Course reader for the course “Use of Force and International Law”

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Table of Contents

1. THE LIMITS OF WORLD ORDER: WHAT HOLDS THE CONTEMPORARY WORLD ORDER TOGETHER? 3

2. STILL CONFUSED? - THE DISTINCTION BETWEEN IUS AD BELLUM AND IUS IN BELLO 20

3. CHALLENGES OF HUMANITARIAN ACTORS IN CONFLICT AREAS AND COOPERATION WITH THE MILITARY 25

4. CERTAIN FACTORS INFLUENCING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW 38

5. CASE STUDY : WHERE THE LAW FAILS : CONFLICT RELATED SEXUAL VIOLENCE: REASONS, APPLICABLE LEGAL PROVISIONS AND HUMANITARIAN RESPONSE 50

6. ENFORCEMENT OF THE LAW OF ARMED CONFLICT; WAR CRIMES 63

7. COLLECTIVE RESPONSIBILITY FOR WAR CRIMES? 83

8. DOMESTIC PROCEDURES ON SERIOUS INTERNATIONAL CRIMES: INTERACTION BETWEEN INTERNATIONAL AND DOMESTIC JURISPRUDENCE AND WAYS FORWARD FOR DOMESTIC AUTHORITIES 105

9. EFFECTS OF WAR CRIMES IN THE ROME STATUTE ON THE SYSTEM OF NATIONAL PROSECUTIONS, *WITH PARTICULAR EMPHASIS ON UNIVERSAL JURISDICTION* 120

10. FACILITATING WAR CRIMES PROCEDURES IN HUNGARY: THE NEW CRIMINAL CODE AND LEX BISZKU 130

11. THE RUSSIAN-UKRAINIAN WAR: THE POSSIBILITIES OF ENSURING ACCOUNTABILITY 148

12. RULES AND OBLIGATIONS UNDER HUMANITARIAN LAW RELATING TO THE INTERNATIONAL COMMITTEE OF THE RED CROSS 154

13. FUNDAMENTAL PRINCIPLES OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT AND HUMANITARIAN ACTIVITIES FOR MIGRANTS 172

14. ANNEX 185

This course reader has been prepared for students following the course "Use of Force and International Law". The course reader is not exhaustive.

It is based on and partially identical to already published articles of the author.

1. The Limits of World Order: What Holds the Contemporary World Order Together?

Introduction

When examining the international relations of our time, the view widely accepted after the Second World War—that the established international order provides a stable and self-sustaining foundation for peaceful cooperation—can be considered less and less self-evident. The fact that armed conflict is once again taking place in Europe was considered a virtually non-existent scenario in the decades since the fall of communism. Following the end of the Cold War, the European continent was long regarded as a region of peace and stability; today, however, the Russian–Ukrainian war, now in its fourth year, serves as a reminder that this assumption has not proved to be enduring. The protracted nature of the conflict has not only fundamentally reshaped Europe's security environment but has also had global consequences: it has highlighted that the political, legal and institutional frameworks underpinning the functioning of the world order face serious limitations in times of crisis.

Outside Europe, in the continent's immediate neighbourhood and in other regions of the world, protracted armed conflicts are taking place, the effects of which extend far beyond their own geographical boundaries. These conflicts have global economic and social consequences: they affect energy and raw materials markets, intensify migration flows, and create lasting uncertainty in the environment that shapes international cooperation as a whole. The accumulation of security, economic and social crises increasingly gives the impression that the international system is not merely functioning with difficulty in certain areas, but is also fraught with tensions at a structural level.

As a result, faith in the stability of the world order appears to be visibly shaken, and the question is being raised with increasing frequency in both policy and social discourse: is the current international order capable of addressing the challenges we face at the beginning of the 21st century?

This feeling, however, is by no means new. The transformation of the world order, the destabilisation of former power structures, and the search for new forms of cooperation are recurring phenomena in history. Even after the end of the Cold War, an uncertain transitional period followed: with the demise of the bipolar order, the restrictive yet long-predictable

system of relations that had shaped inter-state relations for decades disappeared. In the early 1990s, it was not yet clear exactly what power realignments the end of the Cold War would trigger , nor what new patterns of conflict would emerge.

The intellectual imprint of this era is well reflected in the theoretical debates concerning the future of the emerging world order. Henry Kissinger's analyses of diplomatic history drew attention to the fact that the international order is never merely a legal construct, but rather a constellation of power, political and cultural balances.[1] In contrast, Francis Fukuyama's 'hurray-optimistic' vision of the ultimate victory of liberal democracy and 'the end of history' proved to be an illusion within a short time.[2] Samuel Huntington's thesis on the clash of civilisations, however, particularly following the terrorist attacks of 2001, seemed to many to offer a compelling explanation, even if its simplistic nature provoked considerable criticism.[3]

In the interpretation of contemporary international relations, concepts that partly overlap yet carry different emphases frequently appear, such as the multipolar world order, the 'new Cold War' and the post-hegemonic world order. This study deliberately employs the latter concept, as the processes it examines cannot be fully described either by an approach based on the balance of power poles or by a narrative assuming a repetition of Cold War logic.[4] In this context, the term 'post-hegemonic' refers to the fact that, following the brief unipolar period after the Cold War, no lasting, indisputable hegemonic power emerged: the United States' former dominant position was gradually called into question, whilst the rapid strengthening of other centres of power created a new competitive landscape.[5] The study uses the concept of 'world order' to refer to the structural state of the international system as a whole, whilst the term 'multilateral order' denotes the institutional and normative framework that emerged following the Second World War. In this interpretation, the post-hegemonic world order does not describe a new order, but rather the current state in which the institutional legacy of the multilateral order persists, yet loses its former system-organising power.[6] This study does not seek to normatively reject the multilateral order, but rather to describe its operational limitations, with particular regard to how these manifest in crisis situations and during periods of conflict between great powers.

[1] Kissinger 2015.
[2] Fukuyama 2024.
[3] Huntington 2019.
[4] Ismayilli 2025: 255–256; Peters 2023: 1653–1654
[5] Tálas 2021.
[6] Ikenberry 2011, Taggart-Abraham 2024.

The study first examines the emergence of the multilateral order and its internal operating principles. It then analyses the return of great power rivalry in the post-Cold War era, and how this contributes to the instability of the post-hegemonic world order. The subsequent chapters discuss the adaptability of international legal and institutional frameworks, as well as the changing role of globalisation and interdependence, whilst the conclusion outlines some fundamental dilemmas regarding the future of the world order.

The emergence and operating principles of the multilateral order

The international order that emerged in the second half of the 20th century was not organised around a single goal or function, but sought to respond to the challenges of the post-Second World War era across several closely interrelated dimensions.

Equality in principle, power imbalances in practice

The experiences of the two world wars made it clear that the approach previously defining inter-state relations, based primarily on the balance of power, was not in itself sufficient to maintain lasting stability. This is particularly true in an international environment where the consequences of armed conflicts extend far beyond the regions concerned. In recognition of this, a new international order has taken shape, centred on institutional cooperation and a system of commonly accepted rules.[7]

The starting point of the multilateral order established after 1945 was that the maintenance of peace and security cannot be confined to ad hoc cooperation between a few dominant states, but requires broader participation and institutionalised frameworks. Accordingly, the maintenance of peace and security is conceivable only with broad participation, and decision-making must – at least formally – be based on the community of states.

