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KIRIMLI DR. AZIZ BEY COLLECTED COURSES ON INTERNATIONAL HUMANITARIAN LAW

VOL. I

EDITORS

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Mustafa Can Sati

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KIZILAY KÜLTÜR SANAT

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This volume of the Kırımlı Dr. Aziz Bey Collected Courses on International Humanitarian Law is solemnly dedicated to the cherished memories of those who lost their lives in the catastrophic earthquakes that struck Türkiye and Syria in February 2023. Additionally, it is dedicated to the countless innocent souls who have endured the harrowing tribulations of war all across the globe.

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About The Kırımlı Dr. Aziz Bey IHL Competition

Kırımlı (Crimean) Dr. Aziz Bey

The co-organizers of the Kırımlı Dr. Aziz Bey IHL Competition named the project in honor of Kırımlı Dr. Aziz Bey, acknowledging his influence on the establishment of the humanitarian tradition in 19th-century Türkiye.

Kırımlı (Crimean) Dr. Aziz Bey, a renowned medical doctor born in Istanbul in 1840, holds a significant place in the history of Turkish medicine and the advancement of humanitarian efforts in the Ottoman Empire, despite his untimely demise. Collaborating with his colleague Abdullah Bey, Dr. Aziz Bey dedicated his efforts to championing humanitarian ideals, including the moral responsibility of every physician to safeguard human well-being and attend to injured soldiers. Notably, he played a pivotal role in establishing the Association to Help and Rescue the Sick and Wounded Soldiers, which later evolved into the "Hilal-i Ahmer Cemiyeti" (The Red Crescent Society; known today as the Turkish Red Crescent).

Moreover, Aziz Bey took a leading role in founding the Hilal-i Ahmer Cemiyeti within the Ottoman Empire. By designing the emblem of the red crescent and facilitating the transition from the red cross emblem, he paved the way for the establishment of the country's first national red crescent society. Throughout his life, he remained actively engaged in the activities of Hilal-i Ahmer Cemiyeti, serving as both president and delegate until his passing in 1878.

Aziz Bey's contributions extended beyond humanitarian work. He gained recognition as the founder of the first modern medical school that offered education in Turkish. Additionally, he authored the first medical book written in Turkish and acted as the translator for the first medical dictionary in the Ottoman Empire. The enduring legacy of Kırımlı Dr. Aziz Bey lies in his role as one of the foremost pioneers of humanitarian principles and activities in Türkiye.

The IHL Competition

The Kırımlı Dr. Aziz Bey IHL Competition combines advanced IHL lectures with role-playing exercises based on the preceding IHL lectures. The co-organizers have carefully selected the main topics, revolving around an overarching theme. In its inaugural edition, the focus was naval warfare, followed by aerial warfare in the second edition. For the upcoming third edition, the theme will be cyber-warfare.

The Kırımlı Dr. Aziz Bey IHL Competition has achieved several noteworthy milestones. It stands as one of the pioneering IHL Competitions ever organized online. Additionally, it holds the distinction of being the first IHL competition to take place in Türkiye. Notably, Aziz Bey sets itself apart as a unique law competition where the delivered lectures align with the scope of the competition. Consequently, the pedagogic approach of The Kırımlı Dr. Aziz Bey IHL Competition offers an unparalleled learning opportunity to Turkish and foreign law students. In the first two editions, the Kırımlı Dr. Aziz Bey IHL Competition hosted participants from Turkey, Belarus, Palestine, Nepal, Malaysia, India, Bulgaria, the Netherlands, Iran, Georgia, Russia, and Japan.

The Kırımlı Dr. Aziz Bey IHL Competition represents a significant initiative aimed at promoting IHL in Turkey. The co-organizers actively encourage the participation of Turkish universities and foster dialogue between Turkish and international IHL scholars.

About The Book

The second edition of the Kırımlı Dr. Aziz Bey International Humanitarian Law (IHL) Advanced Summer School covered crucial sub-topics of international humanitarian law. Most of the lectures taught within the scope of the event were transcribed and adjusted by the authors and included in this book. The book, therefore composed of seven chapters, namely, Child Soldiers, International Legal Protection of Cultural Heritage in Armed Conflict, Humanitarian Access in Armed Conflict from the Legal Perspective, Protection of the Environment by International Humanitarian Law, International Weapons Law, Aerial Warfare and Hybrid Warfare and the Law of Armed Conflict: Much Ado about Nothing.

In the first chapter of this book, the legal framework surrounding child soldiers is explored by Noelle Quinvet, covering international human rights law, IHL, and international criminal law. The chapter explores the definition of a "child soldier," discusses the recruitment and participation of child soldiers in hostilities, and touches on the difficult topic of child soldiers as perpetrators of war crimes. The final part of the chapter focuses on the protection of children in armed conflict, with a specific emphasis on child soldiers. Using primarily primary sources, this paper aims to provide a solid introduction to the concept of child soldiers and the legal regimes that apply to them.

The second chapter of the book is authored by Riccardo Pavoni and discusses the increasing global concern for the protection of cultural property during armed conflict. The chapter begins by examining former US President Donald Trump's statement on striking 52 cultural sites in Iran and how it highlights the importance of safeguarding cultural heritage in times of war. The chapter notes that this consciousness is the result of a long evolutionary process that has humanized the law of armed conflict, particularly in the protection of cultural property. However, the chapter also points out that the destruction of cultural property has become a key element in many armed conflicts, with expressions such as "cultural terrorism" and "ethnic-cultural cleansing" now in common use. The chapter discusses how contemporary armed conflicts have changed and how the protection of cultural heritage needs to adapt accordingly. Finally, the chapter outlines the existing legal framework for the protec-

tion of cultural property and highlights the main challenges and developments in recent normative and judicial practice.

Elżbieta Mikos-Skuza addresses the issue of humanitarian access in armed conflicts, which is a contentious and significant issue in IHL, in the third chapter. The paper first concentrates on the protection and assistance offered by IHL and delves into substantial provisions governing humanitarian access. It then analyses the legal framework governing humanitarian access in four layers, namely, the primary obligations of the parties to the conflict, the right of humanitarian initiative, state consent requirement and operational consent. The paper briefly addresses the status of humanitarian personnel and the relationship between IHL and counter-terrorism in humanitarian assistance. Lastly, the relationship between IHL rules on humanitarian access and the global Covid-19 pandemic is touched upon by the author. Although the paper focuses on legal aspects of humanitarian access in armed conflict, it highlights the broader problem of humanitarian access in public international law, including natural and technological disasters, which often lack binding rules and rely on soft laws and guidelines.

In the fourth chapter of this book, Anne Dienelt & Franziska Bachmann discuss the legal protection of the environment during armed conflicts. It begins by highlighting the lack of provisions addressing the protection of the environment in relation to armed conflict and the need for the international community to expand international laws against environmental damage during the conflict. It then goes on to discuss the UN International Law Commission's work on the protection of the environment in relation to armed conflict and the 27 draft principles (PERAC principles) it adopted in 2022 to enhance the protection of the environment. The chapter also stresses the environmental impacts of armed conflicts, particularly in the context of the Russian aggression against Ukraine. The legal framework predominantly dealing with armed conflicts and war-related environmental damage is IHL, which is complemented by other fields such as human rights law or international environmental law. The chapter describes the IHL framework for protecting the environment during armed conflict, focusing on international armed conflicts. It also categorizes the relevant norms protecting the environment into two groups: those that directly and implicitly protect the environment. In conclusion, the chapter discusses the importance of protecting the environment in armed conflicts and provides an outlook on the subject.

Daniele Amoroso covers the international weapons law topic in the fifth chapter. The focus of this chapter is on IHL and disarmament regimes and their basic norms, including the principles prohibiting weapons that cause superfluous injury or unnecessary suffering and those that are by nature indiscriminate. The chapter provides an overview of the sources of international weapons law and discusses compliance mechanisms, with a particular focus on national weapons review under Article 36 of Additional Protocol I to the Geneva Convention, using legal reviews of autonomous weapons systems as a case study. The selection of the regimes covered in this chapter was made to provide a representative sample of the different regimes in force.

The sixth chapter, which is authored by Mateusz Piatkowski, concentrates on the phenomenon of aerial warfare in the context of IHL. This chapter examines the current state of IHL applicable to aerial warfare, the gaps in regulation, and the need for dedicated treaty regulation. It highlights the principles of IHL and customary rules that govern air warfare and their practical application in conflicts. The chapter also discusses the ongoing discussions relating to Lethal Autonomous Weapon Systems (LAWS) and the potential impact of such weapons on the regulation of aerial warfare. Overall, the chapter provides a comprehensive overview of the legal framework governing aerial warfare in the context of IHL.

In the last chapter, Aurel Sari explores the relationship between hybrid warfare and the law of armed conflict. He argues that while the law of armed conflict regulates the conduct of hostilities during times of war, the concept of hybrid warfare does not have a settled meaning and has been used to describe a wide range of security challenges faced by democratic nations and institutions. The chapter first reviews the changing character of warfare and identifies key adaptation mechanisms of the law of armed conflict. It then examines the idea of hybridity and its two principal manifestations: hybrid warfare and hybrid threats. Finally, the chapter discusses some of the challenges that hybrid conflicts and competition pose for the law of armed conflict and concludes by identifying some broader lessons. The lack of clarity and breadth of the notion of hybrid warfare is highlighted, and the chapter aims to provide insight into the legal implications of these concepts.

Chapter I: Child Soldiers

Noëlle Quénivet[1]

1. Introduction

The topic of child soldiers is not an easy one to discuss, neither from a legal nor a socio-legal perspective. This is because it combines two contentious and sensitive concepts, that of a child and that of a soldier, two sides that this paper covers.

The paper starts by providing an overview of the legal framework relating to child soldiers, which spans three different legal regimes – international human rights law, international humanitarian law and international criminal law. It then moves on to exploring the concept of a "child soldier". Having set out the legal framework and define the key concepts, the paper briefly explains the process of becoming a child soldier and then delves into the regulation (or the lack thereof) of the recruitment, training and participation of child soldiers in hostilities. It then touches upon the sensitive topic of child soldiers as perpetrators of war crimes. The last part focuses on the protection afforded to children, more generally, and to child soldiers in armed conflict, more specifically. This paper aims to offer a solid overview of the concept of a child soldier and the legal regimes applicable to them, using essentially primary rather than secondary sources.

2. The Legal Framework Relating to Child Soldiers

The legal framework that applies to child soldiers includes international humanitarian law, international human rights law and international criminal law. International human rights law is applicable since in times of armed conflict, both international human rights law and international humanitarian law are applicable. Whilst the International Court of Justice has repeated on several occasions[2] that both legal

1 Noëlle Quénivet is Professor in International Law at Bristol Law School of the University of the West of England, United Kingdom. All websites last accessed on 31 May 2023.

2 ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 8 July 1996; ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 9 July 2004.

regimes apply, there is however some disagreement as to how they interact. The approach adopted in this paper is that according to the *lex specialis* principle the most specific rule, rather than a legal regime, applies. As a result, the two regimes are complementary. A classic case is that of the provision of food to prisoners of war. Article 26 of the Third Geneva Convention (GC) stipulates that the "basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners."[3] Likewise, in relation to child soldiers, the rules encapsulated in both international humanitarian law and human rights law will be used. Another legal regime that is of relevance is international criminal law. Whilst the concept of war crimes has existed for centuries, the prosecution of such crimes was rather limited until the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993.[4] The creation of additional *ad hoc* tribunals such as the Special Court for Sierra Leone[5] and eventually the permanent International Criminal Court[6] has further developed a legal regime that encompasses not only war crimes but also crimes against humanity and genocide. Its relevance with regard to international humanitarian law is particularly visible in the new commentaries to the Geneva Conventions and the ICRC Study on Customary International Humanitarian Law[7] that make ample references to it. Consequently, to understand the legal framework relating to child soldiers one needs to have a good grasp of international humanitarian law, international human rights law, and international criminal law.

The next step is to pinpoint the relevant legal instruments within these three legal regimes. The most important treaties concerning child soldiers are the United Nations Convention on the Rights of the

3 See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (Art. 11)*, UN Doc E/C.12/1999/5, 12 May 1999, para 9.

4 Statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) 1993, 32 ILM 1159 (1993).

5 Statute of the Special Court for Sierra Leone (SCSL Statute) 2002, 2178 UNTS 138.

6 Rome Statute of the International Criminal Court (ICC Statute) 1998, 2187 UNTS 90.

7 International Committee of the Red Cross, Study on Customary International Humanitarian Law (ICRC 2016), <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

Child (UNCRC)[8] and the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC).[9] Unfortunately, very few States have ratified the Optional Protocol. Then in international humanitarian law, the Geneva Conventions, and Additional Protocols I[10] and II[11] are the most pertinent legal instruments, alongside the ICRC Study. As for international criminal law, the Statute of the International Criminal Court and the case law of the Court are used as references, but one needs to bear in mind that statutes and cases from *ad hoc* tribunals are important too. For example, the jurisprudence of the Special Court for Sierra Leone is useful to understand the concept of recruitment of child soldiers. From this brief overview, it is obvious that a wide range of legal instruments applies to child soldiers.

3. Definition of a Child Soldier

Having established the legal framework that relates to child soldiers, we shall turn our attention to defining the concept of a "child soldier". After defining the concept of a child in the context of armed conflicts, this section defines the concept of a soldier and eventually provides an overview of the definition of a "child soldier" as adopted in soft law instruments.

3.1. Definition of a Child

According to Article 1 UNCRC, a child is anyone under the age of 18 years old: "for the purposes of the present Convention, a child means every human being below the age of eighteen years unless the law applicable to the child, majority is attained earlier".[12] Yet, a closer examination of the Convention reveals that Article 38 refers to children who are 15 years old: "State Parties shall refrain from recruiting any person who has not attained the age of 15 years into the armed forces." Whilst this seems

8 United Nations Convention on the Rights of the Child (UNCRC)1989, 1577 UNTS 3.

9 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), GA Res. 54/263, UN Doc. A/54/RES/263, 16 March 2001.

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API) 1977, 1125 UNTS 3.

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII) 1977, 1125 UNTS 609.

12 UNCRC (n 9).

strange at first sight, and in complete contradiction with the very letter and spirit of the UNCRC which aims at protecting anyone under the age of 18 years old, this discrepancy is a throwback from international humanitarian law since reference is made to this legal regime in the first and fourth paragraphs of Article 38 UNCRC. The issue of the age was raised during the negotiations of the UNCRC and whilst civil society saw this as an opportunity to raise the age of recruitment and participation to 18 years old, States stuck to the wording of the Additional Protocols.

15 years of age is indeed the most common age found in international humanitarian law instruments such as Additional Protocols I and II and is also mentioned in the ICRC Study. Whilst 15 years of age appears to be the most used age of a child under international humanitarian law, on inspection, neither the Geneva Conventions nor the Additional Protocols define a child. Interestingly, Article 77(5) AP I refers to "persons who had not attained the age of 18 years" in a legal provision entitled "Protection of Children". This tends to suggest that, even if not expressly stated, according to international humanitarian law a child is anyone under the age of 18 years old and thereby holds "open the possibility that the concept of "childhood" could be extended beyond [the age of fifteen]."[13] Looking at the recruitment and participation of child soldiers more specifically one does not fail to notice the reference to 15 years of age. A further examination of the Geneva Conventions and the Additional Protocols expose various sets of ages: children aged 7, children aged 12, infants, etc. Accordingly, when reference is made to a child in international humanitarian law it is important to know the context as this will determine whether a person is offered specific protection as a child. Simply put, there is no general definition of a child in international humanitarian law. We could contend that impliedly a child is anyone under the age of 18 but the ICRC Study avows that although several States would like the age limit to be 18 there is no such general agreement and that the widely accepted age is still 15 years old.

Nevertheless, increasingly, the United Nations, civil society and some States have been pushing towards adopting 18 years of age as the limit, including for the recruitment and participation in armed forces and armed

13 David Rosen, Child Soldiers, International Humanitarian Law, and the Globalization of Childhood (2007) 109(2) *American Anthropologist 296*, 301.

groups. Shortly after the adoption of the UNCRC, a working group of the United Nations Commission on Human Rights was established to draft an optional protocol on child recruitment and participation in hostilities. It was followed by the first comprehensive report on the plight of children in armed conflict commissioned by the UN General Assembly and penned by Graça Machel.[14] To push for the optional protocol whose negotiations were stalling, a group of NGOs launched in 1998 the Coalition to Stop the Use of Child Soldiers whose goal was to incorporate the straight-18 principle[15] into the new treaty. Their efforts resulted in the adoption of the Optional Protocol though the legal situation created by this Protocol is more complicated than expected. It is not a straight 18. First, the Optional Protocol makes the difference between the armed forces and the armed opposition groups. In relation to armed forces, States commit themselves to raising the age for recruitment which suggests that the minimum age is 16 years old.[16] In contrast, armed opposition groups cannot recruit or use children under the age of 18[17] to the effect that they must solely be comprised of adults. Second, the Optional Protocol differentiates between recruitment and participation. State armed forces can recruit children under the age of 18 years old;[18] however, they cannot make them participate in the conflict when they are younger than 18 years old.[19] This shows that incrementally we are pushing up the age of recruitment and participation in hostilities. The United Nations Special Representative on Children in Armed Conflict launched in 2010 a wide campaign called "Zero under 18"[20] to encourage the adoption of the Optional Protocol and so raise the age to 18 years old. Whilst several States were very supportive of this campaign and the campaign ended in 2012, leading to 21 new ratifications of the Optional

14 Graça Machel, *Study of the Impact of Armed Conflict on Children,* UN Doc A/51/306, 26 August 1996.

15 The straight-18 principle is defined as the prohibition of recruitment and use of children in hostilities under 18 without exception. ICRC, *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups* (Advisory Service on International Humanitarian Law 2011) Section 3: Definitions, 379.

16 OPAC (n 10) Art 3(1). Technically, raising the age from 15 years old to 15 years old and one day would comply with this provision.

17 *Ibid* Art 4(1).

18 *Ibid* Art 3.

19 *Ibid* Art 1.

20 See Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Optional Protocol on the Involvement of Children in Armed Conflict,* <https://childrenandarmedconflict.un.org/tools-for-action/opac/>.

Protocol, others were reluctant to engage with the Special Representative.

Consequently, when determining whether an individual is a child, the first question to be asked is whether the State has ratified the UNCRC – every single State, except the United States of America, has ratified the UNCRC –, the second is whether the State has ratified the Additional Protocols, and, in the case it has not, reference should be made to the ICRC Study, and the third is whether the State has ratified the Optional Protocol. Whether an individual is a child for the purpose of the definition of a child soldier thus depends on State ratification.

3.2. Definition of a "Soldier"

The next step is to define the concept of a "soldier". Soldiers are often viewed as persons who fight in an armed conflict, but their role also extends to providing support, be that behind or on the frontline, to those fighting. Yet, the term "soldier" does not exist in international law and international humanitarian law refers to "combatants" or civilians who participate in hostilities. It should be noted that the concept of a combatant only exists in an international armed conflict whereas that of a civilian taking a direct part in the hostilities can be found in both international and non-international armed conflicts.

The Hague Regulations,[21] Geneva Conventions,[22] customary international law, and Additional Protocol I[23] offer various definitions of a combatant. According to the *lex posterior derogat priori* rule, the AP I definition ought to reflect the current state of the law. It is also the one adopted by the ICRC in its Study on Customary International Humanitarian Law.[24] However, this definition "has been criticized for concluding that at least parts of Articles 43 and 44 of Additional Protocol I reflect customary IHL".[25] Article 43(1) AP I indicates that the armed forces are comprised

21 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, Arts 1 and 2.

22 See GCIII (n 3) Art 4 which, despite its focus on prisoners of war, determines to a great extent combatant status.

23 API (n 11) Arts 43 and 44.

24 ICRC Study (n 8) Rule 106.

25 Jean-François Quéguiner, The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law, in Howard M Hensel (ed), *The Legitimate use of Military Force. The Just War Tradition and the Customary Law of Armed Conflict* (Ashgate 2008) 165.

of members of the regular armed forces or other forces which are under a command responsible to that party "even if that Party is represented by a government or an authority not recognized by an adverse Party". They are, according to Article 43(2) AP I, combatants. Article 43(3) AP I adds that members of paramilitary or armed law enforcement agencies that have been incorporated into the armed forces and notified the other parties to the conflict are also combatants. Article 44(3) AP I imparts a wider definition of a combatant than the one expounded in the Geneva Conventions which requires combatants to meet four requirements.[26] Rather, "while they are engaged in an attack or in a military operation preparatory to an attack" they need to carry their arms openly "(a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."[27] Applied to child soldiers, this means that from the moment they join the armed forces they fall within the category of combatant, whether or not they are truly engaged in frontline combat activities or not. If they are not members of the armed forces but paramilitary groups, they are only combatants provided they fulfil the aforementioned requirements.

In contradistinction to combatants, civilians are not allowed to take part in the hostilities. Yet, some of them do whether in an international or non-international armed conflict. Whilst they are not entitled to fight, they can become lawful targets of attack as, they lose their protection "for such time as they take a direct part in hostilities."[28] The determination of whether an individual is a civilian taking a direct part in hostilities is carried out on a case-by-case basis[29] as what is assessed is the conduct rather than the status of the individual.[30] Unfortunately, as the

26 The requirements are that 1) they are commanded by a person responsible; 2) have a fixed distinctive sign recognizable at a distance; 3) carry arms openly; 4) and conduct operations in accordance with the laws and customs of war. GCIII (n 3) Art 4.

27 API (n 11) Art 43(3).

28 API (n 11) Art 51(3); APII (n 12) Art 13(3); ICRC Study (n 8) Rule 6.

29 *Prosecutor v Fofana and Kondewa* (*CDF Judgment*) (Judgement) SCSL-04-14-T, 2 August 2007, para 134; *Prosecutor v Sesay, Kallon and Gbao* (*RUF Judgment*) (Judgement) SCSL-04-15-T, 2 March 2009, para 104.

30 This illustrates that the notion of direct participation in hostilities does not refer to a persons status, function, or affiliation, but to his or her engagement in specific hostile acts. International Committee of the Red Cross, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC DPH Guidance) (ICRC 2009) 44.

Commentary to Rule 6 of the ICRC Study on Customary International Humanitarian Law states: "a clear and uniform definition of direct participation in hostilities has not been developed in State practice".[31] The Commentary to AP I defines direct participation as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces",[32] a definition repeated in many cases before the ICTY,[33] ICTR,[34] the Special Court for Sierra Leone[35] and the ICC.[36] Following a series of consultations with experts in 2003, the ICRC published in 2009 a guidance note[37] which suggests three cumulative criteria to ascertain whether such acts lead to a loss of civilian status: the threshold of harm, the direct causation and the belligerent nexus. Whilst the ICRC Guidance stresses that the determination relates to acts, it has however introduced the concept of a "continuous combat function" for members of armed opposition groups. This means that such individuals have a *status* based on membership to a group and that, like combatants, they can be attacked based on their status alone.[38] Such a broad definition means that children associated with armed opposition groups may easily turn into civilians taking a direct part in the hostilities and thus a legitimate target of attack, a position criticised by the Special Court for Sierra Leone.[39]

31 ICRC Study (n 8) Rule 6.

32 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols to the Geneva Conventions* (ICRC 1987), para 1944.

33 *Prosecutor v Galić* (Judgement and Opinion) IT-98-29-T, 5 December 2003, para 48; *Prosecutor v Strugar* (Appeals Chamber Judgement) IT-01-42-A, 17 July 2008, para 178; *Prosecutor v D Milosevic* (Judgement) IT-98-29/1-T, 12 December 2007, para 947; and *Prosecutor v Kordić and Čerkez* (Appeals Judgement) IT-95-14/2-A, 17 December 2004, para 51.

34 *Prosecutor v Bagilishema* (Judgement) ICTR-95-1A-T, 7 June 2001, para 104; In *Semanza* the ICTR defined direct participation as to engage in acts of war that strike at personnel or equipment of the enemy armed forces. *Prosecutor v Semanza* (Judgement and Sentence) ICTR-97-20-T, 15 May 2003, para 366.

35 *CDF Judgment* (n 30) para 134; *RUF Judgment* (n 30) para 104.

36 *Situation in Darfur, Sudan in the Case of the Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09, 8 February 2010, para 80.

37 ICRC DPH Guidance (n 31).

38 Michael Schmitt, Deconstructing Direct Participation in Hostilities: The Constitutive Elements (2010) 42 *International Law and Politics* 697, 704; Michael Schmitt, The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis (2010) 1 *Harvard National Security Journal* 1, 21.

39 *RUF Judgment* (n 30) para 1723.

3.3. Definition of a Child Soldier

No international legally binding document defines the term "child soldier". The often-cited definition of a "child soldier" that is found in the Cape Town Principles,[40] a soft law instrument accepted by a large number of States, espouses a wide interpretation of the role of a "soldier" as it enounces that a child soldier is

> any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity included but not limited to cooks, porters, messengers, and anyone accompanying such groups other than family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.

This definition was also adopted by Graça Machel in her 2001 follow-up report to the 1996 seminal report "The Impact of Armed Conflict on Children"[41] and confirmed in the Paris Commitment and the Paris Principles, though the latter did not define the concept of a "child soldier" but of "a child associated with an armed force or armed group",[42] a difference in terminology introduced to reflect more accurately the reality and stress that children are not necessarily fighting[43] as clearly indicated in the last sentence that undoubtedly breaks the classic image of a young boy holding an AK47 and includes girls victims of acts committed by their own group.[44] Indeed, this definition underscores the multiple and changing roles that children play in these armed

40 *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa* (Cape Town Principles), 1997.

41 Graça Machel, *The Impact of War on Children: A Review of Progress since the 1996 United Nations Report on the Impact of Armed Conflict on Children* (Hurst 2001) 7.

42 UNICEF, *The Paris Principles – Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February* 2007 <https://www.unicef.org/mali/media/1561/file/Paris-Principles.pdf>, Point 2.1.

43 See discussion in Mark Drumbl, *Re-Imagining Child Soldiers* (Oxford University Press 2012) 4.

44 In *Ntaganda*, the ICC confirmed that it was a war crime for members of an armed group to sexually assault members of the same group. *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06-309, 9 June 2014; *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v Ntaganda* (Second Decision on the Defences Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9) ICC-01/04-02/06-1707, 4 January 2017; *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v Ntaganda* (Judgment on the Appeal of Mr Ntaganda against the Second Decision on the Defences Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9) ICC-01/04-02/06-1962, 15 June 2017.

opposition groups. Besides fighting, children carry out a plethora of tasks, working as *inter alia* "cooks, porters, nurses, spies, messengers, administrators, translators, radio operators, medical assistants, public information workers, youth camp leaders, and girls or boys used for sexual exploitation".[45] This definition stands in contrast to that of a combatant or a civilian taking a direct part in hostilities. First, it refers to a variety of groups with which children are associated. Too often the concept of a "soldier" refers to a member of the regular armed forces. This definition thus encompasses national liberation movements, rebels, local militia, etc that are often lumped under the category of "armed group". Second, the concept of a "child soldier" includes a wider range of situations of "soldiering". A variety of reasons can be adduced to justify this approach but the main one is that this definition is the one used after an armed conflict, in a situation where organisations are trying to reintegrate these children into "normal" life as part of the DDR (Demobilization, Disarmament and Reintegration) Programmes.[46] Originally, such programmes only targeted children and, in fact, boys holding weapons. This gendered view of child soldiering was criticised and so a broader definition of a child soldier was espoused.

This definition is nonetheless alarming from an international humanitarian law perspective and especially targeting. If a girl recruited for sexual purposes or forced marriage is a child soldier, and the stress is put on the word "soldier", then it might be possible to argue that the girl is a combatant or a civilian taking a direct part in the hostilities and thus becomes a legitimate target of attack. Thankfully, that definition is not used in international humanitarian law. Cooks, porters or girls recruited for sexual purposes in an armed opposition group or the armed forces are not *per se* legitimate military targets under international humanitarian law. After all, the definition offered in the Cape Town Principles has been crafted for protection purposes and therefore adopts a generous definition of a child soldier.

45 *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Lubanga Dyilo*, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, Submitted in Application of Rule 103 of the Rules of Procedure and Evidence, Case No. ICC-01/04-01/06-1229-AnxA (EVD-CHM-00007), 18 March 2008, para 23.

46 See Integrated Disarmament, Demobilization and Reintegration Standards (IDDR Standards), November 2019, <https://www.unddr.org/>.

4. Becoming a Child Soldier

To understand the law relating to child soldiers, it is imperative to have an improved knowledge of what is called the push and pull factors and more generally the context in which children become child soldiers. The process of recruitment can be roughly divided into children who join voluntarily and those who are coerced into joining the armed forces or armed groups.

The reasons for voluntarily joining such forces and groups are multifarious, with several "push and pull" factors[47] explaining the children's decision. Push factors are circumstances that drive children away from home and their community and into joining the armed forces or armed groups. Pull factors, on the other hand, are circumstances that attract children to the armed forces and armed groups. To some degree, these factors, as mentioned in the *Lubanga*[48] and *Katanga*[49] cases, explain why children are attracted by, that is pulled into, or obliged to, that is pushed into, entering the armed forces or an armed opposition group. These factors can be divided into three categories: environmental factors, factors relating to the child's personal characteristics and histories, and trigger events.[50] Among the environmental factors are the community in which children grow. Often, the community will push children, once they have reached a certain age, to join the armed forces or an armed opposition group as it views it to be the children's duty to fight for its protection. Likewise, children are born and grow up in armed opposition groups.[51] Classic examples of factors relating to the children's personal characteristics and history are children wishing to avenge their family or children looking for opportunities to get out of hardship, poverty or violence at home and in the community. In other instances, children

47 For the origins of this expression, see Daya Somasundaram, Child Soldiers: Understanding the Context (2002) 324 *British Medical Journal* 1268.

48 S*ituation in the Democratic Republic of the Congo in the Case of the Prosecutor v Lubanga Dyilo* (*Lubanga Judgment*) (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/06, 14 March 2012, para 804.

49 *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Katanga* (*Katanga Judgment)* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/07, 7 March 2014, para 1053.

50 Alice Schmidt, Volunteer Child Soldiers as Reality: A Development Issue for Africa (2007) 2(1) *New School Economic Review* 49, 52. Based on the conflicts in Sierra Leone and Liberia, Murphy distinguishes four categories: coerced youth, revolutionary youth, delinquent youth and youth clientelism. William P Murphy, Military Patrimonialism and Child Soldier Clientalism in the Liberian and Sierra Leonean Civil Wars (2003) 46 *African Studies Review* 61, 64-66.

51 E.g., Tamil Tigers in Sri Lanka, the FARC (Revolutionary Armed Forces in Colombia) in Colombia.

have been left to their own devices, family members have died and there is no choice but to join the armed forces or an armed opposition group; it is a decision about survival. Triggering events, such as the killing of family members or fear to be abducted as other children in the community are kidnapped, also lead children to take up arms. It is important to understand these circumstances because the law distinguishes between children who voluntarily decide to enter the armed forces and armed groups and those who are coerced into joining such forces.

In contrast, many children are forcefully recruited. Conscription in its traditional meaning refers to the States prerogative to require its nationals to take part in some form of national service, in this case, military service.[52] By definition, conscription is compulsory and, thus, coerced. Failure to comply with conscription often leads to imprisonment. Most armed groups recruit children by force. [53] In some countries, the abduction of children is automatic.[54] For example, examining the recruitment process carried out by the Lords Resistance Army in Uganda, the ICC stressed that there is no evidence of any recruitment system based on voluntary enlistment. Witnesses also mentioned that they had no knowledge of anyone voluntarily joining the LRA.[55] Forced recruitment became endemic in Sierra Leone,[56] the Special Court for Sierra Leone observing that the RUF organisation, having no formal means of recruitment, used abductions as a method to increase its troops.[57] A method commonly used to forcefully recruit children is press-ganging, where armed militia groups […] roam the streets and public gathering places, including school gates, to round up individuals they come across.[58]

52 *Prosecutor v Brima, Kamara and Kanu* (*AFRC Judgment*) (Judgement) SCSL-2004-16-T, 20 June 2007, para 734.

53 Joseph N Madubuike-Ekwe, The International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts (2005) 11 *Annual Survey of International and Comparative Law* 29, 33.

54 See Jean-Claude Legrand and Fabrice Weissman, Les enfants soldats et usages de la violence au Mozambique (1995) 18 *Cultures et Conflits* 165.

55 *Situation in Uganda in the Case of the Prosecutor v Ongwen* (Trial Judgment) (*Ongwen Trial Judgment*) ICC-02/04-01/15, 4 February 2021, para 893.

56 Aubry Mitchell III, Sierra Leone: The Road to Childhood Ruination through Forced Recruitment of Child Soldiers and the Worlds Failure to Act (2003-04) 2 *Regent Journal of International Law* 81, 85-86.

57 *RUF Judgment* (n 30) para 1616.

58 Madubuike-Ekwe (n 55) 33; See also Michael Wessells, *Child Soldiers: From Violence to Protection* (Harvard University Press 2006) 41.

5. The Law Relating to the Recruitment of Child Soldiers

After presenting how the three aforementioned legal regimes prohibit the recruitment of child soldiers, this section examines the controversial issue of compulsory vs. voluntary recruitment.

5.1. Prohibition of the Recruitment of Child Soldiers

Under international humanitarian law, in an international armed conflict, it is prohibited to recruit children into the armed forces and, if recruitment is necessary, priority shall be given to children closer to the age of 18 years old.[59] The provision is phrased very oddly because it conveys the impression that it allows for the recruitment of children, irrespective of age. In contrast, in a non-international armed conflict, there is a strong prohibition on the recruitment of children under the age of 15 years of age.[60] Such a ban is to be welcomed because the majority of cases of child recruitment today take place within the context of non-international armed conflicts. Rule 136 of the ICRC Study unambiguously states that [c]hildren must not be recruited into armed forces or armed groups without specifying the age but its Commentary clearly enounces that

> [a]lthough there is not, as yet, a uniform practice with respect to the minimum age for recruitment, there is agreement that it should not be below 15 years of age. In addition, Additional Protocol I and the Convention on the Rights of the Child require that, in recruiting persons between 15 and 18, priority be given to the older ones.[61]

It should be stressed that this rule applies in international and non-international armed conflicts. Consequently, under international humanitarian law, it is prohibited to recruit children under the age of 15 years old.

In international human rights law, Article 38 UNCRC reiterates the rule enshrined in international humanitarian law. In contrast, the Optional Protocol paints a more complex legal picture. A difference must be made between recruitment into the armed forces and recruitment into armed opposition groups. There is an absolute prohibition of

59 API (n 11) Art 77.

60 APII (n 12) Art 4(3).

61 ICRC Study (n 8) Rule 136.

recruitment into armed groups of children under the age of 18 years old.[62] In relation to the recruitment of children into the armed forces, a further distinction is applied, that of compulsory and voluntary recruitment. Compulsory recruitment is prohibited for anyone under the age of 18.[63] Voluntary recruitment is nevertheless allowed under the age of 18 but the age of recruitment must be raised above 15 years of age which means a minimum of 16 years of age.[64] States are required to make a declaration stating the minimum age. Moreover, Article 3(3) OPAC provides a range of safeguards to ensure that the child makes an informed choice: States are required to ensure that voluntary recruitment is genuine and not coerced, the informed consent of the recruits parents or legal guardians has been obtained, the recruits are well informed about the duties involved in the military service and there is reliable proof of age.[65] One does not fail to notice that a distinction is made between voluntary and compulsory recruitment, an issue dealt with later in this paper.

Under international criminal law, recruitment into the armed forces or armed groups is a war crime both in an international[66] and non-international[67] armed conflict. The age specified in the ICC Statute is 15 years old, thus following international humanitarian law.

5.2. Terminology Issues: Compulsory vs. Voluntary Recruitment

A particular point that needs to be highlighted relates to the terminology used in these three legal regimes to describe the recruitment of child soldiers. Whilst international humanitarian law and international human rights law only use the concept of recruitment, the terms enlistment and conscription appear in international criminal law to cover two types of recruitment.[68] The word recruitment denotes the way children join the armed forces or groups and usually covers two types of actions: first, compulsory or obligatory conscription in the armed forces, usually once a child has reached a certain age (often called military service);

62 OPAC (n 10) Art 4.

63 *Ibid* Art 2.

64 *Ibid* Art 3.

65 *Ibid* Art 3.

66 ICC Statute (n 7) Art 8(2)(b)(xxvi).

67 *Ibid* Art 8(2)(e)(vii).

68 *Lubanga Judgment* (n 49) para 607; *RUF Judgment* (n 30) para 184.

second, enlistment which denotes the activity of entering in the armed forces, either on a voluntary or forced basis.[69] It predates enlistment and conscription[70] which are expressly mentioned in Articles 8(2)(b)(xxvi) and (e)(vii) ICC Statute. Both enlistment and conscription can happen at any time, peacetime or in times of armed conflict and relate to some form of a list. Enlistment in its basic understanding means to be put on a list. For example, individuals who wish to join the armed forces of their country, go to a recruitment centre and enrol on a list. In contrast, conscription is understood as the State putting individuals on a list because, under the law of that State, anyone above a certain age is required to undertake some military training. It should however be noted that conscription is not limited to recruitment into the armed forces as it also includes abductions and forced recruitment.[71] The Trial Chamber of the Special Court of Sierra Leone explained in the AFRC case that conscription should be interpreted as encompass[ing] acts of coercion, such as abductions and forced recruitment […] committed for the purpose of using them to participate actively in hostilities.[72] The Commentary to the Rome Statute makes clear, [c]onscription refers to the compulsory entry into the armed forces. Enlistment [...] refers to the generally voluntary act of joining armed forces by enrolment, typically on the list of a military body or by engagement indicating membership and incorporation in the forces.[73] Whereas enlistment is a voluntary decision, conscription is a compulsory, forcible act. Consequently, the distinguishing element is, as declared by the Special Court for Sierra Leone[74] and the International Criminal Court,[75] consent. Remarkably, a similar distinction appears in the Optional Protocol concerning recruitment into the armed forces.

69 See UNICEF amicus brief in the *Norman* Judgment (Fourth Defence Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-2003-08, 21 January 2004, 2 fn 1.

70 Gus Waschefort, Justice for Child Soldiers? The RUF Trial of the Special Court of Sierra Leone (2010) 1 *Journal of International Humanitarian Legal Studies* 189, 196.

71 *RUF Judgment* (n 30) paras 1695, 1700, 1707.

72 *AFRC Judgment* (n 53) para 734.

73 Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Oxford University Press 1999) 261. *See* also *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Lubanga Dyilo* (*Lubanga Confirmation of Charges)* (Confirmation of Charges) ICC-01/04-01/06, 29 January 1997, para 246; *Lubanga Judgment* (n 49) para 608; *Prosecutor v Ghankay Taylor* (*Taylor Judgement)* (Judgment) SCSL-03-01-T, 18 May 2012, para 442.

74 *Taylor Judgment* (n 74) para 442.

75 *Lubanga Judgment* (n 49) para 608; *Ongwen Trial Judgment* (n 56) para 2769. See also International Criminal Court, *Policy on Children,* November 2016, <https://www.icc-cpi.int/iccdocs/otp/20161115_otp_icc_policy-on-children_eng.pdf>.

Whilst it is already difficult to distinguish between a compulsory and a voluntary act in a so-called normal setting, this task is even more arduous when it relates to children in an armed conflict. When Lubanga was being prosecuted before the International Criminal Court, the United Nations Special Representative on Children in Armed Conflict sent a written statement in which she emphasised that the line between voluntary and forced recruitment is […] not only legally irrelevant but practically superficial in the context of children in armed conflict.[76] In this context, it is useful to remember the push and pull factors that lead to children joining the armed forces or armed groups. How can we with certainty assert that children have made an informed decision based on solid, credible information they have received? What kind of information is available? Let us take the example of the recruitment of the armed forces in the United Kingdom as it takes the ongoing armed conflict element out of the equation. The minimum age for enrolling is 16 years of age, albeit with parental consent.[77] Many of those who join come from areas where there is poverty and few/no chances to get a good education or land in a good job. On the other hand, the armed forces offer free housing, the possibility to get trained, etc. These are push and pull factors. Therefore, one might argue that joining is a voluntary act of children having weighed the advantages and disadvantages of staying at home against those of enrolling in the armed forces. Now, let us add another dimension. In the past few years, the armed forces have run a recruitment campaign on major television channels portraying the life of a soldier as one about sailing around the world, making lifetime friends, learning life skills, going on a fantastic adventure, etc.[78] Watching this ad, one might be even keener to enrol, blinded by the glory of what being a

76 Special Representative of the Secretary-General for Children and Armed Conflict, Written Submissions, Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v Lubanga Dyilo*, Submitted in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-1229-AnxA 18-03-2008 2/10 CB T, 17 March 2008.

77 See e.g., Child Rights International Network, *The British Armed Forces: Why Raising the Recruitment Age Would Benefit Everyone*, 2020, <https://static1.squarespace.com/static/5afadb22e17ba3eddf90c02f/t/5e7b339891874246598b86b5/1585132442746/2020-parliamentary-briefing-armed-forces-recruitment-age.pdf>; Child Rights International Network, *The British Armed Forces: Why Raising the Recruitment Age Would Benefit Everyone*, 2021, <https://static1.squarespace.com/static/5afadb22e17ba3eddf90c02f/t/6170543eab29b94e4790b727/1634751552057/CRIN-2021-briefing-armed-forces-recruitment-age.pdf>.

78 See e.g., Royal Navy: Made in the Royal Na–y - Born in (sic) Carslile <https://www.youtube.com/watch?v=12WqvFPulqw>; Made in the Royal Navy – Michaels Story <https://www.youtube.com/watch?v=KXTCzzden2o>.

soldier might be. There is no ad about the war in Afghanistan, soldiers being killed, coming back maimed, having mental health issues, and struggling to reintegrate into society. One might rightly query whether that decision to enrol is still taken voluntarily, that is considering all the available information to make an informed decision. If this distinction is already difficult to pinpoint in a situation where there is no ongoing armed conflict, one can only imagine the difficulty in a much more dire situation, especially when an armed conflict is raging. Suffice it to say that it is difficult to neatly distinguish between a compulsory and a voluntary act in relation to decisions taken by future child soldiers.

6. The Law Relating to the Training of Child Soldiers

The law relating to the training of child soldiers, be that in the armed forces or an armed opposition group, is non-existent. Indeed, although training is that essential link between the moment a child is recruited and is participating in an armed conflict, training is not specifically regulated by any legal regime. That being said, the State when training its armed forces is bound by international human rights law since it is obliged to ensure that the training does not violate the right to life or the right to be free from degrading, inhuman treatment and torture.[79]

Two questions ought to be answered: first, are child soldiers trained? Whilst one might imagine that the training such individuals receive depends on the tasks, the reality is that too often the training and the tasks do not correspond. Some children might receive no combat training at all and be sent to the frontline. Very few armed opposition groups provide training. Children are used because they are expendable in a country where most of the population is very young and, thus, considered an easy source of fighting force.[80] Moreover, child soldiers tend to be pliable;[81] they are scared and obey orders as they tend to be less likely to refuse to carry out a task. With no training whatsoever, they end up being deployed as what is sadly called cannon fodder.

79 Whether armed groups must abide by international human rights law is more contested.

80 Mary Jonasen, Child Soldiers in Chad (2009) 10(1) *Intersections* 309, 315; Ann Davison, Child Soldiers: No Longer a Minor Incident (2004) 12 *Willamette Journal of International Law and Dispute Resolution* 124, 137-138.

81 Katherine Fallah, Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes (2006) 14(1) *African Journal of International and Comparative Law* 83, 85.

If child soldiers are trained, the next question is: which skills are they taught? As illustrated in various cases brought before the ICC, the training ranges from learning the basics of spying to fully-fledged military training. Child soldiers might be trained to go into villages, walk around soldiers, listen to their conversations, and find out about future planned military operations.[82] The step up in terms of training is to learn about rules and behaviours relating to the military.[83] For example, they might be taught how to salute, how to behave and hold a weapon when a commander comes around. The next step is to be taught how to dissemble and reassemble as well as handle and use a weapon.[84] Limited shooting practice is provided too,[85] though sometimes no guns are fired.[86] Children are taught how to behave in combat, e.g., how to take cover, crouch or fight while standing up.[87] Eventually, full military training includes not only learning the use of weapons but also combat tactics and strategies.[88] Whilst training is sometimes carried out collectively, in some form of collective setting, training can also be done in a more individualised manner, whenever there is time to do so.[89]

Although training is not regulated – after all, if it would, it would signal that children can take part in the hostilities – it is imperative to understand it fully to appreciate the law relating to the participation of child soldiers in hostilities.

7. The Law Relating to the Participation of Child Soldiers in Hostilities

The law relating to the participation of children in armed conflicts is very well developed, namely because participation is, of course, deemed a more dangerous activity than recruitment. After setting out how

82 *Lubanga Judgment* (n 49) para 788.

83 *Ibid* para 802; *Katanga Judgment* (n 50) para 1072; *Ongwen Trial Judgment* (n 56) paras 2380-2381.

84 *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Katanga and Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07, 30 September 2008, para 255; *Ongwen Trial Judgment* (n 56) paras 2380-2394.

85 *Ongwen Trial Judgment* (n 56) paras 2380-2381.

86 *Ibid* para 2383.

87 *Ibid* para 2383.

88 *Lubanga Judgment* (n 49) paras 802-803; *Ongwen Trial Judgment* (n 56) para 2384.

89 For examples of the latter, see *Ongwen Trial Judgment* (n 56) paras 2383-2394.

the three legal regimes regulate the participation of child soldiers in hostilities, this section examines some of the most controversial issues linked to the terminology used in the law.

