about self-defence limits IHL poses for it takes place. At this stage a line between direct participation in hostilities and lawful self-defence should be made. And even here if threshold of violence is passed but defence against unlawful attack has not passed limits of proportionality, necessity and imminence of threat there is a certain room for self-defence actions, lacking belligerent nexus, to be accepted as falling short of triggering IHL.

Conclusion

In conclusion I would like to summarize the key messages of the paper.

First, the explored Customary Rule 33 is aimed at protecting peacekeeping operations based on consent, impartiality, and non-use of force.

Second, protective regime established by the Rule 33 sends us to the *jus ad bellum* sphere in order to check whether the character of the mission in question is compatible with the notion of "a peacekeeping mission in accordance with the Charter of the United Nations".

Third, after this determination is done and protective regime is established one can judge whether a particular behavior in question does not fall under the notion of "direct participation in hostilities" and thus does not diminish the protection. This implies a second layer that still has to be compatible with general international humanitarian law rules.

[50] Article 3 common to the four Geneva Conventions, 1949; Protocol I additional to the Geneva Conventions, 1977, Art. 51; Protocol II additional to the Geneva Conventions, 1977, Article 13.
[51] Ibid.

SETTING THE BOUNDARIES OF INDEPENDENCE AND NEUTRALITY: THE CASE OF THE UN HUMANITARIAN OPERATIONS IN SYRIA.

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Abstract

In August 2016, the Guardian revealed that the UN agencies operating in Syria have been paying substantial sums under the contracts negotiated with the Syrian government, as well as with individuals and businesses closely associated with it. The revelations resulted in protest by many local aid organisations which suspended their cooperation with the UN agencies, as well as in criticism expressed by other humanitarian actors. This paper aims to reflect on issues of the applicability of humanitarian principles to the UN agencies. It is argued that the principles applicable to the UN agencies need to be interpreted differently from those applicable to other humanitarian actors. The paper concludes with a brief analysis of the practices employed by the UN and proposes an answer on whether they are in conflict with the applicable principles.

Introduction

In late August 2016, the Guardian has reported on the information leaked by "a senior member of the humanitarian community", showing that a part of the UN humanitarian aid programme in Syria included contracts worth tens of millions of dollars awarded by various UN agencies to the Syrian government, individual businesses and NGO's closely associated with it[1].The deals included contracts concluded between the Food and Agriculture Organisation of the UN and the General Organisation for Seed Multiplication and General Organization of Fodder, both being run by the government. FAO has paid more than $13m for seeds that are a part of the humanitarian aid it delivers, as importing "the required quantities of seed or feed into Syria from elsewhere would not be feasible or cost-effective"[2]. Disclosed contracts relating to operational needs of the UN agencies included a $4m deal with the state-owned fuel company;rental of the Four Seasons Hotel in Damascus, in which the ministry of tourism owns a 35% stake, being the central base for the UN relief mission since 2013 - approximately $10m; contracts with telecommunications company providing the agencies with mobile communication, worth at least $700,000; local internet provider, warehousing businesses, etc. In total, the UN agencies have done business with at least 258 Syrian companies[3].Importantly, the UN has commented on all of these main deals, saying that they never had a choice in choosing their contractors, i.e. the fuel, telecommunications and internet companies are the sole providers of their respective goods or services in the country, and the chosen hotel is the

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[1]Nick Hopkins & Emma Beals, *UN pays tens of millions to Assad regime under Syria aid programme*, The Guardian, 29 August 2016, https://www.theguardian.com/world/2016/aug/29/un-pays-tens-of-millions-to-assad-regime-syria-aid-programme-contracts; Nick Hopkins & Emma Beals, *How Assad regime controls UN aid intended for Syria's children*, The Guardian, 29 August 2016, https://www.theguardian.com/world/2016/aug/29/how-assad-regime-controls-un-aid-intended-for-syrias-children.

[2]Nick Hopkins & Emma Beals, *How Assad regime controls UN aid intended for Syria's children*, The Guardian, 29 August 2016, https://www.theguardian.com/world/2016/aug/29/how-assad-regime-controls-un-aid-intended-for-syrias-children.

[3]*Ibid*

only safe location for them to operate[4]. Other deals included contracts with local partner NGOs and charities, Syria Trust for Development and the Al-Bustan Association, both being run by people close to the Syrian president, and having received approximately $8.7m[5]. Lastly, the World Health Organisation (WHO) has spent more than $5m on blood bags and kits to support of Syria's national blood bank that is being controlled and operated by Syrian Department of Defence, thus raising concerns about how the blood supplies are being distributed. Importantly, such concerns were first expressed by the WHO itself in 2013, when the body was drafting the memorandum of understanding with the Syrian government; it is reported that the legality of working with the ministry of defence rather than a health administration was questioned by some of senior WHO insiders, who had concrete concerns about the manner in which the blood supplies would be distributed[6].

The revelations have sparked some criticism of the practices used by the UN agencies. Among others, Kenneth Roth, executive director of HRW, said that "In the name of delivering aid to some needy people in opposition-held areas, the UN is subsidising the Syrian government's war-crimes strategy of targeting those same people".[7] Others have described it as an example of "pragmatism versus principles playing out in a conflict"[8].

In response to that, Stephen O'Brien, UN under-secretary-general for humanitarian affairs and emergency relief coordinator, wrote a letter explaining the UN's devotion to the principle of impartiality, while "provid[ing] life-saving and life-sustaining assistance to civilians based on their humanitarian needs without consideration of where they are, which side in the conflict they may sympathise with, their nationality, social status, gender, age, religious belief or any other consideration"[9]. It is indicative that the letter did not touch on other humanitarian principles, which are arguably more relevant to the case, i.e. independence and neutrality. Similar concerns are visible in the letter of 73 local aid groups that have suspended their cooperation with the UN in the framework of the Whole of Syria information-sharing mechanism, claiming that "the Syrian government [...] has a significant and substantial influence on the performance of UN agencies based in Damascus [...]", and thus having "little hope that the UN-coordinated humanitarian response might operate independently of the political priorities of the Syrian government". It was also noted that the OCHA's 2016 Humanitarian Response Plan is a "very clear example of [the political influence of the Syrian government]"[10]. The letter is not the first occasion of the UN being accused of acting in defiance of humanitarian principles. In June 2016, the advocacy group "The Syria Campaign" has issued a strongly worded report blaming the UN for cooperating with the

[4] *Ibid*
[5] *Ibid*
[6] *Ibid*
[7] Nick Hopkins & Emma Beals, *UN under pressure to set up inquiry into Syria aid programme*, The Guardian, 30 August 2016, https://www.theguardian.com/world/2016/aug/30/un-under-pressure-to-set-up-inquiry-into-syria-aid-programme.
[8] *Ibid*
[9] Stephen O'Brien, *The UN is impartial in Syria as it is elsewhere*, The Guardian, 1 September 2016, https://www.theguardian.com/world/2016/sep/01/the-un-is-impartial-in-syria-as-it-is-elsewhere.
[10] Joint Statement from 73 Syrian NGOs on Suspension of Coordination with UN Whole of Syria (WoS) Response Mechanism (2016), http://www.sams-usa.net/wp-content/uploads/2016/09/UN-Position-Paper-final-2.pdf; also see, e.g. Rick Gladstone, *73 Syrian Aid Groups Suspend Cooperation with U.N.*, The New York Times, 9 September 2016, http://www.nytimes.com/2016/09/09/world/middleeast/syria-aid-united-nations.html.

Syrian government and distributing aid only in state-controlled areas[11]. Another exampleis the letter signed by a number of prominent international lawyers urging the UN to undertake cross-border actions for aid delivery as the rules of IHL authorise it do so.[12]

Applicability of humanitarian principles to UN-led humanitarian missions

Principles of independence and neutrality, being the most relevant ones for the case at hand, were first formulated in their contemporary form at the 20th International Conference of the Red Cross in 1965 together with principles of humanity, voluntary service, unity, and universality of humanitarian assistance[13]. While principles themselves do not constitute a legal obligation that is binding on every humanitarian agent[14], many actors have voluntarily committed themselves to follow them: now it is not only National Red Cross and Red Crescent Societies, the ICRC and the IFRC, but also the European Union[15] and more than 600 humanitarian NGOs[16]. Although the declarations made by different actors sometimes vary in language[17], they all seem to understand the principles in the same way.

Applicability of principles of humanity, neutrality and impartiality to the humanitarian assistance provided by the UN was first confirmed by the UNGA resolution 46/182 on "Strengthening of the coordination of humanitarian emergency assistance of the United Nations" in 1991[18]. Resolution 58/114, adopted in 2003, while mentioning importance of the principle of independence only in its preamble[19], is understood to be a full-scale recognition of the principle's applicability to the humanitarian assistance provided by the UN[20]. In different forms, the principles

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[11]The Syria Campaign, *Taking Sides: The United Nations' Loss Of Impartiality, Independence And Neutrality In Syria*, 2016, http://takingsides.thesyriacampaign.org/wp-content/uploads/2016/06/taking-sides.pdf.

[12]The Guardian, *There is no legal barrier to UN cross-border operations in Syria*, 28 April 2014, https://www.theguardian.com/world/2014/apr/28/no-legal-barrier-un-cross-border-syria.

[13]The XX International Conference of The Red Cross, *Proclamation of the Fundamental Principles of the Red Cross*, International Review of the Red Cross, Vol. 5, №56, 1965, pp. 573-574

[14] see, e.g. Kubo Mačák, *Principles of neutrality and impartiality of humanitarian action in the aftermath of the 2011 Libyan conflict*, *in* Humanitarian Action: Global, Regional and Domestic Legal Responses (Andrej Zwitter et al., 2015), p. 447

[15] Treaty on the Functioning of the European Union, Article 214(2)

[16]International Federation of Red Cross and Red Crescent Societies, *The Code of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief*, http://www.ifrc.org/Global/Publications/disasters/code-of-conduct/code-english.pdf; also see the list of signatories to the Code, http://www.ifrc.org/Global/Publications/general/Code%20of%20Conduct%20UPDATED_August%202016.pdf; Médecins Sans Frontières, *MSF Charter and principles*, http://www.msf.org/en/msf-charter-and-principles.

[17]The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief does not explicitly use the terms "neutrality" and "impartiality", but the wording used implies these principles; see analysis and reasoning for that in Laura Hammond, *Neutrality and impartiality*, *in* The Routledge Companion to Humanitarian Action (Roger Mac Ginty& Jenny H Peterson, 2015), pp. 94-95

[18] United Nations General Assembly,*Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, A/RES/46/182, 19 December 1991.

[19] United Nations General Assembly,*Strengthening of the coordination of emergency humanitarian assistance of the United Nations*, A/RES/58/114, 5 February 2004.

[20] See, e.g. JérémieLabbé& Pascal Daudin, *Applying the humanitarian principles: Reflecting on the experience of the International Committee of the Red Cross*, International Review of the Red Cross, Vol. 97, № 897/898, 2015, p. 186; Ed Schenkenberg van Mierop, *Coming clean on neutrality and independence: The need to assess the application of humanitarian principles*, International Review of the Red Cross, Vol. 97, № 897/898, 2015, p. 297

were reaffirmed in the following years by both the UNGA and UNSC[21]. Importantly, the UN Office for the Coordination of Humanitarian Affairs (OCHA) refers to the principle of *operational* independence, while the definition of the term is not different from the one given by resolution 58/114[22]. Secondly, neither the definition of operational independence, nor the definitions of other three principles given by the OCHA have a substantial difference from those given to the principles at the 20th International Conference of the Red Cross[23].

Having found that different actors with different mandates commit themselves to follow the same principles in their humanitarian operations, it is natural to question whether the principles that were first meant to guide solely humanitarian actors can fit the operations led by organisations pursuing other aims[24]. As Hugo Slim puts it, the appeal to the principles by NGO's and the UN is a distorted echo of the principles of the Red Cross and Red Crescent Movement, which "sounds particularly incongruous when it issues from the mouths of stridently political NGOs or heavily armed UN soldiers"[25]. In other words, it is the broad mandate of the UN and its agencies that complicates the application of principles and, in a sense, creates an internal tension. Among other possible dimensions of that tension[26], one could hardly draw the line between purely political/military undertakings of the UN and its humanitarian missions: in the words of the former UN humanitarian coordinator for Libya, humanitarian team carries the same UN flag as the Security Council[27]. It is not, however, the authorisation of force by the UNSC that creates a challenge for any actor working under the UN flag. During the 2003 invasion in Iraq the UN faced a different problem: on the one hand, it has tried to portray itself as a neutral agent in the conflict, but on the other one, its activities there have never been neutral, and, perhaps, were never meant to be such[28].In May 2003, the UNSC has adopted Resolution 1483 that, among other things, requested the Secretary-General to appoint a Special Representative for Iraq, whose responsibilities would include coordination of humanitarian and reconstruction assistance by UN agencies and between United Nations agencies and non-governmental organizations; promotion of human rights and encouragement of international efforts to promote legal and judicial reform[29]. The initial report of the Secretary-General on the activities of the Special Representative went further, stating that the UN's activities in Iraq will focus on, *inter alia*, delivery of humanitarian assistance, assistance in the establishment of electoral processes, and assistance to the Iraqi interim administration to

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[21] See footnotes in Kubo Mačák, *A matter of principle(s):The legal effect of impartiality and neutrality on States as humanitarian actors*, International Review of the Red Cross, Vol. 97, № 897/898, 2015, pp.169, 177

[22]Office for the Coordination of Humanitarian Affairs, *OCHA on Message: Humanitarian Principles*, https://docs.unocha.org/sites/dms/Documents/OOM_HumPrinciple_English.pdf; also see E. Schenkenberg van Mierop, above note 20, pp. 308-309, 316-317

[23] *OCHA on Message: Humanitarian Principles*, above note 22; *Proclamation of the Fundamental Principles of the Red Cross*, above note 12, pp. 573-574

[24]See, e.g. Hugo Slim & Miriam Bradley, *Principled Humanitarian Action & Ethical Tensions in Multi-Mandate Organizations in Armed Conflict*, World Vision, 2013

[25] Hugo Slim, *Relief agencies and moral standing in war: Principles of humanity, neutrality, impartiality and solidarity*, Development in Practice, Vol. 7, Issue 4, 1997, p. 345

[26]H. Slim & M. Bradley, above note 24

[27]K. Mačák, above note 14, p. 470

[28]see e.g. Kenneth Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts*, Harvard Human Rights Journal, Vol. 17, 2004.

