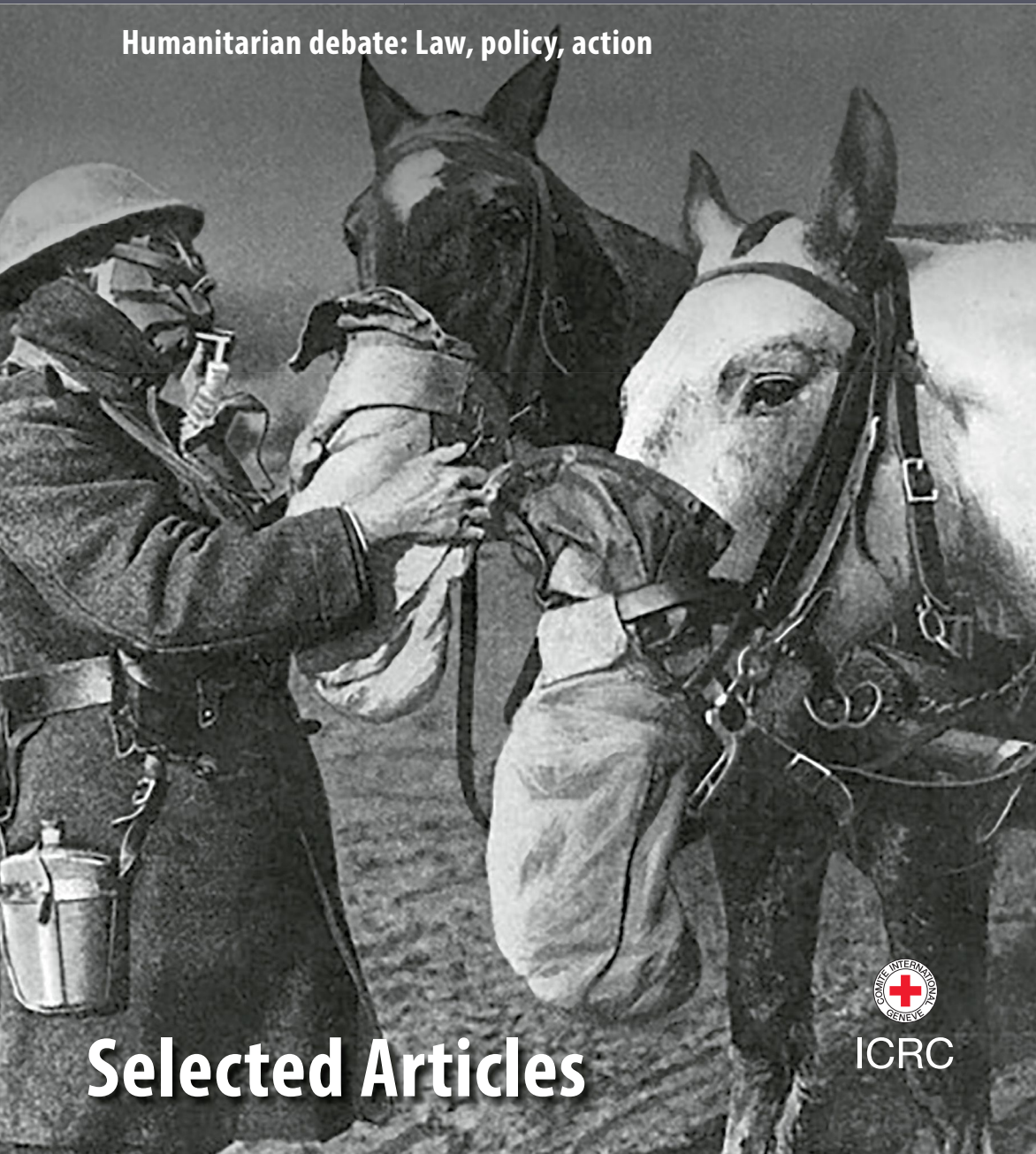


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of the Red Cross

Humanitarian debate: Law, policy, action



Selected Articles



ICRC

International Review

of the Red Cross

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Established in 1869, the *International Review of the Red Cross* is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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Cultural evolution: Protecting “digital cultural property” in armed conflict

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Abstract

As an emerging and largely unfamiliar form of cultural heritage, digital cultural property remains something of an enigma. Under the law of armed conflict, States are bound to protect cultural property from harm, yet the rules applicable to traditional cultural property do not transfer neatly to digital works. It is unclear, for example, how the twin obligations to safeguard and respect cultural property, as outlined in the 1954 Hague Cultural Property Convention, should apply to digital creations – or even what digital material appropriately qualifies as cultural property. Can only new digital creations, otherwise known as “born-digital” material, be cultural property? What about high-quality copies of existing works, such as an extremely high-resolution image of the Mona Lisa? Does it matter whether a digital work has been reproduced in large quantities? Given the ubiquity of digital media and the growing popularity of digital art and other works, protecting digital cultural property in the event of armed conflict will require States to consider and resolve as-yet undecided questions concerning the nature of digital creations and the reasons why certain works should be preserved.

* The views expressed in this article are the author’s personal views and do not necessarily reflect those of the Department of Defense, the US Army, the US Military Academy, or any other department or agency of the US government. The analysis presented here stems from his academic research of publicly available sources, not from protected operational information.

Keywords: cultural property, digital cultural property, cultural heritage, armed conflict, law of armed conflict, international law, international humanitarian law, Hague Cultural Property Convention, UNESCO.



It is unclear why humans first daubed pigments on stone or moulded figures from clay. Succeeding generations, however, continued to craft original works and devise new mediums for their creations. Over time, those novel formats shaped not only how we create and express ourselves, but also how we have come to appreciate art and the genius of the human imagination. In some cases, those new mediums also challenged our sense of what is valuable and what we as a society consider culturally meaningful. The desire to protect culturally important works, though, has often come into conflict with another ancient human impulse: the desire to make war.¹

Attempts to moderate the destructive effects of conflict have met with varying degrees of success throughout history. In the early twentieth century, for example, the Covenant of the League of Nations and the Kellogg–Briand Pact sought to restrict or even eliminate recourse to war, yet the world plunged into a world war nevertheless. More limited efforts to regulate aspects of armed conflict such as the treatment of the wounded and sick,² the treatment of prisoners of war³ and the use of certain weapons in war⁴ have had a more lasting impact. The subject of cultural property in armed conflict has also garnered significant attention. As codified in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Cultural Property Convention)⁵ and

- 1 See, for example, Margaret MacMillan, *War: How Conflict Shaped Us*, Profile Books, London, 2020, p. 5 (noting that while there is some disagreement among historians, anthropologists and sociobiologists, “the evidence seems to be on the side of those who say that human beings, as far back as we can tell, have had a propensity to attack each other in organized ways – in other words, to make war”); John Keegan, *A History of Warfare*, Vintage Books, New York, 1993, p. 3 (“Warfare is almost as old as man himself, and reaches into the most secret places of the human heart, places where self dissolves rational purpose, where pride reigns, where emotion is paramount, where instinct is king”).
- 2 For example, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950).
- 3 For example, Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).
- 4 For example, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 137, 10 October 1980; Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 1342 UNTS 168, 10 October 1980; Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons, 1342 UNTS 171, 10 October 1980; Protocol (IV) on Blinding Laser Weapons, 1380 UNTS 370, 13 October 1995; Protocol (V) on Explosive Remnants of War, 2399 UNTS 100, 28 November 2003; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45, 13 January 1993.
- 5 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954 (Cultural Property Convention).

addressed in subsequent international agreements,⁶ the law relating to cultural property has helped spare cultural objects from harm in war.⁷

Digital technology, however, has begun to strain our understanding of what constitutes cultural property. In particular, the ability to make digital copies of works with ease and exactness has raised questions about the cultural value of reproduced or reproducible works and the expectation to protect them in armed conflict. Although digital technology may have rekindled these concerns, discomfort over copies predates the invention of digital mediums. In the nineteenth and twentieth centuries, the invention of lithography and photography heralded the beginning of what Walter Benjamin famously called the “Age of Mechanical Reproduction”.⁸ Benjamin argued that a copy of a unique work of art – even “the most perfect reproduction” of it – could never equal the original because copies could not capture the “authenticity” or possess the “aura” of their exemplars.⁹ For Benjamin, “[t]he authenticity of a thing is the essence of all that is transmissible from its beginning, ranging from its substantive duration to its testimony to the history of which it has experienced”.¹⁰ It is a reflection of a work’s existence in time and space.¹¹ The patina of an ancient bronze statue, therefore, is not only a sign, but also a constituent, of its authenticity.¹² “Aura”, meanwhile, refers to the authority possessed by a unique and original work.¹³

The advent of art forms designed for reproducibility, however, unsettled our understanding of authenticity and aura. As Benjamin observed, “[f]rom a photographic negative, ... one can make any number of prints; to ask for the ‘authentic’ print makes no sense”.¹⁴ The questions of authenticity and aura that Benjamin raised in the early twentieth century have only grown more apparent today. The “Age of Digital Reproduction” has virtually obliterated the distinction between originals and copies.¹⁵ Just as the digital revolution forced a

6 See, for example Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 53; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 16; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172, 16 March 1999 (Second Protocol).

7 Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge, 2006, p. 2 (explaining that “there is a greater possibility than ever before of sparing cultural property from damage and destruction in wartime”).

8 Walter Benjamin, “The Work of Art in the Age of Mechanical Reproduction”, in Walter Benjamin, *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn, Mariner Books, Boston, 2019.

9 *Ibid.*, pp. 170–172.

10 *Ibid.*, p. 171.

11 See Erin Nicholson, “Keywords Glossary: Authenticity”, Chicago School of Media Theory, available at: <https://csmt.uchicago.edu/glossary2004/authenticity.htm> (all internet references were accessed in February 2022).

12 See, for example, W. Benjamin, above note 8, pp. 169–170.

13 Mike Young, “Keywords Glossary: Aura”, Chicago School of Media Theory, available at: <https://csmt.uchicago.edu/glossary2004/aura.htm>.

14 W. Benjamin, above note 8, p. 174.

15 See, for example, Douglas Davis, “The Work of Art in the Age of Digital Reproduction”, *Leonardo*, Vol. 28, No. 5, 1995, p. 381 (“The work of art in the age of digital reproduction is physically and formally

re-evaluation of the law's applicability to other aspects of society, digital means of creation and reproduction have necessitated a re-evaluation of what constitutes a work of art and cultural property more broadly.¹⁶

One source that has addressed the cultural importance of digital works is the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Tallinn Manual 2.0).¹⁷ Released in 2017, the Tallinn Manual 2.0 reflects the state of the public international law governing cyber warfare and peacetime cyber operations as understood by a distinguished group of legal experts known collectively as the International Group of Experts.¹⁸ Significantly, the Tallinn Manual 2.0 includes a rule requiring that States respect and protect cultural property, including “digital cultural property”, in armed conflict.¹⁹ Digital cultural property, however, remains an elusive concept, and for military forces obligated to protect cultural property in armed conflict, uncertainty about the character of digital material will affect the planning and execution of military operations. Absent a clearer understanding of digital works, material of great importance to the cultural heritage of the world could be lost. Ultimately, if digital cultural property must be safeguarded and respected like tangible cultural property in the event of armed conflict, how must States discriminate between what is and what is not appropriately digital cultural property?

This article begins by outlining the obligation to protect cultural property in the event of armed conflict as provided in the Cultural Property Convention. Under the Convention, protection consists of both a duty to safeguard and a duty to respect cultural property. Because the nature of digital material differs substantially (literally and figuratively) from that of physical material, traditional approaches to safeguarding and respecting tangible cultural property may be ill-suited to the protection of digital works.

In the second section, the article considers the Cultural Property Convention's definition of cultural property and States' protection obligations under the Convention. Other international instruments – adopted both before and after the Cultural Property Convention – have also sought to define cultural property, but while these definitions feature some overlap, they do not neatly align.²⁰ For purposes of this article, therefore,

chameleon. There is no clear conceptual distinction now between original and reproduction in virtually any medium based in film, electronics, or telecommunications”).

16 See, for example, US Supreme Court, *Carpenter v. United States*, 585 U.S. ____ (2018), 2018 (holding that law enforcement's acquisition of cell-site location information was a search under the Fourth Amendment and required a warrant); US Supreme Court, *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018), 2018 (holding that states may tax internet commerce); Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013 (Tallinn Manual) (examining how extant legal norms apply to cyber warfare); Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0), Rule 142.

17 Tallinn Manual 2.0, above note 16, Rule 142.

18 *Ibid.*, pp. 1–3. The Tallinn Manual 2.0 expanded on the work of the 2013 Tallinn Manual, above note 16, which focused specifically on cyber operations involving the use of force and those that occurred in armed conflict. The Tallinn Manual 2.0 broadened the scope of the 2013 Manual to include rules related to peacetime cyber activities.

19 Tallinn Manual 2.0, above note 16, Rule 142.

20 See, for example, US Department of War, *Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, 24 April 1863 (Lieber Code), Arts 34–35; Regulations Respecting the

the Cultural Property Convention’s definition will serve as the foundation for analyzing cultural property, whether in physical or digital form.

In the third section, the article explores the nature of digital material and important conceptual differences between digital and physical works. The third section begins by examining how the drafters of the Tallinn Manual 2.0 debated the meaning of terms such as “object” and “property” when considering digital candidates for protection in armed conflict. The article then analyzes differences between species of digital creations. Broadly speaking, digital works can be divided into two general categories of material: (1) “born-digital” material—works originally created in a digital medium, like a work of digital art or cultural data entered and stored electronically; and (2) digital surrogates—digital facsimiles of extant physical works. The section concludes by comparing how concepts such as aura and authenticity apply to original works and reproductions in both physical and digital mediums. The article contends that elements traditionally valued in physical creations—such as aura and authenticity—are arguably inapplicable to digital works, which can be replicated with exactness and in large quantities. Given the ease of digital reproduction, the protection of cultural information rather than the identification of the “original” digital work may be more salient.

The fourth section examines why some digital material deserves consideration as digital cultural property and how digital cultural property may be identified through direct and indirect indicators. This section discusses how our understanding of tangible goods has informed our evaluation of digital works and suggests that digital material requires a new approach to protection.

Lastly, the fifth section warns that States must be purposeful and deliberate about identifying the digital works they consider to be of great importance to their national cultural heritage. Because identifying an adversary’s digital cultural property during armed conflict could be impracticable, States must actively heed their duty to safeguard their own cultural property. This means that they must identify the works they consider digital cultural property, notify other States of the cultural property, and potentially mark the works as digital cultural property. The duty to safeguard cultural property, which States often neglect with respect to physical works, will play an outsize role in the protection of digital forms of cultural property.

Safeguarding and respecting cultural property in the event of armed conflict

Conceived in the aftermath of the Second World War, the Cultural Property Convention sought to protect cultural property against the destructive effects of

Laws and Customs of War on Land, Annexed to Convention No. IV Respecting the Laws and Customs of War on Land, 36 Stat. 2227, TS No. 539, 18 October 1907, Art. 27; Convention No. IX Concerning Bombardments by Naval Forces in Time of War, 36 Stat. 2351, TS No. 542, 18 October 1907, Art. 5; Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, 49 Stat. 3267, TS No. 899, 15 April 1935 (Roerich Pact), Art. 1; AP I, Art. 53; AP II, Art. 16.

armed conflict while acknowledging the realities of military operations.²¹ The Convention defined cultural property in purely tangible terms, for when it was signed in 1954, the digital creation and reproduction of works was not yet possible.²² In the decades since, digital technology has transformed society in profound ways, resulting in what has been described as a digital revolution.²³ That transformation has, among other things, introduced new mediums for expression, altered how we conceive of and appreciate art, and revolutionized the organization, storage and retrieval of data.²⁴ Already, digital film and digital audio recording have drastically reshaped the movie and music industries, while digital artwork has become increasingly prized and valued.²⁵ Other digital materials—including texts, databases, still images, graphics, software and web pages—have also emerged as potential sources of culturally important works.²⁶

- 21 See Cultural Property Convention, Art. 4(2) (stating that the obligation to respect cultural property and refrain from any act of hostility against such property “may be waived only in cases where military necessity imperatively requires such a waiver”); see also Second Protocol, Art. 6. But see AP I, Art. 53 (establishing that it is prohibited to commit acts of hostility against cultural objects and places of worship); AP II, Art. 15 (similarly establishing that it is prohibited to commit acts of hostility against cultural objects and places of worship). Both Article 53 of AP I and Article 16 of AP II, however, state explicitly that they apply “[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”. Accordingly, both provisions do not necessarily abrogate the waiver for imperative military necessity outlined in Article 4(2) of the Cultural Property Convention. See, for example, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed., Cambridge University Press, Cambridge, 2016, pp. 207–208 (“The ‘without prejudice’ qualification in Article 53 [of AP I] makes it clear that the legal regime established in the [Cultural Property Convention] is not invalidated”); R. O’Keefe, above note 7, p. 208 (noting that the “without prejudice” clause in the *chapeau* of Article 53 was “inserted to make it clear that article 53 is not intended to modify the existing legal obligations of those Parties to [AP I] which are also Parties to the [Cultural Property Convention]”).
- 22 Cultural Property Convention, Art. 1.
- 23 See, for example, Heather Harrison Dinniss, *Cyber Warfare and the Laws of War*, Cambridge University Press, Cambridge, 2012, p. 14 (“It is axiomatic to say that the information revolution is fundamentally changing societies”); June Jamrich Parsons and Dan Oja, *New Perspectives on Computer Concepts*, Cengage, Boston, MA, 2009, p. 4 (“The digital revolution is an ongoing process of social, political, and economic change brought about by digital technology, such as computers and the Internet”). The digital revolution is also sometimes referred to as the third industrial revolution: see H. H. Dinniss, above.
- 24 For example, the introduction of verifiable assets, such non-fungible tokens (NFTs), has revolutionized how digital artwork can be bought and sold. See, for example, Josie Thaddeus-Johns, “What Are NFTs, Anyway? One Just Sold for \$69 Million”, *New York Times*, 12 March 2021, available at: www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html; Clive Thompson, “The Untold Story of the NFT Boom”, *New York Times*, 12 May 2021, available at: www.nytimes.com/2021/05/12/magazine/nft-art-crypto.html.
- 25 See, for example, Manohla Dargis and A. O. Scott, “Film Is Dead? Long Live Movies”, *New York Times*, 6 September 2012, available at: www.nytimes.com/2012/09/09/movies/how-digital-is-changing-the-nature-of-movies.html; Ian Morris, “Technology is Destroying the Music Industry, Which Is Great for the Next Taylor Swift”, *Forbes*, 17 November 2014, available at: www.forbes.com/sites/ianmorris/2014/11/17/technology-is-destroying-the-music-industry-which-is-great-for-the-next-taylor-swift/?sh=dc6538b236b8; Eileen Kinsella, “An NFT Artwork by Beeple Just Sold for an Unbelievable \$69 Million at Christie’s—Making Him the Third Most Expensive Living Artist”, *Artnet*, 11 March 2021, available at: <https://news.artnet.com/market/christies-nft-beeple-69-million-1951036>; Chistine Paul, “Histories of the Digital Now”, Whitney Museum of American Art, available at: <https://whitney.org/essays/histories-of-the-digital-now>.
- 26 See, for example, Charter on the Preservation of the Digital Heritage, 17 October 2003, Art. 1 (stating that “[d]igital materials include texts, databases, still and moving images, audio, graphics software and web pages, among a wide and growing range of formats”).

The digital revolution has also created an entirely new domain—cyberspace—through which States and non-State actors now vie for advantage, to achieve effects both in the physical world and in the incorporeal realm of bits and bytes.²⁷

Meanwhile, the conditions that compelled States to adopt the Cultural Property Convention in the first place persist; armed conflict remains a grave threat to cultural property around the world. In an age of digital creation and reproduction, determining whether digital material might also constitute cultural property—that is, *digital* cultural property—entitled to the same protections as its physical analogues has emerged as an increasingly relevant consideration.

The first step to determining how the Cultural Property Convention applies to digital material is understanding how the Convention protects traditional forms of cultural property. Works created and duplicated digitally are unlike those devised from tangible materials. They exist in time and space differently than physical objects and, arguably, are valued differently as well. Despite these contrasts, the law of armed conflict appears to protect digital cultural property to the same extent as more conventional, more broadly accepted forms of tangible cultural material.²⁸ Rule 142 of the Tallinn Manual 2.0 states unequivocally: “The parties to an armed conflict must respect and protect cultural property that may be affected by cyber operations or that is located in cyberspace. In particular, they are prohibited from using digital cultural property for military purposes.”²⁹

The Cultural Property Convention envisions the protection of cultural property as comprising two main components: the safeguarding of cultural property by territorial States, and respect for such property by both territorial States and those engaged in armed conflict with them.³⁰ With regard to safeguarding, Article 3 of the Convention provides that States are required to safeguard cultural property located in their territory against the foreseeable effects of an armed conflict.³¹ Article 3, however, does not mandate what measures a State must implement. Rather, it specifies only that States must “tak[e] such measures as they consider appropriate”.³² Article 5 of the 1999 Second Protocol to the Cultural Property Convention (Second Protocol), on the other hand, does define certain preparatory measures to safeguard cultural property, including the “preparation of inventories”.³³ Even for States not party to the 1999 Second Protocol, the illustrative examples outlined in Article 5 can help inform how States safeguard cultural property.

27 See, for example, William J. Lynn III, “Defending a New Domain: The Pentagon’s Cyberstrategy”, *Foreign Affairs*, Vol. 89, No. 5, 2010, p. 101 (“As a doctrinal matter, the Pentagon has formally recognized cyberspace as a new domain of warfare. Although cyberspace is a man-made domain, it has become just as critical to military operations as land, sea, air, and space”).

28 Tallinn Manual 2.0, above note 16, Rule 142.

29 *Ibid.*

30 Cultural Property Convention, Arts 2 (“Protection of Cultural Property”), 3 (“Safeguarding of Cultural Property”), 4 (“Respect for Cultural Property”).

31 *Ibid.*, Art. 3 (requiring that parties “undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict”).

32 *Ibid.* art. 3.

33 Second Protocol, Art. 5.

Inherent in the notion of safeguarding—and implied in Article 5 of the Second Protocol—is the identification of relevant cultural property. As Roger O’Keefe has observed, “the measure *sine qua non* that a Party can and should take in pursuance of the obligation laid down in article 3 is the identification of the property in question”.³⁴ Determining what constitutes cultural property is explored in more detail in the following section below.

Notification can also be crucial to safeguarding. Once a State has identified the cultural property located in its territory, effective safeguarding should reasonably include notifying others of the nature and location of the designated property.³⁵ The Cultural Property Convention, however, does not stipulate how States can or should notify other States in advance of armed conflict, and in practice, few States regularly disseminate detailed information about their cultural property.³⁶ As UNESCO’s *Protection of Cultural Property Military Manual* (UNESCO Manual) explains,

[t]he challenge for military planners and forces in the field is that almost no state party to the 1954 Convention indicates explicitly, for the benefit of potential parties to an armed conflict on its territory, all the precise objects, structures and sites that it deems “cultural property”.³⁷

While the UNESCO Manual suggests that an opposing State could consult an adversary’s “register of national cultural heritage or similar domestic legal or administrative inventory” to ascertain what the territorial State considers cultural property, it also recognizes that accessing these registers and inventories “may prove difficult for military planners and impossible for forces in the field”.³⁸ Under Article 7 of the Cultural Property Convention, States are expected to incorporate cultural property “services or specialist personnel” into their armed forces, and access to this expertise could help.³⁹ Nevertheless, a State’s formal communication of its cultural property to others would be more definitive than expecting armed forces to rely on external sources and a degree of conjecture to identify an opposing State’s cultural property.

Alternatively, a State could mark cultural objects to identify them as cultural property. The Cultural Property Convention provides for the physical marking of cultural property with the Convention’s distinctive emblem, but such marking is not obligatory and, in some cases, may be undesirable.⁴⁰ For example, affixing the Convention’s blue and white shield to a work of art or cultural

34 R. O’Keefe, above note 7, p. 114.

35 See Cultural Property Convention, Art. 3; R. O’Keefe, above note 7, p. 114.

36 Roger O’Keefe *et al.*, *Protection of Cultural Property Military Manual*, UNESCO, Paris, 2016 (UNESCO Manual), p. 13.

37 *Ibid.*, p. 13.

38 *Ibid.*, p. 14.

39 Cultural Property Convention, Art. 7(2). Article 7 also provides for the promulgation of military regulations or instructions to “ensure observance” of the convention and to “foster ... a spirit of respect for the culture and cultural property of all peoples”. *Ibid.*, Art. 7(1).

40 *Ibid.*, Arts 6 (“Distinctive Marking of Cultural Property”), 16 (“Emblem of the Convention”), 17 (“Use of the Emblem”). See also R. O’Keefe, above note 7, pp. 116–117 (noting that practicality and aesthetics militate against marking movable cultural property with the distinctive emblem of the Convention).

artifact – a handscroll, painting or sculpture, for instance – could be impractical or aesthetically unappealing.⁴¹ Moreover, relying on visual markings alone to secure the protections of the Convention, rather than on timely and detailed notifications to States, is risky. Modern targeting often occurs outside visual range, increasing the likelihood that cultural property might be inadvertently damaged or destroyed by an opposing force.⁴² Of more immediate consequence, as the UNESCO Manual states, is the reality that “in practice no state affixes the emblem to every item of its cultural property, and most states do not use the emblem at all”.⁴³

In the absence of a declaration by a State attesting to its cultural property – such as a published list – or the marking of all such property with the distinctive emblem of the Convention, it is unlikely that an opposing State could know definitively what moveable and immovable property the territorial State considers cultural property.⁴⁴ States are nevertheless obligated under Article 4 to respect cultural property in armed conflict whether or not it has been previously identified or marked.⁴⁵ Article 4(5) provides:

No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.⁴⁶

To satisfy its Article 4 obligations, then, an opposing State may be forced to assume by default the responsibility for determining what constitutes cultural property in a territorial State.⁴⁷ Under these circumstances, what must an opposing State and its

41 See R. O’Keefe, above note 7, pp. 116–117. In some cases, the distinctive emblem can be affixed in a way that does not distort or distract from the object; for example, the protective emblem can be placed on the object’s base or pedestal. As the records of the Intergovernmental Conference indicate, however, aesthetic and even psychological considerations had already been flagged as potential areas of concern during the drafting of the Cultural Property Convention. See Jan Hladik, “Marking of Cultural Property with the Distinctive Emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”, *International Review of the Red Cross*, Vol. 86, No. 854, 2004, p. 381, quoting UNESCO, *Records of the Conference Convened by the United Nations Educational, Scientific and Cultural Organization, Held at The Hague from 21 April to 14 May 1954*, 1961, p. 383 (observing that “such marking, in peace-time, might raise difficulties on aesthetic and even psychological grounds”).

42 See, for example, Alex Leveringhaus, “Distance, Weapons Technology and Humanity in Armed Conflict”, *Humanitarian Law and Policy Blog*, 6 October 2017, available at <https://blogs.icrc.org/law-and-policy/2017/10/06/distance-weapons-technology-and-humanity-in-armed-conflict/> (observing that “the drone operator, safely seated in a cubicle located thousands of miles away from a theatre, has become an enduring symbol of distance in warfare”).

43 UNESCO Manual, above note 36, p. 14.

44 R. O’Keefe, above note 7, p. 111.

45 Cultural Property Convention, Art. 4(5); see also UNESCO Manual, above note 36, p. 111.

46 Cultural Property Convention, Art. 4(5).

47 R. O’Keefe, above note 7, p. 111 (observing that when a territorial State has failed to notify other States in advance of the identify and location of the cultural property on its territory, or has failed to mark such property with the distinctive emblem of the Convention, “the opposing Party must hazard an assessment as to the cultural importance of the property in question”); UNESCO Manual, above note 36, p. 14 (stating that when in doubt, commanders and other military personnel should proceed on the assumption that all “movable and immovable property of historic, artistic or architectural significance” identified on the territory of another State is “of great importance to the cultural heritage of that state”).

military planners and forces in the field do to identify the requisite cultural property?

What is cultural property?

The Cultural Property Convention's definition

Article 1 of the Cultural Property Convention defines “cultural property” to include, irrespective of origin or ownership,

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments”.⁴⁸

As defined in Article 1, the term “cultural property” bears a legal meaning particular to the Convention and its protocols.⁴⁹ The definition established in Article 1, however, also frequently serves as a starting point for evaluating cultural property more broadly in armed conflict.⁵⁰ The US *Department of Defense Law of War Manual*, for example, provides: “‘Cultural property’ is a term of art that is defined in the 1954 Hague Cultural Property Convention.”⁵¹ The *Air and Missile Warfare Manual* adopts the Cultural Property Convention's definition virtually

48 Cultural Property Convention, Art. 1.

49 *Ibid.* (stating the term “cultural property” is defined “[f]or the purposes of the present Convention”); see also R. O’Keefe, above note 7, p. 102 (“As the chapeau to the provision states, the definition is strictly for the purposes of the Convention. It is not cross-referable to the definitions of cultural property found in subsequent UNESCO standard-setting instruments in the field of cultural heritage”).

50 See, for example, US Department of Defense (DoD), *Department of Defense Law of War Manual*, revised ed., Office of the General Counsel, December 2016, para. 5.18.1; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, paras 5.26, 5.26.2; Harvard University Program on Humanitarian Policy and Conflict Research (HPCR), *Manual on International Law Applicable to Air and Missile Warfare*, 2009 (HPCR Manual), Rule 1(o); Tallinn Manual 2.0, above note 16, p. 534.

51 DoD, above note 50, para. 5.18.1.1.

verbatim.⁵² Meanwhile, the Tallinn Manual 2.0 states that the definition in Article 1 “reflects customary international law”.⁵³

Earlier codifications, such as the 1907 Hague Regulations, conceived of cultural property more expansively.⁵⁴ For example, Article 27 of the 1907 Hague Regulations required that

[i]n sieges and bombardments all necessary steps must be taken to spare as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.⁵⁵

Meanwhile, Article 56 prohibited seizing, damaging or destroying property belonging to “institutions dedicated to religion, charity and education, the arts and sciences”, as well as historic monuments and works of art and science.⁵⁶

In formulating the Cultural Property Convention’s definition, the Convention’s drafters sought to avoid prescribing an over-inclusive and potentially impracticable definition of cultural property.⁵⁷ Accordingly, they abandoned the 1907 Hague Regulations’ broad conception of cultural property for what they believed was something more manageable. O’Keefe writes:

The unchallenged assumption was that it was unrealistic to hope to protect every building dedicated to religion, art, science or charitable purposes, every historic monument, and every work of art in the event of armed conflict. What was wanted was a convention of narrower application, so as to render feasible a higher standard of protection.⁵⁸

As adopted, Article 1(a) of the Cultural Property Convention recognizes “movable or immovable property of great importance to the cultural heritage of every people” to be cultural property.⁵⁹ Significantly, the phrase “of great importance to the cultural heritage of every people” has been interpreted to mean “of great importance to the national cultural heritage of each respective Party” rather than to “all people collectively”.⁶⁰ Therefore, the onus is on individual States to

52 HPCR Manual, above note 50, Rule 1(o). The HPCR Manual purports to “produce a restatement of existing law applicable to air or missile operations in international armed conflict”. *Ibid.*, Rule 2(a).

53 Tallinn Manual 2.0, above note 16, p. 534.

54 Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, 36 Stat. 2277, 1 Bevans 631, 18 October 1907, Arts 27, 56.

55 *Ibid.*, Art. 27.

56 *Ibid.*, Art. 56.

57 R. O’Keefe, above note 7, p. 101.

58 *Ibid.*, p. 101.

59 Cultural Property Convention, Art. 1(a–c). The centres described in Article 1(c) are also known as “centres containing monuments”.

60 R. O’Keefe, above note 7, pp. 103–106; see also Y. Dinstein, above note 21, pp. 207–208. O’Keefe explains: “On its face, the phrase ‘of every people’ is capable of two meanings, that is, ‘of all peoples jointly’ or ‘of each respective people’.” R. O’Keefe, above note 7, p. 103. According to O’Keefe, it is clear that “the term ‘cultural property’ in article 1 refers to movable or immovable property of great importance to the cultural heritage of each respective people – in other words, of great importance to the national cultural heritage of each respective Party.” *Ibid.*, p. 104. Dinstein agrees, noting that the Cultural Property Convention’s “universalist message” is “worthy of emphasis, inasmuch as some Belligerent Parties are disposed to

identify the objects located in their territory that constitute national cultural heritage. If done so reasonably and in good faith, consistent with prevailing rules of treaty interpretation,⁶¹ such national heritage can be assumed also to be “of great importance for all peoples of the world” and, consequently, part of the world’s cultural heritage.⁶² The question of what objects are of the *greatest* importance to humanity—and are, therefore, potentially entitled to additional protection under the Second Protocol’s enhanced protection regime—is a separate matter that lies outside the scope of this article.⁶³

It should also be noted that the terms “cultural heritage” and “cultural property” are not synonymous. While the relationship between the two has been historically vague, more recent developments have helped clarify the differences between these related ideas.⁶⁴ In general, cultural heritage is a broader concept that encompasses both cultural property and non-material elements of culture, such as oral traditions, musical traditions, and rituals or ceremonial practices.⁶⁵ Moreover, because cultural heritage epitomizes aspects of culture that a society considers valuable, and because cultural heritage is non-renewable, it has sometimes been described as “a form of inheritance” that must be kept safe and handed down to future generations.⁶⁶

view the enemy’s cultural property from a constricted (even antagonistic) ethnic or religious perspective, attempting to erase alien monuments and other memorabilia”. Y. Dinstein, above note 21, p. 208.

61 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, Art. 26.

62 Cultural Property Convention, Preamble; see also R. O’Keefe, above note 7, pp. 104 (citing Nagendra Singh, a former president of the International Court of Justice, who stated that “cultural objects and properties which make up [one state’s] national heritage [are], consequently, the world’s heritage”), 109 (noting that a State’s power to evaluate the cultural importance of specific property located in its territory “must be exercised reasonably and in good faith”).

63 Second Protocol, Arts 10–14. Article 10 provides that cultural property may be placed under “enhanced protection” if it meets three conditions, one of which is that the property “is cultural heritage of the *greatest* importance for humanity.” *Ibid.*, Art. 10(a) (emphasis added).

64 See, for example, Janet Blake, “On Defining the Cultural Heritage”, *International and Comparative Law Quarterly*, Vol. 49, No. 1, 2000, pp. 66–67 (“The relationship between ‘cultural property’ or ‘cultural heritage’ is unclear, appearing interchangeable in some cases, while in others, cultural property is a sub-group within ‘cultural heritage’”); UNESCO, *What Is Intangible Cultural Heritage?*, 2011, p. 3, available at: <https://ich.unesco.org/doc/src/01851-EN.pdf> (“The term ‘cultural heritage’ has changed content considerably in recent decades, partially owing to the instruments developed by UNESCO”).

65 See, for instance, Manlio Frigo, “Cultural Property v. Cultural Heritage: A ‘Battle of Concepts’ in International Law?”, *International Review of the Red Cross*, Vol. 86, No. 854, 2004, p. 369; UNESCO, above note 64. The first time the phrase “cultural property” was used in English in a legal instrument was in the Cultural Property Convention. Lyndel V. Prott and Patrick J. O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?”, *International Journal of Cultural Property*, Vol. 1, No. 2, 1992, p. 312. In contrast, UNESCO’s Convention Concerning the Protection of the World Cultural and Natural Heritage purposely used the phrase “cultural heritage” instead. The preamble to this convention underscored the distinction by noting its consideration of “the existing international conventions, recommendations and resolutions concerning cultural and natural property”, then exclusively using the phrase “cultural heritage” throughout the remainder of the text. Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 152, 16 November 1972 (World Heritage Convention), Preamble; see also L. V. Prott and P. J. O’Keefe, above, p. 318.

66 J. Blake, above note 64, pp. 68 (noting the “significance of cultural heritage as symbolic of the culture and those aspects of it which a society (or group) views as valuable”), 69 (identifying the characterization of cultural heritage as a “non-renewable resource” as central to the view of cultural heritage as a form of inheritance); 83–84.

A recognition that non-material elements could constitute cultural heritage is evident in Article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage. Article 2 of the Convention defines “intangible cultural heritage” to mean “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.”⁶⁷ Accordingly, cultural property may be considered a subset of material within the broader umbrella of cultural heritage.⁶⁸ Importantly, as defined in Article 1 of the Cultural Property Convention, cultural property is not intended to include all cultural heritage.

States’ obligation to protect cultural property

As discussed above, notification and marking are not specifically required under the Cultural Property Convention, but the absence of notification or marking does not relieve a belligerent State of the obligation to respect cultural property in time of armed conflict. Article 1, however, may serve as a guide to identifying another State’s cultural property – at least with respect to tangible objects. A belligerent State obligated to respect the cultural property of a State that has not notified others of the identity or location of its cultural property, or otherwise marked such property with the Convention’s protective emblem, could discharge its obligations under Article 4 by nevertheless treating all moveable and immoveable property, buildings and centres outlined in Article 1 as “cultural property”. In other words, as O’Keefe has suggested,

the safest course is to err on the side of caution and simply to presume that every example of the sorts of cultural property outlined in [Article 1] ... is of great importance to the cultural heritage of the territorial Party and is therefore protected by the Convention.⁶⁹

In the context of digital cultural property, however, the presumption that O’Keefe proposes would likely prove unworkable. Digital works are so qualitatively different from tangible works that relying on Article 1 by default would be futile. Instead, protecting digital cultural property in time of armed conflict will require a greater emphasis on States’ peacetime obligation to safeguard cultural

67 Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, Art. 2(1). In contrast, UNESCO’s earlier World Heritage Convention defines “cultural heritage” exclusively in tangible terms. World Heritage Convention, Art. 1.

68 See, for example, J. Blake, above note 64, p. 67 (stating that the Cultural Property Convention’s definition of cultural property “clearly shows it to be one element within the cultural heritage”); M. Frigo, above note 65, p. 369 (observing that cultural property “can and indeed has been conceived as a sub-group within the notion of cultural heritage”).

69 R. O’Keefe, above note 7, p. 111. The UNESCO Manual similarly states that “to ensure their state’s compliance with the law of armed conflict and to avoid their personal responsibility for war crimes, commanders and other military personnel should treat all objects, structures and sites of historic, artistic or architectural significance on foreign territory as ‘cultural property’ protected by the 1954 Hague Convention and its two Protocols and by customary international law”. UNESCO Manual, above note 36, p. 14.

property—through notification and marking—in advance of armed conflict. Expecting a belligerent State’s armed forces to ascertain what digital material comprises its adversary’s national cultural heritage makes little sense given the nature of creation and reproduction in digital mediums.

What is digital property?

Determining what digital material appropriately qualifies as cultural property presupposes that at least some digital material can, as a matter of law, be considered cultural property to begin with. This conclusion is not an immediately obvious one, though the weight of international opinion appears to favour this view.⁷⁰ At present, no State has formally designated digital content to be of great importance to national cultural heritage, but the need to safeguard digital cultural property—however that may be defined—is clearly an emerging concern.⁷¹ As already mentioned, Rule 142 of the Tallinn Manual 2.0 specifically addresses the requirement that States respect and protect cultural property which may be affected by cyber operations or is located in cyberspace.⁷² The commentary to Rule 142 reveals, however, that the International Group of Experts which drafted the Manual was split on the question of whether “intangible items could qualify as ‘property’ for law of armed conflict purposes”.⁷³ This divergence of opinion is indicative of the uncertainty regarding what should and should not qualify as digital cultural property.

Some members of the International Group of Experts believed that cultural property must be tangible and that intangible items, like data, do not qualify.⁷⁴ These experts argued that in formulating the Tallinn Manual 2.0’s Rule 100 on “Civilian Objects and Military Objectives”, the group generally rejected characterizing intangible material as “objects”.⁷⁵ In the commentary to Rule 100, the Tallinn Manual 2.0 states: “The meaning of the term ‘object’ is essential to understanding this and other Rules found in the Manual. An ‘object’ is characterised in the ICRC [International Committee of the Red Cross] Additional Protocols 1987 Commentary as something ‘visible and tangible’.”⁷⁶ Accordingly,

70 See Tallinn Manual 2.0, above note 16, Rule 142. Curiously, the commentary to the Tallinn Manual 2.0 never explicitly states that those who favoured this approach actually constituted a majority of the International Group of Experts.

71 See, for example, Rhian Addison, *Protecting Digital Cultural Assets: A Review of the Export Process and Supporting Mechanisms*, National Archives, London, 2019, p. 4 (“With digital forming such a large part of the world economy and daily activity, policy needs to acknowledge the importance of digital culture as it will soon be an essential part of protecting ‘national treasures’”).

72 Tallinn Manual 2.0, above note 16, Rule 142.

73 *Ibid.*, p. 535.

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*, p. 437. The ICRC’s *Commentary on the Additional Protocols* states: “The English text uses the word ‘objects’, which means ‘something placed before the eyes, or presented to the sight or other sense, an individual thing seen, or perceived, or that may be seen or perceived; a material thing’. The French text uses the word ‘biens’, which means ‘choses tangible, susceptible d’appropriation’. It is clear that in

a majority of the International Group of Experts determined that “the law of armed conflict notion of ‘object’ is not to be interpreted as including data, at least in the current state of the law”.⁷⁷ The commentary further explains that “[i]n the view of these Experts, data is intangible and therefore neither falls within the ‘ordinary meaning’ of the term object, nor comports with the explanation of it offered in the ICRC Additional Protocols 1987 Commentary”.⁷⁸ Based on this analysis, some of the International Group of Experts concluded that cultural property must be tangible and therefore does not encompass digital material.⁷⁹

Other members, however, determined that intangible items could be cultural property so long as the items were cultural in nature.⁸⁰ Reasoning by analogy, these experts pointed out that other intangible material, such as intellectual property, has been widely recognized as “property” under international law and many domestic legal systems.⁸¹ Accordingly, cultural heritage need not manifest physically to qualify for protection as cultural property.⁸²

As mentioned above, Rule 142 of the Tallinn Manual 2.0 approaches the duty to safeguard and respect cultural property in the event of armed conflict from the narrower perspective of “cultural property” rather than “cultural heritage”. While this approach may seem reasonable given the Cultural Property Convention’s particular use of the term “cultural property”, some might argue that the Manual’s emphasis on “property” rather than “heritage” is misguided.⁸³ Some scholars have asserted that “the existing legal concept of ‘property’ does not, and should not try to, cover all that evidence of human life that we are trying to preserve”.⁸⁴ Moreover, the concept of ownership implicit in the notion of property is contrary to the goals of preserving and protecting a common or shared heritage.⁸⁵ Others have even suggested that “cultural property” should be considered a fourth category of property law—in addition to real property, personal property and intellectual property—because the existing categories do

both English and French the word means something that is visible and tangible.” Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, paras 2007–2008.

77 Tallinn Manual 2.0, above note 16, p. 437.

78 *Ibid.*

79 *Ibid.*, p. 535. As the commentary suggests, some of these members may have been further convinced by AP I’s use of the term “cultural objects” in Article 53. The UNESCO Manual notes: “Although the relevant provisions of the 1977 Additional Protocols to the Geneva Conventions adopt different terminology, the property of cultural significance protected by them is effectively the same as the ‘cultural property’ protected by the 1954 Hague Convention and its Protocols.” UNESCO Manual, above note 36, p. 14.

80 Tallinn Manual 2.0, above note 16, p. 535 (“For these Experts, the critical question is whether the intangible property is cultural in nature”).

81 *Ibid.*, p. 535.

82 See *ibid.*

83 See, for example, L. V. Prott and P. J. O’Keefe, above note 65; J. Blake, above note 64.

84 L. V. Prott and P. J. O’Keefe, above note 65, p. 307; see also J. Blake, above note 64, pp. 65–66.

85 See, for example, L. V. Prott and P. J. O’Keefe, above note 65, pp. 307, 309–318; J. Blake, above note 64, pp. 65–66 (asserting that the term “cultural property” is a fundamental legal concept which carries “a range of ideological baggage” and is “problematic to apply” because it involves “the rights of the possessor to the protection of cultural resources which may involve a severe curtailment of such rights and the separation of access and control from ownership”).

not account for important types of (intangible) heritage material, such as oral traditions, performing arts, rituals and ceremonies.⁸⁶

As a matter of legal interpretation, treating digital material as a species of intangible “property”, rather than excluding all such material from protection under the Cultural Property Convention because intangible material cannot be “objects”, appears to be the stronger approach. In defining cultural property, Article 1(a) of the Cultural Property Convention provides a non-exclusive list of examples of the types of “movable and immovable property of great importance to the cultural heritage of every people”, leaving open the possibility that at least some intangible material could fall within the ambit of the Convention. While the idea of culture as property may be problematic – because of property’s association with ownership and commercial value, among other things – and perhaps antiquated by contemporary standards, the Tallinn Manual 2.0’s interpretation of property at least expands the concept of cultural property in a manner consistent with the evolving understanding of cultural heritage.⁸⁷ Ultimately, Rule 142’s acknowledgment that non-material culture may be entitled to protection under the *lex specialis* of armed conflict – albeit under the rubric of property – reflects an appreciation for the broader goals of heritage preservation as referred to in the Convention for the Safeguarding of the Intangible Cultural Heritage and other sources.

Types of digital material

The conclusion that digital material may constitute cultural property is legally significant. If some digital material may be considered cultural property, then States must safeguard and respect it to the same extent as tangible cultural property in the event of armed conflict. Applying the Cultural Property Convention’s definition of cultural property to digital material, however, presents a challenge. Because digital material is so fundamentally different from physical objects – in terms of creation, identification and reproducibility, for example – digital items do not fall neatly within the categories of items outlined in Article 1 of the Convention, nor can they be easily analogized to tangible cultural artifacts. How, then, should States determine what digital items constitute cultural property? And how should military commanders treat potential digital cultural property in the absence of notification or marking by the State in which the digital material is situated?⁸⁸

86 See Richard Crewdson, “Cultural Property – A Fourth Estate?”, *Law Society’s Gazette*, Vol. 18, 1984, p. 126, cited in L. V. Prott and P. J. O’Keefe, above note 65, p. 311.

87 See, for example, L. V. Prott and P. J. O’Keefe, above note 65, pp. 309–318 (discussing the problems with the concept of property); J. Blake, above note 64, pp. 65–66 (describing the drawbacks of applying the rights of a possessor to the protection of cultural resources, the commodification of cultural artifacts, and the limited scope of the term “cultural property”).

88 Determining the location of digital cultural property for purposes of the Cultural Property Convention presents another challenge. This article assumes that digital material which a State considers to be part of its national cultural heritage must be located in the State (e.g., on a server physically situated in the territory of the State) in order to be subject to the provisions of the Cultural Property Convention.

The commentary to the Tallinn Manual 2.0 offers some discussion of what material might qualify as digital cultural property, but whether the parameters the commentary establishes appropriately describe how digital cultural property should be understood is open to debate.⁸⁹ An international consensus has yet to coalesce around the nature of digital cultural property, and given the unsettled state of the subject, the commentary to Rule 142 must be read with caution, at least as it pertains to the characterization of digital cultural property.⁹⁰ To date, none of the State expressions on international law and cyberspace have addressed cultural property, and the discussion to Rule 142 further highlights some of the uncertainty surrounding the concept of digital cultural property.⁹¹ As the means to create, reproduce, alter and destroy digital heritage accelerate, a clearer conception of what constitutes digital cultural property is needed to ensure that States fulfil their obligation to safeguard and respect digital material in the event of armed conflict.

The Tallinn Manual 2.0’s discussion of Rule 142 alludes to two general categories of digital material: (1) original digital works and (2) digital copies of original physical works. The commentary suggests that original digital works include both novel creations devised in a digital medium and cultural information generated and stored in digital form. This article will use the terms “born-digital material” and “original digital works” interchangeably to describe both types of new works. By comparison, digital copies of original physical works include photographs as well as encoded information from sources that could be used to replicate physical objects, such as building plans and maps.⁹² This article will refer to these types of copies as “digital surrogates”. The following subsections briefly examine both born-digital material and digital surrogates as distinct species of digital material.

Born-digital material

To distinguish between originals and copies, some sources refer to original digital material of the type contemplated by the Tallinn Manual 2.0 as “born-digital”.⁹³ The *Oxford English Dictionary* defines “born-digital” works as those “created in digital form, rather than converted from print or analogue equivalents”.⁹⁴

89 Tallinn Manual 2.0, above note 16, pp. 535–536.

90 It is important to note that Rule 142 is not concerned exclusively with digital cultural property. The rule also implicates traditional forms of cultural property that may be affected by cyber operations.

91 See, for example, Brian J. Egan, “Remarks on International Law and Stability in Cyberspace”, 10 November 2016, available at: www.law.berkeley.edu/wp-content/uploads/2016/12/egan-talk-transcript-111016.pdf; UN Office for Disarmament Affairs, *Official Compendium of Voluntary Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technology by States*, UN Doc. A/76/136, August 2021. See also Duncan B. Hollis, “A Brief Primer on International Law and Cyber Space”, 14 June 2021, available at: https://carnegiendowment.org/files/Hollis_Law_and_Cyberspace.pdf.

92 See Tallinn Manual 2.0, above note 16, p. 535 n. 1327.

93 See, for example, Jean-Michel Rodes, Geneviève Piejut and Emmanuèle Plas, *Memory of the Information Society*, UNESCO, Paris, 2003, p. 39; H. H. Dinness, above note 23, pp. 231–232.

94 “P2: To Be Born Digital”, *Oxford English Dictionary*, 3rd ed. 2010, available at: www.oed.com/view/Entry/52611?redirectedFrom=born-digital#eid1262411270. This OED reference cites a 1998 article from

UNESCO similarly states that born-digital heritage “results from an ‘all-digital’ process of initial production, the message being digitally encoded at the moment of its creation”.⁹⁵ What distinguishes “born-digital” from “created-digital” material, therefore, is that born-digital works are new works executed in a digital medium, not copies created digitally to replicate something that already exists. For example, the digital artist Beeple’s work *Everydays – The First 5000 Days* consists of a collage of images generated as a JPG file.⁹⁶ It is a born-digital creation. In contrast, a high-resolution copy of the *Mona Lisa* would be a created-digital work.

As defined, born-digital content could include a wide spectrum of material. The Tallinn Manual 2.0 seems to acknowledge this by providing a range of examples, from works of artistic expression to government bureaucratic records. The commentary to the Manual, however, does not further distinguish between various types of born-digital material. In addition to original creative works, born-digital material could include data recorded and stored digitally – what this article will refer to as “digital data”. Differentiating between these subsets of born-digital material could prove helpful to conceptualizing what digital creations can appropriately be considered digital cultural property, and why they should be regarded as such.

The commentary asserts that intangible property which is cultural in nature could include “objects that are created and stored on a computing device and therefore only exist in digital form, such as musical scores, digital films, documents pertaining to e-government, and scientific data”.⁹⁷ Here, the commentary appears to be referring exclusively to born-digital material rather than created-digital works. Indeed, the commentary specifically rejects the idea that “a single extremely high-resolution image of Leonardo da Vinci’s *Mona Lisa*, comprising a terabyte of information”, could be protected as an original digital work, even if the original painting were later destroyed, leaving only the digital copy.⁹⁸ The commentary’s disinclination to recognize a digital facsimile as an original work, however, does not mean that such material is ineligible for protection as digital cultural property. Instead, the commentary suggests that digital reproductions could be protected under a different category of material – that is, digital surrogates – which is addressed in more detail below.

Business Wire as the earliest known use of the term. The article referred to “[a] vast data resource pulled from the most comprehensive archive of documents ‘born digital’ – that is, electronic at conception and through publication”.

95 J.-M. Rodes, G. Piejut and E. Plas, above note 93, p. 39.

96 Scott Reyburn, “JPG File Sells for \$69 Million, As ‘NFT Mania’ Gathers Pace”, *New York Times*, 11 March 2021, available at: www.nytimes.com/2021/03/11/arts/design/nft-auction-christies-beeple.html; E. Kinsella, above note 25.

97 Tallinn Manual 2.0, above note 16, p. 535. The commentary’s use of the term “object” is interesting here. Earlier in the same discussion, the commentary points out the International Group of Experts’ general rejection of the idea that intangible items could be objects. The commentary then explains how intangible items could be “property” before reverting to the use of the term “object” to describe certain digital material.

98 *Ibid.*, pp. 535–536.

However, the commentary’s recognition that “documents pertaining to e-government” and “scientific data” may be entitled to protection as born-digital cultural property suggests that the significance of born-digital material is not merely a function of uniqueness or the limited production of copies. Digital documents and scientific data may be analogous to the “manuscripts, books and other objects of artistic, historical or archaeological interest” and the “scientific collections and important collections of books or archives” outlined in Article 1(a) of the Cultural Property Convention.⁹⁹ The present article takes an approach similar to the UK National Archives and distinguishes between “digital originals” and “digital data”.¹⁰⁰ While both classes of material are born-digital, they are conceptually different. Understanding why the Cultural Property Convention recognizes the protection of physical books and archives, and why the Tallinn Manual 2.0 acknowledges the need to protect digital data, can help us appreciate why some digital material that has been widely copied might nevertheless be entitled to protection as digital cultural property.

Digital surrogates

In addition to born-digital material (both digital originals and digital data), the commentary to Rule 142 recognizes that digital copies of original physical works – what this article will refer to as “digital surrogates” – could also qualify as digital cultural property. As the commentary explains, some members of the International Group of Experts believed that “[c]ertain copies of objects of which a physical manifestation exists (or has existed) that can be used to create replicas also qualify as cultural property”.¹⁰¹ The commentary states:

No member of the International Group of Experts taking this position asserted that all digital manifestations of cultural property are entitled to protection of this Rule. Protection only applies to digital copies or versions where the original is either inaccessible or has been destroyed, and where the number of digital copies that can be made is limited.¹⁰²

Accordingly, the hypothetical high-resolution copy of the *Mona Lisa* that would not qualify for cultural property protection as a born-digital work could nevertheless be entitled to protection as a digital surrogate.¹⁰³ The Tallinn Manual 2.0 explains, however, that “due to the high speed and low cost of digital reproduction, once

99 Cultural Property Convention, Art. 1(a).

100 See R. Addison, above note 71. Addison’s report, prepared on behalf of the National Archives, divides born-digital material into two forms: (1) “[o]riginal digital art work, such as videos and music”, and (2) “[d]igital data or knowledge, such as databases, spreadsheets and websites” (p. 4).

101 Tallinn Manual 2.0, above note 16, p. 535.

102 *Ibid.*

103 *Ibid.*, pp. 535–536 (commenting that a “single extremely high-resolution image of Leonardo da Vinci’s *Mona Lisa* ... might, and in the event of the destruction of the original *Mona Lisa* would, qualify as cultural property”).

such a digital image has been replicated and widely downloaded, no single digital copy of the artwork would be protected by this Rule”.¹⁰⁴

Notably, the Tallinn Manual 2.0 focuses on the extent of replication rather than the quality of the reproduced material.¹⁰⁵ For some scholars, copy quality is critical to evaluating the importance of digital reproductions. Eugene Ch’ng, for example, distinguishes between what he calls “surrogates” and “true facsimiles”.¹⁰⁶ Ch’ng characterizes “surrogates” as “pointers to the original copy and therefore good only for public appreciation”.¹⁰⁷ He explains that “surrogates” are generally of lower quality, with smaller file sizes, than “true facsimiles”, in order to make them more viewable on the internet.¹⁰⁸ (Note that Ch’ng’s use of the term “surrogates” differs from the term “digital surrogates” as used throughout this article.) For Ch’ng, therefore, the existence of “surrogates” and their widespread replication and dissemination would not necessarily negate the value of a “true facsimile”. Instead, his concern is with preserving the importance of what he calls the “First Original Copy” – that is, “any first true 3D facsimile of a digitally reproduced physical object” – regardless of how many copies exist or might be produced in the future.¹⁰⁹

Unlike Ch’ng, who is comfortable with the digital reproduction of heritage objects and works of art, the Tallinn Manual 2.0’s discussion of both born-digital originals and digital surrogates evinces a strong preference for original works, whether initially created digitally or in a tangible medium. As discussed in the commentary to Rule 142, recognition as digital cultural property is closely tied to a work’s uniqueness as an original or, to a lesser extent, to the ability to limit its reproduction. But why the emphasis on preserving originals over copies? Is the Tallinn Manual 2.0’s preoccupation with originals an anachronism in an Age of Digital Reproduction?

Digital works versus physical works

Physical artifacts have long been valued by human societies.¹¹⁰ Original creations were prized above copies because, as Benjamin argued, originals were believed to

¹⁰⁴ *Ibid.*, p. 536.

¹⁰⁵ The commentary to the Tallinn Manual 2.0 does hint at the importance of reproductive quality, but it never expressly identifies quality as an essential consideration. The commentary’s *Mona Lisa* example identifies the digital copy as “a single extremely high-resolution image” but never discusses whether or why the resolution is significant. Instead, the commentary states that protection is afforded “based on the value and irreplaceability of the original work of art” as well as “the difficulty, time, and expense involved in reproducing faithful copies”. *Ibid.*, pp. 535–536.

¹⁰⁶ Eugene Ch’ng, “The First Original Copy and the Role of Blockchain in the Reproduction of Cultural Heritage”, *Presence*, Vol. 27, No. 1, 2018, pp. 156–157.

¹⁰⁷ *Ibid.*, p. 156.

¹⁰⁸ *Ibid.* Ch’ng also notes that “surrogates” feature smaller file sizes, and they may be of little use to experts “as their lack of surface details have rendered them noninterpretable”.

¹⁰⁹ *Ibid.*, p. 151.

¹¹⁰ See Yuri Smirnov, “Intentional Human Burial: Middle Paleolithic (Last Glaciation) Beginnings”, *Journal of World Prehistory*, Vol. 3, No. 2, 1989, p. 199; Helen Thompson, “The Oldest Stone Tools Yet Discovered Are Unearthed in Kenya”, *SmithsonianMag.com*, 20 May 2015, available at: www.smithsonianmag.com/science-nature/oldest-known-stone-tools-unearthed-kenya-180955341/ (noting that some stone artifacts

possess attributes of aura and authenticity—characteristics associated with a physical existence. Given the traditional allure of aura and authenticity, and the historic predilection for original works, the Tallinn Manual 2.0’s preference for originals over copies may be understandable. However, the Manual’s focus on preserving original examples rather than the cultural information that those works convey is worth reconsidering given the realities of digital technology. Older notions of aura and authenticity and their paramount expression in original physical works do not translate cleanly to works in digital mediums. The primacy of original examples and the significance of aura and authenticity, which already began to be questioned with the development of mechanical reproduction, arguably mean even less with respect to digital creations.

Aura and authenticity of physical creations

The discovery of handmade artifacts in ancient human graves indicates that physical objects could hold great significance to early human societies.¹¹¹ While it is unclear why certain artifacts were interred with the dead, their presence suggests they were meaningful.¹¹² The state of a 28,000-year-old burial site in Sungir, Russia, is illustrative. In it, three bodies were discovered dressed in clothes interwoven with more than 3,000 ivory beads.¹¹³ The bodies were also adorned with carved pendants, bracelets and shell necklaces.¹¹⁴ Two of the bodies—both juveniles—were further flanked by mammoth tusks, each over two yards long, which had been meticulously straightened through a process likely involving boiling.¹¹⁵ The amount of time and effort needed to prepare these bodies for burial would have been considerable; by some estimates, fashioning the ivory beads alone would have consumed nearly 3,000 hours of labour.¹¹⁶ In light of the effort invested in the burials, the sociologists Neil Fligstein and Doug McAdam have argued that the creators of the site must have possessed “an extraordinary capacity for coordinated, meaningful, symbolic, collaborative activity”.¹¹⁷ They contend that “the ritual act encoded in the interment was clearly full of shared meaning for those involved”.¹¹⁸

may be nearly 3.3 million years old, almost 3 million years older than the earliest *Homo sapiens* fossils); Jean-Jacques Hublin *et al.*, “New Fossils from Jebel Irhoud, Morocco and the Pan-African Origin of *Homo Sapiens*”, *Nature*, Vol. 546, No. 7657, 2017, p. 290 (dating the excavations at Irhoud to “315 ± 34 kyr”).

111 See Y. Smirnov, above note 110, p. 214 (“Middle Paleolithic burials are known both with and without associated [grave] goods, which makes it most likely that goods were sometimes deliberately placed in the grave”).

112 See Neil Fligstein and Doug McAdam, *A Theory of Fields*, Oxford University Press, Oxford, 2012, p. 37.

113 Ian Tattersall, *Becoming Human: Evolution and Human Uniqueness*, Oxford University Press, Oxford, 1998, p. 163, cited in N. Fligstein and D. McAdam, above note 112.

114 N. Fligstein and D. McAdam, above note 112, p. 37.

115 *Ibid.*

116 Fligstein and McAdam wonder: “How many people did it take to boil and straighten the mammoth tusks? Who contributed the 3,000 hours required to make then sew the ivory beads on to the burial clothes? ... We will never know, but one can be assured that the members of the group shared an acute and elaborate sense of the event’s significance.” *Ibid.*, pp. 37–38.

117 *Ibid.*, p. 37 (emphasis omitted).

118 *Ibid.* (emphasis omitted).

The world's earliest stories, recorded thousands of years later, confirm how highly prized material objects could be. In the *Epic of Gilgamesh*, the world's oldest extant long poem, the story's eponymous hero mourns the death of his dearest friend Enkidu by ordering the creation of a lavish funeral statue and filling Enkidu's grave with opulent grave goods.¹¹⁹ Ancient Greek epics similarly featured material objects in abundance. For example, Homer dedicates an entire book of the *Iliad* to the tale of the crafting of Achilles' shield.¹²⁰

For Benjamin, original works such as the *Mona Lisa* possess an aura and authenticity that reproductions could never have. Benjamin contends: "Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be."¹²¹ Original physical works may be distinguishable from copies for a variety of reasons; for example, they may be created from particular material, such as a specific metal alloy, stone from a localized area, or unique pigments fashioned into paints. These objective physical characteristics can help to distinguish original works from their copies. Alternatively (or in addition), the aura of original works may set them apart from less authentic reproductions, even those of the highest quality, crafted from identical materials. As Charles Cronin observes:

We revere the Parthenon not only for its aesthetic and historical values but also because the building and its decoration are very old. We cherish, in a manner akin to ancestor worship, the fact that objects we behold today were touched over 2000 years ago by individuals of an ancient civilization that profoundly affected the development of our own.¹²²

Additionally, Cronin notes, an object's aura may be enhanced by the identity of its creator.¹²³ In 2017, for example, a conservator at the Nelson-Atkins Museum of Art in Kansas City discovered a grasshopper embedded in the paint of Vincent van Gogh's 1889 work *Olive Trees*.¹²⁴ The director of the museum

119 See Michael Schmidt, *Gilgamesh: The Life of a Poem*, Princeton University Press, Princeton, NJ, 2019, p. 1 (describing *Gilgamesh* as "the oldest long poem in the world"); *The Epic of Gilgamesh*, trans. Andrew George, Penguin Books, London, 1999. In the poem, Gilgamesh cries out: "O forgemaster! [*Lapidary!*] Coppersmith! Jeweler!" He then commands that Enkidu's statue shall be made with eyebrows of lapis lazuli and a chest of gold. *Ibid.*, p. 65.

120 Homer, *The Iliad*, trans. Robert Fagles, Penguin Books, New York, 1990, pp. 467–487. Virgil similarly describes the shield of another hero, Aeneas, in Book 8 of the *Aeneid*. Virgil, *The Aeneid*, trans. Robert Fagles, Penguin Books, New York, 2006, pp. 241–265. Interestingly, the *Iliad*'s description of the shield is considered the first literary description of a visual work of art—also known as ekphrasis—in Western literature. James A. Francis, "Metal Maidens, Achilles' Shield, and Pandora: The Beginnings of 'Ekphrasis'", *American Journal of Philology*, Vol. 130, No. 1, 2009, p. 6.

121 W. Benjamin, above note 8, p. 169.

122 Charles Cronin, "3D Printing: Cultural Property as Intellectual Property", *Columbia Journal of Law & the Arts*, Vol. 39, No. 1, 2015, p. 21. Cronin further explains that aura "often determines the worth ascribed to an object as much as, if not more than, the combined value of the material of which it is composed and the intellectual effort invested in shaping it".

123 *Ibid.*, p. 22.

124 Katherine McGrath, "Researchers Just Found a Grasshopper in a Van Gogh Painting", *Architectural Digest*, 7 November 2017, available at: www.architecturaldigest.com/story/researchers-just-found-a-grasshopper-in-a-van-gogh-painting.

commented: “Looking at the image of this grasshopper, one can readily imagine Van Gogh struggling with wind, dust, and insects as he created *Olive Trees*.”¹²⁵ Accordingly, an expert copy of a work that perfectly reproduces its form, texture and visual effect could never capture the aura and authenticity of the original because it never endured the same history, nor inhabited the same space, as its archetype.

Benjamin recognized, however, that by enabling the mass production of identical copies, mechanical reproduction threatened to undermine our appreciation of aura and authenticity, and in so doing, radically alter our relationship to original works.¹²⁶ Throughout history, original creations have always been copied—either by students to practice their craft, by artists to disseminate their works, or by opportunists seeking financial gain.¹²⁷ Mechanical reproduction, on the other hand, represented something new and more disruptive.¹²⁸ The philosopher Paul Valéry perceived this as well. In his 1928 essay “The Conquest of Ubiquity”, Valéry observed that “profound changes are impending in the ancient craft of the Beautiful”.¹²⁹ He explained:

In all the arts there is a physical component which can no longer be considered or treated as it used to be, which cannot remain unaffected by our modern knowledge and power. For the last twenty years neither matter nor space nor time has been what it was from time immemorial. We must expect great innovations to transform the entire technique of the arts, thereby affecting artistic invention itself and perhaps even bringing about an amazing change in our very notion of art.¹³⁰

Reproduction degrades the aura and authenticity of originals by displacing them from time and space.¹³¹ Because reproductions do not share the same provenance, nor are they experienced in the same location, as original works, “the technique of reproduction detaches the reproduced object from the domain of tradition”.¹³² Visiting the Parthenon in Athens, for example, is wholly different

125 *Ibid.*

126 See “Mechanical Reproduction”, in Daniel Chandler and Rod Munday (eds), *A Dictionary of Media and Communication*, 2011, available at: <http://tinyurl.com/bdh8vp2u>.

127 See W. Benjamin, above note 8, p. 168.

128 See *ibid.* (“Mechanical reproduction of a work of art, however, represents something new”).

129 Paul Valéry, “La Conquête de l’ubiquité”, *Aesthetics*, trans. Ralph Manheim, Routledge and Kegan Paul, London, 1964, p. 225, quoted in W. Benjamin, above note 8, p. 166.

130 *Ibid.*

131 See, for example, W. Benjamin, above note 8, p. 171; C. Cronin, above note 122, pp. 23–24; M. Young, above note 13. Cronin uses the J. Paul Getty Museum’s *Victorious Athlete* to illustrate this point. He writes: “Imagine the Getty’s bronze Athlete standing among a dozen or more visually and haptically identical copies of it. Each additional copy further undermines the legitimacy of the aura we ascribe to the original; what does it matter that *one* of these ten, twenty, or thirty bronzes was created 2000 years ago if I cannot identify it among the copies?” C. Cronin, above note 122, p. 24 (emphasis in original). Meanwhile, Benjamin further observes that “[t]he uniqueness of a work of art is inseparable from its being imbedded in the fabric of tradition” and that “the unique value of the ‘authentic’ work of art has its basis in ritual, the location of its original use value”. W. Benjamin, above note 8, pp. 173–174.

132 W. Benjamin, above note 8, p. 171.

from visiting its replica in Nashville, Tennessee.¹³³ Every reproduction of the *Mona Lisa* – in art books, on posters and on tote bags – dissipates the aura of the original. Reproduction, however, also emancipates art by removing it from what Benjamin called its “parasitical dependence on ritual”.¹³⁴ The existence of a copy can make art more accessible; the proliferation of copies even more so. As Benjamin remarked, a reproduction “enables the original to meet the beholder halfway”.¹³⁵ Accordingly, the *Mona Lisa* can be enjoyed from the comfort and convenience of one’s home without the need ever to visit the Louvre.¹³⁶

Benjamin also argued that the mechanical reproduction of works – in new formats, such as photography and film – changed how we appreciate the aura and authenticity of original works, and in so doing, transformed how we value art.¹³⁷ When a work of art can be reproduced in identical form and in limitless numbers, authenticity becomes meaningless. No single print from the same photographic negative, for example, is any more “authentic” than another.¹³⁸ Consequently, while the reproduction of original works may make art more accessible, mechanically reproduced works convey no aura and retain no authenticity. In this context, the relevance of originals is lost.

It should be noted that the terms “reproduce” and “reproduction” are often used to mean slightly different things, and the metaphysical – and legal – implications of “reproducing” a work could change depending on which meaning is intended. Sometimes “reproduce” is used to mean “[t]o bring again into material existence; to create or form (a person or thing) again”.¹³⁹ For the purposes of this article, a work reproduced in this sense is produced or created again, like a photograph produced from a negative or a digital work that is executed when its digital file is run. Alternatively, “reproduce” could mean “[t]o produce again in the form of a copy; to replicate (a work of art, picture, drawing, etc.), esp. by means of engraving, photography, scanning, or similar digital or mechanical processes”.¹⁴⁰ Throughout this article, a work “reproduced” in this sense is something that exists as a copy or replica of something else. A photograph or a 3-D digital scan of an extant work, therefore, would be a

133 Metropolitan Government of Nashville and Davidson County, “The Parthenon”, *Nashville.gov*, available at: www.nashville.gov/departments/parks/parthenon.

134 W. Benjamin, above note 8, p. 174. Benjamin explains that art initially served a ritualistic function, first in the service of magic, then of religion.

135 *Ibid.*, p. 170. Benjamin states: “The cathedral leaves its locale to be received in the studio of a lover of art; the choral production, performed in an auditorium or in the open air, resounds in the drawing room.”

136 See, for example, “From the ‘Mona Lisa’ to ‘The Wedding Feast at Cana’: The Salle des États”, *Louvre.fr*, available at: www.louvre.fr/en/explore/the-palace/from-the-mona-lisa-to-the-wedding-feast-at-cana.

137 W. Benjamin, above note 8, pp. 175–176. Benjamin notes that works of art possess both cult value and exhibition value. By enabling works of art to be created or reproduced in quantity, mechanical reproduction freed art from the constraints of ritual, increasing its exhibition value.

138 *Ibid.*, p. 174. Benjamin further asserts that “the instant the criterion of authenticity ceases to be applicable to artistic production, the total function of art is reversed. Instead of being based on ritual, it begins to be based on another practice – politics.” *Ibid.*, pp. 174–175.

139 “Reproduce”, *Oxford English Dictionary*, 3rd ed., 2009, available at: www.oed.com/view/Entry/163098?redirectedFrom=reproduce#eid (definition 2.a.).

140 “Reproduce”, *Oxford English Dictionary*, 3rd ed., 2009, available at: www.oed.com/view/Entry/163098?redirectedFrom=reproduce#eid (definition 1.d.).

reproduction in the sense of a copy, replica or duplicate. Wherever possible, this article will attempt to clarify which meaning is intended.¹⁴¹

Inapplicability of aura and authenticity to digital creations

Like works reproduced through mechanical means—both in the sense of being recreated and being copied—digital creations ostensibly cannot possess aura or authenticity. Stored as code, each version of a digital work is produced in its original form every time its digital file is executed.¹⁴² Consequently, no version (or every version) of a digital work can be easily identified as the original.¹⁴³ As the Tallinn Manual 2.0 anticipates, some digital works will undoubtedly come to be regarded as cultural property.¹⁴⁴ In light of States’ obligation to safeguard and respect cultural property, how will States determine whether a work that may have been recreated constitutes protected digital cultural property?

Before addressing this question, it is important to evaluate the different standards that the Tallinn Manual 2.0 applies to born-digital material and digital surrogates. As discussed in the above subsection on “Types of Digital Property”, several members of the International Group of Experts believed that born-digital material and digital surrogates could be cultural property.¹⁴⁵ With respect to digital surrogates, these experts insisted that not all digital copies of material identified as cultural property are entitled to protection under Rule 142.¹⁴⁶ The commentary to Rule 142 states: “Protection only applies to digital copies or versions where the original is either inaccessible or has been destroyed, and where the number of digital copies that can be made is limited.”¹⁴⁷

This interpretation raises a number of concerns. First, as stated in the aforementioned subsection above, the Tallinn Manual 2.0’s approach seems to preclude the possibility that reproductions of physical objects (a digital photograph, for example, or a 3-D scan of a cultural object) could be protected as

141 For example, “produce again” or “recreate” will be used to indicate the first sense of the definition—to bring again into material existence. “Copy”, “replicate”, or “duplicate” will be used in the second sense—to produce again in the form of a copy.

142 R. Addison, above note 71, p. 15.

143 See E. Ch’ng, above note 106, p. 153 (“There are in fact no mechanisms for authenticating digital copies. Once copied and distributed, there can be no distinction between the first copy and its subsequent copies”). But see Fiona Cameron, “Beyond the Cult of the Replicant: Museums and Historical Digital Objects—Traditional Concerns and New Discourses”, in Fiona Cameron and Sarah Kenderdine (eds), *Theorizing Digital Cultural Heritage*, MIT Press, Cambridge, MA, 2007, pp. 49, 67 (“Like the analog, the materiality of the digital acts as a testimony to its own history and origin, and hence authenticity”). Cameron further notes that the “provenance, chain of origin, and distributive character” of a digital replicant “can be traced, albeit with some difficulty”.

144 Tallinn Manual 2.0, above note 16, Rule 142; see also, for example, H. H. Dinniss, above note 23, p. 232 (noting how some art museums now exhibit digital artworks and some filmmakers now film exclusively in digital mediums); R. Addison, above note 71, p. 4.

145 Interestingly, the Tallinn Manual 2.0 never explicitly states that a majority of the group held this position.

146 Tallinn Manual 2.0, above note 16, p. 535 (“No member of the International Group of Experts taking this position asserted that all digital manifestations of cultural property are entitled to the protection of this Rule”).

147 *Ibid.*

original works themselves – in other words, as born-digital material. Accordingly, the commentary conditions the protection of digital surrogates on the non-existence or inaccessibility of their physical exemplars.

Second, while specifying that protection only applies where the original is either inaccessible or destroyed, the commentary does not explain what “inaccessible” means or even why the inaccessibility or destruction of the physical original is relevant. The commentary’s approach suggests that what is really being protected is the tangible cultural object – the physical creation imbued, as Benjamin asserted, with aura and authenticity – rather than the digital creation.¹⁴⁸ Certainly, a digital surrogate derives its cultural value by reference to a physical analogue, but if virtual objects can convey the same information – and, potentially, evoke the same responses in viewers – as physical objects, arguably they should be protected to the same extent as their referents, whether or not the tangible originals exist or are accessible in the physical world.¹⁴⁹ Moreover, if, as some have argued, objects are only important to the extent that they contain information which can be transmitted in other media, why does the Tallinn Manual 2.0 emphasize the primacy of the physical work over the information that a virtual object encodes?¹⁵⁰

Rule 142 clearly recognizes the cultural importance of digital surrogates; otherwise, the rule would not provide for their protection. However, it is not clear why digital surrogates – and the cultural information they convey – only become meaningful when the original works upon which they were based are lost.¹⁵¹

148 Notably, this approach is consistent with an object-centred view of cultural preservation. As Cameron explains, “[d]iscourses have centered around the status of the digital copy as inferior to its non-digital original, and the potential of the former to subvert the foundational values and meanings attributed to the original. Western concepts of object-centeredness, historical material authenticity, and aura play a central role in upholding this differential relationship.” F. Cameron, above note 143, p. 50.

149 C. Cronin, above note 122, p. 20 (“In the digital age it is increasingly true that the economic and aesthetic value of a cultural artifact is generated more by the information it contains than by the substance in which it is embodied”); Cuseum, *Neurological Perceptions of Art Through Augmented and Virtual Reality*, 2020, available at: <https://tinyurl.com/2p8tn2pw>. See also Sarah Cascone, “Your Brain May Not Be Able to Distinguish a Digital Reproduction of an Artwork from the Real Thing, a New Study Suggests”, *ArtnetNews*, 10 June 2020, available at: <https://news.artnet.com/art-world/brain-digital-art-reproduction-study-1873623>. But see, for example, F. Cameron, above note 143, p. 63. Cuseum’s study on *Neurological Perceptions of Art Through Augmented and Virtual Reality* found that the brains of test subjects did not differentiate between original works of art and digital reproductions. Cuseum, above, p. 1. The study concluded that the electroencephalogram readings of its subjects “would suggest that aesthetic experience is not denigrated by a digital interface representation and, in fact, digital reproductions in the case of augmented reality are shown to *improve* magnitude of brain activity compared to the viewing of original works of art”. *Ibid.*, p. 5 (emphasis in original). Meanwhile, Cameron argues that real objects carry “deep imaginary power” and hold a “special psychological standing” that virtual objects do not. F. Cameron, above note 143, p. 63.

150 See, for example, F. Cameron, above note 143, p. 51 (citing one museum curator’s belief that objects “are important only in that they contain information that can be communicated through a variety of media”); C. Cronin, above note 122, p. 27 (“The significance of aura to the aesthetic and economic valuations of cultural artifacts can be diminished only if we perceive cultural artifacts as fundamentally works of information rather than tangible relics”).

151 See, for example, F. Cameron, above note 143, p. 54 (explaining that “digital historical objects can potentially be seen as objects in their own right, can play to notions of polysemy, the experiential, and the sensual”).

Possibly, the Tallinn Manual 2.0 does not believe a digital surrogate could be “of great importance to the cultural heritage of every people” when the physical original still exists. Under this approach, “great importance” could only attach to a copy when the original has been compromised – that is, become inaccessible or been destroyed. This interpretation, however, discounts the Cultural Property Convention’s apparent recognition that cultural information, regardless of the medium in which it is encoded, can possess a cultural significance entitling it to protection under the Convention’s legal regime. It also precludes States, which are ultimately responsible for deciding what property in their territory is cultural property, from exercising their discretion to recognize digital surrogates of extant works as digital cultural property.¹⁵² Accordingly, the Tallinn Manual 2.0’s approach to digital surrogates may be more constrictive than the Cultural Property Convention’s protective regime.

Digital material as cultural property

The inapplicability of aura and authenticity to digital works suggests that the preservation of digital cultural property is driven by something other than an interest in preserving original examples of works. By conceptualizing digital cultural property as cultural information, some significant works could be treated as digital data rather than as digital surrogates. These works could then be entitled to cultural property protection as born-digital material.

Protection of cultural information

Notably, the Cultural Property Convention provides for the protection of both culturally significant information and reproductions thereof. The Convention incorporates the protection of cultural information by mandating the protection of manuscripts and books of “artistic, historical or archeological interest”, and of “scientific collections and important collections of books or archives” regardless of their artistic, historical or archaeological interest.¹⁵³ The protection of libraries and archives could be understood as being more broadly related to the preservation of human knowledge.¹⁵⁴ As depositories of learning and experience, these collections serve as records of encoded information.

Arguably, digital surrogates serve a similar function. As Fiona Cameron notes, digital reproductions carry information about an original object’s “form,

152 R. O’Keefe, above note 7, p. 105 (explaining that “article 1 devolves to each Party the discretionary competence to determine the precise property in its territory to which the Convention applies”).

153 Cultural Property Convention, Art. 1(a). The commentary to Rule 142 treats similar digital information – e-government documents and scientific data, for example – as born-digital material and would protect them accordingly. Tallinn Manual 2.0, above note 16, p. 535.

154 Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Routledge, London, 1996, p. 52 (remarking that important libraries are protected “probably in the spirit of protecting human knowledge” and that archives offer “irrefutable evidence of the past”).

fabric, shape, aesthetics, and history through interpretation”.¹⁵⁵ Cameron further argues:

In creating a surrogate, the gestures, memories, customs and intentions, and scars of [the original objects’] life histories are faithfully replicated in virtual space taking on the solidity, surfaces, edges, and texture of the real to ensure a more certain recovery of history, time, or aesthetic experience.¹⁵⁶

Digital surrogates, then, could potentially deserve protection as records of cultural information, regardless of the availability or accessibility of the original physical artifact. Instead of being viewed as digital surrogates, they could instead be understood as digital data, a type of born-digital material, entitled to its own protection under Rule 142.

Protection of reproductions

Another argument could be made, however, that digital surrogates merely deserve the same protections already afforded to reproductions under the Cultural Property Convention. The Convention provides that in addition to the examples of movable and immovable property described in Article 1, reproductions of the property outlined in Article 1(a) also constitute cultural property.¹⁵⁷ When the question of reproductions was debated in the Main Commission of the Intergovernmental Conference on the Convention, the French delegate argued that

it was more than ever necessary to preserve reproductions of essential works of art, whether in museums or other places, so that future generations would at least have the opportunity of seeing photographs of such works if the originals had been destroyed.¹⁵⁸

Notably, the protection of these reproductions is not incumbent on the destruction or inaccessibility of the original works. Consistent with this outcome, the protection of digital surrogates arguably should not depend on the existence or availability of their physical counterparts.

It is unclear why the commentary to Rule 142 conditions protection on the ability to limit the number of digital copies that can be made. When the issue of reproductions was debated at the Intergovernmental Conference, photography – a form of mechanical reproduction – was the contemplated method of duplication.¹⁵⁹ Despite the relative ease of producing photographic copies, the Cultural Property Convention contains no limitation on the number of copies that could be

155 F. Cameron, above note 143, p. 55.

156 *Ibid.*

157 Cultural Property Convention, Art. 1(a).

158 Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, *Records of the Conference Convened by the United Nations Educational, Scientific and Cultural Organization and Held at The Hague from 21 April to 14 May 1954*, para. 215, cited in J. Toman, above note 154, pp. 53–54.

159 *Ibid.*, para. 215.

produced. Why, then, is the ability to limit the creation of digital copies a consideration for the protection of digital surrogates? The commentary to Rule 142 contends that the reason is related to uniqueness and value. The commentary states:

[D]ue to the high speed and low cost of digital reproduction, once such a digital image has been replicated and widely downloaded, no single digital copy of the artwork would be protected by this Rule. This is because protection of cultural property is afforded based on the value and irreplaceability of the original work of art, and on the difficulty, time, and expense involved in reproducing faithful copies of that original. The logic underlying this Rule does not apply in cases where large numbers of high-quality reproductions can be made.¹⁶⁰

This same logic, however, would seem to preclude the protection of born-digital material, even though the commentary clearly provides for its protection.¹⁶¹ Born-digital creations are, by their nature, capable of being reproduced not just in large numbers, but also in versions of *identical* quality. Furthermore, unlike tangible cultural objects, “original” digital works possess no aura, authenticity or any other intrinsic characteristics capable of distinguishing them from copies. Cronin observes that “aura often determines the worth ascribed to an object as much as, if not more than, the combined value of the material of which it is composed and the intellectual effort invested in shaping it”.¹⁶² Because digital creations possess no aura and comprise no physical material, valuable or otherwise, their worth is largely a reflection of their intellectual achievement. The value and significance that the Tallinn Manual 2.0 attributes to digital originals, then, is largely artificial unless the originals can be readily distinguished. Cronin asserts that “if, using unenhanced perceptive capacities, we cannot distinguish between an original artifact and a copy, it is irrational to prize the unknown original”.¹⁶³ In this context, valuing one digital version over an identical copy seems unwarranted.

Technological options for distinguishing digital cultural property

Direct indicators

One way to distinguish an original work from a copy would be to mark it. In the case of cultural property, the commentary to Rule 142 observes that use of the Cultural

160 Tallinn Manual 2.0, above note 16, p. 536.

161 *Ibid.*, p. 535. It is possible that the International Group of Experts intended to confine the protection of born-digital material to born-digital property in limited circulation. The commentary to Rule 142, however, does not explicitly state this. Moreover, the examples of born-digital property provided in the commentary – i.e., “musical scores, digital films, documents pertaining to e-government, and scientific data” – are not the types of materials that are generally withheld from circulation or guarded against wide distribution.

162 C. Cronin, above note 122, p. 21; see also E. Ch’ng, above note 106, p. 154 (“The value of a certain relic made of stone can potentially outweigh the value of an object made of gold. ... The fact that a historical artifact has value is not a credit to the object itself, but to the intangible properties embedded within the object through past human activities”).

163 C. Cronin, above note 122, p. 26.

Property Convention's distinctive emblem would be appropriate for qualifying digital cultural property.¹⁶⁴ Currently, however, no formal digital marking equivalent of the Convention's distinctive emblem has been established.

In the absence of such an emblem, the commentary suggests that technological solutions such as “file-naming conventions, the use of tagging-data with machine-interpretable encoding schemes, published lists of IP addresses of digital cultural property, or generic top-level domain names” could be used instead.¹⁶⁵ A report produced for the United Kingdom's National Archives suggests that a single form of persistent identifier could be used to verify the authenticity of digital items among galleries, libraries, archives, museums and the commercial sector.¹⁶⁶ A similar form of identifier could conceivably be developed for digital cultural property as well. Alternatively, special digital watermarks could be used to distinguish specific versions of a work as a State's protected copy.

Ch'ng, meanwhile, has proposed that blockchain technology could be employed to identify and validate digital creations.¹⁶⁷ Although Ch'ng's proposal focuses on creating value for digital reproductions of tangible objects, his scheme could potentially be applied to record examples of digital cultural property.¹⁶⁸ Instead of using blockchains to identify the “First Original Copy” of cultural heritage artifacts, States could resort to blockchains to designate certain reproductions as digital cultural property.

Indirect indicators

Additionally, other technologies could be used as indirect indicators of cultural importance. For example, verifiable assets, such as non-fungible tokens (NFTs), are widely advertised as a way to differentiate versions of digital works. In the absence of marking or formal notification of a work's status by a State, verifiable assets could be used as indirect indicators of a digital work's cultural importance.

Created by private actors or institutions rather than States, indirect indicators would not carry the same authority as State-determined designations of digital cultural property, but they could be used to ascertain whether a work might be culturally important. In other words, the existence of indirect indicators, such as NFTs, while not dispositive, could serve as some evidence of a work's significance as digital cultural property. How might verifiable assets be used in this way?

NFTs use blockchain technology to create a unique identifying code that distinguishes a particular digital asset.¹⁶⁹ They essentially function as a certificate

164 Tallinn Manual 2.0, above note 16, p. 536.

165 *Ibid.*

166 R. Addison, above note 71, p. 15. The report proposes that at bit level, hash values or checksums could be used to assess authenticity.

167 E. Ch'ng, above note 106.

168 See *ibid.*, p. 160 (“Through blockchains the instrumental value of digital copies can be greatly increased, as the uniqueness and rarity of copies can be made possible”).

169 See, for example, Robyn Conti and John Schmidt, “What You Need To Know about Non-Fungible Tokens (NFTs)”, *Forbes*, 14 May 2021, available at: www.forbes.com/advisor/investing/nft-non-fungible-token/;

of authenticity and proof of ownership for a digital work.¹⁷⁰ Ownership of the certificate is recorded on the blockchain, which can be updated to reflect changes in the status of a work.¹⁷¹ Like a physical certificate of authenticity, however, an NFT exists separate and apart from the work it represents. An NFT may contain basic information about the digital work, such as the title and name of the creator, but the work itself typically exists elsewhere on the internet, sometimes on multiple sites simultaneously.¹⁷² To view the work, the owner of the NFT must access its digital file wherever it happens to be hosted online.¹⁷³ Ultimately, ownership of an NFT is nothing more than ownership of the NFT. It does not grant special or exclusive access to its associated work, and the work itself—whether in the form of a JPEG, GIF or other digital format—will generally remain accessible, in identical form, to the multitude of internet users interested in finding it.¹⁷⁴ This arrangement can be somewhat precarious. If, for example, the link to the work becomes broken or the file is removed from the designated domain, access to the work could be lost forever, including for the owner of the NFT.¹⁷⁵

Assigning an NFT to a digital creation can help capture at least some of the mystique and value more commonly associated with original physical works, but

Oscar Gonzalez, “NFTs Explained: These Expensive Tokens Are as Weird as You Think They Are”, *CNET*, 6 April 2021, available at: www.cnet.com/personal-finance/nfts-explained-these-expensive-tokens-are-as-weird-as-you-think-they-are/; J. Thaddeus-Johns, above note 24.

170 See, for example, J. Thaddeus-Johns, above note 24 (“An NFT is an asset verified using blockchain technology, in which a network of computers records transactions and gives buyers proof of authenticity and ownership”); O. Gonzalez, above note 169 (“NFTs offer a blockchain-created certificate of authenticity for a digital asset”).

171 See, for example, Daniel Van Boom, “NFT Bubble: The Craziest Nonfungible Token Sales So Far”, *CNET*, 22 March 2021, available at: www.cnet.com/news/nft-bubble-the-craziest-nonfungible-token-sales-so-far/.

172 See, for example, C. Thompson, above note 24; Jacob Kastrenakes, “Your Million-Dollar NFT Can Break Tomorrow if You’re not Careful”, *The Verge*, 25 March 2021, available at: www.theverge.com/2021/3/25/22349242/nft-metadata-explained-art-crypto-urls-links-ipfs. Sometimes, however, even basic information, such as the title of the work or the name of the artist, isn’t included in the NFT. See J. Kastrenakes, above (explaining that the NFT for Beeple’s *Everydays – The First 5000 Days*, a digital artwork auctioned at Christie’s for a record-setting \$69 million, did not include the name of the artwork or the name of the artist).

173 C. Thompson, above note 24 (“Someone who buys an artwork NFT owns only the NFT”); J. Kastrenakes, above note 172 (“[U]nlike a painting, which can be placed in a buyer’s home, an NFT is more like a piece of paper saying you own something”);

174 See, for example, C. Thompson, above note 24 (explaining that anyone can go to an NFT art site, copy a file, and “then post it to Instagram or Facebook . . . or make it the background on a phone”); J. Kastrenakes, above note 172 (“NFTs use *links* to direct you to somewhere else where the art and any details about it are being stored”) (emphasis in original). See also Emma Bowman, “‘Charlie Bit My Finger’ Will Remain on YouTube After NFT Auction Switcheroo”, *NPR*, 30 May 2021, available at: www.npr.org/2021/05/30/1001627869/charlie-bit-me-will-remain-on-youtube-after-nft-auction-switcheroo (explaining that a YouTube video which was auctioned off as an NFT would remain on YouTube after initial plans to remove it from the site were reconsidered). The suggestion that “Charlie Bit My Finger” could have been removed from the internet to ensure the auction winner would become “the sole owner of this lovable piece of internet history” indicates not all digital works might remain publicly accessible after the sale of an NFT.

175 See, for example, C. Thompson, above note 24 (explaining that if a site hosting a digital artwork goes down, “the NFT no longer even points to anything”); J. Kastrenakes, above note 172 (commenting that broken links could result in “awfully expensive 404 errors” for buyers of NFTs).

ultimately, NFT technology does not actually solve the conundrum of uniqueness, aura and reproducibility in digital formats. Digital works are essentially generated anew each time their code is run and theoretically can be reproduced (recreated) with exactness *ad infinitum*. This process of regular regeneration essentially shields them from the accretions of time. They are not subject to the vicissitudes of a physical existence in the same way that tangible objects are. They cannot be marked by the effects of weather or contact with human beings. They do not accrue patina. Accordingly, they cannot possess aura and authenticity in the same way as physical works, which exist differently in time and space.

An NFT's ability to signal an individual's special relationship to a work, however, has profoundly changed how the ownership of digital creations is perceived.¹⁷⁶ The minting of NFTs can promote a sense of scarcity for digital works, which in turn has enabled digital creations to be monetized and sold in a way more commonly associated with tangible goods.¹⁷⁷ Accordingly, digital creations that were once cheap or even free can now be bought, sold or exchanged as NFTs, much like physical goods – though, as noted above, an NFT is not synonymous with the work it represents.¹⁷⁸

NFTs have been minted for a broad range of digital creations, including YouTube videos,¹⁷⁹ video clips of NBA basketball games,¹⁸⁰ and internet memes.¹⁸¹ Introduced in 2014, NFTs did not gain widespread attention until relatively recently, and growing interest in them has resulted in extraordinary prices for the assets.¹⁸² In March 2021, for example, Jack Dorsey, the co-founder and CEO of Twitter, sold his very first tweet as an NFT for \$2.9 million,¹⁸³ and Beeple's *Everydays – The First 5000 Days* sold at Christie's for \$69 million, achieving the third-highest auction price for a living artist.¹⁸⁴

176 See, for example, J. Thaddeus-Johns, above note 24; R. Conti and J. Schmidt, above note 169.

177 See, for example, J. Thaddeus-Johns, above note 24; R. Conti and J. Schmidt, above note 169.

178 See, for example, J. Thaddeus-Johns, above note 24 (“Now, artists, musicians, influencers and sports franchises are using NFTs to monetize digital goods that have previously been cheap or free”); R. Conti and J. Schmidt, above note 169 (explaining that NFTs can have only one owner at a time and that their unique data “makes it easy to verify ownership and transfer tokens between owners”).

179 See, for example, Christina Morales, “‘Charlie Bit My Finger’ Is Leaving YouTube After \$760,999 NFT Sale”, *New York Times*, 24 May 2021, available at: www.nytimes.com/2021/05/24/arts/charlie-bit-my-finger-nft-auction.html (reporting that the NFT for a video titled “Charlie Bit My Finger”, one of YouTube's first viral videos, sold for \$760,999 in May 2021).

180 *NBA Top Shot*, available at: <https://nbatopshot.com/>.

181 Erin Griffith, “Why an Animated Flying Cat with a Pop-Tart Body Sold for Almost \$600,000”, *New York Times*, 22 February 2021 (updated 27 May 2021), available at: www.nytimes.com/2021/02/22/business/nft-nba-top-shot-crypto.html (explaining that the internet meme featuring “an animated flying cat with a Pop-Tart body leaving a rainbow trail”, which had been viewed and shared online hundreds of millions of times, was sold on a website dedicated to the sale of digital goods).

182 See, for example, J. Thaddeus-Johns, above note 24; Saniya More, “‘NFT’ Search Volume on Google Hits All-Time High as Platform User Count Nears 400K”, *The Block*, 15 March 2021, available at: www.theblockcrypto.com/linked/98358/nft-search-volume-on-google-hits-all-time-high-as-platform-user-count-nears-400k.

183 Maria Armental, “Jack Dorsey's First Tweet Sells as NFT for \$2.9 Million”, *Wall Street Journal*, 22 March 2021, available at: www.wsj.com/articles/jack-dorseys-first-tweet-sells-as-nft-for-2-9-million-11616455944.

184 S. Reyburn, above note 96; E. Kinsella, above note 25. The two living artists who have achieved higher auction prices for their works are Jeff Koons and David Hockney. S. Reyburn, above note 96.

NFTs, however, can do more than merely transform a fungible item into a saleable non-fungible good. Unique information stored in an NFT’s metadata, by either the work’s creator or its owner, can enhance the perceived value of the asset.¹⁸⁵ A digital artist, for example, can add her signature to the NFT of a digital creation,¹⁸⁶ permanently linking the NFT to the artist in a unique and verifiable way.¹⁸⁷ As one commentator has observed, “[i]n the age of NFTs, downloading a picture is like owning a print. Having the NFT is like owning the original painting.”¹⁸⁸ Others have described ownership of NFTs as granting “digital bragging rights”.¹⁸⁹

Ultimately, however, analogizing the ownership of NFTs to the possession of original physical works is inexact and obscures fundamental questions concerning the nature of digital works and their protection in the event of armed conflict. While the potential to authenticate and record the provenance of digital works may have addressed a lingering concern within the art community, the availability of NFT technology has not necessarily resolved the question of how to treat digital material that may or may not constitute digital cultural property.¹⁹⁰ NFTs, though unique and distinguishable, are not themselves cultural objects that must be protected under the law of armed conflict. Meanwhile, because the digital files they link to remain susceptible to boundless copying, an armed force responsible for respecting and protecting cultural property must still determine how to treat such material. Accordingly, the existence of an NFT may be immaterial to the protection of digital cultural property. On the other hand, NFTs may serve as evidence that a work is considered important and, though perhaps not irreplaceable, that it should be treated as digital cultural property at least as a matter of default.

A proposal to protect digital cultural property in armed conflict

Rule 142 of the Tallinn Manual 2.0 is undoubtedly correct: digital cultural property, like more traditional, tangible forms of cultural property, is entitled to protection in the event of armed conflict. The commentary’s approach to identifying what digital material should be afforded protection, however, reflects an older, perhaps outdated understanding of cultural property that ties priority of protection to economic factors such as scarcity and market value. Laudably, the Tallinn Manual 2.0’s interpretation at least expands the protection of cultural property to some

185 R. Conti and J. Schmidt, above note 169.

186 *Ibid.*

187 J. Thaddeus-Johns, above note 24. See also, for example, R. Conti and J. Schmidt, above note 169.

188 D. Van Boom, above note 171.

189 R. Conti and J. Schmidt, above note 169 (“Collectors value those ‘digital bragging rights’ almost more than the item itself.”). See also E. Griffith, above note 181 (“The buyers are usually not acquiring copyrights, trademarks or even the sole ownership of whatever it is they purchase. They’re buying bragging rights and the knowledge that their copy is the ‘authentic’ one”).

190 See J. Thaddeus-Johns, above note 24 (“The technology also responds to the art world’s need for authentication and provenance in an increasingly digital world”).

non-material forms of heritage, but the suggestion that protection is dependent on “value and irreplaceability”, rather than importance to national heritage, somewhat undercuts the text and purpose of the Cultural Property Convention.¹⁹¹ Moreover, it discounts the impact that digital reproduction has had – or will have – on our conception of cultural property.

Certainly not all digital material – whether new creations or copies of extant works – can or should be protected as cultural property. As with tangible objects, the responsibility for determining, reasonably and in good faith, what constitutes cultural property should be left to States.¹⁹² As discussed above, however, States rarely identify and notify other States of their cultural property prior to armed conflict.¹⁹³ While a territorial State’s failure to identify and notify does not relieve an opposing State of the obligation to respect cultural property in armed conflict, expecting an opposing State to rely on Article 1 of the Cultural Property Convention by default to identify digital cultural property would be a mistake. The nature of digital material is too dissimilar to that of tangible works for Article 1 to serve as a useful and practical guide.

Instead, protecting digital cultural property will require States to clearly identify, possibly mark, and notify other States of the digital material they consider to be part of their national cultural heritage. Blockchain technology or other technological means could be used to record States’ designations of digital cultural property. The process of identification should include both born-digital material and digital surrogates, and identification should not be entirely dependent on the existence or accessibility of originals, or the existence of copies. Finally, if a digital equivalent of the Cultural Property Convention’s distinctive emblem is ever adopted, States should be required to specifically mark their digital cultural property with the emblem so that other States can easily distinguish and respect such property in armed conflict.

Designating born-digital works as cultural property

As Valéry predicted, great innovations have transformed the process and product of artistic invention in the less than a century since his essay on art. Born-digital works, like physical artifacts of the past, have the potential to hold great cultural importance – that is, to be regarded as cultural heritage – for future generations. Accordingly, they deserve to be protected, too, and States should thoughtfully and deliberately identify the digital creations they regard as national cultural heritage.

Because a digital copy of a born-digital original could be indistinguishable from the original, identifying and specifically protecting the “original” work should

191 Tallinn Manual 2.0, above note 16, p. 536.

192 See R. O’Keefe, above note 7, pp. 103–106; Vienna Convention on the Law of Treaties, Art. 26.

193 The identification of cultural property entitled to enhanced protection in accordance with the Second Protocol represents one notable exception. To date, however, a total of only seventeen objects have been granted enhanced protection. UNESCO, “International List of Cultural Property under Enhanced Protection”, 2019, available at: www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Enhanced-Protection-List-2019_Eng_04.pdf.

be seen as unnecessary.¹⁹⁴ Instead, retaining a faithful digital reproduction of the work would suffice to preserve it for the future. Issues of materiality, aura and authenticity do not affect our appreciation of digital works in the same way as they do for physical works and therefore should not unduly influence our view of original digital works and their reproductions.

Designating digital surrogates as cultural property

As discussed in the above subsections on “Protection of Cultural Information” and “Protection of Reproductions”, some digital reproductions of physical works, like comparable physical reproductions, also deserve to be recognized as cultural property. Moreover, their protection should not necessarily depend on the existence or accessibility of the physical originals. As records of cultural information, like important collections of books and documents in a library or archive, some copies deserve independent protection as cultural property. Theoretically, copies that can be used to create replicas, on the one hand, and the replicas themselves, on the other, accomplish the same goal: preserving important information about a cultural object. Why, then, the difference in treatment?

Permitting States to designate some digital surrogates as cultural property, regardless of the existence of their physical counterparts, would provide a more coherent and transparent approach to digital cultural heritage preservation. Like the copies of essential works of art discussed at the Intergovernmental Conference on the Cultural Property Convention, these digital surrogates would preserve a simulacrum of the originals in case the originals were destroyed. Consequently, the Tallinn Manual 2.0’s hypothetical one-terabyte, high-resolution image of the *Mona Lisa* might deserve protection as digital cultural property in its own right. Other digital copies of both movable and immovable cultural property, such as the 3-D scan of *David* created by the Digital Michelangelo Project or the data compiled by the Institute for Digital Archaeology to recreate the Triumphal Arch of Palmyra, might similarly be entitled to protection as cultural property.¹⁹⁵

Limitations on which copies qualify as protected cultural property may nonetheless be reasonable. Recognizing a limitation on protection based on the *quality* of the digital surrogate might be a more defensible approach than a

194 See, for example, E. Ch’ng, above note 106, p. 156 (“Copies copied from the First Original Copy are no different in nature and appearance from the original copy and therefore, all copies can be claimed as the First Original Copy”). Ch’ng further explains that while digital watermarking could be used to denote the first copy, digital watermarks easily added to subsequent copies would effectively negate the watermark’s usefulness as an identifier.

195 See, for example, “The Digital Michaelangelo Project”, available at: <http://graphics.stanford.edu/projects/mich/>; Institute for Digital Archaeology, “The History of the Triumphal Arch of Palmyra”, available at: <https://digitalarchaeology.org.uk/history-of-the-arch>. The Institute for Digital Archaeology created a one-third replica of the Triumphal Arch using data from 3-D photographs of the monument and 3-D printing technology. See, for example, Christopher D. Shea, “Palmyra Arch Replica Is Unveiled in Trafalgar Square in London”, *New York Times*, 19 April 2016, available at: www.nytimes.com/2016/04/20/arts/international/replica-of-palmyra-arch-is-unveiled-in-traffic-square.html; Institute for Digital Archaeology, “Building the Arch”, available at: <https://digitalarchaeology.org.uk/building-the-arch>.

limitation based on the availability of the physical archetype. After all, a high-quality “true facsimile” is a better encoder of cultural information than a low-quality copy. The Tallinn Manual 2.0, however, never expressly establishes reproductive quality as a criterion for the protection of digital surrogates. Ultimately, determining which digital surrogates comprise part of a State’s national cultural heritage should be left to individual States to decide, consistent with the process for tangible cultural objects and born-digital material.

Marking of digital cultural property

Intangible, digital material is so fundamentally different from tangible objects that conditioning the protection of digital cultural property on whether it is an “original”, whether it is a copy, or whether many copies of it could be made makes little sense. Rather, attention should be focused on how best to preserve the heritage information encoded by a digital artifact, not how to preserve the “best” – that is, the only or the most authentic – version of the digital artifact. To achieve this, States should clearly designate one example of a digital work to be protected as cultural property, and clearly identify where it is located.¹⁹⁶ One way that States could register State-designated digital cultural property is through the use of blockchain technology; another would be to specifically mark such property. During armed conflict, only the State-designated example, whether a singular example or one of many copies of the work that exist, would be afforded all the protections granted to cultural property. Undesignated copies would not be entitled to the same protections.

Absent reliance on other technologies, the specific marking of protected digital examples could be used to put attackers on notice. Although no digital equivalent of the Cultural Property Convention’s distinctive emblem exists, States could amend the Convention to include a new distinctive digital identifier for digital cultural property or otherwise adopt a special identifier. Article 39 of the Convention outlines the process for revising the treaty.¹⁹⁷ In accordance with Article 39, the new digital identifier could be added to Article 16 as an additional emblem of the Convention, and subsequent articles could be amended to provide for its use.¹⁹⁸

Alternatively, States need not formally amend the Cultural Property Convention to establish a unique digital identifier. For example, when a distinctive emblem for cultural property under enhanced protection was created, States did not resort to amending the 1999 Second Protocol itself. Rather, States established the new emblem and provided for its use by amending the guidelines governing the implementation of the Second Protocol.¹⁹⁹ A similar approach

196 The “technological solutions” described in the Tallinn Manual 2.0 could be used for this purpose. See Tallinn Manual 2.0, above note 16, p. 536.

197 Cultural Property Convention, Art. 39.

198 *Ibid.*, Arts 16, 17.

199 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Sixth Meeting of the Parties, CLT-15/6.SP/CONF.202/Decisions, 18 January 2016. The

could be taken to designate a special digital identifier for digital cultural property. Absent the adoption of a distinctive digital identifier, other direct indicators, such as digital watermarks and persistent identifiers, could also be used to signify that a State has explicitly identified a digital work to be of great importance to its cultural heritage and, by extension, to the cultural heritage of the world.

Conclusion

The Cultural Property Convention begins by recognizing not only that cultural property has suffered grave damage in armed conflict, but also that “developments in the technique of warfare” have placed cultural property in “increasing danger of destruction”.²⁰⁰ These observations remain applicable today, though perhaps in ways the drafters did not anticipate. The cultural property at risk in armed conflict now includes digital cultural property, and the means of warfare that have made such property vulnerable incorporate the use of cyber capabilities.

As an emerging and largely unfamiliar form of cultural heritage, digital cultural property is something of an enigma. Rule 142 of the Tallinn Manual 2.0 explicitly recognizes that States’ responsibility to respect and protect cultural property extends to digital cultural property, but how—and even to some extent why—States must safeguard digital works remains unsettled. Realizing the protective purpose of the Cultural Property Convention regarding digital cultural property will require States to consider and resolve as-yet undecided questions concerning the nature of digital works and the reasons why certain works should be preserved.

Undoubtedly, digital creations of great importance to the cultural heritage of every people deserve to be protected. These works, whether born-digital or created as digital surrogates, fall within the scheme of protection established by the Cultural Property Convention. The intangible nature of digital creations and their susceptibility to exact and prolific copying, however, demands that States play a more active and decisive role in identifying works they consider digital cultural property. The protection of cultural property requires not only that States respect cultural property, but also that they take measures to safeguard it in times of peace.²⁰¹ Should States fail to safeguard digital cultural property by identifying relevant works, notifying others of those works, and potentially marking them with a special identifier, the consequences for the world’s cultural heritage in the next armed conflict could be grim—and, as the Cultural Property Convention reminds us, entirely foreseeable.

new emblem, created “for the exclusive marking of cultural property under enhanced protection”, would help distinguish cultural property under general and special protection (p. 4).

200 Cultural Property Convention, Preamble.

201 *Ibid.*, Arts 2–4.

The obligation to exercise “leniency” in penal and disciplinary measures against prisoners of war in light of the ICRC updated Commentary on the Third Geneva Convention

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Abstract

This paper explores how the general obligation of the Detaining Power to exercise the greatest leniency towards prisoners of war may be used in interpreting the provisions of the Third Geneva Convention of 1949 (GC III) related to the sanction regime to fulfil the obligation of humane treatment and to preserve the persons and honour of prisoners of war. The International Committee of the Red Cross updated Commentary on GC III is placed at the core of the arguments of this research.

Keywords: detaining power, disciplinary sanctions, humanity, leniency, penal punishments, prisoners of war.

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Introduction

Leniency derives from the Latin verb *lenire*, denoting to softening the pain and stress.¹ Historically, this word was often connected with the term clemency as, for example, Lucius Annaeus Seneca the Younger, the Roman philosopher, defined *clementia* as “the leniency of the more powerful party toward the weaker in the matter of setting penalties”.² The concept of clemency, associated with the attitudes of mercy and gentleness, “functioned primarily in military contexts, displayed on the battlefield by a Roman general toward a defected foreign enemy, or as a political tool used by royalty in the discretionary administration of justice”.³

In the sphere of modern-day criminal law, the concept of leniency is still alive and the subject of debate. In using this term, criminal lawyers aim to distinguish between

crime treatment which, on the one hand, is based upon sentiment, emotion, and perhaps personal relationships existing between the offender and the person who deals with him, and on the other hand, treatment which is based upon considerations of the protection of society, the rehabilitation of the offender, his preparation for release and eventual reintegration into the social group as a self-supporting, self-respecting individual.⁴

In the context of international humanitarian law (IHL), the term leniency first appeared in Article 52 of the 1929 Convention Relative to the Treatment of Prisoners of War (1929 Convention),⁵ in particular in connection with facts related to “escape or attempted escape”. With the adoption of Article 83 of the Third Geneva Convention of 1949 (GC III),⁶ the obligation to exercise the

- 1 Merriam-Webster, “Lenient”, in *Merriam-Webster.com Dictionary*, available at: <https://www.merriam-webster.com/dictionary/lenient> (all internet references were accessed in March 2022).
- 2 Lucius Annaeus Seneca, *Of Clemency (De Clementia)*, at 2.3.1., cited in Susanna Morton Braund, “The Anger of Tyrants and the Forgiveness of Kings”, in Charles L. Griswold and David Konstan (eds), *Ancient Forgiveness: Classical, Judaic, and Christian*, Cambridge University Press, Cambridge, 2012, p. 89.
- 3 Jennifer M. Sandoval, *A Psychological Inquiry into the Meaning and Concept of Forgiveness*, Routledge, Abingdon, 2017, p. 28.
- 4 Justin Miller, “Philosophy of Leniency in Crime Treatment”, *Journal of Criminal Law and Criminology*, Vol. 32, No. 4, 1942, p. 389. See, also, Göran Duus-Otterström, “Why Retributivists Should Endorse Leniency in Punishment”, *Law and Philosophy*, Vol. 32, No. 4, 2013.
- 5 Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931) (1929 Convention).
- 6 Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III).

greatest leniency towards prisoners of war (PoWs) in regards to penal and disciplinary measures against them was reinforced.⁷ Article 83, the second article of Chapter III on penal and disciplinary sanctions, provides that “[i]n deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures”. Chapter III of the Convention, in addition to general rules that are applicable to any kind of proceedings, consists of specific rules regulating disciplinary procedures and sanctions, on the one hand, and those rules regulating penal proceedings and punishments, on the other hand.

As will be discussed in this paper, the drafters of GC III intentionally included the obligation to exercise leniency in a distinct article at the beginning of the Chapter on penal and disciplinary measures and emphasized that it “should apply to the whole Chapter”.⁸ As the history of the negotiations demonstrates,⁹ the drafters sought that the authorities or the courts of the Detaining Power apply the leniency considerations prior to the institution of any disciplinary or judicial proceedings against a PoW until its end which includes all the stages of pre-trial, trial and post-trial of PoWs, as reflected in Chapter III. This attitude, *per se*, reiterates that contrary to the mainstream approach among criminal lawyers,¹⁰ the authors of GC III, as will be discussed in the “Historical background” part below, did not restrict the application of leniency merely to the consideration of the severity of punishments.

The obligation to exercise the greatest leniency towards PoWs brings into play considerations of humanity, morality and conscience in the treatment of PoWs. In this way, it may resemble, to some extent, the Martens clause which, by reference to laws of humanity and the requirements of the public conscience, bridges the gap between positive norms of international law relating to armed conflicts and natural law.¹¹ This resemblance, however, does not mean that the lack of leniency equals automatically inhumane treatment.

7 It is noteworthy that Article 121 of the Fourth Geneva Convention also provides that: “The Parties to the conflict shall ensure that the competent authorities exercise leniency in deciding whether punishment inflicted for an offence shall be of a disciplinary or judicial nature, especially in respect of acts committed in connection with an escape, whether successful or not.” Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

8 Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Bern (1949 Diplomatic Conference), Vol. II-A, p. 304.

9 See the “Historical background” part below.

10 See, for example, Nigel Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice*, Blackstone Press, London, 1999, in particular pp. 219–30 where the author makes the distinction between mercy and leniency.

11 Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict”, *International Review of the Red Cross*, Vol. 37, No. 317, 1997, p. 133.

The obligation to exercise leniency toward PoWs does not necessarily result in predetermined answers; rather, it is an appeal to the Detaining Power as a sovereign State to treat PoWs less severely, by contemplating the fact that PoWs are in its hand because they honoured the same ethos as the Detaining Power's members of armed forces: upholding their duty of allegiance. It is for this reason that Article 87(2) states clearly that:

[w]hen fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will ...

Contrary to the principle of humanity and the Martens clause, the nature and scope of which are vastly discussed in the legal literature,¹² the obligation to exercise leniency did not generate any debate in the IHL domain. Even the 1960 International Committee of the Red Cross (ICRC) Commentary, which linked leniency to the “considerations of the ‘honourable motives’ which prompted the prisoner of war to act”¹³ did not discuss the peculiarities of the implementation of leniency to the whole of Chapter III. Consequently, in interpreting Article 87(2) which provides the list of extenuating circumstances that should be considered in fixing the penalties against PoWs, the 1960 Commentary does not ascribe any independent place for “leniency”.¹⁴ However, the ICRC updated Commentary on GC III (Commentary),¹⁵ based on general practice,¹⁶ and following the developments of international law, has brought the humanitarian considerations including the concepts of leniency and clemency, wherever possible, to the heart of its interpretations of the GC III provisions with respect to penal and disciplinary sanctions. On this basis, the Commentary on Article 87(2) emphasizes that considerations mentioned in this Article do not replace rather “complement the rule contained in Article 83 ...”.¹⁷ The Commentary furthermore states that Article 87 encourages detaining authorities “to exhibit as

12 See, for example, Vladimir V. Pustogarov, “The Martens Clause in International Law”, *Journal of the History of International Law*, Vol. 1, No. 2, 1999; Theodor Meron, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, *American Journal of International Law*, Vol. 94, No. 1, 2000.

13 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 (1960 Commentary), commentary on Art. 83, p. 410.

14 *Ibid.*, commentary on Art. 87, pp. 430–1. These elements under Article 87 are “the absence of any duty of allegiance, and the fact that the prisoner is in the hands of the Detaining Power as the result of circumstances independent of his own will”.

15 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War (Commentaries on the 1949 Geneva Conventions)*. Cambridge University Press, Cambridge, 2021 (Commentary).

16 Jemma Arman, Jean-Marie Henckaerts, Heleen Hiemstra and Kvitoslava Krotiuk, “The Updated ICRC Commentary on the Third Geneva Convention: A New Tool to Protect Prisoners of War in the Twenty-First Century”, *International Review of the Red Cross*, Vol. 102, No. 913, 2020, p. 391.

17 Commentary, above note 15, on Art. 87, paras 3662 and 3682.

much leniency as possible in determining the penalty because of the special circumstances in which prisoners of war find themselves”.¹⁸

With reference to the application of the leniency considerations to the whole provisions of Chapter III of GC III, this paper indulges in the obligation of exercising leniency regarding the laws and procedures that are applicable to disciplinary and judicial processes as well as fixing and enforcing sanctions against PoWs. In doing this, it first examines the origin of this rule based on the preparatory works of GC III. Subsequently, the paper develops its arguments about the effects of leniency considerations in each and every disciplinary or penal measure taken against PoWs by the Detaining Power. Moreover, it will be shown that the leniency considerations, as an appeal to the Detaining Power to treat PoWs less severely, has the potential to influence the interpretation of some other obligations under GC III. The ICRC updated Commentary on GC III, which expressly discusses leniency considerations as an independent obligation of conduct,¹⁹ is placed at the core of the arguments of this research.

Historical background

The experience of the First World War revealed the deep inadequacy of the Hague Conventions²⁰ in protecting PoWs in respect of punishments they might face.²¹ As discussed by Wylie and Cameron, “the scale, duration and intensity of wartime captivity after 1914 gave rise to a conceptual shift in the way PoWs were perceived, transforming their status ... to ‘humanitarian subjects’, whose treatment was based on an understanding of their humanitarian needs and rights”.²² As a result, a great number of bilateral agreements on the subject were drafted by the opposing belligerents and entered into force in 1918 to compensate for these shortcomings.²³

These agreements constituted the first international efforts to regulate the treatment of PoWs²⁴ by confirming the existing approach of dividing offences

18 *Ibid.*, para. 3662.

19 *Ibid.*, commentary on Art. 83, para. 3588.

20 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 (entered into force 4 September 1900); and Regulation of Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (entered into force 26 January 1910), (Hague Conventions).

21 Howard S. Levie, “Penal Sanctions for Maltreatment of Prisoners of War”, *American Journal of International Law*, Vol. 56, No. 2, 1962, p. 437.

22 Neville Wylie and Lindsey Cameron, “The Impact of World War I on the Law Governing the Treatment of Prisoners of War and the Making of a Humanitarian Subject”, *European Journal of International Law*, Vol. 29, No. 4, 2018, p. 1327.

23 Howard S. Levie, “Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War”, *United States Air Force Academy Journal of Legal Studies*, Vol. 7, No. 37, 1997, p. 459. Available at: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1475&context=ils>.

24 Le code du prisonnier de guerre. Rapport présenté par le Comité international à la X^{me} Conférence, *Revue Internationale de la Croix-Rouge et Bulletin*, No. 26, 1921, p. 104.

that PoWs might commit²⁵ into two categories: disciplinary and criminal offences.²⁶ They also prohibited collective punishment,²⁷ and the use of cruel and unusual punishments against PoWs.²⁸ These agreements, while aiming to provide more protection for PoWs, were proved to be inadequate, first and foremost, because these agreements came into existence almost at the end of the war,²⁹ when atrocities had already been committed. Besides, they were based, using the words of the ICRC, on the principle of reciprocity than the principle of justice since the belligerents aimed to secure their own advantages rather than to serve the cause of humanity.³⁰

Considering these experiences, the 10th International Red Cross Conference of 1921 decided to address the insufficiency of the existing international conventions to afford the PoWs the necessary protection.³¹ For this purpose, the Conference proposed sixteen main principles regarding the treatment of PoWs.³² These principles were aimed to serve, among others, as the basis for an international code that would govern the judicial and disciplinary measures applicable to PoWs.³³ Among these principles, the Conference, emphasizing that the PoWs are entitled to all considerations that are due to every human being, stressed the general principle that any treatment of PoWs should be free of any hostility, and no restriction should be imposed on them unless it was absolutely necessary.³⁴

The ICRC, based on Resolution XV of the Conference,³⁵ established the so-called “Diplomatic Commission”, composed of five members to draft a convention.³⁶ This commission based its work mainly on the principles approved

25 The first international announcement of such a distinction can be found in Article 28 of the Project of an International Declaration Concerning the Laws and Customs of War of 27 August 1874 expressing that “Prisoners of war are subject to the laws and regulations in force in the army in whose power they are. Arms may be used, after summoning, against a prisoner of war attempting to escape. If recaptured he is liable to disciplinary punishment or subject to a stricter surveillance.” “Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874”, in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, Dordrecht, 1988, pp. 22–34.

26 William Evans Sherlock Flory, *Prisoners of War: A Study in the Development of International Law*, American Council on Public Affairs, Washington, DC, 1942, p. 91.

27 See, for example, Article XLIX of the Agreement between the British and German Governments Concerning Combatant Prisoners of War and Civilians (The Hague, 14 July 1918), and Article 84 of the Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians (Berne, 11 November 1918), in Howard S. Levie, “Documents on Prisoners of War”, *International Law Studies*, Vol. 60, pp. 110 and 131, respectively.

28 Agreement between the United States of America and Germany, *Ibid.*, Arts 74–5, pp. 128–9.

29 Le code du prisonnier de guerre, above note 24, p. 104.

30 *Ibid.*, p. 105.

31 Compte Rendu, Dixième Conférence Internationale de la Croix Rouge, Geneva, 30 March to 7 April 1921, p. 12.

32 These principles were enumerated in Resolution XV, No. 1 adopted by the 10th Conference. *Ibid.*, pp. 218–20.

33 The relevant part of Resolution XV, No. 1 reads as follows: “Un code international de mesures disciplinaires et pénales à appliquer aux prisonniers de guerre fera partie intégrante de cette Convention.” *Ibid.*, p. 218.

34 Resolution XV, No. 1, para. 3. *Ibid.*

35 Resolution XV, No. 2, *ibid.*, pp. 220–1.

36 The names of the members are M. le Dr Ferrière, président, MM. P. Des Gouttes, Edmond Boissier, P. Logoz and G. Werner. Rapport sur la réalisation de la résolution XV de la Xème Conférence

at the 10th Conference, Hague Convention IV, and the agreements that were signed between belligerent powers during the First World War.³⁷ The draft convention, consisting of 103 articles, was submitted for review to the 11th International Red Cross Conference.³⁸ In this draft, one chapter was devoted to the code of penal and disciplinary measures as requested by the 10th Conference, consisting of twenty-five articles. According to the ICRC, these provisions reflected the general principle that PoWs are subject to the laws, regulations and orders of the Detaining Power, and set limits on judicial and disciplinary measures by, for example, limiting the duration of disciplinary confinement,³⁹ prescribing PoWs’ defence rights, and providing for a special procedure in the issuance of the death sentence.⁴⁰ At the same time, two other works to develop international rules on treating PoWs were underway: one by the International Law Association⁴¹ and the other by the Russian Red Cross.⁴² These three works, which were developed independently, provided similar solutions for almost all the questions.⁴³ Yet, reference to the notion of exercising the greatest leniency was only mentioned in the draft articles prepared by the ICRC. The ICRC draft Article 49, which was later adopted as Article 52 of the 1929 Convention, had two paragraphs: the first requiring belligerents to consider the greatest leniency in determining whether an offence committed by a PoW should be punished disciplinarily or judicially, and the second, listing a few offences that should be faced only with disciplinary measures, such as minor disobedience, refusing to work without a legitimate reason, violating camp discipline and minor property offences.⁴⁴

The Proceedings of the 1929 Conference reveal that the delegates had no reservation or comment in regard to the inclusion of leniency in treating PoWs. The discussion, rather, was about the second paragraph, listing offences entailing

internationale de la Croix-Rouge, suivi d’un Avant-projet de Convention relative au traitement des prisonniers de guerre (ICRC Report to 11th Red Cross Conference), p. 2.

37 These agreements include agreement between Turkey, Britain and France of 28 December 1917 and 23 March 1918; France and Germany of 26 April 1918; Austria and Serbia of 1 June 1918; Germany and Great Britain of 14 July 1918; Austria–Hungary and Italy of 21 September 1918, and Germany and the United States of 11 November 1918. *Ibid.*, p. 3.

38 *Ibid.*, p. 2.

39 *Ibid.*, p. 11.

40 *Ibid.*, p. 12.

41 The International Law Association in its 30th Conference, held in the Hague in 1921, adopted twenty-three articles as its proposal for international regulations on treatment of PoWs. See *Reglements internationaux proposes par l’International Law Association pour le traitement des prisonniers de guerre*, in Théodore Aubert, “La XXX^{me} Conférence de l’International Law Association”, *Revue Internationale de la Croix-Rouge*, Vol. 3, No. 35, 1921, pp. 1087–93.

42 This code was presented to the 11th International Conference. The code provided eight principles including the obligation to treat PoWs with human dignity; see Société Russe de la Croix-Rouge, “Rapport sur l’activité de la Société Russe de la Croix-Rouge du 1^{er} août 1922 au 1^{er} août 1923”, pp. 10–11, available at: https://library.icrc.org/library/docs/CI/CI_1923_043_FRE_050_RU_Ra.pdf.

43 ICRC Report to 11th Red Cross Conference, above note 36, p. 4.

44 Art. 49. “Les belligérants veilleront à ce que les Autorités compétentes usent de la plus grande indulgence dans l’appréciation de la question de savoir si une infraction commise par un prisonnier de guerre doit être punie disciplinairement ou judiciairement. Ne seront, en particulier, passibles que de peines disciplinaires les prisonniers coupables d’insubordination légère, de refus de travailler sans motif légitime, de contraventions à la discipline du camp et de délits de peu de gravité contre la propriété.” *Ibid.*, p. 27.

only disciplinary measures.⁴⁵ In this regard, the delegation of Germany proposed to replace the second part of the draft provision with the following “[t]his will in particular be the case in the assessment of the facts which accompanied an escape”, while the delegation of Belgium proposed a third new paragraph that for the same act, no cumulative of penal and disciplinary measure can be applied.⁴⁶ This third paragraph was replaced later with the principle of *non bis in idem*,⁴⁷ which in the view of the delegates constituted a guarantee in the favour of PoWs.⁴⁸ With these changes, Article 52 was adopted by the Conference as follows:

Belligerents shall ensure that the competent authorities exercise the greatest leniency in considering the question whether an offence committed by a prisoner of war should be punished by disciplinary or by judicial measure.

This provision shall be observed in particular in appraising facts in connexion with escape or attempted escape.

A prisoner shall not be punished more than once for the same act or on the same charge.

During the Second World War, the 1929 Convention, “in spite of its imperfections, ... acted as a deterrent on abuses and laid down an average treatment for prisoners of war which seems better, than that meted out to them during the War of 1914–1918”.⁴⁹ However, from thirty-five million military personnel in enemy hands between 1939 and 1945, approximately five million lost their lives by atrocities committed,⁵⁰ which demonstrated the need to strengthen the protection afforded to PoWs. In light of this, efforts were made to supplement the principles and rules laid down in the 1929 Convention.⁵¹

For the revision of provisions on penal and disciplinary measures of the 1929 Convention, a special commission was formed under the 1949 Diplomatic Conference composed of delegates from the United States of America, France, the

45 Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la Convention du 6 juillet 1906 pour l’amélioration du sort des blessés et malades dans les armées en campagne et pour l’élaboration d’une convention relative au traitement des prisonniers de guerre et réunie à Genève du 1^{er} au 27 juillet 1929, C. Deuxième commission (Code des prisonniers de guerre): séances 6, p. 491.

46 Premier sous-commission (juridique et pénale) de la Deuxième commission (Code des prisonniers de guerre), séance du lundi 8 juillet à 16h.30, *ibid.*, pp. 24 and 27.

47 *Ibid.*, p. 491.

48 *Ibid.*

49 Conférence préliminaire des Sociétés nationales de la Croix-Rouge pour l’étude des Conventions et de divers problèmes ayant trait à la Croix-Rouge, Genève, 26 juillet au 3 août 1946 : documentation fournie par le Comité international de la Croix-Rouge, Vol. II. Convention Relative to Prisoners of War, ICRC, 1946, p. 2.

50 S. P. MacKenzie, “The Treatment of Prisoners of War in World War II”, *Journal of Modern History*, Vol. 66, No. 3, 1994, p. 487. MacKenzie explains that during the war the treatment of the PoWs, depending on the nationality of both captive and captor and the period of the war, could range from strict adherence to the terms of the 1929 Convention to severe brutality such as subjecting the Black colonial troops from Senegal captured in 1940 to spurious medical research into racial differences. *Ibid.*, p. 504.

51 Conférence préliminaire des Sociétés nationales de la Croix-Rouge, above note 49, p. 2.

United Kingdom, the Union of Soviet Socialist Republics and the ICRC, to review draft provisions submitted by the 17th Red Cross Conference.⁵² Contrary to the 1929 Convention which had one separate provision on attempted escape (Article 51), and one provision (Article 52) on the exercise of leniency, in general, and in appraising facts in connection with escape, in particular, the ICRC “thought it advisable to merge into one single Article the stipulations of the former Art. 51 and 52, with the exception of Section 3 of Art. 52 [*non bis in idem*]”.⁵³ As this formulation could give the impression that the exercise of leniency would be mainly applicable in regard to offences connected with escape,⁵⁴ the special commission recommended that leniency “should apply to the whole Chapter, and therefore reflected it in a new separate article”.⁵⁵ The importance of the general application of leniency was so obvious that during the discussion on the applicable law, the delegate of the United Kingdom requested its inclusion in the provision of applicable law by stating that:

Article 52 of the Convention of 1929 ... was precisely an Article included in the “General Provisions” of Chapter III ... it [is] logical to maintain this rule and to write in the same Article [on applicable law] the principles of the limitation of legislation and the leniency in appreciating the question whether a breach committed by a prisoner of war should involve a disciplinary or a judicial penalty.⁵⁶

In response, the ICRC delegates recommended not including the reference to leniency in that article because it should “be limited to ‘*droit applicable*’”.⁵⁷ Finally, Article 83 as a new article, titled “Choice of Disciplinary or Judicial Proceedings”, was adopted unanimously.⁵⁸ In this way, the exercise of the greatest leniency as a separate independent obligation of conduct⁵⁹ entered into GC III, and its placement at the beginning of Chapter III as well as its

52 1949 Diplomatic Conference, above note 8, Vol. II, p. 303.

53 The records do not contain the reasons why the ICRC found such a formulation advisable. See ICRC, Draft Revised or New Conventions for the Protection of War Victims Established by the International Committee of the Red Cross with the Assistance of Government Experts, National Red Cross Societies and Other Humanitarian Associations, ICRC, May 1948 (ICRC Draft to the 17th International Red Cross), pp. 110–11.

54 Article 83 of the draft convention, adopted by the 17th International Red Cross Conference in Stockholm of August 1948 to be submitted to 1949 Diplomatic Conference, read as follows: “Escape, or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance... *Belligerents shall see that the responsible authorities exercise the greatest leniency in deciding whether an infraction committed by a prisoner of war shall be punished by disciplinary or judicial measures, particularly in respect of acts committed in connexion with the escape, whether successful or not ...*” In Revised and new Draft Conventions for the protection of war victims: texts approved and amended by the XVIIth international Red Cross Conference, Revision of the Convention Concluded at Geneva on July 27, 1929, Relative to the Treatment of Prisoners of War, ICRC, 1948, p. 85 (emphasis added).

55 1949 Diplomatic Conference, above note 8, Vol. II, p. 304.

56 *Ibid.*, p. 484.

57 *Ibid.*

58 *Ibid.*, p. 500.

59 Commentary, above note 15, on Art. 83, para. 3588.

formulation in a distinct article reinforces its application to the whole Chapter on penal and disciplinary sanctions.

The implications of the obligation to exercise the greatest leniency

The provisions of Chapter III of GC III prescribe the obligations of the Detaining Power with respect to disciplinary and criminal procedures as well as sanction measures taken against PoWs. These obligations are formulated to safeguard the life and wellbeing of accused and convicted PoWs. These provisions encompass general and specific protections applicable during pre-trial, trial and post-trial stages of judicial/disciplinary proceedings. In this regard, Article 83 has a special function since it also addresses an obligation of the detaining authorities before instituting any procedure. Having this in mind, in the first section, we briefly discuss the differences between judicial and disciplinary processes as well as the reasons why the latter should in general be preferred. In the next sections, the paper analyses the safeguards provided for PoWs during proceedings or under punishment and discusses how the obligation to exercise the greatest leniency will influence their interpretation and application. It will be argued that while most of the safeguards in Chapter III, as well as general obligations, like humane treatment, reflect the minimum standards, the leniency consideration in essence is an appeal to go further than this threshold.

General preference for disciplinary proceedings

GC III does not predetermine the choice of proceedings in all cases, yet for certain offences⁶⁰ it provides that only disciplinary sanctions can be applied. For other offences, leniency considerations, as reflected in Article 83, call the Detaining Power to adopt disciplinary measures wherever possible. This formulation may suggest that the drafters of the Convention gave a general preference to disciplinary procedures.

Generally, it is accepted that it is the nature of the alleged offence that determines the choice of proceedings and, thus, as mentioned in the ICRC Commentary on Article 82, “disciplinary measures cover minor offences that can be imposed by a camp commander without a trial, whereas judicial measures are taken in response to more serious, criminal offences after trial proceedings”.⁶¹ In

60 For example, Article 82(2) instructs the Detaining Power to assure that sanctioning the violations of the rules which are enacted to ensure the order in the camp are only through disciplinary measures. Also, Articles 92 and 93 on unsuccessful escape and connected offences. Examples of other offences that are not listed explicitly in the Convention, especially under Article 93(2), but that may equally give rise to disciplinary sanctions only, are the use of forgeries (e.g. counterfeit money), violations of traffic regulations, the abandonment of military equipment, or bribery, as long as they are committed with the sole intent of facilitating the escape. Commentary, above note 15, on Art. 93, para. 3862.

61 *Ibid.*, commentary on Art. 82, para. 3573. According to Article 96(2), disciplinary punishments may be imposed by superior military authorities, the camp commander, a responsible officer according to the

this regard, it is important to note that the part of Article 83 addressing the choice of proceedings based on leniency considerations has a limited scope compared with Article 52 of the 1929 Convention,⁶² because the former subjects the choice of disciplinary measures to “wherever possible”. However, this discretion granted to the Detaining Authority should be always be applied in a lenient way.⁶³ In other words, the adoption of disciplinary measures, in principle, seems to be possible except where the applicable law, in a specific manner, restricts the authorities from choosing measures other than judicial proceedings and sanctions.⁶⁴

Having said that, as will be discussed in the following sections, the rights and guarantees available for PoWs in disciplinary procedures compared with those provided for judicial proceedings are minimal.⁶⁵ This is why the Commentary argues that certain aspects of judicial proceedings could make them more lenient to an accused prisoner.⁶⁶ On this basis, the ICRC provides that in the implementation of the rule contained in Article 83 and to ensure the exercise of the greatest leniency, in each case the competent authorities of the Detaining Power will need to determine “whether judicial or disciplinary proceedings are more lenient”.⁶⁷ In other words, when the Convention does not specifically call for disciplinary punishments,⁶⁸ and it is obvious that judicial proceedings result in more respect for fair trial standards, the obligation to ensure the exercise of the greatest leniency may result in choosing the judicial proceedings. Of course, such a decision is only warranted when the impossible penal punishments foreseen under the domestic law are not more severe than the disciplinary measures prescribed under Article 89(1).

established rules, an officer to whom the camp commander has delegated such a power, or in some occasions, by courts.