7.1. The Regulation of Participation of Child Soldiers in Hostilities

Under international humanitarian law and more specifically the Additional Protocols, the rules differ according to whether the conflict is of an international or non-international nature. In an international armed conflict, there is a prohibition of direct participation of children under the age of 15 years.[90] In a non-international armed conflict, the word direct does not appear[91] and so both direct and indirect participation of children under the age of 15 years are prohibited. This distinction in terminology prompted the International Committee of the Red Cross to comment that since [t]he intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, indirect participation in *international* armed conflict should also be ruled out.[92] Rule 137 of the ICRC Study that applies in both international and non-international armed conflicts does not use the word direct and simply states [c]hildren must not be allowed to take part in hostilities[93] and, in the Commentary, does not dwell much on the type or nature of the participation. It thus seems that under customary law any kind of participation of children under the age of 15 years in hostilities is prohibited.[94]

International human rights law provisions also qualify the participation of children in armed conflict. Article 38 UNCRC prohibits direct participation of children under the age of 15 years as it is mirroring Additional Protocol I. The Optional Protocol, in contrast, sets the age at 18 years, both for the armed forces and armed groups.[95] Remarkably, in relation to the armed forces, the adjective direct was added as States

90 API (n 11) Art 77.

91 APII (n 12) Art 4(3).

92 The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services. Sandoz *et al* (n 33) para 3187.

93 ICRC Study (n 8) Rule 137.

94 Whilst other rules mentioned in this Study have been criticised for not reflecting the current state of customary international law, the rules relating to child soldiers have not.

95 OPAC (n 10) Art 1 for the armed forces and Art 4 for the armed groups.

argued that they might want to use children in an armed conflict in supporting roles. Another interesting point is that the Optional Protocol uses the word use rather than participate in relation to armed groups only[96] whereas the expression direct part in hostilities is associated with armed forces.[97]

In international criminal law, the word actively rather than direct qualifies the participation of children in armed conflict and the verb use rather than participate is used. Under the ICC Statute, using children to participate actively in hostilities, both in an international[98] and in a non-international armed conflict,[99] is a war crime.

7.2. Terminology Issues

The lack of uniformity in the terminology employed concerning the participation of children in armed conflicts needs to be investigated in greater depth. First, a distinction seems to be made between participate (or take part in the case of Rule 138 of the ICRC Study) and use. Whilst the former appears in treaty and customary international humanitarian law as well as in Article 38 UNCRC – that is based on international humanitarian law – the latter features in the Optional Protocol (human rights law – though only in relation to armed groups) and international criminal law. The word use tends to show that children are tools or instruments in the hands of the armed forces and armed groups. In contrast, the word participate sounds more positive and tends to highlight the agency of children. However, on closer inspection, the ICC Statute spells out that it is a war crime to us[e] [children] to participate actively in hostilities,[100] and the Paris Commitments specifically uses the expression used them to participate actively in hostilities,[101] thereby muddling the terminology even further. Interestingly, the definition of a child soldier under the Cape

96 *Ibid* Article 4(1) and 4(2).

97 *Ibid* Article 1.

98 ICC Statute (n 7) Art 8(2)(b)(xxvi).

99 *Ibid* Art 8(2)(e)(vii).

100 *Ibid* Art 8(2)(b)(xxvi) and 8(2)(e)(vii) in the context of international and non-international armed conflict respectively.

101 *The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups*, Consolidated Version, <https://childrenandarmedconflict.un.org/publications/ParisCommitments_EN.pdf> para 6.

Town Principles does not refer to participation or use of children at all but considers them as part of any kind of regular or irregular armed force or armed group.[102]

Second, the difference between active, which is used in human rights law and international criminal law, and direct, which is used in international humanitarian law, needs further explanation. Whilst the word direct relating to child soldier is related to the one used with regard to direct participation in hostilities, a note of caution needs to be rung; in particular, the Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law[103] should never be used to determine whether a child is taking a direct part in the hostilities as one of the key aims of these guidelines is to clarify potential military targets.[104] According to the rather outdated official commentaries of the Additional Protocols, indirect participation would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies, etc.[105] These are classic examples of tasks carried out by civilians taking part in the hostilities and the Commentary underlines that [t]he intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently, they should not be required to perform such services.[106] Interestingly, international criminal law is the legal regime that assists in understanding how direct or active is to be understood. During the negotiation process of the ICC Statute, it was argued that the expression participate actively covers not only direct participation in combat activities but also military-related activities such as scouting, spying, sabotage, and the use of children as couriers.[107] Such a stance was repeated by the Court which explained that using a child does not refer to direct participation in combat activities only but also covers other military-related activities,[108]

102 Cape Town Principles (n 41).

103 ICRC DPH Guidance (n 31). For a definition of direct participation, see also Sandoz *et al* (n 33) para 1944.

104 Whether children fall within the definition of direct participants in hostilities depends on the types of activities they carry out. *Lubanga Judgment* (n 49) para 628.

105 Sandoz *et al* (n 33) para 3187.

106 *Ibid* para 3187.

107 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, UN Doc A/Conf.183/2/Add. 1, 14 April 1998, 25 fn 12.

108 *Lubanga Judgment* (n 49) paras 624-627.

such as guarding military objectives (e.g. military quarters), acting as bodyguards for military commanders,[109] banging jerry cans to confuse the government troops and targeted camp residents, to pretend that the group of attackers was actually larger and to simulate gun shots[110] or carry away the booty.[111] In other words, active is considered as broader than direct.[112] Contrastingly, activities unrelated to hostilities, such as food deliveries, are not considered as participation in hostilities.[113] That being said, the Special Court for Sierra Leone stressed that if a clear link between the [food-finding] mission and the hostilities can be demonstrated then the child is indeed being used to take an active part in the hostilities.[114] The reason for adopting such a broad approach under international criminal law is that it enlarges the scope of alleged perpetrators of the crime of using children in armed conflict. Although, as explained earlier, no direct link should be made between the use of direct in relation to child soldiers and the word direct in relation to civilians taking a direct part in the hostilities, the ICC pointed out

> [t]he decisive factor in deciding whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target.[115]

Such a link can be disquieting. Indeed, lets imagine the situation where children are sent to the frontline to deliver food to ensure that the fighters can continue the combat. Under the DPH Guidelines, these children would not qualify as civilians taking a direct part in the hostilities; yet, when arriving on the frontline, they are exposed to a real danger of becoming a potential target as the enemy might assume that they are part of the fighting forces. Thus, according to the *Lubanga* jurisprudence, the act of delivering food would lead to the children being classified as child soldiers.

Third, the obligation upon the armed forces in an international armed conflict and the armed forces and armed groups in a non-international armed conflict differ. Whilst in an international armed conflict the

109 *Lubanga Confirmation of Charges* (n 74) para 263.

110 *Ongwen Trial Judgment* (n 56) para 2435.

111 *Ibid* para 2437.

112 Waschefort (n 71) 193-195 and 197-198.

113 *Lubanga Confirmation of Charges* (n 74) para 262.

114 *Taylor Judgment* (n 74) para 1479.

115 *Lubanga Judgment* (n 49) para 820.

Parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities,[116] in a non-international armed conflict children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.[117] In an international armed conflict, parties are obliged to take all feasible measures, a wording that keeps open the possibility to recruit children younger than 15 years old. The Commentary to Additional Protocol I acknowledges that the proposals formulated by the ICRC that required States to undertake unconditional obligations were rejected and that even the phrasing take all necessary measures was dismissed.[118] In other words, States can accept the participation of children under the age of 15, should these children volunteer. The Commentary adds that should the State parties not be able to prevent the participation of such children in the armed conflict, they must comply with several obligations.[119] States have therefore expressly kept open the possibility to allow children to take part in hostilities, especially in wars of national liberation. The expression all feasible measures also covers situations whereby it is difficult to determine with certainty the age of individuals because their births are not officially registered. Overall, it is interesting to note that the standards that States must abide by in an international armed conflict are lower than that in a non-international armed conflict when generally international humanitarian law regulates behaviour in international armed conflicts in a more stringent and detailed manner than in non-international armed conflicts.

To summarise, all three legal regimes prohibit the participation of children, at least under the age of 15 years old, in hostilities. Yet, each of them employs different terminology and it is, therefore, important to first verify the status of ratification and then read the pertinent legal provisions together with the related jurisprudence. Undoubtedly, this patchwork of legal provisions is not ideal.

116 API (n 11) Art 77(2).

117 APII (n 12) Art 4(3).

118 Sandoz *et al* (n 33) para 3184.

119 *Ibid* paras 3185-3186.

8. Children as Perpetrators of Crimes

As a result of their participation in armed conflicts, child soldiers are likely to commit war crimes.[120] The question of their criminal liability and whether it is warranted to prosecute them is nevertheless the subject of intense discussions. From a strictly international criminal law viewpoint, the approach towards the prosecution of child soldiers depends on the statutes of the international and hybrid courts and tribunals. One must not also forget the possibility for national courts to prosecute child soldiers.

Article 26 ICC Statute excludes anyone under the age of 18 years old from its jurisdiction: The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.[121] This was nevertheless a policy-based decision.[122] The statutes of *ad hoc* tribunals, such as the ICTY and the ICTR,[123] do not indicate a minimum age for criminal responsibility international law. The youngest individuals prosecuted by the ICTY were Furundžija[124] and Erdemović,[125] both 23 years old at the time of the commission of the crimes.[126]

In contrast, hybrid tribunals are more likely to be given jurisdiction over crimes committed by children. For example, Article 7 of the Statute of the Special Court for Sierra Leone (SCSL) gives the court [j]urisdiction over persons of 15 years of age[127] and this interpretation was confirmed in the *Taylor* case as the Court asserted that

> [t]he Appeals Chamber adopts the term "physical actor" to describe the person or persons who physically perform(s) the *actus reus* of the crime. Children under the age of 15 years performed the *actus reus* of some of the crimes found by the

120 See, e.g., Michael Wessells, *Child Soldiers: From Violence to Protection* (Harvard University Press 2006); Fallah (n 82) 84-85.

121 ICC Statute (n 7) Art 26.

122 Otto Triffterer and Roger S Clark, Article 26: Exclusion of Jurisdiction over Persons under Eighteen, in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Beck) 499.

123 Statute of the International Criminal Tribunal for Rwanda 1994, 33 ILM 1598 (1994).

124 *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T, 10 December 1998, para 284.

125 *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T, 29 November 1996, para 111.

126 See discussion in Noëlle Quénivet, Does and Should International Law Prohibit the Prosecution of Children for War Crimes? (2017) 28(2) *European Journal of International Law* 433.

127 SCSL Statute (n 6) Art 7.

> Trial Chamber, including the most horrific of atrocities. Pursuant to Article 7(1) SCSL Statute, the Special Court does not have jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.[128]

As a policy, the Prosecution did not indict any person under the age of 18 years[129] all the more as Article 1(1) enjoined the Court to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law[130] and it was doubtful that child soldiers would fall into this category of individuals. The War Crimes Chamber in the Court of Bosnia-Herzegovina and the Special Panels for Serious Crimes in East Timor allow for the prosecution of individuals over the ages of 14[131] and 12[132] respectively[133] and the Special Panels prosecuted a child who had committed a crime aged 15 years old.[134]

As for domestic courts, their ability to prosecute child soldiers depends on the national age of criminal responsibility and they are not bound by a limit set out in international law.[135] In some States, it is as low as 8[136] and it can go up to 18. Nothing in international humanitarian law or international human rights law prevents a State from prosecuting these children; children have been prosecuted in the Democratic Republic

128 *Prosecutor v Ghankay Taylor* (Appeals Judgment) SCSL-03-01-A, 26 September 2013, fn 1108.

129 Special Court for Sierra Leone, Public Affairs Office, Special Court Prosecutor Says he Will not Prosecute Children, Press Release, 2 November 2002.

130 SCSL Statute (n 6) Art 1(1).

131 See Arts 1(8) and 8 of the Criminal Code of Bosnia Herzegovina, <http://www.sudbih.gov.ba/files/docs/zakoni/en/krivicni_zakon_3_03_-_eng.pdf>.

132 UN Transitional Administration in East Timor, Regulation 2001/25 on the Amendment of UNTAET Regulation no. 2000/11: On the Organization of Courts in East Timor and UNTAET Regulation No 2000/30: On the Transitional Rules of Criminal Procedure, UN Doc UNTAET/REG/2001/25, 14 September 2001, s. 45.1.

133 Neither the Statute of the Extraordinary Chambers in the Courts of Cambodia nor the Statute of the Special Tribunal for Lebanon make any reference to the age of the alleged perpetrator.

134 *Prosecutor v X,* East Timorese Public Administration, Dili District Court, Special Panel for Serious Crimes, Case No. 04/2002, 2 December 2002.

135 During the negotiations of API and APII, Brazil proposed to insert a provision with the aim of setting criminal responsibility at the age of 16. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Official Records of the Diplomatic Conference) (1974–1977), vol XV, at 66, paras 11-12 (amendments CDDH/III/325 for Additional Protocol I and CDDH/III/328 for Additional Protocol II).

136 Art 4 of Law No 3 of 1997 (on Juvenile Justice), as cited in International Centre for Missing & Exploited Children, *Indonesia,* Updated August 2017, <https://www.icmec.org/wp-content/uploads/2017/08/Indonesia-National-Legislation.pdf>.

of Congo,[137] Rwanda[138] and the USA.[139] There are, of course, some precautions to adopt because of the age of the individual when carrying out the trial.[140]

The real point of discussion is whether it is in the best interests of the child to be prosecuted. This concept which stems from Article 3 UNCRC obliges all State institutions and bodies to ensure that [i]n all actions concerning children […] the best interests of the child shall be a primary consideration.[141] Some argue that prosecution is in the best interest of the child as it enables children to understand the gravity of their acts though that does not mean that children would eventually be put in prison but could be lodged elsewhere with a view to reintegrating them into society in the long term. The situation is even more complicated when these former child soldiers are not children anymore but have grown into adults. On the other hand, the best interest of the child might be to bring them back into their society, community, and family. The topic is no doubt both sensitive and controversial, but international law does not prohibit States from prosecuting child soldiers for war crimes (and other crimes under international law).[142]

The topic of the prosecution of children has recently come to the fore with the sentencing of Dominic Ongwen by the International Criminal Court. To some extent, Ongwen is the poster boy child soldier: he was abducted by the Lords Resistance Army in Uganda at a young age, grew up in the armed opposition group and aged 15-16 started to train other

137 Amnesty International, *Democratic Republic of Congo: Massive Violations Kill Human Decency* (2000) 1; UN Special Representative of the Secretary-General for Children and Armed Conflict, Children and Justice during and in the Aftermath of Armed Conflict, September 2011, 40; Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Democratic Republic of Congo, UN Doc CRC/C/COD/CO/2, 10 February 2009, para 72.

138 Human Rights Watch, *Lasting Wounds: Consequences of Genocide and War for Rwandas Children* (2003) 18-19.

139 *United States v Khadr [Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction under Military Commission Act in Regard to Juvenile Crimes of a Child Soldier]*, D-022, 30 April 2008.

140 UNCRC (n 8) Art 40; UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), GA Res 44/33, 29 November 1985. See also Lima Declaration on Restorative Juvenile Justice, 4-7 November 2009, <http://www.unicef.org/tdad/limadeclarationenglish(1).doc>.

141 UNCRC (n 9) Art 3.

142 See discussion in Quénivet (n 127) 433.

children to become child soldiers.[143] He rose through the ranks and, in the end, became known for his brutal crimes.[144] During his trial, the defence team laid several times emphasis on his experience as a child soldier.[145] The Court in its judgment did not take this into account, stating that the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes.[146] This disconnection of discourse between the *Lubanga* case which highlighted the plight of child soldiers and the *Ongwen* case which set aside the fact that he had been one of these child soldiers is rather disturbing. Yet, a closer examination of the *Ongwen* case reveals that the Court was looking for evidence that Ongwen did not want to be part of these crimes and that he had genuinely tried to leave the armed opposition group.[147] The Court could not find such proof. On the contrary, it seemed that Ongwen, even after leaving the group, came back to it. Further, Ongwen appeared to be keen to move up the ranks and obey orders. Despite looking at these elements, the Court engages in a limited manner in a discussion on the harsh reality that child soldiers are faced with: the brutal punishments for failing to comply, the indoctrination, etc that it had described in earlier cases when it was judging individuals for the recruitment and use of child soldiers in armed conflict. A particular poignant, though fair, point made by the Court is that he was never forced to take brides and commit acts of sexual violence.[148] That being said, it is in the Sentencing that the Chamber makes the effort to delve into Ongwens past as learning about his past helps assess potential mitigating and aggravating factors: [a] s part of this balancing exercise, the Chamber deems that Dominic Ongwens personal history and circumstances of his upbringing, since his young age, in the LRA – in particular his abduction as a child, the interruption of his education, the killing of his parents, his socialisation

143 *Ongwen Trial Judgment* (n 56) paras 27-29.

144 Erin K Baines, Complex Political Perpetrators: Reflections on Dominic Ongwen (2009) 47(2) *Journal of Modern African Studies* 163.

145 *Situation in Uganda in the Case of The Prosecutor v Ongwen* (Public Redacted Version of Corrected Version of "Defence Closing Brief", Filed on 24 February 2020) ICC-02/04-01/15, 13 March 2020, paras 11-21.

146 *Ongwen Trial Judgment* (n 56) para 2672.

147 *Ibid* paras 2619-2642.

148 *Ibid* paras 2666-2667.

in the extremely violent environment of the LRA – must be given a certain weight in the determination of the length of each individual sentence.[149] The Court also dismissed defences such as duress and mental disease,[150] two points that the defence has raised on appeal.[151] It is thus argued that child soldiers are unlikely to be able to use the grounds for excluding responsibility listed in Article 31 of the ICC Statute[152] to avoid being punished for the crimes they have committed. More generally, grounds for excluding criminal responsibility have played a limited role in international criminal law because not only it seems difficult to justify or excuse international crimes[153] but also these grounds tend to be interpreted narrowly.[154] Child soldiers are thus more likely to gain some compassion and understanding at the sentencing stage where their past and individual circumstances are acknowledged.[155]

9. Protection Offered to Children in Armed Conflict

The legal framework relating to child soldiers does not only cover their acts of soldiering. They are also children for all intended purposes. Children are offered general and special protection under international humanitarian law and international human rights law.

First, all children in armed conflict benefit from the principle of non-adverse distinction which means that parties to a conflict are not allowed to discriminate on the basis of race, religion, political opinion, etc. This applies in an international conflict as specified in the Geneva

149 *Situation in Uganda in the Case of the Prosecutor v Ongwen* (Sentencing Judgment) ICC-02/04-01/15, 6 May 2021, para 87.

150 *Ongwen Trial Judgment* (n 56) paras 2450-2580 (in relation to mental disease or defect) and paras 2581-2672 (in relation to duress).

151 *Situation in Uganda in the Case of The Prosecutor v Ongwen* (Defence Notification of its Intent to Appeal the Trial Judgment) ICC-02/04-01/15, 21 May 2021, ground 47 (in relation to the defendant being a former child soldier), grounds 45, 46, 49 and 53 (in relation to duress) and grounds 36, 37, 41 and 43 (in relation to mental disease).

152 ICC Statute (n 7) Arts 31-33.

153 Caroline Fournet, When the Child Surpasses the Father – Admissible Defences in International Criminal Law (2008) 8 *International Criminal Law Review* 509, 510. For a discussion on why defences are important in international criminal law, see Windell Nortje and Noëlle Quénivet, *Child Soldiers and the Defence of Duress in International Criminal Law* (Palgrave 2019) 21-22.

154 Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 147.

155 ICC Statute (n 7) Arts 77-78 in combination with ICC Rules of Procedure and Evidence 2013, Art 145.

Conventions[156] and Additional Protocol I[157] and a non-international armed conflict as spelled out in Common Article 3 GCs and Additional Protocol II.[158] Moreover, Rule 88 of the ICRC Study reiterates the principle of non-discrimination in international and non-international armed conflicts.[159] Discrimination is only allowed provided it has some positive impact and this explains why international humanitarian law offers special protection to children.

Remarkably, the Geneva Conventions do not explicitly refer to the notion of special protection afforded to children even though the wide range of provisions relating to the protection of children, in particular in the Geneva Convention IV and, to some extent, in the Geneva Convention III. In contradistinction, Article 38 UNCRC expressly refers to the protection and care of children, stating that all feasible measures to ensure protection and care of children who are affected by armed conflict must be taken by States. The special protection is also expressly referred to in the ICRC Study as Rule 135 states that [c]hildren affected by armed conflict are entitled to special respect and protection[160] – this rule is applicable in international and non-international armed conflicts – and in the Additional Protocols. This simply shows that increasingly States have agreed that children must be protected owing to their age. In an international conflict, [c]hildren shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of the age or for any other reason[161] whilst in a non-international armed conflict, [c]hildren shall be provided with the care and aid they require.[162] As the Commentary to Article 4 AP II acknowledges, [c]hildren are particularly vulnerable; they require privileged treatment in comparison

156 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31 and Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949, 75 UNTS 85, Art 12; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (GCIV), 75 UNTS 287, Art 27(3).

157 API (n 11) Art 75.

158 APII (n 12) Art 4.

159 ICRC Study (n 8) Rule 88.

160 *Ibid* Rule 135.

161 API (n 11) Art 77(1).

162 APII (n 12) Art 4(3).

with the rest of the civilian population. Therefore, they enjoy specific legal protection.[163] Rather interestingly, Article 4(3)(d) AP II indicates that the special care and protection afforded to children also applies if they are taking part in hostilities though only if they are younger than 15 years of age. This means that child soldiers aged 15 years old and above do not benefit from the special protection under international humanitarian law, a position confirmed by the Commentary to Rule 135 of the ICRC Study which reiterates that 15 years old is the most common age limit to offer protective measures to children.[164]

Special protection is bestowed upon children who are either exposed to danger and/or deemed to be particularly vulnerable and thus require enhanced protection. Roughly, six situations call for special protective measures for children. First, the Geneva Conventions refer to evacuation and special zones. Second, children require assistance and care in the form of medical assistance, food, and shelter. Third, special protection is given to re-establishing childrens links to relatives and guardians. Unaccompanied children must be identified and, if possible, reunited with their families, a task undertaken by the ICRC Tracing Agency.[165] Unaccompanied children must also be taken care of. Fourth, children have special needs concerning education and culture, a point that is too often forgotten in times of armed conflict. Fifth, children must be protected when arrested, detained as prisoners of war under the Geneva Convention III or interned as civilians under the Geneva Convention IV. Last, international humanitarian law stipulates that children under the age of 18 years old are exempt from the death penalty.[166] This overview reveals that the special protection afforded to children covers a wide range of situations.

The special protection is nonetheless not accorded to all children under the age of 15 years in the same manner. International humanitarian law treaties do not identify a single age specification; rather, the relevant age of a child in each case is cast in the light of the interest

163 Sandoz *et al* (n 33) para 4544.

164 ICRC Study (n 8) Rule 135.

165 See ICRC Tracing Agency <https://www.icrc.org/en/document/central-tracing-agency-reuniting-families-since-1870>.

166 API (n 11) Art 77(5); ICRC Study (n 8) Commentary to Rule 135.

protected,[167] ranging from infants to children under 18 years of age.[168] As the Commentary to Rule 135 notes, [t]he Geneva Conventions and Additional Protocols use different age-limits with respect to different protective measures for children.[169] For example, children under the age of 15 years shall receive free passage of all consignments of essential foodstuff, clothing and tonics.[170] Children under twelve must be identified by wearing identity disks or by other means.[171] Special protection is thus dependent on age even though 15 years of age is the most commonly used age threshold, the reason for this being that during the drafting of the Geneva Conventions States maintained that children attained a certain maturity at that age.[172] It is interesting to realise that the Commentary to the Additional Protocol II asserts that it is important not to exclude the possibility that aid is required by children over the age of fifteen,[173] thereby encouraging States to afford special protection to children between the age of 15 and 18, if necessary.

As mentioned earlier, children are offered special protection when detained and this is even more important concerning child soldiers. A distinction must be made between international and non-international armed conflicts. In an international armed conflict, child soldiers can be possibly considered combatants, provided they fall within the aforementioned definitions. If they are deemed combatants, they become prisoners of war upon capture.[174] Although there are no provisions in the Geneva Convention III that specifically refer to children there are three legal provisions that refer to the age of the person: Article 16 refers to the privileged treatment accorded because of age,[175] Article 45 relates to the treatment of officers and non-officers with the regard due

167 See Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 285.

168 Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child, vol. 2: Comment by the International Committee of the Red Cross* (2007) 784.

169 ICRC Study (n 8) Rule 135.

170 GCIV (n 157) Art 23.

171 *Ibid* Art 24.

172 Sandoz *et al* (n 33) para 3179.

173 *Ibid* para 4550.

174 GCIII (n 3) Art 4.

175 *Ibid* Art 16.

to their age[176] and Article 49 which allows States to use prisoners of war for labour purposes refers to the fact that the type of work to be given to prisoners depends on the age of the person.[177] Whilst the tendency is to apply these provisions to older prisoners of war, there is no reason why they do not apply to child soldiers. Additional Protocol I adopts a much broader approach as it states that if children under the age of 15 years take part in hostilities and fall in the power of the adverse party, they benefit from special protection under Article 77 AP I whether or not they qualify as prisoners of war.[178] As the Commentary explains, it is rather unusual for a treaty to cater for a situation that is a violation of the treaty rules[179] but this was done purposely to ensure that child soldiers under the age of 15 years benefit from the special protection. Children, if interned as civilians, benefit from a range of provisions under the Geneva Convention IV, notably in relation to family,[180] schooling,[181] food[182] and playground,[183] and under Article 77(4) AP I which requires them to be held in separate quarters unless they are in family units.[184] In a non-international armed conflict, fewer legal provisions apply. Special protection is offered to children under the age of 15 years who have been captured,[185] a provision that expressly states that it applies to children taking part in hostilities.

It should be noted that children also benefit from special protection under international humanitarian law not because they are children but because they fall within other categories of protection. Protection is offered to the wounded and sick and, as odd as this may appear, newborn babies[186] and maternity cases[187] are covered by these provisions. Likewise, children are protected when they are with their mothers.

176 *Ibid* Art 45.

177 *Ibid* Art 49.

178 API (n 11) Art 77.

179 Sandoz *et al* (n 33) para 3192.

180 GCIV (n 157) Art 82.

181 *Ibid* Art 94.

182 *Ibid* Art 89

183 *Ibid*) Art 94.

184 API (n 11) Art 77(4).

185 APII (n 12) Art 4(3)(d).

186 API (n 11) Art 8.

187 *Ibid* Art 8.

In particular, reference is made to infants,[188] small children,[189] young children,[190] young people,[191] mothers of children under seven,[192] maternity cases,[193] nursing mothers[194] and mothers with infants and young children.[195] Such provisions do not apply to child soldiers as defined earlier since they have not been recruited or used to take part in hostilities. It is particularly interesting to note that the definition of a child soldier in the Cape Town Principles specifically excludes children who are part of armed forces or groups purely as family members,[196] e.g., as children of mothers who are child soldiers.

Accordingly, when determining whether a child soldier benefits from special protection, one needs to know the age of that child as there is no blanket protection offered to all children under a specific age.

10. Conclusion

Although the legal framework relating to child soldiers appears patchy because it stretches three different legal regimes – international human rights law, international humanitarian law and international criminal law – and, therefore, conveys the impression that it is inappropriate, it is remarkably comprehensive since it covers a wide range of situations and does so fairly adequately.

The patchwork could be replaced by a single legal instrument, covering all aspects of child soldiering. Still, as appealing as these calls might be, we should be wary of putting all the rules under a single umbrella, notably because each legal regime has a specific purpose. For example, it would be a grave mistake to interpret the words direct or active participation in the hostilities to determine whether individuals are child soldiers and

188 GCIII (n 3) Annex I: Model Agreement concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War, Part I, Section B, point 7; GCIV (n 157) Art 132(2); API (n 11) Art 76.

189 GCIII (n 3) Annex I: Model Agreement concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War, Part I, Section B, point 7.

190 GCIV (n 157) 132(2); APII (n 12) Art 6(4).

191 GCIV (n 157) Art 94(3).

192 GCIV (n 157) Arts 14(1), 38 and 50.

193 GCIV (n 157) Arts 17, 18, 20, 21, 22, 23, 91 and 127; API (n 11) Art 70(1).

194 GCIV (n 157) Art 89(5); API (n 11) Art 70(1).

195 GCIV (n 157) Art 132.

196 Cape Town Principles (n 41).

to assess whether a civilian becomes a legitimate military target in the same manner. The distinction between the three regimes needs to be maintained, though cross-pollination is certainly welcome, especially in relation to the protection offered to child soldiers (and children more generally).

Undoubtedly, there is room for improvement concerning the rules themselves. For example, the age of a child could be raised to 18 years of age under international humanitarian law. This would be more in line with human rights law and broaden the scope of application of the rules on recruitment and participation in hostilities. On the other hand, 16 years of age is a solution that is more likely to be accepted given that it is found in the Optional Protocol, and the division of views discussed during the ICC negotiations was whether 16 or 18 years should be the age of criminal liability.[197] Likewise, an agreement could be had on not prosecuting any person under a certain age. Whilst we allow domestic courts to continue to apply national standards concerning the age of criminal responsibility though encourage them to raise the age, we might demand that no international or hybrid tribunal set up in the future prosecutes individuals under the age of 18 years.

197 Preparatory Committee on the Establishment of an International Criminal Court, Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc A/AC.249/1998/L.13 (1998), n 234 relating to Art 68(A).

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Chapter II: International Legal Protection of Cultural Heritage in Armed Conflict

Riccardo Pavoni[1]

1. Introduction

The recent statement by former United States President Donald Trump,[2] on his readiness to strike at 52 sites in Iran – some of them of primary cultural importance – in response to possible attacks against United States targets following the killing of General Soleimani, has been met with outrage by many international observers, while the Pentagon hastened to distance itself from "its" President.[3] As noted later, the implementation of Trump's statement *tel quel* would undoubtedly constitute a serious international wrong, consisting in the violation of the rules of international humanitarian law (also known as the law of armed conflict or *jus in bello*) which prohibit reprisals against cultural property and, in any case, acts of war against such property, provided that it has not become a military objective.

In general, this episode is extremely indicative of the importance that the international community now attaches to the safeguarding of cultural property in times of armed conflict, in particular that property of outstanding universal value that should be considered part of the world cultural heritage, such as the many Iranian sites that provide testimony of some of the most ancient civilizations.

This contemporary legal consciousness is the result of a long evolutionary process that has spanned the centuries, significantly humanizing the law

1 Full Professor of International and European Law, Department of Law, University of Siena, Italy. This work builds upon and updates an article previously published in Studi senesi, Vol. 132, 2020, p. 335 ff. All websites last accessed on 31 May 2023.

2 See *President Repeats Threat to Target Cultural Sites*, *New York Times*, 6 January 2020.

3 See *Pentagon Rules Out Strikes on Antiquities*, *New York Times*, 7 January 2020. For a fine summary of the legal issues at stake in these events, see N. Ronzitti, *Lo scontro Usa-Iran alla prova del diritto internazionale*, *Affari internazionali*, 13 January 2020, <www.affarinternazionali.it/2020/01/scontro-usa-iran-diritto-internazionale>.

of armed conflict in its entirety, including the rules protecting cultural property. Thus, the ancient doctrine of the destruction and plundering of that property as an integral and fully legitimate aspect of war has given way to the current legal framework which – with a few narrow exceptions – bans such conduct.

For various reasons, however, the present topic has never been as debated as in the past thirty years. First of all, since the wars in the former Yugoslavia in the 1990s, there has been and continues to be a constant proliferation of armed conflicts with a strong ethnic and cultural connotation, where the violence unleashed against monuments, churches, museums and works of art does not merely and principally amount to collateral damage, but is rather a key element of a central aim of military activities, namely the annihilation of the cultural and religious identity of the enemy, regardless of whether that property fulfils the notion of a military objective.[4] Expressions such as "cultural terrorism" and "ethnic-cultural cleansing" have become established in common use, with reference to, for instance, the damage caused by terrorist groups to the mausoleums of the legendary site of Timbuktu in Mali as well as to Syrian heritage of extraordinary importance such as Palmyra and the historic center of Aleppo, or the destruction of dozens of mosques and the bombing of Dubrovnik by the armies (mainly the Serbian army) engaged in the Yugoslav wars.

Secondly, the nature of contemporary armed conflicts has changed profoundly, as the examples now mentioned emblematically recall. Today, in the face of a small number of "classic" international wars between States, the vast majority of conflicts have a non-international character, a protean category encompassing all conflicts involving non-state armed groups as autonomous belligerent parties, including – in addition to the traditional insurgent movements with a definite territorial connection – global terrorist networks, such as ISIS or Al Qaeda. This has led many scholars to question the possibility of applying the well-established rules for the protection of cultural heritage in the

4 See eg K. Schmalenbach, *Ideological Warfare against Cultural Property: UN Strategies and Dilemmas*, *Max Planck Yearbook of United Nations Law*, Vol. 19, 2015, p. 3 ff. On the tragic iconoclastic destruction of the giant Buddha statues in Bamiyan (Afghanistan) by the Taliban in March 2001, although not in the context of an armed conflict, see F. Francioni and F. Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, *European Journal of Int. Law,* 2003, p. 619 ff.

event of international conflicts to non-international conflicts, which implies, above all, determining whether and to what extent these rules can be considered binding on non-state actors.[5]

Thirdly, the present topic is of pressing interest because never before has it been so clear that war is one of the main causes of illicit trafficking in cultural goods and that the profits generated by such trafficking contribute significantly to the financing of the war effort, in particular, of terrorist networks and other non-state armed factions (think only of the systematic looting, resulting in sales in international markets, of Syrian and Iraqi archaeological artefacts by ISIS). In order to meet this crucial challenge for the preservation of cultural heritage, effective measures are clearly needed to impose – through States – obligations and sanctions on all actors in the art market who come into contact with looted objects from areas of armed conflict. Fortunately, also in this area we have recently witnessed a significant reaction by the international community represented at the highest political level, namely by the UN Security Council.

The following sections will first summarize the existing legal framework for the protection of cultural property in times of war and the main problems associated with it. That framework will then be revisited in light of the various developments arising from the normative and judicial practice which has emerged, to an unprecedented extent, in the context of recent cultural crises and tragedies caused by armed conflict.

2. Treaty Obligations Concerning the Protection of Cultural Property in Armed Conflict

The regime for the protection of cultural property in armed conflict has evolved mainly through the progressive adoption and modernization of treaty rules. As a matter of fact, the pertinent treaties are the primordial and most visible source of international law applicable in this field. However, the traditional limitations to the binding effect of treaty rules and the relentless contemporary developments in this area call for an inquiry into whether customary international norms for the protection of cultural heritage in times of war have emerged and are

5 See *ex multis*, K. Hausler, *Culture under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups*, *Santander Art and Culture Law Review*, 2015, No. 2, p. 117 ff.

therefore mandatory for all international law subjects irrespective of their consent. Prior to this, it is necessary to briefly illustrate the relevant treaty framework.

The most important treaty is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Historically, it was the first treaty with a universal vocation entirely devoted to this subject matter. Its enduring relevance is shown by the constant, albeit slow, process of ratification and accession associated therewith. There are currently 133 States Parties to the Hague Convention, that is, just under three-quarters of existing States. Some of the most significant ratifications have taken place recently, namely those of the United States in 2008 and the United Kingdom in 2017.[6] As a result, all permanent members of the UN Security Council – and all major military powers – are bound by the Convention.

The Hague Convention, like the overall treaty system in question, raises three fundamental problems. The first relates to the scope of the obligations laid down therein, the second to the identification of cultural property of the highest importance,[7] worthy as such of special protection, and the third to the availability of effective mechanisms for the enforcement of obligations and the implementation of the responsibility of the perpetrators of violations.

The central rule of the Convention, and the only one apparently applicable in non-international armed conflicts,[8] is Article 4 on respect for cultural property. This respect translates into the following four obligations on States Parties involved in an armed conflict: (i) to refrain from acts of hostility against cultural property (prohibition of acts of hostility); (ii) to refrain from any use of cultural property and surrounding areas for purposes that expose it to destruction or damage by war (prohibition

6 If only symbolically, the Holy See's accession to the Convention (in 1958) is particularly worthy of note. The last ratification in chronological order (dated 2018) is currently that of Ireland.

7 The authoritative general definition of "cultural property" in the Convention refers to: (i) movable and immovable property of great importance to the cultural heritage of every people, such as monuments, archaeological sites, works of art; (ii) buildings whose main and effective purpose is to preserve or exhibit movable cultural property, such as museums and refuges intended to shelter property endangered by an impending or ongoing armed conflict; (iii) monumental centers, such as historic city centers, Art. 1, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention 1954).

8 Art. 19, para. 1, Hague Convention 1954.

of use for military purposes); (iii) to prohibit, prevent and stop theft and looting of cultural property, as well as acts of vandalism against it; (iv) to refrain from reprisals against cultural property. Unlike the latter two obligations, the prohibition of acts of hostility and the prohibition of use for military purposes are not of an absolute nature, since they may be derogated from in cases of imperative military necessity.[9] The problem is that the notion of military necessity is in no way defined or objectively circumscribed, thus lending itself to being abused as a clause capable of justifying any offence against cultural property on the basis of subjective assessments of military convenience.

Despite appearances, the situation remains essentially unchanged even for cultural property subject to special protection under Chapter II of the Convention, i.e., that property of very great importance which – provided certain requirements are met – can be entered in an International Register maintained by the Director-General of UNESCO. Apart from the fact that this Register has substantially proved to be a failure,[10] the so-called "immunity" of the property included therein translates in reality into the usual prohibitions of acts of hostility and use for military purposes, which here can be derogated from in the presence of "exceptional cases of unavoidable military necessity".[11]

Finally, the Convention is very lenient[12] about issues of enforcement and responsibility, in particular with regard to the mechanism commonly considered to be the most effective for the prosecution and punishment of war crimes and similar serious violations of international humanitarian law, namely the individual criminal liability of the perpetrators of such offences.

In 1999, in the wake of the indignation caused by the cultural destruction during the Yugoslav wars, the Second Protocol to the 1954 Hague Convention was adopted with a view to overcoming the

9 Art. 4, para. 2, Hague Convention 1954.

10 In addition to the Vatican City (since 1960), the Registry includes only nine more monumental centers, that is, nine pre-Hispanic sites registered in 2015 at Mexico"s request. See <https://en.unesco.org/sites/default/files/Register2015EN.pdf>.

11 Art. 11, para. 2, Hague Convention 1954.

12 See Art. 28, Hague Convention 1954, which envisages the criminal or disciplinary responsibility of perpetrators of violations of the Convention, while not providing clear hypotheses of universal jurisdiction over the same violations.

foregoing weaknesses of the treaty framework in question. The 1999 Second Protocol is currently far from achieving a satisfactory level of ratifications and accessions.[13] Most probably, this is largely due to the fact that it is a particularly advanced and ambitious humanitarian law instrument, starting with its full applicability to non-international armed conflicts occurring within the territory of one of the States Parties.[14]

The Second Protocol aims to overcome the weaknesses of the Hague Convention, basically acting on three fronts. First, it clarifies the notion of military necessity by anchoring it to that of a military objective. Thus, the prohibition of acts of hostility against cultural property can only be derogated on that basis if that property has become a military objective by virtue of its function and there are no feasible alternatives for achieving the military advantage expected from the conduct in question.[15] Generally, "military objective" means an object which, by its nature, location, purpose or use, makes an effective contribution to military action and whose destruction offers a definite military advantage.[16] It is evident how, in this context, the adoption of the novel and ambiguous criterion of the function of (cultural) property arises from harsh negotiations and leaves open the possibility that, according to the Second Protocol, such property can be attacked, not only because of its actual use for military purposes, but also because of considerations tied to its nature, its purpose and even its strategic location. This is, for instance, Canada's understanding as reflected in an interpretative declaration made at the time of accession to the Protocol. Moreover, also the prohibition of use of cultural property for military purposes continues to be generally derogable in the name

13 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Second Protocol 1999). As of 29 August 2022, there are 86 States Parties to the Protocol. The last ratification in chronological order (dated 2022) is currently that of Iraq. The most significant accessions certainly correspond to those recently deposited by France and the United Kingdom (in March and September 2017, respectively), being the only ones so far made by permanent members of the Security Council. In general, many key States from a military and cultural point of view – just think of India, Israel, and Turkey – have not become States Parties to the Second Protocol for the time being.

14 Art. 22, para. 1, Second Protocol 1999. To refer to contemporary events, the Second Protocol is thus applicable to the conflict in Libya (which has been a party thereto since 2001), but not to the war in Syria (non-party State), obviously to the extent that such conflicts are to be considered as non-international in nature.

15 Art. 6(a), Second Protocol 1999.

16 Art. 1(f), Second Protocol 1999; Art. 52, para. 2, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

of military necessity, although only when such use constitutes the only option available to achieve a given military advantage.[17]

Coming to the second salient aspect of the 1999 Protocol, the latter marks clear progress in relation to the enhanced protection regime for cultural property introduced therein and intended to replace the unsuccessful special protection regime of the 1954 Convention. The Protocol establishes an intergovernmental Committee of experts to decide on applications for inclusion of property of the "greatest importance for humanity"[18] in a List of Cultural Property under Enhanced Protection, a system largely modelled on the World Heritage List envisaged by the 1972 World Heritage Convention. This Enhanced Protection List currently consists of 17 sites located in Armenia, Azerbaijan, Belgium, Cambodia, Cyprus, Czech Republic, Georgia, Italy, Lithuania, and Mali.[19]

The protection afforded to these sites is – indeed – enhanced as compared to that concerning cultural property in general. A site on this List can be the object of an armed attack only if it has become, by virtue of its use, a military objective.[20] In essence, the ambiguity due to the term "function" as the criterion capable of making cultural property – generally protected – into a military objective has been removed here. In other words, the notion of military objective is retained in the most appropriate and favourable way for the protection of cultural property: provided it is included in the Enhanced Protection List, such property constitutes a military objective, thus implicitly bringing into play the doctrine of military necessity, only when it is actually used for military purposes, for example as a weapons and ammunition store or as a refuge for combatants.[21] A sort of synallagmatic or reciprocal relationship is thereby established between the obligation

17 Art. 6(b), Second Protocol 1999.

18 Art. 10(a), Second Protocol 1999.

19 International List of Cultural Property under Enhanced Protection, see <https://en.unesco.org/sites/default/files/Enhanced-Protection-List-2019_Eng_04.pdf>.

20 Art. 13, para. 1(b), Second Protocol 1999.

21 It should be noted that another interpretative declaration made by Canada at the time of accession is intended to frustrate this achievement of the Protocol. According to the declaration, any cultural property (ie, even if it is subject to enhanced protection) that has become a military objective (without any specification of criteria) can be attacked. A similar declaration has been attached by France to its instrument of accession. However, the French declaration contains the significant clarification that the cultural property in question must constitute a military objective "within the meaning of the Protocol". The declarations and reservations made by States upon becoming parties to the Second Protocol are available at <https://en.unesco.org/node/297970/#edit-sort-by>.

not to launch attacks against cultural property and the obligation not to use it for military purposes: a violation of the former obligation is justifiable only if and when the latter obligation is violated.[22] At the same time, it is clear that the effectiveness of such a scheme is closely linked to the strictness of the obligations relating to the use of cultural property in the event of armed conflict. Accordingly, one of the greatest merits[23] of the Second Protocol is that it lays down an absolute ban on the use of property under enhanced protection for military purposes. There is no provision in the Protocol that justifies, by virtue of military necessity or otherwise, exceptions to this prohibition.

The third major innovation resulting from the Second Protocol concerns the formulation of highly advanced rules on individual criminal responsibility for breaches of its obligations. A whole chapter of the Protocol is devoted to this crucial aspect.[24] States Parties are required[25] to provide in their legislation for the following criminal offences/war crimes,[26] accompanied by appropriate penalties: (i) attack against cultural property under enhanced protection; (ii) use of cultural property under enhanced protection or its surroundings in support of military action; (iii) extensive destruction or appropriation of generally protected cultural property; (iv) attack against generally protected cultural property; (v) theft, pillage or misappropriation of generally protected cultural property, as well as acts of vandalism against it. Although this list may appear redundant, in reality a different regime of jurisdiction is linked to the various criminal offences. As a matter of fact, the principle of conditional universal criminal jurisdiction concerns only the three cases under (i), (ii) and (iii), two of which – attack and use for military purposes – significantly relate to property under enhanced protection. Crimes against generally protected property are subject to this principle only if they consist in its extensive destruction or appropriation. In these three cases, the judicial

22 A. Gioia, *La protezione dei beni culturali nei conflitti armati*, in *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa* del *patrimonio comune della cultura* (F. Francioni, A. Del Vecchio, and P. De Caterini eds.), Milan, 2000, p. 71 ff., pp. 84-86.

23 A. Gioia, *The Development of International Law Relating to the Protection of Cultural Property in the Event of Armed Conflict: The Second Protocol to the 1954 Hague Convention*, *Italian Yearbook of Int. Law*, Vol. XI, 2001, p. 25 ff., p. 45.

24 Chapter 4, Articles 15-21, Second Protocol 1999.

25 Art. 15, para. 2, Second Protocol 1999.

26 Art. 15, para. 1, Second Protocol 1999.

authorities of the States Parties must prosecute and punish perpetrators who are present in their territory, irrespective of their nationality and the place where the crime was committed.[27] In the other two cases under (iv) and (v) the exercise of criminal jurisdiction is anchored to the classic criteria of territoriality and active nationality, i.e. the crime must have been committed in the territory of the forum State or by a national of that State.[28] Although, in some respects, the discipline in question goes beyond what is established by the most important instruments of international criminal law,[29] it is not free from ambiguities and controversial aspects. Bearing in mind what has been pointed out above, it is at least worth emphasizing that the prohibition on the use of cultural property for military purposes is not criminalized,[30] except by reference to that tiny portion of property that enjoys enhanced protection.

A different historical trajectory has concerned the safeguarding of cultural property against thefts and illicit exports originating from war, especially from situations of military occupation of the territory of one State by another. The protection offered in this area by treaty rules is partial and unsatisfactory. This is not due to the absence of primary rules prohibiting theft, looting and illegal transactions in these contexts. As seen, a general prohibition in this sense is laid down in Article 4(3) of the 1954 Hague Convention. This provision is now reinforced by the 1999 Second Protocol, which sets out precise obligations on the occupying States to prevent and prohibit illicit exports and transfers of property, as well as archaeological excavations and changes of use of cultural property in the occupied territory.[31] However, these rules appear to be incomplete, since they are not accompanied by correlative and incisive obligations of restitution of cultural property which has been illicitly trafficked in time of war.