The role of the great powers in this new configuration exhibited a particular duality. Formally, they did not appear as separate decision-makers, but as part of the broader community of states, exercising their influence within the general institutional structures. At the same time, the actual differences in the balance of power not only failed to disappear but became entrenched within the new institutional structure.[8] The most striking example of this is the UN Security Council (SC), which is authorised to make decisions—including those with binding force—concerning the maintenance of collective security , whilst permanent membership and

[7] Ruggie 1982: 386–395.
[8] Hurd 1999: 386–390.

the right of veto are concentrated in the hands of the victors of the Second World War. This solution was built on the post-war balance of power, yet it sought to ensure that rivalry between the great powers did not drag the system back into an era of open warfare.[9]

However, the rapid unfolding of the Cold War soon highlighted the limitations of this model. Amid the conditions of bipolar confrontation, the UN Security Council's decision-making became paralysed in numerous armed conflicts,[10] whilst the rivalry between the great powers increasingly took place on the fringes of the system, in indirect forms.[11]

Legal, functional and normative pillars

One of the central aims of the emerging world order was to establish predictability and stability in international law. Consequently, the use of armed force gradually lost its former status as a legitimate instrument of sovereign state decision-making. The new order was built on the principle that the initiation of war could no longer be treated as one of the options available in foreign policy deliberations, but could only be considered acceptable in narrowly defined exceptional cases. The UN Charter imposed a general prohibition on the use of armed force and the threat thereof, with the sole exceptions being self-defence and authorisation by the Security Council.[12]

Alongside the concept of collective security, collective problem-solving became another defining feature of the system. In the post-war period, it became increasingly clear that numerous challenges – ranging from economic reconstruction and the regulation of world trade, through epidemics and humanitarian crises, to environmental problems – could not be addressed solely at the national level. This led to the creation of international organisations that served as forums for coordination, information exchange and the establishment of common rules.[13]

The third, defining dimension of the multilateral order was the establishment of a normative framework. In the wake of the mass violations of law committed during the Second World War, the international community sought to ensure that inter-state cooperation was not based solely on procedural rules and jointly established institutions, but also possessed clear values . At the heart of this was the principle of the universality of human rights.[14] Although the manner and extent of their enforcement have been the subject of debate from the outset,

[9] Mazower 2012: 218–233.
[10] Hurd 1999: 384–389.
[11] Gaddis 2005.
[12] UN Charter 1945, Article 2(4); Article 51.
[13] UN Charter 1945, Chapters IX–X.
[14] UN Universal Declaration of Human Rights 1948.

human rights norms have become a defining element of international law. In subsequent decades, this normative system expanded further, first with the emergence of the concept of development, and then that of sustainable development, which sought to link economic growth, social justice and long-term environmental considerations.[15] The international system as a whole thus came to be characterised increasingly by the close intertwining of legislation, political compromise and institutional cooperation.

For a time, this system was able to keep great power rivalry within institutional bounds. At the same time, even during its formative period, it contained within it the tensions that would later become increasingly acute: the enduring coexistence of the principle of equality and unequal power relations, as well as the difficult-to-resolve contradiction between normative ambitions and political realities.

Balance of power and instability in the post-hegemonic world order

Just a few years after 1945, international relations were defined by a bipolar power struggle, which differed fundamentally from the situation for which the newly established structure had originally been designed.

As a result of the formation of blocs, the primary arena for conflict management was not the newly established institutional system, but direct and indirect competition between the great powers. The foundations of the multilateral order remained in place, and its system of rules served as a reference point; however, its practical scope of action was severely constrained.[16] The – relative – stability of the Cold War was essentially ensured by the duality of the balance of power and deterrence. It was only with the end of the bipolar dynamic that it first became realistic for the institutions and rules established after the Second World War to actually shape the functioning of the international system.

With the end of the Cold War, competing power aspirations—some of which clashed—began to emerge on the international stage. The armed conflicts of the 1990s clearly signalled this transformation. The conflicts in the territory of the former Yugoslavia or in Rwanda did not fit either into the Cold War logic of blocs or into the collective security concepts developed following the Second World War . The conflicts dragged on, combining ethnic and territorial dimensions, whilst the international community’s response remained fragmented and often

[15] Schrijver 2008.
[16] Ikenberry 2001.

contradictory.[17] The use of military force did not disappear, but it appeared less and less frequently in the form of open, declared war. Great power rivalry typically became increasingly conspicuous through new means and in new regions.

This ‘relative’ period of calm lasted until 11 September 2001. Following the terrorist attacks, the United States broke with the more restrained, diverse approach to intervention that had characterised the 1990s, and once again made military force the central instrument of its foreign policy. The United States sought to provide a legal basis for its military interventions in Afghanistan and Iraq by invoking self-defence. In doing so, however, it dramatically broadened the concept of self-defence compared to its previous interpretation under international law. In this context, the use of military force did not so much entail compliance with existing rules, but rather the opposite: the interpretation of the rules of the game should be adapted to the methods of asserting interests employed. All this demonstrated that, although international law and the institutional system essentially serve to keep power dynamics in check, under favourable – or indeed crisis-ridden – circumstances, these constraints are loosened and states – particularly those with significant military superiority – ‘bend’ the rules in the interests of their own security or strategic interests.[18]

A similar trend can be observed in states that played a more restrained role in international politics during the Cold War. Through its policy in the regional framework of the South China Sea and the expansion of its military presence, China has sought to signal that it does not always regard international rules as binding upon itself, provided they restrict its room for manoeuvre. With the dynamic growth of its global economic influence, Beijing has, in a short space of time, been able to establish a position of power that has secured it the ability to exert real influence in shaping international relations.[19]

At the same time, the successor to one of the main players in the Cold War also began to make its presence felt with increasing assertiveness. Following the collapse of the Soviet Union, Russia first used open military force in the post-Soviet region during the 2008 war in Georgia,[20] then in 2014 with the annexation of the Crimean Peninsula, and finally in 2022 with a full-scale attack on Ukraine , signalling that it does not consider the post-Cold War European security order to be settled.[21] What makes these events particularly significant is that one of the key players in the former world order has, in a relatively short space of time—

[17] Kaldor 2012.
[18] Garwood-Gowers 2012, Chinkin–Kaldor 2017.
[19] Yahuda 2013, Llanos-Antczak, Anna – Phommachanh, Pathummaly 2022: 27–31.
[20] Tálas 2008.
[21] Rabinovych–Pintsch 2024, UN General Assembly 2014 (GA Res. 68/262).

a mere two decades—returned to the practice of forcibly altering territorial and spheres of influence.

The system is therefore only capable of temporarily restricting the major powers' desire to make use of the additional tools at their disposal. At the same time, however, the actions of the great powers no longer take place in complete disregard of the rules: even in the case of the most blatant violations of the law, there is a need to link them to some UN principle or international norm. In this context, however, conflicts rarely lead to a clear resolution.[22] Prolonged, low-intensity crises that perpetuate lasting uncertainty have become far more common. The stability of the international system is fragile and can easily be destabilised during unexpected global crises, or if a regional conflict spills over beyond its own region, or when the great powers disregard, on an ad hoc basis, the international rules to which they are also bound.[23]

Institutions and law: maintaining order or shaping order?

The international institutional system established after the Second World War was based on a relatively simple realisation: if states are allowed to exercise the use of force without restriction, the international system will sooner or later turn against itself. The new order therefore did not set out to eliminate conflicts entirely, but rather to curb and contain them, primarily through institutional and legal constraints.

For a time, this system proved to be functional, despite all its internal contradictions. It did not eliminate conflicts, but it was able to keep them within manageable limits. For a long time after the end of the Cold War, there was an expectation that international institutions would finally be able to fulfil the roles originally envisaged for them. However, practice gradually showed that the system's viability continues to depend primarily on cooperation between the major powers, and in the absence of such cooperation, legal and institutional constraints quickly reach their limits.

The formal power and political weakening of international organisations

A good example of this is the UN Security Council, whose primary task is to maintain international peace and security. To this end, it is even authorised to adopt binding decisions, provided that these are supported by at least nine members of the Council and none of the

[22] Johnstone 2008, Hathaway–Shapiro 2017.
[23] Staniland 2012.

permanent members exercises their right of veto. Depending on the severity of the conflict in question, it may decide on measures ranging from the application of diplomatic and economic pressure, through a peacekeeping presence, to authorising armed intervention. The problem is not a lack of tools, but rather that, in the current political climate, these can be used effectively with ever-decreasing frequency.

During the Syrian civil war, the UN Security Council was unable to take unified action for years, whilst the conflict had severe humanitarian consequences. Armed clashes in the Middle East, or the wars previously taking place in the territory of the former Yugoslavia, have also shown that the scope for action of international organisations fundamentally depends on the extent to which the interests of the great powers coincide.[24] This is no different in the context of the Russian–Ukrainian conflict.