62 Article 52 did not refer to “proceedings”; rather it used the phrase “punished by disciplinary or by judicial measure”. In this regard it is important to note that the French version of Article 52 used the phrase “être punis disciplinairement ou judiciairement” which is exactly the same as the French version of the first part of Article 83 addressing the exercise of leniency in deciding the kind of “proceedings”. The two ICRC commentaries emphasize that both English and French versions must be interpreted as requiring leniency in the case of both proceedings and punishments. Commentary, above note 15, on Art. 83, para. 3593; 1960 Commentary, above note 13, on Art. 83, p. 410. Thus, it can be argued that Article 52 of the 1929 Convention by using the term “measure” addressed both proceedings and sentences. See, also, military manuals of different countries, for example, Rule 9.26.2, Leniency in Favor of Disciplinary Rather Than Judicial Proceedings, *U.S. Department of Defense Law of War Manual*, 2015, p. 617; Rule 8.116, *UK Manual of the Law of Armed Conflict (JSP 383)*, 2013, p. 187.

63 It is noteworthy that the principle of *in dubio pro reo*, known in the common law doctrine as the “rule of lenity”, also directs courts to construe ambiguities in favour of criminal defendants. See, for example, Zachary Price, “The Rule of Lenity as a Rule of Structure”, *Fordham Law Review*, Vol. 72, No. 4, 2004, p. 885.

64 An example can be the case of mandatory sentencing provided by law for a specific crime limiting the discretion of competent authorities. For further details, see Anthony Gray, “Mandatory Sentencing Around the World and the Need for Reform”, *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol. 20, No. 3, 2017.

65 In the same vein, while Article 15 of the U.S. Uniform Code of Military Justice authorizes the commander to opt for non-judicial punishment, a soldier can refuse it and instead demand trial by court-martial. U.S. Congress, 1958, United States Code: Uniform Code of Military Justice, 10 U.S.C. §§ 801–940.

66 Commentary, above note 15, on Art. 83, para. 3594.

67 *Ibid.*, para. 3595.

68 For example, GC III, Arts 82(2) and 93(2).

Applicable legal regime

GC III provides that PoWs shall be subject to the laws, regulations and orders *in force in the armed forces of the Detaining Power*⁶⁹ until the captivity ends.⁷⁰ This provision, the so-called “principle of assimilation”, first appeared in the Hague Regulations of 1899 and 1907⁷¹ and the 1929 Convention reconfirmed it.⁷² This principle, as described in the Commentary, “seeks to avoid prisoners of war being placed in a less favourable position than members of the armed forces of the Detaining Power”.⁷³ Here, it is worth mentioning that the application of GC III is not limited only to nationals of the parties to the conflict; rather, it will be applied to all those who are members of one party’s armed forces. The Commentary on Article 87 confirms this by interpreting the lack of duty of allegiance of PoWs as owing “fidelity and obedience not to the Detaining Power, but to their country of origin”.⁷⁴ In the ICRC view, the “country of origin” means the Power on which the prisoner “depends”, and not the Power of nationality.⁷⁵ This interpretation, despite the clear reference to nationality in Articles 87(2) and 100(3) of GC III, does not enumerate nationality as a factor for granting PoW status under Article 4 of GC III. The Commentary on Article 4, by using the term “clemency”, seems to apply the leniency considerations to expand the protective power of the Convention to PoWs with dual nationality⁷⁶ or those who are nationals of the Detaining State.⁷⁷ The Commentary emphasizes that Articles 87 and 100 “encourage *clemency* in these circumstances, given that each Party to a conflict requires the allegiance of its armed forces and, therefore, prisoners of war should not be punished for their allegiance to the State on which they depend”.⁷⁸

The application of the principle of assimilation, as explained by the Commentary, “constitutes one, but not necessarily the governing, benchmark for determining the judicial and disciplinary treatment owed to prisoners of war”.⁷⁹ Hence, while any offence committed by a PoW shall be sanctioned by measures in accordance with the domestic laws, regulations and orders of the Detaining

69 GC III, Art. 82(1) (emphasis added).

70 Sandra Krähenmann, “Protection of Prisoners in Armed Conflict”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed., Oxford University Press, Oxford, 2021, p. 439.

71 Hague Conventions, Art. 8.

72 1929 Convention, Art. 45(1).

73 Commentary, above note 15, on Art. 82, para. 3565.

74 *Ibid.*, commentary on Art. 87, para. 3679.

75 *Ibid.*, commentary on Art. 4, para. 971.

76 *Ibid.*, para. 973.

77 For a detailed historical analysis of this phenomenon, see Arnold Krammer, *Prisoners of War: A Reference Handbook* (Contemporary Military, Strategic, and Security Issues), Greenwood Publishing Group, Westport, CT, 2008, pp. 9–11.

78 Commentary, above note 15, on Art. 4, para. 971 (emphasis added). The Commentary elaborates further that “granting prisoner of war status to a State’s own nationals does not exclude the possibility of prosecuting such individuals for treason, meaning that there is no need to deny such status in order to punish this or similar acts”. *Ibid.*, para. 972. See, also, Howard S. Levie, Preliminary Problems, in “Prisoners of War in International Armed Conflict”, *International Law Studies*, Vol. 59, 1978, p. 76.

79 Commentary, above note 15, on Art. 82, para. 3577.

Power in force at the time of the offence was committed,⁸⁰ such application is not unconditional. As the second part of Article 82(1) stipulates, only proceedings or punishments that are compatible with the provisions of Chapter III of the Convention shall be allowed.⁸¹ In other words, irrespective of whether the legal system of the Detaining Power can be categorized as monist or dualist,⁸² in cases where domestic laws are not compatible with the requirements of this Chapter, the Detaining Power is requested to directly apply the provisions of the Convention.⁸³ This, however, does not mean that if domestic laws provide for more protection than what is accorded to PoWs under international law, the application of domestic law will be suspended. The provisions of GC III are aimed to ensure the international minimum standards of treatment of PoWs, acknowledging the fact that national laws may vary widely.⁸⁴ Thus, as explained by the ICRC, the last sentence of Article 82(1) “indicates an upward exemption to the principle of assimilation” so as to bar the application of domestic laws that fall below the minimum standards set by these provisions, “not if they go beyond them and provide for greater protection”.⁸⁵ Moreover, although the text of this Article only refers to the provisions of one Chapter, it cannot be read as releasing the Detaining Power of its general obligations under the other provisions of the Convention, and, first and foremost, the general obligation to treat PoWs humanely *at all times* under Article 13(1). In other words, the obligation to provide humane treatment at all times will prevail over the principle of assimilation if national legislation does not guarantee humane treatment of the Detaining Power’s own forces. The Commentary emphasizes that the term “at all times” has to be read in an inclusive way in order to exclude any argument against this provision including any justification of acts or omissions inconsistent with the requirements of humane treatment.⁸⁶

80 GC III, Art. 82(1).

81 For example, in the defence doctrine of Australia, it is provided that “The types of disciplinary punishments available are set out in G.[C] III. The duration of any punishment cannot exceed 30 days.” Australian Defence Force, Australian Defence Doctrine Publication 06.4 (ADDP 06.4): Law of Armed Conflict, para. 10.52, 10–12.

82 For further discussion, see Philip Allott, “The Emerging Universal Legal System”, in Janne E. Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law*, Oxford University Press, Oxford, 2007.

83 Whenever the laws and regulations of the Detaining Power do not provide disciplinary sanctions compatible with Article 89, the detaining authority is required to directly apply this Article and choose disciplinary sanctions from its list. Commentary, above note 15, on Art. 89, para. 3743.

84 For further discussion, see *ibid.*, on Art. 82, para. 3575.

85 *Ibid.*, para. 3577.

86 *Ibid.*, commentary on Art. 13, para. 1580. In the same vein, the Human Rights Committee confirmed that the principle of humane treatment applies to all times and situations and is a non-derogable obligation. General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001 (General Comment 29), para. 13(a). Other international obligations of the Detaining State, including those under applicable human rights treaties, have to be also taken into account. See Daragh Murray, “Prisoners of War and Internment”, in Daragh Murray (author), Elizabeth Wilmshurstin, Françoise Hampson, Charles Garraway, Noam Lubell and Dapo Akande (eds), *Practitioners’ Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016. For a detailed analysis of the influence of human rights obligations on military disciplinary process, see

Another point regarding the application of domestic laws is about laws enacted specifically for PoWs. Article 82 in its second paragraph contains an important limitation in enforcing the laws of the Detaining Power that are specifically enacted for PoWs. No similar provision existed in the 1929 Convention. The experience of the Second World War, when certain Detaining Powers enacted special legislation for PoWs and imposed heavy penalties for their violations, led the drafters to include this provision as a necessary safeguard.⁸⁷ Article 82(2) instructs the Detaining Power not to sanction the violation of these specifically designated regulations by penal punishments. In this way, Article 82(2), which is also derived from leniency considerations, in the words of the Commentary “goes further than the general leniency clause set out in Article 83, as it excludes the option of imposing penal sanctions for offences that can only be committed by prisoners of war”.⁸⁸

PoWs can also be prosecuted under the laws of the Detaining Power for the acts committed before their capture, but according to Article 85 they retain, even if convicted, the benefits of the Convention. Retaining the benefits of the Convention would mean that prior acts which were compatible with IHL,⁸⁹ such as targeting military objectives, cannot be prosecuted by the Detaining Power even if they are considered as a breach of its laws.⁹⁰ Moreover, apart from the rules of the national law, the benefits that are prescribed by GC III, such as the general rule of exercising leniency under Article 83 and the provision of Article 102, requiring the PoWs to be tried by the same courts and according to the same procedures of the armed forces of the Detaining Power, must also be applied when the Detaining Power is prosecuting PoWs for offences committed before their capture.⁹¹

Article 85 should be read in conjunction with the principle of legality. This principle, first, prohibits the imposition of a penalty that was not foreseen at the time the crime was committed, as enshrined in Article 87(1), and second, it establishes that no one may be held responsible for a crime on account of an act or omission that did not constitute a criminal offence under domestic or international law, as

Peter Rowe, “Human Rights and the Disciplinary Process”, in P. Rowe, *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2005.

87 Commentary, above note 15, on Art. 82, para. 3579.

88 *Ibid.*, para. 3581.

89 Commentary refers to this category as “combatant immunity” or “combatant privilege”. *Ibid.*, commentary on Art. 85, para. 3634.

90 See, also, Peter Rowe, “The Trial of Prisoners of War by Military Courts in Modern Armed Conflicts”, in C. Harvey, J. Summers and N. White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe*, Cambridge University Press, Cambridge, 2014, p. 326.

91 This emphasis is important since at the time of the adoption of GC III, practice existed to deprive PoWs from the benefits of the Convention for offences committed “before” becoming a PoW. See 1960 Commentary, above note 13, on Art. 85, p. 423. See also the *Yamashita* case in which the US Supreme Court held that the corresponding provision to Article 102 in the 1929 Convention about “same court”, “same procedure” was not applicable to those accused of war crimes because the Article was directed “for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant”. *Yamashita* case, 317 U.S. 1; 66 S. 340, Judgment, 4 February 1946, para. 4(b), p. 20. Levie argues that in adopting Article 85, the drafters aimed to depart from the finding in the *Yamashita* case. H. S. Levie, above note 23, pp. 463–4. The implications of GC III, Art. 102 are discussed in the “Exercising leniency during the proceedings” section.

expressed in Article 99(1). The reference to international law in Article 99(1) demonstrates that PoWs may be prosecuted for a crime even if the conduct in question was not prohibited under the domestic law of the Detaining Power at the time of the act.⁹² However, the benefits of GC III, including the application of leniency considerations, in cases where PoWs are prosecuted or sentenced under international law for pre-capture offences will be retained.⁹³

The Convention does not address the case of disparities between domestic law and international law beyond the minimum provisions mentioned thereto. This may arise specially for the prosecution of international crimes. For example, if the domestic law of the Detaining Power criminalizes the recruitment of children under 18 years old, while the age limit under customary international law is 15 years old,⁹⁴ it will not be clear whether the rules of international law should prevail or the domestic law. The answer to this question is not straightforward but may be inferred from the application of the principle of legality. This principle requires that the laws in force be reasonably foreseeable to the accused at the time the act or omission took place.⁹⁵ Foreseeability of a crime for an accused would mean that the person must be able “to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.⁹⁶ For these reasons, the Commentary, while emphasizing that Article 99(1) “does not provide an accused prisoner of war with a defence to plead ignorance of the law”,⁹⁷ considers it to be implicit in the principle of legality that

92 Commentary, above note 15, on Art. 99, para. 3959.

93 See H. S. Levie, above note 23, pp. 464–5; Commentary, above note 15, on Art. 85, para. 3629. The review of the historical context of Article 85 shows that one of the underlying reasons for its adoption was to ensure the continued application of the Convention for those prosecuted and convicted for international law crimes. During the Second World War, and in the absence of any explicit reference on the subject in the 1929 Convention, many national courts prosecuting PoWs for alleged war crimes on the basis of international law had announced “[i]t is a recognised rule that a person accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war by ... Convention of 1929.” United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1947–1949, London, 1948, Vol. III, p. 50. The French Court of Appeal in 1946, as a corollary to this rule, held that Robert Wagner, the German head of government of Alsace, was not entitled to the rights provided for a PoW under French Law. See *Trial of Robert Wagner*, in *ibid.* The same considerations led the following States to formulate reservations to exclude PoWs convicted for war crimes and crimes against humanity from the scope of Article 85: Angola, China, the Democratic People’s Republic of Korea, the Russian Federation and Vietnam. See Commentary, above note 15, paras 3642–6.

94 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule136 Rule 136, Recruitment of Child Soldiers.

95 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise* (Appeals Chamber), 21 May 2003, para. 37.

96 European Court of Human Rights, *Cantoni v. France*, Application No. 17862/91, Judgment (Grand Chamber), 15 November 1996, para. 35. See also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Enver Hadžihasanović, Mehmed Alagic and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Appeals Chamber), 16 July 2003, para. 35. For further discussion, see Alexandre Skander Galand, “Article 13 (b) vs Principle of Legality”, in A. S. Galand, *UN Security Council Referrals to the International Criminal Court*, Brill, Leiden, The Netherlands, 2019, p. 144.

97 Commentary, above note 15, on Art. 99, para. 3963.

such laws should be reasonably foreseeable to the accused PoW.⁹⁸ The Commentary does not elaborate what “reasonably foreseeable” means; however, it can be argued that if customary international law does not prohibit an act, it is difficult to say that the law of the Detaining Power providing for a different threshold than what is foreseen under international law is reasonably foreseeable to a PoW.

In practice, the prosecution of PoWs for prior offences may raise several legal and political challenges. For example, the trials of 195 Pakistani PoWs handed over by India to Bangladesh for acts of genocide and crimes against humanity were never held, as an agreement was reached between India, Pakistan and Bangladesh (through the Indian negotiator) for the release of accused PoWs for the future recognition of Bangladesh.⁹⁹ The other case concerns the captivity of Captain Alfredo Astiz during the Falkland Islands/Islands Malvinas conflict. While in the hands of the UK as a PoW, Astiz was charged by France and Sweden for the kidnapping and torture of hundreds of civilians, not at the time of the conflict but before the outbreak of hostilities.¹⁰⁰ The UK did not initiate any proceedings against him not only because the alleged conduct occurred outside the context of the battlefield, but also because “[t]he fact that Astiz was under British control solely because of his capture during armed conflict might lend support to the view that he should be dealt with more leniently”.¹⁰¹ Thus, despite the request for his extradition, the UK repatriated him to Argentina.¹⁰²

Another well-known example is the case of Manuel Noriega who was detained as a PoW in 1990. He was charged with drug trafficking offences before the outbreak of armed conflict between the United States and Panama. The US court’s explanation for the non-relevance of leniency considerations in the evaluation of his offences is revealing:

The humanitarian character of the Geneva Convention cannot be overemphasized, and weighs heavily against Defendants’ applications to the Court. GC III was enacted for the express purpose of protecting PoWs from abuse after capture by a detaining power. The essential principle of *tendance liberale*, pervasive throughout the Convention, promotes lenient treatment of PoWs on the basis that, not being a national of the detaining power, they are not bound to it by any duty of allegiance. Hence, the “honorable motives” which may have prompted his offending act must be recognized ... That such motives are consistent with the conduct and laws of war is implicit in the principle. Here, the Government seeks to prosecute Defendants for alleged narcotics trafficking and other drug-related offences, activities which

98 *Ibid.*, para. 3962.

99 Pakistan even filed a dispute at the International Court of Justice which was later discontinued. See International Court of Justice, *Trial of Pakistani Prisoners of War*, Order of 15 December 1973, *ICJ Reports* 1973, p. 347. For further discussion, see Donald N. Zillman, “Prisoners in the Bangladesh War: Humanitarian Concerns and Political Demands”, *The International Lawyer*, Vol. 8, No. 1, 1974.

100 Michael A. Meyer, “Liability of Prisoners of War for Offences Committed Prior to Capture: The Astiz Affair”, *International and Comparative Law Quarterly*, Vol. 32, No. 4, 1983, pp. 952–3.

101 *Ibid.*, p. 963.

102 *Ibid.*, p. 954.

have no bearing on the conduct of battle or the defense of country. The fact that such alleged conduct is by nature wholly devoid of “honorable motives” renders *tendance liberale* inapposite to the case at bar.¹⁰³

Exercising leniency during the proceedings

GC III, as discussed above, regulates the proceedings against PoWs in two cumulative ways: the principle of assimilation, together with prescribing the minimum standards that should be applied independently of the laws and regulations of the Detaining Power. The principle of assimilation was integrated, *inter alia*, to overcome the need of establishing a detailed code of punitive procedures for PoWs.¹⁰⁴ Through this principle, developments in international law, including in human rights law, since the adoption of the Geneva Conventions will be applicable to the proceedings against PoWs.¹⁰⁵ With this in mind, this section reviews the rules in the Convention applicable to disciplinary and penal proceedings and the possible instances of the application of the obligation to exercise leniency.

The first provision regarding procedural issues can be found in Article 84, placed in the general provisions of the Chapter on judicial and disciplinary measures that establishes the competence of military courts for the trial of PoWs. This Article also permits PoWs trial in civilian courts only in accordance with the principle of assimilation, meaning only when such jurisdiction has been expressly granted to civilian courts to try the members of the armed forces of the Detaining Power for the same offence.¹⁰⁶ The presumption in favour of the competence of military courts for PoWs *with combatant status* can be explained by the fact that “the military courts of that State ... possess the necessary expertise to deal with any alleged offence the prisoners might commit against ... [military] laws”.¹⁰⁷ It can also be added that the military experience of the judges and their familiarity with military honours and loyalty may make the exercise of leniency even more possible. This is because a PoW is “subject more than anyone else to the

103 *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), Opinion: Omnibus Order, William M. Hoeveler, United States District Judge, No. 88-79-CR, 8 June 1990, at 1529.

104 Commentary, above note 15, on Art. 103, para. 4022.

105 See, for example, General Comment 29 stating that “fundamental principles of fair trial” may never be derogated from (above note 86, paras 11 and 16); also, General Comment no. 35 of the Human Rights Committee stating that the “procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights”. Human Rights Committee, General Comment No. 35. Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35, 16 December 2014, para. 67.

106 Commentary, above note 15, on Art. 84, para. 3596. For example, in 1996, amendments were made to the Guatemalan Military Code limiting the jurisdiction of military tribunals to strictly military offences, and granting the ordinary courts jurisdiction over ordinary offences committed by military personnel. Military Code (Decree No. 214 - 1878/09/15. Last amendment: Decree No. 41-96 - 1996/07/10), Art. 1. See also principle 4 of the draft principles governing the administration of justice through military tribunals in the Report submitted by the Special Rapporteur, Emmanuel Decaux, Administration of Justice, Rule of Law and Democracy, Issue of the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/Sub.2/2005/9, 16 June 2005.

107 Commentary, above note 15, on Art. 84, para. 3600.

influences which are generally recognized as extenuating circumstances: extreme distress, great temptation, anger or severe pain”,¹⁰⁸ and a judge with a military background may better understand the special situation of PoWs as prescribed by Article 87(2).

The provision of Article 84 has to be read together with Article 102, which expressly mentions that the courts and the procedures for PoWs should be the “same” as in the case of members of the armed forces of the Detaining Power.¹⁰⁹ The principle of assimilation in regard to the courts and procedures, like other provisions of the Convention, is subject to observing the minimum requirements set by GC III. In this regard, Article 84(2) prohibits, in absolute terms, the trial of PoWs in any court that does not comply with the requirements of independence and impartiality or proceeds under procedures that fail to afford the accused the rights and means of defence provided in Article 105. These requirements are aimed to ensure fair trial of PoWs. The requirement of independence refers, in particular, to procedures and qualifications for the appointment of judges, and the actual independence of the judiciary from political interferences.¹¹⁰ The requirement of impartiality indicates that judges should be free of “personal bias or prejudice, nor harbour preconceptions” (the subjective element), and that the general appearance of the court is also seen impartial (the objective element).¹¹¹ While enacting effective and appropriate laws and regulations may ensure the independence and the objective impartiality of the courts even during the time of armed conflict, it is difficult for a national judge to be always free of any hostile feelings against an enemy combatant who will be judged by him/her. Here lies the value of ensuring general positive discrimination against PoWs by commending the exercise of the greatest leniency.

108 1960 Commentary, above note 13, on Art. 83, p. 411.

109 By using the term “same court”, the Convention bans the establishment of an *ad hoc* court only to try PoWs, which, in the ICRC view, is “an essential safeguard against arbitrary action by the Detaining Power”. Commentary, above note 15, on Art. 102, para. 4010. Similarly, the term “same procedure” means that a special procedure may not be set up for PoWs depriving them of the rights and means of defence enjoyed by the members of the Detaining Power’s own forces. *Ibid.*, commentary on Art. 84, para. 3617. The use of the generic term “same procedure” in this Article cannot be only limited to the sentencing stage of judicial proceedings. In the ICRC view, for the purpose of application of the principle of assimilation, “procedural rights under domestic law that are available to one’s own forces during and prior to trial must also be afforded to prisoners of war”. *Ibid.*, commentary on Art. 102, para. 4012. This would consequently bring into play the applicable human rights law during the investigation process. The application of the principle of fair trial to the proceedings as a whole, and not only the trial, is endorsed in Human Rights Committee, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR/C/GC/32, 23 August 2007 (General Comment 32). See, also, European Court of Human Rights, *Negulescu v. Romani*, Application no. 11230/12, Judgment, 16 February 2021, paras 39–42.

110 General Comment 32, *ibid.*, para. 19. See, also, Mechanism for International Criminal Tribunals, *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay (Appeals Chamber), 31 January 2017, para. 11.

111 General Comment 32, above note 109, para. 21. See also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Appeal Judgment (Appeals Chamber), 21 July 2000, para. 189.

Article 100(3) regarding the issuance of the death sentence against PoWs should also be read and understood on the basis of the above consideration. This Article provides that unless the court’s attention has been drawn to the particular situation of a PoW, the death sentence should not be pronounced. It is said that this Article, reiterating the provision found in Article 87(2), provides extenuating circumstances for the reduction of the punishment.¹¹² On this basis, it can be argued that the consideration of the particular situation of a PoW in issuing the death sentence can be also seen as a necessary element in ensuring the impartiality of the court.

In addition to the requirements of independence and impartiality, Article 84(2) also prohibits a trial process that takes place without respecting the rights and means necessary for an accused PoW to conduct a proper defence. These rights, as enumerated under Article 105, are the right to have an assistant, to have an advocate or counsel to defend, to call witnesses, to have the services of a competent interpreter, to be informed in due time about his/her rights, to be informed of the charges and other relevant documents, as well as supervision of the trial by the Protecting Power.¹¹³

Although Article 105 is silent about its application to the appeal process, it is logical to assume that such guarantees and means of defence should be available as well during the appeal proceedings otherwise the process will be devoid of real meaning.¹¹⁴ It is important to note that Article 106 provides that PoWs shall have the right of appeal or petition “*in the same manner as the members of the armed forces of the Detaining Power*”.¹¹⁵ The Commentary, however, submits that the right to appeal is a substantive right and a fundamental procedural guarantee of international law that must be available to PoWs,¹¹⁶ at all times irrespective of the domestic laws applicable to the members of the armed forces of the Detaining Power.

Furthermore, while Article 106 is silent about the application for pardon, in line with the principle of assimilation and the exercise of leniency towards PoWs, the Commentary reflects and endorses the State practice of interpreting the term

112 1960 Commentary, above note 13, on Art. 100, p. 474; and Commentary, above note 15, on Art. 100, para. 3990.

113 This Article, however, is silent about the presence of the PoW at one’s own trial. Yet, Article 99(3), in enumerating the general principles applicable to judicial procedure, commends that no PoW can be convicted “without having had an opportunity to present his defence...”, which suggests that the presence of the accused in the trial is necessary. Commentary, above note 15, on Art. 99, para. 3977, and on Art. 105, para. 4101.

114 *Ibid.*, commentary on Art. 106, paras 4142 and 4149

115 Not all the countries at the time of the adoption of GC III had foreseen the right of appeal for their armed forces; for example, see Canadian Law Concerning Trials of War Criminals by Military Courts, 31 August 1946, in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1947–1949, London, 1948, Vol. IV, p. 130. Emphasis added.

116 Commentary, above note 15, on Art. 106, para. 4152. GC III does not encompass any explicit right to appeal from disciplinary measures. Yet, Article 96(5) stipulates that a record of disciplinary punishments shall be maintained for the inspection by representatives of the Protecting Power. Reviewing how the camp commanders exercise their disciplinary powers is, therefore, an essential tool of oversight of the administration of PoW camps.

“petition” in Article 106 as including application for various forms of clemency existing in the legal system of the Detaining Power.¹¹⁷

The provisions of Article 84 regarding essential requirements of impartiality and independence, as well as the rights and means of defence and other safeguards,¹¹⁸ not only extend to trial but should also apply to pre-trial investigations.¹¹⁹ Therefore, although Article 103 does not entail any specific requirement regarding investigation except that it should be conducted rapidly, the minimum standards of fair trial as well as general obligations under the Convention, such as the principle of legality as well as leniency considerations, should be taken into account. Moreover, the prohibition of any form of moral or physical coercion upon PoWs in order to induce confession, as reflected in Article 99(2), should also be respected during the investigations both in judicial and disciplinary procedures.¹²⁰

GC III does not elaborate on how investigation in disciplinary procedures should be carried out. The ICRC commentaries consider such an investigation as “proper determination of facts”.¹²¹ According to Article 96(4) the accused PoW should be provided with the opportunity of not only “defending himself” but also “explaining his conduct”. Assumably the latter goes beyond providing a legal defence; hence, it can be argued that the “proper determination of facts” may include the consideration of the special situation of the accused PoW that calls for a more lenient approach. This reading can be understood from Article 52(2) of the 1929 Convention which expressly calls for the exercise of leniency “*in appraising facts* in connexion with escape or attempted escape”.¹²²

Exercising leniency in sentencing and executing disciplinary and penal measures

Article 87(2) justifies the implementation of leniency considerations in fixing penalties. This justification derives from the fact that a PoW is not bound to the Detaining Power by any duty of allegiance. Moreover, this Article emphasizes that a PoW is in the hands of the Detaining Power against his/her independent

117 *Ibid.*, commentary on Art. 106, para. 4158.

118 Other safeguards are the conditions of validity set in Article 102 of GC III. See, also, Noam Lubell, Jelena Pejic and Claire Simmons, “Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice”, Geneva Academy of International Humanitarian Law and Human Rights and ICRC, Geneva, September 2019, Guideline 11, paras 154–6.

119 Commentary, above note 15, on Art. 103, para. 4027.

120 According to the ICRC, the coercion in the context of Article 99(2) differs from the notion of torture since, among others, “the conduct constituting coercion does not necessarily need to cause pain or suffering to meet the required threshold of severity for it to constitute torture”. *Ibid.*, commentary on Art. 99, para. 3972.

121 *Ibid.*, commentary on Art. 96, para. 3898; 1960 Commentary, above note 13, on Art. 96, p. 458. GC III, Articles 95 and 96 provide the minimum standards of due process by limiting the instances of PoWs’ confinement awaiting hearing, prescribing an immediate investigation, designating the competent authority and enumerating the means of defence available to the accused.

122 GC III further enumerates certain rights of the accused during the disciplinary procedures such as the right to receive information regarding the alleged offence, and the opportunity to defend, including by calling witnesses, as well as having recourse to an interpreter. GC III, Art. 96(4) (emphasis added).

will. As a result, the courts and competent authorities of the Detaining State are allowed to reduce the penalty for a particular violation or crime to less than the minimum punishment foreseen for members of their armed forces. Additionally, as discussed above, the Convention provides that the Detaining Power in implementing the principle of assimilation is not permitted to impose sanctions and penalties on PoWs in contrast with the provisions of the Convention including Article 13(1). In this section, the impact of leniency considerations in sentencing and executing penalties will be examined. Before doing so, it is important to recall that the domestic laws and regulations that differ from the provisions of GC III prevail whenever these regulations provide for greater protection.¹²³

General and specific provisions on penal and disciplinary sanctions

Article 87(3) lays down the most important general prohibitions in fixing and implementing the sanctions. This provision prohibits collective and corporal punishments, imprisonment in premises without daylight, and any form of torture or cruelty in relation to PoWs regardless of whether the punishment in question is penal or disciplinary. These prohibitions also apply regardless of the existence of such penalties in the domestic law of the Detaining Power.

The other important principle that applies to both penal and disciplinary punishments is the principle of *non bis in idem* or prohibition against double jeopardy for the same act or on the same charge pursuant to Article 86. As provided in Article 75(4)(h) of the 1977 Additional Protocol I as well as other international treaties,¹²⁴ the principle of *non bis in idem* applies to conviction or a final acquittal. It also bans the imposition of further penalty on a PoW who had already served the term of his/her sentence.¹²⁵ The principle of *non bis in idem* arguably is limited to multiple prosecutions by the “same Party” under “the same law and judicial procedure” of the same sovereign State, which seems to exclude any inter-State effect of that principle. But this may lead to numerous practical problems in the case of PoWs who may be subject to transfer to another belligerent or a neutral State.¹²⁶ Therefore, in the case of transfer, there is a high possibility that a convicted or acquitted PoW faces a new sentence for the same

123 Commentary, above note 15, on Art. 82, para. 3577. See also the “Applicable legal regime” section.

124 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978). For other treaties see, for example, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171 (entered into force 23 March 1976), Art. 14(7); Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117 (entered into force 1 November 1988), Art. 4; Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 (entered into force 1 July 2002), Art. 20.

125 GC III, Art. 88(4). This provision which bans any form of discriminatory treatment with PoWs who have completed their sentences is rooted in Article 16 of GC III. Such a reading, in accordance with the Commentary, “accords with both the law and principles of equity”. Commentary, above note 15, on Art. 88, para. 3734.

126 GC III, Art. 12(2).

act. Following this consideration, “it has been argued that the *non bis in idem* rule should, in principle, apply to attempts by courts of different States to prosecute the same person for the same act, no less than it applies to such attempts by the courts of a single State”.¹²⁷ This argument, which in principle requires a State not to exercise its sovereign (judicial) power, is only justified by exercising the greatest leniency towards PoWs. In other words, it is only based on the leniency considerations that States can be requested not to exercise their sovereign power and adhere to *non bis in idem* in inter-State relations.

Specific provisions of GC III on penal and disciplinary sanctions in some cases, on the basis of leniency considerations, require the Detaining Power to punish a violation only through disciplinary measures.¹²⁸ This, in particular, includes those acts committed by PoWs that are not punishable if committed by a member of the armed forces of the Detaining Power,¹²⁹ or acts such as unsuccessful escape,¹³⁰ facilitating an escape,¹³¹ aiding or abetting an escape,¹³² and an attempt to escape.¹³³ These offences, as well as other disciplinary offences, are only punishable by the list of sanctions mentioned in Article 89. This Article provides an exhaustive list of possible disciplinary punishments. The ICRC Commentary describes this Article as an “important innovation [of] a limitative enumeration of the various forms of disciplinary punishments applicable to prisoners”.¹³⁴ This is because prior to 1949 and even today¹³⁵ there exists a divergence in the systems of disciplinary sanctions imposed on armed forces of different States. This uncertainty on the concept and domain of disciplinary

127 Commentary, above note 15, on Art. 86, para. 3659. See, also, Christine Van den Wyngaert and Guy Stessens, “The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions”, *International and Comparative Law Quarterly*, Vol. 48, No. 4, 1999.

128 According to Article 96(2), disciplinary punishments may be imposed by superior military authorities, the camp commander, a responsible officer according to the established rules, an officer to whom the camp commander has delegated such a power, or on some occasions, by courts.

129 GC III, Art. 82(2).

130 GC III, Art. 92(1). In the case of successful escape when the person is recaptured, pursuant to Article 91(2), he/she should benefit from the privilege of impunity and shall not be liable to any punishment in respect of the previous escape. In this respect, the Commentary argues that “it seems reasonable to consider that the privilege of immunity also applies to [connected] offences which would otherwise occasion disciplinary sanctions”. Commentary, above note 15, on Art. 93, para. 3865. See, for example, Magistrate’s Court of the County of Renfrew, Ontario, Canada *Rex v. Krebs*, Case No. 780 CAN. C.C. 279, 1943, concerning a German PoW interned in Canada, who during his escape, broke into a cabin to get food, articles of civilian clothing, and a weapon. The court held that, since these acts were done in an attempt to facilitate his escape, therefore, he committed no crime.

131 GC III, Art. 93(2).

132 “Aiding and abetting” is not defined in the Geneva Conventions or any other international treaty. Nonetheless, the leniency considerations require the Detaining Power to interpret the term in a narrow way. Commentary, above note 15, on Art. 93, para. 3870.

133 GC III, Art. 93(3). The Commentary also argues that in the case of aiding and abetting of an escape and connected crimes, if “the prisoners who aided or abetted did not know, or could not foresee, that the escapee would commit such offences [...] they should be subject to disciplinary punishment only for aiding or abetting the escape or escape attempt”. Commentary, above note 15, on Art. 93, para. 3871.

134 Commentary, *ibid.* on Art. 89, para. 3740.

135 Peter Rowe, “Penal or Disciplinary Proceedings Brought against a Prisoner of War”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 1026.

sanctions, as described by the 1960 Commentary, could present many disadvantages and “is likely to result in different treatment for the same offence, in a world where conceptions were and still are divergent”.¹³⁶ The possible disciplinary punishments are fine, discontinuance of privileges granted over and above the treatment provided for by GC III, fatigue duties and confinement. No other form of disciplinary punishment is permissible.

Article 90(1) limits the duration of any single disciplinary punishment to a maximum of thirty days which may not be exceeded, even if the PoW is accountable for several disciplinary offences at the time when he is awarded punishment, whether such acts are related or not.¹³⁷ Yet, Article 89 does not prohibit cumulating the listed sanctions for a single offence.¹³⁸ In any case, in accordance with Article 87(1), the Detaining Authority “would need to ensure that the chosen punishment corresponds in its severity to the punishment provided for in respect of members of its armed forces who have committed the same acts”.¹³⁹ Moreover, in accordance with Article 87(2), the Detaining Power shall exercise leniency to reduce the disciplinary measure to less than the penalties prescribed.

In GC III, the term “confinement” refers both to a type of permissible disciplinary sanction and a pre-hearing period of deprivation of liberty.¹⁴⁰ In principle, pre-hearing confinement either before disciplinary proceedings or criminal trial is not allowed,¹⁴¹ unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence.¹⁴² The other exception is when the confinement is essential in the interests of camp order and discipline,¹⁴³ or when, in the case of judicial proceedings, the interests of the essential national security of the Detaining Power so requires.¹⁴⁴ In regard to the latter exception, the Commentary stipulates that in interpreting the exception in Article 95(1), confinement awaiting disciplinary hearing is limited only to “absolutely necessary” or “extremely important” cases.¹⁴⁵ Likewise, in the cases of pre-trial confinement pursuant to Article 103(1), bearing in mind that “the relevant national security standard would require an additional threat beyond that person’s status as a member of the enemy armed forces”,¹⁴⁶ the Commentary states that the term “essential” should be interpreted in a very limited nature to only cover “reasons that are ‘absolutely necessary’ or

136 1960 Commentary, above note 13, on Art. 89, p. 435.

137 GC III, Art. 90(2).

138 Commentary, above note 15, on Art. 89, para. 3744.

139 *Ibid.*, para. 3743.

140 Internment of PoWs under Article 21 of GC III is different from confinement. “Internment has a preventive, not a punitive, purpose, contrary to the detention of prisoners of war for disciplinary or penal reasons.” *Ibid.*, commentary on Art. 21, para. 1919. See, also, Anne Quintin, “The Authority to Intern Prisoners of War in International Armed Conflict”, in A. Quintin, *The Nature of International Humanitarian Law, A Permissive or Restrictive Regime?*, Elgar, Cheltenham, 2020.

141 GC III, Arts 95(1) and 103(1).

142 *Ibid.*

143 GC III, Art. 95(1).

144 GC III, Art. 103(1).

145 Commentary, above note 15, on Art. 95, para. 3889.

146 *Ibid.*, commentary on Art. 103, para. 4033.

‘fundamental’ to the national security interests in question”.¹⁴⁷ The Commentary obliges the Detaining Power to consider alternatives and lesser measures than confinement capable of neutralizing the relevant threat.¹⁴⁸ Although the Commentary, following the silence of GC III, does not discuss any threshold of necessity for pre-hearing confinement carried out in accordance with the principle of assimilation (the first exception), observation of leniency considerations may justify adhering to the same criterion of necessity for the case of such pre-hearing confinement. This is because PoWs are already under the control of the Detaining Power and therefore the risk of escape is not high. Hence, it can be suggested that, based on leniency considerations, there should be other reasons than the mere permission of confinement under national laws to justify such confinement.

Capital punishment remains as one of the penal sanctions which may be imposed on PoWs, while in accordance with Article 100(3), the leniency considerations, as previously discussed,¹⁴⁹ may to some extent prevent the courts of the Detaining Power from pronouncing the death sentence.¹⁵⁰ In any case, pursuant to Article 101, the death sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives the detailed communication provided for in Article 107. The Commentary calls this provision a “strict condition for the execution of a death sentence”¹⁵¹ and states that non-compliance will amount to a grave breach of the Convention,¹⁵² even in the case of the absence of a Protecting Power or a substitute.¹⁵³

Protection of women and children PoWs

Due to the involvement of women in armed conflicts,¹⁵⁴ GC III also contains provisions that provide specific protection for women PoWs, in general, as well

147 *Ibid.*

148 *Ibid.*

149 See the “Exercising leniency during the proceedings” section.

150 From eighty-nine States that have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, only Azerbaijan, Brazil, Chile, El Salvador and Greece have formulated reservations in accordance with Article 2 for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. To see the content of their reservations, see United Nations Treaty Collections, Depository, Chapter IV, 12, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4 (status at January 2022).

151 Commentary, above note 15, on Art. 101, para. 4000.

152 *Ibid.*, para. 4002.

153 *Ibid.*, para. 4001. The Commentary highlights that in such a case the ICRC acts in the interests of PoWs facing the death penalty. *Ibid.* For further discussion on the discharge of the humanitarian duties of the Protecting Power by the ICRC, see Hans-Peter Gasser, “Respect for Fundamental Judicial Guarantees in Time of Armed Conflict: The Part Played by ICRC Delegates”, *International Review of the Red Cross*, Vol. 32, No. 287, 1992, pp. 131–2. See, also, Howard S. Levie, “Prisoners of War and the Protecting Power”, *American Journal of International Law*, Vol. 55, No. 2, 1961.

154 See William Paul Skelton and Nadine Khouzam Skelton, “Women as Prisoners of War”, *Military Medicine*, Vol. 160, No. 11, 1995; Noelle Quenivet, “Special Rules on Women”, in A. Clapham, P. Gaeta and M. Sassoli (eds), above note 135.

as those who are under sanction, in particular.¹⁵⁵ In addition to these specific protections, it is obvious that the general obligations of the Detaining Power in regard to the sanction regime of PoWs including the exercise of the greatest leniency will be applied to women PoWs as well.

Conversely, the Chapter on penal and disciplinary sanctions does not address directly the specific protection of children. The Commentary with reference to Articles 75(5) and 77(4) of the Additional Protocol I perceives that “infants or very young children generally must be accommodated with their parents”.¹⁵⁶ It further requires that if a PoW is under 18 years old, he/she must be separated from adults, except where families are accommodated as a unit.¹⁵⁷ The Commentary also refers to the 1989 Convention on the Rights of the Child,¹⁵⁸ and stipulates that the best interest of the child must be considered in all cases.¹⁵⁹ The ICRC holds the view that based on international law “children are entitled to special respect and protection, including in the matter of disciplinary or judicial proceedings”.¹⁶⁰ In particular, the juvenile justice system should govern any sentencing process against a child PoW. Furthermore, in the case of child soldiers recruited by one of the belligerents, in conformity with Article 87(2) and the obligation to exercise the greatest leniency, the fact that the child is actually a victim of the violation of international law and his/her participation in armed conflicts is in essence against his/her free will, has also to be considered.¹⁶¹

155 For example, Article 88(2) stipulates that a woman PoW shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than the female members of the armed forces of the Detaining Power dealt with for a similar offence. In any case, the punishment of women PoWs cannot be more severe than male members of the armed forces of the Detaining Power for a similar offence. GC III, Art. 88(3). Article 97(4) requires that women PoWs undergoing disciplinary punishment shall be confined in separate quarters from men and shall be under the immediate supervision of women. Similarly, Article 108(2) stipulates the same in the case of criminal conviction. The Convention does not consist of any provision to protect lesbian, gay, bisexual and transgender (LGBT) PoWs. However, the Commentary, in an implicit way, requires that “the requirement of separate quarters may also extend to other categories of persons with distinct needs or facing particular risks where not doing so would violate the obligation of humane treatment”. Commentary, above note 15, on Art. 108, para. 4215. For further analysis on the subject, see Jason A. Brown and Valerie Jenness, “LGBT People in Prison: Management Strategies, Human Rights Violations, and Political Mobilization”, in *Oxford Research Encyclopedia of Criminology and Criminal Justice*, Oxford University Press, Oxford, 2020, available at: <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-647?rskkey=GhpWvQ&result=18>.

156 Commentary, above note 15, on Art. 108, para. 4214. Article 76(3) of Additional Protocol I provides that “[t]o the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.” In the same vein Article 6(5) of the International Covenant on Civil and Political Rights provides that “sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”.

157 Commentary, *ibid.*

158 Convention on the Rights of the Child, UN Doc. E/CN.4/RES/1990/74, 7 March 1990 (entered into force 2 September 1990).

159 Commentary, above note 15, on Art. 108, para. 4214.

160 *Ibid.*, para. 4200.

161 *Ibid.* Notably, Trial Chamber IX of the International Criminal Court, in the *Dominic Ongwen Case*, took into account Ongwen’s personal history for issuing his sentence including the fact that “he himself had in

These considerations may also advise the judge to exercise a lenient approach when the accused PoW perpetrated the crimes prior to capture during his/her childhood. For example, in the subsequent Nuremberg trials, the death sentences announced against German PoWs involving the shooting of surrendered prisoners at the Battle of the Bulge, known as Army cases, were commuted to life or to a period of years during the review process as most of these cases “involved privates or junior officers who had joined the army in their teens or early manhood and from youth had never known a life free from Nazi ideology”.¹⁶²

Repatriation of accused or convicted PoWs

Another reflection of the general obligation to exercise the greatest leniency in the execution of sanctions exists in the Chapter on the termination of captivity. Article 115(1) in line with leniency considerations indicates that not undergoing or non-completion of a disciplinary punishment does not deprive eligible wounded or sick PoWs from repatriation or from accommodation in a neutral country. The ICRC states that the purpose of this provision “is to alleviate the potentially negative effects of long-term internment on the mental, and sometimes physical, health of prisoners of war”.¹⁶³ Accordingly, it appears that the same considerations may justify exercising the greatest leniency with respect to those PoWs who are not wounded or sick but are subjected to disciplinary punishment while awaiting repatriation or internment in a neutral country pursuant to an agreement based on the second sentence of Article 109(2).

Article 115(2) contains the same regulation concerning eligible PoWs detained in connection with a criminal prosecution or conviction, with the difference that for their repatriation or accommodation in a neutral country the consent of the Detaining Power is required. Pursuant to this provision, the Detaining Power is allowed to keep the sick or wounded PoWs in its hands for the duration of the judicial proceedings or until they have served their penal sentences. However, it seems acceptable to argue that for a PoW who is detained in relation to the prosecution of a minor offence or, using the analogy with the disciplinary confinement, is convicted for less than one month’s imprisonment,

the past been a victim of the same crime, having been abducted as a child and integrated as a fighter”, International Criminal Court, *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Sentence (Trial Chamber IX), 6 May 2021, paras 370 and 373. For a comprehensive discussion on the protection of children in armed conflict, see Shaheed Fatima, *Protecting Children in Armed Conflict*, Hart Publishing, Oxford, 2018.

162 Henry L. Shattuck, “The Interim Mixed Parole and Clemency Board”, *Proceedings of the Massachusetts Historical Society*, Third Series, Vol. 76, 1964, p. 77. Other factors considered, in the words of General Thomas T. Handy, were: “First, the offenses are associated with a confused, fluid and desperate combat action, a least attempt to turn the tide of Allied successes and to reestablish a more favorable tactical position for the German Army. The crimes are definitely distinguishable from the more deliberate killings in concentration camps. Moreover, these prisoners were of comparatively lower rank and ... they were neither shown to be the ones who initiated, nor, as far as we know, advocated the idea of creating a wave of frightfulness ...” *Ibid*.

163 Commentary, above note 15, on Art. 115, para. 4397.

or only one month of his/her imprisonment has left to serve,¹⁶⁴ it is justified to request the Detaining Power to exercise the greatest leniency and not to prevent the repatriation or accommodation of these PoWs.¹⁶⁵

Concluding remarks

The obligation to exercise leniency towards PoWs is a continuation of the principle of humanity, which lies at the core of GC III. This paper, in light of the ICRC updated Commentary, demonstrates how the application of leniency considerations on the GC III provisions on disciplinary and judicial measures as a whole contributes to achieving the Convention’s aims. While the principle of humanity sets the minimum standard of treatment, leniency is an appeal to go beyond this threshold. In the context of disciplinary and judicial measures, the greatest leniency that a Detaining Power is obliged to apply in adjudicating the offences committed by PoWs does not necessarily lead to solid outcomes. Yet, it requires the Detaining Power to interpret and implement its obligations under Chapter III in a way that is more favourable towards those PoWs who face allegations and sanctions.

164 The one-month period is the maximum length of disciplinary confinement allowed under Article 90(1). On the basis of analogy, this duration was applied in the current discussion.

165 See the discussion on Article 155(2) in the 1960 Commentary, above note 13, p. 536.

Harnessing the potential of artificial intelligence for humanitarian action: Opportunities and risks

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Abstract

Data-driven artificial intelligence (AI) technologies are progressively transforming the humanitarian field, but these technologies bring about significant risks for the protection of vulnerable individuals and populations in situations of conflict and crisis. This article investigates the opportunities and risks of using AI in humanitarian action. It examines whether and under what circumstances AI can be safely deployed to support the work of humanitarian actors in the field. The article argues that AI has the potential to support humanitarian actors as they implement a paradigm shift from reactive to anticipatory approaches to humanitarian action. However, it recommends that the existing risks, including those relating to algorithmic bias and data privacy concerns, must be addressed as a priority if AI is to be put at the service of humanitarian action and not to be deployed at the expense of humanitarianism. In doing so, the article contributes to the current debates on whether it is possible to harness the potential of AI for responsible use in humanitarian action.

Keywords: artificial intelligence, do no harm, humanitarian action, humanitarian principles, human rights.



Introduction

The use of digital technologies in humanitarian action is not a new phenomenon. Humanitarian actors have been utilizing digital technologies to assist and protect populations affected by conflict and crisis for decades.¹ Yet, contemporary advances in computational power, coupled with the availability of vast amounts of data (including big data), have allowed for more widespread use of digital technologies in the humanitarian context.² The COVID-19 pandemic has further accelerated the trend of the use of digital technologies to help maintain humanitarian operations.³

Artificial intelligence (AI) is one such digital technology that is progressively transforming the humanitarian field. Although there is no internationally agreed definition, AI is broadly understood as “a collection of technologies that combine data, algorithms and computing power”.⁴ These technologies consist of

software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal.⁵

This definition comprises two main elements: knowledge-based systems and machine learning systems. Knowledge-based systems are seen in computer

- 1 Patrick Meier, “New Information Technologies and Their Impact on the Humanitarian Sector”, *International Review of the Red Cross*, Vol. 93, No. 884, 2011; Anja Kaspersen and Charlotte Lindsey-Curtet, “The Digital Transformation of the Humanitarian Sector”, *Humanitarian Law and Policy Blog*, 5 December 2016, available at: <https://blogs.icrc.org/law-and-policy/2016/12/05/digital-transformation-humanitarian-sector/> (all internet references were accessed in April 2022); Dzhennet-Mari Akhmatova and Malika-Sofi Akhmatova, “Promoting Digital Humanitarian Action in Protecting Human Rights: Hope or Hype”, *International Journal of Humanitarian Action*, Vol. 5, 2020.
- 2 Ana Beduschi, “The Big Data of International Migration: Opportunities and Challenges for States under International Human Rights Law”, *Georgetown Journal of International Law*, Vol. 49, No. 4, 2018; Michael Pizzi, Mila Romanoff and Tim Engelhardt, “AI for Humanitarian Action: Human Rights and Ethics”, *International Review of the Red Cross*, Vol. 102, No. 913, 2021.
- 3 Saman Rejali and Yannick Heiniger, “The Role of Digital Technologies in Humanitarian Law, Policy and Action: Charting a Path Forward”, *International Review of the Red Cross*, Vol. 102, No. 913, 2021; Jo Burton, “‘Doing no Harm’ in the Digital Age: What the Digitalization of Cash Means for Humanitarian Action”, *International Review of the Red Cross*, Vol. 102, No. 913, 2021; John Bryant, Kerrie Holloway, Oliver Lough and Barnaby Willitts-King, *Bridging Humanitarian Digital Divides during Covid-19*, Overseas Development Institute, London, 2020; Theodora Gazi and Alexandros Gazis, “Humanitarian Aid in the Age of COVID-19: A Review of Big Data Crisis Analytics and the General Data Protection Regulation”, *International Review of the Red Cross*, Vol. 102, No. 913, 2021.
- 4 European Commission, *White Paper on Artificial Intelligence: A European Approach to Excellence and Trust*, COM (2020) 65 final, 2020, p. 2.
- 5 European Union High Level Expert Group on Artificial Intelligence, *A Definition of AI: Main Capabilities and Scientific Disciplines*, Brussels, 2019, p. 6.

programs that use an existing knowledge base to solve problems usually requiring specialized human expertise.⁶ Machine learning is “the systematic study of algorithms and systems that improve their knowledge or performance with experience”.⁷ Through machine learning, machines can be trained to make sense of data. For example, AI systems can be trained to perform tasks such as natural language processing, utilizing the computer’s capacity to parse and interpret text and spoken words.⁸ Deep learning, a subset of machine learning, is particularly used to perform tasks such as image, video, speech and audio processing.⁹ The analysis in this article applies to both categories of systems.

AI systems often draw on large amounts of data, including information directly collected by humanitarian actors and other sources such as big data, to learn, find patterns, make inferences about such patterns, and predict future behaviour.¹⁰ Big data, or “large volumes of high velocity, complex and variable data”,¹¹ is also increasingly relevant in the humanitarian context. An important part of big data originates in user-generated content available on social media and online platforms, such as text, images, audio and video.¹² Social media platforms tend to provide specific channels for users to engage and communicate during conflicts or crises.¹³ For example, Facebook has enabled safety checks whereby users can report their status as natural disasters or other conflicts or emergencies unfold.¹⁴ AI systems can build on these different types of data to map the evolution of conflicts and crises.

In this regard, AI technologies have the potential to support humanitarian actors as they implement a paradigm shift from reactive to anticipatory approaches to humanitarian action in conflicts or crises.¹⁵ For example, in 2019, AI-supported

- 6 Martin Swain, “Knowledge-Based System”, in Werner Dubitzky, Olaf Wolkenhauer, Kwang-Hyun Cho and Hiroki Yokota (eds), *Encyclopedia of Systems Biology*, Springer, New York, 2013.
- 7 Peter Flach, *Machine Learning: The Art and Science of Algorithms that Make Sense of Data*, Cambridge University Press, Cambridge, 2012, p. 3.
- 8 *Ibid.*; Jacob Eisenstein, *Introduction to Natural Language Processing*, MIT Press, Cambridge, MA, 2019.
- 9 Yann LeCun, Yoshua Bengio and Geoffrey Hinton, “Deep Learning”, *Nature*, Vol. 521, 2015; Neil Savage, “How AI and neuroscience drive each other forwards”, *Nature*, Vol. 571, No. 7553, 2019.
- 10 Jenna Burrell, “How the Machine ‘Thinks’: Understanding Opacity in Machine Learning Algorithms”, *Big Data & Society*, Vol. 3, No. 1, 2016; Sandra Wachter, Brent Mittelstadt and Chris Russell, “Counterfactual Explanations without Opening the Black Box: Automated Decisions and the GDPR”, *Harvard Journal of Law & Technology*, Vol. 31, No. 2, 2018.
- 11 Tech America Foundation, *Demystifying Big Data: A Practical Guide to Transforming the Business of Government*, Washington, DC, 2012.
- 12 Amir Gandomi and Murtaza Haider, “Beyond the Hype: Big Data Concepts, Methods, and Analytics”, *International Journal of Information Management*, Vol. 35, No. 2, 2015.
- 13 Billy Haworth and Eleanor Bruce, “A Review of Volunteered Geographic Information for Disaster Management”, *Geography Compass*, Vol. 9, No. 5, 2015; A. Beduschi, above note 2; Pankaj Sharma and Ashutosh Joshi, “Challenges of Using Big Data for Humanitarian Relief: Lessons from the Literature”, *Journal of Humanitarian Logistics and Supply Chain Management*, Vol. 10, No. 4, 2020; T. Gazi and A. Gazis, above note 3.
- 14 Facebook, “Crisis Response”, available at: www.facebook.com/about/safetycheck/.
- 15 Mark Lowcock, “Anticipation Saves Lives: How Data and Innovative Financing Can Help Improve the World’s Response to Humanitarian Crises”, speech delivered at the London School of Economics, 2019, available at: <https://reliefweb.int/report/world/mark-lowcock-under-secretary-general-humanitarian-affairs-and-emergency-relief>; United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *From Digital Promise to Frontline Practice: New and Emerging Technologies in Humanitarian Action*,

disaster mapping helped humanitarians to provide a swift emergency response in Mozambique.¹⁶ Data-driven AI systems can also build on predictive analytics techniques, which seek to identify patterns and relationships in data, to predict developments in the field.¹⁷ For example, Project Jetson, an initiative of the Office of the United Nations High Commissioner for Refugees' (UNHCR), uses predictive analytics to forecast forced displacement of people.¹⁸

However, scholars and activists have increasingly voiced concerns about the risks posed by the deployment of AI in the humanitarian context. These concerns range from the dangers of “surveillance humanitarianism”¹⁹ to the excesses of “techno-solutionism”²⁰ and the problems related to a potential rise in “techno-colonialism”.²¹ These are significant risks, as they may expose populations already affected by conflict or crises to additional harms and human rights violations.

Against this backdrop, this article investigates the opportunities and risks of using AI in humanitarian action. It draws on legal, policy-oriented and technology-facing academic and professional literature to assess whether and under what circumstances AI can be safely deployed to support the work of humanitarian actors in the field. Although the academic and professional literature points to the heightened interest in using AI for military action in armed conflicts, that area remains outside of the scope of this article.²² This choice is justified by the

New York, 2021; Christopher Chen, “The Future is Now: Artificial Intelligence and Anticipatory Humanitarian Action”, *Humanitarian Law and Policy Blog*, 19 August 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/08/19/artificial-intelligence-anticipatory-humanitarian/>.

16 OCHA, above note 15, p. 7.

17 A. Gandomi and M. Haider, above note 12, p. 143.

18 See the Project Jetson website, available at: <https://jetson.unhcr.org>.

19 “Surveillance humanitarianism” is a term that refers to the increase in data collection practices by humanitarian organizations that, without the appropriate safeguards, may inadvertently amplify the vulnerability of individuals in need of humanitarian aid. See Mark Latonero, “Stop Surveillance Humanitarianism”, *New York Times*, 11 July 2019. See also Keren Weitzberg, Margie Cheesman, Aaron Martin and Emrys Schoemaker, “Between Surveillance and Recognition: Rethinking Digital Identity in Aid”, *Big Data & Society*, Vol. 8, No. 1, 2021.

20 “Techno-solutionism” is a term that refers to decision-makers’ willingness to utilize digital technologies to solve complex societal problems which require more than solely technical solutions. See Mark Duffield, “The Resilience of the Ruins: Towards a Critique of Digital Humanitarianism”, *Resilience*, Vol. 4, No. 3, 2016; Petra Molnar, *Technological Testing Grounds*, EDRI and Refugee Law Lab, Brussels, 2020, available at: <https://edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf>.

21 “Techno-colonialism” is a term that broadly refers to practices in digital innovation which can lead to reproducing the colonial relationships of dependency and inequality amongst different populations around the world. See Mirca Madianou, “Technocolonialism: Digital Innovation and Data Practices in the Humanitarian Response to Refugee Crises”, *Social Media & Society*, Vol. 5, No. 3, 2019; Nick Couldry and Ulises A. Mejias, “Data Colonialism: Rethinking Big Data’s Relation to the Contemporary Subject”, *Television & New Media*, Vol. 20, No. 4, 2019.

22 Rain Liivoja, Kobi Leins and Tim McCormack, “Emerging Technologies of Warfare”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, London, 2016; Ronald Alcalá and Eric Talbot Jensen, *The Impact of Emerging Technologies on the Law of Armed Conflict*, Oxford University Press, Oxford, 2019; International Committee of the Red Cross (ICRC), *Artificial Intelligence and Machine Learning in Armed Conflict: A human-centred Approach*, Geneva, 2019; Hitoshi Nasu, “Artificial Intelligence and the Obligation to Respect and to Ensure Respect for IHL”, in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law*, Routledge, London, 2020; Jai Galliot, Duncan MacIntosh and Jens David Ohlin,

growing uses of AI outside of military action, in support of humanitarian assistance in situations of conflict, disaster and crisis.

The analysis proceeds in three steps. Firstly, the article examines the opportunities brought about by AI to support humanitarian actors' work in the field. Secondly, it evaluates the existing risks posed by these technologies. Thirdly, the article proposes key recommendations for deploying AI in the humanitarian context, based on the humanitarian imperative of "do no harm". Finally, the article draws conclusions on whether it is possible to safely leverage the benefits of AI while minimizing the risks it poses for humanitarian action.

AI in support of a paradigm change: From reactive to anticipatory approaches to humanitarian action

As noted earlier, AI has the potential to support humanitarian actors as they implement a paradigm shift from reactive to anticipatory approaches to humanitarian action.²³ This shift entails acting as soon as a crisis may be foreseen and proactively mitigating the adverse impact on vulnerable people.²⁴ In this regard, AI technologies may further expand the toolkit of humanitarian missions in their three main dimensions: preparedness, response and recovery.

Preparedness is the continuous process that aims to understand the existing risks and propose actions to respond to those risks, thus supporting a more effective humanitarian response to crises and emergencies.²⁵ Response focuses on the delivery of assistance to those in need,²⁶ while recovery refers to programmes that go beyond the provision of immediate humanitarian relief.²⁷ As such, recovery is an important element, as contemporary humanitarian crises tend to be increasingly complex and protracted, transcending the boundaries between humanitarian aid and development cooperation.²⁸

Lethal Autonomous Weapons: Re-examining the Law and Ethics of Robotic Warfare, Oxford University Press, Oxford, 2021.

23 M. Lowcock, above note 15; OCHA, above note 15.

24 M. Lowcock, above note 15.

25 Inter-Agency Standing Committee, *The Implementation of the Humanitarian Programme Cycle*, Geneva, 2015.

26 *Ibid.*

27 International Federation of Red Cross and Red Crescent Societies (IFRC), "Recovery", available at: www.ifrc.org/recovery.

28 Executive Board of the United Nations Development Programme and of the United Nations Population Fund, *Role of UNDP in Crisis and Post-Conflict Situations*, UN Doc. DP/2001/4, Geneva, 2000, para. 48; Lucy Earle, "Addressing Urban Crises: Bridging the Humanitarian–Development Divide", *International Review of the Red Cross* Vol. 98, No. 901, 2016; Atsushi Hanatani, Oscar A. Gómez and Chigumi Kawaguchi, *Crisis Management Beyond the Humanitarian-Development Nexus*, Routledge, London, 2018; Jon Harald Sande Lie, "The Humanitarian-Development Nexus: Humanitarian Principles, Practice, and Pragmatics", *Journal of International Humanitarian Action*, Vol. 5, 2020.

Preparedness

AI technologies can support humanitarian preparedness as AI systems can be used to analyze vast amounts of data, thus providing essential insights about potential risks to affected populations. These insights can inform humanitarians about such risks before a crisis or humanitarian disaster unfolds.²⁹ In this regard, predictive analytics, which builds on data-driven machine learning and statistical models, can be used to calculate and forecast impending natural disasters, displacement and refugee movements, famines, and global health emergencies.³⁰ To date, such systems have performed best for early warnings and short-term predictions.³¹ Yet, their potential is significant, as AI systems performing predictive analytics can be instrumental for preparedness.

For example, the Forecast-based Financing programme deployed by the International Federation of Red Cross and Red Crescent Societies (IFRC) enables the swift allocation of humanitarian resources for early action implementation.³² This programme uses a variety of data sources, such as meteorological data and market analysis, to determine when and where humanitarian resources should be allocated.³³

Another example is UNHCR's Project Jetson, which uses predictive analytics to forecast forced displacement contributing to the escalation of violence and conflict in Somalia.³⁴ Project Jetson builds on various data sources, including climate data (such as river levels and rain patterns), market prices, remittance data, and data collected by the institution to train its machine learning algorithm.

In another context, the World Food Programme has developed a model that uses predictive analytics to forecast food insecurity in conflict zones, where traditional data collection is challenging.³⁵ This model provides a map depicting the prevalence of undernourishment in populations around the world.

But would deploying AI systems, particularly those using predictive analytics models, lead to better preparedness in humanitarian action? Any answer

29 Kevin Hernandez and Tony Roberts, *Predictive Analytics in Humanitarian Action: A Preliminary Mapping and Analysis*, Institute for Development Studies, London, 2020.

30 *Ibid.*; Petra Molnar, "Technology on the Margins: AI and Global Migration Management from a Human Rights Perspective", *Cambridge Journal of International Law*, Vol. 8, No. 2, 2019; Ana Beduschi, "International Migration Management in the Age of Artificial Intelligence", *Migration Studies*, Vol. 9, No. 3, 2020; Centre for Humanitarian Data, "OCHA-Bucky: A COVID-19 Model to Inform Humanitarian Operations", The Hague, 2021, available at: <https://centre.humdata.org/ocha-bucky-a-covid-19-model-to-inform-humanitarian-operations/>; T. Gazi and A. Gazis, above note 3.

31 K. Hernandez and T. Roberts, above note 29; Jessica Bither and Astrid Ziebarth, *AI, Digital Identities, Biometrics, Blockchain: A Primer on the Use of Technology in Migration Management*, Migration Strategy Group on International Cooperation and Development, Berlin, 2020.

32 IFRC, "Forecast-based Financing: A New Era for the Humanitarian System", 2021, available at: www.forecast-based-financing.org/wp-content/uploads/2019/03/DRK_Broschuere_2019_new_era.pdf.

33 Toke Jeppe Bengtsson, *Forecast-based Financing: Developing Triggers for Drought*, Lund University, Lund, 2018.

34 See the Project Jetson website, above note 18; UNHCR Innovation Service, "Is It Possible to Predict Forced Displacement?", *Medium*, 2019, available at: <https://medium.com/unhcr-innovation-service/is-it-possible-to-predict-forced-displacement-58960afe0ba1>.

35 See the World Food Programme HungerMap, available at: <https://hungermap.wfp.org/>.

to this question must be nuanced. On the one hand, in some contexts, AI systems may be beneficial to humanitarian action as they may contribute to a better understanding of the situation and better anticipation of responses. For instance, better preparedness can contribute to early allocation of resources, which may be crucial for the effectiveness of operations on the ground. On the other hand, the analysis of historical data should not be the only way to inform and frame future action. Models based on the analysis of past data may fail to consider variables such as changes in human behaviour and the environment, and may thus provide incomplete or erroneous predictions. For instance, during the COVID-19 pandemic, most AI models failed to provide efficient support to medical decision-making in tackling outbreaks of the disease.³⁶ That was partly due to the low quality of the data (historical data not relating to COVID-19) and the high risk of bias.³⁷ In addition, AI systems focusing on the analysis of past data might continue to reproduce errors and inaccuracies and perpetuate historical inequalities, biases and unfairness.³⁸ Accordingly, careful consideration of the specificities of the humanitarian context in which AI systems are to be deployed may help avoid unnecessary recourse to technologies and prevent exacerbated techno-solutionism.

Techno-solutionism, or faith in technologies to solve most societal problems, has proven to yield mixed results in the humanitarian field. For instance, studies have shown that focusing on big data analysis for anticipating Ebola outbreaks in West Africa was not always as effective as investing in adequate public health and social infrastructure.³⁹ Working closely with affected communities—for example, through participatory design⁴⁰—could help to tailor anticipatory interventions to key community needs, thus better informing and preparing humanitarian action before a conflict or crisis unfolds. This can also apply to AI systems used in humanitarian response, as discussed in the following subsection.

Response

AI systems can be used in ways that may support humanitarian response during conflicts and crises. For instance, recent advances in deep learning, natural

36 Laure Wynants *et al.*, “Prediction Models for Diagnosis and Prognosis of Covid-19: Systematic Review and Critical Appraisal”, *BMJ*, Vol. 369, 2020.

37 *Ibid.*, pp. 5–6.

38 See the discussion in the section below on “AI at the Expense of Humanitarianism: The Risks for Affected Populations”. See also Rashida Richardson, Jason Schultz and Kate Crawford, “Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice”, *New York University Law Review*, Vol. 94, 2019, p. 224.

39 Dilon Wamsley and Benjamin Chin-Yee, “COVID-19, Digital Health Technology and the Politics of the Unprecedented”, *Big Data & Society*, Vol. 8, No. 1, 2021, p. 3.

40 Participatory design is a process that includes a variety of stakeholders from the early stages of technology design. See Peter M. Asaro, “Transforming Society by Transforming Technology: The Science and Politics of Participatory Design”, *Accounting, Management and Information Technologies*, Vol. 10, No. 4, 2000; Elizabeth Rosenzweig, “UX Thinking”, in Elizabeth Rosenzweig (ed.), *Successful User Experience: Strategy and Roadmaps*, Elsevier, Amsterdam, 2015.

language processing and image processing allow for faster and more precise classification of social media messages during crisis and conflict situations. This can assist humanitarian actors in responding to emergencies.⁴¹ In particular, these advanced AI technologies can help identify areas that would benefit from streamlined delivery of assistance to those in need.

For example, the Emergency Situation Awareness platform monitors content on Twitter in Australia and New Zealand to provide its users with information about the impact and scope of natural disasters such as earthquakes, bushfires and floods as they unfold.⁴² Similarly, Artificial Intelligence for Disaster Response, an open platform that uses AI to filter and classify social media content, offers insights into the evolution of disasters.⁴³ Platforms such as these can triage and classify content, such as relevant images posted on social media showing damages to infrastructure and the extent of harm to affected populations, which can be useful for disaster response and management.⁴⁴

Another example is the Rapid Mapping Service, a project jointly developed by the United Nations (UN) Institute for Training and Research, the UN Operational Satellite Applications Programme, and UN Global Pulse.⁴⁵ This project applies AI to satellite imagery in order to rapidly map flooded areas and assess damage caused by conflict or natural disasters such as earthquakes and landslides, thus informing the humanitarian response on the ground.

Could these examples indicate that AI can lead to more effective responses in the humanitarian context? Depending on their design and deployment, AI systems may support humanitarian responses to conflict and crisis. However, much is context-dependent.

Using AI technologies to map areas affected by disasters seems to yield satisfactory results. For instance, the Humanitarian OpenStreetMap project relies on AI systems capable of mapping areas affected by disasters.⁴⁶ This project uses crowdsourced social media data and satellite and drone imagery to provide reliable information about which areas are affected by disaster situations and need prioritization. However, such a project might not produce relevant results in the context of humanitarian responses in situations of armed conflict. For instance, disinformation campaigns may affect access to trustworthy data

41 Swati Padhee, Tanay Kumar Saha, Joel Tetreault and Alejandro Jaimes, “Clustering of Social Media Messages for Humanitarian Aid Response during Crisis”, 2020, available at: <https://arxiv.org/pdf/2007.11756.pdf>; Firoj Alam, Ferda Ofli, Muhammad Imran, Tanvirul Alam and Umair Qazi, “Deep Learning Benchmarks and Datasets for Social Media Image Classification for Disaster Response”, *Proceedings of the IEEE/ACM International Conference on Advances in Social Networks Analysis and Mining*, 2020.

42 See the Emergency Situation Awareness website, available at: <https://esa.csiro.au/aus/about-public.html>.

43 See the Artificial Intelligence for Disaster Response website, available at: <http://aidr.qcri.org/>.

44 Declan Butler, “Crowdsourcing Goes Mainstream in Typhoon Response”, *Nature*, 2013, available at: www.nature.com/articles/nature.2013.14186; Wenjuan Sun, Paolo Bocchini and Brian D. Davison, “Applications of Artificial Intelligence for Disaster Management”, *Nature Hazards*, Vol. 103, No. 3, 2020.

45 Felicia Vacarelu and Joseph Aylett-Bullock, “Fusing AI into Satellite Image Analysis to Inform Rapid Response to Floods”, United Nations Institute for Training and Research, 2021, available at: <https://unitar.org/about/news-stories/news/fusing-ai-satellite-image-analysis-inform-rapid-response-floods>.

46 See the Humanitarian OpenStreetMap website, available at: www.hotosm.org.

during armed conflicts.⁴⁷ More generally, problems with access to good-quality data, which can be scarce during armed conflict situations, might affect the design and development of AI systems in that context and thereby compromise the suitability of their mapping tools.

Accordingly, while AI technologies may present opportunities to support effective humanitarian relief responses, they should not be understood as a ready-made, “one-size-fits-all” solution for any context within the realm of humanitarian action.

Recovery

AI may be effectively used in the context of recovery, as the complexities of contemporary crises often lead to protracted conflict situations.⁴⁸ Information technology can be an additional asset for facilitating engagement between humanitarians and affected communities in such contexts.⁴⁹

AI technologies may support humanitarian action in protracted situations. For example, the Trace the Face tool developed by the International Committee of the Red Cross (ICRC) was designed to help refugees and migrants find missing family members.⁵⁰ This tool uses facial recognition technologies to automate searching and matching, thus streamlining the process. Another example can be found in the AI-powered chatbots that may provide a way for affected community members to access humanitarian organizations and obtain relevant information. These chatbots are currently providing advisory services to migrants and refugees.⁵¹ Similarly, humanitarian organizations may use messaging chatbots to connect with affected populations.⁵²

47 ICRC, *Harmful Information. Misinformation, Disinformation and Hate Speech in Armed Conflict and Other Situations of Violence*, Geneva, 2021, available at: <https://shop.icrc.org/harmful-information-misinformation-disinformation-and-hate-speech-in-armed-conflict-and-other-situations-of-violence-icrc-initial-findings-and-perspectives-on-adapting-protection-approaches-pdf-en.html>.

48 Edwin Odhiambo Abuya, “From Here to Where? Refugees Living in Protracted Situations in Africa”, in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge University Press, Cambridge, 2010; ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016, pp. 9–11; Ellen Policinski and Jovana Kuzmanovic, “Editorial: Protracted Conflicts: The Enduring Legacy of Endless War”, *International Review of the Red Cross*, Vol. 101, No. 912, 2019.

49 Mirca Madianou, Liezel Longboan and Jonathan Corpus Ong, “Finding a Voice through Humanitarian Technologies? Communication Technologies and Participation in Disaster Recovery”, *International Journal of Communication*, Vol. 9, 2015; ICRC, above note 48, pp. 15, 37.

50 ICRC, “Rewards and Risks in Humanitarian AI: An Example”, *Inspired: Innovation to Save Lives and Defend Dignity*, 2019, available at: <https://blogs.icrc.org/inspired/2019/09/06/humanitarian-artificial-intelligence/>.

51 Ana Beduschi and Marie McAuliffe, “AI, Migration and Mobility: Implications for Policy and Practice”, in Marie McAuliffe and Anna Triandafyllidou (eds), *World Migration Report 2022*, International Organization for Migration, Geneva, 2021; Marie McAuliffe, Jenna Blower and Ana Beduschi, “Digitalization and Artificial Intelligence in Migration and Mobility: Transnational Implications of the COVID-19 Pandemic”, *Societies*, Vol. 11, No. 4, 2021.

52 ICRC, *The Engine Room and Block Party, Humanitarian Futures for Messaging Apps*, Geneva, 2017, available at: www.icrc.org/en/publication/humanitarian-futures-messaging-apps; Joanna Misiura and Andrej Verity, *Chatbots in the Humanitarian Field: Concepts, Uses and Shortfalls*, Digital Humanitarian

However, it is vital to question whether it is possible to generalize from these examples that AI contributes to better recovery action. As noted earlier in the analysis of preparedness and response, the benefit of using AI depends very much on the specific context in which these technologies are deployed. This is also true for recovery action. Community engagement and people-centred approaches may support the identification of areas in which technologies may effectively support recovery efforts on the ground, or conversely, those in which AI systems would not add value to recovery efforts. This should inform decision-making concerning the use of AI systems in recovery programmes. Moreover, AI technologies may also pose considerable risks for affected populations, such as exacerbating disproportionate surveillance or perpetuating inequalities due to algorithmic biases. Such risks are analysed in the following section.

AI at the expense of humanitarianism: The risks for affected populations

While AI may lead to potentially valuable outcomes in the humanitarian sector, deploying these systems is not without risks. Three main areas are of particular relevance in the context of humanitarian action: data quality, algorithmic bias, and the respect and protection of data privacy.

Data quality

Concerns about the quality of the data used to train AI algorithms are not limited to the humanitarian field, but this issue can have significant consequences for humanitarian action. In general terms, poor data quality leads to equally poor outcomes.⁵³ Such is the case, for instance, in the context of predictive policing and risk assessment algorithms. These algorithms often draw from historical crime data, such as police arrest rates per postcode and criminal records, to predict future crime incidence and recidivism risk.⁵⁴ If the data used to train these algorithms is incomplete or contains errors, the outcomes of the algorithms (i.e., crime forecasts and recidivism risk scores) might be equally poor in quality. Studies have indeed found that historical crime data sets may be incomplete and may include errors, as racial bias is often present in police records in some

Network, Geneva, 2019, available at: www.digitalhumanitarians.com/chatbots-in-the-humanitarian-field-concepts-uses-and-shortfalls/.

53 Thomas Redman, “If Your Data Is Bad, Your Machine Learning Tools Are Useless”, *Harvard Business Review*, 2 April 2018, available at: <https://hbr.org/2018/04/if-your-data-is-bad-your-machine-learning-tools-are-useless>; R. Richardson, J. Schultz and K. Crawford, above note 38.

54 Andrew Ferguson, *The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement*, New York University Press, New York, 2017; Sarah Brayne, *Predict and Surveil: Data, Discretion, and the Future of Policing*, Oxford University Press, Oxford, 2020; R. Richardson, J. Schultz and K. Crawford, above note 38.

jurisdictions such as the United States.⁵⁵ If such algorithms are used to support judicial decision-making, it can lead to unfairness and discrimination based on race.⁵⁶

In the humanitarian context, poor data quality generates poor outcomes that may directly affect populations in an already vulnerable situation due to conflicts or crises. AI systems trained with inaccurate, incomplete or biased data will likely perpetuate and cascade these mistakes forward. For instance, a recent study found that ten of the most commonly used computer vision, natural language and audio data sets contain significant labelling errors (i.e., incorrect identification of images, text or audio).⁵⁷ As these data sets are often used to train AI algorithms, the errors will persist in the resulting AI systems.

Unfortunately, obtaining high-quality data for humanitarian operations can be difficult due to the manifold constraints on such operations.⁵⁸ For instance, humanitarians may have problems collecting data due to low internet connectivity in remote areas. Incomplete and overlapping datasets that contain information collected by different humanitarian actors may also be a problem—for example, inaccuracies can be carried forward if outdated information is maintained in the data sets.⁵⁹ Errors and inaccuracies can also occur when using big data and crowdsourced data.⁶⁰ Accordingly, it is crucial that teams working with these data sets control for errors as much as possible. However, data sets and AI systems may also suffer from algorithmic bias, a topic that relates to data quality but has larger societal implications and is thus discussed in the following subsection.

Algorithmic bias

Connected to the issue of data quality is the question of the presence of bias in the design and development of AI systems. Bias is considered here not only as a technological or statistical error, but also as the human viewpoints, prejudices

55 S. Brayne, above note 54, pp. 33–34, 105; A. Ferguson, above note 54, p. 23; C. Dominik Güss, Ma Teresa Tuason and Alicia Devine, “Problems with Police Reports as Data Sources: A Researchers’ Perspective”, *Frontiers in Psychology*, Vol. 11, 2020.

56 See, notably, Sonja B. Starr, “Evidence-Based Sentencing and the Scientific Rationalization of Discrimination”, *Stanford Law Review*, Vol. 66, No. 4, 2014; Supreme Court of Wisconsin, *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016), 2016, p. 769 (requiring a warning prior to the use of algorithm risk assessment in sentencing and establishing that risk scores may not be used “to determine whether an offender is incarcerated” or “to determine the severity of the sentence”).

57 Examples can be explored in Curtis G. Northcutt, Anish Athalye and Jonas Mueller, “Pervasive Label Errors in Test Sets Destabilize Machine Learning Benchmarks”, 35th Conference on Neural Information Processing Systems, 2021, available at: <https://arxiv.org/pdf/2103.14749.pdf>.

58 Christopher Kuner and Massimo Marelli, *Handbook on Data Protection in Humanitarian Action*, 2nd ed., ICRC, Geneva, 2020, p. 39; OCHA, above note 15, p. 10; ICRC, The Engine Room and Block Party, above note 52, p. 32.

59 Anne Singleton, *Migration and Asylum Data for Policy-Making in the European Union: The Problem with Numbers*, CEPS Papers in Liberty and Security in Europe No. 89, 2016, available at www.ceps.eu/ceps-publications/migration-and-asylum-data-policy-making-european-union-problem-numbers/; European Union Agency for Fundamental Rights, *Data Quality and Artificial Intelligence: Mitigating Bias and Error to Protect Fundamental Rights*, Vienna, 2019.

60 B. Haworth and E. Bruce, above note 13; P. Sharma and A. Joshi, above note 13.

and stereotypes that are reflected in AI systems and can lead to unfair outcomes and discrimination.⁶¹ AI systems can indeed reflect the biases of their human designers and developers.⁶² Once such systems are deployed, this can in turn lead to unlawful discrimination.

International human rights law prohibits direct and indirect forms of discrimination based on race, colour, sex, gender, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶³ Direct discrimination takes place when an individual is treated less favourably on the basis of one or more of these grounds. Indirect discrimination exists even when measures are in appearance neutral, as such measures can in fact lead to the less favourable treatment of individuals based on one or more of the protected grounds.

Bias in AI systems may exacerbate inequalities and perpetuate direct and indirect forms of discrimination, notably on the grounds of gender and race.⁶⁴ For instance, structural and historical bias against minorities may be reflected in AI systems due to the pervasive nature of these biases.⁶⁵ Bias also commonly arises from gaps in the representation of diverse populations in data sets used for training AI algorithms.⁶⁶ For example, researchers have demonstrated that commercially available facial recognition algorithms were less accurate in recognizing women with darker skin types due in part to a lack of diversity in training data sets.⁶⁷ Similarly, researchers have shown that AI algorithms had

61 Kate Crawford, *The Atlas of AI: Power, Politics, and the Planetary Costs of Artificial Intelligence*, Yale University Press, New York, 2021, pp. 133–135.

62 Batya Friedman and Helen Nissenbaum, “Bias in Computer Systems”, *ACM Transactions on Information Systems*, Vol. 14, No. 3, 1996; James Zou and Londa Schiebinger, “AI Can Be Sexist and Racist — It’s Time to Make It Fair”, *Nature*, Vol. 559, 2018; Harini Suresh and John V. Guttag, “A Framework for Understanding Unintended Consequences of Machine Learning”, 2020, available at: <https://arxiv.org/pdf/1901.10002.pdf>.

63 Universal Declaration of Human Rights (UDHR), 10 December 1948, Arts 2, 7; International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, Art. 26; European Convention on Human Rights (ECHR), 4 November 1950, Art. 14; American Convention on Human Rights (ACHR), 22 November 1969, Art. 1; African Charter on Human and Peoples’ Rights, 27 June 1981, Art. 2. See also Rachel Murray and Frans Viljoen, “Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples’ Rights and the African Union”, *Human Rights Quarterly*, Vol. 29, No. 1, 2007; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity*, UN Doc. A/HRC/19/41, 17 November 2011; Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/HRC/RES/32/2, 15 July 2016.

64 Noel Sharkey, “The Impact of Gender and Race Bias in AI”, *Humanitarian Law and Policy Blog*, 28 August 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/08/28/impact-gender-race-bias-ai/>; UN Secretary-General’s High-Level Panel on Digital Cooperation, *The Age of Digital Interdependence*, New York, 2019, available at: www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf; UN General Assembly, *Report of the Special Rapporteur Tendayi Achiume on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc A/75/590, 10 November 2020.

65 H. Suresh and J. V. Guttag, above note 62.

66 J. Zou and L. Schiebinger, above note 62.

67 Joy Buolamwini and Timmit Gebru, “Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification”, *Proceedings of Machine Learning Research: Conference on Fairness, Accountability*

more difficulties identifying people with disabilities when such individuals were using assistive technologies such as wheelchairs.⁶⁸

In this regard, biased AI systems may go undetected and continue supporting decisions that could lead to discriminatory outcomes.⁶⁹ That is partly due to the opacity with which certain machine learning and deep learning algorithms operate—the so-called “black box problem”.⁷⁰ In addition, the complexity of AI systems based on deep learning techniques entails that their designers and developers are often unable to understand and sufficiently explain how the machines have reached certain decisions. This may in turn make it more challenging to identify biases in the algorithms.

The consequences of deploying biased AI systems can be significant in the humanitarian context. For example, in a scenario where facial recognition technologies are the sole means for identification and identity verification, inaccuracies in such systems may lead to the misidentification of individuals with darker skin types. If identification and identity verification by those means is a precondition for accessing humanitarian aid, misidentification may lead to individuals being denied assistance. This could happen if the system used for triage mistakenly indicates that an individual has already received the aid in question (such as emergency food supplies or medical care). Such a situation would have dramatic consequences for the affected individuals. If the AI systems’ risks were known and not addressed, it could lead to unlawful discrimination based on race. This could also be contrary to the humanitarian principle of humanity, according to which human suffering must be addressed wherever it is found.⁷¹

Accordingly, safeguards must be put in place to ensure that AI systems used to support the work of humanitarians are not transformed into tools of exclusion of individuals or populations in need of assistance. For example, if online photographs of children in war tend to show children of colour with weapons (i.e., as child soldiers) disproportionately more often, while depicting children of white ethnic background as victims, then AI algorithms trained on such data sets may continue to perpetuate this distinction. This could in turn contribute to existing biases against children of colour in humanitarian action, compounding the suffering already inflicted by armed conflict. Awareness and control for this type of bias should therefore permeate the design and development of AI systems to be deployed in the humanitarian context. Another example relates to facial

and Transparency, Vol. 81, 2018. But see Stewart Baker, “The Flawed Claims about Bias in Facial Recognition”, *Lawfare*, 2 February 2022, available at: www.lawfareblog.com/flawed-claims-about-bias-facial-recognition.

68 Meredith Whittaker *et al.*, *Disability, Bias and AI*, AI Now Institute, New York University, 2019, pp. 9–10.
69 M. Pizzi, M. Romanoff and T. Engelhardt, above note 2.

70 The black box problem occurs when AI systems’ operations are not visible to users and third parties. See Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information*, Harvard University Press, Cambridge, MA, 2016.

71 UNGA Res. 46/182, 19 December 1991; Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 1986 (amended 1995, 2006), preamble.

recognition technologies—as long as these technologies remain inaccurate in recognizing people with darker skin types, they should not be used to assist decision-making essential to determining humanitarian aid delivery.

Data privacy

As is internationally agreed, “the same rights that people have offline must also be protected online”.⁷² This should include AI systems.

International human rights law instruments recognize the right to privacy.⁷³ In addition, specific legal regimes, such as the General Data Protection Regulation (GDPR), establish fundamental standards for protecting personal data. While the GDPR is a European Union (EU) law regime that does not bind all humanitarian actors across the globe, it remains relevant beyond the EU as it has inspired similar regulations worldwide.⁷⁴

The principles set forth in the GDPR have also been taken into account by the *Handbook on Data Protection in Humanitarian Action*,⁷⁵ which is considered a leading resource that sets a minimum standard for processing personal data in the humanitarian context. These principles include lawfulness, fairness and transparency in the processing of personal data (Article 5 of the GDPR).

Having a lawful basis for the processing of personal data is a legal requirement (Article 6 of the GDPR). Consent is often used as a lawful basis for processing personal data in the humanitarian context. According to the legal standards, consent must be fully informed, specific, unambiguous and freely given (Article 4(11) of the GDPR). Yet, in the humanitarian context, consent may not be entirely unambiguous and freely given due to the inherent power imbalance between humanitarian organizations and beneficiaries of humanitarian assistance. A refusal to consent to collecting and processing personal data may, in practical terms, lead to the denial of humanitarian assistance.⁷⁶ However, it may be difficult for humanitarian actors to ensure that recipients of humanitarian assistance effectively understand the meaning of consent due to linguistic barriers and administrative and institutional complexities.

Fully informed, specific, unambiguous and freely given consent may also be challenging to achieve given that AI systems often use data to further refine and

72 UNGA Res. 68/167, 21 January 2014, para. 2; Human Rights Council, *The Promotion, Protection and Enjoyment of Human Rights on the Internet*, UN Doc A/HRC/20/L.13, 29 June 2012, para. 1.

73 UDHR, Art. 12; ICCPR, Art. 17; ECHR, Art. 8; ACHR, Art. 11.

74 According to Article 45 of the GDPR, the European Commission can issue an adequacy decision recognizing that a third country’s domestic law offers an adequate level of data protection that is essentially equivalent to the GDPR. The consequence of such a decision is that data flows can continue without the need for further safeguards. To date, the European Commission has issued adequacy decisions regarding Andorra, Argentina, Canada (commercial organizations), the Faroe Islands, Guernsey, Israel, the Isle of Man, Japan, Jersey, New Zealand, the Republic of Korea, Switzerland, the United Kingdom and Uruguay. See European Commission, “Adequacy Decisions”, available at: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en.

75 C. Kuner and M. Marelli, above note 58, p. 23.

76 M. Madianou, above note 21, p. 9; M. Pizzi, M. Romanoff and T. Engelhardt, above note 2, p. 152.

develop other AI solutions. While individuals may agree to have their personal information processed for a specific purpose related to humanitarian action, they may not know about or agree to that data being later used to develop other AI systems.⁷⁷ Such concerns are further aggravated by the criticisms concerning “surveillance humanitarianism”, whereby the growing collection of data and uses of technologies by humanitarians may inadvertently increase the vulnerability of those in need of assistance.⁷⁸

These practices require even more scrutiny due to the increasingly common collaborations between technology companies and humanitarian organizations.⁷⁹ These companies play a central role in this area as they design and develop the AI systems that humanitarians later deploy in the field. Arguably, technology companies’ interests and world view tend to be predominantly reflected in the design and development of AI systems, thus neglecting the needs and experiences of their users.⁸⁰ This is particularly concerning for the deployment of AI systems in the humanitarian context, where the risks for populations affected by conflicts or crises are significant. Accordingly, it is essential to have a clear set of guidelines for implementing AI in the humanitarian context, notably placing the humanitarian imperative of “do no harm” at its core, as discussed in the following section.

AI at the service of humanitarian action: The humanitarian imperative of “do no harm”

As noted earlier, while AI may bring about novel opportunities to strengthen humanitarian action, it also presents significant risks when deployed in the humanitarian context. This section elaborates on the humanitarian imperative of “do no harm” and offers recommendations on making AI work in support of humanitarian action and not to the detriment of populations affected by conflict and crisis.

“Do no harm” in the age of AI

In the face of ever-evolving AI technologies, it is crucial that humanitarians consider the imperative of “do no harm” as paramount to all deployment of AI systems in

77 C. Kuner and M. Marelli, above note 58, p. 284; Meg Leta Jones and Elizabeth Edenberg, “Troubleshooting AI and Consent”, in Markus D. Dubber, Frank Pasquale and Sunit Das (eds), *The Oxford Handbook of Ethics of AI*, Oxford University Press, Oxford, 2020, p. 366.

78 M. Latonero, above note 19; P. Molnar, above note 20; Pierrick Devidal, “Cashless Cash: Financial Inclusion or Surveillance Humanitarianism?”, *Humanitarian Law and Policy Blog*, 2 March 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/03/02/cashless-cash/>.

79 M. Pizzi, M. Romanoff and T. Engelhardt, above note 2; Linda Kinstler, “Big Tech Firms Are Racing to Track Climate Refugees”, *MIT Technology Review*, 17 May 2019, available at: www.technologyreview.com/2019/05/17/103059/big-tech-firms-are-racing-to-track-climate-refugees/.

80 Ziv Carmon, Rom Schrif, Klaus Wertenbroch and Haiyang Yang, “Designing AI Systems that Customers Won’t Hate”, *MIT Sloan Management Review*, 16 December 2019, available at: <https://sloanreview.mit.edu/article/designing-ai-systems-that-customers-wont-hate/>.

humanitarian action. This principle of non-maleficence has long been recognized as one of the core principles of bioethics.⁸¹ It was first proposed in the humanitarian context by Mary Anderson;⁸² subsequently, various humanitarian organizations have further developed its application.⁸³ Today, this principle is also commonly invoked in the fields of ethics of technology and AI.⁸⁴

The “do no harm” principle entails that humanitarian actors consider the potential ways in which their actions or omissions may inadvertently cause harm or create new risks for the populations they intend to serve.⁸⁵ For example, humanitarian “innovation” may introduce unnecessary risks to already vulnerable populations, such as when technical failures in newly introduced systems lead to delays, disruption or cancellation of aid distribution.⁸⁶ Therefore, avoiding or preventing harm and mitigating risks is at the heart of this humanitarian imperative.

Risk analysis and impact assessments may be used to operationalize the “do no harm” principle. Risk analysis can help to identify potential risks arising from humanitarian action and provide a clear avenue for risk mitigation. Impact assessments can provide the means to identify the negative impacts of specific humanitarian programmes and the best ways to avoid or prevent harm. These processes may assist humanitarian organizations as they envisage the utilization of AI technologies for humanitarian action. At times, they may even lead to the conclusion that no technologies should be deployed in a specific context, as these would cause more harm than good to their beneficiaries. On certain occasions, the fact that a technology is available does not mean that it must also be used.

AI technologies present some well-known risks, which ought to be addressed by humanitarian actors before the deployment of AI systems in humanitarian action. For example, humanitarian organizations using data-driven AI systems should identify risks concerning data security breaches that could lead to the disclosure of sensitive information about their staff and their beneficiaries. They should also evaluate whether using AI systems would negatively impact affected populations – for example, by revealing their location while mapping the evolution of a conflict and thereby inadvertently exposing them to persecution. In

81 Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 8th ed., Oxford University Press, Oxford, 2019; Luciano Floridi and Josh Cows, “A Unified Framework of Five Principles for AI in Society”, *Harvard Data Science Review*, Vol. 1, No. 1, 2019.

82 Mary B. Anderson, *Do No Harm: How Aid Can Support Peace or War*, Lynne Rienner, Boulder, CO, 1999; Mary B. Anderson, *Options for Aid in Conflict: Lessons from Field Experience*, CDA Collaborative Learning Projects, Cambridge, MA, 2000.

83 ICRC, “ICRC Protection Policy”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 753; Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, 4th ed., Geneva, 2018.

84 L. Floridi and J. Cows, above note 81; Luciano Floridi, *The Ethics of Information*, Oxford University Press, Oxford, 2013; C. Kuner and M. Marelli, above note 58.

85 Sphere Association, above note 83, p. 268.

86 Kristin Bergtora Sandvik, Katja Lindskov Jacobsen and Sean Martin McDonald, “Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation”, *International Review of the Red Cross*, Vol. 99, No. 1, 2017.

sum, the deployment of AI systems should never create additional harm or risks to affected populations.

Accordingly, humanitarian actors must not over-rely on AI technologies, particularly those that remain insufficiently accurate in certain contexts, such as facial recognition technologies.⁸⁷ Before adopting AI systems, humanitarian actors should evaluate whether there is a need to deploy these technologies in the field, whether they add value to the humanitarian programmes in question, and whether they can do so in a manner that protects vulnerable populations from additional harm.

Mechanisms for avoiding and mitigating data privacy harms

In the digital age, avoiding or mitigating harm also entails the protection of data privacy. Data privacy should be protected and respected throughout the AI life cycle, from design to development to implementation.

In this regard, “privacy by design” principles provide a good starting point.⁸⁸ They offer a proactive (instead of reactive) and preventive (instead of remedial) set of principles based on user-centric approaches. These are valuable tools for building better data privacy protection.⁸⁹

For humanitarian organizations that are subject to EU law, Article 25 of the GDPR imposes a more comprehensive requirement for data protection by design and by default.⁹⁰ This provision requires the implementation of appropriate technical and organizational measures aimed at integrating the core data protection principles (enumerated in Article 5 of the GDPR) into the design and development of systems processing personal data. As noted earlier, these core principles are lawfulness, fairness and transparency, along with purpose limitation, data minimization, accuracy, storage limitation, integrity and confidentiality, and accountability. These are also consistent with the basic data protection principles proposed by the ICRC.⁹¹

87 Davide Castelvetti, “Is Facial Recognition too Biased to Be Let Loose?”, *Nature*, Vol. 587, 2020.

88 These principles were proposed by Ann Cavoukian in 2010, as she occupied the position of information and privacy commissioner of Ontario, Canada. See Ann Cavoukian, “Privacy by Design: The 7 Foundational Principles”, Toronto, 2010, available at: www.ipc.on.ca/wp-content/uploads/resources/7foundationalprinciples.pdf. These principles were later endorsed by the International Conference of Data Protection and Privacy Commissioners. See “Resolution on Privacy by Design”, 32nd International Conference of Data Protection and Privacy Commissioners, Jerusalem, 27–29 October 2010, available at: <http://globalprivacyassembly.org/wp-content/uploads/2015/02/32-Conference-Israel-resolution-on-Privacy-by-Design.pdf>. See also Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, Washington, DC, 2012, available at: www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

89 Lina Jasmontaite, Irene Kamara, Gabriela Zafir-Fortuna and Stefano Leucci, “Data Protection by Design and by Default: Framing Guiding Principles into Legal Obligations in the GDPR”, *European Data Protection Law Review*, Vol. 4, No. 2, 2018; Giovanni Buttarelli, *Opinion 5/2018: Preliminary Opinion on Privacy by Design*, 31 May 2018, available at: https://edps.europa.eu/sites/edp/files/publication/18-05-31_preliminary_opinion_on_privacy_by_design_en_0.pdf.

90 Lee Bygrave, “Data Protection by Design and by Default: Deciphering the EU’s Legislative Requirements”, *Oslo Law Review*, Vol. 4, No. 2, 2017.

91 C. Kuner and M. Marelli, above note 58.

Accordingly, humanitarian organizations designing AI solutions or procuring AI systems from private sector providers should ensure that data protection is implemented by design and by default in these AI systems. For instance, they should ensure that they have obtained consent for processing personal information or that they rely on another legal basis for processing, such as the vital interest of the data subject or of another person, public interest, legitimate interest, performance of a contract, or compliance with a legal obligation.⁹² Similarly, data collection should be kept to the minimum needed, storage should be cyber-secure, personal data should be destroyed once it is no longer required, and personal information should only be used for the purpose for which it was collected in the first place.

Moreover, carrying out data protection impact assessments (DPIAs) may also help humanitarian actors understand the potential negative impacts of AI technologies used in humanitarian programmes. A DPIA is a process that identifies the risks for the protection of individuals' data privacy and the ways of mitigating those risks.⁹³ Humanitarian organizations subject to the GDPR will have an obligation to carry out a DPIA before processing data if there is a high risk of harm to individuals' rights and freedoms (Article 35(1) of the GDPR). DPIAs can add value to humanitarian projects, even if the organizations involved are not legally obliged to carry out such a process. A DPIA can help to provide a clear roadmap for identifying risks, solutions and recommendations concerning data-driven AI systems.

For example, a DPIA can be used to identify situations in which anonymized data used to train AI algorithms may be re-identified, thus becoming personal information again and attracting the application of legal regimes on data protection. Re-identification occurs when data that was initially anonymized is de-anonymized. This can happen when information from different sources is matched to identify individuals from an initially anonymized data set. For instance, a study found that it was possible to match information in order to identify individuals from a list containing the anonymous movie ratings of 500,000 Netflix subscribers, also uncovering their apparent political preferences and other potentially sensitive information.⁹⁴ Overall, research demonstrates that individuals have an over 99% chance of being re-identified in certain circumstances, even when data sets were initially anonymized.⁹⁵

In the humanitarian context, anonymization may not be enough to prevent the re-identification of vulnerable populations, and failure to retain information in a cyber-secure manner risks exposing such populations to persecution and harm.

92 *Ibid.*, p. 60.

93 *Ibid.*, p. 84.

94 Arvind Narayanan and Vitaly Shmatikov, "Robust De-anonymization of Large Sparse Datasets", *Proceedings of the 2008 IEEE Symposium on Security and Privacy*, 18–22 May 2008.

95 Luc Rocher, Julien M. Hendrickx and Yves-Alexandre de Montjoye, "Estimating the Success of Re-identifications in Incomplete Datasets Using Generative Models", *Nature Communications*, Vol. 10, No. 1, 2019.

A DPIA can help identify other solutions and organizational measures that could prevent re-identification from occurring.

Transparency, accountability and redress

The principle of “do no harm” also implies that humanitarian actors should consider establishing an overarching framework to ensure much-needed transparency and accountability on the uses of AI in humanitarian action.

The term “transparency” is used here to indicate that humanitarian actors should communicate about whether and how they use AI systems in humanitarian action. They should disclose information about the systems they use, even when the way in which these systems work is not fully explainable. In this sense, transparency is a broader concept than the narrower notion of explainability of AI systems.⁹⁶

For example, consider a scenario in which AI systems are used for biometric identity verification of refugees as a condition for distributing aid in refugee camps.⁹⁷ In this case, the humanitarian actors using such AI systems should communicate to the refugees that they are doing so. It is equally important that they disclose to those refugees how they are employing the AI systems and what it entails. For instance, they should disclose what type of information will be collected and for what purpose, how long the data will be stored, and who will access it. Similarly, they should communicate which safeguards will be put in place to avoid cyber security breaches.

Accountability is understood as the action of holding someone to account for their actions or omissions.⁹⁸ It is a process aimed at assessing whether a person’s or an entity’s actions or omissions were required or justified and whether that person or entity may be legally responsible or liable for the consequences of their act or omission.⁹⁹ Accountability is also a mechanism involving an obligation to explain and justify conduct.¹⁰⁰

In the humanitarian context, accountability should be enshrined in the relationships between humanitarian actors and their beneficiaries—particularly when AI systems are used to support humanitarian action, due to the risks these technologies may pose to their human rights. For instance, humanitarian actors should inform their beneficiaries of any data security breach that may expose the

96 Stefan Larsson and Fredrik Heintz, “Transparency in Artificial Intelligence”, *Internet Policy Review*, Vol. 9, No. 2, 2020.

97 Biometrics refers to “the application to biology of the modern methods of statistics” and relates to biometric characteristics or the “biological and behavioural characteristic[s] of an individual from which distinguishing, repeatable biometric features can be extracted for the purpose of biometric recognition”, such as fingerprints, iris patterns and facial features. International Organization for Standardization, “Information Technology—Biometrics—Overview and Application”, ISO/IEC TR 24741:2018, 2018, available at: www.iso.org/obp/ui/#iso:std:iso-iec:tr:24741:ed-2:v1:en.

98 Richard Mulgan, “‘Accountability’: An Ever Expanding Concept?”, *Public Administration*, Vol. 78, No. 3, 2000.

99 Ivo Giesen and François G. H. Kristen, “Liability, Responsibility and Accountability: Crossing Borders”, *Utrecht Law Review*, Vol. 10, No. 3, 2014, p. 6.

100 Mark Bovens, “Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism”, *West European Politics*, Vol. 33, No. 5, 2010, p. 951.

beneficiaries' personal information and give an account of the measures taken to remedy the situation. The recent swift response by the ICRC to a data security breach has set an example of good practice in this area. The institution undertook direct and comprehensive efforts to explain the actions taken and inform the affected communities worldwide of the consequences of the cyber security incident.¹⁰¹

Finally, individuals should be able to challenge decisions that were either automated or made by humans with the support of AI systems if such decisions adversely impacted those individuals' rights.¹⁰² Grievance mechanisms, either judicial or extra-judicial, could thus provide legal avenues for access to remedy, notably in cases where inadvertent harm was caused to the beneficiaries of humanitarian assistance. Extra-judicial mechanisms such as administrative complaints or alternative dispute resolution could be helpful to individuals who may not be able to afford the costs of judicial proceedings.

Conclusion

Data-driven AI technologies are progressively transforming the humanitarian field. They have the potential to support humanitarian actors as they implement a paradigm shift from reactive to anticipatory approaches to humanitarian action. AI may thus contribute to humanitarian action in its three main dimensions: preparedness, response and recovery.

AI technologies can support humanitarian preparedness. They can do so by analyzing vast amounts of multidimensional data at fast speeds, identifying patterns in the data, making inferences, and providing crucial insights about potential risks before a crisis or humanitarian disaster unfolds. AI technologies can also present opportunities to support effective humanitarian relief responses and promote recovery programmes, notably in protracted conflict situations.

Several AI-based initiatives are currently being deployed and tested by humanitarian organizations. These include AI systems deployed to forecast population movements, map areas affected by humanitarian crises and identify missing individuals, thus informing and facilitating humanitarian action on the ground. Yet, deploying these systems is not without risks. This article has analyzed three main areas of concern: the quality of the data used to train AI algorithms, the existence of algorithmic bias permeating the design and development of AI systems, and the respect for and protection of data privacy.

While these concerns are not exclusive to the humanitarian field, they may significantly affect populations already in a vulnerable situation due to conflict and crisis. Therefore, if AI systems are not to be deployed at the expense of

101 ICRC, "Cyber Security Incident: How Could It Affect Me?", 7 February 2022, available at: www.icrc.org/en/document/cyber-security-how-it-affect-me; ICRC, "ICRC Cyber-Attack: Sharing our Analysis", 16 February 2022, available at: www.icrc.org/en/document/icrc-cyber-attack-analysis.

102 M. Pizzi, M. Romanoff and T. Engelhardt, above note 2, p. 179.

humanitarianism, it is vital that humanitarian actors implement these technologies in line with the humanitarian imperative of “do no harm”. Risk analysis and impact assessments may help to operationalize the “do no harm” imperative. Both processes may be valuable for mitigating risks and minimizing or avoiding negative impacts on affected populations.

The “do no harm” imperative is especially crucial in situations of armed conflict such as the one currently ravaging Ukraine and prompting the displacement of over 4 million people in Europe.¹⁰³ In such contexts, AI technologies can be used in both helpful and damaging ways within and outside the battlefield. For instance, AI can support the analysis of social media data and evaluate the veracity of information,¹⁰⁴ but it can also support the creation of false videos using deepfake technologies, fuelling disinformation campaigns.¹⁰⁵

As AI systems are not inherently neutral, depending on how they are used, they may introduce new, unnecessary risks to already vulnerable populations. For instance, AI-powered chatbots can help streamline visa applications in the face of large movements of people fleeing conflict,¹⁰⁶ but if these systems are used without proper oversight, they could expose individuals’ personal information to needless cyber security risks and potential data breaches. Accordingly, to put AI at the service of humanitarian action, leveraging its benefits while outweighing its risks, humanitarian organizations should be mindful that there is no ready-made, “one-size-fits-all” AI solution applicable to all contexts. They should also evaluate whether AI systems should be deployed at all in certain circumstances, as such systems could cause more harm than good to their beneficiaries. On certain occasions, the fact that technology is available does not mean that it must be used.

Finally, when deploying these technologies, it is crucial that humanitarian organizations establish adequate frameworks to strengthen accountability and transparency in the use of AI in the humanitarian context. Overall, such mechanisms would contribute towards the goal of harnessing the potential of responsible use of AI in humanitarian action.

103 See International Organization for Migration, “IOM Ukraine Situation Reports”, available at: www.iom.int/resources/iom-ukraine-situation-reports.

104 Craig Nazareth, “Technology Is Revolutionizing How Intelligence Is Gathered and Analyzed—and Opening a Window onto Russian Military Activity around Ukraine”, *The Conversation*, 14 February 2022, available at: <https://theconversation.com/technology-is-revolutionizing-how-intelligence-is-gathered-and-analyzed-and-opening-a-window-onto-russian-military-activity-around-ukraine-176446>.

105 Hitoshi Nasu, “Deepfake Technology in the Age of Information Warfare”, *Articles of War*, 1 March 2022, available at: <https://lieber.westpoint.edu/deepfake-technology-age-information-warfare/>.

106 A. Beduschi and M. McAuliffe, above note 51.

Hacking international organizations: The role of privileges, immunities, good faith and the principle of State sovereignty

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Abstract

This article examines the extent to which international law protects international organizations (IOs) from hacking operations committed by States. First, it analyzes whether hacking operations undertaken by member States and host States breach the privileges and immunities granted to IOs by their constitutive treaties, headquarters agreements, and conventions on privileges and immunities concerning the inviolability of their premises, property, assets, archives, documents and correspondence. The article also explores the question of whether hacking operations carried out by non-member States breach these provisions on the basis that they have passed into customary international law or because they attach to the international legal personality of IOs. Second, the article considers the question of whether hacking operations breach the principle of good faith. In this regard, it discusses the applicability of the principle of good faith to the relations between IOs, member States, host States and non-member States, and then considers how

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hacking operations impinge on a number of postulates emanating from good faith such as the pacta sunt servanda rule, the duty to respect the legal personality of IOs, the duties of loyalty, due regard and cooperation, and the duty not to abuse rights. Finally, the article examines the question of whether the principle of State sovereignty offers IOs indirect protection insofar as hacking can breach the sovereignty of the host State or the sovereignty of the State on whose cyber infrastructure the targeted data is resident.

Keywords: international organizations, hacks, data protection, privileges and immunities, good faith, State sovereignty.

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Introduction

International organizations (IOs) increasingly collect, store, process, analyze, exchange and communicate information as part of their daily activities. One type of information handled by IOs is the personal information of employees, and IOs usually have specific rules, policies and procedures in place to regulate how this information is used.¹ Another type of information handled by IOs, and which is our focus in this article, relates to the exercise of their powers and the discharge of their functions. For example, IOs use information to monitor sanctions and ceasefires, enforce arms control regimes, protect civilians against attacks, identify international humanitarian law and international human rights law violations in the course of peacekeeping operations, make decisions, plan and execute operations, counter terrorism and prevent diseases. This information is gathered, analyzed, stored, shared and communicated in the course of an IO's decision-making cycle and activities. Ensuring the confidentiality, availability and integrity of this information is important for the functioning of IOs and their ability to carry out their tasks effectively.²

In the modern era, the information collected and handled by IOs is almost invariably compiled as electronic data. Inevitably, IOs have become the target of hacking operations – that is, cyber operations which gain access to data that is resident on computer networks and systems without the consent of the IO and which do not serve any lawful purpose under international law. For example, officials of United Nations (UN) bodies mandated to monitor the sanctions imposed on North Korea have been targeted by spear-phishing attacks attributed

1 See UN High-Level Committee on Management, *Principles on Handling of Personal Information*, October 2018, available at: <https://unsceb.org/personal-data-protection-and-privacy-principles> (all internet references were accessed in February 2022).

2 See, for example, Office of the UN High Commissioner for Refugees, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, May 2015, available at: www.refworld.org/docid/55643c1d4.html; UN, *Data Strategy of the Secretary-General for Action by Everyone, Everywhere 2020–2022*, 2020, available at: www.un.org/en/content/datastrategy/images/pdf/UN_SG_Data-Strategy.pdf.

to North Korea's Kimsuky advanced persistent threat group.³ Reports also demonstrate that dozens of UN servers—including those operated by the UN's human rights offices—have been hacked.⁴ The UN is not the only IO that has fallen victim to attempted hacking; many other IOs, regardless of their designation, have been targeted. In 2018, the Netherlands foiled a hack against the Organisation for the Prohibition of Chemical Weapons (OPCW) and attributed it to Russia.⁵ At the time, the OPCW was investigating the poisoning of former Russian double agent Sergei Skripal and his daughter Yulia Skripal as well as a chemical attack on the Syrian city of Douma. During the COVID-19 pandemic, the World Health Organization (WHO) reported that there had been a sharp rise in attempts to hack its computer networks and systems and gain access to sensitive data.⁶ In January 2022, the International Committee of the Red Cross (ICRC)⁷ reported that its data had been hacked while the data was stored on servers hosted by a private company based in Switzerland.⁸ The ICRC determined that the personal information of more than 500,000 people receiving services from the International Red Cross and Red Crescent Movement had been compromised and that it was working under the presumption that this data had been “copied and exported”.⁹

Although hacking has become a widespread feature of international affairs, academic attention has largely focused on whether and to what extent international law protects *States* from hacking.¹⁰ Little – if any – academic literature has analyzed whether international law protects *IOs* from hacking, even though they exercise

- 3 *Report of the Panel of Experts Established Pursuant to Resolution 1874 (2009)*, UN Doc. S/2020/840, 28 August 2020, paras 118–121. See also *Report of the Panel of Experts Established Pursuant to Resolution 1874 (2009)*, UN Doc. S/2020/151, 2 March 2020, Annexes 28–30.
- 4 “The Cyber Attack the UN Tried to Keep under Wraps”, *The New Humanitarian*, 29 January 2020, available at: www.thenewhumanitarian.org/investigation/2020/01/29/united-nations-cyber-attack; “United Nations Agency ‘Hacking Attack’ Investigated”, *BBC News*, 21 November 2021, available at: www.bbc.co.uk/news/technology-15951883.
- 5 “Netherlands Defence Intelligence and Security Service Disrupts Russian Cyber Operation Targeting OPCW”, *ASD News*, 4 October 2018, available at: www.asdnews.com/news/defense/2018/10/04/netherlands-defence-intelligence-security-service-disrupts-russian-cyber-operation-targeting-opcw.
- 6 WHO, “WHO Reports Fivefold Increase in Cyber Attacks, Urges Vigilance”, 23 April 2020, available at: www.who.int/news/item/23-04-2020-who-reports-fivefold-increase-in-cyber-attacks-urges-vigilance; “Elite Hackers Target WHO as Coronavirus Cyberattacks Spike”, *Reuters*, 23 March 2020, available at: www.reuters.com/article/us-health-coronavirus-who-hack-exclusive-idUSKBN21A3BN.
- 7 In the authors’ view, the ICRC is an international organization possessing international legal personality. Various States and IOs have recognized the ICRC’s international legal personality; for a discussion of this practice, see Els Debuf, “Tools to Do the Job: The ICRC’s Legal Status, Privileges and Immunities”, *International Review of the Red Cross*, Vol. 97, No. 897–898, 2015, pp. 321–329.
- 8 ICRC, “Cyber-Attack on the ICRC: What We Know”, 21 January 2022, available at: <https://icrc.org/en/document/cyber-attack-icrc-what-we-know>; ICRC, “ICRC Cyber-Attack: Sharing our Analysis”, 16 February 2022, available at: www.icrc.org/en/document/icrc-cyber-attack-analysis.
- 9 *Ibid.* (“Were data sets copied and exported? We must presume so. We know that the hackers were inside our systems and therefore had the capacity to copy and export it.”)
- 10 See, generally, Russell Buchan, *Cyber Espionage and International Law*, Hart, Oxford, 2018; Russell Buchan and Iñaki Navarrete, “Cyber Espionage and International Law”, in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace*, Edward Elgar, Cheltenham, 2021; Asaf Lubin, “The Liberty to Spy”, *Harvard International Law Journal*, Vol. 61, No. 1, 2020; Craig Forcece, “Spies Without Borders: International Law and Intelligence Collection”, *Journal of National Security Law and Policy*, Vol. 5, No. 1, 2011.

important governance functions and handle large amounts of data. With this in mind, this article is perhaps the first to examine the important and timely question of which international legal rules apply when IOs fall victim to hacking operations committed by States. In answering this question, we identify three types of hacking scenarios: the first involves hacking by member States (MSs) of the IO in question, the second involves hacking by States that host the IO within their territory (host States), and the third involves hacking by non-member States (NMSs) of the IO in question.¹¹

All three scenarios give rise to a number of overlapping legal issues. The first of these concerns the scope of the privileges and immunities accorded to IOs by their founding treaties, headquarters agreements, conventions on privileges and immunities, and customary international law (CIL), and whether hacking by MSs, host States and NMSs breaches these obligations. The second issue concerns the application of the principle of good faith (GF) to the relations between IOs, MSs and NMSs, and whether hacking breaches the particular legal postulates that stem from this principle and govern these relations. The third issue concerns the scope of the principle of State sovereignty and whether hacking breaches the sovereignty of the host State or the State on whose infrastructure the IO's data resides.

The ensuing legal analysis follows the above order, and its principal aim is to explain how the aforementioned regulatory frameworks protect IOs from hacking. This study is important because it identifies the basic set of legal parameters that should be considered when IOs are hacked, and the analysis herein will help scholars and practitioners better understand and evaluate the effectiveness of legal responses to this issue.

International organizations and their privileges and immunities

States establish IOs in order to pool resources and achieve certain objectives through joint and coordinated action. Because IOs exercise governance functions over States but consist of States which retain their sovereignty, they require a range of privileges and immunities to enable them to operate free from interference. Privileges and immunities refer to certain protections and exemptions from local jurisdiction that are necessary for the independent functioning of IOs and the effective performance of their tasks.¹² This section therefore examines the source and

11 In this article, we assume that the hacking is committed by a State or is attributable to a State. On attribution in the context of IOs, see International Law Commission (ILC), *Draft Articles on the Responsibility of International Organizations*, 2011 (DARIO). On cyber attribution, see Nicholas Tsagourias and Michael Farrell, "Cyber Attribution: Technical and Legal Approaches and Challenges", *European Journal of International Law*, Vol. 31, No. 3, 2020.

12 "Both the basis for and the scope of this immunity, which is aimed at ensuring that the UN can function completely independently and thus serves a legitimate purpose, are therefore different from those underlying the immunity from jurisdiction of foreign states": Supreme Court of the Netherlands, *Stichting Mothers of Srebrenica and Others v. Netherlands and United Nations*, LJN: BW1999, ILDC 1760 (NL, 2012), Final Appeal Judgment, 13 April 2012, para. 4.2. "International organizations enjoy

scope of these privileges and immunities and assesses whether and to what extent they protect IOs from hacking.

Privileges and immunities under conventional law

The constitutive treaties of IOs usually grant IOs certain privileges and immunities vis-à-vis their MSs, but IOs may also conclude additional agreements that set out in more detail the nature, content and scope of those privileges and immunities. For example, Article 105(1) of the UN Charter states that the UN “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”, whereas the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN) fleshes out the detail of the UN’s privileges and immunities.¹³

As already indicated, the basis of the privileges and immunities of IOs is functional necessity, and given that IOs possess different functions, they would in principle require different privileges and immunities. That said, IOs are usually endowed with broad and general functions which are interpreted and reinterpreted as the international political landscape evolves.¹⁴ The upshot of this is that, in practice, the concept of functional necessity often leads to the award of general or “absolute” privileges and immunities.¹⁵

When formulating their agreements on privileges and immunities, IOs tend to use the CPIUN as a model.¹⁶ In this way, the CPIUN has “become *the* reference point for the definition of the privileges and immunities of other IOs”.¹⁷ Also, many of the concepts appearing in the CPIUN—such as the terms “premises”, “inviolable”, “archives” and “documents”—are used by the 1961 Vienna

privileges and immunities entirely because they are necessary for the fulfilment of their purposes and functions”: Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge University Press, Cambridge, 2006, p. 316. See also C. Wilfred Jenks, *International Immunities*, Stevens & Sons and Oceana, London, 1961, p. 18; Council of Europe, Committee of Ministers, *European Committee on Legal Cooperation: Addendum: Privileges and Immunities of International Organizations and Persons Connected with Them*, 9 July 1969, p. 4; Chanaka Wickremasinghe, “International Organizations or Institutions: Immunities before National Courts”, *Max Planck Encyclopedia of International Law*, 2009, para. 1.

13 In relation to the UN’s specialized agencies, see Convention on the Privileges and Immunities of Specialized Agencies, 1947.

14 August Reinisch, “Privileges and Immunities”, in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations*, Oxford University Press, Oxford, 2016, p. 1058.

15 “[T]he immunity of international organizations, within the framework of their functional restrictions, is to be regarded in principle as absolute”: Austrian Supreme Court, *Firma Baumeister Ing. Richard L v. O*, 10 Ob 53/04 y, ILDC 362 (AT 2004), 14 December 2004, para. 12. See also August Reinisch and Peter Bachmayer, *The Convention on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary*, Oxford University Press, Oxford, 2016, p. 67 (“In practice an unqualified, general immunity ... is often regarded as absolute immunity”).

16 See, for example, General Agreement on Privileges and Immunities of the Council of Europe, 1949; Agreement on Privileges and Immunities of the Organization of American States, 1949; Treaty Establishing the Central American Institute of Public Administration, 1954; Agreement Establishing the World Trade Organization, 1995; Convention on the Privileges and Immunities of Specialized Agencies, 1947.

17 E. Debuf, above note 7, p. 333.

Convention on Diplomatic Relations (VCDR) to describe the privileges and immunities of diplomatic missions. Courts¹⁸ and commentators¹⁹ have thus used these definitions to interpret the privileges and immunities of IOs under the CPIUN. Consequently, we will examine specific provisions of this agreement in order to consider how they apply to incidents of hacking.

Section 3 of the CPIUN provides that “[t]he premises of the United Nations shall be inviolable”. The term “premises” refers to those areas that house or contain an IO and includes those spaces owned, occupied or controlled by the organization,²⁰ such as buildings (and parts thereof), car parks and gardens. The premises of an IO can be virtual insofar as they include the computer networks and systems that are supported by cyber infrastructure which is physically located within the organization’s premises.²¹ Generally, the premises of IOs do not extend to computer networks and systems hosted by cyber infrastructure located beyond the IO’s physical premises—for example, where computer systems and networks are supported by servers located within the territory of the host State or third States.²² However, where an IO can establish ownership or control over that computer network or system, it will form part of the organization’s “premises”. An IO’s ownership of a computer network or system may be indicated by the fact that it has entered into a contract with a service provider that grants legal ownership to the organization. An IO exercises control over a computer network or system where, for example, it regulates access to that network or system (e.g., by deploying and operating firewalls and anti-intrusion software) and supervises the activities occurring within it. Regarding the 2022 ICRC hack, the ICRC explained that it manages the data and applications on the targeted servers notwithstanding the fact that they are hosted by a private company.²³ The ICRC therefore exercises control over the servers and, on this basis, they can be said to form part of the ICRC’s premises and as such are protected from hacking.

Premises are “inviolable” to the extent that they are protected from any form of interference.²⁴ International law therefore deploys a “protective ring”

18 Supreme Court of Canada, *World Bank Group v. Wallace*, [2016] 1 SCR 207, 29 April 2016, para. 78.

19 Laurie Blank, “The Limits of Inviolability: The Parameters for Protection of United Nations Facilities during Armed Conflict”, *International Law Studies*, Vol. 93, 2017, p. 55.

20 UN General Assembly, *The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their Status, Privileges and Immunities: Study Prepared by the Secretariat*, UN Doc. A/CN.4/L.118, 8 March 1967. See also A. Reinisch and P. Bachmayer, above note 15, p. 127.

21 With regard to the diplomatic and consular missions of States, some authors have argued that their premises encompass the computer networks and systems supported by cyber infrastructure that is located within the missions’ physical premises. See Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0), Rule 39; R. Buchan, above note 10, p. 73.

22 R. Buchan, above note 10, p. 73.

23 “We also feel it is important to clarify that this was a targeted, direct cyber-attack on ICRC servers, not the company that hosted them. We manage the data and applications on these servers, not the hosting company”: ICRC, “Cyber-Attack on the ICRC”, above note 8.

24 Supreme Court of Canada, *World Bank Group*, above note 18, para. 78.

around an IO's premises and shelters them from intrusion.²⁵ This *cordon sanitaire* prohibits spying within the premises of IOs, and indeed, on several occasions the UN Secretariat has claimed that electronic surveillance against its offices represents a breach of its inviolability.²⁶ It follows that hacking operations against an IO's computer networks and systems constitute a prohibited interference in its premises and, accordingly, amount to a breach of its privileges and immunities.

Section 3 of the CPIUN also provides that “[t]he property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action”. “Property and assets” include those items over which IOs can establish ownership or control.²⁷ They certainly include an IO's *tangible* property and assets, and this means that computer hardware such as servers and storage devices are protected from interference. But “property and assets” also include an IO's *intangible* property and assets, such as its bank accounts²⁸ and pension funds.²⁹ If this is the case, computer networks and systems and data can be “property and assets” of an IO, provided of course that the organization can establish ownership or control over them. Again, ownership of a network, system or data may be determined by the contractual relationships entered into by the IO, and control can be established where the organization exercises a regulatory and supervisory function over them. As “property and assets” of the IO, computer networks and systems and data are protected from hacking given that this activity constitutes a prohibited “search” or “interference”.

Moreover, an IO's “property and assets” are protected “wherever located and by whomsoever held”. This means that, where an IO is able to establish ownership or control over computer networks and systems supported by cyber infrastructure located within the territory of the host State or any other State, and regardless of whether that infrastructure is publicly or privately owned or operated, the networks and systems qualify as “property and assets” of the IO and are protected from interference. In relation to the 2022 ICRC hack, for example, the ICRC was responsible for managing the data and applications on the targeted servers rather than the private company that hosts them. The ICRC therefore exercises control over the computer networks and systems and data

25 UK Court of Appeal, *R (Bancoult No. 3) v. Secretary of State for Foreign and Commonwealth Affairs*, [2014] EWCA Civ. 708, 23 May 2014, para. 58.

26 “UN to Investigate GCHQ, MI5 Spying on Foreign Delegates at Climate Summit Talks”, *RT*, 5 November 2010, available at: www.rt.com/uk/202147-uk-climate-summit-spying/; “U.N. to Britain: If Spying on Us, Stop It”, *UPI*, 26 February 2004, available at: www.upi.com/Defense-News/2004/02/26/UN-to-Britain-If-spying-on-us-stop-it/31241077833950/; UN, *Daily Press Briefing by the Office of the Spokesman for the Secretary-General*, 29 November 2010, available at: www.un.org/press/en/2010/db101129.doc.htm.

27 A. Reinisch and P. Bachmayer, above note 15, p. 132.

28 *Report of the Commissioner-General of UNRWA to the General Assembly, 1 January to 31 December 2013*, UN Doc. A/69/13, 2014, para. 58.

29 Supreme Court of the State of New York, Appellate Division, *Shamsee v. Shamsee*, 428 NYS2d 33, 36 (2d Dep't 1980), (1980) UNJYB, 18 October 1979, p. 222 (“[T]he Pension Fund is an organ of the United Nations, subject to regulation by the General Assembly, and ... its assets, although held separately from other United Nations property, are the property of that international organization”).

supported by those servers, which makes them “property and assets” of the ICRC, and as such they are protected from hacking. Equally, where an IO can establish ownership or control over data that is stored on computer systems and networks operated by third parties, that data qualifies as “property and assets” of the IO and is protected from interference and specifically hacking.

Section 4 of the CPIUN provides that “[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located”. The term “archives” does not refer to historical documents only, but to “the entire collection of stored documents ... including [the IO’s] official records and correspondence”.³⁰ In any event, Section 4 explains that “all documents” belonging to or held by IOs are inviolable. It is well established that, in the Digital Age, documents are inviolable irrespective of whether they are compiled physically or electronically.³¹

As Section 4 explains, archives and documents are inviolable when they “belong to” or are “held by” an IO. The latter term indicates that, even in the absence of ownership, archives and documents are protected when they are placed in an IO’s “safekeeping”.³² In short, what is critical is that the IO exercises “control” over the archives and documents in question.³³ Moreover, the archives and documents of an IO are inviolable “wherever located”. Consider, for example, a situation in which an IO stores data on servers in third States. It may be the case that the IO preserves its legal ownership of that data by concluding a contract with the actor who owns or controls the server. But even if ownership cannot be established, that data can be said to form part of the archives and documents of the IO where the organization exercises control over it, for example by being able to access, modify and delete the data or transfer it to another actor. Conversely, data does not form part of the archives and documents of an IO

30 Supreme Court of Canada, *World Bank Group*, above note 18, para. 73. The UN Secretary-General defines archives as “records to be permanently preserved for their administrative, fiscal, legal, historical or informational value”: UN Secretariat, “Secretary-General’s Bulletin: Record-Keeping and Management of United Nations Archives”, ST/SGB/2007/5, 2007.

31 UK Supreme Court, *R (on the Application of Bancoult No. 3) v. Secretary of State for Foreign and Commonwealth Affairs*, [2018] UKSC 3, 8 February 2018, para. 68; Tallinn Manual 2.0, above note 21, p. 220; A. Reinisch and P. Bachmayer, above note 15, pp. 161–162; “Letter from the Assistant Secretary-General for Legal Affairs to the Minister Counsellor of a Permanent Mission to the United Nations”, 5 September 2007. The UN Secretary-General defines documents as “any data or information, regardless of its form or medium, which is or has been electronically generated by, transmitted via, received by, processed by, or represented in an ICT resource”: UN Secretariat, “Secretary-General’s Bulletin: Use of Information and Communication Technology Resources and Data”, ST/SGB/2004/15, 2004. “All records, including electronic records and e-mail records, created or received by a staff member in connection with or as a result of the official work of the United Nations, are the property of the United Nations”: UN Secretariat, above note 30.

32 “[With regard to Section 4] we are thus talking about not only all the Organization’s own documents but also those held by it, in other words those in its safekeeping”: Leonardo Diaz-Gonzalez, *Fifth Report on Relations between States and International Organizations*, UN Doc. A/CN.4/432, 11 May 1990, p. 4. See also A. Reinisch and P. Bachmayer, above note 15, pp. 163–165.

33 “What is it that identifies a document as belonging to the archives or documents of the mission, as opposed to some other organ of the sending state? ... The test is not their location, for they are protected ‘wherever they may be’. It must necessarily be whether they are under the control of the mission’s personnel”: UK Supreme Court, *Bancoult No. 3*, above note 31, para. 68.

where the organization passes it to, or shares it with, another actor and in doing so relinquishes control over it.³⁴ In this context, the data can no longer be described as “belonging to” or “held by” the IO. However, this does not apply to MSs because when an IO shares data with them related to the functions of the organization, they act as organs of the IO and the data is still data of the organization. Otherwise, an IO would not be able to discharge its functions if relevant data were not protected when shared with its MSs.³⁵

According to Section 10 of the CPIUN, “[t]he United Nations shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same privileges and immunities as diplomatic couriers and bags”. Electronic communications such as emails can be seen as correspondence analogous to courier dispatches and, where they contain attachments (for example, zip files), they can be analogized to diplomatic bags.³⁶ Under the VCDR, diplomatic bags must “bear visible external marks of their character”.³⁷ In the cyber context, email addresses, subject lines and electronic signatures can be used to identify the communications of an IO.³⁸ Critically, diplomatic bags cannot be “opened or detained”.³⁹ Airport security cannot therefore X-ray diplomatic bags because this would result in their contents being revealed. However, sniffer dogs can be used to search for drugs, explosives or other illicit items because such searches do not penetrate or otherwise reveal the contents of the bag. In the cyber context, sniffer software that can detect malicious emails is permitted but more intrusive software that reveals the content of emails is proscribed.⁴⁰

We can thus conclude by saying that these privileges and immunities provide IOs with overlapping protection against hacking.

Privileges and immunities in headquarters agreements

IOs are almost always located within the territory of MSs, and this raises the possibility that the host State may interfere in the organization’s work. In particular, host States have greater opportunity to hack the data of IOs because such organizations may use the cyber infrastructure located within the territory of host States to support their computer networks and systems and may use this infrastructure to connect and communicate with the outside world. IOs and host States thus conclude bilateral treaties—usually referred to as “headquarters agreements”, “seat agreements” or “host State agreements”—to regulate their

34 *Ibid.*

35 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, Oxford, 1994, p. 93.

36 Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, Oxford, 2016, p. 194.

37 Vienna Convention on Diplomatic Relations, 1961 (VCDR), Art. 27(4).

38 R. Buchan, above note 10, p. 87.

39 VCDR, Art. 27(3).

40 Won-Mog Choi, “Diplomatic and Consular Law in the Internet Age”, *Singapore Year Book of International Law*, Vol. 10, 2006, p. 131.

relations and, in particular, maintain the IO's independence. These agreements cover different areas and usually award IOs the privileges and immunities they need to discharge their functions.⁴¹

Headquarters agreements tend to incorporate the privileges and immunities set out in the CPIUN.⁴² At the same time, headquarters agreements can tailor the scope of the awarded privileges and immunities to the particular context of hosting an IO.⁴³ Since the CPIUN tends to act as the baseline for the privileges and immunities contained in headquarters agreements, and since (as explained in the previous section) these privileges and immunities protect IOs from hacking, headquarters agreements equally protect IOs from hacking by host States.

Privileges and immunities under customary international law

The preceding sections established the scope of the privileges and immunities enjoyed by IOs vis-à-vis their member States and host States. In this section, we consider whether NMSs should respect the privileges and immunities of IOs. Although NMSs are not bound by the privileges and immunities contained in agreements concluded by IOs or treaties to which they are not party,⁴⁴ the question arises as to whether these privileges and immunities (or at least certain privileges and immunities) have been absorbed into CIL and thus apply to the relationships between IOs and NMSs.

Commentators have cast doubt on whether IOs enjoy privileges and immunities under CIL due to the fact that IOs' privileges and immunities are invariably enshrined in treaties, meaning there is little scope for State practice and *opinio juris* to develop outside of this dense patchwork of conventional agreements.⁴⁵ Yet, the question of whether there is CIL on the privileges and immunities of IOs cannot be ignored because the treaties setting up IOs may be silent in this respect,⁴⁶ there may be no headquarters agreements, the existing agreements may not be comprehensive or enacted domestically, and above all because IOs are active participants in international life and interact with other actors, including NMSs.

41 A. Sam Muller, *International Organizations and Their Host States: Aspects of their Legal Relationship*, Brill, Leiden, 1995, p. 22.

42 *Ibid.*, Chap. 6; Anthony J. Miller, "Privileges and Immunities of United Nations Officials", *International Organizations Law Review*, Vol. 4, No. 2, 2007, p. 170.

43 Pieter H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, Martinus Nijhoff, Leiden, 1994, p. 136.

44 Vienna Convention on the Law of Treaties, 1969 (VCLT), Art. 34.

45 Michael Wood, "Do International Organizations Enjoy Immunity under Customary International Law?", in Niels M. Blokker and Nico J. Schrijver (ed.), *Immunity of International Organizations*, Brill, Leiden, 2015, p. 30; Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations*, Oxford University Press, Oxford, 2018, p. 269. For a more nuanced approach, see Niels M. Blokker, "Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges", in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law*, Cambridge University Press, Cambridge, 2019, pp. 194–197.