[29] United Nations Security Council, *Resolution 1483 (2003)*, S/RES/1483, 22 May 2003.

gradually rejoin the international community[30]. It is doubtful that the mandate of the Special Representative (and later the Assistance Mission[31]) that includes promotion of reforms and establishment of electoral process can be described as non-political. The comments made by senior UN officers after the bombing of its headquarters in Baghdad are especially indicative of the confusion that the UN had with its mandate: they have described the mission as neutral, impartial and apolitical, while at the same time interpreted the purpose of their presence as "to help the Iraqi people recover their independence and sovereignty" and "help them return to self-government"[32].

Another example is the 2011 intervention in Libya, when the UN was at the same time a body that authorised the use of force against government and a humanitarian actor. In addition to that, in April 2011, the Secretary-General appointed the Special Adviser to the Secretary-General on Post-Conflict Planning for Libya and several months later proposed the SC to establish the United Nations Support Mission in Libya[33]. The mission was established by SC resolution 2009 as having purely political mandate that initially included, for example, promotion of national reconciliation, and embankment on the constitution-making and electoral process[34].

A simple answer to resolving that tension is to separate the UN's humanitarian operations from any other undertakings and "turn on" the applicability of principles as long as it deals with purely humanitarian activities, e.g. aid distribution. Such argument, however, would not solve the problem of the perception, i.e. the way states, non-state actors or other humanitarian agents see the UN activities. In other words, it is first the perception of the actor that either helps it to be allowed to operate on the territories controlled by states or NSAs, or it is the perception that bars that actor from being allowed to operate[35]. And the UN has already faced situations when partner groups have decided to limit their activities with it: the UN Integrated Missions project that have caused many NGOs that have been working with the UN to deliberately distance themselves from the UN in order to ensure acceptance for their own actions, access, safety of staff, as well as their image of neutral, independent and impartial actors[36]. The change in policy has taken place in countries where the UN peacekeeping and political missions have been deployed in support of governments facing long-term armed opposition, such as Afghanistan, DRC and Somalia, where armed groups tend to

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[30]United Nations Security Council, *Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003)*, S/2003/715, 17 July 2003, para. 98

[31]*Ibid*, paras.100-104; United Nations Security Council, *Resolution 1500 (2003)*, S/RES/1500, 14 August 2003, para. 2

[32]***Felicity Barringer, AFTER THE WAR: UNITED NATIONS; Questions About Role of World Agencies in Hot Spots, The New York Times, 20 August 2003, http://www.nytimes.com/2003/08/20/world/after-the-war-united-nations-questions-about-role-of-world-agencies-in-hot-spots.html. Two month later, the ICRC Baghdad headquarters were attacked by suicide car bombers. Arguably, the attack on the ICRC is an a counter-evidence for those who believed that the UN was bombed because of being too close to the US Coalition Provisional Authority; however that may be, some believe that it was an incentive for the community to reconsider their close alliance with the UN, see. Adele Harmer & Joanna Macrae, Beyond the continuum. The changing role of aid policy in protracted crises, Humanitarian Policy Group, 2004, p.26***

[33] United Nations Security Council, *Letter dated 7 September 2011 from the Secretary-General to the President of the Security Council*, S/2011/542, 7 September 2011.

[34] United Nations Security Council, *Resolution 2009*, S/RES/2009, 16 September 2011, p. 12

[35]see, e.g. Norwegian Refugee Council, *A partnership at risk? The UN-NGO relationship in light of UN integration*, p. 6; Victoria Metcalfe, Alison Giffen, Samir Elhawary, UN Integration and Humanitarian Space. An Independent Study Commissioned by the UN Integration Steering Group, Humanitarian Policy Group, 2011, pp.32-34; Ingrid Macdonald & Angela Valenza, *Tools for the Job: Supporting Principled Humanitarian Action*, Norwegian Refugee Council, 2012, pp. 7-8; H. Slim & M. Bradley, above note 24, pp.6-7

[36]*A partnership at risk?*, above note 35, p. 6; V. Metcalfe, A. Giffen, S. Elhawary, above note 35, pp.3-6

consider the UN as a party to the conflict[37]. Another example is the ICRC's decision not to join the UN humanitarian coordination mechanism, despite its benefits, as they have not overweighed possible damage to its reputation and perception[38].

The problem of the principles' role in the UN activities is twofold: on declaratory level, the UN claims to follow the principles, while on practical one it is hardly possible. One possible solution is the reconciliation of principles with developmental/human rights/political agenda that UN sometimes pursues, rather than seeing the principles in a way that they are understood by Dunanist organisations, e.g. the ICRC and the MSF that have a narrower mandate and aims. It is not the aim of this paper to propose ways and means of such reconciliation; neither is it proposed to define the scope and content of the "new" principles. However, one possible way to interpret them is suggested below.

Analysis of the practices employed in Syrian humanitarian operation

Aside the claims that the UN is "subsidising the war crimes strategy", the question that remains is whether the principles allow the UN to finance state institutions, when such financing either takes the form of a direct aid (i.e. FAO and NGO deals), or indirect (i.e. the UN's operational expenses that went to companies controlled by the government), and when the state is a party to an armed conflict. The second question is whether principles allow the WHO to finance national blood bank that is controlled and operated by a military department of a state.

In respect of the first question it is submitted that the answer is to be found in the resolution 46/182 that first introduced the principles. Although the general rules of interpretation would not be applicable to the document *per se*, it is reasonable to read the principles of (operational) independence and neutrality in accordance with the context of the resolution. The resolution is clearly state-oriented and states that it is the affected state that has the "the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory", while "international cooperation to address emergency situations is [...] of great importance. [...] Intergovernmental and non-governmental organizations [...] should continue to make a significant contribution in supplementing national efforts"[39]. In other words, the framework for humanitarian assistance puts the responsibility of the concerned state (regardless of its compliance with applicable rules of international law) to provide such assistance first, while international support plays a supplementary role when the state is not able to provide the assistance[40]. Thus, it is argued that as long as one follows this framework, there is nothing that could stop the UN and its agencies from financing the state, either directly or not, and as long as such financing is given for humanitarian assistance or operational needs of the UN.

The same conclusion should not, however, apply to the second question, as the financing of the blood bank controlled by a military department is not simply a support for the government in crisis, but a support that has a high risk of being distributed not on the basis of medical needs (and regardless of the status of person receiving it), but given solely to the military. It is submitted that a

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[37]*A partnership at risk?*, above note 35, p. 6; V. Metcalfe, A. Giffen, S. Elhawary, above note 35, p. 4

[38]J. Labbé& P. Daudin, above note 20, pp. 200-201

[39]United Nations General Assembly,*Strengthening of the coordination of humanitarianemergency assistance of the United Nations*, A/RES/46/182, 19 December 1991, paras. 4-5

[40]Edward Tsui, *Analysis of Normative Developments in Humanitarian Resolutions since the Adoption of 46/182*, p. 13

different conclusion would simply defeat the purpose of the principle of neutrality, be it a principle applied by Dunanist groups or by the UN agencies that is (1) not to create military advantage[41] and (2) abstain from actions that further the interests of one party to the conflict or jeopardising those of the other[42]. Thus, as long as the WHO is not able to control the process of the blood distribution, such policy does not satisfy the minimum requirements of the principle of neutrality. The difference between handling money to state institutions, which as I argue is allowed for the UN by principles of independence and neutrality, and donating blood that is distributed by the military may seem to be insignificant: one can follow the point made by Kenneth Roth and conclude that any money given to a state will create a military advantage for it. The difference lies in the following: the UN agencies would never be able to sustain its presence and avoid any kind of financial contribution given to companies somehow affiliated with the state. Nor would it be able to efficiently provide assistance without operations that will rely on state institutions or affiliated groups. At the same time, having the military of that state responsible for blood distribution appears to be problematic as it stops being a help to the affected population, but rather puts the military into a more advantaged position.

In conclusion, it is worth noting that having a clear-cut position on the scope and content of principles guiding the UN in its humanitarian operations would be beneficial for it in several dimensions. First, it would help other actors working with the UN understand its position and thus foresee its policies. Second, at least on theoretical level, it would help the UN itself avoid controversial practices. As this short note has attempted to show, there is a need for reconciliation of the principles with the broad mandate of the UN and its agencies that should not be barred from having their own interpretation of principles that would correspond to their mandates and pursued aims. Lastly, it was shown that declaratory adherence to principles and their purely Dunanist interpretation is neither beneficial, nor practically possible for the UN.

[41] Jean Pictet, *Commentary on the Fundamental Principles of the Red Cross*, International Federation of Red Cross and Red Crescent Societies, 1979, p. 35

[42] Denise Plattner, *ICRC neutrality and neutrality in humanitarian assistance*, International Review of the Red Cross, Vol. 36, № 331, p. 165

CYBER WARFARE OPERATIONS: APPLICABILITY OF IHL, QUESTIONS & CHALLENGES

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Abstract

The paper will focus on cyber operations that are conducted in the course of cyber warfare. It will explore whether and under what conditions International Humanitarian Law may be applicable to such operations. Finally, it will identify and explore some significant questions and challenges arising from such application.

Introduction

Cyberspace is a rapidly and continuously developing domain. Over the years, it has enabled the carrying out of a variety of services such as communications, bank transactions and the gathering and exchange of information; these are but a few of the countless benefits enjoyed by its stakeholders which include *inter alia* States, multilateral and non-governmental organizations, businesses and other private companies, the military, and individuals.

At the same time, however, cyberspace is not at all an *ideal* domain. On the contrary, depending on its users and the irrespective purposes, and due to the grand evolution in both technology and computer training, it may also be a source of immeasurable threats. In fact, a wide range of harmful activities has been continuously taking place - among the most known types are cyber-attacks taking the forms of computer-related fraud, theft of copyright and intellectual property, distribution of child pornography, and business espionage. Famous examples would include the numerous attacks by the *Anonymous* hacktivists; the 2007 cyber-attack against Estonia; the scandals that erupted following the public release of *Wiki Leaks* and the *Panama Papers*; and more recently, the alleged interference of Russia in the 2016 USA elections and the subsequent diplomatic crisis between the two States.

Nevertheless, as already mentioned, this paper will focus solely on cyber warfare operations amounting to the level of an armed attack under article 51 of the UN Charter, conducted within the context of an armed conflict as the latter is described in IHL. This topic was selected because cyber-attacks of this type are increasing in frequency and intensity, while many discussions amongst experts, academics and other stakeholders have been continuously held on how to regulate them and to mitigate their disastrous effects.

The paper will begin by examining which legal principles could be applicable to these operations, leading to an analysis of whether IHL could indeed regulate them. Following that, it will detect and question some important challenges arising from such application.

I. Legal Framework

Before delving into the various issues concerning cyber warfare, the operations conducted within it and the laws that govern them, one should highlight that as a domain, cyberspace faces a very important challenge: there is actually *no* legal framework designed specifically for it as for example for the sea or outer-space. Consequently, due to the lack of a more specialized legal

framework, the regulation and subsequent examination of the legality of all cyber activities at an international level must be based upon the combined application of a variety of legal sources. More specifically:

A. Legal Sources

i. International or Regional Treaties and Conventions may be applicable as long as they regulate issues of relevance to cyber. So far, however, it seems that the 2001 Budapest Convention on Cybercrime[1] is the only binding document to have been entered into force worldwide on a cyber-related issue.

ii. General principles and customary rules of Public International Law as presented in article 38 of the Statute of the International Court of Justice (ICJ) may be also relied upon. Examples of such principles are *inter alia* the following:

1.*Bona fide*[2], a principle which requires all parties to any agreement to deal honestly and fairly with each other, to represent their motives and purposes truthfully and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them.

2. Due diligence[3], which is a "*standard of reasonable care against which fault can be assessed. It seeks to take account of the consequences of wrongful conduct and the extent to which such consequences could feasibly have been avoided by a State or an international organisation that either commissioned the relevant act or which omitted to prevent its occurrence*"[4]. Nonetheless, it should be noted that "*what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future*"[5].

3. *Sic uteretuoutalienum non laedas*, also known as the principle of good neighbourliness[6], according to which, a State has an obligation to not knowingly allow its territory to be used for acts contrary to the rights of other States, and its property may not be used in such a way that it would harm that of another or others[7].

iii. Specialized legal frameworks or as they are also referred to, "*leges speciales"*, could be applicable with regards to specific cyber activities, as according to the general principle *lex special isderogatlegigenerali*, whenever two or more norms deal with the same subject matter, priority should be given to the more specific one[8]. For example, the monitoring and disclosure of private

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[1] Convention on Cybercrime, Budapest, 23.XI.2001, ETS 185.

[2]*Nuclear Tests Case (N. Zealand v. France), ICJ Rep. 1974, para.49; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA), ICJ Rep. 1984, para. 87; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, para. 63; Aerial Incident of 10 August 1999 (Pakistan v. India), ICJ Rep. 2000, para. 53.*

[3]Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Rep. 2010, para. 38.

[4] ILA Study Group on Due Diligence in International Law, Second Report, July 2016.

[5] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001, A/5154.6/10, p.

[6] G. Lynham, The Sic UtereTuo Principle as Customary International Law: a case of wishful thinking?,1995 JCULR 2, pp. 172-189 at p. 173.

[7]Trail Smelter case (USA v. Canada), Reports of International Arbitral Awards 1938, p. 1965; Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), ICJ Rep. 1949, p. 22.