The problem of restitution was so controversial at the time of conclusion of the Hague Convention that it was addressed in a separate Protocol – of the same date – to the Convention, which was subject to an *ad hoc*

27 Art. 16, para. 1(c), Second Protocol 1999.

28 Art. 16, para. 1(a) and (b), Second Protocol 1999.

29 Suffice it to note that the International Criminal Court (ICC) cannot exercise jurisdiction on a universal basis, except when a situation concerning the commission of international crimes is submitted to the ICC Prosecutor by the UN Security Council, Art. 12(2), Rome Statute of the International Criminal Court (Rome Statute 1998).

30 See Art. 21, Second Protocol 1999.

31 Art. 9, Second Protocol 1999.

ratification process. For one thing, this has resulted in a lower number of States Parties to the 1954 Protocol than to the Convention.[32] Basically, the Protocol, after laying down a general duty on the occupying State to prevent the exportation of cultural property from the occupied territory,[33] establishes an automatic obligation to return to the State of origin property that has nevertheless left that territory.[34] In a particularly questionable and unrealistic way, the Protocol then obliges the former occupying State, not the State of origin and not necessarily the State in which the property in question is located, to compensate any *bona fide* holders of the returned property.[35] In short, the difficult conciliation of these rules with the private law systems of many States, the widespread perception of their non self-executing nature and the scarce relevance of the Protocol in contentious cases, explain the marginal impact of this instrument on the evolution of the legal framework concerning the fight against illicit trafficking of cultural goods in times of war.[36]

3. Protection of Cultural Heritage in Times of War between Customary Law, International Crimes and Security Council Resolutions

3.1 Destruction and Use for Military Purposes

It is certainly worth revisiting the state of customary law on the protection of cultural property in times of war in light of the multiple developments in recent practice. Moreover, as has already emerged from previous considerations, the principle of consent, which permeates the

32 Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (First Protocol 1954). As of 29 August 2022, there are 110 States Parties to the Protocol. An important example of a non-Party State is offered by the United States, which, when ratifying the Hague Convention in 2008, deliberately discarded a similar decision with respect to the 1954 Protocol.

33 Para. 1, First Protocol 1954.

34 Para. 3, First Protocol 1954.

35 Para. 4, First Protocol 1954.

36 For the sake of completeness, it should be recalled that the much more important and more widely ratified 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is commonly considered applicable in times of war (see Art. 11). However, in the event of incompatibility, the 1954 Protocol should take precedence over that Convention as a *lex specialis*. Moreover, the obligation to return cultural objects under the same Convention applies only to those stolen from a museum or a religious or secular public monument (Art. 7(b)).

law of treaties, is likely to significantly limit the effectiveness of the treaty regimes illustrated above, in particular by requiring their ratification or equivalent acts in order to become binding, or by allowing reservations or denunciations.[37]

In addition, treaty law offers a fragile legal basis for requiring non-state actors involved in armed conflicts to comply with the rules on the protection of cultural property. Scholarship is divided on this point and various manifestations of practice militate in favour of excluding that, especially by virtue of the principle *pacta tertiis neque nocent neque prosunt*, treaty rules may as such bind non-state actors. On the contrary, customary law, for which the principle of consent is not relevant,[38] is considered almost unanimously applicable to such actors, especially when they effectively control portions of territory, as has long been the case with ISIS. At any rate, the importance of this problem in our context is at least mitigated by the rules of international criminal law which provide for cases of individual responsibility for war crimes and crimes against humanity concerning offences against cultural heritage. Such crimes are undoubtedly punishable (also) when committed by non-state armed groups.

The core of the relevant customary law is the prohibition to intentionally attack and/or destroy cultural property in times of international or non-international armed conflict, provided that such property has not become, by virtue of its use, a military objective. Various elements of the treaty practice examined above militate in favour of this conclusion. Article 27 of the Regulations concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 should be added. That norm requires the belligerent States to spare, as far as possible, buildings dedicated to religion, the arts and sciences, and historical monuments, provided they are not used for military purposes. Moreover, Article 56 of the Regulations prohibits, in situations of war occupation, the intentional destruction or damage of institutions dedicated to religion, the arts and sciences, as well as historical monuments and works of art. The latter rule was deemed to correspond to customary law by the Eritrea-Ethiopia Claims Commission, which was thus able to affirm,

37 Art. 37, Hague Convention 1954; Art. 45, Second Protocol 1999; para. 13, First Protocol 1954.

38 At least and certainly not to the same extent with which it operates under treaty law.

in a situation denoted by the absence of military necessity, Ethiopia's responsibility for the felling of, and consequent serious damage to, the ancient Stela of Matara.[39] Neither of the two States in question had at the time ratified the 1954 Hague Convention, which, as we know, clearly prohibits such conduct.

The rules of international criminal law which identify the destruction of, and damage to, cultural property as an autonomous war crime – the commission of which engages both State and, particularly, individual responsibility – also militate in favour of the customary norm under discussion. In addition to the penal chapter of the Second Protocol examined above, it is necessary to recall Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia, which essentially reproduces the aforementioned Article 56 of the 1907 Hague Regulations, and above all the provisions of the Statute of the International Criminal Court (ICC) which in identical terms punish, in international[40] and non-international[41] conflicts, intentional attacks against historic monuments and buildings dedicated to religion, art and science, provided they are not military objectives.

Crucially, these rules have given rise to an especially relevant international judicial practice. In the jurisprudence of the Tribunal for the former Yugoslavia, the most important case – if only because it relates to a site on the UNESCO World Heritage List since 1979 – concerned the bombing, with related damage and destruction, of the Old City of Dubrovnik by the Serbian army in December 1991. As a result, two officers of that army were sentenced to imprisonment for the crime of destruction and wilful damage done to cultural property under Article 3(d) of the Statute.[42] Particularly, the judgment at first instance in the *Strugar* case confirms in full the characterization of the customary norm in question as set out above. The Trial Chamber, after having ruled out that military necessity could justify the attack on the Old

39 Eritrea-Ethiopia Claims Commission, *Central Front*, *Eritrea's Claims 2, 4, 6, 7, 8 and 22*, Partial Award of 28 April 2004, para. 113.

40 Art. 8, para. 2(b)(ix), Rome Statute 1998.

41 Art. 8, para. 2(e)(iv), Rome Statute 1998.

42 *Prosecutor v. Jokić*, Judgment of 18 March 2004 (Trial Chamber), Judgment of 30 August 2005 (Appeals Chamber); *Prosecutor v. Strugar*, Judgment of 31 January 2005 (Trial Chamber), Judgment of 17 July 2008 (Appeals Chamber).

City,[43] nevertheless wished to stress that the crime in question cannot be committed when cultural property is used for military purposes. In other words, military necessity arises when the property has become a military objective and this only occurs when it is used for military purposes, not also by virtue of other criteria, in particular, that of the location of the property itself.[44]

Another emblematic case, only recently completed by the Tribunal for the former Yugoslavia, involved the bombing by Bosnian Croat troops and the subsequent collapse in November 1993 of the Old Bridge of Mostar, a spectacular 16th century Ottoman bridge. The Tribunal, in accordance with the Prosecutor's submissions, questionably examined this subject-matter in light of the crime of wanton destruction of cities, towns or villages not justified by military necessity,[45] rather than with reference to the *lex specialis* represented by the crime of destruction of cultural property. According to the Trial Chamber's judgment, even if the destruction of the Mostar Bridge was justified by military necessity, it had a disproportionate impact – compared to the expected military advantage – on the Muslim civilian population of Mostar, with the resulting conviction of some defendants for the crime in question.[46] This ruling and related convictions were overturned on appeal on the assumption that, in the presence of military necessity, a constitutive element of the crime was lacking.[47]

Although this decision may formally appear to be correct, it did not spare the majority of the Appeals Chamber from the lashing criticism of the dissenting Judge Pocar, who pointed out the absence of any consideration of the cultural dimension of the case – concerning a monument of immense historical, cultural and symbolic value – and of the corresponding international legal framework, starting from the 1954 Hague Convention.[48] He also stigmatized the substantive failure to take the general principle of proportionality into account on the part

43 *Strugar* (n 41), paras. 193-194, 214, 279-280, 288, 309.

44 Ibid., para. 310. See also ibid., para. 295.

45 Art. 3(b), Statute of the International Criminal Tribunal for the Former Yugoslavia.

46 *Prosecutor v. Prlić et al.*, Judgment of 29 May 2013, Vol. 3, para. 1584.

47 *Prosecutor v. Prlić et al.*, Judgment of 29 November 2017, Vol. 1, para. 411.

48 Ibid., Dissenting Opinions of Judge Fausto Pocar, Vol. 3, paras. 12-17.

of the majority.[49] The latter could have corrected the Trial Chamber judgment on this point, thus making it clear that a proportionality test is now inherent in the notion of military necessity and that the expected military advantage must be balanced, if not with the impact on the civilian population, at least with the extent of the damage – most plausibly excessive – caused to the cultural property in question and other civilian objects.

The case of the Mostar Bridge can thus be regarded as a setback to the otherwise progressive jurisprudence of the Tribunal for the former Yugoslavia on the safeguarding of cultural property in times of war. Nevertheless, it is telling that, even on this occasion, military necessity was considered as a clause justifying war violence against that property only because, objectively, the Old Bridge had become a military objective by virtue of its actual use as a means of communication and military supply by the troops of Bosnia and Herzegovina.[50]

For its part, the ICC issued its first conviction in 2016 for the crime of intentional attack against cultural property under the provisions of the Rome Statute mentioned above. In the *Al Mahdi* judgment,[51] a member of a so-called "Islamic" extremist group linked to Al Qaeda was held responsible for the destruction and serious damage, between May and June 2012, of 10 religious buildings – nine mausoleums and a mosque – in Timbuktu (Mali), a UNESCO World Heritage site since 1988. This case is highly significant for the consolidation of the legal framework for the protection of cultural property in times of war. Crucially, it concerned crimes committed in the context of a non-international armed conflict by a non-state armed group.[52] The decision did not focus on the application of the notion of military necessity in the field of the protection of cultural property, but merely noted that the mausoleums and the mosque were not military objectives.[53] In fact, no military necessity whatsoever could come into play here, since the proceedings concerned a paradigmatic example of iconoclastic destruction of

49 Ibid., paras. 9-11.

50 *Prlić et al.* (n 45), Vol. 3, para. 1582.

51 *Prosecutor v. Al Mahdi*, Judgment of 27 September 2016.

52 Ibid., paras. 49-50.

53 Ibid., para. 39.

cultural property,[54] thus deriving from an ideological motive extraneous to considerations associated with the pursuit of a military advantage *stricto sensu*. The ICC itself pointed out that the destruction was the result of a discriminatory religious motive aimed at annihilating the cultural diversity of the population of Timbuktu.[55]

The last mentioned part of the judgment allows us to recall a consolidated legal achievement in this area: in addition to representing a distinct war crime, the destruction of cultural property may fulfil the objective element of the crime against humanity of persecution of a human group on political, ethnic, cultural and religious grounds, in particular.[56] As such, it can be committed in any armed conflict, as well as in peacetime. Since the central element of persecution is the intention to discriminate against a certain group on the basis of its identity, it is clear that the decision of the ICC to examine the *Al Mahdi* case solely in light of the crime of attack against cultural property[57] may appear highly questionable.[58] In any case, this reluctance on the part of the ICC can certainly not diminish the importance of the existing, well-settled jurisprudence on the link between crimes against cultural heritage and persecution.[59] In addition, it cannot be forgotten that, according to authoritative case law, the large-scale destruction of cultural property is also relevant to the crime of crimes, i.e., genocide. Although genocide presupposes the performance of acts capable of causing the physical destruction of a national, ethnical, racial or religious group, thereby ruling out cultural genocide as such, systematic offences against the cultural

54 The iconoclastic destruction perpetrated on a large scale by ISIS on Syrian and Iraqi territory could only trigger the jurisdiction of the ICC if the alleged perpetrators were foreign fighters with the nationality of one of the States Parties to the ICC Statute or if that situation were referred to the ICC Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter, see Arts. 12-13, Rome Statute 1998. The criterion of the territoriality of crimes cannot operate in this context at present, as Syria and Iraq have not ratified the ICC Statute.

55 *Al Mahdi* (n 50), para. 81.

56 Art. 7, para. 1(h), Rome Statute 1998.

57 The above finding of the discriminatory religious motive underlying the defendant"s conduct was appreciated by the ICC only as an indication of the particular gravity of that conduct, i.e., when determining the appropriate sentence.

58 See S.A. Green Martínez, *Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?*, *Journal of Int. Criminal Justice*, 2015, p. 1073 ff.; P. Rossi, *The* Al Mahdi *Trial Before the International Criminal Court: Attacks on Cultural Heritage Between War Crimes and Crimes Against Humanity*, *Diritti umani e diritto int.*, 2017, p. 87 ff.

59 For all references, especially to the extensive case law of the Tribunal for the former Yugoslavia, see R. O'Keefe, *Protection of Cultural Property*, in *The Oxford Handbook of International Law in Armed Conflict* (A. Clapham and P. Gaeta eds.), Oxford, 2014, p. 492 ff., pp. 516-519.

heritage of one of these groups can be considered significant evidence of the *dolus specialis* required for the crime in question, namely the specific intent to physically destroy the group itself.[60]

The close relationship between attacks on cultural property and international crimes, *a fortiori* when it comes to crimes against humanity targeting sites of outstanding universal value such as those on the UNESCO World Heritage List, also implies that the prohibition of destruction of such property in times of war can plausibly be considered to fall within the particular category of customary rules from which *erga omnes* obligations arise, i.e. obligations relating to the protection of fundamental values of the international community as a whole. Accordingly, any State – even if not directly injured – may invoke the responsibility of, and seek reparation from, the wrongdoer.

Among the many elements of practice which support this assertion,[61] the *Al Mahdi* jurisprudence of the ICC is again particularly instructive. Certain aspects of it can be seen as an authoritative recognition of the *erga omnes* nature of the prohibition in question, albeit in a non-interstate context. At the same time, it should be recalled that the *Al Mahdi* case referred to a site on the UNESCO World Heritage List, thus to a situation that appears ontologically relevant in terms of *erga omnes* obligations.

In its 2017 Reparations Order, the ICC – given the specific nature of the crime of attack against cultural property – granted the status of victim, in addition to the inhabitants of Timbuktu, to the entire population of Mali, as well as to the international community as a whole.[62] This

60 In the case law of the Tribunal for the former Yugoslavia, see *Prosecutor v. Krstić*, Judgment of 2 August 2001, para. 580, and, in its wake, International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 344; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, paras. 388-390.

61 To confine ourselves to an example of particular importance, the UN General Assembly has characterized attacks on the cultural heritage of any country as attacks on the common heritage of humanity as a whole, Res. 69/281 of 28 May 2015 (*Saving the Cultural Heritage of Iraq*), eleventh preambular paragraph.

62 *Prosecutor v. Al Mahdi*, Reparations Order of 17 August 2017, para. 53; for a comment, see F. Capone, *An Appraisal of the* Al Mahdi *Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage*, *Journal of Int. Criminal Justice*, 2018, p. 645 ff. For the appeal decision against this order, see *Prosecutor v. Al Mahdi*, Judgment of 8 March 2018. The latter decision is not relevant for our purposes.

notwithstanding that no Malian citizen, other than the inhabitants of Timbuktu, nor, above all, any representative of the international community – and UNESCO in particular – had submitted any request for reparation.[63] Consequently, the ICC acknowledged the suffering endured by the Malian population and the international community as a result of the destruction of the religious buildings in question[64] and awarded reparations – certainly symbolic yet replete of legal implications – both to the former (through the State of Mali) and to the latter (through UNESCO), in the form of one Euro for each of them.[65]

Beyond the ban on attack and destruction of cultural property in wartime, the state of customary law in this area is uncertain. In particular, one can rightly doubt the emergence of a well-defined customary rule on the prohibition of use of cultural property for military purposes, *a fortiori* with reference to non-international armed conflicts and property not covered by special protection regimes recognizing its exceptional value. Practice is unable to shed light into a rule which, on the basis of certain treaty provisions such as those in the 1954 Hague Convention and the 1999 Second Protocol, outlines precisely the contours of a customary obligation not to use cultural property for military purposes, especially when it comes to establishing whether and how military necessity may constitute an exception to that obligation. Moreover, the absence of rules about individual criminal liability for breaches of the obligation in question militates against the existence of a customary rule. While the pertinent provisions of the Second Protocol are unsatisfactory, the constitutive instruments of international criminal courts and tribunals, and particularly the ICC Statute, do not punish the use of cultural property for military purposes as a war crime. This is certainly a significant loophole that may undermine the effectiveness of the legal framework for the protection of cultural heritage in armed conflict. It is enough to reiterate that respect for the prohibition on attacking cultural property is intimately linked to that property's extraneousness to wartime activities.

63 *Al Mahdi*, Reparations Order (n 61), para. 52.

64 Ibid., para. 53.

65 Ibid., paras. 106-107.

3.2. Illicit Trafficking

The obligations concerning illicit trafficking in cultural goods in times of war deserve separate consideration. In this field, it is certainly possible to identify a customary rule prohibiting theft, looting, confiscation and illegal transactions involving such goods and committed during international or non-international conflicts. The prohibition in question has gradually emerged in the wake of a uniform and consistent set of acts, declarations and treaty rules proclaiming the unlawfulness of such conducts as particularly important *species* of the *genus* of the spoliations of civilian property. For example, the aforementioned Article 56 of the 1907 Hague Regulations imposes a prohibition of seizure – alongside destruction and damage – of works of art located in territories under military occupation.

The customary rule in question is stringent, since it is based on a presumption of illegality – only exceptionally rebuttable – of any transaction concerning cultural property which takes place in time of armed conflict and leads to the transfer of its ownership or possession.[66] Moreover, various cases of individual criminal liability and corresponding war crimes play a valid deterrent function with respect to the violation of the primary rule at stake. These may be either crimes specifically related to the unlawful removal of cultural property[67] or crimes concerning property generally understood, which may, however, be prosecuted in proceedings involving cultural property.[68]

Yet, as noted above, the *punctum dolens* of the legal framework relating to trafficking in cultural goods in wartime is the absence of a clear and unconditional obligation to return property, which despite the rules prohibiting its circulation has been the subject of unlawful transactions, to the States of origin. The fragmentary nature of practice and the

66 The milestone of this approach is represented by the famous London Declaration of 5 January 1943, with which the Allies reserved their right to consider invalid all transactions – including those "apparently legal in form" – concerning property situated in the territories occupied by the Axis Powers during the Second World War. This Declaration has an enduring, considerable impact on the litigation relating to the illicit trafficking and restitution of cultural property plundered by the Third Reich during the Second World War, especially in the context of the Holocaust.

67 See Art. 3(d), Statute of the International Criminal Tribunal for the Former Yugoslavia.

68 See Art. 8, para. 2(a)(iv) ("Extensive… appropriation of property, not justified by military necessity") and Art. 8, para. 2(b)(xvi) and (e)(v) ("Pillaging a town or place"), Rome Statute 1998.

uncertainties revealed by the relevant treaty law (in particular the 1954 Protocol) make it considerably difficult to identify a customary rule in this area. In addition, international criminal law is clearly irrelevant here, and any potential obligation to return property plundered in armed conflict is essentially incumbent upon States, whose cooperation is therefore essential.

At any rate, one of the most significant developments arising from recent practice about cultural property and armed conflict is represented by the adoption of UN Security Council resolutions envisaging, *inter alia*, restitution obligations on States. Given the scale of the phenomenon of trafficking in cultural goods in wartime as a criminal business aimed at fueling armed violence and terrorism, a particularly authoritative source of international law has thus gradually been mobilized, that is, a source with almost universal[69] binding effects and largely free of the limitations and negotiating constraints affecting the life of treaties.

The first historical manifestation of the role acquired by the Security Council in this field is Resolution 1483 (2003), approved in the aftermath of the acts of vandalism and looting perpetrated on a large scale in April 2003 inside the Iraqi National Museum in Baghdad, at the time when Iraq was invaded and militarily occupied by the United States. Among the measures set out in the Resolution, which are certainly binding on States as they are based on Chapter VII of the UN Charter, is the obligation to facilitate the return to Iraq of cultural property illegally removed from its territory since 2 August 1990, i.e., the date of the Iraqi invasion of Kuwait, in particular by introducing a ban on trade in such property, including property for which there is reasonable suspicion of unlawful removal.[70] From a substantive point of view, it is worth highlighting the broad scope of this obligation: *ratione temporis*, it applies retrospectively to all illegal transactions carried out since August 1990,[71] while *ratione materiae* it covers cultural objects of

69 Essentially all States are members of the UN.

70 Para. 7 of Res. 1483 (2003).

71 As is well known, the retroactivity of restitution obligations has always been one of the thorniest issues in negotiations on treaties on the illicit movement of cultural property, both in times of war and peace. No treaty provides, at least unconditionally, for retrospective restitution obligations.

doubtful provenance. In general, Resolution 1483 set a precedent of absolute importance, also on a symbolic level, given that the destruction and trafficking of cultural goods during armed conflicts were for the first time considered as integral aspects of a threat to international peace and security capable of triggering the enforcement and law-making powers of the Security Council.

In recent years, and on the basis of this precedent, the Security Council has reacted firmly to the cultural crises caused by the iconoclastic destruction and systematic looting committed by ISIS and similar extremist groups, moving mainly on two fronts. First, under pressure from UNESCO, it sought to strengthen the protection of cultural property in times of war by incorporating a cultural dimension into the mandate of UN peacekeeping operations.[72] Specifically, such a key development concerned the peacekeeping force (MINUSMA) established by Resolution 2100 (2013) in the context of the war in Mali. Thus, the mandate of this force, as established by that Resolution and subsequently reiterated, includes support for cultural preservation, i.e., assistance to the Malian authorities in protecting Mali's historical and cultural sites from attacks, in cooperation with UNESCO.[73]

The option of including a cultural *volet* in the mandate of peacekeeping forces is now generalized by Resolution 2347 (2017), which is a milestone in this area, being entirely dedicated to the protection of cultural heritage in armed conflict.[74] Insofar as material, Resolution 2347 provides that the mandate of UN peacekeeping forces may include, where authorized by the Security Council and in accordance with the relevant rules of engagement, assistance to States – at their request – in protecting cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts.[75] The Council also urges these forces to exercise caution when they operate in the vicinity of historical and cultural sites.[76]

72 See L. Pineschi, *Tutela internazionale del patrimonio culturale e missioni di pace delle Nazioni Unite: un binomio possibile? Il caso MINUSMA*, *Rivista di diritto int.*, 2018, p. 5 ff.

73 Para. 16(f) of Res. 2100 (2013).

74 See K. Hausler, *Cultural Heritage and the Security Council: Why Resolution 2347 Matters*, *Questions of International Law*, No. 48 (Zoom-in), 2018, p. 5 ff.; A. Jakubowski, *Resolution 2347: Mainstreaming the Protection of Cultural Heritage at the Global Level*, *Questions of International Law*, No. 48 (Zoom-in), 2018, p. 21 ff.

75 Para. 19 of Res. 2347 (2017).

76 Ibid.

The emergence of the "blue helmets of culture" can only be regarded as a welcome development.[77] If they are consistently institutionalized in the coming crisis situations, it is entirely reasonable to expect reinforced protection of cultural heritage which finds itself hostage to armed conflict, for example by means of an *ex ante* creation of "protected cultural areas" manned by UN troops around major archaeological zones, museums and monumental centers, or an *ex post* effective contribution to the demining of cultural sites[78] and other operations aimed at restoring such sites and requiring military techniques and capabilities.

Secondly, the Security Council has ultimately stepped up its action against trafficking in cultural goods, particularly in response to the escalation of the ISIS military campaign and in the knowledge that such trafficking is a valuable source of revenue for the terrorist network in question. The Council has first of all made it clear that ISIS represents a global and unprecedented threat to international peace and security, not least because of its responsibility for the uprooting of cultural heritage and trafficking in cultural goods,[79] thus confirming that these crimes may well correspond to a manifestation of terrorism worthy of condemnation and reaction at the highest level of the international community. Resolution 2199 (2015), containing a package of sanctions and other measures against ISIS and associated entities, deals with cultural heritage in a separate section.[80] In this section, the Council reiterates the obligation on States to prevent trade in cultural property illegally transferred from Iraq since 6 August 1990 and extends it to property unlawfully removed from Syria since 15 March 2011,[81] the day on which a devastating war – that is still ongoing – began in that State. The obligation, however, appears less stringent

77 The activities of the Security Council are, however, only one aspect of this issue. To these must be added the intensive work carried out by UNESCO in this area. For example, UNESCO and Italy signed a Memorandum of Understanding in February 2016 to set up an Italian task force of civilian and military personnel to be deployed in – and at the request of – States affected (in particular) by armed conflicts that endanger cultural and natural heritage. See *Memorandum of Understanding on the Italian National "Task Force in the framework of UNESCO's Global Coalition Unite4Heritage" for initiatives in favour of Countries facing emergencies that may affect the protection and safeguarding of culture and the promotion of cultural pluralism*, 16 February 2016; see M. Mancini, *The Memorandum of Understanding between Italy and UNESCO on the Italian "Unite4Heritage" Task Force*, *Italian Yearbook of Int. Law,* Vol. XXVI, 2016, p. 624 ff.

78 See para. 18 of Res. 2347 (2017).

79 Res. 2249 (2015), fifth preambular paragraph.

80 Res. 2199 (2015), paras. 15-17.

81 Ibid., para. 17.

than that laid down in Resolution 1483 (2003). It directly concerns the prevention of the trade in Iraqi and Syrian property endangered by illicit trafficking, not their restitution, which is regarded as a mere eventuality favoured by the implementation of the former obligation.[82] At the same time, although the same obligation retains a retrospective scope also with respect to the Syrian situation, it does not apply – at least *expressis verbis* – to goods of suspicious provenance.

The last piece of Security Council's practice in this area is Resolution 2347 (2017), which deals exclusively with cultural heritage and armed conflict. The binding force of this Resolution may well be questioned, as it is not based on Chapter VII of the UN Charter. However, the key provision on illicit trafficking in cultural goods is precisely formulated as an obligation under which the prohibition of trade, as previously set out in relation to Iraqi and Syrian property, is extended to any similar unlawful transaction that occurs in any armed conflict, whether ended, ongoing or future. Thus, the Council requests States to take appropriate measures to prevent and combat illicit trade and trafficking in cultural property originating from a context of armed conflict, thereby allowing for its "eventual safe return".[83] Particularly noteworthy is the applicability of the obligation in question to suspicious goods, which should be regarded as such if, in the absence of adequate certification of provenance, their origin can be assumed to be from territories affected by war.[84] This provision authoritatively confirms the presumption of illegality of any commercial transaction concerning cultural goods coming from contexts of armed conflict.

It is clear that the foregoing Security Council resolutions do not go so far as to establish an absolute obligation to return cultural property unlawfully removed during wartime. As a matter of fact, and for a number of reasons, such an obligation seems impracticable, whereas it is reasonable to leave room for manoeuvre, albeit limited, to the States actually involved in specific controversies, especially as regards the substantive and procedural details of the pertinent legal rules. Whatever their nature and precise wording, however, the Security Council resolutions in question have

82 Ibid. ("thereby allowing for their eventual safe return").

83 Res. 2347 (2017), para. 8.

84 Ibid.

already given and will continue to give impetus to the law-making and law-enforcing activities of States and international organizations engaged in the fight against the illicit trafficking in cultural goods.[85]

4. Concluding Remarks

The protection of cultural property in times of armed conflict is a fascinating field of study and research. Given the ancient origin of the relevant rules, it is in this area that progress in the theory and practice of international law on the protection of cultural heritage can best be appreciated. Theory and practice today converge towards the recognition that the fundamental interest of the international community in the safeguarding of cultural heritage deserves to be guaranteed by all means, even during wartime, and that the same heritage should be spared from wartime activities to the highest possible extent.

This recognition implies that some of the most significant doctrines of international law can and should be called into play with regard to the protection of cultural property in armed conflict. It has thus been shown that customary law has gradually entered the field in question, in particular by universalizing the rule prohibiting attacks and destruction of cultural property which does not fulfil the notion of a military objective, as well as the rule prohibiting theft, looting and any unlawful appropriation of such property in times of war. Furthermore, it is at least plausible to consider that these rules now enshrine obligations of an *erga omnes* nature, which legitimize all members of the international community to regard themselves as victims of their violation and invoke the responsibility of the perpetrators.

In the area of responsibility, major and concrete advances have emerged from the doctrine of individual criminal liability, which has been increasingly mobilized through the prosecution of international crimes against culture, thereby allowing convictions of individuals guilty of serious offences against cultural heritage in times of armed conflict. The trials of a few authors of the attack on Dubrovnik and the destruction in Timbuktu appear emblematic in this respect.

85 In this context, special mention should be made of the recent adoption by the European Union of Regulation No. 2019/880 of 17 April 2019 on the introduction and the import of cultural goods.

On the other hand, the magnitude of the iconoclastic destruction and illicit trafficking of cultural goods committed in recent times by terrorist groups – such as ISIS in particular – has clearly shown the quantity and quality of the threats to which cultural heritage continues to be exposed in times of armed conflict. However, it should be noted that the reaction of the international community to this rampant cultural terrorism has been extremely significant. In this context, the activities of the UN Security Council have enormous symbolic, political and legal value. Thus, especially through resolutions that are generally binding on all UN Member States, the Council has first and foremost considered the offences against cultural property to be an integral part of the threat to international peace and security posed by terrorism and its military actions. It then endorsed the extension of the mandate of peacekeeping forces to tasks of cultural heritage preservation and imposed obligations on States to prevent trafficking in cultural property and to return property stolen in times of armed conflict.

Ultimately, all conditions are in place for the protection of cultural heritage in armed conflict to take further steps forward, for example, by strengthening the ban on the use of cultural property for military purposes or by increasing the legal and political synergies between UNESCO's work, particularly in safeguarding the world heritage, and that of the institutions most involved in the military and humanitarian field.

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Chapter III: Humanitarian Access in Armed Conflict from the Legal Perspective

Elżbieta Mikos-Skuza[1]

The question of humanitarian access in armed conflicts is one of the most topical and controversial issues in today's International Humanitarian Law (IHL). It is regulated mainly in the Geneva Convention IV of 1949[2] and its Protocols Additional of 1977.[3] Many rules are of a customary nature.[4] The practical perspective is also very significant, because the law is only a tool that one can use in order to support and strengthen the demand for access. If access is denied, then it is seldom denied for purely legal reasons but rather for practical ones, meaning security, logistical, administrative or - broadly speaking - political reasons. It means that while the understanding of the law is extremely important, even more important is the question of the political will of parties to a conflict or those who exercise control over the area where humanitarian access is needed.

The issue of humanitarian access poses a central challenge in public international law in general, not only in the context of armed conflicts but also in the context of natural and technological disasters. In the majority of such situations there are not many binding rules, rather

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2 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War adopted on 12 August 1949, 75 UNTS 287, further referred to as the Geneva Convention IV (GC IV).

3 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts adopted on 8 June 1977, 1125 UNTS 3, further referred to as the Additional Protocol I (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts adopted on 8 June 1977, 1125 UNTS 609, further referred to as the Additional Protocol II (AP II).

4 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005). The Study is available and updated regularly, taking into account new practice and evidence of *opinio iuris*, on the website of the International Committee of the Red Cross <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

the so-called soft laws, different types of guidelines or draft articles. It means that the reflection on humanitarian access in armed conflicts is only a part of a broader problem. On the other hand, natural disasters sometimes take place during armed conflicts, like the tsunami of December 2004 in South-East Asia when some states affected heavily by this disaster were also affected by armed conflicts, e.g. Sri Lanka or the western part of Indonesia. In such cases, humanitarian access becomes additionally complicated as the occurrence of both man-made and natural disasters at the same time and at the same place multiplies all the problems. The present article will deal with legal aspects of humanitarian access in armed conflicts, but it is important not to neglect the relevance of the question of access in case of natural and technological catastrophes.

1. Protection and Assistance Offered by IHL

It should be emphasized that humanitarian action in times of armed conflicts encompasses both protection and assistance. The former one relates mainly to civilian detainees and prisoners of war and it implies, among others, the right to collective and individual relief supplies. Under the Geneva Convention III[5] and the Geneva Convention IV, there are some entities authorised to carry out such activities, such as the International Committee of the Red Cross (ICRC), other humanitarian organizations, the Protecting Powers and their substitutes. There are even additional regulations annexed to these Conventions regarding collective relief shipments to persons who are interned as prisoners of war or civilian internees. It means that humanitarian access in such situations is not very problematic. What is much more problematic and controversial is humanitarian access in the context of assistance to civilians, such as the provision of foodstuffs, water, medical supplies, clothing, bedding, shelter and other supplies that are essential to the survival of the civilian population.[6] It is interesting to note that the expression "humanitarian assistance" is not used in IHL. Instead,

5 Geneva Convention (III) Relative to the Treatment of Prisoners of War adopted on 12 August 1949, 75 UNTS 135, further referred to as the Geneva Convention III (GC III).

6 See Article 69 paragraph 1 AP I that is usually considered the most comprehensive enumeration of the categories of supplies necessary for the civilian population in situations of armed conflict.

the GC IV regulates "relief schemes",[7] "relief consignments",[8] "medical relief supplies"[9] and "relief shipments"[10]. Protocols Additional add "relief actions"[11] to this list.

2. Substantial Legal Rules Governing Humanitarian Access

Putting aside the language used, the legal regime of humanitarian access in the context of humanitarian assistance is quite well developed, there is a good number of legal provisions relating to it. However, on the other hand, many provisions are not clear, sometimes interpreted by States, by practitioners and by scholars in different ways.

Humanitarian access in the context of humanitarian assistance means access to civilians, with the exception of medical assistance supplies and services that may also benefit active combatants.[12] As mentioned earlier, humanitarian access in the context of protection is understood more broadly and means access to all persons protected - not only to civilians but also to combatants who are off the combat, particularly those who are detained as prisoners of war. In this article, the focus is on the question of humanitarian access in the context of assistance provided only to the civilian population.

Next point of a general nature is that the rules on humanitarian access are cross cutting, they belong both to the so-called "Geneva Law" and the so-called "Hague Law" - two subsections of IHL. The former regulates the situation of persons protected who find themselves in the hands of enemy powers. In the case of civilians, the Geneva Law[13] addresses the dangers that civilians are exposed to when they are in the hands of the enemy, for example they live on occupied territory or find themselves, as aliens, in the territory of one of the parties in the conflict and therefore there is a risk that they would be subjected to the abuse of the enemy state's power, for example prevented from sufficient access to medical

7 Article 59.

8 Articles 60 - 62.

9 Article 108.

10 Article 109.

11 Article 70.1 AP I and Article 18.2 AP II.

12 Marco Sassòli, *Rules, Controversies and Solutions to Problems Arising in Warfare* (Elgar 2019) 574.

13 Mainly the GC IV.

and spiritual assistance or mistreated in detention. The Hague Law[14] regulates the means and methods of warfare thus protecting civilians against the effects of hostilities. The main issue is the question of the conduct of hostilities, and particularly - in the context of humanitarian access - the methods of warfare, like siege, are relevant. In case civilians find themselves in the besieged area, and suffer because of the lack of basic products and services, they should be allowed to leave this place or humanitarian assistance should be provided to them. It means this is the question of humanitarian access to civilians. A similar problem arises in case of a naval blockade, if a given area is separated from other territories and civilian population is not sufficiently supplied. The understanding of the overarching nature of rules on humanitarian access is very important, as too often this problem is perceived as affecting only those, who live on the territory under the control of one of the parties to the conflict, therefore falling only under the Geneva Law.

Additional question that should be mentioned in the context of humanitarian access as a cross cutting issue, is that IHL imposes some rules regarding humanitarian access not only on states that exercise control over civilians who suffer, but also on third states that are not parties to a given conflict, for example with regard to free passage of relief. If relief supplies are sent from State A to State B, and they pass through states C and D, IHL imposes some obligations also on those states C and D despite the fact that they are not parties to a conflict.

As far as sources of law relating to humanitarian access in armed conflicts are concerned, there are quite a few rules both in treaty law and in customary law.[15] With regard to treaty law, numerous examples can be found in the GC IV, particularly in Articles 38, 55 and 58 to 63 about the provision of humanitarian assistance to civilians who find themselves in the power of the enemy.[16] Articles 17 and 23 of GC IV belong to the

14 Mainly the Hague Regulations Concerning the Laws and Customs of War on Land, annexed to the Hague Convention (IV) of 18 October 1907 Respecting the Laws and Customs of War on Land, further referred to as the Hague Regulations published in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff 1988) 69ff. Protocols Additional I and II of 1977 belong partly to the Hague Law too.

15 Contrary to humanitarian access in situations of natural or technological disasters where treaty law is very limited.

16 Article 38 relates to humanitarian needs of aliens in the territory of a party to an international armed conflict, while Articles 55 and 58 to 63 - to needs of population living in occupied territories and the obligations of the occupying powers.

very tiny part that we find in GC IV and that exceptionally relates to the conduct of hostilities. Article 17 concerns civilian suffering due to lack of means to survive in areas, that are encircled, and the necessity to either evacuate civilians from there, or to allow medical or spiritual assistance to enter. Article 23 is about the obligations regarding the passage of humanitarian assistance. There are also few provisions on humanitarian assistance and access in the AP I. Some of them, particularly Article 69, complement the provisions on occupied territories that we find in the GC IV. Article 70 is more general - it regulates relief actions to civilian population in any situation that is not considered to be the situation of occupation. In both the GC IV and the PA there are provisions (Articles 10 and 81 respectively) that confirm the right of initiative of the humanitarian organizations such as the ICRC, which includes the right to offer their services in order to ensure assistance to civilians. AP I also contains a specific provision (Article 71) on the status of personnel participating in relief actions. All the regulations mentioned above relate only to international armed conflicts.

In non-international armed conflicts, the number of treaty law provisions on humanitarian access is smaller. First and above all Article 3 common to all the four Geneva Conventions, including GC IV, should be mentioned. It covers the right of humanitarian initiative of humanitarian impartial organizations, such as the ICRC. Of crucial importance is Article 18 in AP II. Its second paragraph raises very important controversies that will be discussed later in more detail, regarding the question of consent to humanitarian access in non-international armed conflicts.

With regard to customary obligations, the Customary International Humanitarian Law Study identifies two rules, namely rules 55 and 56, relating to the passage of relief consignments. There are also rules 31 and 32 on the status of relief personnel that should be respected and protected and on the status of objects that are used for humanitarian assistance purposes. Their customary status is very important. Although these questions are regulated in treaty law, namely in Protocols Additional of 1977, these treaties are not ratified universally. Therefore the fact that the rules mentioned are identified as customary ones, binding both in international and non-international armed conflicts, is extremely important for practical reasons.

There are also significant soft law documents that influence the interpretation of rules regarding humanitarian access and help to understand the treaty and customary law better. Among them one should mention the ICRC Lexicon on Humanitarian Access.[17] This document is composed of two parts - questions and answers on humanitarian access and lexicon in which different notions and concepts are explained. Another initiative worth mentioning is the Oxford Guidance on the Law relating to Humanitarian Relief Operations in Situations of Armed Conflicts.[18] There is also a very interesting study on the perception of humanitarian access by armed non-state actors, that was conducted by the non-governmental organization named Geneva Call.[19] Another publication that should be also mentioned is a Handbook on the Normative Framework of Humanitarian Access which was published by the Swiss Foreign Ministry, and which includes interesting comments on relevant IHL rules.[20]

In addition, IHL arguments in this field are supported by International Human Rights Law, particularly in cases when the denial of humanitarian access in armed conflict would amount to a violation of not only IHL, but also Human Rights rules.

3. Four Layers of the Legal Framework Governing Humanitarian Access

The general overview of the legal framework of humanitarian access under IHL indicates, that it is composed of four layers.[21]

17 ICRC "Q&A and Lexicon on Humanitarian Access" (2014) 96 IRRC 359.

18 Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (UN OCHA 2016).

19 Ashley Jackson, *In Their Words: Perception of Armed Non-State Actors on Humanitarian Action* (Geneva Call 2016). On this specific question see more Annyssa Bellal, "Humanitarian Action from an Armed Group"s Perspective" in Stéphane Kolanowski (ed), *Proceedings of the Bruges Colloquium - The Additional Protocols at 40: Achievements and Challenges* (48 Collegium, College of Europe and ICRC 2018).

20 Swiss Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict. Handbook on the Normative Framework* (2nd edn, SFDoFA 2014).

21 This part of the present article, particularly the concept of four „layers" of the IHL framework of humanitarian action, is based very much on opinions expressed by Tristan Ferraro in his publication: Tristan Ferraro, "Humanitarian Access and IHL: the ICRC Perspective" in Stéphane Kolanowski (ed) (n 18).

3.1. First Layer - Primary Obligation of the Parties to the Conflict

According to the first layer, the primary obligation to meet the basic needs of the civilian population rests on the shoulders of the parties to an international or non-international armed conflict that exercise control over a given area, and not of humanitarian actors. This principle is not controversial. It is a general concept of public international law directly linked, on the one hand, to the very idea of state sovereignty and on the other hand - to the International Human Rights Law premises. In IHL itself it is stated explicitly in the context of occupation, where numerous concrete obligations of occupying powers are listed.[22] The only controversy relates to the question whether a corollary to this obligation is an individual claim of a civilian who needs support and assistance. The majority of scholars consider such an interpretation as exceeding the limits of IHL.[23]

3.2. Second Layer - the Right of Humanitarian Initiative

Second layer is about the right of humanitarian initiative enjoyed by the humanitarian sector if the basic needs of the civilian population are not satisfied. At this stage the right of different humanitarian actors, mainly impartial humanitarian organizations, but also third states neutral to a given conflict, to offer humanitarian activities is recognized[24], and such an offer cannot be considered as an interference into internal affairs of a given state. In case of organizations, they have to qualify as humanitarian and impartial and to provide assistance "without any adverse distinction", as it is explicitly stated in some IHL provisions.[25] This is a clear reference to the first two Fundamental Red Cross and

22 See particularly Article 55 GC IV and Article 69 AP I.

23 See Flavia Lattanzi, "Humanitarian Assistance" in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (OUP 2015) 231, 232; Michael A. Meyer, "Humanitarian Action: A Delicate Balancing Act" (1987) 27 IRRC 485; Heike Spieker, "The Right to Give and to Receive Humanitarian Assistance" in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism* (Springer 2011) 17. A contrary approach is presented by Ruth A. Soffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps" (2004) 86 IRRC 515.

24 See Articles 3 and 9/9/9/10 common to the four Geneva Conventions, Article 81 AP I and Article 18 AP II.

25 Article 70 paragraph 1 AP I and Article 18 paragraph 2 AP II. More on this right see Nishat Nishat, "The Right of Initiative of the ICRC and Other Impartial Bodies" in Clapham, Gaeta and Sassòli (n 22).

Red Crescent Principles as defined in 1965.[26] They constitute the main catalogue for the International Red Cross and Crescent Movement, but also important catalogue for the purpose of humanitarian assistance for other humanitarian organizations and States.[27] According to them humanitarian assistance is focused on preventing and alleviating human suffering, on protecting life and health as well as ensuring respect for the human being. There is no discrimination in the delivery of humanitarian aid which is guided solely by the needs of those who suffer, and the priority is given to the most urgent cases of distress. It means that if the needs of civilian population are not met - despite the obligations of the parties to a conflict - then impartial humanitarian bodies may offer their services with no other agendas, goals and purposes than purely humanitarian and impartial ones. It is worthwhile mentioning that Fundamental Red Cross and Red Crescent Principles add also neutrality and independence to the list of core principles of humanitarian action and the humanitarian sector refers to them usually as NIIHA: Neutral, Impartial and Independent Humanitarian Action. However, IHL does not require neutrality and independence in this context, it refers clearly to requirements of humanity of impartiality only.

3.3. Third Layer - State Consent Requirement

Once the offer of humanitarian assistance is made, then the most controversial question arises regarding consent to those activities. Namely, in almost every situation, except for the situation of occupation, the general consent for humanitarian assistance activities voiced by parties to the conflict is necessary. In other words, the fact that impartial humanitarian organizations or third states are entitled to offer humanitarian assistance "does not translate into an unrestricted right of access given to humanitarian actors".[28] Such a right is based on the consent of the parties to the conflict

26 The Fundamental Principles of the International Red Cross and Red Crescent Movement were proclaimed by the 20th International Conference of the Red Cross in Vienna in 1965. Today they are contained in the Preamble of the Statutes of the International Red Cross and Red Crescent Movement adopted by the 25th International Conference of the Red Cross in 1986, and amended in 1995 and 2006 <www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf>.

27 The obligation of States to comply with the principles of humanity and impartiality was emphasized by the International Court of Justice in its judgment of 27 June 1986 in *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Rep. 1986, paragraph 243.

28 Ferraro (n 20) 68.

concerned that on the one hand constitutes the bedrock of the rules on humanitarian access, but on the other hand belongs to the most legally controversial and politically sensitive issues in humanitarian action.

Two conditions must be fulfilled before any issue of consent arises, namely civilians are inadequately provided with essential supplies and the party under whose control they find themselves is unable or unwilling to provide the necessary assistance. Based on the structure of Article 70 AP I one may distinguish between two types of consent, namely general and operational consent.[29]

The general consent (the third layer of the legal framework of humanitarian assistance) is a positive answer to an offer of services by an impartial humanitarian actor, which means a broad decision allowing for humanitarian operations due to the fact that civilians are inadequately provided with essential supplies and there is a real need for humanitarian action. It implies that states or non-state bodies that exercise control over those civilians are either not able or not willing to provide assistance. The general consent should be followed by the "fourth layer", namely the operational consent that will be discussed later on in more detail.