In such a tight spot, the UN Security Council is unable, and will never be able, to take meaningful decisions, because the conflicting interests of the major powers preclude consensus. The Council meets, debates, and draft resolutions are drawn up, whilst every participant is aware that no binding decision can be reached.[25]

Similarly, the World Trade Organisation (WTO) is also suffering from clashes between the major powers. The economic conflict between the United States and China has led to the paralysis of the dispute settlement system. According to the United States, the organisation was unable to address the issues of Chinese state subsidies, state-owned enterprises and forced technology transfer, whilst its decisions consistently favoured China. As a result, Washington has blocked the appointment of new appellate judges since 2017. By 2019, the body had become unable to reach a quorum. The legal resolution of disputes ceased; the losing party could simply appeal to a non-existent forum, whilst trade conflicts continued in the form of tariff wars and bilateral deals.[26]

It did not take long for these conflicting interests to come to the fore in the field of healthcare as well. During the COVID-19 pandemic, the functioning of the World Health Organisation (WHO) became one of the battlegrounds for confrontation between the major powers. Following the outbreak of the pandemic, the United States accused China, and indirectly the WHO itself, of withholding information and issuing delayed warnings, whilst China rejected the possibility of international investigations with a broader mandate to uncover the origins of

[24] Hehir 2013.
[25] Luck 2006, Hurd 2016.
[26] Bhan et al. 2025

the pandemic . The conflict quickly escalated beyond technical issues: Washington suspended its financial contributions and subsequently announced its intention to withdraw, which significantly weakened the organisation's influence and authority in the midst of the crisis. The WHO continued to operate formally, issuing recommendations and assuming a coordinating role, yet its statements took on an increasingly cautious, politically neutral tone. Instead of global action, parallel and often competing national strategies emerged, with states responding through lockdowns, export bans and a race to procure vaccines.[27] The pandemic thus served not only as a health crisis but also as an institutional stress test, demonstrating that in the event of a confrontation between major powers, even an international organisation with a fundamentally professional mandate of vital importance to every state can easily fall victim to international political dynamics.

Overall, it can be observed that international organisations are increasingly shifting roles. Instead of decision-making, they are gradually taking on functions of communication and legitimisation. They provide a forum and maintain dialogue, but in many cases the actual decisions are made outside the organisational framework.[28]

Selective enforcement of law and resulting inequalities

Another persistent source of tension within the multilateral order is the selective application of international law and the unequal enforcement of the consequences of violations. Following the Cold War, the areas in which states accepted that their decisions could not be regarded solely as internal affairs gradually expanded. Institutional mechanisms have been established in the fields of security policy, economic cooperation and human rights which have effectively constrained states. However, this constraint has not affected all actors to the same extent or in the same way. For small and medium-sized states, violations of the rules of the multilateral order often entail tangible political or economic consequences. In the case of great powers, however, these consequences are felt to a much lesser extent.

The 2003 military intervention in Iraq is a good illustration of this phenomenon. The United States launched a war without UN Security Council authorisation, citing self-defence, yet the argument was on shaky ground. Within the framework of the war on terrorism, it applied the concept of self-defence against non-state actors to whom the UN Charter did not originally apply unequivocally. Furthermore, it was unclear when an attack by a terrorist group operating within a state's territory could be attributed to the state itself, nor whether a future,

[27] Fidler 2020
[28] Hurd 2016.

hypothetical threat could justify armed action.[29] The military intervention provoked widespread disapproval; several states openly questioned its legality, and the perception of US foreign policy deteriorated noticeably. However, none of this led to a situation that would have actually forced the United States to reconsider its position.[30]

The international reaction to China's actions in the South China Sea region has been similar. The 2016 ruling by the International Tribunal for the Law of the Sea in The Hague unequivocally rejected the legal basis for Beijing's territorial claims, yet in practice the ruling did not lead to any substantive change.[31] China did not withdraw its claims, did not alter its behaviour, and did not regard the ruling as binding. Beijing's reaction was not an open rejection of the law, but a deliberate sidestepping of it. Without going into the details of the legal argument, China instead prioritised a narrative based on sovereignty, historical rights and stability.[32] Although the position under international law was clear, there were no consequences. In this case too, the international reaction was limited primarily to diplomatic protests, political statements and principled dissociation. Although several states and international actors emphasised the importance of respecting international law, these statements were not accompanied by substantive action.

The other side of the coin, however, is when small and medium-sized states break the rules. In the wake of the conflicts in Yugoslavia and Rwanda in the 1990s, which provoked widespread international outrage, a clear demand emerged that the most serious violations of the law should not go unpunished. This led to the establishment of ad hoc international criminal tribunals, which remain a major milestone in international criminal justice to this day.

In the case of Serbia, for example, the consequences of the violations committed in the territory of the former Yugoslavia between 1991 and 1999 had a lasting impact for years and remained a defining factor on multiple levels – politically, economically and legally. The European Union and other international actors made Belgrade's international reintegration explicitly conditional on cooperation with the Hague Tribunal. The extradition of Slobodan Milošević in June 2001[33] was not only a political turning point but also a clear message: failure to address violations of the law would result in immediate diplomatic and economic

[29] Kecskés 2007, Hathaway–Shapiro 2017
[30] Kecskés 2007.
[31] Legal Forum 2016
[32] Permanent Court of Arbitration 2016
[33] International Criminal Tribunal for the Former Yugoslavia n.d.

consequences. Any failure to cooperate consistently delayed EU rapprochement and financial support.[34]

A similarly tough response followed Sudan's actions during the Darfur conflict. In the wake of the armed clashes that erupted in 2003 and the serious violations associated with them, the UN Security Council adopted several sanctions resolutions, which included an arms embargo, travel bans and asset freezes.[35] The consequences of these violations reached a new level in 2009 and 2010 when the International Criminal Court (ICC) issued an arrest warrant for Omar al-Bashir, Sudan's incumbent head of state. This move resulted in unprecedented political and diplomatic pressure, as it was the first time an arrest warrant had been issued against a sitting head of state on suspicion of genocide, crimes against humanity and war crimes.[36] As a result of all this, Sudan's diplomatic isolation and economic vulnerability deepened further.

In the 2010s, the same dynamics applied to Syria. Following the civil war that erupted in 2011, the international response was swift and wide-ranging: from May 2011 onwards, the European Union gradually introduced a comprehensive sanctions regime against the Damascus regime, which included financial restrictions, oil and energy sanctions, and trade bans. This was soon followed by measures from the United States, which imposed targeted sanctions on the leaders and economic backers of Bashar al-Assad's regime. At this stage, Syria bore the consequences of these violations in the classic manner: in the form of rapid isolation, economic collapse and diplomatic marginalisation.

However, the response to these violations did not stop at sanctions. From September 2014, the United States, at the head of an international coalition it led, launched military air strikes against Islamic State on Syrian territory, without formal consent from Damascus. The legal justification for the intervention was based primarily on self-defence and the fight against terrorism, whilst Syria's sovereignty was effectively compromised.

The conflict took a further turn in September 2015 when Russia intervened in Syria with direct military force on the side of the government. The deployment of the Russian air force, as well as the deployment of military advisers and equipment by the United States ( ), fundamentally altered the balance of power on the ground and made it clear that Syria had become a front line in the competition between the great powers.

[34] Human Rights Watch 2008
[35] UN Security Council Resolution 1556, 2004; Resolution 1564, 2004; Resolution 1591, 2005; Resolution 1651, 2005.
[36] International Criminal Court n.d.

In this situation, the duality became particularly acute: whilst legal and economic sanctions against Syria were consistently and persistently enforced, the military dimension of the conflict was now determined by the superpowers' confrontation with one another. The small and medium-sized state thus became simultaneously the target of law enforcement and the arena for the great powers' power politics. The scale and intensity of the conflict far exceeded Syria's own weight, whilst the consequences continued to be borne primarily by the country itself.

Whilst in the case of smaller states and regional actors, violations of the law resulted in actual sanctions, institutional accountability and, often – ironically, but quite literally – the development of the law, in the case of states with significant political and military weight, the application of the law typically became a matter of political discretion. The rules, therefore, do not become null and void, nor do they disappear from international practice, but they are gradually losing their role in predetermining the direction of decisions. International law is increasingly less the starting point for action and much more its retrospective explanation: a language of reference through which states render their already taken political and military decisions acceptable.[37]

At the end of this chapter, however, it must be emphasised that the Russian–Ukrainian conflict has created a new and, for the time being, open-ended situation: despite its status as a great power, Russia has faced an unprecedentedly extensive and sustained regime of sanctions. Among other things, the European Union has now adopted more than a dozen packages of sanctions, significant financial and asset freezes have been imposed, and[38] the ICC have issued arrest warrants against Russian President Vladimir Putin.[39]

Whether all this represents a genuine break with the previous practice of selective law enforcement, or remains merely an exception under extraordinary circumstances, will only be judged once the war has ended. What is already clear, however, is that international law and the institutional order have been set in motion once again.