[8] UN, Report of the International Law Commission, UN Publications, 2006, p. 408.

data in the cyber domain, such as the social media or e-mail accounts, is *mutatis mutandis* regulated by International Human Rights Law and more specifically by article 17 of the International Covenant on Civil and Political Rights (ICCPR)protecting the right to privacy. Human Rights Law is once again the legal regime that forbids the exploitation of children through the distribution of pornography, by applying by analogy the Convention on the Rights of the Child.

iv. Soft law – documents that are non-binding but demonstrate the opinions of eminent scholars on specific matters of international law, and on occasion maybe even the *opinion juris* of States, may still provide the basis for examining the legality or not of a cyber-activity. A significant example of such non-binding documents which, nonetheless, are by far the most inclusive in this field and, therefore, the most relied upon, are the *Tallinn Manual on the International Law applicable to Cyber Warfare*[9]and the soon-to-be published *Tallinn 2.0 on the International Law applicable to Cyber Operations*[10]which focuses on cyber operations that do not rise to the level of an armed attack under article 51 of the UN Charter.

B. Application of IHL

As already stated, this paper concerns the cyber warfare operations that are conducted within the context of an armed conflict .As a result and given the previously mentioned lack of a concrete, specialized framework, the question that arises is whether IHL may be applicable to these operations as *lexspecialis.*

First of all, it is essential that the context of IHL is explained: IHL, or *jus in bello*[11], is a branch of Public International Law, the aim of which is to protect specific objects and people during an armed conflict[12], as well as to regulate and restrict[13] the means and methods of warfare employed by the Parties to it. These aforementioned protective measures, regulations and restrictions have been introduced and are governed by international customary rules[14], as well as the 1899 and 1907 Hague Conventions[15], the four 1949 Geneva Conventions[16] and their Additional Protocols adopted in 1977[17],and finally, the extensive jurisprudence provided by international courts and tribunals

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[9] M. N. Schmitt (editor), Tallinn Manual on the International Law applicable to Cyber Warfare, Cambridge University Press, 2013.

[10] M. N. Schmitt (editor), Tallinn 2.0 on the International Law applicable to Cyber Operations, Cambridge University Press, planned to be published in March 2017.

[11] F. Buignon,"Jus Ad Bellum, Jus In Bello and Non-International Armed Conflicts", Yearbook of International Humanitarian Law (International Committee of the Red Cross) VI (2003): 167-198.

[12]"ICRC - Jus in Bello and Jus ad Bellum." International Committee of the Red Cross,20 October 2010.

[13] For example: "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects" Geneva, October 10, 1980; "Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)" Geneva, October 10, 1980.

[14]J-M.Henckaerts, L. Doswald-Beck, Customary International Humanitarina Law, Volume I: Rules, Cambridge University Press, 2009.

[15]"Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land." The Hague, July 29, 1899; "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land." The Hague, October 18, 1907.

[16]"Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field." Geneva, August 12, 1949; "Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea." Geneva, August 12, 1949; "Convention (III) relative to the Treatment of Prisoners of War." Geneva, August 12, 1949; "Convention (IV) relative to the Protection of Civilian Persons in Time of War." Geneva, August 12, 1949.

[17]"Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)." June 8, 1977; "Protocol Additional to the Geneva Conventions of 12

such as the International Court for the Former Yugoslavia (ICTY), the International Court for Rwanda (ICTR) and the International Criminal Court (ICC).

What is crucial is that IHL is applicable when an armed conflict takes place. One of the most explicit and respected definitions of the term armed conflict is found in the *dictum* of *Tadić*, one of the most well-known cases presented before the ICTY. According to it, "*an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state*"[18]. As a result, it must be assumed that in order for a cyber-operation to fall within the scope of application of IHL, it should either be conducted during the process of a conventional armed conflict – i.e. boots on the ground – or actually *constitute* the armed conflict itself.

Furthermore, the *Tadić* definition brings forward the notions of "armed force" and "armed violence", but this raises further questions: how an operation conducted through cyber can be possibly viewed as "armed"; how any type of kinetic force can be exercised through cyber, which is intangible; and finally, how a cyber-operation could qualify as an actual attack.

All answers are found in the *Tallinn Manual on the International Law applicable to Cyber Warfare*, according to which, a cyber-operation is described as the "*employment of cyber capabilities with the primary purpose of achieving objectives in or by the use of cyberspace*". Such an operation "*constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force"*[19]. Finally, cyber-attacks are "*cyber operation*[s], *whether offensive or defensive, that* [are] *reasonably expected to cause injury or death to persons or damage or destruction to objects*", while "damage" is perceived not only as "physical damage" but also as "loss of functionality", which is of great importance for all cyber software and machinery connected to it.

At the same time, IHL states in article 49§1 of Additional Protocol I that "*attacks"* are defined as "*acts of violence against the adversary, whether in offence or in defense*". Furthermore, according to the ICRC's Commentary of the Protocol, "*attack*" means "*combat action*"[20]; while it has been pointed out that the Protocol's focus lies on attacks that may lead to violent and harmful consequences[21].

It is suggested that, since the relevant bodies of law do not seem to have a binding directive as to whether IHL could apply to cyber warfare operations, in order to determine whether the latter are understood to be cyber-attacks falling under the scope of IHL, it is necessary to address the

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August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)." June 8, 1977.

[18]ICTY, The Prosecutor v. Duško Tadić, IT-94-1-AR72, Judgment, 14 May 1997; ICTY, TheProsecutor v. Kunarać, Kovać and Voković, IT-96-23 and IT-96-23/1 (Appeals Chamber), 12 June 2002).

[19]*Use of force and the inherent right of States to self-defense are regulated in articles 2§4 and 51 of the UN Charter. The contexts of the use of force and of an armed attack have been debated enormously before the ICJ in the 1984 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) case; the 2003 Oil Platforms (Islamic Republic of Iran v. United States of America) case; and the 1996 Legality of the Threat or Use of Nuclear Weapons Advisory Opinion.*

[20] Y. Sandoz, C. Swinarski & B. Zimmermann (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, para. 1880.

[21] M. N. Schmitt, "Attack" as a Term of Art in International Law: The Cyber Operations Context in C. Czosseck, R. Ottis, K. Ziolkowski (Eds.), 2012 4th International Conference on Cyber Conflict, CCD-COE Publications, pp. 283-293 at p. 290.

question by referring to the Vienna Convention on the Law of Treaties (VCLT) and specifically article 31 which is of customary nature. Article 31 states that "*treaties should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

Consequently, bearing in mind that the object and purpose of the Geneva Conventions and their Additional Protocols had always been the protection of specific people and objects in the course of an armed conflict[22], one would see it as a paradox to interpret them as excluding *a priori* future technologies, such as cyberspace, UAVs, drones and robots. This is further reiterated through article 36 of Additional Protocol I, according to which a Member-State of the Geneva Conventions is "*under an obligation to determine whether the study, development, acquisition or adoption of anew weapon, means or method of warfare would, in some or all circumstances, be prohibited by the Protocol or by any other rule of international law applicable to the High Contracting Party*". After all, the significance of cyberspace in the military world has been evident since 2011 when it was recognized as the fifth operational military domain following land, water, air and outer-space by the USA[23] and later on by NATO[24], while currently the USA Congress is set to authorize the elevation of the US Cyber Command into a fully unified combatant command, no longer under the aegis of the US Strategic Command[25], and Germany plans to launch a Cyber and Information Space branch within its military in April 2017[26].

Overall, clearly the fundamental principle of IHL is that wars have limits and rules. These rules apply just as much to cyber, which is after all simply a means of warfare - just not the conventional type that the world has been used to so far. Consequently, it is argued that IHL is indeed applicable to those cyber warfare operations that amount to the level of armed attack under the UN Charter and are conducted during an armed conflict.

II. Questions and Challenges

The questions and challenges arising from the application of IHL to cyber warfare operations are closely linked. In general, however, all issues revolve around the fundamental principles of IHL: distinction, proportionality and precaution, as well as the principle of neutrality. Examples include: the classification of a conflict; the possibilities of detecting that the threshold of a conflict has been reached; the lawfulness of a target; and problems of attribution and accountability. More specifically:

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[22] *ICRC, The Geneva Conventions of 1949 and their Additional Protocols, 29/10/2010, found at https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm*

[23] D. ALEXANDER, PENTAGON TO TREAT CYBERSPACE AS "OPERATIONAL DOMAIN", 14 JULY 2011, HTTP://WWW.REUTERS.COM/ARTICLE/US-USA-DEFENSE-CYBERSECURITY-IDUSTRE76D5FA20110714.

[24] NATO RECOGNISES CYBERSPACE AS A 'DOMAIN OF OPERATIONS' AT WARSAW SUMMIT, HTTPS://CCDCOE.ORG/NATO-RECOGNISES-CYBERSPACE-DOMAIN-OPERATIONS-WARSAW-SUMMIT.HTML.

[25] M. POMERLEAU, CONGRESS SET TO ELEVATE CYBERCOM TO UNIFIED COMBATANT COMMAND, 1 DECEMBER 2016, HTTP://WWW.C4ISRNET.COM/ARTICLES/CONGRESS-AUTHORIZES-ELEVATING-CYBERCOM-TO-UNIFIED-COMBATANT-COMMAND.

[26] *L. Hoffmann, Germany Creates Cyber, IT Defense Branch, 27 April 2016, http://www.defensenews.com/story/defense/international/europe/2016/04/27/germany-cyber-it-armed-forces-military-branch/83590028/; N. Fiorenza, Germany outlines plan to create Bundeswehr cyber command, 28 April 2016, http://www.janes.com/article/59861/germany-outlines-plan-to-create-bundeswehr-cyber-command.*

1. Classification of conflicts: IHL basically dichotomizes conflicts in International (IAC)and Non-International or internal (NIAC). The former include as well situations of occupation, while the latter are distinguished from situations of violence that have not yet risen to the threshold of an actual conflict and, therefore, do not constitute subject of IHL[27]. Consequently, in order for a cyber-warfare operation to be covered by IHL, it must have risen to the level of an armed conflict, or at least form part of it.

IACs are defined in the 2nd article of all four Geneva Conventions as conflicts "*which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them"*. NIACs, on the other hand, are regulated in common article 3 of all four Geneva Conventions, simply as "*armed conflict*(s) *not of an international character occurring in the territory of one of the High Contracting Parties*". Furthermore, Additional Protocol II clarifies that all armed conflicts that are not covered by the previously mentioned article 1 of Additional Protocol I fall under this classification, adding that they must *"take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".* The continuous challenge here is that due to the anonymity that is possible in cyberspace and the capability of its users to cover up their activities, it is quite difficult to discover who launched an attack, or on whose behalf it was launched, therefore rendering rather problematic the classification of a conflict due to the inability to recognise the Parties to it.

2.International Intervention: throughout the years, it has been quite common that an alliance of States or an international/interregional organisation would intervene within a pre-existing conflict; examples would include NATO in Afghanistan and a USA-led coalition in Libya. According to the Appeals Chamber of the *Tadić* case, "*it is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending on the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State*[28]*"*.Therefore, the case of international intervention within a NIAC, which might be referred to as a *mixed conflict* as it does not fall clearly within the definition of any of the "basic" armed conflicts, might include several characteristics of both IACs and NIACs. More specifically, the hostilities may be carried out: between the forces of the territorial State and those of an intervening State; between intervening States taking action on both sides of the front line; between government forces of the host or of a third State and non-

[27] S. Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations", International Review of the Red Cross 91, no. 873 (March 2009): 69-94; RULAC. "Qualification of armed conflicts ." Geneva Academy of International Humanitarian Law and Human Rights, 2015; UNSW. "Types of armed conflict." University of New South Wales, 2015; International Committee of the Red Cross (ICRC). How is the Term "Armed Conflict" Defined in International Humanitarian Law? Opinion Paper, International Committee of the Red Cross (ICRC), March 2008; ICRC. "International humanitarian law and the challenges of contemporary armed conflicts: Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent." Geneva : International Review of the Red Cross, Volume 89, Issue 867, November 26–30, 2007.

[28]ICTY, Tadić, supra note 18.

governmental armed groups; or between armed groups solely[29]. In brief, the intervention of another State, a coalition of States, or an international/interregional organisation, may result in either the internationalization of a pre-existing NIAC, or the simultaneous existence of a NIAC and an IAC.

Consequently, in order to define whether the nature of a NIAC has been altered, following one of the criteria introduced in the judgment of the *Tadić* case, one must determine whether "*some of the participants in the internal armed conflict act on behalf of* [an]*other State*". Nonetheless, the *Tadić* case introduces a second possible criterion: the military intervention on behalf of a foreign State.

The judgment of the ICTY in the *Blaškić* case regarding the military intervention of Croatia in the Bosnia-Herzegovina NIAC confirmed that the presence of about 3,000 to 5,000 regular Croatian Army troops stationed outside the area of the hostilities was sufficient to internationalise the conflict. The reasoning was that "*the areas outside the* [conflict zone] *inevitably also had an impact on the conduct of the conflict in that zone. By engaging the* [Bosnia Herzegovina Army] *in fighting outside the* [conflict zone], *the Croatian Army weakened the ability of the* [Bosnia Herzegovina Army] *to fight the* [Croatian Defence Council] *in central Bosnia"*[30], practically suggesting that foreign military intervention that affects a pre-existing NIAC indirectly will eventually internationalize that conflict; a decision that was also reaffirmed in the *Kordić and Čerkez* case[31]. Furthermore, a according to the *Rajić* case *dictum*, "*an internal conflict could be rendered international if troops intervene 'significantly and continuously'"*[32].These two criteria are "*hardly a term of precision"*[33].As it concerns the last scenario, that of the situation remaining exactly as it originally was prior to the intervention, it has been suggested that *"an armed conflict*[should] *remain internal where a foreign state intervenes on behalf of a legitimate government to put down an insurgency, whereas foreign intervention on behalf of a rebel movement would 'internationalize' the armed conflict"*[34]. In these cases it is obvious that the military intervention on behalf of other States did indeed affect the classification of a pre-existing conflict. The problem here, however, lies in the fact that it is impossible at this early stage to examine and ascertain what the effect of a cyber-operation in support of a foreign government would be; whether that effect should be direct or indirect; and, finally, whether it could be deemed analogous to, say, that of the Croatian army in Bosnia, leading to the conclusion that even cyber operations can now affect the classification of a conflict.