46 For example, the NATO Constitution and the Warsaw Treaty Pact Organization Charter.

In our opinion, a positive case can be made that certain privileges and immunities contained in the CPIUN have acquired the status of CIL – namely, those pertaining to premises, property, assets, archives, documents and correspondence.⁴⁷

As a preliminary matter, we should recall that, according to the International Court of Justice (ICJ), for treaty provisions to pass into CIL, they must be “of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”.⁴⁸ When it comes to the CPIUN’s provisions on privileges and immunities, there is little doubt that they are of a norm-creating character given that they require States Parties to respect and protect the inviolability of an IO’s premises, property, assets, archives, documents and correspondence and do not permit any reservations or derogations. More critically, though, the CPIUN introduced the notion of functional privileges and immunities by shifting the approach away from sovereign privileges and immunities to privileges and immunities of non-sovereign entities – to wit, IOs. In this regard, at least certain provisions, such as those relating to premises, property, assets, archives, documents and correspondence, are generalizable as applying to all IOs because they enable such organizations to fulfil their functions without interference, in view also of the fact that IOs lack territory and the material and legal resources that States have at their disposal.

For CIL to arise, there must be a general practice and *opinio juris*.⁴⁹ The immediate question for the purposes of the present discussion, then, is whether there is a general practice accompanied by *opinio juris* in favour of the CPIUN’s privileges and immunities provisions. One can say that where States become parties to a convention, the act of ratification evinces an intention to be bound by that treaty as a matter of treaty law, and from this, no State practice or *opinio juris* can be deduced to support the formation of CIL.⁵⁰ However, the ICJ has held that a treaty can be assimilated into CIL where there is “very widespread and representative participation in the convention” and its membership includes

47 “[T]he General Convention’s provisions on jurisdictional immunity have been applied to other organizations and non-member states through the development of similar treaties and customary international law”: Charles H. Brower II, “International Immunities: Some Dissident Views on the Role of Municipal Courts”, *Virginia Journal of International Law*, Vol. 41, No. 1, 2001, p. 22. Amerasinghe explains that the CPIUN and the Specialized Agencies Convention reflect an “incipient customary law of international privileges and immunities” and that there is “a presumption that many of the privileges and immunities incorporated in the two general conventions are generally what are required for this purpose”: C. F. Amerasinghe, above note 12, p. 346. See also Giorgio Gaja, “Jurisdictional Immunity of International Organizations”, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2006, p. 202; Christian Dominicé, “L’immunité de juridiction et d’exécution des Organisations Internationales”, *Recueil des Cours*, Vol. 187, 1984, pp. 174–177 (“Le problème de la coutume”), 219–225 (“La question de la coutume”); James Crawford, *Brownlie’s Principles of Public International Law*, Oxford University Press, Oxford, 2019, pp. 164–166.

48 ICJ, *North Sea Continental Shelf Cases*, Judgment, [1969] ICJ Rep. 3, 20 February 1969, para. 72.

49 Statute of the International Court of Justice, 1945, Art. 38(1)(b).

50 ICJ, *North Sea*, above note 48, para. 71; ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), [1986] ICJ Rep. 14, 17 June 1986, para. 184.

those States whose “interests” are “specially affected”;⁵¹ this approach has also been adopted by international courts,⁵² commissions⁵³ and domestic courts.⁵⁴ In these circumstances, the widespread ratification of a treaty gives rise to a large body of State practice and signals the emergence of a communal *opinio juris*, and these combine to generate a parallel rule of CIL.⁵⁵ This approach to the formation of CIL is important in the context of the CPIUN given that the CPIUN has attracted widespread support within the international community, with 162 States having ratified it at the time of writing.⁵⁶

The argument that provisions contained in widely ratified treaties are constitutive of CIL is even more compelling when those provisions are replicated

- 51 ICJ, *North Sea*, above note 48, para. 73. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 226, 8 July 1996, para. 82 (citing “the extent of the accession” to the Hague and Geneva treaties as confirming their CIL status). “The number of parties to a treaty may be an important factor in determining whether particular rules set forth therein reflect customary international law; treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect”: ILC, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, 2018, Conclusion 11, Commentary para. 3.
- 52 Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras 17–20 (referring to the “huge acceptance, the highest acceptance of all international conventions” as indicating that the relevant provisions of the Convention on the Rights of the Child have passed into CIL).
- 53 “Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion”: Eritrea–Ethiopia Claims Commission, *Partial Award: Prisoners of War, Ethiopia’s Claim 4*, UNRIAA, Vol. 26, 1 July 2003, para. 31 (citations omitted).
- 54 “[A] treaty will only constitute sufficient proof of a norm of customary international law if an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles”: District Court for the Eastern District of Virginia, *United States v. Hasan and Ors*, Decision on Motion to Dismiss, No. 2:10cr56, ILDC 1586 (US 2010), 29 October 2010, para. 87. The Court considered the definition of piracy in the UN Convention on the Law of the Sea to be reflective of CIL on the basis that 161 States had ratified it, which represented the “overwhelming majority”: *ibid.*, para. 89. See, generally, Cedric M. J. Ryngaert and Duco W. Hora Siccama, “Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts”, *Netherlands International Law Review*, Vol. 65, No. 1, 2018, pp. 6–10.
- 55 Crawford explains that there must be “a presumption of *opinio juris* from wide participation in a treaty, at least in normative terms”: James Crawford, “Chance, Order, Change: The Course of International Law”, *Recueil des Cours*, Vol. 365, 2013, para. 167. “[P]articipation in a treaty with a fundamentally norm-creating character (such as an IHL treaty) counts as practice capable of supporting the development of parallel rules of customary law”: Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, para. 4.40. See also Richard R. Baxter, “Multilateral Treaties as Evidence of Customary International Law”, *British Yearbook of International Law*, Vol. 41, 1965–66, p. 275; Hugh Thirlway, *International Customary Law and Codification*, A. W. Sijthoff, Leiden, 1972, p. 89; Anthony D’Amato, *The Concept of Custom in International Law*, Cornell University Press, London and Ithaca, NY, 1971, p. 104.
- 56 It is interesting to note that in 1967 the UN Legal Counsel opined that “the standards and principles of the Convention have been so widely accepted that they have now become a part of the general international law governing the relations of States and the United Nations”, and this was also correct in relation to NMSs; “Question of Privileges and Immunities of the United Nations, of Representatives of Member States and of Officials of the Organization: Statement made by the Legal Counsel at the 1016th Meeting of the Sixth Committee of the General Assembly on 6 December 1967”, *United Nations Juridical Yearbook*, 1967, p. 314.

in successive treaties.⁵⁷ To explain, when a treaty provision is repeated in a series of subsequent conventions, this amounts to a general State practice and indicates the “gradual fusion of a communal *opinio juris*”,⁵⁸ thereby furnishing the necessary ingredients to establish a rule of CIL. This is the case with the CPIUN. As explained previously, the CPIUN has been used as a template for many other treaties on privileges and immunities—in fact, the CPIUN’s privileges and immunities provisions are usually repeated verbatim in most IOs’ privileges and immunities treaties. This is a deliberate and conscious act which demonstrates both State practice and *opinio juris*.

Further evidence of the CIL status of the CPIUN’s privileges and immunities provisions lies in the VCDR. The law on diplomatic privileges and immunities and the law on the privileges and immunities of IOs are closely related. The customary law of diplomatic privileges and immunities has a long history in international relations and has influenced the development of the law on the privileges and immunities of IOs, including the CPIUN.⁵⁹ Moreover, certain privileges and immunities contained in the 1946 CPIUN are replicated in the 1961 VCDR and, as we have seen, courts have frequently used the definitions of terms and concepts appearing in the VCDR to aid their interpretation of similar terms and concepts appearing in the CPIUN. Importantly, the ICJ has consistently found the VCDR to be reflective of CIL⁶⁰ and, as we explain in the next paragraph, certain IOs have been granted diplomatic privileges and immunities.

Headquarters agreements also provide evidence of the existence of CIL since certain agreements refer or allude to the customary law of privileges and immunities, such as the agreements concluded between Switzerland (as the host State) and many IOs. For example, Article 3 of the agreement with the International Labour Organization provides: “L’Organisation Internationale du Travail est au bénéfice de l’ensemble des immunités connues, en droit des gens,

57 “[I]n some cases it may be that frequent repetition in widely accepted treaties evinces a recognition by the international community as a whole that a rule is one of general, and not just particular, law”: International Law Association, *Committee on Formation of Customary (General) International Law: Final Report*, 2000, Rule 25, Commentary para. 5. “The repetition in two or more codification conventions of the substance of the same norm may be an important element in establishing the existence of that norm as a customary rule of general international law”: Institut de Droit International, *Problems Arising from a Succession of Codification Conventions on a Particular Subject*, Lisbon, 1995, Rule 12. “The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law”: ILC, above note 51, Conclusion 11(2).

58 Yoram Dinstein, “The Interaction between Customary International Law and Treaties”, *Recueil des Cours*, Vol. 322, 2006, pp. 299–300.

59 Alison Duxbury, “Intersections between Diplomatic Immunities and the Immunities of International Organizations”, in Paul Behrens (ed.), *Diplomatic Law in a New Millennium*, Oxford University Press, Oxford, 2017.

60 ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, [2002] ICJ Rep. 3, 14 February 2002, para. 52; ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, [2008] ICJ Rep. 177, 4 June 2008, para. 174; ICJ, *United States Diplomatic and Consular Staff in Tehran*, Judgment, [1980] ICJ Rep. 3, 24 May 1980, paras 62, 69.

sous le nom d'immunités diplomatiques";⁶¹ Article 2 of the agreement with the European Free Trade Association explains: "L'Association jouit des immunités et privilèges habituellement reconnus aux organisations internationales";⁶² Article 2 of the agreement with the European Organization for Nuclear Research provides: "The Organization shall enjoy the immunities and privileges usually granted to international organizations to the extent required for the fulfilment of their tasks";⁶³ and Article 2 of the agreement with the World Health Organization explains: "L'Organisation Mondiale de la Santé est au bénéfice de l'ensemble des immunités connues, en droit des gens, sous le nom d'immunités diplomatiques."⁶⁴

How national courts deal with the privileges and immunities of IOs can provide evidence of the existence of CIL. For example, in *A. S. v. Iran–United States Claims Tribunal*, the Dutch Supreme Court held that, in the absence of an agreement on privileges and immunities, "it follows from unwritten international law that an international organization is entitled to the privilege of immunity from jurisdiction on the same footing as generally provided for in the treaties referred to above [namely, headquarters agreements and privileges and immunities conventions]".⁶⁵ In another case, an Israeli court granted absolute immunity to the European Commission even in relation to commercial matters because "it is not a sovereign state but an international organisation with certain goals" to which the impugned act fell.⁶⁶

What we can conclude from the preceding discussion is that certain provisions of the CPIUN – specifically, those on the inviolability of premises, property, assets, archives, documents and correspondence – have transitioned into CIL.⁶⁷ This is because they have been reaffirmed by State practice and *opinio juris*, as evinced by their formulation in relevant conventions. More importantly, they are supported by the practice and *opinio juris* of IOs. Although views as to whether IOs can contribute to the creation of CIL may differ, we subscribe to the International Law Commission's (ILC) view that they can do so in certain cases, such as when the subject falls within an IO's mandate and/or the rule is addressed to IOs.⁶⁸ Privileges

61 Accord du 11 Mars 1946 entre le Conseil Fédéral Suisse et l'Organisation Internationale du Travail pour régler le Statut Juridique de cette Organisation en Suisse, available at: www.fedlex.admin.ch/eli/cc/1956/1103_1182_1194/fr.

62 Accord entre le Conseil Fédéral Suisse et l'Association Européenne de Libre-échange pour déterminer le Statut Juridique de cette Association en Suisse, available at: www.fedlex.admin.ch/eli/cc/1961/749_763_779/fr.

63 European Organization for Nuclear Research, *Headquarters Agreement*, CERN/115 Rev. 2, 11 February 1955, available at: <https://cds.cern.ch/record/21737/files/CM-P00074863-e.pdf>.

64 Accord entre le Conseil Fédéral Suisse et l'Organisation Mondiale de la Santé, pour régler le Statut Juridique de cette Organisation en Suisse Conclu le 21 août 1948, available at: www.fedlex.admin.ch/eli/cc/1956/1120_1198_1210/fr.

65 Supreme Court of the Netherlands, *A. S. v. Iran–United States Claims Tribunal*, RvdW (1986) No. 20, NJ (1986) No. 438, 20 December 1985, *Netherlands Yearbook of International Law*, Vol. 18, 1987, p. 360.

66 Haggai Carmon, "A Jerusalem Court Ruling: The European Commission is Immune to a Commercial Lawsuit", *Diplomatic/Consular Law and Sovereign Immunity in Israel and Worldwide*, available at: <http://diplomaticlaw.com/blog/?p=100>.

67 J. Crawford, above note 47, pp. 164–166.

68 ILC, above note 51, Conclusion 4(2), Commentary paras 5, 6. See also Kristina Daugirdas, "International Organizations and the Creation of Customary International Law", *European Journal of International Law*, Vol. 31, No. 1, 2020, p. 201; C. Dominicé, above note 47, pp. 220–225.

and immunities is indeed an area where IOs engage in practice and express their *opinio juris*. As we have noted, this is because the privileges and immunities conventions and the headquarters agreements that replicate the CPIUN are negotiated and signed by the relevant IO as an international legal person.

Moving forward, another ground on which the CIL of privileges and immunities can be established is the international legal personality of IOs. Privileges and immunities are attendant to and give effect to the distinct legal personality of IOs; they therefore constitute part of the bundle of customary law rights attached to the legal personality of IOs.⁶⁹

This raises the question of when IOs enjoy legal personality under international law, the answer to which depends on whether legal personality is established subjectively or objectively. The subjective approach awards legal personality to IOs on the basis of the express or implied intention of their MSs. For example, MSs can explicitly endow the IO with legal personality in its constitutive treaty, or such personality can be inferred from the terms of the treaty. Insofar as NMSs are concerned, if they recognize (either explicitly or through acquiescence) an IO's legal personality, they also accept the attendant CIL privileges and immunities. Conversely, if they do not recognize the legal personality of an IO, they are not under any obligation to respect its privileges and immunities.

However, the subjective approach is not the dominant one. Rather, the prevailing view is that the legal personality of IOs is objectively established as a matter of international law.⁷⁰ According to this approach, IOs are bestowed with legal personality if they exhibit certain attributes, such as organs, powers and functions. This was how the ICJ established the legal personality of the UN in the absence of a specific provision in the Charter.⁷¹ The significance of an IO's objective legal personality is that it operates *erga omnes* and is therefore opposable to NMSs.⁷²

69 “[T]he privileges and immunities of an international organization derive from its legal status as an international person”: E. C. Okeke, above note 45, p. 253. See also Fernando Lusa Bordin, “To What Immunities are International Organizations Entitled under General International Law? Thoughts on *Jam v IFC* and the ‘Default Rules’ of IO Immunity”, *Questions in International Law*, Vol. 72, No. 1, 2020, p. 5. Italian case law has derived immunities from the legal personality of an IO. See Italian Court of Cassation, *Christiani v. ILAI*, Judgment No. 5819/1985, *Rivista di Diritto Internazionale*, 1986, p. 149. Dominicé takes the view that an IO with legal personality and whose MSs have granted it jurisdictional immunities as a matter of customary law enjoys the same immunities vis-à-vis NMSs (third States), but this may not be the case if the IO does not enjoy immunities vis-à-vis its MSs; C. Dominicé, above note 47, pp. 222–224.

70 Finn Seyfersted, *Objective International Personality of Intergovernmental Organisations: Do Their Capacities Really Depend upon their Constitutions?*, Copenhagen, 1963, pp. 9–10; C. W. Jenks, above note 12, p. 34; Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions*, Sweet and Maxwell, London, 2009, p. 490; Nigel D. White, *The Law of International Organisations*, Manchester University Press, Manchester, 2017, pp. 101–120.

71 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. 174, 11 April 1949, pp. 177–185. See also DARIO, above note 11, Art. 2, Commentary para. 9.

72 “There are those who take the view that the international legal personality of an organization is opposable only to those who have ‘recognised’ the organization, in the sense of being a member of the organization or engaging in some transaction with it, or granting privileges to it. But this is to ignore the objective legal reality of international personality. If the attributes are there, personality exists. It is not a matter of recognition. It is a matter of objective reality”: R. Higgins, above note 35, pp. 47–48. “[T]he personality

Accordingly, NMSs should respect the privileges and immunities that are attendant to an IO's legal personality.⁷³

To summarize, in this section we have argued that the privileges and immunities found in constitutive treaties, conventions and headquarters agreements protect IOs from hacking and that these privileges and immunities can be extended to NMSs because they are established in CIL and attach to the legal personality of IOs.

The principle of good faith: Its application to international organizations and hacking

In this section we discuss the application of the principle of good faith (GF) to the relations between IOs, MSs and NMSs, and consider how GF protects IOs from hacking. This section will explain the legal status of GF, establish its applicability to the relations between IOs, MSs (including host States) and NMSs, identify its particular postulates, and explain how it protects IOs from hacking.

The legal status of good faith

GF is a general principle of international law⁷⁴ whose modern formulation derives from the Roman concept of *bona fides*, which refers to trustworthiness, conscientiousness and honourable conduct.⁷⁵ In fact, GF is a fundamental principle of international law⁷⁶ because it upholds the integrity and effectiveness

of international organizations is in fact objective, which means that it is opposable to non-members and that non-members are bound to accept that organization as a separate legal person": Dapo Akande, "International Organizations", in Malcolm Evans (ed.), *International Law*, Oxford University Press, Oxford, 2018, p. 233. The United States claims that the objective legal personality of an IO depends on the size of its membership: "An international organization with substantial membership is a person in international law even in relation to states not members of the organization. However, a state does not have to recognize the legal personality of an organization of which it is not a member, which has few members, or which is regional in scope in a region to which the state does not belong." "Restatement (Third) of Foreign Relations Law of the United States", American Law Institute, 1987, Section 223, Comment (e). However, as Amerasinghe explains, once the legal personality of an IO is objectively established, there is no need to inquire into the size of its membership: C. F. Amerasinghe, above note 12, pp. 86–91.

73 J. Crawford, above note 47, p. 163; F. L. Bordin, above note 69, pp. 8–15; N. D. White, above note 70, p. 117.

74 Statute of the International Court of Justice, 1945, Art. 38(1)(c). See also ICJ, *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment (Preliminary Objections), [1998] ICJ Rep. 275, 11 June 1998, para. 38; ICJ, *Certain Norwegian Loans*, [1957] ICJ Rep. 9, 6 July 1957, p. 53 (Separate Opinion of Judge Lauterpacht) ("Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law"); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, Cambridge, 1953, Part II; Michel Virally, "Good Faith in Public International Law", *American Journal of International Law*, Vol. 77, No. 1, 1983, p. 130; Robert Kolb, *Good Faith in International Law*, Hart, Oxford, 2017. For a more critical approach, see Elisabeth Zoller, *La bonne foi en droit international public*, A. Pédone, Paris, 1977.

75 John F. O'Connor, *Good Faith in International Law*, Dartmouth, Aldershot, 1991, pp. 18–19, 124.

76 According to Schwarzenberger, GF is "a fundamental principle which can be eradicated from international law only at the price of the destruction of international law itself [and] forms necessarily

of the international legal order by fostering respect for the law as well as trust and confidence in legal relations.⁷⁷ GF thus ensures the stability and predictability of international legal relations, which is critical in an order characterized by voluntarism, weak institutional enforcement mechanisms, and value and power differentiation. It is for this reason that GF informs all international legal relations, including those established by IOs.⁷⁸

Although GF is sometimes referred to as a CIL rule,⁷⁹ the ICJ and other judicial bodies do not always differentiate between customary rules and general principles but instead view general principles as the formulation of fundamental and general rules. In fact, they place CIL and general principles under the umbrella of general international law.⁸⁰

That said, the classification of GF as a general principle is in our opinion the most appropriate because it corresponds to its general content, acceptance and binding effect. The legal implications that flow from the classification of GF as a general principle are as follows. First, GF has independent legal standing and binds all international legal persons.⁸¹ It is also legally consequential in that it produces legal consequences when applied to particular situations.⁸² In this regard, there are similarities between GF as a general principle and customary law because they both bind all international legal persons (with the exception of

part of the international public order. This consideration alone would suffice to qualify good faith as one of the fundamental principles of international law"; Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des Cours*, Vol. 87, 1955, p. 326. See also B. Cheng, above note 74, p. 105; ILC, *First Report on General Principles of Law*, UN Doc. A/CN.4/732, 2019, para. 154.

77 ICJ, *Nuclear Tests (Australia and New Zealand v. France)*, Judgment (Questions of Jurisdiction and/or Admissibility), [1974] ICJ Rep. 457, 20 December 1974, para. 46; Guillaume Futhazar and Anne Peters, "Good Faith", in Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law*, Cambridge University Press, Cambridge, 2020, p. 191.

78 "Good faith is a supreme principle, which governs legal relations in all of their aspects and content": International Centre for Settlement of Investment Disputes, *Inceysa Vallisoletana s.l. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, para. 230. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, [1984] ICJ Rep. 392, 29 November 1984, para. 60; ILC, above note 76, para. 161.

79 Permanent Court of International Justice, *Case Concerning Certain German Interests in Polish Upper Silesia*, Judgment No. 7, [1926] PCIJ Series A, 25 May 1926, pp. 1, 39–40; Court of First Instance of the European Communities, *Opel Austria GmbH v. Council*, Case No. T-115/94, [1997] ECR II-39, 22 January 1997, paras 24, 89–90.

80 ICJ, *Delimitation of Maritime Boundary in Gulf of Maine Area*, Judgment, [1984] ICJ Rep. 246, 12 October 1984, para. 79; World Trade Organization, Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 158; ILC, above note 76, paras 142–162.

81 ICJ, *Reparation for Injuries*, above note 71 (where the ICJ viewed the UN (as an IO) and States as "two political entities, equal in law, similar in form, and both the direct subjects of international law": pp. 177–179). Also see ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Rep. 73, 20 December 1980, para. 37 ("International organizations are subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law").

82 "It is clear to this Tribunal that the investment made by Inceysa in the territory of El Salvador, which gave rise to the present dispute, was made in violation of the principle of good faith": International Centre for Settlement of Investment Disputes, *Inceysa Vallisoletana s.l.*, above note 78, para. 234.

persistent objectors in the case of custom⁸³) and both produce legal consequences. Second, as a general principle GF contains a cluster of more specific postulates that give effect to its normative content, as will be seen in the subsection below on “The Content of Good Faith and Its Application to Hacking”. Third, certain of these postulates have acquired the status of independent rules, but this does not mean that GF has become otiose. GF remains as the background principle that assists in the application and interpretation of these specific rules, but more critically, it applies directly to fill any legal gaps that arise.⁸⁴ Fourth, the application of GF as a general principle to a particular set of circumstances and legal relations requires a certain contextualization. This is indeed one of the main differences between general principles and rules, with the latter applying in an “all-or-nothing” fashion.⁸⁵ In relation to IOs, it means that the content of GF may be thicker or thinner depending on the nature of the IO,⁸⁶ or whether GF applies to the relations between IOs and their MSs, host States, or NMSs, as we shall see later.

The application of good faith to the relations between international organizations and member States

As we have noted, IOs are created by States to pursue common goals, and for this reason MSs assume certain procedural and substantive obligations towards each other and towards the organization. However, and notwithstanding certain exceptions,⁸⁷ IOs do not have their own binding mechanisms for interpreting and enforcing these obligations. Moreover, IOs, even those with legal personality, are dependent on States for institutional and material resources. The relationship between IOs and their MSs is therefore complex: it is a relationship of interdependence and mutual interactions which can be simultaneously vertical and horizontal because MSs remain sovereign and independent legal persons even within the IO and because they continue to exist and operate outside the IO and sometimes in competition with it.

In such a context, the role of GF is critical in ensuring the integrity, viability and effectiveness of the political and legal order established by the IO. GF sets out the modalities according to which obligations and interactions are to be performed in order for the IO to function and attain its objectives, while also maintaining its integrity and independence as a separate legal person.

83 ICJ, *North Sea*, above note 48, p. 44; ICJ, *Fisheries Case (United Kingdom v. Norway)* (Merits), [1951] ICJ Rep. 116, 18 December 1951, p. 131.

84 M. Virally, above note 74, p. 134: “[G]ood faith is often hidden by the more precise rules it has generated (e.g. *pacta sunt servanda*), so that it becomes no longer necessary to rely upon it expressly for ordinary practical purposes. But even in such instances, general principles retain their full value as the *ratio legis* to which one may profitably turn in difficult cases.” See also Alain Pellet and Daniel Müller, “Article 38”, in Andreas Zimmermann and Christian J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, Oxford, 2019, para. 297.

85 Ronald Dworkin, *Taking Rights Seriously*, Duckworth, London, 1978, Chaps 2, 3; Joseph Raz, “Legal Principles and the Limits of Law”, *Yale Law Journal*, Vol. 81, No. 5, 1972, p. 823.

86 In relation to the EU, see Court of Justice of the European Union, *Greece v. Commission*, Case No. C-203/07 P, [2008] ECR I-8161, 2008, para. 83 (Opinion of Advocate-General Mazák).

87 For example, the EU or Section 30 of the CPIUN.

It is for this reason that the principle of GF has been specifically included in the constitutive treaties of certain IOs, such as in Article 2(2) of the UN Charter⁸⁸ and Article 4(3) of the Treaty on European Union.⁸⁹ However, even in the absence of a specific rule, GF will still apply because, as has been explained, IOs and MSs as legal persons are bound by general principles of international law and because GF is part and parcel of the law of treaties, which governs the IO's constitutive instrument.⁹⁰

Good faith in the relations between international organizations and host States

IOs and host States sign headquarters agreements which, as we have seen, define among other issues the privileges and immunities enjoyed by the organization. GF as part of the law of treaties thus governs the relations between an IO and the host State as formulated in the headquarters agreement. However, headquarters agreements or constitutive treaties do not regulate the whole spectrum of relations between IOs and host States, as the *WHO/Egypt* Advisory Opinion demonstrates. The question put to the ICJ was: "What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?"⁹¹ This issue is not covered by the headquarters agreement or the WHO constitutive treaty.

In such cases, GF applies directly to fill the gap by taking into consideration the special character of the relations between IOs and host States. This refers to the fact that the host State can facilitate or hinder the functioning of the IO more easily than any other MS because it provides the physical location and the resources that enable the IO to function as an independent legal person and carry out its activities.⁹² It is for this reason that in the *WHO/Egypt* Advisory Opinion the ICJ stressed the importance of GF in the relations between IOs and host States.⁹³ The Court derived the principle of GF from "general international law", thus going beyond the treaty-based obligations of the parties. The Court examined a considerable number of headquarters agreements in order to establish how the relations between IOs and host States should be regulated, but also what GF

88 See Article 2(2) of the UN Charter in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford, 2012. See also UNGA Res. 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", 24 October 1970, Principle 4.

89 See also Articles 13(2) and 24(3) of the Treaty on European Union. See, generally, Geert De Baere and Timothy Roes, "EU Loyalty as Good Faith", *International and Comparative Law Quarterly*, Vol. 64, No. 4, 2015.

90 See Articles 26 and 31 of the VCLT and of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

91 ICJ, *WHO/Egypt*, above note 81, para. 48.

92 See *ibid.*, pp. 155–162 (Separate Opinion of Judge Ago).

93 The ICJ explained that the very essence of these relations "is a body of mutual obligations of co-operation and good faith": *ibid.*, para. 43. See also *ibid.*, p. 158 (Separate Opinion of Judge Ago).

requires in such cases.⁹⁴ What the Court did, in other words, was to apply GF to the relations between IOs and host States as general international law and to contextualize its application to the specific circumstances of the case concerning the removal of offices. This led the Court to identify the more specific GF obligations that the host State or any host State will have in this respect.

Good faith in the relations between international organizations and non-member States

IOs and NMSs interact in many different ways, but the fact that they may have no conventional relations or that their conventional relations do not cover all aspects of their interactions does not mean that they interact in a legal void. Instead, general principles (and CIL) provide the default legal framework that governs their relations.

The *Reparation for Injuries* Advisory Opinion is again instructive in this regard because the ICJ applied a general principle of law to the relations between the UN and an NMS. The ICJ opined that the right of the UN as an IO to claim reparations for breaches of international law from an NMS (Israel, in this instance) and the corresponding duty of an NMS to provide reparations derive from the general principle to make reparations, which the Permanent Court of International Justice had established in a previous Advisory Opinion⁹⁵ and when read in conjunction with the objective legal personality of the UN.⁹⁶

It thus follows that GF as a general principle applies to any conventional legal relations between NMSs and IOs as part of the law of treaties, but also to relations arising from other general principles of international law and/or CIL – for example, the customary law of privileges and immunities or the principle of providing reparations. Beyond this, GF governs all other interactions between IOs and NMSs, giving rise to more specific legal postulates relative to the nature of their interactions, as will be seen in the next section.

The content of good faith and its application to hacking

Having established the applicability of GF to the relations between IOs, MSs, host States and NMSs, we will now consider GF's content in order to determine whether hacking breaches this principle. Before doing this, it is important to recall three points made earlier. The first is that, even if certain obligations emanating from GF have acquired independent legal standing, GF remains their normative source and GF continues to maintain its own independent legal standing and force. The second is that the content and scope of GF may differ depending on the nature of the legal relations to which it applies. The third point

⁹⁴ *Ibid.*, paras 46, 48.

⁹⁵ Permanent Court of International Justice, *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, Advisory Opinion No. 13, [1926] PCIJ Series B, 23 July 1926, p. 18.

⁹⁶ ICJ, *Reparation for Injuries*, above note 71, pp. 177–179, 183–185.

is that GF embodies a network of more specific substantive and procedural obligations; some of these have a negative dimension insofar as they require States to abstain from certain conduct, while others have a positive dimension insofar as they require certain conduct.

Turning now to the bundle of obligations flowing from GF, the first is that of *pacta sunt servanda*. *Pacta sunt servanda* is part and parcel of the law of treaties,⁹⁷ and it is accepted that it applies to all international legal obligations, including those arising from general principles of international law and CIL.⁹⁸

GF is the normative source of *pacta sunt servanda*.⁹⁹ If the *pacta sunt servanda* rule were to be seen in isolation, it would be a circular and empty rule because it does not add anything new to the international law maxim that consent is the basis of legal obligations. That said, consent alone cannot guarantee the durability of obligations or their effective performance because it can be withdrawn at any time. That is why the *pacta sunt servanda* rule should be considered within its normative source—namely, the principle of GF—which requires States not only to comply with the obligations to which they have consented but also to carry out fully the terms of these obligations. This is also the reason why treaties and indeed constitutive treaties of IOs contain specific rules on GF or rules aligning *pacta sunt servanda* to GF, because simply consenting to a treaty establishing an IO is not sufficient to make it a functioning IO.

Insofar as hacking is concerned, hacking by MSs (including host States) breaches the *pacta sunt servanda* rule as it applies to their conventional obligations—for example, their obligation to respect the IO’s privileges and immunities contained in special agreements or the constitutive treaty as discussed in the above section on “International Organizations and their Privileges and Immunities”—unless of course the particular act of hacking is justified under international law.¹⁰⁰ To the extent that certain privileges and immunities have acquired CIL status as argued in the above subsection on “Privileges and Immunities under Customary International Law”, GF also covers these

97 For example, see VCLT, Art. 26. See also ICJ, *Nuclear Tests*, above note 77, para. 46 (“the very rule of *pacta sunt servanda* in the law of treaties is based on good faith”); ICJ, *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Request for the Indication of Provisional Measures, [2014] ICJ Rep. 147, 3 March 2014, para. 44 (“Once a State has made a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed”); J. F. O’Connor, above note 75; John B. Whitton, “La règle ‘pacta sunt servanda’”, *Recueil des Cours*, Vol. 49, 1934, pp. 151–216.

98 The UN General Assembly’s Friendly Relations Declaration (UNGA Res. 2625 (XXV), above note 88), for example, affirms that good faith applies to all international obligations. In *Nuclear Tests* (above note 77), the ICJ explained that GF governs legal obligations “whatever their source” (para. 46) and then grounded the binding effect of unilateral obligations on GF (para. 49). See, further, Hersch Lauterpacht, “The Nature of International Law and General Jurisprudence”, *Economica*, Vol. 37, 1932, p. 315.

99 B. Cheng, above note 74, pp. 105–162; G. Futhazar and A. Peters, above note 77, p. 195.

100 For that, see DARIO, above note 11, mainly Chap. V; ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001 (ARSIWA), mainly Chap. V. Good faith has not yet been recognized as a *jus cogens* norm the wrongfulness of whose violation cannot be precluded: see Article 26 of both DARIO and ARSIWA. The view that it is a *jus cogens* norm has been put forward by Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory*, Hart, Oxford, 2015, pp. 56–58.

obligations, which in turn makes hacking by MSs and also NMSs a breach of this rule.

Second, GF entails a duty of cooperation between and among MSs and IOs in order to promote and attain the agreed objectives as they are formulated in the IOs' constitutive instruments, but also in other agreements.¹⁰¹ This is not just a procedural obligation but also a substantive one, although it does not mandate a certain result. It requires MSs to communicate and consult with each other and with the IO in an honest and meaningful way, maintain good working relations, support and assist the IO, provide the required resources, refrain from withholding or disrupting services, reconcile interests, and find solutions to problems. In short, MSs must interact with each other and with the IO in such a way as to facilitate the functioning of the IO and the attainment of its objectives, and, at a minimum, must not actively or consciously hinder the work of the IO.¹⁰² This obligation also extends to the settlement of disputes, particularly in the absence of dispute settlement mechanisms.

Evidently, the obligation to cooperate as a postulate of GF is most pertinent in the relations between IOs and their MSs (and especially the host State). This is further reinforced by the limitations imposed on the power of MSs to take countermeasures against an IO of which they are members.¹⁰³ More specifically, MSs can take countermeasures only if no other appropriate means of inducing compliance are available, which highlights the importance of the duty to cooperate.

Hacking by MSs breaches the duty to cooperate with the IO based on the free and confidential exchange of information, meaningful consultations, trust and honesty.¹⁰⁴ Hacking also damages the working relationship between the MS and the IO and disrupts the functioning of the IO. With regard to NMSs, the degree to which the duty to cooperate applies depends on the nature and scope of their relations with the IO; for example, if a dispute arises between an NMS and an IO involving hacking, they should cooperate in order to settle it peacefully.

Third, GF entails a duty to respect the legal personality of the IO. Respecting the personality of an IO encompasses a duty to abstain from practices, behaviours and acts inside or outside the IO that undermine the IO as a legal person. Among others, it includes a duty to respect the IO's capacity to hold meetings and make decisions; discuss issues; consult with MSs; collect, store and share information; and communicate freely within and among organs and

101 ICJ, *WHO/Egypt*, above note 81, paras 43, 48–49. See also ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, [1999] ICJ Rep. 62, 29 April 1999, pp. 109–110 (Separate Opinion of Judge Rezek). See also R. Kolb, above note 74, pp. 162–163.

102 It can be argued that the use of privileges and immunities, as discussed earlier, is one way of achieving this purpose. The broader question is whether, in the absence of a specific agreement or customary law, GF can justify the granting of privileges and immunities or justify extending them if they have already been provided. In relation to host States, see R. Higgins, above note 35, pp. 90–91 (but for a more cautious approach, see C. F. Amerasinghe, above note 12, p. 347).

103 DARIO, above note 11, Art. 52.

104 "US Diplomats Spied on UN Leadership", *The Guardian*, 28 November 2010, available at: www.theguardian.com/world/2010/nov/28/us-embassy-cables-spying-un.

between organs and MSs in order to make decisions or implement tasks. Where an MS (including a host State) hacks without legal justification into an IO's computer networks and systems in order to acquire data or hacks data owned by the IO residing on servers operated by other actors, such conduct violates the GF obligation to respect the personality of the IO. It undermines the IO's operational autonomy in decision-making, supplants its decision to keep that information confidential, impacts on its ability to make independent decisions to the extent that its decisions can be manipulated, and, above all, affects its ability to dispose of its resources, competences and functions as it chooses, which is the essence of independent legal personality. For example, responding to Russia's attempted hack of the OPCW, and bearing in mind that Russia is a State party to the OPCW, the Dutch defence minister Ank Bijleveld explained that "[a]ny incident in which the integrity of international organisations is undermined is unacceptable".¹⁰⁵

The importance of this GF postulate can also be demonstrated by the limitations imposed on the ability of MSs to take countermeasures against IOs. Suppose, for example, that an MS hacks data covered by privileges and immunities or exfiltrates confidential information but claims that the act was a lawful countermeasure because it was in response to a previous violation by the IO of an obligation owed to that State. According to the *Draft Articles on the Responsibility of International Organizations* (DARIO), MSs can take countermeasures against an IO only if it is in accordance with the "rules of the organization" in the sense that these rules allow countermeasures for breaches of the external and/or internal obligations owed by the IO to its MSs.¹⁰⁶ We are not aware of any such provision in the constitutive treaties of IOs, but what is important to stress for our purposes is that this approach to countermeasures deviates significantly from the general international law approach whereby States can take countermeasures against any violation of international law even if this is not specifically provided for in a particular instrument. The rationale behind such a limitation is to preserve the autonomy and independence of IOs and their ability to fulfil their functions against any pressure from MSs in the form of (or under the pretext of) countermeasures.

The GF obligation to respect the legal personality of IOs also applies to NMSs, since IOs enjoy objective legal personality. Consequently, NMSs should refrain from activities and behaviours that undermine the IO as an independent and autonomous legal person. Hacking which is not justified under international law constitutes such an activity.

Fourth, GF entails a duty of due regard to the rights, decisions, interests and legitimate expectations of the IO. This relates to and reinforces other duties such as *pacta sunt servanda*, respect of personality, and cooperation. It is both a procedural and substantive duty. How it will be fulfilled depends on the circumstances, and there is no particular course of conduct that should be adopted. The *Chagos Marine Protected Area* tribunal held that it requires a balancing of the rights and interests of the parties by also taking into consideration the importance of the

105 "Netherlands Defence Intelligence and Security Service disrupts Russian Cyber Operation", above note 5. 106 DARIO, above note 11, Art. 52; see also Arts 51–54.

impairment of rights.¹⁰⁷ The duty of due regard applies to MSs when they act within or outside the IO, and also applies to NMSs when they interact with the IO. Hacking by MSs and NMSs breaches the GF obligation of due regard if it is not the outcome of a conscious balancing of the rights and interests of the hacking State with those of the IO and no attempt to communicate or consult has been made.¹⁰⁸

Fifth, GF entails a duty of loyalty to the IO. This relates to and reinforces all the preceding duties; for example, it reinforces the obligation to abide by mutual obligations, comply with the decisions of the IO, give due regard even to non-binding decisions,¹⁰⁹ cooperate with the IO, and respect its personality. The duty of loyalty serves the interests of an IO by imposing constraints on the exercise of MS powers within or outside the IO in order to ensure its effective functioning and independent standing. This duty also applies to the servants of IOs,¹¹⁰ but does not apply to NMSs. Hacking by MSs that is not justified under international law breaches the duty of loyalty by not respecting the IO's processes and decisions and by reneging on any specific obligation that MSs have to respect the confidentiality or integrity of data belonging to an IO.

Sixth, GF entails an obligation on the part of MSs not to abuse their rights, powers and discretion in order to gain an advantage over the IO.¹¹¹ This duty also relates to the duties to respect the personality of the IO, to cooperate with it, and to respect the allocation of its powers. Hacking by an MS which has no valid legal justification constitutes the use by that MS of its power and position within the IO to serve its own interests and not those of the IO.

To conclude, we can say that hacking by MSs, host States and NMSs can breach a number of legal postulates flowing from GF, although the scope of the violation may differ depending on the nature of the relations between the IO and the State that committed the hacking.

Hacking and the principle of State sovereignty

In this section we consider whether the hacking of an IO by an MS or NMS breaches the sovereignty of the host State or the sovereignty of the State on whose cyber infrastructure the IO's data is located. This question is relevant because an IO's computer networks and systems are necessarily supported by cyber infrastructure that is physically located within the territory of a State, which may be either the

107 Permanent Court of Arbitration, *The Chagos Marine Protected Area Arbitration (Mauritius v. U.K.)*, Award of 18 March 2015, paras 519, 534.

108 *Ibid.*, paras 530–535.

109 ICJ, *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion, [1955] ICJ Rep. 76, 7 June 1955, pp. 118–119 (Separate Opinion of Judge Lauterpacht).

110 See UN Charter, Arts 100, 101.

111 ICJ, *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, [1948] ICJ Rep. 57, 28 May 1948, pp. 62–63. See also *ibid.*, Dissenting Opinion of Judges Basdevant, Winiarski, Sir Arnold McNair and Read, paras 20, 83, 91, and Individual Opinion of Judge Alvarez, p. 71; World Trade Organization, *Shrimp Products*, above note 80, para. 158; B. Cheng, above note 74, p. 121; Alexandre Kiss, "Abuse of Rights", *Max Planck Encyclopedia of International Law*, 2006.

territory of the host State or a third State if the IO transmits its data through, or stores its data on, cyber infrastructure located within that State's territory. In order to answer this question, we first need to explain the status, content and scope of the principle of State sovereignty

It is nowadays well established that the principle of State sovereignty applies to cyberspace.¹¹² According to this principle, a State is entitled to exercise its sovereign rights over its territory and people free from interference.¹¹³ In relation to cyberspace, sovereignty covers all cyber infrastructure located within a State's territory and under its jurisdiction regardless of whether it is publicly or privately owned or operated, and in addition, it encompasses the computer networks and systems supported by that infrastructure.¹¹⁴

That said, States are currently divided as to when cyber operations breach the principle of State sovereignty. Certain States take the view that cyber operations breach this principle when there is unauthorized intrusion into another State's sovereign cyber domain, while others argue that such operations are unlawful only when they cross a *de minimis* threshold – namely, when they cause damage to, or at least interfere with, the functionality of systems, or when they interfere with governmental functions.¹¹⁵ This is an issue that can be resolved only through State practice and *opinio juris*, although in our opinion any unauthorized intrusion into a State's cyber infrastructure (such as hacking) would constitute a breach of its sovereignty.¹¹⁶ We also reject the view that hacking falls beyond the prohibitive scope of the principle of State sovereignty because of its frequency.¹¹⁷ The present article is not the place to enter this complex debate, but as one of the authors has written elsewhere, hacking is a weak contender for a CIL exception because it is often unaccompanied by the requisite *opinio juris*.¹¹⁸

112 See, for example, Switzerland, *Position Paper on the Application of International Law in Cyberspace: Annex UN GGE 2019/2021*, 2021; Germany, *Position Paper on the Application of International Law in Cyberspace*, 2021; New Zealand, *The Application of International Law to State Activity in Cyberspace*, 1 December 2020; Finland, *International Law and Cyberspace: Finland's National Position*, 2020; French Ministry of the Armed Forces, *Droit international appliqué aux opérations dans le cyberspace*, 2019. For the views of MSs of the Organization of American States, see Organization of American States, *Improving Transparency: International Law and State Cyber Operations (Fourth Report)*, OEA/Ser.Q, CJI/doc. 603/20 rev.1, 5 March 2020, pp. 18–20; Organization of American States, *Binding and Non-Binding Agreements: Final Report*, OEA/Ser.Q, CJI/doc. 615/20 rev.1, 7 August 2020, pp. 28–32. See, generally, Tallinn Manual 2.0, above note 21, Rules 1–4; Nicholas Tsagourias, “The Legal Status of Cyberspace: Sovereignty Redux?”, in N. Tsagourias and R. Buchan (eds), above note 10. *Contra* Jeremy Wright, “Cyber and International Law in the 21st Century”, 23 May 2018, available at: www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

113 Permanent Court of Arbitration, *Island of Palmas*, 2 RIAA, 4 April 1928, p. 829.

114 See, for example, the cyber security statements listed in above note 112. See also Tallinn Manual 2.0, above note 21, Rule 1.

115 Contrast, for example, the position of Finland with that of France (see above note 112). See also Tallinn Manual 2.0, above note 21, Rule 4 and accompanying commentary. For a review of this State practice, see R. Buchan and I. Navarrete, above note 10.

116 For support for this approach, see R. Buchan, above note 10, Chap. 3; Kevin Jon Heller, “In Defense of Pure Sovereignty in Cyberspace”, *International Law Studies*, Vol. 97, 2021.

117 See, for example, Glenn Sulmasy and John Yoo, “Counterintuitive: Intelligence Operations and International Law”, *Michigan Journal of International Law*, Vol. 28, No. 3, 2006, p. 625.

118 Iñaki Navarrete and Russell Buchan, “Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions”, *Cornell International Law Journal*, Vol. 51, No. 4, 2009, p. 897.

Having said that, we will now consider the 2018 OPCW and 2022 ICRC incidents and assess their legality under the principle of State sovereignty. As we recalled in the introduction to this article, the Netherlands alleged that Russia had attempted to hack the OPCW, which is an IO based in The Hague.¹¹⁹ More specifically, the Netherlands claimed that Russian agents had parked a vehicle outside the OPCW's premises that was fitted with sophisticated surveillance equipment and which would enable them to hack into the computer networks and systems of the organization.¹²⁰ The Netherlands maintained that it had foiled the hack before it could commence¹²¹ and proceeded to denounce the Russian actions as undermining the international rule of law without specifying which rules were implicated.¹²²

In light of the preceding discussion, the hack would have breached a number of legal obligations owed to the OPCW by Russia as an MS. First, the hack would have breached the privileges and immunities contained in Article VIII of the Chemical Weapons Convention,¹²³ an agreement to which Russia is a party even though it has not signed a further agreement on privileges and immunities with the OPCW as other States Parties have.¹²⁴ The hack would have also breached the CIL on privileges and immunities, as discussed in the above subsection on "Privileges and Immunities under Customary International Law". Second, it would have breached the principle of GF as explained in the preceding section.

As far as the Netherlands as the host State is concerned, the principle of sovereignty comes to the fore. First, the fact that Russian agents had entered the Netherlands and operated within its territory and jurisdiction without its consent constitutes a breach of its sovereignty.¹²⁵ Second, the hack would have breached the Netherlands' sovereignty if the Russian agents had utilized Dutch cyber infrastructure to gain access to the OPCW's computer networks and systems. In this respect, it is important to recall the Netherlands' approach to sovereignty in cyberspace. According to the Netherlands, the principle of State sovereignty applies to cyberspace and "States have exclusive authority over the physical, human and immaterial (logical or software-related) aspects of cyberspace within their territory". The Netherlands further asserts that sovereignty is violated if

119 "How the Dutch Foiled Russian 'Cyber-Attack' on OPCW", *BBC News*, 4 October 2018, available at: www.bbc.co.uk/news/world-europe-45747472.

120 "Netherlands Defence Intelligence and Security Service Disrupts Russian Cyber Operation", above note 5.

121 Remarks by the Minister of Defense, The Hague, 4 October 2018, available at: www.justice.gov/opa/page/file/1098576/download.

122 See "Netherlands Defence Intelligence and Security Service Disrupts Russian Cyber Operation", above note 5: "The Netherlands shares the concerns of other international partners regarding the damaging and undermining [nature of] the GRU's [Russian military intelligence] actions. It supports the conclusion, presented today by the UK, that GRU cyber operations such as this one undermine the international rule of law."

123 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, Art. VIII(E), available at: www.opcw.org/chemical-weapons-convention/articles/article-viii-organization.

124 For a list of these agreements, see: www.opcw.org/resources/opcw-agreements.

125 ICJ, *Nicaragua*, above note 50, para. 251.

there is “1) infringement upon the target State’s territorial integrity; and 2) there has been an interference with or usurpation of inherently governmental functions of another state”.¹²⁶ It seems that the Netherlands does not require physical damage or impose any threshold but defines a breach of sovereignty in qualitative terms—that is, according to the target of the interference. The OPCW hack would thus violate the first prong of the definition, provided that Dutch cyber infrastructure was used.

Regarding the 2022 ICRC hack, at the time of writing the identity of the perpetrator has not been established, but assuming that it was a State, the question arises as to whether the hack breaches Switzerland’s sovereignty. The Swiss position is that “state sovereignty protects information and communication technologies (ICT) infrastructure on a state’s territory against unauthorised intrusion or material damage” and that a breach of sovereignty can be established on two alternative bases: first, where the cyber operation violates its territorial integrity, and second, where the cyber operation interferes with or usurps an inherently governmental function. Again, these views are not expressed in categorical terms, and the Swiss statement goes on to mention

i) incidents whereby the functionality of infrastructure or related equipment has been damaged or limited, ii) cases where data has been altered or deleted, interfering with the fulfilment of inherently governmental functions such as providing social services, conducting elections and referendums, or collecting taxes, and iii) situations in which a state has sought to influence, disrupt or delay democratic decision-making processes.¹²⁷

It follows that the answer to the question of whether the ICRC hack breached Switzerland’s sovereignty is not clear-cut. From the available information, the hack does not fall within the three scenarios mentioned above because it did not affect the functionality of Swiss infrastructure, delete or alter data, or influence decision-making—but again, these scenarios are not exhaustive. However, the hack may have breached the principle of State sovereignty provided that it involved unauthorized intrusion into Swiss cyber infrastructure.

To conclude this section, we contend that hacking operations against IOs breach the sovereignty of the host State or the sovereignty of any other State on whose cyber infrastructure the IO’s targeted data or servers are located if the hacking involves unauthorized intrusion into the State’s cyber infrastructure. We recognize that this describes the lowest threshold of violability and that the threshold can increase to the removal of functionality or damage, but this does not detract from the fact that hacking under certain circumstances can breach the sovereignty of the host State or the State which hosts the IO’s servers and data.

126 The Netherlands, “Letter to the Parliament on the International Legal Order in Cyberspace: Appendix: International Law in Cyberspace”, 5 July 2019, pp. 2–3, available at: www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace.

127 Switzerland, above note 112, pp. 2–3.

Conclusion

IOs perform critically important functions and it is essential that they can maintain the confidentiality and integrity of their data. This article has examined which international legal rules can be called upon to protect IOs from hacking operations committed by States. It has demonstrated that hacking by MSs breaches the privileges and immunities granted to IOs by their constitutive treaties and other related treaties (such as specific agreements on privileges and immunities or headquarters agreements). These instruments usually provide for the inviolability of an IO's premises, property, assets, archives, documents and correspondence. Hacking by NMSs also breaches the privileges and immunities of IOs, which are established in CIL on the basis of a general practice accompanied by *opinio juris* and because they attach to the objective legal personality of IOs. Moreover, this article has argued that hacking operations by MSs and NMSs breach the principle of GF, which imposes certain obligations upon them in their relations with IOs. In particular, hacking impinges on the *pacta sunt servanda* rule, the duty to respect the legal personality of IOs, the postulates of loyalty, due regard and cooperation, and the obligation not to abuse rights. Finally, the principle of State sovereignty offers IOs indirect protection from hacking insofar as this activity breaches the sovereignty of the host State or any other State if its cyber infrastructure is penetrated in order to commit the hack.

Punishment and pardon: The use of international humanitarian law by the Special Jurisdiction for Peace in Colombia

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Abstract

Transitional justice systems generally aim to achieve two goals. One is to bring the perpetrators of past atrocities to justice to ensure that they do not go unpunished, which involves the State fulfilling its duty to investigate, prosecute and punish serious human rights violations and breaches of international humanitarian law (IHL). The other is to bring about reconciliation to heal a divided society and achieve peace and stability. This normally requires the adoption of measures of clemency, such as granting amnesty, so that those who took part in the country's violent past can return to civilian life. The use of IHL is relevant in attaining both these goals because its complex nature means that it provides the legal basis for their implementation. However, this very complexity can mean that there are contradictions or complementarities between its characteristics. This article looks at the case of the Special Jurisdiction for Peace (JEP) in Colombia, showing how this transitional jurisdiction has used IHL as a legal basis both for investigating, prosecuting and punishing serious violations committed during the Colombian armed conflict and for granting amnesty to those who took part in the hostilities. These different uses by the JEP demonstrate that IHL is a flexible tool that can facilitate the process of delivering both justice and peace after a conflict has ended.

Keywords: international humanitarian law, transitional justice, Colombia, Special Jurisdiction for Peace, justice, peace.

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Introduction

Transitional justice refers to the range of processes and mechanisms established by a society to come to terms with a violent past, with the aim of prosecuting human rights violations and breaches of international humanitarian law (IHL), guaranteeing victims' rights and achieving peace and reconciliation.¹ However, in the implementation of transitional justice processes, tensions tend to arise between these objectives, especially between those concerned with pursuing justice and those concerned with achieving peace and reconciliation. This is because prosecuting those who took part in hostilities hinders their reintegration into society, but the failure to bring perpetrators to justice can undermine efforts to achieve a meaningful peace.² Serving justice and guaranteeing victims' rights

1 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, UN Doc. S/2004/616, 3 August 2004, p. 4.

2 On the subject of the tension between peace and justice and the debate on the issue, see, in particular, Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on*

generally requires mechanisms that prevent impunity and ensure that those who committed serious human rights violations or grave breaches of IHL are investigated, prosecuted and punished.³ On the other hand, the goal of achieving peace and reconciliation commonly requires measures with a degree of flexibility in the application of the rule of law and the logic of ordinary justice, calling for a shift in perspective, in some cases, in the administration of criminal justice.⁴ Consequently, societies in transition sometimes choose to adopt measures of clemency, such as granting amnesty. In such cases, the impunity of those who took part in the hostilities is considered a necessary sacrifice to facilitate their reintegration into society and avoid a cycle of vengeance that would perpetuate the conflict.⁵

The mechanisms and processes that societies in transition develop and deploy for the implementation of such measures must be consistent with domestic legislation and the different international standards and obligations that are largely enshrined in three bodies of law: international human rights law, international criminal law (ICL) and IHL.⁶ Societies attempting to overcome a non-international armed conflict (NIAC), in particular, need to ensure that transitional justice mechanisms comply with applicable IHL provisions and also fit in with these other legal regimes.⁷ The legal context of transitional justice is therefore complex because it is necessary to fit together the different legal regimes used to pursue aims that may be complementary or contradictory, such as punishing and pardoning crimes.⁸ When it comes to using IHL, these

Transitional Justice, Peace and Development – The Nuremberg Declaration on Peace and Justice, Springer, Berlin/Heidelberg, 2009; William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, Oxford, 2012; Karen Engle, Zinaida Miller and D. M. Davis (eds), “Anti-Impunity and the Human Rights Agenda”, in *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, Cambridge, 2016, pp. i–ii; and Mikkel Jarle Christensen, “The Borderlands between Punitive and Non-punitive Transitional Justice: Distinct Elites and Diverging Patterns of Import/export”, *International Journal of Transitional Justice*, Vol. 14, No. 3, 2020.

- 3 Although the concept of “grave breaches of IHL” is specific to international armed conflicts, Article 5 of Legislative Act 01 of 2017, which creates the Comprehensive System for Truth, Justice, Reparation and Non-Repetition (SIVJRNR), determines that one of the purposes of the system is to administer justice in cases involving crimes that qualify as grave breaches of IHL. This term is therefore used throughout the article. On mechanisms for preventing impunity, see the Joint Principles, available at: <http://www.derechos.org/nizkor/impu/joinet2.html> (all internet references were accessed in January 2022). See also United Nations (UN) General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005.
- 4 Tatiana Rincón and Jesús Rodríguez, “Estudio introductorio”, in Tatiana Rincón and Jesús Rodríguez (eds), *La justicia y las atrocidades del pasado: Teoría y análisis de la justicia transicional*, Universidad Autónoma Metropolitana, Mexico City, 2012, pp. 5–58.
- 5 Louise Mallinder, “Can Amnesties and International Justice be Reconciled?”, *International Journal of Transitional Justice*, Vol. 1, No. 2, 2007, p. 218.
- 6 Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’”, *International Journal of Transitional Justice*, Vol. 3, No. 1, 2009, p. 19.
- 7 *Ibid.*
- 8 Juan Francisco Soto, “Legal Argumentation in Transitional Justice Adjudication: A Land of New Arguments, a Land of New Law”, in Camila de Gamboa Tapias and Bert van Roermund (eds), *Just Memories: Remembrance and Restoration in the Aftermath of Political Violence*, Intersentia, Cambridge, 2020.

contradictions and complementarities will depend on the way the nature of this body of law and its rules are interpreted and how these rules are associated with the transition's goals of delivering justice and peace.⁹

The Colombian experience reflects the different uses of IHL in a society in transition. On 1 December 2016, following arduous negotiations in Havana (Cuba) to end an internal armed conflict spanning more than fifty years, the Colombian Government and the then guerrilla group, the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP) signed the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace. Among other things, this agreement led to the creation of a range of transitional justice mechanisms, including the Special Jurisdiction for Peace (JEP), which has two central aims based on a restorative justice approach: (i) to guarantee the right of victims to the truth, justice, reparation and non-repetition by investigating, prosecuting and punishing crimes committed in the course of the armed conflict; and (ii) to provide legal certainty for those who participated in the hostilities and, where appropriate, grant the broadest possible amnesty and facilitate reconciliation processes. To achieve these aims, the JEP can use different legal sources, including IHL. This leads to the question of what use the JEP has made of IHL and how the different uses relate to the achievement of its goals?

This article shows that the complex nature of IHL and its relation to transitional justice means that the JEP has been able to use IHL as a source of law in imposing punishments and as a basis for granting amnesty in its efforts to bring perpetrators to justice and facilitate the achievement of peace and reconciliation. The article will be developed through three sections. First, it dissects the relationship between transitional justice and the nature of IHL and explains how this body of law relates to the goals of doing justice and making the transition to peace. Second, it describes how the JEP's legal framework establishes IHL as the direct source for the jurisdiction and how its goals of justice and peace are reflected in a design that takes into account the need to use IHL in different ways. Third, it discusses some of the challenges the JEP has faced in applying IHL as the basis for both imposing punishment and pardoning perpetrators by granting a conditional amnesty, highlighting the complex nature of IHL and its relation to transitional justice.

Transitional justice and the nature of IHL: Using IHL to punish and pardon

Transitional justice systems generally include measures for granting conditional amnesties and applying alternative forms of justice. They must ensure, in accordance with international requirements, the fulfilment of the State's duty to

9 Emily Camins, "Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law", *International Journal of Transitional Justice*, Vol. 10, No. 1, 2016, p. 135.

guarantee victims' rights by investigating, prosecuting and punishing serious human rights violations and grave breaches of IHL. How these goals are pursued will largely depend on how the nature of IHL and the scope of its rules and principles are interpreted. As will be shown in this section, the complex nature of IHL means that it serves as a source of law for two transitional justice goals which may oppose or complement each other – it can be used as a legal basis for punishing crimes and also allows for perpetrators to be pardoned through amnesties.

Debate on the nature of IHL as a restrictive or permissive regime

Determining the nature of IHL is a challenging task because its historical development and use have given it a hybrid or ambiguous character. As indicated by Anne Quintin, there is an ongoing debate about whether IHL is a permissive legal regime, or at least one that authorizes certain conducts during war, or whether it is an exclusively restrictive regime, composed of prescriptions and prohibitions that seek to prohibit or limit means and methods of warfare.¹⁰ This dichotomy, or dual nature, is due to the way IHL has developed historically as a legal regime and as a term. The consideration of IHL as *jus in bello*, or the law that governs the way in which warfare is conducted, is the result of different political and historical developments in which two principles have played a crucial role: the principle of military necessity and the principle of humanity.¹¹ According to the principle of military necessity, the parties to a conflict are justified in using whatever means are necessary, provided they are lawful, to achieve their military objectives, while the principle of humanity prohibits the employment of means or methods of warfare that are not necessary for the purpose of the war.¹² The principle of military necessity therefore adds a permissive element to IHL, while the principle of humanity makes it a primarily restrictive legal regime.

For some authors, the incorporation of these two defining principles is the result of two historical currents that have contributed to the making of IHL: the law of The Hague and the law of Geneva.¹³ There is a common understanding, although not entirely unchallenged, that the law of The Hague incorporates the permissive element of IHL, and the law of Geneva the restrictive element.¹⁴ The former developed as the law governing means and methods of warfare, while the latter

10 Anne Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?*, Edward Elgar Publishing, Cheltenham, 2020.

11 Amanda Alexander, "A Short History of International Humanitarian Law", *European Journal of International Law*, Vol. 26, No. 1, 2015, p. 114.

12 *Ibid.*

13 On the evolution of these different currents, see Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Cambridge University Press, Cambridge, 2011.

14 A. Quintin, above note 10, p. 31. However, the author points out that this take is not entirely accurate because the overall aim of the law of The Hague was also to limit the effects of war, which means that, to some extent, it too entails a restrictive rather than a permissive vision of IHL.

evolved as the law governing humanitarian aspects of warfare.¹⁵ The tension between them was eased by the so-called New York current which, through the influence of the United Nations (UN), led to the development of the notion of the duty to punish war crimes, the incorporation of human rights standards into IHL and the adoption of restrictive measures on the use of atomic bombs.¹⁶ The influence of these developments tipped the balance towards a humanitarian approach, particularly after the adoption of Protocols I and II additional to the Geneva Conventions, which definitively cemented IHL as a term and as a concept.¹⁷ From the late 1970s, the shift towards this approach and the relabelling of the law of war or law of armed conflict as IHL contributed to shaping a more humanitarian vision of the nature of IHL under which, at least officially and narratively, its restrictive character prevails.¹⁸

However, this development of IHL as a primarily restrictive legal regime in which the humanitarian approach takes precedence does not mean that the permissive elements, or the principle of military necessity, have disappeared from the substance of this field of law. On the contrary, this principle has come to be considered as a tool for interpreting or creating the rules that make up IHL.¹⁹ Moreover, in the use and implementation of IHL, a tension persists between the restrictive and permissive vision, or between the principle of military necessity and the principle of humanity, when it comes to assessing or analysing issues such as the distinction between civilians and combatants and those directly participating in hostilities or the legal protection that those affected by armed conflict are entitled to.²⁰ This tension is explicit in the vague and ambiguous wording used in some IHL instruments, for example, the Additional Protocols, to avoid tipping the balance too far one way or the other.²¹

This characteristic has led some authors to consider that IHL is in constant production because the scope of its rules is contested on a case-by-case basis, with the result that their meaning is not definitively set.²² In other words, IHL is constantly oscillating to maintain a balance – to the extent possible – between the principle of military necessity and the principle of humanity.²³ Characterizing the nature of IHL therefore calls for an interpretative effort that has practical effects and leads to a recognition that, while the overall purpose of IHL is restrictive, it

15 A. Alexander, above note 11, p. 116.

16 F. Kalshoven and L. Zegveld, above note 13, p. 20.

17 A. Alexander, above note 11, p. 124. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978). Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

18 *Ibid.*, p. 135.

19 A. Quintin, above note 10, p. 27.

20 Helen Kinsella and Giovanni Mantilla, “Contestation Before Compliance: History, Politics, and Power in International Humanitarian Law”, *International Studies Quarterly*, Vol. 64, No. 3, 2020, p. 655.

21 A. Alexander, above note 11, p. 125.

22 H. Kinsella and G. Mantilla, above note 20, p. 654.

23 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, International Committee of the Red Cross, Geneva, 2016, p. 17.

also has some permissive features.²⁴ These interpretative discussions and the idea of IHL as a body of law in constant production and contestation are relevant to the assessment of acts of violence that occur in international conflicts or NIACs. In particular, the way in which its rules are legally interpreted and the tension between its principles is addressed will have an impact on assessments conducted to determine whether actions carried out in an armed conflict should be classified as hostilities that do not constitute a breach of the rules of IHL, ordinary domestic crimes or war crimes.²⁵

Use of IHL in transitional justice

As IHL is regarded as a body of law that applies primarily in armed conflict, there is little in the literature about its potential use in transitional and post-conflict settings.²⁶ There are, however, studies that have found that IHL and its principles are relevant in transitional processes because they form part of the legal framework that affects the criminal prosecution of grave breaches of IHL, repatriation, the search for missing people and processes for the reintegration of former combatants and other people who took a direct part in the hostilities.²⁷ Furthermore, some studies have highlighted how IHL provides a crucial grounding for transitions to peace, offering legal resources to make different agreements that allow the opposing sides in a conflict to end hostilities and begin the post-conflict process.²⁸ Some authors have analysed how IHL can provide a legal basis for individual claims by victims of armed conflict for reparation²⁹ or for the granting of amnesty.³⁰

The use of IHL in such matters will vary depending on the specific circumstances of each transition, the way in which domestic legislation incorporates or relates to its rules and how these rules are interpreted, taking into its complex nature resulting from the tension between the principle of military necessity and the principle of humanity.³¹ Two common uses of IHL in transitional justice, in particular, can be identified in relation to this tension. First, as a result of what some authors have dubbed the anti-impunity turn in international law, IHL has become one of the main sources of law for measures

24 A. Quintin, above note 10, p. 336.

25 On the triple classification of acts of violence during a NIAC, see, for example, Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, pp. 11–15.

26 E. Camins, above note 9, p. 126.

27 See Wasantha Seneviratne, “Continued Relevance of International Humanitarian Law in Post-Armed Conflict Situations: A Critical Analysis with Special Reference to Sri Lanka”, *Sri Lanka Journal of International Law*, Vol. 24, No. 33, 2012, p. 34.

28 Christine Bell, “Peace Agreements: Their Nature and Legal Status”, *American Journal of International Law*, Vol. 100, No. 2, 2006, p. 381; Mark Freeman and Ivan Orozco, *Negotiating Transitional Justice: Firsthand Lessons from Colombia and Beyond*, Cambridge University Press, Cambridge, 2020.

29 E. Camins, above note 9.

30 W. Schabas, above note 2, pp. 177–8; Juana Inés Acosta and Ana María Idárraga, “Alcance del deber de investigar, juzgar y sancionar en transiciones de conflicto armado a una paz negociada: convergencias entre el Sistema Interamericano de Derechos Humanos y la Corte Penal Internacional”, *Revista Derecho del Estado*, No. 45, 2019.

31 E. Camins, above note 9; W. Seneviratne, above note 27.

to investigate, prosecute and punish acts of violence or, in some cases, for justifying the decision not to grant amnesty.³² The second seemingly contradictory use of IHL has been to justify the need to establish peace agreements with the granting of amnesty as an effective way to facilitate a negotiated end to a conflict and measures for the reintegration of those who took part in the hostilities into civilian and political life.³³ These two uses of IHL, in which it serves as a source of law and an interpretative framework for different transitional justice mechanisms, can have opposing or complementary aims.

The opposition between IHL as a basis for granting amnesty and as a critical source of law that requires States to prosecute serious breaches of its rules has been the subject of extensive academic debate.³⁴ Comparative experience shows that different amnesties have been justified on the basis of Article 6(5) of Additional Protocol II, which provides that governments must endeavour to grant the broadest possible amnesty to people who have participated in the armed conflict and those deprived of their liberty in connection with it.³⁵ The contestation of this use is that it is not acceptable to grant blanket amnesties that cover grave breaches of IHL, including war crimes.³⁶ With regard to international standards, the UN Secretary-General has explicitly stated that societies should not grant amnesties for “genocide, war crimes, crimes against humanity or gross violations of human rights” through transitional justice mechanisms.³⁷ On the contrary, they have a duty to investigate, prosecute and punish such acts. This same interpretation has been developed by international human rights and criminal tribunals, which have used the legal framework of human rights law and IHL to rule various amnesties unlawful on the grounds that States have a duty to guarantee the right of victims to truth, justice, reparation and non-repetition.³⁸

In spite of this tension, there are perspectives that consider that the different uses of IHL as a basis for punishing or pardoning crimes can be complementary. The interpretation of Article 6(5) of Additional Protocol II is nuanced by the recognition that amnesties do not necessarily mean forgoing justice altogether. It is possible to grant different types of amnesty that balance the need to guarantee the rights of victims with the need to uphold other rights,

32 On the subject of the anti-impunity or criminal turn in international law, see Karen Engle, “A Genealogy of the Criminal Turn in Human Rights”, in K. Engle Zinaida Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, Cambridge, 2016.

33 For a typology of amnesties and their political and peace-seeking functions, see Louise Mallinder, *Amnesty, Human Rights and Political Transitions*, Hart Publishing, Oxford, 2008.

34 Schabas and Engle provide an insightful summary of the historical debate on the possibility of societies with a violent past granting or not granting amnesty in the light of international law. W. Schabas, above note 2; K. Engle, Z. Miller and D. M. Davis, above note 2.

35 This was the case in South Africa, a landmark example of transitional justice and the use of amnesty to achieve truth and reconciliation. On this subject, see L. Mallinder, above note 33, p. 227.

36 W. Schabas, above note 2, p. 180.

37 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, UN Doc. S/2011/634, 12 October 2011, p. 18.

38 Sebastián Machado Ramírez, “Límites a la exoneración de responsabilidad en el derecho internacional: la selección y priorización de casos en la jurisdicción nacional”, *Anuario Colombiano de Derecho Internacional*, Vol. 7, 2014.

such as the right to peace.³⁹ An example of this is conditional amnesties which are granted when certain requirements are met, such as contribution to the truth-seeking and reconciliation process, the surrender of weapons, the non-repetition of violence, and reparation and restoration.⁴⁰ The duty to ensure that grave breaches of IHL are prosecuted does not necessarily involve meting out a form of retributive justice that prevents or hinders the transition to peace.⁴¹ Different mechanisms can be implemented to bring perpetrators to justice, including imposing alternative penalties and punishments,⁴² focusing prosecution efforts on those most responsible,⁴³ selecting and prioritizing cases⁴⁴ and employing restorative justice tools, such as dialogue, participation, apology and reparation.⁴⁵ It is, in fact, customary IHL that allows for the use of such tools to enable a society to overcome an armed conflict, by weighing the need for retributive justice against values and principles that might be considered more important, such as other victims' rights or the achievement of a lasting peace.⁴⁶

Use of IHL in the legal framework and functions of the JEP

The Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the Government of Colombia and the FARC-EP had two overarching aims that needed to be achieved to ensure a successful transition to peace.⁴⁷ The first was to guarantee the right of victims to truth, justice, reparation and non-repetition,⁴⁸ and the second was to ensure legal certainty for those involved in the conflict to facilitate their reintegration into society and the reconciliation process.⁴⁹ A key focus of the peace agreement was therefore

39 W. Schabas, above note 2, p. 198.

40 L. Mallinder, above note 33, p. 155.

41 S. Machado Ramírez, above note 38, p. 33.

42 L. Mallinder, above note 5, p. 221.

43 W. Schabas, above note 2, p. 180.

44 S. Machado Ramírez, above note 38, p. 33.

45 Kerry Clamp and Jonathan Doak, "More than Words: Restorative Justice Concepts in Transitional Justice Settings", *International Criminal Law Review*, Vol. 12, No. 3, 2012.

46 Rule 159 of customary IHL reads: "At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes." Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

47 The Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace contains six sections: (I) Comprehensive rural reform; (II) Political participation; (III) End of the conflict; (IV) Solution to the problem of illicit drugs; (V) Agreement on the victims of the conflict; and (VI) Implementation, verification and public endorsement. This article is concerned with Section V.

48 Colombian Office of the High Commissioner for Peace, Biblioteca del Proceso de Paz con las FARC-EP, "La Discusión del punto 5: Acuerdo sobre las Víctimas de Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición', incluyendo la Jurisdicción Especial para la Paz y el compromiso sobre derechos humanos y de las medidas de construcción de confianza", Bogotá, 2018, p. 42.

49 Article 5 of Legislative Act 01 of 2017. This article establishes that the objectives are to "uphold the right of victims to justice; provide Colombian society with the truth; protect the rights of victims; contribute to

victims' rights, and the Comprehensive System for Truth, Justice, Reparation and Non-Repetition (SIVJRNR) was created to address this issue.⁵⁰ The system is made up of three transitional justice mechanisms: the Commission for Truth, Reconciliation and Non-Repetition, the Special Missing Persons Unit, tasked with finding people who went missing as a result of the armed conflict, and the JEP, which is the component responsible for administering justice.

The principle underlying the operation of the SIVJRNR is the centrality of victims' rights. The JEP must therefore carry out its functions—which are to investigate, prosecute and punish serious human rights violations and grave breaches of IHL and grant legal benefits, such as amnesty, to perpetrators—with a view to guaranteeing the rights of victims and facilitating the reintegration of those who took part in the armed conflict. As will be seen below, in order to do this, the JEP can apply IHL as a direct source of law. The complex nature of IHL, owing to the convergence of the principles of military necessity and humanity, means that it can contribute to this dual function: IHL as a source of law for punishment and IHL as a tool for pardon. This section briefly describes the structure of the JEP, showing how this dual purpose of IHL is evident in its normative design and operation, specifically in the functions of two of its bodies: the Panel for Acknowledgement of the Truth and Responsibility and Determination of the Facts (Acknowledgement Panel) and the Panel for Amnesty and Pardon (Amnesty Panel).

The JEP's structure and legal basis

The JEP was established as part of Colombia's legal system, in accordance with the Peace Agreement, by Legislative Act 01 of 2017 which reformed the Constitution with the addition of transitional provisions. This Act created the JEP as a transitional justice mechanism that would operate independently to deal with acts constituting serious human rights and IHL violations committed in relation to the armed conflict in order to:

uphold the right of victims to justice; provide Colombian society with the truth; protect the rights of victims; contribute to achieving a stable and lasting peace; and adopt decisions that provide legal certainty to those who participated directly or indirectly in the internal armed conflict with regard to the acts referred to herein.⁵¹

achieving a stable and lasting peace; and adopt decisions that provide legal certainty to those who participated directly or indirectly in the internal armed conflict with regard to the acts referred to herein”.

50 *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, available at: https://www.jep.gov.co/Marco%20Normativo/Normativa_v2/01%20ACUERDOS/Texto-Nuevo-Acuerdo-Final.pdf?csf=1&e=0fpYA0. English translation available at: <https://undocs.org/en/S/2017/272>.

51 Article 5 of Legislative Act 01 of 2017. For an overview of the operation of the JEP, see, for example, María Camila Correa Flórez and Andrés Felipe Martín Parada, “La Jurisdicción Especial para la Paz: un modelo de justicia transicional en Colombia”, *Revista Electrónica de Derecho Internacional*, Vol. 3, No. 3, 2020.

In order to implement these objectives, the JEP is structured into two levels: the Judicial Panels and the Peace Tribunal. There are three Judicial Panels: the Panel for Amnesty and Pardon, the Panel for Acknowledgement of the Truth and Responsibility and Determination of the Facts and the Panel for the Determination of Legal Situations. The Peace Tribunal is made up of the Trial Chamber for cases in which those accused have not acknowledged the truth or their responsibility, the Trial Chamber for cases in which those accused have acknowledged the truth and their responsibility, the Sentence Review Chamber and the Appeals Chamber, which is the last instance body of the JEP.⁵² In this article, the functions of the Acknowledgement Panel and the Amnesty Panel will be described as they are the bodies that have used IHL most since the JEP came into operation.⁵³

In order to perform their functions, the Acknowledgement Panel and the Amnesty Panel have a legal framework that relies on different sources of law: international law, ordinary domestic law and the specific legislation concerning the creation and operation of the JEP.⁵⁴ Referring to the JEP as a whole, Article 5 of Legislative Act 01 of 2017 provides that:

For its rulings and judgments, the JEP shall make its own legal assessment of the acts in question under the SIVJRNR, based on the Colombian Penal Code and/or the provisions of international human rights law (IHRL), international humanitarian law (IHL) or international criminal law (ICL), with the mandatory application of the most-favourable-law principle.

This provision is supplemented by Article 23 of the Statutory Act on the Administration of Justice by the JEP (Act 1957 of 2019), which reads as follows:

For the purposes of the SIVJRNR, the main applicable legal frameworks are international human rights law (IHRL) and international humanitarian law (IHL). For their rulings and judgments, the Peace Tribunal Chambers, the Judicial Panels and the Investigation and Prosecution Unit, shall make their own legal assessment of the acts in question under the SIVJRNR, based on the provisions of the general and special parts of the Colombian Penal Code and/or the rules of international human rights law (IHRL), international humanitarian law (IHL) or international criminal law (ICL), with the mandatory application of the most-favourable-law principle.

52 Article 7 of Legislative Act 01 of 2017.

53 The JEP began operating in March 2018. The Panel for the Determination of Legal Situations is responsible for granting members of the armed forces and police special treatment with regard to criminal matters and, for the discharge of this function, can also use the sources of international law listed in Article 5 of Legislative Act 01 of 2017 and Article 23 of Act 1957 of 2019.

54 The JEP has its own legal framework comprising: (I) Legislative Act 01 of 2017 which creates a section of transitional provisions in the Constitution to end the armed conflict and build a stable and lasting peace; (II) Act 1820 of 2016 which creates provisions on amnesty, pardons and special treatment with regard to criminal matters; (III) Act 1922 of 2018 which adopts rules of procedure for the JEP; (IV) Statutory Act 1957 of 2019 on the Administration of Justice by the JEP; and a battery of implementing regulations.

The resulting characterization may differ from a previous assessment made by judicial, disciplinary or administrative authorities as international law is considered to be applicable as a legal framework.

It can therefore be concluded that the JEP can use different legal regimes directly for the assessment of crimes committed in connection with the Colombian armed conflict in the cases brought before it.⁵⁵ In making its assessments, the JEP can use IHL to determine, for example, if a certain act constitutes a breach of IHL or, on the contrary, does not contravene the rules of IHL because it was carried out in accordance with the principle of military necessity and complies with the principles of distinction, proportionality and precaution. Every individual case needs to be analysed in the light of each of these principles to determine whether a given act is contrary to IHL or not. As will be seen below, this poses an interpretative challenge for the JEP.

The JEP can classify a particular act as it deems fit even if an ordinary court has already heard the case and made a different assessment. The JEP's assessment is what determines whether the perpetrator is eligible for amnesty or will face punishment. The JEP's power to make such assessments itself, based on IHL, gives it the legal and constitutional capacity to classify certain acts as war crimes in the light of the Rome Statute and/or customary law. Here, IHL, as used by the JEP, can be considered a tool for imposing punishment.⁵⁶

The implications are at least threefold. The first, and most evident, is the imposition of penalties by the JEP; if it can classify acts as war crimes, there must be a punishment system in place.⁵⁷ The second is that if perpetrators

55 The JEP has three jurisdictional criteria: personal – members of the FARC-EP and the armed forces and police are required to appear before the JEP for their involvement in acts committed during the armed conflict or in direct or indirect connection with it; and subject matter and temporal – “the JEP only has preferential jurisdiction to hear cases concerning acts directly or indirectly associated with the armed conflict and ... only those committed before 1 December 2016. Ordinary courts of law therefore have jurisdiction over crimes committed after this date” (M. Correa Flórez and A. Martín Parada, above note 51, p. 35). State agents and third parties can appear before the JEP voluntarily if the jurisdictional criteria are met.

56 On how war crimes have been a way of incorporating or absorbing grave breaches of IHL, see, for example, Marko Öberg, “The Absorption of Grave Breaches into War Crimes Law”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009.

57 The JEP can impose three types of punishment. (I) It can impose penalties, according to its own punishment system, on those who disclose the whole truth and fully acknowledge their responsibility when required before the Acknowledgement Panel. The penalties include participating in works, projects and activities with reparative and restorative purposes and a sentence of five to eight years to be served in a non-prison setting if the person played a determining role or from two to five years if they did not. These penalties, which are imposed by the Trial Chamber for cases in which there has been full disclosure of the truth and admission of responsibility, effectively restrict the rights and freedoms of the perpetrators. (II) Alternative penalties are imposed by the Trial Chamber for non-acknowledgement cases on those who only tell the truth and acknowledge their responsibility at a later stage in the process but before sentencing. They consist of a custodial prison sentence of between five and eight years if the person was a participant in the acts in question. (III) Lastly, ordinary sanctions are imposed on those who are convicted without having acknowledged their responsibility. They consist of custodial prison sentences of between fifteen and twenty years imposed by the Trial Chamber for non-acknowledgement cases. On this subject, see Observatory on the Special Jurisdiction for Peace (ObservaJEP), “Cápsula informativa. Sanciones propias y TOAR: ejes y procedimientos”, 8

acknowledge their responsibility in the commission of such acts, they are admitting to society, themselves and their victims that they are war criminals and must apologize and make reparations to the victims. In the words of the JEP, classifying acts as war crimes helps to restore the “dignity of victims because it acknowledges that what happened was part of a predetermined plan systematically implemented against the population”.⁵⁸ The third implication is that classifying one or more acts as war crimes means that perpetrators cannot be granted amnesty or exempted from criminal prosecution for those acts.⁵⁹

Use of IHL by the Acknowledgement Panel and the Amnesty Panel

The Acknowledgement Panel’s central function is to decide which acts are related to the armed conflict and carry out a legal assessment to classify them so that it can be determined in which cases penalties should be imposed and in which cases amnesty or legal benefits can be granted. The Acknowledgement Panel is therefore the body responsible for exercising the power to establish the legal characterization of the facts, based on the sources of law the JEP can apply, in order to determine what crimes those involved in the conflict are to be charged with. The Panel first prioritizes and selects the cases to be heard and then opens what has been termed a “macro-case”. This is the investigative method employed by the JEP, starting from the premise that it would be impossible to investigate all the violations committed during the armed conflict.

This macro-case approach enables the JEP to select the most serious and representative violations and investigate, prosecute and punish those responsible. A series of criteria must be met and certain steps taken to determine whether or not a macro-case should be opened. The assessment takes into account territorial, differential and gender considerations, with some cases being prioritized because they involve a specific situation in a given area or a particular issue.⁶⁰ If the criteria are met, a macro-case is opened and the Panel examines reports from victims’ organizations and government institutions, the records of cases heard in ordinary courts and the accounts of the perpetrators and the victims.⁶¹ Based on this information, the Panel draws up the findings of fact, and

June 2020, available at: <http://observajep.com/images/capsulas/13274137075ee04e480b4100.00617661.pdf>.

58 JEP, Acknowledgement Panel, Ruling 019 of 2021, 26 January 2021, footnote 1633, p. 258.

59 While this article is concerned with amnesty granted to guerrilla fighters, it should not be forgotten that there is also the Sentence Review Chamber that can grant legal benefits to soldiers; the condition that benefits cannot be granted for war crimes applies here too.

60 JEP, “Criterios y metodología de priorización de casos y situaciones en la Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas”, available at: <https://www.jep.gov.co/Documents/CriteriosYMetodologiaDePriorizacion.pdf>.

61 The JEP has opened seven macro-cases (Case 001 “Hostage-taking and Other Severe Deprivation of Physical Liberty by FARC-EP Members” opened on 6 July 2018; Case 002 “Serious Human Rights Situation Affecting People in the Municipalities of Tumaco, Ricaurte and Barbacoas (Department of Nariño)” opened on 10 July 2018; Case 003 “Deaths Unlawfully Reported by State Agents as Casualties in Combat” opened on 17 July 2018; Case 004 “Humanitarian Situation in the

those alleged to have participated in the acts in question either admit their responsibility or deny involvement. The Acknowledgement Panel then submits its conclusions of law to the Peace Tribunal.⁶²

In both the findings of fact and the conclusions of law, the Panel can make its own assessment for the legal characterization of the facts, using IHL and other sources of law. IHL provides the legal basis for imposing penalties if the Panel classifies an act as a war crime, in which case the severity of the crime precludes the possibility of the perpetrators being eligible for amnesty or legal benefits. If, on the other hand, the Panel finds that an act is not a war crime, classifying it as an action forming part of the hostilities and not therefore a serious breach of IHL or as an action permissible in an armed conflict on the grounds of military necessity and complying with the principles of proportionality, precaution and distinction, it can refer the case to the corresponding Panel – the Amnesty Panel or the Panel for the Determination of Legal Situations – so that amnesties, pardons or legal benefits can be granted, as appropriate.⁶³

The Amnesty Chamber is governed by Act 1820 of 2016, which develops the provisions of the Peace Agreement on this question. Its main function is to assess the granting of transitional justice benefits to former FARC-EP members, including amnesty, pardons and conditional release. In its assessment, the Amnesty Chamber must make various determinations. First, it must establish that the alleged acts are associated with the armed conflict, by making:

a value judgment on the connection between the unlawful acts the alleged perpetrator is charged with and the conduct of the armed conflict. It must be established whether the act was committed as a result of, in the course of or in direct or indirect connection with the armed conflict.⁶⁴

Municipalities of Turbo, Apartadó, Carepa, Chigorodó, Mutatá and Dabeiba (Department of Antioquia) and El Carmen del Darién, Riosucio, Unguía and Acandí (Department of Chocó)” opened on 11 September 2018; Case 005 “Humanitarian Situation in the Municipalities of Santander de Quilichao, Suárez, Buenos Aires, Morales, Caloto, Corinto, Toribío and Caldono (Department of El Cauca)” opened on 8 November 2018; Case 006 “Victimization of Patriotic Union (UP) Members” opened on 4 March 2019; Case 007 “Recruitment and Use of Children in the Colombian Armed Conflict” opened on 6 March 2019.

62 Those who admit their responsibility are sentenced according to the SIVJRNR punishment system by the Trial Chamber for cases in which there has been full acknowledgement of the truth and responsibility, and proceedings are instituted against those who deny the allegations in the Trial Chamber for non-acknowledgement cases.

63 Article 79 of Act 1957 of 2019.

64 JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-001-2018, 8 November 2018; JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-002-2018, 9 November 2018; JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-003-2018, 27 December 2018; JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-006-2019, 4 February 2019.

Second, it must establish if the crime is political in nature,⁶⁵ within the meaning of Article 23 of Act 1820 of 2016.⁶⁶ The third determination is whether the act is one of the crimes for which no amnesty or legal benefits of any kind are permitted under any circumstances. These crimes are listed in the above-mentioned article.⁶⁷ It is at this point, when assessing whether legal benefits can be granted, that the Amnesty Panel has used IHL to establish whether or not the act in question is a war crime.

Article 23 of Act 1820 of 2016 stipulates that the Panel shall grant amnesty for political and related crimes and lists the criteria for establishing the connection. It also provides that:

In no case shall amnesties or pardons be granted for the following crimes:

- a) Crimes against humanity, genocide, **war crimes**, hostage-taking or other severe deprivation of physical liberty, torture, extrajudicial executions, enforced disappearance, forcible rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of child soldiers, in accordance with the provisions of the Rome Statute. If the terms “vicious” or “heinous” or any other such term with a similar meaning are used in the sentencing judgment, the bar on amnesties and pardons shall only apply to unlawful acts listed here as not eligible for amnesty (emphasis added).

Amnesty cannot therefore be granted for acts classified as war crimes. To determine whether an act constitutes a war crime, the Panel must use the criteria established by the Appeals Chamber which are based on IHL and its guiding principles and on ICL and which are also consistent with international jurisprudence on the matter:

65 The Colombian Constitutional Court defines “political crime” as “a crime motivated by a sense of justice that leads perpetrators and co-perpetrators to adopt attitudes that are unlawful under the constitutional and legal framework in order to achieve their aim”, Colombian Constitutional Court, Judgment C-009 of 1995, 17 January 1995. This definition was supplemented by the affirmation in a Colombian Supreme Court judgment that a political crime is one that harms or jeopardizes “the political, constitutional or legal organization of the state”, Criminal Cassation Chamber of the Colombian Supreme Court, Judgment of 5 December 2017 (25931). In view of the altruistic motivation of political crimes, those who commit them cannot be treated in the same way as those who commit other types of crimes. Paragraph 17 of Article 150 of the Colombian Constitution provides that amnesties can only be granted for the political crimes listed in Title XVII of the Penal Code (rebellion, sedition, riot, conspiracy and seduction of troops). Amnesty can also be granted for crimes related to political crimes because, as the Constitutional Court states, “[w]ithout the nexus, political crimes would have no effect within the legal system. It therefore follows that the effects reserved for political crimes should also apply to related crimes”, Colombian Constitutional Court, Judgment C-577 of 2014, 6 August 2014.

66 This Act, which establishes provisions on amnesties, pardons and special criminal treatment, among others, forms an integral part of the JEP’s legal framework and governs everything relating to the granting of amnesties and special criminal treatment for members of armed and security forces.

67 Article 23. Criteria for determining whether an unlawful act is related to a political crime. “The Panel for Amnesty and Pardon shall grant amnesties for political and related crimes. Crimes considered to be related to political crimes are those that meet any of the following criteria: a) crimes specifically related to the conduct of the rebellion and committed in the course of the armed conflict, such as killing in combat permitted under international humanitarian law and the capture of combatants during military operations; b) crimes directed against the government and constitutional order; and c) crimes committed to facilitate, support, finance or conceal the rebellion. The Panel for Amnesty and Pardon shall determine whether an unlawful act is related to a political crime on a case-by-case basis.”

- a. an act committed in the context of an international or non-international armed conflict within the meaning of Article 62(1) of the Statutory Act on the Administration of Justice by the JEP;
- b. an act that constitutes a violation of a rule of international humanitarian law applicable to the conflict;
- c. an act constituting a gross breach which exceeds the established threshold of seriousness or severity in that it affects the fundamental interests of victims – individuals, groups or society – harming or endangering their fundamental rights in a socially significant manner.⁶⁸

The Amnesty Panel also uses IHL as a source of law for granting amnesty. The JEP's regulations are based on Article 6(5) of Protocol II additional to the Geneva Conventions which requires government authorities to grant the broadest possible amnesty at the end of the hostilities.⁶⁹ The Colombian Constitutional Court has itself recognized that the amnesty mechanism was necessary to achieve reconciliation and peace:

The Court finds that (i) although transitional justice processes implemented in different parts of the world and at different points in time have their own specific characteristics, the granting of legal benefits to those who lay down their weapons is a measure consistently used in the quest for peace through reconciliation processes; (ii) in particular, the granting of the broadest possible amnesty at the end of the hostilities is a mechanism recognized under international humanitarian law, specifically in Article 6(5) of Protocol II additional to the Geneva Conventions; (iii) in view of the situation, it is not only understandable but inevitable that, in the peace process undertaken by the Government of Colombia and the FARC-EP, this should be a central and critical issue in the achievement of a negotiated end to the internal armed conflict;⁷⁰

It is clear from this legal framework and the functions of the two Panels that IHL was incorporated into the JEP as a dual-purpose tool. It serves as a basis for imposing penalties in two ways: the first is when the Acknowledgement Panel exercises its power to make its own legal characterization of the facts in the light of IHL and determine whether the act in question constitutes a war crime or not; the second is when the Amnesty Panel uses IHL and its principles and customary law to establish that a given act constitutes a war crime and is therefore not eligible for amnesty. In making such assessments, the Panels must consider the IHL principle of humanity and demonstrate that the act manifestly exceeded the limits that IHL imposes on behaviour in an armed conflict, such as the principles governing the conduct of hostilities and the rules on the protection of those who are not or are no longer taking part in the hostilities. The next section provides an overview of some examples of such assessments made by the JEP.

68 JEP, Appeals Chamber, Judgment TPSA-AM-203, 27 October 2020, Case of Jaime Aguilar, p. 27.

69 Article 8 of Act 1820 of 2016, "Pursuant to recognition of political crimes and in accordance with international humanitarian law, at the end of the hostilities, the Government of Colombia shall grant the broadest possible amnesty."

70 Colombian Constitutional Court, Judgment C-007 of 2018, 1 March 2018.

IHL is also used by these Panels as a tool for pardoning crimes. The Acknowledgement Panel uses IHL when it refers cases to the Amnesty Panel because it considers that the act in question does not constitute a grave breach of IHL or can be classified as an action that is lawful in armed conflict. When the Amnesty Panel makes assessments in cases that have not been dealt with by the Acknowledgement Panel, it applies this IHL logic to grant the broadest possible amnesty, as mentioned above. This illustrates how both the principle of humanity and the principle of military necessity play a central role in the JEP. In spite of the antagonism caused by its principles, IHL also seems to facilitate the complementarity of the functions of the two Panels which, through the complex nature of this body of law, can use its provisions to fulfil their objectives.

Some examples of the challenges faced by the JEP in its use of IHL

The work of the Acknowledgement and Amnesty Panels has thrown up a number of challenges for the JEP associated with the complex nature of IHL. This section describes cases that highlight three challenges the JEP has faced when applying IHL to determine whether the acts in the case it is dealing with are eligible for legal benefits, such as amnesty, or whether their severity precludes this option. The first challenge arose in determining whether members of the National Police are protected persons under IHL. This is a complicated issue because of the specific characteristics of the armed conflict and the structure of the police service in Colombia. The second challenge was posed in the assessment of one of the main crimes committed by FARC-EP members: kidnapping. Examining this crime in the light of IHL was a matter of crucial importance because kidnapping was a practice carried out on a massive scale and the conclusions would affect the eligibility of FARC-EP fighters, particularly high-ranking members, for legal benefits. The third challenge was related to the assessment of an attack on the Military Academy in Bogotá involving a car bomb, which was originally classified as an act of terrorism under domestic law. The challenge in this case was to determine whether the crime was eligible for amnesty in the light of IHL principles, despite having previously been classified as an act of terrorism.

Use of IHL to determine whether members of the National Police are protected persons

In Ruling AOI-006 of 2019, the Amnesty Panel assessed various crimes that Jaime Aguilar had been charged with. One of them was a FARC-EP attack on a local police unit (CAI)⁷¹ in the city of Villavicencio in Meta. Explosives and firearms were used

71 *Comandos de Atención Inmediata* (CAI) in Colombia are police units with a relatively small jurisdiction, strategically located in peripheral urban areas of the municipalities, localities, communes and districts of

in the attack, which resulted in the destruction of the CAI and the death of a police officer.⁷² This case is relevant because it brings to the fore the debate about whether police officers can be considered protected persons in NIACs under IHL. The answer to this question will determine whether the killing of a police officer is a breach of IHL and therefore a war crime. The Amnesty Panel recognized that, given the “complexities of Colombia’s internal armed conflict, some members of the National Police could be deemed combatants or persons taking a direct part in the hostilities”.⁷³ On the same matter, the Appeals Chamber also mentioned the complexity of IHL, pointing out that there is no consensus on the question of the status of police officers even though, in principle, they are entitled to the same protection as civilians because they are not considered to be persons participating in the hostilities. However, in Colombia, they can lose this status if they: (I) belong to units assigned to carry out military operations or work alongside military forces; or (II) individually take a direct part in the hostilities.⁷⁴

To assess this question, the Amnesty Panel had to analyse whether either of the conditions that would lead to police officers losing their status as protected persons was met in the attack on the CAI. The Panel found that the attack did not comply with the principles of distinction, proportionality or precaution because the police officers stationed at the CAI were not directly participating in the hostilities and CAIs were not assigned to carry out military operations.⁷⁵ The Panel therefore held that the attack constituted a grave breach of IHL, which meant that it was a war crime under Article 8.2(c)(i) of the Rome Statute.⁷⁶ As the act was classified as a war crime, the Panel ruled that amnesty could not be granted. In this case, a restrictive interpretation was therefore made of the rules of IHL, with the Panel giving precedence to the principle of humanity and rejecting the argument that the attack was lawful because it was a military action.

This debate is important because some police officers could have performed duties or carried out activities during the armed conflict in Colombia that would result in them being considered to have participated in the hostilities. CAIs operate under the authority of the Ministry of National Defence,⁷⁷ and it was not unusual, in some parts of the country, for them to accompany or assist in

the main cities with these administrative divisions. The purpose of the CAIs is to orient and strengthen the police presence and protect citizens’ rights and freedoms in their local area. By working closely with the community and local authorities, they enhance the decentralization of the services provided by police stations for more community-based policing. Their main function is to remain in “constant contact with the community to prevent crime and wrongdoing and ensure public safety, security and peaceful coexistence in communities, with the efficient and timely use of available resources and technological tools”. See Policía Nacional, *Manual para el Comando de Atención Inmediata*, Bogotá, July 2009, available at: https://www.camara.gov.co/sites/default/files/2020-09/RTA.ANEXO_MINDEFENSA.MANUAL.ESTATUTO%20DE%20POSICIONAMIENTO%20EN%20COMUNIDADES.pdf.

72 Although in this case the Amnesty Panel also assessed blasts at a dock and a hotel and the destruction of a bridge, for the purposes of this article, only the CAI attack will be discussed.

73 JEP, Panel for Amnesty and Pardon, Ruling AOI-006 of 2019.

74 JEP, Appeals Chamber, Judgment TP-SA-AM-168, 18 June 2020, Case of Luis Alberto Guzmán Díaz.

75 JEP, Panel for Amnesty and Pardon, Ruling AOI-006 of 2019.

76 *Ibid.*

77 Decree 1814 of 1953.

military operations. Some of them were assigned to participate in activities related to the conflict on a continuous basis. This makes it difficult to determine whether an attack on the police complied with the principle of distinction because establishing which members of the police were assigned to perform military functions on a continuous basis and which were not is not easy. This debate has also played out in other contexts, for example, in the case involving the Revolutionary United Front brought before the Special Court for Sierra Leone, in which the Trial Chamber ruled that, on occasions, weapon bearers (such as the police in the case of Colombia) that are not a legitimate military target can become one if they participate in the hostilities.⁷⁸

Use of IHL to pardon sentences imposed under domestic law

On 19 October 2006, a bomb exploded outside the Military Academy in Bogotá,⁷⁹ causing material damage and injuring thirty-three people at the academy and in the vicinity of the nearby Military University. It was an attack carried out by the FARC-EP involving the detonation of an explosive device placed inside a car. The investigation into the blast established that Ms Marilú Ramírez had participated in the attack, and she was convicted by an ordinary criminal court of the crimes of terrorism, attempted murder and grievous bodily harm.⁸⁰ In Ruling SAI-AOI-D-003-2020, the Amnesty Panel found that the attack complied with the principles of distinction, precaution and proportionality and did not therefore constitute a breach of IHL. It also found that the attack did not constitute a war crime because, in addition to complying with the above-mentioned principles, it was not indiscriminate and, in this particular case, the car bomb was not a prohibited means of warfare under IHL.⁸¹ It therefore decided to grant amnesty to Ms Ramírez on the grounds that the act was considered to be related to a political crime because it was part of a lawful military operation carried out by the FARC-EP guerrilla group against the armed forces.⁸²

The Panel reached this conclusion on the basis of its determination that the Military Academy was a legitimate military target in accordance with Rule 8 of customary IHL. According to this rule, for an object to be considered a military objective: (I) it must be an object that makes an effective contribution to military action; and (II) its destruction must offer, in the circumstances prevailing at the time, a definite military advantage. In the opinion of the Amnesty Panel, “the military purpose and nature of the Military Academy made it a military objective

78 Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment, 2 March 2009.

79 According to its website (<https://esdegue.edu.co/>), the Military Academy (Escuela Superior de Guerra) “is a higher military educational institution that trains officers of the armed forces, the future generals and admirals of the Colombian Army, Navy and Air Force and senior figures in Colombian society in national security and defence, with a view to strengthening channels of communication and integration”.

80 JEP, Panel for Amnesty and Pardon, Ruling SAI-AOI-D-003-2020, 12 February 2020, Case of Marilú Ramírez Baquero.

81 *Ibid.*

82 *Ibid.*

at the time of the incident and, based on an assessment of the action in the prevailing circumstances, it offered a definitive military advantage”.⁸³

The Panel also found that “although a car bomb that explodes at the site of a military target located within an urban area can potentially have indiscriminate effects on civilians and civilian property, based on the information available, in this case no such effects were observed”.⁸⁴ In the same vein, it established that, in light of Article 3(7) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Convention Prohibiting Certain Conventional Weapons), the car bomb used was not a prohibited weapon because the attack was directed against a military target and not civilians or civilian objects.⁸⁵

The conclusion reached by the Panel was at odds with the assessment made by Colombia’s ordinary courts, which convicted Ms Ramírez of terrorism, among other crimes. According to domestic criminal law, terrorism is any act that seeks to instil or spread “fear and terror among the population or part of it by carrying out actions that endanger people’s lives, safety or freedom or threaten buildings, means of communication, transport, or water and power facilities, using means capable of causing havoc”.⁸⁶ In the Colombian context, acts carried out by the FARC-EP similar to those reassessed in this case have been classified as terrorism, which would seem to suggest that the political motivation of these acts, and therefore the existence of a NIAC, were ignored. Moreover, the level of severity of terrorist acts was high in both material and symbolic terms. In this case, the JEP granted amnesty for this crime, based on IHL and its principles, evidencing the permissive manifestation of this body of law and its use for pardoning crimes.⁸⁷

Use of IHL to assess unlawful practices committed on a massive scale in the armed conflict

In Ruling 019 of 2021 (findings of fact and conclusions of law), the Acknowledgement Panel indicted a number of former FARC-EP Secretariat members for the war crime of hostage-taking.⁸⁸ The ruling established that

83 *Ibid.*, p. 55.

84 *Ibid.*, p. 43.

85 *Ibid.*, p. 48.

86 Article 343 of the Colombian Penal Code.

87 It is important to note that IHL clearly prohibits acts of terrorism targeting civilians and people not taking part in the hostilities. It could therefore be argued that an attack on a military target would not constitute an act of terrorism. See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Article 33; Additional Protocol I, Article 51(2); and Additional Protocol II, Articles 4 and 13.

88 They were also charged with other acts of severe deprivation of liberty as a crime against humanity. The individuals indicted for war crimes and crimes against humanity were Rodrigo Londoño Echeverry, Jaime Alberto Parra, Miltón de Jesús Toncel, Juan Hermillo Cabrera, Pablo Catatumbo, Pastor Lisandro Alape, Julián Gallo Cubillos and Rodrigo Granda Escobar in Case 001 concerning hostage-taking and other severe deprivation of liberty by the FARC-EP.

kidnapping, as it is called in domestic criminal law, was a systematic policy pursued by the FARC-EP in the period from 1993 to 2012 in Colombia:

the policy consisted of indiscriminate acts of deprivation of liberty, as a means of securing funds to finance the armed organization, under the threat of disappearance or murder if the ransom was not paid. This *de facto* policy resulted in a pattern of conduct, particularly with regard to the *modus operandi* (discriminate and indiscriminate deprivation of liberty) and the characteristics of victims (age and financial status).⁸⁹

The Panel was of the opinion that, under Article 8(2)(c)(iii) of the Rome Statute, these acts of deprivation of liberty constituted the war crime of hostage-taking, considered one of “the most serious violations of IHL because it seeks to compel someone to act or refrain from acting as a condition for the release, life or safety of the person held captive”.⁹⁰ It concluded that the level of severity of this crime was high because:

(I) the victims of the war crime of hostage-taking are individuals who are taking no part in the conflict or are *hors de combat*, including soldiers and police officers; (II) in the case of combatants *hors de combat* being deprived of their liberty, it could be argued that there was no intention, at the time of their capture, to make their release conditional on the release of guerrilla prisoners [and] that they were deprived of their liberty for reasons of military necessity [but] from the moment the release of guerrilla prisoners is made a condition for their release, this deprivation of liberty becomes the war crime of hostage-taking; and (III) it is not necessary for there to be an intention to demand something in exchange for the release or life of the hostage at the time of the deprivation of liberty. This intention can arise subsequently during the time the person is deprived of their liberty. [Therefore] the act is considered to constitute hostage-taking even when the initial detention was lawful or not prohibited because it is not the manner in which the hostage falls into the hands of the perpetrator that defines the crime but the intention to impose conditions for their release.⁹¹

This ruling is important for the application of IHL because, in addition to directly applying IHL to acts already determined to be kidnappings by an ordinary criminal court, it changes the name of the case “for technical reasons relating to the legal

89 JEP, Acknowledgement Panel, Ruling 019 of 2021, 26 January 2021, p. 90.

90 The Panel recalled that the elements of this crime are those established in Article 8(2)(c)(iii) of the Rome Statute: “1. The perpetrator seized, detained or otherwise held hostage one or more persons. 2. The perpetrator threatened to kill, injure or continue to detain such person or persons. 3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons. 4. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities. 5. The perpetrator was aware of the factual circumstances that established this status.” UN General Assembly, Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002).

91 JEP, Acknowledgement Panel, Ruling 019 of 2021, 26 January 2021, para. 719.

characterization of the facts”⁹² because, according to the Acknowledgement Panel, the correct term is “hostage-taking” not “kidnapping”. This determination by the Acknowledgement Panel means that amnesty cannot be granted for such acts and recognizes the “international relevance of these [acts] insofar as they could be tried by the International Criminal Court”.⁹³ It is also a recognition that the acts “are more serious than domestic crimes”⁹⁴ given that they not only seriously affected the victims, but also “(I) affected humanity as a whole; (II) were not isolated events, but part of a policy; and (III) violated the rules of international law”.⁹⁵ Although this conclusion leaves open the question of what would happen with reciprocal exchanges of people deprived of their liberty in a NIAC – an issue beyond the scope of this article – in this case, it is clear that the Acknowledgement Panel is applying IHL with a restrictive use of its rules which elevates these kidnappings to the category of international crimes, recognizing their seriousness, and provides the legal basis for punishing them.

A comparison of this case and the Military Academy case highlights the dual use of IHL by the JEP. On the one hand, in the Military Academy case, IHL enabled the Amnesty Panel to pardon an act deemed a serious crime under domestic law. On the other, in the hostage-taking case, IHL enabled the Acknowledgement Panel to elevate a different act, also considered a serious crime under domestic law, to the category of war crime. This dual use of IHL not only has implications for those appearing before the JEP, but also for victims and the recognition of their rights. This is because when it is established that a given act complies with IHL, the rights of the victims are not acknowledged, as in the case of the Military Academy attack. Then again, when it is determined that a given act is a war crime or crime against humanity, as in the findings of fact ruling in Case 001, questions could be raised about whether this violates the right of those appearing before the JEP not to be tried twice for the same crime.

Conclusions

The application of IHL in the transitional justice system in Colombia highlights the complex nature of this body of law, in which restrictive and permissive elements interact. The configuration and interaction of these elements is influenced by the historical development of IHL and the two cardinal principles underlying this entire body of law: the principle of military necessity and the principle of humanity. This characteristic of IHL plays into the twin goals of transitional justice, which are to serve justice and achieve peace. Transitional justice mechanisms such as the JEP use IHL both in their normative design and operation and in adjudicating the cases brought before them. As has been shown,

92 ObservaJEP, “Informative Capsule: Judgment on Case 001”, 9 February 2021, p. 1, available at: <http://observajep.com/images/capsulas/101562074860252052274128.91650344.pdf>.

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

IHL is used, on the one hand, as the basis for punishing acts of violence that constitute grave breaches of IHL or qualify as war crimes and, on the other, as a source of law for the adoption of measures such as amnesty, subject to certain conditions (for example, they are not permitted in cases involving war crimes), which facilitate the reintegration of those involved in the armed conflict and contribute to political and negotiated solutions for peace. Cases involving atrocities committed in an armed conflict, such as the FARC-EP kidnappings in Colombia, can be assessed in the light of IHL to establish their severity and ensure that the perpetrators do not go unpunished. Then again, acts considered to constitute terrorism or serious crimes under domestic law can be reassessed in the light of IHL and reclassified as military actions that do not violate the rules of this body of law and can therefore be pardoned.

It can be inferred from these different uses of IHL in transitional justice that its complex nature is not necessarily an undesirable feature. On the contrary, it can facilitate the efforts of transitional justice mechanisms such as the JEP in the pursuit of their goals, which are to serve justice and achieve peace in compliance, in both instances, with international standards. However, the evidence presented in this article, drawn from the Colombian experience, will no doubt be the subject of future debates and contestations. There is no denying that the ambiguities in IHL can also hinder the consistent application of its rules and principles. This can lead to situations in which similar acts and practices are assessed differently, resulting in punishment in some cases and pardon in others. This difficulty underlines the importance of IHL being regarded as a legal regime that is under constant development and construal, as mentioned above, and whose implementation and interpretation, rather than a definitive definition of its nature and principles, determine its scope and purpose as a formula for achieving justice and peace at the end of an armed conflict.

“Reason to know” in the international law of command responsibility

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Abstract

A recent report by the Australian Defence Force arrived at a conclusion that further investigation was not warranted of commanders regarding their responsibility for failing to investigate suspicious behaviour of subordinates in Afghanistan, who were accused of violations of international humanitarian law. This troubling conclusion calls for a better analysis and understanding of command responsibility in international law and gaps in the law of command responsibility. This article identifies the conflicting precedents and scholarship regarding the law of command responsibility, which create uncertainty, and proposes a clarification of that law, with a special focus on the “reason to know” standard that triggers responsibility for failing to prevent or punish war crimes. It refutes the popular claim that commanders must act wilfully, and it rejects the common dichotomy between a commander who orders or otherwise directly participates in the war crimes of subordinates and one who unwittingly fails to prevent or punish such crimes. Using the empirical psychological literature, the article further explains how commanders can insidiously signal toleration of war crimes without giving direct orders. Finally, the article argues that international law, by absolving commanders who fail to

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properly train their subordinates to respect the law of armed conflict, misses a rare opportunity to deter war crimes, and offers some suggestions to fill this gap in the law.

Keywords: command responsibility, *scienter*, reason to know, prevent or punish, international criminal law, international humanitarian law.

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Commanders are responsible for everything their command does or fails to do. . . .
Commanders who assign responsibility and authority to their subordinates still retain the overall responsibility for the actions of their commands.

US Army Regulation 600-20¹

Introduction

In November 2020, the Australian Defence Force (ADF) was confronted with the findings of a four-year-long investigation, undertaken by the inspector-general of the ADF and a justice of the New South Wales Supreme Court, Major General Paul Brereton, into allegations of war crimes by ADF special forces. The Afghanistan Inquiry Report, also known as the Brereton Report,² found that there was credible evidence to support claims that, from 2005 until 2013, some members of the Australian Special Air Services (SAS) had engaged in a pattern of war crimes, including the murders of dozens of detainees and civilians and a subsequent cover-up. One of the practices uncovered in the investigation was the carrying of “throwdowns” – foreign weapons or equipment to be placed with the bodies of an ostensible “enemy killed in action” for the purposes of site exploitation photography, in order to portray that the person killed had been carrying the weapon or other military equipment when engaged and was therefore a legitimate target.³ The Brereton Report found evidence that Command was aware of these practices and had been told of claims by Afghans that SAS soldiers and junior officers were committing war crimes.⁴ SAS commanders chose neither to investigate the claims nor to alert high command, in part because SAS officers were biased toward disbelieving complaints.⁵

In applying the law of armed conflict (LOAC) to these events, the Brereton Report arrives at a set of conclusions that, while critical of SAS officers’ handling of the evidence of potential violations, do not favour further investigation of the commanders who themselves chose not to investigate these incidents. The Report

1 US Department of the Army, *Army Regulation 600-20: Army Command Policy*, 24 July 2020, para. 2-1(b).

2 *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report*, 2020 (Brereton Report), available at: <https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf> (all internet references were accessed in March 2022).

3 *Ibid.*, p. 29, paras 18–19.

4 *Ibid.*, p. 31, para. 30.

5 *Ibid.*, p. 464, paras 336, 338–339; p. 490, paras 49–50.

characterizes the actions of the SAS as “disgraceful and a profound betrayal” of the ADF’s “professional standards and expectations”⁶ by a number of lower-ranked soldiers, not going so far as to conclude that these actions together indicate an accepted culture of criminality throughout the SAS. The suspicious behaviour of subordinates, the Report concludes, could have been properly interpreted as being indicative not of premeditation for the commission of war crimes, but rather of acts done to avoid unnecessary scrutiny for what could theoretically have been lawful activities.⁷

The Brereton Report paints the picture of an insular and secretive unit operating without the oversight of Command,⁸ but concludes that the behaviour was justifiably considered necessary for unit cohesion, stating:

The close-holding of information – frequently referred to as “compartmentalisation” – is a necessary feature of military units generally, and it is accentuated in the sphere of special operations. The security of the nation and the lives of individuals can depend on it.⁹

Ultimately, the Report explains commanders’ failure to discover, prevent or investigate potential violations, in part, by noting that “few would have imagined some of our elite soldiers would” commit these violations.¹⁰

The conclusions of the Brereton Report, on both unit cohesion and the law of command responsibility, make for unsettling reading. They imply that the obligation of military officers to prevent and punish war crimes is secondary to considerations of morale and unit effectiveness. More generally, they reflect a long-standing inconsistency in command responsibility doctrine that removes a critical disincentive to dangerously irresponsible command decisions and thereby undermines command responsibility’s deterrent value.

This article examines the law of command responsibility and its relationship to unit cohesion and other extralegal values. In general, the law of command responsibility makes a commander criminally responsible for crimes committed by forces under his or her effective authority and control if the commander knew or, owing to the circumstances at the time, had reason to know that the forces were committing or were about to commit such crimes, yet failed to take all necessary and reasonable measures to prevent or repress the commission of the acts.¹¹ Similarly, a commander who knew or had reason to know of past war crimes of subordinates becomes responsible for failing to take the necessary measures to punish those subordinates.¹² Within this seemingly straightforward doctrine lies a confusing vagueness about the mental element of

6 *Ibid.*, p. 41, para. 77.

7 *Ibid.*, p. 31, para. 30.

8 *Ibid.*, p. 325.

9 *Ibid.*, p. 332, para. 15.

10 *Ibid.*, p. 489, para. 42.

11 Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (Rome Statute), Art. 28. Section 268.11 of the Australian Criminal Code Act 1995 (Cth), which is discussed in the Brereton Report, largely but not precisely replicates the command responsibility provision of the Rome Statute.

12 Rome Statute, Art. 28.

the offence. In particular, the circumstances under which a commander will be deemed to have constructive knowledge of the war crimes of subordinates has occasioned recurrent debates among international criminal tribunals and scholars alike, with inconsistent and sometimes contradictory results.

Nearly all jurists addressing the issue propose a clear demarcation between a commander's intentional participation in a subordinate's war crime, which triggers either direct or command responsibility, and a commander's mere negligent supervision of subordinates who commit war crimes, which generally results in the exoneration of the commander as lacking the necessary *scienter*. This article challenges the widely assumed dichotomy between participation and neglect as both an oversimplification of human methods of communication and a misapprehension of the dynamics of military organizations. The consequences of this false dichotomy, illustrated in the Brereton Report but by no means unique to it, have proven disturbing from both moral and legal perspectives. The article proposes a reformed concept of a commander's "reason to know" of war crimes by subordinates, in which evidence of intentionality assumes a less prominent role. It concludes by suggesting an alternative to the doctrine's absolution of commanders from any duty to train or supervise subordinates under their command.

The law of indirect command responsibility

If a military commander plays an active role in promoting war crimes by subordinates, the appropriate charge is ordering, soliciting or inducing a war crime,¹³ aiding, abetting or assisting in a war crime,¹⁴ or contribution to a war crime,¹⁵ depending on the form the commander's promotion takes. In contrast, command responsibility relates to a superior's failure to take appropriate action to prevent or punish war crimes committed by subordinates. Indirect responsibility is a much more complex doctrine and raises difficult questions of interpretation and application, particularly regarding the mental element of the offence. The essential point of indirect command responsibility is to deter commanders from tolerating war crimes by subordinates or exonerating them after their crimes come to light.

In the Brereton Report, because there were no allegations that ADF officers ordered subordinates to commit war crimes in Afghanistan, only the indirect aspect of command responsibility is implicated. This is unsurprising, not merely because

13 See *ibid.*, Art. 25(3)(b).

14 See *ibid.*, Art. 25(3)(c); see also e.g. International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras 693–694 (finding the mayor of Taba Commune in Rwanda guilty of aiding and abetting widespread and systematic rapes through his "words of encouragement", which "sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place").

15 See Rome Statute, Art. 25(d). Cf. Beatrice I. Bonafé, "Finding a Proper Role for Command Responsibility", *International Journal of Criminal Justice*, Vol. 5, No. 3, 2007, p. 615; Chantal Meloni, *Command Responsibility in International Criminal Law*, Springer, New York, 2010, pp. 216–233 (discussing the International Criminal Tribunal for the former Yugoslavia (ICTY) decisions imposing responsibility for aiding and abetting, conspiracy and joint criminal enterprise).

direct commands to commit war crimes are relatively rare. The doctrinal difficulties of the law of indirect command responsibility have so perplexed both scholars and international criminal tribunals that untangling the jurisprudence and the underlying policy rationale for specific approaches to indirect command responsibility demands careful analysis. In this part of the article, we will briefly summarize the conflicting jurisprudence and sources of authority on command responsibility under the LOAC as it has developed since the Second World War.

Early indirect command responsibility in the LOAC

Command responsibility for ordering war crimes by subordinates, or for refusing to punish subordinate war criminals, found its way into early municipal articles of war and military codes,¹⁶ but no such law before 1945 held commanders criminally responsible for violations of international law caused by mere toleration of war crimes by subordinates. Suggestions for the incorporation of more robust command responsibility into the international LOAC were floated as early as the Hague Peace Conferences of 1907 and the Versailles Peace Conferences of 1919,¹⁷ but even after the Second World War, the Allies were divided about whether a military commander could be criminally responsible for the war crimes of subordinates caused by toleration or neglect, as opposed to ordering the crimes.¹⁸

The Yamashita trial

The resolution of that debate, and the origin of the modern law of indirect command responsibility, came with the trial of the commander of the Japanese Army in the Philippines, Tomoyuki Yamashita. General Yamashita became the first officer to be charged based on responsibility for an omission, specifically in permitting officers and troops under his command to plan and commit thousands of war crimes, including mass murder, torture, mutilation and gang rape of civilians as Japanese forces were driven out of Manila.

There was no strong, direct evidence that Yamashita knew or expressed approval of the war crimes,¹⁹ and he claimed at trial that he had operational but

16 For detailed historical summaries of State practice, see William H. Parks, “Command Responsibility for War Crimes”, *Military Law Review*, Vol. 62, No. 1, 1973, pp. 2–16; Matthew Lippman, “Humanitarian Law: The Uncertain Contours of Command Responsibility”, *Tulsa Journal of Comparative and International Law*, Vol. 9, No. 1, 2001.

17 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919*, reprinted in *American Journal of International Law*, Vol. 14, No. 1, 1920, p. 121.

18 W. H. Parks, above note 16, p. 20.

19 Several authors have argued that there was credible evidence that Yamashita was aware of the war crimes (see e.g. W. H. Parks, above note 16, pp. 22–38; William V. O’Brien, “The Law of War, Command Responsibility and Vietnam”, *Georgetown Law Journal*, Vol. 60, No. 3, 1972, pp. 625–627; William G. Eckhardt, “Command Criminal Responsibility: A Plea for a Workable Standard”, *Military Law Review*, Vol. 97, No. 1, 1982, p. 19), but the tribunal never in fact found direct evidence that Yamashita had knowledge. It held instead that the war crimes were so open, systematic and in propinquity to Yamashita’s location that knowledge could reasonably be imputed to him on the facts. The tribunal

not disciplinary control over naval land forces. Nonetheless, the US Military Commission found that Yamashita, as the highest military commander in the Philippine Islands, had a responsibility to prevent and investigate war crimes committed by subordinate officers under his command:

The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused.

... [W]here murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.²⁰

Thus, two new standards for a commander's criminal responsibility were established: first, the commander must not passively tolerate war crimes of which he or she is aware, and second, the commander must supervise and discipline troops under his or her command with regard to detecting and preventing war crimes. As Ilias Bantekas has interpreted the case:

This standard ... creates an objective negligence test that takes into account the circumstances at the time. Absence of knowledge is no defence if the superior did not take reasonable steps to acquire such knowledge, which in itself constitutes criminal negligence. Superiors have reason to know if they exercise due diligence. ... This inevitably raises a duty to know, rebuttable only through evidence of due diligence, because it is a commander's duty to be apprised of events within his or her command.²¹

These principles were reaffirmed by the Nuremberg Tribunal and the International Military Tribunal for the Far East (IMTFE), also known as the Tokyo War Crimes Tribunal.²²

put great emphasis on those duties of a commander that, if properly exercised, would have led to the discovery of the war crimes, but this emphasis is more consistent with a "reason to know" standard than with an actual knowledge standard.

- 20 US Military Commission, Manila, *Trial of General Tomoyuki Yamashita*, Case No. 21, Judgment, 4 February, 1946, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 4, 1948, pp. 34–35.
- 21 Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, Juris, New York, 2002, pp. 113–114 (footnotes omitted). But see Guénaël Mettraux, *The Law of Command Responsibility*, Oxford University Press, Oxford, 2009, pp. 217–218 (interpreting ICTY precedents, including the *Čelebići* case decision, to exonerate commanders for whom evidence of the war crimes of subordinates is readily available, but who take no steps whatsoever to acquire it).
- 22 See e.g. United Nations War Crimes Commission, *United States v. von Leeb*, in *Law Reports of Trials of War Criminals*, Vol. 9, 1949, p. 512. That said, some tribunals varied the phrasing of the duty of command responsibility. Thus, for example, in the *Toyoda* trial, the IMTFE characterized the commander's duty as one of "the exercise of ordinary diligence" or "use of reasonable diligence" to learn of the commission of crimes by subordinates. See IMTFE, *United States v. Toyoda*, in *Records of the Trial of Accused War Criminal Soemu Toyoda, Tried by a Military Tribunal Appointed by the Supreme Commander of the Allied Powers, Tokyo, Japan, 1948–1949*, National Archives and Records Administration, M1729,

Additional Protocol I

The *Yamashita* rule was incorporated with some alterations into Additional Protocol I to the 1949 Geneva Conventions (AP I), in its Article 86:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.²³

The phrasing of AP I – “had information which should have enabled them to conclude” – suggests a high standard of diligence in both supervision of subordinates and prevention of war crimes. The use of the past conditional “should have enabled” indicates that the failure to investigate incomplete evidence or make logical inferences that war crimes were occurring engages the commander’s responsibility as surely as if the commander actually knew these facts. Wilful blindness and reckless disregard of incriminating facts are therefore as culpable as actual knowledge,²⁴ consistent with the ancient maxim of *non scire quod scire debemus et possumus culpa est*.²⁵

The International Committee of the Red Cross (ICRC) Commentary on AP I asserts that a commander’s “negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place”.²⁶ This interpretation is unfortunate. It contradicts the plain language of Article 86, which requires only that the commander possess inculpatory information and fail to take action as required. Malicious intent is simply not an element of the crime. On the contrary, AP I thus uses the strongest possible language to describe the commander’s responsibility once facts have come to his or her attention that warrant further investigation.²⁷ Apathy meets this standard as well as malicious intent, although it could perhaps be argued that

7 rolls; *Transcripts from the Case of the United States of America vs. Soemu Toyoda and Hiroshi Tamura, 1946–1948*, M1661, 4 rolls (*Toyoda* Transcript).

23 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 86(2).

24 Anne-Marie Boisvert, Hélène Dumont and Martin Petrov, “Quand les crimes des sous-fifres engage la responsabilité de leur chef: La doctrine de la responsabilité du supérieur hiérarchique en droit pénal international”, *Canadian Criminal Law Review*, Vol. 9, No. 1, 2004, p. 117.

25 See ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgment (Appeals Chamber), 3 July 2002, para. 28.

26 Claude Pilloud, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (ICRC Commentary on APs), p. 1012.

27 It is thus even less justified to argue that a commander must have verified proof of a potential war crime by subordinates to incur liability for failing to prevent those crimes, and he must consciously choose not to act. See G. Mettraux, above note 21, pp. 208, 217, 223. Such an argument excuses both total neglect of supervision on the commander’s part and his wilful blindness to indicators of possible war crimes, in contradiction to the plain words of AP I.

malicious intent can be inferred from a commander's self-blinding to the facts available to him or her.

The language of Article 86 seems to require evidence to be in the commander's actual possession ("had information"), not merely available to the commander. It thus may be interpreted to exonerate a commander who, lacking incriminating evidence, takes no measures to supervise direct subordinates in order to ensure that they are not committing war crimes. If this interpretation is correct, it departs from at least one of the credible interpretations of the Nuremberg and Tokyo war crimes precedents. The ICRC Commentary takes the opposite approach; it interprets actual possession of incriminating information as not being required to engage the commander's responsibility. For example, it views a commander's failure to diligently review reports of war crimes during absence from the theatre of combat as not excusing a failure to inform himself or herself and to take appropriate preventive or punitive measures.²⁸

Statutes of the international criminal tribunals

In modern practice, Article 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) used less exacting language with regard to negative duties, providing that a superior would be responsible for the illegal acts of his subordinate

if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.²⁹

The Statute of the International Criminal Tribunal for Rwanda (ICTR) included similar language in its Article 6(3). In both cases, the tribunals have interpreted their respective statutes as requiring only general knowledge about possible war crimes³⁰ – a point that will be elaborated later in this essay.

Although "reason to know" is conceptually analogous to (and more elegant than) the AP I standard of *scienter*, the ICTY Statute dilutes "all feasible measures" into the less exacting "necessary and reasonable measures". The distinction may be more apparent than real, however. The seriousness of war crimes such as the wilful killing of civilians or the torture of detainees implies that very extreme measures should be considered both necessary and reasonable to prevent such crimes. It is therefore logical to interpret any measure taken by a commander that is weaker than necessary to prevent or punish such crimes as unreasonable.³¹

28 ICRC Commentary on APs, above note 26, p. 1014.

29 Updated Statute of the International Criminal Tribunal for the former Yugoslavia, September 2009, Art. 7(3).

30 ICTR, *Bagilishema*, above note 25, para. 28 (quoting ICTY, *Prosecutor v. Čelebići [sic: Delalić]*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 238).

31 See, generally, Elies van Sliedregt, "Command Responsibility at the ICTY: Three Generations of Case-Law and Still Ambiguity", in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011.

The Rome Statute of the International Criminal Court (ICC) echoes, but expands considerably upon, both AP I and the ICTY and ICTR Statutes. Article 28 provides in relevant part:

A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.³²

The “should have known” standard of responsibility, which originates in the *Toyoda* trial,³³ reflects an early (later amended) draft of AP I’s Article 86.³⁴ It also parallels the ICTY Statute’s “reason to know” and the “all necessary and reasonable measures within his or her power” language, merging the terms of AP I and the ICTY Statute on the obligation of prevention.³⁵ But the Rome Statute also adds a consequential innovation: an explicit reference to the responsibility of military commanders to “exercise control properly” over forces under their command.

Plainly, neither the statutes of international tribunals nor their jurisprudence attribute strict liability to military commanders whenever their subordinates commit war crimes. But precisely what they require of commanders is not entirely apparent from these sources and is made still less certain by the different formulations found in them. Consider the divergent treaty language:

32 Rome Statute, Art. 28(a).

33 See below text accompanying note 62.

34 There was insufficient published debate at the Diplomatic Conference to explain why the original “should have known” language was amended to “had information which should have enabled them to conclude”. The United States had proposed altering the phrase to “should reasonably have known”, but one can only guess as to why the “information” language was added. See Howard S. Levie, “Command Responsibility”, *U.S. Air Force Academy Journal of Legal Studies*, Vol. 8, 1997–98, pp. 8–9.

35 Some writers have interpreted the “should have known” standard as somehow more relaxed than the “reason to know” standard. It appears that Guénaël Mettraux in particular has conflated “reason to know” with the widely accepted responsibility of a commander to supervise his or her subordinates in order to prevent war crimes, and has concluded that the former is unique to and a product of the latter, resulting in a “legal fiction” of knowledge. G. Mettraux, above note 21, pp. 77–78, 210–212. There is no support for such an interpretation. The confusion can be easily dispelled by pointing out that the commander should have known of a war crime when he or she had reason to know of it, and the commander has reason to know of a war crime when ordinary supervision of his or her subordinates produces information that would alert a reasonable person that subordinates planned to commit or had committed a war crime. No fictional imputation of actual knowledge to the commander is necessary.

	AP I	ICTY/ICTR Statutes ³⁶	Rome Statute of the ICC
Scienter	“had information which should have enabled them to conclude”	“had reason to know”	“owing to the circumstances ... should have known”
Action required	“all feasible measures within their power”	“the necessary and reasonable measures”	“all necessary and reasonable measures within his or her power”

Interestingly, the ICRC’s study on customary international humanitarian law endorses the “knew or had reason to know” language of the *ad hoc* tribunals.³⁷ At the same time, the ICRC Commentary on AP I takes the surprising position that the “should have enabled” language is essentially inoperative due to a divergence between the English and French versions of AP I, with the French version referring only to information that did in fact enable the commander to conclude (“des informations leur permettant de conclure”).³⁸ The reasoning behind this conclusion, as Jenny Martinez has noted with some charity, is “not entirely clear”.³⁹ If evidence suggests that subordinates are committing war crimes, such evidence “should” enable a commander to conclude that a crime is occurring, and therefore it does “permit” the commander “to conclude” the same.

Modern jurisprudence developing the law of command responsibility

Between 1949 and the formation of the ICTY, no international tribunal further developed the law of command responsibility appreciably. However, the issue came up regularly before both the ICTY and ICTR, beginning in the mid-1990s. Soon, these tribunals began treating command responsibility as customary international law, despite the nearly fifty-year gap in international criminal jurisprudence. In the *Čelebići* case, the ICTY noted the incorporation of command responsibility into AP I and declared that the criminal responsibility of “military commanders and other persons occupying positions of superior

36 The Statute of the Special Court for Sierra Leone, 2002, uses identical language in its Article 6.

37 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 558–562, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

38 ICRC Commentary on APs, above note 26, pp. 1013–1014. This interpretation of the difference in meaning between the English and French versions misunderstands the significance of the English past conditional tense, but ultimately this misapprehension does not affect the Commentary’s conclusion.

39 Jenny S. Martinez, “Understanding *Mens Rea* in Command Responsibility”, *Journal of International Criminal Justice*, Vol. 5, No. 3, 2007, pp. 653–654.

authority ... for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law.”⁴⁰

In evaluating whether war crimes by subordinates engaged a commander’s indirect responsibility, the ICTY adopted a three-step approach. First, there needed to be a superior–subordinate command relationship. Second, the commander must have had the requisite mental state, as discussed below. Third, the superior must have failed to take reasonable and appropriate measures to prevent or punish international crimes committed by a subordinate or subordinates.⁴¹ A fourth step, showing that the commander caused or contributed to the subordinate’s war crime by failing to prevent or punish the crime, has sometimes been discussed in the ICTY and ICTR jurisprudence, but it was not clearly required until the Rome Statute embraced a causation requirement.⁴²

The development of command responsibility jurisprudence beyond these basic points has proved nettlesome. In some cases, the tribunals have treated command responsibility as a dereliction of duty by commanders, who assume responsibility for their own acts only.⁴³ In others, the tribunals have followed the Nuremberg and IMTFE precedents in treating command responsibility as a form of vicarious liability that made the commander complicit in the crimes of subordinates.⁴⁴ This jurisprudence has left international criminal law plagued with mixed messages, but the trend in the ICTY and ICTR Trial Chambers was toward treating a dereliction of duty as sufficient to trigger command responsibility,⁴⁵ while the Appeals Chambers of the ICTY favoured an approach that required the commander to possess some information which would suggest that war crimes were planned, were being committed, or had been committed by subordinates.⁴⁶ This section will summarize the elements of command responsibility as they have developed in modern international criminal law jurisprudence.

40 ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 333.

41 The case of *Prosecutor v Orić* expanded the test to include a fourth limb: that “an act or omission incurring criminal responsibility according to Articles 2 to 5 and 7(1) of the [ICTY] Statute has been committed by other(s) than the accused (“principal crime”).” ICTY, *Prosecutor v Orić*, Case No. IT-03-68, Judgment (Trial Chamber), 30 June 2006, para. 294. See also Tilman Blumenstock and Wayde Pittman, “*Prosecutor v. Naser Orić*: The International Criminal Tribunal for the Former Yugoslavia Judgment of Srebrenica’s Muslim Wartime Commander”, *Leiden Journal of International Law*, Vol. 19, No. 4, 2006.

42 Rome Statute, Art. 28.

43 See ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment (Appeals Chamber), 17 September 2003, para. 171, in *International Legal Materials*, Vol. 43, 2004, p. 330; accord ICTY, *Orić*, above note 41, para. 293 (“neglect of duty”).

44 See e.g. ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 436.

45 See also ICTY, *Prosecutor v Halilović*, Case No. IT-01-48-T, Judgment (Trial Chamber), 16 November 2005, para. 54; ICTY, *Prosecutor v Hadžihasanović*, Case No. IT-01-47-T, Judgment (Trial Chamber), 15 March 2006, paras 74–75; ICTY, *Krnojelac*, above note 43, para. 171 (“It cannot be overemphasised that, where responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control”).

46 See e.g. ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001.

Superior–subordinate relationship

An officer or other commander may be held liable for the acts of subordinates only if the subordinates are under his or her formal command⁴⁷ or, in the case of civilian commanders, effective authority and control.⁴⁸ This is a factual test. An officer holding higher rank in the same service as a subordinate and in the same unit of military organization may have effective control over the subordinate, but formal military authority is not dispositive.⁴⁹ An officer or civilian superior may have effective control even without formal superiority in rank, and therefore military titles have limited relevance. Moreover, superior officers may be tasked with supervising only specific junior officers and troops. The jurisprudence of the ICTY accordingly focuses on “*de facto* command”, meaning actual ability to control the behaviour of subordinates, at the time of the commission of the relevant acts.⁵⁰ Command responsibility cannot, therefore, be presumed from *de iure* command.