The proliferation of human rights standards and assessment mechanisms

Over the past few decades, the steady increase in the number of international organisations initially served to streamline tasks and strengthen specialisation. As time went

[37] Hurd 1999, Johnstone 2008, Mazower 2012
[38] Ujvári–Varga 2023, Varga 2024.
[39] International Criminal Court 2023.

on, however, functional differentiation became an institutional logic in its own right, encouraging the creation of ever more organisations, bodies and mechanisms – but never their dissolution. As a result, the functioning of the international institutional system has become increasingly fragmented: competences are blurred, decision-making processes are fragmented, and it is often unclear even to the participating states which forum actually has the power to act on a given issue.

One of the most clearly identifiable areas of structural overreach is the system of human rights monitoring mechanisms. At the global level, within the framework of the UN, committees monitoring the implementation of international treaties, special rapporteurs with thematic and country-specific mandates, and the Universal Periodic Review mechanism (UPR). These all examine the legal practices of the same states, often in the same areas (such as the independence of the judiciary, freedom of expression, etc.), but on the basis of different procedures and assessment criteria.

In practice, this means that a particular piece of legislation or measure may first appear in a thematic report by a special rapporteur, later serve as a reference point in the concluding observations of a treaty body, and then resurface in the form of a recommendation within the framework of the UPR. During this process, a statement that was originally political or technical in nature gradually evolves into a normative expectation, whilst neither the hierarchy between the individual forums nor the differing legal binding force becomes clearly distinguishable. The system thus creates an increasingly dense normative environment not through conscious law-making, but through institutional interdependence.

A similar parallel can be observed at the regional level. In Europe, the European Court of Human Rights, the Council of Europe's political monitoring mechanisms, and the European Union's own rule of law instruments—including the annual rule of law reports and conditionality mechanisms—assess the human rights and rule of law performance of the same states in parallel. Although their mandates are formally distinct, in practice the same issues are scrutinised at multiple levels, using different criteria.

This multi-level assessment system is not contradictory in a legal-technical sense, yet in practice it results in significant uncertainty regarding legal interpretation and implementation. It is not always clear to states whether a given finding stems from a judicial decision, a political assessment or a professional recommendation, or how these relate to one another.

At the decision-making level, the consequences of structural overreach are similarly evident. Where a central decision-making body is unable, for political reasons, to adopt a binding decision, other institutional actors attempt to fill the void in substantive action through statements, reports or political resolutions. However, these tools do not come with a clear mandate to make decisions, whilst contributing to the diffusion of political responsibility across multiple institutions.

Taken together, these subtly but consistently erode the legitimacy of international organisations. If the process by which rules are established, their legal binding force and the party responsible for their enforcement are unclear, the system loses its ability to provide a predictable and transparent framework for cooperation.

Soft power, globalisation and the paradox of dependencies

In the post-Cold War era, the toolkit of power has undergone a dramatic reshuffling. Military force has not disappeared from international politics; indeed, its presence and demonstrative role have remained decisive. At the same time, however, it has appeared with ever-decreasing frequency as the primary instrument in the day-to-day assertion of interests. In many cases, overt military action was pushed into the background by economic, financial and cultural mechanisms capable of exerting lasting influence without the need for direct coercion. In this sense, ‘soft power’ is not the opposite of ‘hard’ power, but rather a complement to it: it does not demand immediate obedience, but shapes the environment for decision-making in the longer term.[40]

The basis of soft power’s operation is that it determines what becomes natural and worth emulating in the international arena. Language use, educational and scientific standards, cultural products and lifestyle models are all channels through which influence manifests not in the form of commands, but through the shaping of preferences. The actor capable of shaping these patterns gains a lasting advantage without engaging in open conflict.[41]

This duality is particularly evident in the economic interdependence of the world. The deepening of global trade and financial ties has not only brought growth and prosperity, but has also created dependencies that remain invisible in peacetime yet rapidly acquire political significance in times of crisis.

[40] Nye 2004
[41] Nye 2011

As supply chains have become internationalised, states are increasingly unable to secure their basic resources by relying solely on their own capacities. In terms of energy, food, raw materials and technology, external relations have become part of day-to-day operations. For a long time, this interdependence held the promise of stability based on mutual interests: the assumption was that a serious conflict would entail economic losses for all parties involved.

However, reality has repeatedly contradicted this optimistic assumption. The European energy crisis triggered by the Russia–Ukraine war has clearly demonstrated how quickly energy dependence can become a tool for exerting political pressure. The curtailment of natural gas and oil supplies, and the sanctions imposed in response, have caused not only economic but also domestic political and social tensions in the countries concerned.[42]

During the COVID-19 pandemic, the fragility of global supply chains became palpable. It soon became clear that the production of medicines and protective equipment is concentrated in a few geographical hubs, and that a single production outage or export restriction is capable of paralysing the functioning of the entire global economy. The 'just-in-time'[43] model, previously regarded as efficient, resulted not in flexibility but in vulnerability during a crisis.[44]

The outcome of today's conflicts is increasingly shaped not by military force, but by the terms of economic relations and supply decisions. Mutual dependence in this form does not produce peace, but vulnerability.

As a result of all this, the relationship with globalisation has also changed. In previous decades, interconnectedness was valued in its own right, and efficiency was the primary consideration. However, the crises of recent years have highlighted that systems based solely on cost optimisation are fragile and can quickly become dysfunctional under adverse conditions.

The answer to this is not complete isolation, but a more conscious reorganisation of relationships. States are increasingly seeking to spread their dependencies in multiple directions, thereby reducing their unilateral vulnerability . The aim of diversification is not independence, but keeping risks at a manageable level. In parallel, regional cooperation is also gaining in importance, offering both protection against uncontrollable international influences and a stronger bargaining position in the global arena.

[42] European Commission 2025, Reuters 2025
[43] Pisch 2020
[44] Xu et al. 2020, News-Medical 2023

The emphasis is thus not on whether cross-border relations are good or bad, but on the conditions under which they become manageable. In the post-hegemonic world order, these relationships do not disappear, but take on new political significance and become part of governance. The question is therefore not whether globalisation is ‘coming to an end’, but whether the international system is capable of coexisting with the interdependencies it has itself created.

Outlook: the openness of the future

In today’s international arena, the sense of a shared direction that once existed is becoming increasingly elusive. States are not moving towards a distant, orderly destination, but rather are trying to mitigate risks and avoid more serious consequences by adapting to current situations. This is not a temporary uncertainty, but a characteristic of an era in which ‘transition’ itself has become the norm.

In this context, the meaning of order and security also shifts. It is not a question of tensions ceasing, but of ensuring they do not spiral out of control. This is clearly evident in the fact that even during periods of acute confrontation, channels of communication do not break down completely: military consultations, crisis management lines and technical contacts remain in place. Behind these lies not trust, but the recognition that complete isolation is more dangerous than uncomfortable contact.

Moreover, the factors shaping the future are becoming increasingly at odds with traditional geopolitical thinking. The rise of artificial intelligence, data-driven decision-making and digital infrastructures not only offers new opportunities but also creates new forms of vulnerability. Control over information, the setting of technological standards or access to platforms often carry greater weight than traditional military resources.

At the same time, global politics is becoming increasingly fragmented. Rather than a single overarching order, a series of coexisting partial solutions is emerging: regional security agreements, ad hoc coalitions, and economic and technological blocs. These are capable of delivering results on certain issues, but in other areas they clash openly with one another. In this environment, the international institutions that previously played a central role— —are being pushed into the background: they do not set the direction, but provide a framework, whilst stabilising and only occasionally applying the brakes.

All this suggests that the future does not promise a new world order accepted by all. Rather, a longer period is unfolding in which disorder becomes the norm, and the yardstick for political decision-making will be whether open conflicts can be postponed, rather than whether a genuine resolution is achieved.

2. Still confused? - the distinction between ius ad bellum and ius in bello

1. Description of history of difference between the two notions

Ius ad bellum, the right to go to war, has been first globally regulated in the Charter of the United Nations, which established a general prohibition on the use of force in international relations. As laid down in Article 2 (4) of the Charter, states must refrain from "*the threat or use of force against the territorial integrity or political independence of any state*". At the same time, the Charter preserves limited exceptions to this prohibition. Article 51 recognizes the "*inherent right of individual or collective self-defence*" in the event of an armed attack, while the Charter also allows for the use of force when authorized by the Security Council to maintain international peace and security.