3. Internal violence vs. conflict: unlike armed conflicts - whether internal or international - situations of internal disturbances and tensions, such as banditry, unorganized and short-lived insurrections, isolated terrorist activities, riots and other acts of similar nature are not subjects of IHL[35]. According to the *Tadić* and *Limaj* cases before the ICTY, in order for a NIACto exist, two criteria must be met: the armed confrontations must have reached a minimum level of intensity and

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[29] S. Vité,supra note 27..
[30]ICTY, The Prosecutor v. Blaskic, IT-95-14, 3 March 2000.
[31]ICTY, The Prosecutor v. Kordic & Cerkez, IT-95-14/2-T, 26 February2001.
[32]ICTY, TheProsecutor v. Rajic, Review of the Indictment Pursuant to Rule 61, IT-95-12-R61, 13 September1996.
[33] J.G. Stewart, "Towards a single definition of armed conflict in international humanitarian law:A critique of internationalized armed conflict", International Review of the Red Cross 85, no. 850 (2003): 313-350.
[34] J. Elsea,Treatment of 'Battlefield Detainees' in the War on Terrorism, Congressional Research Service, 2005; G. D. Solis,The Law of Armed Conflict: International Humanitarian Law in War, Cambridge University Press, 2010.
[35]Solis, supra note 34.

the armed groups involved must show a minimum degree of organization[36].Regarding intensity, in order for a situation to be more serious than internal violence, the ICTY has considered an extensive variety of factors, such as the seriousness of attacks and whether there has been an increase in armed clashes; the spread of clashes over territory and over a period of time; the number of persons displaced, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed[37]. Concerning organization, the ICTY has highlighted that an armed conflict can exist only between Parties that are sufficiently organized to confront each other through military means[38]. Consequently, *in contrario* to what is necessary for a NIAC to exist, the criteria of intensity of fighting and of the organization of the participating groups, must *not* be met in order for a situation of internal disturbances to be taking place. All the above render the discerning of whether specific cyber operations have reached the threshold of an internal armed conflict very challenging, unless of course the intensity of the attacks is so obvious and the outcome so harmful and destructive, that there is no doubt it has evolved from being mere disturbances.

4. Lawfulness of targets: due to the fact that there is a high level of interconnectivity and interdependence among civilian and military computer infrastructure, it is very challenging to ensure that the target is of a solely military character and that civilians will not be affected at all or at least at the minimum level possible. Using cyber to target such closely-linked infrastructure would greatly endanger the proper application of the principles of distinction and proportionality. Examples would include the launching of a cyber-attack against any kind of critical infrastructure such as a water treatment plant, possibly leading to the contamination of drinking water; the taking down of all computer systems of a State, affecting all activities within the State, even the operation of hospitals, transportation, and search and rescue helicopters due to the lack of radars.

5. Attribution and Responsibility: attribution and responsibility are among the most sacred and fundamental principles of law, both international and domestic. In international law, violations must be attributable to a State, which assumes responsibility according to the relevant international provisions[39]; otherwise, they may invoke the individual criminal responsibility of the perpetrator. As it concerns cyberspace, however, attribution at an international level is challenging, as any disclosure of information on the cyber activities of States is highly doubtful usually due to reasons of national security. Besides, the secrecy and anonymity that exist in the field render the identification of the perpetrator a very perplexing procedure. Attribution relating to cyber-warfare operations would question who is to be held responsible: whether it would be the attacking machine; the initiating machine; the person behind the keyboard launching the attack; or it would be the State within whose territory the territory was initiated or whose national the person was. What

[36]ICTY, Tadić, supra note 18, para. 561-568; ICTY, The Prosecutor v. Fatmir Limaj, Judgment, IT-03-66-T, 30 November 2005, para. 84.
[37]ICTY, Tadić, supra note 18; ICTY,Kunarać, Kovać and Voković, , supra note 18; ICTY, TheProsecutor v. Boškoski and Tarčulovski, IT-04-82-T, 10 June 2010; ICTY, Limaj, supra note 36; ICTY, Kordic & Cerkez, supra note 31; ICTY, TheProsecutor v. Milomir Stakić, IT-97-24-A, 22 March 2006; ICTY, TheProsecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj, IT-04-84bis-T, 29 November 2012; ICTY, The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo, IT-96-21-T, 16 November 16.
[38]ICTY, Haradinaj, Balaj, Brahimaj, supra note 37, para. 60.
[39]International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, A/56/10, 2001.

would happen, for example, should an attack be launched by an Italian national from within French territory, under orders of the Russian government? All these questions, apart from vast research and data analysis, would most likely require simultaneous application of the principles regarding attribution according to the regulations on State responsibility, as well as domestic legal provisions.

6. Neutrality: according to IHL, a State has the right to remain neutral during the course of an armed conflict. If, however, State A launches a cyber-attack against State C, it may have, for example, to use servers and routers that run through their common neighboring State B. As a result, such an action could possibly render State Ba Party to the conflict, based on the assumption that it has provided State A with support of its operations in an active way. Nonetheless, neutrality -especially when referring to cyber warfare -is rendered even more complicated when taking into consideration the judgment of the ICJ in the *Congo v. Uganda* case according to which, in order to trigger the international responsibility of a State and establish it as a Party to the conflict, it must have "*tolerated*" or "*acquiesced*" to such use of its territory on behalf of another Party[40]. Given, however, the numerous technicalities in cyberspace, as well as the uncertainty regarding the perpetrator's identity, it is very challenging to ensure that a State may remain neutral during a cyber-warfare operation.

7. Territoriality: the Geneva Conventions state that "*IHL applies*[in the case of international conflicts] *in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place"*[41]. Nonetheless, in recent years conflicts between the governmental authorities of a State and an armed group have been increasingly taking place in the territory of two or even more States, thus falling out of the territorial scope of a NIAC[42]. The reason for this is that by interpreting it grammatically, one may conclude that IHL does not cover extraterritoriality in NIACs, as its provisions cover the carrying out of hostilities within the territory of only *one* Party.

The ICTY has held that it would be sufficient to demonstrate that some of the operations in question were closely related to the hostilities occurring in other parts of the territories effectively controlled by the Parties to the conflict, in order to incorporate them within the on-going NIAC[43]; in other words, it would suffice to prove the existence of a *nexus* between an on-going NIAC and the operations taking place outside of the territory where the hostilities were originally conducted and would normally continue doing so, had the territorial aspect not been altered. Consequently, although a NIAC requires the existence of protracted armed violence, some scholars interpret the ICTY judgements as stating that it is not really necessary that the violence take place solely within the territorial boundaries it originally broke out in[44]. In the case of cyber, though, it is highly possible that operations may take place in numerous locations rendering the verification of a *nexus* very unlikely.

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[40]Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Rep. 2005, para. 301.
[41]ICTY, Tadić, supra note 18, para. 70.
[42] S. Vité, supra note 27.
[43]ICTY, Kunarać, Kovać and Voković, supra note 18, para. 57; ICTY, Stakić, supra note 37, para. 342.
[44] N.D. White, C. Henderson, Research Handbook on International Conflict and Security Law,Edward Elgar Publishing, 2013.

Conclusion:

The topic of cyber-warfare operations is one of debate, as despite the existence of principles of international law and other *legesspeciales* that could apply to them by analogy, none of these legal instruments was initially developed specifically for the regulation of such operations. It is indeed argued that IHL may be applicable, but under very specific circumstances and only after interpretation of the relevant Geneva Conventions and their Additional Protocols in accordance with the Vienna Convention on the Law of Treaties. Furthermore, the challenges arising from such an application are numerous and not easily resolved, mainly due to the secrecy and anonymity in cyberspace.

Although it is highly unlikely that States would accept to share their technology with other States, it would be useful to discuss issues of severe violations amongst, perhaps, various Ministries of Defense, in order to foster stronger collaborations and cooperation. Furthermore, States could undertake more activities and educational programs on best practices and prevention of violations under the auspices of interregional organizations and institutions, such as NATO's CCD-COE.

Last but not least, maybe it is high time to restart the discussions and consultations with help on behalf of the ICRC, on adopting a Geneva Convention of Cyber Warfare. A good start could be to assess the content of both *Tallinn Manuals* in order to decipher how practice may differ from theory, and use this information to transform the provisions within them into a legally binding instrument.

Unfortunately, as the Special Envoy of the UN High Commissioner for Refugees, Angelina Jolie mentioned when addressing the UN Security Council, it is true that "*the lack of political will stops the world from moving forward*". The Geneva Conventions were inspired after the deadly Battle of Solferino. With cyber being already such an advanced, potentially out of control, technology, regulations must be put in place in the very close future, before a new "Solferino" takes place. Technically, it may not differ whether an attack is launched through a conventional weapon or through cyber, but the effects may be more devastating. As a result, cyberspace and cyber warfare operations are in need of rules and restrictions for the benefit of all, before it is too late.

PROBLEMS OF QUALIFICATION ACTS COMMITTED DURING THE APRIL WAR IN NAGORNO-KARABAKH FROM THE PERSPECTIVE OF INTERNATIONAL HUMANITARIAN LAW

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Abstract

The events that happened from April 2nd to 5th, 2016 on the contact line of opposing forces of Nagorno-Karabakh and Azerbaijan will remain in the history as the four-day war. Events that happened in those days both in terms of the intensity of military operations and from the point of view of arm usage can be considered as a real war.

It is a fact that armed conflicts between Karabakh-Azerbaijani opposing forces were accompanied by massive human rights violations, and the importance of this paper lies in the fact that there is an objective need to investigate these violations from the point of view of legal norms.

Introduction

Nagorno-Karabakh, on September 2, 1991, declared its independence in full compliance with the fundamental norms and principles of international law. On December 10, 1991, a referendum was held in Nagorno-Karabakh with the overwhelming majority of the participants voting in favor of full independence from Azerbaijan.

The active warfare ended in May, 1994 by a Ceasefire Agreement. In the early morning hours of April 2, 2016 the Azerbaijani armed forces launched a thoroughly planned large-scale offensive along the entire line of contact between Nagorno-Karabakh Defend armies and Azerbaijani armed forces. The Azerbaijani surprising and unprovoked offensive was the largest and bloodiest breach of the cease-fire regime installed in 1994.

Definition of the Legal Character of the Karabakh-Azerbaijani Conflict

To determine which international legal norms have been violated by Azerbaijan, and how to qualify these acts in terms of international humanitarian law, we must, first of all, determine the legal character of the Karabakh-Azerbaijani conflict.

It is important to clearly define the type of armed conflict, as it gives an opportunity, depending on how the situations are legally defined, to identify the norms that apply specifically to this case. In fact, depending on how the situations are legally defined, the rules that apply vary from one case to another.

Noticeably, experts do not have a consensus on this issue. Some of them consider that we are dealing with a non-international armed conflict, and the other part reckons that we are dealing with an international armed conflict. In my opinion, the Karabakh-Azerbaijani conflict has an international character, with the following arguments.

According to the ICTY "… we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the

whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.".[1]

In the light of Common article 2 of the Geneva Conventions "… the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[2]".

In this case, the following question may be asked whether the conflict can be considered international if one of the parties to the conflict has not been recognized by the international community. We can note that despite this fact, Nagorno-Karabakh, however, under the Montevideo Convention on the Rights and Duties of States[3], as a person of international law possesses the following qualifications: it has:

a. a permanent population,
b. a defined territory,
c. government,
d. capacity to enter into relations with other states.

At the same time, we should note that the citizens of the Nagorno-Karabakh live in a geographical area where Nagorno-Karabakh has absolute jurisdiction. Moreover, Nagorno-Karabakh has all the characteristics of the state, the government, parliamentand judiciary. Legislative, executive and judicial authorities in Nagorno-Karabakh are formed through democratic processes.

Even if we look at this issue from the point of view of the Republic of Azerbaijan, it will not change its character. The Azerbaijani side has repeatedly stated that Armenian-controlled territories (occupy) the surrounding Nagorno-Karabakh. In this case they talk about occupation. According to the Article 42 of the 1907 Hague Regulations, "territory is considered occupied when it is actually placed under the authority of the hostile army"[4]. For occupation in the meaning of this provision to exist, two conditions must be fulfilled: (a) the occupier is able to exercise effective control over a territory that does not belong to it; (b) its intervention has not been approved by the legitimate sovereign.

Grave Violations of the International Humanitarian Law in April War

The events that took place from April 2nd to 5th, 2016 on the contact line of opposing forces of Nagorno-Karabakh and Azerbaijan can be considered in terms of those episodes:

1. torture and execution (violence to life),
2. mutilation of dead bodies.

1. Torture.

The prohibition of torture and violence to life are the most fundamental principles of international humanitarian law. According to the Convention against Torture and Other Cruel,

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[1] Prosecutor v. DuscoTadic, Decision of the Defence Motion on Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, § 70, at http://www.un.org/icty/tadic/appeal/decision-e/51002.htm.

[2] Geneva Conventions, https://ihl-databases.icrc.org/ihl/WebART/365-570005?OpenDocument.

[3] *Montevideo Convention on the Rights and Duties of States Montevideo Convention on the Rights and Duties of States, http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897.*

[4] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=01D426B0086089BEC12563CD00516887

Inhuman or Degrading Treatment or Punishment, "the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"[5].

According to article 12 of the First Geneva Convention,"Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances... Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments...".

According to article 32 of the Fourth Geneva Convention, "The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.".

According to the International Court of Justice "… the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens)"[6].

Azerbaijani military forces committed acts of brutality against the elderly and infirm people. The case is about the barbaric methods of murder used by the Azerbaijani forces in the Tallish village of the Martakert region, which was heavily attacked on April 2. One of the vivid examples is the killing of an elderly and the complete destruction of their house in Tallish. They were shot in their home and were tortured, with their ears cut off.