The question of consent does not arise in situations of occupation. In Article 55, the GC IV covers the obligations of occupying powers to provide foodstuffs, medical supplies and other indispensable articles in case of their shortage. If, despite this obligation, the population is still inadequately supplied, the occupying power "shall agree" to relief schemes.[30] It means there is no room for doubts or discretionary powers.

In other situations, namely in international armed conflicts other than occupation and in non-international armed conflicts, the consent of the states concerned is of paramount importance. This question is regulated mainly in Article 70 AP I for international armed conflicts and in Article 18 paragraph 2 AP II for non-international armed conflicts. The same promising language is used at the beginning of each of these two provisions: "If the civilian population (…) is not adequately provided with / is suffering undue hardship owing to a lack of / the

29 Ibid 67ff.

30 Article 59 paragraph 1 GC IV.

supplies (…) relief actions, which are humanitarian and impartial, shall be undertaken. However, it is followed immediately by an additional phrase: "subject to the agreement / subject to the consent".

In international armed conflicts, it has to be the "agreement of the Parties concerned in such relief actions". Therefore, the question arises with regard to the Parties concerned. In international armed conflicts "parties" refers to states, therefore it would be, first and foremost, the state in whose territory those operations are carried out, the state from whose territory they are undertaken and the state through which territory they transit.[31] No one expects the consent of the adversary state if it does not belong to one of the above categories.

In non-international armed conflict, Article 3 common to the four Geneva Conventions is very brief and does not mention the question of consent. It only refers to the second layer of humanitarian access, namely the right of impartial humanitarian bodies to offer their services to the parties to the conflict. In non-international armed conflict, "parties to the conflict" are first and foremost, non-state armed groups. As mentioned above, the issue of consent in such situations is regulated clearly in the AP II. Namely, Article 18 paragraph 2 covers the right to undertake relief actions of an exclusively humanitarian and impartial nature, conducted without any adverse distinction, "subject to the consent of the High Contracting Party concerned". While the offer of humanitarian assistance may be submitted to any party to a conflict, consent has to be sought from the government because the "High Contracting Party concerned" is a state on whose territory an armed conflict takes place.[32]

3.3.1. State Consent in case the Government Loses its Control over a Territory

There is an obvious question that arises, namely, what happens if the state's government is not in control of the area to which the relief supplies are to be delivered? The wording of the Article 18 is clear and

31 Michael Bothe, "Humanitarian Assistance Post-1977: Do the Additional Protocols Meet All the Challenges?" in Stéphane Kolanowski (n 18), 55.

32 This formulation is often criticized. See Denise Plattner, "Assistance to the Civilian Population: the Development and Present State of International Humanitarian Law" (1992) 32 IRRC 249, 260 and the discussion below on the legal framework of cross-border operations.

in conformity with the principle of state sovereignty. It was particularly widely discussed in the context of the conflict in Syria, when there were parts of Syria that were completely out of governmental control. Syria is not a state party to the Protocol Additional II and there were humanitarian organizations that wanted to undertake the so-called cross-border operations, for example, from Turkey to Syria to the population that was suffering undue hardship in the areas controlled for months or years by non-state armed groups only and exclusively. Formally they were obliged to ask the central government for permission.

There are also some other interpretations based on Article 3 common to the four Geneva Conventions and on *travaux préparatoires,* that ended with the adoption of the Protocols Additional, namely on the fact that during the Diplomatic Conference of 1974 - 1977 the present Article 18 paragraph 2 contained, until the very last moment, the clause on "parties concerned" like Article 70 in the AP I. In AP II the consequences of such a formulation would be different because in the context of non-international armed conflicts it would include non-state armed groups. However, at the end of negotiations any references to non-state armed groups were deleted from the draft AP II and the reference to "parties concerned" was replaced by a reference to a "High Contracting Party concerned".[33]

Another argument used by those who are not convinced about the necessity of obtaining the consent of a central government for humanitarian assistance delivered in those parts of state's territory that do not fall under the government's control is the jurisprudence of the International Court of Justice. In the case Nicaragua v. the USA, the International Court of Justice clearly stated that "there can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law".[34]

In the case of the conflict in Syria, on 14 July 2014 the Security Council of the United Nations took an important decision regarding cross-border operations, that allowed for undertaking humanitarian assistance activities by the United Nations humanitarian agencies and their

33 Bothe (n 30) 56.

34 Nicaragua v. United States of America (n 26) paragraph 242.

implementing partners after a mere notification of the intent to carry out relief activities.[35] No formal consent was necessary. This resolution was renewed on an annual basis and, as of 2021, on six months" basis. It didn't establish a pattern for similar resolutions on other conflicts where cross-border operations would help to save the lives of many civilians.

IHL does not answer a question of the criteria used in case there are more than one political powers claiming to be a given state's government. Politically this is the issue of the recognition of a government, but legally it entails important consequences for the question of consent sought for relief action. A different problem arises with regard to failed States and the lack of any authority that could be approached with such a request.

3.3.2. onsent Given by the Non-State Actors?

Another difficult question should be asked with regard to the status of non-state armed groups in the context of cross-border humanitarian activities. The clear reference to the government's consent for such acts suggests that there is no obligation to consult non-state armed groups and to get their consent for humanitarian access. However, a consultation with those who exercise control over a given area is necessary for operational reasons, security reasons, political reasons and all other reasons. One simply cannot enter the territory under the control of a non-state armed group without letting that party know about one's intentions. Therefore the position presented in the Study by the Geneva Call[36] and in Oxford Guidance[37] is that the spirit of humanitarian assistance requires such consent, even if formally it is not required under IHL. The Geneva Call Study clearly indicates that many non-state armed groups perceive themselves as *de facto* governments that should be treated as partners in dialogue and therefore have the right to regulate humanitarian activities undertaken in the territories under their control. Some of them consider a failure to obtain consent as a valid reason for the expulsion of a humanitarian organization.[38] It should be emphasized that the request for a non-state armed group's permission for the provision of humanitarian assistance does not constitute formal

35 UNSC Res 2165 (2014), operative paragraph 2.

36 Jackson (n 18).

37 Akande and Gillard (n 17).

38 Jackson (n 18) 16ff.

recognition of this group and it does not confer any legal status upon this entity. In accordance with Article 3 common to the four Geneva Conventions, IHL application "shall not affect the legal status of the Parties to the conflict".

3.3.3. Conditions Allowing for a Denial of Consent

The next question that arises relates to the grounds to turn down an offer of humanitarian assistance. Such grounds are a corollary to the preconditions of an offer of services presented above. It means that consent may be denied if there are no needs to meet, either because the civilian population does not suffer, or it does but the party is willing and able to meet the needs of civilians either by itself, or by granting another entity the permission for humanitarian activities. Another precondition relates to the nature of activities proposed or the character of an organization that offers its services - in both cases the criteria of humanity and impartiality must be met. If one of those conditions is not satisfied (for example there is a high probability that a given organization calls itself humanitarian, but actually will be spying or undertaking political subversion activities or introducing a new ideology), then a given party to a conflict can legally deny the consent for humanitarian access. The list of conditions allowing for a denial of consent is exhaustive and it cannot be extended by invoking, for example, an argument of military necessity. Additional arguments, from outside the list, may be valid only in relation to the concept of operational consent (the fourth layer within the IHL framework of humanitarian access), and not under the general consent concept (the third layer within this framework).

3.3.4. Arbitrary Denial of Consent

Another difficult issue that arises in this context is the question of an arbitrary denial of consent to relief operations and its consequences. Formally speaking, the expressions "arbitrary denial of consent" or "arbitrary refusal of consent", often used by scholars and practitioners,[39] are not present in IHL. What is more, neither IHL nor general Public

39 See for example Dapo Akande and Emanuela-Chiara Gillard, "Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict" (2016) 92 International Law Studies 483; Michael Bothe (n 30) 57; Françoise Bouchet-Saulnier, "Consent to Humanitarian Access: An Obligation Triggered by Territorial Control, not States' Rights" (2014) 96 IRRC 207; ICRC "Q&A and Lexicon on Humanitarian Access" (n 16) 359, 369; Christa Rottensteiner, "The denial of humanitarian assistance as a crime under international law" (1999) 81 IRRC 555.

International Law regulate the consequences of the unlawful denial of consent despite the fact that they should be at the heart of any rules on humanitarian action. It is clear under IHL and also under Human Rights Law that a party to a conflict must not deny access when it is not able to meet the basic needs of the population under its control, particularly when this refusal will result in the starvation of civilians[40] or in violation of other obligations accepted under IHL or International Human Rights Law. Such breaches should be also addressed domestically, under the national laws of individual states. However, it is very difficult to determine in a particular situation whether a consent was not granted for valid or for arbitrary reasons. Even if the lack of consent is arbitrary and illegal, it definitely does not allow the humanitarian organizations and other providers of humanitarian assistance to undertake cross-border operations without consent or authorization.[41]

There are no good solutions in case of the lack of consent, even if it results in the starvation of civilians.[42] As mentioned above, decisions by the UN Security Council allowing for cross-border operations after a mere information sent to a government about activities undertaken on territories outside its control were taken only with regard to the armed conflict in Syria, and only for a limited time. Particularly, one may not hope for such resolutions if one of the UN Security Council members is a party to a given conflict or a strong ally of such a party.

40 Starvation of civilians is prohibited under Article 54 AP I, under Article 14 AP II and under Rules 53 and 54 of the Customary Law Study (n 3). Article 8.2(b)(xxv) of the Statute of the International Criminal Court qualified starvation of civilians as a war crime only in international armed conflicts. In 2019 the amended Article 8.2(e)(xix) extended this concept to non-international armed conflicts. See more on this topic Dapo Akande and Emanuela-Chiara Gillard, "Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law" (2019) 17 Journal of International Criminal Justice 753; Federica D"Alessandra and Matthew Gillett, " The War Crime of Starvation in Non-International Armed Conflict" (2019/031) BSG Working Paper Series 1; Jelena Pejic, "The Right to Food in Situations of Armed Conflict: The legal framework" (2001) 83 IRRC 1097.

41 Opposite opinions are expressed by Françoise Bouchet-Saulnier (n 38) and by Tom Gal, "Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance" (2017) 50 Israel Law Review 25. On different legal aspects of cross-border operations see more Emanuela-Chiara Gillard, "The Law Regulating Cross-Border Relief Operations" (2013) 95 IRRC 351.

42 See different scenarios in Akande and Gillard (n 17) 52ff; Sassòli (n 11) 580; Felix Schwendimann, "The Legal Framework of Humanitarian Access in Armed Conflict" (2011) 93 IRRC 993, 1004ff.

One may try to refer to the concept of the "state of necessity," which is formulated in non-binding Articles on Responsibility of States for Internationally Wrongful Acts adopted by the United Nations International Law Commission in 2001 in the following way:

> Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act (…) unless the act: (a) is the only way for the State is to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State (…) or of the international community as the whole.[43]

It means that if the situation is so dramatic, that civilians starve because of the lack of relief supplies, then actually, it would be in the interest of the international community to deliver humanitarian aid despite the lack of consent by a state concerned if such a delivery would not "seriously impair an essential interest" of this state.

Finally, the concept of Responsibility to Protect (R2P) might be invoked. This concept is very vague.[44] It is a more political than legal commitment based upon a premise that states bear a responsibility to protect not only their populations but also populations of other states from genocide, war crimes, ethnic cleansing and crimes against humanity. As it is argued by some authors that the denial of consent for humanitarian action might be considered a war crime or crime against humanity,[45] then the R2P mechanism might be helpful. However, as in the case of other mechanisms triggered by the UN Security Council, it is difficult to imagine that it would be used against its permanent members.

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43 Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>. For more comments on the state of necessity in the context of the refusal of consent for the delivery of assistance see Akande and Gillard (n 17) 52ff, paragraphs 146-51.

44 See Joseph Besigye Bazirake and Paul Bukuluki, "A Critical Reflection on the Conceptual and Practical Limitations of the Responsibility to Protect" (2015) 19 The International Journal of Human Rights 1017; Alex J. Bellamy, "The Responsibility to Protect: Five Years On" (2010) 24 Ethics and International Affairs 143; Gareth Evans, *The Responsibility to Protect: End Mass Atrocity Crimes Once and for All* (Brookings Institution 2008); Edward C. Luck, "The Responsibility to Protect: Growing Pains or Early Promise?" (2010) 24 Ethics and International Affairs 34; James Pattison, *Humanitarian Intervention and the Responsibility to Protect* (OUP 2010); Ramesh Thakur and William Malley, *Theorising the Responsibility to Protect* (CUP 2015).

45 For example Akande and Gillard (n 39); D'Alessandra and Gillett (n 39); Rottensteiner (n 38); Schwendimann (n 41) 1005ff.

3.4. Fourth Layer - Operational Consent

The fourth layer of the legal framework of humanitarian access, namely the so-called operational consent for humanitarian assistance following and implementing a general consent, is present only in international armed conflicts. It means that if there is a general consent of parties concerned for the delivery of humanitarian aid granted, these parties and third states are basically obliged to allow and facilitate the rapid passage of the relief supplies. However, they may temporarily impose different types of requirements and additional expectations regarding humanitarian assistance, for example concerning the entry of relief personnel without visas or other formalities that are usually required, such as professional licenses for performing some duties, or lifting of taxes and other fees that should be normally paid for professional activities carried out in a given territory.

The question of operational consent is not very sensitive, but still regulations on administrative formalities, immigration issues, financial requirements, military necessity arguments, etc. may hamper humanitarian access. Such exceptions to the general consent, that allow parties to an armed conflict and third states to postpone, divert, or impose additional control obligations on the delivery of assistance are very much rooted in quite a few IHL provisions. For example, in Article 23 of the GC IV the paragraph that covers the free passage of "foodstuffs, clothing and tonics for children under fifteen, expectant mothers and maternity cases" as well as "medical stores and hospital stores" for sick civilians (which means the range of addressees does not encompass all civilians) is much shorter than the paragraphs on different types of safeguards for a state allowing such a passage. Those states have to be satisfied with information

> that there are no serious reasons for fearing: 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 (…) consignments for goods which would otherwise be provided or produced by the enemy (…).[46]

46 Article 23 paragraph 2 GC IV.

The next paragraphs of Article 23 refer to the neutral supervision of distribution of such consignments and to states' "right to prescribe the technical arrangements under which such passage is allowed". Similar conditions are mentioned in the context of assistance provided to the civilian population living in occupied territories. Articles 59, 60 and 62 GC IV cover the right of states granting passage to search the consignments to verify their humanitarian and impartial nature, to regulate their passage and to satisfy themselves that they would not be used for the benefit of occupying powers. The importance of "imperative reasons of security" in the context of individual relief consignments is also emphasized.

Even Article 70 AP I, underlining the obligation of states, parties to an armed conflict and third parties to "allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel" (paragraph 2) and to facilitate the rapid distribution of such consignments (paragraph 4), confirms their right to "prescribe the technical arrangements, including search, under which the passage is permitted", to allow for a distribution of assistance only "under the local supervision of a Protecting Power" and to divert consignments or delay their forwarding "in cases of urgent necessity" (paragraph 3). One may see some positive aspects of these exceptions, e.g. "they may ensure that humanitarian relief supplies and equipment meet minimum health and safety standards"[47], but on the other hand they mean that there is no absolute right to humanitarian assistance. There are always ways to avoid or delay the consequences of general consent for such assistance granted by parties to a conflict. There are also different ways of interpreting the obligation "to facilitate" the passage or the distribution of relief consignments. This concept is not well defined under international humanitarian law. Does "facilitation" mean the obligation to allow as rapid a passage or distribution as possible, without additional impediments or additional restrictions like, for example, all types of formalities mentioned above? Or perhaps it requires some active support, for example, provision of additional means of transportation in case of need? The literal reading of relevant IHL provisions suggests that rather the former interpretation is a correct one, but it is not obvious.

47 Ferraro (n 20) 73. See also Akande and Gillard (n 17) 28.

4. The Status of Humanitarian Personnel

The rules on the status of relief consignments, discussed above, have an important impact on the status of personnel delivering humanitarian assistance. Such personnel is and will be necessary for the assessment of needs, transportation and relief's distribution, dealing with all types of logistical issues, despite all new trends aiming at strengthening the cash assistance programmes for those in need. Under Article 71 paragraph 2 of the AP I this personnel "shall be respected and protected", which confirms its civilian status - a humanitarian worker may neither be attacked during hostilities nor ill-treated if s/he finds herself or himself in the power of one of the parties to a conflict. However, the participation of this personnel, like the humanitarian action itself, "shall be subject to the approval of the Party in whose territory they will carry out their duties" (paragraph 1). Even if approval is granted, humanitarian activities may be limited or movements of the relief personnel temporarily restricted in case of imperative military necessity argument used by military commanders (paragraph 3).

Paragraph 4 of Article 71 emphasizes that the relief personnel may not, under any circumstances, exceed the terms of their mission. "The mission of any of the personnel who do not respect these conditions may be terminated". Individual members of the relief personnel take also the risk of being prosecuted under domestic legislation, except when they benefit from immunities of international organizations or under specifically negotiated agreements. A good example of such exceptions is provided by the Convention on the Safety of United Nations and Associated Personnel concluded at New York in 1994, under the UN auspices.[48] Among other privileges, it provides the duty to promptly release or return United Nations and associated personnel captured or detained in the course of performance of their duties.[49]

5. Relationship between IHL and Counter-Terrorism Law in Humanitarian Assistance

In recent years the situation of those humanitarian workers who do not benefit from exceptional immunities became more complicated due to counter-terrorism resolutions of the United Nations Security

48 2051 UNTS 363.

49 Article 8.

Council[50] and domestic laws adopted by states such as Australia, Canada, United Kingdom and USA.[51] There are different types of interactions with designated terrorist groups that are prohibited and even criminalized under such measures, sometimes including incidental transactions necessary for the provision of relief supplies (e.g. payments at checkpoints), provision of assistance to groups in which individuals associated with terrorists may be among the beneficiaries or negotiating with designated terrorist groups humanitarian access to civilians living in territories under their control. There are many concrete examples of a negative impact of such measures in recent years, mainly the fact that humanitarian action is sometimes not based on actual needs, but on constraints and limitations.[52] Humanitarian sector lobbies for exemptions in case of purely humanitarian and impartial activities.

6. Covid-19 and IHL Rules on Humanitarian Access

The global Covid-19 pandemic raises the range of international legal issues, including its impact on state practice in situations of armed conflicts regarding the question of humanitarian access. On the one hand, health systems of states or territorial units affected and overburdened by, often, years or decades of violence are not able to face the new challenges posed by Covid-19. The assistance of aid organizations becomes essential to ensure, that civilians and detained fighters have access to medical supplies and treatment responsive to Covid-19. However, on the other hand, new regulations on the freedom of movement (including movement of humanitarian workers) and social contacts, lockdowns, restrictions on travel and transport of goods, adopted in order to prevent the spread of Covid-19, hamper severely the ability of the humanitarian sector to maintain humanitarian access to suffering populations.

50 See for example UNSC Res. 1916 (2010) and Res. 2317 (2016) on the situation in Somalia.

51 The analysis of domestic legislation in this field is carried out in the study commissioned by OCHA and the Norwegian Refugee Council: Kate Mackintosh and Patrick Duplat, *Study on the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (OCHA and NRC 2013) 19-43.

52 There are many publications on counter-terrorism measures and their consequences for humanitarian action. Among them there is a double issue (916 - 917) of the IRRC, Volume 103, on *Counterterrorism, Sanctions and War* of February 2022 containing more than thirty articles, interviews and other materials. Another joint publication, containing almost twenty contributions, is Stéphane Kolanowski (ed), *Proceedings of the Bruges Colloquium - Terrorism, Counter-Terrorism and International Humanitarian Law* (47 Collegium, College of Europe and ICRC 2017).

There is no doubt that the principles of humanitarian access in international and non-international armed conflicts, presented in above sub-chapters, continue applying in the times of pandemic. Measures taken by states to protect public health must be consistent with IHL rules on humanitarian access. Referring to four layers of the legal framework governing humanitarian access, one cannot deny their validity even in such exceptional circumstances.

The relevance of the first layer on the obligation of each party to an armed conflict to meet the needs of the population under its control is demonstrated additionally by a clear reference to contagious diseases in the GC IV. Namely, occupying authorities have

> the duty of ensuring and maintaining (...) public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.[53]

Unfortunately, in practice of many armed conflicts, parties were not able to prevent the spread of Covid-19 and to respond to urgent health needs.[54] A particularly wide criticism was raised in response to the Israel's decision of December 2020 to ensure Covid-19 vaccines only to citizens of Israel, to Israeli settlers in the West Bank and to Palestinian residents of Jerusalem, excluding the Palestinians living in the West Bank and Gaza Strip, under Israeli occupation.[55]

The second layer, namely the right of impartial humanitarian organizations to offer their services, cannot be restrained under the pretext of pandemic-related measures. On the contrary, the pandemic has rendered humanitarian activities more necessary than ever.

The third layer, on the general consent of the parties to the conflict to the activities of impartial humanitarian organizations, includes activities carried out in areas affected by pandemics. There is a rather

53 Article 56 paragraph 1 GC IV.

54 See for example reports by the Human Rights Watch on the situation in Syria and Yemen: <www.hrw.org/news/2020/04/28/syria-aid-restrictions-hinder-covid-19-response> ; <https://www.hrw.org/report/2020/09/14/deadly-consequences/obstruction-aid-yemen-during-covid-19>.

55 See the following reports: <www.amnesty.org/en/latest/press-release/2021/01/denying-covid19-vaccines-to-palestinians-exposes-israels-institutionalized-discrimination> and <https://reliefweb.int/report/occupied-palestinian-territory/factsheet-gaza-face-two-viruses-covid-19-and-occupation>.

general consensus that, under IHL, the necessity to counter the spread of Covid-19 alone is not a valid ground to deny consent to humanitarian activities[56] and that such a refusal should be considered "arbitrary".[57]

The fourth layer is the only one that entitles parties to a conflict to introduce any restrictions or to prescribe measures of control based on health considerations. These may include ensuring that humanitarian supplies and equipment meet minimum health standards, that the personnel be medically vetted, that there are alternate methods of providing services to avoid gathering of too many people at once and of avoiding cross-contamination risks. It is worthwhile to emphasize once more that these technical arrangements may not amount to a general refusal of consent to humanitarian operations.[58]

7. Conclusion

As demonstrated above, the IHL rules on humanitarian access are not always clear and some questions remain unanswered. Among them, the most crucial issue is how to ensure the balance between, on the one hand, humanitarian imperatives and on the other hand, interests of the parties to the conflict, particularly political (including security) interests. IHL tries to address this problem and to find a balance, but is not fully successful in this regard. Present and future humanitarian workers, as well as civilian and military decision makers should be aware of this challenge and should understand the legal framework of humanitarian access in order to avoid unnecessary complications for them and for the beneficiaries of humanitarian assistance.

56 ICRC paper *IHL Rules on Humanitarian Access and Covid-19* (2020) <ihl_humanitarian_access_and_covid-19.pdf>. See also Oona A. Hathaway, Mark Stevens and Preston Lim, "COVID-19 and International Law Series: International Humanitarian Law - Humanitarian Access" <www.justsecurity.org/73336/covid-19-and-international-law-series-international-humanitarian-law-humanitarian-access>; Patrick Leisure, "The Martens Clause, Global Pandemics, and the Law of Armed Conflict" (2021) 62 Harvard International Law Journal 469.

57 See sub-chapter 3.3.4. in the present chapter.

58 ICRC paper *IHL Rules on Humanitarian Access and Covid-19* (n 55) 4.

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Chapter IV: Protection of the Environment by International Humanitarian Law

Anne Dienelt & Franziska Bachmann[1]

1. Introduction

On November 6th, 2003, the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict, the late UN Secretary-General *Kofi Annan* called upon the international community to expand international laws against environmental damage in times of armed conflict. He observed that there were only few provisions addressing the protection of the environment in relation to armed conflict.[2] Since then, the topic has received more and more attention. In 2011, the UN International Law Commission ("UN ILC") began its work on the protection of the environment in relation to armed conflict.[3] In 2022, it finalized the project and adopted 27 draft principles (so-called "PERAC principles") on the second reading. They address the entire conflict circle (pre-, during and post-conflict phases) and include the various obligations protecting for the environment[4] in

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2 United Nations ("UN"), "Annan calls for expanded laws against environmental damage in war" (*UN News*, 6 November 2003) <https://news.un.org/en/story/2003/11/84782-annan-calls-expanded-laws-against-environmental-damage-war>.

3 ILC, "Syllabus on Protection of the Environment in Relation to Armed Conflicts by Marie G. Jacobsson", 63rd session of the ILC (2011), UN Doc. A66/10 (2011), Annex V.

4 Even though Art. 35(3) of Additional Protocol I ("AP I") refers to the "natural" environment, for the purposes of this paper, the authors in line with the ILC Draft Principles use the term "environment" consistently without prejudice to the application and interpretation of AP I, *cf.* Marja Lehto, "Second Report on protection of the environment in relation to armed conflicts" (ILC Report 2019) 85-86 paras 194-197. For a discussion of a possible definition of "natural environment," see Anne Dienelt, *Armed Conflicts and the Environment–Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law* (Springer 2022) 282.

relation to armed conflict.[5] The ILC intends with the draft principles to "enhanc[e] the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment."[6]

Ever since, the environment has been a "silent" victim of armed conflicts, being severely harmed in international and non-international armed conflicts.[7] Recently, the Russian aggression against Ukraine and the related conflict demonstrate the continuous environmental hazards and the devastating consequences of the conduct of hostilities on the environment. Environmental impacts of the warfare include but are not limited to risks of radiation leaks due to strikes on Ukraine's nuclear power facilities,[8] pollution of soil, air, and water by hazardous substances, either released from explosions of attacked facilities or weaponry and ammunition remnants containing toxic materials,[9] and depletion of forests and natural areas as part of military activities.[10] The extent of damages in Ukraine will be difficult to assess,[11] despite efforts made by the Government of Ukraine, supported by *inter alia* the Organization for Security and

5 ILC, "Report of the International Law Commission Seventy-third session" (18 April-3 June and 4 July-5 August 2022) UN Doc A/77/10, 92 ff.

6 Draft Principle 2, ILC, "Report of the International Law Commission Seventy-third session (18 April-3 June and 4 July-5 August 2022) UN Doc A/77/10, 92.

7 See, e.g., the reports of the Conflict and Environment Observatory on various conflicts, <https://ceobs.org/>.

8 Conflict and Environment Observatory and Zoï Environment Network, "Ukraine conflict environmental briefing: 1. nuclear sites and radiation risks" (*Conflict and Environment Observatory*, July 2022) <https://ceobs.org/ukraine-invasion-environmental-brief-nuclear-and-radiation-risks/>. On the question of legal protection of nuclear power plants in armed conflict see Anne Dienelt, "How Are Nuclear Power Plants Protected by Law During War?" (*Völkerrechtsblog*, 7 March 2022) <https://voelkerrechtsblog.org/de/how-are-nuclear-power-plants-protected-by-law-during-war/>.

9 Organisation for Economic Co-operation and Development, "Environmental impacts of the war in Ukraine and prospects for a green Reconstruction" (*OECD Policy Responses on Impacts of the War in Ukraine*, 1 July 2022) 4 <https://www.oecd.org/ukraine-hub/policy-responses/environmental-impacts-of-the-war-in-ukraine-and-prospects-for-a-green-reconstruction-9e86d691/>.

10 Organisation for Economic Co-operation and Development, "Environmental impacts of the war in Ukraine and prospects for a green Reconstruction" (*OECD Policy Responses on Impacts of the War in Ukraine*, 1 July 2022) 4 <https://www.oecd.org/ukraine-hub/policy-responses/environmental-impacts-of-the-war-in-ukraine-and-prospects-for-a-green-reconstruction-9e86d691/>.

11 Shirin Hakim and Karen E. Makuch, "Conflicts of Interest: The Environmental Costs of Modern War and Sanctions" (*The Royal United Services Institute*, 11 May 2022) <https://www.rusi.org/explore-our-research/publications/commentary/conflicts-interest-environmental-costs-modern-war-and-sanctions>.

Co-operation in Europe, to monitor the environmental consequences of military activities *via* the so-called *EcoDozor* platform.[12]

The current situation in Ukraine provokes questions as to the legal protection of the environment in armed conflicts. In light of the current observations in the field, one may critically ask whether the environment enjoys any protection in conflict at all.

The legal framework predominantly dealing with armed conflicts and thus also war-related environmental damage is international humanitarian law ("IHL"), which can be complemented by other fields, such as human rights law or international environmental law in this regard.[13] States when adopting the Geneva Conventions and the two additional protocols primarily aimed at the protection of the civilian population from the consequences of the conduct of hostilities. The protection of civilians and civilian objects represents one of the overarching purposes of IHL. Still, the protection of the "natural environment" is also addressed in IHL: There are certain treaty provisions as well as customary norms[14] protecting explicitly and implicitly against environmental damage in relation to armed conflict.

This article summarizes the IHL framework protecting for the environment during armed conflict and intends to give a general overview.[15] The

12 *EcoDozor–Environmental Consequences and Risks of the Fighting in Ukraine* <https://ecodozor.org/index.php?lang=en>. Furthermore, Ukrainians can report environmental crimes using the web resource *ecozagroza.gov.ua* or the *EcoZagroza* mobile application.

13 Anne Dienelt, *Armed Conflicts and the Environment–Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law* (Springer 2022), Chap. 3 + 4.

14 In 1946, the International Military Tribunal (Nuremberg) found that the rules of land warfare as expressed in the Regulations annexed to the Hague Convention IV of 1907 reflected "customs of war", *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 American Journal of International Law 172, 248-249. According to the International Court of Justice ("ICJ"), "[the] extensive codification of humanitarian law and the extent of the accession to the resultant treaties […] have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles", *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, 258 para 82. See also the 2005 ICRC's study on customary international humanitarian law, originally published as Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005) Vol I (rules) and Vol II (practice), and its online version <*ihl-databases.icrc.org/customary-ihl/eng/docs/home*> where the practice part is regularly updated. This study also helps analyze how the environment is protected by IHL based on customary rules. Rules 43, 44 and 45 deal with the environment and armed conflict.

15 The article is based on a course (Protection of the Environment) taught to students at the II. Kirimli Dr. Aziz Bey International Humanitarian Law Competition & Advanced Summer School in 2021.

focus is placed on international armed conflicts. While the protection of the environment in non-international armed conflicts is not regulated specifically, the protection in international armed conflicts relies on some provisions explicitly protecting the environment. In the first section (2.), the legal framework protecting the environment in relation to international armed conflicts and based on treaty law is described. The relevant norms are categorized in two groups: treaty provisions either directly (meaning explicitly) (2.1.) or indirectly (meaning implicitly) protecting the environment (2.2.), stressing the two-fold protection the environment enjoys. In the concluding remarks (3.), this assessment is placed in context and an outlook is given.

2. Legal Framework based on IHL Treaties

The conduct of hostilities is largely regulated by IHL. The main sources of law regulating the conduct of hostilities include by the 1907 Hague Convention (IV) and Regulations concerning the Laws and Customs of War on Land,[16] by the 1949 Geneva Conventions ("GC I-IV")[17] and their two Additional Protocols[18] from 1977 ("AP I+II").[19] Customary rules and principles of the laws of armed conflict add another layer of

16 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 (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 277. At the 2nd International Peace Conference in 1907, the 1899 Hague Convention and Regulations were revised; the 1907 version differs only slightly from the 1899 Convention and Regulations.

17 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) (1949) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) (1949) 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) (1949) 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) (1949) 75 UNTS 287.

18 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (1977) 1125 UNTS 3; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (1977) 1125 UNTS 609. Additionally, the Geneva Conventions are complemented by Protocol (III) Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) (2005) 2404 UNTS 261.

19 For the distinction between and the convergence of the Law of The Hague and the Law of Geneva as two branches of IHL, see François Bugnion, "Droit de Genève et droit de La Haye" (2001) 83 Revue internationale de la Croix-Rouge 901.

protection. They also protect for the environment[20] but are not addressed in this contribution.

In treaty law, three norms specifically address the natural environment, namely Art. 35(3) and 55(1) AP I, as well as Art. I of the Convention on the prohibition of military or any hostile use of environmental modification techniques ("ENMOD Convention"[21]).[22] Additionally, other provisions protect the natural environment without expressly referring to the environment; they provide implicit or indirect protection to the environment. For instance, the 1899/1907 Hague Regulations and the Geneva Conventions contain various provisions that indirectly sustain and protect the environment, such as the prohibition of pillage or the prohibition of poisoning wells. Similarly, AP I contains provisions that implicitly protect the environment. Provisions directly and indirectly protecting the environment will be addressed in the following sections.

2.1. Direct Protection of the Natural Environment

Art. 35(3) and 55 AP I and the ENMOD Convention directly protect the environment. Nevertheless, despite their very similar wording ("widespread", "long-term" and (or) "severe" damage to the natural environment) they differ in their understandings of environmental protection in conflict.

2.1.1. Prohibition of Widespread, Long-Term and Severe Damage to the Natural Environment (Article 35(3) AP I)

Art. 35 AP I is denoted as "basic rules" and is situated in Part III Section I on Methods and Means of Warfare of the Protocol. This provision functions as a general limitation relating to methods and means of

20 See also the 2005 ICRC's study on customary international humanitarian law, originally published as Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005) Vol I (rules) and Vol II (practice), and its online version <*ihl-databases.icrc.org/customary-ihl/eng/docs/home*> where the practice part is regularly updated. This study also helps analyze how the environment is protected by IHL based on customary rules. Rules 43, 44 and 45 deal with the environment and armed conflict.

21 Convention on the prohibition of military or any other hostile use of environmental modification techniques (adopted 10 December 1976, entered into force 5 October 1978) (1976) 1108 UNTS 151.

22 *Cf. Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, 241 paras 27+31.

warfare.[23] Paragraph 3 specifically addresses environmental damage by prohibiting "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." Its scope as well as its application raise several questions that will be addressed in the following.

2.1.1.1. Ecocentric Approach to Environmental Protection in AP I

Neither Art. 35(3) AP I nor its drafting history and the related *travaux préparatoires* of AP I contain a legal definition of the term "natural environment",[24] leaving the precise notion and the exact object of protection indistinct.[25] In fact, state delegations during the negotiations of AP I differed greatly in their concept of environmental protection: While some aspired to protect the environment for its own sake, as "an end in itself,"[26] others aimed at protecting the environment because of its existential importance to "the continued survival or health of the civilian population"[27]. According to the *travaux préparatoires* on Art. 35(3) AP I, the provision reflects an ecocentric approach to environmental protection, since it protects the environment as such, independently from the survival of civilians. The wording of Art. 35(3) AP I does not refer to any human values at all; it thus "operates independently of human variables."[28]

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23 Yoram Dinstein, "Warfare, Methods and Means" (*Max Planck Encyclopedia of Public International Law*, September 2015) para 1.

24 As stated before (n 4), for the purposes of this contribution, the authors in line with the ILCs use the term "environment" consistently without prejudice to the application and interpretation of AP I.

25 See, e.g., ICRC, "Guidelines on the Protection of the Natural Environment in Armed Conflict" (2020) 17 para 16 <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>. According to the report of the Group, Biotope, that assisted the Working Group in the drafting process of AP I, "the natural environment relates to external conditions and influences which affect the life, development and the survival of the civilian population and to living organisms", "Report of the Group 'Biotope'" (11 March 1975) CDDH/III/GT/35, 2 para 5, reprinted in Howard S. Levie, *Protection of War Victims* (Vol 3, Oceana Publ. 1980) 267. It thus represents the opposite term to "human environment" which relates "only to the immediate surroundings in which the civilian population lives", "Report of the Group 'Biotope'" (11 March 1975) CDDH/III/GT/35, 2 para 5, reprinted in Howard S. Levie, *Protection of War Victims* (Vol 3, Oceana Publ. 1980) 267.

26 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/275, 358.

27 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/275, 358.

28 Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Journal of International Law 1, 70.

2.1.1.2. Cumulative Threshold and Remaining Ambiguities

Ambiguity also remains in the use of the three terms "widespread", long-term" and "severe" as stated in Art. 35(3) AP I. Prohibited conduct of hostilities must meet these three criteria **cumulatively**.[29] They are, however, ill-defined as they lack clarity on the definition.[30]

The *travaux préparatoires* show several proposals by different delegations of states on how to define the terms: Discussions in the (Working) Group, Biotope, which was tasked to draft the provision, show, for instance, that some states proposed to define "long-term" as environmental damage caused by an armed conflict that should last "perhaps for ten years or more," while some other state representatives considered twenty or thirty years "as being the minimum."[31] In any case, there was sufficient consensus among the drafters that "long-term" environmental damage should be measured in decades.[32] To this effect, they also agreed that "short-term" damage to the natural environment caused by conventional warfare activities, such as artillery bombardment, should not be prohibited by Art. 35(3) AP I.[33] There was no agreement on a definition of "severe" or "widespread". The *travaux préparatoires* only indicate that "widespread" was meant to refer to the

29 See, e.g., Jean de Preux, "Article 35 – Basic rules" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 418 para 1457. This is contrary to the 1976 ENMOD Convention which prerequisites in Art. I(1) are non-cumulative, see, e.g., Dieter Fleck, "Protection of the Environment in Relation to Armed Conflicts" in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) Section 10.06. para 1.

30 See, e.g., Michael Bothe and others, "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities" (2010) 92 International Review of the Red Cross 569, 578-579; Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Journal of International Law 1, 71.

31 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/275/Rev.1, 269 para 27.

32 *Cf.* Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Journal of International Law 1, 70. See also Jean de Preux, "Article 35 – Basic rules" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 416 para 1452.

33 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/275/Rev.1, 269 para 27; "Report of the Group "Biotope"" (11 March 1975) CDDH/III/GT/35, para 6, reprinted in Howard S. Levie, *Protection of War Victims* (Vol 3, Oceana Publ. 1980) 269; Jean de Preux, "Article 35 – Basic rules" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 416-417 para 1454.

affected scope or area of the potential damage.[34] Whether this requires an area of several kilometers, an entire region, or effects beyond an area in form of transboundary harm was not clarified. However, the *travaux préparatoires* record some examples of what state representatives had in mind. Against the backdrop of the Vietnam War, the representative for the Democratic Republic of Vietnam recalled "the large-scale extermination of the civilian population and the systematic destruction of entire regions."[35] He further referred to an instance where an area of 2,5 million hectares was contaminated with 90,000 tons of herbicidal chemicals.[36] Apart from this, the extent of environmental damage and therefore the interpretation of "widespread" lacks clarity.[37]

In the end, the drafters of AP I agreed to include the threshold demanding "widespread", "long-term" and "severe" environmental damage without clarifying their meaning. So far, they "mandate a three-part test which is nearly impossible to meet."[38]

2.1.1.3. Absolute Protection

The protection of the natural environment provided for in Art. 35(3) AP I is absolute.[39] No means or method of warfare causing harm to the natural environment that qualifies as widespread, long-term, and

34 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/275/Rev.1, 268-269 para 27.

35 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XIV, Geneva 1974-1977) CDDH/III/SR.26, 236 para 11. See also ICRC, "Guidelines on the Protection of the Natural Environment in Armed Conflict" (2020) 35 para 56 <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>.

36 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XIV, Geneva 1974-1977) CDDH/III/SR.26, 237 para 12. See also ICRC, "Guidelines on the Protection of the Natural Environment in Armed Conflict" (2020) 35 para 56 <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>.

37 ICRC, "Guidelines on the Protection of the Natural Environment in Armed Conflict" (2020) 36 para 59 <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>.

38 Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Journal of International Law 1, 71. See also Dieter Fleck, "Scope of Application of International Humanitarian Law" in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) Section 10.01. para 3.

39 See, e.g., Jean de Preux, "Article 35 – Basic rules" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 420 para 1462.

severe can be rendered lawful.[40] The prohibition takes effect irrespective of any deliberations of military necessity or proportionality.[41] Once the undetermined and arguably very high and difficult to reach threshold of Art. 35(3) AP I is met, the environment enjoys an absolute protection.[42]

2.1.1.4. Reality Check in the War Theatre?

Both the vagueness and the absolute threshold of the three-part test, as seen above, cause difficulties when it comes to application and practice. Since there are diverging views and no agreed definitions, neither by states nor in scholarship, it is rather doubtful whether the threshold will ever be applied in practice.[43]

Conflicts such as the 1990/1991 Gulf War and the oil spills and fires never raised these questions, since not all conflict parties were parties to AP I. Additionally, the US Department of Defense pointed out that the environmental damage caused by the oil spills and fires as "conventional operations" would not have led to the application of AP I to this conflict.[44]

The provision was not applied either to the NATO bombing campaign in Kosovo in 1999, since the US and France were not a party to AP I. When reviewing the situation, the competent committee also held that even if AP I was applied, the environmental damage caused by the bombing campaign was below the threshold established in Art. 35(3)

40 Raising the question whether Art. 35 and 55 AP I are insofar *lex specialis* to the principle of proportionality, Michael Bothe and others, "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities" (2010) 92 International Review of the Red Cross 569, 578.

41 See, e.g., Dieter Fleck, "Scope of Application of International Humanitarian Law" in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) Section 10.01. para 3; Richard Desgagné, "The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures" (2000) 3 Yearbook of International Humanitarian Law 109, 111; Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Journal of International Law 1, 99.

42 ICRC, "Guidelines on the Protection of the Natural Environment in Armed Conflict" (2020) 32 para 49 with further reference <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>.

43 Michael Bothe and others, "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities" (2010) 92 International Review of the Red Cross 569, 576.

44 US Department of Defense, "Report to Congress on the Conduct of the Persian Gulf War" (10 April 1992) 31 ILM 612, 636-637.

AP I.[45] With regard to the qualifiers "widespread", "long-term" and "severe" it was stressed that the Balkans region was not affected in its entirety.[46]

Concerning chemical warfare and the deployed herbicides by the US forces in Vietnam, some doubt that the time and duration of the damage meet the long-term criterion in terms of several decades of lasting environmental damage, since parts of the environment in Vietnam have recovered since then.[47]

Regarding nuclear weapons and AP I's application to their deployment, most nuclear powers are not party to AP I or have made reservations as to their deployment and AP I. The US, for instance, are not a state party to AP I;[48] France as a state party to AP I has made a reservation with regard to Art. 35(3) AP I excluding an application to nuclear weapons.[49] Interestingly, Russia as a nuclear power is a state party to AP I and has not excluded the application of AP I to nuclear weapons.[50]

In sum, an important political message was conveyed when states adopted provisions in AP I in 1977 to protect the natural environment in armed conflict after the experiences of the Vietnam War. The specifics, however, such as lacking definitions of the threshold criteria and the threshold's cumulative character, render an application to the conduct of hostilities almost impossible. One can thus doubt whether the adoption was meant seriously. Nevertheless, if states had the political will and found consensus today, they could facilitate the application of Art. 35(3)

45 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ICTY (2000) 39 ILM 1257, para 17.

46 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ICTY (2000) 39 ILM 1257, para 16-17.

47 Michael Bothe and others, "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities" (2010) 92 International Review of the Red Cross 569, 575-576.

48 ICRC, "Treaties, States Parties and Commentaries – States Parties" <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470>. So far, the USA are signatory state to AP I.

49 ICRC, "Treaties, States Parties and Commentaries – France" <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=D8041036B40EBC44C1256A34004897B2>.

50 ICRC, "Treaties, States Parties and Commentaries – States Parties" <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=74BABBD71087E777C1256402003FB5D4>.

and 55(1) AP I to military conduct by clarifying the terminology and by agreeing on definitions, for instance.[51]

2.1.2. Obligation to Take Care for the Environment for the Sake of the Population (Article 55 AP I)

2.1.2.1. Protection of the Civilian Population

Art. 55 AP I is denoted as "Protection of the Natural Environment" and is situated in its Part IV Section I on the general protection of the civilian population against the effects of hostilities. Like Art. 35(3) AP I, Art. 55 AP I also addresses specifically the natural environment. Paragraph 1 of Art. 55 AP I denotes in its first sentence that "care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage." Its second sentence addresses environmental damage by specifically prohibiting "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*." Especially in terms of its second sentence Art. 55(1) AP I takes a different turn compared to Art. 35(3) AP I: It links the protection of the environment against widespread, long-term and severe damage to the health and survival of the population and thus differs from Art. 35(3) AP I considerably.[52] A second paragraph prohibits reprisals against the natural environment.

2.1.2.2. Anthropocentric Approach to Environmental Protection in AP I

Looking into the *travaux préparatoires*, a proposal of Art. 55 AP I was brought forward by the delegation of Australia and a new paragraph was eventually added according to efforts by the delegations of Czechoslovakia, the German Democratic Republic and Hungary.[53] It was debated whether both drafts should remain two separate provisions

51 E.g., UN Environment has recommended this in 2009 in its report "Protecting the Environment During Armed Conflict - An Inventory and Analysis of International Law", <https://www.unep.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international>. The UN ILC has refrained from providing definitions as well, see Draft Principle 13, para 8, Report of the International Law Commission Seventy-third session (18 April-3 June and 4 July-5 August 2022) UN Doc A/77/10, 92.

52 See, e.g., Silja Vöneky and Rüdiger Wolfrum, "Environment, Protection in Armed Conflict" (*Max Planck Encyclopedia of Public International Law*, February 2016) para 25.

53 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol III, Geneva 1974-1977) CDDH/III/60, 220 and CDDH/III/64, 221.

or whether they should be joined together since they duplicated each other in vast parts.[54] The Group, 'Biotope', was entrusted with this question and came to the conclusion that "the two Articles should remain separate for the reason that whereas Article [55] relates to the protection of the civilian population, Article [35(3)] relates to the prohibition of unnecessary injury."[55]

Based on the wording and the drafting history, Art. 55(1) AP I protects the environment for the purpose of health and survival of the population and not for the environment's sake. It thus reflects an anthropocentric understanding of environmental protection, envisaging an environment that serves humans.[56] Art. 35(3) AP I, in contrast, reflects the ecocentric approach by limiting methods and means of warfare that damage the natural environment for ecological reasons.[57] Although both provisions overlap in some part, they do not reduce the effect of one another.[58] Art. 55(1) AP I gives full effect to Art. 35(3) AP I and even furthers its dimension of environmental protection with regard to collateral environmental damage caused by certain methods or means of warfare.[59]

Notably, the term "population" differs from the initial wording "civilian population", which was *inter alia* used in the report of the Group 'Biotope' The omission of the adjective "civilian" as a qualifier did not occur by accident but was used to stress that Art. 55 AP I aims at

54 Jean de Preux, "Article 35 – Basic rules" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 414 para 1449.

55 "Report of the Chairman of the Group 'Biotope'" (11 March 1975) CDDH/III/GT/35, 1 para 11, reprinted in Howard S. Levie, *Protection of War Victims* (Vol 3, Oceana Publications 1980) 268.