Ius in bello, the law in war, however, has been an old, and progressively developing field of law. It was first regulated in national customs, military orders, laws, and then in international law. The first rules of international law, adopted in international treaty was the First Geneva Convention of 1864. The Convention established fundamental principles aimed at alleviating the suffering of wounded soldiers and those caring for them. It provided, *inter alia*, that "*ambulances and military hospitals shall be recognized as neutral*", and extended such neutrality to medical personnel. Furthermore, it introduced the obligation that "*wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for*", thereby emphasizing the principle of non-discrimination. The Convention also recognized the protection of civilians assisting the wounded and introduced a distinctive emblem, the red cross on a white background, as a sign of neutrality and protection.[45]

Later, the Hague Regulations of 1907 put restrictions on the means and methods of warfare.

The first Geneva Convention of 1864 later developed into what we today know as the Geneva Conventions of 1949 and their Additional Protocols of 1977, supplemented by a number of international treaties banning the use of certain weapons and ammunitions. The collection of international rules applicable to armed conflicts is collectively called international humanitarian law (IHL), law of war, law of armed conflicts – or, ius in bello.

2. AP I, Article 1 (4)

During the Diplomatic Conference negotiating the text of Additional Protocol I, many delegations were critical from the beginning of the formulation of Article 1 (4) of the said treaty. They claimed that this provision brings into a *ius in bello* treaty some *ius ad bellum* considerations in referring to the right to self-determination as a condition for application of the Protocol to national liberation movements.[46] These delegations also claimed that such a condition brings about an unequality between the parties, giving justification to national liberation movements to wage war, therefore granting more rights to national liberation movements than to the other party. This argument, however, is essentially political, advanced by colonial powers to oppose the recognition of wars of decolonisation as international armed

[45] Articles 1, 2, 5-7. of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, Geneva)
[46] US, UK delegation and France delegation opinions

conflicts. In fact, the whole logic and many provisions of Protocol I[47] sustain that all sides to the conflict are bound by the same rules, irrespective of the justification of the conflict itself.[48]

3. Threats of blurring *ius ad bellum* and *ius in bello* today:

3.1. mandate of mission / neutrality of state (UN Convention on safety of UN personnel, argument of a state being neutral)

Confusion between the two concepts is more and more apparent in examining the mandate of a multinational crisis management operation.[49] In particular, there is a tendency to interpret the applicability of *ius in bello* dependent on the mandate of such missions, rather than on the objective existence of an armed conflict.[50]

One general such conclusion is looking at the mandate of a UN operation to determine whether IHL will be applied. In simplified terms, this would mean that a peace enforcement mandate would mean the existence of an armed conflict, therefore the applicability of IHL, while a peacekeeping mandate would close out the possibility of the existence of an armed conflict.

Many argue that peace-enforcement missions mandated under Chapter VII, because they are carried out without the consent of the concerned state where the operation is carried out, are, by definition, armed conflicts. According to this same argument, Chapter VI missions cannot, by definition, be armed conflicts since they are based on the invitation or agreement of the state concerned. Hence, IHL cannot apply to such situations. This being a question of application of IHL at the first glance, also brings about *ius ad bellum* / *ius in bello* distinction issues.

This line of argument makes the applicability of *ius in bello* obligations dependent on the mandate of the mission (*ius ad bellum*), irrespective of how the situation on the ground unfolds. It is not difficult to imagine a situation where an originally Chapter VI-mandated mission finds itself in a situation which in fact amounts to an armed conflict. Although in Chapter VI missions UN soldiers are only allowed to use their weapons in self-defence, if the other side is attacking them, they may ultimately find themselves in a situation that really reaches the threshold of an armed conflict. In such a situation, looking at it from a qualification point of view, it does not matter who initiated the attack or whether it was lawful, the peacekeepers will fire back, and this may result in a case where the exchange of

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[47] See Article 96. 3. (b) AP I: „the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol" and (c): „The Conventions and this Protocol are equally binding upon all Parties to the conflict"

[48] Adam Roberts, p. 937.

[49] A multinational crisis management operation (CMO) is an operation involving multiple states and/or international organizations working together to manage or resolve a crisis through military and/or civilian means. Such operations typically include peacekeeping, peace enforcement, humanitarian assistance, civilian protection, and post-conflict reconstruction missions, conducted under frameworks such as the United Nations, the European Union, or NATO. They rely on coordinated planning, interoperability, and civil-military cooperation in order to provide rapid and effective responses to complex crises, which cannot be addressed by a single state alone, including armed conflicts as well as natural disasters.

[50] „Another proposition, which critiques the equal application principle from a slightly different angle, is that many soldiers in a conflict, even perhaps some or all of those on the 'aggressor' side, may be individually so innocent of blame that they should not be legitimate targets." See Adam Roberts, The equal application of the laws of war: a principle under pressure, in: International Review of the Red Cross, Volume 90, Number 872, December 2008, ICRC, Geneva, p. 933.; See also: Adam Roberts for a discussion on some writers have sought to advance the radical proposition that forces acting under the authority of the United Nations, whether in enforcement or peacekeeping mode, should have a general immunity from attack. Adam Roberts, p. 952.

fire may not be a one-off, short incident, but a prolonged situation, reaching an armed conflict.

In such a situation, the UN (also on the pressure of the troop-contributing nations - TCNs) may not be willing to change the mandate of the mission to Chapter VII, due to mainly political considerations. It is much easer for the TCNs to "sell" the idea of a peacekeeping force among their own public opinion, then asking for money and resources for a "war". Thus, it must be recognized, that the decision regarding the mandate of a UN force is to a large extent a political decision. In extreme cases, it can also be imagined that in a clearly armed conflict situation, states, because of political considerations, may still refrain from changing the mandate of a mission to Chapter VII, at the same time, when their soldiers, formally acting in self-defence, but in effect, engaging in hostilities against their attackers.[51]

One example of this problem is the activities of Provincial Reconstruction Teams (PRTs) in Afghanistan. PRTs were joint civil-military units established by the US in 2002 as an interim mechanism to operate in insecure provinces where civilian actors could not safely work. Over time, these units were taken over by different NATO member states and operated under varying national approaches, with no single standardized model.

Their main goal was, however, to extend the authority of the central government into outlying regions and to support reconstruction and development efforts.[52] Their tasks included promoting local governance, identifying and implementing small-scale reconstruction projects, and strengthening the link between Kabul and the provinces.[53]

Despite this primarily reconstruction-oriented purpose, PRTs had to operate in a volatile security environment. They were working within the framework of the International Security Assistance Force (ISAF) mission. ISAF had been authorized by the Security Council under Chapter VII as a peace-enforcement operation.[54] PRTs were, therefore, regularly exposed to attacks. This is why their activities included also force protection, patrolling, and cooperation with Afghan security forces, even though they were not tasked with conducting combat operations in the first place. The Hungarian PRT in Baghlan shows this clearly: on paper it dealt with reconstruction and governance, but in reality it had to operate in an insecure environment and deal with security threats as part of its work.[55]

Therefore, the political considerations regarding the mandate, should not be a factor when determining the obligations of the parties and the existence of *ius in bello* requirements applicable to specific conduct.

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[51] In many cases UN peacekeeping forces were deployed during an ongoing armed conflict. See Adam Roberts, p. 955.

[52] U.S. Department of State, "Provincial Reconstruction Teams (PRTs) Fact Sheet", 26 January 2006 https://2001-2009.state.gov/p/sca/rls/fs/2006/60031.htm

[53] Institute for the Study of War, Provincial Reconstruction Teams (PRTs): https://understandingwar.org/research/middle-east/provincial-reconstruction-teams-prts/

[54] International Security Assistance Force (ISAF) was established by the UN Security Council in Resolution 1386 (2001) under Chapter VII. As such, it constituted a peace-enforcement mission, authorized to take all necessary measures to fulfil its mandate. Its task was to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas. The mandate was later expanded by Resolution 1510 (2003). This allowed ISAF to operate beyond Kabul and to support the maintenance of security so that Afghan authorities and international civilian personnel, in particular those engaged in reconstruction and humanitarian activities, could operate in a secure environment. Provincial Reconstruction Teams (PRTs) were not created by the Security Council as a distinct legal category. They emerged in practice within this framework as civil-military units supporting reconstruction and governance in insecure provinces. Their role was later acknowledged by the Security Council, which welcomed the establishment of further PRTs by NATO lead nations (UNSC Res. 1623, 2005).