These acts show that the numerous provisions of international human rights law and international humanitarian law have been violated, in particular, article 16 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War; article 6 of the International Covenant on Civil and Political Rights; article 2^3 of the Convention for the Protection of Human Rights and Fundamental Freedoms; article 3 of the Universal Declaration of Human Rights; articles 10, 15 of the Convention on the Rights of Persons with Disabilities.

In this case, Rule 138 of the customary international humanitarian law has been violated. According to this rule, the elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection.[7]

Well-established customary law particularly prohibits attacking persons who are recognized as hors de combat. A person hors de combat, inter alia, is: (a) anyone who is in the power of an

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[5]CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, HTTP://WWW.OHCHR.ORG/EN/PROFESSIONALINTEREST/PAGES/CAT.ASPX

[6]Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, ICJ Reports 2012, §99.

[7]The recognition of the special respect and protection due to the disabled and infirm is contained in various provisions of the Third and Fourth Geneva Conventions relating to their evacuation and the treatment of persons deprived of their liberty. The Fourth Geneva Convention provides that the infirm "shall be the object of particular protection and respect".

adverse party; (b) anyone who is defenseless because of unconsciousness, shipwreck, wounds or sickness; provided he or she abstains from any hostile act and does not attempt to escape.

2. Mutilation of dead bodies.

Mutilation of dead bodies is prohibited under international humanitarian law. The customary nature of this rule, as well as its applicability on Azerbaijan clearly follows from a long list of arguments:

1) "It is forbidden to … mutilate the dead lying on the field of battle."[8]

2) Mutilation or other maltreatment of dead bodies during armed conflict is prohibited under the military manuals of more than twenty different countries.[9]

3) Mutilation of dead bodies during armed conflict is considered a criminal offence.

4) The prohibition of mutilating dead bodies in international armed conflicts is covered by the war crime of "committing outrages upon personal dignity" under the Statute of the International Criminal Court.[10]

5) In 1993 the Ministry of Internal Affairs of Azerbaijan ordered that troops "in zones of combat, during military operations … must not desecrate the remains of enemies".[11]

During the escalation of the armed conflict in the Nagorno-Karabakh Republic in April 2016, three soldiers of the Nagorno-Karabakh Defense Army were killed and beheaded.

On April 10, 2016, Azerbaijan returned the bodies of 18 soldiers of the Nagorno-Karabakh Defense Army. All of them, without exception, bore signs of torture and mutilation. The prohibition of mutilation or other maltreatment of dead bodies during armed conflicts constitutes an established norm of customary international law. It is stipulated in the Geneva Conventions of 12 August 1949, and relates to the Protection of Victims of International Armed Conflicts. Article 34(1) therefore stipulates in particular that "the remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities … shall be respected".

If we want to solve those episodes of April events it is necessary to refer to the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular, to the article 3. So, according to article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." According to the case of Akkum and others v. Turkey the European Court of Human Rights reiterates at the outset that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behavior.

In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question whether the purpose of the treatment was to humiliate or debase the victim is a further

[8] The Laws of War on Land, Article 19, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=C113B3873037E2ACC12563CD00515881.

[9] ICRC, Customary International Humanitarian Law, Vol. I: Rules, by Jean-Marie Henckaerts and Louise Doswald-Beck, 2009, p. 410.

[10] Elements of Crimes for the ICC, Definition of outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime (ICC Statute, Article 8(2)(b)(xxi) and (c)(ii)).

[11] Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, §5; cited from ICRC, Customary International Humanitarian Law, Vol. II: p. 2668.

factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a violation of Article 3.

According to the case of Akpinar and Altun v. Turkey, the present Chamber concurs with this approach, finding that the human quality is extinguished on death and, therefore, the prohibition on ill-treatment is no longer applicable to corpses.

The Court observes, in the present case, that the applicants were indeed presented with the mutilated bodies of Seyit Külekçi and Doğan Altun.

In the light of the aforementioned Akkumjudgment, the Court confirms that the applicants, who are the sister and the father of the deceased, can claim to be victims within the meaning of Article 34 of the Convention. Furthermore, the Court has no doubt that the suffering caused to them as a result of this mutilation amounted to degrading treatment contrary to Article 3 of the Convention.

It follows that there has been a violation of Article 3 of the Convention in respect of the applicants themselves.

In the light of the preparatory work on Article 3 (Council of Europe, DH (56) 5), it is to be noted that the purpose of this provision is to protect bodily integrity and human dignity. The Court has already held that the very essence of the Convention is respect for human dignity.

Qualification Acts Committed During the April War

After the disclosure of acts committed during the April war, a question arises about their qualifications. So, in April 2016, acts committed against civilians and the military may be regarded as grave breaches of the Geneva Law.

Grave breaches of the Geneva law are: willful killing, torture or inhuman treatment.

The elements of the crime of murder are in the death of the victim and the accused or persons under its recess deliberate action or inaction, which resulted in death. Moreover, the murder being labeled as a war crime, it is necessary for it to be held in the context of international armed conflict and for the perpetrator to realize the facts that confirm the existence of the action.

"Heavy suffering" cause covers both the physical and moral suffering.

"Deliberately inflicting severe suffering" means causing physical or mental pain or suffering or serious bodily injuries or damage to the health of one or more persons.

At the same time, any torture constitutes cruel and inhuman treatment.

Moreover, the acts are regarded as serious violations of the case when they are carried out on persons who are entitled to protection.

Furthermore, in early April the rules of the customary international humanitarian law were violated (in particular 11th, 87-91th, 135th, 137th). All of the described facts were war crimes according to the Rome Statute of the International Criminal Court ((8(2)(a)(i)), (8(2)(a)(ii)), (8(2)(a)(iii)), (8(2)(a)(iv)), (8(2)(b)(i)), (8(2)(b)(ii)), (8(2)(b)(iv)), (8(2)(b)(ix)), (8(2)(b)(x)), (8(2)(b)(xxi)).

Responsibility for the War Crimes Committed by the Azerbaijani Armed Forces

State Responsibility for grave breaches of 1949 Geneva Conventions is set forth in the respective Geneva Conventions[12]. Moreover, the general rule of State responsibility for violations of international humanitarian law is attributable to it, including violations committed by its armed forces is of customary nature. It is a well-established rule of customary international law, prescribed back in 1907 in Hague Convention (IV)[13] and repeated in Additional Protocol I to the Geneva Conventions[14]. There is also an excessive national practice of application of the aforementioned customary rule[15].

Aside from the State Responsibility, the aforementioned war crimes of torture, executions, and mutilation presume Individual Criminal Responsibility, as well. The 1949 Geneva Conventions require States to search for persons alleged to have committed, or ordered to have committed grave breaches, and to bring such persons before the court[16].

Under customary international humanitarian law, the individual criminal responsibility is addressed in much broader and stricter terms, including each State's obligation of investigation into the war crimes allegedly committed by its armed forces, and, if appropriate, prosecution of the suspects[17], as well as each State's entitlement of vesting with the universal jurisdiction in its national courts over the war crimes[18].

Customary international humanitarian law strictly stipulates the concept of Command Responsibility, meaning that commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders ("Command Responsibility for Orders to Commit War Crimes")[19], as well as (2) committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible ("Command Responsibility for Failure to Prevent, Repress or Report War Crimes")[20].

So, under the international humanitarian law, Azerbaijan bears State Responsibility for the war crimes of its armed forces, and has an obligation to investigate and properly prosecute the

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[12] "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches of these Conventions]" (First GC, Article 51; Third GC, Article 131; Fourth GC, Article 148).

[13] "A belligerent Party which violates the provisions of the [1907 Hague Regulations] shall . . . be responsible for all acts committed by persons forming part of its armed forces." (1907 Hague Convention (IV), Article 3).

[14] "A Party to the conflict which violates the provisions of the Conventions or of this Protocol . . . shall be responsible for all acts committed by persons forming part of its armed forces" (1977 Protocol Additional l to the Geneva Conventions of 1949, Article 91).

[15] ICRC, Customary International Humanitarian Law, Vol. II: Practice, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2005, pp. 3508-3514.

[16] First GC, Article 49; Third GC, Article 129; Fourth GC, Article 146.

[17] Customary IHL, compilation by ICRC, Rule 158. For extensive national practice (including Azerbaijan's), see: ICRC, Customary International Humanitarian Law, Vol. II, pp. 3948-3995.

[18] Customary IHL, compilation by ICRC, Rule 157.For extensive national practice see: ICRC, Customary International Humanitarian Law, Vol. II, pp. 3888-3931.

[19] Customary IHL, compilation by ICRC, Rule 152. For extensive national practice (including Azerbaijan's), see: ICRC, Customary International Humanitarian Law, Vol. II, pp. 3716-3726.

[20] Customary IHL, compilation by ICRC, Rule 153. For extensive national practice (including Azerbaijan's), see: ICRC, Customary International Humanitarian Law, Vol. II, pp. 3738-3764, 3791-3798.

perpetrators and others who bear responsibility. The perpetrators and their commanders are also individually responsible.

Conclusions

Irrespective of the term that will be used in the future in order to characterize the atrocious acts committed by the Azerbaijani side from 2-5 April 2016, it, anyway, willnot change the content of these acts.

During the 2016 April war, the Azerbaijani armed forces committed war crimes of torture, execution, and mutilation. Azerbaijani military forces committed acts of brutality against the elderly and infirm people. During the escalation of the armed conflict in the Nagorno-Karabakh Republic in April 2016, three soldiers of the Nagorno-Karabakh Defense Army were killed and beheaded. On April 10, 2016, Azerbaijan returned the bodies of 18 soldiers of the Nagorno-Karabakh Defense Army. All of them, without exception, bore signs of torture and mutilation.

Definitely, the acts committed by the Azerbaijani side should be condemned by the international community and international judicial authorities; otherwise, its behavior will contribute to the deepening of inhuman and criminal behavior, representing serious threat to the regular development of the civilized countries. I would like for the parties to conflict not to discard, but rather to follow the principle, according which, even wars have limits.

BETWEEN MILITARY STRATEGY AND THE LEGAL REGIME PROTECTING CIVILIANS IN WARTIME: THE CASE OF SIEGES, STARVATION AND HUMANITARIAN ACCESS

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Abstract

This paper argues that there is 'a growing strain, not harmony between [the] law and strategy in modern conflict'. I analyze the interaction between the norms that (i) permit employment of sieges as a method of warfare and the norms that (ii) prohibit usage of starvation as a method of warfare and prescribe the right to humanitarian assistance. As the war moves to cities, military decision makers are likely to use sieges since they can produce surrender or reduce resistance by the opposing belligerent, preserve resources or avoid military casualties on the attacking side usually associated with block-by-block urban assaults. On the other hand, as the civilian population is present in the vicinity of operations, it is more likely to be affected by the conduct of hostilities, which to some extent explains why 10 civilians die for each military casualty. This outcome only creates pressure for a more restrictive interpretation of the law, for the purpose of restoring the balance between military necessity and humanity. These tendencies only increase the conflict between the norms. Two alternative measures for the protection of the civilian population are thus available: evacuation and humanitarian relief. While in the case of evacuation military manuals tend to use an optional tone, in the case of humanitarian relief they stipulate an obligation, although some state practice deviates from this approach.

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In contemporary wars 'it may paradoxically be safer to be a combatant rather than a civilian'[1][2].The number of conflicts seems to be in decline, yet civilian casualties are constantly on the rise[3]. The International Committee of the Red Cross (hereinafter ICRC) estimates that in contemporary wars 'ten civilians die for every soldier or fighter killed in battle'[4]. Academic circles argue that one potential explanation for these somewhat contradictory outcomes is the change of the environment in which hostilities occur. Acknowledging that urban warfare is not a new phenomenon, one should still realize that there are drivers that seem to emphasisethe importance of

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[1]Andru E. Wall, 'Discussion: Reasonable Military Commanders and Reasonable Civilians', *Legal and Ethical Lessons of NATO's Kosovo Campaign* (US Naval War College 2002), p. 219.

[2]United Nations reports that 'the civilian percent of deaths was 58% for the 20th century, which was higher than previous centuries, and it was 74% for the 1980s, which was the second highest decade in the 20th century. For wars going on in 1990, the percentage of civilian deaths was 91%'. In Note by the Secretary-General, 'Promotion and Protection of the Rights of Children: Impact of armed conflict on children' (1996) UN Doc A/51/306, p. 9. Available from <http://www.unicef.org/graca/a51-306_en.pdf> accessed 27 April, 2017. For criticism on the data and the applied methodology of estimation, see Adam Roberts, 'Lives and Statistics: Are 90% Of War Victims Civilians?' (2010) 52 Survival, p. 115-136.

[3]In the International Institute for Strategic Studies, 'Armed Conflict Survey 2015' (2015). Available from <https://www.iiss.org/en/about%20us/press%20room/press%20releases/press%20releases/archive/2015-4fe9/may-6219/armed-conflict-survey-2015-press-statement-a0be>accessed 27 April, 2017.

[4] Stanley B. Greenberg and Robert O. Boorstin,'People On War' (2001) Public Perspective, p. 18. Available from <https://www.icrc.org/eng/assets/files/other/article-public-perspective-2001.pdf>accessed 27 April, 2017.

this factor: the population increases[5], by 2050, 2/3 of the world population is expected to live in urban centres[6]and asymmetrical warfare is significantly present[78]. It has been estimated that 'some 50 million people are affected by armed conflict in urban areas' many of whom have become internally displaced persons[9].

'Warfare, like everything else, [became] urbanized'[10].Urban warfare as a term describes the conduct of military operations in cities. While receiving unprecedented attention with the invasion of Iraq in 2003, the modern urban warfare in many instances resembles the urban warfare as practised through time. In a short retrospective, from middle 18th century to the early 20th century the decisive military battles were fought on the open fields of the countryside. The first years of the WWII were fought by 'sweeping gigantic battles of manoeuvre'[11]. Most inhabited areas that were affected by fighting were either evacuated or declared open cities[12]. Despite the willingness of commanders to avoid major urban areas, still as the war progressed the city, due to its military value, could not be bypassed or the presence of bypassed enemy located in the city could not be tolerated. So, the battles returned to densely inhabited cities, resulting in 'high military casualties, massive destruction and appalling [death] toll on the inhabitants'[13].