56 "Report of the Chairman of the Group 'Biotope'" (11 March 1975) CDDH/III/GT/35, 2-3 para 4, reprinted in Howard S. Levie, *Protection of War Victims* (Vol 3, Oceana Publications 1980) 269. See also Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Journal of International Law 1, 70; Anne Dienelt, *Armed Conflicts and the Environment – Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law* (Springer 2022), 22ff.

57 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/275, 358-359; Jean de Preux, "Article 35 – Basic rules" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 414 para 1449; 420 para 1462.

58 Silja Vöneky and Rüdiger Wolfrum, "Environment, Protection in Armed Conflict" (*Max Planck Encyclopedia of Public International Law*, February 2016) para 25.

59 Michael Bothe and others, "Article 55 – Protection of the Environment" in Michael Bothe and others (eds), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Nijhoff 2013) 388 para 2.3.

the future health or survival of the overall population including both combatants and civilians regardless of their status.[60] The accompanying term "health" expresses that Art. 55 AP I does not only seek to ensure the plain survival of humankind; it instead puts an emphasis on intolerable health impairments having a devastating effect on the population, such as genetic or birth defects.[61]

2.1.2.3. Threshold: Absolute Protection and Remaining Ambiguities

Art. 35(3) and 55 AP I employ corresponding criteria by adopting the very same formula "widespread, long-term and severe" in order to maintain the necessary consistency between the two provisions.[62] Hence, the definitions of all three terms remain vague and lead to similar difficulties when interpreting them. The definitions of all three terms remain vague while at the same time Art. 55(1) AP I– like Art. 35(3) AP I– provides absolute protection of the environment;[63] it takes effect irrespective of any deliberations of military necessity or proportionality.[64] Again, both the vagueness as well as the absolute threshold of the three-part test cause, as discussed in the context of Art. 35(3) AP I,[65] massive difficulties when it comes to application and practice.

60 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/275, 360 and CDDH/215/Rev.1, 281 para 82.

61 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/275, 360 and CDDH/215/Rev.1, 281 para 82.

62 This had already been suggested in "Report of the Chairman of the Group 'Biotope'" (11 March 1975) CDDH/III/GT/35, 3 para 5, reprinted in Howard S. Levie, *Protection of War Victims* (Vol 3, Oceana Publications 1980) 269. *Cf.* Claude Pilloud and Jean de Preux, "Article 55 – Protection of the natural environment" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 663 para 2132.

63 Dieter Fleck, "Protection of the Environment in Relation to Armed Conflicts" in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) Section 10.06. para 3; *cf.* Claude Pilloud and Jean de Preux, "Article 55 – Protection of the natural environment" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 663 para 2133.

64 See, e.g., Dieter Fleck, "Scope of Application of International Humanitarian Law" in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) Section 10.01. para 3; Richard Desgagné, "The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures" (2000) 3 Yearbook of International Humanitarian Law 109, 111.

65 See Section 2.1.1.4/.

2.1.2.4. Prohibited Reprisals against the Environment

Art. 55(2) AP I prohibits attacks against the natural environment by way of reprisal.[66] This treaty obligation complements a series of provisions in AP I specifically aiming to prohibit certain attacks against protected objects or persons.[67]

Remarkably, having originally proposed this paragraph, Australia later declared its objection with regard to this prohibition.[68] Several states made reservations or declarations to Art. 55(2) AP I.[69] For this reason, several members of the ILC's Drafting Committee on the "Protection of the Environment in relation to Armed Conflict" opposed that Art. 55(2) AP I is reflective of customary law,[70] and they also raised concern with regard to the application of the prohibition of reprisals against the environment in both IACs and NIACs, pointing out the absence of such prohibitions *inter alia* in AP II.[71] These concerns were echoed when the 6th Committee of the General Assembly discussed this issue in 2019.[72] The prohibition of reprisals against the environment has been especially disputed among non-state parties to AP I. The US, for instance, repeatedly stressed that they do not believe that there is a

66 *Pantazopoulos* points out that the widely used shorthand "reprisals against the natural environment" is not entirely accurate in itself since Art. 55(2) prohibits attacks that target the natural environment by way of reprisals, Stavros-Evdokimos Pantazopoulos, "Reflections on the Legality of Attacks Against the Natural Environment by Way of Reprisals" (2020) 10 Goettingen Journal of International Law 47, 51 n 11.

67 An overview is provided by Stavros-Evdokimos Pantazopoulos, "Reflections on the Legality of Attacks Against the Natural Environment by Way of Reprisals" (2020) 10 Goettingen Journal of International Law 47, 52-53.

68 Michael Bothe and others, "Article 55 – Protection of the Environment" in Michael Bothe and others (eds), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Nijhoff 2013) 387 para 2.1.2.; 389 para 2.5.

69 Including Egypt, the Federal Republic of Germany, Italy and the UK, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Vol II, CUP 2005) 3471, para 1076-1079.

70 Still, the ILC affirmed Draft Principle 16 which mirrors Art. 55(2) as being reflective of customary law.

71 ILC, "Protection of the environment in relation to armed conflicts – Statement of the Chairman of the Drafting Committee, Mr. M. Forteau" (30 July 2015) 10-11 <https://legal.un.org/ilc/documentation/english/statements/2015_dc_chairman_statement_peac.pdf>. With regard to the ILC Draft Principles, see also Britta Sjöstedt and Anne Dienelt, "Enhancing the Protection of the Environment in Relation to Armed Conflicts – the Draft Principles of the International Law Commission and beyond" (2020) 10 Goettingen Journal of International Law 13.

72 ILC, "Report of the International Law Commission on the work of its 71st session (2019)" (12 February 2020) UN Doc A/CN/.4/734, para 116.

customary prohibition of reprisals against the environment.[73] If there was such a customary prohibition of reprisals against the environment, the US must be considered a persistent objector.[74] State parties to AP I, however, are prohibited from deploying reprisals against the environment.

2.1.3. Environmental Modification Techniques in Terms of Article I ENMOD Convention

The ENMOD Convention, that counts 78 state parties, addresses the "hostile use of environmental modification techniques".[75] It was negotiated at the same time as AP I, but both treaties were discussed in different settings: the ENMOD Convention is placed in the context of arms control law while AP I forms part of the body of international humanitarian law.[76] Even though the ENMOD Convention contains a similar wording as Art. 35(3) and 55(1) AP I, it broadly differs from AP I as to their scope of application and the meaning of the wording. As part of arms control law, the ENMOD Convention regulates the use of the environment as a weapon.[77] Art. 35(3) and 55 AP I, on the other hand, prohibit more generally the employment of methods or means of warfare, thus regulating the conduct of hostilities, when causing certain environmental damage, no matter the weapon. The scope of application also differs in terms of temporal applicability: The ENMOD Convention arguably applies in peacetime, as long as it is

73 See, e.g., Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, "The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions" (1987) 2 American University International Law Review 419, 426. For further instances and references see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Vol II, CUP 2005) 3474 para 1106; 3477-3479 para 1124-1126; 3486-3487 para 1184-1186.

74 If states repeatedly voice that they are not bound by a new customary rule, and thereby confirm that they do not feel bound by it, then they are persistent objectors. For jurisprudence see *Asylum (Colombia v. Peru)* (Judgment) [1950] ICJ Rep 266, 275-278; *Fisheries (United Kingdom v. Norway)* (Judgment) [1951] ICJ Rep 116, 131.

75 Art. I(1) ENMOD Convention.

76 See, e.g., Silja Vöneky and Rüdiger Wolfrum, "Environment, Protection in Armed Conflict" (*Max Planck Encyclopedia of Public International Law*, February 2016) para 36.

77 *Cf.* Preamble para 3 ENMOD Convention. See also Silja Vöneky, "Limiting the Misuse of the Environment during Peacetime and War – The ENMOD Convention" (2020) Freiburger Informationspapiere zum Völkerrecht und Öffentlichen Recht 1, 7.

used in a hostile manner.[78] Additionally, it is disputed whether NIACs are fully encompassed by the ENMOD's scope of application during armed conflict.[79] Based on the wording, which refers to "damage or injury to any other State Party," it only applies between states and thus only applies to IACs.

2.1.3.1. Anthropocentric Approach in ENMOD Convention

The ENMOD Convention arose out of bilateral efforts made by the US and USSR in the 1970s.[80] Its drafting history can also be placed in context of the Vietnam War in the 1970s.[81] It aims at prohibiting the modification of the environment through deliberate manipulation of natural processes, turning the environment itself into a weapon.[82] In its Art. II the Convention defines the term "environmental modifications techniques" as referring "to any technique for changing –through the deliberate manipulation of natural processes– the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space." In an (legally non-binding) Understanding relating to Art. II, several examples of phenomena that could be a consequence of such environmental modification techniques were listed, including seism and tsunamis, changes in weather or climate patterns, changes in sea currents or the status of the ozone layer.[83] Peaceful environmental modification techniques are not regulated by the ENMOD Convention as highlighted by its Art. III(1). Paragraph

78 Pointing to a systematic interpretation of Art. III(1) ("for peaceful purposes") and Art. I(1) ("military or any other hostile use") that would lead to the application of the Convention outside of the *ius in bello*, Silja Vöneky, "Limiting the Misuse of the Environment during Peacetime and War – The ENMOD Convention" (2020) Freiburger Informationspapiere zum Völkerrecht und Öffentlichen Recht 1, 13-14.

79 Silja Vöneky, "Limiting the Misuse of the Environment during Peacetime and War – The ENMOD Convention" (2020) Freiburger Informationspapiere zum Völkerrecht und Öffentlichen Recht 1, 13+18 with further reference.

80 "Letter dated 74/08/08 from the representatives of the Union of Soviet Socialist Republics and the United States of America to the United Nations addressed to the Secretary-General" (9 August 1974) UN Doc A/9698, Annex IV.

81 For the historical context, see, e.g., Silja Vöneky, "Limiting the Misuse of the Environment during Peacetime and War – The ENMOD Convention" (2020) Freiburger Informationspapiere zum Völkerrecht und Öffentlichen Recht 1, 4-8.

82 See also Michael Bothe and others, "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities" (2010) 92 International Review of the Red Cross 569, 572.

83 "Report of the Conference of the Committee on Disarmament" (Vol 1, New York 1976) UN Doc A/31/27[Vol.I] 92.

7 of its Preamble emphasizes that the Convention aims to "prohibit […] military or any other hostile use of environmental modification techniques in order to eliminate the dangers to mankind from such use." Like Art. 55 AP I, the ENMOD Convention can be categorized in anthropocentric terms, since it regulates the conduct of state parties (i.e., the use of the environment) to protect the health or survival of humankind.[84]

2.1.3.2. Threshold and a Clarifying Memorandum of Understanding

A striking difference in terms of the ENMOD Convention is that it does not combine the qualifying adjectives "widespread", "long-lasting", and "severe" with the preposition "and" but "or" instead. The terms are therefore non-cumulative and are read alternatively.[85]

In the non-binding Understanding relating to Art. I the drafters agreed upon definitions for those terms.[86] At the same time the Understanding stresses that the definitions are given for the purposes of the ENMOD Convention and do not extend to interpretations of identical or comparable words in other treaties.[87] Similarly, several delegations that formed part in the drafting process of AP I pointed out that the definitions given to the terms in AP I would not have the same meaning as the words used in the ENMOD Convention.[88]

In the Understanding, states agreed that the term "widespread" should "[encompass] an area on the scale of several hundred square kilometers".[89] "Long-lasting" should refer to harm that endures months, maybe a

84 Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Journal of International Law 1, 13-14.

85 Michael Bothe and others, "Article 55 – Protection of the Environment" in Michael Bothe and others (eds), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Nijhoff 2013) 389 para 2.6.1.

86 "Report of the Conference of the Committee on Disarmament" (Vol 1, New York 1976) UN Doc A/31/27[Vol.I] 91.

87 "Report of the Conference of the Committee on Disarmament" (Vol 1, New York 1976) UN Doc A/31/27[Vol.I] 91.

88 See, e.g., Argentina and Egypt's explanations of vote to Art. 33 of Draft AP I, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol VI, Geneva 1974-1977) CDDH/SR.39, 113-114. For similar thoughts, yet without explicitly referring to the ENMOD Convention, Federal Republic of Germany's explanation of vote to Art. 33 of Draft AP I, *ibid*, 115.

89 "Report of the Conference of the Committee on Disarmament" (Vol 1, New York 1976) UN Doc A/31/27[Vol.I] 91.

season. It is important to see that the interpretation set forth in the Understanding thus differs from the interpretation of the term "long-term" as discussed in the context of Art. 35(3) AP I where the drafters of the Protocol at least seemed to agree that "long-term" environmental damage should be measured in decades.[90] "Severe" was also defined by the state parties to the ENMOD Convention and states agreed that this would include "serious or significant disruption or harm to human life, natural and economic resources or other assets."[91]

This difference can be explained against the backdrop of the different scopes and objectives of the ENMOD Convention on the one hand and AP I on the other. The scope of application of the ENMOD Convention is far more limited than the scope of AP I, since the Convention is strictly confined to regulating the use of environmental modification techniques.[92] Its scope is even more limited since the term "environmental modification techniques" as used in Art. I is based on "deliberate manipulation of natural processes".[93] AP I, by way of contrast, prohibits the employment of no matter which methods or means of warfare that may cause environmental damage, and also covers collateral environmental damage. As the ENMOD Convention and AP I lack any equivalency from this perspective, Art. 35(3) and 55 AP I thus require a high threshold whereas a lower threshold suffices in relation to the ENMOD Convention's narrower scope of application.[94]

2.1.4. Preliminary Remarks

On the one hand, Art. 35(3) and 55 AP I and the ENMOD Convention offer direct protection of the environment in relation to armed conflict. Their specific protection, however, differs and complements each other. Art. 35(3) and 55 AP I protect against environmental damage caused

90 See Section 2.1.1.2.

91 "Report of the Conference of the Committee on Disarmament" (Vol 1, New York 1976) UN Doc A/31/27[Vol.I] 91.

92 Carson Thomas, "Advancing the legal protection of the environment in relation to armed conflict: Protocol I's threshold of impermissible environmental damage and alternatives" (2013) 82 Nordic Journal of International Law 83, 90.

93 Art. II ENMOD Convention.

94 See also Carson Thomas, "Advancing the legal protection of the environment in relation to armed conflict: Protocol I's threshold of impermissible environmental damage and alternatives" (2013) 82 Nordic Journal of International Law 83, 90; Silja Vöneky, "Limiting the Misuse of the Environment during Peacetime and War – The ENMOD Convention" (2020) Freiburger Informationspapiere zum Völkerrecht und Öffentlichen Recht 1, 13.

by the employment of any methods or means of warfare if the damage caused exceeds the threshold of "widespread, long-term and severe." This includes collateral environmental damage. Mainly due to its cumulative and undefined threshold, the norm has never been applied in practice.

The ENMOD Convention, on the other hand, prohibits hostile use of the environment through environmental modification techniques, requiring a deliberate manipulation of natural processes. The damage or injury caused to any other state party must meet a threshold by qualifying as either widespread, long-lasting *or* severe, and as defined in the related Understanding. Its scope of application, however, is far more limited from the outset and has different legal effects than AP I. Additionally, with only 78 state parties (compared to 174 state parties to AP I) the Convention enjoys less support and consequently only has a limited effect in practice. In fact, the ENMOD Convention has not yet been applied to a war setting either, similarly to Art. 31(3) and 55(1) AP I. For all of these reasons, none of these norms have been applied to the 2022 Russia-Ukraine conflict even though both parties to the conflict are state parties to AP I and ENMOD Convention.

2.2. Indirect Protection of the Natural Environment

The conflict in Ukraine shows that even though Art. 35(3) and 55(1) AP I and the ENMOD Convention do not apply so far, other norms protect for the environment in the conflict. Apart from provisions that are specifically designed to protect the environment in relation to armed conflict, there are numerous provisions indirectly protecting the environment without expressly referring to it. In this regard, the 1899/1907 Hague Regulations, the Geneva Conventions, and their additional protocols contain provisions that indirectly sustain and protect the environment. Mainly, provisions that protect civilian objects and the civilian population also implicitly protect the environment and parts of it.

2.2.1. Regulations Governing the Conduct of Hostilities Based on the 1899/1907 Hague Regulations

Before the Geneva Conventions were adopted in the aftermath of World War II, the Hague Regulations from 1899/1907 regulated the conduct of hostilities. While the Geneva Conventions focus on the

protection of the victims of war, the Hague Regulations regulate the conduct of hostilities as such.[95] They contain provisions that are reflective of customary law,[96] offering indirect protection of the environment by prohibiting employment of means of warfare that could cause harm to the environment, such as Art. 23, 28 and 47 Hague Regulations.

2.2.1.1. Prohibition of Poison

Art. 23 *lit.* a Hague Regulations prohibits the employment of "poison or poisoned weapons." Even before the Hague Regulations were first adopted in 1899, the American Lieber Code from 1863[97] encompassed a similar provision in its Art. 16.[98] The prohibition of the use of poison is reflective of customary law,[99] and has an impact on the protection of the environment: The prohibition of poison prevents the environment from being contaminated by poison, thus serving as an example of indirect or implicit environmental protection.[100]

2.2.1.2. Protection of Property

Additionally, Art. 23 *lit.* g Hague Regulations prohibits the destruction or seizure of the enemy's property, "unless such destruction or seizure be imperatively demanded by the necessities of war". The environment and some of its elements can form part of the enemy's property.[101] Some have also argued that during the 1990/1991 Gulf War the destruction of hundreds of Kuwaiti oil fields violated Art. 23 *lit.* g Hague Regulations.[102]

95 For the distinction between and the convergence of the Law of The Hague and the Law of Geneva as two branches of international humanitarian law, see François Bugnion, "Droit de Genève et droit de La Haye" (2001) 83 Revue internationale de la Croix-Rouge 901.

96 See n 14.

97 *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (24 April 1863) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=A25AA5871A04919BC12563CD002D65C5>.

98 See also Patryk I Labuda, "Lieber Code" (*Max Planck Encyclopedia of Public International Law*, September 2014) para 18.

99 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, 248 para 54, 258 para 80-82.

100 *Cf.* Silja Vöneky and Rüdiger Wolfrum, "Environment, Protection in Armed Conflict" (*Max Planck Encyclopedia of Public International Law*, February 2016) para 21.

101 Pointing out that it is still unclear what parts of the environment fall under the term "property", Richard Desgagné, "The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures" (2000) 3 Yearbook of International Humanitarian Law 109, 115.

102 US Department of Defense, "Report to Congress on the Conduct of the Persian Gulf War" (10 April 1992) 31 ILM 612, 636–637. See also Carson Thomas, "Advancing the legal protection of the environment in relation to armed conflict: Protocol I's threshold of impermissible environmental damage and alternatives" (2013) 82 Nordic Journal of International Law 83, 92.

Nevertheless, the protection Art. 23 *lit.* g Hague Regulations offers is not absolute: If the necessities of war demand for such destruction, an attack can be rendered lawful. Consequently, there are situations when the destruction of the enemy's property is justified by military necessity and is thus lawful. This is different from AP I: Once an attack may cause widespread, long-term, and severe harm to the natural environment, Art. 35(3) and 55(1) AP I provide absolute protection of the environment and take effect regardless of military necessity or proportionality.[103] In comparison, the protection of the environment provided for in Art. 23 *lit.* g Hague Regulations is limited,[104] but in practice it can be applied more easily and enjoys more relevance since the legal requirements are lower compared to Art. 35(3) AP I.

2.2.1.3. Prohibition of Pillage

The prohibition of pillage in Art. 28 Hague Regulations (and Art. 33(1) Geneva Convention IV) is also indirectly protecting the environment and plays an important role in practice and case law. The International Court of Justice ("ICJ") in the case concerning *Armed Activities on the Territory of the Congo* examined the depletion of natural resources in armed conflict and confirmed that looting, plundering and the exploitation of natural resources is unlawful.[105] Since pillage of a town or a place also covers elements of natural resources, such as gold and timber,[106] it indirectly protects parts of the environment from the consequences of an armed conflict. Importantly, pillage is prohibited without any possibility of rendering it lawful by military necessity or proportionality, parallel to Art. 35(3) and Art. 55(1) AP I.[107] The practical relevance of these norms is also stressed by the mentioned case-law.

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103 See Sections 2.1.1.3 and 2.1.2.3.

104 Silja Vöneky and Rüdiger Wolfrum, "Environment, Protection in Armed Conflict" (*Max Planck Encyclopedia of Public International Law*, February 2016) para 20

105 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Reports 168, 252 para 245. See also Olivia Radics and Carl Bruch, "The Law of Pillage, Conflict Resources, and Jus Post Bellum" in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (online edn, OUP 23 November 2017) Section 6.1.

106 See for instances of domestic cases dealing with pillages pursued by corporations, Olivia Radics and Carl Bruch, "The Law of Pillage, Conflict Resources, and Jus Post Bellum" in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (online edn, OUP 23 November 2017) Section 6.3.

107 See Sections 2.1.1.3 and 2.1.2.3.

2.2.1.4. Prohibition of Reprisals

Art. 33(3) Hague Regulations prohibits attacks in form of reprisals against protected people and their property. This prohibition is similar to the prohibition of reprisals against the environment in Art. 55(2) AP I.[108] In the context of Art. 23 *lit.* g Hague Regulations, that only prohibits the destruction of the enemy's property, it has been established that property can also include some elements of the environment.[109] Hence, the prohibition of reprisals against property in Art. 33(3) GC IV protects parts of the environment, thus implicitly protecting the environment.

2.2.2. Protection of the Victims of War based on the 1977 Additional Protocol I

In addition to the specific protection of the environment in AP I, the protocol contains several provisions implicitly protecting parts of the environment.

2.2.2.1. Objects Indispensable to the Survival of the Civilian Population

Art. 54(2) AP I protects objects indispensable to the survival of the civilian population and prohibits to attack, destroy, remove, or render them useless. It explicitly mentions foodstuffs, agricultural areas to produce foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works in a non-conclusive list.[110] This list contains various parts of the environment: foodstuff, areas of cultivation, crops, and cattle, for instance, which form part of the environment. By explicitly mentioning these parts of the environment (as objects that are specifically protected), the provision again recognizes the dependence of the civilian population on the environment (cf. Art. 55(1) AP I).

The second part of the sentence in Art. 54(2) AP I ("for the specific purpose of denying them for their sustenance value to the civilian population") was much debated in the drafting process. At first, the wording "for the purpose of denying them as such" was adopted by the

108 See Section 2.1.2.4.

109 See Section 2.2.1.2.

110 Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 Yale Journal of International Law 1, 77; Claude Pilloud and Jean de Preux, "Article 54 – Protection of objects indispensable to the survival of the civilian population" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 655 para 2103.

Working Group[111] and Committee III in charge of the provision.[112] Only in the final Drafting Committee today's wording was introduced and eventually adopted by consensus[113]. The wording "for their sustenance value to the civilian population" in Art. 54(2) AP I is in large parts similar to Art. 55(1) AP I, where specific elements of the natural environment as such are protected to secure "the health or survival of the population," reflecting the anthropocentric dimension of environmental protection.[114] The present wording stresses the link between the protected objects to the civilian population and their survival: Paragraph 2 only addresses the protection of the civilian population from deliberate denial of objects that provide for sustenance; it does not protect the civilian population from denial of that objects for any other purposes, e.g., military necessity.[115] The *travaux préparatoires* provide a clarifying example: "[B]ombarding an area to prevent the advance through it of an enemy is permissible, whether or not the area produces food, but the deliberate destruction of food-producing areas in order to prevent the enemy from growing food on them is forbidden."[116] Incidental damage is not covered by this provision since the destruction has to be deliberate.[117] Even if attacks are permissible in light of military necessity, they are subject to the limitations in Art. 57 AP I on precautions in attacks.[118]

111 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/III/264/Rev.1, 349.

112 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/215/Rev.1, 279 para 74.

113 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol VI, Geneva 1974-1977) CDDH/SR.42, 208 para 19.

114 See Section 2.1.2.2.

115 Claude Pilloud and Jean de Preux, "Article 54 – Protection of objects indispensable to the survival of the civilian population" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 655-656 para 2104-2105.

116 "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict" (Vol XV, Geneva 1974-1977) CDDH/215/Rev.1, 279 para 74.

117 *Cf.* Michael Bothe and others, "Article 54 – Protection of objects indispensable to the survival of the civilian population" in Michael Bothe and others (eds), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Nijhoff 2013) 381 para 2.3.

118 Claude Pilloud and Jean de Preux, "Article 54 – Protection of objects indispensable to the survival of the civilian population" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 656 para 2105.

2.2.2.2. Works and Installations Containing Dangerous Forces

Art. 56 AP I addresses works and installations containing dangerous forces and expressly refers to dams, dykes and nuclear electrical generating stations.[119] They are civilian objects *a priori* and as such protected by Art. 52 AP I.[120] In the event that they become military objectives,[121] Art. 56 AP I provides additional but not absolute protection.[122] Based on Art. 56(2) AP I, in very exceptional cases attacks on protected objects in terms of Art. 56(1) AP I are lawful, as long as the other rules and principles in IHL are also fulfilled.[123] In general, Art. 56(1) AP I renders such an attack unlawful.[124] Whether severe losses among the civilian population can occur must be evaluated against objective criteria, e.g., vicinity of the next inhabited town, number of inhabitants, or geographical features of the location.[125] If a dam is destroyed, for instance, contained water will be released in an

119 On the question of legal protection of nuclear power plants in armed conflict Anne Dienelt, "How Are Nuclear Power Plants Protected by Law During War?" (*Völkerrechtsblog*, 7 March 2022) <https://voelkerrechtsblog.org/de/how-are-nuclear-power-plants-protected-by-law-during-war/>; Abby Zeith and Eirini Giorguo, "Dangerous forces: the protection of nuclear power plants in armed conflict" (*ICRC Humanitarian Law & Policy Blog*, 18 October 2022) <https://blogs.icrc.org/law-and-policy/2022/10/18/protection-nuclear-power-plants-armed-conflict/>.

120 *Cf.* Michael Bothe and others, "Article 56 – Protection of works and installation containing dangerous forces" in Michael Bothe and others (eds), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Nijhoff 2013) 393 para 2.1.; *cf.* Claude Pilloud and Jean de Preux, "Article 56 – Protection of works and installation containing dangerous forces" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 669 para 2153: "civilian objects a priori".

121 Military objectives are defined by Art. 52(2) AP I: "Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

122 Claude Pilloud and Jean de Preux, "Article 56 – Protection of works and installation containing dangerous forces" in Yves Sandoz and others (eds), Commentary on the Additional Protocols (Nijhoff 1987) 669 para 2153.

123 Abby Zeith and Eirini Giorguo, "Dangerous forces: the protection of nuclear power plants in armed conflict" (*ICRC Humanitarian Law & Policy Blog*, 18 October 2022) <https://blogs.icrc.org/law-and-policy/2022/10/18/protection-nuclear-power-plants-armed-conflict/>.

124 *Cf.* Michael Bothe and others, "Article 56 – Protection of works and installation containing dangerous forces" in Michael Bothe and others (eds), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Nijhoff 2013) 396 para 2.5.3.

125 Claude Pilloud and Jean de Preux, "Article 56 – Protection of works and installation containing dangerous forces" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 669-670 para 2154.

uncontrolled manner and might destroy an entire village;[126] the dam, as well as the water, form part of the environment.

2.2.2.3. Civilian Objects

Art. 52(1) AP I prohibits attacks or reprisals against civilian objects. Military objectives are defined in Art. 52(2) AP I as "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." This provision reflects the dichotomy of IHL; an object is either a military objective, or a civilian object. Even more so, every possible target that does not fulfil the criteria of a military objective in terms of Art. 52(2) AP I is, by definition, a civilian object.[127] Nevertheless, even though the environment does not *per se* constitute a military objective, some deny the environment the status as a civilian object.[128] Against the backdrop of Art. 55(1) AP I, which is placed in Part IV Section I on the general protection of the civilian population against effects of hostilities, and specifically prohibits "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," there are good reasons to categorize the environment as a civilian object by its nature.[129] If a possible target must either be a civilian object or a military objective, Art. 52(1) AP I highlights that all objects which are not military objectives must

126 With an introductory example see Michael N. Schmitt, "Attacking Dams – Part II: The 1977 Additional Protocols" (*Articles of War*, 2 February 2022) <https://lieber.westpoint.edu/attacking-dams-part-ii-1977-additional-protocols/>.

127 *Cf.* Claude Pilloud and Jean de Preux, "Article 52 – General protection of civilian objects" in Yves Sandoz and others (eds), *Commentary on the Additional Protocols* (Nijhoff 1987) 634 para 2012.

128 Arguing that the environment does not constitute an "object" as such due to its "different and differing natural components and processes", Wolff Heintschel von Heinegg and Michael Donner, "New Developments in the Protection of the Natural Environment in Naval Armed Conflicts" (1994) 37 German Yearbook of International Law 281, 289. Cordula Droege and Marie-Louise Tougas, "The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection" (2013) 82 Nordic Journal of International Law 21, 26-27, propose to draw a distinction between the environment as a whole and parts of it where the status as civilian object can be questioned, but ultimately reject such distinction since there is no indication in state practice that would support this distinction and it would be alien to the principle of distinction on which IHL is based, requiring the classification either as civilian or military object.

129 Karen Hulme, "Taking care to protect the environment against damage: a meaningless obligation?" (2010) 92 International Review of the Red Cross 675, 678.

be civilian; this must apply to the environment too.[130] However, the environment can be turned into a military objective, depending on how it is used.[131] For instance, if a party to a conflict uses a forest, which forms part of the environment, in order to hide munition, or to hide its troops, the forest is turned into a military objective because attacking hiding troops serves a military objective.[132] This is one of the scenarios where the environment as a civilian object can be turned into a military objective; it becomes a lawful target, if the other requirements such as military necessity and proportionality are fulfilled.[133] Consequently, by definition, and by its nature, the environment is a civilian object. Hence, all provisions that protect civilian objects, also apply to the environment and its elements. In practice, this is of huge relevance,[134] but it appears as if this fact needs to be highlighted over and over again due to lacking awareness and realization among the relevant actors.

2.2.2.4. Precautions in an Attack

Precautions in an attack are regulated in Art. 57 AP I. Paragraph 1 states: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." The environment and its parts are civilian objects, and consequently, based on Art. 57 AP I, constant care shall be taken to spare the environment as a civilian object from the consequences of military operations, even though the provision does not explicitly include environmental considerations.[135] In paragraph 2, examples are given on how precautions are to be taken. *Lit.* a addresses the attacking state who is required to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects". This

130 Cordula Droege and Marie-Louise Tougas, "The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection" (2013) 82 Nordic Journal of International Law 21, 27.

131 See, e.g., Cordula Droege and Marie-Louise Tougas, "The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection" (2013) 82 Nordic Journal of International Law 21, 28.

132 See also Cordula Droege and Marie-Louise Tougas, "The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection" (2013) 82 Nordic Journal of International Law 21, 28.

133 *Cf.* Art. 52(2) AP I.

134 Karen Hulme, "Taking care to protect the environment against damage: a meaningless obligation?" (2010) 92 International Review of the Red Cross 675, 678.

135 Richard Desgagné, "The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures" (2000) 3 Yearbook of International Humanitarian Law 109, 117.

includes to take all feasible precautions in the choice of means and methods of an attack to avoid collateral injury or damage. At the same time, Art. 57(2) *lit.* a AP I clarifies that this provision serves as back-up in some sense; it points out that the attacking state shall do everything feasible to verify "that it is not prohibited by the provisions of this protocol to attack [the objectives]". In context of the environment, precautions in attack require states to protect damage from the environment when they are planning an attack, stressing the preventive dimension, which is of utmost importance when talking about environmental damage. In many instances, it is very difficult to restore the environment to the *status quo* before an attack, some damage is even irreversible. Additionally, Art. 57 AP I also "[points] to possible precautionary measures that should be considered with a view to minimizing environmental damage *per se*."[136] The provision thus requires states to prevent *and* mitigate environmental damage.

2.2.3. Preliminary Remarks

The environment is protected in an armed conflict by treaty law; three dimensions of environmental protection can be distinguished with regard to the *immediacy* of protection (direct or indirect) on the one hand, and the *object and purpose* of protection (ecocentric or anthropocentric) on the other. First, Art. 35(3) AP I provides direct protection of the natural environment, protecting it for its own sake (direct + ecocentric dimension). Second, Art. 55(1) AP I ENMOD Convention provide direct protection of the natural environment but specifically link this protection to the health and survival of the civilian population (direct + anthropocentric dimension). Third, many norms provide indirect protection for the environment as a civilian object (indirect + anthropocentric dimension). Overall, the indirect protection of the environment is of major relevance. *Karen Hulme* stated in 2010: "Certainly, the recognition of the environment as a *prima facie* civilian object has done more to protect it than any environmentally specific rule of international humanitarian law."[137] This is certainly also true for indirect protection of the environment, since the undefined and cumulative threshold of the norms directly protecting the environment has

136 Richard Desgagné, "The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures" (2000) 3 Yearbook of International Humanitarian Law 109, 117.

137 Karen Hulme, "Taking care to protect the environment against damage: a meaningless obligation?" (2010) 92 International Review of the Red Cross 675, 678.

prevented an application in the field. The environmental harm from warfare in Ukraine that becomes known these days only confirms this observation.

3. Conclusions and Outlook

Even though the environment suffers and is harmed in almost all international armed conflicts, it enjoys protection by international humanitarian treaty law. *Direct* or specific protection is provided for the environment in two treaties, namely AP I and the ENMOD Convention. They differ greatly in their dimensions and legal effect: The ENMOD Convention follows a purely anthropocentric approach to the protection of the environment whilst AP I contains two provisions, one of which protects the natural environment for its own sake (Art. 35(3) AP I), and the other for the sake of the population (Art. 55(1) AP I). Compared to the ENMOD Convention, AP I sets a very high threshold for these two provisions to take effect; this causes great difficulties when it comes to application and practice. For these reasons, an important and very relevant additional layer of environmental protection is based on provisions that provide *indirect* protection, most effectively addressing the environment as a civilian object. They include the special protection of property, objects indispensable for the survival of the civilian population or works and installations containing dangerous forces. Prohibitions of poison, pillage and reprisals also contribute to environmental protection in armed conflicts. Most of these provisions protect the environment for anthropocentric reasons, only Art. 35(3) AP I was motivated by ecocentric motives and protects the environment for its own sake.

Additionally, even though not addressed in this contribution, customary law complements the protection of the environment in international and non-international armed conflicts, especially based on the principles of IHL such as distinction and proportionality.[138] Over the past years, more and more research and case law allow to conclude that other fields of international

138 See also n 14. In 2005, the ICRC published an extensive study on customary international humanitarian law aiming at displaying the rules and underlying practice; the study was originally published as Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law (CUP 2005) Vol I (rules) and Vol II (practice), and its online version, <*ihl-databases.icrc.org/customary-ihl/eng/docs/home*>, where the practice part is regularly updated. This study also helps analyze how the environment is protected by international humanitarian law based on customary rules. Rules 43, 44 and 45 deal with the environment and armed conflict.

law, such as human rights law[139] and international environmental law,[140] continue to apply during armed conflict. Moreover, human rights norms are interpreted today with an environmental dimension.[141] In consequence, there are several indications that other fields can complement the norms protecting the environment from the conduct of hostilities and enhance the protection of the environment in relation to armed conflicts.

The topic of environmental protection in armed conflict is thus very complex. Recent armed conflicts, such as the Ukraine-Russia conflict, demonstrate that the protection of the environment during the conduct of hostilities is a balancing act between different and oftentimes ambiguous provisions, combining various dimensions of protections and diverging legal effects. More research is required to investigate this interplay, eventually clarifying, and possibly enhancing environmental protection in armed conflicts.

Additionally, one of the main challenges in IHL more generally is its implementation in a war theater. States involved in a conflict should be

139 On the relationship between IHL and international human rights law, see, e.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Reports 168, 243 para 216; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136, 178 para 106.

The 1981 African Charter on Human and Peoples' Rights, as an example of an international human rights treaty, contains a right of all peoples "to a general satisfactory environment favourable to their development" in its Art. 24, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217. A human right to the environment, however, is not contained in all human rights treaties. For instance, in the European context, the European Convention of Human Rights does not know a comparable human right to the environment. Still, there is increasing recourse to the rights to life to address the protection of the environment within its scope, see, e.g., UN Human Rights Committee "General comment no. 36: Article 6, Right to life" (2019) UN Doc CCPR/C/GC/36, and the right to private and family life according to Art. 8 ECHR, see, e.g. Katharina Franziska Braig, "Reichweite und Grenzen der aus der Europäischen Menschenrechtskonvention Abgeleiteten Umweltrechtlichen Schutzpflichten in der Europäischen Union" (2017) NuR 39:100.

140 The Annex of the ILC Draft articles on the effects of armed conflicts on treaties contains an indicative list of treaties, *lit.* g of which names "treaties relating to the international protection of the environment". According to Art. 7 ILC Draft articles, all treaties included in this list shall continue to apply during armed conflicts, ILC, "Report of the International Law Commission on the work of its sixty-third session" (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, 179ff. *Cf.*, more general, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, 243 para 33.

141 The UN Human Rights Council has recently recognized a universal human right to a safe, clean, healthy and sustainable environment, see UN Doc. A/HRC/48/L.27 from 8 October 2021; so has the UN General Assembly in UN Doc. A/A/76/L.75 from 26 July 2022. Other regional human rights systems had already addressed the environment before, see, e.g., IACtHR, Advisory Opinion No. 23 on Environment and Human Rights from 7 February 2018.

aware of, respect, and adhere to the law.[142] But IHL is lacking effective mechanisms to ensure its compliance. As has been stated by the Swiss / ICRC Initiative on Strengthening Compliance with IHL: "The main problem in contemporary armed conflicts is not the lack of norms but rather the widespread flouting of those that already exist."[143] Hence, in addition to the gaps and ambiguities in treaty law on the protection of the environment in armed conflict, an insufficient implementation of the existing norms and lacking effective compliance mechanisms stand in the way of effective environmental protection in armed conflict.

In light of this assessment, the work of the UN ILC on the topic was a huge step, since it was in parts state-driven. On 7 December 2022, the UN General Assembly concluded its final debate on the UN ILC's 27 PERAC principles, followed by the adoption of a resolution, in which it "took note" of the principles.[144] Civil society considers the adoption of the PERAC principles as "the most significant advance in the legal framework protecting the environment from war since the 1970s."[145] The implementation of the PERAC principles, which now depends on the states, is the litmus test.

142 See, e.g., the violations of international humanitarian law, and human rights law in the Russia-Ukraine-Conflict, e.g. as stated in the report of the UN Independent International Commission of Inquiry on Ukraine, UN Doc. A/77/533 from 18 October 2022.

143 Swiss Federal Department of Foreign Affairs and ICRC, "Initiative on Strengthening Compliance with International Humanitarian Law (IHL) – Fact Sheet" (January 2015) <https://www.icrc.org/en/doc/assets/files/2015/factsheet-compliance-01-2015-english.pdf>.

144 UN General Assembly Res 77/104 (7 December 2022) UN Doc A/RES/77/104. See also Conflict and Environment Observatory, "Time to transition to PERAC implementation." (Conflict and Environment Observatory, 8 December 2022) <https://ceobs.org/states-adopt-new-legal-framework-on-the-environmental-impact-of-war/>.

145 Conflict and Environment Observatory, "Time to transition to PERAC implementation." (Conflict and Environment Observatory, 8 December 2022) <https://ceobs.org/states-adopt-new-legal-framework-on-the-environmental-impact-of-war/>.

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Chapter V: International Weapons Law

Daniele Amoroso[1]

1. Introduction

In international law, there is no universally accepted definition of "weapons". For the purpose of this Chapter, a broad notion will be adopted, so as to include any "device, system, munition, substance, object, or piece of equipment that is used, that it is intended to use, or that has been designed for use to apply the offensive capability, usually causing injury or damage to an adverse party to an armed conflict".[1] It is also appropriate to briefly recall here two other notions that, in international legal texts, are often mentioned alongside with weapons: means and methods of warfare.[2] The notion of "means of warfare" basically overlaps with that of weapons; that of "methods of warfare", on the other hand, describes the way weapons are used (e.g. high-altitude bombing).

The definition of the very object of this Chapter, namely "Weapons Law" or "International Weapons Law", is indeed less straightforward as it may appear at first sight. Nowadays, there is a substantial body of international norms governing the use, design, acquisition, or possession of weapons, which are made of principles and rules different in character and sometimes serve different purposes.[3]

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1 Professor of International Law, University of Cagliari. The author can be contacted at daniele.amoroso@unica.it. All websites last accessed on 31 May 2023. W.H. Boothby, Weapons and the Law of Armed Conflict, OUP, 2016, p. 4. Reference to "offensive capabilities" is by no means intended from this definition weapons normally used for defensive purposes (such as an air-defense system). Rather, it aims to bring to the limelight the "essence" of the weapon, that is its capability to cause "(i) death of, or injury to, persons; or (ii) damage to, or destruction, of objects". See HPCR Manual on International Law Applicable to Air and Missile Warfare, CUP, 2013, Rule 1(ff).

2 See, for instance, Art. 36 of the 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.

3 For an overview, see C. Chinkin and M. Kaldor, International Law and New Wars, CUP, 2017, pp. 285-335.

More specifically, international norms on weapons include:

- Arms control regimes, which limit the arms race, mainly for strategic stability purposes, e.g. by freezing or reducing the number of certain categories of weapons available to States, as it is the case of the New START – Strategic Arms Reduction Treaty – between the US and Russia;[4])
- Non-proliferation regimes, whose aim is to prevent the acquisition, transfer, discovery, or development of materials, technology, knowledge, munitions/devices or delivery systems related to weapons of mass destruction (WMD), i.e. chemical, bacteriological and nuclear weapons;
- Conventional arms export control regimes, whose most relevant example is the 2013 Arms Trade Treaty, whose provisions forbid – among other things – the export of weapons which are going to be used to commit serious violations of international law (including International Human Rights Law and International Humanitarian Law, IHL) in the country of destination;
- IHL regimes, which strive to mitigate the consequences of war, by prohibiting or restricting the employment of certain weapons;
- Disarmament regimes, which pursue the elimination of certain categories of weapons, both conventional (e.g. anti-personnel landmines or cluster munitions) or of mass destruction (biological and chemical weapons), by prohibiting their development, production and stockpiling.

It would be impossible to address appropriately all these regimes. Therefore, I will focus solely on those which are most directly related to the topic of these Collected Courses, namely IHL and disarmament regimes.

On these assumptions, this Chapter will provide, in the first place, an overview of the sources of international weapons law (Section 2). Then, its basic norms will be spelt out, with a focus on the principles prohibiting weapons of a nature to cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate (Section 3). This will be pivotal in introducing the main legal regimes related to conventional weapons (Convention on Certain

4 See: <https://www.state.gov/new-start/>.

Conventional Weapons and Convention on Cluster Munitions; Sections 4 and 5) and to WMD (Biological Weapons Convention and Chemical Weapons Convention; Section 6). Section 7, finally, will address compliance mechanisms. In this respect, particular attention will be paid to national weapons review under Article 36 of Additional Protocol I to the Geneva Convention by using legal reviews of so-called autonomous weapons systems as a case study.

As one may see, it will not be possible to dwell on all existing IHL and disarmament regimes. The selection that I made was justified by the need to illustrate a sufficiently representative sample of the different regimes in force.

2. The Sources of International Weapons Law

In the international legal order, one may broadly distinguish between sources of general international law, which produce norms that are binding upon all States, and particular international law, which binds only some of them.

The main source of general international law is represented by customary international law. Custom is traditionally defined as a "general practice accepted as law".[5] This means that the fact that the generality of States, and under certain conditions international organizations,[6] behave in a certain way with the conviction that such behavior is dictated by a legal prescription (*opinio iuris*) is by itself productive of a binding obligation upon them. Think of, for instance, the case where the generality of States (and of international organizations involved in peace-keeping operations) consistently abstain from using a certain category of weapons, by explaining in their military manuals (or analogous documents: e.g. UN Secretary General's Bulletin on the Observance by United Nations forces of international humanitarian law[7]) that is done out of legal concerns. This practice could substantiate the claim that a prohibition on the use of such weapon is imposed by customary international law.

5 Art. 38(1)(b) of the Statute of the International Court of Justice.

6 International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, in Yearbook of the International Law Commission, 2018, vol. II, Part Two, p. 122 ff., Conclusion 2, para. 2 and commentary thereto.

7 UN Doc. ST/SGB/1999/13 (6 August 1999).

It should be noted that reference has been made to the generality of States not to their totality. This means that universality is not required, being sufficient a practice that is widespread and representative of the various interests at stake and geographical regions.[8] The foregoing goes with the caveat that, in order to establish the existence of a customary norm, greater weight is somehow accorded to the practice of what the International Court of Justice called "specially affected States",[9] namely those which are most likely to be concerned with the emerging customary rule. As regards weapons law, notably, a customary norm cannot be said to be in force without considering the practice of "militarily significant States", to borrow from the language of the Preamble of the Convention on Certain Conventional Weapons.[10] This entails that even a widespread opposition to a certain category of weapons, say: nuclear weapons, cannot be enough to outlaw it under customary law, if "militarily significant States", in this case nuclear powers, disagree.