“Effective control” must be assessed in the broader context of a situation of command or authority, with command being defined as authority over forces, and authority being defined as “the power or right to give orders and enforce obedience”.⁵¹ The ICC has stated that effective control can be ascertained through examination of objective factors, such as the capacity to issue orders, whether orders are in fact followed, the authority to issue disciplinary measures, and the power to terminate the employment of subordinates.⁵² It is obviously easier to prove the existence of a superior–subordinate relationship in the context of a military chain of command, where rank is clearly delineated within a hierarchical structure. However, because effective control is a factual test, there are certain universal relevant factors that can be examined to find the requisite relationship, even in the absence of a formal military hierarchy. The ICC in the *Bemba* case outlined the relevant factors as including:

- (i) the official position of the commander within the military structure and the actual tasks that he carried out; (ii) his power to issue orders, including his capacity to order forces or units under his command, whether under his immediate command or at lower levels, to engage in hostilities; (iii) his capacity to ensure compliance with orders including consideration of whether the orders were actually followed; (iv) his capacity to re-subordinate units or make changes to command structure; (v) his power to promote, replace, remove, or discipline any member of the forces, and to initiate investigations;

47 AP I, Art. 87.

48 Rome Statute, Art. 28.

49 ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Judgment (Appeals Chamber), 16 October 2007, para. 59.

50 ICTY, *Delalić*, above note 46, paras 193, 197.

51 ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-3343, Judgment (Trial Chamber III), 21 March 2016, para. 180.

52 The ability to terminate employment was considered critical in the *Musema* case at the ICTR for determining *de facto* and *de jure* control. See ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment (Trial Chamber), 27 January 2000, para. 880.

(vi) his authority to send forces to locations where hostilities take place and withdraw them at any given moment; (vii) his independent access to, and control over, the means to wage war, such as communication equipment and weapons; (viii) his control over finances; (ix) the capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group; and (x) whether he represents the ideology of the movement to which the subordinates adhere and has a certain level of profile, manifested through public appearances and statements.⁵³

It should also be noted that, in at least some US cases involving command responsibility, courts have held, consistent with equitable principles, that a military commander “cannot escape liability where his own action or inaction causes or significantly contributes to a lack of effective control over his subordinates”.⁵⁴ Determining whether a commander has made a “significant contribution” to undermining his or her own control inevitably requires a fact-dependent inquiry, but such behaviour as the delegation of substantial authority to subordinates without adequate supervision, a chronic failure to punish infractions or insubordination, or displaying a high degree of passivity when leadership is needed would all seem to qualify as relevant factors.

Mental state and scienter

As noted, a commander who orders or otherwise directly contributes to a subordinate’s war crime becomes a principal and active participant in the crime under various doctrines establishing responsibility for ordering, facilitating or contributing to a war crime.⁵⁵ Similarly, a commander who knew of war crimes and did not take adequate measures to prevent or punish them incurs indirect command responsibility. These standards are doctrinally straightforward, and most difficult questions turn on the availability and persuasiveness of evidence of the relevant facts.

The second situation, and the one arising most commonly in practice, occurs under the scenario of incomplete information about possible war crimes by a subordinate. When a commander becomes aware of ambiguous facts which raise a suspicion that subordinates might have committed war crimes or might commit them in the future, the concept of “should have known” or “reason to know”⁵⁶ comes into play and precludes the plea that a commander can only assume responsibility when observing a war crime *flagrante delicto* or with incontrovertible evidence, such as contemporaneous video footage of the crime. Confusion and discord in the doctrine of command responsibility rest principally on disagreement about the nature and extent of the commander’s responsibility

53 ICC, *Bemba*, above note 51, para. 188.

54 See e.g. US District Court, Southern District of Florida, *Romagoza Arce v. Guillermo Garcia*, Case No. 99-8364-CIV, Jury Instructions, 19 July 2002, p. 8 (unrep.), available at: https://cja.org/wp-content/uploads/downloads/Romagoza_Jury_Instructions_242.pdf.

55 See W. G. Eckhardt, above note 19, p. 4; Rome Statute, Art. 25(3).

56 See Jamie Allan Williamson, “Some Considerations on Command Responsibility and Criminal Liability”, *International Review of the Red Cross*, Vol. 90, No. 870, 2008, p. 308.

to act when information available to the commander may suggest, without proving, that his or her subordinates are planning, committing, or have committed a war crime.

Part of the confusion arises from the fact that “reason to know” is not a unitary concept; it is a spectrum, ranging from highly probative information confirmed by multiple independent and reliable sources at one end, to the merest unsubstantiated innuendo from a single unknown or biased source at the other. At the root of this discord is moral doubt about imposing a criminal punishment for a person’s incompetence or passivity, or worse, for an exercise of questionable judgment in assessing uncertain evidence of war crimes, rather than intentional wrongdoing. The early international criminal tribunals overcame this doubt to a degree by rejecting the need for proof of the commander’s positive knowledge about a subordinate’s war crime. In the trial of Wilhelm List, often known as the *Hostages* case, the Nuremberg Tribunal affirmed that a commander need not be aware of war crimes committed by his subordinates to incur liability; the commander’s failure to review reports of war crimes and to order investigation alone could make the commander criminally responsible.⁵⁷ If a commander

fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. ...

Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefits. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.⁵⁸

A British military court took a similar approach in the trial of Major Karl Rauer, whose subordinates had been convicted of executing British prisoners of war while traveling to a prison camp in several instances. Although it was not claimed that Rauer ordered or even knew of the executions, the subordinates repeatedly reported shootings during escape attempts and Rauer failed to investigate. Although Rauer was acquitted of the charge for the first such murder, apparently on the basis that he had no reason to disbelieve his subordinates, the court found Rauer guilty of the subsequent charges, because he had set a tone favouring war crimes by expressing hostility toward captured enemies, and after the first report by subordinates, he should have investigated the shootings to prevent their continuation. Rauer was sentenced to death by hanging, which was ultimately commuted to life imprisonment.⁵⁹

57 U.S. Military Tribunal, Nuremberg, *Trial of Wilhelm List and Others*, Case No. 47, Judgment, 19 February 1948, p. 71, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 11, US Government Printing Office, Washington, DC, 1950, pp. 1271–1272.

58 *Ibid.*, p. 1271.

59 British Military Court, Wuppertal, Germany, *Trial of Major Karl Rauer and Six Others*, Case No. 23, Judgment, 18 February 1946, in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 4, Her Majesty’s Stationery Office, London, 1948, pp. 113–117.

In the *Araki* judgment, the IMTFE similarly held that a commander is responsible for having “failed to acquire” knowledge, through “negligence or supineness”, that war crimes were being committed by subordinates.⁶⁰ It was insufficient that a commander “accepted assurances from others more directly associated with [the facts on the ground] if having regard to the position of those others ... he should have been put upon further enquiry as to whether those assurances were true or untrue”.⁶¹ In the *Toyoda* case, the IMTFE reaffirmed this standard, elaborating that if the commander

knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties.⁶²

Command responsibility can thus arise from constructive or imputed knowledge that subordinates were committing or were about to commit war crimes, and the imputation is not defeated by mere assurances from subordinate officers or reports unless these views are vindicated by the commander’s reasonably diligent investigation.

By contrast, in the *High Command* case, the Nuremberg Tribunal insisted that command responsibility must result from

a personal dereliction. That can occur only where the act is directly traceable to [the commander] or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates *amounting to acquiescence*.⁶³

This is the language repeated in the ICRC Commentary on AP I. It is unclear how negligence can amount to acquiescence; the two concepts are mutually exclusive. It appears likely that the Nuremberg Tribunal was attempting to raise the standard of command responsibility to apply only in the most severe cases, but perhaps did not wish to impose upon prosecutors an obligation to provide evidence that the commander actually approved or tolerated known war crimes.

It is technically possible to reconcile these opinions by imputing a “wanton, immoral disregard” of a subordinate’s war crime to any disregard of credible information implicating such crimes. However, such an interpretation seems contrary to the emphases of the respective opinions. It may instead be that the *High Command* case is an outlier, and that all that can be concluded from the early jurisprudence of the war crimes tribunals is that it supports a spectrum of

60 IMTFE, *United States of America v. Araki and Others*, Judgment, 4 November 1948, p. 48,445.

61 *Ibid.*

62 *Toyoda* Transcript, above note 22, Vol. 19, p. 5006.

63 Nuremberg Military Tribunal, *United States of America v. von Leeb et al.*, Case No. 72, Judgment, 28 October 1948 (*High Command*), in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 11, US Government Printing Office, Washington, DC, 1950, pp. 543–544 (emphasis added).

opinions about the commander's requisite *scienter* in the face of evidence of war crimes by subordinates, ranging from "negligence" and "supineness" on one end to "wanton disregard" and "acquiescence" on the other. This is perhaps dependent to some extent on the degree of removal of the commander from the subordinate, with officers at the top of the chain of command being held to a less exacting standard than lower-ranking officers with more direct supervisory responsibilities over the guilty subordinates.

As noted, the ICTY and ICTR have also been at odds with themselves on the mental element of the doctrine. The Appeals Chambers of both tribunals agree that the commander's actual knowledge of past or future war crimes by subordinates need not be proved. It suffices that the accused "had 'some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates'".⁶⁴ The adjectives used suggest that the evidence need not be exceptionally strong to engage the commander's duty. Because the information need only be "general", it would seem unnecessary for a commander to know the identity of the specific subordinates involved, the time or date of the crime, the identity of the target or victim, or other details. As noted in the *Čelebići* case:

This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.⁶⁵

Because the commander need be alerted to no more than "possible unlawful acts", the reliability of the information apparently does not need to be high.

Yet, the Appeals Chambers have also shied away from full criminal responsibility in cases in which a commander egregiously failed to supervise troops who committed war crimes. The jurisprudence of the early Trial Chambers proposed multifactor tests to determine whether a commander could be held responsible for negligence. In the *Blaskić* case, for example, the ICTY Trial Chamber held that "ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of [the commander's] duties: this commander had reason to know within the meaning of the [ICTY] Statute".⁶⁶ The Chamber elaborated that knowledge may be proved by circumstantial evidence such as the

number, type and scope of the illegal acts; the time during which the illegal acts occurred; the type and number of troops involved; the logistics involved, if any;

64 ICTR, *Bagilishema*, above note 25, para. 28, quoting ICTY, *Čelebići*, above note 30, para. 238.

65 ICTY, *Delalić*, above note 46, para. 238. The quoted language refutes those who reject a commander's legal duty to acquire knowledge altogether and claim instead that the commander must have positive knowledge of an incipient or past crime. See G. Mettraux, above note 21, pp. 76–77, 209; B. I. Bonafé, above note 15, pp. 606–607; A.-M. Boisvert, H. Dumont and M. Petrov, above note 24, pp. 126–127.

66 ICTY, *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 332.

the geographic location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time.⁶⁷

The ICTY Appeals Chamber has drawn the line at the “possession” of information, however, and rejected a commander’s criminal responsibility for failure to supervise criminal subordinates, even if such dereliction enabled or contributed to the commission of their war crimes. Most prominently, in the *Čelebići* case, the Appeals Chamber rejected the reliance on IMTFE precedents and held that a commander does not assume responsibility for war crimes committed by subordinates without actual possession of some incriminating knowledge.⁶⁸ In the ICTY’s view, a military commander has no legal obligation to supervise the compliance of his or her direct subordinates with the LOAC,⁶⁹ a commander’s responsibility can arise from “deliberately refraining” from investigating information in his or her possession about subordinates’ war crimes, but not for “negligently failing” to gather such information in the first place through inadequate or non-existent training, supervision, or both.⁷⁰

The municipal military laws of States are no more consistent than the international decisions. The US Department of Defense *Law of War Manual* adopts the standard in the *High Command* case, favouring the language imposing the least stringent duty on commanders to prevent war crimes: “The commander’s personal dereliction must have contributed to or failed to prevent the offense; there must be a personal neglect amounting to a wanton, immoral disregard of the action of his or her subordinates amounting to acquiescence in the crimes.”⁷¹ US military practice thus ignores both contemporaneous and subsequent jurisprudence applying a higher standard to commanders.⁷²

The Australian Criminal Code Act 1995 uses a much more forgiving standard: the commander who fails to “exercise control properly over” forces under his or her command must either know or be “reckless as to whether the

67 *Ibid.*, para. 307 (quoting *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674, 27 May 1994, Annex, para. 58).

68 ICTY, *Delalić*, above note 46, paras 388–393.

69 *Ibid.*; accord ICTY, *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, para. 62.

70 ICTY, *Blaskić*, above note 69, para. 406. As noted earlier, civilian commanders are held to a different standard.

71 US Department of Defense, *Law of War Manual*, December 2016, p. 1141, § 18.23.3.2.

72 US military jurisprudence under the Uniform Code of Military Justice similarly frequently ignores the “reason to know” standard and requires “actual knowledge” of the subordinates’ intentions to commit war crimes for the criminal conviction of the commanding officer. See e.g. *United States v. Medina*, CM 427162, 1971; *United States v. Flaherty*, 12 CMR 466, 1953, p. 469. For criticism of this approach as incompatible with international law (and, indeed, with US military law at the time and since), see Joseph Goldstein *et al.*, *The My Lai Massacre and Its Cover-Up: Beyond the Reach of Law?*, Free Press, New York, 1976; W. G. Eckhardt, above note 19, pp. 11–22; Roger S. Clark, “Medina: An Essay on the Principles of Criminal Liability for Homicide”, *Rutgers-Camden Law Journal*, Vol. 5, No. 1, 1973; Michael L. Smidt, “*Yamashita*, *Medina*, and Beyond: Command Responsibility in Contemporary Military Operations”, *Military Law Review*, Vol. 164, 2000, pp. 211–234; Andrew D. Mitchell, “Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes”, *Sydney Law Review*, Vol. 22, No. 3, 2000, pp. 396–397.

forces were committing or about to commit” war crimes.⁷³ The United Kingdom goes still further. The UK *Manual of the Law of Armed Conflict* uses the Rome Statute’s “reason to know” language on the commander’s mental state,⁷⁴ but UK criminal law provides that a military commander must have either known “or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit ... offences”.⁷⁵ Conscious disregard and “clearly indicated” are a far cry from negligent supervision or even wilful blindness to information suggesting war crimes. It appears that the UK manual adopts the *scienter* standard for civilian commanders under the Rome Statute. The Statute provides that military commanders will be liable if “owing to the circumstances at the time, [they] should have known”⁷⁶ that forces under their control were committing or planning a war crime, whereas civilian commanders become responsible if they “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; [and] ... [t]he crimes concerned activities that were within the effective responsibility and control of the superior”.⁷⁷

Not all State military and penal codes adopt such forgiving standards, however. For example, the French Penal Code reproduces the language of the Rome Statute,⁷⁸ and German criminal law holds a commander liable if he or she “omits to prevent” a subordinate from committing a war crime or “negligently omits properly to supervise a subordinate under his or her command or effective control.”⁷⁹

In short, with regard to “reason to know,” international criminal law has established no definitive statement of where, on the spectrum of reliability, information must fall for purposes of indirect command responsibility, and how much (if anything) a commander must do to investigate or to supervise subordinates in the absence of any inculpatory information. Such inconsistent standards as “wanton disregard”, “reckless disregard”, “criminal negligence”, “supineness” or “dereliction of duty” are used to characterize the commander’s reaction to the information available in various cases. At most, it can be said that customary international law appears to have converged on an interpretation of “reason to know” which encompasses general information, including from outside sources such as media reports, that does not need to be complete or to include highly dependable sources of evidence, but which is nonetheless “sufficiently alarming”⁸⁰ that it puts the commander on notice of possible war crimes by

73 Criminal Code Act 1995, No. 12, as amended up to 20 April 2019, § 268.115.

74 UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, §§ 16.36, 16.36.6. With uncharacteristic optimism, the *Manual* also asserts that, despite the various formulations of command responsibility, “there is general agreement on the nature of command and the degree of knowledge required” (§ 16.36.2).

75 International Criminal Court Act 2001, § 65(2)(3), Chap. 17, 11 May 2001.

76 Rome Statute, Art. 28(a)(i).

77 *Ibid.*, Art. 28(b)(i–ii). See generally Maria Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors*, TMC Asser Press, The Hague, 2010.

78 Loi No. 2010-930, 9 August 2010, Art. 7, codified in Code Pénal, Art. 462-7.

79 Gesetz zur Einführung des Völkerstrafgesetzbuches, 26 June 2002, §§ 4, 13, in *Bundesgesetzblatt*, Part 1, No. 42, 2002, p. 2254 (authors’ translation).

80 ICTY, *Delalić*, above note 46, para. 155.

subordinates.⁸¹ If a military commander chooses not to investigate such facts, that failure must engage the commander’s criminal responsibility.⁸² At a minimum, then, a commander who blinds himself or herself to the specific facts relevant to possible war crimes by his or her subordinates is not safe from responsibility, because the mere awareness of alarming information suffices to trigger the duty to act.

Whether the relevant information includes general information relating to the characteristics of subordinates, such as their ages, training, experiences, past criminal convictions, service records and attitudes, is unclear.⁸³ The existing jurisprudence focuses more on evidence of facts indicating that war crimes are actually being planned or executed, or have actually been committed. However, the jurisprudence of the international criminal tribunals has not unambiguously ruled out the relevance of general information.

Failure to take measures to prevent or punish

A superior is liable both for a failure to prevent a foreseeable crime by subordinates and a failure to punish one that has occurred. These are separate obligations, and a commander will be responsible for forsaking the duty to prevent a foreseeable crime even if he or she punished the crime afterward.

In the *Čelebići* case, the ICTY Trial Chamber expressed scepticism that a satisfactory general standard of preventive action could be formulated. According to the Chamber, “any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful”.⁸⁴ Other judgments of the ICTY have taken a less pessimistic view and relied upon four factors:

1. the degree of effective control a superior has over the conduct of subordinates – different superiors will have different degrees of power and control, and this will affect what measures they are expected to take;
2. the extent to which a measure is necessary and reasonable under the circumstances;

81 See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed., Cambridge University Press, Cambridge, 2010, p. 275; Bing Bing Jia, “The Doctrine of Command Responsibility: Current Problems”, *Yearbook of International Humanitarian Law*, Vol. 3, 2000, pp. 159–160; Diane A. Desierto, “The Contours of Command Responsibility: Philippine Incorporation and Customary Evolution”, *Asia-Pacific Yearbook of International Humanitarian Law*, Vol. 2, 2006, pp. 227–228.

82 Cf. Daryl A. Mundis, “Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute”, in Gideon Boas and William A. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY*, Martinus Nijhoff, Leiden, 2003, pp. 239, 262.

83 See I. Bantekas, above note 21, pp. 116–117. But see G. Mettraux, above note 21, p. 201 (asserting that a commander’s awareness of “criminal propensities among some subordinates” triggers no legal duty of supervision to prevent possible war crimes).

84 ICTY, *Delalić*, above note 40, para. 394. Some scholars similarly despair of a general rule on the standard of conduct that should be required of commanders to address possible war crimes by subordinates: see e.g. J. A. Williamson, above note 56, p. 310.

3. the severity and imminence of the war crime—more grievous or imminent potential war crimes require the commander to react more expeditiously and decisively; and
4. the actual authority and ability of the commander to prevent the crime—*impossibilium nulla obligatio est*.⁸⁵

The ICC Appeals Chamber made clear in the *Bemba* case that it is not enough to suggest in the abstract that a commander could have done more. Instead, a tribunal “must specifically identify what a commander should have done *in concreto*” to prevent the subordinate’s war crimes.⁸⁶

As for past war crimes, the ICTY Appeals Chamber in the *Hadžihasanović* case has held that a superior officer’s knowledge of and failure to punish the past offences of subordinates cannot as a matter of law justify imputing *future* war crimes by the subordinates to the superior officer.⁸⁷ However, although the Chamber was correct in distinguishing the duty to punish from the duty to prevent, the two are not factually unrelated. A superior’s conscious tolerance of crime by subordinates will predictably promote more crime. In holding that the Trial Chamber had committed an error of law in inferring command responsibility based on failure to punish past war crimes, the Appeals Chamber removed a potent disincentive for military commanders to punish war crimes committed by subordinates. The Appeals Chamber thereby made it easier for military commanders to escape liability for fostering a culture of tolerance for war crimes, and to compound the abuse by implicitly endorsing it.⁸⁸ As will be explained below, this line of reasoning is especially problematical because not all communication within the context of a military command occurs through explicit orders or guidance.

One point at which international criminal tribunals and domestic laws have been repeatedly at odds is whether the commander’s failure to prevent or punish makes the commander responsible for the subordinate’s war crime itself or for an independent crime of neglect of duty. The ICTY Appeals Chamber wrote in the *Krnojelac* case that “where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control”.⁸⁹ Although a few scholars and jurists have endorsed this viewpoint,⁹⁰ it contradicts much of the jurisprudence of the

85 ICTY, *Orić*, above note 41, para. 329; ICTY, *Čelebići*, above note 84, para. 395; accord ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08 A, Judgment (Appeals Chamber), 8 June 2018, para. 167.

86 ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision (Appeals Chamber), 8 June 2018, para. 170.

87 ICTY, *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-A, Judgment (Appeals Chamber), 22 April 2008, paras 30–31.

88 See Amy J. Sepinwall, “Failures to Punish: Command Responsibility in Domestic and International Law”, *Michigan Journal of International Law*, Vol. 30, No. 1, 2009, pp. 294–295.

89 ICTY, *Krnojelac*, above note 43, para. 171; accord ICTY, *Orić*, above note 41, para. 293 (“neglect of duty”).

90 See Mirjan Damaška, “The Shadow Side of Command Responsibility”, *American Journal of International Law*, Vol. 49, No. 3, 2001, p. 467. This was also the position of Judge Shahabudeen in his separate opinion in ICTY, *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-AR72, Judgment (Appeals Chamber), 16 July 2003, para. 32.

post-Second World War military tribunals, and it has not been followed by the relevant treaties or consistently in State practice.⁹¹

Causation

The final element—only explicit under the Rome Statute⁹²—is that of causation: a superior is criminally responsible for crimes committed by subordinates under his or her command and control, or effective authority and control, as a result of his or her failure to exercise proper control over those subordinates. The commander’s acts or omissions need not be the entire cause of the subordinate’s war crime; it suffices that the commander’s behaviour was a significant contributing factor.

In the case of prevention, a causation may seem anomalous. In both *Blaškić*⁹³ and *Orić*,⁹⁴ the ICTY noted the impossibility of a commander’s failure to punish a subordinate’s antecedent crime retroactively “causing” that crime. The obvious solution would be to treat causation as prospective, in the sense that failure to punish may contribute to future war crimes by subordinates. Given the crucial function of punishment as a general deterrent, it would be difficult to imagine a situation in which the toleration of past war crimes by subordinates would fail to signal an equal toleration of any future war crimes they might be contemplating.⁹⁵ As will be discussed below, however, even the failure to punish a subordinate’s isolated past crime, with no possibility of future repetition, plays a role in causing injury relating to that crime.

Command responsibility as a distinctively international doctrine

“Reason to know” of war crimes by subordinates

The inconsistencies and contradictions in the command responsibility doctrines of treaties and statutes, international criminal jurisprudence and custom open a wide

91 See e.g. Rome Statute, Art. 28; ICTY, *Halilović*, above note 49, para. 53; International Criminal Court Act 2001, § 65; Military Commission Act of 2009, Title XVIII, § 950q, HR 2647; *Final Report of the Commission of Experts*, UN Doc. S/1994/674, 27 May 1994.

92 As Bing Bing Jia has observed, the language of Rome Statute Article 28 conditions the responsibility of the commander for subordinate war crimes on a causative connection between the failure to properly control the subordinate and the commission of the war crime: B. B. Jia, above note 81, p. 15. A negligent commander who could not have prevented a subordinate’s war crime if he or she had (counterfactually) tried to prevent it, therefore, cannot be held criminally liable under the Statute. In contrast, causation was not viewed as obligatory in the jurisprudence of the ICTY and ICTR: see ICTY, *Blaškić*, above note 69, paras 73 ff. The Trial Chamber in the *Čelebići* case posited that a causal relationship between the commander’s acts and the subordinate’s war crime “may be considered to be inherent” in command responsibility, but it also admitted finding no support for this proposition in customary international law. ICTY, *Delalić*, above note 40, paras 398–400.

93 ICTY, *Blaškić*, above note 69, para. 83.

94 ICTY, *Orić*, above note 41, para. 338.

95 Cf. Darryl Robinson, “How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution”, *Melbourne Journal of International Law*, Vol. 13, No. 1, 2000, pp. 16–17.

door to confining responsibility for war crimes to the direct actors while exonerating officers who may have subtly pressured subordinates to commit war crimes, intentionally or negligently communicated tolerance of war crimes, or simply shown no interest in preventing or punishing war crimes. They have also frustrated military and international lawyers seeking to clarify the commander's concrete responsibilities under the LOAC.⁹⁶

The doctrinal points on which consistency is most elusive are the extent of the commander's obligations (1) to investigate any partial information actually presented to the commander which suggests that subordinates are planning or committing, or have committed, war crimes, and (2) to pre-empt war crimes by subordinates through training and the implementation of systems and procedures to detect, prevent and punish war crimes. The first point calls for a more nuanced interpretation of the "reason to know" prong of the commander's *scienter*. The second asks the fundamental question of whether a military commander satisfies their legal obligations by relying on colleagues, subordinates, the media or other sources to bring war crimes to their attention, or, more broadly, whether the commander has any affirmative duty to train and supervise their subordinates in order to ensure that they are not committing war crimes and have not committed war crimes with impunity. We will address the first point in this section and the second further below.

Command responsibility in context

To seek a reconciliation between these doctrines, the temptation to turn to municipal criminal laws for parallels has proved great. Such laws suggest that responsibility for a subordinate's war crimes must depend on the commander's own conscious intentions to further the crime through encouragement, or at least conscious inaction. A commander's mere passive failure to supervise the subordinates or negligence in investigating war crimes, in this view, does not involve sufficient moral culpability to characterize the commander as a war criminal himself or herself. Instead, such failures should be referred to the municipal disciplinary code of the officer's own country for whatever action that country's military authorities might wish to take, if any.⁹⁷

96 See e.g. W. G. Eckhardt, above note 19; Matthew Lippman, "Humanitarian Law: The Uncertain Contours of Command Responsibility", *Tulsa Journal of Comparative and International Law*, Vol. 9, No. 1, 2001; Arthur Thomas O'Reilly, "A Call to Realign Doctrine with Principles", *American University International Law Review*, Vol. 20, No. 1, 2004; B. I. Bonafe, above note 15; A.-M. Boisvert, H. Dumont and M. Petrov, above note 24, p. 122; A. D. Mitchell, above note 72, p. 402.

97 See e.g. Antonio Cassese, *International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013; Cassandra Steer, *Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes*, TMC Asser Press, The Hague, 2017, p. 264; Ilias Bantekas, "The Contemporary Law of Superior Responsibility", *American Journal of International Law*, Vol. 39, No. 3, 1999, p. 577; B. B. Jia, above note 81, pp. 32–33; Stefan Trechsel, "Command Responsibility as a Separate Offense", *Berkeley Journal of International Law Publicist*, Vol. 3, 2009, pp. 29–30, 34–35; cf. G. Mettraux, above note 21, pp. 38–41, 45, 223 ("To be liable, the commander must, therefore, have been aware of the criminal character of his [own] action and, with that awareness, he must have consciously decided not to fulfil his obligations").

Variations on this argument have been advanced by numerous scholars⁹⁸ and approved by some international criminal tribunals,⁹⁹ based on the claim that such liability is unknown in municipal criminal law. Municipal law, they believe, does not recognize criminal responsibility without a specific intent to further the criminal act, because an actor’s criminal responsibility is tied strictly to his or her *mens rea*.¹⁰⁰ Some have gone further and claimed that command responsibility requires a military commander to actually or constructively approve or at least acquiesce to the crimes of subordinates.¹⁰¹ Others have argued as well that a commander’s approval of a subordinate’s war crime *ex post facto* and failure to prosecute it should not engage the commander’s criminal responsibility for the war crime itself due to the lack of contemporaneous *mens rea*.¹⁰²

The claim that municipal criminal laws never recognize criminal responsibility without specific intent is factually inaccurate,¹⁰³ but the flaw in these arguments runs much deeper. The analogy between command responsibility in international law and the requirement of *mens rea* in municipal criminal law is necessarily a false one, because nearly every aspect of the context in which war crimes occur is radically different from any context in a municipal criminal law setting. The idea that the *mens rea* of command responsibility must conform to municipal criminal law concepts is indeed based on a basic misconception about international law itself.¹⁰⁴ Command responsibility is not a creature of municipal law; it arose in response to a perceived need to create disincentives for military commanders to order, encourage or tolerate the war crimes of subordinates in the specific context of armed conflict, which is to say, a breakdown of civilized social behaviour.¹⁰⁵

98 See e.g. M. Damaška, above note 90, *passim*; G. Mettraux, above note 21, pp. 86, 221; C. Meloni, above note 101, pp. 633–636; Arthur Thomas O’Reilly, “Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice”, *Gonzaga Law Review*, Vol. 40, No. 1, 2004–05; see also A. J. Sepinwall, above note 88, pp. 255–256.

99 See e.g. ICTR, *Akayesu*, above note 14, para. 78; ICTY, *Prosecutor v. Naletilić*, Case No. IT-98-34-A, Judgment (Appeals Chamber), 3 May 2006, para. 114.

100 See e.g. M. Damaška, above note 90, pp. 463–467; D. Robinson, above note 95, pp. 30–31.

101 See e.g. Nuremberg Military Tribunal, *High Command*, above note 63, pp. 543–544; G. Mettraux, above note 21, p. 42. See also Chantal Meloni, “Command Responsibility”, *Journal of International Criminal Justice*, Vol. 5, No. 3, 2007, pp. 621–623 (noting that the ICTY interpreted the post-Second World War legislation on command responsibility as a form of accomplice liability, and correctly noting that the *Tokyo* judgment took a different view).

102 M. Damaška, above note 90, pp. 468–469 (“Used as a vehicle for vicarious liability, approval of a transgression is alien to the tenets of modern criminal law”).

103 Many jurisdictions recognize general intent crimes characterized by criminal negligence or recklessness, such as reckless arson or driving under the influence of alcohol. Some also recognize strict liability crimes, such as statutory rape. See e.g. Danish Penal Code, No. 871, 2014, § 216, available at: www.retsinformation.dk/eli/lta/2014/871#Kap24; Penal Code of Japan, 2017, Art. 177, available at: www.japaneselawtranslation.go.jp/law/detail?id=3581&vm=04&re=01; UK Sexual Offences Act 2003, c. 42, § 5.

104 On the pitfalls of trying to fit international criminal law into the Procrustean bed of municipal criminal law, see generally Mark A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, pp. 5–9, 38–39; Mark Osiel, “The Banality of Good: Aligning Incentives against Mass Atrocity”, *Columbia Law Review*, Vol. 105, No. 6, 2005, pp. 1753, 1768.

105 Cf. Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 4th ed., Oxford University Press, Oxford, 2020. Surprisingly, the ICTR Trial Chamber claimed without support that

The commander plays a unique role in that context. A commander's responsibilities under international criminal law are embedded in an exceptionally comprehensive hierarchical order that exists nowhere in municipal law. To the extent that the superior officer acts within the framework of the command structure and the military organization's legal order (and sometimes when acting outside of that framework), the commander's authority over his or her subordinates is absolute in a sense unknown to municipal law.¹⁰⁶ The obedience of military subordinates to the lawful orders of their commanders is a basic tenet of military service, inculcated throughout a soldier or officer's training, and always enforced by criminal penalties.¹⁰⁷ In most State military organizations, insubordination or disobedience may be punished severely.¹⁰⁸ To mitigate the risks of insubordination and war crimes, in most countries commanders are obligated by military law to supervise the performance of their orders by subordinates and to adjust their orders to account for changing circumstances.¹⁰⁹ Commanders are also responsible for assessing risks to their subordinates during operations for purposes of force preservation.¹¹⁰ Understandably, no comparable relationship exists in a municipal criminal law context.

A propensity for obedience is not the only characteristic engrained in military troops that increases the risk of war crimes; military personnel are also systematically trained to develop aggressive personality traits and desensitized to lethal violence against other human beings.¹¹¹ Their training may also entail exhortations to subordinates that are intended to dehumanize opposing combatants (and, in some cases, all persons of the same nationality, ethnicity, religion or political ideology). Such communications serve the need of reducing moral doubt in subordinates about the killing of fellow human beings, but they may easily trigger tribalistic instincts of fear and hatred that can result in

command responsibility did derive from the individual criminal responsibility in dicta in the *Akayesu* judgment. ICTR, *Akayesu*, above note 14, para. 78.

106 See Major Trenton W. Powell, "Command Responsibility: How the International Criminal Court's Jean-Pierre Bemba Gombo Conviction Exposes the Uniform Code of Military Justice", *Military Law Review*, Vol. 225, 2017, pp. 837–838.

107 See e.g. Defence Force Discipline Act 1982, No. 152, C2019C00107, Compilation No. 33, 2 March 2019, § 27, available at: www.legislation.gov.au/Details/C2019C00107 (Australia); Uniform Code of Military Justice, 2021, Art. 90, 10 USC § 890 (United States); Décret No. 2005-796 relatif à la discipline générale militaire, 15 July 2005, Arts 5(1), 7, available at: www.legifrance.gouv.fr/jorf/id/JORFTEXT000000630665 (France); Código de Justicia Militar, 16 July 1951, Art. 667, Sanción Ley 14029, available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/105000-109999/105438/texact.htm#49> (Argentina). See, generally, Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, Routledge, London, 2017, p. 241 fn. 21.

108 See e.g. Uniform Code of Military Justice, 2021, Art. 90, 10 USC § 890 (United States); Code de Justice Militaire (Nouveau), 2021, Arts L323-6 to L323-8 (France); Army Act, 1995, §§ 34, 36, 71, 85 (United Kingdom); Military Justice Law 5715, 1955, §§ 122–124, 133 (Israel).

109 See e.g. US Department of the Army, *Field Manual 22-100: Military Leadership*, 1965, paras 19, 25; US Department of the Army, *Field Manual 100-5: Operation of Army Forces in the Field*, 1968, paras 3–7.

110 See e.g. US Department of the Army, *Field Manual 5-19: Composite Risk Management*, 2006, paras 1-0, 1–17, 1–18.

111 See Charlie Barnao, "Military Training: Group Culture, Total Institution, and Torture", *Italian Sociological Review*, Vol. 9, No. 2, 2019, p. 295.

indiscriminate killing, torture, or other war crimes against opposing combatants or civilians belonging to the same group.¹¹²

The circumstances of armed conflict are comparably dissimilar to the circumstances under which municipal crimes occur. In the context of combat, the commander’s responsibility is concomitant to his or her legal authority to direct the extrajudicial killing of other human beings. As one jurist put it,

intensified legal obligations are commonly placed upon persons who engage in inherently dangerous activities. The military commander is entrusted with the inherently dangerous activity of supervising persons with training in violence who have access to weapons and other equipment to carry out violence, and who have undergone indoctrination to reduce their inhibitions against violence. The law grants the commander privileges, but it also requires her to be vigilant in remaining informed and taking measures to prevent and repress violations. Thus, the commander entrusted with such an inherently dangerous activity cannot argue that she was “merely” criminally negligent in creating her own ignorance. Her indifference, in the context of her responsible relation to a clear public danger, is, arguably, sufficiently blameworthy in a desert-based account.¹¹³

The commander–subordinate relationship precludes any useful analogy between municipal and international criminal law.¹¹⁴ Colonel William Eckhardt observed decades ago that “[t]he wisdom of civilian law never really contemplated the judging of criminal actions in battlefield related circumstances”.¹¹⁵ Colonel Kenneth A. Howard later amplified this notion, stating that “[d]omestic law has not been required to contemplate a military commander’s duty in a battlefield situation to control and regulate the actions of his subordinates short of the legal theory of principals”.¹¹⁶ The responsibilities and authority of a supervisor in a civilian context (such as in an employment situation) are not remotely analogous to those of a military commander, and the consequences of inadequately supervising a subordinate in the two cases are far from equivalent.¹¹⁷ Nearly all

112 This dynamic has been studied extensively by social and clinical psychologists. See e.g. Leonard S. Newman and Ralph Erber, *Understanding Genocide: The Social Psychology of the Holocaust*, Oxford University Press, New York, 2002; Donald G. Dutton, *The Psychology of Genocide, Massacres, and Extreme Violence: Why “Normal” People Come to Commit Atrocities*, Praeger, Westport, CT, 2007; Paul A. Roth, “Social Psychology and Genocide”, in Donald Bloxham and A. Dirk Moses (eds), *The Oxford Handbook of Genocide Studies*, Oxford University Press, Oxford, 2010, p. 198.

113 D. Robinson, above note 95, p. 11 (footnotes omitted).

114 This is the case *a fortiori* in the context of collective war crimes, such as genocide. Cf. A.-M. Boisvert, H. Dumont and M. Petrov, above note 24, p. 122 (observing in the context of collective crimes: “Le droit pénal classique des pays occidentaux, centré sur la répression d’un acte précis en fonction d’une certaine conception philosophique de l’être humain, convient mal en effet à la répression de la criminalité de groupe”).

115 W. G. Eckhardt, above note 19, p. 4.

116 Kenneth A. Howard, “Command Responsibility for War Crimes”, *Journal of Public Law*, Vol. 21, No. 1, 1972, p. 21.

117 See J. S. Martinez, above note 39, p. 662. Cf. *Committee of the Whole: Summary Record of the 1st Meeting, 16 June 1998*, UN Doc. A/CONF.183/C.1/SR.1, 20 November 1998, paras 67 ff. (statements of the United States justifying the ICC regime of separate command responsibility).

modern discussions of command responsibility fail to recognize these differences and are therefore inappropriately tethered to domestic analogies.

The differences between the two situations have moral as well as legal consequences. The commander's enhanced legal responsibility for the actions of subordinates, far from representing a radical departure from the ethics underlying municipal criminal law, is integral to military culture and organization. The strict parallelism between municipal criminal law and command responsibility would, in fact, undermine the structure of and justification for the LOAC itself. As Jenny Martinez has observed: "The moral logic of the law of war breaks down if the commander has no duty to acquire knowledge of what the killing machines he has unleashed and whom he ostensibly controls are doing with the power he has conferred on them."¹¹⁸ Martinez has likewise argued that a reasonably prudent commander is not justified in assuming that subordinates, predominantly young men in dangerous and charged situations, armed with weapons designed for mass killing, will stay strictly within the boundaries of lawful violence without "constant monitoring" and supervision.¹¹⁹ To exonerate a commander who falls short of positively "acquiescing" in the crimes of subordinates¹²⁰ releases the commander from his or her institutional responsibilities too easily, with what must inevitably prove disastrous consequences for civilians and persons *hors de combat*.

In consequence, the responsibility to actively investigate any information which may suggest that subordinates are planning or committing a war crime, or have committed one, is the minimum standard to which international law can hold a commander consistent with the moral obligation to protect civilians and persons *hors de combat* from war crimes. The commander's approval or even tolerance of war crimes by subordinates is, and should be, epiphenomenal, a point that both AP I and the Rome Statute support.

The false dichotomy between participation and innocence

Understanding the institutional context of military organization and operations also leads to a more nuanced appreciation of the role that commanders can play in indirectly enabling or encouraging war crimes by subordinates. The hierarchical military relationship is no different from any human relationship to the extent that it rarely confines itself to explicit communications without subtext or secondary meaning. A sharp line cannot always reliably be drawn between active and passive failures of a commander, or between negligent and reckless encouragement of war crimes.¹²¹ Ignoring the unique nature of the relationship between commander and subordinate in military organizations, and the equally unique nature of the situations in which war crimes occur, tends to result in

118 Cf. J. S. Martinez, above note 39, p. 662.

119 Cf. *ibid.*, p. 663.

120 See e.g. G. Mettraux, above note 21, p. 73; ICRC Commentary on APs, above note 26, p. 1012.

121 See e.g. M. Damaška, above note 90, p. 480.

oversimplification of the ways in which a commander can contribute indirectly to war crimes by subordinates, either purposely or unwittingly.

At least on the conceptual level, the distinction between reckless toleration of a war crime committed by subordinates and failure to adequately supervise subordinates is defensible.¹²² The respective consequences of each offence would seem to follow logically as well; in the case of toleration, the commander’s punishment should be on par with the subordinate’s due to their equivalent intentions and the commander’s ability to prevent the crime by taking appropriate action. In contrast, the commander’s mere failure to supervise subordinates is a dereliction of duty that may have tragic but presumably unforeseeable results, and the commander’s punishment should be accordingly less severe, if it should be criminal at all.¹²³

Yet, the dichotomy between conscious toleration and neglect of duty is often a false one. It distorts the dynamics of military command, and indeed of human communication and interaction in general, in the service of a simplistic legal doctrine. Human beings use a wide variety of techniques of signalling with each other to communicate beliefs and intentions indirectly and often indistinctly.¹²⁴ Military officers are frequently well aware of these modes of communication. In approving the criminal conviction of General Jacob Smith for inciting and permitting subordinates to commit war crimes during US counter-insurgency operations in the occupied Philippines in the early 1900s, President Theodore Roosevelt (himself a veteran cavalry officer) emphasized that officers must be:

peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of improper character by their subordinates. ... Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong.¹²⁵

The basis for these points requires some development by reference to the social psychology research on group dynamics and implicit communication. Implicit meaning is a normal feature of human communication among persons of normal or higher intelligence. There are many reasons why a person might communicate a message, the face value of which differs from the subtext.¹²⁶ In the context of war crimes, motivations might include the commander’s wish for deniability of

122 See Y. Dinstein, above note 81, p. 271.

123 See e.g. Victor Hansen, “Creating and Improving Legal Incentives for Law of War Compliance”, *New England Law Review*, Vol. 42, No. 2, 2008, pp. 248–258.

124 See, generally, Myron Wish and Susan J. Kaplan, “Toward an Implicit Theory of Interpersonal Communication”, *Sociometry*, Vol. 40, No. 3, 1977; Miles L. Patterson, “Strategic Functions of Nonverbal Exchange”, in John A. Daly and Mohn M. Wiemann (eds), *Strategic Interpersonal Communication*, Erlbaum, Hillsdale, NJ, 1994, p. 273.

125 US S. Doc. 213, 57th Cong., 2nd Sess., p. 5. The background to this conviction can be reviewed in John Bassett Moore, *A Digest of International Law*, Vol. 7, US Government Printing Office, Washington, DC, 1906, p. 187.

126 See, generally, M. Wish and S. J. Kaplan, above note 124; Francisco Yus, “Misunderstandings and Explicit/Implicit Communication”, *Pragmatics*, Vol. 9, No. 4, 1999, p. 487; Jan Hoogervorst, Henk van de Flier and Paul L. Koopman, “Implicit Communication in Organisations”, *Journal of Managerial Psychology*, Vol. 19, No. 3, 2004.

the order and the felt need to avoid triggering a moral reaction to a barbarous act by explicitly naming the act. How much more civilized it sounds to “teach him a lesson” than to “brutalize him” or “beat him to a pulp”.

In some circumstances and contexts, a commander’s innuendo, joke, facial expression or body language could implicitly convey toleration or encouragement of war crimes as effectively as a direct order. Seemingly general affirmations of unit cohesion and military solidarity or affirmations to subordinates of trust or grants of independence can be intended and interpreted as encouragement or toleration of war crimes. In practice, orders to commit war crimes are sometimes phrased ambiguously with no diminution in the clarity. For example, during the Second World War, Adolf Hitler instructed his high command that armies of the Soviet Union were to be “annihilated”, which was interpreted to apply not only to the weakening of Soviet military power but to the extermination of the Russian people.¹²⁷ During Operation Barbarossa, commanders of the *Einsatzgruppen* used similar language to subordinates, stating during evacuations that “nothing could be done” with burdensome old and sick persons, who subordinates then murdered in order to avoid the inconvenience of transporting them away from the zone of operations.¹²⁸ Similarly, irresponsible statements by US military commanders at Haditha, Iraq, in 2005 “created a climate that minimized the importance of Iraqi lives”, which likely contributed to the war crimes committed by US troops there.¹²⁹

By similar means, the US war crimes in Afghanistan and Iraq resulted from commanders giving orders focused on the desired results, such as obtaining information, along with hints and innuendos which suggested that the means for obtaining those results mattered little (“You have *carte blanche*”; “Soldiers are dying, get the information”; “Do whatever is necessary”).¹³⁰ Statements of commanders to subordinates portraying the military mission or objectives as all-important may be designed to order a disregard of the LOAC and may be heard as such. For example, statements by President George W. Bush, Vice-President Dick Cheney and Secretary of Defense Donald Rumsfeld insisting that US interrogators of prisoners of war and detainees must obtain “results” from the interrogations were interpreted by subordinates as commands to engage in torture for that purpose, and they may have been intended to communicate precisely that.¹³¹

Euphemism has been a particularly effective means of conveying a commander’s wishes for subordinates to commit war crimes and is especially

127 See Ian Kershaw, *Hitler 1936–1945: Nemesis*, Penguin Press, London, 2000, pp. 355–389.

128 See Sophie Richardot, “‘You Know what to Do with Them’: The Formulation of Orders and Engagement in War Crimes”, *Aggression and Violent Behavior*, Vol. 19, No. 2, 2014, p. 87.

129 See A. J. Sepinwall, above note 88, p. 291; see also Melissa Epstein Mills, “Brass-Collar Crime: A Corporate Model for Command Responsibility”, *Willamette Law Review*, Vol. 47, No. 1, 2010, pp. 39–50 (description of command failures at Haditha and Abu Ghraib). The command responsibility doctrine was not invoked by the US courts martial in either the Haditha or Abu Ghraib incidents. *Ibid.*, p. 26.

130 See S. Richardot, above note 128, p. 86; Jerrold M. Post and Lara K. Panis, “Crimes of Obedience: ‘Groupthink’ at Abu Ghraib”, *International Journal of Group Psychotherapy*, Vol. 61, No. 1, 2011, p. 54.

131 See M. Cherif Bassiouni, “The Institutionalization of Torture under the Bush Administration”, *Case Western Reserve Journal of International Law*, Vol. 37, No. 2, 2006, p. 390; Christopher Kutz, “The Lawyers Know Sin: Complicity in Torture”, in Karen J. Greenberg (ed.), *The Torture Debate in America*, Cambridge University Press, Cambridge, 2005, pp. 242–243.

useful for dehumanizing potential war crime victims, creating the psychological conditions for war crimes without the need for direct orders. Such techniques were used by the Nazis during the Second World War, Hutu genocidaires in Rwanda, and US commanders in Abu Ghraib.¹³² For example, rather than explicitly inciting genocide, Hutu leaders and influencers referred to the need to “go to work” or “sweep the dirt outside”.¹³³ US commanders referred to “enhanced interrogation” of “unlawful combatants” to communicate their desire that detainees be treated inhumanely.¹³⁴

It could be argued that the fault for interpreting such instructions as orders to commit war crimes lies with subordinates, and indeed in some cases commanders may use ambiguous or dehumanizing language with no intention of encouraging war crimes. However, as the quoted language from President Roosevelt suggests, irresponsible statements by officers carry a known danger. Even when no intention to order war crimes can be shown, military commanders must realize that subordinates will tend to interpret vague or ambiguous orders in light of the specific characteristics inculcated in military personnel through training and in light of the perilous combat situation they are experiencing.

Psychological pressures to obey authority exist even without the additional pressures of military training and combat stress;¹³⁵ most human beings are primed by nature to obey the commands of perceived authorities.¹³⁶ But obedience obviously exerts a far more powerful pull in the military context, where, as noted, that trait is systemically drilled into combatants until it becomes nearly instinctive.¹³⁷ Human beings are also strongly inclined to conform to group opinions and behaviour in order to avoid unpopularity or ostracism as a minority,¹³⁸ another trait that assumes exaggerated importance in the military context.

This dynamic may be particularly pronounced in elite regiments, where unit cohesion, solidarity and the notion of the unit being separate and superior to “regular” soldiers is particularly pronounced. In the psychological literature, this

132 See Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition*, Oxford University Press, New York, 2017, p. 289; S. Richardot, above note 128, pp. 87–88; J. M. Post and L. K. Panis, above note 130, pp. 62–64.

133 See G. S. Gordon, above note 132, p. 287.

134 J. M. Post and L. K. Panis, above note 130, pp. 62–64.

135 In Stanley Milgram’s experiments on obedience to authority, one subject shocked a person to death without direct instructions from the experimenter, seemingly based on the belief that the experimenter wished the shocks to continue when the “learner” resisted answering the experimenter’s questions. See Stephen Gibson, “Obedience without Orders: Expanding Social Psychology’s Conception of ‘Obedience’”, *British Journal of Social Psychology*, Vol. 58, No. 1, 2019, pp. 241, 250.

136 See generally Stanley Milgram, *Obedience to Authority: An Experimental View*, Harper, New York, 1974 (describing a series of experiments showing that a large majority of persons will obey instructions of apparent authorities to torture and ultimately kill another person).

137 See Emilie A. Caspar *et al.*, “The Effect of Military Training on the Sense of Agency and Outcome Processing”, *Nature Communications*, 31 August 2020, available at: <https://doi.org/10.1038/s41467-020-18152-x>; Silvia da Costa *et al.*, “Obedience to Authority, Cognitive and Affective Responses and Leadership Style in relation to a Non-Normative Order: The Milgram Experiment”, *Revista de Psicologia*, Vol. 39, No. 2, 2021.

138 See, generally, Solomon E. Asch, “Opinions and Social Pressure”, *Scientific American*, Vol. 193, No. 5, 1955; Knud S. Larsen, “The Asch Conformity Experiment: Replication and Transhistorical Comparisons”, *Journal of Social Behavior and Personality*, Vol. 5, No. 4, 1990.

dynamic is known as “deviant cohesion”;¹³⁹ it occurs when sub-unit solidarity leads to a breakdown of command pathways as superior organizational goals are undermined by the sub-unit, whose members feel a greater loyalty to one another than to the hierarchy and its mission goals.

Deviant cohesion is not an uncommon phenomenon in military contexts,¹⁴⁰ and cannot be dismissed as individual misconduct by “lone wolf” soldiers with psychological disorders that could not be known by the blameless commander. Instead, it is a common form of military misconduct, in which the “actors involved believe that their misconduct was serving some military purpose, which is notably perceptible in the ways in which they frame what they had done at the time and retrospectively”.¹⁴¹ Indeed, the very nature of elite units seems designed to foster deviant cohesion—the elite soldier, intentionally separated from his or her fellow “regular” soldiers, is consistently reminded of their special status, and frequently given more situational autonomy than their comrades. Elite units in the field “rely less on formal authority and more on personal rapport, fostering a more informal approach to leadership. This relative autonomy can also become a double-edge sword, however, as it can create a permissive environment favouring misconduct.”¹⁴² Exonerating commanders who fail to counteract such pressures, or indeed who foster them, misses an important opportunity to deter war crimes by subordinates.

The hallmarks of deviant cohesion can be clearly seen in the Breton Report. There is an acceptance, both within the unit and without, of the SAS as being somehow above or separate to the rules that other soldiers must follow. Throughout the Report, repeated reference is made to patrol commanders being considered infallible, and to the notion that the duty owed by the soldier was to the commander and not to the mission or the law. For example, the Report observes that

to a junior Special Air Service Regiment trooper, the patrol commander is a “demigod”, and one who can make or break the career of a trooper, who is trained to obey and to implement their superior commander’s intent. ... [T]o such a trooper, who has invested a great deal in gaining entry into Special Air

139 Pascal Vennesson, “Cohesion and Misconduct: The French Army and the Mahé Affair”, in Anthony King (ed.), *Frontline: Combat and Cohesion in the Twenty-First Century*, Oxford University Press, Oxford, 2015, p. 235.

140 There are numerous examples of deliberate criminal activities committed by military personnel, perceived as being part of a broader mission: see Peter Rowe, “Military Misconduct during International Armed Operations: ‘Bad Apples’ or Systemic Failure?”, *Journal of Conflict and Security Law*, Vol. 13, No. 2, 2008; Jim Frederick, *Black Hearts: One Platoon’s Descent into Madness in Iraq’s Triangle of Death*, Harmony Books, New York, 2010; A. T. Williams, *A Very British Killing: The Death of Baha Mousa*, Jonathan Cape, London, 2012.

141 P. Vennesson, above note 139, p. 242. See also Michael Walzer, *Arguing about War*, Yale University Press, New Haven, CT, 2006, p. 31, who writes that systemic criminal acts done pursuant to military objectives can be considered as “purposive crimes” rather than “crimes of indiscipline”.

142 *Ibid.*, pp. 242–243. See also P. Rowe, above note 140, pp. 170–182.

Service Regiment, the prospect of being characterised as a “lemon” and not doing what was expected of them was a terrible one, which could jeopardise everything for which they had worked. ...

...
... Some domestic commanders of Special Air Service Regiment ... embraced or fostered the “warrior culture” and empowered, or did not restrain, the clique of non-commissioned officers who propagated it. That responsibility is to some extent shared by those who, in misconceived loyalty to their Regiment, or their mates, have not been prepared to “call out” criminal conduct or, even to this day, decline to accept that it occurred in the face of incontrovertible evidence, or seek to offer obscure and unconvincing justifications and mitigations for it.¹⁴³

This seeming acceptance of a culture of deviant cohesion was evidenced at higher command levels also:

[C]ommanders trusted their subordinates: including to make responsible and difficult good faith decisions under rules of engagement; and to report accurately. Such trust is an important and inherent feature of command. However, an aura was attached to the operators who went “outside-the-wire”, and whose lives were in jeopardy. There was a perception – encouraged by them and accepted by others – that it was not for those “inside-the-wire” to question the accounts and explanations provided by those operators. This was reinforced by a culture of secrecy and compartmentalisation in which information was kept and controlled within patrols, and outsiders did not pry into the affairs of other patrols. These matters combined to create a profound reticence to question, let alone challenge, any account given by an operator who was “on the ground.” As a result, accounts provided by operators were taken at face value, and what might at least in retrospect be considered suspicious circumstances were not scrutinised. Even if suspicions were aroused in some, they were not only in no position to dispute reported facts, but there was a reticence to do so, as it was seen as disloyal to doubt the front line operators who were risking their lives.¹⁴⁴

Group solidarity represents a powerful force in military culture that can lead to greater unit cohesion and effectiveness but also to mutual support in committing, tolerating or covering up war crimes.¹⁴⁵

Similarly, military culture is particularly adapted to “groupthink” – the situation in which high group cohesiveness and a perceived need for unanimity override an individual’s independent judgment and motivation to think realistically and rationally.¹⁴⁶ The result is overestimation of the group’s judgment, closed-mindedness, and enhanced pressure toward cognitive

143 Brereton Report, above 2, p. 31, para. 27; p. 33, para. 34.

144 *Ibid.*, p. 34, para. 40.

145 See A. J. Sepinwall, above note 88, p. 289.

146 See, generally, Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes*, Houghton Mifflin, Boston, MA, 1982, pp. 5–9.

conformity.¹⁴⁷ In the military context of extreme threats to the group, anyone who questions an order or a group consensus about appropriate measures may be seen as disloyal and pressured into conformity through fear of ostracization or worse.¹⁴⁸

There is, finally, notable pressure from politics and personal ambition in military organizations. As Amy Sepinwall has noted,

political expediency may ... lead a commander to pass over his troops' crime; where, for example, support for the military effort is waning, a commander may seek to avoid the negative publicity that investigation into an atrocity will undoubtedly invite. Then again, a commander may be motivated to forego punishment not for the sake of some larger national goal, but instead for the sake of personal ambition and, in particular, a fear that his subordinates' offense will taint his future professional prospects.¹⁴⁹

Career ambition of this kind apparently joined with instincts for unit cohesion to prevent reporting of the war crimes by the Australian SAS. According to the Brereton Report:

It is evident that fear of the consequences of reporting misconduct to the chain of command has deterred some from doing so. In most cases, this is fear for career prospects, although in some there has been fear of physical reprisals. In any event, experience shows that where a complaint or report is adverse to a member's chain of command, there are powerful practical constraints on making it.¹⁵⁰

The result was that junior officers aware of suspicious practices by subordinates refrained from alerting superiors or investigating the circumstances vigorously themselves.

Combined, the psychological forces described here can exert intense pressure on service personnel who interpret vague or ambiguous communications from commanders as authorizing or ordering war crimes, and who feel compelled to execute the perceived will of the commander. Service personnel can be expected to face difficulty resisting such pressure, and this may have some explanatory power for the disturbing frequency of war crimes committed without explicit orders from a commander.

The doctrine of command responsibility, as interpreted in much scholarship and the appellate jurisprudence of international criminal tribunals, thus overlooks that a commander who "does nothing" can clearly signal a message to subordinates, just as Sherlock Holmes concluded that the dog's silence carried more meaning than if it had barked.¹⁵¹ Omission can contribute to causing a subordinate's war crime as effectively as committing an act of

147 *Ibid.*, p. 60.

148 See e.g. J. M. Post and L. K. Panis, above note 130, p. 61 (context of US torture of detainees at Abu Ghraib military prison); D. G. Dutton, above note 112, pp. 102–103, 111.

149 A. J. Sepinwall, above note 88, p. 290.

150 Brereton Report, above note 2, p. 326.

151 Arthur Conan Doyle, "The Adventure of Silver Blaze", *Strand Magazine*, London, 1892.

complicity, as Colonel Kenneth A. Howard observed long ago.¹⁵² The ICTY alluded to this possibility in *Blaškić*, where it noted that the failure to prevent or punish a subordinate’s war crime “conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes”.¹⁵³ Similarly, in *Aleksovski*, the Trial Chamber observed that, although a commander’s presence at the scene of a subordinate’s war crime does not automatically indicate encouragement of the crime,

the presence of an individual with uncontested authority over the perpetrators of the unlawful act may, in some circumstances, be interpreted as approval of that conduct ... [taking] into account the accused’s prior or concomitant behaviour or statements Moreover, it can hardly be doubted that the presence of an individual with authority will frequently be perceived by the perpetrators of the criminal act as a sign of encouragement likely to have a significant or even decisive effect on promoting its commission.¹⁵⁴

As noted, such methods of communication are not necessarily malevolent. The concept of wilful blindness is too narrow to capture the full range of circumstances in which supervisory negligence could encourage subordinate war crimes. A commander might avoid asking questions or reviewing reports in which subordinate war crimes might be revealed, not from a conscious desire to approve of such war crimes but from other motivations, such as anxiety that knowledge would result in personal responsibility or guilt, fear of unpopularity with subordinates, or a desire not to draw negative attention from superiors. Tales of this form of command failure and “misguided loyalty” to the unit, fuelled by anxiety at rocking the boat, suffuse the Brereton Report.¹⁵⁵ As Peter Rowe has stated:

At the command level misconduct in the form of failing to deal with allegations of misconduct by those lower in the chain of command may be due to personal reasons, to misplaced loyalty to superior commanders or to an old-fashioned attempt to cover up alleged wrongdoing. Each is likely to encompass fear for one’s reputation, career or promotion prospects. In any event, it is likely to be a very uncomfortable process for commanders.¹⁵⁶

152 K. A. Howard, above note 116, p. 17. See also A. J. Sepinwall, above note 88, p. 289. In his treatise on international criminal law, Judge Cassese insightfully observes that a commander’s wilful failure to prevent a subordinate’s war crime need not involve positive action; “it may happen that the commander by his inaction aimed in fact at furthering the crime of the subordinate”. A. Cassese, above note 97, p. 244. Similarly, he notes that it can be argued that failure to exercise the duty of supervision may “in some way” contribute to the war crime. *Ibid.*, p. 245.

153 ICTY, *Blaškić*, above note 66, p. 789.

154 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Judgment (Trial Chamber), 25 June 1999, para. 65.

155 See e.g. Brereton Report, above note 2, p. 325.

156 Peter Rowe, “Military Misconduct during International Armed Operations”, *Journal of Conflict and Security Law*, Vol. 13, No. 1, 2008, p. 179. This very sentiment was echoed in the aftermath of the My Lai massacre by US forces in Vietnam. During the trial of Lieutenant Calley, his superior Captain Medina gave four reasons as to why he did not report the massacre to his superiors: “The four reasons that I did not report the shooting of any innocent or noncombatants at the village of My Lai four and the reason that I suppressed the information from the brigade commander when I was questioned are

Yet, motivations for not investigating suspicious facts are doctrinally irrelevant once the commander has reason to know that war crimes might be committed. It is reasonable, then, to ask why blindness must be “wilful” to trigger command responsibility.

Although it may seem that the foregoing discussion does not apply to a failure to punish a subordinate’s past war crimes, because the failure cannot necessarily be viewed as implicitly communicating approval of future behaviour, there are compelling reasons to view the commander’s behaviour as potentially criminal in such cases as well. The most obvious situation, and the one most readily admitted to satisfy the exigencies of municipal criminal law, is that the commander’s failure to punish subordinates guilty of war crimes may embolden them to repeat their crimes by signalling implicit approval, thus contributing causally to future crimes.¹⁵⁷

Some believe this logic cannot extend to a subordinate’s isolated war crime with no possibility of repetition.¹⁵⁸ Whether this position is justifiable depends on how the injury from a war crime is conceived. Although the immediate and direct effect of the war crime cannot be enhanced or facilitated retroactively, it is reasonable to view the broader injury caused by a war crime, both to the victim and to the rule of law, as continuing until justice is visited upon the war criminal. Amy Sepinwall has argued that “expressive injuries” resulting from unpunished war crimes cause harm that cannot be ignored without undermining the humanitarian function of the LOAC.¹⁵⁹ As long as the commander fails in his or her duty to punish the subordinate, a war criminal escapes punishment, the victim’s interest in justice goes unsatisfied, and the LOAC’s force and authority are degraded; even a failure to prosecute an isolated war crime produces significant material and moral harm that justifies punishing the commander as partly responsible for the war crime’s effects, if not the war crime itself. Holding a commander responsible for failing to punish a war crime thus serves the interests of the international community by providing a general deterrent for future war crimes, upholding the rule of law, and vindicating the interests of the victims in ensuring that their abusers do not escape justice.

as follows: Number one, I realized that instead of going in and doing combat with an armed enemy, the intelligence information was faulty and we found nothing but women and children in the village of My Lai four, and, seeing what had happened, I realized exactly the disgrace that was being brought upon the Army uniform that I am very proud to wear. Number two, I also realized the repercussions that it would have against the United States of America. Three, my family, and number four, lastly, myself, sir.” See “Captain Ernest Medina, Witness of the Court”, *Famous Trials*, available at: <https://famous-trials.com/mylaicourts/1628-myl-medin>.

157 M. Damaška, above note 90, p. 467.

158 See e.g. M. Damaška, above note 90; D. Robinson, above note 95, pp. 18–23.

159 See A. J. Sepinwall, above note 88, pp. 298–302. Darryl Robinson has argued that the municipal criminal law concept of “accessory after the fact” could not justify holding commanders responsible for failing to punish the war crimes of subordinates: D. Robinson, above note 95, p. 48. While technically correct, this argument is irrelevant. As discussed, municipal criminal law analogies have no application in international criminal law due to the very different contexts in which the respective legal systems operate.

Does a commander’s failure to train and supervise subordinates make the commander complicit in their war crimes?

The discussion of the *lex lata* of command responsibility above noted that no international treaty or criminal tribunal has unambiguously endorsed the criminal responsibility of military commanders under international law for prospective or past war crimes of subordinates when the commander possessed no information about those crimes, but when the commander’s failure to adequately train subordinates in the LOAC and to supervise their compliance with the LOAC resulted in, or contributed to, the commission of the war crimes by subordinates. The large preponderance of jurisprudence and most of the academic commentary treat an officer’s neglect of such duties as a matter for internal military disciplinary proceedings at most, not a subject for international criminal law.¹⁶⁰ The idea of a commander having a legal duty under the LOAC to supervise subordinates was explicitly rejected by the ICTY Appeals Chamber in the *Čelebići* case:

Neglect of a duty to acquire [knowledge of war crimes], however, does not feature in the provision [ICTY Statute Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. ... The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. ... [A]lthough a commander’s failure to remain apprised of his subordinates’ action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.¹⁶¹

Similarly, the ICTR Appeals Chamber has insisted that only an officer who deliberately fails to prevent or punish war crimes by subordinates, or who “culpably or willfully” disregards his or her duty to prevent or punish, may be held liable.¹⁶² As a result, “criminal negligence is not a basis of liability in the context of command responsibility”.¹⁶³

160 See e.g. ICTY, *Delalić*, above note 46, para. 226; G. Mettraux, above note 21, pp. 248 (arguing that a commander’s failure to adopt general measures to prevent war crimes is not relevant to command responsibility), 225 (arguing that, if an officer receives “contradictory reports about allegations of crimes” of subordinates, the officer is free to ignore the more disturbing report and rely on the “optimistic and calming report” without investigation, without incurring command responsibility if the reassuring reports turn out to be false). See also Amy Sepinwall’s discussion of how the United States repeatedly declined to prosecute officers who intentionally or recklessly ignored war crimes by subordinates in Iraq: A. J. Sepinwall, above note 88, pp. 258–260, 275–279, 284–285.

161 ICTY, *Delalić*, above note 46, para. 226 (emphasis in original); accord ICTY, *Blaskić*, above note 69, para. 62; ICTR, *Bagilishema*, above note 25, para. 42. In *Kordić*, the Trial Chamber interpreted the *Čelebići* appellate judgment to excuse commanders from a general duty of supervision of their subordinates. ICTY, *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment (Trial Chamber), 26 February 2001, paras 432–437.

162 ICTR, *Bagilishema*, above note 25, paras 35–37.

163 ICTY, *Halilović*, above note 45, para. 71.

Indeed, one jurist has gone so far as to assert that because failure to supervise subordinates is an “omission”, it “can never, strictly speaking, be causal to an effect. *Ex nihilo nihil fit*.”¹⁶⁴ To hold otherwise, some believe, would inevitably subject commanders to a repugnant standard of strict liability for the war crimes of their subordinates.¹⁶⁵ This claim is of course an overstatement—neglect of duty and strict liability are mutually exclusive concepts—but it arises from a healthy concern with ensuring that military commanders are not maligned and punished as war criminals for a failing that is not a proximate cause of the war crime but is at most a contributing factor and, from an evidentiary standpoint, a speculative one.¹⁶⁶ In many cases it may be impossible to know whether adequate training and supervision would have prevented subordinates from committing a war crime, because this requires considering a counterfactual situation. The danger of subjecting a commander to unfair hindsight bias is considerable.

Certainly, it would be unrealistic and counterproductive to expect a commander’s omniscience with regard to the activities of his or her subordinates. As the Nuremberg Tribunal observed, “[a] high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure”.¹⁶⁷ Moreover, “the distinction between excusable and culpable lack of information may be a fine line in practice”,¹⁶⁸ and fine distinctions supply a precarious foundation for criminal liability.

Yet, much worse than holding commanders to an exacting standard of supervision is releasing commanders from the obligation to protect defenceless persons against whom those same commanders unleash lethal violence. The commander’s duty to prevent or punish war crimes begins not with discrete acts of ordering, tolerating or consciously ignoring war crimes, but with the very tone and attitude the commander takes toward the LOAC and military professionalism. As General Douglas MacArthur once observed: “Soldiers of an army invariably reflect the attitude of their general. The leader is the essence.”¹⁶⁹ The same may be said *mutatis mutandis* of lower-ranking officers relative to subordinates under their command.

The treaties and statutes articulating the law of command responsibility are at best vague on the relevance of tone, training and supervision, and the jurisprudence of the international criminal tribunals has not treated the question of whether a commander created a culture of compliance with the LOAC as a crucial factor in command responsibility analysis. Indeed, the *Čelebići* case approach to protecting civilians naively treats commanders as somehow hermetically sealed away from subordinate war crimes short of an intrepid

164 S. Trechsel, above note 97, p. 29.

165 See e.g. ICTY, *Blaskić*, above note 69, para. 332; G. Mettraux, above note 21, p. 45.

166 See e.g. S. Trechsel, above note 97 p. 32; G. Mettraux, above note 21, p. 225; A.-M. Boisvert, H. Dumont and M. Petrov, above note 24, p. 127.

167 Nuremberg Military Tribunal, *High Command*, above note 63, pp. 543–544.

168 Sigrid Redse Johansen, *The Military Commander’s Necessity: The Law of Armed Conflict and Its Limits*, Cambridge University Press, Cambridge, 2019, p. 78.

169 Douglas MacArthur, *Reminiscences*, Da Capo Press, Burlington, VT, 1964, p. 298.

informant alerting them to the facts about a future, contemporaneous or past war crime. The neglect of such factors leads to a doctrine that privileges military commanders with the right to command their troops to kill and maim without assuming any responsibility to ensure that they do so legally, then treats them as blameless when their fecklessness results in horrific acts by subordinates. This was the reasoning that led the Trial Chamber in *Blaskić* to insist that the role of commanders “obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take necessary measures for this purpose”, when there is a danger of subordinates committing war crimes¹⁷⁰ – but that decision was overturned on appeal.

The law of command responsibility cannot achieve effective deterrence while conceiving of officers as mere passive participants in the organized violence of their subordinates. No well-regulated army functions in such a manner. Enforcing military discipline and compliance with the LOAC is not a last resort taken only after great hesitation and deliberation, but a normal and continuing obligation of military commanders. An officer in any military organization is required to ensure that soldiers under his or her command are trained in the LOAC; that they are issued rules of engagement (ROE) cards and reminded of their duties; that treatment of detainees and prisoners is properly supervised; and that systems are adopted for supervising compliance with the ROE and LOAC generally, for reporting breaches of conduct, and for the detection and punishment of war crimes.¹⁷¹ Failure to do so not only increases the risk of the commission of war crimes by subordinates through ignorance of the LOAC or through deception by soldiers intent on committing war crimes; it also fails to acculturate subordinates to condemnation of war crimes, as the ICTY Trial Chamber suggested in *Blaskić*.¹⁷² And, as the discussion above indicates, such a failure in training and supervision may in fact reflect a commander’s unspoken approval or tolerance of war crimes by subordinates.

The commander, who sets the tone of the military organization under his or her command and who structures the lives of subordinates in a manner that can communicate either hostility or apathy toward the LOAC or conscientious respect

170 ICTY, *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Decision (Trial Chamber), 3 March 2000, paras 329–332.

171 See I. Bantekas, above note 21, pp. 67–70; cf. W. G. Eckhardt, above note 19, pp. 22–24.

172 An informative case arose following the Canadian intervention in Somalia during the mid-1990s. In *Morneault v. Canada* (2000 CarswellNat 980), the Appeals Division of the Canadian Federal Court reviewed the decision of a Commission of Inquiry to discipline a lieutenant colonel whose subordinate soldiers beat to death a detainee and shot civilians during a deployment in Somalia. Although another commander had ordered his subordinates to “abuse” any Somali intruders into the base, the Commission did not find that Morneault had specifically ordered or participated in war crimes. It instead concluded that he had failed in his duty as a commander to train and supervise his subordinates, and to ensure that his subordinates knew their obligations under the international law of armed conflict in general and with regard to detainees in particular. See *Dishonoured Legacy: Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Vol. 4, 1997, pp. 1029–1032. See also L. C. Green, “Command Responsibility in International Humanitarian Law”, *Transnational Law & Contemporary Problems*, Vol. 5, 1995, pp. 370–371.

for it, thus cannot be treated as immaterial when ill-trained or unsupervised subordinates commit war crimes. It would show slight respect for the LOAC if the mere ignorance of specific war crimes exculpated a commander who created or substantially contributed to the conditions that made such crimes likely.

In assessing a commander's responsibility for the war crimes of subordinates, it is therefore relevant to inquire, at a minimum, what type of training was ordered or given by the commander, what behavioural expectations were communicated directly and indirectly to subordinates, and whether any statements were made which might suggest that opposing forces are unworthy of respect or rights, or that specific results must be obtained regardless of the means.¹⁷³ If General MacArthur's dictum is accurate, a commander may contribute to creating a culture of tolerance for war crimes by subordinates even before obtaining any relevant information about a subordinate's planned or past war crimes. As Mills has observed, "most war crimes are not only individual acts of atrocity. They are also command failures."¹⁷⁴

Although modern international criminal jurisprudence rejects the idea that commanders become responsible for the war crimes of their subordinates merely by inadequate supervision, it is noteworthy that failure to supervise subordinates was a factor in assessing command responsibility in the early international criminal law jurisprudence. As mentioned previously, the IMTFE treated a high commander's dereliction of duty as sufficient grounds for command responsibility in the *Yamashita*, *Toyoda* and *Araki* trials, and the Allied military tribunals in Europe did the same in the *Hostages* case and the *Rauer* trial. In the *Roechling* case, the Superior Military Government Court of the French Occupation Zone in Germany observed, albeit with too broad a brush, that it is a commander's "duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence".¹⁷⁵ More recently, the Rome Statute of the ICC mentions a commander's duty to "exercise control properly over" forces under his or her command as a factor in command responsibility, although this has not been interpreted as a major factor in command responsibility analysis.¹⁷⁶ And as a municipal law implementing international criminal law, the Canadian Crimes against Humanity and War Crimes Act provides for commander responsibility for a commander's failure "to exercise control properly" over persons under his or her

173 It is thus incorrect to argue that because any responsibility a commander may have to train troops is subject to municipal military law and policies, the nature of that training or other preventive measures, or the absence altogether of training, is irrelevant to the commander's responsibility for the war crimes of subordinates: see G. Mettraux, above note 21, pp. 69–70, 248. The ICC arrived at the opposite conclusion, finding a commander responsible for failing to properly train his troops and disseminate a code of conduct prohibiting pillage: ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Judgment, 21 March 2016, paras 736–737.

174 M. E. Mills, above note 129, pp. 25–26.

175 Superior Military Government Court of the French Occupation Zone in Germany, *Case of Hermann Roechling and Others*, Judgment, 25 January 1949, reprinted in *Trials of the War Criminals Before the Nuremberg Military Tribunal under Control Council Law No. 10*, Vol. 14, 1949, pp. 1097, 1106.

176 Rome Statute, Art. 28.

effective command, and for not only knowing but being “criminally negligent in failing to know” of a planned war crime or a war crime in the process of commission.¹⁷⁷

It does not follow that a general rule should be recognized presuming that commanders are aware of war crimes by subordinates.¹⁷⁸ However, what this analysis does suggest is that a commander who fosters a culture of disregard for the LOAC or implicitly communicates tolerance of war crimes by a serious failure to train and supervise subordinates under his or her direct command may contribute substantially and concretely to the commission of war crimes by subordinates. The fact that the LOAC imposes no responsibility on a commander who, through various indirect failures, creates conditions propitious to the commission of war crimes leaves a gap in the doctrine that is dangerous to civilians and persons *hors de combat*. The circumstances and allegations described in the Brereton Report, though still pending further criminal investigation, may prove to illustrate this dynamic and its tragic consequences.

Towards a more nuanced regime of command responsibility

The optimal standard of indirect command responsibility

The Brereton Report, with its disjunction between the suspicious behaviour of subordinates who committed war crimes and the exoneration of commanders reluctant to investigate the evidence, provides a timely reminder of the need for reform of the international law of command responsibility. It illustrates how national military organizations are often quick to excuse commanders who indirectly contribute to war crimes by subordinates, and how a consequential gap in the law of command responsibility can be used to justify that exoneration. The costs of holding military commanders to such a relaxed standard of duty are unacceptably high, not only to the LOAC but to the functioning of military organizations themselves. The backlash from high-ranking military officers after President Donald Trump’s pardoning of convicted war criminals and granting of amnesties to accused war criminals in 2019 and 2020¹⁷⁹ illustrates how deference

177 Crimes against Humanity and War Crimes Act, SC 2000, c. 24, para. 7. “Criminal negligence”, it should be noted, is a higher standard under Canadian law than simple negligence; it requires wanton or reckless disregard for a legal duty. See Canadian Criminal Code, RSC 1985, c. C-46, § 219.

178 This is how Parks interprets the *Muto* and *Yamashita* holdings: see W. H. Parks, above note 16, pp. 89–90. We disagree. We interpret these cases as drawing the inference of knowledge under the specific facts of the cases, involving war crimes so systematic, widespread and repeated that an inference of knowledge was properly drawn in the cases at bar.

179 In May 2019, Trump pardoned several officers and a security contractor who had either been convicted of murdering civilians and unarmed prisoners of war or had been accused of such crimes and were awaiting trial. He also restored the full rank and pay of a Navy SEAL who had committed war crimes. See Leo Shane III, “Trump Grants Clemency to Troops in Three Controversial War Crimes Cases”, *Military Times*, 22 November 2019; Dan Maurer, “Should There Be a War Crime Pardon Exception?”, *Lawfare.com*, 3 December 2019, available at: www.lawfareblog.com/should-there-be-war-crime-pardon-exception. In 2020, he also pardoned private military contractors who murdered civilians and children in Iraq. See “Trump Grants Clemency to Former Blackwater Contractors Convicted of War Crimes in Iraq and Associates Prosecuted Following the Mueller Investigation”, *American Journal of International Law*, Vol. 115, No. 2, 2021; Leo Shane III, “Trump Pardons Former Rep. Duncan Hunter and Four Iraq

to soldiers by those charged with enforcing the LOAC not only puts innocent civilians, detainees and prisoners of war at risk of horrendous crimes, but also undermines justice and the military order. As these generals knew, armies thrive not on sycophancy but on discipline, and command responsibility is an essential component of that discipline.

The difficulty of balancing fairness to military commanders with recognition of the indirect role they may play in promoting war crimes is surmountable with a comprehension of the multifaceted role of military commanders in controlling their subordinates. We reject the fatalism of exonerating military commanders from responsibility because of the difficulty of predicting when subordinates may commit war crimes.¹⁸⁰ The difficulty of an important task is no excuse for neglecting it, particularly for those engaged in a profession reliant on lethal force. The risk that soldiers will commit war crimes is present in every armed conflict, and therefore the risk of war crimes is always foreseeable in a general way.¹⁸¹ This does not mean that every individual war crime is foreseeable or preventable by a higher officer. What it does mean is that the law of command responsibility is hampered by an all-or-nothing mentality that is incompatible with the realities of military command. A person threatened by lawless soldiers has no reason to care whether their commander acquiesced in war crimes, felt no concern, refused to believe the evidence, or was too preoccupied to be bothered. The result is the same for the victims.

As discussed, the desire to remould the law of command responsibility in the image of municipal criminal law arises from a misapprehension that ignores the unique characteristics of military training and the dynamics of military organizations, especially those intrinsic to the relationship between commanders and subordinates. The violent nature of armed conflict and the commander's relatively comprehensive control over direct subordinates under circumstances that carry an inherent risk of war crimes justifies holding commanders to a high standard of diligence and care with regard to restraining the violence that they are charged with unleashing on others. Military commanders are usually the only significant restraint on war crimes by soldiers and officers beneath them. Any

War Vets Convicted in Blackwater Shooting", *Military Times*, 22 December 2020. High-ranking Pentagon officers and veteran soldiers alike expressed dismay about and opposition to the pardons and clemencies for undermining military discipline and the LOAC. See David S. Cloud, "Senior Military Officers Rebel against Trump Plan to Pardon Troops Accused of War Crimes", *Los Angeles Times*, 22 May 2019, available at: www.latimes.com/politics/la-na-pol-pentagon-oppose-trump-pardon-murder-warcrimes-20190522-story.html; Alex Johnson, "Gallagher Case Reveals Trump's Ignorance of the Military, Fired Navy Secretary Writes", *NBC News*, 27 November 2019, available at: www.nbcnews.com/news/military/gallagher-case-reveals-trump-s-ignorance-military-fired-navy-secretary-n1092931. One jurist has made a strong case for Trump's status as a war criminal based on command responsibility. See Gabor Rona, "Can a Pardon Be a War Crime? When Pardons Themselves Violate the Laws of War", *Just Security*, 25 May 2019 and 24 December 2020, available at: www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/.

180 See Jeremy Dunnaback, "Command Responsibility: A Small-Unit Leader's Perspective", *Northwestern University Law Review*, Vol. 108, No. 4, 2014, pp. 1411, 1419.

181 See K. A. Howard, above note 116, p. 21; cf. J. Dunnaback, above note 180, p. 1420 ("There is always some level of risk that war crimes are about to be committed").

attempt to relieve them of the obligation to create a culture of compliance with the LOAC, much less to investigate any information suggesting that subordinates may commit or have committed war crimes and to prevent and punish such crimes, leaves civilians, war prisoners and other defenceless individuals with very little protection against the barbarities of which soldiers have historically proved capable.

This article has also explored the dynamics of military command, including the implicit means of communicating approval or tolerance of war crimes available to commanders. The common assumption that commanders who overlook the war crimes of subordinates are merely remiss in their supervisory duties and not active participants in those crimes imposes a false dichotomy on a situation that is frequently much more fluid, ranging from indirect but clearly understood expressions of approval for war crimes to passivity motivated by personal ambition, denial of reality, or cowardice at the possibility of exposing an alarming truth.

At the same time, a pure standard of criminal negligence will be too strict to hold a commander responsible for the war crimes of subordinates in at least some situations. Notwithstanding the justifiability of expecting commanders to meet a very high standard of training and supervising their subordinates, it would be disproportionate to hold a commander responsible for such war crimes as torturing a prisoner or murdering a civilian because the commander did not always thoroughly train and supervise all those under his or her direct command. The problem is not necessarily that no moral theory can justify a criminal penalty against the commander under such circumstances. As observed, a military commander who neglects his or her training and supervisory duties can reasonably foresee that subordinates may try to commit war crimes; relying merely on faith in their moral probity is dangerously naive at best. Yet, negligence or neglect of duty is not a forgiving standard, while war crimes are some of the most reprehensible acts a human being can commit. It would be disproportionate to visit the most extreme penalties of international criminal law on a negligent commander and an active participant in a war crime in equal measure.

The optimal approach, in light of the dynamics of military organization and human psychology discussed here, is to hew to an interpretation of “reason to know” similar to that adopted by the ICTY in *Čelebići*. Specifically, a commander should be equally responsible for the war crimes of subordinates if he or she disregards or inadequately investigates *any* evidence suggesting that subordinates are involved in war crimes. Such evidence must be treated with the utmost gravity and should never be dismissed as inconsistent with what the commander believes or wishes about subordinates, as not credible because it is contrary to the commander’s bare assumptions, or as inconvenient for the cohesion of the unit or some other objective.

In effect, this is a kind of recklessness standard, in which the concept of recklessness involves failing to observe a strict duty to investigate adequately any evidence of subordinate war crimes, but not a duty to constantly monitor subordinates proactively in order to ensure that they never commit war crimes. In 1973, Major William Parks published an article proposing that the standard of culpability for a commander should be “wanton negligence”, presumably meaning

something like recklessness, in order to hold the commander responsible for aiding and abetting a war crime.¹⁸² Punishing a commander who does not share the culpable mentality of his or her subordinates to at least some degree would brand as a war criminal an individual who is merely incompetent, poorly trained and supervised as an officer, or overburdened and distracted. Parks' proposal is thus consistent with our reasoning in a general way. A reckless disregard standard is morally justifiable because of the unique characteristics of military command in a way that neither a negligence standard nor an inferred acquiescence standard captures.

At the same time, nothing in this standard justifies requiring direct evidence of a commander's overt tolerance or approval of war crimes. As discussed above, there are many ways in which a commander can communicate implicit tolerance of war crimes by subordinates. Omission can be as influential as suggestion, and a euphemism can be intended and interpreted as an order. The only practical case that defenders of a higher bar for command responsibility have made is that if commanders are held responsible for training and supervising subordinates against war crimes by punishments comparable to those given to subordinates, it may be difficult to recruit officers.¹⁸³ Such *in terrorem* arguments are speculative on the facts, but worse, they attribute more moral weight to the exigencies of military staffing than to the potential commission of war crimes. There is reliable evidence showing that proper training is effective at reducing the risk of war crimes;¹⁸⁴ there is no such evidence to suggest that holding commanders responsible for properly training and supervising their troops would cause any military organization to collapse.

The necessity of training and supervision

As also noted, failure to create a culture of compliance with the LOAC, including adequate training and supervision of subordinates, is one potentially telling indicator of the commander's complicity in subordinate war crimes. It should therefore assume a more prominent role in command responsibility analysis. This is not to argue that such neglect should constitute a new, independent basis for a war crime, but the claim that a commander's general duty to supervise subordinates and to assiduously investigate allegations of planned or past war crimes unfairly penalizes commanders who "failed to keep properly informed" skews the moral calculus indefensibly.¹⁸⁵ It privileges fairness to one actor, who has assumed exceptional responsibility over the safety and lives of the entire universe of enemy combatants, as well as defenceless civilians and persons *hors*

182 W. H. Parks, above note 16, p. 103.

183 See e.g. M. Damaška, above note 90, p. 474; J. Dunnaback, above note 180, p. 1414.

184 See e.g. Christopher H. Warner *et al.*, "Effectiveness of Battlefield-Ethics Training during Combat Deployment: A Programme Assessment", *The Lancet*, Vol. 378, No. 9794, 2011.

185 See G. Mettraux, above note 21, p. 211. Mettraux also argues that obligating commanders to fulfil their military duties of supervision "has the practical effect of shifting the burden of proof" to the defendant. However, this claim assumes that only evidence of the commander's actual knowledge of war crimes is relevant. As noted, the commander is factually and morally responsible for a broader range of attitudes and behaviour by subordinates.

de combat, over innocent persons whose lives could be seriously degraded or simply ended through the commander’s negligence. There is no credible moral argument for striking the balance in the commander’s favour in such circumstances.¹⁸⁶ It is not enough for a military commander to “assume that” subordinates “would properly perform the function which had been entrusted to them by higher authorities”.¹⁸⁷ True, high command is not field supervision—but no military commander has the “right”¹⁸⁸ to trust in the unimpeachable integrity and legal scrupulousness of subordinates, particularly in the necessarily perilous context of armed conflict, because that right will be enjoyed at the potential expense of defenceless persons.

Limiting command responsibility for war crimes to cases of reckless disregard and ignoring the military culture created by commanders leaves a gap in international criminal law for commanders who use implicit means to communicate encouragement or toleration of war crimes by subordinates, and for commanders who through carelessness or incompetence put at risk the lives of civilians and persons *hors de combat*. The consequence of mitigating the punishment of superior officers in cases of serious negligence is to trivialize their moral and legal responsibility to ensure that armed subordinates perpetrating deadly violence, and their superior officers directly responsible for supervising them, comply with minimally civilized standards of behaviour. Indeed, it creates an incentive for unscrupulous generals to informally pressure lower-ranking officers to commit war crimes while preserving plausible deniability, with the greatest risk being an anodyne accusation of “dereliction of duty” under municipal military law that may or may not result in some form of discipline within the commander’s own military organization.

To address this gap would require a significant innovation in international law beyond firmly embedding evidence of command neglect as an important factor in command responsibility analysis in international criminal law. One additional option would be to create a lesser charge under international law for a commander who inadequately trains or supervises troops under his or her direct command, when those troops subsequently commit a war crime.¹⁸⁹ Colonel Howard observed that a commander who negligently allows a subordinate to commit premeditated murder in violation of the LOAC may be charged with involuntary manslaughter under a military code.¹⁹⁰ Although international criminal law does not recognize an involuntary manslaughter charge, the introduction of a lesser offence of this kind, such as “gross neglect of duty”, might be worth considering. To mitigate the risk of hindsight bias, such a charge should require strong evidence of a substantial and sustained neglect of training and supervision, as opposed to training and supervision that are merely considered inadequate in light of the war crimes actually committed by subordinates.

186 Cf. M. Osiel, above note 107, p. 193.

187 Nuremberg Military Tribunal, *High Command*, above note 63, p. 558.

188 *Ibid.*

189 See C. Meloni, above note 101, p. 636.

190 K. A. Howard, above note 116, p. 20.

It should be clear that the idea of a lesser offence of neglect of duty would in no way overlap with cases in which the commander participates in a war crime. When the commander had information that should have put him or her on notice of a possible war crime and failed to take preventive or punitive action, command responsibility is the appropriate paradigm. The proposed lesser offence becomes relevant only when the commander had no reasonable notice that a subordinate was planning or committing a war crime.

Alternatively, or in addition, the LOAC could be amended to require States to ensure that commanders properly train and supervise subordinates, to require that States implement auditing or other supervisory systems to assess and correct a commander's neglect in this regard, and to hold States responsible for failing to demote or discharge commanders found guilty of such neglect. Such requirements would have to operate independent of any actual crimes committed by subordinates, because prevention of war crimes will always be more desirable than punishment of those who commit or contribute to war crimes.

It may be asked why this matter should not be left solely to the disciplinary system of the national military organization. The answer is that war crimes are among the gravest offences of which a person is capable, and given the dearth of other safeguards against them, ensuring that commanders give minimally adequate training and supervision of subordinates merits international concern. Although there are counterexamples, history has repeatedly shown that States tend to be reluctant to try, much less to convict, their own military officers for war crimes. The Brereton Report, which largely does not recommend further investigation of SAS Command's failure to investigate evidence of subordinate war crimes, serves as an instructive example. The function of international criminal law is to end impunity for the most serious offences against the LOAC, and this can be accomplished most reliably not only by punishing individual soldiers who commit murders, torture and other war crimes *ex post facto*, but by creating the conditions that discourage the commission of war crimes in the first place.

The SolarWinds hack: Lessons for international humanitarian organizations

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Abstract

As humanitarian organizations become more active in the digital domain and reliant upon new technologies, they evolve from simple bystanders to full-fledged stakeholders in cyberspace, able to build on the advantages of new technologies but also vulnerable to adverse cyber operations that can impact their capacity to protect and assist people affected by armed conflict or other situations of violence. The recent hack of the International Red Cross and Red Crescent Movement's Restoring Family Links network tools, potentially exposing the personal data of half a million vulnerable individuals to unauthorized access by unknown hackers, is a stark reminder that this is not just a theoretical risk but a very real one.¹

The 2020 cyber operation affecting SolarWinds, a major US information technology company, demonstrated the chaos that a hack can cause by targeting digital supply chain components. What does the hack mean for the humanitarian cyberspace, and what can we learn from it? In this article, Massimo Marelli, Head of the

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International Committee of the Red Cross's Data Protection Office, draws out some possible lessons and considers the way forward by drawing on the notion of "digital sovereignty".

Keywords: supply chain, cyber security, digital sovereignty, data sovereignty, humanitarian action, international law, data protection, cyber strategy, international organizations.

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Introduction

Even in 2022, with a news cycle overwhelmed by conflicts, a deadly pandemic, climate disasters and political turmoil, the 2020 cyber operation targeting SolarWinds continues to leave a mark, with consequences that still persist today.² Hackers used the operation against SolarWinds, a major US information technology (IT) company, to spy on private companies – such as FireEye,³ the elite cyber security firm that exposed the breach⁴ – as well as US government agencies, including the Department of Homeland Security and Treasury Department.

Cyber operations of this type, exploiting the digital supply chain, are happening and causing damage. Humanitarian organizations today are essentially bound to this supply chain and therefore are also in harm's way.⁵ This article will explore these two phenomena and discuss avenues forward. Specifically, the article seeks to identify relevant questions and draw lessons from the SolarWinds hack in order to help illustrate the challenges facing humanitarian organizations in cyberspace and, in turn, to think through the potential approaches that organizations can take to meet these challenges.

There are three parts to this article. The first part provides a brief analysis of the SolarWinds hack and its significance to international organizations and

- 1 International Committee of the Red Cross (ICRC), "Cyber-Attack on ICRC: What We Know", 16 February 2022, available at: www.icrc.org/en/document/cyber-attack-icrc-what-we-know (all internet references were accessed in March 2022).
- 2 A simple explanation of how the hack happened and why it is so significant can be found in Isabella Jibilian and Katie Canales, "The US is Revising Sanctions against Russia Over the SolarWinds Cyber Attack", *Insider*, 15 April 2021, available at: www.businessinsider.com/solarwinds-hack-explained-government-agencies-cyber-security-2020-12.
- 3 William Turton and Kartikay Mehrota, "FireEye Discovered SolarWinds Breach while Probing Own Hack", *Bloomberg*, 15 December 2020, available at: www.bloomberg.com/news/articles/2020-12-15/fireeye-stumbled-across-solarwinds-breach-while-probing-own-hack.
- 4 See FireEye, "Highly Evasive Attacker Leverages SolarWinds Supply Chains to Compromise Multiple Global Victims with SUNBURST Backdoor", *Mandiant*, 13 December 2020, available at: www.fireeye.com/blog/threat-research/2020/12/evasive-attacker-leverages-solarwinds-supply-chain-compromises-with-sunburst-backdoor.html.
- 5 Though not directly the subject of this paper, humanitarian organizations face very significant and real cyber risks, as seen in the February 2022 hack of the International Red Cross and Red Crescent Movement's Restoring Family Links network tools, which potentially exposed the personal data of half a million vulnerable individuals to unauthorized access by unknown hackers. For more, see ICRC, above note 1.

humanitarian action. The second part places the SolarWinds hack and the challenges it poses in a broader context, drawing on the concepts of “data sovereignty” and “digital sovereignty”; the application of humanitarian principles and working modalities in conflict scenarios; and the broader geopolitical drivers of overarching conflicts in cyberspace. The third part of the article considers how international humanitarian organizations like the International Committee of the Red Cross (ICRC) can respond, taking all of these factors into account.

SolarWinds: The hack and its significance

While the Stuxnet operation⁶ showed us that, when attackers have sufficient means, it is very challenging to resist thoroughly planned and targeted operations (including, in that case, targeting air-gapped systems), the SolarWinds hack has shown us the massive scale and reach that an adversary can achieve by targeting digital supply chain components that are widely adopted, in this case the security of the software supply chain.

The SolarWinds hack⁷ was an operation that was ongoing during most of 2020. It was revealed and widely reported in the media at the end of December 2020. It primarily targeted US government agencies and private companies, including the security company that exposed the hack, FireEye. The European Commission confirmed on 13 April 2021 that fourteen institutions, bodies or agencies of the European Union used SolarWinds/Orion. Six of them were confirmed to have been affected by the hack.⁸ The operation is believed by the US intelligence community to be of Russian origin⁹ and has been formally attributed by the United States to the Russian Federation.¹⁰ Russia has denied any involvement in the operation.¹¹ The SolarWinds hack was a “supply chain” type of operation in that it vectored malware through updates of the Orion software product of SolarWinds, which is widely used to manage IT resources along business supply chains. The malicious code creates a backdoor to customers’ systems, which enables hackers to install more malware and to spy on their victims. Even at the

6 Stuxnet is a well-known operation carried out in Iran, allegedly by the United States and Israel, and first reported in June 2010. It involved damaging a number of centrifuges installed in the Natanz nuclear facilities used for fuel enrichment. It was allegedly aimed at hindering the Iranian uranium enrichment programme. For more information, see “Stuxnet (2010)”, *Cyber Law Toolkit*, available at: https://cyberlaw.ccdcoe.org/w/index.php?title=Stuxnet_%282010%29.

7 I. Jibilian and K. Canales, above note 2.

8 European Parliament, “Answer Given by Mr. Hahn on Behalf of the European Commission”, 13 April 2021, available at: www.europarl.europa.eu/doceo/document/P-9-2021-001112-ASW_EN.pdf.

9 Government of the United States, “Joint Statement by the Federal Bureau of Investigation (FBI), the Cybersecurity and Infrastructure Security Agency (CISA), the Office of the Director of National Intelligence (ODNI), and the National Security Agency (NSA)”, 5 January 2021, available at: www.cisa.gov/news/2021/01/05/joint-statement-federal-bureau-investigation-fbi-cybersecurity-and-infrastructure.

10 White House, “Fact Sheet: Imposing Costs for Harmful Foreign Activities by the Russian Government”, 15 April 2021, available at: www.whitehouse.gov/briefing-room/statements-releases/2021/04/15/fact-sheet-imposing-costs-for-harmful-foreign-activities-by-the-russian-government/.

11 “‘Flattered’ Russian Spy Chief Denies SolarWinds Attack”, *Reuters*, 18 May 2017, available at: www.reuters.com/technology/russian-spy-chief-denies-svr-was-behind-solarwinds-cyber-attack-bbc-2021-05-18/.

time of writing, months after the hack was revealed, the full extent of the damage cannot yet be completely mapped. Indeed, according to the CEO of FireEye, Kevin Mandia, the hackers prioritized stealth above all else.¹² It has been estimated that recovering from the SolarWinds hack could take up to eighteen months.¹³

It has also been reported that “[w]hile the SolarWinds hack primarily targeted in-house infrastructure, the breach has morphed into a multidimensional assault on key computing infrastructure, including cloud services”.¹⁴ Indeed, it appears that breaching large-scale cloud providers, such as Microsoft,¹⁵ was a primary objective of the operation,¹⁶ and this in turn exposed the customers of such providers to data breaches. Microsoft’s president, Brad Smith, has suggested that more than 80% of the victims subsequently targeted were non-government organizations.¹⁷ Microsoft source code was also accessed,¹⁸ and it appears that SolarWinds hackers also accessed the US Justice Department’s Microsoft Office 365 email environment.¹⁹

Supply chain attacks and their challenges

A supply chain attack occurs when hackers infiltrate a victim’s IT systems through an outside partner or vendor that provides components of the system, ranging from silicon chips to software applications.²⁰ In recent years the attack surface of IT systems has drastically increased due to their increased complexity and that of their supply chains.²¹ Broadly speaking, there are two types of supply chain

12 Lucian Costantin, “SolarWinds Attack Explained: And Why It Was so Hard to Detect”, *CSO*, 15 December 2020, available at: www.csoonline.com/article/3601508/solarwinds-supply-chain-attack-explained-why-organizations-were-not-prepared.html.

13 Patrick Howell O’Neill, “Recovering from the SolarWinds Hack Could Take 18 Months”, *MIT Technology Review*, 2 March 2021, available at: www.technologyreview.com/2021/03/02/1020166/solarwinds-brandon-wales-hack-recovery-18-months/.

14 Alicia Hope, “Cloud Services from Major Providers Including Amazon and Microsoft Vulnerable to the Widespread SolarWinds Hack”, *CPO Magazine*, 4 January 2021, available at: www.cpomagazine.com/general/cloud-services-from-major-providers-including-amazon-and-microsoft-vulnerable-to-the-widespread-solarwinds-hack.

15 Scott Ikeda, “Hackers Behind SolarWinds Supply Chain Attack Targeted CrowdStrike through Microsoft Vendor’s Account”, *CPO Magazine*, 31 December 2020, available at: www.cpomagazine.com/general/hackers-behind-solarwinds-supply-chain-attack-targeted-crowdstrike-through-microsoft-vendors-account.

16 *Ibid.*

17 Katie Canales, “The US Senate Just Grilled Microsoft and SolarWinds Over Last Year’s Historic Cyberattack. Here’s What Happened”, *Insider*, 23 February 2021, available at: www.businessinsider.com/watch-live-senate-hearing-solarwinds-microsoft-fireeye-crowdstrike-cyberattack-2021-2.

18 Ravie Lakshmanan, “Microsoft Says SolarWinds Hackers Accessed Some of Its Source Code”, *The Hacker News*, 31 December 2020, available at: <https://thehackernews.com/2020/12/microsoft-says-solarwinds-hackers.html>.

19 *Ibid.*

20 Maria Korolov, “Supply Chain Attacks Show Why You Should Be Wary of Third-Party Providers”, *CSO*, 4 February 2021, available at: www.csoonline.com/article/3191947/supply-chain-attacks-show-why-you-should-be-wary-of-third-party-providers.html.

21 Krontech, “The Increasing Attack Surface in 2019”, 15 April 2019, available at: <https://krontech.com/the-increasing-attack-surface-in-2019>.

attack, software and hardware, though the underlying technological infrastructure is much more complex in practice.²² The SolarWinds hack is a perfect example of supply chain attacks where the hackers attack the software applications of the systems. Other examples of this kind of operation, which has been prevalent for many years, include dependency confusion attacks,²³ a type of software supply chain attack that relies on the dependencies inherent in software development processes, discovered by bug hunter Alex Birsan. For many package managers (such as npm and pip), the catalogue of dependencies for software can be a mix of public and private dependencies, which causes ambiguity when there exist both public and private packages with the same name. Some package managers default to public packages over private ones upon a name conflict. By exploiting this, the hackers can upload their malicious package to the package manager registry with the same name as some private packages used by the victim's software. The victim will run the malicious code directly on its local environment upon software build. As explained in Birsan's blog, this vulnerability enabled him to hack into systems belonging to Apple, Microsoft and other major tech companies without much effort.²⁴

Examples of hardware supply chain hacks include the Supermicro hack.²⁵ According to a Bloomberg report, Chinese hackers planted, during the manufacturing phase, small compromised chips on Supermicro motherboards²⁶ that were destined to be used in US government data centres as well as in the data centres of large cloud technology companies. The chips in question contained a backdoor programmed to send data back to the hackers. While, according to the Bloomberg report, both Supermicro and China separately deny the allegations, the elements reported by Bloomberg describe a useful illustration of a scenario of a possible hack on the hardware level of the supply chain. Another known example of a supply chain attack relates to Crypto AG, a Swiss company supplying States with hardware devices for encrypting confidential communications. As revealed in a Swiss parliamentary investigation in 2020, Crypto AG machines included secret backdoors to US intelligence services which provided Crypto AG with full access to the content of the communications.²⁷

22 "Layers of Computing Systems", *David 'n' CS*, 1 September 2016, available at: <https://davidnics.wordpress.com/2016/09/01/featured-content-2/>.

23 Alex Birsan, "Dependency Confusion: How I Hacked into Apple, Microsoft and Dozens of Other Companies", *Medium*, 9 February 2021, available at: <https://medium.com/@alex.birsan/dependency-confusion-4a5d60fec610>.

24 *Ibid.*

25 Jordan Robertson and Michael Riley, "The Long Hack: How China Exploited a US Tech Supplier", *Bloomberg*, 12 February 2021, available at: www.bloomberg.com/features/2021-supermicro/.

26 Linsey Knerl, "What Does a Motherboard Do?", *HP*, 17 October 2019, available at: www.hp.com/us-en/shop/tech-takes/what-does-a-motherboard-do.

27 Greg Miller, "The Intelligence Coup of the Century", *Washington Post*, 11 February 2020, available at: www.washingtonpost.com/graphics/2020/world/national-security/cia-crypto-encryption-machines-espionage/.

As US public-interest technologist Bruce Schneier, speaking from a US perspective, explains:

Supply-chain security is an incredibly complex problem. US-only design and manufacturing isn't an option; the tech world is far too internationally interdependent for that. We can't trust anyone, yet we have no choice but to trust everyone. Our phones, computers, software and cloud systems are touched by citizens of dozens of different countries, any one of whom could subvert them at the demand of their government.²⁸

Humanitarian security in cyberspace

Humanitarian organizations have growing digital footprints and are increasingly dependent on the international supply chains that the SolarWinds hack has exposed as vulnerable. As described by this author in a previous contribution for the *Review*,²⁹ there are several key operational, technical, organizational and legal elements that an international humanitarian organization should consider when increasing its footprint in the cyber sphere, and it is important for humanitarian organizations to clearly address these elements in a cyber security strategy. The key starting point in the development of a cyber security strategy for a humanitarian organization is an analysis of the cyber environment within which the organization operates and the challenges and threats it faces therein. In addition, in developing a cyber security strategy, humanitarian organizations should take into account that the principles of humanity, neutrality, impartiality and independence, as well as humanitarian working modalities developed over the years to enable humanitarian work, require strategic transposal in order to reflect such organizations' presence and activities in cyber space, deriving, for example, from the offering of humanitarian services to affected communities digitally.³⁰

In addition to these elements, and as will be seen further in this article, it is argued that, in developing a cyber security strategy, it is important for humanitarian organizations to take into account three specific dimensions of the cyber environment in which they operate. The first of these is the challenges that international organizations face in maintaining exclusive "jurisdictional control" over their data due to the complexity and interconnectedness prevalent in cyberspace. The second is the challenges of applying the humanitarian principles through which organizations like the ICRC have garnered trust and access in the real world to cyberspace. What lessons can be drawn from the attempts to mitigate security risks in environments characterized by conflict and other

28 Bruce Schneier, "Supply-Chain Security", *Security Boulevard*, 10 May 2018, available at: <https://securityboulevard.com/2018/05/supply-chain-security/>.

29 Massimo Marelli, "Hacking Humanitarians: Defining the Cyber Perimeter and Developing a Cyber Security Strategy for International Humanitarian Organizations in Digital Transformation", *International Review of the Red Cross*, Vol. 102, No. 913, 2020.

30 *Ibid.*

situations of violence – threats which may come from State and non-State actors alike? The third dimension is the broader geopolitical cyber environment in which international humanitarian organizations operate. Parallels emerge with the power struggles that often underlie the conflicts to which humanitarians respond, and the very real risk of being caught in the crossfire.

“Data sovereignty” and “digital sovereignty”: Tools for protecting humanitarian principles in cyberspace

The privileges and immunities enjoyed by international humanitarian organizations are an essential means of ensuring the neutrality and independence of their humanitarian action, which is the basis for trust on the part of the communities they serve. Anything that calls into question the neutrality and independence of organizations like the ICRC threatens to undermine that trust, which in turn jeopardizes the viability of operations on the ground and access to those in need of assistance. The security and confidentiality of information given to the ICRC in confidence, for example by detainees or parties or witnesses to a conflict, is fundamental to maintaining the trust that the organization has built up over 150 years. Accordingly, how can the ICRC maintain that trust when operating in digital environments, with incidents like the SolarWinds hack demonstrating how vulnerable the IT systems that international entities use can be?

These challenges are not unique to the ICRC, of course. States, public bodies and multinational enterprises face similar challenges. Some States have responded by asserting the need for “data sovereignty” or “digital sovereignty”.³¹ Both of these concepts imply a problematic technological dependency embedded in unwarranted or undesirable international relations, yet for the most part they are rarely defined or unpacked. And despite implying distinct types of sovereignty, these terms are often used interchangeably, without reference to how one concept might be distinguished from the other. It is therefore instructive to try to disentangle these terms.

While the notions of data sovereignty and digital sovereignty have a very different meaning from the notion of sovereignty under international law, they borrow loosely from the international law notion of the territorial sovereignty of a State: “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”³² This brings a connotation of control over the use of data and digital infrastructure. Data sovereignty would appear to indicate that a State (or an international

31 See, for example, Marie Baezner and Patrice Robin, “Cyber Sovereignty and Data Sovereignty”, ETH Zürich Research Collection, 2018, available at: <https://doi.org/10.3929/ethz-b-000314613>; Stéphane Couture, “The Diverse Meanings of Digital Sovereignty”, *Global Media Technologies & Cultures Lab*, 5 August 2020, available at: <https://globalmedia.mit.edu/2020/08/05/the-diverse-meanings-of-digital-sovereignty/>; Patrik Hummel, Matthias Braun, Max Tretter and Peter Dabrock, “Data Sovereignty: A Review”, *Big Data & Society*, Vol. 8, No. 1, 2021.

32 Permanent Court of Arbitration, *Island of Palmas Case (or Mianga)*, *United States v Netherlands*, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4 April 1928.

organization) can exercise full control over the data it processes (which are not in the public domain), to the exclusion of any (other) entity. In other words, no other State may by application of law seek and obtain the data of the “data sovereign”. For the avoidance of doubt, the notion of sovereignty is used analogously, since international organizations obviously do not enjoy territorial sovereignty. Rather, an international organization may seek to leverage the privileges and immunities it enjoys, including the inviolability of its correspondence and archives and its immunity from jurisdiction, in combination with other organizational and technical measures to achieve “exclusive control” over data. As suggested elsewhere,³³ international organizations can seek to ensure exclusive control through a combination of legal, technical and organizational measures.³⁴

While the notion of data sovereignty helps to crystalize the challenges faced by States and international organizations in transnational environments like the contemporary Internet, it is not comprehensive enough to capture the challenges posed by supply chain attacks like SolarWinds. Put another way: even if by a combination of legal, technical and organizational measures an organization manages to establish exclusive control over the data it processes, largely addressing concerns over possible loss of control through exercise of legal process, a lack of control over its supply chain leaves it exposed to additional risks and vulnerabilities. Data sovereignty, it appears, needs to be complemented by a more nuanced strategic approach, which could be encapsulated by the notion of digital sovereignty.

Like data sovereignty, digital sovereignty³⁵ is difficult to define. It appears to imply a broader form of “sovereign” control that covers not just data but also the hardware and software supply chains, as mentioned above, as well as network infrastructure (cables, routers and switches) and the communications supply chain. The concept of digital sovereignty does not necessarily mean that a State or an international organization can produce or have total control over all of the above, in a “digital autarky” sense: considering the level of dependencies and interconnectedness of cyberspace today, this may well be beyond the reach of even the most powerful and sophisticated stakeholders in cyberspace who have strategically been investing huge resources precisely for this purpose.³⁶ Indeed, the enormity of these challenges may even call into question the appropriateness of using the term “digital sovereignty” in the first place, when the most that can realistically be achieved may be “digital independence”. But just as data sovereignty is helpful in understanding challenges, vulnerabilities and

33 M. Marelli, above note 29.

34 Linked to this is the notion of the “sovereign cloud” – i.e., a cloud architecture in which data sovereignty can be respected and applied. See Christopher Kuner and Massimo Marelli, *Handbook on Data Protection in Humanitarian Action*, 2nd ed., ICRC, Geneva, 2020, Chap. 10.9, available at: www.icrc.org/en/data-protection-humanitarian-action-handbook.

35 European Commission, “Europe: The Keys to Sovereignty”, 11 September 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/breton/announcements/europe-keys-sovereignty_en.

36 See, for example, Henry Farrell and Abraham L. Newman, “Weaponized Interdependence: How Global Economic Networks Shape State Coercion”, *International Security*, Vol. 44, No. 1, 2019.

international relations, digital sovereignty as a term points to the underlying fundamental objective of asserting control and exercising discretion in the choice and use of digital tools and infrastructures, pointing in other words to the importance of managing and mitigating “digital dependencies”, and over-dependencies in particular.

While ensuring data sovereignty would already be a major success for any international humanitarian organization, because it would enable a response to most of the digital challenges identified so far, the recent SolarWinds hack highlights that this analysis should perhaps be taken one step further. International humanitarian organizations ought to give attention to their digital sovereignty too.

It is argued that carefully analyzing the application of the notion of digital sovereignty to the work of humanitarian organizations may provide these organizations with security assets that are linked to, and exist because of, their unique status, and that can be relied on in addition to and beyond what technical security measures alone can offer. In the humanitarian sector, the reaction to cyber attacks such as the SolarWinds hack is often defeatist: if the most renowned government agencies and security companies cannot protect themselves from cyber attacks and surveillance, is it even worth it for a humanitarian organization to try to protect itself? Another common reaction is to lean even more on cyber security “professionals”, tech giants and “hyperscalers” equipped with very significant resources and skilled workforces. Both reactions, however, fail to take into account the fact that security is not an absolute concept and that it depends on the vulnerabilities, threats, assets and opportunities of each organization.

The SolarWinds hack has shown us that even the best-resourced, tech-giant-backed security teams, such as those of some of the companies that relied on SolarWinds, can fail in protecting their customers, and that, precisely because they serve so many customers, it does not matter who the target is: every organization using affected cloud services becomes vulnerable, and a potential victim of the attack—and that includes humanitarian organizations. Yet, some humanitarian organizations have specific “security enablers” that other organizations do not have. For instance, the security enablers of the ICRC include the recognition of a specific mandate under international law to pursue its exclusively humanitarian mission, and the trust and acceptance generated by its principles of neutrality, impartiality and independence, as well as operating modalities based on (among others) confidentiality and bilateral confidential dialogue. The ICRC is used to leveraging these principles and operating modalities for its own security in the physical world, and like other international humanitarian organizations, it needs to transpose this way of working to the cyber world.³⁷

37 Massimo Marelli, “Hacking Humanitarians: Moving Towards a Humanitarian Cybersecurity Strategy”, *Humanitarian Law and Policy Blog*, 16 January 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/01/16/hacking-humanitarians-cybersecurity-strategy/>.

Ensuring the security of humanitarian actors in cyberspace

For over 150 years, the ICRC has been operating in conflict areas that are increasingly fragmented, polarized, volatile and difficult to read, where technical innovation has often brought important challenges. The ICRC has therefore been keenly aware of the vulnerable situation it is in. Specific security rules consider that in some places, walking down the street or in a market could be too dangerous; staff could get abducted or sometimes even killed simply because they are foreigners and/or they work for a humanitarian organization. In those cases, security rules provide for movement restrictions, and staff are not allowed to leave the compound of the organization unless specific security measures are in place. It is also possible that vehicles of the organization, moving in order to deploy and run its activities, may hit an improvised explosive device or be attacked, possibly by accident. Therefore, security rules provide for restrictions of movement along specifically greenlighted routes, notifying all the parties to the conflict or actors involved in a situation of violence about the anticipated movement in the area, and marking the organization's vehicles very visibly with emblems and flags in order for them to be recognized from afar.

This approach also relies on the assumption that a very important protective asset that humanitarians working amid conflict and violence can have and rely on is the trust and acceptance of warring parties, local authorities and populations.

The notion that the security of humanitarian staff is linked to trust and perceptions of neutrality, impartiality and independence is indeed one of the pillars of security for organizations like the ICRC. Acceptance is a key pillar of security that highlights the need to be politically, operationally and culturally accepted as a neutral, impartial and humanitarian actor by all relevant stakeholders—it is an essential operational modality that contributes to access and security. Specific security rules are therefore in place to ensure that humanitarian workers demonstrate at all times the humanity, neutrality, impartiality and independence that may grant them the trust and acceptance (or at least tolerance) of all relevant stakeholders.

This principled approach is further reinforced by a risk management-based security system that provides practical guidance for field staff as it navigates the acceptance–rejection sliding scale on a daily basis. This includes making sure that humanitarian personnel do not become “collateral damage” to an attack. For example, the ICRC would generally not locate an office within, or in proximity to, a military base. Nor would, in principle, an ICRC office or ICRC staff be protected by military personnel of one of the two parties to a conflict or actors in a situation of violence, as this would negatively affect its perception as a neutral and impartial humanitarian actor. It is for instance a common practice that humanitarian vehicles in transit must drive at a safe distance from military convoys.

While a parallel between the physical world and cyberspace is not straightforward and may be imperfect, there are reasons to consider that a similar

approach—even if more technically challenging—could be transposed to cyberspace. By depending too much on the technology solutions, systems and networks that are increasingly recognized as compromising digital sovereignty, a humanitarian organization runs the risk of going against the logic of the security rules and principles mentioned above.

While it may be stretching things to suggest that the use of or dependence on these tools calls into question a humanitarian organization’s neutrality, impartiality and independence, and in turn has an impact on its acceptance (or tolerance) and its security, it is simply a fact that the use of and dependence on these tools makes a humanitarian organization vulnerable to attacks aimed at the great powers that rely on them—just as a humanitarian organization could be the victim of a rocket attack on a military base if it had its office physically located within the base.

It may be that the “classic” humanitarian approach to security as set out above is not fully suitable for the digital sphere. But the above analysis does highlight that alternative approaches need to be looked for and considered, whether these may lead to already available tools and solutions or, more likely, to new tools that need to be designed and built.

Humanitarians in the crossfire?

The SolarWinds attack is merely the latest manifestation of what is currently unfolding in cyberspace: a competition between the “great powers”. David Kilcullen and others have analyzed this power struggle, including in cyberspace, stressing that what is at stake is not a series of isolated, one-off cyber incidents of a criminal nature, but a worldwide and increasingly strategic use of cyberspace to assert influence, and dominance, by global powers.³⁸

Any international humanitarian organization that operates in a complex and volatile conflict environment on the basis of neutrality, impartiality and independence must remain alert to these geopolitical dynamics, since they have an impact on the physical world in which such organizations function. As a result, these organizations need to ground their planning in a robust strategy that captures the implications of the great powers’ competition, and in this respect, what works for a multinational corporation may not necessarily work for an international humanitarian organization.³⁹

Against the backdrop of these global tensions among the major cyber powers, one could ask whether using the same digital supply chain as one of the key stakeholders, and counting on the security it provides, brings a humanitarian organization dangerously close to the physical-world parallel of positioning offices within or near a military base. While the infrastructure of the base may

38 David Kilcullen, *The Dragons and the Snakes: How the Rest Learned to Fight the West*, Oxford University Press, New York, 2022.

39 M. Marelli, above note 37.

look reassuring, relying on it may affect the perception that other stakeholders have of the organization's neutrality, impartiality and independence. It cannot be excluded that this, in turn, may affect the trust and acceptance that enables the organization to deliver on its exclusively humanitarian mandate. Even if the perception of the organization's neutrality, impartiality and independence is not affected, it could find itself caught in the crossfire if the military base is attacked, simply because of its proximity to the target.

While examining the threats from this angle takes into account just one of the many risks that hackers may pose, it does provide an important additional security enabler to leverage for protection from possible cyber operations by States and State-sponsored groups, or by non-State armed groups participating in the great powers' competition dynamics. Arguably these are the more powerful, and well-resourced, types of attackers.

Tackling the challenge: Forward-looking proposals

Given the challenges laid out above, one question is pivotal: are there any alternatives to relying on the same supply chain as that which is used by possible targets?

The answer, unfortunately, is: not yet. There is no viable alternative for the entire stack of technology supporting the humanitarian cyber infrastructure, from hardware, to software, to networks, and beyond. The digital infrastructures we are using today have become increasingly complex. Digital systems are made of hardware and software that can be infiltrated in various ways, in particular on the supply chain. Indeed, according to former CIA and NSA director Michael Hayden, supply chain threats are not "a problem that can be solved" but "a condition that you have to manage".⁴⁰

In this sense, digital sovereignty can be seen as a risk management problem with respect to digital supply chain threats. The asset at risk is an organization's digital infrastructure, including both software and hardware, but eventually also the organization's ability to carry out its mandate and mission. A successful strategy around digital sovereignty is therefore one that consists of the continuous assessment and management of risks related to the digital supply chain.

Risk mitigation tools from within the supply chain

There are several avenues being explored and worked on that can be useful as risk mitigation tools in this area. These avenues make sense for all organizations and are not of exclusive relevance for impartial humanitarian organizations, but they are ones that an organization of this type, having identified the supply chain as a particularly delicate area, may wish to consider as a priority.

40 Adam Rawnsley, "Can Darpa Fix the Cybersecurity 'Problem from Hell'?", *Wired*, 8 May 2011, available at: www.wired.com/2011/08/problem-from-hell/.

The first one is based on the notion that, even if each digital component on its own cannot be fully trusted, it is possible to build trustworthy and resilient systems out of untrustworthy components. As security researcher Bruce Schneier has explained:

The other solution is to build a secure system, even though any of its parts can be subverted. ... [C]an we solve [supply chain issues] by building trustworthy systems out of untrustworthy parts? It sounds ridiculous on its face, but the Internet itself was a solution to a similar problem: a reliable network built out of unreliable parts. This was the result of decades of research. That research continues today, and it's how we can have highly resilient distributed systems like Google's network even though none of the individual components are particularly good. It's also the philosophy behind much of the cybersecurity industry today: systems watching one another, looking for vulnerabilities and signs of attack.⁴¹

In other words, minimize trust to maximize trustworthiness.⁴² “Zero trust” is an approach that goes in this direction. The National Institute of Standards and Technology (NIST) refers to the notion of “zero trust” as “a collection of concepts and ideas designed to minimize uncertainty in enforcing accurate, least privilege per-request access decisions in information systems and services in the face of a network viewed as compromised”.⁴³ The main principles and technologies behind zero-trust security involve an assumption that an attacker could be both within and outside of the network, and that users within a network should not be assumed to be trusted. They include least-privilege access, microsegmentation, multi-factor authentication, and strict controls on device access.⁴⁴

Many new technologies like distributed ledgers,⁴⁵ homomorphic encryption⁴⁶ and confidential computing⁴⁷ are designed to work under this assumption of a hostile environment. While their application would be very useful in enabling trust in an untrusted environment, some of these technologies are not yet mature enough to be fully deployed, and they are still being explored in research and development mode. It is therefore important to invest in partnerships to further leverage these advances in technology, such as the

41 Bruce Schneier, “Every Part of the Supply Chain Can Be Attacked”, *New York Times*, 25 September 2019, available at: www.schneier.com/essays/archives/2019/09/every_part_of_the_su.html.

42 David Basin, Patrick Schaller and Michael Schlöpfer, *Applied Information Security: A Hands-On Approach*, Springer, Berlin, 2011.

43 Scott W. Rose, Oliver Borchert, Stu Mitchell and Sean Connelly, *Zero Trust Architecture*, NIST Special Publication 800-207, August 2020, p. 4, available at: www.nist.gov/publications/zero-trust-architecture.

44 Cloudflare, “Zero Trust Security: What Is a Zero Trust Network?”, available at: www.cloudflare.com/learning/security/glossary/what-is-zero-trust/.

45 “Distributed Ledger”, *Wikipedia*, available at: https://en.wikipedia.org/wiki/Distributed_ledger.

46 Microsoft, “Homomorphic Encryption”, 27 March 2016, available at: www.microsoft.com/en-us/research/project/homomorphic-encryption/.

47 Azure, “Azure Confidential Computing”, available at: <https://azure.microsoft.com/en-us/solutions/confidential-compute/>.

partnerships that the ICRC recently launched with the Swiss Federal Institutes of Technology in Lausanne⁴⁸ and Zurich.⁴⁹

In addition, establishing security standards for hardware and software can contribute to mitigating risks linked to supply chains. In its early days, aviation was also a sector that involved high risks; little or no governance was in place to guarantee the safety of aircraft, and passengers flew at their own risk.⁵⁰ Today, the aviation industry is subject to extensive quality norms and testing requirements, and aircraft manufacturers are held accountable for defects found in the aircraft. Similarly, investing in the creation of minimum security standards for hardware and software, and holding suppliers accountable for violations of these standards, could go a long way in mitigating supply chain security risks.

Another key avenue in the mitigation of digital supply chain risks is the removal of strong supplier dependencies. In terms of digital sovereignty, vendor lock-in without the possibility of moving from one vendor to another—for example, because of product incompatibilities, lack of interoperability or portability, or because there may be no alternative in the market—is a major concern. Such dependencies bear various risks: if the vendor goes out of business, it can no longer provide support for its products or patches to address discovered vulnerabilities. Also, the vendor can suddenly change its policies and pricing to the detriment of the customer, or even stop delivering its products and services as a form of digital sanction.

To address the risks linked with vendor dependencies of this type, free and open-source alternatives can be considered. An interesting initiative in this respect was the MALT Project at the European Organization for Nuclear Research (CERN),⁵¹ which was aimed at implementing a strategy to seek “open software solutions and products with simple exit strategies and low switching costs”. Free and open-source software (FOSS)⁵² can be seen as a method for mitigating dependencies; it is usually developed through the collaboration of an open community, and can be publicly reviewed and modified, and used for any purpose.⁵³ However, it should be noted that FOSS comes with its own supply chain risks, and under the cover of improvements, malicious contributors can

48 EPFL, “EPFL, ETH Zurich and the ICRC Team Up to Bolster Humanitarian Aid”, 10 December 2020, available at: <https://actu.epfl.ch/news/epfl-eth-zurich-and-the-icrc-team-up-to-bolster-hu/>.

49 ETH Zürich, “Engineering at the Service of Humanitarian Aid”, 10 December 2020, available at: <https://ethz.ch/en/news-and-events/eth-news/news/2020/12/cooperation-icrc.html>.

50 Digital Switzerland, *Supply Chain Security*, 26 September 2019, p. 14, available at: https://digitalswitzerland.com/wp-content/uploads/2021/08/White_Paper_Supply_Chain_Security_2019_09_25_EN.pdf.

51 Andrew Purcell, “Three-Year MALT Project Comes to a Close”, CERN, 17 January 2022, available at: <https://home.cern/news/news/computing/three-year-malt-project-comes-close>.

52 The term “free” refers not to the price of a product but to “freedom”. Many prefer to use the term “free/libre and open-source software” (FLOSS) to clear up the ambiguity. See Richard Stallmann, “FLOSS and FOSS”, *GNU Operating System*, available at: www.gnu.org/philosophy/floss-and-foss.en.html.

53 Albeit still being subject to licenses. See, for instance, Open Source Initiative, “Licenses & Standards”, available at: <https://opensource.org/licenses>; Janelia Farm FlyEM Project, “Open Source Licenses and Their Compatibility”, available at: <https://janelia-flyem.github.io/licenses.html>.

propose changes that leave a backdoor in the software,⁵⁴ as mentioned above with reference to Birsan’s study. Moreover, the amount of support and security that can be provided for FOSS often depends on the size and expertise of the contributing open-source community.

A complementary concept to open hardware and open-source software is open standards. Open standards are standards that do not prohibit the creation of conforming open-source implementations.⁵⁵ Open standards in turn give open-source implementations the guidance and interface specifications needed to be portable and interoperable.⁵⁶ Even beyond FOSS, open standards can prevent vendor lock-in, simply because they are not proprietary and can be used by other vendors as well.⁵⁷ The Internet Engineering Task Force (IETF),⁵⁸ with the help of other organizations, produces and maintains many open standards in so-called Requests for Comments (RFCs). RFCs are a series of documents that contain technical and organizational notes about the Internet; some of them become standards.

When open standards or open-source alternatives to proprietary solutions are not available or not satisfactory, diversifying the digital supply chain can reduce the impact of vendor dependence and improve overall supply chain resilience.⁵⁹

The ICRC and “cyber crossfire”

The risk of “cyber crossfire” for a neutral, impartial and independent humanitarian organization like the ICRC, within the global competition between the great powers, has been mentioned above. In the area of supply chain attacks, it involves the risk of an organization becoming a victim of collateral damage, or having its systems exposed to attacks targeted at a different entity, due to its reliance on the same digital supply chain as that of the target of the operation. In the physical world, the ICRC would not open an office close to a military installation because military installations are obvious (and under certain conditions lawful) targets for enemy forces in armed conflicts. In the same vein, in the digital world, risk assessment for digital procurement should consider the risk of suppliers, or a particular piece of software or hardware, being targeted because they are used by other customers, who may be (lawful or unlawful) targets of cyber operations.

54 Ravie Lakshmanan, “PHP’s Git Server Hacked to Insert Secret Backdoor to Its Source code”, *The Hacker News*, 28 March 2021, available at: <https://thehackernews.com/2021/03/phps-git-server-hacked-to-insert-secret.html>.

55 “What Are Open Standards?”, *Opensource.com*, available at: <https://opensource.com/resources/what-are-open-standards>.

56 Jon Siegel and Richard Mark Soley, “Open Source and Open Standards: Working Together for Effective Software Development and Distribution”, *Technology Innovation Management Review*, November 2008, available at: <https://timreview.ca/article/207>.

57 Andy Gower, “Open Standards vs Open Source: A Basic Explanation”, IBM, 2 April 2019, available at: www.ibm.com/blogs/cloud-computing/2019/04/02/open-standards-vs-open-source-explanation/.

58 See the IETF standards and mission, available at www.ietf.org/standards/ and www.ietf.org/about/mission/ respectively.

59 Sarah Hippold, “Diversifying Global Supply Chains for Resilience”, Gartner, 4 February 2021, available at: www.gartner.com/smarterwithgartner/diversifying-global-supply-chains-for-resilience/.

This may be an element to militate for a more “independent” supply chain, or a supply chain that has less dependencies and therefore provides its users with more “sovereignty”.

On the other hand, suppliers who serve other customers, including customers active in regulated business sectors or business sectors involving sensitive information handling, or who handle critical infrastructure, such as suppliers offering public cloud services, may be more likely to have very high security measures in place—even if the SolarWinds hack proved that this is far from a straightforward assumption.⁶⁰ Ultimately, therefore, the choice of supplier and supply chain for an impartial humanitarian organization may need to take into account, in addition to all the elements listed in the section above, a trade-off between the benefit of enjoying the alleged higher security standards of “industrial” suppliers and the risk of cyber crossfire.

The assessment of digital supply chain risks, therefore, starts by identifying the potential threats and threat actors that apply specifically to each individual organization, and by analyzing the available mitigating measures in respect of each of those threats and threat actors. Threat actors range from unskilled actors who take advantage of well-known, unpatched software vulnerabilities through ready-to-use exploitation tools,⁶¹ to States and State-sponsored groups with access to zero-day exploits,⁶² the ability to interfere with products of vendors under their jurisdiction⁶³ and even the resources to combine cyber tools with human intelligence.⁶⁴

In analyzing how to address risks arising from each of these threat actors, it may be established, for example, that the impartial humanitarian organization in question is not specifically on the radar of “script kiddies”, and the organization, vis-à-vis those actors, is in neither a better nor a worse position than any company trying to protect itself from them. Yet the more limited capabilities of these threat actors may mean that the risks represented by them may be adequately addressed with state-of-the-art cyber hygiene, whether in an “industrial” and allegedly more secure supply chain or in a more “independent” or “sovereign” supply chain. On the other hand, as far as more capable threat vectors such as State or State-sponsored attackers are concerned, it may not be possible to effectively defend an organization from attacks originating from them if they really invest resources into developing an attack.

60 David E. Sanger, Nicole Periroth and Julian E. Barnes, “As Understanding of Russian Hacking Grows, So Does Alarm”, *New York Times*, 28 May 2021, available at: www.nytimes.com/2021/01/02/us/politics/russian-hacking-government.html.

61 Alpine Security, “7 Steps to Hack a Target with Virtually No Experience”, available at: <https://alpinesecurity.com/blog/7-steps-to-hack-a-target-with-virtually-no-experience/>.

62 Project Zero, “Introducing the In-the-Wild Series”, available at: <https://googleprojectzero.blogspot.com/2021/01/introducing-in-wild-series.html>.

63 Arjun Kharpal, “Huawei Says It Would Never Hand Data to China’s Government. Experts Say It Wouldn’t Have a Choice”, *CNBC*, 4 March 2019, available at: www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html.

64 David Kushner, “The Real Story of STUXNET”, *IEE Spectrum*, 26 February 2013, available at: <https://spectrum.ieee.org/telecom/security/the-real-story-of-stuxnet>.

The ICRC can, however, leverage a number of unique protection assets that other organizations do not have, such as public international law relating to international organizations,⁶⁵ international humanitarian law,⁶⁶ and—beyond what is provided under international humanitarian law in times of armed conflict—the respect by all States for the neutrality, impartiality and independence of the organization and the respect for the solely humanitarian nature of its work, as enshrined, for example, in Article 2 of the Statutes of the International Red Cross and Red Crescent Movement.⁶⁷ The ICRC can thus leverage its widespread acceptance and the protection it enjoys under the provisions mentioned above, also in the digital world; however, there are two essential preconditions for this.

The first precondition, just as would be the case outside the cyber paradigm, is the fact that a humanitarian organization needs to be capable of credibly anticipating, detecting (ideally preventing) and, very importantly, understanding who is responsible for possible adverse cyber operations likely to affect the organization. The challenges around attribution are many, and very significant.⁶⁸ In public discourse, attribution of cyber operations is often associated with public attribution by States, accompanied, in many cases, by State responses such as sanctions and indictments. There are several reasons why States use public attribution as a key part of an integrated national security policy response.⁶⁹ This State-specific angle is outside of the scope of this article and is analyzed in detail elsewhere.⁷⁰ What matters, in the framework of the present analysis, is not so much attribution as such, but the capacity for an organization to identify the likely source of an adverse cyber operation, as a necessary condition to enable the organization to continue its bilateral confidential dialogue with its interlocutors⁷¹—simply put, to allow the organization to know who to talk to. From the angle of an actor that may be considering directing an operation against a humanitarian organization, this is also likely to have a deterrent effect, since that actor will know that the operation will not go undetected. Beyond identification of the origin of a cyber operation as an enabler of bilateral confidential dialogue, public attribution by States concerning an operation affecting the ICRC can also have a significant deterrent effect, as it can put the

65 “Scenario 04: A State’s Failure to Assist an International Organization”, *Cyber Law Toolkit*, available at: https://cyberlaw.ccdcoe.org/wiki/Scenario_04:_A_State’s_failure_to_assist_an_international_organization.

66 Tilman Rodenhäuser, “Hacking Humanitarians? IHL and the Protection of Humanitarian Organisations against Cyber Operations”, *EJIL: Talk!*, 16 March 2020, available at: www.ejiltalk.org/hacking-humanitarians-ihl-and-the-protection-of-humanitarian-organizations-against-cyber-operations/.

67 Statutes of the International Red Cross and Red Crescent Movement, Adopted at the 25th International Conference of the Red Cross and Red Crescent, Geneva, 1986 (amended 1996 and 2006), available at: www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf.

68 Florian J. Egloff, “Public Attribution of Cyber Intrusions”, *Journal of Cybersecurity*, Vol. 6, No. 1, 2020.

69 *Ibid.*, p. 3.

70 *Ibid.*

71 ICRC, “The International Committee of the Red Cross’s (ICRC’s) Confidential Approach: Specific Means Employed by the ICRC to Ensure Respect for the Law by State and Non-State Authorities: Policy Document”, *International Review of the Red Cross*, Vol. 94, No. 887, 2012, available at: <https://international-review.icrc.org/sites/default/files/irrc-887-confidentiality.pdf>.

spotlight of the international community on conduct that would likely attract significant stigma, and that may in some circumstances amount to a violation of international law. In other words, and again, the basis for the security approach outlined above is based on deterrence deriving from the fact that if a hack is attempted, it will not go undetected, and the perpetrator will be identified.