In this paper, I argue there is 'a growing strain, not harmony between [the] law and strategy in modern conflict'. According to Waxman, 'the historical development of cities, strategy and the law – form a triadic structure, each one influencing and influenced by the other two'[14]. This paper seeks to analyze the interaction between the norms that (i) permit employment of sieges as a method of warfare and the norms that (ii) prohibit usage of starvation as a method of warfare and prescribe the right to humanitarian assistance. As the war moves to cities, military decision makers are likely to use sieges since they can produce surrender or reduce resistance by the opposing belligerent, preserve resources or avoid military casualties on the attacking side usually associated with block-by-block urban assaults. On the other hand, as the civilian population is present in the vicinity of operations, it is more likely to be affected by the conduct of hostilities, which to some extent explains why 10 civilians die for each military casualty, in modern warfare. This outcome only creates pressure for a more restrictive interpretation of the law, for the purpose of restoring the

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[5]In Esteban Ortiz-Ospina and Max Roser, 'World Population Growth - Our World in Data' (*Ourworldindata.org*, 2016) <https://ourworldindata.org/world-population growth/>accessed 27 April, 2017.

[6] In 1950, 30% of the world population lived in cities, by 2014 the percentage rose to 54%, while by 2050 it is projected to reach 66%6. In United Nations, 'World Urbanization Prospects: The 2014 Revision' (2016) <https://esa.un.org/unpd/wup/Publications/Files/WUP2014-Highlights.pdf>accessed 27 April, 2017.

[7] Michael N. Schmitt, 'Asymmetrical Warfare and International Humanitarian Law'(2008) Air Force Law Review Volume 62.

[8] Other authors have suggested that factors such as the type of the regime, perceptions of the opposing adversary, military organisational culture, position in the war endeavour and purpose of the war influence civilian victimisation in war. In Alexander B. Downes, *Targeting Civilians in War* (Cornell University Press 2008).

[9]International Committee of the Red Cross, 'Armed Violence and the New Urban Agenda: The ICRC's Recommendations for Habitat III' (2016), p. 6
<http://reliefweb.int/sites/reliefweb.int/files/resources/icrc_policy_paper_for_habitat_iii.pdf> accessed 28 April 2017.

[10]Steve Graham,*Cities under Siege: The New Military Urbanism* (Verso 2010) p.16.

[11]Louis A DiMarco, *Concrete Hell: Urban Warfare from Stalingrad to Iraq* (Osprey 2012) p. 25.

[12]AlexandreVautravers, 'Military Operations in Urban Areas' (2010) 92 International Review of the Red Cross, p. 438.

[13]Ibid, p. 439.

[14] Matthew Waxman, 'Siegecraft and Surrender: The Law and Strategy of Cities as Targets' (1998) 353 Virginia Journal of International Law, p. 355.

balance between military necessity and humanity. These tendencies only increase the conflict between the norms.

The rationale behind sieges as a method of warfare

The complexities of urban operations are shaped by various factors: the battlefield is multidimensional, with both natural and man-made features; there is close proximity and high density of civilian population; the urban society is dynamic and ever-changing (it includes interaction and exchange of attitudes, actions, needs); urban centres have multiple centres of gravity; there is no single infrastructural system but rather a system of systems (communication and information, energy, economics and commerce, transportation and distribution and so on)[15]. Military manuals warn that conduct of hostilities in urban areas due to the 'intricate topography and high population density'[16]poses a variety of challenges for military decision makers, which simply cannot be encountered elsewhere.

The willingness to evade the urban block by block warfare, while still exercising control over cities suggests a sustained and perhaps increased role for sieges in future armed conflicts'[17].

Siege warfare can be defined as 'an operational strategy to facilitate capture of a fortified place such as a city, in such a way as to isolate it from relief in the form of supplies or additional defensive forces'[18]. In other words, sieges involve 'surrounding a garrison or a populated area with the goal of driving out the enemy forces by deteriorating their defences and cutting them off from reinforcements and vital supplies'[19]. Physical isolation also 'keeps the opposing belligerent from withdrawing or breaking out'[20]. From military strategic point of view, sieges are seen as a method to 'reduce enemy resistance or provoke surrender', 'to avoid the high attacking force casualty rates associated with urban warfare, to divert or preserve valuable forces for later operations or to avoid highly destructive block-by-block urban assaults'[21].All things considered, military doctrine perceives isolation 'often the most critical component of shaping operations'[22].

One of the dominant features of urban centres is the high density of civilian population. Conducting military operations in cities, although primarily for the purpose of isolating the opponents' military forces (usually to compel their surrender), inevitably affects the civilian population present in the vicinity of the theatre of operations. In fact 'experience indicates civilians are likely to experience the deprivations of isolation…. far sooner and to a greater extent than their military co-besieged'[23]. This conclusion should come as no surprise, given that sieges have historically been 'conducted through two methods: starvation or bombardment'[24].

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[15]*Urban Operations No.3-06* United States Department of the Army (2006) para. 2-7.
[16]Ibid,Chapter 2, Understanding the Urban Environment.
[17] Sean Watts, 'Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations' (2014) Research and Policy Paper, Counterterrorism and Humanitarian Engagement Project, p. 2.
[18] James Kraska, 'Siege', *Oxford Public International Law* (2009).
[19] Beth Van Schaack, 'Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime' <https://www.justsecurity.org/29157/siege-warfare-starvation-civilians-war-crime/> accessed 26 April 2017.
[20]*Urban Operations No. 3-06* (n15)para.6-12.
[21]Watts (n17) p.3.
[22]*Urban Operations No. 3-06* (n15)para.6-11.
[23]Watts (n17) p.4.
[24]Kraska (n18) p.2.

Past experiences show that 'the encirclement and protracted siege of cities [was needed] to starve [the cities] into submission'[25]. In the early modern examples of siege warfare, the civilian protection was dependent on the timing of surrender, 'the quicker a city's population or garrison capitulated to a besieging army, the greater immunity from pillage they received'[26]. Obviously, the responsibility for the outcome was on the defender, not the attacker. The consequence of shifting the responsibility lead to the understanding that 'harm befalling non-combatants as a result of a siege- starvation, bombardment, sack' is an 'incidental effect of warfare'[27]. Subjecting the population to starvation and attacks puts pressure on the besieged, defending force as responsible for providing protection to the population, thus increasing the chances of compelling surrender. So, the siege not only weakens the military capacities of the besieged force, but also tends to break the morale of the population that ultimately gives support for the war endeavour. However modern developments in law tend to redefine the relationship between the attacker, defender and the besieged population, as argued further on.

Legality of sieges

The use of siege as a method of warfare is not prohibited per se. However, the evolution of the law on war certainly affected the way a siege should be executed, if the besieging force is willing to act within the limits of the law.

The Lieber Code in Art. 18 prescribed that 'when a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender'[28]. This provision not only fails to sanction the employment of siege, but also legitimises preventing evacuation of the civilian population by the besieging force, as to ensure the effectiveness of the measure (if the population stays in the besieged city, the stocks will run out faster, pressuring the besieged belligerent to surrender). The customary nature of this norm was upheld by the Nuremberg tribunal, when assessing the criminal conduct of Wilhelm Von Leeb pertaining to the siege of Leningrad:

> 'A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavour by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back so as to

[25]Waxman (n14) p.359.
[26]Ibid, p.360.
[27]Ibid, p.363. Also, Vitoria, cited in Waxman, p.363:'It is occasionally lawful to kill the innocent not by mistake, but with full knowledge of what one is doing, if this is an accidental effect: for example, during the justified storming of a fortress or city, but where it is impossible to fire artillery and other projectiles or set fire to buildings without crushing or burning the innocent along with the combatants'.
[28]General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code). Washington, DC: Government Printing Office, 24 April 1863.

hasten the surrender. We might wish the law were otherwise but we must administer it as we find it. Consequently, we hold no criminality attached on this charge'[29].

While sieges remain permissible, however 'refus[ing] to allow civilians to leave a besieged locality and to use force to drive any who attempted to flee back to the besieged locality…would now be prohibited because [it] would not be consistent with the duty to take feasible precautions for the protection of civilians'[30]

Contemporary military manuals, explicitly allow siege warfare if targeting legitimate military objectives. UK's Joint Service Manual of The Law on Armed Conflict explains:

> 'Attacks can be costly in casualties and incidental loss or damage. A more effective method may be to encircle enemy forces, cutting them off from supplies and communications with the outside world and forcing their surrender. The same is true of besieging a town or stronghold. Siege is a legitimate method of warfare as long as it is directed against enemy armed forces'[31].

Other military manuals emphasize the permissibility of using starvation as an effect arising from sieges against enemy forces. US's Law on War Manual prescribes the following:

> 'It is lawful to besiege enemy forces, *i.e.*, to encircle them with a view towards inducing their surrender by cutting them off from reinforcements, supplies, and communications with the outside world. In particular, it is permissible to seek to starve enemy forces into submission'[32].

Neither ICTY's nor ICC's statute lists the use of a siege as a violation over which it exercises jurisdiction. In terms of court practise, ICTY in the case pertaining to the infamous siege of Sarajevo, found General Galicguiltyon the counts of violations of the laws or customs of war,for acts of violence for which the primary purpose is to spread terror among the civilian population and crimes against humanity including murder and other inhumane acts. Obviously Galic was not prosecuted for a crime of laying siege, but rather for the acts done during the siege, which have been prohibited by both conventional and customary law[33].

To sum up, sieges that target opposing military forces and legitimate military objectives are permissible under international law. It is also allowed under the laws of war to target military objectives, including using starvation and bombardment as a method. However, what lacks clarity is the legality of the side effects affecting the besieged population, when pursing legitimate military targets.

Given the consequences of conducting a blockade resembling those of laying a siege, a useful starting point in deconstructing this legal riddle is a reflection on the commentary on the San Remo Manual on International Law Applicable to Armed Conflicts at Sea. An intense argument occurred in the negotiation process whether a prohibition on starvation of the civilian population renders a naval blockade unlawful. The majority seemed to agree 'that the blockade, in order to be of itself illegal, must have the sole purpose of starving the population or have a disproportionate

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[29]*The High Command Case*(Opinion and Judgment of Military Tribunal XI) Trials of War Criminals before the Nuremberg Military Tribunals Vol.11 (28 June 1947) p.563, para.6.
[30]*Law of War Manual*, United States Department of Defence (2015) p. 290,para. 5.19.4.1.
[31]*The Joint Service Manual of the Law of Armed Conflict*, The Joint Doctrine and Concepts Centre, Ministry of Defence, United Kingdom (2004) p. 87, para. 5.34.1.
[32]*Law of War Manual*(n30)p.288, para. 5.19.1.
[33]*Prosecutor v Galic*(Summary of Judgment) IT-98-29-T (5.12.2003).

effect'[34]. A blockade that 'has starvation [of the population] as one of its effects, effectively triggers [other] obligations'[35], but is not of itself illegal.

Some military manuals, in regulating siege warfare, follow this line of logic. Australia's Commander Guide prescribes that:

> 'Military operations involving collateral deprivation are not unlawful as long as the object is not to starve the civilian population'[36].

In a similar fashion, New Zealand's Military Manual notes that siege is not prohibited 'even if it causes some collateral deprivation to the civilian population, so long as starvation is not the specific purpose'[37].

Israel's Manual on the Laws of War declares that:

> 'Siege as a method of warfare vis-a-vis a military objective is an absolutely legal method even if it involves the starvation of the besieged or preventing the transfer of medications in order to achieve surrender'[38].

Military manuals explicitly authorize the use of sieges as a method of warfare. Not only is it permissible to attack military objectives, but collateral damage to the civilian population would still not by definition qualify the siege as illegal. However, in such cases the besieging force has other seta of responsibilities primarily assuring respect for the principle of proportionality and distinction, precautions in attack, provision of humanitarian relief, evacuation. I want to look further into the interaction between sieges and the responsibilities of the attacking force.

Limitations on siege warfare: The principles of military necessity and distinction and the rules guiding their application

Unfortunately, for a long time in history 'war was not only waged against States and their armies, but also against their people 'which usually resulted in depriving civilians of basic rights by their conquerors[39].

Jean Jacque Rousseau in the 19th century developed the idea of a sovereign war which implied that 'war does not constitute a confrontation between peoples, but between States and their rulers'[40].The Lieber Code recognized the principle of distinction between 'the private individual belonging to a hostile country and the hostile country itself, with its men in arms'[41] asking 'unarmed citizen to be spared in person, property, and honour as much as the exigencies of war will admit'[42]. The St. Petersburg Declaration of 1868explicitly stated that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the

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[34]Louise Doswald-Beck, 'Methods and Means of Warfare at Sea', *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1st edn, Cambridge University Press 1995) p.102, para.102.4.
[35]Ibid.
[36]Jean-Marie Henckaerts, Louise Doswald-Beck and CarolinAlvermann, *Customary International Humanitarian Law Volume II: Practice* (Cambridge University Press 2005) p. 1150, para.199.
[37]*Customary International Humanitarian Law Volume II: Practice* (n36) p.1140, para.138.
[38]Ibid.
[39]Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (MartinusNijhoff 1987) p. 585, para.1822.
[40] Michael Bothe, 'Targeting' in Andru E Wall, *Legal and Ethical Lessons of NATO's Kosovo Campaign* (Naval War College 2002) p.173.
[41]Art.22, Lieber Code (n28).
[42]Ibid.

enemy'[43]. The Hague Regulations of 1907 'were negotiated with military necessity in mind'[44], so although there is a lack of direct reference to the principle, still some of its provisions require such distinction to be made[45].

The Additional Protocol I of 1977 finally provided detailed and legally binding definition of a military objective. Some have condemned the definition due to 'its restrictive nature, which purports radically to limit the category of legitimate objectives of military operations'[46]. However, Article 52 (2) was adopted by 79 votes in favour, none against and 7 abstentions. No reservations have been made. Numerous military manuals contain this definition of military objectives, including states that at the time or presently are not a party to the API[47].