Custom is by definition an unwritten source of law, which makes it particularly difficult to ascertain its precise content. For this reason, international organizations and institutions, as well as academic associations, have undertaken the effort to codify the norms of general international law, so as to make them more easily discernible, to the benefit of legal certainty. As far as we are concerned here, reference should be made to the ponderous Study on Customary IHL by the International Committee of the Red Cross (ICRC), whose Chapter IV is devoted to the customary rules governing the use of weapons under IHL, identified on the basis of an in-depth analysis of international practice.[11] It is worth recalling that the rules codified in the Study are not binding as such, but only insofar as they faithfully reproduce the content of customary law. In light of the authoritativeness of its source and of the thoroughness of the study, such correspondence may in principle be presumed, although there

8 Draft Conclusions on Identification of Customary International Law, above note 6, Conclusion 8 and commentary thereto.

9 North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3 ff., para. 74.

10 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 (Convention on Conventional Weapons or CCW), Geneva, 10 October 1980, Tenth preambular paragraph.

11 J.-M. Haenckaerts and L. Doswald-Beck, Customary International Humanitarian Law, CUP, 2005 (hereinafter "ICRC Study on Customary IHL"). The relevant practice is regularly updated and collected in an online database available on the ICRC website <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2>.

are cases where the rules included in the Study are more geared towards stimulating the progressive development of IHL by attracting consistent practice and *opinio iuris*, rather than reproducing its actual content (which is an entirely legitimate aim of codification works, by the way). Similar considerations apply, *mutatis mutandis*, to the four Geneva Conventions and Protocols thereto, whose provisions may be deemed as codifying – at least to a significant extent – customary international law.[12]

The other source of law we will be concerned with is constituted by the main source of particular international law, treaties, namely the agreements concluded between two or more states (and/or international organizations) with a view to creating rights and obligations between the parties. As we will see, most of the obligations featuring weapons law are primarily treaty-based.

When not prevented from doing so by the treaty text or by its object and purpose, States (and international organizations) may exclude or modify the legal effect of one or more of its provisions, by making a reservation. Likewise, they may also specify and clarify the meaning of their commitment to comply with the treaty by way of interpretative declarations. For instance, when ratifying Additional Protocol I to the Geneva Conventions, NATO States appended a declaration to the effect that the norms of the Protocol applied only to conventional weapons and so were without effect on the use of nuclear weapons.[13]

2.1. The Relationship between Sources of International Weapons Law

It is possible that, in relation to a certain issue (in our case: the possession, development and use of a category of weapons), there is an overlap of treaty regimes, as more treaties are stipulated on the same subject. This may create some problems of coordination since States may well be parties to one regime and not to the other(s), which is exactly what happened in relation to anti-personnel landmines, which are regulated by three treaties: Protocol II to the Convention on

12 Unlike the ICRC Study on Customary IHL, however, since the Geneva Conventions and their Protocols are treaties, their provisions remain legally binding upon State parties regardless of their correspondence with customary international law. On the interplay between customs and treaties, see *infra* Section 2.1.

13 See, for references, the "Practice Relating to Nuclear Weapons" available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_nuwea>.

Certain Conventional Weapons (CCW), the Amended Protocol II to the CCW, and the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. We cannot dwell on the details of this thorny question.[14] It will suffice here to observe, in light of Article 30 of the Vienna Convention of the Law of Treaties, that i) as regards States which ratified more than one treaty, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty";[15] ii) States that ratified only one treaty will be bound solely by this one, regardless of whether the other parties acceded to a new treaty;[16] iii) when a State ratifies more than one treaty, whose provisions are not compatible with each other, this may give rise to international responsibility.[17]

Different considerations apply when we pass to consider the relationship between custom and treaties. As a matter of principle, treaty provisions prevail over customary norms as *lex specialis*. If, for instance, a customary norm is more permissive as to the use of a certain weapon than a treaty provision, a State party to the treaty must comply with the latter. This does not apply to customary norms having *jus cogens* character, namely those protecting the fundamental values of the international community and are therefore hierarchically superior to the other norms of international law.[18] While it may be disputed whether each and every prohibitive customary norm of weapons law qualifies as *jus cogens*, it is fair to assume that the basic principles of weapons law (prohibition of superfluous injury and unnecessary suffering and of indiscriminate weapons) share this quality, with the consequence that States are not allowed to derogate from – say – the prohibition against indiscriminate weapons by simply stipulating a treaty to this effect.[19]

14 For an account, see Boothby, above note 1, p. 149 ff.

15 Vienna Convention on the Law of Treaties, 23 May 1969, Art. 30(3).

16 Ibid., Art. 30(4)(b).

17 Ibid., Art. 30(5).

18 International Law Commission, Peremptory norms of general international law (*jus cogens*), Texts of the draft conclusions and Annex adopted by the Drafting Committee on second reading, 11 May 2022, UN Doc. A/CN.4/L.967, Draft Conclusion 2 [3].

19 As established by Art. 53 of the Vienna Convention on the Law of Treaties, indeed, "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law".

The relationship between treaties and customs goes further, however, in that the former may have a role in the codification or the development of the latter. On the one hand, it may happen that a treaty provision limits itself to put in writing an already existing customary norm by clarifying and specifying its content. This was the case, for instance, with Article 35(2) of Additional Protocol I to the Geneva Conventions, codifying the prohibition of weapons of a nature to cause superfluous injury or unnecessary suffering. On the other hand, a treaty provision may give rise to a general practice accepted as law, so generating new customary international norms. This may be said to have happened, for instance, in relation to treaties having received almost universal ratification, such as the Chemical Weapons Convention, whose substantive provisions are now reflected in customary law, with the consequence that they are binding also upon the few States that have not yet ratified it.[20]

2.2. The Martens Clause

Before concluding this overview, one may wonder what happens if, in relation to a certain category of weapons, there are no applicable customary or treaty rules. This may be the case for a new class of weapons, such as autonomous weapons systems. Are in these hypotheses, States free to behave as they please in the application of a residual rule whereby "whatever is not explicitly prohibited by international law is permitted"?[21] This question is routinely replied in the negative and the reason lies in the so-called Martens clause, on which it is worth spending some words at this stage of our discussion.

The Martens Clause is named after the Russian publicist Fyodor Fyodorovich Martens, who successfully proposed its insertion in the Preamble of the Second Hague Convention containing the Regulations on the Laws and Customs of War on Land.[22] The Clause was subsequently reiterated in several key IHL and weapons law treaties, including the 1949 Geneva Conventions and Additional Protocol I thereto, as well as

20 Customary International Humanitarian Law, above note 11, Rule 74.

21 In international legal jargon this rule is named "Lotus principle" after a judgment by the Permanent Court of International Justice, where it was firstly affirmed (although in these exact terms). See The Case of the S.S. Lotus, 1927 PCIJ Series A, No. 10.

22 On the history of the clause, see A. Cassese, The Martens Clause: half a loaf or simply pie in the sky?, in European Journal of International Law, 2000, p. 187 ff.

in the Preambles of the Convention on Certain Conventional Weapons and the Cluster Munitions Convention. In its modern formulation, it reads as follows:

> in cases not covered by this Convention […] or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[23]

In the *Nuclear Weapons* Advisory Opinion, the International Court of Justice (ICJ) famously praised the Clause as an "effective means of addressing the rapid evolution of military technology".[24] It fell short of explaining, however, in what way it should do so and, indeed, the interpretation of the Martens Clause is a widely controversial issue in international law.[25]

In this author's opinion, the Clause provides a comprehensive description of the methodology to be followed with a view to identifying general principles of law governing belligerent conduct in the absence of applicable provisions, by semantically distinguishing three approaches to general principles, which are often enmeshed in the actual processes leading to their individuation.[26]

The "established customs" prong of the Clause, in particular, recalls the orthodox, formalistic approach whereby principles of international law may be derived by way of induction and abstraction from existing customary rules. The "principles of humanity" prong, on the other hand, appeals to a sense of shared belonging to the human species, from which a number of normative implications regarding the treatment of enemies and civilians are to be drawn. The "dictates of public conscience" prong, finally, is aimed at unveiling the connection between the "principles of international law" and the reactions of the international community at large to certain means and methods of warfare, as they emerge – with a varying degree of cogency – from declarations

23 Convention on Certain Conventional Weapons, Fifth preambular paragraph.

24 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226 ff., para. 78.

25 For an overview of the debate, see Cassese, above note 22, pp. 189-192.

26 On this process, see M. Iovane, L'influence de la multiplication des juridictions internationales sur l'application du droit international, in Recueil des Cours, Vol. 383 (2017), p. 249 ff., pp. 392-410.

adopted at intergovernmental conferences, resolutions of international organizations, statements by authoritative NGOs, views by relevant scientific communities, and so on.[27]

If the Martens Clause is so understood, the way it performs its stop-gap role will not substantively differ from the normal functioning of general principles. This means, specifically, that the "principles of international law" referred to by the Clause may be invoked, absent a specific regulation, either to advance interpretations of existing norms geared towards a fuller protection of human beings; or to induce the generation of new norms, aimed at constraining the belligerents' freedom to choose means and methods of warfare in circumstances that existing law has overlooked or not yet covered.[28]

3. Basic Norms

According to an old adage, generally attributed to the XVI century English writer John Lyly, "all is fair in love and war". I would not take a stand as to whether this holds true in international law with regard to "love", even if there are clear indications in the negative sense (see, for instance, the Istanbul Convention on preventing and combating violence against women and domestic violence). Yet, it could be fairly assumed that this is certainly not the case when it comes to war. Since the 1874 Brussels Declaration concerning the Laws and Custom of War,[29] militarily significant States agreed that "the right of the Parties to the conflict to choose methods or means of warfare is not unlimited" – a principle which is now codified in Article 35(1) of Additional Protocol I.

The constraints regarding specific categories of weapons will be dealt with in the ensuing Sections. What we are concerned with here, instead, are the *general limits* to the belligerents' discretion in choosing

27 For an analytical account of these various approaches, see R. Pisillo Mazzeschi and A. Viviani, General Principles of International Law: From Rules to Values?, in R. Pisillo Mazzeschi and P. De Sena (eds.), Global Justice, Human Rights and the Modernization of International Law, Springer, 2018, p. 113 ff.

28 M. Veuthey, Public Conscience in International Humanitarian Law Today, in H. Fischer et al. (eds), Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck, BWV, 2004, p. 607 ff.

29 Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, Article 12.

methods or means of warfare. These were identified by the ICJ in its Advisory Opinion on *Nuclear Weapons*, which described them as the "cardinal principles" of weapons law, namely the prohibition on the use of weapons of a nature to cause superfluous injury and unnecessary suffering; and the prohibition on the use of weapons that are by their nature indiscriminate, i.e. that are incapable of being used so as to distinguish between civilian and military targets.[30] These two principles will now be examined in turn.

3.1. The "Superfluous Injury and Unnecessary Suffering" Principle

Scholarly expositions on the "superfluous injury and unnecessary suffering" principle routinely moves from a very old treaty, the 1868 Saint Petersburg Declaration.[31] The Declaration, which outlawed the use of certain exploding bullets, was adopted by an International Military Commission composed of what could be considered the major militarily powers of the time. [32] Yet, it is not the specific prohibition introduced thereby to be relevant, as rather its Preamble, where we may find one of the earliest – but still largely valid – articulations of the principle, which explains why it is worth looking at it in its entirety:

> Considering:
>
> That the progress of civilisation should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would therefore be contrary to the laws of humanity;

30 Nuclear Weapons, above note 24, para. 78. Quite noteworthily, the Court also mentioned a further basic principle, whereby, in the choice of means and methods of warfare, States should take environmental considerations into duly account (ibid., para. 30). On this issue, see the Chapter by Dienelt.

31 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November / 11 December 1868.

32 They were: Austria-Hungary, Bavaria, Belgium, Denmark, France, Greece, Italy, Netherlands, Persia, Portugal, Prussia and the North German Confederation, Russia, Sweden-Norway, Switzerland, the Ottoman Empire, the British Empire, and Wurtemberg.

Two remarks are in order here. First, causing suffering is prohibited only to the extent that it is not justified by the necessities of war, namely by the legitimate objective of "weakening the military forces of the enemy, by disabling the greatest possible number of soldiers". Second, the employment of weapons contravening to this principle was deemed by the International Military Commission as contrary to the laws of humanity, a language that – as we saw – was subsequently employed in the Martens Clause and which signals the conviction that the prohibition at hand is not solely treaty-based but is to be considered as part of general international law, and thus binding for all States.

As already anticipated, the principle is now codified in Art. 35(2) of Additional Protocol I, which reads as follows:

It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

A similar wording is employed by Rule 70 of the ICRC Study on Customary IHL.

Let us zoom in on the text of this provision. First, it should be stressed that weapons and methods of warfare must be *of a nature to cause* superfluous injury and unnecessary suffering. This provides us with the opportunity to clarify a crucial aspect of most provisions of weapons law. Weapons falling under the scope of this principle are those which *by design* cause or *whose intended purpose* is to cause superfluous injury and unnecessary suffering. This is the case, for instance, of weapons whose primary effect is to injure by fragments which in the human body are not detectable by X-rays or of laser weapons specifically designed to cause permanent blindness.[33] Contrariwise, the principle at hand does not cover every possible injury caused by the weapon.[34] Indeed, all weapons, even the most sophisticated ones, may be employed in a way to cause unnecessary suffering. Think of, for instance, a sniper using a high-tech precision rifle to mutilate his/her targets before killing them. This applies also with regard to the prohibition on weapons that are *by nature* indiscriminate (below Section 3.2).

33 As it will be seen in Section 4, the use of these weapons is prohibited, respectively, by Protocol I and Protocol V to the Convention on Certain Conventional Weapons.

34 Boothby, above note 1, p. 49.

Second, the expression "superfluous injury and unnecessary suffering" is wide enough to include physical and psychological damages.[35]

Third, the adjectives "superfluous" and "unnecessary" clearly imply a comparison. Superfluous or unnecessary in relation to what? While the comparator is not explicitly mentioned, it could be easily inferred, even in light of the previous discussion of the Saint Petersburg Declaration, that the comparator should be identified in the legitimate military purpose for which the weapon has been designed and will generally be used. A weapon will be therefore prohibited under the principle if the injury and suffering normally associated with its intended use exceed the generic military advantage anticipated from the use of the weapon at hand. In carrying out this comparison, it will be crucial to verify whether (i) there is a less injurious alternative weapon available and, if so, (ii) is the alternative sufficiently effective in achieving the intended military purpose.[36]

In the 90s, the ICRC tried to take a step further in the clarification of the content of the principle with the SIrUS Project. This led to a report, authored by a former field surgeon for the ICRC, where four alternative criteria are spelt out with a view to determining whether the design-dependent effects of a weapon are of a nature to cause superfluous injury or unnecessary suffering:

- a specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability, or specific disfigurement, or
- field mortality of more than 25 per cent or a hospital mortality of more than 5 per cent, or
- Grade 3 wounds as measured by the ICRC classification scale for wounds, or
- effects for which there is no well-recognized and proven treatment.[37]

The report was criticized by a number of States because it focused only on one aspect of the SIrUS principle, namely the amount of the injury or the suffering, without considering that both of them can be considered

35 Ibid.

36 Ibid, p. 53. See also Nuclear Weapons, above note 24, para. 78.

37 R. Coupland, The SIrUS Project: Towards a Determination of Which Weapons Cause "Superfluous Injury or Unnecessary Suffering", ICRC, 1997.

superfluous or unnecessary only if compared with the intended military purpose of the weapon.[38] As Judge Higgins noted in her Dissenting Opinion in the *Nuclear Weapons* case, the fact that a weapon causes "horrendous suffering" does not necessarily entail that this suffering is "unnecessary".[39] Significantly enough, the Project was discontinued in 2001. That notwithstanding, the initiative is generally regarded as an authoritative reminder of the need to factor available scientific evidence into legality reviews of weapons.[40]

3.2. The "Indiscriminate Weapons" Principle

The obligation to direct attack against military targets and thus to distinguish the latter from civilians and civilian objects is deeply rooted in IHL, since its early manifestations. Yet, its counterpart in the law of weaponry, namely the principle whereby it is prohibited to use indiscriminate weapons, emerged only during the diplomatic talks leading to the adoption of the AP I. Until then, the prevailing was that violations of the requirement of discrimination do "in general result from the method of use of a given weapon rather than from its properties".[41]

The opposite idea whereby weapons can be indiscriminate by nature made its way in AP I through Art. 51(4), which qualifies as indiscriminate attacks:

> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
>
> (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
>
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

38 J. McClelland, The Review of Weapons in Accordance with Article 36 of Additional Protocol 1, International Review of the Red Cross, 2003, p. 397 ff., p. 400. The Project was discussed during an Expert Meeting on Legal Reviews of Weapons and the SIrUS Project, held in Jongny sur Vevey, on 29-31 January 2001. Participating States included Australia, Austria, Belgium, Canada, China, Denmark, Finland, France, Germany, Ireland, Israel, the Netherlands, Norway, the Russian Federation, South Africa, Spain, Sweden, Switzerland, the United Kingdom and the United States. For a summary of the meeting see International Review of the Red Cross, 2001, p. 539 ff. (in particular, at p. 541, where it is noted that "ICRC's proposals were not broadly accepted in the form presented in the SIrUS Project").

39 I.C.J. Reports 1996, p. 583 ff., pp. 585-587.

40 McClelland, above note 37, p. 400.

41 F. Kalshoven, Arms, Armaments and International Law, in Recueil des Cours, vol. 191 (1985), p. 183 ff, p. 236.

A norm with a similar content is codified in Rule 71 of the ICRC Study and is reflected in several military manuals, including those of States non-party of AP I.[42]

One should concede to the skeptics of such norm that it is not easy to identify, at least if we look at conventional weapons, means of warfare that are by nature indiscriminate. An example that is sometimes made is that of long-range missiles which cannot be aimed exactly at the objective, but this is hardly the case of contemporary missiles. The reason for this difficulty is twofold. First, also rudimentary weapons can be used in a discriminating manner (e.g. by directing their effects against a military objective which is clearly separated from civilian objects), with the consequence that they could well escape the definition of a weapon which is *by nature indiscriminate*.[43] Second, it should be noted how the idea that a weapon should be capable of being properly directed against military targets is clearly one where humanitarian and military interests in principle converge. This is because the backlashes of a misdirected attack causing damage to civilians could be not less detrimental for the attacking party, e.g. in term of morale and domestic support to the conflict.[44]

When we pass to consider WMD, it is a different story. It is indeed arguable that the full range of effects of biological, chemical, and nuclear weapons cannot be controlled, with the consequence that they are of a nature to strike military targets and the civilian population without distinction. And indeed the possession, development, acquisition and use of biological and chemical weapons is expressly prohibited by treaty regimes which, because of the quasi-universal participation they attracted, gave rise to corresponding customary prohibitions (see below Section 6). As mentioned above, on the other hand, NATO countries clearly ruled out the applicability of AP I to nuclear weapons by appending interpretative declarations to this effect. And in fact, although nuclear weapons are prohibited by a recently adopted treaty (the 2017 Treaty on the Prohibition of Nuclear Weapons), the actual

42 See the practice reported in: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule71> (in particular, Section III).

43 M.N. Schmitt and J.S. Thurnher, "Out of the Loop": Autonomous Weapon Systems and the Law of Armed Conflict, in Harvard National Security Journal, 2013, p. 231 ff., p. 246.

44 Boothby, above note 1, p. 60.

prospects of outlawing nuclear weapons on a universal basis are quite bleak, because of the opposition of nuclear powers.[45]

The foregoing confirms what we already noted when briefly discussing the Martens Clause. The prescriptive content of both basic norms of weapons law principles are very loose and it is pretty hard to ascertain the unlawfulness of a category of weapons solely on their basis. To be fully operative, both principles needed to be translated into more concrete prescriptions by specific treaty regimes,[46] on which we will now turn our attention.

4. The Convention on Certain Conventional Weapons

The first treaty regime we will address is the one set forth by the so-called Convention on Certain Conventional Weapons (CCW), adopted on 10 October 1980. The close connection with the basic principles of weapons law will be apparent if one only considers the full title of the Convention, which is "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". Close connection does not mean, however, that they fully overlap.

On the one hand, the Convention envisages not only prohibitions, but also restrictions on use, while weapons that are *of a nature* to cause superfluous injury or unnecessary suffering or are *by nature* indiscriminate are simply prohibited.

On the other hand, the Convention addresses conventional weapons which "may be deemed" excessively injurious or to have indiscriminate effects. This language seems to imply a subjective evaluation – by the State parties to the CCW – as to the effects of certain categories of weapons, which cannot be *tout court* equated to the objective (but, admittedly, hardly attainable) standard embodied in the basic principles which, as we said, prohibit weapons whose design or intended purpose is to cause superfluous injury and unnecessary suffering or indiscriminate

45 M. Pedrazzi, The Treaty on the Prohibition of Nuclear Weapons: a Promise, a Threat or a Flop?, in Italian Yearbook of International Law 2017, 2018, p. 215 ff.

46 See, with specific regard to the prohibition of superfluous injury and unnecessary suffering, Y. Sandoz, C. Swinarski and B. Zimmermann, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, 1987, p. 399. See also A. Cassese, Weapons Causing Unnecessary Suffering: Are They Prohibited?, Rivista di diritto internazionale, 1975, p. 12 ff., pp. 37-42.

effects. This entails that the fact that a certain category of weapons is regulated by the CCW does not warrant any conclusion as to whether the weapons at hand are also prohibited under those principles.

The Convention is structured as a framework convention. As such, it does not regulate any category of weapons. It limits itself to establishing some basic rules regarding its scope and operation, which include provisions on the adhesion to the Convention and its amendments.

The substantive prohibitions and restrictions are included in separate Protocols. To become a party to the CCW, a State must ratify at least two of them. This allows for greater flexibility and, thus, wider participation, as a State that does not want to be bound (or does not want yet to be bound) by all Protocols may still join the Convention.

To date, five protocols have been adopted under the CCW, namely:

- 1980 Protocol I – Non-Detectable Fragments
- 1980 Protocol II – Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, amended in 1996
- 1980 Protocol III – Prohibitions or Restrictions on the Use of Incendiary Weapons
- 1995 Protocol IV – Blinding Laser Weapons
- 2003 Protocol V – Explosive Remnants of War

Some of them have a very short content. This is the case of Protocol I on Non-Detectable Fragments, which consists in only one provision which prohibits the use of "any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays". Others, such Protocol II and Protocol V, are more articulated and look like proper conventions.

It will not be possible to analyze all of them. I will only focus on Protocol III on Incendiary Weapons. As we will see, international regulation of incendiary weapons intersects both basic norms of weapons law, which makes it a useful subject for our purposes. Before that, however, two general issues concerning the CCW have to be briefly addressed.

First, the scope of the Convention should be clarified. The matter is governed by Article 1, which has been amended in 2001. In its original

formulation, this provision circumscribed the scope of the Convention to international conflicts, including wars of national liberation as defined by Article 1(4) of Additional Protocol I to the Geneva Conventions, viz. "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". The 2001 amendment made the Convention and its Protocols applicable to armed conflicts not of an international character under Article 3 Common to the Geneva Conventions. In the latter case, therefore, the Convention and the Protocols will bind each party to the conflicts, so including the armed opposition groups, regardless of whether they made a declaration of acceptance in this sense.[47]

Second, the procedures for amending the CCW and the Protocols, as well as for adopting new protocols should be briefly described. The matter is regulated by Article 8, which is quite a long provision, but whose content can be easily summarized. Proposals for amendments and new protocols are discussed at *ad hoc* conferences, convened by the UN Secretary General, as Depositary of the CCW, upon request of a majority of States Parties, or at Review Conferences, which are convened every five years since 1996. While the Convention is anything but clear on the point, State Parties interpreted Article 8 CCW so as to require consensus (i.e. universal acceptation) for the adoption of an amendment or of a new protocol. With the growing number of States Parties – which are now 125 – this requirement made it particularly difficult to adopt new protocols and amendments, being sufficient the opposition of one State to forestall the process. This weakened the ability of the CCW to address emerging concerns posed by new weapons and technologies, sometimes leading to compromise solutions which were seen as unsatisfactory by many States (as it was the case of the Amended Protocol II) or no solutions at all (as it happened in relation to Cluster Munitions). As a consequence, alternative venues were sought for. This led to the adoption of the 1997 Ottawa Convention on Anti-Personnel Landmines and the 2008 Oslo Convention on Cluster Munitions outside the institutional framework of the CCW. The same could happen with regard to Lethal Autonomous Weapons Systems,

47 Be it noted that the 2001 amendment has not yet been ratified by all States parties. Accordingly, the extension of the application of the CCW to NIACs is not universal, but applies only to ratifying States.

whose discussion at the CCW GGE seems to have reached a stalemate because of the opposition of "militarily significant States", first and foremost, US and Russia.[48]

4.1. Incendiary Weapons

The issue of the legality of the use of incendiary weapons has begun to acquire prominence in international discussions mainly because of the terrible images documenting the effects of the use of napalm by the US during the Vietnam War. Notwithstanding the view that such weapons should have been prohibited as such was favored by a non-negligible number of States, it was not possible to achieve a consensus on a protocol to this effect. Protocol III to the CCW contains in fact a blend of prohibitions and restrictions on the use of these weapons.

The Protocol is made of two provisions, one on the definitions, and the other on the substantive aspects. The most relevant definition is, of course, that of "incendiary weapons", which is as follows:

> "Incendiary weapon" means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target. (a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances. (b) Incendiary weapons do not include:
>
> i. Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;
>
> ii. Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.[49]

It is worth highlighting that a weapon, to be considered "incendiary" for the purposes of the Protocol, must be designed so as to have, as a

48 See, for instance, Campaign to Stop Killer Robots, Fragile Diplomatic Talks Limp Forward, 26 November 2018, available at: <https://www.stopkillerrobots.org/news/press-release-fragile-diplomatic-talks-on-killer-robots-limp-forward>.

49 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980, Art. 1.

"primary effect" that to set fire to objects or to cause burn injury to people. The implications of this are made explicit in lett. b) whereby do not fall under this definition: (i) Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems; (ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect. This means, for instance, that white phosphorus munitions, to the extent that are used to produce smoke screen with a view to camouflaging friendly forces' movements, do not fall under this definition, even if they incidentally set fire on objects and/or burn people.[50] It should also be noted that the incendiary effect does not necessarily have to be caused by flame, but also by a chemical reaction.

Article 2, on the other hand, contains substantive provisions. Its first paragraph, however, does not have any added value in that it merely restates the gist of the principle of distinction under IHL.

The same cannot be said for the second paragraph, which prohibits *in all circumstances* air-delivered incendiary attacks on military objectives located within concentrations of civilians, be they permanent (e.g. a part of the city) or temporary (e.g. a column of refugees). This provision introduces an irrebuttable presumption that in this scenario the use of incendiary weapons will have indiscriminate effects. This is indeed entirely reasonable in light of the fact that, once the fire has started, the attacking party has no possibility to control it.

The third paragraph provides a more nuanced prohibition in relation to incendiary attacks that are not air-delivered, by envisaging an exception for the case where the military objective is clearly separated from the concentration of civilians.

The fourth paragraph is aimed at environmental protection, insofar as it prohibits "to make forests or other kinds of plant cover the object of attack by incendiary weapons", unless they are legitimate military objectives.

The ICRC Study on Customary IHL devotes two provisions to incendiary weapons. Rule 84[51] basically reproduces the principle of

50 S.N. Christensen, Regulation of White Phosphorus Weapons in International Law, TOAEP, 2016, p. 27.

51 ICRC Study on Customary IHL, above note 11, Rule 84 ("If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects").

precaution under IHL, so it is of little interest for our purposes. Rule 85,[52] on the other hand, codifies a prohibition on anti-personnel uses of incendiary weapons, with the proviso that the prohibition does not apply if there are no other feasible ways to render a person *hors de combat*. At the first sight, one may be surprised by the fact that the ICRC affirmed the existence of such customary prohibition notwithstanding State Parties to the CCW were not able to reach an agreement on this point. One would be tempted to say that, by including Rule 85 in the Study, the ICRC is trying to foster development in the law rather than codifying an existing customary norm. It should be noted, however, that one of the authors of the Study made clear that the Rule would represent a concrete application of the prohibition of superfluous injury and unnecessary suffering.[53] In fact, the suffering caused by anti-personnel use of incendiary weapons is unnecessary and thus prohibited only if feasible alternatives are available to the attacking party, which is in line with what we said above about the principle. In this perspective, the actual novelty of Rule 85 is that the injury and/or suffering caused by incendiary weapons is deemed as more serious in comparison to that caused by other conventional weapons.

5. The Convention on Cluster Munitions

As we said, because of the consensus rule, the CCW regime is not always capable of delivering results, in terms of regulation, that are satisfying for all the States involved. This has led, in a couple of occasions, like-minded States willing to introduce more effective constraints on the use of certain weapons outside the CCW framework. This is what happened, for instance, in the case of cluster munitions. At the same time that the issue had been discussed at the CCW without significant prospects of success, a group of States spearheaded by the Norwegian government started to meet and work together to lay down a binding international instrument to prohibit the use, production, transfer, and stockpiling of cluster munitions that cause unacceptable harm to civilians. The result is the Cluster Munitions Convention, which was opened to signature in Oslo in 2008.

52 Ibid., Rule 85 ("The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat").

53 J.-M. Haenckaerts, Customary International Humanitarian Law: A Rejoinder to Judge Aldrich, British Yearbook of International Law, 2005, p. 525 ff., p. 531.

Before analyzing its provisions, two questions need to be addressed: what cluster munitions are and what humanitarian issues they raise.

As regards the first issue, a distinction should be drawn between the operational definition of cluster munitions and the legal one, enshrined in the Convention, which – as we will see at a later stage – has some important peculiarities.

Operationally speaking, cluster munitions are "weapons that open in mid-air and disperse smaller submunitions into an area".[54] They are classified as "area weapons" in that they are designed to attack an entire area, so proving particularly effective in engaging concentrations of armour, vehicles, or troops.

The humanitarian problem with them is that these submunitions too often fail to explode at the time of the attack. They hence remain on the battlefield posing a persistent and serious risk to civilians even after the war is over. These weapons, therefore, "continue to kill", notwithstanding the end of the conflict, in a potentially indiscriminate manner.[55]

This issue is also dealt with, in general terms (so not only in relation to cluster munitions), by Protocol V to the CCW on explosive remnants of war. While the latter, however, mainly set forth clearance and removal obligations, which thus arise after the weapons have been used, the Cluster Munitions Convention seeks to tackle the problem at its roots in that it envisages, in addition to clearance duties and the obligation to assist the victims, comprehensive prohibitions regarding cluster munitions that, because of their design features, are likely to pose such humanitarian risk.

Notably, under Article 1, States Parties commit "never under any circumstances to: a) Use cluster munitions; b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions; c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention."

The word "anyone" employed to define the prohibitions under letters b) and c) is wide enough to include also States that are not party to the

54 A. Feickert and P. K. Kerr, Cluster Munitions: Background and Issues for Congress, Congressional Research Service, CRS Report for Congress, 30 July 2013, p. 1.

55 Reaching Critical Will, Factsheet on Cluster Munitions, available at: <https://www.reachingcriticalwill.org/images/documents/Resources/Factsheets/cluster-munitions.pdf>.

Convention. As we will see, this has consequences on the so-called "interoperability" issue, which arises when State Parties and non-state parties are jointly involved in military operations as part of a coalition or alliance.

Article 3 further envisions the obligation to destroy cluster munitions that States Parties happen to possess at the time when they ratify the Convention. The Cluster Munitions Convention thus introduces a disarmament regime, not differently from those set forth by the Biological Weapons Convention and the Chemical Weapons Convention, which will be analyzed in Section 6.

As anticipated, a crucial aspect in the Convention is the definition of "Cluster Munitions" for the purposes of all these prohibitions and obligations, which is provided by Article 2, whereby:

> 'Cluster munition' is, for the purposes of the Convention, defined as:
>
> a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions.
>
> It does not mean the following:
>
> (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
>
> (b) A munition or submunition designed to produce electrical or electronic effects;
>
> (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
>
> (i) Each munition contains fewer than ten explosive submunitions;
>
> (ii) Each explosive submunition weighs more than four kilograms;
>
> (iii) Each explosive submunition is designed to detect and engage a single target object;
>
> (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
>
> (v) Each explosive submunition is equipped with an electronic self-deactivating feature.

In the first part, we have a definition that is similar to the operational one we gave before, with the additional clarification that prohibited submunitions are those weighting less than 20 kilos. The reference to

weight, which also recurs in the exception under lett. c) is to be explained with the fact that lighter submunitions are more unstable.

The most interesting provision is that under lett. c), which in fact permits the use of cluster munitions (by excluding them from the legal definition) provided that they comply with 5 design requirements, whose respect should help to avoid "indiscriminate area effects and the risks posed by unexploded submunitions". This provision, therefore, seems to strike a fair balance between humanitarian concerns and military necessity, by allowing the use of cluster munitions that are designed in a way that minimizes the risk for civilians.

As we said, a delicate issue dealt with by the Convention regards the relations between States Parties and States that are not party, which may well be jointly involved in an armed conflict as allies. What happens if a non-party engages in the use of a prohibited cluster munition in the context of a military operation involving a State Party? Under what conditions the latter may be deemed to have breached the Convention?

The matter is governed by Article 21, which reads as follows:

> 1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.
> 2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.
> 3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.
> 4. Nothing in paragraph 3 of this Article shall authorise a State Party:
>
> (a) To develop, produce or otherwise acquire cluster munitions;
>
> (b) To itself stockpile or transfer cluster munitions;
>
> (c) To itself use cluster munitions; or
>
> (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

The first two paragraphs are of limited legal relevance as they exhort State Parties to promote the widest adhesion to the Convention and to discourage States that are not party to employ cluster munitions.

More important to the point are the ensuing two paragraphs. Paragraph 3, in particular, rules out that the military cooperation with a State not party amounts to a breach of the Convention, if the latter may happen to use prohibited cluster munitions. Paragraph 4 lett. d), however, clarifies that this does not authorize a State party to expressly request the use of cluster munition "where the choice of munitions used is within its exclusive control". The latter proviso may give room for conflicting interpretations. A literal interpretation thereof would warrant the conclusion that it would be lawful for a State party to request the use of cluster munitions, whenever it has not exclusive control over the choice of the weapon. It has been convincingly noted, however, that such an interpretation would conflict with the object and purpose of the treaty, which is aimed at prohibiting *under any circumstance* acts aimed at encouraging the use of cluster munitions. Under the latter view, the provision should be construed so as to exclude the unlawfulness of a generic request by a State party for fire support from a State not party resulting in the use of cluster munitions by that non-party State whenever the State party does not exercise effective control over the choice of weapons.[56]

Some concluding remarks should be made in relation to the status of the prohibition on the use of cluster munitions under general international law. To date, the Convention has been ratified by 110 States, which do not include several militarily significant States, first and foremost the United States and the Russian Federation. One can reasonably rule out, therefore, that the prohibition at hand has reached customary status. In this respect, it should be recalled that, in 2008, the US unilaterally adopted a policy on cluster munitions, whose aims were very close to that of the Convention.[57] Yet, this progressive policy was revoked by former President Trump in 2017[58] and, to date, it does not seem that President Biden will revive it any time soon.

56 T.R. Arntsen, Relations with States not party to this Convention in G. Nystuen and S. Casey-Maslen (eds.), The Convention on Cluster Munitions: A Commentary, OUP, 2010, p. 541 ff., p. 595.

57 Memorandum: DoD Policy on Cluster Munitions and Unintended Harm to Civilians, 19 June 2008.

58 Memorandum: DoD Policy on Cluster Munitions, 30 November 2017.

6. Weapons of Mass Destruction

WMD may be defined as weapons that are a source of international concern because of their capacity to inflict death and destruction on a massive scale and in an indiscriminate manner. While the term may be used to stigmatize any category of weapons (as Kofi Annan famously did in relation to small weapons[59]), this expression is correctly employed only to indicate three categories of weapons: nuclear, biological and chemical ones. In this Chapter, I will not deal with nuclear weapons. Notwithstanding their potentially devastating effects, IHL has not yet made significant steps to outlaw them, because of the fierce opposition to nuclear weapons, none of which – significantly enough – ratified the 2017 Treaty on the Prohibition of Nuclear Weapons. I will therefore focus solely on biological and chemical weapons.

The prohibition on the use of biological and chemical weapons is historically rooted in the prohibition against poison, which is commonly considered the most ancient prohibition of a means of combat (reference is routinely made to the Hindu Laws of Manu, dating back to the first or second century BC, and to other ancient attempts to outlaw it).[60] The first internationally binding instrument enshrining such prohibition has to be found in the 1899 Hague Regulations concerning the Laws and Customs of War on Land, which – after reaffirming that "The right of belligerents to adopt means of injuring the enemy is not unlimited", it envisaged at Article 23 an express prohibition on the employment of "poison or poisoned arms".[61]

This prohibition was not considered to be applicable to poison gases, which were basically the precursors of contemporary chemical weapons, as they were considered a novel technology.[62] In relation to them, a separate Declaration was adopted by the Contracting Powers, whereby they committed themselves to abstain "from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases".[63]

59 UN News, Proliferation of illicit small arms leads to culture of violence and impunity – Annan, 26 June 2006.

60 See, e.g., Boothby, above note 1, p. 104.

61 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, 29 July 1899, Art. 23.

62 J.P. Zanders, International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy, Journal of Conflict and Security Law, 2003, p. 391 ff., pp. 407-408.

63 Declaration (IV,2) concerning Asphyxiating Gases, The Hague, 29 July 1899.

The scope of the Declaration was widened with the stipulation, in 1925, of the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, whose most relevant parts are reproduced below:

> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; […] the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.[64]

Compared to the Hague Declaration, the scope of the prohibition is broadened in two directions. On the one hand, instead of referring to projectiles whose "sole object […] is the diffusion of asphyxiating or deleterious gases", the Protocol refers to a more encompassing prohibition on the use in war of asphyxiating, poisonous or other gases, and of all analogous liquid materials or devices. This means that, while under the 1899 rule, it would have been permitted to use weapons whose incidental effects were poisonous, this is no longer the case under the 1925 Protocol. On the other hand, and perhaps more evidently, the Protocol extends the prohibition to the use of bacteriological methods of warfare.

The Geneva Protocol, which has been so far ratified by 146 States, including most militarily relevant States, is generally considered to have laid the normative foundations upon which the Biological Weapons Convention and the Chemical Weapons Convention have subsequently been built.

6.1. Biological Weapons

The Biological Weapons Convention was adopted in 1972 and was the first treaty to have prohibited entirely a category of weapon. The object of the prohibition is defined by Article I as follows:

> (1) Microbial or other biological agents or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
>
> (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict

64 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.

The obligations undertaken under the Convention in relation to these toxins, agents, weapons, equipment, and means of delivery are indeed far-ranging and closely resemble those already recalled when analyzing the Cluster Munitions Convention including:

- The prohibition to develop, produce, stockpile or otherwise acquire or retain them (Article I)
- The obligation to destroy them or divert them for peaceful purposes (Article II)
- The prohibition to transfer them to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organisations to manufacture or otherwise acquire them (Article III)

Curiously enough, no reference is made to the prohibition of the use of biological weapons. Such prohibition, however, on the one hand, may be inferred from Article VIII, which affirms that the Convention is without prejudice to the Geneva Gas Protocol of 1925, which actually prohibited the use of biological weapons, and, on the other hand, was expressly confirmed by State Parties at the Fourth Review Conference, held in 1996.[65]

The Convention has so far been ratified by 183 States, including the most militarily significant States. The prohibition on the use of biological weapons can be safely considered as part of customary international law, and is codified in Rule 73 of the ICRC Study, which specifies that the norm applies to both international and non-international armed conflicts.[66]

6.2. Chemical Weapons

Under Article IX of the Biological Weapons Convention, State Parties affirmed "the recognised objective of effective prohibition of chemical weapons and, to this end, undertakes to continue negotiations in good faith with a view to reaching early agreement on effective measures" to this effect. It took about 20 years to reach this objective and the result is the 1993 Chemical Weapons Convention.

65 Final Declaration of the Fourth Review Conference of the Biological Weapons Convention, 1996, BWC/Conf.IV/9, *passim*.

66 ICRC Study on Customary IHL, above note 11, Rule 73 ("The use of chemical weapons is prohibited").

The Chemical Weapons Convention is another disarmament treaty, with the consequence that the general obligations set forth in its Article 1 are similar to those already seen when discussing the Cluster Munitions Convention and the Biological Weapons Convention, namely:

1. Prohibition "to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; to use chemical weapons; to engage in any military preparations to use chemical weapons; to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention"
2. Obligation to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
3. Obligation to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.
4. Obligation to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

One of the most relevant features of the Convention is the introduction, alongside these general obligations, of a robust verification system, administered by the Organisation for the Prohibition of Chemical Weapons, which is regulated by a long and detailed Annex, also containing three Schedules listing chemicals that are subject to the application of verification measures.[67]

The definition of chemical weapons is provided by Article 2, whereby:

> Chemical weapons for these purposes means, together or separately:
> (a) toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
> (b) munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals […] which would be released as a result of the employment of such munitions and devices;

67 M. Daoudi and R. Trapp, Verification under the Chemical Weapons Convention, in R. Avenhaus et al. (eds.), Verifying Treaty Compliance. Limiting Weapons of Mass Destruction and Monitoring Kyoto Protocol Provisions, Springer, 2006, p. 77 ff.

> (c) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in sub-paragraph b)

Three key notions are employed here: "toxic chemicals", "precursors" and "purposes not prohibited under the Convention", which are also defined by the subsequent paragraphs of Article 2.

> 'Toxic chemical' means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals
>
> 'Precursor' means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical.
>
> 'Purposes Not Prohibited Under this Convention' means:
>
> (a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
>
> (b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
>
> (c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
>
> (d) Law enforcement including domestic riot control purposes.

In relation to the latter use, it should be noted that the use of riot control agents as a method of warfare is prohibited by Article I.5 of the Convention. The notion of "riot control agents" is also defined in Article II as "any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure". It is not self-evident, indeed, why the use of a chemical agent would be prohibited in war, but not in the context of domestic enforcement. The reason for this apparent contradiction is explained by the ICRC in its Study on Customary IHL. Although riot control agents can be far less injurious than most conventional weapons, there is the risk that a party which is being attacked by riot control agents may think it is being attacked by deadly chemical weapons and resort to the use of chemical weapons as a reaction. The need to avoid such escalation, therefore, is why States agreed to prohibit the use of riot control agents as a method of warfare in armed conflict.[68]

To date, the Chemical Weapons Convention counts 193 parties, which include the most militarily significant States, to the exclusion of Israel.

68 Customary International Humanitarian Law, above note 11, p. 265.

The prohibition of the use of chemical weapons, as well as that of using riot control agents as methods of warfare, are both codified in the ICRC Study on Customary IHL, respectively at Rules 74 and 75, which consider them applicable to both international and non-international armed conflicts.

7. Compliance Mechanisms

As it is often the case when it comes to international law, compliance mechanisms in weapons law are mostly rudimentary and largely rely on the good will of States. The main reason is that States are generally reluctant to accept to undergo verification mechanisms that permit the inspection by representatives of foreign States or agencies of sensitive defence facilities, the most relevant exception being the regime introduced by the Chemical Weapons Convention, which is to be explained in light of the acknowledgement of the seriousness of the risk of a breach of treaty commitments.

The most common compliance mechanisms include:

- Annual reporting on the status of implementation of the Convention
- Consultation between State Parties on issues of implementation
- Lodging of a complaint with the UN Security Council
- Criminalization (or otherwise sanctioning) of breaches committed by individuals, both at the domestic and international level (e.g. before the International Criminal Court)
- Training of armed forces
- Legal reviews of weapons, means, and methods of warfare

From a genuinely IHL perspective, the most salient one is the obligation to conduct legal reviews of weapons, means and methods of warfare, on which the last part of this Chapter will be devoted.

7.1. Legal Reviews of Weapons, Means, and Methods of Warfare

The obligation to conduct legal reviews of new weapons is put forth by the Article 36 of Additional Protocol I. While the existence of a corresponding norm of customary international law is

disputed,[69] it is significant that one of the few militarily significant States that have not yet ratified the Protocol, the United States, regularly conducts weapons reviews, whose content does not deviate from the requirements of Article 36 in a substantive manner.[70] I will therefore address the issue by analyzing the text of Article 36 on the assumption that it enshrines a model to be followed also by States that are not yet Parties to the Protocol.

Article 36, in particular, reads as follows:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

This provision has, therefore, a somewhat "preventive" purpose in that it obliges States to verify the legality of weapons before they are actually deployed with a view to averting their unlawful use. To this end, States are thus obliged to establish "internal procedures" in order to perform such legal reviews.

Against this backdrop, it can be useful to dissect the provision in its constitutive elements to better elucidate its meaning.

First, what constitutes a "new weapon"? As explained by the ICRC in its Guide to Article 36 review, this notion should be construed broadly, so as to include not only weapons that are "new" in the literal sense of the term, but also:

- a weapon which the State is intending to acquire for the first time
- an existing weapon that is modified in a way that alters its function, or a weapon that has already passed a legal review but that is subsequently modified;
- an existing weapon where a State has joined a new international treaty which may affect the legality of the weapon.[71]

The latter example is noteworthy in that here, the novelty would not concern the weapon but the applicable legal framework. This

69 N. Jevglevskaja, Weapons review obligation under customary international law, International Law Studies, 2018, p. 187 ff.

70 DoD Directive 5000.01, The Defense Acquisition System, 9 September 2020.

71 ICRC, A Guide to the Legal Review of New Weapons, Means and Methods of Warfare, 2006, pp. 8-9.

interpretation may perhaps stretch a bit the meaning of the provision, but – on balance – it seems reasonable in light of its purpose.

Second, what are the legal yardsticks against which to assess the legality of the weapon?

In light of the above Sections, the weapons reviewer should explore the following issues:

- Is the weapon, in its normal or intended circumstances of use, of a nature to cause superfluous injury or unnecessary suffering?
- Is the weapon by its nature indiscriminate?
- Are there any specific treaty or customary rules that prohibit or restrict the use of the weapon?

To this, one should add the issue, we did not deal with, as to whether the use of the weapon would be in compliance with IHL rules on environmental protection.