The second precondition is the capacity to carry out in cyberspace the same extensive work of prevention, dissemination and dialogue with weapons bearers that the ICRC leverages in the physical world in order to build trust and acceptance, and ensure access. This, in turn, requires a clear mapping of the different types of weapons bearers operating in this space, and an understanding of their drivers, objectives, motives and control structures (or lack thereof).⁷² From this standpoint, a risk mitigation plan would clearly include the development of technical and organizational solutions for ensuring that digital assets belonging to an impartial humanitarian organization, or otherwise used to deliver humanitarian assistance, could be clearly marked and identified as protected.⁷³

Conclusion

Despite the lack of an easy solution, the question of supply chain security remains an important one. The reaction to attacks of the SolarWinds type should not be defeatist, and should instead be to ask: how can we manage and mitigate our dependency on these supply chain systems that have put us in such vulnerable positions in the first place?

The purpose of developing a cyber security strategy should include looking beyond what can be achieved today and tomorrow and identifying areas of possible investment, disinvestment, organizational changes and partnerships, with a clear vision of the landscape in which the organization may find itself in five to ten years both in terms of specific threat actors and the resources and means to deal with them. It is suggested that any strategic decision that considers an organization's unique security assets is one that better enables the organization to deliver on its mandate and mission.

In this sense, what is therefore required is a careful strategy around digital sovereignty, intended, as discussed above, as a careful and deliberate management of the organization's digital dependencies and over-dependencies according to its unique security assets. Such a strategy could involve investment in moving the cursor towards reducing dependencies to the maximum extent that is possible and meaningful, and evolving in an incremental way in this direction over time.

72 M. Marelli, see above note 29.

73 See, for example, Felix E. Linker and David Basin, "Signaling Legal Protection during Cyber Warfare: An Authenticated Digital Emblem", *Humanitarian Law and Policy Blog*, 21 September 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/09/21/legal-protection-cyber-warfare-digital-emblem/>; Antonio De Simone, Brian Haberman and Erin Hahn, "Identifying Protected Missions in the Digital Domain", *Humanitarian Law and Policy Blog*, 23 September 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/09/23/protected-missions-digital-domain/>.

Animals in war: At the vanishing point of international humanitarian law

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Abstract

Animals are the unknown victims of armed conflict. They are regularly looted, slaughtered, bombed or starved on a massive scale during such hostilities. Their preservation should become a matter of great concern. However, international humanitarian law (IHL) largely ignores this issue. It only indirectly, and often ambiguously, provides animals with the minimum protection afforded to civilian objects, the environment, and specially protected objects such as medical equipment, objects indispensable for the survival of civilian population or cultural property. This regime neither captures the essence of animals as sentient beings experiencing pain, suffering and distress, nor takes into account their particular needs during wartime. To address these challenges, two strategies are possible: the first strategy would be to apply existing IHL more effectively to animals, if necessary by creative interpretation in line with the animals' needs. This strategy comprises two options: animals could be included into the categories of combatant/prisoners of war or of civilians. Animals would thus benefit from many guarantees

given to human beings in armed conflict. Alternatively, and perhaps more realistically, animals could be equated with “objects” under IHL, while the relevant rules would be reinterpreted to cater for the fact that animals are living beings, experiencing pain, suffering and distress. The second strategy, which could be envisaged as a long-term objective, would be to adopt a new international instrument specifically aimed at granting rights to animals, notably in relation to prohibiting the use of animals as weapons of war.

Keywords: animals, endangered species, medical equipment, eco-centric protected zones, animal soldiers, prisoners of war, animal rights.

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Introduction

Over the last fifty years warfare has had devastating consequences on many species of animals. Located in fragile ecosystems and precarious habitats – such as certain areas of the Central African Republic, Colombia, the Democratic Republic of the Congo, Iraq or Mozambique – a number of these species, including buffalos, hippopotamuses and elephants have been the direct victims of armed conflicts and, as a consequence, are vanishing at a particularly rapid rate.¹ During this period, many vulnerable animals have been poached by armed groups or State armed forces, which take advantage of the chaos raised by war to engage in the trafficking of expensive animal products.² Livestock and companion animals, highly dependent on human care, have regularly been slaughtered, looted, bombed or starved on a massive scale.³ Millions of animals have served in the military around the world in various capacities.⁴ For instance, horses, donkeys, mules, elephants and camels have been employed to carry heavy loads – such as food, water, ammunition or medical supplies – to soldiers located in war zones. Elephants, dogs and rats have been trained to detect anything from explosives and booby traps to humans buried in rubble.⁵ Dolphins and sea lions have been

- 1 Thor Hanson, Thomas M. Brooks, Gustavo A. B. Da Fonseca, Michael Hoffmann, John F. Lamoreux, Gary Machlis, Cristina G. Mittermeier, Russell A. Mittermeier and John D. Pilgrim, “Warfare in Biodiversity Hotspots”, *Conservation Biology*, Vol. 23, No. 3, 2009, p. 578.
- 2 James McDonald, “How War Affects Wildlife”, *JSTOR Daily*, 23 January 2018, available at: <https://daily.jstor.org/how-war-affects-wildlife/> (all internet references were accessed in February 2022).
- 3 Anne Peters, “Animals in International Law”, in Hague Academy of International Law, *Collected Courses of The Hague Academy of International Law: Recueil des Cours*, Vol. 410, Brill, Leiden, 2020, p. 339.
- 4 See, generally, Jilly Cooper, *Animals in War*, Corgi Books, London, 2000; Rainer Pöppinghege (ed.), *Tiere im Krieg: Von der Antike bis zur Gegenwart*, Brill, Leiden, 2009; Eric Baratay, *Bêtes de tranchées: Des vécus oubliés*, CNRS éditions, Paris, 2013; Ryan Hediger (ed.), *Animals and War: Studies of Europe and North America*, Brill, Leiden, 2013.
- 5 Michael Ray, “Fightin’ Fauna: 6 Animals of War”, *Encyclopedia Britannica*, no date, available at: <https://www.britannica.com/list/fightin-fauna-6-animals-of-war>. On the use of military dogs in the United States, see Sarah D. Cruse, “Military Working Dogs: Classification and Treatment in the U.S. Armed Forces”, *Animal Law*, Vol. 21, 2014–2015, available at: [https://www.animallaw.info/sites/default/files/Military%](https://www.animallaw.info/sites/default/files/Military%20Working%20Dogs.pdf)

used to find or lay underwater mines, to locate enemy combatants, or to seek and destroy submarines using kamikaze methods.⁶ In so doing, all these animals have regularly been exposed to the dangers of war.

Despite their vulnerability in these situations, animals have been largely ignored by international humanitarian law (IHL), which remains overwhelmingly anthropocentric.⁷ Indeed, coded into the categories of property, at best as specially protected objects, or as part of the environment, they are only the incidental beneficiaries of minimal IHL rules that apply to these categories.⁸ Therefore, under this body of law, animals neither enjoy an explicit legal status that would—in recognition of their sentience—directly and explicitly protect them *qua* status, nor are they granted any rights. In this regard, IHL appears to be increasingly at odds with the evolution of the status that animals have progressively—albeit incompletely—acquired during the last decades in many jurisdictions around the world as being living beings suffering and feeling pain in comparable ways to humans. IHL also fails to recognize that armed conflicts have disastrous effects on animals and particularly on certain species whose survival is threatened by the conduct of hostilities. We will come back to these points below.⁹

A preliminary question needs, however, to be addressed: Why should lawmakers and law-apppliers be concerned about the silence of IHL on animals? Why should IHL deal with this issue? Skeptics might point to the fact that animals are killed on a massive scale in peacetime, for human use and consumption under full protection of the law. Would it not be absurd to protect animals in war while upholding the lawfulness of constantly and severely harming animals, for example in factory farming? Our response is that this superficial normative inconsistency should be resolved in the direction of upgrading, not keeping down the animals' protection. The severe shortcomings of the legal regimes governing food and agriculture should not be allowed to stymie a legal evolution in other fields. Moreover, the killing of animals for human food (and in much smaller quantities for research) is considered to pursue, as a matter of principle, legitimate objectives. “Unnecessary” suffering in the context of farming, animal experiments, and other uses of animals is increasingly prohibited.¹⁰ Although the

20Working%20Dogs.pdf. See, generally, Imperial War Museums, “12 Ways Animals Have Helped the War Effort”, no date, available at: <https://www.iwm.org.uk/history/12-ways-animals-have-helped-the-war-effort>.

6 Ceiridwen Terrill, “Romancing the Bomb: Marine Animals in Naval Strategic Defense”, *Organization & Environment*, Vol. 14, No. 1, 2001. See also John M. Kistler, *Animals in the Military: From Hannibal's Elephants to the Dolphins of the US Navy*, ABC-CLIO, Santa Barbara, 2011, pp. 311–26.

7 Jérôme de Hemptinne, “The Protection of Animals during Warfare”, *American Journal of International Law Unbound*, Vol. 111, 18 September 2017, p. 272, available at: <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/protection-of-animals-during-warfare/DA9EA3AF4F252F1DC0ECAF8016B6406>.

8 A. Peters, above note 3, pp. 344–9 on the protection of domestic animals as livestock and of wild animals against pillage and plunder.

9 See the section “Changing attitudes” below.

10 Global Animal Law, Database, available at: <https://www.globalanimallaw.org/database/national/index.html>, status as of 1 January 2022. Importantly, there has been a steep increase of legislation since 2020. On 1 January 2020, the database listed only 101 States. In the past two years, twenty-three States adopted animal protection legislation.

standards prescribed in animal welfare laws around the world are extremely low, they nevertheless acknowledge the animals' interests and explicitly seek to minimize animal suffering. IHL has not yet reached this first stage. Another argument in favour of bringing animals' interests to bear (at all) in IHL is the structural similarity between animals' welfare law and IHL: both bodies of law do not outlaw violence. Rather, they are characterized by an inbuilt tension between the allowance of "necessary" violence and its moderate containment on the grounds of "humane" considerations. Both bodies of law possibly inadvertently also legitimize violence.¹¹ This resemblance should facilitate extending the scope of IHL also to (non-human) animals.

In order to reach this objective, two strategies could be pursued: the first strategy would be to apply existing IHL more effectively to animals, if necessary, by creative interpretation more in line with animals' interests and needs. The second option would be to adopt a new international instrument specifically aimed at granting rights to animals.¹² Pursuing the first strategy, we see two ways of applying existing IHL norms more effectively. Animals could be placed in categories so far reserved under IHL for humans, such as combatant and prisoner of war or civilian. We will, however, observe that this raises more problems than it resolves. Alternatively, animals could remain in the category of objects, but benefit from IHL rules (e.g. on the environment, on cultural objects and on protected zones) that could be interpreted in a dynamic manner to take account of the fact that animals are sentient beings, experiencing pain, suffering and distress. This approach would not only significantly reinforce the animals' welfare, but also reflect the evolution of the status and protection that animals have acquired in various jurisdictions around the world. The second strategy would be to grant animals fundamental rights. However, this legal approach would be far more complicated and ambitious. For reasons of legal certainty (and facing the paucity of judicial fora available for controlling compliance with IHL), animal rights under IHL could hardly be brought about by judicial law-making. Rather, such a new paradigm could only be introduced by a new international instrument.¹³ And, for this to happen, States would need to overcome high conceptual barriers relating to the legal personality of animals and would have to accept curtailing their powers to conduct war against enemy fighters in the interest of non-human living beings.¹⁴ Obviously, this would be a particularly challenging endeavour. Even outside the context of war, several civil society attempts to bring States to adopt an international convention on animal welfare

11 Saskia Stucki, "Animal Warfare Law and the Need for an Animal Law of Peace: A Comparative Reconstruction", *American Journal of Comparative Law*, Vol. 71, 2023 (forthcoming).

12 Jérôme de Hemptinne, Anne Peters and Robert Kolb, "Towards Effective Legal Protection of Animals in Wartime: Key Findings and Concluding Recommendations", in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, Cambridge University Press, Cambridge, forthcoming.

13 Heike Krieger and José Martínez Soria, "The Protection of Animals in Wartime: Rationale and Challenges", in A. Peters, J. de Hemptinne and R. Kolb (eds), *ibid.*

14 J. de Hemptinne, A. Peters and R. Kolb, above note 12.

have so far not been successful.¹⁵ Nevertheless, an IHL-specific convention would not necessarily face more resistance than a general convention on animal welfare, because it would much less affect the everyday lives of consumers and the vested interests of the animal–industrial complex.

In this contribution, we will first explore how and under which conditions animals are protected under IHL as it stands. We will then examine how this body of law could be better applied and interpreted to take account of the fact that animals are sentient beings experiencing pain, suffering and distress. We will finally envisage the possibility of adopting a new convention providing fundamental rights to animals which would recognize and safeguard their needs, interests and arguable dignity during wartime.

The protection of animals in IHL as it stands

Adopted at a time when legal entitlements for animals did not attract significant attention, IHL rules are essentially geared towards the safeguarding of human interests and, thus, largely ignore the welfare of animals.¹⁶ IHL only indirectly and ambiguously addresses the animal question through the protection of objects, the environment, medical transports and equipment, objects indispensable for the survival of civilian population, and cultural property. Additionally, those animals which are located in protected zones benefit from further important safeguards.¹⁷ Let us briefly examine how these different sets of rules concretely play out.

Animals as objects

At first glance, animals do not easily fall under the category of objects referred to in IHL conventions.¹⁸ Indeed, the historic intention of these instruments was probably to

15 A group led by David Favre suggested an umbrella treaty (“International Convention for the Protection of Animals”) with four protocols (a Companion Animal Protocol, a Protocol for the Care of Exhibited Wildlife, a Protocol for the Taking of Wild Animals, and a Protocol for the International Transportation of Animals). See David Favre, “An International Treaty for Animal Welfare”, *Animal Law Review*, Vol. 18, 2012. The text of the convention is available at: <https://www.animallaw.info/treaty/international-convention-protection-animals>. Sabine Brels and others proposed a “UN Convention on Animal Health and Protection”. See Sabine Brels, “Globally Protecting Animals at the UN: Why and How?”, *L’Observateur des Nations Unies*, Vol. 45, 2018, p. 193. The text of the convention is available at: <https://www.globalanimallaw.org/downloads/Folder-UNCAHP.pdf>.

16 Jérôme de Hemptinne, “Challenges Regarding the Protection of Animals During Warfare”, in Anne Peters (ed.), *Studies in Global Animal Law*, Springer, Heidelberg, 2020, pp. 174–5.

17 For reasons of space, the protection of animals in occupied territory will not be addressed in this contribution. For an analysis of this question, see Marco Longobardo, “Animals in Occupied Territory”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict* above note 12.

18 The law itself, however, does not exclude this qualification. Notably “livestock” is mentioned in Article 54 (2) of the Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I). The provision is situated in Chapter III of AP I, entitled “Civilian Objects”, and Article 54 carries the official heading: “Protection of objects indispensable for the survival of the civilian population”. So livestock is here listed under “objects”.

protect inanimate objects, thereby excluding living beings.¹⁹ However, our basic premise that animals need and deserve a better protection in war animates argumentative strategies to close the gap in protection. We therefore suggest a broader understanding of the open IHL concept of “object”. The main explanation is that, for a number of reasons explored below, animals cannot be easily assimilated to the category of “protected persons” under IHL which would allow them to benefit from the protection offered by the status of “civilian” under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV)²⁰ or, when they “belong” to armed forces, to benefit from the status of “combatant/prisoner of war” under the 1949 Convention Relative to the Treatment of Prisoners of War (GC III).²¹ The only available other IHL category is “object”. The open meaning of the word as used in the relevant provisions allows drawing animals as “living” objects under their coverage, in order to avoid animals as falling in between the two categories. This interpretation of the IHL term “object” (in French and Spanish “*bien*”) is also consistent with the legal qualification of animals as moveable things (*res*) in many national legal systems around the world.

In their quality as objects, animals can only be targeted – after all necessary measures of precaution have been taken²² – in the following three constellations: when they are used as weapons of war,²³ when they qualify as military objectives,²⁴ or when the harm they suffer constitutes proportionate incidental damage resulting from attacks on military objectives.²⁵ However, when animals are harmed as collateral damage, the proportionality calculation becomes a complex endeavour. The outcome of the assessment largely depends on the value attributed to animals.²⁶ In most societies, such a value judgement is contingent upon what animals offer to humankind: working tool, food, clothing, etc.²⁷ It is,

19 Marco Roscini, “Animals and the Law of Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 47, 2017, p. 46.

20 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

21 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III).

22 AP I, Arts 57 and 58.

23 It could be argued that animals which are armed – for instance, strapped with explosives and then sent to attack the enemy – could be qualified as “weapons” or “means and methods of warfare” under IHL. The employment of animals as weapons is not *per se* illegal. Chris Jenks argues that this should, however, be subject to legal reviews to determine whether weaponized animals are able to distinguish between military objectives and civilian objects (or persons) and whether their use could cause superfluous injury. It remains unclear to what extent the injury to animals themselves when employed as war weapons should be factored into such an assessment. See Chris Jenks, “Animals as War Weapons”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

24 AP I, Art. 52(2). This rule applies both in international and non-international armed conflicts. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 7–10.

25 AP I, Arts 51(5)(b) and 57. This rule applies in both international and non-international armed conflicts. See ICRC Customary Law Study, *ibid.*, Rule 14.

26 J. de Hemptinne, above note 16, p. 179. For an extensive analysis of the concept of proportionality in the context of the protection of the environment, see generally Michael N. Schmitt, “Green War: An Assessment of the Environmental Law of Armed Conflict”, *Yale Law Journal*, Vol. 22, 1997, pp. 55–61.

27 de Hemptinne, above note 16, p. 179.

nonetheless, increasingly accepted that animals possess a value in their own right and, as a consequence, that their interests should no longer be automatically subordinated to those of human ones.²⁸ Also, an even greater intrinsic value should be attributed to species which are in danger of extinction. Further complicating matters, the status of animals varies widely from one culture to another and inevitably changes over time.²⁹ To conclude, the moderately progressive interpretation of the term “object” as also covering animals (living objects) bears the potential to improve those living objects’ protection (only) if the ensuing balancing exercises are adapted to their vulnerability.

Animals as part of the environment

IHL also protects animals indirectly and globally as general components of the environment in which they live.³⁰ The concept of environment encompasses wildlife and its habitats, as well as the relationship that these elements have with the ecological system in which they exist. The International Committee of the Red Cross (ICRC) Guidelines on the protection of the environment in armed conflict specify that, for purposes of IHL, the environment encompasses not only natural elements *stricto sensu*, but also “elements that are or may be the product of human intervention, such as foodstuffs, agricultural areas, drinking water and livestock.”³¹ Accordingly, all animals, including farm and companion animals, are part of the environment. As a result, every animal located in a given natural area or site, as well as their habitat, are duly protected by the laws of warfare and, in particular, by three sets of rules relating to the environment as such.³²

First, the general principles governing the conduct of hostilities in order to protect civilian objects – i.e. the principles of distinction,³³ proportionality³⁴ and precaution³⁵ – are applicable to the environment as a whole, which is traditionally considered to be civilian in character.³⁶ Accordingly, specific elements of the environment can become military objectives, but only under restrictive conditions

28 *Ibid.*

29 *Ibid.*

30 A. Peters, above note 3, pp. 354–9.

31 ICRC, *Guidelines on the Protection of the Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary*, ICRC, Geneva, 2020, Preliminary Considerations, para. 16 (p. 18 emphasis added), available at: www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating.

32 Jérôme de Hemptinne, “Animals as Part of the Environment”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

33 AP I, Arts 48, 51(2) and 52(2); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 13(2).

34 AP I, Arts 51(5)(b) and 57.

35 AP I, Arts 57 and 58.

36 See ICRC Environmental Guidelines, above note 31, para. 18; ICRC Customary Law Study, above note 24, Rule 43. See also International Law Commission (ILC), Draft Principles on the Protection of the Environment in Relation to Armed Conflict (2019), reproduced in United Nations (UN) General Assembly, Report of the International Law Commission: Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN Doc. A/74/10, UN, New York, 2019, Chapter VI. Protection of the environment in relation to armed conflicts, Principles 13 and 14, pp. 250–6, in particular pp. 252–3.

set forth in Article 52(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I). In principle, no component of the natural environment is a military objective by its nature.³⁷ Notably wildlife (as opposed to trained domestic animals) can never be treated as a military objective by virtue of its use or purpose, even if the trading of endangered species might contribute to sustaining military activities.³⁸

Moreover, the environment always remains protected against excessive collateral damage: an attack against a military objective which may be expected to cause incidental damage to the environment that would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.³⁹ Given that the protection of the environment (and animals which form part of it) has become much more important—as shown by the numerous environmental conventions and soft law instruments adopted on the matter over the last four decades—the damage caused to the environment (and animals) should be attributed a particularly heavy weight in the proportionality calculation that is needed to determine what is “excessive”.⁴⁰ When balancing the anticipated military advantage against the expected environmental harm, account must also be taken of, not only the attack’s direct effects, but the attack’s indirect effects (known as “reverberating” or “knock-out effects”) on the environment.⁴¹ This creates an obligation upon the belligerents to assess the indirect effects (damage) caused by an attack on an area which does not host many animals, but whose destruction affects the ecological balance on a wide scale and will therefore cause the disappearance of animals situated elsewhere.⁴² However, only “foreseeable” damage (direct and indirect) would count as excessive and thus be unlawful.

Second, other IHL rules that seek to prevent or limit certain damage to the environment (such as those which regulate the usage of specific weapons or combat techniques) also play a role in this context. These comprise rules on specially protected objects (such as works and installations containing dangerous forces⁴³ and objects indispensable to the survival of the civilian population),⁴⁴ rules on pillage⁴⁵ and those prohibiting incendiary weapons or the use of herbicides as a method of warfare.⁴⁶ In the same vein, a specific convention prohibits the

37 Cordula Droegge and Marie-Louise Tougas, “The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection”, *Nordic Journal of International Law*, Vol. 82, 2013, p. 28.

38 *Ibid.*, p. 29.

39 See ICRC Environmental Guidelines, above note 31, paras 114–22.

40 J. de Hemptinne, above note 32.

41 ICRC Environmental Guidelines, above note 31, para. 117.

42 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Recommitting to Protection in Armed Conflicts on the 70th Anniversary of the Geneva Conventions*, ICRC, Geneva, 2019, p. 68. See also ICRC Environmental Guidelines, above note 31, para. 18.

43 AP I, Art. 56.

44 AP I, Art. 54.

45 GC IV, Art. 33(2).

46 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980, 1342 UNTS 171 (entered into force 2 December 1983).

destruction of the environment as a form of weapon.⁴⁷ In contrast to the IHL-based protection of domestic animals as property or even as “objects indispensable to the survival of the civilian population” and of wildlife by the rules against pillage⁴⁸ which under strict conditions may apply directly to animals, the environmental rules provide only indirect safeguards for animals. We will come back below to the protection of objects indispensable to the survival of the civilian population.⁴⁹

Third, more importantly, Articles 35(3) and 55 of AP I prohibit using means and methods of warfare that are intended, or may be expected, to cause “long-term, widespread and severe damage” to the environment. The difference between this specific form of protection and the general protection of the environment referred to above is that the special rule is absolute.⁵⁰ If widespread, long-term and severe damage is inflicted, it will always be unlawful – independently of any inquiry into whether this behaviour or result could be justified on the basis of military necessity or whether incidental damage was excessive.⁵¹ Although the *travaux préparatoires* of Articles 35(3) and 55 of AP I indicate that each of the three conditions contained in the special norms was extensively discussed during the negotiations of AP I, only the term “long-term” was clarified as meaning “years” or “decades”.⁵² There is no indication of what the terms “widespread” and “severe” were intended to signify exactly. Traditionally, “widespread” has been understood to refer to “several hundred square kilometres”, and “severe” means “serious disruption of the ecosystem”.⁵³ However, this interpretation should be revisited in light of today’s importance of environmental values, given the progressive understanding that the environment must be protected as such, and in view of the awareness of the dramatic consequences that wars have on the whole ecosystem and wildlife in particular.⁵⁴ What might not have appeared to be a widespread, long-term and severe damage forty years ago when AP I was adopted may now be considered to be so.⁵⁵ For instance, it is increasingly accepted by scientists that destroying biodiversity spots or areas known to be populated by endangered species or by a great diversity of

47 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, 10 December 1976, 1108 UNTS 151 (entered into force 5 October 1978).

48 See A. Peters, above note 3, pp. 344–9.

49 See below, section “Animals as objects indispensable”.

50 ICRC Customary Law Study, above note 24, Rule 45; ICRC Environmental Guidelines, above note 31, para. 49.

51 ICRC Customary Law Study, above note 24, Rule 45.

52 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (APs Commentary), para. 1452.

53 C. Droege and M.-L. Tougas, above note 37, p. 32. See also J. de Hemptinne, above note 32.

54 Djamchid Montaz, “Les règles relatives à la protection de l’environnement au cours des conflits armés à l’épreuve du conflit entre l’Irak et le Koweït”, *Annuaire français de droit international*, Vol. XXXVII, 1991, pp. 209–10; Michael Bothe, Carl Bruch, Jordan Diamond and David Jensen, “International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities”, *International Review of the Red Cross*, Vol. 92, 2010, p. 576. See also J. de Hemptinne, above note 32.

55 Michael Bothe, “The Protection of the Environment in Times of Armed Conflict”, *German Yearbook of International Law*, Vol. 34, 1991, p. 57.

fauna can have serious repercussions for the environment as a whole, even if the area concerned is relatively small.⁵⁶

However, Articles 35(3) and 55 of AP I formally apply only in international armed conflicts. In contrast, the legal framework for non-international armed conflicts (Article 3 common to the four Geneva Conventions and AP II) does not contain any provision dealing specifically with the environment. Moreover, it is not fully clear, although “likely in due course” according to the ICRC, that the customary rule prohibiting widespread, long-term and severe damage to the natural environment in international armed conflicts also applies in non-international armed conflict.⁵⁷ We will return to this point below.

Beyond the mentioned principles governing the conduct of hostilities that potentially apply to natural resources and animals and beyond the few provisions that specifically protect them, IHL does not address any other environmental matters, for instance, the conservation and the preservation of wildlife. These gaps can and should be filled by international environmental treaties which continue to apply during armed conflicts.⁵⁸ Their content and nature vary widely. Some conventions pursue a sectorial approach protecting particular species, such as the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),⁵⁹ the 1979 Convention on the Conservation of Migratory Species of Wild Animals,⁶⁰ the 2001 Agreement on the Conservation of Albatrosses and Petrels⁶¹ or the 1946 International Convention on the Regulation of Whaling.⁶² Others, which are more holistic in nature – such as the 1992 Convention on Biological Diversity,⁶³ the 2003 African Convention on the Conservation of Nature and Natural Resources (revised),⁶⁴ or the 1982 Convention on Wetlands of International Importance, Especially as Waterfowl

56 ICRC Environmental Guidelines, above note 31, para. 58. See also Daniella Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*, Cambridge University Press, Cambridge, 2015, p. 230.

57 ICRC Customary Law Study, above note 24, Rule 45.

58 ILC, *Effects of Armed Conflicts on Treaties. Titles and Texts of the Draft Articles on the Effects of Armed Conflicts on Treaties Adopted by the Drafting Committee on Second Reading*, 11 May 2011, A/CN.4/L.777, Arts 3, 6 and 7. For a discussion of the substantive, personal and territorial scope of application of the international conventions on the environment, see J. de Hemptinne, above note 32. See also the work of the ILC on the matter: ILC, *Effects of Armed Conflicts on Treaties. Titles and Texts of the Draft Articles on the Effects of Armed Conflicts on Treaties Adopted by the Drafting Committee on Second Reading*, 11 May 2011, A/CN.4/L.777, Arts 3, 6 and 7.

59 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

60 Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983).

61 Agreement on the Conservation of Albatrosses and Petrels, 19 June 2001, 2258 UNTS 257 (entered into force 1 February 2004).

62 International Convention on the Regulation of Whaling, 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

63 Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

64 African Convention on the Conservation of Nature and Natural Resources signed on 15 September 1968 and revised on 11 July 2003.

Habitat (Ramsar Convention)⁶⁵ – focus not only on environmental protection and conservation, but more broadly on issues of common interest for humanity, such as sustainable development, biological diversity, or the impact of climate change on ecosystems. Each treaty regime can supplement IHL basic rules in the conservation and preservation of wildlife. Moreover, as recalled above, IHL provisions on the protection of the environment are themselves rather broad and vague. They leave wide discretion on how to read and apply them concretely.⁶⁶ Environmental treaties can here play a complementary role by giving a meaning and substance to IHL norms and concepts which remain ambiguous, such as the concept of environment, the criteria of long-term, widespread and severe damage, or the requirement of proportionality.⁶⁷ As shown above, these terms should be construed in conformity with fundamental environmental standards and values that have progressively emerged from the numerous international conventions and soft law instruments adopted during the last decades. This means that, through a “harmonious interpretation”, relevant IHL provisions protecting wildlife could be interpreted and applied by reference to the normative context in which they operate, a context co-shaped by international environmental law.⁶⁸

Animals as means of medical transport, search and rescue

Many animals which possess a highly developed sense of smell, such as dogs, are employed to search on the battlefield for missing combatants or civilians in need of medical assistance.⁶⁹ Often, these animals receive sophisticated training to find such persons and to bring them medical equipment, food and water. Other animals – such as horses, mules, donkeys or camels – exercise similar search-and-rescue activities in inaccessible areas. In many cases, these animals are simply employed to transport the wounded and sick, medical personnel or equipment.⁷⁰

When exercising such medical functions, “medical animals” could, in theory, benefit from IHL “special” safeguards, adapted to the need for medical care, beyond the general protection afforded to civilian objects. When employed as a means of transportation, animals could fall within the category of medical

65 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

66 Jorge E. Viñuales, “Le concept de ‘régime special’ dans les rapports entre droit humanitaire et droit de l’environnement”, *Research Paper 12, The Graduate Institute Center for International Environmental Studies*, Geneva, 2012, p. 13. See also Mara Tignino, “Droit international de l’environnement”, in Raphael van Steenberghe (ed.), *Droit international humanitaire: un régime spécial de droit international*, Bruylant, Brussels, 2013, p. 293; J. de Hemptinne, above note 32.

67 J. E. Viñuales, *ibid.*, p. 14.

68 See Ayşe-Martina Böhringer and Thilo Marauhn, “Animals as Endangered Species”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

69 E. Baratay, above note 4, pp. 111–13. M. Tignino, above note 66, p. 253; See Jérôme de Hemptinne, “Animals as Means of Medical Transportation, Search and Rescue”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

70 See Australian Government, Department of Veterans’ Affairs, “Animals in the Military during World War I”, no date, available at: <https://anzacportal.dva.gov.au/wars-and-missions/ww1/military-organisation/animals-in-military>.

transport.⁷¹ Such an approach is consistent with the definition of “medical transports” in Article 8(g) of AP I: “any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation” by a competent authority of a party to the conflict. By referring to “any means of transportation”, this legal definition is open-ended. According to an authoritative commentary, no means of transportation “is excluded, from the *oxdrawn cart* to the supersonic jet, or any future means of transportation; the absence of an exhaustive list leaves the field open for the latter”.⁷² This suggests that the definition does not only cover inanimate carriers. Quite to the contrary, with the word “assigned”, the legal definition is purpose- or use-oriented. Article 8(g) of AP I thus implicitly acknowledges that, like any other means of transportation, animals need protection in this context, not because of their intrinsic characteristics, but because of their assignment to medical purposes. In other words, animals could and should receive the safeguards offered by the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field⁷³ and by GC IV on account of the medical functions of transportation they perform.

When used by medical personnel for search or rescue activities, it could be argued that animals constitute material or equipment of medical units⁷⁴ and, as such, benefit from the reinforced protection afforded to mobile or fixed medical units to which they belong.⁷⁵ At first sight, animals seem to be excluded from this regime. The term “medical equipment” is normally understood to comprise only inanimate objects. This seems to be confirmed by the 2016 ICRC Commentary on GC I which states that “medical equipment includes drugs, bandages, medical instruments, stretchers and other supplies needed for the care of the wounded and sick”.⁷⁶ But this list, too, is open-ended: despite the limited examples it provides, the commentary does not restrict the provision’s scope of application to inanimate objects. One could again argue that the ICRC’s approach is “purpose/use-oriented”. This would entail that, like any means of medical transportation, animals deserve protection – independently of being natural living beings – because of the medical functions assigned to them in warfare.

In both situations – when used as means of medical transportation or as medical material or equipment⁷⁷ – animals must not be attacked, nor harmed in

71 J. de Hemptinne, above note 69. See, generally, GC I, Arts 35–7; GC IV, Arts 21–3.

72 APs Commentary, above note 52, para. 384 (emphasis added). It could be contended that the term “transports” covers only inanimate vehicles. For example, the Commentary on GC I (2nd ed., ICRC, Geneva, 2016, Art. 35, para. 2372) (2016 ICRC Commentary on GC I) lists, among other things, automobiles, trucks, trains, motorcycles, small all-terrain vehicles and inland boats. At first sight, animals seem to be excluded from this regime. For a discussion of this question, see J. de Hemptinne, above note 69.

73 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I).

74 GC I, Art. 33.

75 J. de Hemptinne, above note 69.

76 2016 ICRC Commentary on GC I, above note 72, para. 2384.

77 Transports of wounded and sick and transports of medical equipment are protected in the same way as mobile medical units. See GC I, Arts 33(1) and 35(1).

any way, nor may their medical functioning be impeded, even if they do not momentarily bear any wounded and sick persons or medical equipment.⁷⁸ Moreover, animals benefit from all rules on precautions in attacks and on the effects of attacks.⁷⁹ It is only if and when animals are employed for military purposes – for example, to transport able soldiers or munitions, to serve as “living bombs” or to detect explosives – that they may lose such a protection.⁸⁰ In these circumstances, they may become legitimate military targets and may thus be directly attacked and even killed by the adversary. However, “medical animals” can only lose such a protection after a warning has been issued and set, whenever appropriate, a reasonable time limit, and only after such warning has remained unheeded.⁸¹

Common Article 3 of the Geneva Conventions does not explicitly protect means of medical transportation, search and rescue in non-international armed conflicts. But such a protection is implicit in the legal requirement that the wounded and sick be searched for, collected and protected against pillage and ill-treatment, and that they receive adequate care.⁸² It is a necessary implication of the legal obligation to fully guarantee for the care of the wounded and sick that the means of medical transportation, search and rescue must be respected and protected at all times, and may not be attacked.⁸³ Such a specific rule on the protection of medical units and transports is explicitly set forth in AP II.⁸⁴ The principle should be extended to animals used for medical purposes, in all types of armed conflict.⁸⁵

Animals as objects indispensable to the survival of the civilian population

When they are “indispensable to the survival of the civilian population”, certain animals, such as livestock, benefit from reinforced safeguards in both international and non-international armed conflicts.⁸⁶ They are protected, not only against any attack, but also against any destruction, removal, or being rendered useless.⁸⁷ Moreover, even when they become legitimate military objectives, animals lose protection only when they are used exclusively as

78 AP I, Art. 21. See also ICRC Customary Law Study, above note 24, Rule 29.

79 Alexander Breitegger, “The Legal Framework Applicable to Insecurity and Violence Affecting the Delivery of Health Care in Armed Conflicts and other Emergencies”, *International Review of the Red Cross*, Vol. 95, 2013, p. 108.

80 GC I, Arts 21 and 22; AP I, Art. 13. See also ICRC Customary Law Study, above note 24, Rules 28 and 29.

81 GC I, Art. 22; AP I, Art. 13. See Marco Sassòli, *International Humanitarian Law, Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, para. 8.29.

82 Katja Schöberl, “Buildings, Material, and Transports”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 829. See also AP II, Arts 7 and 8.

83 Antoine Bouvier, “The Use of the Emblem”, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions, ibid.*, p. 863.

84 AP II, Art. 11(1).

85 J. de Hempinne, above note 69.

86 AP I, Art. 54 (literal quote of the title of the provision); AP II, Art. 14; ICRC Customary Law Study, above note 24, Rule 54. See also M. Sassòli, above note 81, para. 8.353.

87 AP I, Art. 54(2).

sustenance for the opposing armed forces or, if not as sustenance, in direct support of military action.⁸⁸ This special protective regime is, however, subject to two important limitations. First, the regime is clearly designed to prevent the starvation of human beings and not to protect animals *per se*, as the reference to the “survival of the civilian population” (heading of AP I, Art. 54) makes clear.⁸⁹ Furthermore, as stated by Article 54(2) of AP I, only those attacks against animals that are conducted with the “specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party” are prohibited. The forbidden motives of destruction comprises not only the motive of causing starvation, but also “any other motive”,⁹⁰ such as to drive a human population away. This means that a range of purposes or motives is prohibited by this rule. Nevertheless, these are limited: the killing of animals for legitimate purposes (other than just depriving the population of the animals’ value) is allowed.⁹¹ The second limitation of the rule is that the protection offered is not absolute. Any belligerent may derogate from the mentioned prohibitions “where required by imperative military necessity” for the defence of its national territory against invasion, even if only within territory under its own control.⁹² As noted by Marco Sassoli, “[i]n such limited circumstances, a scorched earth policy to delay the enemy’s advance is therefore not prohibited.”⁹³

Animals as cultural property

It could be argued that certain animals should fall under the category of “tangible cultural heritage or property” and benefit from the detailed and multi-layered IHL principles protecting such property. These are set out mainly in the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict,⁹⁴ in its two Protocols,⁹⁵ in the Additional Protocols,⁹⁶ as well as in IHL customary principles.⁹⁷ Concededly, non-human living beings do not easily fit into the category of cultural property—as into any other category of IHL. The mentioned IHL instruments understand cultural property as property “of great importance to the heritage of every people”.⁹⁸ The legal definitions list human-

88 AP I, Art. 54(3) in the two variants lit. (a) and lit. (b).

89 M. Roscini, above note 19, p. 59; Sandra Krähenmann, “Animals as Specially Protected Objects”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

90 AP I, Art. 54(2).

91 M. Roscini, above note 19, p. 59.

92 AP I, Art. 54(5).

93 M. Sassoli, above note 81, para. 8.354.

94 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956) (1954 Hague Convention).

95 (First) Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954, 249 UNTS 358 (entered into force 7 August 1956); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999, 2253 UNTS 172 (entered into force 9 March 2004).

96 AP I, Art. 54; AP II, Art. 16.

97 ICRC Customary Law Study, above note 24, Rules 38–41.

98 See, e.g., 1954 Hague Convention, above note 94, Art. 1(a).

made objects (such as buildings and other monuments of historic or architectural significance, archaeological sites and works of art).⁹⁹ Neither the major international instruments safeguarding cultural property mentioned above nor the Commentaries to the Additional Protocols make any reference to animals. This is not surprising since, as already mentioned, these conventions were adopted at a time when the protection of animals was not on top of the agenda of many States. Nonetheless, the enumerations in the relevant instruments are not exhaustive. The legal concept of “property” generally also covers animals. The necessary cultural value may also attach to animals which are used by humans for traditional food, in traditional sports, for religious rites (sacrifices), or enjoy a totemic or holy status (e.g. as heraldic animal, as a national symbol, and the like). Moreover, animals at the brink of extinction have a significant value for humanity as a whole.

Against this background, Sandra Krähenmann has argued that, today, the terms of cultural heritage or property can be interpreted in a progressive manner to include some categories of animals, namely endangered and endemic species:¹⁰⁰

Though it may seem as a stretch, arguably the evolution of cultural heritage law to progressively recognise the interrelationship between humanity and nature could inform the interpretation of the notion of cultural property under IHL in the sense that endangered animals may be cultural property, namely objects of “historical or archaeological interests”, similarly to cultural landscapes that have been included as archaeological sites.¹⁰¹

This interpretation is reinforced by the consideration that drawing a clear dividing line between the cultural heritage (that would be specially protected under IHL) and the natural heritage, including fauna and flora (that would be left outside such a protection) seems rather artificial. It is now increasingly accepted that the cultural heritage and the natural heritage are often intertwined, reflecting the constant interactions between humans and their environment.¹⁰² Interestingly, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) acknowledges the duty to identify and safeguard certain places that constitute part of the common heritage of humankind, including the habitat of threatened species of animals “of outstanding universal value from the point of view of science or conservation”.¹⁰³ Even if it does not directly protect the endangered animals as such, the World Heritage Convention indirectly recognizes their importance and value by safeguarding their habitats. In any case, animals that inhabit the surrounding of cultural heritage sites will always indirectly benefit from the special protection afforded by IHL to these sites.

99 *Ibid.*

100 S. Krähenmann, above note 89.

101 *Ibid.*

102 *Ibid.*

103 Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972, 1037 UNTS 151, Art. 2 (entered into force 17 December 1975).

The many different regimes protecting cultural property that could apply to specially protected animals cannot be studied in detail in this contribution.¹⁰⁴ In a nutshell, the application of such regimes to animals – which arguably form part of the world cultural heritage or which are located in protected sites – would, in theory, provide them with significant additional customary law-based safeguards in both international and non-international armed conflicts. Attacking cultural property or using it for military purposes is strictly prohibited in these circumstances, unless imperatively required by military necessity.¹⁰⁵ Moreover, this type of property is protected against seizure, destruction,¹⁰⁶ theft, pillage and vandalism.¹⁰⁷ In addition to complying with the general rules on the conduct of hostilities, belligerents must take special care in military operations to avoid any damage to cultural property.¹⁰⁸ In practice, however, it will often be difficult for parties to an armed conflict and, in particular, for armed groups, to guarantee an effective protection to the natural heritage sites. Effective protection is all the more difficult because the sites are often very large and usually host a high number of animals, including protected species, constantly moving from one area to another.¹⁰⁹

Finally, the cultural importance of certain animals could be recognized and protected by IHL and international criminal law less under the technical category of “cultural property” but as part of human–animal culture. During warfare, inhumane acts might be committed on animals for the specific reason that they entertain religious, cultural, historical or sociological ties with a given group of individuals (such as sacred cows in Hinduism). This has been acknowledged by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kupreškić* trial judgment. The judges highlighted in this case that “the killing of the livestock [of Muslims was] clearly intended to deprive the people living there of their most precious assets”. They also noted that “livestock had for their owners not only economic value, but also and probably even more importantly, emotional, psychological and cultural significance. [...] Also the livestock, in addition to their economic value, took on a symbolic significance (for instance because Croats had pigs and Muslims did not).”¹¹⁰ The ICTY judges even found that the cumulative effects of plunder of Bosnian Muslim dwellings, on discriminatory grounds, including plunder of livestock, could amount to the crime of persecution.¹¹¹ That said, persecution as a form of crime against humanity will only be present in limited circumstances: when such acts against

104 For a thorough analysis of the protection of cultural property, see Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge, 2006.

105 See ICRC Customary Law Study, above note 24, Rules 38 and 39.

106 *Ibid.*, Rule 40.

107 *Ibid.*

108 *Ibid.*, Rule 38.

109 S. Krähenmann, above note 89.

110 ICTY, Trial Chamber, *Prosecutor v. Zoran Kupreškić and others* (IT-95-16-T), judgment of 14 January 2000, para. 336 (footnote omitted).

111 ICTY, Trial Chamber, *Prosecutor v. Dario Kordić & Mario Čerkez* (IT-95-14/2-T), judgment of 26 February 2001, para. 205. “Plunder” is penalized in Article 3(e) of the Statute of the ICTY.

these animals are committed “as a part of a widespread or systematic attack against any civilian population, with the knowledge of the attack”.¹¹²

To conclude, the cultural value of animals in various contexts allows them to be drawn under the protective umbrella of IHL and international criminal law¹¹³ under limited conditions.

Animals in protected zones

In both international and non-international armed conflicts, IHL foresees several types of protected zones, such as neutralized zones for non-combatants and wounded combatants, non-defended localities, or demilitarized zones within conflict situations, located in or outside combat areas.¹¹⁴ The common purpose of these zones is to increase the protection of particularly vulnerable persons who are not – or no longer – taking part in hostilities and who are not performing any work of military character, by sheltering them from the dangers arising out of combat operations or by placing certain areas beyond the reach of these operations.¹¹⁵ Of course, this system requires that all belligerents guarantee that such zones are free of military objectives and are not defended by military means. The belligerents must also agree beforehand on the zones’ recognition and identification. While the creation of protected zones was not originally foreseen to benefit non-human beings, “the impetus to establish zones to protect animals and their habitats from the ravages of war is growing in momentum”.¹¹⁶ For instance, in its recent Environmental Guidelines, the ICRC has suggested the establishment of protected zones in national parks, natural reserves and endangered species’ habitats,¹¹⁷ and drafted a model pledge for removing fighting away from areas of major ecological importance or fragility.¹¹⁸

The creation of protected zones could increase the protection of animals in two respects. It could directly benefit animals located in these zones which will not be impacted by the conduct of warfare.¹¹⁹ It could also indirectly benefit animals, since their habitat will flourish when not disrupted by hostilities.¹²⁰ Nevertheless, the absence of combat operations in certain areas might be a double-edged sword: It might attract a high number of human populations seeking refuge in these zones, and the human presence might impact the normal feeding and

112 International Criminal Court Statute, 17 July 1998, Art. 7(1)(h).

113 See Marina Lostal, “De-objectifying Animals: Could they Qualify as Victims before the International Criminal Court?”, *Journal of International Criminal Justice*, Vol. 19, No. 3, 2021.

114 GC I, Art. 23; GC IV, Arts 14 and 15; AP I, Arts 59 and 60. See Trevor Keck, “What You Need to Know About ‘Safe Zones’”, *ICRC Blog*, 27 February 2017, available at: <https://intercrossblog.icrc.org/blog/what-you-need-to-know-about-safe-zones>.

115 T. Keck, *ibid.*

116 Matthew Gillett, “Animals in Protected Zones”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

117 ICRC Environmental Guidelines, above note 31, para. 14.

118 *Ibid.*, para. 61.

119 Niccolò Pons, “Animals”, in Dražan Djukić and Niccolò Pons (eds), *The Companion to International Humanitarian Law*, Brill, Leiden, 2018, pp. 171–2.

120 M. Gillett, above note 116.

foraging behaviour of animals.¹²¹ The zoning might also reinforce industrial and economic activities, such as deforestation, thereby causing significant prejudice to wildlife.¹²² In conclusion, the creation of protected ecological zones might generate (despite possible drawbacks) additional benefits for animals and thus complement the belligerents' obligations to respect and protect all animals, including wildlife, under the other regimes and principles of IHL.

Interpretation and application of IHL in line with animals' needs

Changing attitudes and new domestic law categories

By treating animals as mere civilian or cultural objects, as part of the environment or of protected zones, or as medical equipment and means of transport, IHL is out of sync with the evolution of the status and protection that animals have progressively acquired around the world over the last decades.¹²³ Currently, 124 States of the world possess some kind of animal protection legislation.¹²⁴ For sure, these laws do not prohibit the killing of animals on a massive scale for human consumption. However, they prohibit—as a minimum—cruelty against animals, and in many States regulate the keeping, transport and slaughter in order to reduce suffering. The discrepancy between legal protection in peacetime and complete neglect in war should be overcome. In many other matters, the evolution of the law outside the context of armed conflict (ranging from human rights to environmental law) had significant consequences on the development of IHL. Similarly, the increasing concern for animal welfare could and should impact the way animals are treated in war.¹²⁵ Generally speaking, public awareness of the need to improve animal conditions in those circumstances is growing.¹²⁶ As emphasized by Marco Roscini, attitudes are shifting, especially towards animals like dogs or horses which have entertained close emotional bonds with soldiers for centuries:

A legislative proposal submitted to the US Congress, the US Canine Members of the Armed Forces Act, provided, for instance, that military working dogs should not be considered as “equipment” but should be reclassified as canine members of the armed forces. In some cases, at least unofficially, dogs have been given a military rank and wear a sign distinctive of their rank on their body armour.¹²⁷

121 *Ibid.*

122 Joshua H. Daskin and Robert M. Pringle, “Warfare and Wildlife Declines in Africa’s Protected Areas”, *Nature*, Vol. 553, No. 7688, 2018, p. 328.

123 Sabine Brels, *Le Droit du bien-être animal dans le monde: évolution et universalisation*, L’Harmattan, Paris, 2017.

124 Global Animal Law, above note 10.

125 J. de Hemptinne, above note 7, p. 273.

126 Jérôme de Hemptinne, Tadesse Kebebew and Joshua Niyo, “Animals as Combatants and as Prisoners of War?”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

127 M. Roscini, above note 19, p. 44.

The decoration of animals who have distinguished themselves on the battlefield¹²⁸ and of establishing war memorials commemorating animal soldiers also illustrate the intention of some armies to treat certain “combatant animals” differently from mere commodities.¹²⁹ Concededly, these symbolic practices fall short of a trend of respecting animals in war more generally, and they are accompanied by other practices that manifest disregard for animal interests. For example, in the 1970s, the US dogs that had been donated to fight in the Vietnam war were not repatriated but left on the ground.¹³⁰ Also, in 2003, a US-American Department of Defense Order prohibited soldiers in the Iraq war from bringing home stray animals they had adopted during their serving time.¹³¹ Such inconsistencies are typical for the human laws dealing with animals.

A growing concern for animals’ intrinsic value is also manifest in the new legal qualification of animals as “not things” in several jurisdictions around the world. In some legal orders they are even explicitly qualified as “sentient beings”.¹³² In parallel, scholars have developed new legal categories for animals such as “living property”,¹³³ “animal personhood”,¹³⁴ “quasi property”,¹³⁵ “legal beingness”,¹³⁶ or as explicitly lying between person and thing.¹³⁷ This evolution could impact the development of the laws of warfare along two paths that run in the same direction. First, and more radically, animals could be removed from the category of object as envisaged under IHL and be included into the categories of combatant/prisoners of war or of civilians and thereby benefit from the guarantees extended to human beings. Second and more pragmatically, animals might still be equated with “objects” in the sense of IHL, while the rules

- 128 See BBC News, “War-wounded Military Dog Awarded Charity Medal”, 5 April 2016, available at: <https://www.bbc.co.uk/news/uk-england-london-35957766>.
- 129 Karsten Nowrot, “Animals at War: The Status of ‘Animal Soldiers’ under International Humanitarian Law”, *Historical Social Research*, Vol. 40, 2015, p. 140.
- 130 Janet M. Alger and Steven F. Alger, “Canine Soldiers, Mascots, and Stray Dogs in U.S. Wars: Ethical Considerations”, in Ryan Hediger (ed.), *Animals and War: Studies of Europe and North America*, Brill, Leiden, 2013.
- 131 See critically, DanaMarie Pannella, “Animals are Property: The Violation of Soldiers’ Rights to Strays in Iraq”, *Case Western Reserve Journal of International Law*, Vol. 43, 2010.
- 132 Treaty on the Functioning of the European Union, Art. 13; Czech Act No. 89/2012 of 3 February 2012, § 494; French Code Civil, amendment by Art. 2 of Loi n° 2015-177 of 16 February 2015, Arts 515–4; Portuguese Código Civil, Decreto-Lei n° 47344, Diário do Governo n° 274/1966, Série I de 1966-11-25, consolidado, versão à data de 2018-11-05; Colombia, Art. 201.-B “Animais”; Código Civil, Amendment by Law no. 1774 of 6 January 2016, Art. 655(3); Spain, Art. 333bis, inserted into the Civil Code by Law 17/2021 of 15 December 2021 “BOE” núm. 300 of 16 December 2021, available at: <https://www.boe.es/eli/es/l/2021/12/15/17/con>. See in detail, A. Peters, above note 3, pp. 400–3 with further references. The quality as “sentient being” should always form a barrier to the application of those legal rules on “things” that do not do justice to the sentience of animals.
- 133 David Favre, “Living Property: A New Status for Animals Within the Legal System”, *Marquette Law Review*, Vol. 93, No. 3, 2010.
- 134 Carolin Raspé, *Die tierliche Person*, Duncker & Humblot, Berlin, 2013.
- 135 Angela Fernandez, “Not Quite Property, Not Quite Persons: A ‘Quasi’ Approach for Nonhuman Animals”, *Canadian Journal of Comparative and Contemporary Law*, Vol. 5, 2019.
- 136 Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders*, University of Toronto Press, Toronto, 2021.
- 137 Eva Bernet Kempers, “Neither Persons nor Things: The Changing Status of Animals in Private Law”, *European Journal of Private Law*, Vol. 29, No. 1, 2021.

governing them could be reinterpreted to better take account of the fact that animals are living beings, experiencing pain, suffering and distress. Let us examine these two avenues in turn.

Animals as combatants and prisoners of war or as civilians?¹³⁸

When determining the groups of individuals that can benefit from the status of combatants and prisoners of war in international armed conflicts, the Geneva Conventions and AP I only refer to “persons”.¹³⁹ The Commentary on Article 43 of AP I explicitly states that “[t]he expression ‘armed forces’ means ‘members of the armed forces’, *i.e.*, *persons*, [...]” and adds that “[i]n itself it [...] does not allow, for example, the use of *animals* trained to attack, who are incapable of distinguishing between an able-bodied enemy and an enemy who is ‘hors de combat’”.¹⁴⁰ The concept of “civilians” in Article 50(1) of AP I also refers to persons.¹⁴¹ Although the word “person” normally refers to humans, the law also knows moral or “artificial” persons such as corporations. It is therefore not out of the question to broaden the meaning of “person” also in IHL so as to encompass non-human persons. In contrast to animals, corporations are man-made and governed by human beings. However, this is irrelevant for their “artificial” personhood which was highly controversial at its inception in the second half of the nineteenth century and still is in several respects, for example with regard to the criminal liability of corporations.¹⁴² Moreover, the rationale of the category of “person” might suggest its extension to animals. The need for the status as “protected person” arises from the increased vulnerability of persons in specific constellations.¹⁴³ More specifically, the assumption is that they are under an increased risk of abuse in the hands of the enemy. The radical vulnerability of animals in armed conflict is comparable to that of humans. Arguably, animals are also under heightened risk of being abused in the hands of members of the opposing party to the conflict, because these humans are not as emotionally bonded to the animals as their normal trainers and handlers.¹⁴⁴

Finally, and most importantly, the legal term “person” in IHL does not seem to carry a particular philosophical and doctrinal baggage. It is thus set apart from the debate in moral philosophy and in legal scholarship on animal personhood. In the broad and intense moral and legal debate on the possible legal personality of animals, the quality of “person” is mostly seen as a precondition for

138 This analysis is mainly drawn from J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

139 For non-international armed conflicts, the preamble of AP II mentions the “*human person*” three times.

140 APs Commentary, above note 52, para. 1672. Article 43 of AP I does not mention the word “person”, though.

141 AP I, Art. 50(1). According to the provision, “[a] civilian is any *person* who does not belong to one of the [other] categories of persons [...]” (emphasis added).

142 John C. Coffee, “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment”, *Michigan Law Review*, Vol. 79, No. 3, 1981.

143 Heike Krieger, “Protected Persons”, in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of International Law*, Oxford University Press, Oxford, 2015, para. 1.

144 A. Peters, above note 3, p. 385.

having rights, and as synonymous with legal capacity. In those fields, the recognition of animal personhood is central to the struggle over animal rights.¹⁴⁵ In contrast, being a “person” in the sense of IHL is not associated with having rights in this branch of law. On the contrary, the traditional view is that “persons” benefit from protective standards under IHL but are not themselves rights-holders (“*titulaires*”).¹⁴⁶ It is therefore conceptually possible to broaden the concept of “person” under IHL (and even “protected persons”) so as to encompass “animal persons”.¹⁴⁷

At the same time, the rigid categories of persons under IHL are ill-adapted to the needs of animals. Granting them a combatant and a prisoner-of-war status raises several difficulties. First, under customary international law, combatants belonging to armed forces who, at the time of falling into the power of the enemy, fail to individually distinguish themselves from the civilian population – by not wearing a uniform or a distinctive sign – lose their combatant status and, thus, forfeit their prisoner-of-war status.¹⁴⁸ The criterion of distinction could also make sense for animals: If the adversary is able to distinguish those animals that participate in hostilities from those that do not, the adversary would know which animals can be targeted or placed in custody.¹⁴⁹ On the other hand, the animals are not able to comply by themselves with the obligation to wear a distinctive sign. This consideration suggests that “animal soldiers” should not lose their protection just because they do not satisfy a requirement of distinction over which they have no control whatsoever.¹⁵⁰ In result, the requirement of distinction cannot reasonably apply to animals.

Second, in order to benefit from the combatant and prisoner-of-war status, an individual must be part of a group of regular or irregular State armed forces which must itself belong to a party to an international armed conflict.¹⁵¹ However, ascribing membership in armed forces to “animal soldiers” might turn out to be problematic since, unlike most human beings, animals do not voluntarily join armed forces. Even humans who are drafted or forcibly conscripted are in a position different from animals, because they are at least aware of the dangerous conditions under which they will be forced to operate.¹⁵²

145 Gary L. Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation*, Columbia University Press, New York, 2008.

146 Ziv Bohrer, “Divisions over Distinctions in Wartime International Law”, in Z. Bohrer, J. Dill and H. Duffy, *Law Applicable to Armed Conflict, Max Planck Trialogues on the Law of Peace and War*, Vol. 2 (Anne Peters and Christian Marxsen series eds), Cambridge University Press, Cambridge, 2019, p. 175 and pp. 182–6.

147 A. Peters, above note 3, pp. 383–5.

148 ICRC Customary Law Study, above note 24, Rule 106. See also Laura Olson, “Status and Treatment of Those Who do not Fulfil the Conditions for Status as Prisoners of War”, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions*, above note 82, p. 915.

149 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

150 *Ibid.*

151 Sean Watts, “Who Is a Prisoner of War?”, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions*, above note 82, pp. 891–7. See also J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

152 Be it as it may, status under IHL is determined by factual (objective) conditions: membership of the armed forces and a belonging to a party to an international armed conflict. In contrast, the individual mental state, that is, cognition and volition to be a member or participate in the armed conflict, is immaterial. Considerations on the mental state of actors should not exclude them – animals or humans – from

Furthermore, these animals cannot willingly disengage from active duty like human members of armed forces: They remain entirely dependent on the goodwill of the soldiers who exercise authority over them.¹⁵³

Third, if treated as combatants, “animal soldiers” may be targeted at all times when belonging to armed forces. However, as pointed by Jérôme de Hemptinne, Tadesse Kebebew and Joshua Niyo:

[w]hile human beings willingly and deliberately join armed forces, perfectly cognisant that this situation could lead to lethal consequences, animals have no freedom of choice in this regard. They are not aware of the exact role that they play in the conduct of hostilities and are unable to react autonomously to any military action undertaken by adverse military forces against them. Moreover, they do not benefit from any immunity of prosecution that is available to those human beings who have the legal right to participate in hostilities, because they are not subjected to criminal prosecution anyway.¹⁵⁴

This ultimately means that animals do not need the combatant status, but would rather be burdened by it.

Fourth, when animals fall into the hands of the enemy, the application of the full regime of protection envisaged in GC III and AP I to them would be unrealistic and unnecessary.¹⁵⁵ Many existing rules on prisoners of war would not be directly relevant to animals, for instance, the rules on discipline, clothing, ranks, religious and intellectual activities, interrogation, financial resources and remuneration, representation, retention of civil capacities, escape or sanctions.¹⁵⁶ Besides, in situations where armed forces are already unable to protect the well-being of human detainees, providing “animal soldiers” with the guarantees contained in GC III and AP I would certainly not constitute a priority for these forces.¹⁵⁷

Fifth, the overarching rationale of the internment regime of prisoners of war, as well as the related matter of release and repatriation, do not fit for animals. The internment of prisoners of war is mainly justified by the legitimate goal to prevent combatants from future involvement in hostilities.¹⁵⁸ However, animals do not threaten to get involved once they are not under the patronage of their handlers. It is unlikely that they could by themselves re-join their armed forces in order to participate again in combat efforts.¹⁵⁹ The main reason that may justify, in exceptional circumstances, the animals’ “internment” is to guarantee their own survival, by providing them with the necessary medical

protection under GC III and AP. See A. Peters, above note 3, p. 377. See also J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

153 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

154 *Ibid.* See also A. Peters, above note 3, pp. 337 and 394.

155 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

156 *Ibid.*

157 *Ibid.*

158 Marco Sassòli, “Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War”, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions*, above note 82, p. 1040.

159 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126. See also A. Peters, above note 3, pp. 377–8.

care and means of subsistence, and by protecting them from the danger of hostilities.¹⁶⁰ Hence, decisions to “liberate” animals should be based on different considerations, such as an evaluation of their capacities to feed themselves in the difficult circumstances of war, or on the possibility of returning them to their countries of origin without creating danger. The material costs for the army generated by the loss of an animal on whose military training considerable resources had been spent is a different consideration that does not fit into the prisoner-of-war regime. It was therefore lawful and legitimate that the Taliban did not return the British army dog that had been captured by them in Afghanistan, as long as they continued to feed and shelter the animal adequately.¹⁶¹

For these five reasons, qualifying animals as proper combatants when they take part in hostilities, and as prisoners of war when they fall in the hands of the enemy, would be neither appropriate nor meaningful.¹⁶² Since the term of “civilian” in IHL is defined *ex negativo* as “any person who does not belong to one of the categories of persons” who are entitled to prisoner of war status,¹⁶³ its applicability to animals is problematic, too.¹⁶⁴

An animal-friendly interpretation of IHL rules on objects

The second, less radical, and arguably more adequate developmental strategy would be to interpret and apply the many existing IHL norms that could potentially offer protection to animals during warfare in a “progressive manner” so as to better account for the animals’ nature as “sentient beings” that deserve to be treated as such in all circumstances.¹⁶⁵ As “sentient being” is already a legal term in several legal orders of the world, it could in the future potentially become a *sui generis* category of IHL.¹⁶⁶ It is conceded that such a (r)evolutionary reading of IHL norms cannot yet point to any general practice of States, accompanied by *opinio iuris* that would give rise to new customary rules. Also, as far as the interpretation of the IHL conventions is concerned, no subsequent State practice manifesting agreement has so far emerged.¹⁶⁷ On the other hand, as argued above and applying the principle of systemic integration, a progressive interpretation may legitimately be based on “other relevant rules of international law applicable

160 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126. See also A. Peters, above note 3, p. 377.

161 Shashank Bengali and Hashmat Baktash, “Taliban Says Captured British Military Dog is Healthy”, *Los Angeles Times*, 7 February 2014, available at: <https://www.latimes.com/world/worldnow/la-fg-wn-taliban-captive-british-dog-20140207-story.html>.

162 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126. See also A. Peters, above note 3, pp. 394–5.

163 See wording of AP I, Art. 50(1); and ICRC Customary Law Study, above note 24, Rule 5.

164 However, see A. Peters, above note 3, pp. 380–3.

165 J. de Hemptinne, A. Peters and R. Kolb, above note 12. For a novel approach of “animal-adequate interpretation”, see Peter V. Kunz, “Tieradäquate Auslegung als methodische Erweiterung”, *Zeitschrift des Bernischen Juristenvereins*, Vol. 157, No. 5, 2021.

166 See above note 132 and K. Nowrot, above note 129.

167 See Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969, 1155 UNTS, Art. 31(3)(a) and (b) on treaty interpretation.

in the relations between the parties”,¹⁶⁸ as found, e.g., in animal species conservation treaties.¹⁶⁹ The evolution of IHL in the direction of greater concern for animals might also benefit from the dynamism instilled into this legal field by the Martens clause whose contemporary version is codified in Article 1(2) of AP I.¹⁷⁰ The “principles of humanity” and “the dictates of public conscience” mentioned here “both suggest construing the relevant norms, wherever they lack clarity or precision, and wherever doubt arises in their application to the facts, in the direction of outlawing acts that cause suffering”.¹⁷¹ Such an interpretation is especially plausible because the contemporary, more ecological version of the Martens clause, as proposed by the ICRC and the International Law Commission (ILC), protects not only civilians and combatants but also “the environment” as such¹⁷² – which comprises animals.¹⁷³

Using this evolutionary approach, we identify six main principles of IHL that apply to animals as objects, part of the environment, means of medical transport, search and rescue, objects indispensable for the survival of the civilian population, and cultural property, as well as to those animals that are located in protected zones.¹⁷⁴ It should be noted at the outset that certain States and non-State actors might not be capable of respecting and implementing all these principles in the difficult circumstances of war, especially when they are not controlling the territory in which they are fighting. Moreover, belligerents will normally prioritize the alleviation of suffering of human beings. Therefore, the application of the recommended principles will always be tempered and limited to what it is actually feasible. The suggested principles are also flexible enough to guarantee that human interests prevail over animal interests when they are in conflict – which is not inevitably the case.

168 VCLT, *ibid.*, Art. 31(3) lit. (c).

169 J. de Hemptinne, A. Peters and R. Kolb, above note 12; A. Peters, above note 3, p. 390. The primary rationale of the species conservation treaties is the avoidance of extinction and concomitant loss of genetic material, and not the reduction of animal suffering. These two goals sometimes stand in tension but are in other respects aligned in that they seek to protect lives. See Guillaume Futhazar, “Biodiversity, Species Protection, and Animal Welfare Under International Law”, in A. Peters (ed.), *Studies in Global Animal Law*, above note 16.

170 The Martens clause is also enshrined in the termination clauses of the four Geneva Conventions (GC I, Art. 63; GC II, Art. 63; GC III, Art. 142; GC IV, Art. 158) (GC II: Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950)). In combination with common Article 3 of the Geneva Conventions, these clauses lead to the application of the Martens clause in non-international armed conflicts. See, on the relevance for animals, A. Peters, above note 3, pp. 385–8.

171 A. Peters, above note 3, p. 388.

172 ICRC Environmental Guidelines, above note 31, Rule 16; ILC, Draft Principles, above note 36, draft principle 8*bis*.

173 See ICRC Environmental Guidelines, above note 31, and main text of this contribution.

174 These principles are mainly drawn from J. de Hemptinne, A. Peters and R. Kolb, above note 12.

First principle: Animals should be utilized for military purposes only in exceptional circumstances and always be provided with adequate care that meets their needs

Belligerents should not use animals to carry out functions which are directly or indirectly related to the conduct of hostilities, except when absolutely necessary for essential tasks that cannot be accomplished by human beings in specific circumstances; tasks such as searching, rescuing or transporting wounded soldiers. When using animals for these rather medical tasks, belligerents should provide them, to the greatest practicable extent, with satisfactory conditions of nutrition, safety and health. They should not employ animals outside these exceptional circumstances to perform actual military tasks, such as carrying able-bodied soldiers or weapons. Belligerents should, whenever feasible, return animals that have fallen into their hands to their homeland—except if they would be badly treated in their homeland—or retain these animals to perform the mentioned medical duties only.

Second principle: During warfare, animals should, whenever feasible, be treated as sentient beings experiencing pain, suffering and distress

This principle has a number of concrete implications in different contexts. First, whenever feasible in concrete situations, belligerents should consider capturing rather than “destroying” animals used for military purposes. Second, belligerents should never use means and methods of warfare which by their nature will cause superfluous injury to or unnecessary suffering of identifiable animals. Third, in the proportionality calculation, animals should be accorded a value in their own right and, as a consequence, their interests should no longer be automatically subordinated to those of humans. In other words, when evaluating collateral damage, belligerents should ensure, to the greatest practicable extent, that the consequences of an attack on animals are not only a factor of “minor weight” in the balancing exercise.

Third principle: The rules codified in Articles 35(3) and 55 of AP I which prohibit using means and methods of warfare that are intended, or may be excepted, to cause long-term, widespread and severe damage to the environment should also be applied in non-international armed conflicts and fully protect wildlife

The norms protecting the environment are currently limited to international armed conflicts and not unequivocally applicable in non-international armed conflicts. This limitation reflects the reluctance of States to accept heavy constraints on the way they conduct hostilities against rebels on their national territories. This restriction creates an unjustified legal lacuna.¹⁷⁵ IHL as it stands still assumes a

¹⁷⁵ J. de Hemptinne, above note 32.

world in which dividing lines between international and non-international armed conflicts are clear. In contrast, the safeguarding of the environment and in particular wildlife is grounded in theoretical and practical assumptions that differ from IHL. From a theoretical perspective, the environment is progressively being ascribed a universal normative value which is – strictly speaking – incompatible with the constraints imposed by the sovereignty of States.¹⁷⁶ Concomitantly, it is increasingly recognized that environmental concerns are no mere domestic affair of individual States. One legal consequence is that certain essential or rare natural resources, including endangered species, receive an absolute protection in all circumstances, wherever they are.¹⁷⁷ On a more pragmatic level, belligerents in non-international armed conflicts – be they governmental forces or armed groups – can damage natural resources like any other belligerents, and this has repercussions on wildlife. As also observed by the ICRC, “major damage to the environment rarely respects international frontiers”.¹⁷⁸ Even when such damage is caused within the boundaries of a non-international armed conflict, it usually affects the ecological balance on a wide scale.¹⁷⁹ This is especially true where protected areas, habitats and, more generally, interconnected ecosystems extend beyond the frontiers of the State embroiled in a non-international armed conflict – which is typical.¹⁸⁰ Therefore, the rules on the protection of the environment and, in particular wildlife, should be interpreted and applied whenever feasible in a manner that transcends the territorial and political boundaries on which IHL is historically grounded.¹⁸¹

Fourth principle: When captured by the enemy, animals should be treated to the greatest practicable extent as sentient beings experiencing pain, suffering and distress

Upon capture, belligerents should ensure, to the greatest practicable extent, that the interests and arguable dignity of animals which have been involved in hostilities be respected by providing conditions satisfying their needs of nutrition, safety and health. All forms of cruel treatment, torture or mutilation should be strictly prohibited. Whenever possible, animals should not be located in the vicinity of dangerous areas or installations, nor should they be placed in regions where essential resources, like water, are not available and cannot be provided. Whenever possible, they should not be “interned” close to war zones, where they run the risk of being killed or injured. Since captured animals will rarely represent a military threat to the security of the adversary, they should, as far as possible, be freed if they can survive by themselves, be returned to their

176 Markus Vordermayer, “The Extraterritorial Application of Multilateral Environmental Agreements”, *Harvard International Law Review*, Vol. 59, No. 1, 2018, p. 110.

177 *Ibid.*

178 ICRC Customary Law Study, above note 24, Rule 45.

179 J. de Hemptinne, above note 32.

180 *Ibid.*

181 *Ibid.*

hometown, or be detained with the soldiers accompanying them (if treated with due respect in these circumstances).

Fifth principle: Endangered species and species endemic to particular areas should benefit from the protection that is afforded to cultural property

The fairly narrow concept of cultural property in IHL should be expanded through an evolutionary interpretation in the light of other international law instruments relating to the protection of both cultural and natural heritage.¹⁸² This would allow the drawing of some wildlife categories, namely endangered species and species endemic to particular areas, under the umbrella of cultural property.¹⁸³

Sixth principle: The creation of protected zones to shelter animal populations should be encouraged in peacetime whenever necessary

Eco-centric protected zones for particularly vulnerable areas or environmental hotspots, in which endangered species are often located, should be created in peacetime.¹⁸⁴ Moreover, a network of such zones should be established in a systematic manner through reliance on other pre-existing multilateral conventions, such as the World Heritage Convention and the Convention on Biological Diversity.¹⁸⁵ Finally, decisions to establish such zones should take into account the possible negative consequences for animals, such as attracting persons seeking refuge, thereby putting the well-being of animals at risk.

These six principles may not yet be firmly established in IHL as it stands but they can be extrapolated in a mode of legitimate interpretation of the relevant treaties and customary law. The key motivation and justification for the progressive interpretation is the need to pay full regard to welfare requirements of animals stemming from their nature as sentient beings affected by war.¹⁸⁶ Today, respect for animal sentience and animal welfare is not a social value that would be alien to the corpus of IHL but a value that already forms part of the principles of humanity and of public conscience that lie at the heart of the contemporary laws of war.¹⁸⁷ Based on this insight, the idea is to perform a kind of animal mainstreaming in the reading and application of the relevant rules which is in line with the canons of interpretation, relying on the open wording, the object and purpose of the rules, and their normative context.¹⁸⁸ These principles should be acknowledged and disseminated in order to guarantee a

182 S. Krähenmann, above note 89.

183 *Ibid.*

184 M. Gillett, above note 116.

185 *Ibid.*

186 For the legal obligation to “pay full regard” to animal welfare requirements, see Treaty on the Functioning of the European Union, Art. 13.

187 See AP I, Art. 1(2).

188 See VCLT, above note 167, Art. 31.

minimum level of protection for vulnerable animals in international and non-international armed conflicts.

A convention granting fundamental rights to animals

The progressive animal-friendly interpretation of the relevant IHL rules that takes into account the animals' nature as sentient being (as opposed to inanimate objects), as suggested above, is already dynamic and slightly pushes the law beyond its current state. Moving further, an additional level of protection could be envisaged: animals could be treated as bearers of rights adapted to their needs. It is a legal fact that human rights (and the idea of rights more generally) have progressively led to an attribution of certain rights to human beings in armed conflicts and have contributed to the "individualization" of IHL.¹⁸⁹ In a similar manner, the nascent case law on animal rights ("subjective" rights as opposed to "objective" welfare and protective standards) in peace times could play a role.¹⁹⁰ This case law is still very thin and limited to a few countries in Latin America and Asia, and has so far not led to legislative reform. It may nevertheless inspire a corresponding form of "animalization" of IHL which could significantly improve the legal situation of animals during warfare, both symbolically and practically.¹⁹¹ On a symbolic level, animal rights would emancipate animals from the guardianship of humans and affirm their intrinsic value grounded on their proper interests, such as the interest in not being subjected to unnecessary suffering.¹⁹² On a practical level, animal rights would change the dynamic of trade-offs that belligerents are forced to undertake under IHL when they cannot fully reach competing goals—for instance, satisfying their military imperatives while at the same time respecting humanitarian concerns, including those relating to the welfare of animals. If animals were treated as distinct legal persons possessing rights (as "*titulaires*"), and not just as beneficiaries of legal standards of protection, the burden of legal explanation and justification would shift, and the trade-off would have to change significantly. Without rights to life and liberty, animals may be captured, detained and killed if no special rule prohibits this. In a rights framework, the legal analysis must take the rights as its starting point. The rights mark a *prima facie* protection. The protection by rights is not

189 Anne Peters, "The Direct Rights of Individuals in the International Law of Armed Conflict", in Dapo Akande, David Rodin and Jennifer Welsh (eds), *The Individualisation of War*, Oxford University Press, Oxford, 2022.

190 Supreme Court of India, *Animal Welfare Board of India v. Nagaraja and others*, Civil appeal no. 5387, 7 May 2014; Tercer Juzgado de Garantías Mendoza (Argentina), *Chimpanzee "Cecilia"* Case no. P-72.254/15, 3 November 2016; Colombian Supreme Court of Justice, *Chucho Case* AHC4806-2017, Radicación n° 17001-22-13-000-2017-00468-02, 26 July 2017 (overturned by Constitutional Court of Columbia, *Chucho Case* T-6.480.577 – Sentencia SU-016/20, 23 January 2020); Islamabad High Court, *Islamabad Wildlife Management Board (through its Chairman) v. Metropolitan Corporation Islamabad (through its Mayor & 4 others)*, W.P. no. 1155/2019, 21 May 2020; Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022.

191 A. Peters, above note 3, pp. 440–52.

192 *Ibid.*, p. 445.

absolute. However, most human behaviour involving animals (also in war) would then constitute interference with those rights. This interference must be specifically explained and justified in certain procedures. When the justification fails, the right is violated. The key of the justificatory procedure is balancing. The rights-based balancing is not free-floating but well-structured.

In other words,

rights confer a legal position which is elevated above the ordinary balancing of conflicting goods. When animals only benefit from protective rules, their welfare is but one interest among others. Balancing the animals' interests against human interests typically ends up prioritising the human interests, even trivial ones. Arguably, this type of balancing is structurally biased against animals. In contrast, animal rights would allow a fair balancing in which the proper value of fundamental interests (such as the interest to live) could be integrated.¹⁹³

When applying certain IHL rules, for example on the conduct of hostilities or on detention, when attacking or apprehending animals involved in war, belligerents would be forced to specifically justify restricting animals' substantive rights to life or to liberty and would have to take due account of the substantive importance ("weight") of these rights.

Such a shift of the argumentative burden and of the "weights" on the balance is already highly controversial in peace times. When States are faced with significant challenges in war, curtailing their powers to increase the protection of non-human beings by granting them concrete rights might appear illusionary. But, ultimately, any progress in this field will depend on the nature of these rights. Among potential animal rights, one right deserves particular attention: the right not to be used to carry out military functions, except when absolutely necessary for essential tasks that cannot be accomplished by humans, such as tracing and recovering wounded soldiers or civilians.¹⁹⁴ Indeed, it does not seem unrealistic that a consensus to formally recognize such an animal right not to be used as a means of warfare could soon be reached. Only a few States still weaponize animals, and the public is generally strongly opposed to this practice. Moreover, technological progress, such as the use of drones, has reduced the need to employ animals as weapons.

This evolution could be crucial for the fate of animals in war. Indeed, it would constitute a first concrete step towards formally recognizing the right to life of animals during warfare. Banning, once and for all, the usage of animals as weapons of war could also trigger a wider reflection on the granting of other rights to animals which are at the heart of their dignity, such as the right to receive medical care when wounded or sick, the right not be submitted to any

193 Anne Peters, "Toward International Animal Rights", in A. Peters (ed.), *Studies in Global Animal Law*, above note 16, p. 111; Anne Peters, "Animal Rights", in Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig (eds), *Elgar Encyclopedia of Human Rights*, Edward Elgar, Cheltenham, 2022.

194 See in favour of an absolute ban on using animals in war, A. Peters, above note 3, p. 396.

cruel and degrading treatment, the right to be preserved from military attacks of enemy forces, and the right to be provided with satisfactory conditions regarding nutrition, safety and health.

Outlook

IHL, the law of war, is, as Hersch Lauterpacht famously wrote, “at the vanishing point of international law”.¹⁹⁵ The same applies – *mutatis mutandis* – to animal law. Bringing both together, as we suggest in this paper, seems to cumulate the difficulties to the extreme. However, we submit that we can and should pursue a “realistic utopia” for animals globally, proceeding “from the international political world as we see it” and extending “what are ordinarily thought to be the limits of practicable political possibility”.¹⁹⁶ Citing Lauterpacht again, we affirm that “the lawyer must do his duty regardless of dialectical doubts – though with a feeling of humility”,¹⁹⁷ and based not only on his and her bounded rationality but also – and especially when it comes to the laws of war – on *feelings* of compassion, outrage about injustice, and solidarity that in turn inform our moral judgment¹⁹⁸ – feelings and morality we share with our fellow beings, the non-human animals.¹⁹⁹

195 Hersch Lauterpacht, “The Problem of the Revision of the Law of War”, *British Yearbook of International Law*, Vol. 29, 1952, p. 382.

196 John Rawls, *The Law of Peoples*, Harvard University Press, Cambridge, MA, 1999, § 1, quotes at pp. 83 and 11. See also Antonio Cassese, *Realizing Utopia*, Oxford University Press, Oxford, 2012.

197 H. Lauterpacht, above note 195, p. 381.

198 Susan A. Bandes, Jody Lynee Madeira, Kathryn D. Temple and Emily Kidd White (eds), *The Edward Elgar Research Handbook on Law and Emotion*, Edward Elgar, Cheltenham, 2021; Nele Verlinden, “To Feel or Not to Feel: Emotions and International Humanitarian Law”, in Mats Deland, Mark Klamberg and Pål Wrangé (eds), *International Humanitarian Law and Justice: Historical and Sociological Perspectives*, Routledge, London, 2018.

199 Frans B. M. de Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals*, Harvard University Press, Cambridge, MA, 1996; Mark Bekoff and Jessica Pierce, *Wild Justice: The Moral Lives of Animals*, Chicago University Press, Chicago, IL, 2009.

Reparation for victims of serious violations of international humanitarian law: New developments

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Abstract

This article aims to determine what important new developments have emerged in reparation for victims of serious violations of international humanitarian law (IHL). Our hypothesis is that there have been significant new developments in this

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area of particular relevance to IHL and that reparation for victims of serious violations of IHL is increasingly being incorporated into this body of law as one of its key components. It is submitted that the following developments are evidence of this gradual transformation of IHL: (i) broad recognition of the right of victims of serious violations of IHL to reparation; (ii) extension of the scope of the obligation to provide reparation under IHL to include non-State armed groups and individuals as well as States; (iii) the existence of innovative domestic reparation mechanisms complemented or supervised by regional courts, as evidenced by experiences in Latin America; and (iv) the reparation system of the International Criminal Court as a global mechanism.

Keywords: international humanitarian law, reparation, victims, serious violations, new developments.

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Introduction

Breaches of international obligations under international humanitarian law (IHL) entail international State responsibility and individual criminal responsibility.¹ Furthermore, as obligations arising from IHL, such as those set out in Article 3 common to the four Geneva Conventions (non-international armed conflicts; NIACs), refer to “Parties to the conflict”, IHL links armed groups involved in hostilities to other groups or a State.² This means that non-State armed groups must also undertake to comply with IHL.³

It is widely recognized that States are required to provide reparation when they are responsible for violations of the rules of international law, as has been consistently held in international case law.⁴ The Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC Draft Articles), seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts and the ensuing legal consequences, in particular, content on reparation for the harm caused by such acts.⁵ Article 31 establishes the principle of full reparation according to which a State bearing responsibility for an internationally wrongful act is under

- 1 See Marco Sassòli, *International Humanitarian Law*, Edward Elgar Publishing, Cheltenham, 2019, pp. 84–5 and 150–1.
- 2 Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004, para. 22.
- 3 See M. Sassòli, above note 1, pp. 196–7; Marco Sassòli and Yuval Shany, “Should the Obligations of States and Armed Groups Under International Humanitarian Law Really be Equal?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.
- 4 For example, Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)*, Series A, No. 17, Judgment (Merits), 13 September 1928, p. 29; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 259.
- 5 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, p. 31.

an obligation to make full reparation for any material and moral damage caused by that act.⁶ There are, however, ongoing debates about the role of reparation in addressing the consequences of armed conflicts. These debates involve contestation about moral values, different conceptions of justice and approaches to international law.⁷

The article's main research question focuses on determining what important new developments there have been with respect to reparation for victims of serious violations of IHL and examining some of them. Our hypothesis is that there have been significant new developments in reparation for victims of atrocities that are part of or specific or relevant to IHL. Increasingly, IHL is incorporating reparation for victims of serious violations of IHL as one of its core components, adding an important reparative purpose to its more traditional and better-known preventive and punitive purposes. These recent developments are evidence of a gradual transformation of IHL. They include: (i) broad recognition of the right of victims of serious violations of IHL to reparation; (ii) the consideration of subjects of IHL other than States, such as non-State armed groups and individuals, as parties required to provide reparation; (iii) the consolidation of innovative domestic reparation mechanisms complemented or supervised by regional courts, as evidenced by experiences in Latin America; and (iv) the International Criminal Court (ICC) reparation system as a global mechanism with jurisdiction over reparation for victims of serious violations of IHL, as emerging practice shows.

This article seeks to fill some of the gaps in the literature. The issue of reparation for the victims of atrocities has mainly or traditionally been examined from the perspective of international human rights law (IHRL). Among other authors, Sandoval holds that IHL “has not evolved at the same pace as international human rights law”.⁸ Furthermore, academic articles or individual chapters on reparation in IHL tend to focus almost exclusively on a very specific aspect or a particular institution, largely ignoring other aspects. This article, in contrast, looks at a selection of important recent developments in reparation for victims of serious violations of IHL and aims to provide a more comprehensive analysis, albeit with an emphasis on certain aspects.

The article is divided into three parts. The first analyses the basis for reparation for victims of serious violations of IHL and some current developments in this regard. It examines the shaky start to the development of the obligation to provide reparation under IHL and current thinking on the subjective right of the victims of serious violations of IHL to reparation. It

6 Report of the International Law Commission on the work of its fifty-third session, 23 April–1 June and 2 July–10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, UN Doc. A/56/10, 2001.

7 Christian Marxsen, “Unpacking the International Law on Reparation for Victims of Armed Conflict”, in Christian Marxsen and Anne Peters (eds), *Reparation for Victims of Armed Conflict*, Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2018-19, Heidelberg, 2018, p. 3.

8 Clara Sandoval, “The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation”, in C. Marxsen and A. Peters, *ibid.*, p. 45.

provides an overall analytical mapping of the relevant sources of law, mechanisms and subjects of law relating to reparation for victims of armed conflict. The second part looks at experiences involving reparation for victims of armed conflict in Latin America. The countries examined are Colombia, whose experience is analysed in greater depth, as well as Peru, Guatemala and El Salvador. The analysis mainly focuses on domestic reparation programmes, reparation provided by non-State armed groups and the case law of the Inter-American Court of Human Rights (I/A Court HR) on reparation relating to these countries. The third part addresses reparation for victims of serious violations of IHL and the ICC. It takes a look at the reasons that justify that the ICC has a reparation system and examines its limitations, with an emphasis on IHL-related content. This is followed by discussion of the extent to which this system provides procedural and substantive justice for victims of serious violations of IHL.

Reparation in IHL: Basis and developments

The development of the notion of reparation within the normative and practical framework of IHL, centred on repairing harm caused in international armed conflicts (IACs), got off to a shaky start. In IHL, individuals were intuitively considered beneficiaries but not holders of rights. They were considered objects of protection but not actual subjects of IHL. Relevant treaty-based IHL provisions on reparation are Article 3 of Hague Convention IV of 1907 respecting the Laws and Customs of War on Land and Article 91 of the Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of IACs of 1977 (Additional Protocol I).

Article 3 of Hague Convention IV provides that a “belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation”. According to Article 91 of Additional Protocol I, parties to a conflict shall be “liable to pay compensation” for violations of the Geneva Conventions and Additional Protocol I. The commentary of the International Committee of the Red Cross (ICRC) on this article states that this obligation applies to all parties to an armed conflict and that those entitled to compensation will normally be parties to the conflict or their nationals.⁹ Article 38 of the Second Protocol of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict provides that individual criminal responsibility does not affect the responsibility of States “including the duty to provide reparation”.

Traditionally, these IHL treaty provisions were interpreted as giving rise to obligations between States, the fulfilment of which was owed only to other States parties in armed conflicts. It was only after IHL ventured beyond the inter-State/State sphere, increasing the focus on people in a “humanization” process, that

⁹ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, paras 3652 and 3656.

experts have considered that IHL can recognize the rights of individuals.¹⁰ The ICRC Commentary on Article 91 of Additional Protocol I clearly confirms this, observing that “since 1945 a tendency has emerged to recognize the exercise of rights by individuals”.¹¹ There is, as yet, no provision like Article 91 in treaty law applicable to NIACs that establishes an obligation for all parties to such conflicts to provide reparation. However, Rule 139 of customary IHL applicable in both IACs and NIACs stipulates that “[e]ach party to the conflict must respect and ensure respect for international humanitarian law”. Furthermore, the ICRC recognizes in Rule 150 of customary IHL that practice indicates that non-State armed groups are required to provide reparation for harm caused by violations.¹²

The reason behind this State-centric approach was that most IHL treaty provisions expressly stipulate State obligations and do not clothe them in the language of rights. However, as Peters observes, there are numerous precepts and prohibitions in IHL treaties that require not only the protection of individuals but also expressly refer to “rights”, “liberty”, “claims”, “entitlements” and “guarantees” in relation to individuals.¹³ Other noteworthy provisions are the non-renunciation of rights stipulated in Article 7 of the Third Geneva Convention and Article 8 of the Fourth Geneva Convention, the ban on scientific experiments in Article 11 of Additional Protocol I and the prohibition on special agreements that affect protected persons and safeguard clauses on most favourable treatment in Article 6 of the First, Second and Third Geneva Conventions and Article 7 of the Fourth Geneva Convention.

In sum, the wording of IHL provisions is mixed, making the textual analysis inconclusive.¹⁴ However, the preparatory work and the *telos* of the Geneva Conventions would suggest that the possibility of individual rights under IHL should be considered more seriously.¹⁵ This problem is not resolved by the ILC Draft Articles. While Article 33(2) establishes that direct obligations towards individuals can exist, especially regarding human rights violations and other breaches of international law where the primary beneficiary of reparation is not a State,¹⁶ it also specifies that such direct obligations towards individuals exceed the scope of the Draft Articles, which should not affect these obligations.¹⁷

In any event, the ICC is now established, through its recent practice, as a global mechanism where victims of serious violations of IHL can exercise their right to reparation. The ICC and hybrid criminal courts, such as the Extraordinary

10 See, for example, *ibid.*, para. 3657; Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000; Lawrence Hill-Cawthorne, “Rights under International Humanitarian Law”, *European Journal of International Law*, Vol. 28, No. 4, 2017.

11 Y. Sandoz, C. Swinarski and B. Zimmermann, above note 9, para. 3657.

12 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, p. 549.

13 Anne Peters, “Rights to Reparation as a Consequence of Direct Rights under International Humanitarian Law”, in C. Marxsen and A. Peters, above note 7, p. 29.

14 *Ibid.*

15 *Ibid.*, pp. 29–30.

16 ILC, above note 5, p. 87.

17 *Ibid.*

Chambers in the Courts of Cambodia (ECCC), determine individual criminal responsibility for serious violations of IHL which constitute war crimes.¹⁸ In these courts, the victims of such violations and other atrocities committed during armed conflict can claim and receive reparation ordered against convicted individuals.¹⁹ The ICC reparation system is examined later.

Some contemporary international instruments also include provisions on reparation for victims. For example, the Rome Statute of the ICC (Article 75), the 2006 International Convention for the Protection of all Persons from Enforced Disappearance (Article 24(4)) and the 2019 ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity (Article 12(3))²⁰ are part of the growing trend towards the identification of an individual's right to reparation for serious violations of IHL and other atrocities committed during armed conflict.

Some regional systems, the I/A Court HR in particular, have recognized that the injured party has a subjective right to reparation.²¹ This court understands reparation in subjective terms and has always taken Article 63(1) of the American Convention on Human Rights (ACHR) seriously.²² In this vein, the I/A Court HR has developed an independent reparation system which, along with national transitional justice experiences, has served as a model for the ICC in interpreting Article 75 ("Reparations to victims") of its Statute.²³

The I/A Court HR and the European Court of Human Rights do not have the power to determine the international responsibility of States for serious violations of IHL or, strictly speaking, order them to provide reparation to victims of such violations. However, these courts have relied on sources of IHL for interpretation purposes²⁴ and, on this basis, awarded reparation to victims of armed conflict. I/A Court HR's practice, which is examined below, illustrates this. The African Court on Human and People's Rights also has the power, subject to certain jurisdictional requirements, to order reparation for victims of serious violations of IHL.²⁵

The International Court of Justice (ICJ) can order reparation for serious violations of IHL in an inter-State case in favour of the complainant State where the victims of such violations should be the ultimate beneficiaries of the reparation award.²⁶ This would suggest that, under the recent ICJ's judgment on

18 Rome Statute of the ICC, Art. 8; Law on the Establishment of the ECCC, Arts 6–7.

19 Rome Statute of the ICC, Art. 75; ECCC Internal Rules, Rules 23–23 *quinquies*.

20 Fourth Report on Crimes Against Humanity by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/725, 18 February 2019.

21 Ludovic Hennebel and Hélène Tigroudja, *Traité de droit international des droits de l'homme*, 2nd ed., Pedone, Paris, 2018, p. 1386.

22 *Ibid.*, p. 1441.

23 *Ibid.*

24 Françoise J. Hampson, "The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body", *International Review of the Red Cross*, Vol. 90, No. 871, 2008.

25 Protocol to the African Charter on Human and People's Rights, Art. 3(1).

26 See ICJ, *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*, Compensation, Separate Opinion of Judge Cançado-Trindade, 19 June 2012, para. 100; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 6 December 2016, Separate Opinion of Judge Cançado-Trindade, paras 24–7.

reparations in the case of *Armed Activities on the Territory of the Congo*,²⁷ the Democratic Republic of the Congo should share out among the victims of the serious violations of IHL part of the compensation Uganda was ordered by the ICJ to pay to it. The ICJ found that people had suffered harm as a result of the violations committed and set the amount of the compensation to be paid.²⁸ There are also quasi-judicial bodies, such as the United Nations (UN) Compensation Commission²⁹ and the Eritrea–Ethiopia Claims Commission,³⁰ both of which have a mandate to deal with serious violations of IHL, among other things.

What has usually happened is that victims of serious violations of IHL have claimed and received reparation nationally. Domestic mechanisms consist mainly of administrative reparation programmes.³¹ Victims have also claimed and been awarded reparation in national civil and/or criminal proceedings against (former) officials and agents of the State, members of armed groups and corporations.³² International reparation mechanisms are complementary or subsidiary to domestic ones. Some such national developments in Latin America are examined below.

An instrument that has made a crucial contribution in this area is the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005³³ (UN Principles), which affirm the right of victims of serious violations of IHL to “full and effective reparation”.³⁴ Although this instrument is not legally binding, it reflects a strong consensus among stakeholders, including States. It marked an important step in the evolution of the right to reparation because it served as the conceptual catalyst that brought together the views of victims, civil society, the UN, regional organizations and States.³⁵

Generally speaking, academic positions on reparation for victims acknowledge the existence of a (customary) individual right to reparation for serious violations of IHL although certain aspects of implementation are defined according to specific contexts.³⁶ All in all, the vast majority of academics consider

27 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 9 February 2022.

28 *Ibid.*, paras 133–258.

29 UN Compensation Commission, Documents, available at: <https://uncc.ch/documents> (all internet references were accessed in March 2022).

30 Eritrea–Ethiopia Claims Commission, available at: <https://pca-cpa.org/en/cases/71/>.

31 See Cristián Correa, “Operationalising the Right of Victims of War to Reparation”, in Cristián Correa, Shuichi Furuya and Clara Sandoval, *Reparation for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2020, pp. 126–63.

32 *Ibid.*, pp. 101 and 107–108; Suichi Furuya, “The Right to Reparation for Victims of Armed Conflicts”, in C. Correa, S. Furuya and C. Sandoval, *ibid.*, pp. 46–51.

33 UN General Assembly, Resolution Adopted by the General Assembly on 16 December 2005: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006.

34 UN General Assembly, *ibid.*, UN Principle 18.

35 C. Sandoval, above note 8, p. 46.

36 For more details, see Christian Marxsen, “Introduction: The Emergence of an Individual Right to Reparation for Victims of Armed Conflict”, in C. Correa, S. Furuya and C. Sandoval, above note 31,

that the victims of serious violations of IHL are entitled to claim and receive reparation.³⁷ Based on international and national practice, some authors recognize victim-centred approaches and the existence or emergence of a right to reparation with substantive and procedural content.³⁸

It is not a stretch to concur with those who, considering that individuals are subjects of international law, conclude that a (customary) right to reparation has emerged for victims of serious violations of IHL. This is also practicable owing to the loose wording of IHL provisions. Although they were not originally interpreted in this way, a different interpretation can be adopted today in the light of changing circumstances and new developments and according to the principle of the dynamic interpretation of the law.

Furthermore, the same or similar developments in international and domestic practice concerning the entitlement of victims of serious violations of IHL and other atrocities committed during armed conflict to claim and receive reparation have also taken place in IHRL and international criminal law, as observed by a number of experts.³⁹ It is indeed difficult to accept that the situation should be any different under IHL.⁴⁰ Similarly, in relation to Rule 150 of customary IHL, which establishes that a State responsible for violations of IHL “is required to make full reparation for the loss or injury caused”, the ICRC identified practices enabling victims of serious violations of IHL to seek reparation directly from the State responsible.⁴¹ Such practices include Latin American experiences, which are examined below.

Additionally, there is clearly a growing trend towards victims being able to seek reparation from other entities, particularly non-State armed groups and convicted individuals, a development that is examined in detail below. It is important to mention here that the ICRC study on customary IHL concluded that armed groups can “incur responsibility for acts committed by persons forming part of such groups”.⁴² Indeed, some authors have considered theories

pp. 10–12; Anne Peters, “Conclusion: Reparation for Victims of Armed Conflict”, in C. Correa, S. Furuya and C. Sandoval, above note 31, pp. 268–70.

37 For example, Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2012, pp. 39–43 and 117–28; Paola Gaeta, “Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?”, in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, pp. 305–27; S. Furuya, above note 32, pp. 16–91.

38 See S. Furuya, above note 32, pp. 16–91; C. Evans, *ibid.*; P. Gaeta, *ibid.*, pp. 305–27; Clara Sandoval, “International Human Rights Adjudication, Subsidiarity, and Reparation for Victims of Armed Conflicts”, in C. Correa, S. Furuya and C. Sandoval, above note 31, pp. 179–264; M. Sassòli, above note 1, pp. 91–8; Emily Crawford and Alison Pert, *International Humanitarian Law*, 2nd ed., Cambridge University Press, Cambridge, 2020, pp. 289–90.

39 For example, Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed., Oxford University Press, Oxford, 2015; Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Brill, Leiden/Boston, 2020.

40 Rainer Hofmann, “The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflict”, in C. Marxsen and A. Peters, above note 7, p. 33.

41 J.-M. Henckaerts and L. Doswald-Beck, above note 12, pp. 541–9.

42 *Ibid.*, p. 550.

such as the organizational responsibility of armed groups⁴³ and the binding force of IHL on organized armed groups. There are various explanations as to why they are bound by IHL: via the State; as individuals; because customary IHL is applicable to them; by virtue of the fact that they exercise *de facto* governmental functions; or because they have consented to it.⁴⁴

However, the ICRC study on customary IHL observes that the consequences of such responsibility are not clear. In particular, it is unclear “to what extent armed opposition groups are under an obligation to make full reparation”.⁴⁵ The ICRC did, however, conclusively find that there is practice to the effect that armed groups are required to provide reparation for the damage resulting from serious violations of IHL.⁴⁶ Based on recent practice, a growing number of academics have also identified an emerging obligation for armed groups to provide reparation to victims of serious violations of IHL and other atrocities committed during armed conflict.⁴⁷

Developments relating to reparation in IHL and recent national practice in Latin America

Colombia

Colombia is an important case in terms of national developments in reparation for victims of serious violations of IHL and other atrocities committed during armed conflict. Following a NIAC spanning five decades, the Colombian Government and the Revolutionary Armed Forces of Colombia (FARC) signed the Final Peace Agreement in 2016, establishing the Comprehensive System for Truth, Justice, Reparation and Non-Repitition.⁴⁸

The Peace Agreement includes provisions on reparation and considers the FARC as a party required to provide reparation and adopt transitional justice measures consistent with international law. It is based on the principle of collective

43 For example, Luke Moffett, *Justice for Victims Before the International Criminal Court*, Routledge, Abingdon, 2014, pp. 149–50; Jann K. Klefner, “The Applicability of International Humanitarian Law to Organized Armed Groups”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 454–6.

44 J. K. Klefner, *ibid.*, pp. 445–60. See also Andrew Clapham, “Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups”, *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 920–5.

45 J.-M. Henckaerts and L. Doswald-Beck, above note 12, p. 550.

46 *Ibid.*, pp. 549–50.

47 For example, Paloma Blázquez, “Does an Armed Group Have an Obligation to Provide Reparations to its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law”, in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations*, Brill/Nijhoff, Leiden, 2018, pp. 406–28; Laura Íñigo-Álvarez, “The Obligation to Provide Reparations by Armed Groups”, *Netherlands International Law Review*, Vol. 67, No. 3, 2020; S. Furuya, above note 32, pp. 62–4; Olivia Herman, “Beyond the State of Play: Establishing a Duty of Non-State Armed Groups to Provide Reparations”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020.

48 See also Marcela Giraldo Muñoz and Jose Serralvo, “International Humanitarian Law in Colombia: Going a Step Beyond”, *International Review of the Red Cross*, Vol. 101, No. 912, 2019, pp. 1135–46.

responsibility under which those who directly or indirectly took part in the armed conflict and were involved in serious violations of IHL are considered accountable.⁴⁹

The above-mentioned Comprehensive System, which is made up of judicial and non-judicial mechanisms, was established to carry out the Peace Agreement.⁵⁰ These mechanisms have been implemented in a coordinated way to achieve the objectives set, including enforcing the rights of victims to the greatest extent possible. This complements the existing legal framework on reparation, consisting of Act 975/2005 (2005) on the reintegration of the members of armed groups who make an effective contribution to peace and Act 1448/2011 (2011) on measures for comprehensive reparation and assistance for victims of the NIAC. Although legally sophisticated and comprehensive, the administrative reparation programmes resulting from these two laws met with a number of difficulties in their implementation.⁵¹ For victims, reparation is the most tangible manifestation of the government's efforts to compensate for the harm caused.

The Colombian system currently comprises three entities: the Commission for Truth, Reconciliation and Non-Repetition, the Missing Persons Unit responsible for searching for people who disappeared as a result of the armed conflict and the Special Jurisdiction for Peace.⁵² There are various comprehensive reparation measures in place corresponding to the categories referred to in the UN Principles – restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition – and collective reparation measures for the geographic areas, communities and groups most affected by the conflict and most vulnerable.

The question of vulnerable groups and their entitlement to reparation in Colombia is dealt with in Act 1448/2011, which sets out gender and differentiated approaches to reparation.⁵³ Colombia's legal and institutional framework for reparation is consistent with the protection that the legal system provides for vulnerable groups, such as women, persons with disabilities, children, ethnic minorities, older people and internally displaced people.⁵⁴ Implementation of the reparation measures has been sketchy although the situation has begun to improve in recent years with the introduction of a fast-track procedure to give these groups priority access to reparation.⁵⁵ Even so, progress in implementing the measures to provide reparation to victims of sexual violence and ethnic minorities remains slow.⁵⁶

The Final Peace Agreement also seeks to strengthen the existing comprehensive reparation programme, facilitating its implementation and

49 Jurisdicción Especial para la Paz, *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, 24 November 2016, p. 127, available at: https://www.jep.gov.co/Marco%20Normativo/Normativa_v2/01%20ACUERDOS/N01.pdf.

50 *Ibid.*, p. 8.

51 Nelson Sánchez and Adriana Rudling, *Reparations in Colombia: Where to?*, Policy Paper, Queen's University, Belfast, 2019, p. 7.

52 Jurisdicción Especial para la Paz, above note 49, pp. 129–30.

53 N. Sánchez and A. Rudling, above note 51, p. 23.

54 *Ibid.*

55 *Ibid.*, p. 7.

56 María Cielo Linares, *Setting an Agenda for Sustainable Peace: Transitional Justice and Prevention in Colombia*, International Center for Transitional Justice, New York, 2021, pp. 46–8 and 61.

requiring all those who took part in the NIAC to contribute to providing reparation.⁵⁷ The reasoning behind the involvement of the FARC in the Peace Agreement and requiring it to provide reparation is that if the idea that those responsible for harm resulting from wrongful acts must provide reparation seems coherent, why should that logic not also apply to those cases where victims have been harmed by organized armed groups? In other words, what can be done to “fill the current accountability gap”?⁵⁸

According to the ILC Draft Articles (Article 10), the conduct of a rebel group such as the FARC, if it becomes the government of a State, is considered an “act of that State”. However, it is very difficult to determine this in practice, and it leaves victims unprotected, particularly in a context as complicated as post-conflict Colombia. The UN Principles have gaps in relation to the role of non-State actors, such as the FARC. Although UN Principle 15 recognizes that the obligation to provide reparation can apply to “a person, a legal person or other entity”, UN Principle 16 holds that “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations”.

This principle apparently determines that the State has a subsidiary responsibility to provide reparation. However, the UN Principles could potentially indicate that there is an obligation on armed groups such as the FARC to provide reparation for harm caused to victims.⁵⁹ Furthermore, in relation to Rule 150 (“Reparation”) of customary IHL, the ICRC recognizes that there is “some practice to the effect that armed opposition groups are required to provide appropriate reparation for the damage resulting from violations of international humanitarian law”.⁶⁰

There is sufficient evidence to suggest that the collective responsibility of armed groups such as the FARC can be conceptualized in international law and that their obligation to provide reparation is simply a matter of the progressive development of the law.⁶¹ Analysis of the Colombian experience and other practices has led the ICRC⁶² and academics⁶³ to identify an emerging obligation requiring armed groups that have caused harm to victims as a result of serious violations of IHL and other atrocities committed during armed conflict to provide reparation to them. These practices include resolutions adopted by UN bodies, agreements between parties to armed conflict, instruments issued *motu proprio* by armed groups, domestic legislation, reports by international commissions and missions, etc.⁶⁴ In recent years, various UN bodies and international non-governmental organizations have repeatedly stated that both

57 N. Sánchez and A. Rudling, above note 51, p. 64.

58 P. Blázquez, above note 47, p. 428.

59 *Ibid.*, p. 409.

60 J.-M. Henckaerts and L. Doswald-Beck, above note 12, p. 549.

61 P. Blázquez, above note 47, p. 427.

62 J.-M. Henckaerts and L. Doswald-Beck, above note 12, pp. 549–50.

63 For example, C. Evans, above note 37, pp. 213–16; P. Blázquez, above note 47, pp. 418–26; L. Iñigo-Álvarez, above note 47; O. Herman, above note 47.

64 See, for example, J.-M. Henckaerts and L. Doswald-Beck, above note 12, pp. 549–50.

States and other parties to armed conflict must provide reparation for harm caused to victims. However, there are still key questions that need to be addressed, such as: Where can victims enforce their right to reparation? How realistic is it to expect armed groups such as the FARC to provide reparation? What kind of reparation suits each specific case?

In terms of temporal scope, transitional justice coexists with the rules of IHL that apply to the post-conflict period, including the right to reparation.⁶⁵ Transitional justice and IHL, along with IHRL, have been used as theoretical frameworks in Colombia to define different types of reparation for victims of serious violations of IHL during the armed conflict with the FARC. The starting point for the Colombian experience was the relationship between peace and reparation; reparation is important for establishing and consolidating peace.⁶⁶

The predominant focus of the Colombian model is collective and comprehensive reparation. The reason for this is the sheer scale of the harm caused as a result of the atrocities committed in this NIAC in which large numbers of victims were directly affected. In such circumstances, it is generally impracticable to assess individual claims on a case-by-case basis. The benefits of reparation awarded to groups of victims help to repair the harm caused by serious violations of IHL. The approach taken is that reparation should be regarded as a whole. Measures are therefore proposed to cover all aspects of the harm caused and cannot be considered in isolation.

In an example of a non-State armed group providing reparation, the National Liberation Army (ELN) publicly apologized in 2001 for the deaths of three children and the destruction of civilian houses as the result of an attack involving explosives and expressed its willingness to collaborate in the recuperation of the remaining objects.⁶⁷ The FARC participated in the Colombian reparation process in two ways. It undertook to carry out collective and symbolic reparation measures. However, the FARC no longer exists as an organized armed group and has been replaced by a political party known as the Common Alternative Revolutionary Force, which has taken up the political discourse of the former FARC guerrillas and represents them.⁶⁸ This could make it complicated to determine reparation against the actual party responsible.

The FARC has mainly conducted three reparation measures.⁶⁹ First, the FARC apologized even before the Final Peace Agreement was signed, and in August 2013 the guerrilla group issued a declaration in which it clearly recognized its partial responsibility for the violence and the need to provide

65 See Emily L. Camins, “Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law”, *International Journal of Transitional Justice*, Vol. 10, No. 1, 2016.

66 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General, UN Doc. S/2004/616, 23 August 2004, para. 2.

67 J.-M. Henckaerts and L. Doswald-Beck, above note 12, p. 550.

68 See Vicente Torrijos Rivera and Juan David Abella Osorio, “The FARC’s Behavior after the Signing of the Peace Agreement”, *Revista Científica General José María Córdova*, Vol. 16, No. 24, 2018.

69 See Olivia Herman, “Reparative Justice in Colombia: A Role for Armed Non-State Actors?”, *JusticeInfo.Net*, 17 December 2018, available at: <https://www.justiceinfo.net/en/39792-reparative-justice-in-colombia-a-role-for-armed-non-state-actors.html>.

reparation for the harm caused to victims.⁷⁰ This included a ceremony at which it issued a public apology and a video in which it admitted responsibility for the damage it caused during the NIAC.⁷¹ Second, the FARC undertook to take part in work to restore the infrastructure in areas of Colombia affected by the conflict. The third measure, which was controversial and has yet to be implemented, was the payment of monetary compensation by the FARC to victims, based on an inventory of properties and assets amassed by the FARC during the conflict. The FARC has handed over assets worth around US\$888,000, which have been or will be used solely to pay compensation to victims of the NIAC.⁷² However, by the end of 2020, the FARC had only delivered approximately US\$12.9 million of the US\$300 million pledged to compensate victims.⁷³

The continued existence of the armed group has been a problem in many aspects of the Colombian peace process, including in the matter of reparation for victims of serious violations of IHL. With the signing of the Final Peace Agreement in Colombia, the disarmament process was set in motion. On 1 September 2017, the FARC officially began the transition to become a legal political organization, changing its name but maintaining the acronym “FARC”. This means that responsibility for reparation lies with an armed group that no longer exists as such.

The Colombian experience therefore shows that armed groups have become part of national systems providing reparation to victims of serious violations of IHL either because they control parts of the State’s territory or because they have adversely affected the lives of millions of people.⁷⁴ The Colombian model also demonstrates that any assessment of the difficulties associated with reparation and potential solutions should take into account innovative and robust developments in transitional justice.

Peru, Guatemala and El Salvador

Peru

According to the Truth and Reconciliation Commission (CVR) of Peru, a NIAC took place in the country between 1980 and 2000 mainly between the terrorist organization known as the Peruvian Communist Party–Shining Path (PCP–SL) and the Peruvian State.⁷⁵ The CVR estimated the probable number of fatal victims to be 69,280.⁷⁶ In Peru, unlike in other Latin American countries, it was a non-State armed group (PCP–SL) that was responsible for most of the fatalities

70 BBC, “FARC reconoce por primera vez ‘crudeza y dolor provocados’ desde sus filas”, 20 August 2013, available at: https://www.bbc.com/mundo/ultimas_noticias/2013/08/130820_ultnot_farc_admision_mr.

71 L. Íñigo-Álvarez, above note 47, pp. 441–2.

72 *Ibid.*, p. 440.

73 See Luke Moffett, “Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1077.

74 P. Blázquez, above note 47, p. 428.

75 CVR, *Informe Final*, Lima, 2003, Conclusiones, paras 1 and 12.

76 *Ibid.*, para. 2.

(54%).⁷⁷ Both the PCP–SL and State agents committed serious violations of IHL and IHRL which constituted war crimes and crimes against humanity.⁷⁸

The CVR proposed a Comprehensive Reparation Plan consisting of material and symbolic reparation provided through collective and individual measures.⁷⁹ The plan was set out in Act 28,592 (2005), including the creation of the Reparation Council.⁸⁰ The complexity of the reparation programme has made implementation difficult; only measures to provide collective reparation and monetary compensation have been widely implemented.⁸¹ The amount approved for the collective reparation programme was reduced to US\$37,000, and a limit of one project per community, chosen by the latter, was established. A total of 1852 communities have benefitted under the programme since 2007.⁸² In recent years, however, implementation has extended beyond collective reparation and compensation.⁸³ Compensation has been paid to 98,818 victims registered by the Reparation Council, and tens of thousands of people have benefitted from healthcare, education and housing schemes, although not all the registered victims were reached.⁸⁴

In Peru's reparation programmes, special attention has been paid to harm caused to members of particularly vulnerable groups, such as indigenous communities and women affected by sexual violence.⁸⁵ However, there are claims that have yet to be resolved concerning reparation for serious human rights violations that occurred in the 1990s, particularly forced sterilization of women in rural areas by the State, a case still being investigated.⁸⁶

Peru's legal framework for reparation refers to the NIAC, crimes committed during the conflict and the resulting harm to be repaired,⁸⁷ but there is no express reference to any obligation on the part of non-State armed subversive groups, such as the PCP–SL, to provide reparation. The members of rebel groups were, however, excluded from receiving reparation.⁸⁸ In spite of the fact that it committed serious violations of IHL, the PCP–SL has not, on its own initiative, provided any symbolic or material reparation or made any contribution to the work of the CVR.⁸⁹

77 *Ibid.*, para. 13.

78 *Ibid.*, paras 28 and 55.

79 Julie Guillerot, *Reparations in Peru: 15 Years of Delivering Redress*, Queen's University, Belfast, September 2019, p. 11, available at: <https://reparations.qub.ac.uk/assets/uploads/Peru-Report-ENG-LR-2.pdf>.

80 *Ibid.*, pp. 15–16.

81 C. Correa, above note 31, p. 132.

82 *Ibid.*, pp. 132 and 135.

83 Julie Guillerot, *Alive in the Demand for Change: Transitional Justice and Prevention in Peru*, International Center for Transitional Justice, New York, 2021, pp. 26–7.

84 C. Correa, above note 31, p. 135.

85 Consejo de Reparaciones, *Todos los Nombres*, Lima, 2018, pp. 20, 27 and 29.

86 Lucien Chauvin, "Forced Sterilization in Peru: 'After Decades in Limbo, There Will Finally be a Decision'", *JusticeInfo.Net*, 15 April 2021, available at: https://www.justiceinfo.net/en/76073-forced-sterilization-peru-decades-limbo-finally-decision.html?mc_cid=71b937d2f4&mc_eid=35e10b1c9f.

87 Act 28,592, Art. 3; Supreme Decree 015-2006-JUS, Art. 5.

88 Act 28,592, Art. 5.

89 Ron Dudai, "Closing the Gap: Symbolic Reparations and Armed Groups", *International Review of the Red Cross*, Vol. 93, No. 883, 2011, p. 792.

This failure to provide reparation is a major stumbling block, taking into account, for example, that public apologies by rebel groups that have committed atrocities during a NIAC, acknowledging the truth about past events and accepting responsibility are moral or symbolic reparations often seen by victims as equally or more important than material reparations.⁹⁰ As part of their sentence, PCP–SL leaders were ordered to pay the equivalent of almost US\$1000 million in civil reparations in 2007, but this was to go to the State not to the victims and remains unpaid.⁹¹

Guatemala

The Commission for Historical Clarification (CEH) of Guatemala estimated that the number of people who were killed or went missing during the NIAC (1960–1996) was more than 200,000 and that some 1.5 million people were displaced by the conflict.⁹² The army and related paramilitary groups (civil patrols) were responsible for 93% of the atrocities committed against the indigenous population, who were believed by the armed forces to be collaborating with the guerrillas.⁹³ The CEH went as far as to say that the government committed acts of genocide against indigenous communities.⁹⁴

Guatemala's Peace Agreement (1996) included the creation of a truth commission and stressed the humanitarian obligation to provide reparation to victims through government programmes.⁹⁵ The CEH recommended putting in place a reparation programme combining individual and collective measures and including monetary compensation, material restitution and medical and psychosocial rehabilitation.⁹⁶ However, the government ignored these recommendations and did not implement the proposed programme.⁹⁷ Guatemala's reparation programme was not implemented until much later (Government Decision 258-2003), and even then it did not provide details of the reparation measures to be carried out or who the beneficiaries would be; this was clarified in subsequent amendments.⁹⁸ The programme establishes the following reparation measures: restoration of the dignity of victims, cultural redress, psychosocial reparation, rehabilitation, material restitution and monetary compensation.⁹⁹ Guatemala's legal framework for reparation refers expressly to

90 *Ibid.* See also UN General Assembly, above note 33, UN Principle 22(e).

91 Supreme Court of Justice of Peru, *Abimael Guzmán Reinoso et al.*, Judgment, 26 November 2007, p. 121.

92 CEH, *Guatemala, Memory of Silence: Conclusions and Recommendations*, UN Office for Project Services (UNOPS), Guatemala, 1999, pp. 17 and 30.

93 *Ibid.*, p. 20; Denis Martínez and Luisa Gómez, *Reparations for Victims of the Armed Conflict in Guatemala*, Queen's University, Belfast, 2019, p. 5.

94 CEH, above note 92, pp. 38–41.

95 C. Correa, above note 31, p. 130; Comprehensive Agreement on Human Rights, March 1994, para. 8(1).

96 CEH, above note 92, pp. 49–52; C. Correa, above note 31, p. 130.

97 C. Correa, above note 31, p. 130.

98 *Ibid.*

99 Government Decision 258-2003, Art. 2 (amended).

human rights violations and crimes against humanity committed during the NIAC.¹⁰⁰

Implementation has focused on providing monetary compensation to individuals, but results have been limited, with most victims yet to receive anything: 31,845 victims were paid compensation between 2005 and 2014 in the amount of US\$3300 for the relatives of those killed and US\$2750 for survivors of torture or sexual violence.¹⁰¹ The implementation of other measures seems to have been rather patchy, with only a few thousand victims benefitting from measures such as housing subsidies, psychological care and seed capital for income-generating activities.¹⁰² Furthermore, the reparation policy does not have a gender or differential focus, failing to establish specific procedures for women and other vulnerable people.¹⁰³

With regard to reparation by non-State armed groups, after the CEH report was published, the Guatemalan guerrillas offered a public apology to victims and their families and communities and acknowledged responsibility for the crimes committed,¹⁰⁴ a symbolic form of reparation that contributed to victim satisfaction.¹⁰⁵ This also shows how armed groups can make a major contribution to reconstructing the facts and disclosing the truth.¹⁰⁶ Verification of the facts and full and public disclosure provide satisfaction, which is an additional form of reparation.¹⁰⁷

The CEH found that armed rebel groups, which were responsible for 3% of the violations recorded, had an obligation to comply with the minimum standards of IHL.¹⁰⁸ It did not, however, address the question of the potential obligation of the guerrillas to provide reparation to victims or contribute financially to the national reparation programme.¹⁰⁹

El Salvador

The Chapultepec Peace Agreement (1992) ended the NIAC in El Salvador (1980–1992) between the Government of El Salvador and the Farabundo Martí National Liberation Front (FMLN).¹¹⁰ In 1993, The Commission on the Truth for El Salvador (backed by the UN) established that over 75,000 people had been tortured or killed or had gone missing during the conflict.¹¹¹ The Commission

100 *Ibid.*, Art. 1 (amended).

101 C. Correa, above note 31, p. 131.

102 *Ibid.*

103 D. Martínez and L. Gómez, above note 93, p. 23.

104 R. Dudai, above note 89, p. 792.

105 UN General Assembly, above note 33, UN Principle 22(e).

106 P. Blázquez, above note 47, p. 420.

107 UN General Assembly, above note 33, UN Principle 22(b).

108 CEH, above note 92, paras 127–8.

109 P. Blázquez, above note 47, p. 421.

110 See Commission on the Truth for El Salvador, *From Madness to Hope: The 12-Year War in El Salvador, The Report of the Commission on the Truth for El Salvador*, San Salvador/New York, 1993.

111 *Ibid.*

recommended material compensation and moral reparation for victims and their families.¹¹²

Initially, El Salvador prioritized the issues of land and benefits for former combatants, and this was maintained in Legislative Decree 416 (1992) on the protection of people who suffered permanent injury during the conflict.¹¹³ It was not until 2010 that the National Commission on Reparations for victims of human rights violations committed during the NIAC (Executive Decree 57) developed a reparation programme for victims of the conflict, which came into operation in 2013 (Executive Decree 204).¹¹⁴ This programme provides for a variety of rehabilitation measures in the field of health and education, monetary compensation and the honouring of victims, including through cultural acts, public apologies and historical memory initiatives. It also establishes guarantees of non-repetition, including human rights training for police and military personnel.¹¹⁵

There is a register of programme beneficiaries, and in 2016 a scheme was set up to provide compensation in the form of a pension.¹¹⁶ While the reparation programme is an important step, it does not go far enough; only around 5000 victims are registered.¹¹⁷ The instability and lack of legislative backing means that the massive material reparation programme seems to be more of a declaratory initiative than a genuine effort to provide comprehensive reparation.¹¹⁸ Urgent measures are also needed to assist older adults and other vulnerable victims.¹¹⁹

On the question of reparation and rebel groups, the Commission on the Truth found that IHL was binding on both the FMLN and the State and that while the FMLN must provide compensation where it is found to have been responsible, the State has a wider obligation.¹²⁰ As a guarantee of non-repetition and as part of law enforcement reforms,¹²¹ FMLN combatants were transferred to the police force following the signing of the Peace Agreement.¹²²

After the signing of the Peace Agreement, the FMLN became a political party, formed by the guerrilla group, and governed the country. It maintained the reparation programme although it was beset by a number of problems, including a lack of institutional support and instability.¹²³ The FMLN government also promoted isolated commemoration initiatives and raised awareness about issues related to the conflict and the agreements.¹²⁴

112 *Ibid.*, pp. 196–7.

113 Martha Gutiérrez, “Negar el pasado: Reparaciones en Guatemala y El Salvador”, *Colombia Internacional*, Vol. 97, 2019, p. 200.

114 Visit to El Salvador: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Doc. A/HRC/45/45/Add.2, 9 July 2020, para. 49.

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*, para. 53.

118 M. Gutiérrez, above note 113, p. 200.

119 Special Rapporteur, above note 114, para. 104.

120 Commission on the Truth for El Salvador, above note 110, p. 20–2 and 185.

121 UN General Assembly, above note 33, UN Principle 23.

122 Special Rapporteur, above note 114, para. 62.

123 M. Gutiérrez, above note 113, pp. 178 and 191.

124 *Ibid.*, p. 198.

Some comparisons

Unlike in Colombia, the reparation processes in Peru, Guatemala and El Salvador were undertaken only after the end of the NIAC and following the recommendations of the truth commissions. The Colombian reparation programme is considered the most comprehensive in the world;¹²⁵ the others are much more modest and more limited in comparison although the Peruvian reparation programme has been acclaimed for its innovative approach to collective reparation involving community development projects.¹²⁶

The processes for the implementation of the reparation programmes in the four countries examined have faced considerable challenges and limitations, which have been or are being addressed, with varying degrees of success, by the respective domestic mechanisms. The domestic reparation systems examined – in particular those of Colombia and Peru – have incorporated the most recent international standards, including those contained in IHL.

While in Colombia non-State armed groups have been actively involved in providing symbolic and material reparation, in Guatemala the rebel groups have only provided moral reparation in the form of public apologies. The Commission on the Truth for El Salvador concluded that the FMLN has an obligation to provide reparation, which it did as a political party in power, not as a rebel group. In Peru, the PCP–SL has not provided any form of reparation.

In all four countries, different internationally recognized forms and types of reparation have been adopted to varying degrees and have benefitted victims of serious violations of IHL and other atrocities committed during armed conflict. These measures have been implemented largely through administrative reparation programmes. There have also been interactions between domestic reparation mechanisms and the I/A Court HR, particularly in the form of supranational judicial assessment and supervision of these programmes.¹²⁷ This is examined in detail in the next sub-section.

National reparations and the I/A Court HR

Although the I/A Court HR does not determine State responsibility for violations of IHL, it has used this body of law to interpret the ACHR and other Inter-American instruments and develop an approach involving the direct use of humanitarian rules, invoking the *lex specialis* nature of IHL and making selective use of it to expand human rights content.¹²⁸ Strictly speaking, the Court does not order

125 C. Sandoval, above note 38, p. 196.

126 *Ibid.*, p. 194.

127 C. Correa, above note 31, pp. 158–9.

128 See Elizabeth Salmón, “Institutional Approach Between IHL and IHRL: Current Trends in the Jurisprudence of the Inter-American Court of Human Rights”, *Journal of International Humanitarian Legal Studies*, Vol. 5, No. 1–2, 2014; Elizabeth Salmón, “Entre la *lex specialis* y la metodología *pick-and-choose*: aproximaciones al derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos”, *Anuario Iberoamericano sobre Derecho Internacional Humanitario*, Vol. 1, 2020.

reparation for violations of IHL by a State. However, in application of Article 63(1) of the ACHR, it has developed robust case law on reparation for harm caused to victims as a result of serious violations of their rights in NIACs.

Of particular importance is the concept of “comprehensive reparation”, a term coined by the I/A Court HR and developed over several decades. In the words of the Court, “comprehensive reparation of the abridgment of a right protected by the Convention cannot be restricted to payment of compensation to the next of kin”,¹²⁹ which means that reparation for harm caused by a violation of an international obligation requires “whenever possible, full restitution (*restitutio in integrum*), which is to reinstate the situation that existed prior to the commission of the violation”.¹³⁰ Under this comprehensive reparation approach, the Court has developed and ordered a variety of reparation measures involving monetary compensation, rehabilitation, symbolic reparation (satisfaction) and guarantees of non-repetition to be provided individually or collectively to direct and indirect victims.¹³¹ These standards have made an important contribution to reparation in the region and have been taken into account by other supranational courts, such as the ICC.¹³²

As Sandoval points out, the approach of the I/A Court HR to domestic reparation programmes has evolved.¹³³ Some Latin American countries that have experienced a NIAC have used subsidiarity as an argument in cases against the State in a bid to get the Court to order reparation to be provided through their own existing domestic reparation programmes.¹³⁴

In its original approach in the case of the *Plan de Sánchez Massacre v. Guatemala* (2004), concerning the massacre that occurred during the NIAC, the I/A Court HR did not take into account Guatemala’s arguments about its national reparation programme and instead applied its comprehensive reparation approach,¹³⁵ ordering a number of specific measures.¹³⁶ The Court ordered, among other things, monetary compensation, ceremonies to honour the memory of the victims and the provision of decent housing, water supply, a sewage system and a health centre.¹³⁷ The Court did not consider subsidiarity, opting to exercise full jurisdiction over reparations and not defer to Guatemala’s national reparation

129 For example, I/A Court HR, *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, para. 214.

130 For example, I/A Court HR, *Cantoral Benavides v. Peru*, Reparations and Costs, Judgment, 3 December 2001, para. 41.

131 Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed., Cambridge University Press, Cambridge, 2013, pp. 188–250.

132 For example, ICC, *Lubanga*, ICC-01/04-01/06-3129-AnxA, Order for Reparations, 3 March 2015, paras 33 and 39–40.

133 See C. Sandoval, above note 38, pp. 197–221. See also Juan-Carlos Ochoa-Sánchez, “Review by the Inter-American Court of Human Rights and Domestic Reparation Programmes: Towards a More Nuanced Approach”, *International Journal of Human Rights*, Vol. 25, No. 6, 2021.

134 C. Sandoval, above note 38, p. 190.

135 *Ibid.*, p. 197.

136 I/A Court HR, *Plan de Sánchez Massacre v. Guatemala*, Reparations, Judgment, 19 November 2004, para. 125.

137 *Ibid.*

programme.¹³⁸ This jurisprudential approach was also adopted in other cases involving armed conflicts,¹³⁹ including cases related to the Colombian NIAC, such as the *Mapiripán Massacre* (2005),¹⁴⁰ and to El Salvador's NIAC, for example, *El Mozote* (2012).¹⁴¹ Between 2004 and 2013, the Court adopted an approach based on the specific case before it and did not review domestic reparation programmes.¹⁴²

The I/A Court HR later adopted a more balanced approach in the case of *Operation Genesis v. Colombia* (2013) concerning the Colombian NIAC. It partly accepted the argument put forward by Colombia, which invoked the principle of subsidiarity and asked the Court not to order reparations on the grounds that the presumed victims had not claimed compensation from domestic reparation mechanisms.¹⁴³ The Court did, however, order additional forms of reparation or qualify its orders. In this case, the Court therefore deferred to Colombia's domestic reparation programme on those forms of reparation included in it, namely compensation, rehabilitation and restitution.¹⁴⁴ The case shows that the Court can play a subsidiary role for some forms of reparation but may impose conditions on how its orders are to be carried out, such as deadlines for implementation or giving priority to certain beneficiaries.¹⁴⁵ In fact, the Court established a number of requirements that domestic reparation programmes have to meet if decisions on reparation were to be wholly or partly deferred to them.¹⁴⁶

The I/A Court HR has given some form of deference to domestic programmes in cases against Peru and Guatemala related to their NIACs. However, in contrast to its approach with Colombia, the Court has been more cautious with these States, possibly because of the lack of evidence regarding the merits of their domestic reparation programmes, etc.¹⁴⁷ Although Peru invoked its reparation programme in relation to the matter of compensation and rehabilitation in the case of the *Peasant Community of Santa Bárbara* (2015) so as to avoid the Court ordering it to provide these forms of reparation, the Court, based on its own case law, issued reparation orders to this effect, owing to evidentiary issues relating to the payment of compensation. It did the same in the case of *Tenorio Roca* (2016),¹⁴⁸ regardless of the rehabilitation measures available under the domestic reparation programme. The Court did, however, order

138 C. Sandoval, above note 38, p. 200.

139 *Ibid.*

140 I/A Court HR, *Mapiripán Massacre*, above note 129; I/A Court HR, *Ituango Massacres v. Colombia*, Judgment, 1 July 2006; I/A Court HR, *Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006.

141 I/A Court HR, *Massacres of El Mozote and Surrounding Areas v. El Salvador*, Judgment, 25 October 2012.

142 J.-C. Ochoa-Sánchez, above note 133, p. 900.

143 I/A Court HR, *Operation Genesis v. Colombia*, Judgment, 20 November 2013, para. 465.

144 C. Sandoval, above note 38, p. 201.

145 *Ibid.*, p. 206.

146 I/A Court HR, *Operation Genesis*, above note 143, paras 470–1; J.-C. Ochoa-Sánchez, above note 133, p. 901.

147 C. Sandoval, above note 38, p. 201. See also J.-C. Ochoa-Sánchez, above note 133, pp. 900–3.

148 I/A Court HR, *Peasant Community of Santa Bárbara v. Peru*, Judgment, 1 September 2015, paras 327–36; I/A Court HR, *Tenorio Roca et al. v. Peru*, Judgment, 22 June 2016, paras 281–4; C. Sandoval, above note 38, p. 209.

reparation in the form of scholarships for higher education, in line with Peru's reparation programme, when the State provided sufficient information.¹⁴⁹

In relation to Guatemala's NIAC, in the cases of *Río Negro Massacres* (2012) and *Chichupac and Rabinal* (2016), the I/A Court HR ordered the State to provide compensation but specified that the amounts already awarded to victims under the domestic reparation programme must be recognized as part of the compensation due to them and deducted from the amounts ordered by the Court.¹⁵⁰ In this way, the Court was able to reconcile its case law on reparation with the country's domestic reparation measures, particularly monetary compensation, giving only partial and limited deference to Guatemala.¹⁵¹ In *Chichupac and Rabinal*, the Court assessed reparation according to its own standards and based on the specific case before it.¹⁵²

In the *El Mozote* case (2012) concerning El Salvador's NIAC, Judge García-Sayán indicated that in the case of massive and widespread human rights violations, domestic reparation programmes require effective mechanisms for the participation of the victims receiving reparation under them.¹⁵³ In *Rochac Hernández et al.* (2014), also relating to El Salvador's NIAC, the I/A Court HR assessed positively the measures taken by the State to provide medical care to some of the victims in this case.¹⁵⁴ However, the Court also found it necessary to order the State to provide rehabilitation measures, including immediate and appropriate care offered free of charge to victims suffering physical and psychological ailments as a result of the violations found to have been committed.¹⁵⁵

More recently, the I/A Court HR revisited its approach to subsidiarity in relation to reparation developed in the case of *Operation Genesis*,¹⁵⁶ examined above. In *Yarce et al. v. Colombia* (2016), concerning the Colombian NIAC, the Court recognized that domestic administrative reparation programmes are legitimate mechanisms for providing reparation when there are large numbers of victims that exceed the capacity of domestic courts.¹⁵⁷ Nonetheless, the Court denied Colombia's request for it to defer to its domestic reparation programme on the grounds that it was not enough for Colombia to indicate the reparation measures included in its programme in general terms and that it must specify how the measures would be applied to each individual victim in order to determine whether it could defer to the country's own programme under the principle of complementarity.¹⁵⁸

149 I/A Court HR, *Tenorio Roca*, *ibid.*, paras 294–8; C. Sandoval, above note 38, p. 209.

150 I/A Court HR, *Río Negro Massacres v. Guatemala*, Judgment, 4 September 2012, para. 304; *Members of the Village of Chichupac and neighbouring communities of the Municipality of Rabinal v. Guatemala*, Judgment, 30 November 2016, para. 326.

151 C. Sandoval, above note 38, p. 208.

152 J.-C. Ochoa-Sánchez, above note 133, p. 902.

153 I/A Court HR, *El Mozote*, above note 141, Concurring Opinion of Judge Diego García-Sayán, para. 33.

154 I/A Court HR, *Rochac Hernández et al. v. El Salvador*, Judgment, 14 October 2014, para. 219.

155 *Ibid.*, paras 219–23.

156 C. Sandoval, above note 38, pp. 201–13; N. Sánchez and A. Rudling, above note 51, p. 27.

157 I/A Court HR, *Yarce et al. v. Colombia*, Judgment, 22 November 2016, para. 326.

158 *Ibid.*, para. 328.