The principle of distinction is recognised as a basic rule in Article 48 of API, adopted by consensus[48] asking Parties to make distinction at all times, directing their operations only towards military objectives.

Both the principles of military necessity and distinction have been operationalised in Articles 50 through 57 of API, defining the regime of civilian protection in much more detail[49].Targeting the civilian population as such is prohibited[50] meaning 'the population must never be used as a target or as a tactical objective'[51]. This prohibition also includes acts or threats of violence whose primary purpose is to spread terror among the civilian population[52]. Indiscriminate attacks including attacks that are not directed at a specific military objective[53], attacks which employ means or methods that cannot be directed at a specific military objective[54] or whose effects cannot be limited[55] are also forbidden. Indiscriminate attacks also subjected to a prohibition are area attacks that treat as a military objective clearly separated and distinct military objectives[56] and attacks that are expected to cause damage excessive to the military advantage obtained[57]. Article 51, as one of the most important articles in Additional Protocol I, 'explicitly confirms the customary

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[43]*Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles* (adopted 11.12.1868) <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> accessed 27 April 2017.

[44]Waldemar A. Solf, 'Protection of Civilians against the Effects of Hostilities under Customary Law and Under Protocol I' (1986) 1 American University International Law Review, p.122.

[45] For example, Art. 23(g) forbids 'to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war' in *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (adopted 18 October 1907).

[46]Parkscited in Stefan Oeter, 'Methods and Means of Combat', in Dieter Fleck, Handbook of humanitarian Law in Armed Conflicts (1st edn, 1995) p. 156.

[47]'Customary IHL Practice Relating To Rule 8. Definition of Military Objectives' (*ICRC*, 2016) <https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule8_SectionA>accessed 27 April 2017.

[48]Commentary (n39) p. 599, para. 1871.

[49] Art.48, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS (Protocol I) <https://www.icrc.org/ihl/INTRO/470> accessed 26 April 2017.

[50]Art.51(2)API (n49).

[51]Commentary (n39) p.618, para.1938.

[52]Art.51(2)API (n49).

[53]Art.51(4)(a)API (n49).

[54]Art. 51(4)(b)API (n49).

[55]Art. 51(4)(c)API (n49).

[56]Art.51(5)(a)API (n49).

[57]Art. 51(5)(b)API (n49).

rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against dangers arising from hostilities'[58].

In the context of siege warfare, it would be impermissible to conduct siege over an urban area that contains no military objectives. In case of absence of a clear military objective, one cannot invoke the 'morale of the civilian population' as a legitimate military objective to justify an attack[59]. The acts of shelling and sniping with the primary purpose of spreading terror as was the case during the siege of Sarajevo[60]; treating entire cities as a single military objective as done in the strategic bombing campaigns or 'air sieges'[61] in WWII; or using barrel bombing as suggested in the besieged Daraya[62], are all acts of violence targeting the civilian population. All of these acts which are done during siege operations constitute explicit violation of the principles of military necessity and distinction, and therefore the laws of war, but the siege itself remains lawful.

However, 'the most substantial addition to restrains on siege operation is Art.54'[63] that prescribes 'starvation of civilians as a method of warfare is prohibited'.

Limitations on siege warfare: Prohibition on starvation of the civilian population and the right to humanitarian access

Article 54 is what has been described as 'a significant progress of the law'[64], since it 'establishes a significant new principle of international law'[65]. Aside from the prohibition on starvation, the article outlaws attack, destruction, removal or rendering useless 'objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works', regardless of the motive, as long as the specific purpose is to deny their sustenance value to the civilian population or to the adverse Party'. Paragraph 3 defines when the prohibition would not apply. It would be lawful to attack objects used 'as sustenance solely for the members of its armed forces and objects that are in direct support of military action' but not those that 'may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement'.

Some have argued that this article effectively prohibits destruction of sustenance items, even if that would bring military advantage to the attacking side:

> 'Although paragraph 3 states unambiguously that a belligerent may derogate from the rule if the items are used *solely* by the adverse Party, the paragraph 2 wording ostensibly removes the option of destroying sustenance items used by both civilians and military personnel. Accordingly, the article advances humanitarianism by disallowing indiscriminate starvation

[58] Commentary (n39)p. 615, para. 1923.
[59]Charles A. Allen, 'Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law' (1989) 19 Georgia Journal of International and Comparative Law, p.20.
[60]*Prosecutor v. Galic* (n33), *Prosecutor v. Milošević* (Summary of Judgment) IT-98-29/1 (12.12.2007).
[61]Col. Dale O. Smith, 'Forgotten- The Atom Bomb'(1949) Flying Magazine, p. 22.
[62]Amnesty International, 'Syria: Terrifying Eyewitness Video of Life under Siege and Barrel Bombs Must Spur Humanitarian Lifeline' (2016) <https://www.amnesty.org/en/press-releases/2016/04/syria-terrifying-eyewitness-video-of-life-under-siege-and-barrel-bombs/>accessed 27April 2017.
[63]Watts (n17) p.10.
[64]Commentary (n39) p.653, para. 2091.
[65]Guy B. Roberts, 'The New Rules for Waging War: The Case against Ratification of Additional Protocol I' (1985) 26 Virginia Journal of International Law, p.45.

measures under some notion of' military necessity in scenarios where both military forces and civilians might consequently suffer. By way of recent example, the Beirut sieges aimed at starving Palestinian forces-which also severely harmed civilians in besieged refugee camps-would appear to be violations of this rule'[66].

In a similar fashion others have suggested that 'the tactical imperative of physical isolation is practically impossible to be implemented lawfully under Art.54'[67], which 'effectively prohibits the use of siege warfare and naval blockades' since commanders cannot cut off supplies inside besieged areas.

However, the Commentary of API recognizes that 'the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians. Unfortunately it is a well-known fact that all too often civilians, and above all children, suffer most as a result.'[68]In such cases, the Commentary refers to Art. 70 which requires for a relief action to be undertaken. If the relief action seems to be insufficient, 'the principle of the prohibition of starvation should henceforth dictate the evacuation of such persons'[69].

This interpretation acknowledges that one may use starvation as a method of warfare if it targets a legitimate military objective, which by definition excludes targeting the civilian population as such. In those cases, the protection of the civilian population should be secured through two means: evacuation or humanitarian relief. However, the application of those provisions is even more contested.

Evacuation is regulated in Article 17 of the IV Geneva Convention, which appears to be quite limited in scope. The obligation to the Parties is merely to 'endeavour to conclude local agreements for the removal from besieged or encircled areas' of certain vulnerable groups[70].Article 49 of IV Geneva Convention gives an opportunity for the occupying Power to 'undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand', but it does not set up an obligation to do so. It may be argued that the prohibition on starvation in Article 54, dictates that when starvation is likely to occur as a result of siege operation, evacuation of the entire civilian population is required if one wants to act within the limits of the law (Article 54 of API unlike Article 17 GC IV does not provide special protection for particular groups). However military manuals use the formulations as given in Articles 17 and 4;, they do not state a clear responsibility but merely an option to arrange for an evacuation[71].

For example, the UK's Joint Service Manual of The Law on Armed Conflict in case of failure to reach an agreement does not preclude the besieging force from continuing with the siege operations:

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[66]Allen (n59) p.62.Arguing full siege starvation is not prohibited, AP Rogers points out that 'a besieging commander would not need to violate Art. 54 (2). There will be no need to attack, destroy or render useless food supply. [The commander] would simply prevent those supplies from getting through to the besieged area by turning them back'. In A. P. V Rogers, *Law on the Battlefield* (3rd edn, Manchester University Press 2012) p. 140-141.

[67]Watts (n17) p.10.

[68]Commentary (n39) p.654,para.2095.

[69]Ibid, para. 2096.

[70]Art.70, Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, Switzerland: International Committee of the Red Cross, 12 August 1949.

[71]*Customary International Humanitarian Law Volume II: Practice* (n36) p. 2944-2946.

> ‘The military authorities of the besieged area might decide not to agree to the evacuation of civilians or the civilians themselves might decide to stay where they are. In those circumstances, so long as the besieging commander left open his offer to allow civilians and the wounded and sick to leave the besieged area, he would be justified in preventing any supplies from reaching that area’[72].

Access to humanitarian relief is the alternative to evacuation in providing protection to the besieged civilian population at risk of starvation. Article 23 of GCIV sets an obligation for the Parties to ‘allow for free passage’ of religious and medical supplies intended for the civilian population. It provides special protection for children under fifteen, expectant mothers and maternity cases, extending the scope of essentials to include foodstuffs, clothing and tonics. The article includes grounds which if invoked may obstruct the delivery of humanitarian relief[73]. However, the shortcomings of the protection regime set up with the Geneva provisions were addressed by Article 70 of API: it provides protection to the civilian population of any territory under the control of the Party and extends the type of supplies subject to humanitarian relief. Still actions to provide humanitarian relief are ‘subject to the agreement of the parties concerned’.

The language used in some military manuals appears to suggest obligation, not just an option to provide relief and assistance. For example, Canada’s LOAC Manual prescribes that:

> ‘The parties to a conflict are obliged to facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel’[74]

In a similar fashion, Germany’s Military Manual provides that:

> ‘If the civilian population of a party to the conflict is inadequately supplied with indispensable goods, relief actions by neutral States or humanitarian organisations shall be permitted. Every State and in particular the adversary, is obliged to grant such relief actions free transit, subject to its right of control.’[75]

Italy’s IHL Manual states that ‘an occupying power has the obligation to accept the despatch of relief materials (foodstuffs, medicines, and clothing) by other States or impartial humanitarian organisations, especially if the occupied population is inadequately supplied’[76].

However, other manuals fail to include explicit obligation to provide relief. Australia’s Commanders’ Guide referring to blockades states that:

> ‘There is a duty to consider, in good faith, requests for relief operations, but no duty to agree thereto. Any obligation upon a Party to permit a relief operation is dependent on the agreement of the State in control, given at an appropriate time’.[77]

US Law of War Manual takes the more restrictive approach as defined in Art. 23 GCIV[78].In addressing siege warfare, UK’s Joint Service Manual recognises that the rules preventing starvation,

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[72]*The Joint Service Manual of the Law of Armed Conflict*(n31) p.88, para. 5.34.3.

[73] (A) that the consignments may be diverted from their destination,
(B) that the control may not be effective, or
(C) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

[74]*Customary International Humanitarian Law Volume II: Practice* (n36) p. 1180, para. 384.

[75]*Customary International Humanitarian Law Volume II: Practice* (n36), p. 1181,para. 386.

[76]Ibid, p. 1181,para. 387.

[77]Ibid, p.1179,para.382.

[78]*Law on War Manual (n30) p. 289, para 5.19.3.*

protecting supplies indispensable for the survival of the civilian population and the obligation to allow essential relief supplies through to the civilian population, apply[79]. However subject to military necessity, the Manual advises that alternative options to be used such as evacuation of civilians[80].

While this requirement of Art. 70 that conditions humanitarian relief to 'the agreement of the parties concerned' may cause concerns as to the effectiveness of the article to provide protection, the Commentary clarifies the clause 'did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones'[81].

Conclusion

Cities as theatre of operations are likely to be the rule, not the exception in the future. However, given the complexities of the urban battle space, commanders will likely explore tactics that can bring them victory without being exposed to the risks of urban conduct of hostilities, such as sieges, which as a method ensures isolation of the opposing belligerent that incites surrender. More importantly, sieges are a method that ensures isolation of the opposing belligerent that incites surrender. Sieges are not impermissible under international law. A number of military manuals explicitly authorise the use of sieges, as long as they target a legitimate military objective. They also recognise that conducting sieges or encirclement of cities exposes the civilian population to significant hardship, but that still does not render the method unlawful. International tribunals' statutes do not list sieges as a separate crime under international law.

On the other side, the legal regime protecting the civilian population in warfare requires for distinction to be made at all times. Looking back at cases of sieges, one may see that violations of IHL were evident as belligerents for example targeted the civilian population as such or used indiscriminative means of warfare. Again, perpetrators were prosecuted for acts done during a siege, but not laying the siege per se. The legality of sieges has been challenged by the explicit prohibition on starvation of the civilian population as set in API. However, the Commentary on API recognises that starvation of the civilian population may happen as a side effect of a siege that pursues a legitimate military objective. Two alternative measures for protection of the civilian population are thus available: evacuation and humanitarian relief. While in the case of evacuation military manuals tend to use an optional tone, in the case of humanitarian relief they stipulate an obligation, although some state practice deviates from this approach.

All of this suggests an increasing conflict between military needs and humanitarian concerns. While siege warfare is significantly limited, yet not prohibited, the regime of protection of the civilian population while advanced still makes compromises that make the siege possible.

[79] *The Joint Service Manual of the Law of Armed Conflict*(n31) p.87, para. 5.34.2.
[80]Ibid.
[81] Commentary (n39)p.819, para. 2805.

LAW AND POLICY QUESTIONS RAISED WITH REGARD TO THE USE OF DIRECTED ENERGY WEAPONS

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"The only thing a soldier can do to protect his eyesight against this quiet and invisible threat is to wear a black patch over one eye. At least that eye will then be protected against the risk of permanent blindness"
O.Bring[521]

Abstract

The revolution in military affairs has set a challenge for the actual legal regulation of armed conflicts. New weapons, which are actively being designed in the present, are not always able to comply with existing legal frameworks. However, it does not stand for the necessity to review the fundamental principles and norms of IHL. In this article Directed Energy Weapons are considered from the point of view of compliance with IHL without any attempts to new interpretation of these regulations. Besides, in this article the creation of universal instrument based on multidisciplinary research for expertise of new weapons is considered as an attempt to prove its necessity. This mechanism could give necessary answers regarding the permissibility of using DEW and could help to overcome the utilitarian approach of States regarding new weapons.