Third, when should the review be carried out?

The formula "study, development, acquisition or adoption" is such as to encompass any stage of the procurement process. In practice, however, in light of the preventive purpose of the provision, legal reviews should be conducted as early as possible. On reflection, this is also in the interest of the State, which will better avoid costly advances in the procurement process for a weapon which may end up being unusable because illegal.

Fourth and finally, what kind of response is to be expected from the weapons reviewer?

The text of Article 36 is clear in positing that the review must establish whether the use of the weapon at stake would be unlawful "in some or all circumstances". This entails that the reviewing authority will not necessarily give a "yes" or "no" answer. It may also approve the use of the weapon, provided that certain operational restrictions are put in place or that some technical modifications are made to the weapon.

Being ultimately dependent on the good will of the procuring States, legal reviews of weapons are but an imperfect tool in the quest to ensure compliance with the prescriptions of weapons law. Yet, in the absence of an international and impartial supervisory mechanism, this is all we

got. Indeed, weapons review may prove a viable second-best solution in situations where an international agreement including all relevant States (and thus also militarily significant ones) is difficult or impossible to reach. This seems to be the case, at least for the time being, with Autonomous Weapons Systems, whose analysis will conclude this Chapter.

7.2. Emerging Technologies: Autonomous Weapons Systems

Currently, there is no universally accepted definition of Autonomous Weapons Systems (AWS) in international law. Nonetheless, one may detect a growing consensus around the idea whereby AWS are weapon systems that – by relying on (more or less) advanced AI technologies – are able, once activated, to perform the critical functions of selecting and engaging targets without human intervention. Quite remarkably, this notion of autonomy in weapons systems has the support of crucial international stakeholders: the most powerful and technologically advanced military power (US),[72] the main guardian of international humanitarian law (ICRC),[73] and the Coordinator of the coalition of NGOs advocating a ban on AWS (the Campaign to Stop Killer Robots).[74]

Based on this definition, one may identify at least four categories of existing weapons systems that can be qualified as autonomous:[75]

1) air defence systems, like Phalanx and Iron Dome. These systems rely on radars to identify fast-approaching incoming threats, such as missiles, rockets or aircrafts, in light of two simple criteria: speed and trajectory.[76]

2) robotic sentries, like the Super aEgis II stationary robotic platform tasked with surveillance of the demilitarised zone between North and South Korea. These robots are able to sense the environment by relying on digital and infra-red cameras and to discern trespassers on the basis of heat and motion patterns. The Super aEgis II can function both in unsupervised or supervised modes. In the former case, the platform

72 DoD Directive 3000.09, Autonomy in Weapons Systems, 21 November 2012.

73 ICRC, Views of the International Committee of the Red Cross on Autonomous Weapon System, paper submitted to the Informal Meeting of Experts on Lethal Autonomous Weapons Systems, Convention on Certain Conventional Weapons, Geneva, 11 April 2016, p. 1.

74 Human Rights Watch, Losing Humanity: The Case against Killer Robots, 19 November 2012, p. 1.

75 For a more detailed overview, see V. Boulanin and M. Verbruggen, Mapping the Development of Autonomy in Weapon Systems, SIPRI, 2017.

76 Ibid., pp. 37-39.

is enabled to select and engage intruders in the demilitarized zone, without any further intervention by human operators, while in the latter case, target engagement is conditional upon positive action by the human operator. The Super aEgis II, therefore, can be considered an autonomous weapon solely when operating in its unsupervised mode. Out of ethical concerns, these systems are to date employed only in supervised (and hence non-autonomous mode).[77]

3) guided munitions, which may be used to autonomously identify and engage targets that are not in sight of the attacking aircraft, as in the case of the Dual-Mode Brimstone. Brimstone is reportedly capable of seeking for "targets in its path, comparing them to a known target signature in its memory",[78] as well as of "automatically reject[ing] returns which do not match (such as cars, buses, buildings) and continu[ing] searching and comparing until it identifies a valid target".[79]

4) loitering munitions, such as the Harpy NG, the STM Kargu-2[80] or the Kalashnikov ZALA Aero KUB-BLA,[81] overflying for a long time an assigned area in search of targets to dive-bomb and destroy. Such loitering capability enables the operator to activate the weapon even when (s)he is not sure about the presence of valid targets within the area.

This definition also captures foreseeable and more advanced AWS, including those formed by multiple units manifesting swarming capabilities, which are the object of several recent military research programs (such as the US LOCUST, Low-Cost UAV Swarming Technology). Swarm robotics is a bioinspired field of robotics aimed at reproducing the collective behavior of certain animals, by designing large groups of unmanned systems that may be programmed to accomplish a task in a coordinated and cooperative manner, in the same way as a

77 Ibid., pp. 45-46.

78 Royal Air Force, Aircraft & Weapons, 2007, p. 87.

79 Ibid.

80 This Turkish unmanned aerial vehicle was reportedly employed in autonomous attack mode during the Second Libyan Civil War against Haftar-affiliated forces. See United Nations, "Final Report of the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011)," March 8, 2021, UN Doc. S/2021/229, para. 63.

81 This loitering munition has allegedly been used by Russian forces in Ukraine. See Z. Kallenborn, Russia May Have Used a Killer Robot in Ukraine. Now What?, Bulletin of the Atomic Scientists, 15 March 2022, <https://thebulletin.org/2022/03/russia-may-have-used-a-killer-robot-in-ukraine-now-what>.

school of fish or a flock of birds. Military research has been increasingly focusing on the development of small-size, low-cost unmanned weapons systems that can be deployed in swarms composed of a sheer number of units, with a view to "overwhelming enemy defenses".[82] While swarming capabilities do not necessarily entail autonomy in the targeting functions (in principle, a swarm could be programmed to execute a detailed plan decided by human commanders),[83] it is clear that, if one wants to bring out the best of it in military terms, they should be allowed to operate autonomously to a significant extent, including as regards the selection and engagement of enemy targets.[84]

As mentioned above, the legality of AWS is currently debated by a Group of Governmental Experts established within the institutional framework of the CCW. In that context, one of the main issues at stake is whether AWS would ever be capable of taking targeting decisions that are respectful of IHL principles of distinction, proportionality and precaution embedded in IHL, at least as well as a conscientious and law-compliant human warfighter. Those opposing full autonomy in weapons systems, indeed, argue that the current and foreseeable AWS will fail to meet, in many warfare situations, this benchmark.[85] And also supporters of AWS recognize the "daunting problems" that need to be addressed before developing IHL-compliant AWS (such as "the development of effective perceptual algorithms capable of superior target discrimination capabilities").[86]

Against this background, the works of the GGE have produced anything but satisfactory results, in that it did not go further than adopting 11 Guiding Principles (a soft law instrument) whose content is very vague or merely a repetition of existing norms, including Article 36.[87] This is mainly due to the fact that States most involved in the AI arms race, first and foremost US and Russia, are clearly opposing any attempt to reach an agreement on a legally binding instrument.

82 P. Scharre, Robotics on the Battlefield Part II. The Coming Swarm, CNAS, October 2014, p. 10.

83 Ibid., p. 40.

84 Ibid. pp. 29-32.

85 N.E. Sharkey, The Evitability of Autonomous Robot Warfare, in International Review of the Red Cross, 2012, p. 787 ff., p. 788.

86 R.C. Arkin, Governing Lethal Behavior in Autonomous Robots, CRC Press, 2009, pp. 211-12.

87 Guiding Principles affirmed by the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, 13 December 2019, UN Doc. CCW/MSP/2019/9, Annex III (see, in particular, lett. e)).

This may perhaps change in the coming future following the ground-breaking position paper published by the ICRC on May 2021, making the call for new legally binding rules on AWS.[88] In a nutshell, the ICRC proposal contains two prohibitions of general character regarding (1) anti-personnel AWS and (2) AWS that are by design unpredictable. Outside these two provisions, autonomy in weapons systems is permitted, albeit subject to robust constraints: limits on the types of targets (objects that are military objectives by nature), limits on the duration, geographical scope and scale of use, limits on situations of use (not in scenarios populated by civilians), and the requirement of human supervision and veto.

In the meanwhile, however, the only legal gateway preventing the development of indiscriminate AWS is constituted by weapons review. Yet, Article 36 reviews (or the like) have to be reconceived in order to address the "conceptual challenge" posed by the autonomous performance of the critical functions of selecting and engaging targets. In particular, reviews cannot be limited to assessing whether AWS' technical features allow humans to behave in compliance with the applicable norms of international law but should rather be aimed at verifying whether the weapon itself is capable of acting lawfully when taking "determinations in the targeting cycle which traditionally are being taken care of by a human operator".[89]

In this perspective, in addition to the issues described above, which apply to all weapons systems, including autonomous ones, the reviewer will approve an AWS weather is satisfied that, in its normal or intended circumstances of use, the weapon system will be capable of distinguishing between combatants/fighters who are hors de combat and those who are not; between civilians who are directly participating in the hostilities and those who are not; between combatants/fighters and peaceful civilians; between military objectives and civilian objects; between persons or objects that are entitled to special protection and those which are not; as well as to making proportionality decisions which conform to the standard of the reasonable military commander.

88 ICRC Position on Autonomous Weapons Systems, 12 May 2021.

89 Switzerland, Towards a "compliance-based" approach to LAWS, Working Paper submitted to the 2016 Informal Meeting of experts on Lethal Autonomous Weapons Systems (LAWS), Geneva, 30 March 2016, para. 23.

If needed, the reviewer may attach some conditions to the approval, for instance, by requiring the application of operations constraints of the kind suggested by the ICRC.

8. Conclusions

The overview carried out in this Chapter, albeit selective and necessarily brief, should have made clear that the law of weaponry does not differ from the rest of IHL in that it is made of norms lying at the intersection between military necessity and humanity. This may leave unsatisfied the idealist, and in fact many norms are far from setting satisfying standards, but at the same time it ensures that States, notwithstanding the lack of proper enforcement mechanisms, mostly comply with these rules, so contributing to alleviate – to borrow from the language of the Saint Petersburg Declaration – the calamities of war.

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Chapter VI: Aerial Warfare

Mateusz Piątkowski[1]

1. Introduction

The phenomenon of aerial warfare in the context of international humanitarian law follows the general principle of practical character: the more effective the weapons are, the less is the probability that the new tool of warfare is regulated. This is the general tendency of international humanitarian law, as this is observed, for instance, in the case of ongoing discussion relating to the – Lethal Autonomous Weapon Systems (LAWS). The states are very reluctant to restrict prematurely such promising armament, fearing the collapse of the technical progress or a new field of rivalry among military powers.[2]Aerial warfare is a history of the IHL in a nutshell. Despite being such an effective tool of warfare, the use of air power in armed conflict still awaits a dedicated treaty regulation. A comprehensive treaty on aerial warfare does not exist: the Additional Protocol I (AP I) to the Geneva Convention of 1977 is a partial codification.[3] On the other hand, due to the exceptional work done by the experts of the IHL, the customary rules of air warfare are at least gathered in one practical handbook of the *lege de lata* character: the HPCR Manual on International Law Applicable to Air and Missile Warfare.[4]

2. The First Rules of Air Warfare

The key to understanding the complexity of air warfare is to review the specific relationship between the law, history, military doctrine and strategy: it is especially important to understand certain breakthroughs

1 University of Lodz, Poland. All websites last accessed on 31 May 2023.

2 Jona Puschmann and Heike Krieger, *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar 2021) 73.

3 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, 1125 UNTS 3, <https://www.refworld.org/docid/3ae6b36b4.html>.

4 Program on Humanitarian Policy and Conflict Research at Harvard University, HPCR Manual on International Law Applicable to Air and Missile Warfare (Cambridge University Press 2013).

in military doctrine and also the reaction of the law. In fact, unrestricted aerial warfare during World War Two was the main flywheel of changes in international humanitarian law.[5] The story of air warfare started at the end of the 18th century The Montgolfier brothers' invention in 1783 was actually the first device that fulfilled the dream of mankind about flying. In 1794, the first air force military detachment was created, called the French Aerostatic Corps. During the battle of Fleurus in 1794, balloons of the French Army were providing intelligence data or providing reconnaissance data about the movements of enemy forces.[6] During the Civil War in the United States, the Union Armies of the North were also extensively using balloons in order to get information about the Confederate movements. In the course of the Battle of Seven Pines, the aerostats were crucial in securing the safe withdrawal of the Union Forces.[7] It is also important to emphasize that the hostility in aerial warfare does not always mean the pure combat function: by that we mean aircraft dropping bombs, firing rockets, firing its main arm and guns, etc. But it's not only limited to this classic combat function, planes, and aircraft are able to gather intelligence as well as information and are able to transmit to relay some messages.[8] Air platforms are also very useful means of troops' transportation. The late 19th century was the moment of the introduction of airships, which offered warring nations a set of new possibilities, including extensive range and payload.

The first proposal for air warfare was drafted in the context of the war between Prussia and France in 1870-1871. The French Forces were extensively deploying balloons for sending messages between separate armies across the theatre of war, and of course, for intelligence gathering. Germans were defenceless from the aerostats: they tried to counter their movements by pursuing them with cavalry units. In order to elevate the chances on the battlefield, the Germans turned to international law.[9] The French balloons were operating far behind enemy lines. The Prussian officials threatened the French Government that the captured

5 Judith Gail Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Martius Nijhoff Publishers 1993) 20.

6 F. Stansbury Haydon, *Military Ballooning During the Early Civil War* (John Hopkins 2000) 10.

7 P. Delmar, *Vehicles of the Civil War* (Capstpone Press 2014) 28.

8 Patrycja Grzebyk, *Human and Non-Human Targets in International Armed Conflict* (CUP 2022) 152; William H. Boothby, *The Law of Targeting* (OUP 2012) 353.

9 Stephen Badsey, *The Franco-Prussian War: 1870-71* (Osprey Publishing 2022) 100.

balloon crew members would be considered spies and prosecuted accordingly.[10] This created a massive disagreement inside international law scholarship due to the open nature of the reconnaissance missions carried out by the balloon crews.[11] This is something quite different from being involved in espionage because espionage requires acting under a false pretext. Afterwards, Prussia changed official policy and agreed that the members of the balloon crews were combatants.[12]

Definitely, the most controversial part of air warfare is the air bombardment. In fact, air warfare involves multiple examples of activity, but definitely, air bombardment is probably the most controversial one. At the end of the 19th century, increased payload and range allowed constructors to retrofit the balance and airships into the platform of carrying bombs, of course, very primitive bombs, rudimentary like grenades. But nevertheless, they already had the ability to damage or even destroy some targets on the ground. During the First Hague Peace Conference in 1899, the IV Hague Declaration was adopted.[13] An interesting discussion during this Conference was ignited among the delegates. The delegates noted that despite its ineffectiveness, air warfare has the potential to be a great tool of warfare. In order not to block the development of air technology, the states agreed on only a temporal moratorium prohibiting aerial bombardment.

3. Hague Convention of 1907

It took only eight years for the delegates to completely change their position on aviation[14]. The Wright Brothers' invention Flyer-1 departed successfully for the first time in 1901. Another famous constructor of Louis Blériot on his plane called Blériot-9 won the contest of the British newspaper Daily Mail for a flyover above the British Channel.

10 Rowan A. Greer, "International Aerial Regulations", Air Service Information Circular (Washington: Chief of the Air Service 1926) 3.

11 US Naval Institute, *Proceedings of the United States Naval Institute*, vol. XI, (US Naval Institute 1885) 390.

12 *See* Article 22 Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, <https://ihl-databases.icrc.org/ihl/INTRO/135>.

13 Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature. The Hague, 29 July 1899.

14 James W. Garner, "Some Question of International Law in the European War" (1916) 9 AJIL 72, 95-96.

Blériot's overflight sparked a legal question: the French pilot did not ask for permission to cross the airspace of the United Kingdom and he was fined. This raised a question about the status of the airspace: whether it is free (even above the territory) or subjected to state sovereignty[15].

Given such drastic changes, during the Second Peace Conference which took place in 1907, instead of temporal prohibition, states opted for a constant limitation. The wording of Article 25 of the Hague Regulations of 1907 was changed and the air bombardment was considered to be a part of land bombardment[16]. This amendment, however, will have drastic consequences in due course[17].

Prior to World War One, there were actually only two positive rules regarding air warfare. Article 29 of the Hague Regulations of 1907 regarding the combatant status of the crew members and Article 25, imposing a limitation on air bombardment, regulating the conduct of air bombardment.[18] In 1907, only a few states accepted the future promulgation of this moratorium on discharging the explosive from balloons including the United States.[19] From the technical point of view, this declaration (XIV Hague Declaration) is still binding because it was extended until the Third Hague Peace Conference. However, due to the outbreak of World War One, this conference was never organized. Technically, this Declaration is still in force. Nevertheless, it's only of historical significance because actually, its normative value collapsed due to the process that *desuetude*[20]. One has to observe the treaty regulation and the practice of the states. The structure of international law is that we do have equal power over all sources of international law and there is no "superior" source of international law. Some rules could be embodied in treaty provisions, and some rules to be embodied in customary law.

15 *See* Arthur K. Kunh, *The Beginnings of an Aerial Law,* (1910) 4 AJIL 109.

16 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.

17 Mateusz Piątkowski, "War in the Air from Spain to Yemen: The Challenges in Examining the Conduct of Air Bombardment", (2021) 26 Journal of Conflict and Security Law 493, 497.

18 International Conferences (The Hague), 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, 18 October 1907 <www.refworld.org/docid/4374cae64.html>.

19 Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons. The Hague, 18 October 1907.

20 G. Schwarzenberger, "The Law of Air Warfare and the Trend Towards Total War" (1959) 1 University of Malaya Law Review 120.

It is known that the widespread opposite practice has the capacity to collapse the normative value of the treaty. This treaty is no longer considered binding, is only considered to be binding technically but legally, it falls to the *desuetude* process.[21] Before World War Two, the international community accepted a called London Protocol, restricting the action of submarines during the war. Why was it considered very impractical?[22] Because it imposed on the commander of the submarine to actually go to the surface before the submarine attacked the enemy vessel, the enemy merchant ship. Basically, by asking submarines not to submerge, it was eliminating the main feature of submarine warfare. So actually, during World War Two all belligerents, not only Germany but actually the Western Allies as well, rejected to follow the London Protocol in practice.[23] This same happened from time to time in different areas of international law, especially, in the area of law of air warfare.

Sources of the law of air warfare, are in the majority of customary character, as I said previously, we only have a few rules of treaty origin. Some rules were derived from the analogy. The analogy was also used in terms of air warfare and this prior regime was the regime of naval warfare because there were a lot of similarities between the warships and aircraft. However, the analogy has its limits in air warfare, we have to remember the characteristics of air warfare.

When talking about generally air warfare, then we are switching to the law of air warfare; there is no clear definition in the IHL as we already stated previously and there is no comprehensive treaty in this regard.[24] It is possible to formulate a working definition that it is an overall spectrum of rules and norms of the international humanitarian law, regulating the conduct of military operations in the air domain during the armed conflict through the aerial platforms between other aerial platforms, targets located on the ground, or sea etc. So, there is a specific range of questions covered by the law of air warfare: the

21 Raijka Hanski, "*The Second World War*", in L. Hainnikainen and others (eds), *Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland* (Martinus Nijhoof Publishers 1992) 59.

22 Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930. London, 6 November 1936.

23 Wolf Heintschel von Heinegg, "Armed Conflict at Sea", in Dieter Fleck (ed), *The Handbook of International Humanitarian Law,* 573.

24 Francisco Javier Guisandez Gomez, "The Law of Air Warfare" (1998) 323 IRRC 347.

status of military aircraft and the crew, the question of markings of military aircraft, rules concerning the air bombardment, the legality of the armament, the legality of weapons deployed by the aircraft, and the rights and duties of neutral states. This is, a loose example of problems covered by the law of air warfare.[25]

Three remarks are important in the context of the structure of the law of air warfare. First, we cannot have this wrong impression that law of the air warfare is something separate legal domain from the main core of the IHL, is actually a part of the IHL and still is ruled by its general principles. Secondly, there are rules derived by the analogy from the legal regimes of land and naval warfare, if we don't have a clear solution, sometimes we could use a reasonable analogy as a solution to guide us through the ambiguous legal framework and this is where the analogy seems to operate quite efficiently.[26] The analogy has its limits, in many circumstances, it could lead to misleading and impractical results. And lastly, there are certain rules characteristic only for the law of air warfare because of the characteristic of the air warfare, for instance, the status of a person evacuating from the aircraft in distress, like the pilot who is trying to jump with the parachute, who is trying to escape the aircraft which is going down.

4. Sources of the Law of Air Warfare

The sources of the law of air warfare, basically, they're identical to international humanitarian law because international humanitarian law is a part of international law. So, first of all, the treaties, but there is, in fact, very limited treaty law. However, it is quite significant because this small fraction of positive law it covers the most controversial aspect of air warfare, air bombardment which is the most important issue of air warfare from the perspective of humanitarian principles. So, the Part IV Section I of the AP I of 1977; the air bombardment of the targets located on land is codified by the treaty law. Another source is the customary law due to the lack of a comprehensive treaty in other areas than air bombardment. Those rules generally emerge through practice; they have been "forged" on the battlefield. They are general principles of law and

25 Michael N. Schmitt, "The Law of Air Warfare" in Andrew Clapham and others (eds) *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 125.

26 Sarah, McCosker, *Domains of Warfare,* in Ben Saul, Dapo Akande (eds) *The Oxford Guide to International Humanitarian Law* (OUP 2020) 98.

this is somehow a little bit misleading because when we are taking a look at the ICJ Statute Article 38 there is a reference toward rather general principles of law from national legal orders that were later implemented to international law. So, if we take this approach, those rules are very limited in the IHL. However, more recently, as per the International Law Commission issued a very interesting report on general principles of law. ILC stated that there are some principles of general character within international law, like the principle of distinction.[27] This is a general principle of the IHL because it has this great normative value through the combination of the treaty and customary law. Another source is unilateral acts of States or binding resolutions of international organizations have limited significance in terms of air warfare. But there are, of course, rules of a secondary character, we could say a soft law they are not *per se* legally binding but do have a practical impact and it is necessary to notify their existence.

In this context it is necessary to recall the jurisprudence, there are several rulings of importance for the law of air warfare, for instance, the Mixed Arbitrary Tribunals in the pre-war period faulty applied the law of land warfare to address the air bombardment.[28] There are interesting remarks towards the law of air warfare contained in the trials of Nuremberg and Tokyo, after World War Two, but we have to bear in mind that no charges related to the air operations had been pressed. The legality of the atomic bombardment of Hiroshima and Nagasaki was reviewed by the district court in Tokyo in 1963 (*The Shimoda Case*).[29] Another important source of jurisprudence is the ICJ Advisory Opinion of Nuclear Weapons: the only source of the International Court of Justice authority of international humanitarian law.[30] Important remarks are also emphasized in ICTY jurisprudence concerning the conduct of hostilities (*Gotovina*)[31]. They are also the drafts of the treaties, which have never been accepted as a treaty.

27 International Law Commision, General Principles of Law A/CN.4/L.971 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/411/33/PDF/G2241133.pdf?OpenElement>.

28 "Coenca Brothers v. Germany" (1932) 4 Annual Digest of Public International Law Cases 570.

29 *Shimoda* Case (Compensation claim against Japan brought by the residents of Hiroshmina & Nagasaki), Tokyo District Court, 7 December 1963.

30 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996.

31 *Prosecutor v. Ante Gotovina and Mladen Markac*, IT-06-90-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 2012 <https://www.refworld.org/cases,ICTY,50acffdd2.html>.

For instance, the famous Hague Rules of Air Warfare 1923.[32] Notably, the experts on international law proposed a comprehensive manual on certain areas of international law which are not fully codified, with a notable example of the HPCR Manual on Air and Missile Warfare. Basically, manuals are not law *per se*, they are rather a presentation and illustrative character of already accepted rules, they are not formulating, they actually should not formulate anything that is beyond the *lex lata*, they should not propose any *de lege ferenda* solution. Finally, a source of practical approach is presented by the quasi-judicial bodies or fact-finding missions. For instance, after the NATO bombardment of Serbia, the ICTY established a special commission which reviewed the legality of the NATO bombardment.[33]

Manuals are not law *per se*, although they are quite important because they serve as an illustration. They are gathering in a practical way known rules of customary or treaty character. And they also do have some value when we are talking about the *opinio juris*, although we have to remember that international law is ultimately shaped by the states.[34] To contribute to *opinio juris*, those manuals should be somehow supported by the states' opinion on them. Usually, those manuals are consulted by prominent experts on the IHL. But it is not enough: the *opinio juris* requires that the States practice needs to somehow accept the rules stemming from those manuals.

5. Customary Rules of Air Warfare

The rise of military aviation was the flywheel for the development of the rules of customary character, for instance, the definition of military aircraft.[35] The aircraft must be operated by the armed forces of the state. Secondly, need to bear the military markings, be commanded by a member of the armed forces, and be controlled by the crew subjected

32 Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923.

33 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia <www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal>.

34 Heather A. Harrison Dinniss, "A Room Full of Experts: Experts Manuals and Their Influence on The Development of International Law", (2022) 23 Yearbook of International Humanitarian Law 21, 22-23.

35 Mateusz Piątkowski, *The Markings of Military Aircraft under the Law of Aerial Warfare,* (2020) 58 Military Law and the Law of War Review 63.

to a military discipline. When the First World War started, all the belligerents were following the above-mentioned requirements. They decided, for instance, to adopt the distinctive markings that every air force has its own unique sets of identification.

It was important during World War One to display very visible markings, external marks painted on the aircraft, due to the necessity of visual recognition. So, there was no doubt that this plane is friendly, this plane belongs to the enemy. But of course, the types of identification changed and during the next conflict, World War Two, the belligerents realized that sometimes the national colours are very bright, but they are not very well corresponding with the camouflage. There is a solution, and actually, the practice adopted by the Japanese Air Force is an example of this solution; the so-called low visibility markings. And there are two ways to adopt the low visibility markings: through the faded colours or the grayscale. Why the markings are important? Because they are this constitutive part of the military aircraft definition. Generally, military aircraft could be only deployed by the state air forces.

IHL is a very complex legal regime and the character of the conflict might be complex as well. Sometimes even non-state parties to the armed conflict are possessing own air forces`s detachment. A notable example is Biafra and Katanga, as they were non-state entities, and Katanga was actually fighting for its independence during this secession process from Congo in the 60s.[36] While being non-state entities, however, they decided to form their own air detachments and they decide to adopt state-style markings. A question arises: what is their status? Those entities are not states, those aircraft are not belonging to the state. However, it is possible to internationalize the non-international armed conflict: for instance, non-state entities are going to be recognized as belligerents or for instance, or they submit this special declaration under Article 96(3) of the AP I.[37] This declaration is reserved for the people's fighting for independence, and their right of self-determination against

36 Mateusz Piątkowski, "Military Markings and Unmanned Aerial Vehicles" <https://lieber.westpoint.edu/military-markings-unmanned-aerial-vehicles/>.

37 '*The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary*' Article 96 (3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API) 1977, 1125 UNTS 3.

alien occupation etc., In such a situation, the aircraft deployed by the party of the above-mentioned conflict shall be treated as a military aircraft (under the condition of fulfilling the definition).

Another rule shaped during World War One: St Petersburg Declaration of 1868 prohibits the use of explosive bullets below 400 grams but there is one notable exception to this rule: air warfare.[38] Why? Because the explosive projectiles were a very effective way of fighting the Zeppelin airships. The British invented the special bullet called the Pomeroy bullet, it was an incendiary bullet with an inflammable substance within the bullet and when it penetrated the outer layer of the airship, it caused a massive reaction with the hydrogen because inside the airship, there was hydrogen, and it creates a chemical reaction. The introduction of the incendiary anti-aircraft ammunition was a turning point which ended the Zeppelin raids against Britain during World War One. This conflict also confirms that the crew members are entitled to POW status in case of capture.

Another example of rule of customary character "forged" by the battlefield was the practice of neutral states regarding the incursion of belligerent military aircraft. It was recognized that neutral states had a right to defend their own airspace, and both aircraft and crews shall be internment until the end of hostilities.[39]

6. Rules Regarding Bombardment from the Air

Article 25 of the Hague Regulations of 1907 was one of the very few positive rules regarding the conduct of hostilities binding in World War Two. However, the provision was labelled as highly impractical. The article refers to the land bombardment and based its original scope on the realities of the land artillery. The most ambiguous part of the rule prohibits the bombardment of the "undefended" locality. In the context of the land operation when a city or town is open to occupation without breaking any resistance then is branded as undefended.[40] However, the

38 Marco Longobardo, "Means of Combat" in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (OUP 2021) 133, HPCR Manual on International Law Applicable to Air and Missile Warfare, Commentary, 70.

39 This practice is subject to ongoing change due to the recent events concerning the Russian aggression against Ukraine.

40 International Law—The Conduct of Armed Conflict and Air Operations. By the U.S. Air Force. (Pamphlet 110-31, 19 Nov. 1976) Washington: Department of the Air Force, (1976) 5-12.

delegates combined the legal regime of the land bombardment, with the air bombardment because they did not realize that the aircraft is unable to occupy the port of land. This was leading to an illogical paradox.[41] What was more practical was to actually mix the regime of air bombardment and naval bombardment because the warship just like a military aircraft, is not able to capture location on the ground. This blurry legal framework was a gateway for even the most extensive interpretations, labelling every town and city behind the frontline as defended. That was definitely one of the contributing factors to the catastrophe of international law during World War Two.[42]

In the meanwhile, after World War One, before World War Two in 1922, scholars and military officers proposed a formulation of the so-called Hague Rules of Air Warfare. It was a comprehensive draft, a proposal of the total code of air warfare. The rules have never been ratified by any of the States.[43] Some provisions were accepted norms of customary character, for instance, the Hague Rules of Air Warfare provided the definition of military aircraft, emphasized that only the military aircraft has the right to perform acts of hostility, accepted the prohibition of displaying false external markings but they have one important novelty, and the novelty was the regime regulating the conduct of air bombardment. Hague Rules of Air Warfare rejected the "undefended" location test and introduce the term "military objective". It was no longer crucial whether their location was defended or not, it was rather important, what is being subject of the target, what type of objective is attacked, and according to Article 24, air bombardment is legitimate only when is directed against a military objective. The article is a great achievement of the Hague Rules of Air Warfare, and undoubtedly rules were a source of inspiration for the drafter of AP I.

What was a little bit controversial about the Hague Rules of Air Warfare? Because the Hague Rules of Air Warfare, for instance, proposed an exclusive list of military objectives. This was considered to be practically impossible, because there were so many changes in the technology in

41 Harry Post, *War Crimes in Air Warfare,* in, Natalinno Ronzitti, Gabriella Venturini (eds.), *The Law of Air Warfare: Contemporary Issues,* Eleven International Publishing (2006) 161.

42 Heinz M. Hanke, *The 1923 Hague Rules of Air Warfare: A Contribution To The Development of International Law Protecting Civilians From Air Attack,* IRRC (1993) 23.

43 James Upcher, "Neutrality in Contemporary International Law" (OUP 2020) 109.

the infrastructure, that it was not possible to actually build a somehow exhaustive list of military objectives. The Rules were imposing a controversial distinction between tactical and strategic bombardment. So generally, they follow the line that in the proximity of the military operation, the air bombardment could be much more destructive, and could cost lawfully, much more destruction when a bombardment of strategic targets.[44] Nevertheless, one could not miss from sight a sad, but firm fact: the Hague Rules remain only a proposal of law.

The states were very reluctant to restrain the power. Governments did not consider that strategic bombardment is a weapon of mass destruction and was rather focused on aviation progress. The stance of public opinion also favours aviation as a wonderful and remarkable technical newbie. Moreover achievements of pilots – national heroes such as Charles Lindberg – were considered an element of national pride and somehow completely overshadowed the dangers of unrestricted aerial warfare.

Signs were ignored, despite a very strong indication of what is going to happen in the next World War, the conduct of air operations in Spain, China or Ethiopia; the famous painting of Picasso's Guernica, was actually two years before the outbreak of World War Two. Also, military thinkers were opting for unrestricted air operations. Giulio Douhet proposed a very straightforward doctrine of the use of strategic airpower.[45] His idea was to build as many bombers as possible and bombard the enemy from day to night, targeting the civilian population because when we are imposing the terror bombardment, we will force the enemy to surrender. Giulio Douhet considered indiscriminate terror bombing, a main strategical doctrine. William Mitchell was convinced that bombardment should be focusing on destroying the industrial networks of the state, especially of the highly developed state. Those strategic experts assumed direct or non-direct targeting of the civilian population to break down morale and ultimately, forced the enemy to surrender.

Dark predictions were fully confirmed during World War Two. For instance, operations during World War Two started with the bombardment of the city of Wieluń on 1 September 1939. There is no

44 Dieter Fleck, "Strategic Bombing and the Definition of Military Objectives" Israel Yearbook on Human Rights (1997) 43-44.

45 Giulio Douhet, *The Command of the Air,* 1927.

evidence of any logical military logic behind the attack rather, an example of a pure terroristic attack. The conduct of air operations during World War Two highlighted the fundamental flaws in the legal regime protecting the civilians against the effect of hostilities and belligerents adopted two approaches.[46] One approach, the restrictive: the military objective doctrine was accepted standard of customary law before World War Two, so generally, according to this restrictive approach, every bombardment conducted, were illegal because they were violating the doctrine of the military objective. However, under the second approach, extensive positive law provision regarding the conduct of aerial bombardment was Article 25 of the Hague Regulations.[47] Not only legal uncertainty was behind the catastrophic to have civilian losses during World War Two, but also the fact that the belligerents often deliberately relocate military objectives among populated areas. Moreover, the targeting techniques were quite rudimentary and the bomb, for instance, if the bombs were dropped one kilometre from the designated target area, it was considered to be in the target.

Few remarks about Arthur "Bomber" Harris: the mastermind of the British Bomber Offensive. British decided that the bombers are going to dismantle German capabilities to wage war. Harris was asked to comment the international law. He famously responded that "International law can always be argued pro and con, but in this matter of the use of aircraft in war there is no international law at all.".[48] In my opinion, this quotation is also showing perfectly what happened during World War Two, and what kind of challenge international law was facing during this conflict. And basically, the British were imposing the idea of "morale bombing" and which could be described as: "we are not deliberately targeting civilian population in order to terrorize them, any losses are just accidental and unavoidable; we consider targeting the morale of German working class as means to ignite a revolt against the government".

46 Mateusz Piątkowski, *Judging the past – international humanitarian law and the Luftwaffe aerial operations during the invasion of Poland in 1939* in P. Wrange, M. Klamber, M. Delands, *International Humanitarian Law and Justice,* Routledge 2018.

47 Hamilton De Saussure, "The Laws of Air Warfare: Are Thery Any?" (1971) 5 International Lawyer 527.

48 A. C Greyling, *Among the Dead Cities: Is the Targeting of Civilians in War Ever Jusfified,* (Bloomsbury 2006) 211.

7. Rendulic Rule

However, when we are talking about historical cases concerning air bombardment, we have to remember about two remarks. First of all, the standpoint of international law regulating air warfare before 1977 was entirely different from today. International cannot be applied backwards. Secondly, the so-called Rendulic Rule is applicable, the standard of reasonable commander, requiring us to determine what information was available to the commander during the time of the decision, not post factum review.[49] This is accepted construction of criminal law: mistake of fact, *error in facti*.[50]

As some may know the Yenga game, for me, is a very frustrating game I have to say, but I find it a perfect reference to the IHL that the IHL is progressing with time. As lawyers, we have to be careful, we have to remember, first of all, the impossibility to apply the law backwards and applying the law as it stands at the time of the event.

I already mentioned the so-called *Rendulic Rule*, related to the case of German General Lothar Rendulic who was charged with the wanton destruction of areas in Northern Norway in 1944. He ordered the destruction of the whole infrastructure in order to delay the anticipated Soviet offensive, but actually, in fact, *post factum* this offensive did not occur. The decision was considered to be unjustified by the military circumstances. However, there he was acquitted by the United States Military Tribunal during High Command Case. The Tribunal found that the general is not guilty of this destruction as his decision was reasonable in light of the information that was available to him. *Rendulic Rule* is reflected in the interpretive declaration of the state parties to AP I. It is worth citing here the content UK Declaration "Military commanders and others responsible for planning, deciding or executing attacks necessarily have to reach a decision on the basis of the assessment of the information from all sources which is reasonably available to them at the relevant time".[51] It is imperative to review the operational incidents from the *post factum* perspective, rather, we should use a different perspective: *ante factum*.

49 C. Cooper, *NATO Rules of Engagement: On ROE, Self-Defence and the Use of Force during Armed Conflict* (Brill 2019) 224.

50 Mateusz Piątkowski, "The Rendulic Rule and the Law of Aerial Warfare" (2013) 2 PRIEL 69.

51 See: <ihl-databases.icrc.org/ihl/NORM/0A9E03F0F2EE757CC1256402003FB6D2>.

An example of a possible practical application of the *Rendulic Rule is* the bombardment of the Al-Firdos bunker in 1991 during the first Gulf War.[52] On 13 February 1993, US planes bombed the underground structure in Baghdad, it was classified as a military objective. However, it was a great and terrible humanitarian catastrophe because the bunker was turned into a civilian shelter, and almost 300 persons were killed. Some researchers are highlighting there was solid intelligence data also supported by the interception of cryptid military transmission, and the presence of camouflage and military equipment, indicating that, in fact, this bunker was a command-and-control centre. The Americans had testimony from the Scandinavian constructor, who testified that was building this construction for military reasons.[53]

8. Special Rules Concerning the Law of Air Warfare

Airmen in distress: the practice of World War Two highlighted the problem of attacking the pilot who was leaving the aircraft in distress. The reason to attack the airman was purely military: the airman is much more precious than the aircraft. So basically, their position was highly volatile. And the state practice in this regard was unsettled. It is not clear whether Article 42 of the AP I was at the time the reflection of customary law.[54] Contemporary, no person parachuting from the aircraft in distress shall be made the object of attack during his descent.

The airmen who had been shot down sometimes is involved in "evade and escape" tactic. Pilots all over the world are trained to survive in very difficult conditions. The essence of "evade and escape", is to survive behind enemy lines in order to re-join friendly forces and actually, international humanitarian law accepts that the airmen in the escape and evade situation do not lose the combatant status, even if the pilot is finding himself to distinct from the civilian population, for instance, by wearing civilian clothes, and it's not committing the offence of improper use of enemy uniforms, as long as they are not committing the acts of hostility.[55]

52 G. D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP 2010) 275.

53 Bryan Frederick, David. E Johnson, *The Continued Evolution of U.S. Law of Armed Conflict Implementation: Implications for the U.S. Military* (Rand Corporation 2015) 14.

54 Sandoz et al (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987) 495.

55 See: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule62>.

9. Towards the AP I

The circumstances around negotiations regarding AP I unveiled a change of air force doctrine and targeting technologies. There was a change of paradigm. During, especially the last stage of the Vietnam War, the results of the Linebacker I and Linebacker II campaign confirmed that there is no military advantage stemming from bombarding the civilian population.

So that was the main flywheel of a massive breakthrough in the legal paradigm during the AP I, the lack of clear laws regarding air bombardment was a major challenge during the Geneva Diplomatic Conference in 1977. However, formulation of this total code of air warfare was too difficult and too time-consuming. The AP I scope is limited only to air bombardment against objects located in the air. In consequence, the AP I is not a full codification of air warfare.

The bitter experience of unregulated air warfare had a great impact on the AP I: for instance, the prohibition of indiscriminate attacks are a direct reference to the strategy of World War Two this carpet style of bombardment.[56] "Indiscriminate attack" is not only launching a weapon which is not able to precisely hit the designated target area but also using lawful methods in an indiscriminate fashion.[57] But it is also illegal to employ a method or means of combat, the effects of which cannot be limited as required by this Protocol. IHL is requiring that somehow the weapon must be controllable and reasonably accurate. In light of Part IV of the AP I air warfare is treated similarly to any other dimension of hostiles if affects the civilian population on land.[58]

10. Status of Medical Aircraft

Due to the possible dual use, certain requirements need to be fulfilled before classifying aircraft as medical aircraft. One needs to bear in my mind that aircraft are used in different hostile manners: firing a rocket, dropping a bomb, but also gathering information. The function of medical aircraft is exclusively to transport the wounded and sick. The aircraft is obliged to display the distinctive emblem and the national colours. Every

56 Article 51(5)(a) AP I.

57 Article 51(4)(b) AP I.

58 Article 49(3) AP I.

medical aircraft could be ordered to land and comply with the inspection.[59] During World War Two, the Germans created an air service to evacuate downed pilots from the British Channel and the British aviation targeted planes down they were displaying this distinctive emblem. The British position was that the German were carrying out the evacuation of pilots, who were not ill, wounded or shipwrecked.[60]

Under Geneva Convention I, the precondition for initiating medical air transportation during the armed conflict is approval from both belligerents. This was considered during the Geneva Diplomatic Conference (1974-1977) to be a strict requirement if the medical aircraft was flying in the friendly zone.[61] But the problem is that AP I is implementing a highly subjective term, the contact zone. And the contact zone basically means that every medical aircraft in the contact zone shall have permission from another party in the conflict.[62] And this is highly controversial, what does the contact zone mean, basically, because in the era of the long-range surface-to-air missiles every area is now considered to be a contact zone.

Any deviation from the strict scope of prescribed activity, could classify aircraft as potentially hostile, especially when the aircraft fails to comply with the request to land in the designated airport. ICRC study is also highlighting that this is valid in terms of non-international armed conflict.[63] However, it is somehow controversial also, how the non-state party could deploy the medical aircraft.

11. No-Fly Zones

No-fly zones are not the products of the IHL, they are products of *ius ad bellum*, and basically, they did not relieve the party from duties under the IHL. Basically, it's just for operational, it's very beneficial operationally, but it did not change the background of the law, so, from the perspective of the IHL, the establishment of the no-fly zone is irrelevant.[64]

59 Article 36 of the I GC of 1949.

60 H. McCourbey, *International Humanitarian Law and Air Warfare,* (1995) 2 International Law and Armed Conflict Commentary 23.

61 Article 25 AP I.

62 Article 26(2) AP I.

63 See: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule29>.

64 Michael N Schmitt, *Wings Over Libya: The No-Fly Zone in Legal Perspective*, (2011) 36 Yale Journal of International Law 45.

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Chapter VII: Hybrid Warfare and the Law of Armed Conflict: Much Ado about Nothing?

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1. Introduction

Hybrid warfare and the law of armed conflict seem like natural bedfellows. The law of armed conflict regulates the conduct of hostilities during times of armed conflict or, to use the older terminology, during times of war. Whatever the exact meaning of the phrase "hybrid warfare" is, a point we will return to in a moment, it explicitly invokes the idea of war. It is therefore reasonable to assume that hybrid warfare has something to do with war. At least at first sight, hybrid warfare and the law of armed conflict thus pertain to the same field of human endeavour: the conduct of armed hostilities. However, initial appearances can be deceptive.

While the law of armed conflict is known under several different names, including international humanitarian law and the laws of war, there is no uncertainty about the fact that it refers to the legal regime of international law designed to regulate warfare. The rules that make up this regime are found in instruments such as the Hague Regulations of 1907,[2] the four Geneva Conventions of 1949,[3] their First and Second Additional Protocol of 1977,[4] as well as in the form of

1 Associate Professor of Public International Law, University of Exeter. All websites last accessed on 31 May 2023.

2 See A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences concerning the Laws and Usages of War* (University Press, Cambridge, 1909).

3 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 1949, 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), 1949, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 1949, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 1949, 75 UNTS 287.

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, 1125 UNTS 609.

customary international law.[5] By contrast, the concept of hybrid warfare does not have a settled meaning. The phrase has become a prominent fixture of strategic and policy discourse over the last fifteen years.[6] In the political West, it has been used as a shorthand to describe a wide range of compound security challenges faced by democratic nations and institutions, from geopolitical competition below the threshold of armed conflict all the way to full-scale hostilities. This means not only that the exact contours of the concept are ambiguous, but also that the subject matter of hybridity extends beyond the field of application of the law of armed conflict. In fact, because of its elasticity, many commentators who have studied the concept in greater depth have come to criticize it for its lack of clarity and breadth.[7] The intellectual history of the notion of hybrid warfare is therefore not a happy one: while it has its proponents, it also has its fair share of detractors.

How, then, do the law of armed conflict and the notion of hybrid warfare relate to one another and what can we learn from considering their relationship? The purpose of this paper is to explore these questions. It does so in three steps. First, to place the discussion within its broader context, it reviews the changing character of warfare and identifies some of the key adaptation mechanisms of the law of armed conflict. Second, it takes a closer look at the idea of hybridity and its two principal manifestations: hybrid warfare and hybrid threats. Finally, it turns to the legal implications of these concepts to discuss some of the challenges that hybrid conflicts and hybrid competition pose for the law generally and for the law of armed conflict in particular. The paper concludes by identifying some broader lessons.

5 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press, Cambridge, 2005).

6 For recent contributions on the subject, see Brin Najžer, *The Hybrid Age: International Security in the Era of Hybrid Warfare* (Tauris, London, 2020); Mikael Weissmann, *et al.* (eds), *Hybrid Warfare: Security and Asymmetric Conflict in International Relations* (1 edn, Tauris, London, 2021).

7 For critical perspectives, see Russell W. Glenn, "Thoughts on "Hybrid" Conflict", Small Wars Journal, 2 March 2009; Robert Johnson, "Hybrid War and Its Countermeasures: A Critique of the Literature" (2018) 29 *Small Wars and Insurgencies* 141–163; Ilmari Käihkö, "The Evolution of Hybrid Warfare: Implications for Strategy and the Military Profession" (2021) 51 *Parameters* 115-127.

2. Warfare in the Modern Age

As Carl von Clausewitz reminds us, war is about the application of violence for political ends.[8] War entails the use of combat power by one organized political community against another to compel the latter to submit to its will. This is the essential and inescapable logic of war. The nature of warfare is therefore constant and unchanging: it involves the use of violence for political ends. The character of warfare, however, does evolve. The key features of warfare —who is fighting against whom, for what ends and using which means and methods— are historically contingent. They are shaped by the political, social, technological, military and other relevant conditions prevailing at any given time. As these conditions change, so does the character of warfare.