Similarly, in *Vereda La Esperanza v. Colombia* (2017), while the I/A Court HR acknowledged and appreciated the efforts made by Colombia to provide reparation to victims of the NIAC through domestic mechanisms, it found that, by virtue of the principle of subsidiarity/complementarity, it was not prevented from ruling autonomously on reparation measures because the victims in this case had not received domestic reparation and the domestic reparation programme did not exclude access to complementary domestic or supranational judicial reparation processes.¹⁵⁹

The I/A Court HR has therefore engaged with reparation for victims of NIACs in the countries examined. There are a number of important developments that should be mentioned in relation to the implementation and impact of the judgments of the I/A Court HR on reparation in the countries in question. In Colombia, the Council of State has been consolidating the case law on reparation for victims of the NIAC, incorporating reparation criteria developed by the I/A Court HR since 2002. The Council has added measures such as rehabilitation, satisfaction and guarantees of non-repetition to its traditional package of compensation and presumes moral harm suffered by direct and indirect victims.¹⁶⁰

There are approximately thirty I/A Court HR judgments against Peru concerning its NIAC.¹⁶¹ In the majority of cases, Peru has paid the compensation ordered by the Court but has failed to implement other measures also ordered by the Court, namely providing physical and psychological rehabilitation, establishing the whereabouts of the missing and returning remains to families.¹⁶²

The I/A Court HR has issued some fifteen judgments against Guatemala in relation to its NIAC, in which it has ordered measures including compensation, rehabilitation, acknowledgement of the truth by the State, the erection of monuments and guarantees of non-repetition.¹⁶³ Guatemala has failed to comply with the judgments for reasons including a lack of resources although it has carried out some of the reparation measures ordered by the Court in some of the cases.¹⁶⁴

Finally, the I/A Court HR has ruled on four cases concerning El Salvador's NIAC, and the State has implemented reparation measures ordered by the Court, consisting of symbolic reparation (public apologies), development programmes, monetary compensation, medical and psychological care and the establishment of a register of victims.¹⁶⁵ However, El Salvador has yet to implement other measures ordered by the Court, in particular, the tracing of missing persons and criminal investigation and prosecution.¹⁶⁶

159 I/A Court HR, *Vereda La Esperanza v. Colombia*, Judgment, 31 August 2017, paras 264–5.

160 N. Sánchez and A. Rudling, above note 51, p. 26.

161 J. Guillerot, above note 79, p. 49.

162 *Ibid.*

163 D. Martínez and L. Gómez, above note 93, pp. 41 and 43–4.

164 *Ibid.*, p. 44.

165 Special Rapporteur, above note 114, paras 51–2.

166 *Ibid.*, para. 69.

Reparation for victims of serious violations of IHL and the ICC

Importance and limitations of the ICC reparation system

Although IHL and international criminal law are separate bodies of law, there are significant overlaps and direct connections between them as the criminalization of serious violations of IHL gives rise to war crimes and entails criminal responsibility.¹⁶⁷ IHL not only deals with the responsibility of States and armed groups, but also individual criminal responsibility,¹⁶⁸ including the obligation to provide reparation for harm caused.¹⁶⁹ The ICC and other international and hybrid criminal courts are therefore mechanisms that apply, enforce and implement IHL, particularly in relation to serious violations of IHL which constitute war crimes.¹⁷⁰

Traditionally, the victims of serious violations of IHL, which are war crimes, were not able to claim reparation in international and hybrid criminal courts. The ICC was the first such court to introduce a reparation system under which victims of war crimes and other atrocities committed during armed conflict can claim and receive reparation from those convicted. Most hybrid criminal courts have followed this model.

Recent and emerging ICC practice on reparation began in 2012 with the *Lubanga* case. As this practice shows, the ICC is able to act as an important global or international mechanism allowing victims of serious violations of IHL to exercise their right to claim and receive reparation. There are various reasons for this. The first is that IHL forms part of the applicable law of the ICC. The ICC has jurisdiction over war crimes, which are serious violations of IHL committed in IACs and NIACs, namely grave breaches of the Geneva Conventions, serious violations of common Article 3 and other serious violations of the laws and customs applicable in IACs and NIACs.¹⁷¹ In addition, the applicable (subsidiary) sources of law of the ICC include “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”.¹⁷²

A second reason is that the award of reparation to victims by the ICC derives from individual criminal responsibility for war crimes and other international crimes committed in armed conflicts. As of April 2022, the ICC has issued orders for reparations for victims of war crimes in four cases. The crimes in question are: enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (*Lubanga*);¹⁷³ murder, attack against civilians,

167 M. Sassòli, above note 1, pp. 151–67 and 443–51; Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2008, pp. 81–97.

168 M. Sassòli, above note 1, pp. 151–67; E. Crawford and A. Pert, above note 38, pp. 280–7.

169 S. Furuya, above note 32, pp. 62–5.

170 *Ibid.*, pp. 287–9; M. Sassòli, above note 1, pp. 159–67 and 443–51.

171 Rome Statute of the ICC, Art. 8.

172 Rome Statute of the ICC, Art. 21(1)(b).

173 ICC, *Lubanga*, ICC-01/04-01/06-2904, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012.

destruction of property and pillaging (*Katanga*),¹⁷⁴ attacking religious and historic buildings (*Al-Mahdi*),¹⁷⁵ and murder, attacks against civilians and civilian objects, sexual crimes, forced displacement of civilians and enlisting and conscripting children under the age of 15 years and using them to participate in hostilities (*Ntaganda*).¹⁷⁶

The third reason is that, in its case law on reparation and war crimes, the ICC has invoked provisions of IHL as a source of law on reparation for victims of serious violations of IHL. The ICC has, for example, used the UN Principles to interpret provisions of its instruments on reparation and to rule on matters such as categories of beneficiaries of reparation (direct and indirect victims), forms of reparation (compensation and satisfaction) and types of harm to be repaired (physical, psychological and material harm).¹⁷⁷ When analysing the legal elements of war crimes, with a view to determining sentences and reparation, the ICC has invoked IHL treaties, including the Geneva Conventions and their Additional Protocols and the Second Hague Protocol for the Protection of Cultural Property, on the one hand, and the case law of other international and hybrid criminal courts on war crimes on the other.¹⁷⁸

The fourth reason has to do with the characteristics of the ICC reparation system, which differ from those of other international mechanisms. One of the differences with other international courts is that under the ICC reparation system, individuals exercise their status as subjects of IHL actively¹⁷⁹ by exercising their right, as victims of serious violations of IHL, to claim and receive reparation and also passively because those convicted have an obligation to provide reparation to victims. Unlike non-judicial international mechanisms, the ICC's reparation orders are binding.

A fifth reason is that, when domestic mechanisms fail, the ICC can be the last chance for victims of serious violations of IHL to get justice. The ICC can only act when States are unable or unwilling to deliver justice under the principle of complementarity.¹⁸⁰ Such failings on the part of the State also generally result in a failure to provide reparation to victims of serious violations of IHL. Even when there are domestic reparation mechanisms in place, international judicial reparation measures may also be necessary, including those ordered by the ICC. This is the case when domestic reparation programmes trivialize the suffering of the victims¹⁸¹ or when truth and reconciliation commissions play only a symbolic role and do not result in reparation for victims.¹⁸²

174 ICC, *Katanga*, ICC-01/04-01/07-3728-tENG, Order for Reparations, 24 March 2017.

175 ICC, *Al-Mahdi*, ICC-01/12-01/15-236, Reparations Order, 17 August 2017.

176 ICC, *Ntaganda*, ICC-01/04-02/06-2659, Reparations Order, 8 March 2021.

177 ICC, *Lubanga*, above note 132, paras 13–44.

178 For example, ICC, *Al-Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence, 27 September 2016, paras 14–16.

179 Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge University Press, Cambridge, 2016, pp. 60–232 and 255–81; C. Evans, above note 37, pp. 117–28.

180 Rome Statute of the ICC, Art. 17.

181 Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Beacon Press, Boston, 1998, p. 93.

182 Pablo De Greiff, "Introduction", in Pablo De Greiff (ed.), *The Handbook of Reparations*, Oxford University Press, Oxford, 2006, p. 2.

The ICC reparation system also has some significant shortcomings and limitations in ensuring reparation for harm caused to victims of serious violations of IHL. The main issue is that, under the principle of individual criminal responsibility, the ICC can only issue reparation orders against convicted individuals¹⁸³ and not against States or non-State armed groups. Article 75(2) of the Rome Statute of the ICC articulates this principle: “The Court may make an order directly against a convicted person specifying appropriate reparations.” The ICC has applied this principle in its case law on reparation.¹⁸⁴

The ICC cannot therefore issue reparation orders against States, armed groups or corporations involved in armed conflicts. Such a limited legal mandate leads to problems in practice because it ignores the complex realities of contemporary armed conflicts and the need to provide reparation for harm caused to victims by actors responsible for serious violations of IHL and other atrocities committed during armed conflict.

As the ICC can only issue reparation orders against convicted individuals, implementation of the reparation measures ordered is highly problematic. All the convicted individuals that the ICC has ordered to provide reparation have so far (as of April 2022) been declared indigent. The Trust Fund for Victims, which is responsible for enforcing ICC reparation orders, has faced funding problems, having to rely on voluntary contributions, and has encountered difficulties in delivery due to security issues and the challenges of practical implementation in complex contexts.¹⁸⁵ This has prevented more substantial and comprehensive reparation orders from being issued and implemented for victims of serious violations of IHL. As other authors have pointed out,¹⁸⁶ the ICC should have jurisdiction to order reparations against (or related cooperation from) States and other entities, especially non-State armed groups. This would require the applicable provisions of the ICC Statute, particularly Article 75, to be amended.

In this context, the universe of claimants/beneficiaries of reparation, the forms and types of reparation and their implementation are restricted and limited in the ICC reparation system. In spite of these limitations, the reasons explained above justify the importance afforded to the system. Victims of armed conflict have exercised their right to reparation and obtained at least some measure of justice through this system, as described in the sub-section below.

183 See Carsten Stahn, “Reparative Justice after the *Lubanga* Appeals Judgment: New Prospects for Expressivism and Participatory Justice or ‘Juridified Victimhood’ by Other Means?”, *Journal of International Criminal Justice*, Vol. 13, No. 4, 2015.

184 ICC, *Lubanga*, above note 132, paras 20–1.

185 See Luke Moffett and Clara Sandoval, “Tilting at Windmills: Reparations and the International Criminal Court”, *Leiden Journal of International Law*, Vol. 34, No. 3, 2021.

186 Eva Dwertmann, *The Reparation System of the International Criminal Court*, Martinus Nijhoff, Leiden/Boston, 2010, pp. 51–6; Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, Cambridge, 2012, pp. 317–18.

Justice for victims of serious violations of IHL and reparation at the ICC

Along with the supranational courts that determine State responsibility and domestic mechanisms, the ICC reparation system too has begun to make an important contribution to operationalizing the right of victims of serious violations of IHL to reparation in terms of procedural and substantive justice. While procedural justice entails fair proceedings and procedural rights of victims, substantive justice refers to the outcomes obtained for victims at the ICC.¹⁸⁷ Procedural and substantive justice for victims of serious violations of IHL under the ICC reparation system also includes elements of restorative justice.¹⁸⁸ victims are at the centre of justice mechanisms and the delivery of reparation is a priority.¹⁸⁹

As far as procedural justice is concerned, although the “civil party” does not exist as such at the ICC, victims of serious violations of IHL, as claimants of reparation, are actual parties to the proceedings at the ICC, along with the convicted party, at the post-conviction reparation stage, as the Court itself has repeatedly maintained.¹⁹⁰ While in the stages of the proceedings prior to the conviction, including the trial and proceedings directly related to affirming or reversing the conviction, victims can be participants under Article 68(3) of the Rome Statute of the ICC, but not parties to the proceedings, at the reparation stage which takes place after the conviction, if there is one, the victims are parties to the proceedings.¹⁹¹ This is a crucial development and contrasts with what has happened at other international and hybrid criminal courts, where victims have only been involved as witnesses or participants.

This role as party to the proceedings gives victims of serious violations of IHL procedural rights enabling them to effectively exercise their right to reparation during the post-conviction reparation stage. According to ICC instruments and practice, these rights include the following:¹⁹² first, present written and oral arguments on substantive and procedural aspects of reparation; second, present evidence and call witnesses and experts to testify in support of their reparation claims, particularly on the existence and type of harm suffered and the causal relationship between the crimes committed and the harm caused; third, respond to arguments on reparation and object to evidence presented by the defence in reparation proceedings; fourth, appeal decisions on reparation and participate as a party to such proceedings; fifth, fulfil their role as parties in the

187 L. Moffett, above note 43, pp. 29–38.

188 *Ibid.*, pp. 41–3.

189 See David O’Mahony and Jonathan Doak, *Reimagining Restorative Justice: Agency and Accountability in the Criminal Process*, Hart Publishing, London, 2017, pp. 76–89.

190 For example, ICC, *Lubanga*, ICC-01/04-01/06-2953, Decision on the Admissibility of the Appeals Against Trial Chamber I’s “Decision Establishing the Principles and Procedures to be Applied to Reparations”, 14 December 2012, para. 67; ICC, *Katanga*, above note 174, para. 15. See also Juan Pablo Pérez-León-Acevedo, *Victims’ Status at International and Hybrid Criminal Courts: Victims’ Status as Witnesses, Victim Participants/Civil Parties and Reparations Claimants*, Åbo Akademi University Press, Åbo, 2014, pp. 678–93; Christoph Safferling and Gurgun Petrossian, *Victims Before the International Criminal Court: Definition, Participation, Reparation*, Springer, Cham, 2021, p. 269.

191 See ICC, *Lubanga*, *ibid.*, para. 67; ICC, *Katanga*, above note 174, para. 15.

192 Rome Statute of the ICC, Arts 75 and 82(4). See also case law: above notes 173–8.

implementation of reparations ordered by the ICC, particularly before the Trust Fund for Victims which is responsible for enforcing reparation orders; and sixth, benefit from legal representation, psychological counselling and protection to ensure their safety and well-being during the reparation proceedings.

The ICC reparation system also has a number of significant procedural shortcomings. First, the procedural rights of victims as parties to the proceedings are mainly exercised through lawyers representing groups of victims. This is necessary because of the large number of claimants seeking reparation at the ICC and for the sake of procedural efficiency. However, this permanent legal intermediation means that the role of victims as parties to post-conviction reparation proceedings and their procedural rights as such are more symbolic than real.

A second issue is that the universe of victims has been procedurally limited because although reparation claimants and beneficiaries include both direct victims and indirect victims (those who suffer harm as a result of harm caused to direct victims),¹⁹³ only the victims of crimes for which there is a conviction can receive reparation.¹⁹⁴ Additionally, the ICC, as a criminal court, applies high evidentiary and procedural standards in relation to the causal nexus between the crime and the harm caused, among other things, which reduces the universe of beneficiaries of reparation.¹⁹⁵

The third problem is that victims have no recourse to procedural remedies to claim reparation at the ICC when there is no conviction. The fact that a conviction is required for the ICC to issue a reparation order means that if the accused is acquitted, the Court does not award reparation to the victims. Lastly, when those convicted and ordered by the ICC to provide reparation are declared indigent, which is most often the case at the ICC, the victims cannot ask the Court to order States or non-State armed groups to provide the corresponding reparation instead.

In terms of substantive justice, the ICC has ordered various forms of reparation corresponding to the different categories referred to in the UN Principles – compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition¹⁹⁶ – as individual and/or collective measures. At the ICC, the outcomes have been mixed. In the case of *Lubanga*, the ICC ordered compensation, restitution and rehabilitation as collective reparation measures and did not order individual reparation or compensation.¹⁹⁷

In *Katanga*, individual reparation was confined to monetary compensation measures, but they consisted of the award of a token amount of US\$250 per person.¹⁹⁸ *Katanga* was declared indigent, and the funds used to pay this compensation were donated by the Netherlands. In this case, collective reparation only involved measures to provide support for housing, income-generating

193 ICC, *Lubanga*, above note 132, para. 6.

194 *Ibid.*, paras 20–1.

195 *Ibid.*, paras 10–11.

196 UN General Assembly, above note 33, UN Principles 19–23.

197 ICC, *Lubanga*, above note 132, paras 67–8.

198 ICC, *Katanga*, above note 174, para. 230.

activities, education and psychological well-being,¹⁹⁹ that is, rehabilitation and (partially) restitution measures. The victims asked the ICC not to order measures such as broadcasts of the trial, the erection of monuments, commemorative events or the tracing of missing persons for reasons bound up with the sociocultural context and a sense that such measures were pointless or could lead to social unrest or revictimization.²⁰⁰ Such measures fall into the category of satisfaction and guarantees of non-repetition.²⁰¹

In the case of *Al-Mahdi*, the ICC ordered individual compensation, but only for a very limited group of victims, and collective reparation consisted of rehabilitation, guarantees of non-repetition and satisfaction measures, including apologies, memorials, commemoration and forgiveness ceremonies.²⁰² The ICC also concluded that the destruction of protected historic and religious buildings in Timbuktu caused suffering to the people of Mali and to the international community.²⁰³ It did not, however, order specific reparation measures for these extremely large and indeterminate groups.

In *Ntaganda*, the ICC adopted a novel approach; it ordered what it called collective reparations with an individual component.²⁰⁴ Such measures can include different forms of reparation, such as restitution, compensation, rehabilitation and satisfaction for direct and indirect victims.²⁰⁵

At the ICC, collective reparation may be more appropriate than individual reparation because war crimes and other international crimes are collective in nature and cause collective harm.²⁰⁶ Furthermore, collective reparation is focused on providing redress to people victimized as a group or a collective of victims,²⁰⁷ and can be easier to deliver than individual reparation²⁰⁸ and can have a broader impact in a transitional justice scenario.²⁰⁹ However, individual reparations should also be provided because some victims prefer them²¹⁰ and because they address individual aspects of victimization and explicitly acknowledge the individual right of each victim to reparation.²¹¹

In terms of forms of reparation, where practicable, measures should combine monetary, material and symbolic components rather than relying on a

199 *Ibid.*, para. 302.

200 *Ibid.*, para. 301.

201 UN General Assembly, above note 33, UN Principles 22–3.

202 ICC, *Al-Mahdi*, above note 175, paras 67–71 and 90–104.

203 *Ibid.*, paras 60–2.

204 ICC, *Ntaganda*, above note 176, paras 7–9 and 186.

205 *Ibid.*, paras 82–8 and 97.

206 E. Dwertmann, above note 186, p. 122.

207 Lisa Magarrell, *Reparations in Theory and Practice*, International Center for Transitional Justice, New York, 2007, p. 5; M. Cherif Bassiouni, “International Recognition of Victims’ Rights”, *Human Rights Law Review*, Vol. 6, No. 2, 2006, p. 257.

208 Frédéric Mégret, “The Case for Collective Reparations Before the International Criminal Court”, in Jo-Anne Wemmers (ed.), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation*, Routledge, London, 2014, pp. 177–79.

209 *Ibid.*, p. 179.

210 For example, ICC, *Lubanga*, ICC-01/04-01/06-2864-tENG, Observations on the Sentence and Reparations by Victims a/0001/06 *et al.*, 18 April 2012.

211 L. Magarrell, above note 207, pp. 5–6.

single measure or excluding a particular one.²¹² This is consistent with UN Principle 15, which refers to “[a]dequate, effective and prompt reparation”.

In conclusion, the ICC reparation system has generally provided procedural and substantive justice for victims of serious violations of IHL and other atrocities committed during armed conflict. This does not mean that it is alright to ignore the system’s shortcomings and limitations, which restrict its impact in terms of restorative justice for victims. This is also reflected in the mixed perceptions of victims.²¹³ As other authors have observed,²¹⁴ it is questionable whether the ICC reparation system can contribute to other transitional justice goals, such as reconciliation or transformative justice, even if ICC case law has, on occasions, invoked such goals.²¹⁵

Conclusion

The international and domestic rules, practices and mechanisms that make up IHL or are closely related to it have become increasingly engaged with the question of reparation for victims of serious violations of IHL and other atrocities committed during armed conflict. IHL is now therefore inextricably involved in addressing the complex problems relating to reparation that arise after an armed conflict. It is a crucial and constantly evolving issue that has generated much discussion of the theoretical and practical challenges involved. In spite of the limitations, shortcomings and unresolved issues, the strengthening of the reparative dimension of IHL, especially with regard to victims of serious violations of IHL, is an important new development in this body of law. Significant advances have been made and new developments are currently taking shape in the matter of reparation for victims of serious violations of IHL.

These developments include the following aspects. First, it is now widely recognized that victims have a legitimate individual right to claim and receive reparation as redress for the harm caused as a result of serious violations of IHL and other atrocities committed during armed conflict. Second, the scope of the obligation to provide reparation under IHL is increasingly being extended: not only States but also non-State armed groups and individuals. Third, innovative domestic systems capable of effectively implementing the rules and principles of IHL on reparation are being consolidated, with regional courts playing a significant complementary and supervisory role, as evidenced by experiences in Latin American countries to varying degrees. Lastly, the legal framework and recent practice of the ICC reparation system have resulted in its emergence, in spite of its limitations, as a global forum for enforcing the right of victims of serious violations of IHL and other atrocities to claim and receive reparation.

212 *Ibid.*, p. 4.

213 For example, Stephen Cody *et al.*, *The Victims’ Court: A Study of 622 Victim Participants at the International Criminal Court*, Human Rights Center, Berkeley, 2015.

214 For example, L. Moffett and C. Sandoval, above note 185, p. 4.

215 For example, ICC, *Lubanga*, above note 132, paras 34 and 71.

The impacts of human rights law on the regulation of armed conflict: A coherency-based approach to dealing with both the “interpretation” and “application” processes

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Abstract

Nowadays, human rights law significantly impacts the regulation of armed conflict through two main processes: the “interpretation process”, whereby international humanitarian law is interpreted in light of human rights law’s norms or concepts, and the “application process”, whereby human rights law applies in armed conflict alongside international humanitarian law. These processes raise complex problems with respect to the interplay between the two branches of international law. The aim of this paper is to propose an elaborated theoretical framework, based on legal theories of normative coherence, in order to address that interplay and to overcome the shortcomings of the formal mechanisms usually referred to in practice and legal scholarship. It is demonstrated that such a coherency-based approach recommends

adapting the outcomes of the interpretation and application processes, either by modulating or displacing the inappropriate norm or regime, in light of substantial considerations.

Keywords: international humanitarian law, international human rights law, legal theory, legal interpretation, norms.

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Introduction

It is well known that international humanitarian law (IHL) and international human rights law (IHRL) have different origins. Modern IHL was born during the second half of the nineteenth century, primarily in relation to the foundation of the Red Cross,¹ while IHRL mainly developed after World War II,² under the aegis of the United Nations (UN). It is classically held that the two bodies of law evolved independently and that the two respective communities were mutually distrustful until the 1960s. On the one hand, the development of the regulation of armed conflict was neglected by the UN community, since, as emphasized by the International Law Commission (ILC) in 1947, such development could show a “lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace”.³ On the other hand, IHRL was seen by the IHL community and by the International Committee of the Red Cross (ICRC), in particular, as a utopian and politically driven ideal, diametrically opposed to the pragmatic and neutral approach that the Committee favoured in order to alleviate, in a concrete way, the suffering of people in armed conflict.⁴

Although this classical narrative seems exaggerated, since connections existed between the two worlds during the 1940s and 1950s,⁵ it is undisputable that the 1968 Tehran Conference played a crucial role in bringing them closer together. IHL was actually put under great pressure by the human rights

1 However, modern IHL also developed in relation to other aspects than the protection of wounded members of armed forces in the field, including neutrality in naval warfare, the codification process of the laws and customs of war and the prohibition and regulation of weapons.

2 However, the first attempts to limit the sovereignty of States vis-à-vis their own citizens at the international level date back to the period following World War I. This was mainly in relation to the protection of certain minorities after the dismantling of the Central Powers; see e.g. Millan R. Casanova, “‘Minority Treaties’ Protection in the Interwar Period: Its Contribution to Maintain the European Order after 1945”, in Ioan Horga and Alina Stoica (eds), *Europe a Century after the End of the First World War (1918–2018)*, Romanian Academy Publishing, Bucharest, 2018, pp. 351–355.

3 International Law Commission (ILC), *Report of the International Law Commission on the Work of Its First Session*, in *Yearbook of the International Law Commission*, 1949, p. 281, para. 18.

4 See e.g. Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy*, Cambridge University Press, Cambridge, 2015, pp. 53–54.

5 Katharine Fortin, “Complementarity between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948–1968”, *International Review of the Red Cross*, Vol. 94, No. 888, 2012, pp. 1440–1450.

community, which criticized that body of law for its inability to protect persons and human rights in armed conflicts. This was exacerbated by the protracted and extremely violent armed conflicts occurring at the time, such as the Vietnam War and the struggles for liberation in the colonies. A clear will was expressed at that time to further “humanize” the regulation of armed conflict and ensure better protection of people.⁶ This firstly led to the development of IHL itself. The Tehran Conference adopted several resolutions, including the famous Resolution XXIII, entitled “Human Rights in Armed Conflicts”,⁷ which was later endorsed by the UN General Assembly Resolution 2444, concerning “Respect for Human Rights in Armed Conflicts”.⁸ These titles are confusing, however, since the resolutions do not deal with human rights at all – they recommend the normative development of IHL itself.⁹ It is on that basis, following the initiatives undertaken by the UN Secretary-General in accordance with the recommendations of Resolution 2444, that the work for the reaffirmation and development of IHL started, which resulted in the two 1977 Additional Protocols to the Geneva Conventions. That work was finally conducted under the aegis of the ICRC, after unsuccessful attempts to place certain IHL developments under the UN umbrella.¹⁰

IHRL significantly impacted the material content of the two Additional Protocols. It pushed further the movement initiated after World War II, giving predominance to the principle of humanity in its balance against the principle of military necessity. It did this, notably, by reducing any reciprocity in IHL through the exclusion of additional belligerent reprisals in Additional Protocol I (AP I)¹¹

6 See e.g. Marko Milanovic, “A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law”, *Journal of Conflict and Security Law*, Vol. 14, No. 3, 2010, p. 460.

7 United Nations, *Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968*, 1968, p. 18, available at: https://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf (all internet references were accessed in February 2022).

8 UNGA Res. 2444 (XXIII), 19 December 1968.

9 In paragraph 2 of Resolution 2444, which endorses Resolution XXIII, the resolution “[i]nvites the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study ... [t]he need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare”.

10 See e.g. the view upheld by some States in relation to the protection of journalists in armed conflicts: *Respect for Human Rights in Armed Conflicts: Protection of Journalists Engaged on Dangerous Missions: Argentina, Austria, Colombia, Finland, France, Iran, Japan, Madagascar and Senegal: Revised Draft Resolution*, UN Doc. A/C.3/L.1797/Rev. 3, 30 November 1970.

11 Certain reprisals were already prohibited in the Geneva Conventions: see Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 46; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 47; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 13; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 33. That list has been extended under AP I: see Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4).

and by providing the Martens Clause in the core articles of that Protocol.¹² More straightforwardly, its content clearly informed some provisions enshrined in the two Protocols, especially the fundamental guarantees protecting persons from any inhumane treatment. In particular, the fair trial guarantees provided for in the International Covenant on Civil and Political Rights (ICCPR), which had recently been adopted, were almost copy-pasted in Additional Protocols I and II, under Articles 6 and 75 respectively.¹³ As a result, IHRL and the case law of its monitoring bodies could be seen as an entirely legitimate tool for interpreting the content of those provisions. As emphasized by certain scholars,¹⁴ by replicating such IHRL content in the Protocols, their drafters introduced a powerful driving force for the evolution of IHL within that body of law itself. As will be seen in detail below, several institutions and courts actually engaged in this “interpretation process”, by which IHRL significantly impacted IHL through the interpretation of that body, in light of its norms and case law.

The 1968 Tehran Conference not only gave an impulse to the development of IHL itself. Resolution 2444 has been followed by a series of resolutions that clearly acknowledged the applicability of IHRL in any armed conflict.¹⁵ For instance, in its Resolution 2675, adopted at its twenty-fifth session (1970), the UN General Assembly affirmed that “[f]undamental human rights, as accepted in international law and laid down in international instruments, *continue to apply fully in situations of armed conflict*”.¹⁶ IHL was no longer viewed as the only body of law exclusively regulating armed conflict; IHRL was considered as also being applicable to such situations, in parallel to IHL. This “application process”, by which IHRL does not impact IHL itself but more generally impacts the regulation of armed conflict through its applicability to those conflicts, is now well recognized in legal scholarship and confirmed in State and judicial practice.¹⁷

However, both the interpretation and application processes raise several issues, especially with respect to the interplay between IHL and IHRL. Practice shows that, in some instances, no mechanism at all is provided to address this

12 The Martens Clause first appeared in the preamble of the 1899 Hague Convention. It was repeated in the Geneva Conventions in the final provisions dealing with the execution of the Conventions: see GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158. It is only with AP I that the Martens Clause has been given a prominent place and a general scope as it has been put in Article 1, as part of the general provisions of the Protocol.

13 See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, paras 4515, 3005.

14 See e.g. Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie*, Pedone, Paris, 2013, p. 106.

15 Note that, already in 1967, the UN General Assembly “considered that essential and inalienable human rights should be respected even during the vicissitudes of war” in relation to humanitarian assistance in the Middle East (UNGA Res. 2252 (ES-V), 4 July 1967), whereas the 1968 Tehran Conference adopted a specific resolution on “Respect for and Implementation of Human Rights in Occupied Territories” (United Nations, above note 7, p. 5), later endorsed by the UN General Assembly in a resolution having the same title (UNGA Res. 2443 (XXIII), 19 December 1968).

16 UNGA Res. 2675 (XXV), 9 December 1970 (emphasis added). See also e.g. UNGA Res. 3318 (XXIX), 14 December 1974.

17 See e.g. below notes 83–89.

interplay, or, when specific mechanisms are mentioned, like the *lex specialis* principle or the principle of systemic integration, they prove to be unsatisfactory, mainly because they are mere formal mechanisms, whereas dealing with the interactions between IHL and IHRL involves value judgements. This paper argues for a coherency-based approach, based upon legal theories on coherence, which gives weight to substantial considerations and serves as a suitable legal framework to both the interpretation and application processes. After describing both these processes and the difficulties that they raise regarding the interplay between IHL and IHRL, the paper delves into the legal theories on coherence and shows how these difficulties might be overcome by resorting to those theories.

The interpretation process versus the application process

The two main ways through which IHRL currently impacts the regulation of armed conflict are the interpretation of IHL in light of IHRL norms and case law, whereby IHRL impacts IHL itself,¹⁸ and the applicability of IHRL in armed conflicts alongside IHL.

The interpretation process

The interpretation process has been performed by several jurisdictions and institutions, mainly those charged with sanctioning IHL violations or monitoring the application of that body of law. Although this process has the potential to

18 IHRL might also impact IHL itself through a normative rather than a mere interpretative process, by inspiring secondary norms applicable to IHL or incorporating IHRL content into primary (conventional or customary) IHL norms. However, this process remains quite limited. There are a few cases of IHRL impact on the secondary norms applicable to IHL; these arguably include the non-reciprocal character of IHL treaty obligations and the current trend towards recognizing IHL as bestowing rights to individuals rather than merely imposing obligations upon States (see. e.g. Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 247–252). With respect to primary IHL norms, no IHL treaty incorporating IHRL norms, as the two Additional Protocols did in 1977, has since been adopted. On the other hand, while the ICRC Customary Law Study suggests that IHRL has been incorporated into customary IHL norms (Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>), it is argued that the concerned Rules, in particular Rule 99, dealing with detention, and Rule 100, concerning the fair trial guarantees, amount to a “disguised” application and interpretation process respectively. Regarding Rule 99, this is already noticeable in the title of that Rule, which prohibits “arbitrary detention”, those terms being specific to the IHRL narrative. It is even more apparent with respect to the procedural guarantees claimed by the ICRC to be applicable in non-international armed conflict (NIAC), especially the right of *habeas corpus* (*ibid.*, pp. 351–352), which is entirely based upon human rights practice and case law. Such “disguised” application is contentious since, unlike in the traditional application process (discussed below), these IHRL guarantees, including the right of *habeas corpus*, are incorporated into IHL and bind armed groups. Regarding Rule 100, the ICRC interpreted the fair trial guarantees applicable to any armed conflict, including NIACs, notably in light of human rights treaties and case law, as incorporating certain IHRL requirements, such as the right to be tried “without undue delay” (*ibid.*, p. 363), although those requirements are provided by IHL treaties only with respect to specific protected persons in international armed conflict (IAC).

greatly influence the regulation of armed conflict, as it leads to the incorporation of IHRL into IHL, few indications are given in practice on how the process must be conducted.

Practice

The first instances of elaborated interpretations of IHL through IHRL date back to the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). Those interpretations mainly concerned the IHL fundamental guarantees, notably the prohibitions against torture,¹⁹ cruel/inhumane treatment²⁰ and slavery.²¹ This interpretation process is witnessing a revival today, through the work of the ICRC and the activity of the International Criminal Court (ICC).

Firstly, the ICRC devotes general considerations to this process in its recent updated Commentaries on the Geneva Conventions,²² in particular in each introductory part of those Commentaries. Each such part deals with the interpretation of the commented-upon Convention in light of any other relevant rules of international law, including IHRL.²³ In addition, in the core part of the Commentaries, the ICRC has proceeded to engage in significant interpretations of conventional IHL norms in light of IHRL. Those interpretations not only echo those made by the ICTY²⁴ but also concern other fundamental guarantees, such as the fair trial guarantees²⁵ and the principle of *non-refoulement*.²⁶ Such interpretations have also been made in relation to many specific notions, like the qualification of “religious personnel” as protected persons under Geneva Convention I (GC I),²⁷ or specific protections, like the minimum amount of living space for prisoners of war (PoWs)²⁸ and the use of weapons against those

19 See e.g. International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment (Trial Chamber), 15 March 2002, para. 181. See also ICTY, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17-1-T, Judgment (Trial Chamber), 10 December 1998, paras 143 ff.; ICTY, *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras 452–493, 534–542.

20 See e.g. ICTY, *Delalić*, above note 19, paras 534–540.

21 See e.g. ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, Case Nos IT-96-23-T, IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, paras 519–520; ICTY, *Krnojelac*, above note 19, para. 353.

22 For less recent ICRC practice, see e.g. ICRC Customary Law Study, above note 18, p. xxxi.

23 See in particular ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 39–41; ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017 (ICRC Commentary on GCII), paras 41–42; ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), paras 99–105, available at: <https://tinyurl.com/5yf9ta5n>. The updated ICRC Commentary on GC III is much more developed on this issue than the two other Commentaries.

24 In relation to cruel/inhumane treatment, see e.g. ICRC Commentary on GC III, above note 23, paras 651–659, particularly para. 655 fn. 417, as well as paras 665–669; in relation to torture, see e.g. *ibid.*, paras 662–681, particularly paras 662, 668, 673 fn. 474, 674 (with examples of torture taken from IHRL case law), 681.

25 See e.g. *ibid.*, paras 710–731, particularly paras 715, 718, 723, 724, 728.

26 See *ibid.*, paras 744–751, particularly paras 746, 749.

27 See ICRC Commentary on GC I, above note 23, para. 1968 fn. 20.

28 See ICRC Commentary on GC III, above note 23, para. 2090 fn. 32.

prisoners, as provided by Geneva Convention III (GC III) under Articles 25 and 42 respectively.²⁹

Secondly, the ICC recently engaged in the interpretation process in the *Al Hassan* case. In its 2019 decision on the confirmation of charges,³⁰ the ICC Pre-Trial Chamber substantially relied on IHRL to interpret the fair trial guarantees that any tribunal must afford in non-international armed conflicts (NIACs) in relation to criminal prosecutions. The *Al Hassan* case notably concerns tribunals established by armed groups, in particular the coalition between AQMI and Ansar Dine, two terrorist organizations that took control over certain localities of northern Mali in April 2012, including the city of Timbuktu and its region. The accused was an alleged member of the Islamic police created by that coalition and was allegedly involved in the work of the Islamic Tribunal set up by the terrorist organizations for prosecuting conduct contravening their strict religious laws. The Islamic Tribunal rendered numerous judgments and sentenced many persons to corporal punishments, including flogging, lashes and amputations. The Tribunal operated until January 2013, when the terrorist coalition was pushed back by the Malian authorities, supported by the French army. The accused was charged with the war crime of passing sentences without due process. The ICC Pre-Trial Chamber referred to IHRL in order to interpret the guarantees that the Islamic Tribunal had to respect, including the statutory guarantees, namely the independence and impartiality of the Tribunal,³¹ and the procedural guarantees, which include a series of requirements, such as those stemming from the rights of the accused.³²

The interpretation process has also been conducted by several other bodies, but only in an unelaborated or implicit way.³³ This is the case with regard to the US

29 See *ibid.*, paras 2536 ff.

30 ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18-461-Corr-Red, Corrigendum to the Decision on the Confirmation of Charges (Pre-Trial Chamber), 13 November 2019.

31 *Ibid.*, paras 378–380.

32 *Ibid.*, paras 383–384; see also paras 483, 492.

33 However, it is worth observing that no interpretation of IHL in light of IHRL has been made at all by most other bodies, which are nonetheless competent to rule on IHL violations together with violations of other branches of international law or domestic law. For instance, the International Court of Justice (ICJ) has never undertaken such an interpretation, although it has pronounced on IHL violations in several cases and those violations concerned fundamental guarantees, such as the prohibition against torture, or other rules, like those dealing with the requisition or destruction of properties, whose content could have potentially been clarified in light of IHRL, notably in order to harmonize the norms belonging to the two different regimes: see ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, paras 206–207; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 132. This is also the case with regard to the Eritrea–Ethiopia Claims Commission. Although competent to address violations of both IHL and IHRL, the Commission decided not to consider IHRL given that no party to the case relied on it (regarding the International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR), see Eritrea–Ethiopia Claims Commission, *Partial Award: Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 and 22*, 28 April 2004, para. 25). This is quite unfortunate since the issues put before the Commission concerned matters with respect to which IHRL could have played a clarifying role, such as the conditions of detention of PoWs and civilians, as well as the administration of occupied territories. Finally, numerous fact-finding, inquiry and independent commissions and panels of experts have been given the mandate by UN institutions—either the UN Security Council, the UN Secretary-General, the Commission on Human Rights or the Human Rights Council—to

Supreme Court, which merely referred to Article 14 of the ICCPR in a footnote of its judgment in the *Hamdan* case, when it dealt with the fair trial guarantees afforded under Article 3 common to the four Geneva Conventions.³⁴ This is also the case with regard to the Israeli Supreme Court and the Commission of Inquiry on the Protests in the Occupied Palestinian Territory: both briefly referred to the law enforcement paradigm regarding the use of lethal force against civilians who do not take a direct part in hostilities in international armed conflicts (IACs)³⁵ or against PoWs under Article 42 of GC III, as well as in relation to any use of lethal force in occupied territories under Article 43 of the 1907 Hague Regulations.³⁶ Finally, this is also the case with regard to some human rights bodies, in particular when those bodies have interpreted Article 43 of the Geneva Convention IV (GC IV). That article, which provides that a mere administrative board may review the legality of the detention of civilians, was considered as being required to fulfil a certain IHRL requirement – namely, that of affording “sufficient guarantees of impartiality and fair procedure to protect against arbitrariness”.³⁷ Such interpretations have actually been made in the course of the application process, when, as we will see in detail later,³⁸ those bodies resorted to IHL to interpret the IHRL norm that they applied in relation to the detention of civilians in IACs. IHL was itself interpreted while being used by human rights bodies as an interpretive standard for the applied IHRL norm.

Unavoidable interplay: The issue of the incorporation of IHRL into IHL

When an IHRL norm is used to interpret an IHL one, the former is incorporated into the latter. Through this process of interpretation, the incorporated IHRL

investigate violations of both IHRL and IHL. However, most of them did not proceed to any interpretation of the applicable IHL rules in light of IHRL (see, nonetheless, below note 36), even when they specifically addressed the issue of the relationships between IHL and IHRL.

34 US Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, 558 US 557, No. 05.184, 29 June 2006, pp. 70-71, available at: www.supremecourt.gov/opinions/05pdf/05-184.pdf.

35 See below note 36; see also *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission*: Report, Part 1, January 2011 (Report of the Turkel Commission), para. 234, available at: www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf. It has also been argued that the Israel Supreme Court interpreted (customary) IHL in light of IHRL with respect to the use of lethal force against legitimate targets under IHL, in particular civilians directly taking part in hostilities in IACs: see Israel Supreme Court, *Public Committee Against Torture v. Government*, Case No. HCJ 769/02, 14 December 2006, para. 40. According to the Turkel Commission, the Court “incorporate[d] human rights law into international humanitarian law”: Report of the Turkel Commission, above, p. 232 fn. 809.

36 Regarding the Israel Supreme Court, see *Yesh Din – Volunteers for Human Rights and Others v. Israel Defense Forces Chief of General Staff and Others*, Case No. HCJ 3003/18, 24 May 2018, paras 39–40; regarding the Commission of Inquiry, see *Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory*, UN Doc. A/HRC/40/CRP.2, 18 March 2019 (2019 Protests Report), paras 84–93, particularly para. 86, and fn. 100.

37 European Court of Human Rights (ECtHR), *Hassan v. The United Kingdom*, Appl. No. 29750/09, Judgment (Grand Chamber), 16 September 2014, para. 106. See also Inter-American Commission on Human Rights (IACHR), *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 143; IACHR, *Coard and Others v. United States*, Report No. 109/99, Case 10.951, 29 September 1999, para. 58.

38 See the below section on “Elaborated but Confusing Frameworks”.

norm then “indirectly” regulates situations to which the IHL interpreted norm applies, according to the specific conditions for the applicability of IHL. However, the scope of application of IHL is broader than that of IHRL in certain respects; in other words, IHL applies to situations to which IHRL is not applicable.

Firstly, no derogation is allowed from IHL norms, while such derogation is possible with respect to certain human rights.³⁹ Secondly, IHL is indisputably applicable to both States and any armed groups in NIACs once they are party to such conflicts, whereas the issue of the applicability of IHRL to non-State actors and in particular to armed groups is controversial. Under the traditional view, IHRL does not apply to armed groups, but there is a current trend in practice to admit such an application with respect to armed groups having territorial control and/or exercising government-like functions.⁴⁰ Thirdly, IHL applies to persons or properties that are not necessarily under the (physical or territorial) control of a party to the conflict,⁴¹ while such control is a traditional prerequisite for the applicability of IHRL.⁴²

The crucial issue, then, is whether IHRL can be used to interpret an IHL norm when that norm is designed to apply to situations to which IHRL is not or could not be applicable according to the conditions for its applicability. Practice shows that IHRL is used as an interpretative standard even in such cases. Indeed, IHRL obligations have been incorporated into IHL, although States are formally authorized to derogate to those obligations. This is the case for certain IHRL obligations that have been used in practice as interpretive standards for IHL fair trial guarantees. For instance, in the *Al Hassan* case, the ICC incorporated the IHRL rights to be tried “without undue delay”⁴³ (or “within a reasonable time”⁴⁴), “to present and examine witnesses”, and to public proceedings within the IHL fair trial guarantees applicable to NIACs,⁴⁵ although those rights may be

39 See e.g. ICCPR, Art. 4; European Convention on Human Rights (ECHR), 4 November 1950, Art. 15; American Convention on Human Rights (ACHR), 22 November 1969, Art. 27.

40 See e.g. Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, December 2016, available at: www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf.

41 See e.g. the law regulating the conduct of hostilities, in particular the rules on targeting. On that control requirement regarding the IHL fundamental guarantees, see e.g. Raphaël van Steenberghe, “Who Are Protected by the Fundamental Guarantees under International Humanitarian Law? Part II: Breaking with the Control Requirement in light of the ICC Case Law”, *International Criminal Law Review*, Vol. 22, 2022, available at: <https://tinyurl.com/yckrrwc3>.

42 At the international level, see e.g. Human Rights Committee (HRC), General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10; at the European level, see e.g. ECtHR, *Georgia v. Russia (II)*, Appl. No. 38263/08, Judgment (Grand Chamber), 21 January 2021, para. 81; at the US level, see e.g. IACHR, *Coard*, above note 37, para. 37.

43 ICCPR, Art. 14(3).

44 ECHR, Art. 6(1); ACHR, Art. 8(1); African Charter on Human and Peoples’ Rights, 27 June 1981, Art. 7(1)(d).

45 ICC, *Al Hassan*, above note 30, para. 384.

subject to derogations under IHRL.⁴⁶ The ICRC did the same with respect to the first two foregoing rights.⁴⁷ This means that, as incorporated into IHL, such guarantees can no longer be subject to any derogation in times of armed conflict. Moreover, both the ICRC and the ICC, as well as other international criminal jurisdictions, have interpreted several IHL fundamental guarantees applicable in NIACs, and therefore binding upon armed groups, in light of IHRL norms.⁴⁸ These norms then became “indirectly” applicable to those groups, although their scope of application does not traditionally extend to such groups. More specifically, practice even shows that certain norms of international law, such as those provided in the International Convention against the Taking of Hostages, have been mobilized by international tribunals to interpret IHL, although the treaty containing them expressly provides that it is not applicable in armed conflict.⁴⁹

The ICRC position on this issue is, however, ambiguous. In each introductory part of its updated Commentaries, when developing its general considerations on the interpretation of the commented-upon Convention in light of any other relevant treaties of international law, the ICRC refers to “human rights law *where applicable*”.⁵⁰ In its updated Commentary on GC III, it even adds that “[i]t is important to note that treaties other than the Conventions themselves are referred to in the Commentaries on the understanding that they apply *only if all the conditions relating to their geographic, temporal and personal scope of application are fulfilled*”.⁵¹ This might suggest that IHRL can only be used as an interpretive tool for an IHL norm when it is or could be applicable to the situation regulated by that norm. However, by emphasizing that these other relevant treaties “are referred on the understanding that they apply”, the ICRC appears to confuse the interpretation and application processes. This is reinforced by the fact that the ICRC also considers in its Commentaries that referring to human rights treaties is relevant to complement – and not just to interpret – the IHL ones,⁵² such as the IHRL treaties prohibiting the death penalty in relation to the transfers of PoWs to third States.⁵³ In any case, when making interpretations in the core part of the Commentaries, the ICRC does not enquire whether the IHRL norm used as an interpretive tool is or could be applicable to the situation

46 No human rights treaty expressly excludes derogations to those guarantees. In addition, even if the practice of human rights bodies has extended the list of guarantees of due process that may not be subject to any derogation, the aforementioned guarantees have not been included on that list: see e.g. IACHR, *Report on Terrorism and Human Rights*, above note 37, paras 261–262.

47 See e.g. ICRC Commentary on GC III, above note 23, paras 722–723.

48 See above notes 19–21, 24–26 and 31–32.

49 See e.g. ICTY, *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, para. 639 fn. 1332; Special Court for Sierra Leone (SCSL), *The Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-A, Judgment (Appeals Chamber), 26 October 2009, paras 577–579. See also the ICC *Elements of Crimes* regarding the taking of hostages as a war crime (ICC, *Elements of Crimes*, The Hague, 2011, pp. 17, 33, available at: <https://tinyurl.com/y3d6tebm>), which “are ‘largely taken from’ the definition contained in the Hostages Convention” (SCSL, *Sesay*, above, para. 579).

50 See ICRC Commentary on GC I, above note 23, para. 35; ICRC Commentary on GC II, above note 23, para. 35; ICRC Commentary on GC III, above note 23, para. 94 (emphasis added).

51 ICRC Commentary on GC III, above note 23, para. 95 (emphasis added).

52 See *ibid.*, para. 105.

53 See *ibid.*, para. 1543.

regulated by the IHL interpreted rule.⁵⁴ More specifically, the ICRC did not bar itself from resorting to IHRL to interpret the fundamental guarantees provided under common Article 3, although those guarantees are applicable to any armed group party to a NIAC and the IHRL scope of application does not traditionally extend to such groups. The Committee even refers to IHRL to interpret common Article 3 as including the principle of *non-refoulement*, while expressly asserting that this principle is binding upon both States and armed groups.⁵⁵

Some developments on the interpretation of common Article 3 nonetheless remain intriguing in the updated ICRC Commentaries, in particular with respect to the statutory fair trial guarantees, namely the independence and impartiality of tribunals. While indicating that “[h]uman rights bodies have stated that [such guarantees] can never be dispensed”, the Commentaries indeed emphasize that the “interpretation given to [them] by these bodies is also relevant in the context of common Article 3, *at least for courts operated by State authorities*”.⁵⁶ Those last terms suggest that the interpretation based on IHRL would only be valid for States, not armed groups, in accordance with the limited personal scope of application of IHRL. Such a position is, however, untenable as it directly contradicts an important principle of IHL—namely, the principle of equality between belligerents. It would indeed lead to an asymmetry of the application of the interpreted IHL norm, since IHRL used as an interpretive standard would have been incorporated into that norm.⁵⁷

No elaborated legal framework

The interpretation process has great potential to impact the regulation of armed conflict by incorporating IHRL standards into IHL, even when those standards are not applicable to the situation regulated by IHL. However, that process has not been the object of any elaborated legal framework in practice.

Firstly, few indications are given of the reasons justifying a resort to IHRL in order to interpret IHL. The only indications are those briefly mentioned by the ICTY in the *Kunarac* case and the ICRC in its updated Commentaries. Both the ICTY and the ICRC suggest that referring to IHRL to interpret IHL is relevant because the two regimes share certain common features. In the *Kunarac* case, the only case in which the ICTY expanded on the interplay between IHL and IHRL, the ICTY indicated that it “had recourse to instruments and practices developed in the field of human rights law” to interpret undefined IHL concepts, such as the notion of torture, “[b]ecause of [the] *resemblance* [between these two bodies of law], in terms of goals, values and terminology”.⁵⁸ On the other hand, the

54 See above notes 24–29.

55 See e.g. ICRC Commentary on GCIII, above note 23, para. 750.

56 *Ibid.*, para. 715 (emphasis added).

57 That issue must be distinguished from the potential asymmetry that could result, as we will see in detail below, from the *application* of IHRL, when IHRL may arguably be said to apply only to one party to the armed conflict, namely the State: see the below section on “Modulating Applicable IHRL Obligations”.

58 ICTY, *Kunarac*, above note 21, para. 467 (emphasis added).

ICRC indicated that “[r]eference has been made to human rights law where relevant to interpret *shared concepts* (e.g. cruel, inhumane and degrading treatment)”.⁵⁹

Secondly, few indications are given about the standards that must guide the interpretation of IHL through IHRL. Although the ICTY made general observations on those standards, these observations were quite limited and vague and were expressed only in relation to the determination of the notion of torture under IHL. In the *Kunarac* case, where the observations were the most elaborated,⁶⁰ the Tribunal merely warned against “embrac[ing] too quickly and too easily concepts and notions developed in a different legal context” and indicated that “notions developed in the field of human rights [could] be transposed in international humanitarian law only if they [took] into consideration the specificities of the latter body of law”.⁶¹ In other words, although the ICTY emphasized that IHL was somewhat similar to IHRL, it suggested that adaptations of the IHRL interpretive norm might be needed when incorporated into IHL, given the specificities of the latter.⁶² One such adaptation made by the Tribunal mainly concerned the specific IHRL requirement that a State agent must be involved in the act of torture.⁶³ While the Tribunal extended such involvement to both State and non-State parties to armed conflicts in early cases,⁶⁴ it completely excluded that requirement from the notion of torture later in the *Kunarac* case⁶⁵ and repeated the aforementioned solution in subsequent case law.⁶⁶ Moreover, the only IHL specificity to which the Tribunal briefly referred in its reasoning was that IHL, unlike IHRL, was binding upon both States and armed groups.⁶⁷ The

59 ICRC Commentary on GC I, above note 23, para. 40; ICRC Commentary on GC II, above note 23, para. 41; ICRC Commentary on GC III, above note 23, para. 101 (emphasis added).

60 Regarding less elaborated observations, see also ICTY, *Delalić*, above note 19, para. 473; ICTY, *Furundžija*, above note 19, para. 162; ICTY, *Krnjelac*, above note 19, para. 181.

61 ICTY, *Kunarac*, above note 21, para. 471.

62 Such emphasis by the Tribunal on the specificity of IHL, justifying the adaptation of the interpretive IHRL norm, has also been expressed in other cases dealing with the definition of torture under IHL: see e.g. ICTY, *Krnjelac*, above note 19, para. 181.

63 Another adaptation was related to the specific purpose for which the act of violence must be committed in order to amount to an act of torture. In the *Furundžija* case, the ICTY added the purpose of humiliating the victim to the purposes expressly mentioned in the 1984 Convention Against Torture: ICTY, *Furundžija*, above note 19, para. 162. While that interpretation has been followed by the Tribunal in the *Kvočka* case (ICTY, *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgment (Trial Chamber), 2 November 2001, para. 140), it was rejected later by the ICTY, which argued that this purpose was not yet part of the customary definition of torture under international law (see e.g. ICTY, *Krnjelac*, above note 19, para. 186).

64 See e.g. ICTY, *Delalić*, above note 19, para. 473; ICTY, *Furundžija*, above note 19, para. 162.

65 See ICTY, *Kunarac*, above note 21, para. 496.

66 See e.g. ICTY, *Kvočka*, above note 63, para. 138; ICTY, *Krnjelac*, above note 19, para. 162; ICTY, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgment (Appeals Chamber), 21 July 2000, para. 148; ICTY, *The Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Judgment (Trial Chamber), 17 October 2003, para. 82; ICTY, *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgment (Trial Chamber), 1 September 2004, paras 488–489; ICTY, *The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 240; ICTY, *The Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, Judgment (Trial Chamber), 27 September 2007, para. 514; ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 519.

67 See ICTY, *Kunarac*, above note 21, para. 470; see also ICTY, *Delalić*, above note 19, para. 473.

specificities on which the Tribunal rather focused were actually specific to the relationships between IHRL and international criminal law. The Tribunal emphasized that the former was mainly binding upon States and was designed to engage State responsibility in case of violations, whereas the latter focused on the criminal responsibility of individuals, which therefore made the requirement of the involvement of a State agent irrelevant with respect to the crime of torture.⁶⁸ Finally, the ICTY never identified in its case law any specific legal mechanism upon which it could legally ground such interpretations of IHL by reference to IHRL.

By contrast, in its updated Commentaries, the ICRC referred to a specific legal mechanism. According to the Committee, IHRL may be used to interpret the Geneva Conventions on the basis of the principle of systemic integration, as enshrined in Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.⁶⁹ That article provides that a treaty shall be interpreted in light of “any relevant rules of international law applicable in the relations between the parties”. However, the ICRC does not seem to adopt a rigorous and cautious approach with respect to the application of Article 31(3)(c). As already emphasized,⁷⁰ its reasoning suggests that the rule of a treaty can only be considered for the interpretation of the Geneva Conventions “if all the conditions relating to [the] geographic, temporal and personal scope of application [of that treaty] are fulfilled”. Yet, according to Article 31(3)(c), a rule must be “applicable in the relations between the parties” in the mere sense that those parties must be bound by it because they ratified the treaty providing it, not in the sense that the rule must be applicable to the concrete situation at stake. In addition, the ICRC does not pronounce on the meaning of the controversial notion of “parties” to which the relevant rule of international law must be applicable in order to serve as an interpretative standard for a treaty. The issue is indeed whether that notion must include all the States Parties to the interpreted treaty or only those parties to the specific dispute concerning the interpretation of the treaty.⁷¹ This seems important, since the updated Commentaries intend to interpret the Geneva Conventions, which are universally ratified, notably by resorting to IHRL instruments, to which less States are parties. Similarly, the ICRC does not question whether mere soft-law instruments may act as a relevant rule for the interpretation of the Geneva Conventions, although it relies on such instruments

68 See ICTY, *Kunarac*, above note 21, paras 470, 493–495. Regarding such reference to the specificity of international criminal law rather than of IHL to justify adaptations of the notion of torture under IHRL, see ICTY, *Furundžija*, above note 19, para. 162; ICTY, *Furundžija*, above note 66, para. 148; ICTY, *Brđanin*, above note 66, paras 488–489; ICTY, *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgment (Appeals Chamber), 28 February 2005, para. 283.

69 ICRC Commentary on GC I, above note 23, para. 33; ICRC Commentary on GC II, above note 23, para. 33; ICRC Commentary on GC III, above note 23, para. 92.

70 See above notes 50–51 and corresponding main text.

71 See e.g. Ulf Linderfalk, “Who are ‘the Parties’? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the ‘Principle of Systemic Integration’ Revisited”, *Netherlands International Law Review*, Vol. 55, No. 3, 2008; see also ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, paras 470–472.

in the core text.⁷² More generally, the ICRC does not elaborate on how such systemic integration concretely operates in general or in relation to the interpretation of IHL through IHRL in particular. It merely makes a few general observations that echo those already made by the ICTY on that issue in the *Kunarac* case – notably, that “human rights law and interpretations can[not] be transposed mechanically to humanitarian law provisions, and differences [must] be pointed out where relevant”.⁷³ Regarding the specific issue of detention regulated by GC III, the ICRC states in general terms that “[r]eferences to human rights law and standards must ... be read with due regard to the particular context and to the specificities of detention in armed conflict”.⁷⁴ Moreover, in all of its interpretations made in the core part of its Commentaries, few adaptations of the interpretive IHRL standard are expressly indicated and articulated.⁷⁵

Finally, in its confirmation decision in the *Al Hassan* case, the ICC also relied on a legal mechanism to justify resorting to IHRL in order to interpret IHL. That mechanism is however specific to the ICC’s Rome Statute, as it is derived from Article 21(3) of the Statute. Article 21 indeed deals with the law applicable before the ICC, with that law including IHL, and its third paragraph contains a general test of consistency of this applicable law with IHRL. In the *Al Hassan* case, the ICC used that test to perform an interpretive function with respect to the fair trial guarantees,⁷⁶ as it usually does with respect to various procedural issues regulated by the Rome Statute.⁷⁷ However, the ICC remained completely silent on the concrete operation of that test in relation to the interpretation of IHL through IHRL and, more particularly, regarding the issue of the fair trial guarantees that any tribunal must afford in NIACs.

Legal scholarship is unfortunately no more helpful than the foregoing practice. Few scholars actually focus on the interpretation process; legal literature is more attracted, as we will see,⁷⁸ to the application process. It is nonetheless worth observing that some scholars point to another legal mechanism upon which the interpretation of IHL through IHRL could be based: namely, the well-known *lex specialis* principle.⁷⁹ However, there are disagreements on whether

72 See e.g. ICRC Commentary on GC III, above note 23, para. 2541.

73 ICRC Commentary on GC I, above note 23, para. 40; ICRC Commentary on GC II, above note 23, para. 41; ICRC Commentary on GC III, above note 23, para. 101.

74 ICRC Commentary on GC III, above note 23, para. 102.

75 See e.g. the adaptation of the IHRL definition of torture; however, the ICRC merely refers to the ICTY case law on that issue (ICRC Commentary on GC III, above note 23, para. 681). With respect to implicit adaptations, however, regarding the minimum amount of living space that dormitories of PoWs should afford, the ICRC refers to the standard established by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, but requires Detaining Powers to comply with that standard only “wherever circumstances permit” (*ibid.*, para. 2090 fn. 32).

76 ICC, *Al Hassan*, above note 30, paras 378 (statutory guarantees), 383 (procedural guarantees).

77 See e.g. the case law described in William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford, 2016, pp. 530–534.

78 See e.g. below notes 110 and 119.

79 See e.g. Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham and Northampton, MA, 2019, p. 216; Laura M. Oleson, “Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International

IHRL should be seen as the *lex generalis*, in light of which IHL, as the *lex specialis*, may be interpreted,⁸⁰ or rather as the *lex specialis*, acting as an interpretive tool for IHL, which is considered the *lex generalis* with respect to certain issues.⁸¹ This already evidences the shortcomings of such a mechanism, which does not provide any guidance on the determination of which rule must be seen as the *lex specialis* or *lex generalis*. These limits will be examined in detail later, when dealing with the main legal mechanisms used in practice to deal with the problems raised by the interplay between IHL and IHRL.⁸²

The application process

The application process, which stems from the applicability of IHRL in armed conflict, has been much more addressed in practice. Difficulties may arise only in the case of the interplay between IHRL and IHL, when the two bodies of law simultaneously apply to the same situation and enter into conflict. Several mechanisms have been used in practice to overcome these difficulties.

Practice

The application process has been conducted by all the bodies devoted to monitoring the application of IHRL, including the Human Rights Committee (HRC),⁸³ the European Court of Human Rights (ECtHR),⁸⁴ the Inter-American Commission on Human Rights (IACHR),⁸⁵ the Inter-American Court of Human Rights (IACtHR)⁸⁶ and the African Commission on Human and People’s Rights.⁸⁷ Given the number of such bodies, which contrasts with the few bodies monitoring the application of IHL, and their intense activity, notably in relation to situations of armed conflict, it is not surprising that a significant part of their case law is devoted to the application process.

In addition, that process has also been abundantly addressed before other bodies competent to pronounce on IHRL violations together with violations of other branches of international law or domestic law, like the International Court

Armed Conflict”, *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 451; Heike Krieger, “A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, *Journal of Conflict and Security Law*, Vol. 11, 2006, p. 275.

80 See e.g. H. Krieger, above note 79, p. 275.

81 See e.g. M. Sassòli, above note 79, p. 216.

82 See the below section on “The Unsatisfactory Traditional Frameworks”.

83 See e.g. HRC, above note 42, para. 11; HRC, “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life”, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 64.

84 See e.g. ECtHR, *Hassan*, above note 37, para. 104.

85 See e.g. IACHR, *Report on Terrorism and Human Rights*, above note 37, para. 61.

86 See e.g. IACtHR, *The Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Series C, No. 148, 1 July 2006, para. 179.

87 See e.g. ACHPR, Communication 227/99, “Democratic Republic of Congo/Burundi, Rwanda, Uganda”, 29 May 2003, available at: www.achpr.org/sessions/descions?id=138.

of Justice (ICJ)⁸⁸ and the numerous fact-finding missions or commissions of inquiry established by the Human Rights Council or the UN Security Council.⁸⁹

No automatic interplay: The issue of the conflicting application of IHL and IHRL to the same conduct

The applicability of IHRL in armed conflict does not necessarily mean that this body of law will interplay with IHL. Contrary to what occurs in the interpretation process, the concerned IHRL norm is not incorporated into IHL and remains subject to its own scope of application. This means that any interplay between IHRL and IHL with respect to a given conduct may arise only when that conduct simultaneously falls into the scope of application of both bodies of law. As a result, at least five cumulative conditions must be met.

Three conditions result from the scope of application of IHRL: as already seen,⁹⁰ (1) the IHRL norm applicable to the conduct must not have been subject to any valid derogation; (2) that conduct must be that of a State (or an international organization) and not of an armed group (at least not of an armed group that does not exercise government-like functions and/or have any territorial control); and (3) the conduct must have occurred with respect to a person who is under the jurisdiction of the State bound by the concerned IHRL norm (through its personal or spatial control). The two other conditions result from the scope of application of IHL: (4) the conduct must have a nexus with an armed conflict,⁹¹ which means that conduct, like the killing of a person, may well occur in the context of an armed conflict and be regulated by IHRL while failing to have any nexus with the conflict and therefore being outside of the scope of application of IHL; and (5) the conduct must occur with respect to persons fulfilling a particular status under IHL, traditionally that of belonging to the enemy,⁹² which means that acts of violence committed by a party to an armed

88 See e.g. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 106; ICJ, *Armed Activities*, above note 33, para. 216.

89 See e.g. *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, UN Doc. A/HRC/17/44, 12 January 2012 (2012 Libya Report), paras 61, 146; *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, UN Doc. A/HRC/31/CRP.3, 15 February 2016 (2016 Libya Report), para. 20.

90 See the above section on “Unavoidable Interplay: The Issue of the Incorporation of IHRL into IHL”.

91 For practice referring to the nexus requirement, see e.g. *Report of the Commission on Human Rights in South Sudan*, UN Doc. A/HRC/40/69, 12 March 2019 (2019 South Sudan Report), para. 101; *Situation of Human Rights in Yemen, including Violations and Abuses since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen*, UN Doc. A/HRC/45/6, 28 September 2020 (2020 Yemen Report 1), para. 67. It is argued that the scope of that test may be determined in light of the nexus requirement for the purpose of establishing criminal responsibility for war crimes; see e.g. M. Sassòli, above note 79, pp. 200–203; on that scope, see e.g. ICTY, *Kunarac*, above note 21, paras 58–59; ICC, *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges (Pre-Trial Chamber), 23 March 2016, para. 2689.

92 See e.g. Antonio Cassese *et al.* (eds), *Cassese’s International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 67; M. Sassòli, above note 79, p. 199. See also SCSL, *The Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, paras 1451, 1453. See, in particular, Article 4 of GC III and GC IV, Article 41 of AP I, and the condition of not

conflict against persons affiliated to that party are normally regulated exclusively by IHRL.⁹³

Admittedly, practice shows many situations in which similar conduct is likely to be simultaneously regulated by both IHRL and IHL and therefore to give rise to interplay between the two bodies of law. The conducts concerned include those abundantly discussed in legal scholarship, namely the use of lethal force as well as the detention of persons for security reasons, especially in NIACs. However, other practice, especially the detailed reports of the human rights fact-finding missions and commissions of inquiry,⁹⁴ evidences a much wider range of conduct that may trigger the application of both IHL and IHRL norms. Such conduct may encompass enforced disappearance,⁹⁵ internal displacement of persons,⁹⁶ pillaging,⁹⁷ the use of human shields,⁹⁸ closures⁹⁹ and curfews,¹⁰⁰ obstacles to humanitarian assistance,¹⁰¹ attacks or restriction of movements on journalists,¹⁰² unfair administration of justice,¹⁰³ and destruction of civilian objects,¹⁰⁴ including

directly participating in hostilities set out in common Article 3 and Article 4 of Additional Protocol II (APII) regarding the enjoyment of the fundamental guarantees (on the interpretation of these conditions as meaning that those guarantees only protect against inter-party violence, see e.g. Raphaël van Steenberghe, “Who Are Protected by the Fundamental Guarantees under International Humanitarian Law? Part I: Breaking with the Status Requirement in light of the ICC Case Law”, *International Criminal Law Review*, Vol. 22, No. 3, 2021, pp. 367–369).

- 93 See nonetheless the ICC view that the protections against rape and sexual slavery apply even to intra-party violence: ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1707, Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9 (Trial Chamber), 4 January 2017; ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1962, Judgment on the Appeal of Mr Ntaganda against the “Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9” (Appeals Chamber), 15 June 2017.
- 94 See e.g. also ECtHR, *Georgia v. Russia (II)*, above note 42, paras 176–199 (pillaging and destruction of properties), 290–291 (internal displacement of persons), 310–311 (pillaging and destruction of schools), 323–325 (failure to investigate).
- 95 See e.g. 2016 Libya Report, above note 89, paras 149–152; 2020 Yemen Report 1, above note 91, para. 67.
- 96 See e.g. *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/22/59, 5 February 2013 (2013 Syria Report), Annex XIII, para. 21; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/27/60, 13 August 2014, para. 132.
- 97 See e.g. *Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/31/49, 22 April 2016 (2016 South Sudan Report), para. 46.
- 98 See e.g. *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009 (2009 Gaza Report), paras 1096–1106.
- 99 See e.g. *ibid.*, paras 1300–1322.
- 100 See e.g. *Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000*, UN Doc. E/CN.4/2001/121, 16 March 2001 (2001 Occupied Territories Report), paras 93–94.
- 101 See e.g. *Situation of Human Rights in Yemen, including Violations and Abuses since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen*, UN Doc. A/HRC/45/CRP.7, 29 September 2020 (2020 Yemen Report 2), paras 110–147.
- 102 See e.g. 2001 Occupied Territories Report, above note 100, para. 94; 2012 Libya Report, above note 89, para. 131.
- 103 See e.g. 2020 Yemen Report 2, above note 101, paras 334–335.
- 104 See e.g. 2013 Syria Report, above note 96, para. 13; 2016 South Sudan Report, above note 97, para. 46; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*,

places of worship, historic or cultural monuments,¹⁰⁵ hospitals¹⁰⁶ and objects essential to the survival of the civilian population,¹⁰⁷ such as flour mills or chicken farms.¹⁰⁸ That being said, difficulties may arise from the interplay between the IHL and IHRL norms applicable to the same conduct only when there is a normative conflict between those norms, with that notion of conflict being understood in a broad sense: the two norms provide for different – but not necessarily contradictory – results.¹⁰⁹

Elaborated but confusing frameworks

Such conflicts of norms, arising from the applicability of IHRL in armed conflict, have been abundantly addressed in practice and legal scholarship. The core approach followed in practice to solve such conflicts is the harmonization of the two bodies of law through the interpretation of the applicable IHRL norm in light of IHL. This particular process has been designated by certain scholars as leading to the “humanitarization” of IHRL.¹¹⁰ It operates in an opposite way to the interpretation process examined above, but the logic underlying the two processes is similar. While it is admitted that IHRL may impact the regulation of armed conflict, either through IHL itself by its interpretation in light of IHRL or by applying in armed conflict simultaneously with IHL, this might only be possible if IHRL is somewhat adapted when needed.

This “humanitarization” of IHRL is based upon several mechanisms in practice. The most familiar is the *lex specialis* principle, and the 1996 ICJ Advisory Opinion in the *Nuclear Weapons* case is an emblematic precedent in this respect. It is indeed well known that the Court ruled that the right to life under Article 6 of the ICCPR, understood as the right of not being arbitrarily deprived of one’s life, had to be interpreted in light of the relevant IHL provisions when applied in armed conflict.¹¹¹ Since then, the *lex specialis* principle has been abundantly used in practice.¹¹² To a lesser extent, courts have

25 January 2005 (2005 Darfur Report), para. 318, available at: www.un.org/ruleoflaw/files/com_inq_darfur.pdf; 2009 Gaza Report, above note 98, paras 323–324.

105 See e.g. 2012 Libya Report, above note 89, paras 148 (IHL), 150 (IHRL).

106 See e.g. 2020 Yemen Report 2, above note 101, para. 84.

107 See e.g. 2016 South Sudan Report, above note 97, para. 52; 2009 Gaza Report, above note 98, paras 926–941.

108 For a series of conducts regulated by both IHL and IHRL, see e.g. 2019 South Sudan Report, above note 91, paras 96–98; *Report of the Commission on Human Rights in South Sudan*, UN Doc. A/HRC/43/56, 31 January 2020, paras 26, 66–68.

109 For a similar approach to the notion of normative conflict, see e.g. ILC, above note 71, para. 25. See also M. Sassòli, above note 79, p. 438.

110 One of the first scholars to use this term was Vera Gowlland-Debbas, “The Right to Life and the Relationship between Human Rights and Humanitarian Law”, in Christian Tomuschat, Evelynne Lagrange and Stefan Oeter (eds), *The Right to Life*, Martinus Nijhoff, Leiden and Boston, MA, 2010, p. 128; see also Hélène Tigroudja, “Les conflits armés”, in Michel Levinet (ed.), *Le droit au respect de la vie au sens de la Convention européenne des droits de l’homme*, Anthémis, Limal, 2010, p. 215; Jean d’Aspremont and Jérôme de Hemptinne, *Droit international humanitaire: Thèmes choisis*, Pedone, Paris, 2012, p. 86.

111 ICJ, *Nuclear Weapons*, above note 88, para. 25.

112 The ICJ again referred to the *lex specialis* principle with respect to the relationships between IHL and IHRL in the *Wall* case (above note 33, para. 106), but not in the *Armed Activities* case (above note 33, para. 216).

also resorted to another mechanism: the principle of systemic integration. This is actually the only mechanism to which the ECtHR has referred in its case law dealing with alleged violations of the European Convention on Human Rights (ECHR) in armed conflicts,¹¹³ while the IACHR has combined it with other mechanisms, including the *lex specialis* principle,¹¹⁴ in similar cases.¹¹⁵

However, this claimed “harmonization” of the two bodies of law through the interpretation of IHRL in light of IHL, often expressed in practice by the paradigmatic formula that IHL and IHRL “are complementary, not mutually exclusive”,¹¹⁶ is flawed, or at least confusing. There are indeed instances in which the norms of the two bodies of law cannot be conciliated by merely interpreting one norm in light of the other. Conflicts can then only be solved through the displacement of one norm to the detriment of the other. This can hardly be said to amount to a harmonization of the two norms. A well-known example is the application of the IHRL requirements to provide detainees with the right of *habeas corpus* and periodic review to the internment of PoWs in IACs. The relevant IHL regulation does not contain such requirements – as is traditionally sustained,¹¹⁷ they would be inappropriate since PoWs are detained merely for the purpose of preventing them from returning to combat, and they can therefore be interned until the end of active hostilities without their detention being reviewed. In such cases, the applicable IHRL requirements are not formulated in a way that would allow interpretation of those requirements in order to apply them in

Regarding the human rights monitoring bodies, see e.g. above notes 83 and 85; regarding the commissions of inquiry and fact-finding missions, see e.g. 2012 Libya Report, above note 89, para. 146; 2005 Darfur Report, above note 104, para. 143; 2001 Occupied Territories Report, above note 100, para. 62; 2019 Protests Report, above note 36, paras 81–83; 2020 Yemen Report 1, above note 91, para. 11; *Report of the OHCHR Investigation on Sri Lanka (OISL)*, UN Doc. A/HRC/30/CRP.2, 16 September 2015 (2015 Sri Lanka Report), para. 178.

113 See ECtHR, *Hassan*, above note 37, para. 102; ECtHR, *Georgia v. Russia (II)*, above note 42, para. 95.

114 See e.g. IACHR, *Franklin Guillermo Aisalla Molina (Ecuador–Colombia)*, Admissibility Report No. 112/10, Inter-State Petition IP-02, OEA/Ser.L/V/II.140, Doc. 10, 21 October 2010, para. 121.

115 See e.g. *ibid.*, para. 122. Although the Commission relied on the IHL regulation not only to interpret the relevant IHRL norm but also to pronounce on violations of that regulation itself, it ceased such practice after the IACtHR ruled in the *Las Palmeras* case (Preliminary Objections, Judgment, Series C No. 67, 4 February 2000, para. 33) that the Commission, like itself, was only competent to pronounce on IHRL violations.

116 That formula has been used by the HRC in its General Comment No. 31 (above note 42, para. 11) and repeated by the commissions of inquiry or fact-finding missions established by the Human Rights Council (see e.g. 2016 Libya Report, above note 89, para. 20; *Report of The International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, UN Doc. A/HRC/15/21, 27 September 2010, paras 68, 71; 2020 Yemen Report 2, above note 101, paras 178–179).

117 See e.g. M. Sassòli, above note 79, p. 440. However, a less traditional view envisages a qualified *habeas corpus* to which PoWs should be entitled, in particular “where the detainee (a) challenges his or her status as a prisoner of war; (b) claims to be entitled to repatriation or transfer to a neutral State if seriously injured or ill; or (c) claims not to have been released or repatriated without delay following the cessation of active hostilities” (*Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, UN Doc. A/HRC/30/37, 6 July 2015, para. 30).

parallel with IHL. They must simply be displaced by the relevant IHL regulation when applicable.

Practice nonetheless shows that human rights bodies are strongly willing to consider that IHL and IHRL may be harmonized even when they are clearly contradictory. An illustrative example is the *Hassan* case. The ECtHR presented its ruling on the interplay between Article 5 of the ECHR and the IHL regulation on detention in IACs as a true instance of harmonization of the two bodies of law, which the Court allegedly reached through the interpretation of Article 5 in light of the relevant IHL regulation on the basis of the principle of systemic integration.¹¹⁸ Yet, it is well known that the two norms concerned are clearly contradictory, since Article 5, unlike IHL, does not provide for any ground of detention based on security reasons among its exhaustive list of grounds and requires that the detention be reviewed by a court rather than by a mere administrative body. This conflict could therefore only be avoided by displacing Article 5 in favour of the relevant IHL regulation, since Article 5 was applicable to the case due to the absence of any derogation to it. By incorporating that IHL regulation into Article 5 under the guise of interpretation, the Court actually engaged in rewriting the ECHR, an approach that has been qualified as an act of “judicial vandalism” in legal scholarship.¹¹⁹ At any rate, the principle of systemic integration is unsuitable in any case of conflicts of norms that cannot be overcome through an interpretation process but only through the displacement of one norm in favour of the other, such as in the *Hassan* case. The *lex specialis* principle would be more appropriate, provided that it is admitted that this principle can act not only as an interpretive tool (as a rule of norm conflict avoidance¹²⁰), in which case it would be unhelpful too, but also as a displacement tool (as a rule of norm conflict resolution¹²¹), justifying the setting aside of the “inappropriate” regulation.¹²²

However, even when the interpretation of IHRL through IHL is possible, it is hard to consider such interpretation as a harmonious process that would conciliate the two competing norms by respecting their own specificities. Actually, it may also entail a displacement process, but at the level of the interpretive standards rather than the norms themselves. When the issue of the interpretation of the applicable IHRL norm arises, such as the interpretation of the right to life under Article 6 of the ICCPR, different interpretive standards may actually be available—either the IHL one, authorizing the deprivation of life merely on the basis of the status of the persons involved, or the IHRL one,

118 ECtHR, *Hassan*, above note 37, para. 102.

119 M. Milanovic, above note 6, p. 475. It is arguable that the ECtHR would remain competent to adjudicate the case even if it would have to assess the concerned conduct in light of the relevant applicable IHL norm that would have displaced Article 5 of the ECHR; similarly, in relation to Article 2 of the ECHR, see ECtHR, *Georgia v. Russia (II)*, above note 42, Concurring Opinion of Judge Keller, p. 153, para. 25 (and the case law quoted by the judge).

120 On this terminology, see e.g. M. Milanovic, above note 6, p. 465.

121 On this terminology, see *ibid.*

122 See e.g. ILC, above note 71, para. 56; see also G. Gaggioli, above note 14, p. 59, in which the author distinguishes between the “interpretative” *lex specialis* and the “derogatory” *lex specialis*.

making the use of lethal force dependent upon circumstances.¹²³ That particular interpretation process therefore implies that a choice must be made between two competing legal frameworks and that one will have to give priority to the other. In practice, the IHL framework is usually favoured to the detriment of the IHRL one. This is definitely not seen as a harmonious process by human rights proponents, who argue that the conflict between the two legal frameworks should rather be solved in favour of the human rights framework, at least in certain particular circumstances.¹²⁴ The only difference with the classical displacement process, which operates at the level of the norms themselves, is that the applicable IHRL norm is formulated in such an open way, using terms like “arbitrariness”, that its interpretation is made possible. Had the IHRL norm been formulated in another way, like the absolute formulation of Article 2 of the ECHR, the IHL framework would also be given precedence, not under the guise of interpretation but through the displacement of the IHRL norm in favour of the IHL one.

Traditional legal framework versus a coherency-based approach

Practice and legal scholarship show that there is a lack of any satisfactory legal framework to guide both the interpretation and application processes and to overcome the difficulties arising from those processes. It is submitted that such guidance may be found through a coherency-based approach, mainly drawn from legal theories on the normative coherence of legal systems.

The unsatisfactory traditional frameworks

It has already been emphasized that practice sometimes does not identify any legal framework or only makes general and vague considerations on the matter, especially in relation to the interpretation process, and that the principle of systemic integration is incapable of dealing with true conflicts of norms when IHL and IHRL apply simultaneously. That being said, this principle and any similar mechanisms, such as the *lex specialis* principle, are intrinsically unsatisfactory, with respect to both the interpretation and application processes. The main reason for this is that such mechanisms are only formal tools, and providing solutions to the interplay between IHRL and IHL cannot merely result from a formal process. Rather, it involves substantial considerations, qualified by certain scholars as entailing “a highly value-based decision [which results from] political

123 On those two different paradigms, see e.g. Gloria Gaggioli (ed.), *Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, ICRC, Geneva, 2013, pp. 4–12. See also the below section on “Setting Aside the Applicable IHRL Regime”.

124 See e.g. Vera Gowland-Debbas and Gloria Gaggioli, “The Relationships between International Human Rights and International Humanitarian Law: An Overview”, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and International Humanitarian Law*, Edward Elgar, Cheltenham and Northampton, MA, 2013, p. 85.

choices”.¹²⁵ Such substantial considerations must be taken into account when determining in which case and how those mechanisms operate.

In particular, the principle of systemic integration does not determine which norms must be considered as “relevant” for the interpretation of another norm applicable in relation to the same parties. Similarly, the *lex specialis* principle does not contain in itself any indication of which norm must be qualified as general or special in relation to a particular subject matter. It does not therefore come as a surprise that diverging views are upheld in that respect, with an increasing number of scholars as well as human right bodies arguing nowadays that an IHRL standard may sometimes constitute the *lex specialis* and prevail over the competing IHL framework. This approach is particularly noticeable with regard to the use of lethal force against persons who may lawfully be targeted under IHL, especially when there are no ongoing hostilities and those persons are located in an area under the firm control of the targeting party. By contrast to the ruling of the ICJ in the *Nuclear Weapons* case, it has been argued that, in such circumstances, the restrictive human right standard had to prevail over the more permissive IHL framework, as the *lex specialis*.¹²⁶ This clearly evidences that the traditional mechanisms used to deal with the interplay between IHL and IHRL are not able to provide by themselves any automatic solution, as any solution to that interplay actually involves “policy and value judgement[s]”.¹²⁷

It has been argued in legal scholarship that such judgements should ultimately be made by the legislator¹²⁸ – namely, by the States, which should draft new treaties to determine the applicable law. It has therefore been suggested that it would be appropriate to “write a treaty of IHL enlightened by IHRL [which would incorporate the outcomes of the interpretation process] and a treaty of IHRL applicable in wartime enlightened by IHL [which would incorporate the outcomes of the application process], and hope that the two reach the same conclusions”.¹²⁹ However, although this might be the best option, it is hard to imagine that States would agree to engage in new treaties in the near future, especially about such a controversial matter.

Another option is to elaborate clear guidelines to practitioners on the subject. This has actually been done by a group of experts in a work that provides a comprehensive and detailed overview of the law applicable to State military

125 Anja Lindroos, “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*”, *Nordic Journal of International Law*, Vol. 74, No. 27, 2005, p. 42.

126 See e.g. Laura M. Olson and Marco Sassòli, “The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 613–614; David Ktetzmer, Avias Ben-Yehuda and Meirav Furth, “Thou Shall Not Kill: The Use of Lethal Force in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 47, No. 2, 2014, pp. 191 ff.

127 M. Milanovic, above note 6, pp. 479, 481.

128 See e.g. *ibid.*, p. 482. The author supports this argument only with respect to conflicts of norms that cannot be solved through a mere interpretation process, but which involve displacing one rule in favour of another. However, as already argued, it seems artificial to distinguish between the interpretation and displacement processes, since both lead to the same result – namely, prioritizing the solution provided by one legal system over the solution provided by the other.

129 L. M. Oleson, above note 79, p. 457.

operations, drawn from the interplay between the relevant IHL and IHRL norms.¹³⁰ This impressive overview, addressing a wide range of issues, is preceded by a description of the theoretical model that the experts adopted to determine the applicable law. Two frameworks in which both IHL and IHRL are applicable are distinguished: (1) the “active hostilities” framework, in which IHL is the primary applicable body of law, while IHRL, as the secondary body of law, may be adapted in light of IHL;¹³¹ and (2) the “security operations” framework, in which IHRL is the primary applicable body of law, while IHL, as the secondary body of law, may be interpreted in light of IHRL.¹³² The determination of the primary applicable law is made according to a range of factors,¹³³ but as it is designed to be a guide for practitioners, the document does not propose any elaborated legal theory upon which the determination of those factors can be legally based. It also does not provide any satisfactory indication of the criteria for the articulation of the secondary applicable law to the primary one, although this lies at the heart of the interplay between IHL and IHRL; it merely refers in that respect to the unsatisfactory principle of systemic integration.¹³⁴ Finally, the document does not distinguish between the interpretation and application processes, although such distinctions matter, notably for jurisdictional purposes. It does not address a key issue raised by the interpretation process – namely, that the interpretation of IHL in light of IHRL may impact not only States but also armed groups – although it does engage in such a process on several topics.¹³⁵

Any legal theory designed to provide a successful framework for conceptualizing the interplay between IHL and IHRL must take into account the substantial considerations involved by such interplay. Marco Sassòli is one of the few scholars to have incorporated non-formal considerations in his proposal for a theoretical framework. Admittedly, he argues for the application of the *lex specialis* principle as requiring priority to be given to the rule having the ‘larger ‘common contact surface area’ with the situation’ at stake.¹³⁶ However, he adds that another factor might be taken into account – namely, a “less formal (and less objective) factor, [which] is the extent to which the solution conforms to the systemic objectives of the law”.¹³⁷ He specifies that “[t]he systemic order of international law is a normative postulate founded upon value judgments”.¹³⁸ Yet he does not elaborate on those substantial considerations, referring in that respect to the ILC work on the fragmentation of international law.¹³⁹

130 Daragh Murray, *Practitioner’s Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016.

131 *Ibid.*, p. 90.

132 *Ibid.*, p. 91.

133 *Ibid.* These factors include not only the existence of explicit rules on a given conduct but also the fact that those rules are designed for regulating that conduct, the nature of the armed conflict, the existence of active fighting, the status or activity of the individual, and the degree of control exercised by the State.

134 *Ibid.*, p. 90.

135 See e.g. *ibid.*, p. 194.

136 M. Sassòli, above note 79, p. 439.

137 *Ibid.*

138 *Ibid.*

139 ILC, above note 71, para. 104.

Towards a coherency-based approach

The notion of “normative coherence” as developed in legal theory about legal systems, enriched by certain theoretical reflections on legal pluralism and antinomies in law, is a promising candidate for providing a suitable legal framework for the interplay between IHL and IHRL in relation to both the interpretation and application processes.

Normative coherence as developed in legal theory

According to the legal theory on coherence,¹⁴⁰ a legal system is characterized by both consistency (or formal coherence) and coherency (or material coherence). Consistency is the result of a logical process. It means that no apparent or genuine contradiction exists within the concerned system or, at least, that the system contains within itself the necessary tools, such as the *lex specialis* principle, to solve any apparent or real conflict of norms. This process is in line with the theory of legal pluralism that aims at building a common legal system from different normative orders.¹⁴¹ According to that theory, the first step consists of avoiding conflicts of norms through a horizontal exchange between these normative orders, on the basis of either cross-internormativity, which means apparent or express *renvoi* from the legal source of one order to the legal source of another order, or cross-interpretation, which entails the interpretation of one norm or concept of one order in light of a norm or concept of another order.¹⁴²

However, proponents of the legal theory on coherence emphasize that such a consistency process (or formal coherence) is not sufficient. The mechanisms for resolving real or potential conflicts of norms are unable to provide any automatic solutions to such conflicts since the identification of these conflicts and the application of those mechanisms are not merely logical operations. They involve non-formal choices – that is, choices of a substantial nature. This requires seeking a hermeneutical constraint that is capable of guiding these choices. Such a constraint is actually what enables a legal system to be coherent (or materially coherent) and to become a genuine legal system. It acts as a compatibility test

140 See e.g. Norberto Bobbio, *Teoria dell'ordinamento giuridico*, G. Giappichelli Ed., Torino, 1960, particularly pp. 69 ff.; Ronald Dworkin, *Law's Empire*, Fontana Press, London, 1986, particularly pp. 176 ff.; Neil MacCormick, “Coherence in Legal Justification”, in Aleksander Peczenik, Lars Lindahl and Bert Van Roermund (eds), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11–14, 1983*, D. Reidel, Dordrecht, Boston, MA and Lancaster, 1984, pp. 235 ff.; Vittorio Villa, “Normative Coherence and Epistemological Presuppositions of Justification”, in Patrick Nerhot (ed.), *Law, Interpretation and Reality*, Kluwer, Dordrecht, Boston MA and London, 1990, pp. 430 ff.; Aldo Schiavello, “On ‘Coherence’ and ‘Law’: An Analysis of Different Models”, *Ratio Juris*, Vol. 14, No. 2, 2001, pp. 233 ff.; Amalia Amaya, “Ten Theses on Coherence in Law”, in Michael Araszkievicz and Jaromir Savelka (eds), *Coherence: Insights, from Philosophy, Jurisprudence and Artificial Intelligence*, Springer, Dordrecht, 2013, pp. 257–260.

141 See e.g. Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Hart, Oxford and Portland, OR, 2009.

142 *Ibid.*, pp. 19 ff.

with respect to the legal solutions available from the operation of the formal mechanisms for resolving conflicts of norms and, more generally, with respect to any legal solution of the concerned legal system. It allows “the multitudinous rules of [the] developed legal system [to] ‘make sense’ when taken together”.¹⁴³

General principles of law are seen as the best candidates to serve as such a hermeneutical constraint, as they express the fundamental values of a system. As a result, the solutions obtained for establishing the formal coherence of a legal system must be tested against those principles. This is not a test of conformity, since general principles are not clear-cut rules but ponderable elements.¹⁴⁴ Rather, it is a test of compatibility, which may vary in degree. This process has the advantage of providing a constraint while giving at the same time a sufficient margin of flexibility to adapt the solutions to the specificity of each case. Such a process is actually also in line with the second step proposed by the theory on legal pluralism that aims at building a common legal system from different normative orders. That second step consists of harmonizing these orders through the establishment of a vertical relationship of compatibility – and not of conformity – with an international norm.¹⁴⁵

It is worth observing that such a harmonization process, involving a hierarchical relationship of compatibility with general principles of law, has also been developed in theoretical reflections on antinomies in law.¹⁴⁶ It has been asserted in that framework that

any legal system must be coherent in the sense that no contradiction may exist between its norms but also that these norms must be characterized by a relationship of harmony, [which is evidenced by the matching of the legal solutions that have been chosen and] which is informed by the overall spirit of that system.¹⁴⁷

That spirit itself is derived from the general principles which ground the system.

Using normative coherence to build an “integrated common regulation on armed conflict”

All the foregoing theoretical constructions prove to be particularly interesting for providing a suitable legal framework for the issue of the interplay between IHL and IHRL. This issue is indeed a matter of coherence between the two bodies of law. In particular, as shown above,¹⁴⁸ there is no doubt that a consistency (or formal coherence) process currently operates in practice between IHL and IHRL:

143 N. MacCormick, above note 140, p. 238.

144 See e.g. Robert Alexy, *A Theory of Constitutional Rights*, Oxford University Press, Oxford, 2002, pp. 57 ff.; Emmanuelle Jouannet, “L’influence des principes généraux face aux phénomènes de fragmentation du droit international contemporain”, in Rosario Huesa Vinaixa and Karel Wellens (eds), *L’influence des sources sur l’unité et la fragmentation du droit international*, Bruylant, Brussels, 2006, pp. 115 ff.

145 M. Delmas-Marty, above note 141, pp. 39 ff.

146 See e.g. Charles Perelman (ed.), *Les antinomies en droit*, Bruylant, Brussels, 1965.

147 Charles Huberlant, “Antinomies et le recours aux principes généraux”, in C. Perelman (ed.), above note 146, p. 212 (author’s translation).

the relevant courts and monitoring bodies explicitly or implicitly resort to mechanisms for resolving or avoiding conflicts of norms. This means, according to the terminology used in the aforementioned theory on legal pluralism,¹⁴⁹ that horizontal exchanges, through cross-internormativity and cross-interpretation, clearly take place between the two bodies of law in situations of armed conflict.

Moreover, as also previously emphasized, those mechanisms for resolving or avoiding conflicts of norms between IHL and IHRL have been criticized as not being satisfactory, precisely because the identification of such conflicts and the operation of those formal mechanisms involve choices which cannot be made on the basis of formal tools, but only by resorting to substantial considerations. In other words, consistency between the two bodies of law is not sufficient; it must be complemented by the establishment of a coherence (or material coherence) process, which entails testing the compatibility of all the potential legal solutions drawn from the interpretation and application processes with a hermeneutical constraint. Again, according to the terminology used in certain theories on legal pluralism,¹⁵⁰ this would allow moving from a horizontal process of coordination between IHL and IHRL to a vertical process of harmonization and therefore to progressively building an international common legal system that is specifically devoted to the regulation of armed conflict. Such a system, which may be deemed as amounting to an “integrated common regulation on armed conflict”, with IHL as its core, would be drawn from the approximations of the latter body of law not only with IHRL but also, more generally, with any other branch of international law applicable in armed conflict, such as international environmental law.¹⁵¹ Contrary to similar projects in legal scholarship,¹⁵² this amounts to an integrated¹⁵³ and comprehensive¹⁵⁴ common legal system, specific to armed conflicts.¹⁵⁵ In any

148 See the introduction to this paper and the above section on “The Interpretation Process Versus the Application Process”.

149 M. Delmas-Marty, above note 141, pp. 39 ff.

150 *Ibid.*

151 On the approximation of that branch of international law with IHL, see Raphaël van Steenberghe, “Interactions between International Environmental Law and International Humanitarian Law regarding the Protection of the Environment during Warfare”, *Journal of International Criminal Justice*, forthcoming.

152 See below notes 153–155.

153 See by contrast the project submitted by Jean Pictet in the 1960s to bring IHL and IHRL together within a common legal system that he named “international humanitarian law”: Jean Pictet, “The Principles of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 48, No. 573, 1966; Jean Pictet, “The Principles of International Humanitarian Law – II”, *International Review of the Red Cross*, Vol. 48, No. 574, 1966; Jean Pictet, “The Principles of International Humanitarian Law – III”, *International Review of the Red Cross*, Vol. 48, No. 575, 1966. The project merely involves the juxtaposition of the two bodies of law under a similar heading – except certain principles that Pictet developed and qualified as common to both the Geneva Law and IHRL, like the principles of inviolability, non-discrimination and security.

154 See by contrast the project of “complete and full *jus in bello*” only briefly advocated by Gerd Oberleitner in his book *Human Rights in Armed Conflict* (above note 4, p. 124); this project consists of an integrated common regulation on armed conflict built upon the approximations of various regulations applicable in armed conflict, including IHL and IHRL but also other fields of international law, and driven by shared concerns and a quest for coherency.

155 See, by contrast, similar projects that do not however prove specific to armed conflict, such as the project for an “international law common to the protection of individuals”, as advocated by scholars such as

case, its legal solutions would have to be compatible with its overall spirit, expressed by a foundational principle.

Admittedly, identifying such a principle is not an easy task, but it must start from the rationale of the historical crux of the interplay between IHL and IHRL: the 1968 Tehran Conference and the mandate given by States to work for an immediate expansion of IHRL into armed conflicts, a sphere exclusively regulated by IHL until that time. The project was clearly – and is still – intended to further humanize the regulation of armed conflicts,¹⁵⁶ mainly by incorporating IHRL into IHL through normative and interpretative processes, and by applying IHRL in armed conflicts, which makes the human rights bodies competent to enforce that regulation. This objective of strengthening the protection of persons in armed conflicts must determine the first prong of the foundational principle, acting as a “coherency test” for the interplay between IHL and IHRL. Both the application and interpretation processes must operate in such a way that the ensuing legal solutions afford the best protection to individuals. This is in line with the *pro homine* principle according to which IHRL “norms must always be interpreted and applied in way that most fully and adequately protects human beings” and, if more than one norm applies, “the one that gives most protection or freedom to the individual should prevail”.¹⁵⁷ This must not be confused with the *lex favorabilis* principle, although it involves similar substantial considerations. *Lex favorabilis* is mainly used in the human rights sphere to harmonize two or several IHRL norms through interpretation. By contrast, under the foundational principle, the considerations based on the most favourable protection command favouring one general approach to the interplay between IHL and IHRL with respect to both the interpretation and application processes. Whenever possible, IHRL must be fully incorporated into IHL through interpretation and both IHRL and IHL must apply cumulatively to the conduct concerned.

On the other hand, the full incorporation of IHRL into IHL and the cumulative application of IHRL and IHL, which results in providing individuals with the best protection, must be counterbalanced by other considerations, because of the specific context in which that regulation, common to IHL and IHRL, is designed to apply – namely, armed conflicts. The second prong of the foundational principle of such common regulation, acting as a “coherency test”, must therefore involve considerations specific to armed conflicts. Those considerations must be inspired by what fundamentally distinguishes the regulation of war from the regulation applicable in peacetime. It is argued that such specificity is clearly linked to the principle of military necessity. As

Antonio Cançado Trindade (*International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff, Leiden and Boston, MA, 2010, pp. 511 ff.), or the project that resulted in the 1990 Declaration of Turku (*Declaration of Minimum Humanitarian Standards*, UN Doc. E/CN.4/Sub.2/1991/55, 2 December 1990), which provides for a series of “minimum humanitarian standards” applicable in any situation.

156 See e.g. M. Milanovic, above note 6, p. 460.

157 H. Victor Condé, *A Handbook of International Human Rights Terminology*, 2nd ed., University of Nebraska Press, Lincoln, NE, 2004, p. 207, quoted in L. M. Oleson, above note 79, p. 456.

emphasized by scholars, who refer to the ILC, “military necessity is the justifying factor inherent in all rules of IHL which, in derogation from the rules applicable in peacetime, permit the resort to measures meeting the needs of the extreme circumstances prevailing in situations of armed conflict”.¹⁵⁸ What matters under that principle is to take into account the realities of war in order to make efficient fighting possible, and those considerations are not in fact opposed to the objective of affording the best protection to individuals—rather, they serve that purpose. The main reason for this is that failure to duly take account of the realities of war in any regulation of armed conflict is likely to result in a loss of credibility of that regulation and ultimately to lead to its non-respect or even rejection. This would considerably lessen or even entirely annihilate the protection afforded to individuals in armed conflict.

Those considerations of effectiveness, against which any common regulation on armed conflict should be tested, involve both *in concreto* and *in abstracto* assessments. Since they may be context-dependent, such considerations must be assessed on a case-by-case basis, notably in light of the capacities of the parties, especially armed groups in NIACs, and the particular circumstances ruling at the time, like the degree of territorial control exercised by the concerned party. Since they relate to the particular situation of armed conflict, they may also be tested against certain features which are specific to that situation. Those features include the sociological reciprocity in the fighting of war, which is duly taken into account by the principle of equality of belligerents. They also include the need to detain persons for mere security reasons, the unsuitability of making the legality of the detention of certain persons (namely combatants) subject to a review process, and the possibility for armed groups to conduct fair trial prosecutions by their own courts and not only through the courts of the government that they are fighting. Any regulation that did not take these features into account would make respect for the regulation (nearly) impossible.

As a result, the combination of the two prongs of the relevant “coherency test” for the determination of the regulation of armed conflict dictates that the outcomes of the full incorporation of IHRL into IHL or of the cumulative application of IHL and IHRL must be adjusted, but only if, and to the extent that, they conflict with those effectiveness-based considerations. As will be detailed in the next part of this paper, such an adjustment process can take two main forms: it may entail *modulating* the IHRL interpretive standard or applicable regulation, which is particularly well suited when the realities of war require taking into account certain circumstances *in concreto*, including the material capacities of the parties to the armed conflict; or it may involve *setting aside* the inappropriate IHRL interpretive standard or applicable regulation, which is generally the case when the realities of war require taking into account

158 Nils Melzer, “Targeted Killing or Less Harmful Means? Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity”, *Yearbook of International Humanitarian Law*, Vol. 9, 2006, p. 104. See also ILC, *Report of the International Law Commission on the Work of Its Thirty-Second Session (5 May -25 July 1980)*, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 1980, p. 45, para. 27.

certain considerations *in abstracto*, like structural features specific to situations in armed conflict, which cannot be subject to any modulation.

Non-international armed conflicts versus international armed conflicts and occupations

The coherency-based approach must be tested with respect to NIACs as well as IACs and occupations in relation to significant issues dealt with by IHL. While considering NIACs and IACs/occupations in turn, this paper will address the core effectiveness-based considerations against which the full incorporation of IHRL into IHL or the full application of IHRL in armed conflict must be tested, in accordance with the two prongs of the coherency test.

Non-international armed conflicts

It is with respect to NIACs that IHRL has the most potential to influence the regulation of armed conflict, since the regulation of NIACs by IHL remains limited in numerous aspects, compared to IHL applicable to IACs and belligerent occupations. However, it is also with respect to NIACs that both the interpretation and application processes raise the most significant difficulties.

The interpretation process in NIACs

The main difficulty concerning the interpretation process in NIACs stems from the need to adapt the full incorporation of IHRL into IHL, as prompted by the first prong of the coherency test, in light of a general effectiveness-based consideration – namely, the principle of equality of belligerents. Actually, the operation of that principle with respect to the incorporation of IHRL into IHL may have a twofold impact. It might result either in a setting aside or modulating of the relevant IHRL interpretive standard. This mainly comes from the fact that IHRL initially emerged as a body of law only applicable to States and that it is now called, under the interpretation process, to regulate the conduct of non-State actors through its incorporation into IHL.

The application of the principle of equality of belligerents

The principle of equality of belligerents originally developed with respect to IACs to avoid any asymmetrical application of IHL between the parties to such conflicts, in light of the legality of their use of force under *jus ad bellum*.¹⁵⁹ A State lawfully resorting to force under *jus ad bellum* cannot dispense with respecting (certain)

¹⁵⁹ See e.g. Vaios Koutroulis, “And Yet It Exists: In Defence of the ‘Equality of Belligerents’ Principle”, *Leiden Journal of International Law*, Vol. 26, No. 2, 2013, p. 449; Keiichiro Okimoto, “The Relationship between *Jus ad Bellum* and *Jus in Bello*”, in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford, 2015, p. 1214.

IHL obligations while fighting against an aggressor State. Although the relationships between States, characterized by horizontal sovereign equality, are significantly different from the relationships between States and armed groups, which must rather be envisaged “under the vertical domain of domestic law”,¹⁶⁰ the principle of equality of belligerents has also been deemed applicable in NIACs.¹⁶¹ Considered as a cardinal IHL rule “dominat[ing] the entire body of the laws and customs of war”,¹⁶² this principle has usually been interpreted in relation to NIACs as meaning that both States and armed groups must be bound by the same relevant IHL rules once they are party to a conflict.¹⁶³ The rationale for asserting this principle in NIACs is, however, less clear since *jus ad bellum* is only applicable to inter-State uses of force and is not therefore relevant with respect to internal armed conflicts.¹⁶⁴ Legal scholarship and practice nonetheless refer to various rationales, most of which relate to the particular situation of the armed groups in question, such as their more limited capacity compared to States’ capacity,¹⁶⁵ the (un)justness of their cause,¹⁶⁶ the illegality of their fighting under domestic law¹⁶⁷ or the controversial basis upon which they are bound by IHL.¹⁶⁸ In any case, it is undisputed that the key legal effect of the principle of equality of belligerents is the symmetrical application of IHL to any party to the NIAC.

The principle has traditionally been construed as peculiar to IHL, and therefore as not applying to other bodies of law, such as IHRL.¹⁶⁹ Yet it remains applicable in any case of the interpretation process, when IHRL is used to interpret IHL.¹⁷⁰ Since IHRL is incorporated into IHL under that process and

160 Jonathan Somer, “Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict”, *International Review of the Red Cross*, Vol. 89, No. 867, 2007, p. 659.

161 See e.g. ICRC Commentary on GC III, above note 23, para. 538; Yuval Shany, “A Rebuttal to Marco Sassòli”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 432; François Bugnion, “*Jus ad Bellum, Jus in Bello* and Non-International Armed Conflicts”, *Yearbook of International Humanitarian Law*, Vol. 6, 2003, p. 186; M. Sassòli, above note 79, p. 12; J. Somer, above note 160, pp. 659–664.

162 F. Bugnion, above note 161, p. 174.

163 See above note 161.

164 See e.g. V. Koutroulis, above note 159, pp. 449–450 fn. 4.

165 See e.g. Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 34–35.

166 See e.g. Jasmine Moussa, “Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law”, *International Review of the Red Cross*, Vol. 90, No. 872, 2008, p. 990.

167 See e.g. Ezequiel Heffes, “Generating Respect for International Humanitarian Law: The Establishment of Courts by Organized Non-State Armed Groups in Light of the Principle of Equality of Belligerents”, *Yearbook of International Humanitarian Law*, Vol. 18, 2015, p. 187.

168 See e.g. Jean-Marie Henckaerts and Cornelius Wiesener, “Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice”, in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, Springer, The Hague, 2020, pp. 197–199; SCSL, *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Appeals Chamber), 31 May 2004, para. 22.

169 See e.g. J.-M. Henckaerts and C. Wiesener, above note 168, p. 202; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 95.

170 See e.g. J. Somer, above note 160, pp. 663–664. Although in unclear terms, the author seems to distinguish the interpretation process, to which the principle of equality is applicable, from the application process, to which the principle is not applicable (*ibid.*, fn. 46).

becomes part of it, the interpreted IHL norm must logically conform to the principle of equality of belligerents, irrespective of the nature of the body of law serving as the interpretive standard. Practice confirms such a view. Notably, when interpreting IHL in light of IHRL with respect to NIACs, courts and other bodies have usually considered that the interpreted IHL norm applied to both States and armed groups alike,¹⁷¹ though IHRL is classically construed as not applying to armed groups. As we will see below, the ICTY case law on torture unambiguously confirms the impact of the principle of equality of belligerents on the incorporation of IHRL into IHL through the interpretation process.

Setting aside IHRL interpretive standards

In the course of the interpretation process, the IHRL interpretive standards might be set aside in the interest either of States or of armed groups. The ICTY case law on torture is an emblematic example of the role played by the principle of equality of belligerents in adapting an IHRL standard in order to avoid any imbalance unfavourable to States. As already seen,¹⁷² in early cases, the Tribunal extended the requirement of the involvement of a State official in the acts of torture to officials of non-State parties, including armed groups, in order to avoid making the prohibition of torture applicable only on the governmental side. Later, in the *Kunarac* case,¹⁷³ it simply set aside that requirement. This view has been followed by the Tribunal in subsequent case law,¹⁷⁴ as well as by the ICC¹⁷⁵ and other institutions.¹⁷⁶

IHRL standards may also be set aside in the interest of armed groups, when the incorporation of that standard into IHL would prevent those groups from conforming to the interpreted IHL obligations or would make the fulfilment of those obligations almost impossible. This is, for example, the case with regard to the guarantee that a court must be “regularly constituted” provided under common Article 3 if that guarantee is interpreted in light of the IHRL requirement that the court must be established in accordance with the law of the State.¹⁷⁷ Any court established by armed groups would be unlawful since no domestic law has ever authorized the creation of such courts. On the other hand, the only alternative option – namely, to use the State’s courts – is hard to imagine in practice. Even if armed groups succeed in gaining control over such courts, it is not certain that those courts will still be in operation¹⁷⁸ and it is unlikely that

171 See above notes 19–21, 24–26 and 31–32. Note, however, the ambiguous ICRC assertion in its updated Commentary on GC III: see above note 56 and corresponding main text.

172 See above note 64 and corresponding main text.

173 See ICTY, *Kunarac*, above note 21, para. 496.

174 See above note 66.

175 See e.g. ICC, above note 49, p. 32.

176 See e.g. ICRC Commentary on GC III, above note 23, para. 681.

177 For a plausible interpretation in that sense, see e.g. ICRC Customary Law Study, above note 18, p. 365, combined with p. xxxi. See also US Supreme Court, *Hamdan*, above note 34, Dissenting Opinion of Judge Alito, p. 3.

178 The enemy State might have closed those courts before leaving the territory controlled by the armed group: see e.g. cases in Syria (International Legal Assistance Consortium, *ILAC Rule of law Assessment*

the armed groups will be willing to resort to them,¹⁷⁹ especially with the same judges and in accordance with the applicable domestic law. This is why the requirement that a court must be “regularly constituted” is increasingly interpreted today as being encapsulated in the statutory guarantees and no longer as an autonomous requirement.¹⁸⁰ This is the approach expressly followed in the ICC *Elements of Crimes*¹⁸¹ and emphasized by the ICC in its recent case law.¹⁸² The requirement of “a regularly constituted court” had already been dropped in AP II, which merely requires that the court must “[offer] the essential guarantees of independence and impartiality”.¹⁸³ Alternatively, it is gradually being admitted that the term “law” might refer to the law of the armed group,¹⁸⁴ which nonetheless means that the armed group is able to legislate.

Similarly, the *nullum crimen sine lege* guarantee, as explicitly provided in Article 6(2)(c) of AP II, must not be interpreted in light of IHRL as requiring that the prohibited conduct must necessarily be criminalized by the law of the State.¹⁸⁵ Although practice shows that armed groups conduct prosecutions on the basis of existing domestic law,¹⁸⁶ they cannot be

Report: Syria 2017, 2017, p. 78, available at: www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf and the Ivory Coast (Daniel Balint-Kurti, *Côte d'Ivoire's Forces Nouvelles*, Africa Programme Armed Non-State Actors Series, Chatham House, 2007, p. 27).

- 179 See e.g. Louise Doswald-Beck, “Judicial Guarantees under Common Article 3”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 491. This is nonetheless possible, as it occurred in Sri Lanka: see Katrine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017, p. 164.
- 180 See e.g. Mark Klamberg, “The Legality of Rebel Courts during Non-International Armed Conflict”, *Journal of International Criminal Justice*, Vol. 16, No. 3, 2018, p. 9. See also Stockholm District Court, Case No. B 3787-16, Judgment, 16 February 2017, available at: <https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments>, para. 26; Jonathan Somer, “Opening the Floodgates, Controlling the Flows: Swedish Court Rules on the Legal Capacity of Armed groups to Establish Courts”, *EJIL: Talk!*, 10 March 2017, available at: www.ejiltalk.org/opening-the-floodgates-controlling-the-flow-swedish-court-rules-on-the-legal-capacity-of-armed-groups-to-establish-courts/.
- 181 Although the requirement that the courts must be “regularly constituted” still appears in the ICC *Elements of Crimes*, that requirement means, according to those *Elements*, that the court must “afford the essential guarantees of independence and impartiality”: ICC, above note 49, p. 34.
- 182 ICC, *Al Hassan*, above note 30, paras 375–377.
- 183 AP II, Art. 6(2).
- 184 See e.g. ICRC Commentary on GC III, above note 23, para. 728; S. Sivakumaran, above note 169, p. 306. See also the declaration of Nigeria during the preparatory works of AP I: *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol. 8, Berne, 1978, p. 360, para. 20.
- 185 During the preparatory works of AP II, it was discussed whether Article 6(2)(c) had to include the law of armed groups (see e.g. the declaration of Argentina, in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol. 9, Berne, 1978, p. 314, para. 54). Although the English version of Article 6(2)(c) refers to the term “law”, which might be interpreted as including the rebels’ law, the French version appears more restrictive as it refers to “national or international law”. However, as argued in the 1987 Commentary on the Additional Protocols (above note 13, para. 4605), the law of armed groups could be considered as a type of national law.
- 186 Regarding armed groups in Ukraine, see UN Office of the High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine: 16 February to 15 May 2017*, 13 June 2017, para. 94, available at: www.ohchr.org/Documents/Countries/UA/UAReport18th_EN.pdf. Regarding armed groups in Sri Lanka, see Zachariah Chierian Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during*

barred from enacting their own criminal law and prosecuting individuals accordingly.¹⁸⁷

Modulating IHRL interpretive standards

Certain IHRL interpretive standards might rather be modulated when incorporated into IHL. This mainly stems from the need to take into account the potential limited capacity of armed groups compared to the usually higher capacity of States. Although this is not problematic with respect to negative obligations like the prohibitions on torture, cruel treatment or slavery, difficulties arise regarding IHL obligations imposing positive duties on armed groups, such as the obligation to afford their courts fair trial guarantees. Interpreting those guarantees in light of IHRL standards, without any adaptation, may result in some armed groups facing serious difficulties in complying with them. An illustrative example is the ICC confirmation decision in the *Al Hassan* case. As already seen,¹⁸⁸ the Pre-Trial Chamber interpreted the fair trial procedural guarantees applicable in any NIAC in light of IHRL as entailing a series of rights for the accused, such as the right of public proceedings, the right to examine or obtain the attendance of witnesses and the right to be assisted by a lawyer, all of which are guarantees that armed groups are not necessarily able to respect. Similarly, the Chamber imposed demanding statutory guarantees on the basis of IHRL, especially in relation to the requirement of independence. It required that the court must be independent “vis-à-vis des autres pouvoirs; c’est-à-dire l’exécutif et le législatif”,¹⁸⁹ adding:

Le Comité des droits de l’homme a ainsi estimé qu’une situation dans laquelle les fonctions et les attributions du pouvoir judiciaire et du pouvoir exécutif ne peuvent être clairement distinguées ... est incompatible avec le principe d’un tribunal indépendant au sens de l’article 14-1 du Pacte international relatif aux droits civils et politiques.¹⁹⁰

A solution must then be found that combines the need to further “humanize” the law of NIAC to the maximum extent possible, through the full incorporation of IHRL into IHL, with both the principle of equality of belligerents and the capacity of any armed group to comply with that solution. It is submitted that such a hard equilibrium can only be achieved by the modulation of the concerned IHRL interpretive standards, through phrasing the interpreted IHL obligations as obligations of conduct.

War, Cornell University Press, Ithaca, NY, 2011, p. 116. Regarding armed groups in the Democratic Republic of the Congo, see Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, p. 28, March 2005, available at: www.hrw.org/sites/default/files/reports/drc0305.pdf.

187 In that sense, see e.g. UK Ministry of Defence (MoD), *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383, 2004, p. 404, para. 15.42 fn. 94; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden, 2013, pp. 745–746; S. Sivakumaran, above note 169, p. 561.

188 See above note 32 and corresponding main text.

189 ICC, *Al Hassan*, above note 30, para. 379.

190 *Ibid.* (footnotes omitted).

In international law,¹⁹¹ as in civil law countries,¹⁹² obligations of conduct are usually opposed to obligations of result. Respect for obligations of conduct is not dependent upon the achievement of any specific result but must rather be assessed against a flexible standard of due diligence, which determines the conduct that must be followed under the obligation at stake.¹⁹³ The obligation is breached when the conduct concretely adopted by the addressee of the obligation does not conform to the conduct required by the standard of due diligence. The standard of due diligence against which the respect for such obligation must be assessed is determined on the basis of several factors, which vary according to the obligation at stake and may include the material capacity of the addressees.¹⁹⁴ As a result, the standard of due diligence may be higher for those with greater capacities.

IHL contains numerous obligations of conduct applicable in both NIACs and IACs.¹⁹⁵ The most well known are the obligations of precaution in attack, as most of those obligations require taking all “feasible” or “reasonable” measures to spare civilians and civilians objects as much as possible.¹⁹⁶ “Feasible measures” may be defined as involving “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁹⁷ This means that the extent of the measures which must be taken or even the possibility of taking any of them may vary according to a range of factors, including time, terrain, weather, available troops and resources, enemy activity, civilian considerations and the capabilities of the belligerents.¹⁹⁸ The latter factor, the capabilities of the

191 See e.g. Paul Reuter, *Droit international public*, Presse Universitaire de France, Paris, 1958, pp. 56–59; Paul Reuter, “Principes de droit international public”, *Recueil des Cours/Collected Courses*, Vol. 103, No. 9, 1962, pp. 598–599; Riccardo Pisillo Mazzeschi, “Due diligence” e responsabilità internazionale degli stati, Giuffrè, Milan, 1992; Riccardo Pisillo Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States”, *German Yearbook of International Law*, Vol. 35, 1992; Alexia De Vauleroy, “Les obligations de comportement en droit international public: Due diligence et responsabilité internationale”, PhD thesis, University of Louvain, 2021.

192 On the origin of obligations of conduct in civil law countries, see e.g. James Crawford, *State Responsibility: The General Part*, Cambridge University Press, Cambridge, 2013, pp. 221 ff.

193 See e.g. Timo Koivurova, “Due Diligence”, in *Max Planck Encyclopedia of Public International Law*, 2010, available at: <https://tinyurl.com/2p8kmf62>.

194 See e.g. R. Pisillo Mazzeschi, “The Due Diligence Rule”, above note 191, pp. 44–45.

195 Regarding the obligations of conduct under IHL, see e.g. Gabriella Venturini, “Les obligations de diligence dans le droit international humanitaire”, in Société Française pour le Droit International and Sarah Cassella (eds), *Le standard de due diligence et la responsabilité internationale*, Pedone, Paris, 2018; Antal Berkes, “The Standard of Due Diligence as a Result of Interchange between the Law of Armed Conflict and General International Law”, *Journal of Conflict and Security Law*, Vol. 23, No. 3, 2018; Marco Longobardo, “The Relevance of the Concept of Due Diligence for International Humanitarian Law”, *Wisconsin International Law Journal*, Vol. 37, No. 1, 2019.

196 See e.g. AP I, Arts 57(2)(a)(i–ii), 57(4), 58.

197 ICRC Customary Law Study, above note 18, p. 54; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended 3 May 1996, Art. 3(10); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980, Art. 1(5). See also the reservations made by certain States to AP I, including the UK, available at: <https://tinyurl.com/5b68srmr>; France, available at: <https://tinyurl.com/y75tj5mu>; and Spain, available at: <https://tinyurl.com/2e5we5ys>.

198 See also the factors listed in the following documents: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, above note 197, Art. 3(10); MoD, above note 187, para. 5.32.5; US Department of Defense, *Law of War Manual*, 2015, para. 5.3.3.2.

belligerents, constitutes an important element in the assessment of whether the obligations of precaution are fulfilled. It is thus admitted that those obligations are more demanding for more developed parties to an armed conflict, which benefit from high-tech capacities and sophisticated weaponry.¹⁹⁹ The treaty law of NIAC itself contains several obligations of conduct the application of which is exclusively dependent upon the capacity of the parties to the conflict. Indeed, Article 5(2) of AP II, dealing with detention, provides for obligations that “[t]hose who are responsible for the internment or detention of ... persons ... shall [apply], *within the limits of their capabilities*” (emphasis added). It is worth observing that those obligations are preceded by several core obligations that are intended to apply to any party to the conflict, irrespective of its capacity.²⁰⁰

Likewise, it is submitted that the IHL interpretive standards raising concerns with respect to the capacity of armed groups could be formulated as obligations of conduct when incorporated into IHL, in addition to a set of core rules reflecting a minimum regulation. Regarding, for instance, the fair trial guarantees, this means that the problematic procedural and statutory guarantees, such as those required by the ICC Pre-Trial Chamber in the *Al Hassan* case²⁰¹ – or some of those identified by the ICRC²⁰² – should be phrased as obligations of conduct, which implies that the parties to the conflict should apply them only “to the maximum extent feasible”, while a core minimum standard would still be required in the form of obligations of result. In particular, this approach might be relevant with respect to the following procedural rights: (1) the right of public proceedings, which would have to be granted to the accused only “to the maximum extent feasible”, though the accused should at least be afforded the right to have the judgment pronounced publicly; (2) the right to examine or obtain the attendance of witnesses, which would also have to be afforded “to the maximum extent feasible”, though the accused should at least be granted that right whenever the latter has been afforded to the prosecutor, in order to respect the basic principle of equality of arms;²⁰³ and (3) the right to be assisted by a lawyer, from which the accused would also have to benefit only “to the maximum extent feasible”, though the accused should necessarily be granted the right to be assisted by a competent person who at least meets the standard of education of the prosecution counsel.²⁰⁴ Similarly, the strict standard identified

199 See e.g. Wolff Heintschel von Heineg, “Precautions in Attack”, in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2017, p. 1010; Jean-François Quéguiner, “Precautions under the Law Governing the Conduct of Hostilities”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 802. But see, *contra*, Nathan A. Canestaro, “Legal and Policy Constraints on the Conduct of Aerial Precision Warfare”, *Vanderbilt Journal of Transnational Law*, Vol. 37, No. 2, 2004, p. 465.

200 AP II, Art. 5(1).

201 See above notes 188–190 and corresponding main text.

202 See e.g. ICRC Commentary on GC III, above note 23, paras 710–731, particularly paras 715, 718, 723, 724, 728.

203 See e.g. Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart, Oxford and Portland, OR, 2016, p. 218.

204 *Ibid.*, p. 217.

by the ICC Pre-Trial Chamber in relation to the independence of the court on the basis of IHRL²⁰⁵ should be required only to the “maximum extent feasible”. It is clear that the traditional State division between the legislative, executive and judicial powers is rarely replicated within the structure of non-State parties to armed conflicts, but any court established by armed groups should, at a minimum, be composed of judges who do “not have structural links to the armed group command structure”²⁰⁶ in order to conform to the independence requirement. This means that courts established by armed groups might be composed of members of such groups, if no State-like separation of powers exists within those groups.²⁰⁷ Once such separation is established, the non-State party then becomes bound to apply the highest standard.

In sum, the greater the capacities of parties to a NIAC are, the more demanding are their IHL obligations inspired by IHRL, whereas the parties having the lowest capacities remain at least bound by minimum standards. Such a paradigm, based on the assertion of obligations of conduct coupled with core obligations of result, introduces differentiations in the law of NIAC,²⁰⁸ and this enables that law to integrate the highly protective IHRL standards to the maximum extent compatible with the capacity of armed groups while still respecting the principle of equality of belligerents.²⁰⁹ Both parties to the NIAC indeed remain bound by the same obligations, while the level of requirement of those obligations varies according to the capacity of the parties. It is possible that this approach may have the drawback effect of discouraging armed groups from developing their capabilities, but it is hard to imagine that armed groups would purposely refrain from engaging in such development in order to avoid complying with a more demanding standard. Moreover, in practice, the objective of armed groups is to defeat their opponents, which usually means gaining more territorial control and acquiring more developed weaponry.

The application process in NIACs

In some cases, the cumulative application of IHRL and IHL in NIACs, as prompted by the first prong of the coherency test, does not raise any specific problem since the relevant applicable IHRL and IHL norms do not provide for different results. However, in certain cases, especially in relation to issues dealt with both by IHL

205 ICC, *Al Hassan*, above note 30, para. 379.

206 D. Murray, above note 203, p. 212; see also Marco Sassòli, “Difficulties and Opportunities to Increase Respect for IHL: Specificities of the Additional Protocols”, in *40th Round Table on Current Issues of International Humanitarian Law: The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, Sanremo, 7–9 September 2017, p. 4.

207 Consequently, civilians could be judged by military courts, although this is only exceptionally allowed under IHRL.

208 For a discussion of that concept, specific to international environmental law, in relation to IHL, see e.g. Gabriella Blum, “On a Differential Law of War”, *Harvard International Law Journal*, Vol. 1, No. 52, 2011.

209 Regarding the flexibility of due diligence obligations, which “manage to maintain the *legal* equality of belligerents along with taking into account the *factual* asymmetries”, see also M. Longobardo, above note 195, p. 85.

and IHRL, such as the use of lethal force and detention, adaptations might be needed. The relevant applicable IHRL regulation must be set aside in light of effectiveness-based considerations related to the specific needs of parties to any armed conflict. In addition, it is open to question whether the other applicable IHRL obligations must be modulated through formulating them as obligations of conduct in order to conform to the principle of equality of belligerents and to take into account the capacities of the parties to the conflict.

Cumulative application

The cumulative application of IHRL and IHL is always possible in NIACs since no formal contradiction exists between the relevant applicable norms of the two bodies of law. Most often, IHRL provides for further protection than the relevant applicable IHL norm as it is more detailed or it deals with issues unaddressed by IHL. In such cases, IHRL acts as a suitable complement to IHL. In a few instances, IHL nonetheless proves to be more protective than IHRL. An illustrative example is the prohibition under Article 17 of AP II on expelling any civilian from the country, whereas IHRL only prohibits mass expulsion of aliens and authorizes individual expulsion subject to specific safeguards.²¹⁰

In some cases, the content of the regulation provided by the relevant applicable IHRL and IHL norms is entirely similar, such as the prohibition against adversary distinction or the prohibition against the death penalty for pregnant women. In other cases, the regulation is not the same but the IHRL norm is formulated in such a flexible way that it can be easily accommodated with the exceptions or limitations provided by IHL with respect to the same protection in NIACs. Such flexibility is mainly ensured through four different mechanisms. Firstly, certain IHRL norms contain express exceptions that are broad enough to cover the corresponding IHL regulation. In that sense, the prohibition of compulsory or forced labour provided in certain IHRL treaties does not contradict the possibility envisaged under Article 5(1)(e) of AP II to oblige detainees to work, since those treaties exclude from the definition of forced or compulsory labour “any work required to be done in the ordinary course of detention”²¹¹ or “any work or service exacted in cases of emergency, that is to say, in the event of war”.²¹²

Secondly, several IHRL norms allow for restrictions to the rights that they grant to individuals. This is the case with the restrictions contained in Article 12 of the ICCPR with respect to the right to liberty of movement, according to which that right may be subject to restrictions “which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedom of others, and are consistent with the other rights

210 In that sense, see e.g. Vincent Chetail, “Transfer and Deportation of Civilians”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 179, p. 1195.

211 ECHR, Art. 4(3)(a).

212 Forced Labour Convention, 1930, Art. 2(2)(d).

recognized in the present Covenant”.²¹³ Such a limitation enables the conciliation of that right with the exceptions provided by corresponding IHL protections in NIACs, in particular the exceptions to the prohibition against forced movement of civilians under Article 17 of AP II, according to which such movement is authorized when needed for ensuring “the security of the civilians involved or imperative military reasons”.²¹⁴

Thirdly, numerous IHRL norms merely entail obligations of conduct, the assessment of which is context-dependent—and such context might include the limited resources available to a party to an armed conflict. This is the case with regard to the rights provided in the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the rights to food, to health and to education. According to Article 2(1) of the ICESCR, only the progressive realization of those rights is required in light of the “available resources”. Although this means that “a minimum core obligation” must at least be respected, the Committee on Economic, Social and Cultural Rights (CESCR) has emphasized that “any assessment as to whether [this] minimum core obligation [is discharged] must also take account of resource constraints applying within the country concerned”.²¹⁵ Again, such flexibility makes those rights compatible with corresponding IHL norms applicable in NIACs, although those norms do not contain absolute protection, such as the obligation under Article 5(2)(d) of AP II to provide detainees with medical examinations “only within the limits of [the] capabilities [of the parties to the armed conflict]”.

Fourthly, several IHRL norms prohibit certain conduct only when the conduct is “unlawful” or “arbitrary”, and this can make such prohibitions compatible with corresponding IHL norms. In relation to the prohibition against interference with correspondence,²¹⁶ for example, Article 5(2)(b) of AP II provides that the number of cards and letters sent and received by detainees “may be limited by [a] competent authority if it deems necessary”. However, as discussed in the next section, this does not always provide a solution with respect to the interactions between the two norms. In certain cases, mainly in relation to the right to life and the right to liberty, IHRL provides for a specific regime in light of which a conduct might be considered “unlawful” or “arbitrary”, and that regime might be significantly different from the IHL one. In such cases, effectiveness-based considerations may require setting aside the concerned IHRL regime.

213 See also e.g. Article 2 of Protocol No. 4 to the ECHR securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No 11, 16 September 1963.

214 Regarding such mechanisms of limitation, allowing for exceptions provided by corresponding IHL obligations, see also the limitation provided by Article 8 of the ECHR to the right to respect for private and family life, including the right to correspondence, which enables compatibility with the right of the Detaining Power to limit the number of cards or letters sent and received by detainees under Article 5 (2)(b) of AP II; and the limitation on the right to freedom of thought, conscience and religion contained in Article 18 of the ICCPR or Article 9 of the ECHR, which allows compatibility with the right of the Detaining Power to decide whether it is “appropriate” to provide detainees with spiritual assistance under Article 5(1)(d) of AP II.

215 CESCR, General Comment No. 3, “The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)”, UN Doc. E/1991/23, 14 December 1990, para. 10.

216 See e.g. ICCPR, Art. 17.

Setting aside the applicable IHRL regime

The issue of setting aside the applicable IHRL regime mainly arises with respect to the use of lethal force and detention in armed conflicts. According to IHRL, the use of lethal force is subject to a restrictive regulation. Notably, such force can only be used as a last resort in case of absolute necessity, which depends upon the circumstances ruling at the time, and the proportionality test must include the potential death of the victim as well as any other person.²¹⁷ This contrasts with the traditional IHL regime, according to which the use of lethal force is dependent upon the status of the targeted persons and the proportionality test only includes the death of persons other than the victim, who are protected against attacks.²¹⁸ It is well admitted that it would not make sense to require parties to any armed conflict to comply with the foregoing restrictive IHRL regime, at least during active hostilities. Such a regime must therefore be set aside. At the formal level, this issue has been solved, as already seen,²¹⁹ by interpreting the term “arbitrarily” that qualifies the deprivation of life prohibited under most IHRL instruments as to be assessed in light of IHL, since that latter body of law is the *lex specialis*. In the ECHR, however, such an interpretation is not possible because the right to life is not formulated in a way that allows for this interpretation; the ECHR merely provides limited circumstances in which lethal force can be used, and none of them can be accommodated with the more permissive IHL regulation. Here the solution involves setting aside the applicable IHRL norm, in particular Article 2 of the ECHR, but not under the guise of interpretation. The IHL regime must prevail on the basis of the *lex specialis* acting as a displacing tool and not as a mere interpretive mechanism.

The same concern arises with respect to detention and, more specifically, the grounds for detention. It is inherent in armed conflict that persons may be detained for mere security reasons, at least in order to avoid them returning to or engaging in combat, including for a long period of time if needed. Admittedly, several IHRL instruments do not provide any specific ground for detention and merely prohibit “arbitrary detention”.²²⁰ This leaves the door open for administrative detention—that is, detention decided by the executive branch without criminal charges. However, it is well admitted that such detention must remain exceptional and it is contested that it could be justified by any general reference to security reasons.²²¹ In addition, such a justification would clearly be prohibited under the ECHR regime: Article 5 of the ECHR exhaustively lists the grounds for detention (with the main ones relating to criminal proceedings), and

217 See above note 123 regarding the IHRL paradigm with respect to the use of lethal force. See also M. Sassòli, above note 79, pp. 601–603.

218 See above note 123 regarding the IHL paradigm with respect to the use of lethal force. See also M. Sassòli, above note 79, pp. 604–607.

219 See above note 111 and corresponding main text.

220 See e.g. ICCPR, Art. 9; ACHR, Art. 7.

221 This might explain why States are inclined to derogate to IHRL in order to proceed to detention for mere security reasons in NIACs: see e.g. *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, Chatham House and ICRC, London, 22–23 September 2008, p. 7.

the list does not contain any security-related grounds.²²² As a result, it would again be unrealistic to require belligerents to abide by those restrictive IHRL standards in armed conflicts. In particular, if the ECHR regime was applied, this could have the drawback effect of pushing States to conduct criminal proceedings against those captured in order to justify their detention, even if they acted in conformity with IHL and despite the recommendation made in AP II to “grant the broadest possible amnesty”.²²³ Again, this might be solved by resorting to the principle of *lex specialis*, either as an interpretive tool, when the right of liberty is merely formulated as prohibiting “arbitrary” deprivation of liberty, or as a displacing tool, when the right of liberty is formulated as providing only certain grounds for detention that do not include security reasons, as in Article 5 of the ECHR.

Yet it is contested that IHL might be used as a *lex specialis* in such a case in NIACs, since, contrary to the law of IACs dealing with PoWs under GC III and civilian detainees under GC IV, no express grounds for detention are provided in IHL treaties or customary IHL applicable to NIACs.²²⁴ IHL is silent on this issue, focusing instead on the conditions of detention. Yet such silence must also be taken into account in the IHL regulation on detention, which must be considered as a whole. As a result, IHL regulating detention in NIACs, including its silence on the grounds for detention, might be considered as a *lex specialis* and might inform the “arbitrariness” of the detention under IHRL or prevail over the much more restrictive IHRL standard provided under Article 5 of the ECHR. As a result, detention for security reasons in NIACs cannot be prohibited under that article when applied in armed conflicts, even though it is not expressly authorized under IHL.

Modulating applicable IHRL obligations

The issue of the modulation of certain IHRL obligations applicable in NIACs is linked to the controversial question of the scope of application of the principle of equality of belligerents. It is indeed disputable whether that principle extends to IHRL when the latter is applied in NIACs and regulates conduct in parallel to IHL.²²⁵ By contrast to the interpretation process, the application process does not involve the incorporation of the IHRL norm into IHL. When applied alongside IHL, the IHRL requirement does not become part of IHL and is not therefore

222 Regarding the two paradigms, see e.g. M. Sassòli, above note 79, pp. 613–614, 617–619.

223 AP II, Art. 6(5).

224 This is the classical view: see e.g. Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, pp. 74, 75; Els Debuf, *Captured in War: Lawful Internment in Armed Conflict*, Pedone and Hart, Paris and Oxford, 2012, pp. 486–488; Gabor Rona, “An Appraisal of US Practice Relating to ‘Enemy Combatants’”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 240. This view is however contested nowadays: see e.g. Jelena Pejic, “Conflict Classification and the Law Applicable to Detention and the Use of Force”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, p. 94; Sean Aughey and Aurel Sari, “Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence”, *International Law Studies*, Vol. 91, 2015, p. 108.

225 For a similar line of questioning, see e.g. J.-M. Henckaerts and C. Wiesener, above note 168, p. 202.

formally subject to the principle of equality of belligerents, since, according to the traditional view,²²⁶ the scope of application of that principle is limited to IHL. As a result, parties to NIACs might be bound by different IHRL norms, or one party – namely States – might be required to respect IHRL while the other – that is, armed groups – would not have to comply with any IHRL rule.

However, such a traditional and formal understating of the principle of equality of belligerents may be called into question in light of the evolution of the regulation of armed conflict through IHRL. Practice shows instances in which equality between belligerents has been advocated with respect to specific issues regulated by both IHL and IHRL. One emblematic example is the regulation of child soldiers under the 2000 Optional Protocol to the Convention on the Rights of the Child. With regard to this instrument, armed groups complained that the standard applicable to them under Article 4 was more demanding than the obligation imposed on States under the same article.²²⁷ In addition, in some cases, States protested that they were bound to comply with IHRL rules while fighting against armed groups that did not have to apply those rules.²²⁸ Likewise, institutions like the Guatemalan Commission on Historical Clarification, whose mandate was to clarify the human rights violations that occurred throughout the long-standing violence in Guatemala, acknowledged the applicability of IHRL to armed groups “*in order to give equal treatment to the Parties*”.²²⁹ More generally, it seems artificial to treat the interpretation and application processes so differently in that regard, when an issue is simultaneously regulated by both IHL and IHRL. The only reason for resorting to the interpretation of IHL through IHRL rather than to the application of IHRL in armed conflicts is when the concerned IHL norm is formulated in an open way. Yet, *interpreting* open-formulated IHL notions like the fair trial guarantees as including a series of guarantees provided under IHRL comes close to *applying* those IHRL guarantees in parallel to those provided under IHL.