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Today the world is facing very fast technological advances in the field of development of means of warfare(so-called *"revolution in military affairs"*). These changes put pressure on existing rules and principles of IHL in spite of the fact that the ICJ claimed that the Martens Clause "has proved to be an effective means of addressing the rapid evolution of military technology"[522].Non-kinetic-energy weapons (NKE) – "weapons that seek to achieve their purposes other than through the threat or application of force to the human body"[523] - are among the most developing[524] and this

[521]O. Bring, "Legacy of St. Petersburg declaration: contribution of its principles to the development of international humanitarian law regulating means and methods of warfare. Keynote address", International Conference on IHL dedicated to the 140th Anniversary of the 1868 St.Petersburg Declaration, Materials of the Conference, Volume 2, Moscow, ICRC, P. 20.

[522]International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996, Para. 78.

[523] Non-kinetic-energy weapons termed non-lethal, P. 1. (URL: http://www.geneva-academy.ch/docs/projets/Non-Kinetic-EnergyOctober2010.pdf).

[524] In accordance with considerations of the most technologically advanced militaries, the use of DEW will provide significant military advantage. The largest defense, military and advanced technologies corporations, e.g. Lockheed Martin and Northrop Grumman, are involved into the developing process of DEW. Thus, Northrop Grumman was recently (Aug. 23, 2016) awarded a USD 39 million contract for the developing of Self-Protect High Energy Laser Demonstrator (SHiELD). See: (URL: http://news.northropgrumman.com/news/releases/northrop-grumman-to-develop-laser-beam-control-system-for-next-generation-fighter).

category includes such subcategories as chemical and biological weapons, electrical weapons, directed energy weapons (DEW) and acoustic weapons[525].

DEW are those which emit energy without a physical projectile, e.g. in the form of radiation, in a specific direction to achieve their intended effects[526]. DEW include laser weapons, millimetre wave weapons and elementary particles weapons[527].According to professor J.Altmann of the Technical University of Dortmund, the most famous examples of DEW are: Laser and the Space-Based Laser, Advanced Tactical Laser (ATL), Pulsed Energy Projectile (PEP), Active Denial System (ADS)[528].This article has a special focus on two of the four abovementioned types of DEW and deals with technical and legal aspects of these DEW as well as examines compliance of different types of DEW with IHL core principles regulating the means and methods of warfare (the prohibition on using arms which cause superfluous injuries and unnecessary suffering (hereinafter – prohibition on SIrUS) and the prohibition against using arms with indiscriminate effects). We deliberately limit our attention here to ATL and ADS and do not examine Laser and PEP, as they all have common legal and policy questions with differences mainly in technical aspects.

Advanced Tactical Laser

ATL is a chemical laser working with energy transfer from oxygen to iodine atoms[529]. The concept was developed by Boeing in the 1990sand its military task is to achieve damage on an extremely small area (10-20 cm diameter)[530]. ATL has such military purposes as disabling communication lines, radio and TV antennas, satellite dishes, breaking electrical power lines, disabling vehicles, destroying cruise missiles and sea-skimming missiles; and because of this destructive capability ATL should be considered as a lethal weapon the effect of which is anti-materiel.ATL is based on aircraft and can be used from significant distance (10-15 km) and generally, compared with artillery and guided missiles, ATL (if this weapon is used in a proper manner/favorable atmospheric conditions) would allow much more discriminating destruction[531]. However such long-range use in air turbulence will not allow room to achieve a 10 cm focus on target and could lead to target's mistake. Within densely populated areas the invisible beam can heat another target than the intended one and that means the possible violation of prohibition of indiscriminate attacks that is set forth in art. 51 (4) of 1977 Additional Protocol I (hereinafter - API) and was established by state practice as a norm of customary IHL[532].Furthermore, ATL in the absence of operator, as well as another computer-controlled radar-guided laser system, is potentially unable to identify the type of target and verify its hostile intention: for instance, lasersystem with the same characteristics and concepts of operation governed by computer is not able to distinguish strike aircraft from civilian airliner/medical aircraft as well as to make a distinction between naval

[525]Non-kinetic-energy weapons termed non-lethal, P. 2. (URL: http://www.geneva-academy.ch/docs/projets/Non-Kinetic-EnergyOctober2010.pdf).
[526]Ibid., P. 7.
[527]J. Altmann, Directed Energy Weapons, Proceedings of the Bruges Colloquium №37, 2007, P. 136.
[528] Ibid.
[529]Ibid., P. 137.
[530] J. Altmann, Millimetre waves, lasers, acoustics for non-lethal weapons? Physics analyses and inferences, P.30. (URL: http://www.ssoar.info/ssoar/bitstream/handle/document/26039/ssoar-2008-altmann-millimetre_waves.pdf).
[531]Ibid., P. 34.
[532] See: Rule 11, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), P. 37-40.

warship and hospital/civilian ship. These theoretic examples can be solved in practice by precautions in attack under the art. 57 of API (rule 15, ICRC CIHL study) - measures that should be taken in the conduct of military operations: target verification (art. 57(2)(a)(i) API); rule 16, ICRC CIHL study) – e.g. calculation of the speed of the target, target's direction, trajectory estimation; attack's cancellation or suspending (art. 57(2)(b) API)[533]; effective advance warning (art. 57(2)(c) API; rule 20 ICRC CIHL study). At the same time ATL can lead to serious burns and because of this constitute the violation of prohibition on SIrUS (art. 35 (2) API; rule 70, ICRC CIHL study).It should be noted that these two principles were recognized by the ICJ as "cardinal principles… constituting the fabric of humanitarian law"[534].

Active Denial System

According to the U.S. Department of Defense, ADS is a non-lethal[535], counter-personnel weapon and has a range greater than small-arms range[536]. According to prof. J.Altmann, it is *mostly* non-lethal. The main goals of this device are to control the crowd, protesters, internal mass disorder by firing a beam of microwaves (millimeter waves). ADS is intended to be used inside the country but is also considered as an effective measure against pirates and for diplomats' protection, especially after the 2012 attack on U.S. mission in Benghazi. These millimeter waves penetrate less than one millimeter and lead to painful heating of the skin (so-called "repel effect"). Nevertheless, nobody can stand under this beam more than a few seconds before having to get out[537].ADS is managed by operator with joystick and monitor and this allows to disperse the crowd from a safe distance. On the other hand, such distance would lead to mistakes inbeam's temperature and capability, and because of that ADS is considered as potentially lethal: "ADS could be called non-lethal beyond any doubt only if technical limiters were built in which guarantee that a target subject would not be heated to more than 55-60°C skin temperature under any circumstance"[538].Additionally, that also could mean the violation of prohibition on SIrUS. Unfortunately, this is only in theory.

How to deal with legal and policy challenges?

The most disputable challenge concerning these principles consists in their practical application.IHL norms are emerging mainly because of the concordance of the Will of States, being

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[533]An old (and because of that, not applicable to DEW or another new weapons) but illustrative example:in 1941 a finish pilot saved the unique world famous wooden architecture complex – the Church of Transfiguration on the Kizhi island during the Second World War. The Fins intelligence had information about using this church as a base of guerilla. When the planes were coming down the island pilot saw that there was no guerilla base and refused to attack the temple…and dropped the bombs on the Onego Lake. (URL: http://gov.karelia.ru/News/1999/Leader/1007_e.html).

[534]International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996, Para. 78.

[535]"Non-lethal weapons are weapons which are explicitly designed and developed to incapacitate or repel personnel, with a *low probability of fatality or permanent injury*, or to disable equipment, with minimal undesired damage or impact on the environment". See 13 Oct. 1999 NATO press statement. (URL: http://www.nato.int/docu/pr/1999/p991013e.htm).

[536]See: ADS FAQs, U.S. Department of Defense. (URL: http://jnlwp.defense.gov/About/Frequently-Asked-Questions/Active-Denial-System-FAQs/).

[537]"Why Russia Will Be the First to Use the Pain Ray: Analysis" (URL: http://www.popularmechanics.com/military/weapons/a7804/why-russia-will-be-the-first-to-use-the-pain-ray-9833954/).

[538]J. Altmann, Millimetre waves, lasers, acoustics for non-lethal weapons? Physics analyses and inferences, P. 28.

the result of compromise. This compromise is reached during the diplomatic conferences; that is why IHL is too dependent on states political interests, military interests and diplomacy. H.Morgenthau wrote in his "*Politics among Nations" (1948)* that international politics is a "struggle for power"[539]. In accordance with that, States, especially in the absence of specific norms and treaties, are very reluctant to comply with restrictions and obligations imposed by principles: "In their submissions to the ICJ in the Nuclear Weapons case, France and Russia stated that a weapon can only be prohibited by virtue of this rule if States choose to prohibit the weapon by treaty"[540].The quotation from epigraph to the article illustrates that such attitude could be a stumbling block to the development of IHL. Unfortunately, IHL treaties also do not always comply with idealistic spirit of IHL and F.Kalshoven gave a remarkable illustration concerning the foundered attempts to prohibit the whole categories of explosive munitions (1980, Protocol on Non-Detectable Fragments)[541]. In addition, treaties concerning incendiary weapon (Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) Geneva, 10 October 1980) and blinding laser weapons (Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention) 13 October 1995) contain the formulations that lead to narrowing of prohibition and to extension of permission: "primary effect" and "specifically designed".

The prohibition on SIrUS (that could be violated by DEW) is a rule of CIHL applicable in all armed conflicts, whether international or non-international and was qualified by prof. A.Cassese as "one of the most unclear and controversial rules of warfare"[542]. There are two approaches to the issue of "unnecessary": "utilitarian" and "medical". From the "utilitarian" point of view, unnecessary suffering is that which is disproportionate to the military objective sought. "Medical" attitude identifies the suffering that is excessive compared to the suffering of the victim necessary to the goal of putting the person "hors de combat". "Utilitarian" one is not sufficient for dealing with new categories of weapons because of its speculative nature. The deadlock could be breached with medical considerations: "Health professionals were instrumental in gathering the epidemiological data from clinical studies to make the humanitarian argument for the banning of blinding laser weapons and anti-personnel landmines"[543].

In 1996 the ICRC established "the SIrUS project"– a multidisciplinary research program that gathered a group of expert who analyzed an ICRC field-hospitals database of wounded personnel to quantify certain effects of conventional weapons. The four following criteria of "unnecessary suffering" were developed: specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability or specific disfigurement

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[539]H. Morgenthau, Politics Among nations, 6th edition. P. 31.
[540]Jean-Marie Henckaerts and Louise Doswald-Beck, Op. cit.,P. 243.
[541] "The limited significance of the Protocol cannot be illustrated better than by pointing out that its single line is the sole remnant of *attempts to ban whole categories* of actually used explosive munitions such as projectiles with a pre-fragmented casing (designed to explode according to a set pattern into fragments of predetermined dimensions) or filled with very small round 'pellets' or nail-like 'fléchettes'. *All these attempts had foundered* on the argument that compared with other existing and commonly used types of munitions, such as the high-explosive bomb or artillery shell, the 'fragmentation' types of explosive ammunition could not be said to be of a nature to cause superfluous injury or unnecessary suffering". See: F. Kalshoven, Constraints on the Waging of War: An Introduction to International Humanitarian Law,4th edition, P. 174.
[542] A. Cassese,Weapons causing unnecessary suffering: are they prohibited? Rivista di dirittointernazionale, 1975, Vol. 58, P. 15.
[543]War surgery, ICRC, 2010, Vol. 1, P. 100. (URL: https://www.icrc.org/eng/assets/files/other/icrc-002-0973.pdf).

(Criterion 1); or field mortality of more than 25% or hospital mortality of more than 5% (Criterion 2); or Grade 3 wounds as measured by the Red Cross wound classification (Criterion 3); or effects for which there is no well-recognized and proven treatment (Criterion 4)[544]. Eventually, this project was heavily criticized by the "utilitarians" for ignoring considerations of military necessity. But some actors gave their support to the project: e.g., the Australian Defence Force intended to incorporate the SIrUS Project findings into the Australian National Review Processes for new (or modified) weapons systems[545]. Furthermore, the U.S. Air Force Pamphlet lists as one of the bases for the prohibition of poison the "inevitability of permanent disability"[546] and that factis strong evidence against "utilitarians".

Despite the fact that most of DEW are developing under the rubric of so-called "non-lethal" with the implication that because of that they are not covered by IHL prohibition, some studies indicate that the effects of DEW are very dramatic – ranging from serious and deep burns, nervous system overwhelming and radiation disease to significantly increased cancer rates. Under certain circumstances microwave weapons could lead also to irreversible brain damages[547]. As it was noted by the authors of the ICRC CIHL Study, "a relevant factor in establishing whether a weapon would cause superfluous injury or unnecessary suffering is the inevitability of serious permanent disability"[548] and that could be used as some kind of compass for further interdisciplinary research with the involvement of experts in the areas of law, statistics, medicine, communications and weapon industry. The ICRC ongoing study on explosive weapons in populated areas as well as the 16th Bruges colloquium on *Urban warfare*– the initiatives that gathered a group of expert from different areas, allow us to be enthusiastic also in new weapons regulation.

Conclusion

In summary, the following conclusions can be drawn from the article:

1. the norms of IHL are sufficient for regulation of DEW, there must be no derogations and novels in interpretation of these norms;
2. DEW could violate the fundamental principle of IHL – the prohibition on SIrUS. Moreover, the effects of DEW may materialize after a period of time that's why accessorial instruments (e.g., the "SIrUS" Project; A Guide to the Legal review of new weapons, means and methods of warfare) should be recognized and should be implemented into the weapons development process under art. 36 of API;

Implementation measures and, especially, "field", or "front line" implementation measures should be taken. The norms of IHL should be clear for soldier or operator of any warfare system.

[544]The SIrUS project.Towards a determination of which weapons cause "superfluous injury or unnecessary suffering", 1997.P.8.
[545]See: The SIrUS project and reviewing the legality of new weapons.(URL: http://www.redcross.int/en/conference/ws_reports/ws_report9.asp).
[546]Jean-Marie Henckaerts and Louise Doswald-Beck, Op. cit.,P. 241.
[547]See: E. David, Principes de droit des conflitsarmés (2nd Russian edition, 2011), P. 363.
[548]Jean-Marie Henckaerts and Louise Doswald-Beck, Op. cit., P. 241.