[55] Government of Hungary, Report on the performance of the HUN PRT: https://2010-2014.kormany.hu/en/hungary-in-afghanistan/about-our-teams-and-contingents/provincial-reconstruction-team

The other reason why states are reluctant to acknowledge the existence of an armed conflict in a peacekeeping operation is that it would make their soldiers attackable under the laws of war as combatants. However, if the situation on the ground reaches the threshold of an armed conflict, IHL becomes applicable, thus combatants are legal military targets, irrespective of their mandate.

In such a case, the followings are to be considered: attacking UN soldiers in a peacekeeping operation is a crime itself and does not give further rights to the attacker to attack combatants. Alternatively, the immunity of UN soldiers from attack may be regarded as *lex specialis* from IHL, therefore they cannot be attacked. If, however, UN soldiers are attacked and they respond, the original attacker cannot argue with his right of self-defence, because he initially violated the prohibition of attack. Therefore, if in such a case the UN soldier, on being attacked, kills the attacker, it will only be a legal act as far as he did it in compliance with IHL AND self-defence. Being attacked from a village does give the UN soldier the right to attack back, but while attacking back he also has to comply with IHL: not attack civilians or civilian objects.

What are the consequences of making the applicability of IHL dependent on the mandate of the mission? Existence of *ius in bello* obligations would be subject to political decisions, which was a factor that was strongly closed out already in the 1949 Geneva Conventions.

The proposition of the present author is therefore that whatever the mandate of a UN mission is, if the facts show the existence of an armed conflict, based on the criteria that crystallized in international law in, among others, the *Prosecutor v. Tadić* case, determination must be based on the facts, not on the mandate: *"... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*."[56] In such situations, UN soldiers are bound by the rules of IHL.

3.2. just war (US arguments), claim of self-defence (Gaza operation)

After the 9/11 attacks the US President referred to the "war against terrorism" as THE just war, allowing for special treatment. This argument went so far as to allow techniques amounting to torture as a legitimate way to fight this war. Although such techniques were strongly criticized from both inside and outside the US and the UK, repeated justifications found themselves in the notion of "just" war.[57] As the US administration noted, „the cause represented by al Qaeda is so deeply wrong that those deemed to be adherents of the movement should not benefit from the standard treatment for detainees and prisoners of war as outlined in the conventions on the laws of war – or even (in some interpretations) from the plain meaning of basic rules of universal application set out in the 1984 Convention on Torture." [58] Just war, a justification under *ius ad bellum*, thus became an excuse for violations of *ius in bello*.

[56] Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 70.

[57] „In the conduct of warfare it is often possible to detect an implicit claim that the adversary's violations (including in the original decision to resort to force) provide an excuse for extreme acts by one's own side that might otherwise be doubtful under jus in bello. The long history of such claims attests to the attraction of the idea of unequal application of the laws of war, but it also suggests that there are many dangers in such an approach, which is contrary to the existing law." President Truman used a similar argument for the use of bombs dropped at Hiroshima and Nagasaki, whereby arguing that such an act was necessary considering that the Japanese attacked the US at Pearl Harbour without warning. See Adam Roberts, p. 947.

[58] See Adam Roberts, p. 951.

3.3. "humanitarian intervention"

Sometimes it is argued that violations of *ius in bello* (eg Kosovo) trigger arguments for *ius ad bellum*. This would mean that mass human rights or IHL violations would allow for an intervention that would be legal, even without a Security Council authorization, based on humanitarian considerations. This argument is not convincing, as the factors forming conditions for the application of resort to force are of different logic, based on the peaceful relationship between states.[59] The big question it therefore raised was the existence of the right of self-determination for the Kosovar Albanian population, an issue that is not the subject of the present debate.

4. Significance of problem, consequences of confusion

The consequence of blurring *ius ad bellum* and *ius in bello* would have weakening effects on *ius in bello*. The legality of war being so subjective, so much politicized and its determination so much under-represented in law[60] (see the general discussion on act of aggression and crime of aggression with respect to the ICC Rome Statute), if it had a connection with the much more objective-based *ius in bello*, it would undermine the already reached results of IHL treaties. This is reflected in the fact that it is the Security Council that has the power to define whether a particular act is to be considered as aggression. The Security Council being made up of states, which, as history shows, have a very poor record of putting international interests before their own interests, is, even to a very optimist eye, political.[61]

[59] Some states argue for humanitarian intervention, for example the UK justified its airstrikes in Syria after the use of chemical weapons (in Douma, 2018) based on humanitarian intervention.
[60] See Adam Roberts, p. 957.
[61] „At a time when jus in bello is under considerable pressure, not least from both sides (in different ways) in the 'war on terror ', a philosophical-cum-legal approach that provides some basis for relativizing the application of the law on account of the alleged justice of the cause could only too easily be misused, for example to minimize
still further the already attenuated body of rules applied to detainees." See Adam Roberts, p. 961.

3. Challenges of humanitarian actors in conflict areas and cooperation with the military

In order to understand the challenges international humanitarian law (IHL) is facing today, it is important to understand the environment in which it applies and the players that have a role in its application. In the wake of 9/11 and the new types of conflicts, it was often debated whether IHL was fit to regulate the 21st century conflicts. In response, it had been mostly highlighted that it was not the body of IHL, but the lack of its application that caused non-compliance. In parallel, regular armed forces often complain that due to the changing nature of conflicts, it is more and more difficult to fight by the rules, especially that the enemy often takes advantage of not abiding by the norms.

At the same time, as we can see from the data and information shared in the pages below, the past years have brought about a significant increase in the number of conflicts, civilian victims, people who had to flee their homes or attacks on humanitarian workers, all – or at least most – of which probably constitute violations of international humanitarian law. Given the changing character of armed conflicts, such as the confusion between who is a combatant and who is a civilians, the asymmetric nature of conflicts or the blurring of roles between military and humanitarian actions, it is acknowledgedly more difficult to wage war in a way that is effective and corresponds to the rules. At the same time, we have witnessed the emergence of groups that do not even try to appear as respecting the rules and seem immune to moral calls against causing human suffering. These considerations of course do not, in any way, give a carte blanche on means and methods of warfare, but illustrate the changing environment in which IHL applies and in which humanitarian actors must operate.

It is due to such changed circumstances that humanitarian organizations came close to reaching their limits and cry for political solutions to end or diminish the effects of conflicts. Humanitarian action in armed conflict situations has never been easy, but in the past years it has become more difficult than ever. Not only the security situation has impeded humanitarian work, but the increasing activity of the military in humanitarian action, and consequently the blurring of lines between humanitarian and military action has brought about perception problems for humanitarian organizations. Therefore humanitarian organizations are bound to re-confirm their roles and the basic principles upon which they act, need to re-focus their dialogue and relationship with the actors on the field, and need to re-consider basic issues, such as effectiveness, the balance between assistance and protection activities, the need to conclude dialogue with all parties involved or their cooperation with local civil society organizations.

Questions of international humanitarian law cannot be understood in isolation from an understanding of the situation on the ground and the roles and challenges of the various players. The present article therefore attempts to provide a background picture of the current challenges humanitarian organizations face and their ongoing thinking on different ways forward, new challenges and their attitude towards cooperating with military forces, providing an introduction to the subsequent articles on international humanitarian law in the thematic part of this edition of the Hungarian Yearbook.

1. Introduction

The past one and a half decade has witnessed a large increase in the number of players in emergency situations. The past years have also seen a rise in many other aspects: number of emergencies, number of people displaced, number of civilians affected or number of security incidents affecting humanitarian workers. The increased presence of actors, notably military – be it national or multi-national –, the private sector, donors, international or regional humanitarian organizations, national or local humanitarian organizations calls for re-evaluation and rethinking of cooperation and coordination among the various actors on the field. At the same time, due to different motives and policies of the various players, questions also raise such as perception, neutrality and the limits of potential cooperation among military and humanitarian organizations. Eighty percent of the activities of humanitarian organizations are currently taking place in conflicts, where humanitarian action is even more complex, dangerous and demanding.

The following lines will introduce the main dilemmas the humanitarian world is facing today, as well as the roles military forces and humanitarian organizations are playing. It also discusses the dynamics of their cooperation and coordination on the field. This is preceded by providing a display of the most recent data on humanitarian action and humanitarian effects of conflicts to demonstrate the framework in which humanitarian organizations and military forces must act.