There is therefore a strong argument that the scope of application of the principle of equality of belligerents extends to IHRL, when that body of law applies to a specific issue that is also regulated by IHL and that directly bears on the relations between the parties to the NIAC. Typical examples of this are the use of lethal force and detention in relation to such conflict. Regarding the use of lethal force, it has been advocated, as already seen,²³⁰ that the restrictive IHRL standard should prevail over the IHL one in certain specific circumstances, in particular when force is used “against isolated individuals who are lawful targets

226 See above note 169; see also e.g. M. Sassòli, above note 79, p. 588; K. Fortin, above note 179, p. 337; Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, pp. 169, 225.

227 See e.g. the practice quoted in S. Sivakumaran, above note 169, p. 88.

228 See e.g. the practice quoted in Christian Tomschat, “The Applicability of Human Rights to Insurgent Movements”, in Hans Fischer *et al.* (eds), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berliner Wissenschaftsverlag, Berlin, 2004, p. 576.

229 Practice quoted in and translated by J.-M. Henckaerts and C. Wiesener, above note 168, p. 203.

230 See above note 126 and corresponding main text.

under IHL but are located in regions under a State's firm and stable control, where no hostilities are taking place and it is not reasonably foreseeable that the adversary could readily receive reinforcement".²³¹ Regarding detention, while, as also seen,²³² IHL does not expressly provide for any ground for detention with respect to NIACs, it does not expressly contain other safeguards required by IHRL either, including that the grounds for detention must be established by law and that the procedure must afford the detainees with a right of *habeas corpus*. Depending on whether or not the principle of equality of belligerents extends to IHRL, the more protective IHRL standards with respect to both the use of lethal force and detention would bind both States and armed groups or only the former.

The mere application of those IHRL obligations to States would not only upset the aim of further "humanizing" IHL as much as possible through the application of IHRL in armed conflict, but would also probably be untenable for States, especially when armed groups exercise control over a large portion of the territory and administer that territory through State-like institutions. It is hard to imagine in particular that States would accept being bound to provide enemy detainees with the right to challenge the legality of their detention before a court, when the opposing armed groups would be allowed to dispense with affording such a guarantee to captured members of the government side. Admittedly, the current trend in practice is to advocate for the applicability of IHRL to armed groups,²³³ thus reducing the inequality gap between States and those groups. However, that approach raises several issues, such as the determination of the level of development that armed groups must reach in order for IHRL to be applicable to them. Moreover, a significant inequality remains with respect to armed groups that do not reach such a level of development but nonetheless exercise some control over the territory. Finally, under that approach, no minimum IHRL regulation is applicable either to such groups or to those having no control at all.

In order to avoid such difficulties and, in particular, the all-or-nothing approach to the applicability of IHRL to armed groups, sliding-scale approaches have been proposed in legal scholarship, such as the notion of different applicable IHRL obligations in accordance with different thresholds²³⁴ or in accordance with each specific context in which the obligations are intended to apply.²³⁵ However, besides having inherent shortcomings, like the difficulty in determining the relevant thresholds in practice or the lack of any general guiding framework, those approaches are not flexible enough to propose similar IHRL obligations to all parties to a NIAC, in accordance with the principle of equality of belligerents.

231 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report Prepared by the International Committee of the Red Cross for the 32nd International Conference of the Red Cross and Red Crescent, 8–10 December 2015*, 2015, p. 35.

232 See above note 224 and corresponding main text.

233 See above note 40 and corresponding main text.

234 See e.g. Tilman Rodenhäuser, who distinguishes between three distinct thresholds (*Organizing Rebellion Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018, pp. 147–149).

235 See e.g. Daragh Murray, who supports a context-dependent approach (above note 203, pp. 177–180).

It is obvious that this principle must not lead either to the full application or to the non-application of IHRL to States and armed groups. Although the full application would fully serve the aim of further “humanizing” IHL through the application of IHRL in armed conflict, it would not take into account the effectiveness-based considerations related to the capacity of armed groups. Conversely, the non-application of IHRL to parties to a NIAC would entirely annihilate any positive impact of IHRL on the regulation of armed conflict and would run counter to the well-established view that IHRL is applicable in armed conflict. A possible alternative approach to conciliate the application of IHRL with the principle of equality of belligerents and the various levels of capacity of armed groups is again to resort to obligations of conduct with respect to IHRL obligations imposing positive standards and to combine them with core obligations of result providing a minimum regulation. The need for differentiation in order to take into account the specific capacities of armed groups is not sought through the assertion of different IHRL obligations for the different types of armed groups, as proposed by the above-mentioned sliding-scale approaches,²³⁶ but through the assertion of the same obligations involving a flexible standard of due diligence. Under this approach, those obligations of conduct are the same for any party to a NIAC, both States and any kind of armed group, and the fluctuating nature of those groups is then taken into account through the standard of due diligence. In addition, this approach has the advantage of relying on well-known categories of obligations in both general international law and IHL.²³⁷ Finally, as already shown above,²³⁸ the combination of those obligations with core obligations of result is an approach expressly envisaged by the law of NIAC, in particular under Article 5 of AP II.

This approach is arguably relevant for the application of the IHRL standards in NIACs with respect to both the issue of the use of lethal force in specific circumstances and the issue of detention. Regarding the use of lethal force, the IHRL restrictive standard, which entails that arrest and capture are given priority over targeting, must be applied “to the maximum extent feasible”. As formulated in the form of an obligation of conduct, requiring the parties to “make their best efforts” to comply with the IHRL standards in light of their capacities as well as all the circumstances ruling at the time, that obligation is flexible enough to enable various factors to be taken into account for its assessment. Those factors do not therefore merely include the firm control exercised by the targeting party over the territory where the lawfully targetable person is located. They also encompass, for example, the possibility of “arrest [ing] the fighter, the danger inherent in an attempt to arrest the fighter and the danger the fighter poses to [the targeting party] and civilians as well as the immediacy of this danger”.²³⁹ More generally, it becomes feasible for a party to

236 See above notes 234–235.

237 See above notes 191 and 195.

238 See above note 200 and corresponding main text.

239 M. Sassòli, above note 79, p. 609.

an armed conflict to apply the more restrictive IHRL standard when the fighter or even a group of fighters can be arrested without that party “being overly concerned about other [fighters belonging to the same armed forces] interfering in that operation”.²⁴⁰

Regarding the issue of detention, certain IHRL safeguards, such as the requirements to provide the grounds for detention by law and to afford detainees with the right of *habeas corpus*, must be modulated and regulated by obligations of conduct coupled with core minimum standards. Those standards would involve that a person may lawfully be detained only if the aim of the detention is to avoid them taking a direct part in hostilities (again) and only if they are afforded the right to contest the legality of their detention before a person other than their captor.²⁴¹ The additional obligations would be obligations of conduct that would require both establishing the grounds for detention through the enactment of a specific law and providing detainees with a right of *habeas corpus* before a judiciary court, but only “to the maximum extent feasible”. This means that, depending upon the circumstances ruling at the time and the capacities of the parties, those parties might, for example, only be able to—and would therefore have to—establish an impartial administrative body to review the legality of the detention.²⁴²

Admittedly, this approach would introduce more flexibility, which could potentially lower the level of protection with respect to the obligations owed by States, compared to the full application of unmodulated IHRL obligations to them. However, there would not be any difference with that full application

240 *Ibid.*

241 *Ibid.*, p. 621..

242 It is worth observing that similar solutions, involving the application of the same but adapted obligations inspired by IHRL to both States and any armed group party to a NIAC, has been advocated by the ICRC through resorting to IHL itself. Regarding the use of lethal force, the ICRC adopted such an approach in the well-known Section IX of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Interpretive Guidance). Here the ICRC resorted to the IHL concept of military necessity, arguing that the capture and arrest of a lawfully targetable person must be favoured under IHL when the targeting of that person is not justified by military necessity, such as when the person is located in a region firmly controlled by the targeting party: Nils Melzer (ed.), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 77–82. This actually comes close to advocating for the application of the relevant IHRL standard to any party to an armed conflict, including NIACs. In addition, the test based on military necessity is context-dependent and enables that standard to be adapted to the circumstances present at the time and in particular the capacities of the parties, as does the standard of due diligence against which the respect for obligations of conduct is to be assessed. Another similar approach has been followed by the ICRC in its Customary Law Study with respect to the issue of detention in NIACs. Here the ICRC identified the customary IHL procedural safeguards on the basis of human rights practice, including the entitlement to *habeas corpus*, without however defining the precise contours of those safeguards. As already seen (above note 18), this also comes close to the application of the relevant IHRL standards to parties to NIACs. That being said, both approaches have been strongly criticized in legal scholarship: regarding the ICRC position on the use of lethal force in the Interpretive Guidance, see e.g. W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010; regarding the ICRC’s approach to the issue of detention in its Customary Law Study, see e.g. Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, p. 17.

whenever States operate as usual, since the standard of due diligence would be highly demanding in such case. In addition, this would allow certain IHRL obligations to be accommodated with the realities of war that States themselves might face and that can make the application of those standards unrealistic even for them, such as the obligation to proceed to the review of the legality of the detention before a judiciary court when the State is engaged in active hostilities and is led to capture numerous fighters in a short period of time.²⁴³ Finally, States could not derogate to the modulated IHRL obligations even if those obligations can be subject to derogation under IHRL, given the operation of the principle of equality of belligerents.

International armed conflicts and occupations

The potential for IHRL to impact on IHL and further “humanize” that body of law is less significant with respect to IACs and belligerent occupations, since both situations are much more regulated under IHL than NIACs. In addition, the (potential) application of the principle of equality of belligerents raises fewer problems, since those situations only involve States and IHRL is applicable to those actors. However, there are still certain difficulties with respect to both the interpretation and application processes.

The interpretation process in IACs and occupations

Practice shows few cases of interpretations of IHL in light of IHRL with respect to the IHL norms that are exclusively applicable to IACs and situations of belligerent occupations. In addition, only a few of those cases required that the IHRL standards had to be adapted.

Practice

With respect to IACs, instances of the interpretation process may be found in the updated ICRC Commentaries concerning the protection of the wounded and sick as well as PoWs. The main instance elaborated by the ICRC relates to Article 42 of GC III, which deals with the use of weapons against PoWs and provides that such use, “especially against [PoWs] who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.” According to the ICRC, the notion of an “extreme measure”, conditioning the use of lethal force under Article 42 of GC III, must be determined in light of the traditional IHRL standards.²⁴⁴ This is a consistent approach, since, as emphasized by the ICRC, Article 42 is “one of the few provisions of humanitarian law that govern the use of force in situations that do not pertain to the conduct of hostilities”.²⁴⁵

243 In that sense, see e.g. M. Sassòli, above note 79, p. 621.

244 ICRC Commentary on GC III, above note 23, para. 2536.

245 *Ibid.*, para. 2538.

Regarding situations of occupation, one significant instance of incorporation of an IHRL standard into IHL relates to Article 43 of the 1907 Hague Regulations, which states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

In the *Armed Activities* case, the ICJ interpreted Article 43 as incorporating the IHRL positive obligation to protect persons from acts of violence by a third party. The Court concluded that Article 43 “comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party”.²⁴⁶ This is consistent with the function that any Occupying Power is intended to perform, namely restoring and maintaining public order in occupied territories, since IHRL was designed to apply to such activities.

Modulating IHRL standards

Certain instances of the interpretation process may raise concerns. The incorporated IHRL standard might be subject to modulation in order to account for effectiveness-based considerations related to the specific features of armed conflicts.

An example of this is the reference made by the ICRC to the demanding IHRL standard relating to the minimum amount of living space for prisoners as a guide for interpreting Article 25 of GC III dealing with quarters in PoW camps. As acknowledged by the ICRC, such a demanding standard can only be required “wherever circumstances permit”.²⁴⁷ It was thus necessary to modulate that standard by phrasing it as a mere context-dependent obligation. This is due to the fact that unlike ordinary prisoners, PoWs are not detained for criminal purposes, but only in the context of hostilities in order to avoid them returning to combat. As a result, it is not excluded that a Detaining Power may be led to capture a significant number of individuals in a short period of time during or after intensive fighting. In such situation, it may be hard for the Detaining Power to provide immediately all the detainees placed in the PoW camp with the amount of living space required under IHRL.

The application process in IACs and occupations

The issues raised by the application process with respect to IACs and situations of occupation are broadly similar to those relating to the application process concerning NIACs, except for the issue of the potential application of the

²⁴⁶ ICJ, *Armed Activities*, above note 33, para. 178.

²⁴⁷ ICRC Commentary on GC III, above note 23, para. 2090 fn.32.

principle of equality of belligerents, which does not raise any significant problems in this case since only States are normally involved. Certain features specific to IACs and situations of occupation must nonetheless be emphasized regarding both the cumulative application of IHRL and IHL and the displacement or adaptation of the applicable IHRL regulation.

Cumulative application

Cumulative application of the relevant applicable IHRL and IHL norms is not always possible in IACs and occupations. Conflicts, understood in a narrow sense (meaning that the application of one norm leads to a result prohibited by the other), indeed exist between certain applicable norms of the two regimes in those situations.

Regarding IACs, it is open to question whether Article 30(1) of GC III, according to which “[i]solation wards shall, if necessary, be set aside for cases of contagious or mental disease”, may be cumulatively applied with relevant contemporary IHRL regulation, in particular Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD). The latter article provides, *inter alia*, “that the existence of a disability shall in no case justify a deprivation of liberty”. It is now well admitted that the past IHL approach to persons with mental health conditions is outdated, as evidenced by the fact that the Geneva Conventions²⁴⁸ consider those conditions as a disease.²⁴⁹ Accordingly, it is undisputed that such persons cannot be detained for the sole reason of their actual or perceived impairment. However, practice is not straightforward with regard to the legality of their detention in two specific situations: namely, when they are deemed dangerous to others or to themselves. Detention in those situations seems to be allowed by the HRC²⁵⁰ as well as by certain States and experts.²⁵¹ In such cases, the “necessity” of the isolation of the mentally disabled persons in PoW camps under Article 30(1) of GC III must at least be read in light of that practice. This would amount to an interpretation process according to which mentally disabled persons may be isolated only if “necessary”, meaning only if they pose a danger to others or themselves.

However, no interpretation is possible if it is argued that such danger could never justify by itself the detention of mentally disabled persons. This is the view supported by the Committee on the Rights of Persons with Disabilities²⁵² as well

248 See e.g. not only Article 30(1) of GC III but also Articles 16, 17, 18, 20 and 22 of GC IV, referring to the “infirm” or “wounded and sick”.

249 In that sense, see also e.g. ICRC, *How Law Protects Persons with Disabilities in Armed Conflict*, Geneva, 13 December 2017, p 7; Alice Priddy (ed.), *Disability and Armed Conflict*, Geneva Academy, Geneva, April 2019, pp. 52–53, 56, 69, 77.

250 See HRC, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 19.

251 See those quoted in the ICRC Commentary on GC III, above note 23, paras 2242 fn. 33, 2244 fn. 35.

252 See HRC, *Thematic Study on the Rights of Persons with Disabilities under Article 11 of the Convention on the Rights of Persons with Disabilities, on Situations of Risk and Humanitarian Emergencies: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/31/30, 30 November 2015, paras 10, 47, 55.

as by certain States and experts,²⁵³ which emphasize that such detention would otherwise amount to an adverse distinction or even to acts of torture or degrading and humiliating treatment. According to this view, the applicable IHRL regulation, namely Article 14 of the CRPD, contradicts Article 30(1) of GC III. The conflict between IHRL and IHL must be solved in light of the two prongs of the coherency test, according to which the outcomes of the interactions between IHRL and IHL must aim at ensuring the best protection of individuals to the maximum extent compatible with effectiveness-based considerations. It is thus submitted that the conflict may be solved by favouring the exclusive application of the IHRL regulation, which is the most protective regime, as this would not prevent the Detaining Powers from effectively managing PoW camps where such persons are detained. Contemporary knowledge of mentally disabled persons shows that nothing justifies treating those persons differently from others in that regard, since their impairment does not give rise in itself to more danger for others or themselves.²⁵⁴ Accordingly, they could be isolated if they pose a danger to others but only as a result of a punitive measure like the other detainees.²⁵⁵

Another conflict of norms, understood in a narrow sense, concerns the law of occupation.²⁵⁶ Article 66 of GC IV authorizes the Occupying Power to hand over persons, including civilians, accused of having breached its penal regulation “to its properly constituted, non-political *military courts*” (emphasis added). On the other hand, States are prohibited from bringing civilians before military courts under the case law of the ECtHR.²⁵⁷ Again, the conflict of norms may be solved in light of the coherency-based approach. IHL should prevail, not because effectiveness-based considerations featuring IHL would displace the inappropriate IHRL regulation, but rather because Article 66 of GC IV offers the best protection to people as sought by the rationale of the coherency-based approach. Indeed, the underlying purpose of the IHL regulation is to avoid the annexation of the occupied territory by the foreign power and therefore to protect the right of people to self-determination.²⁵⁸ That fundamental collective right might then be seen as superseding the right of individual civilians to be tried before civilian courts, as provided in the case law of the ECtHR. In any case, the military courts established by the Occupying Power must respect the detailed judicial guarantees provided in GC IV²⁵⁹ and

253 In that sense, see also ICRC Commentary on GC III, above note 23, para. 2242 fn. 33.

254 See e.g. HRC, *Rights of Persons with Disabilities: Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/40/54, 11 January 2019, para. 27.

255 See e.g. GC III, Art. 89(4).

256 On that narrow conflict, see e.g. Marco Sassòli, “La Cour européenne des droits de l’homme et les conflits armés”, in Stephan Breitenmoser, Bernhard Ehrenzeller and Marco Sassòli (eds), *Droits de l’homme, démocratie et Etat de droit: Liber amicorum Luzius Wildhaber*, Dike, Zürich, 2007.

257 See e.g. ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment (Grand Chamber), 10 May 2011, paras 277–278; ECtHR, *Incal v. Turkey*, Appl. No. 22678/94, Judgment (Grand Chamber), 9 June 1998, paras 70–72.

258 See e.g. M. Sassòli, above note 79, p. 438.

259 See in particular GC IV, Arts 64–77.

other relevant IHL rules,²⁶⁰ supplemented by all the IHRL safeguards protecting persons before any criminal court.²⁶¹

That being said, the foregoing conflicts seem to be the only formal conflicts of norms between IHL and IHRL in IACs and occupations. Usually, it is possible to proceed to the cumulative application of IHRL and IHL. However, as already emphasized, by contrast to NIACs, IHRL has less potential to further “humanize” the IHL norms that are specifically applicable to IACs and occupations, since those situations are much more regulated by IHL. Accordingly, IHL often provides for better protection than IHRL, especially with respect to specific issues like the regulation concerning the amount of the various financial resources available to PoWs or civilian internees,²⁶² or the specific protective guarantees relating to the death penalty²⁶³ or, more generally, those applicable in any case of criminal and disciplinary prosecution, like the relaxation of the principle of assimilation to enemy armed forces by the leniency clauses, which allows taking into account the allegiance of the accused to their own party.²⁶⁴ Yet, in certain instances, IHRL proves to be more developed and more protective, such as with respect to the principle of *non-refoulement* protecting civilians under GC IV.²⁶⁵

Finally, as in NIACs, the applicable IHRL norms are often formulated in a sufficiently flexible way to accommodate the exceptions or limitations contained in the corresponding IHL regulation, which makes the cumulative application of IHRL and IHL possible. However, given the detailed regulation of IACs and occupations under IHL, instances of such accommodation are much more numerous than in NIACs, whether through exceptions²⁶⁶ or restrictions²⁶⁷ provided in the relevant IHRL norm, the formulation of the

260 See in particular AP I, Art. 75.

261 See e.g. Yukata Arai-Takahashi, “Law-Making and the Judicial Guarantees in Occupied Territories,” in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 179, pp. 1438 ff. See also the HRC admitting that civilians are put on trial before military courts but only if such trials are “very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14 [of the ICCPR]”: HRC, *Salim Abbassi and Abbassi Madani v. Algeria*, Communication No. 1172/2003, UN Doc. CCPR/C/89/D/1172/2003, 28 March 2007.

262 See e.g. GC III, Part III, Section IV; GC IV, Part III, Section IV, Chap. VI.

263 See e.g. GC III, Arts 100, 101; GC IV, Art. 75.

264 See e.g. GC III, Arts 83, 87, 100.

265 See e.g. V. Chetail, above note 210, pp. 1203–1205.

266 See e.g. the exception to the IHRL prohibition on forced or compulsory labour, above notes 211–212, which might enable that prohibition to be compatible with the IHL right of the Detaining Power to oblige certain categories of detainees to work (see e.g. GC III, Art. 49).

267 See e.g. the restrictions on the IHRL right to manifest one’s religion or belief (contained notably in Article 18(3) of the ICCPR or Article 9(2) of the ECHR), which might make that right compatible with the IHL limitation on the religious practice of detainees, which is indeed subject to the requirement that it must comply with the disciplinary routine of the camp (Hague Regulations, 1907, Art. 18; GC III, Art. 34; GC IV, Art. 93). On this compatibility, see specifically the ICRC Commentary on GC III, above note 23, para. 2371 fn. 29. For instances of compatibility between IHRL and the law of belligerent occupation, based on the existence of restrictions on the concerned IHRL rights, see e.g. D. Murray, above note 130, pp. 243–244 (right to freedom of expression), 244–246 (right to freedom of movement, right to freedom of association and right to freedom of assembly), 256–257 (right to property).

concerned IHRL obligations as obligations of conduct,²⁶⁸ or the limitation of the IHRL prohibition to “arbitrary” or “unlawful” conduct.²⁶⁹

Displacement or modulation of the applicable IHRL regime

Although the cumulative application of IHL and IHRL is possible, the applicable IHRL regime must nonetheless be set aside in certain instances because it proves inadequate in light of effectiveness-based considerations related to the specific features of armed conflicts. This is the case with respect to the use of lethal force, at least in situations of active hostilities, and detention. The results must be the same as those described above with respect to NIACs.²⁷⁰ The IHL regulation must prevail.

However, it is generally admitted that this process raises less difficulty in IACs and occupations, especially regarding detention, since IHL expressly provides for a right to detain for security reasons in such situations.²⁷¹ That express legal basis may then be referred to as the *lex specialis* in order to interpret or displace the inappropriate IHRL regime in that respect.²⁷² This is also the case concerning the express regulation of the right of *habeas corpus* under GC IV, which does not require that the detention must necessarily be challenged before a judiciary court,²⁷³ unlike in IHRL.²⁷⁴ The inappropriate IHRL requirement may then be displaced by relying on the express IHL *lex specialis*.

Yet no express regulation exists regarding the right of *habeas corpus* as far as PoWs are concerned. While IHRL requires that detainees must be able to challenge the legality of their detention, GC III remains silent on that issue. Such silence is due to the fact that, according to the traditional approach,²⁷⁵ it would be inappropriate to provide persons with a right of *habeas corpus* when those persons are detained not for criminal purposes but for the sole reason of

268 See e.g. the rights provided in the ICESCR, which must be afforded by each contracting party “to the maximum of its available resources” (Art. 2(1)). This enables those rights to be conciliated with IHL norms that do not impose absolute obligations, such as the obligation of the Occupying Power, “[t]o the fullest extent of the means available to it, [to ensure and maintain], with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory” (GC IV, Art. 56); the obligation of the Occupying Power, “[t]o the fullest extent of the means available to it, [to ensure] the food and medical supplies of the population” (GC IV, Art. 55); or the obligation of the captor State to take “all feasible precautions ... to ensure [the] safety” of those combatants who “have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation” (AP I, Art. 41(3)).

269 See e.g. the human right to correspondence provided in the ICCPR, which prohibits any arbitrary or unlawful interference with correspondence (Art. 17(1)). This enables that right to be cumulatively applied with, for example, the right afforded by IHL to the Detaining Power to limit the correspondence sent by PoWs (GC III, Art. 71) or civilian internees (GC III, Art. 107) and to subject the correspondence sent to or by PoWs (GC III, Art. 76) or civilian internees (GC IV, Art. 112) to censorship.

270 See the above section on “Setting Aside the Applicable IHRL Regime”.

271 See Article 21 of GC III regarding PoWs, and Articles 42 and 78 of GC IV regarding civilian internees.

272 See the above section on “Setting Aside the Applicable IHRL Regime”.

273 See GC IV, Arts 43, 78.

274 Regarding IHRL, see e.g. ICCPR, Art. 9(4); ECHR, Art. 5(4).

275 See above note 117.

preventing them from returning to combat. This silence must then be considered as part of the regulation on the detention of PoWs, and that regulation must be seen as the *lex specialis* capable of displacing the inappropriate IHRL regime, including the right of *habeas corpus* granted under that regime.²⁷⁶

In certain instances, the applicable IHRL regime does not have to be displaced but must be merely modulated. An illustrative example is the use of lethal force in circumstances where the lawfully targetable person is located in a territory under the firm control of the targeting party. It has already been seen that the IHRL regime has been said to be applicable to such situations and to prevail as the *lex specialis* over the more permissive IHL regime.²⁷⁷ As supported with respect to NIACs, the applicable IHRL regime should nonetheless be modulated in order to take into account the various circumstances ruling at the time.²⁷⁸ It should be framed as an obligation of conduct, requiring that arrest and capture must be preferred to targeting “to the maximum extent feasible”. This allows for the consideration of numerous factors in addition to the control exercised by the targeting party.

Conclusion

The interplay between IHL and IHRL has been the object of numerous studies in legal scholarship. However, no study has ever proposed any elaborated theoretical framework, combining formal and substantial considerations, in order to address the interplay resulting from both the interpretation of IHL in light of IHRL (the interpretation process) and the application of IHRL in armed conflicts alongside IHL (the application process).

These processes represent the two main ways through which IHRL currently impacts the regulation of armed conflict since the 1960s and, in particular, since the 1968 Tehran Conference. Although the two processes are often operated in practice, by courts or other competent bodies, legal frameworks that have been proposed to guide them are either lacking or unsatisfactory. The main reason for the unsatisfactory nature of the currently proposed mechanisms, such as the *lex specialis* principle or the principle of systemic integration, is that they are only formal tools. They do not integrate any substantial considerations that are necessary to deal with the interplay between IHL and IHRL.

Such considerations have a key place in the legal theories on normative coherence, which deal with the interrelations of norms of any genuine legal system. Those theories mean that any legal system entails not only a formal coherence (“consistency”) between its norms but also a material coherence (“coherence”) that is obtained through testing the compatibility of the solutions of the system against its foundational principle. Such theories, enriched by other

276 See e.g. G. Gaggioli, above note 14, p. 52.

277 See above note 126 and corresponding main text.

278 See the above section on “Modulating Applicable IHRL Obligations”.

theoretical reflexions such as those on legal pluralism, have the potential to provide an adequate framework for the relationships between the IHL and IHRL norms.

Accordingly, the outcomes of the interpretation and application processes must be compatible with the foundational principle according to which the best protection must be afforded to persons, in conformity with the mandate given by States at the 1968 Tehran Conference (first prong of the coherency test), provided or to the extent that the resulting legal solution does not conflate with effectiveness-based considerations specific to situations of armed conflict (second prong of the coherency test). This means that the full incorporation of IHRL into IHL (as a result of the interpretation process) or the cumulative application of IHL and IHRL in armed conflicts (as a result of the application process) can only be limited if, or to the extent that, it is justified by the particular circumstances ruling at the time (*in concreto* considerations) or general features specific to armed conflicts (*in abstracto* considerations). Those limitations may result either in modulations or displacements of the inappropriate regime.

Modulation has mainly been elaborated in this paper in relation to NIACs, especially in order to take into account the principle of equality of belligerents in light of the different levels of capacities of the parties to the conflict, particularly armed groups. It has been submitted that the best approach to combine those effectiveness-based considerations with the aim of further “humanizing” the regulation of armed conflict through IHRL, as required by the coherency test, is to phrase the IHL obligation interpreted in light of IHRL or the IHRL obligation applicable alongside IHL in armed conflict as an obligation of conduct. Although such an obligation would be applicable to both parties to the conflict, the standard of due diligence against which the respect for the obligation is to be assessed would enable taking into account the particular circumstances ruling at the time and the different intrinsic features of each party, including their material capacity. In addition, such obligations would be supplemented by core obligations of result. This sliding-scale approach, which bears mainly on the content of the obligations rather than on their existence, has been advocated with respect to several issues, including the fair trial guarantees and the procedural guarantees in case of detention.

In certain instances, however, modulation is not possible and the inappropriate IHRL regime must be displaced in favour of the IHL one. This has been asserted in relation to NIACs as well as IACs and occupations, mainly with respect to the regimes relating to the use of lethal force – at least when that force is used in active hostilities – and the grounds for detention. The IHL regime is to be preferred in those cases, given the specific features of any armed conflict. Displacements of the IHRL standard have also been argued in order to avoid making the ensuing regulation (almost) impossible to be respected by the parties to the conflict, in particular by armed groups in NIACs, in instances of potential interpretation of certain IHL guarantees in light of IHRL.

Supporting value sensitivity in the humanitarian use of drones through an ethics assessment framework

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Abstract

The current humanitarian use of drones is focused on two applications: disaster mapping and medical supply delivery. In response to the growing interest in drone deployment in the aid sector, we sought to develop a resource to support value sensitivity in humanitarian drone activities. Following a bottom-up approach encompassing a comprehensive literature review, two empirical studies, a review of guidance documents, and consultations with experts, this work illuminates the nature and scope of ethical challenges encountered by humanitarian organizations embarking upon innovation programmes. The Framework for the Ethics Assessment of Humanitarian Drones (FEAHD) identifies five values and five key questions related to ethical considerations along the decision chain of humanitarian drone activities. It fills a gap between high-level, principle-based guidance related to humanitarian innovation, and detailed operation-oriented checklists for projects involving the use of drones. In this way, the FEAHD contributes to support value sensitivity in the humanitarian use of drones.

Keywords: humanitarian drones, disaster mapping, medical supply delivery, value sensitive innovation, technology ethics.

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Introduction

Emerging technologies are widely used in humanitarian and development settings by aid agencies around the globe¹ – a development that has also been discussed critically in the humanitarian sector.² Nevertheless, as humanitarian needs and the complexity of aid programmes in challenging conditions continue to expand, populations affected by natural disasters or living in remote locations experience significant obstacles to recovery in post-disaster environments or to receive aid supplies. This situation potentially widens the gap of equitable access to assistance for people experiencing heightened vulnerability.

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1 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *From Digital Promise to Frontline Practice: New and Emerging Technologies in Humanitarian Action*, April 2021, available at: <https://www.unocha.org/sites/unocha/files/OCHA%20Technology%20Report.pdf> (all internet references were accessed in January 2022).

2 Kristin Sandvik, Maria Jumbert, John Karlsrud and Mareile Kaufmann, “Humanitarian Technology: A Critical Research Agenda”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014; Kristin Sandvik, Katja Jacobsen and Sean McDonald, “Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation”, *International Review of the Red Cross*, Vol. 99, No. 904, 2017.

As a prominent example of emerging technologies, drones³ are increasingly being employed to address such barriers.⁴ For example, they can be used to support humanitarian operations by collecting high-resolution aerial imagery from above, or to overcome the so-called “last mile challenge”, whereby aid supplies cannot be easily delivered to end-users due to logistical obstacles.⁵ According to van Wynsberghe and Comes,⁶ the first drones deployed in the humanitarian sector were used for peacekeeping surveillance in the Democratic Republic of Congo in 2006.⁷ The current practice of the humanitarian use of drones (HUD) revolves around two main applications: disaster mapping and medical supply delivery.⁸ The “good drones”, or, more specifically, the “humanitarian drones”⁹ offer novel solutions that harness this technology to provide disaster relief or aid supplies to those in need.¹⁰

The rising use of the “good drones” has required sustained engagement among a diverse set of actors. These activities have brought together aircraft and drone manufacturers, insurance companies, airspace regulators, ministries of health, as well as development and humanitarian workers, to collaborate in new

- 3 Within the context of this article, the term “drones” refers to—and is used interchangeably with—“unmanned aerial vehicles” (UAVs), “unmanned aerial systems” (UASs), “remotely piloted aircrafts” (RPAs) or “remotely piloted aircraft systems” (RPASs). While different technical definitions of drones exist, according to Floreano and Wood (2015), they are electrically powered aircraft of small size, with limited flight range and duration, flying above the ground (semi-)autonomously, within or beyond a pilot’s visual line of sight. Although there are various types of drones in terms of mechanical structure (such as fixed-wing, rotary-wing and multi-copters), according to Christen *et al.* (2018), most drones used in humanitarian contexts are fixed-wing or multi-copters below 30 kg. Dario Floreano and Robert J. Wood, “Science, Technology and the Future of Small Autonomous Drones”, *Nature*, Vol. 521, No. 7553, 2015; Markus Christen, Michel Guillaume, Maxinilian Jablonowski, Peter Lenhart and Kurt Moll, “Zivile Drohnen – Herausforderungen und Perspektiven”, *TA Swiss*, vdf Hochschulverlag AG, Zurich, 2018.
- 4 Ning Wang, Markus Christen and Matthew Hunt, “Ethical Considerations Associated with ‘Humanitarian Drones’: A Scoping Literature Review”, *Science and Engineering Ethics*, Vol. 27, No. 51, 2021; Aimee van Wynsberghe, Denise Soesilo, Thomasen Kristen and Noel Sharkey, *Drones in the Service of Society*, Foundation of Responsible Robotics, 2018.
- 5 Jack C. Chow, *The Case for Humanitarian Drones*, Open Canada, 2012, available at: <https://opencanada.org/the-case-for-humanitarian-drones/>; Austin Choi-Fitzpatrick, “Drones for Good: Technological Innovations, Social Movements, and the State”, *Journal of International Affairs*, Vol. 68, No. 1, 2014; Bart Custers, “Drones Here, There and Everywhere”, in Bart Custers (ed.), *The Future of Drone Use: Opportunities and Threats from Ethical and Legal Perspectives*, Springer, Heidelberg, 2016.
- 6 Aimee van Wynsberghe and Tina Comes, “Drones in Humanitarian Contexts, Robot Ethics, and the Human–Robot Interaction”, *Ethics and Information Technology*, Vol. 22, No. 2, 2020.
- 7 John Karlsrud and Frederik Rosén, “In the Eye of the Beholder? UN and the Use of Drones to Protect Civilians”, *Stability: International Journal of Security and Development*, Vol. 2, No. 2, 2013.
- 8 It is worth emphasizing that the humanitarian use of drones is commonly understood as within the framework of the Humanitarian Action, Development and Peace Nexus, which includes a wide range of practices, including activities such as assessing water supply infrastructure or crop monitoring.
- 9 Within the context of this article, by “humanitarian drones”, we refer to the deployment of drones by humanitarian actors in three situations: acute humanitarian crisis settings, including relief efforts during emergencies arising from events such as natural disasters, epidemic outbreaks or mass population displacement; immediate post-crisis settings, including post-disaster recovery and reconstruction efforts for populations affected by a humanitarian crisis; and long-term crisis-resilience or development projects, including activities related to medical commodity delivery or health supply chain management to strengthen resilience and mitigate risks.
- 10 A. van Wynsberghe and T. Comes, above note 6.

ways. This situation presents communication and operational challenges given the different areas of expertise, approaches, and vocabulary used in daily operations across these different actors.¹¹ The diversity of entities involved in HUD is illustrated by the following: many international organizations (IOs) active in the humanitarian field¹² have explored the use of drones for mapping and cargo delivery in their projects; multiple donors¹³ have funded cargo drone projects; and a range of other organizations¹⁴ are engaged in regulatory development or governance work related to HUD.

Another key actor is the drone industry. It is dynamic and changing quickly, and has been described as reinventing itself every eight years.¹⁵ In contrast, the conventional aviation industry moves much more slowly. Civil aviation authorities are accustomed to adapting their guidelines at a pace that matches developments in the aviation industry. This pace is insufficient to keep up with the speed of change in the drone sector. Authorities thus find themselves under pressure to act quickly yet maintain rigorous and thorough processes, and to be focused on public safety and equity.¹⁶ Aligning these goals can be particularly challenging if powerful companies with substantial economic interests seek to exploit this situation to influence the development of drone regulations for their own advantage.¹⁷ Critics have identified risks that drones used in humanitarian contexts could disenfranchise communities and local efforts, leading to remote management, data collection, or processing dilemmas that many humanitarian organizations are ill-equipped to handle.¹⁸

In the past decade, innovation has become an area of focus in the humanitarian sector, appearing in institutional initiatives, donor speeches, policy documents and media coverage, and leading to new initiatives, partnerships and

11 Denise Soesilo, Patrick Meier, Audrey Lessard-Fontaine, Jessica Du Plessis and Christina Stuhlberger, *Drones in Humanitarian Action: A Guide to the Use of Airborne Systems in Humanitarian Crises*, Swiss Foundation for Mine Action, Geneva, 2016.

12 Examples include Medair, Médecins Sans Frontières (MSF), the United Nations Population Fund (UNFPA), the United Nations Children's Fund (UNICEF), the World Food Programme (WFP) and the World Health Organization (WHO).

13 Examples include the US Agency for International Development (USAID), the Gates Foundation and the Rockefeller Foundation.

14 Examples include the World Bank Group (WBG), the World Economic Forum (WEF) and the International Civil Aviation Organization (ICAO).

15 D. Soesilo *et al.*, above note 11.

16 *Ibid.*

17 *Ibid.*

18 Nathaniel Raymond, Brittany Card and Ziad Al Achkar, "The Case Against Humanitarian Drones", *OpenCanada Blog*, 12 December 2012, available at: <https://opencanada.org/the-case-against-humanitarian-drones/>; Antonio Donini and Daniel Maxwell, "From Face-to-Face to Face-to-Screen: Remote Management, Effectiveness and Accountability of Humanitarian Action in Insecure Environments", *International Review of the Red Cross*, Vol. 95, No. 890, 2013; Kristin Sandvik and Kerstin Lohne, "The Rise of the Humanitarian Drone: Giving Content to An Emerging Concept", *Millennium: Journal of International Studies*, Vol. 43, No. 1, 2014; Kristin Sandvik and Nathaniel Raymond, "Beyond the Protective Effect: Towards a Theory of Harm for Information Communication Technologies in Mass Atrocity Response", *Genocide Studies and Prevention: An International Journal*, Vol. 11, No. 1, 2017.

funding programmes. Alongside these developments, there has been discussion of ethical principles in humanitarian innovation,¹⁹ and concern expressed for whether and how populations affected by crises are benefiting from innovations.²⁰ It is, thus, important to critically appraise how technological innovation intersects with values, norms, beliefs and moral commitments,²¹ including the relationship between technological innovation and humanitarian principles.²² If not, the relationship between innovation and experimentation may be obscured, participation and inclusion may be afforded limited attention, and risks and benefits may be unevenly distributed.²³ Hence, normative analysis of ethical challenges associated with humanitarian innovation is required for understanding what is at stake and how best to move forward regarding the use of emergent technology in the aid sector, including HUD.

This article aims to contribute to such an analysis by introducing an ethics assessment framework to support value sensitivity when humanitarian organizations are deciding whether and how to engage in a drone project in a particular setting. Here, value sensitivity entails close attention to how values are implicated in, and engaged by, decisions and actions. The framework has three levels: identifying values, key questions to support reflection across stages of the decision chain, and considerations for institutional preparedness related to ethics. The intent is to provide an accessible ethics support for reflection and deliberation among individuals and groups involved in HUD operations, and to encourage engagement with values in decisions about the initiation of drone-related programmes in the humanitarian sector. The framework seeks to address a gap between high-level, principled-based guidance for innovation more generally,²⁴ and detailed, operation-oriented checklists related to humanitarian drones.²⁵ On a broader scale, the framework may also serve to prompt further discussion and reflection about these issues among actors from humanitarian organizations, communities, government, industry, regulatory authorities and academia, as well as technology developers, designers and engineers.

- 19 Alexander Betts and Louise Bloom, *Humanitarian Innovation: The State of the Art*, OCHA, November 2014, available at: https://www.unocha.org/sites/unocha/files/Humanitarian%20Innovation%20The%20State%20of%20the%20Art_0.pdf; Louise Bloom and Romily Faulkner, "Innovation Spaces: Lessons from the United Nations", *Third World Quarterly*, Vol. 37, No. 8, 2016; Humanitarian Innovation Fund (HIF)-ALNAP, *Humanitarian Innovation Guide*, Elrha, 2019, available at: <https://higuide.elrha.org>.
- 20 Kristin Sandvik, "African Drone Story", *BEHEMOTH: A Journal on Civilisation*, Vol. 8, No. 2, 2015.
- 21 K. Sandvik *et al.*, 2014, above note 2; K. Sandvik, K. Jacobsen and S. McDonald, 2017, above note 2; HIF-ALNAP, above note 19.
- 22 N. Wang, M. Christen and M. Hunt, above note 4; K. Sandvik, above note 20.
- 23 K. Sandvik *et al.*, 2014, above note 2; K. Sandvik, K. Jacobsen and S. McDonald, 2017, above note 2; K. Sandvik, above note 20.
- 24 A. Betts and L. Bloom, above note 19; HIF-ALNAP, above note 19.
- 25 WBG, *Guidance Note: Managing the Risks of Unmanned Aircraft Operations in Development Projects*, WBG, 2017; ICAO, *Unmanned Aircraft Systems (UAS) For Humanitarian Aid and Emergency*, ICAO, 2020; International Committee of the Red Cross (ICRC), *Handbook on Data Protection in Humanitarian Action*, 2nd ed., Geneva, 2020; Harvard Humanitarian Initiative (HHI), *Humanitarian UAV Code of Conduct & Guidelines (Fully Revised Version for 2020/2021)*, Uavcode, 2021; USAID, *UAV in Global Health: Defining A Collective Path Forward*, USAID, Washington, DC, 2019.

In the following sections, we present the steps undertaken to develop the framework and introduce the tool that resulted from this process. The next section presents an overview of the ethical landscape of HUD based on the findings of a scoping literature review and two empirical studies that we conducted. This step allowed us to identify areas of particular salience that an ethics assessment framework for HUD should be responsive to. We then offer a comparative review of six selected guidance documents that have relevance for ethics and HUD. Reviewing key documents allowed us to consider existing guidance and possible gaps, and to orient our development process in light of existing work in this area. The multi-step consultation process that we undertook as part of the framework development is presented in the penultimate section, which also introduces the proposed framework, providing details about its content and an illustration of its application with a short vignette. The final section concludes with a discussion about the strengths and limitations of the framework, as well as recommendations for future work on this topic.

State of knowledge about ethics and humanitarian use of drones

Scoping literature review

The development of the proposed framework was grounded by a comprehensive scoping literature review aimed to identify and assess how ethical considerations associated with HUD are discussed in the academic and grey literature.²⁶ We used a mixed approach of qualitative content analysis and quantitative landscape mapping of the selected articles to inductively develop a typology of ethical considerations associated with HUD. The analysis was complemented by two consultation meetings that took place in October 2020, whereby eight participants with expertise in related fields provided feedback on provisional findings and helped us refine our analysis, including identifying potentially missing or overlooked areas in the literature.

The review presents a portrait of the expanding literature from 2012 through to early 2020 related to HUD, and how ethical considerations are understood and conceptualized across academic and grey literature sources. It illuminates areas that have been the focus of attention (e.g. minimizing risks of harm and protecting privacy), sketches the evolution of this discussion over time (e.g. moving from a focus on mapping drones towards medical cargo drones) and points to areas that have received less consideration (e.g. potential tension between profit and humanitarian goals as new markets open up and as private sector engagement increases in the humanitarian space).²⁷ The findings broadly

²⁶ N. Wang, M. Christen and M. Hunt, above note 4.

²⁷ N. Wang, M. Christen and M. Hunt, above note 4.

overlap with the general ethical, legal and social implications (ELSI) agenda²⁸ that is widely used for technology assessment, while highlighting distinctive considerations for HUD.

The mapping of key areas of ethical concern for HUD resulting from the literature review was then used as an analytical reference to assess existing guidance documents (see Table 4). These insights can also be situated within the rise of the humanitarian innovation movement which emerged just prior to the time period of this review,²⁹ and which has led to a growing and diverse literature in its own right, including many papers critically examining ethical issues associated with innovative practices, processes and products, as well as efforts to develop ethics guidance for innovation projects.³⁰

Empirical studies

A second source that allowed us to orient the early phase of framework development was empirical research that we conducted, which illuminates how ethical considerations were experienced by people involved in, and affected by, HUD in two contrasting settings. The first study took place in a landslide area of rural Nepal, where the livelihood of a local community was threatened by the 2015 Nepal earthquake, and a humanitarian organization sought to improve safety by using drones to map the area due to the unstable geological conditions of the terrain.³¹ Based on qualitative interviews conducted in 2019, this study sheds light on a real-world example where different actors were brought together in a humanitarian innovation initiative. Based on an inductive analysis of the interviews, ethical considerations were identified related to community, technology, data, regulation and stakeholders as shown in Table 1.

At the centre of the analysis lie tensions between the hopes associated with technological innovation and the realities of what it could provide. The response to the earthquake in Nepal has been repeatedly portrayed by the advocates of

28 The term “ELSI” first emerged in the context of the Human Genome Project (HGP) in the USA in 1990, where researchers, medical practitioners and lay advocates began to systematically explore the ethical, legal and social implications surrounding the HGP. Katie Cottingham, “A Decade of ELSI Research: Embracing the Past and Gazing into the Future”, *Science*, 26 January 2001, available at: <https://www.science.org/content/article/decade-elsi-research-embracing-past-and-gazing-future>.

29 HIF-ALNAP, above note 19.

30 L. Bloom and R. Faulkner, above note 19; Tom Scott-Smith, “Humanitarian Neophilia: The ‘Innovation Turn’ and its Implications”, *Third World Quarterly*, Vol. 37, No. 12, 2016; Benjamin White, “Refuge and History: A Critical Reading of a Polemic”, *Migration and Society: Advances in Research*, Vol. 2, 2019; Silke Roth and Markus Luczak-Roesch, “Deconstructing the Data Life-cycle in Digital Humanitarianism”, *Information, Communication & Society*, Vol. 23, No. 4, 2020.

31 Ning Wang, “‘A Successful Story that Can be Sold’? A Case Study of Humanitarian Use of Drones”, *Proceedings of the 2019 IEEE International Symposium on Technology and Society (ISTAS)*, IEEE, 2019; Ning Wang, “‘We Live on Hope...’ Ethical Considerations of Humanitarian Use of Drones in Post-Disaster Nepal”, *IEEE Technology and Society Magazine*, Vol. 39, No. 3, 2020.

Table 1. *Ethical considerations – Nepal case*³²

Theme	Focus	Ethical consideration
Community	<i>Consent and care:</i> procedure of consent, sources of consent, consequences of consent	<ul style="list-style-type: none"> ● <i>Trust:</i> already existing <i>v.</i> newly established ● <i>Hope:</i> need for aid and dependence on external support ● <i>Literacy:</i> what is expected to be understood <i>v.</i> what is actually understood ● <i>Philanthropic misconception:</i> unrealistic expectations and neglected communication gap ● <i>Duty of care:</i> being vulnerable <i>v.</i> being made vulnerable
Technology	<i>Risks and benefits:</i> technological limitations, societal implications, risk–benefit assessments	<ul style="list-style-type: none"> ● <i>Tensions, compromises and trade-offs:</i> quality of information, types of technology, etc. ● <i>Purposes, conditions and contexts:</i> why, how, at what cost, benefiting whom, whose responsibility, etc. ● <i>Matters of concern:</i> “silver bullet” <i>v.</i> fundamental problems ● <i>Priority of the agenda:</i> hasty technological advance <i>v.</i> sluggish social, economic and political growth

Continued

technological innovation as “a success story that can be sold”.³³ In such narratives, technology is often depicted as the “magic solution” to resolve social and structural problems.³⁴ However, the reality on the ground is more complicated, with high expectations but uncertain benefits being realized. Ultimately, the analysis can be distilled to two core aspects: (1) the role of emerging technologies in a precarious

32 A more detailed version of this Table is presented in N. Wang, 2020, *ibid.*

33 N. Wang, 2019, above note 31.

34 *Ibid.*

Table 1. *Continued*

Theme	Focus	Ethical consideration
Data	<i>Safety and security:</i> regulatory priority, operational guidelines	<ul style="list-style-type: none"> ● <i>Data collection:</i> degree and level of data accuracy ● <i>Data storage and usage:</i> compliance mechanism for data safety and security ● <i>Data sharing:</i> digital data management system
Regulation	<i>Authority and procedure:</i> top-down force, regulatory authority, provisions and procedures	<ul style="list-style-type: none"> ● <i>Lead agencies:</i> who and at what level ● <i>Compliance and enforcement mechanisms:</i> content and process
Stakeholders	<i>Responsibility and accountability:</i> bottom-up force, moral hazard, ethical standards	<ul style="list-style-type: none"> ● <i>Government:</i> priority-setting ● <i>Humanitarian organization:</i> self-positioning ● <i>Community:</i> needs-oriented ● <i>Ethical standards:</i> action-guiding

context where diverse factors are at play, all of which may trigger vulnerabilities for affected populations; and (2) the role of the aid sector in an increasingly technologized ecosystem where new models of delivering humanitarian services present challenges of alignment with respect to the fundamental humanitarian principles.³⁵

The second study took place in the lake area of Malawi, where drones were used to deliver medical supplies to two remote islands to help address the last-mile delivery challenges faced by the Government of Malawi.³⁶ In this context, in-depth

35 N. Wang, 2020, above note 31.
 36 Ning Wang, “‘As it is Africa, it is OK’? Ethical Considerations of Development Use of Drones for Delivery in Malawi”, *IEEE Transactions on Technology and Society*, Vol. 1, No. 2, 2021a; Ning Wang, “‘Killing Two Birds with One Stone’? A Case Study of Development Use of Drones”, *Proceedings of the 2020 IEEE International Symposium on Technology and Society (ISTAS)*, IEEE, 2021b.

interviews revealed a noticeable mentality of “killing two birds with one stone”, whereby the use of drones enables the tech industry to associate their image with humanitarian causes and to trial products on a large scale in countries where needs are widespread and regulation is relaxed.³⁷ We identified ethical considerations related to safety, operationality and sustainability, as shown in Table 2.

Table 2. *Ethical considerations– Malawi case*³⁸

Theme	Focus	Ethical consideration (cross-theme)
Safety	<ul style="list-style-type: none"> ● <i>Human and environmental safety:</i> drone technology, connectivity solution, weather conditions, safety insurance ● <i>Cargo safety:</i> sample packaging, dangerous goods, patient data 	<p>How does the context influence what is deemed acceptable?</p> <ul style="list-style-type: none"> ● <i>International development challenge:</i> donor-based, high beneficiary expectations, prone to shortcuts due to resource constraint
	<ul style="list-style-type: none"> ● <i>Operationality</i> 	
Operationality	<ul style="list-style-type: none"> ● <i>Infrastructure gap:</i> health logistic system, laboratory sample processing, health facility capacity ● <i>Operational costs:</i> investment, beneficiary, business model 	<ul style="list-style-type: none"> ● <i>Public acceptability of innovation:</i> donor confidence, government commitment, community engagement <p>Is it a solution looking for a problem?</p> <ul style="list-style-type: none"> ● <i>Technology experimentation:</i> “do not impose, but ask” approach, positive disruption, responsible innovation in the aid sector
	<ul style="list-style-type: none"> ● <i>Sustainability</i> 	
Sustainability	<ul style="list-style-type: none"> ● <i>Local capacity:</i> locally based operation, project management, airspace management ● <i>Donor dependence:</i> committed resources, structural roots, lack of knowledge 	<ul style="list-style-type: none"> ● <i>Drone industry expansion:</i> business motive, industry lobbying, supply chain bottlenecks, responsible private sector engagement

37 N. Wang, 2021b, *ibid.*

38 A more detailed version of this Table is presented in N. Wang, 2021a, above note 36.

The dual-purpose approach seen in this study is potentially problematic because introduction of new technologies to development programmes can have negative consequences for affected populations, both short-term risks related to the safety of the technology, and long-term consequences with respect to the experimentation approach, sustainability of benefits, and what might be displaced. Additionally, although the culture of taking risks and accepting failure is mainstream in innovation, such attitudes may not suit humanitarian contexts, where fundamental principles are derived from the humanitarian imperative of alleviating suffering and assisting people affected by crisis.³⁹ This study offers insights for critical reflection on the trend of the “African drone rise”, whereby drones and Africa are being construed as solutions to each other’s problems, opening up questions with respect to the ethical and societal implications of using drones in the aid sector in light of two key concerns: (1) the social implications of such practices across different settings; and (2) the normative role of technology in the aid sector, especially where it appears to be a solution looking for a problem.⁴⁰

Overall, the two empirical studies complemented the scoping literature review by identifying areas of concern through investigations of experiences and perceptions of people involved in, and affected by, real-world situations of HUD, as well as ethical issues that emerged from these cases. A main insight gained through these studies is that the use case (mapping *v.* delivery) implicates both distinct and partially overlapping sets of ethical values, and that these concerns are perceived differently across different groups of people. Additionally, the relation between the technology industry and the humanitarian sector adds a new layer of complexity to the power dynamics among involved parties, especially communities affected by disasters or living in resource-constrained settings.

The ethics landscape and implications for humanitarian use of drones

Our literature review and empirical studies point to the following issues that are of particular relevance in developing a framework to support value sensitivity for HUD. First, as our empirical studies have shown, a key concern for HUD is the possibility that the humanitarian space has become a “testing zone” to advance drone technology that is intended to be implemented elsewhere. Likewise, commentators have suggested that the cost pressure from research and development (R&D) and regulatory compliance may encourage manufacturers to test new drones in countries where regulation is relatively flexible, while nations and localities with uncrowded skies may sense opportunity and seek to attract business by offering incentives for drone testing.⁴¹ This arrangement, however, may create a dynamic in which companies and citizens of high-income countries benefit from the information learned from HUD in settings such as Nepal or

39 N. Wang, 2021b, above note 36.

40 N. Wang, 2021a, above note 36.

41 J. C. Chow, above note 5; B. Custers, above note 5.

Malawi. Conflicts may also result between governments and companies over intellectual-property rights and the sharing of benefits derived from drone testing.⁴² From this perspective, initiatives to test drones as part of humanitarian operations should assess how a wide range of short- and longer-term benefits and risks will be apportioned, and whether the conditions exist or can be created for the benefits of HUD programmes to be sustained for local communities.

Second, concerns have been raised that the drone industry may seek legitimacy through HUD and that it may facilitate expansion into new markets, driven by financial rather than humanitarian motives.⁴³ Similarly, O’Driscoll suggests that drone companies may associate themselves with humanitarian organizations as part of a public relations and marketing campaign to overcome lingering perceptions associating drones with military applications.⁴⁴ This pattern is somewhat seen in our two empirical studies, where drones are labelled by the industry as “life-saving machines” and are accepted by organizations and governments using them on that basis. A contrasting view is that a focus on drones may deflect the attention of humanitarian organizations away from underlying issues or alternative methods; if drones are envisioned as a panacea for all the problems that currently attend relief provision, various issues involved in aid delivery are likely to be ignored.⁴⁵ For instance, in our study in Malawi, concern was raised that efforts and resources devoted to drones could have been used on other approaches that might be more easily sustained, such as improving the laboratory equipment or training more health personnel. These aspects highlight the importance that, when assessing a potential drone project, consideration should be directed toward the possibility that enthusiasm for drones as a novel approach might displace potentially simpler and more effective solutions.

Third, there is a concern that the use of drones in humanitarian operations may create distance between humanitarian responders and the populations they seek to assist, turning humanitarian responses into a form of virtual reality and eventually diminishing empathy for affected populations.⁴⁶ In addition to the psychological aspect, as reported by the participants of our interviews during our empirical studies, responsibilities of humanitarian aid providers also have liability implications, with current regulatory frameworks lagging technological developments. Consequently, those wishing to use the technology face a range of hurdles with respect to legality, coordination and safety.⁴⁷ These concerns lead to

42 J. C. Chow, above note 5; D. Soesilo *et al.*, above note 11.

43 K. Sandvik *et al.*, 2014, above note 2; K. Sandvik, K. Jacobsen and S. McDonald, 2017, above note 2; A. Donini and D. Maxwell, above note 18.

44 Dylan O’Driscoll, *UAVs in Humanitarian Relief and Wider Development Contexts*, K4D Helpdesk Report, UK Institute of Development Studies, 14 August 2017, available at: <https://www.gov.uk/research-for-development-outputs/uavs-in-humanitarian-relief-and-wider-development-contexts>.

45 K. Sandvik, above note 20; D. O’Driscoll, *ibid.*

46 K. Sandvik *et al.*, 2014, above note 2; N. Raymond, B. Card and Z. Al Achkar, above note 18.

47 Bruno Martins, Chantal Lavallée and Andrea Silkoset, “Drones in Times of Pandemic: Caution Behind the Hype”, *Global Policy Blog*, 11 April 2020, available at: <https://www.globalpolicyjournal.com/blog/22/04/2020/drones-times-pandemic-caution-behind-hype>.

questions related to best use of limited humanitarian resources, and whether humanitarian organizations are sufficiently well positioned to manage the development, operation and procurement of drones.⁴⁸

Review of existing guidance documents

The next step of our framework development process involved the review of key guidance documents relevant to the range of ethical concerns that need to be addressed in relation to HUD. Guided by this rationale, we selected documents that were at the intersection of our three core concerns: (1) relating to drones; (2) applied to humanitarian and development uses; and (3) discussing ethical considerations. This review of existing guidance documents was not exhaustive in nature, but rather intended to provide a general sense of what was currently available on this topic. In what follows, six of the most recent and widely known guidance documents are presented as examples to illustrate the current state of guidance relevant to ethics and HUD. These documents were produced by leading IOs, as well as academics working on the topic. The review includes two documents produced by IOs, two documents jointly produced by IOs and academics, and two pieces of academic work. [Table 3](#) offers an overview and comparison of the selected documents.

Existing frameworks, guidance and tools⁴⁹

*World Bank Group: Guidance Note: Managing the Risks of Unmanned Aircraft Operations in Development Projects (2017)*⁵⁰

The World Bank Group (WBG) Guidance Note provides an overview of the rapid emergence and possible uses of unmanned aircraft systems (UASs). It discusses potential risks, as well as operational and regulatory considerations, that need to be taken into account while planning and executing UAS operations. It also includes recommendations for how to apply UAS technologies within WBG operations and related client activities. The overall focus of the Note is on risk management. According to the WBG, its duty of care extends beyond operational safety and includes protection for people and the environment, data protection and cybersecurity, as well as to the reputation of the organization. It suggests that the risk-management process should cover all activities to reduce the possibility of both cultural and systemic failings resulting in a catastrophic event. Such a process includes three steps: hazard identification around key risk factors, risk

48 K. Sandvik and K. Lohne, above note 18.

49 In this section, we kept the original terminologies referring to “drones” that are used in the respective guidance documents. The various terminologies used in these documents, as well as the technical definitions that may apply to them, is a reflection of the current state of un-unification of this technology, which is a challenge of its own.

50 WBG, above note 25.

Table 3. Overview of selected guidance documents relevant to humanitarian use of drones

Nature of document	Date	Name of document	Author and affiliation	Focus of document	Principles introduced	Guidance proposed	Practical tools recommended
IO governance document	2017	WBG Guidance Note	WBG	Operational risk management	Not applicable	<ul style="list-style-type: none"> Considerations for UAS operators 	<ul style="list-style-type: none"> WBG UAS Operational Checklist Form (Annex C)
	2020	ICAO U-AID Guidance	ICAO	Operational risks in emergency response	Not applicable	<ul style="list-style-type: none"> Dangerous goods management Safety risk management 	<ul style="list-style-type: none"> Examples of Dangerous Goods that May Be Necessary for Humanitarian Aid or Emergency Response (Appendix 2) Elements that Should Be Included in a UA Operator's Policy and Procedures Manual for the Safe Transport of Dangerous Goods (Appendix 3) Elements to Consider as Part of the UA Operator's Safety Risk Management Procedures (Appendix 4)

Continued

Table 3. Continued

Nature of document	Date	Name of document	Author and affiliation	Focus of document	Principles introduced	Guidance proposed	Practical tools recommended
IO and academia joint guidance document	2020	ICRC/BPH Data Protection Handbook	ICRC and BPH	Data protection	<ul style="list-style-type: none"> Fairness and lawfulness Purpose limitation Proportionality Data minimization Data quality 	<ul style="list-style-type: none"> Basic data protection principles Specific types of technologies and data processing situations 	<ul style="list-style-type: none"> Template Data Protection Impact Assessments Report (Appendix I)
	2021	UAViators/HHI Humanitarian UAV Code of Conduct and Guidelines	UAViators and HHI	Principles, obligations, and standards	<ul style="list-style-type: none"> Humanitarian principles 	<ul style="list-style-type: none"> Operating principles Humanitarian obligations 	<ul style="list-style-type: none"> Sixteen operating principles to support the safe, effective and ethical delivery of humanitarian assistance in emergencies (Code) Four obligations for humanitarian teams to observe humanitarian principles in practice, as well as UAV-specific objectives and requirements that shape the engagement (Guidelines)

Continued

Table 3. Continued

Nature of document	Date	Name of document	Author and affiliation	Focus of document	Principles introduced	Guidance proposed	Practical tools recommended
Academic analyses	2019	Drones in Humanitarian Contexts, Robot Ethics, and the Human-Robot Interaction	TU Delft/van Wynsberghe and Comes	Analytical approach	<ul style="list-style-type: none"> Humanitarian ethics principles (humanity, impartiality, and neutrality, and independence) Robot ethics principles 	<ul style="list-style-type: none"> Integrating robot ethics into the humanitarian ethics framework as an approach for nuanced and fine-grained ethical evaluations of HUD 	Not applicable
	2020	An Ethical Framework for the Design, Development, Implementation, and Assessment of Drones Used in Public Healthcare	SDU and TU Delft/ Cawthorne and van Wynsberghe	Analytical approach and ethical framework	<ul style="list-style-type: none"> Bioethics principles (beneficence, non-maleficence, autonomy, and justice) Artificial intelligence ethics principle (explicitability) VSD principles 	<ul style="list-style-type: none"> Integrating contextually relevant values that can be operationalized in the design, development, implementation, and assessment of drones used in the public healthcare context 	Not applicable

calculation with respect to probability and severity, and practical technical solutions to address the identified risks. It concludes by calling for a closer exploration of UAS uses for WBG operations, and of the risk factors and associated considerations.

*International Civil Aviation Organization: Unmanned Aircraft Systems (UAS) for Humanitarian Aid and Emergency (2020)*⁵¹

The International Civil Aviation Organization (ICAO) refers to humanitarian aid and emergency response operations collectively as “U-AID”. The U-AID Guidance consists of four main sections: general regulatory framework, operational overview, risks and responsibilities about dangerous goods, as well as safety risk assessment, responsibility and mitigation. It is a resource for Member States to enable humanitarian aid and emergency response operations using UASs, and to enable an expedited review process for urgent operations. The Guidance supports civil aviation authorities in their review of requests for UAS operational authorizations in response to humanitarian emergencies, regardless of the status of their UAS regulations. Regarding the operational requirements, the ICAO distinguishes missions undertaken in response to a catastrophic event from missions for purposes of routine humanitarian cargo delivery, and makes recommendations for permissions and authorizations.

As regards dangerous goods, the ICAO developed international Standards and Recommended Practices that govern their safe transport on civil aircraft. The Guidance applies to circumstances when a State has determined that the use of UASs to transport dangerous goods for humanitarian aid and emergency response is appropriate. When granting an operator approval for carriage of such goods, the State of the operator must ensure that the operator establishes standard operating procedures for their safe transport on board or attached to the UAS. The Guidance recommends steps regarding the safety risk assessment process, and provides risk mitigation strategy examples, including several methods for operational risk assessment.

*International Committee of the Red Cross and The Brussels Privacy Hub: Handbook on Data Protection in Humanitarian Action (2020)*⁵²

The Handbook on Data Protection in Humanitarian Action is a joint publication of the Data Protection Office of the ICRC and the Brussels Privacy Hub (BPH), an academic research centre of the Vrije Universiteit Brussel (Free University of Brussels). It aims to further the discussion launched by the Resolution on Privacy and International Humanitarian Action adopted by the International Conference of Data Protection and Privacy Commissioners in Amsterdam in 2015. The objectives are to explore the relationship between data protection laws and humanitarian action, understand the impact of new technologies on data

51 ICAO, above note 25.

52 ICRC, above note 25.

protection in the humanitarian sector, and formulate appropriate guidance. The target audience includes humanitarian organizations involved in processing personal data for humanitarian operations, as well as other parties involved in humanitarian action or data protection.

The Handbook has two main parts: Part I applies generally to all types of personal data processing, including a detailed description of five basic data protection principles, namely, the principle of fineness and lawfulness of processing, the purpose limitation principle, the proportionality principle, the principle of data minimization and the principle of data quality, alongside the legal basis of personal data protection and sharing, as well as data protection impact assessments. Part II deals with specific types of technologies, including drones, as well as data processing situations, each with a discussion of data protection issues. It notes that information technologies embedded in drones or connected to them can perform various data processing activities and operations, e.g. data collection, recording, organization, storage and combination of collected data sets. Depending on the quality of the data, it may be possible to identify individuals directly or indirectly, either by a human operator or automatically. Even when identification of individuals is not possible via the use of drones, their use may still have substantial implications for the life, liberty and dignity of individuals and communities. Thus, the Handbook recommends humanitarian organizations to process personal data collected by drones using one or more of the following legal bases: the vital interest of the data subject or of another person, the public interest, in particular stemming from an organization's mandate under national or international law, consent, a legitimate interest of the organization, the performance of a contract and compliance with a legal obligation.

*Humanitarian UAV Network and The Harvard Humanitarian Initiative: Humanitarian UAV Code of Conduct & Guidelines (2021)*⁵³

The Humanitarian UAV Network (UAViators)/Harvard Humanitarian Initiative (HHI) Code of Conduct and its supporting Guidelines presents a set of principles, obligations and standards to guide the use of unmanned aerial vehicles (UAVs) during humanitarian emergencies. The Code and the Guidelines are two related but separate documents. The former was created by the UAViators practitioner community, and is a standalone document and briefly describes sixteen operating principles, with the aim to guide all actors involved in the use of UAVs to support the safe, effective and ethical delivery of humanitarian assistance in emergencies; the latter outlines how humanitarian teams can respect these humanitarian principles *vis-à-vis* four obligations: engaging communities, upholding data protection standards, forming ethical partnerships, and engaging responsibly in conflict-affected environments. The latest revisions of the Guidelines were made by the Signal Program on Human Security and Technology at the HHI in late 2020. The Guidelines are recommended to be used

53 HHI, above note 25.

either by governmental or private sector actors to support alignment of practices, legal obligations and partnership terms with those of humanitarian actors; or by humanitarian and development donors to help ensure that their data and practice requirements can utilize UAV-assisted remote sensing without compromising core principles and obligations.

*Technical University of Delft: Drones in Humanitarian Contexts, Robot Ethics, and the Human–Robot Interaction (2019)*⁵⁴

The Technical University of Delft (TU Delft) paper aims to provide a nuanced analysis to the question of “should” we use drones in humanitarian contexts. The authors suggest that the strength of the humanitarian principles approach to answer questions of aid provision can be complemented by a technology-facing approach, namely that of robot ethics. In the paper, they review the principles of humanitarian ethics and robot ethics, and raise concerns about how they connect to HUD on two levels: (1) for humanitarian workers: the loss of contextual understanding culminating in the de-skilling of workers; and (2) for people living in communities affected by crisis: a threat to the principle of humanity by reducing human–human interactions, and a threat to dignity both through a lack of informational transparency and by failing to account for the physiological and behavioural impacts of drones. They then examine the ethical frameworks available for an evaluation of HUD, and point out that existing work in this area is missing a focus on the shift in how humanitarian care is provided as a result of the robot’s introduction. The authors explore two opposing themes in the humanitarian space, namely, respect for the humanitarian principles, and the “technologizing” of care. They finally propose to integrate robot ethics, with a focus on the ethical issues stemming from human–robot interactions, into the humanitarian framework as an approach for the ethical evaluation of introducing new robots into the humanitarian space.

*University of Southern Denmark and Technical University of Delft: An Ethical Framework for the Design, Development, Implementation, and Assessment of Drones Used in Public Healthcare (2020)*⁵⁵

The University of Southern Denmark (SDU)/TU Delft paper aims to bring the various ethical frameworks around care ethics and robot ethics into the design of public healthcare drones, in a way that supports the engineers and designers creating them, and that ensures the timely reflection of ethical issues prior to their use. The authors advocate for a proactive ethical approach to guide the R&D of drones used in public health. They propose a framework for ethical

54 A. van Wynsberghe and T. Comes, above note 6.

55 Dylan Cawthorne and Aimee Robbins van Wynsberghe, “An Ethical Framework for the Design, Development, Implementation, and Assessment of Drones Used in Public Healthcare”, *Science and Engineering Ethics*, Vol. 26, No. 3, 2020.

evaluations and guidance by: (1) using bioethics principles as the foundation, namely, beneficence, non-maleficence, autonomy and justice; and (2) adding a fifth ethical principle derived from artificial intelligence ethics, namely, explicability. Guided by the value sensitive design (VSD) approach,⁵⁶ the framework was built upon the notion of a values hierarchy consisting of four levels: ethical principle, values, norms and design requirements. The main discussion of the paper revolves around a detailed description of the upper two levels of the values hierarchy, followed by an illustrative deliberation on how practitioners can translate these into contextual norms and design requirements to construct an ethically informed design process. The authors note that although the framework is developed as an applied ethics tool to facilitate the consideration of ethics and human values in technology design, it is meant as a starting point for ethical reflection in technology development and should be used in conjunction with other bottom-up methods, such as gathering stakeholder input and conducting field studies.

Comparative analysis

As illustrated above, there has been activity by both IOs and the academic community to develop guidance for HUD on a range of topics related to ethics. Amongst these documents, we notice different approaches. The documents produced by academics mainly advance principle-based approaches, whereas the IO governance documents are typically based on detailed and checklist-type instructions for flight operations and the like. Joint guidance documents are more comprehensive with respect to their approach (from principle-based to concrete guidance), yet they tend to focus on particular domains of applications, such as data protection or airspace safety management.

A closer examination of the content of the selected documents through the lens of the areas of concern identified in our scoping literature review reveals the following: regulation and governance issues are well covered in the documents provided by IOs, but not addressed within the academic analyses. While ethical

56 The VSD approach was first developed in the field of human–computer interaction in the early 1990s in the USA, and has since been used in information management, human–robotic interaction, computer security, civil engineering, applied philosophy, and land use and transportation. According to Friedman *et al.* (2002), VSD is a theoretically grounded approach to the design of technology that accounts for human values throughout the design process in a principled and comprehensive manner. The philosophical foundation of VSD holds that technology is the result of human imagination – humans envisioning alternatives to the status quo and acting upon the environment with the materials at hand to change the conditions of human and non-human life. At the same time, human values do not exist in isolation; rather, in the complexity of human relations, values sit in a delicate balance with each other (Friedman and Hendry, 2019). As a result of this human activity, technology to some degree reflects, and reciprocally affects, human values. And it is because of this deep-seated relationship that actively engaging with values in the design process not only is a responsible act, but also offers creative opportunities for technological innovation. Batya Friedman, Peter H. Kahn and Alan Borning, “Value Sensitive Design: Theory and Methods”, *UW Technical Report*, University of Washington, Seattle, WA, 2002; Batya Friedman and David G. Hendry, *Value Sensitive Design: Shaping Technology with Moral Imagination*, MIT Press, Cambridge, MA, 2019.

issues are generally covered, there does not appear to be a tool that is comprehensive in its approach to these issues. None of the tools addressed more than twenty of the twenty-seven ethical concerns identified in our scoping literature review.⁵⁷ The most obvious gaps are with respect to broader societal issues concerning, in particular, the relationship between humanitarian organizations and private industry, or the impact of drones on questions of identity and purpose for those involved in the provision of humanitarian aid. Yet, notably, these are key issues for operational decisions, i.e. whether a humanitarian organization should involve drones as a means to address concrete problems in specific contexts. Table 4 provides a comparison between the ethical concerns identified through our scoping literature review⁵⁸ and the six selected guidance documents.

The proposed ethics assessment framework

In this section, we introduce the framework that we developed following the steps presented in the preceding sections. Frameworks addressing technology ethics can help appraise as well as shape the development and acceptability of a technology as it is unfolding, rather than having to attempt to foresee all the risks beforehand.⁵⁹ We stress that the integration of fundamental humanitarian principles of humanity, neutrality, impartiality and independence, along with other ethical values such as autonomy, justice, fairness, respect, responsibility and accountability, should also be a focus of attention for people involved in HUD.

Rationale of the framework

In the area of applied ethics, guidance tools may be formulated at the level of a general area of discourse (e.g. technology ethics), or they may be specific to a particular problem (e.g. humanitarian use of drones). With respect to ethics assessment frameworks, the intent is to guide decision making and the performance of actions by supporting normative deliberation, making relevant values explicit, and offering a justified account for the answers provided to the problems at hand.⁶⁰ The utility and effectiveness of frameworks depend on their comprehensiveness and clarity, and the potential for consistent operationalization of general principles to concrete ethical issues and for decision making by specific groups of actors. Our objective of developing an ethics assessment framework for HUD was to create a tool to aid decision making for the humanitarian drone community with respect to integrating ethical values for HUD, within the broader context of value sensitive innovation, and to support reflection and deliberation around these issues.

57 N. Wang, M. Christen and M. Hunt, above note 4.

58 *Ibid.*

59 D. Cawthorne and A. R. van Wynsberghe, above note 55.

60 Caroline Clarinval and Nikola Biller-Andorno, "Challenging Operations: An Ethical Framework to Assist Humanitarian Aid Workers in their Decision-making Processes", *PLoS Currents*, Vol. 23, No. 6, 2014.

Table 4. Comparative results regarding areas of ethical concern for humanitarian use of drones

Primary level	Secondary level	Tertiary level	WBG Guidance Note	ICAO U-AID Guidance	ICRC/ BPH Data Protection Handbook	UAViators/ HHI Code of Conduct & Guidelines	TU Delft paper	SDU and TU Delft paper
Harm/benefit	Minimizing harm	Focus on physical safety and security of drone use	X	X	X	X	X	X
		Focus on environmental impacts of drone use		X			X	X
		Focus on compensating for harm		X			X	X
Justice	Maximizing welfare	Focus on specific benefits		X	X			X
		Focus on general public welfare	X	X	X		X	X
	Substantive justice	Focus on fair sharing of costs and benefits				X		X
		Focus on equitable access				X		X
		Focus on cost-effectiveness and/or opportunity costs				X		X
Respect for autonomy	Procedural justice	Focus on stakeholder accountability and compliance	X	X	X		X	
		Focus on general responsible use of drones	X	X	X		X	X
	Respect for individuals	Focus on technical aspects of information security	X	X	X			
Focus on general considerations of privacy		X	X	X			X	X
Respect for communities	Respect for communities	Focus on active community engagement	X	X	X			X

Continued

Table 4. Continued

Primary level	Secondary level	Tertiary level	WBG Guidance Note	ICAO U-AID Guidance	ICRC/ BPH Data Protection Handbook	UAViators/ HHI Code of Conduct & Guidelines	TU Delft paper	SDU and TU Delft paper
		Focus on broader forms of stakeholder engagement	X	X		X		X
Regulation and governance	Content gaps in regulation	Focus on safety regulations	X	X	X	X		X
		Focus on airspace integration regulations	X	X		X		
	Focus on data protection regulations	X	X	X	X	X		
	Procedural dysfunction	Focus on inadequate or ambiguous regulatory process	X	X	X	X		
		Focus on undefined regulatory authorities	X			X		
Broader societal impacts	Public perception	Focus on effectiveness, accountability, transparency and trust of humanitarian aid	X	X	X	X	X	X
		Focus on reputational risks	X		X	X		X
		Focus on consistency of drone use with humanitarian principles	X		X	X		X

Continued

Table 4. Continued

Primary level	Secondary level	Tertiary level	WBG Guidance Note	ICAO U-AID Guidance	ICRC/ BPH Data Protection Handbook	UAViators/ HHI Code of Conduct & Guidelines	TU Delft paper	SDU and TU Delft paper
	Relations between humanitarian organizations and drone industry	Focus on the power (im) balance between humanitarian organizations and the drone industry	X			X		
	Identity of humanitarian aid providers	Focus on “in-house capacity” v. “external service providers”					X	
		Focus on “bunkerization” and the impacts of technology on aid providers and recipients						
		Focus on “solutionism” in aid provision						
		Focus on the “turn to innovation” in the aid sector						

Our target audience in developing the framework was primarily aid organizations and practitioners in both humanitarian and development sectors. The content of the framework, including the set of questions enclosed, may also help support reflection, discussion and deliberation among other involved actors, from industry to government and communities. Echoing the growing awareness of ethics among technologists and engineers—especially among those active in advocating the VSD approach—we also hope that the framework could provide an accessible resource for technology developers and designers to further engage with ethical issues.⁶¹ In line with these goals, we sought to develop an ordered series of questions to prompt reflection and discussion at each stage of deliberation, along with clear guidance on when the framework is to be used and how it is to function.

Methodology of the framework development

Building on the previous steps, a crucial component of the framework development was consultation with a range of individuals involved in HUD, and with scholars working in areas relevant to this domain. Participants included researchers with expertise in humanitarian studies, sociology, ethics, anthropology and law, as well as practitioners from international humanitarian organizations, intergovernmental organizations and the drone industry. This consultation process involved the following five steps:

- (1) An initial draft of the framework was circulated among nineteen individuals to obtain written comments at the beginning of 2021. Their feedback was used to make refinements for cohesion, clarity and scope.
- (2) An online workshop was then held on 23–24 March 2021 with fourteen participants providing further input and discussing elements of the first draft. This feedback was taken into consideration in the next iteration of the framework development.
- (3) A second draft was then developed and subsequently sent to the same group to solicit further feedback, which was incorporated into the next iteration.
- (4) The third draft was shared with participants at a three-day hybrid-format workshop held on 1–3 June 2021. During the workshop, the framework was tested against realworld scenarios in small group simulation exercises (see the “Application of the FEAHd” section below for an example of a vignette; more details are available on the project website⁶²). The small groups reported back to the larger group and a broader discussion of the fit and alignment of the framework to respond to HUD operations took place.
- (5) Based on the feedback obtained at this workshop, including insights gained through the simulation exercises, the framework was finalized. The final version of the framework is presented in detail in the Annex, and its application to a hypothetical case study is discussed below.

61 D. Cawthorne and A. R. van Wynsberghe, above note 55.

62 Further resources about the FEAHd are presented on the project website, available at: www.ethics.dsi.uzh.ch/projects/FEAHd/.

The Framework for the Ethics Assessment of Humanitarian Drones (FEAHD) and its Application

Structure of the FEAHD

The FEAHD consists of three levels of considerations, asking different sets of questions to the potential users. [Figure 1](#) provides a visual representation of the FEAHD, which aims to give an accessible overview of the structure of the FEAHD, and is used for illustration and dissemination purposes.⁶³ On an overarching level (i.e. “normative orientation”, see [Figure 1](#)), an array of ethical values relevant to HUD are outlined to inform and orient deliberation, discussion and decision making regarding HUD. On a foundational level (i.e. “institutional foundation”, see [Figure 1](#)), resources for ethics preparedness are suggested. These two sources of guidance together provide the context for a value-based decision chain (i.e. the decision chain, see centre bar of [Figure 1](#)), beginning with whether to embark upon a drone project, and continuing on to consider how to undertake drone operations in a responsible and sustainable manner.

In particular, we propose five values on the “normative orientation” level, based on the findings of the scoping literature review, and feedback received during the consultation process. These values include: optimizing benefit and minimizing harm, safeguarding justice, respecting autonomy, adhering to regulatory and governance standards, and promoting humanitarian principles. On the “institutional foundation” level, we draw on the concept of “ethics preparedness”⁶⁴ – a notion referring to an organization’s capacity and state of readiness to support their staff, and to work collaboratively with partners and others, to respond to ethical issues. These supports may include common instruments such as statements of organizational values, codes of conduct, or policies and procedures. They could also take the form of internal organizational structures such as identifying someone with an advisory role for ethics questions or forming an ethics task force. External organizational structures may also be established, such as working with an arm’s-length ethics advisory board. These sets of resources (core values, guidance documents and institutional support structures) are different in form and focus, reflecting some key areas identified through the literature review and consultation processes. They are functionally independent from each other, but can also be used in a coordinated fashion. For instance, “safeguarding justice” could be strengthened by ensuring that justice is appropriately reflected in

63 The visual representation of the FEAHD was printed on an A6 “postcard” to support dissemination and distribution activities among humanitarian organizations and other entities involved in HUD. The “postcard” also contains a link to the project website, available at: www.ethics.dsi.uzh.ch/projects/FEAHD/.

64 Abha Saxena, Peter Horby, John Amuasi, Nic Aagaard, Johannes Köhler, Ehsan Gooshki, Emmanuelle Denis, Andreas Reis, the ALERT-WHO Workshop and Raffaella Ravinetto, “Ethics Preparedness: Facilitating Ethics Review During Outbreaks – Recommendations from an Expert Panel”, *BMC Medical Ethics*, Vol. 20, No. 29, 2019.

Framework for the Ethics Assessment of Humanitarian Drones (FEAHD)

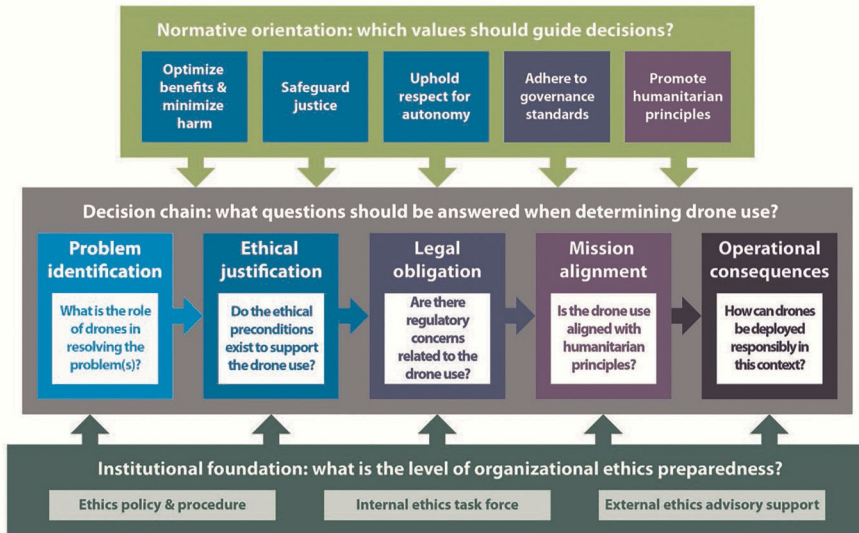


Fig. 1 - Colour online, B/W in print

Figure 1. Overview of the Framework for the Ethics Assessment of Humanitarian Drones (FEAHD).

organizational guidance documents and emphasized by those individuals or groups holding internal or external ethics advisory roles.

Application of the FEAHD

To illustrate the application of the FEAHD, we present below the simulation exercise of one of the vignettes that was undertaken by participants at the final consultation workshop we held in June 2021.⁶⁵

Vignette description

Following a destructive typhoon, organization Y intends to support disaster response activities in the particularly hard-hit city T, in cooperation with non-governmental organizations, including a search and rescue team and a country office of a humanitarian organization, and in collaboration with the United Nations Disaster Assessment and Coordination (UNDAC) teams.

A quad-copter drone is anticipated to be used. The drone has two cameras (one with high-definition colour and one with thermal bands) which would allow live, on-screen observation of the area captured by the camera. It can fly as far as

⁶⁵ In the development of the vignettes, we took inspiration from real-world humanitarian actions referenced by D. Soesilo *et al.*, above note 11.

2 km from its controller, and has a maximum flight time of 25 minutes. In particular, Y intends to conduct a number of missions in and around city T, and provide an aerial view of roadways, damaged buildings and to gather other real-time information about the typhoon's impacts.

One such mission includes flying over a hospital that has reportedly been damaged by the storm. Roadways to reach the hospital are blocked, and there is concern for the safety of team members if they were to travel by road to assess the state of the building. The deployment of the quad-copter drone will provide aerial imagery of the hospital, allow the team to assess the damage from the air, and provide accurate information on the needs for repairs and materials.

There is uncertainty about the authorization process for this operation. It is possible that by the time the drone flights are authorized by the national aviation and other regulatory authorities, the roads will have already been cleared and the major search and rescue work already completed.

Framework Application

1. With respect to “normative orientation”, two values are particularly relevant to this case: optimizing benefits, and adhering to governance standards.
2. Regarding “institutional foundation”, different approaches may apply. For instance, if relevant ethics policies and procedures are in place, then they should be complied with straightforwardly. It could also be possible that guidelines for use cases (such as infrastructure assessment through drones) with some similarities to the actual case are available that could serve as a template to facilitate the authorization process. Additionally, the team should have clarity about who they could contact (e.g. internal ethics advisor or external support) to request input if required.
3. In relation to the decision chain, the following steps may be applicable:
 - (1) Problem identification:
 - The primary use of drones is to guide the search and rescue teams
 - Secondary use of drone data for infrastructure repair could be possible
 - (2) Ethical justification:
 - The use of drones may affect aid supply allocation
 - The drones may detect other people in need (distress) during flight, possibly creating dilemmas of who (and how) to help first
 - The images captured by the drones may contain data about affected populations, touching upon the issue of data handling, especially regarding sensitive data
 - Limited scope for consultation or engagement with communities due to the emergency may create unexpected tension between humanitarian organizations and involved communities
 - (3) Legal obligation: identify potential challenges due to timing of approval procedures

- (4) Mission alignment: clarify what to do with the information that is collected, including if people in distress are identified
- (5) Operational consequences: define communication and plans for how to proceed when approval is received or if it is delayed, including contingency plans.

Additional guidance

Further details are provided in the Annex and on the project website,⁶⁶ including example questions linked to the different components of the framework. These additional questions are intended to provide further lines of reflection and discussion for users of the framework who wish to look more closely at particular dimensions of the framework (for example, when a team is considering the topic of regulation, they could pull up the linked questions in order to look at this element in greater detail). It is not intended that users of the framework respond to every question, but that they draw on the bank of questions as a resource to support value sensitivity for their respective HUD activities.

Conclusion

Given the growing interest in drone deployment in the humanitarian sector, and a more favourable regulatory environment in adopting drones in the civilian context in recent years, the ethical implications of HUD and governance guidance addressing them have received increasing attention. This trend indicates a heightened awareness of ethics among scholars and practitioners, echoing the debate about the rise of the “good drones” in the aid sector. Our research sits at the intersection of three domains: applied ethics, humanitarian studies, and science and technology studies. We drew on the findings of existing research to bring together insights from the theoretical and the experiential and to inform the development of an ethics assessment framework that is empirically informed and responsive to stakeholders’ expressed interests. Those interests range from strengthening public health outcomes, to managing airspace regulations and promoting community wellbeing, as well as their real-world needs – encompassing economic, political, commercial and reputational concerns.⁶⁷

Like many other contemporary frameworks,⁶⁸ the FEADH is a multi-level instrument, with components ranging from general values, to key questions guiding relevant ethical decisions, to resources for institutional preparedness. In its decision chain, it guides the user through a sequence of key questions in relation to problem identification, ethical justification, legal obligation, mission alignment and

66 See above note 62.

67 N. Wang, 2019, 2020, above note 31; N. Wang, 2021a, 2021b, above note 36; N. Wang, M. Christen and M. Hunt, 2021, above note 4.

68 European Commission, *Ethics Guidelines for Trustworthy AI*, Brussels, 8 April 2019, available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>.

operational consequences, and operationalizes the areas of inquiry with questions to guide reflection and deliberation. The empirically informed and consultative process of developing the framework enabled us to draw on a range of sources of insight and knowledge on this topic, and also to identify perceptions and key areas of concern for individuals involved in, or affected by, HUD.

By integrating considerations related to normative values, institutional preparedness, and key questions to ask across the decision chain related to the implementation of a drone project, the framework makes a distinctive contribution relative to other resources currently available in this area. One generic limitation of the framework is that it will likely become outdated with future technological and policy developments. Relatedly, its practical use with respect to variations across use cases might reveal some ambiguities or considerations of alignment that need to be remedied in future versions. The FEADH is, thus, conceived as a “living document” that needs ongoing revision to be responsive to additional challenges, refinements, and learning as HUD continues to evolve in humanitarian action and development programmes.

As feedback is received related to the use of the FEADH, we believe that the development of additional explanatory or supporting material would be beneficial. Importantly, the document is primarily focused on humanitarian organizations and practitioners, and this is the group (along with academic researchers) who were most involved in consultations around the framework development. We sought to access other perspectives through the two empirical studies in Nepal and Malawi, but additional aspects of this topic are likely to be uncovered through engagement with additional stakeholder groups as HUD activities continue to emerge.

We hope that the FEADH also provides a starting point for further reflection and discussion among stakeholders to engage with ethics and to support value sensitive innovation in humanitarian and development settings—for example, by providing insights for a methodological approach and structure to develop ethics resources for different domains of innovation. At the same time, our intention is that the FEADH will continue to be refined through insights from additional perspectives and contexts, and be enriched through the experiences of teams or individuals engaged with HUD and beyond. Ultimately, our objective is to encourage reflection, discussion and deliberation about how values can be taken into account at all stages of considering and using drones in humanitarian settings, along with attention to structured approaches to ethics support.

Annex: Framework for the Ethics Assessment of Humanitarian Drones (FEADH)⁶⁹

In the sections that follow, we provide additional questions and components with the goal of supporting teams using the FEADH to drill down and consider

⁶⁹ The framework presented herewith in the Annex is a condensed version of the FEADH. Further resources about the FEADH and its applications are presented on the project website, above note 62.

further aspects of a particular topic across the decision chain, or an aspect of ethics preparedness. It is not intended that users of the framework consider all of these questions, but rather that they use them as they dial in or dial out their attention between the broader structure of the FEAHD, and looking more closely at a particular aspect, all with the goal of supporting attention to values across the different stages of HUD activities. For an overview of the framework, see [Figure 1](#).

I. Normative orientation: Which values should guide decisions?

Deciding whether and how to embark on a drone project in the aid sector will benefit from attention to how values can be linked to practices through a clear normative orientation. As a starting place for reflection about the humanitarian use of drones, the FEAHD proposes five value orientations based on a review of the literature on ethical issues related to humanitarian drone use, and a series of expert consultations.⁷⁰ These values include the following:

- Optimize benefits, minimize harm
- Safeguard justice
- Uphold respect for autonomy
- Adhere to governance standards
- Promote humanitarian principles

II. Decision chain: What questions should be answered when determining drone use?

The decision chain proposes a sequence of key questions that should be asked and answered in making the strategic decision regarding whether and how to use drones in a specified context, and in relation to the five principles noted above. Additional questions are presented below which are linked to each of the main steps of the decision chain. This bank of additional questions is intended to support further lines of reflection for those seeking to delve deeper into a specific component of the decision chain.

- Problem identification: What is the role of drones in resolving the problem(s)?
 - *What is the problem?*
 - *What is the context of the proposed drone use?*
 - *Who are the key stakeholders?*
- Ethical justification: Do the ethical preconditions exist to support drone use in this context?
 - *What are the potential harms and benefits?*
 - *How can justice be safeguarded?*
 - *How can respect be demonstrated?*

⁷⁰ [Table 4](#) in the main text provides a detailed account of how these value orientations are contextualized with respect to HUD.

- Legal obligation: Are there regulatory concerns related to the drone use?
- Mission alignment: Is the drone use aligned with humanitarian principles?
- Operational consequences: How should drones be deployed responsibly in this context?
 - *What is the level of involvement and related responsibilities regarding the management of the proposed drone operations?*
 - *What are the technical conditions required to manage the proposed drone operation(s)?*
 - *Will pilot study be conducted prior to the operation(s)?*
 - *How will operation(s) be conducted?*
 - *Will a final evaluation be conducted after the operations?*

III. Institutional foundation: What is the level of organizational ethics preparedness?

Ethics preparedness concerns the structures and processes in place to support an organization's ability for handling ethical issues. A range of resources may contribute to ethics preparedness including policies or guidelines, internal organizational structures such as ethics task forces, or external organizational structures such as ethics advisory boards.

- Ethics policy and procedure: What policies and procedures exist or are needed in your organization to support ethics preparedness?
- Internal ethics task force: Is it feasible to establish a dedicated ethics support structure within your organization?
- External ethics advisory support: What are the possibilities for external ethics advisory support?

A new understanding of disability in international humanitarian law: Reinterpretation of Article 30 of Geneva Convention III

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Abstract

This paper examines whether the interpretation of Article 30 of Geneva Convention III that allows the use of solitary confinement for prisoners of war with psychosocial disabilities is still valid in light of the new standards of the Convention on the Rights of Persons with Disabilities. It proposes two alternative interpretations of Article 30 to demonstrate why isolation based on disability is unlawful and concludes that the use of solitary confinement on prisoners of war with psychosocial disabilities should be prohibited.

Keywords: solitary confinement, persons deprived of liberty, persons with psychosocial disabilities, inhuman and degrading treatment, torture.

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Introduction

Solitary confinement is the physical and social isolation of persons who are confined to their cells for 22–24 hours a day.¹ It is an ancient practice that has become part of the world's prison systems.² This measure was used in the Auburn and Pennsylvania prison models as a means of rehabilitation through isolation.³ Nowadays it is applied in a range of different settings, including prisons, prisoner of war (PoW) camps and psychiatric hospitals.

This paper analyzes the use of solitary confinement for PoWs with psychosocial disabilities in international armed conflict (IAC) by examining the normative development and approaches to the rights of persons with disabilities in international law throughout history and up to the Convention on the Rights of Persons with Disabilities (CRPD), which defines persons with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.⁴ In particular, the paper looks at how the 1949 Geneva Conventions fit into the normative development of international law and the international landscape at the time the Conventions were written.

- 1 *Istanbul Declaration on the Use and Effects of Solitary Confinement*, 9 December 2007 (Istanbul Declaration).
- 2 Solitary confinement has been used by CIA: see George Tenet, “Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001”, *The Torture Database*, American Civil Liberties Union (ACLU), 16 August 2021, available at: <https://tinyurl.com/hyhf3jjh> (all internet references were accessed in March 2022). It has also been used by the KGB: see Lawrence E. Hinkle and Harold George Wolff, “Communist Interrogation and Indoctrination of ‘Enemies of the States’: Analysis of Methods Used by the Communist State Police (a Special Report)”, *AMA Archives of Neurology and Psychiatry*, Vol.33, No. 9, 1956. Solitary confinement has also been used in various countries: see Peru, Decree Law No. 25475, Art. 20 (this rule was in force until the approval of Supreme Decree No. 005-97-JUS, 24 June 1997); Pakistan Penal Code, Act XLV, 1860, Art. 73, available at: www.wipo.int/wipolex/es/text.jsp?file_id=315426; Law of Penal Execution of the Federative Republic of Brazil, Arts 53, 58, in *Penitentiary and Penal Enforcement Legislation in Comparative Law*, May 2005, available at: www.pj.gov.py/ebook/libros_files/coleccion_de_derecho_penitenciario_4.pdf; German Law on the Execution of Custodial Sentences and Custodial Measures for Improvement and Security, Art. 89, in *Penitentiary and Penal Enforcement Legislation in Comparative Law*, May 2005, available at: http://www.pj.gov.py/ebook/libros_files/coleccion_de_derecho_penitenciario_4.pdf; Penal Code of Austria, Art. 103(2)(4), in Weil, Gotshal and Manges, *Seeing into Solitary: A Review of the Laws and Policies of Certain Nations regarding Solitary Confinement of Detainees*, Weil, New York, 2016, p. 24; *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/64/215, 3 August 2009, para. 53.
- 3 See Norval Morris and David Rotham (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society*, Oxford University Press, Oxford, 1998; Peter Scharff, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature”, *Crime and Justice*, Vol. 34, No. 1, 2006, p. 441; Peter Scharff, “Solitary Confinement: History, Practice, and Human Rights Standards”, *Prison Service Journal*, No. 181, 2009, p. 3. See also Michael Foucault, *Discipline and Punish: The Birth of the Prison*, Vintage Books, New York, 1995; Mark Colvin, *Penitentiaries, Reformatories, and Chain Gangs: Social Theory and the History of Punishment in Nineteenth-Century America*, St. Martin Press, New York, 1997; Peter Scharff, “A Religious Technology of the Self: Rationality and Religion in the Rise of the Modern Penitentiary”, *Punishment and Society*, Vol. 6, No. 2, 2004.
- 4 Convention on the Rights of Persons with Disabilities, UNGA Res. 61/106, 30 March 2007 (entered into force 3 May 2008), Art. 1.

The paper will analyze the terminology of and different approaches to disability and persons with disabilities in the instruments of international humanitarian law (IHL), in particular the Geneva Conventions. This will help to establish how disability was viewed at the time of the adoption of the treaties, which will in turn allow the paper to propose a new understanding of disability that will be essential to reinterpreting Article 30 of Geneva Convention III (GC III).

The paper will then examine whether the interpretation of the first paragraph of Article 30 of GC III that allows the use of solitary confinement⁵ for PoWs with mental or psychosocial disabilities⁶ is valid in light of the standards of the CRPD. Based on the medical model of disability, Article 30 of GC III was intended as a protective measure for third parties. However, since the emergence of the social and rights models of disability and the standards of the CRPD, the medical model and its interpretation are deemed outdated, as they are not responsive to or compliant with modern human rights standards.

Nonetheless, this need not necessarily imply that Article 30 should be deleted. On the contrary, this paper proposes that the provision should remain the same, but should be subject to reinterpretation and updating of the norm in accordance with the new *corpus juris* of persons with disabilities and the protected values of the humanitarian norm, the *pro persona* principle, the criterion of terminological coherence, and Article common 3 to the four Geneva Conventions.⁷

The evolution of disability in international law and its understanding in international humanitarian law

The history of treatment of persons with disabilities in international law

This section discusses how persons with disabilities were portrayed throughout history within the framework of the United Nations (UN). In 1971, the UN adopted the Declaration on the Rights of Mentally Retarded Persons, the first UN

5 At the level of conventional sources of international law, there is no universal definition of solitary confinement. On the other hand, soft-law instruments (declarations, resolutions and principles) have developed a wide legal framework on the use of solitary confinement. Thus, in the Istanbul Declaration, above note 1, solitary confinement is defined as the physical and social isolation of persons who remain confined to their cells for 22–24 hours a day. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment shares the definition of the Istanbul Declaration in the *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/63/175, 28 July 2008, para. 77; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/66/268, 5 August 2011, para 25; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/HRC/22/53, 11 February 2013. The present paper will follow the definition outlined in the Istanbul Declaration.

6 This paper recognizes the definition of person with a psychosocial or mental disability according to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5); however, the paper will cover the legal angle of persons with psychosocial disabilities and not the mental health angle.

7 These concepts will be explained in later sections.

document to recognize the rights of persons with disabilities in the field of international human rights protection.⁸ While this document recognizes that persons with disabilities—at that time referred to as “mentally retarded persons”—should enjoy the same rights as other human beings, it represents a medical model of disability.⁹

Later, in 1975, the UN General Assembly adopted the Declaration on the Rights of Disabled Persons,¹⁰ in which persons with disabilities were referred as “the disabled”. This document recognizes several rights, such as the right of persons with disabilities to live with their families and not to be subjected to differential treatment.¹¹ These rights are intended to develop the skills of persons with disabilities to the maximum extent possible and to hasten the processes of their social integration or reintegration.¹²

In 1991, the General Assembly adopted the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles),¹³ which provided standards for treatment, living conditions within psychiatric institutions and protections against arbitrary detention in such facilities. It also established the basis for reports on the treatment of persons with disabilities and the conditions to which they are subjected in institutions.

Following the adoption of the MI Principles, the UN convened the World Conference on Human Rights in Vienna.¹⁴ At this conference, the UN promoted equal opportunities for persons with disabilities by encouraging the removal of all socially determined barriers, whether physical, economic, social or psychological, which prevented or restricted their full participation in society.¹⁵

To summarize, the Declaration on the Rights of Persons with Mental Retardation, the Declaration on the Rights of Persons with Disabilities, the MI Principles, and the Vienna Declaration Standard Rules highlight the UN’s commitment to protecting the rights of persons with disabilities in the decades prior to the drafting and entry into force of the CRPD. Although non-binding, these documents represent an attempt to set legal standards for the protection of persons with disabilities. In addition to adopting such disability-specific instruments, various UN bodies have issued interpretations of the general human rights treaties to explain how they can be applied to persons with disabilities.¹⁶

8 *Declaration of the Rights of Mentally Retarded Persons*, UN Doc. A/8429, 21 September–22 December 1971, p. 93.

9 *Ibid.*, preambular para. 1.

10 *Declaration on the Rights of Disabled Persons*, UNGA Res. 3447 (XXX), 9 December 1975.

11 *Ibid.*, Art. 9.

12 *Ibid.*, Art. 6. This article emphasizes the medical model of disability.

13 *Principles for the Protection of the Mentally Ill and the Improvement of Mental Health Care*, UN Doc. 46/119, 17 December 1991.

14 World Conference on Human Rights, Vienna, 14–25 June 1993. The conference produced the Vienna Declaration.

15 Standard Norm 64 of the Vienna Declaration. See also Regulations 63 and 65 concerning the rights of persons with disabilities.

16 See, for example, Committee on Economic, Social and Cultural Rights, “General Comment No. 5 (Persons with Disabilities)”, UN. Doc. E/C.12/1994/13, 25 November 1994.

In addition, in the six decades following the establishment of the UN, States adopted several core human rights treaties. These included the International Covenant on Civil and Political Rights (ICCPR),¹⁷ the International Covenant on Economic, Social and Cultural Rights,¹⁸ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²⁰ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²¹ the Convention on the Rights of the Child (CRC),²² the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,²³ and the International Convention for the Protection of All Persons from Enforced Disappearance.²⁴ Each of these treaties has some bearing, of course, on the rights of persons with disabilities as well.

Prior to the CRPD, however, almost none of these human rights treaties recognized persons with disabilities as a group needing specific legal protection. The exception was the CRC, which addressed children and parents with disabilities in its Articles 2 and 23, but did not specifically recognize the right of children with disabilities to be treated on equal terms with children with no disabilities. Although the rest of the core human rights treaties made no mention of disability, the principle of non-discrimination is contained in some of them.²⁵

In 2002, the UN General Assembly established an *ad hoc* committee to draft the CRPD, which was adopted on 13 December 2006. This document was the first instrument on the rights of persons with disabilities to be signed by UN member States, and remains the main such instrument in use today.

The evolution of models of disability

Throughout the development of the rights of persons with disabilities in international law, we have seen an evolution of disability models. First, disability was treated through the “dispensation model”, which understands disability as a

17 International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), 16 December 1966 (entered into force 23 March 1976).

18 International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A (XXI), 16 December 1966 (entered into force 3 January 1976).

19 International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2106A (XX), 21 December 1965 (entered into force 4 January 1969).

20 Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. 34/180, 18 December 1979 (entered into force 3 September 1981).

21 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. 39/46, 10 December 1984 (entered into force 26 June 1987) (CAT).

22 Convention on the Rights of the Child, UN Doc. 44/25, 20 November 1989 (entered into force 2 September 1990).

23 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Doc. 45/158, 18 December 1990 (entered into force 1 July 2003).

24 International Convention for the Protection of all Persons from Enforced Disappearance, UN Doc. A/61/53, 29 June 2006 (entered into force 23 December 2010). Additionally, the International Labour Organization established its own treaty regarding persons with disabilities: Vocational Rehabilitation and Employment (Disabled Persons) Convention, No. 159, 20 June 1983 (entered into force 20 June 1985).

25 Alerne Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights*, Routledge, New York, 2015, p. 24.

burden to the community that must therefore be dispensed with.²⁶ The second iteration saw the “medical model”, which regards disability as a physical, mental, intellectual or sensory limitation that can and must be healed or repaired.²⁷ The medical approach to disability is based on the premise that “disability is considered exclusively a problem of the person, produced by an illness, accident or health condition that requires medical care provided by professionals in the form of individual treatment”.²⁸ According to Agustina Palacios, this approach dates back to the beginning of the twentieth century, specifically the end of the First World War. It persists to the present day, but its use is not recommended since the emergence of the social model in the last decades of the twentieth century.²⁹

Finally, the modern approach is the “social model”, which posits that disability is the result of the interaction between functional diversities and social barriers. This model is based on the intrinsic values underlying human rights – i.e., dignity, autonomy, equality and solidarity.³⁰

The medical and dispensation models had repercussions throughout the mid-twentieth century. This can be seen in the purpose of Article 30 of GC III, which states that the use of solitary confinement serves to protect PoWs with mental disabilities. Another example is Article 5(1)(e) of the 1950 European Convention on Human Rights, which allows the detention of a person who is “insane or of unsound mind”. Both instruments share the idea that excluding persons with mental disabilities is part of their protection.

The aforementioned normative interpretations concerning disabilities have changed over time. In the late 1980s, traditionally dehumanizing approaches were increasingly challenged, and international measures aimed at the equal treatment of persons with disabilities resulted in the identification and removal of external barriers involved in the social or legal exclusion of such persons.³¹ The *travaux préparatoires* of the CRPD suggested the need for a treaty on the rights of persons with disabilities to improve their protection and treatment.³² This implied revising the basis of the medical and dispensation models whose approaches constituted the scope of protection prior to the CRPD.³³ The CRPD

26 Agustina Palacios, “El modelo social de la discapacidad”, in Elizabeth Salmón and Renata Bregaglio (eds), *Nueve conceptos claves para entender la Convención sobre los Derechos de las Personas con Discapacidad*, IDEHPUCP, Lima, 2015, pp. 10–12.

27 Agustina Palacios, *El modelo social de discapacidad: Orígenes, caracterización y plasmación en la Convención Internacional sobre los Derechos de las Personas con Discapacidad*, Cinca, Madrid, 2008, p. 97.

28 *Ibid.*, p. 97.

29 *Ibid.*, p. 97.

30 Rafael de Asís Roig, “La incursión de la discapacidad en la teoría de los derechos: Posibilidad, educación, derecho y poder”, in Ignacio Campoy (ed.), *Los derechos de las personas con discapacidad: Perspectivas sociales, jurídicas y filosóficas*, Dykinson, Madrid, 2004, p. 62.

31 Carey Denholm, Phil McGowan and Peter Tatham, “Emerging from the Shadows: Fijian Children and Youth with Disabilities”, in David Baine, Roy I. Brown and Aldred H. Neufeldt (eds), *Beyond Basic Care: Special Education and Community Rehabilitation in Low Income Countries*, Captus Press, North York, 1996, p. 104.

32 Institute of Public Policy Research, *Equal Rights for Disabled People*, London, 1991, p. 104.

33 Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, “Letter Dated 7 October 2005 from the Chairman to All Members of the Committee”, UN Doc. A/AC.265/2006/1, 14 October 2005.

thus adopts the social model of disability, which is based on the intrinsic values that underpin human rights, namely:

dignity, freedom understood as autonomy (in the sense of development of the moral subject, which demands among other things that the person is the centre of the decisions that affect him/her), the inherent equality of every human being (including differentiation, which demands the satisfaction of certain basic needs) and solidarity.³⁴

Articles 14 and 15 of the CRPD, pertaining to the liberty and security of the person as well as protection from torture and other cruel, inhuman or degrading treatment or punishment, are the new standards for understanding the various forms of deprivation of liberty of prisoners with mental disabilities.

Disability, persons with disabilities, and their representation in international humanitarian law

In addition to the aforementioned evolution of international law regarding persons with disabilities, IHL contains its own set of references to related issues. In particular, persons with disabilities in IHL have been referred to as invalids, the infirm, blind, maimed or disfigured. Evidence of the use of this medically focused terminology can be found in the following articles, among others:³⁵

- Article 16 of Geneva Convention IV (GC IV) provides as follows: “The *wounded* and *sick*, as well as the *infirm*, and expectant mothers, shall be the object of particular protection and respect.”³⁶
- Article 17 of GC IV states: “The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of *wounded*, *sick*, *infirm*, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel.”³⁷
- Article 8(a) of Additional Protocol I to the Geneva Conventions (AP I) explains that “‘*wounded*’ and ‘*sick*’ mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care”.³⁸

The terms used in these articles reflect the medical model that framed persons with disabilities as passive, weak, defective and vulnerable, and as such, in need of special

34 R. de Asís Roig, above note 30, p. 62.

35 The present list is not exhaustive. See also Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 110; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 16, 21, 22, 27, 127. These articles reflect the same disability terminology as “invalid”, “sick”, “blind”, “mutilated” and “disfigured”.

36 GC IV, Art. 16 (emphasis added).

37 *Ibid.*, Art. 17 (emphasis added).

38 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 8(a) (emphasis added).

and paternalistic protection. Along these lines, the perspective and obligations of IHL are structured within the paradigm of the need to treat and care for persons with disabilities.³⁹

IHL's understanding and treatment of persons with disabilities is limited, and this is largely attributable to the fact that the bulk of IHL was developed between the 1940s and 1970s, when the medical approach to disability remained dominant. The medical model is not without its uses, particularly given its role in referring to and identifying persons who acquire a disability as a result of armed conflict.

Still, IHL has yet to take on board more recent developments that have shaped a new understanding of disability, including the principles of equality and human dignity. To begin with, IHL lacks an adequate definition of disability, and this in turn creates ambiguities as to whether persons with physical, mental, psychosocial and/or intellectual disabilities should be protected – without discrimination and on equal terms – during and after armed conflicts.⁴⁰

In addition, the medical model implies a discriminatory distinction on the basis of disability. This discrimination has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with other people.⁴¹

Similarly, discrimination on the basis of disability is prohibited in IHL under the prohibition of adverse/unfavourable distinction, or the principle of equal treatment.⁴² The aforementioned normative provisions of IHL identify adverse distinction as any distinction based on race, colour, religion or faith, sex, birth, wealth or “any other similar criteria”. Although disability is not explicitly considered as a prohibited ground, it can be included in the category of “any other similar criteria” under a social model approach to disability.

Regarding the social model of disability, terms such as “sick” and “mental illness” should be understood as referring to persons with disabilities and persons with psychosocial disabilities respectively. Moreover, the terminology used in IHL treaties is outdated in light of the social model of disability (a human rights-based approach to disability), and thus we must take into consideration the importance of terminology in recognizing the dynamic interpretation of IHL norms in line with the new contemporary understanding of disability, which underwent various changes up to the adoption of the CRPD. This will allow us to introduce a new

39 Ivan Mugabi, “An Analysis of the Adequacy of Protection afforded by the Convention on the Rights of Persons with Disabilities (CRPD) in Situations of Armed Conflict”, *Societies*, Vol. 8, No. 2, 2018, p. 8.

40 *Ibid.*, p. 9.

41 This is defined in Articles 2, 5 and 9 of the CRPD, which address topics such as accessibility and measures against discrimination on the basis of disability.

42 See common Article 3; GC III, Art. 16; GC IV, Art. 13; AP I, Art. 75(1); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 4 (1); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 87, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

view of disability, which will be essential to reinterpreting Article 30 of GC III regarding the use of solitary confinement for PoWs with psychosocial disabilities.

The use of solitary confinement contained in Geneva Convention III

In order to reinterpret and update the content of Article 30 of GC III, it is necessary to begin with an interpretation of Article 30 in light of the context of GC III's adoption, which took place in 1949. Subsequently, the 2020 International Committee of the Red Cross (ICRC) Commentary on GC III concerning the use of solitary confinement for PoWs with a mental disability will be analyzed.

Article 30 and the context of its adoption

In IHL, the discussion of the use of solitary confinement on persons deprived of their liberty⁴³ in situations of vulnerability, and in particular on persons with disabilities,⁴⁴ is limited to the first paragraph of Article 30 of GC III:

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. *Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.*⁴⁵

Analyzing the aforementioned paragraph reveals a conflict between this norm and the new *corpus juris* of the rights of persons with disabilities framed in the CRPD. This implies a new interpretation of Article 30 in light of the context of its adoption in 1949 based on three criteria: literal, systematic and teleological.

Firstly, a literal interpretation of Article 30 would state that the norm must be interpreted in such a way that its terms acquire specific meaning and significance. This entails understanding that States agreed to adopt measures for PoWs with mental illness or persons with disabilities recognized in GC III. Secondly, through

43 The use of solitary confinement can result in inmates experiencing hallucinations, dementia and other mental disorders. See P. Scharff, "Solitary Confinement: History, Practice, and Human Rights Standards", above note 3, p. 3; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez; *Observations on Communications Transmitted to Governments and Replies Received*, UN Doc. A/HRC/28/68/Add.1, 5 March 2015, para. 16; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/66/268, 5 August 2011.

44 The use of solitary confinement for persons deprived of liberty with mental or psychosocial disabilities can cause severe psychological and physical effects, and often results in an aggravation of an existing mental condition. Sharon Shalev, *A Sourcebook on Solitary Confinement*, Mannheim Centre for Criminology, London, 2008, p. 10; ACLU, *Abuse of the Human Rights of Prisoners in the United States: Solitary Confinement*, 2011; Jeffrey L. Metzner and Jamie Fellner, "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics", *Journal of the American Academy of Psychiatry and the Law*, Vol. 38, No. 1, 2010; Terry Kupers, "Waiting Alone to Die", in Hans Toch, James R. Acker and Vincent Martin Bonventre (eds), *Living on Death Row: The Psychology of Waiting to Die*, American Psychological Association, 2018, p. 56. Since the use of isolation for people with disabilities is very restrictive and may cause serious health effects, it amounts to cruel, inhuman or degrading treatment or punishment, and in some cases, it may constitute an act of torture.

45 GC III, Art. 30(1) (emphasis added).

a systematic interpretation, “norms must be interpreted as part of a whole, the meaning and scope of which must be determined in accordance with the legal system to which they belong”;⁴⁶ this would imply an interpretation in light of the new standards of the CRPD and the values protected by humanitarian norms. In the framework of a systematic interpretation of GC III, all of its constituent provisions, formally related agreements and instruments,⁴⁷ and supplementary means of interpretation, in particular the preparatory works of the treaty,⁴⁸ must be taken into account. Thirdly and finally, a teleological interpretation of Article 30 allows for an analysis of the object and purpose of the Convention as well as of the purpose of the norm.

Article 30 of GC III is based on the 1929 Geneva Convention relative to the Treatment of Prisoners of War.⁴⁹ Article 14 of the 1929 Convention provides for the use of isolation quarters for PoWs with contagious or infectious diseases.⁵⁰ Persons with disabilities were not considered therein, and neither were they included in the ICRC’s *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*.⁵¹ However, this report stated that confinement of PoWs as a security measure was not justifiable, as it could lead to abuse.

Subsequently, at the 1949 Diplomatic Conference of Geneva and in GC III, the terms “mental illness” and “disabled persons”⁵² were used in the drafting of Article 30 and in the Geneva Conventions, along with the term “visually impaired persons”, to help this population in their rehabilitation and reintegration into society.

It is important to analyze the entire normative content of Article 30, which provides:

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. *Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.*

46 Inter-American Court of Human Rights (IACtHR), *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Series C, No. 205, 16 November 2009, para. 43.

47 Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980) (VCLT), Art. 31.

48 The preparatory works can be used to confirm the meaning resulting from the interpretation carried out in accordance with the methods indicated in Article 31 of the VCLT, insofar as they allow us to verify whether the interpretation made with respect to a specific norm or term is consistent with the meaning of other provisions. Cf. IACtHR, *Ownership of Rights of Legal Persons in the Inter-American Human Rights System*, Advisory Opinion OC-22/16, Series A, No. 22, 26 February 2016, para. 45.

49 Geneva Convention relative to the Treatment of Prisoners of War, 118 LNTS 343, 27 July 1929 (entered into force 19 June 1931) (1929 PoW Convention).

50 Article 14 states: “Each camp shall possess an infirmary, where prisoners of war shall receive attention of any kind of which they may be in need. If necessary, isolation establishments shall be reserved for patients suffering from infectious and contagious diseases. The expenses of treatment, including those of temporary remedial apparatus, shall be borne by the detaining Power.”

51 ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, Geneva, 14–26 April 1947.

52 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 1, Section A, Federal Political Department, Berne, 1949.

Prisoners of war suffering from *serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care*, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future. *Special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.*

Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.

Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. The detaining authorities shall, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received. A duplicate of this certificate shall be forwarded to the Central Prisoners of War Agency.

The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and other artificial appliances, and spectacles, shall be borne by the Detaining Power.⁵³

Through a literal, systematic and teleological interpretation of Article 30 of GC III, we can interpret the meaning of this norm, which has allowed the use of the solitary confinement regime for PoWs with mental disabilities since its entry into force. Based on the medical model of disability, this normative provision has two purposes: (1) rehabilitation and (2) use of isolation as a protective measure for third parties and not for persons with disabilities themselves. On the one hand, this measure acts as a means of neutralizing PoWs with a “dangerous” mental deficiency in order to ensure the physical and mental integrity of others. On the other hand, it would seek to cure those PoWs, who are considered seriously ill.

This interpretation is crystallized in the 1960 ICRC Commentary on GC III,⁵⁴ in which the author states that PoWs with serious illnesses are allowed to be treated in hospitals or establishments and the necessary special facilities shall be provided while they are under the guardianship of the Detaining Power.⁵⁵

Regarding the criterion of dangerousness, it may be argued that this is the criterion *par excellence* for the use of solitary confinement for prisoners with disabilities. In traditional forensic discourse, dangerousness or a propensity for violent crime has been treated as a trait inherent to the individual. That inherent trait has often, in turn, been linked to pathological mental health issues.⁵⁶ This reinforces the idea that violence is inherent to the person and considers people

53 GC III, Art. 30 (emphasis added).

54 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960.

55 *Ibid.*, p. 210.

56 Lucía Martínez Garay, “The Uncertainty of the Predictions of Dangerousness: Consequences for the Dogmatics of Security Measures”, *Indret: Revista para el análisis del derecho*, No. 2, 2014, p. 8.

with mental disabilities to be more dangerous than people without them. This criterion disadvantages persons with psychosocial disabilities, as it is used to validate their isolation and is therefore indirectly discriminatory. However, it is important to recognize that this criterion is a foundational element of forensic psychology practice and can be used in the assessment of an individual's aggressiveness within facilities.

The 2020 ICRC Commentary on GC III

The interpretation put forward in the 1960 ICRC Commentary made substantial changes, but they are not enough in light of the new standards of the CRPD. The ICRC's 2020 Commentary on GC III states that the use of solitary confinement on PoWs with mental health conditions may violate the prohibition of adverse distinction based on a mental health condition or psychosocial disability.⁵⁷ It also emphasizes that the use of any form of isolation, whether solitary confinement or any other form of closed confinement, on persons with mental health issues shall be prohibited under GC III if it amounts to adverse distinction or to torture or other ill-treatment.⁵⁸ In light of the above, the isolation of PoWs with disabilities may violate the prohibition on adverse distinction where a person is presumed to be dangerous on the basis of a mental health condition.

Although the 2020 Commentary has made advances regarding the discussion of the use of solitary confinement, it has not discarded the old interpretation of Article 30. For instance, it is mentioned that some States reserve the possibility of imposing closed confinement on PoWs, including persons "with mental health problems, where it is considered unavoidable in light of the danger such persons pose to themselves (including suicide) or to others".⁵⁹ Even in the new Commentary, the dangerousness criterion for the use of solitary confinement as a protective or security measure remains decisive.

Still, the 2020 Commentary argues that the possibility of isolating persons with mental health problems "if necessary" under Article 30 must be interpreted in the context of other obligations of the Detaining Power – i.e., physiotherapy, psychotherapy or psychosocial counselling, provision of assistive devices and repatriation. Implementing these obligations would provide alternatives to isolation and would help to avoid it being considered necessary. Moreover, the 2020 Commentary recognizes that PoWs with disabilities may have specific medical care needs and that, if required, specific measures should be taken to ensure access to those needs.⁶⁰

We can thus conclude that the use of solitary confinement for persons with disabilities, though deemed a last resort for the Detaining Power and only as a

57 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 2020 (2020 Commentary on GC III), para. 2241, available at: <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>.

58 *Ibid.*, para. 2242.

59 *Ibid.*, para. 2244.

60 *Ibid.*, para. 2256.

temporary measure, is still considered lawful even under more modern interpretations of GC III. Once the risk to the life and health of the other prisoners has been contained, the isolation of the PoWs concerned should be terminated.⁶¹

Article 30 continues to have two purposes since its adoption in 1949: (1) the use of the criterion of dangerousness as the criterion *par excellence* for employing solitary confinement for PoWs with disabilities as a protective or security measure, despite the challenges that arise regarding adverse distinction; and (2) the rehabilitation of PoWs with disabilities, which still reflects the backwardness of the medical model. The latter approach can be found in the 2020 Commentary: "... to enable them to achieve and maintain their optimal physical and mental functioning in interaction with their environment ...".⁶² Taking these two purposes into account, the current interpretation of Article 30 constitutes at the very least cruel, inhuman, or degrading treatment or punishment or an act of torture, as will be shown below. Both of these purposes are contrary to Article 3 common to the four Geneva Conventions.

As evidenced by the previous paragraphs, Article 30 of GC III needs to be reinterpreted and updated due to its current practice that violates the rights of persons with mental disabilities. In the following section, this paper will identify and develop the methods of interpretation of international law that can be used for this purpose.

Reinterpretation (and updating) of Article 30 of GC III

This section will present two interpretations of Article 30 following the *pro personae* principle, the criteria of dynamic interpretation and terminological coherence, and common Article 3, in order to update its content. These criteria will allow us to argue that the use of solitary confinement for PoWs with mental disabilities in the context of Article 30's adoption in 1949 did not consider the rights of people with disabilities. This was related to Article 30's two purposes: the first was rehabilitation, since Article 30 was based on a medical model of disability, and the second was the use of isolation based on the criterion of dangerousness as a measure of protection or security towards third parties and not towards people with disabilities themselves. Both purposes go against common Article 3.

Reinterpretation of Article 30

In order to reinterpret and update the content of Article 30, we must consider that the rules of IHL are rules of public international law more broadly, and thus their interpretation must comply with the main and complementary principles of interpretation contained in the 1969 Vienna Convention on the Law of Treaties

61 *Ibid.*, para. 2239.

62 *Ibid.*, para. 2260.

(VCLT), as well as the provisions established for treaties authenticated in several languages and other rules not contemplated in the VCLT.

The main general rule of treaty interpretation is found in Article 31 of the VCLT: good faith, in accordance with the ordinary meaning to be given to the terms employed by the treaty in question in their context and in light of the treaty's object and purpose. This rule of interpretation has been broadly accepted, as evidenced by the International Court of Justice:

According to customary international law, which has found its expression in Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms employed by the treaty in their context and in the light of its object and purpose.⁶³

In addition to the main rule for treaty interpretation set out in Article 31 of the VCLT, the following criteria of interpretation of international law will be used in the reinterpretation and updating of Article 30 of GC III: (1) the *pro personae* principle,⁶⁴ which will apply the most favourable, most extensive and broadest interpretation in order to protect the human rights implicit in Article 30; (2) the criterion of dynamic interpretation of the norm,⁶⁵ which is appropriate for interpreting Article 30 in accordance with the new *corpus juris* of persons with disabilities; and (3) the use of the criterion of interpreting terms⁶⁶ based on their ordinary meaning in order to interpret the values protected by the humanitarian norm.

Another criterion that will be used to update Article 30 is common Article 3. Common Article 3 sets out the obligation of providing humane treatment without any adverse distinction, and it prohibits violence to life, especially murder in all its forms,

63 International Court of Justice (ICJ), *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*, Judgment, *ICJ Reports* 1994, p. 22; IACtHR, *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, 9 May 1986, para. 13; IACtHR, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, 24 September 1982, para. 33.

64 Cecilia Medina and Claudio Nash, *Manual de derecho internacional de los derechos humanos*, Centro de Documentación, Defensoría Penal Pública, Santiago de Chile, 2003, p. 22; Mónica Pinto, "El principio pro homine: Criterios de hermenéutica y pautas para la regulación de los derechos humanos", in Martín Abregú and Christian Courts (eds), *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, Editores del Puerto, Buenos Aires, 2004, p. 163. For a deeper insight into the criteria, see ICCPR, Art. 5; CEDAW, Art. 23; CRC, Art. 41; American Convention on Human Rights, Art. 29 (b); European Court of Human Rights (ECtHR), *Loizidou v. Turkey*, Judgment, Series A, No. 310, 23 March 1995, para. 72; Zlata De Clément, "La complejidad del principio pro homine", *Revista Doctrina*, No. 12, 2015, p. 103.

65 C. Medina and C. Nash, above note 64, p. 22. See ECtHR, *Soering v. The United Kingdom*, Appl. No. 14038/88, Judgment, 7 July 1989, para. 87; ECtHR, *Dudgeon v. The United Kingdom*, Appl. No. 7525/76, Judgment, 27 October 1981; IACtHR, *The Interpretation of the American Declaration of the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion 10/89, 14 July 1989, para. 37; IACtHR, *Gender Identity, and Equality and Non-Discrimination for Same Sex Couples*, Advisory Opinion 24/17, 24 November 2017, para. 59.

66 VCLT, Art. 31. See IACtHR, Advisory Opinion OC-1/82, above note 63, para. 33; ICJ, *Territorial Dispute*, above note 63, p. 22.

mutilation, cruel treatment and torture. Each party to the conflict must comply to the obligations set forth in this article.

In order to reinterpret Article 30 of GC III, we need to understand the obligations arising from common Article 3. According to the ICRC's 2016 Commentary on Geneva Convention I (GC I),⁶⁷ the fundamental obligations established by common Article 3 are understood as follows.

The obligation to treat humanely

This obligation is inherent to the human being and can be found in several provisions of international law, both IHL and international human rights law (IHRL). Humane treatment is set out in common Article 3 and Rules 87 and 88 of customary IHL, as well as in certain rules of the Geneva Conventions and Additional Protocols I and II.⁶⁸ In accordance with the general provisions of IHL, civilians and combatants who are *hors de combat* due to illness, injury, detention or other causes must be treated humanely.

However, the meaning of “humane treatment” is not defined in common Article 3 or in any other provision of conventional IHL. That is why the ICRC's 2016 Commentary on GC I states that the meaning of humane treatment is context-specific and needs to be considered in the specific circumstances of each case, taking into account both objective and subjective factors (e.g., environment and the individual's mental and physical state, age, social, cultural, religious or political background, and past experiences). Furthermore, it is increasingly recognized that women, men, girls and boys are affected in different ways by armed conflict. Therefore, being aware of the inherent status, capacities and needs of each individual can contribute to an understanding of the notion of humane treatment in common Article 3.⁶⁹

Common Article 3 ensures that all persons who are not or are no longer taking part in hostilities are treated humanely by both State and non-State parties to non-international armed conflicts.⁷⁰ It emphasizes that “attacks on life and limb, hostage-taking, outrages upon personal dignity and sentences passed without trial are prohibited at any time and in any place”. Persons protected by common Article 3 must never be treated as less than human, and their inherent human dignity must be respected and protected. No circumstances justify the

67 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 2016 (2016 Commentary on GC I).

68 GC I, Art. 12(1); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 12(1); GC III, Art. 13(1); GC IV, Arts 5, 27; AP I, Art. 75(1); AP II, Art. 4(1); ICRC Customary Law Study, above note 42, Rules 87, 88.

69 2016 Commentary on GC I, above note 67, para. 553.

70 See also 1899 and 1907 Hague Regulations, Art. 4; Geneva Convention on the Wounded and Sick, 1929, Art. 1; 1929 PoW Convention, Art. 2. Today, see in particular GC I, Art. 12; GC II, Art. 12; GC III, Art. 13; GC IV, Art. 27; AP I, Arts 10, 75. For IACs, the principle of humane treatment was codified in the Hague Regulations of 1899 and 1907, the Geneva Conventions of 1949, and AP II.

non-application of this obligation since the fundamental standards set out in common Article 3 are recognized as the minimum floor governing all armed conflicts as a reflection of “elementary considerations of humanity”.⁷¹ By virtue of common Article 3 and Article 10(1) of the ICCPR, PoWs must be treated humanely at all times. Furthermore, the Human Rights Committee has noted that “treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule”.⁷²

The prohibition against unfavourable distinction

Persons protected under common Article 3 must be treated humanely in all circumstances “without any adverse distinction based on race, colour, religion or belief, sex, birth or wealth, or any other similar criteria”. However, the latter category is not specific enough, as it alludes to another type of unfavourable distinction based on criteria such as health, age, level of education etc.⁷³ This non-exhaustive list of prohibited criteria of adverse distinction also appears in the ECHR under the expression “any other status”.⁷⁴ Likewise, different committees of the universal system of human rights protection (the Human Rights Committee, the Committee Against Torture etc.) have expressed their concern regarding various situations of discrimination, and this has led to an exercise of interpretation of other prohibited criteria of discrimination.

Although the list of prohibited criteria does not explicitly mention disability as a prohibited ground, all IHL protections afforded to civilians and persons *hors de combat* apply equally to persons with and without disabilities by virtue of the prohibition on distinction of an adverse nature. A complementary approach to the interpretation of IHL would require that disability be included in “any other similar criteria”.

Another key normative instrument concerning the prohibition of distinction of any nature is the CRPD. Beyond being specific to disability, this treaty has been widely ratified, even more than many other human rights treaties.⁷⁵ This demonstrates a certain level of international consensus on the prohibition of any kind of unfavourable distinction and the *jus cogens* norm referring to the principle of non-discrimination, and is an indicator that States have accepted the differentiated treatment of persons with disabilities.

It should be highlighted that common Article 3 does not prohibit distinctions of a non-favourable nature – i.e., distinctions justified by the substantially different situations and needs of the protected persons. This allows for differential treatment that serves to ensure humane treatment through

71 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, paras 218–219.

72 UN, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, paras 176–178.

73 2016 Commentary on GC I, above note 67, para. 321.

74 See ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Appl. No. 33290/96, 21 December 1999.

75 To date the CRPD has 184 States Parties, making it one of the most widely ratified human rights treaties.

adaptation to the specific needs of persons and/or groups of persons in vulnerable situations.

In compliance with IHL's prohibition against unfavourable distinction and the CRPD's right to equality and prohibition against discrimination, persons with disabilities are entitled to the same IHL protections afforded to all other persons. This would include rules related to the treatment of civilians and persons *hors de combat* and to the conduct of hostiles.⁷⁶ In addition, differential treatment, including reasonable accommodation, may be required to ensure that IHL protections are applied in a non-discriminatory manner to all PoWs with mental disabilities.⁷⁷

Considering the above, common Article 3 is strictly humanitarian in nature. It focuses exclusively on ensuring that each person who is not or is no longer taking part in hostilities is treated humanely⁷⁸ and that the protection of certain persons by a non-favourable distinction (e.g., pregnant or breastfeeding women in places of detention) should under no circumstances result in less humane treatment of other persons protected by the article.

In summary, these understandings of the core obligations of common Article 3 – humane treatment and the prohibition of unfavourable distinction – will be especially useful when updating Article 30 of GC III. On the one hand, the obligation of humane treatment allows PoWs with mental disabilities to be treated humanely by the Detaining Party regardless of the circumstances. On the other hand, the prohibition against unfavourable distinction would need disability to be included as a prohibited ground under “any other similar criteria” so as to complement the interpretation of IHRL. With regard to non-favourable distinction, common Article 3 does not prohibit differential treatment that serves to ensure humane treatment by accommodating the specific needs of the individual. This distinction will be taken into account to present reasonable accommodations for PoWs with mental disabilities later.

Following the criteria of dynamic interpretation, the *pro personae* principle, terminological coherence and common Article 3 and the values protected by humanitarian norms, two concurrent alternative interpretations of Article 30 of GC III will be developed below.

First reinterpretation

The first interpretation will analyze Article 30 through a dynamic interpretation, which understands the historical elements and concepts contained in the provision to be alive, open and dynamic. In this sense, the provision still has vestiges of a time where persons with disabilities were considered to have lives of less value and were not even included in treaties as groups in vulnerable situations – and before the meaningful developments of the past several decades

76 Alice Priddy, *Disability and Armed Conflict*, Geneva Academy Briefing No. 14, 2019, p. 55.

77 *Ibid.*, p. 55.

78 2020 Commentary on GC III, above note 57, para. 572.

concerning the rights of persons with disabilities under international law. In light of this, Article 30 is outdated in relation to the current standards developed in the *corpus juris* of the CRPD and the rights of persons deprived of liberty. Therefore, based on the dynamic interpretation, it is possible to reinterpret the concepts contained in the law in accordance with the new *corpus juris* of persons with disabilities as follows.

Firstly, the social model of disability demonstrates that disability is the result of the interaction between functional diversity and social barriers. Thus, PoWs with disabilities should be treated under this model, which is part of the normative framework of the CRPD.