The changing character of warfare has both practical and normative implications.[9] Innovations in warfighting require constant adaptation in military organization and doctrine.[10] Preparing to fight the last war is rarely a recipe for battlefield success: national armed forces must plan for the future and adjust to new circumstances. The same also applies to the law. Rules that regulate outdated forms of warfare, but fail to address current realities, are of little use. Disruptive changes in the character of warfare therefore require legal adaptation. This section will briefly review the key trends and drivers of change in the character of warfare and how the law of armed conflict is equipped to deal with these.

2.1. Drivers of Change

War is a complex social phenomenon driven by the interplay of multiple factors, including social, political and economic impulses. Among the drivers of war and its changing character, technological innovation undoubtedly takes pride of place. Throughout all periods of history, new inventions have disrupted established military organization and tactics by handing those able to exploit the potential of new technologies a military advantage over their opponents. Successive industrial

8 Carl von Clausewitz, *On War* (Princeton University Press, Princeton, 1976), 87.

9 See Steven Haines, "The Nature of War and the Character of Contemporary Armed Conflict", in Elizabeth Wilmshurst (ed.) *International Law and the Classification of Conflicts* (Oxford University Press, Oxford, 2012) 9.

10 Mick Ryan, *War Transformed: The Future of Twenty-First-Century Great Power Competition and Conflict* (Naval Institute Press, Annapolis, 2022).

revolutions have fuelled an exponential increase in the size, mobility and firepower of national armed forces. Innovations and inventions such as the railroads, mass production, the internal combustion engine, wireless communications, aviation and spaceflight have triggered waves of transformation in military organization and the modalities of applying military power. More recently, the digital and information revolutions have ushered in new weapons, platforms and tactics, whilst at the same time creating new vulnerabilities and domains of engagement.[11] The emergence of cyberspace as a novel environment for military operations illustrates the point. It also highlights the fact that contemporary technological developments have created more room for non-kinetic and non-lethal forms of confrontation, thereby blurring the line between open warfare on the one side and confrontations that fall short of war on the other.

The pace of technological change does not appear to be slowing down. Over the coming years, the growing capabilities of unmanned vehicles in the air, on land and on water, steady advances in artificial intelligence, the widespread automation of human decision-making processes, the exploitation of vast amounts of data and progresses in bio- and quantum technology will almost certainly cause significant disruption that demands continued military adaptation and transformation.

Actors and the strategic objectives they pursue are another major driver in the changing character of warfare. Non-state actors play a significant role in the majority of armed conflicts by acting in conjunction with States or as belligerents in their own right. While their presence on the battlefield is not new, the proliferation of various technological means has rendered non-state actors far more capable, including more lethal and more agile, than was the case in the past. Today, non-state actors are able to impose significant costs on nation States. The balance between international and non-international armed conflicts has now shifted towards the latter, with contemporary wars typically involving a multitude of parties and becoming more mixed in character.

In parallel with these developments, the post-Cold War geopolitical environment has become more hostile as a result of the newfound

11 See Mark Leonard, *The Age of Unpeace: How Connectivity Causes Conflict* (Transworld Digital, London, 2021).

assertiveness of the great powers.[12] Invigorated by the information and communication revolution, geopolitical competition below the threshold of open hostilities has intensified. Yet in the meantime, the prospect of large-scale war among highly capable adversaries has not disappeared, as the Russian Federation's full-scale invasion of Ukraine in February 2022 exemplifies. If anything, peer confrontation among the great powers, including the United States of America and the People's Republic of China, now seems more likely. The strategic outlook is therefore mixed in that future warfare is likely to range from counterinsurgency-type operations all the way to high-intensity conflict, quite possibly not in succession or parallel, but in combination. Humanitarian and security assistance, counter-terrorism and stabilization, including winning hearts and minds, will most likely remain key objectives alongside conventional and nuclear deterrence and the ability to prevail in large-scale joint arms manoeuvres. In short, national armed forces should expect to face the full spectrum of operations, from influencing to warfighting, from reconstruction to attrition – and, crucially, the need to carry out these missions simultaneously.

2.2. Coping with Disruption

The fact that the character of warfare is continually evolving is, of course, old news. So is the fact that this continuous process of change causes significant disruption, including in the legal domain. The development of new weapons, the emergence of novel military tactics, the steady increase in the destructiveness of combat and the transformation of the broader operating environment, such as the growing urbanization of our societies, pose major challenges for the law of armed conflict.[13] This is so because they raise questions about how the existing rules, many of which were originally designed to address very different circumstances, apply in new conditions and to unforeseen developments – assuming they apply at all. For instance, the emergence of heavier-than-air aviation before the First World War required decision-makers at the time to

12 Michael J. Mazarr, *et al.*, *Understanding the Emerging Era of International Competition: Theoretical and Historical Perspectives* (RAND, Santa Monica, 2018).

13 See Darren M. Stewart, "New Technology and the Law of Armed Conflict" (2011) 87 *International Law Studies* 271–300; Michael N. Schmitt, "War, Technology and the Law of Armed Conflict" (2016) 82 *International Law Studies* 137-182.

resolve if and how the existing rules of land warfare and naval warfare might apply to aerial combat and, crucially, to the bombardment of ground targets from the air.

The answer to such questions is governed in part by normative considerations. For instance, whether and how the provisions of specific law of armed conflict agreements apply to novel circumstances must be determined with reference to the rules of treaty interpretation, as formulated in the Vienna Convention on the Law of Treaties.[14] However, there is nothing mechanical about the application of these rules. They often do not yield definite answers, but merely lay bare a spectrum of reasonable interpretations which in turn leave room for reasonable disagreement.[15]

Alongside these normative considerations, one must not forget the profoundly political nature of war and hence of the law of armed conflict. The changing character of warfare benefits some belligerents and disadvantages others. States with access to new arms and technologies that give them an edge on the battlefield almost certainly will not want to see this advantage neutralized by legal restrictions, while adversaries without access to those weapons and technologies will almost certainly wish to achieve exactly that outcome. Military asymmetries foster disagreement over the law, its interpretation and its application.

Complicating matters is the fact that the law of armed conflict tends to lag behind the changing character of warfare, often by some margin. Many of its foundational instruments were adopted in response to past conflicts to address the challenges those particular events posed. The regulatory horizon of the law is very much constrained by the past. For example, reading the Geneva Conventions of 1949, it does not take very long to realize that both their content and scope of coverage are fundamentally shaped by the experiences of the Second World War.

Overall, the law struggles with novel developments because its meaning remains normatively elusive, its application politically contested and its scope historically contingent. Even so, the law is not entirely hostage to events but is capable of adaptation. Successive treaties on the law of

14 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 332.

15 Generally, see Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, Oxford, 2015).

armed conflict have not come out of nowhere but were concluded by States precisely in order to align the regulatory framework of warfare with the military, political and strategic imperatives of the day. This legislative route of responding to the changing character of warfare remains open to States. Perhaps its most attractive feature is the fact that it enables States to adapt the law in a deliberate manner, creating rules that provide tailor-made solutions to specific problems. The various agreements limiting or prohibiting certain types of weapons, such as the Ottawa Convention on Anti-Personnel Landmines,[16] provide a good example. However, the success of this legislative method of adaptation depends on the existence of a sufficient degree of political agreement and momentum. As the ongoing discussions over lethal autonomous weapon systems demonstrate,[17] the agreement and momentum necessary to adopt new rules of law is not always present. In fact, in the current geopolitical climate, it requires much optimism to believe that either can be found.

In the absence of legislative action, other adaptation mechanisms and features of the law of armed conflict come to the fore. Many of the applicable rules are highly contextual. Consider the duty to take feasible precautions in attack in order to avoid, and in any event to minimize, incidental harm to civilian persons and objects.[18] Feasibility is generally understood to demand a belligerent to take those measures of precaution that are practicable or practically possible. Such a standard cannot be divorced from its context: what is and is not practicable or practically possible depends entirely on the specific circumstances prevailing at the time of the attack, including the technological means and capabilities available to the attacker. The contextual nature of the feasibility rule enables it to be applied to a wide range of circumstances, including to new weapons, tactics and domains, with relative ease. New developments, therefore, pose less of a challenge to the feasibility standard than they do to rules that are less adaptable.

16 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, 2056 UNTS 211.

17 Sebastiaan Van Severen and Carl Vander Maelen, "Killer Robots: Lethal Autonomous Weapons and International Law", in Cedric Vanleenhove and Jan De Bruyne (eds), *Artificial Intelligence and the Law* (Intersentia, 2021) 151.

18 Article 57, Additional Protocol I. See Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under additional Protocol I* (Martinus Nijhoff, Leiden, 2009), 157-196.

The hermeneutically open-ended nature of many law of armed conflict rules has a similar effect. The proportionality rule, for example, prohibits attacks that are expected to cause incidental injury to civilians, which would be excessive in relation to the concrete and direct military advantage anticipated from the attack.[19] The core meaning of the notion of "injury" for these purposes is reasonably clear: it refers to some kind of damage or harm suffered by civilians. What remains unclear, however, is the nature of this damage or harm, specifically whether it is limited to physical matters or also extends to psychological harm. The ordinary meaning of the notion of injury is sufficiently broad to encompass both types of harm, yet this is not determinative. Just because a word is capable of carrying certain connotations does not necessarily mean that it actually does so for the purposes of a particular rule of law. Legislative intent, usage and context are also relevant to its construction. Arguments in favour of a broad reading of the proportionality rule that includes both physical and psychological injury may appeal to its humanitarian objectives: a broad reading would clearly maximize the protective effect of the law.[20] By contrast, arguments in favour of a more restrictive reading may point to the countervailing principle of military necessity and the lack of support for an expansive interpretation of the rule in past practice.[21]

The fact that the proportionality rule is open to such competing interpretations may be criticized for leaving its meaning uncertain and indeterminate. While such objections are justified, it is precisely this interpretative openness that also allows the rule of law to be adapted to new developments and changing sensitivities, in the present case moving from a position where proportionality was traditionally understood as being concerned mostly or even exclusively with physical harm to one where the idea that it also extends to psychological injury is gaining ground. The linguistic malleability of the law is therefore key to its successful adaptation.[22]

19 Article 51(5)(b), Additional Protocol I. See Enzo Cannizzaro, "Proportionality in the Law of Armed Conflict", in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (First edition. edn, Oxford University Press, Oxford, 2014) 332.

20 E.g. Michael N. Schmitt and Chad E. Highfill, "Invisible Injuries: Concussive Effects and International Humanitarian Law" (2018) 9 *Harvard National Security Journal* 72-99, at 92.

21 Cf. United States Department of Defense, *Law of War Manual* (updated edn, December 2016), at § 5.12.1.2.

22 Cf. Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, Oxford, 2014).

The *Tallinn Manual on the International Law Applicable to Cyber Operations* demonstrates the point.[23] The purpose of the Manual is to restate how the existing rules of international law, including the law of armed conflict, apply to conflict in cyberspace. In essence, the Manual is an exercise in interpretation meant to clarify how norms designed in an earlier historical epoch apply to a different set of circumstances. Rule 92, for example, defines a "cyber attack" for the purposes of the rules of the law of armed conflict to mean "a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects." In taking this position, Rule 92 clarifies that the notion of "acts of violence against the adversary", which is the defining feature of "attacks" within the meaning of the law of armed conflict,[24] refers to acts that are reasonably expected to cause physical harm to persons or objects. Since this requirement of harm is an essential element of the notion of "attack", Rule 92 concludes that cyber operations too must cause or at least be expected to cause harm in order to qualify as attacks. Neither of these positions is particularly controversial or surprising. Their benefit lies in affirming that the law of armed conflict rules on attacks apply to acts carried out in cyber space provided they actually or at least potentially have kinetic consequences.

Overall, the law of armed conflict is reasonably well equipped to cope with the changing character of warfare: various mechanisms, features and avenues are open for its adaptation to novel circumstances. However, such adaptation may be slow, incomplete or ultimately unsuccessful. While Rule 92 of the Tallinn Manual enjoys broad support, disagreement remains as to what constitutes an object for the purposes of applying that rule.[25] Some questions and challenges thus remain unresolved. These are often compounded by some of the structural deficiencies of the law, including its relatively weak compliance and enforcement mechanisms.

23 Michael N. Schmitt (ed.) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press, Cambridge, 2017).

24 Article 49(1), Additional Protocol I.

25 See Kubo Mačák, "Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law" (2015) 48 *Israel Law Review* 55–80; Michael N. Schmitt, "The Notion of 'Objects' during Cyber Operations: A Riposte in Defence of Interpretive and Applicative Precision" (2015) 48 *Israel Law Review* 81-109.

3. Hybrid Warfare and Hybrid Threats

There is no shortage of concepts designed to describe the contemporary strategic environment. Notions such as unconventional warfare, grey zone conflict, asymmetric warfare, irregular warfare, persistent competition, political warfare and surrogate warfare are just some of the ideas put forward in recent years to make sense of modern war and its trajectory. Hybridity is one of these ideas: it is a conceptual framework devised to explain contemporary forms of conflict. The concept has a descriptive and an analytical function. In an already crowded field of alternative conceptual models, any added value that the idea of hybridity may bring thus depends on how well it performs these two functions and enhances our understanding of warfare and its changing character. Seen from a legal perspective, the added value of hybridity lies in its potential to identify and assess the specific legal challenges posed by current forms of conflict.

Before considering these matters in more detail, we must revisit the notion of hybridity and its different uses. As noted earlier, there is no single definition of the concept in the field of international security. While the basic idea is simple – hybridity refers to some compound made up of diverse elements – the notion has been used in policy discourse and practice to describe very different combinations of elements. We will focus on two of these: hybrid warfare and hybrid threats. The first term, *hybrid warfare*, was coined to refer to a form of warfare that combines different modalities of violence, such as the use of conventional military capabilities in conjunction with acts of terrorism, in a synergistic fashion. The second term, *hybrid threats*, is the looser of the two and is typically employed to describe the complementary use of diverse levers of power, including political, economic and informational tools, in a hostile manner below the level of open violence. As these two versions of hybridity have different legal implications, it is important to distinguish between them in more detail.

3.1. Hybrid Warfare

The concept of hybrid warfare was introduced by General James Mattis and Lieutenant Colonel (retired) Frank Hoffman, both of the United

States Marine Corps, in 2005.[26] Surveying the trends of warfare and their implications for the organization and composition of the United States armed forces, Mattis and Hoffman suggested that future adversaries were likely to resort to irregular means against the United States in an attempt to counterbalance its overwhelming superiority in conventional combat. Specifically, future adversaries were likely to employ niche capabilities and unexpected combinations of tactics to catch the United States off guard. In doing so, they would adopt a combination of different modes of violence, blending terrorism, insurgency, conventional warfighting, guerrilla tactics and organized criminality in a synergistic fashion. Mattis and Hoffman described this blend of violence as hybrid war. In its original meaning, hybrid warfare, therefore, refers to a form of warfighting that unites distinct modalities of force and employs these in a complementary manner.

Conflicts such as the Second Lebanon War of 2006 seemed to confirm these predictions. In that war, the Israel Defense Forces were confronted with Hezbollah, a non-state adversary, fielding a combination of conventional and irregular capabilities in a highly congested environment. Although Israeli forces prevailed, they struggled to assert their conventional superiority against these hybrid capabilities and tactics.[27]

The prospect of hybrid war and the challenges it could pose even to highly capable militaries did not escape the attention of other powers. In 2010, the North Atlantic Treaty Organization (NATO) began to study the idea of hybridity, including through a series of conceptual experiments. The Alliance focused on hybrid threats, which it defined as threats posed by adversaries "with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives".[28] This understanding of hybridity extended the notion of hybrid war introduced by Mattis and Hoffman in two principal ways.

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26 James N. Mattis and Frank G. Hoffman, "Future Warfare: The Rise of Hybrid Wars" (2005) Issue 131 *Proceedings Magazine* 18-19. See also Frank G. Hoffman, *Conflict in the 21st Century: The Rise of Hybrid Warfare* (Potomac Institute for Policy Studies, Arlington, 2007); Frank G. Hoffman, "Hybrid Threats: Reconceptualizing the Evolving Character of Modern Conflict" (2009) *Strategic Forum* 1-8.

27 See Scott C. Farquhar, *Back to Basics: A Study of the Second Lebanon War and Operation CAST LEAD* (Combat Studies Institute Press, US Army Combined Arms Center, Fort Leavenworth, Kan., 2009).

28 Supreme Headquarters Allied Powers Europe and Allied Command Transformation, *Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats* (2010), 2-3.

First, unlike hybrid *war*, the notion of hybrid *threats* encompassed not only actual warfighting, but also situations of potential violence. Second, whereas hybrid war described the combination of diverse means and methods of force, the notion of hybrid threats was not limited to the use of military instruments, but covered the complementary use of military and civilian means. Despite employing this wider understanding of hybridity, NATO's attention nevertheless remained firmly focused on hybridity in situations of conflict or near-conflict, in line with its institutional mandate of collective self-defence against armed attack.

This broader approach was vindicated by the Russian Federation's annexation of Crimea in 2014. Russia employed a range of military and civilian measures to take control of the peninsula, including the deployment of special forces, disinformation, reliance on proxies, economic coercion and the threat of large-scale conventional force, in what seemed like a textbook application of NATO's definition of hybrid threats. This close match between theory and practice helped to propel the idea of hybridity centre stage. In response to Russia's act of aggression, NATO leaders declared themselves ready at their Wales Summit held in September 2014 to "effectively address the specific challenges posed by hybrid warfare threats, where a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design."[29] The Wales Summit Declaration thus confirmed NATO's understanding of hybrid warfare as primarily concerned with the integrated use of both military and civilian levers of power in the context of actual or impending armed conflict.

3.2. Hybrid Threats

The original notion of hybrid warfare, as coined by Mattis and Hoffman, drew on the idea of hybridity in a narrow fashion, using it to describe the synergistic combination of diverse forms of violence. Whilst this usage captured an important trend in the changing character of warfare, its focus on actual hostilities reflected the priorities of the armed forces and institutions such as NATO. Of course, the prospect of military confrontation remains all too real, as Russia's invasion of Ukraine in

29 Press Release (2014) 120, Wales Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council, 5 September 2014, para. 13.

February 2022 underlines. However, the preoccupation with different forms of violence meant that the hybrid warfare construct did not account for the fact that armed force is always employed in conjunction with other, non-violent levers of power. This is why NATO leaders spoke of hybridity in a broader sense to describe the synergistic use of military *and* civilian means.

More generally, by focusing on actual violence, the hybrid warfare construct overlooked the fact that persistent competition below the threshold of open warfare has become one of the defining features of the contemporary strategic environment. Rather than engaging in direct military confrontation, the great powers and their allies compete against each other across multiple domains, relying on a broad spectrum of tools falling short of open hostilities that range from diplomatic measures to economic coercion, from election interference to misinformation.

The danger that this geopolitical rivalry may escalate into open hostilities is ever present, not least because it takes place against the backdrop of proxy warfare, localized conflicts, continuous probing and occasional military encounters. Any one of these could draw the great powers into direct confrontation. However, until such time as this happens, geopolitical competition below the threshold of armed conflict remains, in principle, just that: a form of political warfare at best, not actual warfare. Yet in practice, the dividing line between robust competition and actual warfare is not so clear at all. Major actors regularly engage in coercive acts of lesser intensity designed to achieve incremental gains, as illustrated by China's aggressive actions to assert its control in the South China Sea.[30] Such activities are carefully calculated to achieve the benefit of force but not to cross the threshold of open conflict in such a blatant manner as to create a legally obvious situation and elicit a robust response. To achieve this effect, they typically rely on obfuscation, denial of the facts and attempts to exploit the inherent uncertainty of the applicable law. Warfare, competition and peace are not sharply delimited, but relative notions that sit on a spectrum of violence.

30 See Andrew Sven Erickson and Ryan D. Martinson (eds), *China's Maritime Gray Zone Operations* (Naval Institute Press, Annapolis, 2019).

To account for this aspect of the strategic environment, organizations such as the European Union have used the concept of hybrid threats in a wider sense to describe the synergistic use of non-violent means for strategic ends below the threshold of armed hostilities.[31] This version of the idea of hybridity runs into two principal difficulties, though. First, threats are largely in the eye of the beholder. A threat involves the possibility of some kind of damage, injury or other adverse consequence impacting someone or something. Threats are therefore actor specific in the sense that whether or not something is damaging or injurious depends on the specific circumstances and interests of the party affected. In the context of great power competition, what is a threat to one party may be a strategic advantage to another. Second, the synergistic use of multiple levers of power is not a particularly sinister or even novel idea, but simply a feature of good statecraft. Most international actors aspire to use the resources at their disposal in a complementary manner, even if some are more successful in doing so than others. Consequently, the synergistic use of a multitude of policy instruments is hardly remarkable.

For both of these reasons, the analytical value of the notion of hybrid threats is limited if it is used to describe synergistic action in general without reference to the specific circumstances, interests and objectives of individual actors. Since all international actors aspire to act coherently and in doing so will at least potentially threaten the interests of their rivals, a value-neutral use of the term amounts to little more than a truism. To endow it with more specific meaning, the phrase has therefore frequently been used by Western commentators and institutions in a pejorative sense to describe the malign activities carried out by mostly authoritarian governments against liberal and democratic nations. In the political West, the notion of hybrid threats has thus become a shorthand for the instruments and tactics employed by hostile actors against open societies. This is the approach taken by the European Centre of Excellence for Countering Hybrid Threats, which characterises hybrid threats as

> action conducted by state or non-state actors, whose goal is to undermine or harm a target by influencing its decision-making at the local, regional, state or institutional level. Such actions are coordinated and synchronized and deliberately target

31 E.g. European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication: Joint Framework on Countering Hybrid Threats - A European Union Response*, JOIN(2016) 18 final, 6 April 2016.

> democratic states' and institutions' vulnerabilities. Activities can take place, for example, in the political, economic, military, civil or information domains. They are conducted using a wide range of means and designed to remain below the threshold of detection and attribution.[32]

While this definition does not exclude coercive activities and makes explicit reference to the military domain, it is nevertheless geared towards malign activity that occurs below the level of armed conflict and typically is non-violent in character. In this respect, the hybrid threat construct is something of a mirror image of the hybrid warfare concept introduced by Mattis and Hoffman.

4. Legal Implications and Challenges

In addition to the practical challenges they pose, hybrid warfare and hybrid threats also raise a host of legal questions. As a form of actual hostilities, situations of hybrid warfare as defined by Mattis and Hoffman will almost certainly cross the intensity threshold of an armed conflict. As a consequence, the law of armed conflict will apply in such cases. However, the combination of regular and irregular forms of violence that is the hallmark of hybrid warfare does not fit neatly under the regulatory framework of this body of law. This is one of the reasons why hybrid wars have legal implications beyond the law of armed conflict. Even in times of war, including situations of hybrid warfare, other rules of international law remain applicable. Indeed, one of the challenges that irregular and non-conventional forms of violence, such as organized criminality, pose is precisely that they extend beyond the regulatory reach of the law of armed conflict and are governed mostly by other regimes of international law.

By contrast, hybrid threats understood as malign activities taking place below the threshold of armed conflict will not, by definition, trigger the application of the law of armed conflict. Instead, they are characterized by legal diversity: due to their multidomain character, hybrid threats straddle multiple legal regimes. In fact, the scope of the legal issues raised by such threats is potentially unlimited. This is so because threats are not fixed, but may take on an endless number of forms and guises,

32 European Centre of Excellence for Countering Hybrid Threats, "Hybrid Threats as a Concept" <https://www.hybridcoe.fi/hybrid-threats-as-a-phenomenon/>.

from misinformation and economic dependence to cyber espionage and migration. Since almost anything can be "weaponized" and turned into a threat depending on the circumstances, there is hardly an area of law that could not, at least potentially, be relevant to hybrid threats.

Nonetheless, hybrid threats that are coercive in nature could, in principle, achieve a level of intensity that does cross the threshold of armed hostilities and engages the law of armed conflict. Whether at that point, one ought to refer to them as hybrid wars rather than hybrid threats is a matter of terminology: the more important point is that the dividing line between hybrid warfare and hybrid threats is neither sharp nor impenetrable. While the original idea of hybrid warfare developed by Mattis and Hoffman was concerned with the synergistic use of diverse forms of violence, there is no reason to believe that hostile actors will abandon non-violent means should they find themselves engaged in a hybrid war against their adversaries. Simply put, hybrid tactics such as misinformation will not suddenly disappear just because the threshold of armed conflict has been crossed. Accordingly, it is useful to explore how some of the most prominent tactics associated with hybrid threats map onto the rules of the law of armed conflict.

In the passages below, we will consider two sets of questions raised by hybrid warfare and, to a lesser extent, hybrid threats, under the law of armed conflict: first, the threshold of armed conflict and, second, the classification of conflict, the status of the belligerents and the rules governing the conduct of hostilities. These questions illustrate the intersection between hybridity and the law of armed conflict, but they do not exhaust the subject.

4.1. The Threshold of Armed Conflict

While some of the obligations imposed by the law of armed conflict apply in times of peace, such as the duty to instruct members of national armed forces on the content of the applicable law, the bulk of its provisions is engaged only in times of armed conflict. The existence of an armed conflict is therefore a threshold criterion on which the applicability of the larger part of the law of armed conflict depends.

Armed conflicts within the meaning of international law come in

two forms: international or non-international armed conflict.[33] The first type encompasses hostilities between States, whereas the second involves conflicts between the armed forces of State and non-state actors, or between the forces of several non-state actors. The feature that distinguishes international and non-international armed conflicts is therefore the status of the belligerents.

International armed conflicts may commence in one of several ways, as indicated by Common Article 2 of the Geneva Conventions of 1949. Pursuant to that provision, the Geneva Conventions apply, first, to all cases of declared war. In the past, States have issued formal declarations of war before commencing hostilities, even though such declarations were not as widespread as is often assumed to have been the case. The main legal effect of a formal declaration of war is to trigger the applicability of the law of armed conflict even before any actual fighting takes place. However, in more recent times, declarations of war have virtually disappeared from practice.[34] States simply do not make such declarations any longer. There is no reason to assume that hybrid wars will change this: it is highly unlikely that situations of hybrid warfare would qualify as an armed conflict as a result of formal declarations of war.

Today, international armed conflicts arise overwhelmingly as a consequence of resorting to actual violence between the armed forces of at least two States. Some uncertainty surrounds the question as to whether this violence must reach a certain level of intensity before it qualifies as an armed conflict.[35] One position in this debate suggests that no minimum threshold of this kind exists, but that even minor or inconsequential confrontations between opposing armed forces or their individual members will amount to an international armed conflict. The other, more compelling, position holds that the amount of force and its effects must be more than trivial, though they still need not be substantial. Situations of hybrid warfare as envisaged in the literature generally seem to imply a level of violence that is more than marginal and thus transcends any *de minimis* threshold that may be required for an international armed conflict

33 See Dapo Akande, "Classification of Armed Conflicts", in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law* (Oxford University Press, Oxford, 2020) 29.

34 Christopher Greenwood, "The Concept of War in Modern International Law" (1987) 36 *International and Comparative Law Quarterly* 283-306.

35 Akande (n. 668), 34-35.

to exist. In other words, it is safe to assume that hybrid wars between State actors amount to an international armed conflict by definition and for this reason engage the law of armed conflict.

Finally, international armed conflicts may also arise in situations of partial or total occupation of the territory of a State, even if that occupation meets with no armed resistance. The elements of belligerent occupation are well established: hostile forces must be physically present in the territory of another State without the latter's consent; the territorial sovereign must be unable to exercise its authority in the territory concerned due to the presence of the foreign forces; and those forces must be in a position to assert their own authority over the territory.[36] Whether or not these three elements are present in situations of hybrid warfare is principally a question of fact—few truly distinct legal questions arise in this context.

The invasion and subsequent occupation of Crimea by the armed forces of the Russian Federation in 2014 illustrate the point. Much has been made of the fact that Russia has occupied Crimea through deceit and diversion, stripping its forces of their nationality markings and denying its involvement in the invasion. Such attempts at "plausible deniability" are designed to circumvent the law and evade accountability for its violation.[37] Yet deceit, diversion and denial are first and foremost matters of compliance and enforcement, even if malign actors also exploit legal ambiguity and other normative weaknesses in the law for these ends. The deployment of Russian forces bearing no identifying marks, the infamous "little green men", was neither a violation of the law of armed conflict nor did it absolve Russia of responsibility for violations of other applicable rules of international law its forces may have committed. Accordingly, in this instance, the law itself was relatively clear and the use of deceit and other diversionary tactics by Russia as an element of hybrid warfare raised few, if any, unique legal questions.

36 Philip Spoerri, "The Law of Occupation", in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (First edition. edn, Oxford University Press, Oxford, 2014) 182, 187–192. See also Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press, Oxford, 2012), 43ff.

37 Cf. Rory Cormac and Richard J. Aldrich, "Grey is the New Black: Covert Action and Implausible Deniability" (2018) 94 *International Affairs* 477-494. See also Roy Allison, "Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules" (2014) 90 *International Affairs* 1255-1297.

As a general rule, the same also holds true for hybrid wars between States and non-state actors, such as the Second Lebanon War between Israel and Hezbollah. The legal challenges that arise here are driven less by the special features of hybrid conflicts, but mostly by the general uncertainty surrounding the criteria for the existence of a non-international armed conflict. Armed conflicts of this type must exceed mere riots and other civil disturbances, and for this reason require armed hostilities of a certain intensity to take place between State armed forces and an organized armed group of a non-state actor, or between several such organized groups.[38] International jurisprudence has developed a comprehensive list of indicators for the intensity requirement, but none of these lend themselves to easy quantification.[39] The exact level at which mere disturbances tip over into a non-international armed conflict thus remains a matter of judgment and debate. A comprehensive list of indicators has also emerged for assessing the second requirement for the existence of a non-international armed conflict, the organized and armed nature of the group fighting on behalf of the non-state actor(s).[40] While not free from difficulties, these criteria are somewhat easier to apply than the intensity requirement. However, in either case, there is nothing inherent in hybrid warfare that poses distinct or novel legal challenges. In other words, while hybrid warfare involving non-state actors raises difficult questions as to whether or not the threshold of a non-international armed conflict has been crossed, these difficulties do not substantially differ from those that arise in any other situation of non-international warfare.

These threshold questions are compounded in the case of hybrid threats. Unlike hybrid warfare, the concept of hybrid threats refers principally to acts below the threshold of open violence, but such acts may still be coercive in nature or designed to shape the operational environment in preparation for actual warfare. In principle, isolated and low intensity acts of violence, including organized criminality and terrorism, may fall on either side of the dividing line between "unpeace" and armed hostilities on the other, and thus the dividing line between hybrid threats and

38 Akande (n. 668), 40-41.

39 *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (2008) Judgment, 10 July 2008 (ICTY Trial Chamber II), paras 177-193.

40 *Ibid*, paras 194-206.

hybrid warfare.[41] Take the Salisbury poisoning incident, for example, which involved an attempt by two Russian military intelligence officers to poison a former Russian spy with a chemical warfare agent in the British town of Salisbury in March 2018.[42] The assassination attempt caused one fatality and several individuals, including one police officer, required intensive care. Given the relatively low level of violence and the identity of the intended and actual victims, the incident did not amount to an armed conflict as it did not involve resort to force between the armed forces of Russia and the United Kingdom. However, had the chemical agent caused more severe harm, including injury to British security personnel, the answer would have been less clear cut. Similarly, the killing of Iranian Major General Qassam Soleimani by the United States in a targeted drone strike in January 2020 was of insufficient gravity, when taken on its own, to trigger the applicability of the law of armed conflict.[43] However, it is not difficult to see how the cumulative effect of a series of such incidents may cross the threshold of an international armed conflict.

4.2. Conflict Classification, Belligerent Status and the Conduct of Hostilities

Hybrid wars have several defining characteristics that are likely to raise certain types of legal questions more regularly than others. The fact that situations of hybrid warfare combine different modalities of violence makes it likely that they will also feature multiple belligerents, including State and non-state actors. For instance, it is safe to assume that States employing hybrid warfare tactics will, if circumstances allow, rely on proxies, as doing so offers a number of strategic and tactical advantages. Similarly, non-state actors such as Hezbollah often depend on the support of hostile States, in particular to develop conventional or more advanced military capabilities.

The involvement of multiple State and non-state belligerents in hybrid wars raises difficult questions about how such conflicts should be classified: are they separate international and non-international armed

41 Cf. Haines (n. 644), 24-27.

42 Mark Urban, *The Skripal Files: Putin, Poison and the New Spy War* (Macmillan, London, 2019).

43 Agnes Callamard, "The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters", Just Security, 8 January 2020 <https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/>.

conflicts running in parallel or potentially a single, internationalised armed conflict?[44] Much depends on the facts, in particular the nature of the relationship between the State and non-state belligerents. However, the law itself remains unsettled and does not provide definite guidance on how conflicts involving a multitude of different actors should be classified. The principal difficulty in this respect is that it is unclear under what conditions non-international armed conflicts are transformed into international armed conflicts and *vice versa*.

Approaching the question from a principled perspective, the transformation of one type of armed conflict into another type must happen by the operation of the law, rather than the subjective will or assessment of the parties concerned. Thus, if a situation no longer satisfies the conditions for the existence of a non-international armed conflict, but does meet the criteria for an international armed conflict, the former must necessarily transform into the latter. Given that the feature that distinguishes the two classes of conflict from one another is the status of the belligerents, it follows that what triggers a change in conflict classification is a change in the legal position of the non-state actor. It is at this point that the difficulties arise. Clearly, should a non-state belligerent achieve Statehood as a result of the process of State recognition, the pre-existing non-international armed conflict would convert into an international one. The case of Croatia during the breakup of the former Socialist Federal Republic of Yugoslavia provides a historical example. Similarly, it should be uncontroversial that if a non-state belligerent were to become either a *de jure* or *de facto* organ of an existing State, this would also transform the conflict, given that the actions of the non-state party would now have to be attributed to that State. What is subject to debate is whether intervention by a State into a pre-existing non-international armed conflict on the side of a non-state belligerent transforms the conflict into an international one in situations where the relationship between that State and the non-state actor is not so close.

Famously, the International Criminal Tribunal for the former Yugoslavia held in the *Tadic* case that the exercise of "overall control" by a State over

44 Generally, see Kubo Mačák, *Internationalized Armed Conflicts in International Law* (Oxford University Press, Oxford, 2018).

an organized armed group, which is a lower standard of control than that required for attribution under the law of State responsibility, would suffice to transform an armed conflict.[45] Key law of armed conflict treaties also point into this broad direction. Article 4(A)(2) of the Third Geneva Convention accords prisoner of war status to members of militias and volunteer corps, including those of organized resistance movements, that are not formally incorporated into the armed forces of a State belligerent, but merely "belong to" it. Organized armed groups that "belong to" a State thus acquire the status of national armed forces. The essence of belonging is that the State concerned accepts, expressly or tacitly, that an irregular group is fighting on its behalf.[46] While this may entail the exercise of some degree of control by the State over the group, such control is not an essential factor for belonging.

There is no need to decide here which of these alternative positions, if any, accurately reflects the law. The point, rather, is that situations of hybrid warfare are likely to raise these kinds of questions almost as a matter of course. Before launching its invasion of Ukraine in February 2022, Russia recognized the Donetsk and Luhansk People's Republics, two separatist-controlled provinces that earlier declared their independence from Ukraine. Recognizing these two entities as sovereign States enables Moscow to claim that they are independent actors responsible for their own actions. In reality, both are dependent on the support of Russia and, in the absence of recognition by other States, neither has achieved Statehood. Moreover, there is sufficient evidence to suggest that the relationship between Russia and the two People's Republics since February 2022 meets either the "overall control" or "belonging to" standard, meaning that the non-international armed conflict that existed between the forces of the two separatist entities and Ukraine

45 *Prosecutor v. Duško Tadić* (1999) Judgment, IT-94-1-T, 15 July 1999 (ICTY Appeals Chamber), paras 120-122.

46 See Katherine Del Mar, "The Requirement of 'Belonging' under International Humanitarian Law" (2010) 21 *European Journal of International Law* 105-124Katherine Del</author></authors></contributors><titles><title>The Requirement of 'Belonging' under International Humanitarian Law</title><secondary-title>European Journal of International Law</secondary-title></titles><periodical><full-title>European Journal of International Law</full-title><abbr-1>Eur. J. Int'l L.</abbr-1><abbr-2>Eur J Int'l L</abbr-2></periodical><pages>105</pages><volume>21</volume><number>1</number><section>124</section><dates><year>2010</year></dates><isbn>0938-5428</isbn><urls><related-urls><url>http://dx.doi.org/10.1093/ejil/chq008</url></related-urls></urls><electronic-resource-num>10.1093/ejil/chq008</electronic-resource-num></record></Cite></EndNote>.

before the Russian invasion has become internationalized, merging with the broader international armed conflict between Russia and Ukraine. As a result, and contrary to Moscow's position, Russia is responsible under the law of armed conflict for the actions of the armed forces of the two People's Republics that are fighting on its behalf.

Conflict classification has important implications for the legal status of the belligerents. While in recent years the rules applicable to international and non-international armed conflicts have converged in key respects, significant differences do remain. Amongst other things, no combatant status or belligerent occupation exists in non-international armed conflicts. To use a practical example, whereas members of organized armed groups fighting on behalf of the Luhansk and Donetsk People's Republics did not enjoy combatant immunity prior to the Russian invasion of 2022, they do now as a result of the internationalization of the conflict and as such are entitled, amongst other things, to prisoner of war status on capture by Ukrainian forces. Similarly, territories occupied by the two People's Republics must now be considered occupied territories within the meaning of the law of armed conflict, with all the attendant obligations that this imposes on occupying forces and the State party they belong to.

The status of the parties also has implications for other rules governing the conduct of hostilities, including the rules on targeting. Whereas members of armed forces, militias or volunteer corps belonging to a State party are subject to lethal targeting on the basis of their membership of those forces regardless of the function they perform, with the exception of military medical and religious personnel, the use of lethal force against persons acting on behalf of non-state actors in a non-international armed conflict is subject to different rules.[47] Individuals who are members of organized armed groups and perform combat functions on a continuous basis are understood not to be civilians, but warfighters who are liable to direct attack on the basis of their status. However, it is a matter of debate whether other members of organized armed groups who carry out combat support or combat service support functions, in other words persons who perform logistics, engineering,

47 International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2008).

intelligence, signals or similar functions in support of warfighters, are also liable to direct attack on the basis of their membership in the organized armed group alone.[48]

The fact that hybrid wars involve irregular forms of violence, such as organized criminality or acts of terrorism, adds further urgency to these debates. Provided they meet the criteria of an organized armed group, the membership of criminal gangs and terrorist groups is likely to include persons, possibly in large numbers, who are not directly engaged in warfighting. Such persons may include, for example, bomb-makers, bodyguards, traffickers or drug dealers. Some may perform functions that can reasonably be described as involving combat support tasks, thus raising the question of whether their activities are connected with the hostilities so closely as to justify treating them as non-civilians. The facts will be decisive, but the unsettled position of the law does not make their assessment any easier. Of course, these difficulties are not confined to situations of hybrid warfare but have arisen in other circumstances, such as in the context of counter-insurgency operations.[49] Once again, the point to take away is not that these legal challenges are unique to hybrid wars but that they are prone to arise in such situations.

One of the defining features of hybrid threats is the use of instruments and tactics that are coercive in nature, but typically do not have kinetic effects. In other words, they do not cause physical injury or damage, at least not directly. Disinformation, election interference, economic sanctions and passportization are examples of such measures. As indicated earlier, it would be a mistake to assume that belligerents accustomed to using such instruments and tactics against their geopolitical rivals below the threshold of armed conflict will refrain from using them in times of armed hostilities. On the contrary: as the stakes and level of antagonism increase, the more likely it is that belligerents will resort to such measures against their adversaries if doing so delivers them an advantage. The hybrid warfare construct's exclusive focus on acts of violence is therefore a major blind spot. In practice, instruments and tactics associated with

48 Cf. United States Department of Defense, *Law of War Manual* (updated edn, December 2016), § 5.7.3.2.

49 E.g. William C. Banks (ed.) *Counterinsurgency Law: New Directions in Asymmetric Warfare* (Oxford University Press, New York, 2013); William C. Banks (ed.) *New Battlefields, Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press, New York, 2011).

hybrid threats will also feature in situations of hybrid warfare and most likely do so synergistically to complement acts of violence.

This characteristic of hybridity poses real challenges for the law of armed conflict as the primary regulatory framework of armed conflict. This is so because the law of armed conflict is concerned mostly, though not exclusively, with kinetic actions and their consequences. For example, the targeting rules and the various protections they confer on civilians and civilian objects are engaged in the case of "attacks", which are defined as acts of violence in offence or defence, as we saw earlier. Disinformation and economic sanctions are not acts of violence, even if they were to produce destructive or even fatal effects. Thus, deliberate acts of disinformation directed at the enemy civilian population that knowingly exposes them to the risk of injury or death, for example by convincing them to expose themselves to danger or to behave in a reckless manner, do not qualify as attacks. This is not to suggest that other rules of the law of armed conflict could not be engaged. For example, Article 51(2) of Additional Protocol I prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population". However, the scope of this prohibition is relatively narrow—it covers terror bombardments, for instance, but not acts of disinformation unless they constitute "threats of violence". Most cases of disinformation and other influence activities will therefore not be caught by this rule. The general duty of protection set out in Article 51(1) of Additional Protocol I, which declares that the "civilian population and individual civilians shall enjoy general protection against dangers arising from military operations", may fill this void to a degree. However, since this rule is limited to military operations, it does not cover acts of disinformation a belligerent may direct against the enemy civilian population through means other than military operations, for example disinformation activities conducted by civilian agencies.

5. Conclusion

The idea of hybridity is one among several conceptual models developed to make sense of the changing character of warfare. What distinguishes it from alternative models is its emphasis on the combined use of diverse elements designed to achieve synergistic effects. There is little that is

truly novel in this kind of tactic. States and other international actors have always sought to deploy the different instruments and resources at their disposal in a complementary manner. What is new, however, are the instruments available to them as a result of technological innovation and the different patterns in which these instruments may be employed. The combined effect of technological developments, wider societal changes and the significant deterioration of the geopolitical climate have empowered non-state actors, created new systemic vulnerabilities and further blurred the relative line between war and peace.

The practical challenges posed by these developments are considerable, but so are the legal difficulties, including under the law of armed conflict. Taking a step back, two sets of legal difficulties come into view. First, changes in the character of warfare continue to expose some of the existing weaknesses of the law of armed conflict. Hybrid warfare and hybrid threats raise a series of questions regarding the threshold of armed conflict and its classification, as well as the rules governing the conduct of hostilities. As we have seen, however, few of these questions are unique to hybrid warfare and hybrid threats. They have plagued those working in this area for a number of years now. Second, the measures and tactics associated with hybrid warfare and hybrid threats do not map seamlessly onto the existing regulatory framework of the law. Most fundamentally, the non-kinetic nature of many of the instruments employed sits uneasily with the predominantly kinetic focus of the law of armed conflict.

Despite its shortcomings, several features of the law facilitate its adaptation to new realities. The contextual nature and relative textual openness of many of the rules provide ample opportunities for adjusting their interpretation and application to changed circumstances. However, such adaptation through State practice requires consistency, and hence some convergence around shared understandings and objectives, to be sustainable. In the current political climate, these are in short supply. For the foreseeable future, the danger that hybrid warfare and hybrid threats further erode the rule of law, including in times of armed conflict, remains high.

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* Biographies of the authors are given in accordance with the order of the chapters.

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The Editors would be honoured to appreciate the invaluable contributions of the authors to this edition of the book. We are pleased to publish this book, which was realised with the initiative of the Istanbul Center for International Law and Türk Kızılay, together with a distinguished lecturer team composed of such valuable names, within the framework of the Kırımlı Dr. Aziz Bey Advanced Summer School and IHL Competition project.

As editors, considering the lack of fundamental IHL-based resources in Türkiye, we believe that this book – and its translated version into Turkish – will be an important source covering the fundamental subheadings of IHL and even the beginning of a series.

On this occasion, we would like to express our gratitude to **Noëlle Quénivet**, **Riccardo Pavoni**, **Elżbieta Mikos-Skuza, Anne Dienelt & Franziska Bachmann**, **Daniele Amoroso**, **Mateusz Piątkowski**, and **Aurel Sari**, who contributed to this project with their chapters in the book, as well as **Marco Sassoli**, **Nele Verlinden**, **Valentina Azarova**, **Katja Schöberl**, **Rene Vark**, **Saba Pipia**, **Julie Tenenbaum**, and **Gökhan Albayrak**, who participated as lecturers or jury members.

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The Kırımlı Dr. Aziz Bey IHL Competition & Advanced Summer School is a project initiated by the Istanbul Center for International Law (ICIL) and Türk Kızılay with the support of the ICRC. It combines a theoretical summer school concentrating on specific themes of IHL and a competition where participants have a chance to apply theoretical knowledge into practice.

Kırımlı Dr. Aziz Bey Collected Courses on International Humanitarian Law – Vol. I is another pillar and an integral part of the Kırımlı Dr. Aziz Bey project and consists of the topics of lectures delivered in the second edition of the project that took place in 2021.

The book project, undertaken by the ICIL and Türk Kızılay, is initiated to develop an IHL corpus in Türkiye where the contemporary topics of IHL are addressed and discussed deeply. Aiming to disseminate IHL in international and Turkish academic circles, this project promises an open-access publication of the book.

The inaugural volume of this collected courses series also honors Kırımlı (Crimean) Dr. Aziz Bey, who was one of the founders of the Hilal-i Ahmer Cemiyeti (The Red Crescent Society, Türk Kızılay today) in 1868 and marks the continuing efforts to promote the humanitarian principles by the Istanbul Center for International Law and Türk Kızılay.

KIRIMLI DR. AZIZ BEY COLLECTED COURSES ON INTERNATIONAL HUMANITARIAN LAW – VOL. I

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