2. Recent general data related to humanitarian emergencies

2013 has seen records in many aspects. In 2013, a total of 148.2 million people were affected by natural disasters or displaced by conflict. An estimated 10.7 million people were displaced by conflict or persecution.[62] Globally, the number of internally displaced people (IDPs) rose from 28.8 million in 2012 to 33.3 million in 2013, and the number of refugees from 15.4 million to 16.7 million. At 51.2 million, the total number of people living in forced displacement in 2013 was at the highest level since the Second World War.[63]

Since the conflict started in Syria, it has by far brought about the biggest humanitarian consequences. By the end of 2013, 2.5 million refugees in the region needed assistance, and 6.8 million people inside Syria.[64] Syria is the worst conflict on record concerning its effects, both humanitarian and economic, and also for its regional implications. Syria accounted for 43% of the world's IDPs in 2013.[65] Over five years, from being the second-largest refugee receiving country, Syria has moved to being the world's second-largest refugee producing country. Displacement is not a problem that goes away easy: people live in displacement for an average of 17 years. Lebanon receives the most refugees from Syria: 25% of Lebanon's population is now Syrian refugees, while 20% of Jordan's population is now Syrian refugees (note that 40% of Jordan's population has already been Palestinian refugees). It is not difficult to imagine the devastating effect of such a large influx of refugees on those countries, not only from an economic, but also from a social point of view.

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[62] compared to 7.6 million people displaced in 2012

[63] Serving the needs of people in conflict. Pre-Consultation Briefing Note for the Europe and Others Group Consultation, p.1. Available at www.worldhumanitariansummit.org (last visited 18 January 2015) and OCHA report, p. 2 and p. 14.

[64] UN OCHA, World Humanitarian Data and Trends 2014 (hereafter OCHA report 2014), p.2. Available at http://www.unocha.org/data-and-trends-2014/downloads/World%20Humanitarian%20Data%20and%20Trends%202014.pdf (last visited 8 January 2014)

[65] OCHA report 2014, p.15.

The severity of the conflict in Syria was also reflected in funding. The Syria response plans received the largest amount of overall funding.[66] This amount was larger than the combined funding received by the Democratic Republic of the Congo, Somalia, South Sudan and Sudan.[67] In the International Committee of the Red Cross' (hereafter: ICRC) budget, similarly, the biggest portion was Syria's[68], followed by Afghanistan[69]. The ensuing two appeals[70] resulted in the largest ever financial requirement at the time. Interestingly, the appeals for the Democratic Republic of the Congo (DRC) and Yemen targeted more people[71] than the response plans for Syria and the region.[72] The operational budget of ICRC had risen by almost 50% over the past three years as it tried to keep pace with an "extraordinary period" of enduring humanitarian emergencies.[73]

Interesting to note, that according to research[74], the public interest for a conflict or emergency situation is not necessarily in parallel with funding provided. Therefore emergencies that have not driven so much attention have also received adequate funding meaning that in cases of emergencies that received the least attention (Niger and Mauritania) almost 80% of the appeals' requirements were met.[75]

Apart from multi-sectoral programmes, in 2013 the food assistance sector was again the sector under which the most funds were requested[76]. This was reflected in ICRC operations as well: most people, 6.7 million were beneficiaries of food commodities.[77] In 2013, mine action received extra funding, most probably due to ad hoc donations.[78] In ICRC activities, food was also the largest item purchased or received as contribution in kind: 3.791.000 canned food items were distributed.

2013 was the most dangerous year for humanitarian workers on record, with 251 security incidents recorded, affecting more than 461 aid workers. As for the ICRC, for example in Afghanistan, "where the ICRC has been present for many years, an attack on the Jalalabad sub-delegation killed one of the guards, showing that proximity does not always equal acceptance. Increasingly, humanitarian workers faced the threat of abduction, as was the case (…) for three ICRC colleagues in Syria. In some contexts the authorities impeded activities, asserting their sovereignty or denying the ICRC access to sensitive places."[79] Only in Syria, 33 Syrian Arab Red Crescent volunteers were killed since the beginning of the conflict[80]. "Between January 2012 and July 2013, more than 1,400 such incidents were reported in at least 23 countries; over 90% directly affected local health-care providers (private or public), and 14% were related to National Societies."[81]

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[66] Syria received 38 per cent of appeal funding, an amount of $3.1 billion.
[67] OCHA report 2014, p.4.
[68] with 66.2 million EUR
[69] with 62 million euros
[70] with 4.4 billion USD
[71] 14.7 million and 7.7 million respectively
[72] OCHA report 2014, p.2.
[73] Interview with Peter Maurer, President of the ICRC. See: http://www.theguardian.com/global-development/2015/jul/08/conflict-humanitarian-assistance-red-cross-chief-peter-maurer?CMP=share_btn_fb (last visited 10 July 2015)
[74] The research was conducted based on views on ReliefWeb.
[75] OCHA report 2014, p.2.
[76] $2.7 billion and $2.4 billion respectively
[77] ICRC annual report 2013, p.41. Available at https://www.icrc.org/eng/assets/files/annual-report/icrc-annual-report-extract-2013.pdf (last visited 8 January 2014)
[78] OCHA report 2014, p.12-13.
[79] ICRC annual report 2013, p.43.
[80] As at 31 December 2013
[81] ICRC annual report 2013, p.43.

Such poor security conditions prompted many organizations to adopt new security guidelines and dissemination programs.[82] The ICRC, for instance, launched a "Health-Care in Danger" program, highlighting the difficulties of health-care professionals in attending to victims in conflicts. This program included the collection of information on attacks against health-care personnel, units and patients, making representations to the responsible authorities or groups, consultations, conferences and expert meetings among experts, practitioners and representatives of armed forces.

On another note, many annual reports have highlighted the role of social media in emergency situations. Super Typhoon Haiyan was a testing ground for the role of social media in humanitarian response: of more than 440.000 tweets, 44 per cent related to needs and donations. Syria was the 9th most googled event of 2013 (1st: Boston Marathon).[83] Delivering in a protracted crisis also highlighted the importance of partnerships to meet affected people's needs. In Yemen, the number of organizations included in the Humanitarian Response Plan more than trebled from 25 in 2010 to 89 in 2013.[84]

3. Civil-military cooperation

These numbers illustrate a world which, from the humanitarian point of view, is neither safe nor progressing. It is against this background that humanitarian organizations and military forces must act. The challenge is there for both kinds of actors, with a different focus. For the humanitarians, they have to act in increasingly dangerous circumstances with humanitarian situations offering more complex questions and wider effects than before. For the military, including multi-national crisis management operations, they have to act in new types of conflicts, in more urban settings, with enemies they can often not identify and where political solutions are very far away. And it is against this background that parties must respect international humanitarian law, both concerning its rules on protection of civilian population and allowing humanitarians to deliver assistance and on how they are waging war.

These changing circumstances have also had an effect on military thinking. A good demonstration of the new way of thinking is the increased role the military is playing in the humanitarian field. The emergence of "humanitarian" activities of armed forces is a clear manifestation of the recognition that wars are not only waged by weapons, but also by public relations and through winning the hearts and minds of the local population. The fact that many conflicts take place in urban settings and that the enemy is often not visible, led to the strengthening of CIMIC, or civil-military cooperation, responsible for interacting with the civilian players, be it local population, local authorities or local or international humanitarian organizations. CIMIC is the arm of military through which it is carrying out its so called humanitarian activities.

According to the NATO Doctrine, the definition of CIMIC is „[t]he coordination and cooperation, in support of the mission, between the NATO Commander and civil actors". Its

[82] Another consequence of the increased danger faced by humanitarian workers was far-management of programs. The ICRC which is usually the last organization to withdraw from a conflict, was bound to leave Iraq for a period of time and carry out its activities from Amman. The remote management of programs generally makes it difficult to assess local needs and to have access to the vulnerable population. On the other side, this makes it difficult for the local population to get information on what kind of assistance is available.
[83] OCHA reprort 2014, p.26.
[84] OCHA report 2014, p.3.

aim is to provide „interaction between military and civil actors within a comprehensive environment to support the military commander's plan. (…).", while „[t]he long-term result of CIMIC is to create and sustain conditions that will contribute to the achievement of objectives within the overall mission, and to the implementation of a successful end state."[85] It is thus obvious that the aim of the humanitarian activities of the military is not to alleviate the situation of those in need, but to further the military mission plan. This provides a very different perspective to the humanitarian aid delivered by the military as opposed to aid being delivered by humanitarian organizations, which is mirrored in the way such actions are carried out and how the priorities are set.

This, in turn, also leads to the blurring of roles of humanitarian and military activities, especially in the eyes of the local population. In their eyes, they see the same soldiers delivering aid one day, and conducting military tasks the other day. Consequently, the local population often becomes suspicious about all "Western" persons and organizations and finally develops an era of non-confidence toward humanitarian organizations as well.