Secondly, the CRPD principles of equality and non-discrimination state that disability is a prohibited ground of discrimination and imply that all human beings are equal in terms of dignity and rights regardless of any physical, mental or intellectual condition. States risk violating this right when prisoners with disabilities are placed in solitary confinement, since they are excluded from other prisoners due to their differences. As noted above, common Article 3 prohibits any adverse distinction based on “race, colour, religion or belief, sex, birth or wealth” or “any other similar criteria”.

Thirdly, Article 14 of the CRPD (“Liberty and Security of Person”) imposes an obligation on States Parties to ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, and states that the existence of an impairment does not justify a deprivation of liberty. Article 14 also contains the right to respect for physical, mental and moral integrity. Integrity can be seen as a more general and positive expression of the right to be free from torture and cruel, inhuman or degrading treatment or punishment.⁷⁹

Fourthly, another criterion used in the reinterpretation of Article 30 is the *pro personae* principle. In the IHRL framework, this principle establishes that the most extensive interpretation must be applied when protecting human rights, such as the right to humane treatment and health, in accordance with the *corpus juris* of the CRPD (the social model and the principle of equality and non-discrimination) and of persons deprived of their liberty.⁸⁰

Furthermore, Article 14 of the CRPD, in the framework of the *pro personae* principle, is the norm that provides greater protection for PoWs with mental disabilities by stating that disability cannot be the sole justification or part of the rationale for detention.

Based on the criteria of dynamic interpretation, the *pro personae* principle and common Article 3, the first reinterpretation of Article 30 is that “persons with disabilities” shall be understood to mean persons with pre-existing or acquired

79 Tina Minkowitz, “The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Interventions”, *Syracuse Journal of International Law and Commerce*, Vol. 34, No. 2, 2007, p. 412.

80 IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, 13 November 1985, para. 52. See also IACtHR, *Loayza Tamayo v. Peru*, Judgment, 17 September 1997, para. 44; ECtHR, *Loizidou*, above note 64, para. 72.

mental disabilities resulting from armed conflict, persons with physical and/or motor disabilities, and persons with visual disabilities. These persons should be treated in a dignified manner without adverse discrimination of any kind in accordance with common Article 3.

Second reinterpretation

The above-mentioned criteria are also used in the second reinterpretation of Article 30 of GC III. For instance, the criterion of terminological coherence allows us to have a single definition of the term “torture” in international law. This term can be found in IHL (e.g., the Geneva Conventions and their Additional Protocols) and IHRL (e.g., the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Inter-American Convention to Prevent and Punish Torture) treaties. By applying the criterion of terminological coherence, the definition of torture must be the same in the scope of application of IHL and IHRL.

In IHRL, the definition of torture is found in Article 1(1) of the CAT. This article includes the requirement that torture be committed “by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity”;⁸¹ a requirement which is not necessary in IHL. In *The Prosecutor v. Zejnir Delalic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) determined that this definition was part of customary international law applicable in armed conflict.⁸² As a result, the Tribunal concluded that the definition of torture in humanitarian law did not include the same elements.

Despite this situation, this paper follows the definition of torture proposed by the CAT due to two reasons. Firstly, since the act of torture will be committed by State armed forces, there would be no major difficulty regarding the element of the presence of a “public official or other person acting in an official capacity”. Secondly, as the CAT is a UN treaty, it has a wider scope in many States than those that are part of regional human rights systems. Thus, through the *pro personae* principle, the CAT provision provides a more favourable meaning to the recipient of international protection.

The same reasoning will be used to analyse the term “cruel, inhuman or degrading treatment or punishment”, which has several definitions in the scope of application of IHL and IHRL. In the field of IHL, the Geneva Conventions and Additional Protocols do not define this term, but its definition and characteristics are established in its jurisprudential development.

In *The Prosecutor v. Dusko Tadić*, the ICTY concluded that the prohibition against cruel treatment in common Article 3 “is a means to an end, the aim of which is to ensure that persons taking no active part in hostilities are in all circumstances treated with humanity”.⁸³ As a result, the ICTY defined cruel treatment as

81 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46, 10 December 1984 (entered into force 26 June 1987), Art. 1.

82 ICTY, *The Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, para. 111.

83 ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A. Judgment, 15 July 1999, para. 723.

[t]reatment that causes severe mental or physical suffering or constitutes a serious affront to human dignity, amounting to the crime of inhuman treatment under the grave breaches of the Geneva Conventions.⁸⁴

The reasoning described above has similarities with the definition of the term “cruel, inhuman or degrading treatment or punishment” in Article 16(1) of the CAT, but it is not as fully conceptualized and detailed as the notion of torture.⁸⁵ It is further developed under IHRL, where it is characterized as cruel or inhuman treatment that causes severe physical or mental suffering, intentionally or through negligence, and where a public official is directly or indirectly involved.⁸⁶

Considering the previously developed concept and through the *pro personae* principle, this paper follows the definition developed in IHRL, as it allows the term “cruel, inhuman or degrading treatment or punishment” to be broader or more extensive than those provisions that establish protection for persons within IHL. Therefore, by interpreting terms based on their ordinary meaning, we can reinterpret Article 30 of GC III, which qualifies as an act of discrimination, inhuman treatment and, in some cases, torture.

Implications of the reinterpretations

In addition, when the use of solitary confinement in PoWs with mental disabilities amounts to torture, we are faced with a *jus cogens* norm. The new reinterpretations of Article 30 of GC III can be summarized as follows:

1. First interpretation: The deprivation of liberty in Article 30 is based on the ground of disability; therefore, it is discriminatory and arbitrary.
2. Second interpretation: Deprivation of liberty under Article 30 amounts at least to cruel, inhuman or degrading treatment or punishment or torture.

Thus, with the two new proposed interpretations of Article 30, solitary confinement of PoWs with mental or psychosocial disabilities in international armed conflicts should not be used under any circumstances. It is important to mention which scenarios are possible for PoWs with mental disabilities in a PoW camp.

Considering that solitary confinement is a measure that is against human rights, there are two possible scenarios. First, if there is a genuine risk that the person concerned may harm third parties, regular sanctions should be applied. What is more, since deprivation of liberty is harmful, retention should be

84 ICTY, *Delalic*, above note 82, para. 551.

85 The term “cruel, inhuman or degrading treatment or punishment” captures acts which are legally and morally reprehensible but fall short of the specific crime of torture. See Manfred Nowak and Ralph R. A. Janik, “Torture, Cruel, Inhuman or Degrading Treatment or Punishment”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 317–342.

86 ICRC, “What is the Definition of Torture and Ill Treatment?”, Geneva, 15 February 2005, available at: www.icrc.org/en/doc/resources/documents/faq/69mjxc.htm.

considered for certain behaviours.⁸⁷ Second, if the person does not pose a risk to himself/herself or to third parties, solitary confinement or detention should not be considered under any circumstances. In both cases, repatriation is recommended. Where it may not be possible to repatriate a PoW to their country of origin because there is a risk to their life or integrity, and they cannot be transferred to a neutral country, detention in PoW camps will be feasible in accordance with the minimum standards of treatment of persons deprived of their liberty and the minimum guarantees contained in common Article 3.

Finally, it has been proven in our research that solitary confinement of PoWs with mental disabilities in IAC should be prohibited. Moreover, following the analysis in this paper, the interpretation of Article 30 has been updated to the international standards contained in the CRPD.

Alternatives to the use of solitary confinement

This section will discuss two possible alternatives to the use of solitary confinement: repatriation and retention. It will do so by first laying out where in the relevant sources of law we find references to or obligations of repatriation and/or retention. Next, it will explain several core principles relating to the treatment of persons with disabilities, including reasonable accommodation, universal design, and accessibility. Finally, it will analyze repatriation and retention in light of those principles.

Repatriation and retention under existing IHL

Repatriation of PoWs is set out in Part IV of GC III and Rule 128 of customary IHL.⁸⁸ Article 109 of GC III states that

throughout the duration of hostilities, the Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of ... sick and wounded prisoners of war ... [and] conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

Furthermore, Article 110 of GC III indicates that the persons who shall be repatriated are the incurably wounded and sick whose intellectual or physical

87 It should be noted that to date there is no international standard for the use of restraint to restrict the right to liberty of persons with mental disabilities, but in any case, any restraint must be very specific and short. Thus, we agree with Renato Constantino's idea that "this action would only consist of the limitation of locomotor freedom in a reduced space". See Renato Antonio Constantino Caycho, "¿Hogar, dulce hogar? La privación de libertad de personas con discapacidad en casa particulares a partir de la sentencia Guillén Domínguez del tribunal constitucional peruano", Pontifical Catholic University of Peru, available at: <https://tinyurl.com/yckhdfsr>.

88 GC III, Part IV; ICRC Customary Law Study, above note 42, Rule 128.

aptitude appears to have suffered considerable diminution, who are not expected to recover in the course of a year, or who have recovered but whose intellectual or physical aptitude appears to have suffered a considerable and permanent diminution.

Concerning direct repatriation, Part IV, Section I of GC III addresses topics such as internment in neutral countries, the rights of prisoners to be examined by joint medical commissions, the costs of repatriation, and activity after repatriation.

Another provision related to repatriation is Article 132 of Geneva Convention IV (GC IV), which states that

[t]he Parties to the conflict shall ... endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

Repatriation is an obligation for the Parties to the conflict, and thus PoWs with mental disabilities fit into Article 110 of GC III. According to the contemporary understanding of disability enshrined in the CRPD, the aforementioned article should clearly include persons with mental, physical, intellectual or psychosocial disabilities who appear to have suffered considerable and permanent impairment or whose condition requires treatment.

The grounds for repatriation for PoWs are not sufficient as stipulated in GC III, but there may also be cases where it is not feasible for the Detaining Power to guarantee the rights to equal access to health and rehabilitation of a detainee with a disability and/or their safety when the facilities do not include adequate health services for PoWs with mental or psychosocial disabilities.⁸⁹ In such cases, repatriation may be considered as a reasonable accommodation that would constitute a less harmful alternative to solitary confinement.

Reasonable accommodation, accessibility and universal design

Reasonable accommodation is not only a measure that aims to adapt the environment, goods and services to the specific needs of a person, but also a “right that serves to satisfy the content of the good protected by the right to accessibility and, thus, can also be considered as a measure of that principle or that right”.⁹⁰ This adaptation has an individual scope for each case and is often confused with accessibility (the right to adapt the environment) and universal design (a way of designing the environment taking into account all forms of human diversity).

89 A. Priddy, above note 76, p. 72.

90 Rafael de Asís, “Lo razonable en el concepto de ajuste razonable”, in E. Salmón and R. Bregaglio (eds), above note 26, p. 104.

According to the Committee on the Rights of Persons with Disabilities, accessibility is a precondition for persons with disabilities to live an independent life and to be able to participate fully and equally in society.⁹¹ It is a right that persons with disabilities can demand, and its application is mainstreamed in the exercise of all rights.⁹² According to Article 2 of the CRPD, the concept of universal design is understood as “the design of products, environments, programmes and services that can be used by all people, to the greatest extent possible, without the need for adaptation or specialised design”. Universal design aims to achieve universal accessibility and is aimed at all persons as stated in Article 4(1)(f) of the CRPD.

In addition to accessibility and universal design, there is the concept of reasonable accommodation, which can be defined as the “unequal treatment of persons because they may find themselves in a situation of difference or inequality, which is unfavourable or detrimental to them”.⁹³ Reasonable accommodation has an individual scope for each specific case of a person with a disability and is applied *ex post*: “only when the special situation of a person with a disability is ascertained should a differentiated measure be applied to ensure the enjoyment of rights under equal conditions”.⁹⁴

Reasonable accommodation goes beyond the general areas of accessibility and universal design: it generates obligations on the State or the private sector and can only be provided in certain sectors such as health, care services and medication. It is important to highlight that it does not replace the accessibility obligation.

To determine the validity of a reasonable accommodation, it is important to take into consideration that accessibility implies “(i) universal design, which functions as a general principle [and] source of specific obligations; (ii) accessibility measures, which appear when universal design is not satisfied; [and] (iii) reasonable accommodation, which arises when it is justified that accessibility is not universal”.⁹⁵ In the case of PoWs with mental disabilities, universal design is not feasible due to the limitations concerning their situation. Moreover, appropriate adjustments would be needed for each one of them. Accessibility measures are also not feasible in this context: even if they reach all PoWs with disabilities, there will be cases where certain adjustments will be necessary in order to guarantee the PoW’s rights, especially during the repatriation procedure.

Reasonable accommodation guarantees the rights of access to health and medical care, and bodily and mental integrity, among others. It is important to highlight that its implementation is done through the criterion of reasonableness,

91 Committee on the Rights of Persons with Disabilities, General Comment No. 2, “Article 9: Accessibility”, UN Doc. CRPD/C/GC/2, 22 May 2014, para. 1.

92 Renata Bregaglio, “El principio de no discriminación por motivo de discapacidad”, in E. Salmón and R. Bregaglio (eds), above note 26, p. 91.

93 *Ibid.*, p. 93.

94 Marcial Rubio Correa, Francisco Eguiguren Praeli and Enrique Bernales Ballesteros, *Los derechos fundamentales en la jurisprudencia del Tribunal Constitucional: Análisis de los artículos 1, 2 y 3 de la Constitución*, 1st ed., Fondo Editorial de la PUCP, Lima, 2011, p. 146.

95 R. de Asís, above note 91, p. 105.

which implies the requirements of non-discrimination, proportionality and acceptability.

The requirement of non-discrimination refers to the right to equality and non-discrimination. In order to comply with the non-discrimination mandate, it is necessary not to differentiate; however, there is an obligation to differentiate persons with disabilities so as to allow for the adequate exercise of their rights.⁹⁶ This mandate thus prohibits equal treatment without justification and allows for unequal or different treatment. To ensure equality and non-discrimination, reasonable accommodation will be used to guarantee the right of access to appropriate medical care in a neutral country or in the person's country of origin.

The requirement of proportionality can be determined by means of the proportionality test, which contains the principles of appropriateness, necessity and proportionality.⁹⁷

The requirement of acceptability is related to the need to satisfy the reasonable expectations of the community. The reasonable decision must be the one that is presumably most acceptable within the framework of what is expected by those to whom it is addressed.⁹⁸

Applying the requirements of non-discrimination, proportionality and acceptability in the context of PoWs with disabilities and presenting the minimum parameters of retention

Assessing the potential of repatriation

First, the rule of non-discrimination for PoWs with mental disabilities means that the appropriate adjustments will need to be made to guarantee the right of access to suitable medical care in a neutral country or in the individual's country of origin, with equal treatment and without adverse distinction. Regarding equal treatment, PoWs in different situations and with different needs may need to be treated differently in order to achieve substantive equality of treatment.⁹⁹ In relation to discrimination, the prohibition in Article 16 of GC III provides a number of grounds on which adverse differentiated treatment is prohibited: "race, nationality, religious belief or political opinions, or any other distinction based on similar criteria".¹⁰⁰ Adverse distinctions founded on other grounds, such as disability, would equally be prohibited.

Second, taking into account the principles contained in the proportionality test mentioned in the previous section, repatriation would need to consider the following arguments:

96 R. Bregaglio, above note 92, pp. 94–95.

97 Robert Alexy, *Teoría de los derechos fundamentales*, trans. Ernesto Garzón Valdés, Centro de Estudios Constitucionales, Madrid, 1997, p. 100.

98 R. de Asís, above note 90, p. 113.

99 GC III, Art. 14; 2020 Commentary on GC III, above note 57, para. 1658.

100 GC III, Art. 16; AP I, Arts 9(1), 75(1). See also ICRC Customary Law Study, above note 42, Rule 88.

1. The principle of appropriateness determines whether the limitation to a right must be appropriate in relation to a constitutionally valid end. The adjustment of repatriation thus could be given considering a constitutional end such as the right to health and access to medical care.
2. The principle of necessity determines whether there are other alternative measures that could have been chosen to achieve this end. For instance, repatriation is the least harmful measure for PoWs with mental disabilities since the application of solitary confinement is not possible. The principle of proportionality analyzes whether the satisfaction of the constitutionally legitimate aim is greater than or equal to the effect on the opposing principle or right. In the case at hand, repatriation allows for greater satisfaction of the right to health and access to medical care for PoWs with mental or psychosocial disabilities than solitary confinement.

Finally, we must assess acceptability. Repatriation could be considered as an indeterminable cost, as it will take into account changes in practices or procedures and therefore does not necessarily constitute an undue burden *per se*. In order to know whether it is undue, it will be necessary to assess how much the adjustment actually costs, a point that will not be developed here as it is not the subject of this research.

After having carried out the analysis of non-discrimination, proportionality and acceptability, the reasonableness of the accommodation is evident when talking about the repatriation of PoWs with psychosocial disabilities. This adjustment is made from the social model as a modification or adaptation of repatriation to guarantee the full exercise and rights of persons with disabilities in the context of an IAC.

Assessing the potential of retention

In certain cases, it is not possible to repatriate PoWs to their country of origin – including when there is an imminent risk of human rights violations against PoWs with psychosocial disabilities or when the rights guaranteed in common Article 3 may be violated. In those circumstances, it may be feasible to hold such individuals in PoW camps under certain parameters.

If retention is applied, it would have to be in accordance with the minimum guarantees contained in common Article 3. Any retention should bear in mind the obligation to treat PoWs humanely, which is paramount in the treatment of persons deprived of their liberty. During retention, medical, psychological and/or neurological care, if needed, should be provided to a PoW with a mental or psychosocial disability who is in a psychiatric crisis or in a seriously and severely debilitating situation.

The purpose of the retention is for the Detaining Party to opt for the transfer of the PoW with a disability. If the Detaining Party chooses to transfer the PoW with a psychosocial disability to a psychiatric hospital within its territory, it must take into account the possibility of human rights violations.

However, this will not be addressed under Article 30, but from a human rights perspective of the Detaining Party.

During retention, it will be necessary to consider the minimum parameters for the treatment of persons deprived of their liberty (the right to life, personal integrity, health etc.). All these rights are set out in the UN Standard Minimum Rules for the Treatment of Prisoners, today known as the Mandela Rules, and the UN Basic Principles for the Treatment of Prisoners. Several of these rights are also set out in human rights treaties or covenants for persons deprived of their liberty such as the ICCPR, the American Convention on Human Rights and the European Convention on Human Rights.

As a final note, it should be emphasized that these two alternatives to the use of solitary confinement for PoWs with psychosocial disabilities have not been further detailed in the present article since this was not the aim of this research.

Conclusion

Since the entry into force of GC III, the interpretation of Article 30 has not changed at all. Although there have been advances in its understanding, as seen in the latest ICRC Commentaries, there has been no interpretation in accordance with the new CRPD standards, and Article 30 perpetuates the use of solitary confinement for prisoners with mental disabilities based on the criterion of dangerousness.

To update the rules contained in Article 30, it is necessary to use certain methods of interpretation of international law. The interpretation criteria used in this paper provide us with two reinterpretations which conclude that solitary confinement of PoWs with mental or psychosocial disabilities in IACs should not be used under any circumstances. Regarding this situation, there are two possible solutions: repatriation or retention. Whereas repatriation can be used as a reasonable accommodation for PoWs with mental disabilities, retention must be carried out in accordance with the minimum standards of treatment of persons deprived of their liberty.

“Safe zones”: A protective alternative to flight or a tool of refugee containment? Clarifying the international legal framework governing access to refugee protection against the backdrop of “safe zones” in conflict-affected contexts

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Abstract

So-called “safe zones” pose an increasingly pressing threat to genuine and robust international legal protection for persons fleeing conflict. This paper aims to address the key challenges and risks of safe zones under international law and to provide some clarifications on the legal framework which must be respected by refugee-receiving States. Through assessing the intentions of preventing migration flows which underlie their creation, this paper will demonstrate that the existence of safe zones cannot be used to circumvent the obligations of refugee-receiving States under international law, specifically the right to leave and seek asylum and the prohibition of non-refoulement. This paper concludes that safe zones should only be created as an urgent response to humanitarian crises in order to ensure the immediate safety of civilians in conflict zones, and only under very strict conditions. In this respect, this paper will demonstrate that even if safe zones comply with certain minimum protective standards, because of the volatility and complexities of the conflict environment they should not and cannot act as a substitute for genuine refugee protection under international law.

Keywords: safe zones, refugee containment, *non-refoulement*, conflict environments, internal protection alternatives.

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Introduction

Safe zones are not a novel feature of the conflict landscape and numerous terms, including “safe zone”, “safe area”, “safe haven”, “demilitarized zone” and “protected zone”, have been coined in multiple prior conflict-affected contexts.¹ These broadly refer to specifically designated areas that aim to afford a form of heightened physical and humanitarian protection to the displaced civilian population in an ongoing armed conflict.² In theory, safe zones have the potential to provide additional protection from attack, facilitate humanitarian and medical assistance and even enable education, employment and other opportunities in the midst of an armed conflict.³ However, as will be shown in this paper, safe zones

1 For an overview of prior examples, see, e.g., Mélanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law*, Cambridge University Press, Cambridge, 2012, pp. 232–44.

2 This follows the common definition in scholarship. This paper will refer to such spaces as “safe zones” throughout. See, e.g., Wilson Chun Hei Chau, “Creating Refuge in Hell: The Coming of Age of Safe Areas for the Protection of Civilians in Armed Conflict”, *Auckland University Law Review*, Vol. 18, 2012, p. 192; Phil Orchard, “Revisiting Humanitarian Safe Areas for Civilian Protection”, *Global Governance*, Vol. 20, No. 1, 2014, p. 55; Geoff Gilbert and Anna Magdalena Rüsçh, *Creating Safe Zones and Safe Corridors in Conflict Situations: Providing Protection at Home or Preventing the Search for Asylum?*, Policy Brief 5, The Andrew & Renata Kaldor Centre for International Refugee Law, June 2017, p. 3, available at: https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_brief_Creating_safe_zones_and_safe_corridors.pdf (all internet references were accessed in January 2022).

3 G. Gilbert and A. M. Rüsçh, *ibid.*, pp. 1–3.

are interconnected with responses to conflict-induced displacement and risk evolving into a tool utilized by refugee-receiving States to either knowingly or unknowingly avoid complying with their obligations under international law.

Most prior examples of safe zones, while outwardly aiming to protect the civilian population, have been closely associated with underlying refugee-containment strategies as their proclaimed safety is relied upon to both prevent the flight of individuals and promote their return.⁴ As the increasingly protracted nature of armed conflict triggers further mass displacement and large-scale cross-border movements, there is a growing risk that refugee-receiving States will more frequently consider safe zones as a means of containing persons in need of protection within their country of origin.⁵ In turn, the present author posits that safe zones have the potential to become an increasingly common feature of contemporary conflicts as a means of controlling migration flows, requiring clarification of the legal framework governing their existence. While they raise a number of *jus ad bellum* and *jus in bello* issues that will be alluded to, due to the more limited attention in existing literature this paper will focus on the risks that safe zones pose to comprehensive and effective refugee protection.⁶

Through an assessment of the state of international law on this matter deriving from the complementary application of international refugee law (IRL), international humanitarian law (IHL) and international human rights law (IHRL), this paper will emphasize that the illusion of safety that undercuts most safe zones entails that they cannot be treated as a permissible alternative to robust refugee protection under international law. It will begin by outlining the core typologies of safe zones that have emerged in international practice and briefly discuss their legal basis and impact on the civilian population. Following this initial overview, in light of the potential association of containment strategies with safe zones, this paper will undertake a comprehensive analysis of the refugee protection issues which could arise from their establishment. This will address the right to leave and seek asylum, the Internal Protection Alternative (IPA) as an impermissible basis for the rejection of asylum claims, the importance of the principle of *non-refoulement* as well as broader matters of return in order to demonstrate the incompatibility of safe zones with the obligations of refugee-receiving States.

4 Cécile Dubernet, *The International Containment of Displaced Persons: Humanitarian Spaces without Exit*, Ashgate Publishing Limited, Aldershot, 2001, p. 122; Hikaru Yamashita, *Humanitarian Space and International Politics: The Creation of Safe Areas*, Ashgate Publishing Limited, Aldershot, 2004, p. 3; M. Jacques, above note 1, p. 235; Bríd Ní Ghráinne, “Safe Zones and the Internal Protection Alternative”, *British Institute of International and Comparative Law*, Vol. 69, No. 2, 2020, p. 336.

5 Katy Long, “In Search of Sanctuary: Border Closures, ‘Safe’ Zones and Refugee Protection”, *Journal of Refugee Studies*, Vol. 26, No. 3, 2013, p. 462. On protracted conflicts and displacement, see, e.g., Ellen Policinski and Jovana Kuzmanovic, “Protracted Conflicts: The Enduring Legacy of Endless War”, *International Review of the Red Cross*, Vol. 101, 2019, pp. 971–2.

6 Although the State where a safe zone is located has obligations towards internally displaced persons (IDPs), this paper will focus on the obligations of refugee-receiving States towards those who are able to, or desire to, cross international borders in search of protection. For the IDP framework, see, e.g., Catherine Phuong, *The International Protection of Internally Displaced Persons*, Cambridge University Press, Cambridge, UK, 2005.

The paradox of safety: Ensuring the robust protection of persons in safe zones

This section will compare the legal basis and core features of two broad forms of safe zones, namely “conventional” and “imposed” safe zones.⁷ Accordingly, it will reflect on the limitations of these zones in practice and the consequent risk that future safe zones will evolve beyond these two distinct typologies, with a particular emphasis on the threat that this would pose to robust refugee protection.

“Conventional” safe zones

The only explicit legal basis for the creation of safe zones can be found in IHL, which provides for the possibility of establishing numerous forms of so-called “protected zones”.⁸ The premise of these “conventional” safe zones is to provide enhanced protection from the effects of hostilities for the civilian population, as well as the wounded and sick, as under the relevant IHL provisions these spaces should not contain any military objectives and therefore cannot be deliberately attacked.⁹ The most protective and comprehensively defined forms of safe zones in the IHL framework are demilitarized zones, which can be broadly understood as delineated areas in which belligerents agree not to conduct any hostile activities or military operations under specified conditions.¹⁰ Although the Geneva Conventions and their Additional Protocols only explicitly foresee their establishment in international armed conflicts (IACs), the International Committee of the Red Cross (ICRC) has recognized that the prohibition of directing an attack against safe zones is a customary rule equally applicable in non-international armed conflicts (NIACs),¹¹ in which zones could be established by special agreements under Article 3 common to the four Geneva Conventions.¹²

7 Based on an assessment of literature, these are the most commonly used terms. For “conventional” safe zones, see H. Yamashita, above note 4; P. Orchard, above note 2, p. 60. For “imposed” safe zones, see W. C. H. Chau, above note 2, p. 198; Emanuela-Chiara Gillard, “‘Safe Areas’: The International Legal Framework”, *International Review of the Red Cross*, Vol. 99, 2017, pp. 1088–93.

8 IHL foresees the possibility of establishing safe zones to protect the wounded and sick in Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 23, and for the civilian population in Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 14 and 15; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 59 and 60. See more on the IHL framework in E.-C. Gillard, *ibid.*, pp. 1077–87.

9 Regardless of this additional protection, civilians cannot be targeted at any time except if and for such time as they directly participate in hostilities and must be factored into the proportionality assessment for attacks against legitimate targets. Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Elgar, Cheltenham, 2019, pp. 241–2 and 376–8.

10 AP I, Art. 60.

11 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), rule 35, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

12 M. Sassòli, above note 9, p. 242.

The crucial protective benefit of “conventional” safe zones is that they require the express consent of all parties to the conflict, which increases the likelihood that their neutral and exclusively demilitarized character will be respected.¹³ However, this is also their biggest challenge, as obtaining the consent of belligerents has proven extremely difficult in practice, and is also likely to be withdrawn in the changing conflict environment, creating further risks for the civilian population.¹⁴ Notably, safe zones are typically established in response to repeated attacks against the civilian population and it has been argued that parties who do not wish to respect IHL rules on the protection of civilians are unlikely to consent to a safe zone that is premised on their enhanced protection.¹⁵ Thus, despite the conditions enshrined in IHL for the establishment of safe zones, which have the potential to provide a degree of safety, this framework is rarely applicable.¹⁶

“Imposed” safe zones

The next typology of “imposed” safe zones refers to those established under the auspices of the United Nations (UN). Particularly evident in the 1990s, the UN Security Council has previously authorized the creation of safe zones in order to maintain or restore “international peace and security” under Chapter VII of the UN Charter, the impacts of which have been analysed extensively in existing literature.¹⁷ For the purposes of this paper, it is sufficient to note that this form of safe zone has very rarely retained its promises of safety. Although UN Security Council authorization means that its establishment is not in violation of the prohibition on the use of force,¹⁸ it compromises its civilian character as it has been argued that parties are unlikely to refrain from hostilities in a safe zone that is imposed non-consensually by foreign military powers. In turn, all prior safe zones established with UN involvement are considered as having failed to ensure the long-term and comprehensive protection of the civilian population as they suffered from continued, and sometimes heightened, large-scale attacks against civilians.¹⁹

13 M. Jacques, above note 1, p. 235; G. Gilbert and A. M. Rüschi, above note 2, p. 13; Rutger Birnie and Jennifer Welsh, “Displacement, Protection and Responsibility: A Case for Safe Areas”, *Global Responsibility to Protect*, Vol. 10, No. 3, 2018, p. 337.

14 W. C. H. Chau, above note 2, p. 194.

15 M. Jacques, above note 1, p. 241; E.-C. Gillard, above note 7, p. 1088.

16 The Open Relief Centres in Sri Lanka have been considered as most similar to protected zones under IHL, and consequently the most successful. These spaces were a “temporary” place for displaced persons to reside and receive “relief assistance”, which were consented to by both parties to the conflict and formally recognized in a memorandum of understanding. M. Jacques, above note 1, pp. 238–40; P. Orchard, above note 2, p. 60.

17 See, e.g., M. Jacques, above note 1, pp. 235–44; David Keen, “Anything but Safe: Problems with the Protection of Civilians in So-Called ‘Safe Zones’”, Working Paper Series No. 17–187, London School of Economics and Political Science, November 2017, p. 36.

18 Charter of the United Nations, 1 UNTS XVI, 26 June 1945 (entered into force 24 October 1945), Art. 2(4).

19 The first internationally sanctioned safe zone in Northern Iraq (1991) did arguably offer some immediate protection but its fragile legal basis has been heavily criticized. In 1993, the UN Security Council explicitly authorized a safe zone in Srebrenica. The concentration of civilians without sufficient protection ultimately led to the July 1995 massacre by Bosnian Serb forces. Other UN-sanctioned zones in

The crucial difference between UN-sanctioned safe zones and the *jus in bello* regime is that these safe zones do not require the consent of belligerents, so can overcome the challenges addressed in the previous section.²⁰ However, they still require the consent or non-veto of the Security Council's permanent five members.²¹ By consequence, the UN Security Council has not lent its authorization to the creation of safe zones since the 1990s and it seems unlikely to in the near future.²² The possible reasons for this are twofold. First, there is presumably a natural reluctance to authorize the creation of safe zones when, as aforementioned, they have ultimately failed in ensuring the long-term protection of the civilian population in almost all prior instances.²³ A further challenge is that the interests and divergences of the permanent five members can sometimes lead to the exercise of the veto to block action in response to humanitarian crises where properly established safe zones could arguably have some temporary benefit.²⁴

While UN-imposed safe zones are by no means a preferred response, inactivity at the UN Security Council does not necessarily mean that "imposed" safe zones will no longer be established in conflict-affected contexts. Rather, this paper anticipates that practice could shift towards the unilateral establishment of safe zones by one or more States in foreign territory without consent nor UN Security Council authorization, as will now be discussed.

Evolving practices and future risks

Given the stringent conditions for the specific IHL provisions on safe zones to be applicable and the unlikelihood that the UN Security Council will consent to their establishment in the near future, there is a prominent risk that safe zones could increasingly be unilaterally established by a foreign State both in violation of the UN Charter and in a manner that is not specifically foreseen by IHL. In particular, it seems somewhat unlikely that a State would expressly consent to foreign intervention to establish a safe zone on its territory in any ongoing or future conflict scenarios, especially if it would prevent the flight and facilitate the return of that State's own nationals to situations of insecurity and possibly result in a loss of complete control over its territory. Based on prior practice, it is equally unlikely that a State engaged in an armed conflict would, on its own

Somalia (1992) and Rwanda (1994) also failed to prevent armed attack because of the lack of consent from all belligerents and continued militarization. M. Jacques, above note 1, pp. 240–1; P. Orchard, above note 2, p. 60; R. Birnie and J. Welsh, above note 13, p. 337.

20 W. C. H. Chau, above note 2, pp. 198–202.

21 UN Charter, above note 18, Art. 27.

22 H. Yamashita, above note 4, p. 193.

23 See, e.g., M. Jacques, above note 1, pp. 240–41.

24 For an overview of the challenges posed by the exercise of the veto, see, e.g., Frédéric Mégret, "The Security Council", in Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal*, Oxford University Press, London, 2020, pp. 39–98; UN Security Council, *The Veto*, Security Council Report, Research Report No. 3, 19 October 2015, available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf.

initiative, establish a safe zone for the protection of its nationals on its own territory, or that it would be respected by enemy belligerents if it did so.

Furthermore, even if the establishment of a safe zone was consented to in some manner by the territorial State, as aforementioned, it is still unlikely that there would be clear and express agreement from all belligerents specifically conferring it protected status as required under the “conventional” framework. In that instance, the safe zone would not benefit from the enhanced protection foreseen by IHL and there would be no explicit obligation on the parties to the conflict, including those administering the safe zone, to respect any commitment towards complete demilitarization and refrain from attack. Alternatively, if consent were not at all forthcoming, then there would be a risk of the intensification of hostilities between the intervening and non-consenting forces, either within or in the vicinity of the safe zone, further compromising any possibility of durable protection. It is also suggested that without UN support, the capacity of the intervening forces and their willingness to ensure the genuine protection of the safe zone’s inhabitants would be limited. Therefore, in all of these scenarios, the evident challenges faced in ensuring the long-term safety of the civilian population in prior safe zones would only worsen if practice evolved in this direction.

In order to provide the most comprehensive overview, three alternative scenarios – a safe zone established by the home State, a safe zone expressly consented to by the home State and an imposed safe zone not consented to by the home State – will be considered in the subsequent discussion which aims to demonstrate the risks for refugee protection of creating safe zones which have, at best, a fragile basis in international law.

Safe zones and refugee protection

This paper will take a holistic approach to refugee protection in armed conflict, and views IRL, IHL and IHRL as sources of mutually reinforcing and complementary, rather than conflicting, protection.²⁵ IRL will be considered due to the focus on refugee protection. Additionally, both IHL and IHRL are crucial reinforcing sources of protection that are applicable in the context of armed conflict in which safe zones would typically be established.²⁶ With this in mind, this section will

25 This is in line with the Human Rights Committee’s complementarity approach and the position of Professor Vincent Chetail. Vincent Chetail, “Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law”, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 700–34; Vincent Chetail, “Moving towards an Integrated Approach of Refugee Law and Human Rights Law”, in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law*, Vol. 1, Oxford University Press, Oxford, 2021, pp. 210–12.

26 For the applicability of IHRL in armed conflict, see International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 136, 2004, para. 106; General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to

consider the varying safe zone typologies that have been presented in order to challenge three prominent arguments that risk being associated with their existence: first, that they can justify the denial of access to asylum; second, that their posited “safety” can ground the rejection of asylum applications; third, that persons can be returned to safe zones.

Safe zones and access to asylum

The first danger is that safe zones are relied on by States to justify the closure of borders and denial of access to asylum, forcing persons to settle in spaces which are misrepresented as safe. Although safe zones are an arguably protective alternative to the dangers of irregular border crossings,²⁷ relying on them to prevent persons from seeking protection would be clearly incompatible with international law, particularly the right to leave and to seek asylum and the principle of *non-refoulement*.

The right to leave

The right to leave in the Refugee Convention obliges States Parties to permit “refugees lawfully staying in their territory”, namely the State of asylum, to travel outside the State.²⁸ This has relatively limited relevance for the present discussion as safe zones are premised on being established in the State of origin rather than the State of asylum, and this provision does not offer any protection to those who remain in their home State. Therefore, the right to leave under IHL and IHRL must be considered as they provide more comprehensive protection to persons wishing to leave a territory where a safe zone is located.

The right to leave under IHL stipulates an entitlement to voluntarily leave a territory at the start of, and during, an IAC.²⁹ However, this is subject to several caveats. First, the right to leave does not cover all instances in which safe zones could be established as it is predominantly foreseen for individuals on a State’s own territory.³⁰ Second, even on own territory, the right to leave will only benefit protected persons, as defined by Article 4 of GC IV, which broadly requires that an individual is in the hands of a party of which they are not nationals. Therefore, individuals in the power of their State of nationality, such as those residing in a safe zone controlled by the territorial State or attempting to cross that State’s border to seek asylum elsewhere, would not benefit from the right to leave. While Article 73 of AP I recognizes that refugees can be protected persons regardless of their nationality, this is equally limited in its protective

the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11. For the material scope of application of IHL, see, e.g., M. Sassòli, above note 9, pp. 168–85.

27 G. Gilbert and A. M. Rüsç, above note 2, p. 3; B. Ní Ghráinne, above note 4, p. 336.

28 Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954) (Refugee Convention), Art. 28.

29 GC IV, Art. 35.

30 M. Sassòli, above note 9, p. 336.

effect because they must have been recognized as a refugee prior to the outbreak of hostilities and the parties to the conflict must have ratified AP I.³¹ Additionally, individuals in the power of their country of nationality, and therefore without protected status, would not be recognized as refugees by their own State so would not benefit from this additional protection. Third, individuals can be prevented from leaving if their departure would be contrary to “national interests”, which has been interpreted as broader than the State’s security interests and can also encompass economic considerations.³²

Therefore, in light of the caveats above, there are very limited instances in which individuals in need of protection could benefit from the right to leave their country of origin and seek asylum elsewhere under IHL alone. Specifically, the right to leave under IHL would only substantively benefit persons in a safe zone that is located outside their country of nationality who wish to return to their home State or another country. However, this is a relatively unforeseeable scenario as a State that wishes to prevent the entry of foreign nationals is unlikely to establish a safe zone on its own territory. Even if this were the case, individuals present in the safe zone would be seeking protection in that receiving State rather than wishing to return to their State of persecution and would therefore not substantively benefit from the right to leave in this scenario.

As a result of these limitations, recourse must be had to the right to leave under IHRL, which applies to all individuals regardless of their nationality and is considered as applicable in armed conflict.³³ In this respect, as well as the State’s obligation to secure the rights of all persons on its territory including those arriving at its border, the extraterritorial application of IHRL has been recognized where a State has established effective control over territory or its agents exercise physical control and authority over persons.³⁴ This entails that regardless of the conditions of its establishment, those administering a safe zone would be responsible for respecting the rights of persons therein, including the right to leave. In particular, if a safe zone is established or administered by the territorial State, then it is uncontroversial that it must secure the right to leave of all persons present in the safe zone as they would be clearly within its jurisdiction. Additionally, if a safe zone is directly administered by another State’s forces, it is considered that those administering the safe zone could have extra-territorial IHRL obligations based either on the degree of control and authority they would exercise over its inhabitants or their effective control over the territory.³⁵

Despite its broad applicability, the right to leave is not absolute. In particular, in times of “public emergency which threatens the life of the nation”, under certain

31 V. Chetail, “Armed Conflict and Forced Migration”, above note 25, pp. 706–10.

32 M. Sassòli, above note 9, p. 297.

33 See, e.g., International Covenant on Civil and Political Rights, 999 UNTS 17, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Art. 12(2). The right to leave has been reaffirmed in numerous treaties and argued as customary in nature; see Vincent Chetail, *International Migration Law*, Oxford University Press, Oxford, 2019, pp. 82–92.

34 E.-C. Gillard, above note 7, p. 1097. See also General Comment No. 31, above note 26, para. 10: “anyone within the power or effective control” of a State party.

35 E.-C. Gillard, above note 7, pp. 1098–9; W. C. H. Chau, above note 2, pp. 210–14.

treaties States can derogate from the right to leave, provided measures are strictly required by the situation, not discriminatory, nor inconsistent with other international obligations.³⁶ This has been restrictively interpreted as requiring more than the existence of an armed conflict.³⁷ Specifically, when a State is involved in an extraterritorial armed conflict in which hostilities take place outside its territory, the extent to which there is a legitimate “threat to the life of a nation” permitting derogation is debated.³⁸ Under a similar approach, it has been argued that if a refugee-receiving State imposes a safe zone in another State where there is an ongoing conflict to which they are not party, then it could not derogate from the right to leave because of the lack of a “threat” on its own territory.³⁹ This reasoning could also be extended to a situation where the imposing State is party to the conflict and is engaged in hostilities both within and beyond the safe zone provided hostilities remain confined to the foreign territory.

Furthermore, Chetail has importantly observed that the ability to derogate is limited to certain instruments as the right to leave is enshrined in a number of relevant universal and regional IHRL treaties without any possibility of derogation.⁴⁰ This scholar has also noted that even if permitted by a certain instrument, States will not always derogate in situations of emergency, especially if they do not want to recognize the existence of an armed conflict on their territory.⁴¹ Under this reasoning, it can be argued that there are a number of scenarios where the right to leave could be fully applicable without derogation and would therefore continue to provide crucial protection to those wishing to flee a State where a safe zone is located.

The right to leave can also be restricted on the basis of the legitimate aims of national security and public order, among others. However, this is only as long as measures are provided by law and necessary, which entails that they must be the “least intrusive” measure and “proportionate to the interest to be protected”.⁴² These conditions therefore significantly limit a State’s ability to prevent flight, and were notably drafted as the “exception” rather than the “rule”.⁴³ In particular, a State could not ground a limitation of the right to leave on the mere existence of a safe zone as any restriction must be based on the individual circumstances of the case rather than the general conditions in the country of origin.⁴⁴ In this respect, the

36 See, e.g., ICCPR, Art. 4.

37 General Comment No. 29: Article 4: Derogations During a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3.

38 For detailed analysis, see Marko Milanovic, “Extraterritorial Derogations from Human Rights Treaties in Armed Conflict”, in Nehal Bhuta (ed.), *The Frontiers of Human Rights*, Vol. 1, Oxford University Press, Oxford, 2016.

39 G. Gilbert and A. M. Rüsçh, above note 2, p. 5.

40 V. Chetail, “Armed Conflict and Forced Migration”, above note 25, p. 716. See, e.g., African Charter on Human and Peoples’ Rights, Art. 12(2); International Convention on the Rights of the Child, Art. 10(2) and others.

41 *Ibid.* See, e.g., European Court of Human Rights, *Isayeva v. Russia*, Case No. 57950/00, 24 February 2005.

42 ICCPR, Art. 12(3); General Comment No. 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev.1/Add.13, 2 November 1999, paras 14–16.

43 V. Chetail, above note 33, p. 80.

44 *Ibid.*, pp. 84–5.

individual seeking protection would probably be fleeing persecution or serious harm in an ongoing conflict, and only in the exceptional instance of serious criminality could they be considered as posing any kind of “threat” to the receiving State.⁴⁵ Therefore, in virtually all instances, the exposure to continued danger through restricting an individual’s right to leave is neither necessary nor proportionate to any legitimate aim.

The right to seek asylum and non-refoulement

The right to leave is reinforced by the right to “seek and enjoy asylum” as enshrined in the Universal Declaration of Human Rights,⁴⁶ which has been argued as implicit in the Refugee Convention and an emerging customary norm.⁴⁷ However, on its own, this is limited in effect as it does not oblige States to actually grant asylum and is therefore only made operable through the principle of *non-refoulement*.⁴⁸

Non-refoulement is a crucially important norm enshrined in IRL, IHRL and IHL. Under IRL, this principle applies to both asylum seekers and formally recognized refugees and prohibits return “in any manner whatsoever” to a State where they face persecution on five limitative grounds – nationality, political opinion, race, religion and membership of a particular social group.⁴⁹ Similarly, under IHL, parties to an IAC are prohibited from transferring protected persons from their own territory to another State where they fear persecution, but on more limited grounds of political opinion or religious belief.⁵⁰

Under IHRL, the principle of *non-refoulement* proscribes return where there are “substantial grounds” to consider that an individual faces a “real risk of irreparable harm” owing to a serious human rights violation.⁵¹ This traditionally encompasses harm amounting to torture and cruel, inhuman or degrading

45 This analysis focuses on the obligations of refugee-receiving States to respect the right to leave as practice has shown that safe zones would be established with the intention to prevent individuals from entering the State of asylum, rather than by the home State to prevent the flight of its nationals.

46 Universal Declaration of Human Rights, UN General Assembly Resolution 217 A(III), 10 December 1948, Art. 14.

47 Alice Edwards, “Human Rights, Refugees, and The Right ‘To Enjoy’ Asylum”, *International Journal of Refugee Law*, Vol. 17, No. 2, 2005, p. 301.

48 Vincent Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in Ruth Rubio-Marín (ed.), *Human Rights and Immigration*, Vol. 1, Oxford University Press, Oxford, 2014, p. 31.

49 Refugee Convention, Art. 33. See also Rebecca M. M. Wallace, “The Principle of *Non-refoulement* in International Refugee Law”, in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration*, Elgar, Cheltenham, 2014, p. 418.

50 GC IV, Art. 45. According to this provision, transfer is also prohibited if the destination state is not party to GC IV or is not willing or able to respect it. For analysis of *non-refoulement* under IHL, see Vincent Chetail, “The Transfer and Deportation of Civilians”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 1187–9 and 1198–209.

51 General Comment No. 31, above note 26, para. 12. *Non-refoulement* has been explicitly endorsed in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987), Art. 3. It is also recognized as implicit in the European Convention on Human Rights; see European Court of Human Rights, *Soering v UK*, Application No. 14038/88, 7 July 1989 and a customary norm, arguably amounting to *jus cogens*. See V. Chetail, above note 48, pp. 29–39.

treatment but has also been interpreted to include other core rights, including the right to life and right to a fair trial, namely in situations of armed conflict.⁵² Moreover, as argued by Chetail, it is not necessarily limited to specific rights and will be engaged when there is a serious violation amounting to degrading treatment.⁵³ Therefore, this prohibition is broader than under IRL and IHL, especially in its application to all individuals including those who are not protected persons under IHL, who fall under Article 33(2) of the Refugee Convention or who do not otherwise meet the refugee definition under Article 1A(2) of the Refugee Convention.⁵⁴

The application of *non-refoulement* to safe zones will be considered in the section on returns below. At this stage, it is important to emphasize that *non-refoulement* is at the core of international refugee protection and is an essential guarantee when challenging possible responses by refugee-receiving States towards individuals fleeing a State where a safe zone is located. Taken together with the right to leave and to seek asylum, this provides a crucial layer of protection that precludes States from preventing admission to their territory for individuals in need of protection.

Push backs and border closures

Past practice has indicated that safe zones risk being associated with border closures and other push-back practices, as refugee-receiving States could argue that they mitigate the need for individuals to seek refuge elsewhere due to their apparent safety.⁵⁵ This would be clearly incompatible with the international legal framework protecting the right to leave, as well as the principle of *non-refoulement* which is settled as applying to rejection at the frontier.⁵⁶ The expansion of this principle to include interception on the high seas is also crucial in protecting individuals who make the crossing across international waters to seek protection in Europe.⁵⁷

Beyond these instances, a pertinent consideration is whether *non-refoulement* protects persons who remain in their home State. This would be

52 See, e.g., European Court of Human Rights, *Sufi and Elmi v. United Kingdom*, Application Nos. 8319/07 and 1149/07, 28 June 2011 in V. Chetail, above note 50, p. 1204. For analysis of the scope of *non-refoulement*, see Emanuela-Chiara Gillard, “There’s No Place like Home: States’ Obligations in Relation to Transfers of Persons”, *International Review of the Red Cross*, Vol. 90, 2008, pp. 716–23; V. Chetail, above note 48, pp. 34–9.

53 V. Chetail, above note 48, p. 35.

54 For an assessment of Art. 33(2), see Aoife Duffy, “Expulsion to Face Torture—*Non-Refoulement* in International Law”, *International Journal of Refugee Law*, Vol. 20, No. 3, 2008, pp. 374–7. For the application of the refugee definition to situations of armed conflict, see V. Chetail, “Armed Conflict and Forced Migration”, above note 25, pp. 722–7.

55 K. Long, above note 5, pp. 462–7.

56 UN High Commissioner for Refugees (UNHCR), “Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol”, 26 January 2007, para. 7, available at: <https://www.unhcr.org/4d9486929.pdf>.

57 European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, paras 180–1.

particularly relevant if push-back practices are employed at borders against those fleeing States where safe zones are located.⁵⁸ In this scenario, the State of asylum would be constructively refouling persons to a place of persecution or serious harm by indirectly forcing them to seek protection in a safe zone rather than travel to or across the border where they know their asylum claim would either not be considered or be arbitrarily rejected.⁵⁹ In this respect, it has been argued that *non-refoulement* under IRL is exclusively territorial and will not protect those who remain in their country of origin.⁶⁰ However, as affirmed by the UN High Commissioner for Refugees (UNHCR) and supported in scholarship, there is “growing consensus” that Article 33(1) of the Refugee Convention applies to all persons who fall under the jurisdiction of a State, even if on another State’s territory.⁶¹ The core argument supporting this conclusion is that given their similar object and purpose, there should not be a discrepancy between the geographical scope of application of *non-refoulement* under IRL and IHRL.⁶² While this is still somewhat debatable, it is clear that based on the extraterritorial application of IHRL outlined in the context of the right to leave above, the principle of *non-refoulement* under IHRL must be respected when the individual falls under the jurisdiction of the State, and it is argued that this would include a safe zone controlled and administered by foreign or peacekeeping forces.⁶³

Given that a central concern of refugee-receiving States is the scale of individuals who arrive at their borders in need of protection, it is also possible that safe zones would be associated with arguments of mass influx. While there are remaining controversies, Chetail has convincingly argued that based on the “inclusive” wording of the Refugee Convention, mass influx cannot be a permissible exception to *non-refoulement* under IRL.⁶⁴ Taken together with the absolute nature of *non-refoulement* under IHRL, persons cannot be refoiled to a place where they face persecution or serious irreparable harm regardless of the alleged burden on the State of asylum.⁶⁵ Additionally, the prohibition of collective expulsion requires that all individuals benefit from an individual assessment in

58 B. Ní Ghráinne, above note 4, p. 344.

59 Brid Ní Ghráinne, “Internally Displaced Persons and International Law”, in Satvinder Singh Juss (ed.), *Research Handbook on International Refugee Law*, Elgar, Cheltenham, 2019, pp. 37–8.

60 This derives from the wording of the definition of a refugee as “outside the country of his nationality” and was affirmed in *R v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55. See V. Chetail, above note 48, p. 36.

61 This is based on the ordinary meaning of the Refugee Convention, in light of its object and purpose, taking into account subsequent practice under Article 31 of the Vienna Convention on the Law of Treaties. Thomas Gammeltoft-Hansen, “Extraterritorial Migration Control and the Reach of Human Rights”, in V. Chetail and C. Bauloz (eds), *Research Handbook on International Law and Migration*, Elgar, Cheltenham, 2014, p. 116; UNHCR, above note 56, paras 23–4.

62 UNHCR, above note 56, paras 42–3.

63 V. Chetail, above note 48, pp. 36–7.

64 As affirmed by the UNHCR; V. Chetail, “Armed Conflict and Forced Migration”, above note 25, pp. 719–20.

65 See, e.g., European Court of Human Rights, *MSS v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 223.

their asylum claim, including in situations of mass influx.⁶⁶ Therefore, any collective decision to refuse entry to a State of all persons fleeing a conflict-affected context in which there is a safe zone would be prohibited.

In sum, under the reinforcing protections of IHL, IRL and IHRL, particularly the right to leave, the principle of *non-refoulement* and the prohibition of collective expulsion, regardless of the existence or apparent safety of a safe zone, individuals must still be able to leave their country of origin and access asylum procedures in another State.

Safe zones and determination of asylum claims

The next barrier for refugee protection posed by safe zones is that their existence in the applicant's country of origin could justify the refusal of an asylum claim on the grounds of the IPA. This section will address this notion in the alternative instances that a safe zone is administered by the military powers of the home State, a foreign State or a UN peacekeeping operation.

The internal protection alternative

The IPA is subject to controversy as it was not initially envisaged by the system of refugee protection and is not mentioned in the Refugee Convention.⁶⁷ It is settled that the IPA cannot be invoked by African Union Member States who have ratified the Organisation of African Unity (OAU) Convention, as its definition of a refugee explicitly includes persons compelled to leave their country of origin owing to a number of specified scenarios taking place in part of the country.⁶⁸ However, beyond this region, the matter is not so clear cut and States frequently rely on the IPA as an implicit part of the assessment of a well-founded fear of persecution and whether the applicant is “able or willing” to avail themselves of protection under Article 1A(2) of the Refugee Convention.⁶⁹

The UNHCR has acknowledged the possibility of the IPA but has specified a two-fold test of “safety” and “reasonableness” to limit its scope.⁷⁰ This entails that in the applicant's particular circumstances, there is an area of the country of origin where they do not have a well-founded fear of persecution or can receive protection from it, and which they can safely access and “lead a relatively normal life without ... undue hardship”.⁷¹ These conditions are explicitly endorsed by

66 The prohibition of collective expulsion is explicit in some regional treaties, acknowledged by the Human Rights Committee as implicit in Article 13 of the ICCPR and is arguably a customary norm. V. Chetail, “Armed Conflict and Forced Migration”, above note 25, pp. 720–1; V. Chetail, above note 33, pp. 139–42.

67 Jessica Schultz, *The Internal Protection Alternative in Refugee Law*, Brill Nijhoff, Boston, MA, 2019, p. 2.

68 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969 (entered into force 20 June 1974) (OAU Convention), Art. I(2).

69 Jessica Schultz, “The Internal Protection Alternative and its Relation to Refugee Status”, in S. S. Juss (ed.), *Research Handbook on International Refugee Law*, Elgar, Cheltenham, 2019, p. 129.

70 *Ibid.*

71 UNHCR, Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A (2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/03/04, 23 July 2003, paras 6–7.

the European Union Qualification Directive 2011/95/EU (EUQD) which enshrines a clearer legal basis for the IPA and crucially specifies the minimum standards required for there to be adequate protection from persecution.⁷²

Although the EUQD is not applicable to persons seeking asylum outside of the European Union (EU), its provisions can shed light on the evolving content and substance of the IPA, including beyond the EU system, and provide more specificity on a relatively vague notion. While this is yet to occur, it is also not unforeseeable that in the future EU Member States could rely on the IPA to deny asylum on the basis of the existence of a safe zone in the individual’s country of origin that promoted some form of safety.

Under normal circumstances, the IPA is reserved for cases of persecution by non-State actors, as a State is presumed to be able to exercise its power everywhere on its territory.⁷³ Therefore, if the territorial State consents to the establishment of a safe zone, the scope of the IPA will be considerably limited as the safe zone would be administered either directly by or with the acquiescence of the State, which would be able to continue to persecute its inhabitants. However, it is considered that safe zones will not always be explicitly consented to and, instead, could be controlled and administered by external actors, specifically a UN peacekeeping operation or a foreign power. In this respect, it has been recognized that a State’s ability to persecute can be refuted in the exceptional circumstance that it does not have control over the whole territory.⁷⁴ This creates a risk of the expansion of the IPA to reject asylum claims based on false narratives of safety as refugee-receiving States could argue that an individual is able to receive protection from persecution at the hands of both State and non-State actors if there is a safe zone administered by an external actor in their country of origin. However, this argument can be dismantled, as mere safety in a safe zone, let alone comprehensive protection from persecutory harm, is considered as mostly unrealistic.

Actors of protection: UN peacekeeping forces

This paper contends that future safe zones could increasingly be non-consensually established by foreign States without UN Security Council authorization. However, as has been endorsed by some authors,⁷⁵ a UN peacekeeping force could still be deployed to an existing safe zone to ensure its safety, thus requiring consideration of how this would affect an IPA assessment. This is even more pertinent in light of the role of peacekeeping forces in protection of civilian (PoC) sites, a form of safe zone coined following the spontaneous large-scale arrival of civilians at a UN peacekeeping base in South Sudan.⁷⁶ PoC sites differ from the more common

72 Article 8 of the EUQD defines the IPA and explicitly refers to Article 7 which defines actors of protection. See Council Directive 2011/95/EU of 13 December 2011 [2011] OJ L 337/9-337/26 (EUQD).

73 UNHCR, above note 71, para. 13.

74 *Ibid.*

75 P. Orchard, above note 2, p. 68.

76 E.-C. Gillard, above note 7, p. 1093.

understanding of safe zones presented at the outset of this paper due to their unplanned character and raise several issues, related to jurisdiction and supervision, beyond the scope of this paper.⁷⁷

The EUQD recognizes at Article 7(1)(b) that “parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State”, such as UN peacekeeping operations, are potential actors of protection against persecution. Article 7(2) further provides that protection must be “effective” and “non-temporary”, and the actor must take steps to prevent persecution, such as through operating an “effective legal system” for the punishment of persecutory acts. The UNHCR has similarly accepted the possibility of non-State actors of protection in exceptional circumstances where they have a high degree of control and the capacity to provide comprehensive protection.⁷⁸ Thus, both within and outside of the EU system, there is a relatively high threshold which is beyond the typically limited mandate of UN peacekeepers to protect against imminent physical harm.

Although it is possible that they could provide physical protection from hostilities in a safe zone, the shortcomings of PoC sites suggest that UN peacekeeping operations would not have the capacity to provide sufficient protection for the IPA.⁷⁹ Indeed, in South Sudan, despite the prominent protection needs, only basic medical assistance and water were provided and there was no functioning judicial or administrative system.⁸⁰ This was notably due to the limitations in their mandate, which did not grant powers of law enforcement or judicial authority, preventing the ability to detain or try individuals.⁸¹ In this respect, in order for a peacekeeping operation to be a competent actor of protection in a safe zone, it must have a mandate that allows for the detention and prosecution of persons in a manner that respects fair trial guarantees. However, this seems relatively unlikely given the already evident resistance of the UN Security Council to lend support to safe zones, as discussed above.

Actors of protection: Foreign military powers

In the possible scenario that a safe zone is established by or with the support of a foreign power and administered by its forces, it is similarly considered that the

77 See, e.g., Caelin Briggs, “Protection of Civilians Sites: Lessons from South Sudan for Future Operations”, Norwegian Refugee Council, 31 May 2017, available at: https://www.nrc.no/globalassets/pdf/reports/poc-sites_lessons-from-south-sudan-copy.pdf.

78 UNHCR, above note 71, para. 17. “Protection must be effective and of a durable nature ... provided by an organised and stable authority exercising full control over the territory and population in question.”

79 The limited capacity of international organizations to offer protection has been recognised by the UNHCR. *Ibid.*, para. 16.

80 Damian Lilly, “Protection of Civilians Sites: A New Type of Displacement Settlement?” *Humanitarian Exchange*, September 2014, pp. 31–3, available at: <https://odihpn.org/magazine/protection-of-civilians-sites-a-new-type-of-displacement-settlement/>.

81 E.-C. Gillard, above note 7, p. 1095.

administering powers would not have the capacity to be considered as a competent actor of protection for the purposes of the IPA. Although these forces could probably provide a form of physical protection to individuals through military enforcement activities, their capacity to provide comprehensive and effective protection from persecution in the manner required by the IPA is more limited. The principal issue is that the control and administration of a safe zone by foreign military actors would likely take place in the context of an armed conflict with a constant risk of the resurgence of active hostilities and limited safety. This cannot be considered as an environment where individuals could reasonably be expected to settle in a long-term or durable manner, the final component of the IPA that will now be considered.

“Reasonably expected to settle”

In addition to the challenges already presented, even if the applicant could receive immediate protection from persecution in a safe zone, they must also be able to safely and legally travel there and be “reasonably expected to settle”.⁸² These are the strongest arguments in favour of this section’s conclusion that, in almost all instances, safe zones cannot be invoked as an IPA.

With regard to the condition of safe and legal travel, the traditional premise of safe zones under the IHL framework foresaw their establishment in the midst of intense fighting to protect civilians unable to flee hostilities, rather than as a space for persons in distant areas to travel to. Expecting persons to travel through an active war zone is clearly problematic and precludes the possibility to invoke the IPA for those not in proximity to the safe zone.⁸³ Moreover, the fundamental condition of settlement entails that a safe zone must guarantee more than protection from hostilities and be a “habitable” and “safe” environment, in which the individual can comprehensively and freely enjoy civil and political as well as economic, social and cultural rights.⁸⁴ This must also take into account the risk of indirect *refoulement*, namely the return of persons to a safe zone where the socio-economic conditions are insufficient for them to remain indefinitely, driving return to the original place of persecution or other areas where they face harm.⁸⁵

Beyond the specific context of the IPA, a number of standards have been suggested by Gilbert and Rüschi in order for a safe zone to provide genuine and robust protection to its inhabitants, which can also be relied on to establish some possible benchmarks for when a safe zone could be sufficiently safe for the IPA. In particular, at the absolute minimum, there must be respect for the right to life, freedom from torture and cruel, inhuman or degrading treatment, freedom from sexual and gender-based violence, and unimpeded humanitarian access. In

82 EUQD, Art. 8(1). Similar notions of reasonableness and settlement have been endorsed by the UNHCR. See UNHCR, above note 71, pp. 24–30.

83 B. Ní Ghráinne, above note 4, p. 363.

84 UNHCR, *Interpreting Article 1 of the 1951 Geneva Convention Relating to the Status of Refugees*, Geneva, April 2001, para. 13.

85 B. Ní Ghráinne, above note 4, p. 350.

addition, those administering the safe zone must secure an adequate standard of living for all inhabitants, through providing, at least, medical care, food, water and shelter.⁸⁶ If these conditions were met, then it could be argued that the IPA would be engaged. However, it is relatively unrealistic given that the vast majority of safe zones would be established in a conflict-affected context where the presence of unwanted forces and ongoing attacks either in the safe zone itself or in surrounding areas would foreseeably result in direct and indirect threats to the livelihood and wellbeing of civilians.⁸⁷

Nevertheless, even if a safe zone could meet the conditions of the IPA, there is still the risk that refugee-receiving States would misinterpret it as safe for every individual and reject all cases without any consideration of their merit.⁸⁸ While it might provide some immediate protection, the existence of a safe zone could not be considered as eliminating all forms of persecution, particularly those which are not conflict related. Furthermore, as enshrined in the EUQD, affirmed by the UNHCR and reinforced by the prohibition of collective expulsion, there cannot be automaticity in an asylum determination assessment.⁸⁹ Therefore, any rejection based on the IPA must be following an individualized assessment that takes into account the applicant's personal circumstances, beyond the mere existence of the safe zone.

Safe zones and returns

Both IHL and IHRL recognize the right of return.⁹⁰ However, as highlighted throughout this paper, safe zones risk being associated with illusory notions of safety and being employed to justify the return of persons to their country of origin where a safe zone is located.⁹¹ As will be demonstrated in this section, genuine and comprehensive safety is often unachievable and mostly unrealistic in the context of armed conflict, precluding the return of persons to safe zones in almost all instances.

The application of non-refoulement to safe zones

The principle of *non-refoulement* under IRL and IHL would prohibit return to a safe zone where an individual faces an immediate and apparent danger of persecution in varying instances. Firstly, under IHL, in certain instances, individuals cannot be forcibly returned by a foreign power to a place where they fear persecution on

86 G. Gilbert and A. M. Rüsçh, above note 2, p. 2.

87 B. Ní Ghráinne, above note 4, p. 351.

88 *Ibid.*, p. 344.

89 EUQD, Art. 8(2); UNHCR, above note 71, para. 4.

90 See, e.g., Universal Declaration of Human Rights, Art. 13(2); ICCPR, Art. 12(4). See also ICRC Customary Law Study, above note 11, rule 132, which recognizes a right to return in IAC and NIAC. Articles 35, 45 and 49(1) of GC IV implicitly permit the voluntary return of civilians. For analysis, see V. Chetail, "Armed Conflict and Forced Migration", above note 25, pp. 728–9.

91 K. Long, above note 5, p. 471.

the grounds of their political or religious beliefs.⁹² While this could include the return of individuals present in another State to a safe zone in their country of nationality or origin, this must be caveated as it would only apply to returns from States who are party to the IAC and therefore bound by these provisions, and would only benefit protected persons. Therefore, despite their important protective benefits, the relevant IHL provisions would not cover all scenarios, also due to the more limited grounds of persecution and the arguable exception of deportation.⁹³

Nevertheless, persons falling outside the scope of protection of IHL would likely be protected by *non-refoulement* under IRL, which covers more instances of persecution and prohibits all forms of return. Notably, in light of the conflict environment in which the safe zone would probably be established, it is more than foreseeable that an individual would face persecution on their return. In particular, if the safe zone were administered by or with the acquiescence of the State, then persecution faced by an individual at the hands of the government prior to their departure would not be alleviated by the existence of a safe zone. It is also considered that persecution could arise in the aftermath of conflict and be triggered by return to the safe zone, such as against those who were perceived as supporting the enemy forces of those administering the safe zone. Additionally, as introduced in the context of the IPA, the administering forces are also likely to be ill equipped to provide adequate protection against persecution from other actors.

Notwithstanding the likelihood of persecution in a safe zone, given the challenges of achieving genuine and long-term safety identified in this paper, it is difficult to conceive of a situation where a safe zone would be free from the threat of harm to justify return in accordance with the broader definition of *non-refoulement* under IHRL. More generally, as documented by the ICRC, persons who are displaced by conflict, in particular women and minority groups, often do not wish to return to their country of origin out of fear for their safety and security stemming from the continued risk of instability, even if the immediate threat of attack is no longer present.⁹⁴ This is even more prominent in the case of a safe zone that could, at best, only temporarily provide safety to the civilian population from attack. In particular, it has been noted that if belligerents do not agree to the safe zone, a credible military presence would probably be needed in order to deter activities which compromise its safety.⁹⁵ In turn, it would probably be immediately established in a space prone to hostilities between those administering the zone and non-consenting belligerents, giving rise to the risk of serious harm against the civilian population, and engaging the IHRL principle of *non-refoulement* to preclude return to safe zones in almost all other instances.

92 GC IV, Art. 45(4).

93 V. Chetail, above note 50, pp. 1190–202.

94 Cédric Cotter, *Displacement in Times of Armed Conflict: How International Humanitarian Law Protects in War and Why it Matters*, ICRC’s IHL Impact Series, Geneva, April 2019, pp. 55–6.

95 R. Birnie and J. Welsh, above note 13, p. 339.

Return as voluntary, safe, dignified and durable

Although not explicit in the Refugee Convention, a correlative of *non-refoulement* is that return must always be voluntary, meaning that, regardless of the conditions of safety, individuals could in no instances be forcibly or coercively compelled to return to a safe zone.⁹⁶ Additionally, in recent years, emphasis has increasingly been placed on the “objective conditions” in the country of origin grounded in the language of safety and dignity on return.⁹⁷ Consequently, this would require more than just freedom from hostilities in the safe zone but comprehensive “physical, legal and material safety”, in which returning individuals could fully enjoy their rights, including economic, social and cultural rights, and access services without discrimination.⁹⁸ Authors have also increasingly argued that return must be durable, a somewhat undefined term associated with indirect *refoulement*, which requires that return is sustainable and does not lead to further displacement.⁹⁹

Building upon this paper’s prior analysis in the context of the IPA, active steps must therefore be taken by those who are administering a safe zone to secure the livelihood of persons and enable the exercise of their rights in a genuine and non-discriminatory manner, including the provision of education, comprehensive medical care and employment opportunities.¹⁰⁰ There should also be identifiable longevity in safety, which could be demonstrated by the comprehensive (re) construction of infrastructure, including hospitals, schools, homes and sites of worship that were likely to have been destroyed by conflict.¹⁰¹ In addition, when coupled with the principle of *non-refoulement*, it would be essential that the safe zone had an effective police force, and ideally a functioning judicial system, that would effectively protect all civilians against the risk of persecution and serious harm in a manner that fully upholds IHRL guarantees, including freedom from arbitrary arrest and detention.¹⁰² If a future safe zone were to uphold these comprehensive guarantees, then it is possible that such a space could be considered as potentially suitable for return. However, it is argued that this would only be attainable if the safe zone were located in an area where there is no risk of the resumption of hostilities. As it stands, if safe zones continue to be established in

96 Vincent Chetail, “Voluntary Repatriation in Public International Law: Concepts and Contents”, *Refugee Survey Quarterly*, Vol. 23, No. 1, 2004, p. 19; UNHCR, *Handbook on Voluntary Repatriation: International Protection*, January 1996, Chapter 2, available at: <https://www.unhcr.org/3bfe68d32.pdf>. The “voluntary character of repatriation” is also endorsed in Article 5 of the OAU Convention.

97 V. Chetail, *ibid.*, pp. 17–18. This is affirmed by Objective 21 of UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, 19 December 2019, 73rd Session, UN Doc. A/RES/73/195, para. 37.

98 UNHCR, Global Consultations on International Protection/Third Track: Voluntary Repatriation, UN Doc. EC/GC/02/5, 25 April 2002, para. 15; UNHCR, above note 96, p. 11.

99 Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation*, Oxford University Press, Oxford, 2013, p. 174.

100 K. Long, above note 5, p. 459.

101 As recognized by the ICRC, a key factor that impedes the return of people displaced by armed conflict is the ongoing impact of the destruction of their homes and other infrastructure that are essential to meeting their basic needs on return, including electricity, drinking water and health-care services. Reconstruction processes in a safe zone could overcome this potential hurdle to return. C. Cotter, above note 94, p. 56.

102 ICCPR, Art. 9.

situations of ongoing armed conflict, then the volatility of the conflict environment entails that they can never be considered as durably safe to ensure the long-term protection of the civilian population and justify their return.

Safe zones as an immediate, ad hoc and short-term humanitarian response

By taking into account emerging practices related to their creation, this paper has provided some clarity on the legal framework governing safe zones and demonstrated their illegality as alternatives to refugee protection under international law. In this conclusion, the present author wishes to make some final qualifications. Primarily, it is not necessarily the concept of safe zones *in abstracto* that is problematic but their potential evolution into a tool used to conceal a State’s anti-migration interests. Indeed, given the increasingly protracted nature of armed conflict and the serious risks this entails for the civilian population, the potential of a safe zone to ensure the provision of humanitarian assistance and enhanced physical protection is not something to be overlooked.

While it may be somewhat idealistic in light of the complexities of safe zones that have been discussed throughout this paper, properly constituted and respected safe zones, overseen by an impartial humanitarian agency such as the UNHCR or ICRC, can provide vital protection for those trapped in conflict and do have the potential to lessen excessive loss of civilian life.¹⁰³ They can also be particularly beneficial for the protection of internally displaced persons who, for either voluntary or coercive reasons, do not leave their home country.¹⁰⁴ However, the establishment of safe zones must form part of a genuinely humanitarian strategy focused on the immediate protection of civilians to complement, rather than substitute, robust refugee protection. Crucially, any safe zone must be accompanied by complete respect of the international legal framework governing refugee protection that has been elucidated throughout this paper. In this respect, to have any chance of success, the essential shift that must occur in the discourse and practice surrounding safe zones is their disentanglement from the problematic refugee-containment strategies of States and the migration context altogether.

103 G. Gilbert and A. M. Rüsçh, above note 2, p. 7.

104 R. Birnie and J. Welsh, above note 13, p. 332.

REPORTS AND DOCUMENTS

The ICRC's legal and policy position on nuclear weapons

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I. Introduction

The International Committee of the Red Cross (ICRC) first called for the abolishment of nuclear weapons in September 1945.¹ The call came in the aftermath of the atomic bombing of Hiroshima, where ICRC delegates had witnessed the catastrophic effects of nuclear weapons while working alongside the Japanese Red Cross to care for tens of thousands of wounded and dying civilians. The experience had a profound impact on the ICRC and on the International Red Cross and Red Crescent Movement (the Movement) as a whole. During the following decades, the Movement continued to regularly call for the “absolute prohibition” of nuclear weapons² – one of the most abhorrent and inhumane types of weapon ever created. To date, the ICRC and the National Red Cross and Red Crescent Societies have made a significant contribution towards nuclear disarmament by influencing debates, state policy and practice, and international law on nuclear weapons.

The debate around nuclear weapons had traditionally been dominated by geopolitical arguments and national defence theories. Nuclear weapons were viewed as a tool to ensure national and regional security and to maintain geostrategic balance. On 20 April 2010, in what would prove to be a pivotal moment, the president of the ICRC made a historic appeal to states to view nuclear weapons through the lens of humanity and international humanitarian law (IHL). He called on governments to fulfil existing obligations to pursue negotiations aimed at prohibiting and completely eliminating such weapons through a legally binding international treaty, and to bring the era of nuclear weapons to an end.³ The opening paragraphs of his statement read as follows:

The International Committee of the Red Cross firmly believes that the debate about nuclear weapons must be conducted not only on the basis of military doctrines and power politics. The existence of nuclear weapons poses some of the most profound questions about the point at which the rights of States must yield to the interests of humanity, the capacity of our species to master the technology it creates, the reach of international humanitarian law, and the extent of human suffering we are willing to inflict, or to permit, in warfare.

The ICRC president's statement served as a catalyst for efforts to reframe the debate on nuclear weapons in humanitarian terms, beyond the blinkered arguments focusing on military/security issues that had prevailed until that point. It brought to the fore the notion of *human security*—a concept encompassing individual and collective health and well-being, as well as environmental, food security and climate concerns. Indeed, *human security* relates to the very future of the planet and of humankind as a whole, given that the continued existence of nuclear weapons poses a grave, universal threat.

Subsequently, the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT Review Conference) expressed for the first time “its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons” and reaffirmed “the need for all states at all times to comply with applicable international law, including international humanitarian law”.⁴

In late 2011, the Movement adopted a momentous resolution on nuclear weapons, calling on states to negotiate a legally binding international agreement to prohibit the use of and completely eliminate nuclear weapons, based on existing international obligations and commitments.⁵ The Movement's position further galvanized international efforts to advance nuclear disarmament on humanitarian grounds. These efforts took the form, *inter alia*, of a series of three intergovernmental conferences on the humanitarian impacts of nuclear weapons,

- 1 ICRC, “The end of hostilities and the future tasks of the Red Cross”, Circular Letter No. 370 to the Central Committees of the Red Cross Societies, 5 September 1945; ICRC, *Report of the International Committee of the Red Cross on its activities during the Second World War*, ICRC, Geneva, May 1948, Vol. I, pp. 688–690.
- 2 See the following resolutions of the International Conference of the Red Cross and Red Crescent: Resolution 24 of the 17th International Conference of the Red Cross and Red Crescent, Stockholm, 1948; Resolution 18 of the 18th International Conference of the Red Cross and Red Crescent, Toronto, 1952; Resolution 18 of the 19th International Conference of the Red Cross and Red Crescent, New Delhi, 1957; Resolution 28 of the 20th International Conference of the Red Cross and Red Crescent, Vienna, 1965; Resolution 14 of the 21st International Conference of the Red Cross and Red Crescent, Istanbul, 1969; Resolution 14 of the 22nd International Conference of the Red Cross and Red Crescent, Tehran, 1973; Resolution 12 of the 23rd Conference, Bucharest, 1977; and Resolution 13 of the 24th International Conference of the Red Cross and Red Crescent, Manila, 1981.
- 3 Statement by Jakob Kellenberger, president of the ICRC, to the Geneva diplomatic corps, Geneva, 20 April 2010, available at <https://www.icrc.org/en/doc/resources/documents/statement/nuclear-weapons-statement-200410.htm>.
- 4 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50, Vol. I, Conclusions and recommendations for follow-on actions, section I(A)(v), p. 19.
- 5 Council of Delegates, Resolution 1, “Working towards the elimination of nuclear weapons”, CD/11/R1, ICRC, 2011.

hosted by Norway in 2013, and by Mexico and Austria in 2014. The ICRC, National Red Cross and Red Crescent Societies and the International Federation of Red Cross and Red Crescent Societies (IFRC) played an active part in these conferences.

The tide was turning. A new, state-led humanitarian initiative aimed at “taking forward multilateral nuclear disarmament negotiations” resulted in a large majority of states at the 2016 session of the United Nations General Assembly agreeing to convene a conference to negotiate a legally binding instrument to prohibit nuclear weapons.⁶ The ICRC was closely involved in these negotiations and submitted its views on aspects of the draft treaty within its scope of expertise.⁷

On 7 July 2017, 122 states adopted the Treaty on the Prohibition of Nuclear Weapons (TPNW).⁸ The Treaty comprehensively prohibits nuclear weapons. This prohibition, explicitly based on the principles and rules of IHL, constitutes an essential and long-awaited step towards a world free of nuclear weapons. The treaty entered into force on 22 January 2021, building further momentum towards achieving that goal.

The ICRC's legal and policy position on nuclear weapons⁹ has evolved over the years in step with international developments in policy, medicine, science and law. Its most recent views, expressed below, are based on new evidence and data on the humanitarian impact of nuclear weapons on human health and on the environment. They further reflect the ICRC's legal analysis, as well as the key findings of the International Court of Justice's 1996 advisory opinion on the legality of the threat or use of nuclear weapons.¹⁰ These views are framed by the Movement's policy on nuclear weapons, set out in the above-mentioned resolutions. The ICRC's position is structured around six main points, listed below, followed by a commentary in part III of this document.

6 United Nations General Assembly, Resolution 71/258, “Taking forward multilateral nuclear disarmament negotiations”, A/RES/71/258, 23 December 2016.

7 See “Elements of a treaty to prohibit nuclear weapons”, A/CONF.229/2017/WP.2, and “Comments of the International Committee of the Red Cross on key provisions of the Draft Convention on the Prohibition of Nuclear Weapons”, A/CONF.229/2017/CRP.2, submitted by the ICRC to the United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, 31 March 2017 and 14 June 2017 respectively.

8 Treaty on the Prohibition of Nuclear Weapons (A/CONF.229/2017/8), adopted at the United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, New York, 7 July 2017.

9 The term “nuclear weapons” is used here to designate any explosive device triggered by nuclear fission or fusion. It does not apply to weapons or ammunition that contain radioactive components but do not bring about a process of fission or fusion, such as a “dirty bomb”. (“A “dirty bomb” is a type of “radiological dispersal device” that combines a conventional explosive, such as dynamite, with radioactive material”; see US Nuclear Regulatory Commission Backgrounder on Dirty Bombs, February 2020).

10 ICRC, “The Effects of Nuclear Weapons on Human Health”, Information Note no. 1, 2013; see also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC, 2015, 32IC/15/11, pp. 56–59, available at <https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf> (subsequent references to this report will cite it as the *IHL Challenges Report* 2015); and L. Maresca & E. Mitchell, “The human costs and legal consequences of nuclear weapons under international humanitarian law”, *International Review of the Red Cross*, Vol. 97, No. 899, July 2016, pp. 621–645. Regarding new evidence about the humanitarian impacts of nuclear weapons, see ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, August 2020.

II. Summary

1. Non-use, prohibition and elimination of nuclear weapons, in view of their catastrophic humanitarian consequences

- 1.1. Nuclear weapons release immense quantities of heat and kinetic energy, and prolonged radiation. They have massive destructive power which is impossible to contain in space and time. Their use would cause incalculable human suffering, especially in or near populated areas. There is no adequate humanitarian response capacity in case of use of nuclear weapons. Any use would involve a risk of escalation. A nuclear conflict would have catastrophic effects on people and societies around the globe, on human health, the environment, the climate, food production and socio-economic development. It would cause irreversible harm to future generations and threaten the very survival of humanity.
- 1.2. In view of the catastrophic humanitarian consequences of any use of nuclear weapons, it is a humanitarian imperative for States to ensure that they are never again used and to prohibit and eliminate them, regardless of their views on the legality of nuclear weapons under international humanitarian law.

2. Prevention of use through risk reduction and non-proliferation

- 2.1 Pending their complete elimination, it is a humanitarian imperative for States to urgently take effective measures to reduce the risk of use of nuclear weapons.
- 2.2 States must also take effective measures to prevent the proliferation of nuclear weapons, in accordance with their international obligations and commitments.

3. Adherence to and faithful implementation of the Treaty on the Prohibition of Nuclear Weapons (TPNW)

- 3.1 The ICRC calls on all States to promptly sign and ratify or accede to the TPNW, and to faithfully implement it.
- 3.2 The TPNW provides a comprehensive prohibition of nuclear weapons, which is an essential step towards their elimination. It also reinforces the stigma against their proliferation and use. The treaty is a concrete step towards fulfilling existing nuclear disarmament obligations and commitments, in particular those under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).

4. Adherence to and faithful implementation of other international agreements and pursuit of negotiations for the elimination of nuclear weapons

- 4.1 The ICRC calls on States that have not yet done so to ratify or accede to the NPT, the Comprehensive Nuclear-Test-Ban Treaty (CTBT), and

regional treaties establishing nuclear-weapon-free zones (NWFZ) and calls on all States Parties to fulfil their obligations and commitments under these treaties.

4.2 All States must pursue negotiations with a view to achieving the complete elimination of nuclear weapons, pursuant to their obligations under international law.

5. Incompatibility of nuclear weapons with the principles and rules of international humanitarian law (IHL)

5.1 In an armed conflict, it is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of IHL.

5.2 The principles and rules of international humanitarian law applicable to all means and methods of warfare apply to nuclear weapons, even in situations of national self-defence. These include the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the principle of distinction, the prohibition of indiscriminate and disproportionate attacks, the principle of precaution, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment.

5.3 Directing nuclear weapons against civilian populations or civilian objects, such as entire cities or other concentrations of civilians and civilian objects, or otherwise not directing a nuclear weapon against a specific military objective, would violate the principle of distinction.

5.4 Using nuclear weapons against military objectives located in or near populated areas would violate the prohibitions of indiscriminate and disproportionate attacks.

5.5 Even if used far away from populated areas, the suffering to combatants caused by radiation exposure, and the radiological contamination of the environment and risk of spread of radiation to populated areas, make it extremely doubtful that nuclear weapons could ever be used in accordance with the prohibition to use weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment and the civilian population. In an armed conflict, it is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of IHL.

6. Use of and threat to use nuclear weapons is abhorrent to the principles of humanity and dictates of public conscience

6.1 Any use of nuclear weapons would be abhorrent to the principles of humanity and the dictates of public conscience.

6.2 Any threat to use nuclear weapons is abhorrent to the principles of humanity and the dictates of public conscience.

III. Commentary

1. Non-use, prohibition and elimination of nuclear weapons, in view of their catastrophic humanitarian consequences

1.1 Nuclear weapons release immense quantities of heat and kinetic energy, and prolonged radiation. They have massive destructive power which is impossible to contain in space and time. Their use would cause incalculable human suffering, especially in or near populated areas. There is no adequate humanitarian response capacity in case of use of nuclear weapons. Any use would involve a risk of escalation. A nuclear conflict would have catastrophic effects on people and societies around the globe, on human health, the environment, the climate, food production and socio-economic development. It would cause irreversible harm to future generations and threaten the very survival of humanity.

This position is based on science, including medical studies, research and other evidence. It is informed by the Movement's resolutions on nuclear weapons of 2011, 2013 and 2017, as well as the factual findings of the International Court of Justice in its 1996 advisory opinion.¹¹ The ICRC's conclusion that it would not be possible to provide adequate humanitarian assistance in the aftermath of a nuclear blast is based mainly on its own studies.¹² The range of humanitarian consequences of the use of nuclear weapons, as referred to in point 1.1 of the summary, has been documented in various ICRC publications, most recently the report of a workshop hosted by the ICRC and the IFRC on recent research and findings on the humanitarian impacts and risks of use of nuclear weapons, submitted in 2021 as a working paper to the 10th NPT Review Conference. As referenced in that report, these consequences have also been extensively documented by other organizations and at the international conferences on the humanitarian impacts of nuclear weapons held in Oslo, Nayarit and Vienna in 2013 and 2014.¹³

11 See International Court of Justice, "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons", ICJ, 8 July 1996, paragraph 35.

12 As reported in R. Coupland and D. Loye, "Who will assist the victims of use of nuclear, radiological, biological or chemical weapons – and how?", *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, pp. 329–344, and R. Coupland and D. Loye, "International assistance for victims of use of nuclear, radiological, biological and chemical weapons: time for a reality check?", *International Review of the Red Cross*, Vol. 91, No. 874, June 2009, pp. 329–340. The ICRC has concluded in particular that an effective means of assisting a substantial portion of survivors of a nuclear detonation, while adequately protecting those delivering assistance, is not currently available at national level and not feasible at international level. It has also concluded that it is highly unlikely that the immense investment required to develop such capacity will ever be made, and even if it were made, it would likely remain insufficient. See ICRC president Peter Maurer's 2013 statement to the Oslo Conference on the Humanitarian Impacts of Nuclear Weapons, March 2013, and the interview of 4 March 2013 with Gregor Malich, head of the ICRC's Chemical, Biological, Radiological and Nuclear Response Operational Response Project, "No way to deliver assistance in the event of a nuclear explosion".

1.2 In view of the catastrophic humanitarian consequences of any use of nuclear weapons, it is a humanitarian imperative for States to ensure that they are never again used and to prohibit and eliminate them, regardless of their views on the legality of nuclear weapons under international humanitarian law.

This represents the baseline position applicable to *all* states, regardless of their views on the legality of nuclear weapons. In this respect, the ICRC's position distinguishes between a position based on law (see point 5 below), and a position based on ethics and the principles of humanity (points 1 and 6).

The ICRC president's 2010 appeal and the Movement's 2011 resolution both emphasized the difficulty of envisaging how any use of nuclear weapons could be compatible with the principles and rules of IHL, and called on all states "to pursue in good faith and conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement, based on existing commitments and international obligations."¹⁴ The appeal to prevent the use of nuclear weapons and prohibit and eliminate them was primarily framed as a humanitarian imperative. Given the catastrophic humanitarian consequences that any use of nuclear weapons would entail, nuclear disarmament is an urgent humanitarian imperative.

2. Prevention of use through risk reduction and non-proliferation

2.1 Pending their complete elimination, it is a humanitarian imperative for States to urgently take effective measures to reduce the risk of use of nuclear weapons.

While the entry into force of the Treaty on the Prohibition of Nuclear Weapons marks a historic turning point, the risk of the use of these weapons – whether with intent, through miscalculation or by accident – has increased in recent years to the highest level since the Cold War. Risk is defined as the consequence of an event multiplied by the probability of that event occurring.¹⁵ The deployment of nuclear weapons would have catastrophic consequences, while the likelihood of their use has increased as a result of: growing tensions between nuclear-armed states and their allies; the development of new types of nuclear weapons that are

13 ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, paragraphs 3–8.

14 Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 1, CD/11/R1, 2011, OP3. The "existing international obligations" essentially refer to the obligation to negotiate nuclear disarmament under Article VI of the NPT and customary law.

15 Cf J. Borrie, T. Caughley and W. Wan (eds), *Understanding Nuclear Weapon Risks*, UNIDIR, 2017, p. 11.

more powerful or more “usable”; new or expanded roles of nuclear weapons in military plans and doctrine; and the vulnerability of nuclear command and control systems to cyber attacks.¹⁶

These concerns were highlighted by the president of the ICRC in April 2018, when he appealed to states to urgently reduce nuclear risks through a range of specific actions.¹⁷ Risk reduction measures include unequivocal commitments never to use nuclear weapons first (“no first use” policies), “de-alerting” nuclear weapon systems – namely removing thousands of nuclear weapons from high-alert, launch-ready status to lengthen time required to deploy them), and progressive steps to reduce the role of nuclear weapons in security policies.

While there is no specific, legally binding instrument requiring states to reduce nuclear risks, there are multiple political commitments to do so, including in the resolutions of the United Nations General Assembly and the action plan adopted by consensus at the 2010 NPT Review Conference.¹⁸

2.2 States must also take effective measures to prevent the proliferation of nuclear weapons, in accordance with their international obligations and commitments.

Nuclear non-proliferation is one of the three pillars of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The 191 states parties to the treaty are obliged to take measures under Articles I–III to prevent the proliferation of nuclear weapons, and have further undertaken to implement a series of measures to this end, by means of the 2010 action plan.¹⁹ Non-proliferation requirements under the treaty include nuclear safeguards established under International Atomic Energy Agency verification, also required under Article 3 of the Treaty on the Prohibition of Nuclear Weapons (TPNW).²⁰ The Movement is firmly committed to promoting non-proliferation;²¹ the ICRC and the National Red

16 ICRC Briefing Note for National Societies, “Reducing the Risk of Nuclear Weapon Use and Accidental Detonation”, September 2016; and ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, section III.

17 Peter Maurer, “Nuclear weapons: Averting a global catastrophe”, appeal by the president of the ICRC, Geneva, 2018.

18 See 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50 (Vol. I), “Conclusions and recommendations for follow-on actions”, section IA(v), p. 19; also see United Nations General Assembly, Resolution 75/63, A/RES/75/63, 7 December 2020, OP 5, 7, 9 and 10; Resolution 74/46, A/RES/74/46, 12 December 2019, OP 6, 7 and 10; and Resolution 73/60, A/RES/73/60, 5 December 2018, OP 1 and 2.

19 See 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50 (Vol. I), Actions 23–46. Other instruments require states to take certain nuclear non-proliferation measures, such as United Nations Security Council, Resolution 1540, S/RES/1540, 2004, and export control agreements.

20 ICRC Briefing Note, “Safeguards and the Treaty on the Prohibition of Nuclear Weapons”, October 2018.

21 See Council of Delegates, Resolution 4, “Working towards the elimination of nuclear weapons: 2018–2021 action plan”, CD/17/R4, 2017, paras. 2 and 4.

Cross and Red Crescent Societies continue to urge governments to adhere to and fully implement the provisions of the NPT.²²

3. Adherence to and faithful implementation of the Treaty on the Prohibition of Nuclear Weapons (TPNW)

3.1 *The ICRC calls on all States to promptly sign and ratify or accede to the TPNW, and to faithfully implement it.*

3.2 *The TPNW provides a comprehensive prohibition of nuclear weapons, which is an essential step towards their elimination. It also reinforces the stigma against their proliferation and use. The treaty is a concrete step towards fulfilling existing nuclear disarmament obligations and commitments, in particular those under Article VI of the NPT.*

The Treaty on the Prohibition of Nuclear Weapons is the first universal treaty to prohibit nuclear weapons. It is a humanitarian disarmament instrument based on the principles and rules of IHL, as well as the principles of humanity and the dictates of public conscience. The treaty contains a comprehensive prohibition of nuclear weapons—an essential step towards their elimination. Although this prohibition is only binding on states party to the treaty, it strengthens the taboo against the use of nuclear weapons, thus providing a further disincentive for their proliferation.

Beyond banning nuclear weapons, the TPNW provides pathways for their elimination, and for nuclear-armed states to become party to the treaty and disarm under international verification. As such, the treaty is a concrete step towards fulfilling existing nuclear disarmament obligations, in particular the obligation under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament”. The TPNW is seen by many as an “effective measure” within the meaning of this article.

In addition, by setting out obligations relating to assistance for victims of nuclear weapons use and testing, and for the remediation of contaminated areas, the treaty recognizes states’ duty to care for all life harmed by these weapons.

The ICRC and the Movement are firmly committed to promoting the treaty’s universalization and faithful implementation.²³

22 See Council of Delegates progress report, “Working towards the elimination of nuclear weapons: 2018–2021 action plan (Resolution 4 of the 2017 Council of Delegates)”, CD/19/19, pp. 5–6.

23 Resolution 4 of the Council of Delegates, “Working towards the elimination of nuclear weapons: 2018–2021 action plan”, 2017, CD/17/R4, OP4.

4. Adherence to and faithful implementation of other international agreements and pursuit of negotiations for the elimination of nuclear weapons

4.1 The ICRC calls on States that have not yet done so to ratify or accede to the NPT, the Comprehensive Nuclear-Test-Ban Treaty (CTBT), and regional treaties establishing nuclear-weapon-free zones (NWFZ) and calls on all States Parties to fulfil their obligations and commitments under these treaties.

The Treaty on the Prohibition of Nuclear Weapons (TPNW) is part of a broader nuclear disarmament and non-proliferation architecture, which it strengthens and complements. The ICRC and the Movement remain committed to promoting the universalization and full implementation of other existing international agreements relating to nuclear disarmament, in particular the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the **Comprehensive Nuclear-Test-Ban Treaty (CTBT)** and regional treaties establishing nuclear-weapon-free zones.²⁴

The NPT aims to prevent the spread of nuclear weapons, to pave the way for nuclear disarmament, and to promote cooperation for the peaceful use of nuclear energy. At the heart of the treaty is a “grand bargain” or *quid pro quo*: the five states with nuclear weapons would commit to disarm, and in return all other states parties would commit to non-proliferation, i.e. to never develop or acquire nuclear weapons. However, since the treaty was adopted in 1968, there has been little or no progress on its nuclear disarmament pillar. While the treaty remains critically important and is referred to in the preamble of the TPNW as the cornerstone of the nuclear disarmament and non-proliferation regime,²⁵ real progress on its nuclear disarmament obligations and commitments is urgently needed if it is to remain credible.²⁶

The CTBT prohibits all nuclear weapon test explosions. Adopted in 1996, the treaty has been ratified by 170 states to date. However, it has not yet entered into force, as eight of the states listed in Annex 2 of the treaty have yet to ratify the document. The TPNW recognizes the Comprehensive Nuclear-Test-Ban Treaty as a core element of the nuclear disarmament and non-proliferation regime.²⁷

There are five regional treaties establishing nuclear-weapon-free zones in Latin America (Treaty of Tlatelolco, 1967), the South Pacific (Treaty of Rarotonga, 1985), South-East Asia (Treaty of Bangkok, 1995), Africa (Treaty of Pelindaba, 1996) and Central Asia (Treaty of Semipalatinsk, 2006), to which over

²⁴ *Ibid.*

²⁵ Treaty on the Prohibition of Nuclear Weapons, PP18.

²⁶ ICRC president’s speech at the 2018 signing ceremony of the TPNW.

²⁷ PP19 of the TPNW reads “Recognizing the vital importance of the Comprehensive Nuclear Test-Ban Treaty and its verification regime as a core element of the nuclear disarmament and non-proliferation regime”.

100 states are party. States party to each of these treaties have made a commitment not to develop, acquire or test nuclear weapons within the defined zones. Each treaty includes a protocol for the five nuclear-weapon states under the NPT to ratify. In several cases, the states concerned have signed this protocol with reservations.

The Treaty on the Prohibition of Nuclear Weapons does not aim to supersede or replace the above-mentioned instruments, but rather to complement and strengthen them. It advances their object and purpose, including by establishing additional obligations in line with the ultimate goal of nuclear disarmament, such as the prohibition on use and threat of use, the prohibition of possession, and the prohibition of stationing of nuclear weapons on a state party's territory.

4.2 All States must pursue negotiations with a view to achieving the complete elimination of nuclear weapons, pursuant to their obligations under international law.

There have been calls for the elimination of nuclear weapons since they were first developed. In 1946, the first resolution of the United Nations General Assembly sought to urgently identify pathways to eliminate “atomic weapons”.²⁸ Since then, a large number of other United Nations General Assembly resolutions, as well as various instruments outside of the United Nations system, have reaffirmed the need for nuclear disarmament.²⁹

While the comprehensive prohibition contained in the TPNW is a major achievement and an important step towards their complete elimination, nuclear disarmament remains a work in progress. The TPNW sets out pathways for other nuclear-armed states to become party to the treaty and to eliminate their nuclear weapons. These pathways foresee the future negotiation of agreements with new states parties that possess nuclear weapons, in order to verify their disarmament, and – in particular – the adoption of “measures for the verified, time-bound and irreversible elimination of nuclear-weapon programmes, including additional protocols to this treaty”.³⁰

28 United Nations General Assembly Resolution, “Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy”, A/RES/1(1), OP 5(b).

29 See, e.g. United Nations General Assembly, Resolution 808 A (IX), A/RES/808(IX), 4 November 1954, Resolution 35/152, A/RES/35/152, D, 12 December 1980, Resolution 51/450, A/RES/51/450, 10 December 1996, Resolution 59/77, A/RES/59/77, 3 December 2004 and Resolution 70/57, A/RES/70/57, 7 December 2015; United Nations Security Council, Resolution 984, S/RES/984, 11 April 1995 and Resolution 2310, S/RES/2310, 23 September 2016; European Parliament Resolution 2016/2936 (RSP), 27 October 2016; Association of Southeast Asian Nations, Plan of Action to Strengthen the Implementation of the Treaty on the South-East Asia Nuclear Weapon-Free Zone (2018–2022), 4 August 2017; Community of Latin American and Caribbean States, Special Declaration of the Community of Latin American and Caribbean States on the Urgent Need for a Nuclear Weapon Free World, 29 January 2015.

30 Treaty on the Prohibition of Nuclear Weapons, Articles 4(2) and 8(1)(b).

In its 1996 advisory opinion, the International Court of Justice concluded that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects, under strict and effective international control.³¹ In its reasoning, the court referred to the obligation under Article VI of all states party to the Treaty on the Non-Proliferation of Nuclear Weapons to pursue negotiations in good faith on effective measures relating to nuclear disarmament, and interpreted this not as an obligation of means, but of result, requiring that states bring such negotiations to a conclusion.³² While falling short of expressly stating that the obligation to pursue nuclear disarmament also exists under customary law, the court stated that this “remains without any doubt an objective of vital importance to the whole of the international community today”.³³

While the Treaty on the Prohibition of Nuclear Weapons is an effective measure in the implementation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, these two treaties alone are insufficient to bring about nuclear disarmament. Additional measures will be needed, as well as the involvement of nuclear-armed states and their allies. In this respect, the obligation enshrined in Article VI of the NPT has only been partially fulfilled, and other than the Treaty on the Prohibition of Nuclear Weapons very little progress has been made with regard to the nuclear disarmament pillar of the NPT.

5. Incompatibility of nuclear weapons with the principles and rules of IHL

5.1 In an armed conflict, it is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of international humanitarian law (IHL).

In 2010 and 2011 respectively, the ICRC and the Movement publicly stated that it was “difficult to envisage” how any use of nuclear weapons could be compatible with IHL.³⁴ As of 2014, the ICRC began to express this view in progressively stronger terms, primarily on the basis of new evidence and data on the humanitarian impacts of nuclear weapons.³⁵ This more assertive position on the incompatibility

31 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 105(2)(F).

32 *Ibid.*, para. 99.

33 *Ibid.*, para. 103.

34 See Council of Delegates, Resolution 1, “Working towards the elimination of nuclear weapons”, CD/11/R1, 2011, para. 2.

35 In December 2014, at the last of the three “humanitarian impacts” conferences held in Vienna, the director of International Law and Policy at the ICRC stated that “the new evidence that has emerged in the last two years about the humanitarian impact of nuclear weapons casts further doubt on whether these weapons

with IHL of the use of nuclear weapons also reflects: the gradual shift in states' positions during the last decade, the consensus view expressed by states party to the Treaty on the Non-Proliferation of Nuclear Weapons in 2010 that any use of nuclear weapons would have catastrophic humanitarian consequences; and the large and growing number of states that assert that any use of nuclear weapons would be contrary to IHL. The incompatibility of nuclear weapons with IHL is also explicitly stated in the preamble to the Treaty on the Prohibition of Nuclear Weapons, adopted by a majority of states.³⁶

The principles and rules of IHL apply to all means and methods of warfare, including nuclear weapons. They include the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited; the principle of distinction; the prohibition of indiscriminate and disproportionate attacks; the principle of precaution, in particular the obligation to take all feasible precautions in an attack; the prohibition of the use of weapons of a nature to cause superfluous injury or unnecessary suffering; and the rules on the protection of the natural environment. The International Court of Justice confirmed the applicability of the principles and rules of IHL to nuclear weapons in its 1996 advisory opinion.³⁷ The applicability of IHL to nuclear weapons was also recognized by states party to the Treaty on the Non-Proliferation of Nuclear Weapons in the final document of the 2010 NPT Review Conference,³⁸ and reaffirmed in the preamble to the Treaty on the Prohibition of Nuclear Weapons.³⁹

could ever be used in accordance with the rules of customary IHL”, a position reaffirmed in the *IHL Challenges Report 2015*. Likewise, in February 2015, the ICRC president stated that new evidence only strengthened existing doubts about the lawfulness of using nuclear weapons. He added: “With every new piece of information, we move further away from any hypothetical scenario where the humanitarian consequences of the use of nuclear weapons could be compatible with international humanitarian law”; see “Nuclear weapons: Ending a threat to humanity”, a speech given by Mr Peter Maurer, president of the International Committee of the Red Cross, to the diplomatic community in Geneva (18 February 2015). In his opening statement to the March 2017 session of the United Nations conference negotiating the TPNW, the ICRC president said that “[e]vidence of the indiscriminate effects and unspeakable suffering caused by nuclear weapons raise significant doubts about their compatibility with IHL”. Subsequently, at the ceremony for the entry into force of the TPNW on 22 January 2021, he stated that it is “extremely doubtful” that nuclear weapons could ever be used in accordance with IHL.

36 PP10 of the TPNW considers that “any use of nuclear weapons” would be contrary to IHL. In its explanation of its vote to adopt the Treaty on 7 July 2017, Sweden stated it did “not subscribe to the language” of this preambular paragraph, and maintained that, in its view, the “generally contrary” language of the 1996 advisory opinion of the International Court of Justice on nuclear weapons was the correct statement of the law.

37 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, paras. 79 and 85–86.

38 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50, Vol. I, Conclusions and recommendations for follow-on actions, section I(A)(v), p. 19.

39 See PP8 and PP9 of the TPNW.

5.2 *The principles and rules of international humanitarian law applicable to all means and methods of warfare apply to nuclear weapons, even in situations of national self-defence. These include the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the principle of distinction, the prohibition of indiscriminate and disproportionate attacks, the principle of precautions, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment.*

The principles and rules of IHL apply to nuclear weapons, even in situations of national self-defence. In its 1996 advisory opinion, the International Court of Justice stated, rather ambiguously, that it was unable to conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state was at stake.⁴⁰ The ICRC's position is that the exercise of the right to self-defence – even in an extreme situation where the very survival of a state is at stake – can on no account release that state from its obligations under IHL. Self-defence must be exercised in full compliance with IHL, whatever the circumstances, and never in violation of the very rules intended to mitigate the suffering caused by armed conflict.⁴¹

This clear articulation is crucial to maintaining the full scope of the protection afforded by IHL and its relationship with international law on the use of force (*jus ad bellum*), including the law of self-defence. The assertion “that in certain cases of self-defence humanitarian law no longer applies, is [...] dangerously like an application of the discredited doctrine of *Kriegsraison geht vor Kriegsmanier*. This doctrine, which suggested that in extreme circumstances of danger one could abandon the application of humanitarian law rules in order to meet the danger, was rejected by the Nuremberg Tribunal”.⁴² This has a bearing on the theory of nuclear deterrence, discussed in section 6 below.

40 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 105 2(E).

41 ICRC, *IHL Challenges Report* 2015, p. 59.

42 L. Doswald-Beck, “International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons”, *International Review of the Red Cross*, No. 316, 1997, p. 54. Also see Military Tribunal at Nuremberg, Trial of Erhard Milch, 20 December 1946–17 April 1947, summarized in *Law Reports of Trials of War Criminals*, Vol. VII, The United Nations War Crimes Commission, 1948, pp. 27–: (in response to the argument of the defence that the law of war is suspended in a situation of total warfare, the judges stated “[w]ith all its horror modern war still ‘is not a condition of anarchy and lawlessness between the belligerents, but a contention in many respects regulated, restricted, and modified by law.’”); also see Military Tribunal at Nuremberg, Trial of Krupp, 1948, summarized in *Law Reports of Trials of War Criminals*, Vol. X, The United Nations War Crimes Commission, 1949, pp. 138–139 (“the contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected. [...] [T]hese rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency.”).

In the view of the ICRC, there are two scenarios in which the use of nuclear weapons would clearly violate IHL.

5.3 Directing nuclear weapons against civilian populations or civilian objects, such as entire cities or other concentrations of civilians and civilian objects, or otherwise not directing a nuclear weapon against a specific military objective, would violate the principle of distinction.

Firstly, directing nuclear weapons against civilian populations or civilian objects, including entire cities or other concentrations of civilians and civilian objects – or otherwise not directing a nuclear weapon against a specific military objective – would violate the principle of distinction, which prohibits attacks directed against civilians, civilian populations or civilian objects, as well as attacks not directed against a specific military objective.⁴³

This seems uncontroversial. However, it is highly concerning that only one nuclear-armed state appears to have – relatively recently – stated publicly and unequivocally in its nuclear doctrine that nuclear weapons must be directed against military objectives and would not be used to target civilian populations or civilian objects.⁴⁴ Declassified Cold War-era nuclear target lists reveal that, during that period, nuclear doctrine typically involved planning for the “systematic destruction” of major enemy cities – a policy progressively abandoned by the above-mentioned nuclear-armed state since 2003, as it was considered contrary to IHL.⁴⁵ It is believed that most, if not all, other states in possession of nuclear weapons have, at some point, adopted or continue to have in place such a policy, although their views on specific scenarios for the use of nuclear weapons – and whether those scenarios would comply with IHL – remain opaque.⁴⁶

Questions have been raised as to whether nuclear weapons could be used lawfully in belligerent reprisals, a traditional (albeit arguably anachronistic) method of enforcing IHL. A belligerent reprisal consists of “an action that would otherwise be unlawful but that in exceptional cases is considered lawful under

43 Article 51(4)(a) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, and customary IHL (cf ICRC *Customary International Humanitarian Law Study*, p. 43).

44 *Report on Nuclear Employment Strategy of the United States*, Specified in Section 491 of 10 U.S.C., 12 June 2013, pp. 4–5; Office of the Secretary of Defense, *Nuclear Posture Review*, February 2018 (2018 US Nuclear Posture Review), p. 23; and Joint Chiefs of Staff, *Nuclear Operations*, 11 June 2019, pp. 111–114.

45 W. Burr (ed.), *U.S. Cold War Nuclear Target Lists Declassified for First Time*, The Nuclear Vault, National Security Archive, George Washington University, 22 December 2015; A. Mount and P. Vaddi, *Better Informing a President's Decision on Nuclear Use*, *Lawfare*, 9 November 2020.

46 For example, United Kingdom doctrine states that the legality of the use of nuclear weapons “depends upon the application of the general rules of international law including those regulating the use of force and the conduct of hostilities” and “[w]hether the use, or threatened use, of nuclear weapons in a particular case is lawful depends on all the circumstances.” The United Kingdom “would only consider using nuclear weapons in self-defence, including the defence of its NATO allies, and even then only in extreme circumstances”; see *Joint Service Manual of the Law of Armed Conflict* (JSP 383), 2004 edition, p. 117.

international law when used as an enforcement measure in reaction to unlawful acts of an adversary”.⁴⁷ There has been a trend in IHL towards outlawing belligerent reprisals altogether, including attacks against the civilian population by way of reprisals.⁴⁸ Such attacks are expressly prohibited under Article 51(6) 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) of 8 June 1977, but the prohibition is not yet considered a rule under customary IHL.⁴⁹

Belligerent reprisals are subject to a number of stringent conditions and limits. In particular, they may be used only in response to serious violations of IHL and for the purpose of bringing the adversary back into compliance with IHL; only as a measure of last resort; and only if proportionate to the violations they aim to stop. In the ICRC’s view, this last criterion alone makes it hard to imagine that the use of nuclear weapons in response to a serious violation of IHL involving solely conventional means of warfare could ever be lawful. Even in response to a nuclear attack directed against the civilian population, it is difficult to see how a similar use of nuclear weapons by way of reprisal would in practice comply with the above-mentioned conditions.⁵⁰ Among others, it is doubtful whether such use would induce an adversary to comply with the law, given the high risk of escalation involving an even greater use of nuclear weapons by both parties, with catastrophic humanitarian consequences of regional and global proportions.⁵¹

5.4 Using nuclear weapons against military objectives located in or near populated areas would violate the prohibitions of indiscriminate and disproportionate attacks.

Another clear-cut scenario where the use of nuclear weapons would be unlawful under IHL involves their deployment against military objectives located in or near populated areas. Such use would violate the prohibitions of indiscriminate and disproportionate attacks.

Indiscriminate attacks include those carried out using a weapon that is either incapable of being directed at a specific military objective, or the effects of which cannot be limited as required by IHL, and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction. Even if a nuclear weapon were aimed at a specific military objective, it would not be

47 ICRC Customary International Humanitarian Law Study, Rule 145: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule145.

48 See for example United Nations General Assembly Resolution 2675 (XXV), which affirmed the principle that “civilian populations, or individual members thereof, should not be the object of reprisals” as a basic principle for the protection of civilian populations in armed conflict (GA/RES/2675 (XXV), OP 7).

49 See ICRC Customary International Humanitarian Law Study, Rule 145, pp. 513, 520–523.

50 For example, the condition of use as a last resort, i.e. use only after all other means (political, diplomatic, economic, etc.) have been exhausted, seems unrealistic since nuclear doctrines call for immediate retaliation to a nuclear attack, this being a key element of the nuclear deterrence theory applied by all nuclear-armed states.

51 For further discussion of the use of nuclear weapons as a belligerent reprisal tool, see L. Maresca & E. Mitchell, at pp. 642–643.

possible to control the force and effects of the nuclear detonation and limit them as required by IHL, meaning that if the military target were located in or near a populated area, the attack would not only strike the military target but also civilians and civilian objects, without distinction.

A nuclear detonation releases a combination of powerful blast waves, intense heat in the form of thermal radiation and high levels of ionized radiation, which is typically dispersed over a wide area.⁵² The heat generated by the blast is likely to trigger intense fires and firestorms, whose impact would be impossible to control. Likewise, the residual radioactive particles (“nuclear fallout”) created by the nuclear blast cannot be contained and would likely disperse far beyond the target area, carried by the wind or other weather phenomena, potentially over great distances and across borders.⁵³

Even the use of a so-called “low-yield” nuclear weapon in or near a populated area would have effects that cannot be limited as required by IHL and would be of a nature to strike military objectives, civilians and civilian objects – without distinction. As the ICRC and the Japanese Red Cross witnessed first-hand in Hiroshima and Nagasaki, the use of a single 10 to 20 kiloton bomb would cause a very high number of civilian casualties and devastating damage and destruction.⁵⁴ Thus, even a much smaller weapon would clearly have indiscriminate effects in such an environment.

The International Court of Justice, in its 1996 advisory opinion, stated that “the destructive power of nuclear weapons cannot be contained in either space or time” and that the use of such weapons “seems scarcely reconcilable with respect for” the prohibition of indiscriminate weapons, among other IHL rules.⁵⁵

In the light of the above, it is clear that the use of a nuclear weapon in or near a populated area would contravene the prohibition of indiscriminate attacks.⁵⁶

Such use would also be contrary to the rule of proportionality,⁵⁷ which prohibits attacks that may be expected to cause incidental civilian casualties and/

52 In its 1996 advisory opinion, the International Court of Justice found that radiation was “peculiar to nuclear weapons”, accounting in part for their “unique characteristics”, and that such radiation “would affect health, agriculture, natural resources and demography over a very wide area” (para. 35).

53 See e.g. Matthew McKinzie *et al.*, “Calculating the Effects of a Nuclear Explosion at a European Military Base”, presentation to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, December 2014. Modern environmental modelling techniques have demonstrated that even a “small-scale” use of some 100 nuclear weapons against urban targets would, in addition to spreading radiation around the world, lead to a cooling of the atmosphere, shorter growing seasons, food shortages and a global famine in which it is estimated over a billion people would perish; see Alan Robock *et al.*, “Global Famine after a Regional Nuclear War: Overview of Recent Research”, presentation to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, December 2014.

54 The heat generated by the explosion can be expected to cause severe burns to exposed skin up to 3 km from the epicentre, and massive destruction of buildings and infrastructure within several kilometres; see the *IHL Challenges Report* 2015, p. 57.

55 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, paras 35 and 95 respectively.

56 The ICRC already drew a similar conclusion in 1950: “Atomic weapons and non-directed missiles: ICRC statement, 5 April 1950”, *International Review of the Red Cross*, Supplement, Vol. 3, No. 4, 1950. See also L. Maresca and E. Mitchell, “The human costs and legal consequences of nuclear weapons under international humanitarian law”, *International Review of the Red Cross*, Vol. 97, No. 899, 2015, p. 632.

57 L. Maresca and E. Mitchell, p. 635.

or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. In assessing the proportionality of an attack, both direct and indirect (or reverberating) effects of the attack must be considered, as soon as they are reasonably foreseeable.⁵⁸

The powerful blast wave, intense thermal heat and radiation released by a nuclear explosion would cause severe, extensive, immediate and long-term incidental civilian casualties, including illnesses and cancers caused by radiation exposure, and damage to civilian objects, including to critical civilian infrastructure and the natural environment. Further death, injury and suffering would be caused by the consequent disruption of services essential to the survival of the civilian population, including health services and the water and electrical supply. These consequences can be anticipated and are entirely foreseeable, given what we know today about the effects of nuclear weapons.⁵⁹

It is very hard to imagine any concrete and direct military advantage that could justify “incidental” direct and indirect civilian harm and destruction on such a colossal scale as that caused by a nuclear explosion in or near a populated area. Moreover, as the ICRC has often stated, the overarching aim of winning a war does not qualify as a concrete and direct military advantage for the purpose of assessing compliance with the principle of proportionality.

Likewise, the extreme circumstance of self-defence, in which the very survival of a state would be at stake and which some states argue would justify the use of nuclear weapons, is too broad and abstract to qualify as a concrete and direct military advantage within the meaning of the IHL rule of proportionality. The rule would become meaningless if used to justify the catastrophic humanitarian consequences of the use of nuclear weapons. It would amount to allowing a political imperative – “self-defence for state survival” – to override the balance between military necessity and humanity which underlies proportionality, and which must be maintained if the rule is to achieve its protective purpose.⁶⁰

5.5 Even if used far away from populated areas, the suffering to combatants caused by radiation exposure, and the radiological contamination of the environment and risk of spread of radiation to populated areas, make it extremely doubtful that nuclear weapons could ever be used in accordance with the prohibition to use weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment and the civilian population.

58 ICRC, *International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions*, ICRC, Geneva, 2019 (IHL Challenges Report 2019), pp. 8–9.

59 ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020.

60 Some have interpreted the conclusion put forward by the International Court of Justice as meaning that IHL might not apply in certain extreme cases of self-defence under the *jus ad bellum*. The ICRC has firmly

Some states have argued before the International Court of Justice that nuclear weapons could be used lawfully under certain circumstances, citing examples of the use of a low-yield weapon against warships on the high seas or against troops in a desert. Leaving aside the improbability of these scenarios, as pointed out by the court itself,⁶¹ even if the use of nuclear weapons in remote areas might not have an immediate impact on civilians, it would have horrifying consequences for combatants. Moreover, the risk of the uncontrollable spread of radioactive fallout to civilian areas could not be discounted.

In its 1996 advisory opinion, the court found that, due to their “unique characteristics”, the use of nuclear weapons “seems scarcely reconcilable with respect for” the prohibition of weapons of a nature to cause superfluous injury or unnecessary suffering to combatants.⁶² As interpreted by the court, this refers to weapons “uselessly aggravating their suffering [...] that is to say a harm greater than that unavoidable to achieve legitimate military objectives”.⁶³ Indeed, the detonation of a nuclear weapon generates significant, and often fatal, levels of radiation with devastating immediate and long-term consequences for the health of exposed individuals. These include damage to the central nervous system and the gastrointestinal tract, and an increased risk of developing certain cancers, such as leukaemia and thyroid cancer.⁶⁴ The injuries, illnesses, permanent disability and lifelong suffering caused by radiation exposure make it extremely doubtful whether nuclear weapons could be used in compliance with the IHL rule prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering.

In addition, even if used far away from populated areas, the radiological contamination of the natural environment caused by a nuclear detonation and the likely spread of radioactive particles to populated areas make it extremely doubtful that nuclear weapons could be used in compliance with IHL rules aimed at protecting the natural environment and the civilian population.

Being a civilian object, the natural environment is protected from excessive direct or indirect incidental damage under the customary IHL rule of proportionality. Customary IHL also requires that means and methods of warfare

rejected this, and such an interpretation has been decried by some authors as an application of the discredited doctrine of *Kriegsraison*, as mentioned above (see fn 34).

61 In its 1996 advisory opinion, the International Court of Justice pointed out the weakness of such arguments in the following terms (para. 94): “The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the ‘clean’ use of smaller, low-yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons.”

62 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 95.

63 *Ibid.*, para. 78.

64 ICRC-IFRC, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, para. 5–8; ICRC, *IHL Challenges Report 2015*, p. 58; ICRC, “Long-term Health Consequences of Nuclear Weapons: 70 years on Red Cross Hospitals still treat Thousands of Atomic Bomb Survivors”, Information Note No. 5, July 2015; ICRC, “The Effects of Nuclear Weapons on Human Health”, Information Note No. 1, 2013.

be employed with due regard to the protection and preservation of the natural environment.⁶⁵ We know today that the use of even a single nuclear weapon can cause significant, long-term, widespread environmental damage, due to the dispersion and the impact of dust, soot and radioactive particles on the atmosphere, soil, water, plants and animals.⁶⁶

In any case, it is unrealistic to imagine that nuclear strikes would be limited to areas far removed from population centres, not least given the ever-expanding global population. It is therefore worth recalling that any assessment of the legality of a weapon under IHL must be performed not through an analysis of all possible or hypothetical scenarios, but by examining its “normal or expected use”,⁶⁷ taking into account the realities of warfare. However, states’ nuclear postures remain more or less opaque with regard to specific scenarios of use. What is more, the theories based around “deterrence” and “mutually assured destruction” that continue to underlie nuclear postures are largely predicated on the threat of large-scale nuclear retaliation to a nuclear or conventional attack, particularly against targets located in or near populated areas.

6. Use and threat of use of nuclear weapons is abhorrent to the principles of humanity and the dictates of public conscience

6.1 Any use of nuclear weapons would be abhorrent to the principles of humanity and the dictates of public conscience.

It would be very hard to argue with this position, given the overwhelming body of evidence of the catastrophic humanitarian consequences of nuclear weapons and the taboo against their use. It is reflected in the preamble to the Treaty on the Prohibition

65 Article 35(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, prohibits the use of methods and means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment. This rule, however, has not become part of customary law with regard to nuclear weapons as certain states, notably France, the United Kingdom and the United States, have consistently objected to its application to nuclear weapons; see ICRC, *Guidelines on the Protection of the Environment in Armed Conflict*, Geneva, 2020, at para. 48.

66 ICRC-IFRC, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, para. 5 and 6; ICRC, *IHL Challenges Report 2015*, p. 58; ICRC, “Climate Effects of Nuclear War and Implications for Global Food Production”, Information Note No. 2, 2013. Already in 1996, the International Court of Justice had noted that the ionizing radiation released by a nuclear explosion could “damage the future environment, food and marine ecosystem, and cause genetic defects and illness to future generations” and that nuclear weapons could potentially destroy “the entire ecosystem of the planet”; see International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 35.

67 See the commentary on Article 36 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts in ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, Martinus Nijhoff Publishers, 1987, para. 1469.

of Nuclear Weapons⁶⁸ and is based on the “Martens clause”, a provision found in IHL treaties (notably the 1899 Hague Convention (II) on the laws and customs of war on land, the 1977 Additional Protocols and the 1980 Convention on Certain Conventional Weapons).⁶⁹ The Martens clause states that in cases not covered by existing treaty law – in this case, a situation where there would be no applicable treaty rule prohibiting or limiting the use of nuclear weapons – belligerents remain nonetheless “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”.

The International Court of Justice unanimously affirmed in its 1996 advisory opinion the applicability and importance of the Martens clause, indicating that the clause “had proved to be an effective means of addressing the rapid evolution of military technology”. Indeed, the Martens clause constitutes a moral guideline, namely that certain means or methods of warfare that are not specifically prohibited or limited are nevertheless unacceptable.⁷⁰ The role of the International Red Cross and Red Crescent Movement as the voice of “public conscience” is expressly acknowledged in the preamble to the TPNW.⁷¹ Since 1945, the Movement has repeatedly stated its ethical stance on the unacceptability of nuclear weapons and has been the voice of public conscience by demanding that nuclear weapons be abolished. The concept of “public conscience” is also reflected in public opinion on nuclear weapons; for example, an ICRC survey of the views of over 16,000 “millennials” found that 84% of the young adults surveyed believed that the use of nuclear weapons is never acceptable.⁷²

In addition to prohibiting the use of nuclear weapons, the TPNW clearly underscores their unacceptability in humanitarian and moral terms. This rejection is absolute; as far as the ICRC is concerned, even if nuclear weapons were used as a form of belligerent reprisal, meeting the strict conditions set by proponents of this method, their use would still be contrary to the principles of humanity and the dictates of public conscience.

6.2 Any threat to use nuclear weapons is abhorrent to the principles of humanity and the dictates of public conscience.

68 See Treaty on the Prohibition of Nuclear Weapons, PP11.

69 See also Article 63(3) of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, stipulating that “The denunciation... shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.” (replicated in Article 62 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 142 of the Convention (III) relative to the Treatment of Prisoners of War, and Article 158 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War).

70 It has been debated whether the “principles of humanity” and the “dictates of public conscience” are separate, legally binding yardsticks against which a weapon can be measured in law, or whether they are merely moral guidelines. The view of the ICRC is that since “they reflect public conscience; the principles of humanity actually constitute a universal reference point and apply independently of the Protocol.” See ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, Geneva, Martinus Nijhoff Publishers, para. 4434.

71 See Treaty on the Prohibition of Nuclear Weapons, PP24.

72 ICRC, *Millennials on War*, ICRC, January 2020.

The Martens clause applies to both the use and the threat of use of nuclear weapons. By implying the possibility of actually deploying nuclear weapons, any threat to use them is also abhorrent to the principles of humanity and the dictates of public conscience. This refers to both general and specific threats and is particularly pertinent, given that leaders of certain nuclear-armed states have in recent years made explicit threats to use nuclear weapons against their adversaries.

From a legal perspective, the International Court of Justice unanimously stated in its 1996 advisory opinion that “[i]f an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law”,⁷³ though it did not indicate the basis for this statement.⁷⁴ Today, the threat to use nuclear weapons is prohibited under any circumstances for states party to the TPNW.⁷⁵

At the heart of debates on the threat to use nuclear weapons lies the more sensitive issue of the legal and ethical acceptability of the theory of nuclear deterrence and its corollary, the theory of “mutually assured destruction”. Deterrence is defined as the “prevention of action by the existence of a credible threat of unacceptable counteraction and/or belief that the cost of action outweighs the perceived benefits.”⁷⁶ Though deterrence remains the professed position of nuclear-armed states and their allies, the nuclear era has periodically seen shifts towards more aggressive nuclear policies that aim not just to deter attack, but also appear to allow for initiating, fighting and winning a nuclear war.

Although some contend that nuclear deterrence has prevented the use of nuclear weapons since 1945, this premise is highly contested. Over the last 75 years, the world has on several occasions come extremely close to nuclear catastrophe by miscalculation or error, exposing the inherent weakness of the belief that nuclear deterrence theories guarantee security and stability, and the unacceptable risk that such theories actually entail.⁷⁷ As observed in the ICRC-IFRC report published in August 2020 on the humanitarian impacts and risks of

73 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 78.

74 One state argued in front of the International Court of Justice that threatening to use nuclear weapons would be incompatible with the obligation to comply with and ensure respect for IHL. G. Nystuen, “Threats of use of nuclear weapons and international humanitarian law”, in G. Nystuen, S. Casey-Maslen, A. Golden Bersagel, *Nuclear Weapons Under International Law*, Cambridge University Press, 2014, pp. 161–162. See also International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 105: “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”.

75 See Article 1(1)(d) of the TPNW.

76 United States, *DoD Dictionary of Military and Associated Terms*, December 2020, p. 63.

77 See, for example, Patricia Lewis *et al.*, *Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy*, Chatham House, 2014; and J. Borrie *et al.*, *Understanding Nuclear Weapon Risks*, UNIDIR, 30 March 2017.

use of nuclear weapons, “[t]he concepts of “luck” and “vulnerability” may better capture our inability to control and manage the possible use of nuclear weapons and therefore provide a more accurate understanding of the dangers posed by these weapons.”⁷⁸

As a humanitarian organization, the ICRC cannot but reject as contrary to the principles of humanity and the dictates of public conscience any security theories that rely on the threat of mass suffering and destruction. As the president of the ICRC has observed, the pursuit of theories of nuclear deterrence and mutually assured destruction has ultimately created an unstable “balance of fear” that continues to threaten all of humankind.⁷⁹

IV. Concluding remarks

To conclude, in the words of the president of the ICRC:

*nuclear weapons – the use of which, even on a limited scale, would have catastrophic and long-lasting humanitarian consequences – cannot credibly be viewed as instruments of security. Most States today see nuclear weapons as a major source of insecurity for their populations and for future generations. [...] True security can only happen with progress on nuclear disarmament, and this progress is urgently needed.*⁸⁰

The Treaty on the Prohibition of Nuclear Weapons serves as a welcome and powerful reminder that, despite current global tensions, the international community can overcome even the biggest and most entrenched challenges by acting in concert, with foresight and clarity of purpose, in the true spirit of multilateralism. However, the entry into force of the treaty merely marks the beginning, rather than the end, of our efforts. We must ensure that its provisions are faithfully implemented. We are committed to encouraging states to become party to and fully implement the provisions of the treaty, as well as other instruments with similar objectives.

The ICRC will continue to encourage all states – including nuclear-armed states and their allies – to become party to the treaty. In addition, we will continue to call on nuclear-armed states and their allies to urgently take all measures necessary to reduce the risk of nuclear weapons ever being deployed.

We cannot prepare for the catastrophic consequences of a nuclear detonation. That for which we cannot prepare, we must prevent.

78 ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, para. 14, available at <https://www.icrc.org/en/document/humanitarian-impacts-and-risks-use-nuclear-weapons>.

79 Speech by ICRC president Peter Maurer at the TPNW signing and ratification ceremony, 26 September 2019.

80 Speech by ICRC president Peter Maurer at the TPNW signing ceremony, 26 September 2018.

REPORTS AND DOCUMENTS

Executive Summary: Avoiding civilian harm from military cyber operations during armed conflicts

In January 2020, the International Committee of the Red Cross (ICRC) invited experts from various parts of the world to share their knowledge on practical issues for the implementation of international humanitarian law (IHL) in military cyber operations. Participants included experts with experience in the development and use of military cyber operations, experience working for global IT companies and cyber threat intelligence firms, as well as lawyers and academics. Experts analysed the conduct of military cyber operations, focusing on how armed forces can understand and assess the risk of civilian harm and what measures might be effective and appropriate to avoid or mitigate such risks.

The rich discussions provided an insightful picture of the ways in which armed forces consider the application of IHL when conducting cyber operations and the risks that such operations can entail for the civilian population. What emerged from the discussions is that States need to invest time and resources to develop tools, processes to assess the risks of incidental civilian harm and measures to limit these risks.

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Executive Summary¹

In today's armed conflicts, cyber operations are increasingly used in support of and alongside kinetic operations. Several States have publicly acknowledged such use,

and many more are developing military cyber capabilities as well as doctrines and policies that aim to establish national approaches and principles for the military uses of cyberspace.

In parallel, cyber incidents without, or with unclear, links to armed conflicts have resulted in damage and disruption to civilian services. These incidents have included cyber operations against hospitals, water and electrical infrastructure, and nuclear and petrochemical facilities. They offer a chilling warning about the potential humanitarian impact of military cyber operations in contemporary and future armed conflicts.

If the risk of civilian harm from military cyber operations is to be reduced, it is necessary to consider how it can be assessed and measured. This report presents the findings from an expert meeting convened by the ICRC in January 2020 to discuss these issues.

1. States should address the concerns posed by the increasing integration of cyber operations with other military capabilities during armed conflicts.

Modern armed forces perceive cyber operations as part and parcel of a wide range of military capabilities. These operations fulfil various purposes that can be roughly divided into exploitation, defence and offence. Such purposes are often interlinked: for example, exploitation often needs to be carried out before an offensive operation can be launched.

However, State-run cyber operations are not only conducted by the armed forces; intelligence agencies, the private sector and other actors have also been involved. To protect the civilian population and to ensure appropriate oversight, States should avoid the blurring of the functions of the organizations involved in the conduct of such operations and keep such operations under the supervision and control of the relevant authorities.

Moreover, discussions concerning the risk of civilian harm posed by such operations are made difficult by the persisting lack of clarity on terminology regarding interaction in cyberspace. Accordingly, States should work towards a shared lexicon pertaining to military cyber operations.

1 The report from which this Executive Summary is extracted was prepared by Ewan Lawson, military adviser on cyber, and Kubo Mačák, legal adviser, ICRC. The full report is “Avoiding Civilian Harm from Military Cyber Operations During Armed Conflicts: ICRC Expert Meeting 21–22 January 2020 – Geneva”, available at: <https://shop.icrc.org/avoiding-civilian-harm-from-military-cyber-operations-during-armed-conflicts-icrc-expert-meeting-21-22-january-2020-geneva-pdf-en>. The ICRC Humanitarian Law & Policy blog ran a series of several posts on the same theme, “Avoiding Civilian Harm During Military Cyber Operations”, available at: <https://blogs.icrc.org/law-and-policy/category/special-themes/avoiding-civilian-harm-during-military-cyber-operations/>

2. Existing processes must be adapted to the cyber context to ensure compliance with international humanitarian law (IHL).

Compared to kinetic operations, understanding the possible collateral effects of military cyber operations and the risk to civilians can be challenging because of the interconnected and dynamic nature of target systems and networks, as well as the armed forces' relative inexperience in conducting such operations.

Some States have made the basic procedures for targeting publicly available. However, the details on how these are conducted in practice tend not to be released, which is particularly the case with military cyber capabilities.

Accordingly, States should use the existing processes developed for the purposes of kinetic operations as a general frame of reference and adapt them to account for the challenges posed by cyber operations. It is essential that procedures governing such operations be IHL compliant and, to the extent possible, transparently so.

3. States must put in place measures to mitigate the risk of civilian harm posed by the use of military cyber capabilities (also referred to as 'active precautions').

IHL mandates that in the conduct of military operations, all feasible precautions must be taken to avoid or at least minimize incidental civilian harm. In particular, cyber operators need to understand the extent to which target networks and systems are interconnected, the risk of malware spreading in unintended ways, and the risk of indirect effects.

States should have mitigation strategies in place for all military cyber capabilities they consider developing. Specifically, a variety of technical measures can be considered, such as 'system-fencing' (preventing malware from executing itself unless there is a precise match with the target system), 'geo-fencing' (limiting malware to only operate in a specific IP range), or 'kill switches' (disabling malware after a given time or when remotely activated).

However, not all military cyber operations involve the deployment of malware. In operations that consist of taking direct control of the target system, mitigation is rather a matter of establishing appropriate decision-making processes. At every stage, States should involve expertise from a wide range of sources and ensure that this is put into straightforward language for the relevant decision makers.

4. States must put in place measures to protect the civilian population against the dangers resulting from military cyber operations (also referred to as 'passive precautions').

Parties to conflicts that may be the object of cyber operations have a responsibility to minimize the risk of civilian harm posed by such operations. Some of these measures may have to be implemented already in peacetime.

In particular, States should build strong cyber resilience cultures across their societies and ensure that their critical infrastructure is protected to the best possible standard. States should also have a sufficient understanding of the critical dependencies in their networks in order to be able to restore their functionality in the event of a destructive or disruptive attack.

Moreover, armed forces tend to create distinct, dedicated military networks, to facilitate their defence. This may also limit the spread of harmful effects onto civilian networks when such a military network is attacked. Designing civilian systems such that they are not reliant on systems that may qualify as military objectives likewise reduces the risk of civilian harm.

5. States should address the risk of civilian harm posed by so-called information operations and grey-zone operations.

There is a growing trend of using digital technologies to engage in operations that spread disinformation, undermine social cohesion, or even incite violence (sometimes referred to as ‘information operations’).

The related notion of ‘grey-zone operations’ describes competition between States that appears to fall between the standard categories of peace and war. States sometimes argue that such operations offer means that are less lethal and less escalatory than traditional military operations. However, these operations may also lead to unexpected escalation and thus considerable civilian harm, depending on how they are perceived by the adversary.

Accordingly, States and other stakeholders should work towards a better understanding of the risks posed by information and grey-zone operations. In addition, States should ensure that all organizations involved in the conduct of military cyber operations (including, but not limited to the armed forces and intelligence agencies) are acquainted with the scope of application and requirements of IHL.

6. States and other stakeholders should continue to develop their understanding of the risk of civilian harm posed by new technologies and work towards mitigating those risks.

In the future, advances in artificial intelligence (AI) will likely be integrated into military cyber capabilities, leading to a degree of operational autonomy and thus to new risks of civilian harm. In addition, the growth of the Internet of Things (IoT) will expand the attack surface and the range of vulnerabilities available to be exploited by malicious actors. Finally, quantum computing will boost available computational power by orders of magnitude, resulting in unprecedented growth in the volume and speed of data processed by computers.

Accordingly, States should ensure that in the deployment of autonomous cyber systems, commanders or operators always retain a level of human control

sufficient to allow them to make context-specific judgements to apply IHL. States and other stakeholders should also continue to study the risks associated with the expansion of the IoT and with the quantum-enabled increase in the speed and scale of cyber and other operations.

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Cover Photo: Horses pulling a military service wagon are fitted with gas masks during the First World War.

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