In order for these two players, military and humanitarian, to be able to work on the field, it is important that they understand each other's mandate, possibilities, interests and also limits. This enables a ground for better dialogue and eventually a more successful cooperation and less debate.

Cooperation is important and can be advantageous for both sides. From the military's perspective, as they see it, humanitarian organizations could be a source of information regarding the local population or local circumstances, they can be a means for "winning hearts and minds", they can be assisting military humanitarian actions, they can be good advocates for rights of the victims, be it civilians or detainees, they can be a source of expertise or experience on ways of dealing with people on the ground, and they can be critics of their actions.

From the humanitarian's perspective, depending on their different approach, the military can be providing means of transport for humanitarian workers or for the goods they want the local population to reach, be a source of information on safe areas to work for humanitarian staff or be a source of physical protection for them.

Although the level of willingness for humanitarian organizations and the military to cooperate and work together on the ground is very different, depending on the context, the players and their mandate, coordination is inevitable. Even in cases where for the sake of perception, ICRC was not ready to openly meet UN forces, a basic level of dialogue went on and was necessary. Coordination may also be helpful to understand who is doing what and where, to avoid duplication of work or collision of interests. The military may meet humanitarian organizations for many reasons. In certain cases they share information, resources, or the military provides information to humanitarian organizations on where it is or it is not safe to go.

For many humanitarian organizations the limits of cooperating with armed forces on the ground is probably one of the most critical issues and is a demonstration of the sensitive

[85] NATO, AJP-3.4.9 CIMIC, Allied Joined Doctrine for Civil-Military Cooperation, Edition A Version 1, February 2013, paras 0201 a; 0202 and 0203 a-b. respectively. Source: http://nso.nato.int/nso/zPublic/ap/ajp-3.4.9%20eda%20v1%20e.pdf (last visited 10 April 2015).

relationship between the military and humanitarian actors. Humanitarian organizations largely differ in how close they are willing to work or cooperate with military forces. Such policies range from the least possible contact (coordination but not cooperation) to directly seeking physical protection from the military. When forming such policies, the neutrality of humanitarian organizations should be taken into serious account, and it should also be borne in mind that bad perception of a single humanitarian organization may have an effect on the others as well.

It is for this reason that humanitarians often become suspicious, nervous or cautious when considering aid provided by military forces. It is for the same reason that naming such action "humanitarian" causes the raising of eyebrows by humanitarian actors. Whereas the results of aid provided by military may undoubtedly have a beneficial effect on the local population or communities, the centre of interest is not the needs of the beneficiaries but the military goal. This constitutes the largest difference between aid provided by military and aid provided by humanitarian organizations. According to the Executive Director of MSF-USA, "[w]e recognize that aid supplied by military forces can provide relief to people in need as can acts of assistance undertaken by individual soldiers or units moved by a sense of humanity. But this aid is different. It is not humanitarian assistance. It is given to reward, and it can be withheld to punish. It is often also linked with other activities, particularly intelligence gathering. By being subordinated to the military's broader objectives, such aid is fundamentally different from humanitarian aid in its nature and intent."[86]

4. Humanitarian organizations and their challenges

Humanitarian organizations can be basically divided into two groups: (1) assistance and (2) advocacy organizations. Usually the two do not go together, simply because criticizing-advocating and gaining access to the vulnerable from the same authorities you have criticized is not possible. In certain rare cases assistance organizations do carry out advocating activities, but this is the exception. Usually such a division is also characterized by humanitarian organizations versus human rights organizations. Lately there has been a discussion about closer cooperation between these two circles, in order to be more effective.

Another division between humanitarian activities is assistance versus protection activities. 80% of humanitarian activities are carried out in conflict areas, whereas only 10 % of humanitarian budget goes for protection activities. At the same time, protection needs constantly rise. When asked, local population put their own security first in the priority of their needs.

Considering the past years' conflicts, and the devastating effects of the Syria crisis, which has brought about the worst humanitarian disaster since the Second World War, and the arising power and acts of organizations whose aim it is to bring terror, like the Islamic State / ISIS or Boko Haram, humanitarian organizations started realizing that their activities, however good they may be, were not enough to address the humanitarian needs that arose as a consequence of these types of conflicts or events. They realized that conflicts happened so fast, to such an extent, and to such a devastating effect on civilian population, that they are only legging behind and can't make up for the problems such conflicts bring about. Therefore they

[86] May 01, 2006, By Nicolas De Torrenté, Executive Director of MSF-USA, see http://www.doctorswithoutborders.org/news-stories/op-ed/humanitarian-ngos-must-not-ally-military (last visited 20 February 2015)

increasingly call for political players to do something more to prevent and stop the atrocities. This was the outcome of the Europe and Others Group consultation in advance of the 2016 World Humanitarian Summit.[87] Therefore in the end we witness humanitarian organizations calling for political solutions, including, if necessary, armed action, to prevent and stop conflicts. Awkwardly, today's reality seems to point the way that nothing else would help.

4.1. More emphasis needed on protection activities

There is a growing recognition of the need for **protection activities** during providing humanitarian aid. While often assistance is seen as the basic requirement, due to the changing nature of conflicts, the blurring of roles and growing politicization of humanitarian activities, most documents highlight that protection shall be provided for the beneficiaries. According to the Sphere Handbook, protection principles encompass the following elements: (i) avoid causing further harm as a result of your actions, (ii) ensure people's access to impartial assistance, (iii) protect people from physical and psychological harm due to violence or coercion and (iv) assist with rights claims, access to remedies and recovery from abuse.[88]

4.2. Cooperation with local organizations

Case studies carried out by OCHA reveal that there is a need to **enhance cooperation with local NGOs** and civil society. This is necessary both for better evaluating needs, assessing and making better use of local opportunities, capacity building, sustainable development and so on, and for logistical-administrative reasons: in the territories of emergencies (18 countries) more than 1000 languages were spoken (e.g. only in Chad, 131 local languages are spoken). In six countries (Afghanistan, Yemen, Occupied PAL territories, Mauritania, Syria, Somalia) the language of official UN correspondence is not the official language of the country.[89] Cooperation with local community is a particular problem in Syria, where lack of access to affected people constrained the work of humanitarian organizations.[90]

It was also recognized that the lack of appropriate information on needs on the ground hinders adequate humanitarian response. In order to get as accurate information as possible on needs, interests of especially vulnerable, such as women, children and disabled, a more active cooperation is required with local players.[91]

Strengthening capacities of local communities, "with the goal of ensuring that governments and local communities are better able to meet their responsibilities and coordinate effectively with humanitarian partners" is also a part of the Good Humanitarian Donorship principles.[92]

The Code of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief of 1994 mentions among its principles that "we shall attempt to build

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[87] World Humanitarian Summit, Regional Consultation for Europe and Others, Final Report, p. 71. Available at https://www.worldhumanitariansummit.org/bitcache/0630a6f65e7655356108297dc0d02c7aad5e9a46?vid=536399&disposition=inline&op=view (last visited 26 May 2015)

[88] The Sphere Project: Humanitarian Charter and Minimum Standards in Humanitarian Response, 2011, pp 28-29. available at http://www.ifrc.org/PageFiles/95530/The-Sphere-Project-Handbook-20111.pdf (last visited 29 January 2015)

[89] OCHA report 2014, p.2.

[90] OCHA report 2014, p.22.

[91] EOG preparatory briefing book, pp. 68-69. Available at https://www.regonline.com/custImages/400000/406937/Briefingbookfinal_reduced.pdf (last visited 29 January 2015)

[92] Good Humanitarian Donorship principles, Endorsed in Stockholm, 17 June 2003, principle 8.

disaster response on local capacities".[93] This includes the aim to strengthen local capacities by employing local people, carrying out programs through local organizations, cooperating with local governments, purchasing local goods and trading with local companies. This principle is interlinked with other principles of the same document, such as the principle of involving program beneficiaries in the management of relief aid[94], and the principle of accountability to those who the humanitarian organizations seek to assist[95]. These objectives are somehow culminating in the last principle, which declares that in the publicity, beneficiaries of humanitarian assistance should be referred to as human beings, not as helpless objects. The first sentence of explanation of the principle is quite telling: "Respect for the disaster victim as an equal partner in action should never be lost."[96]

It is somewhat striking that such a basic idea requires special emphasis. For a start, it should never be forgotten that humanitarian aid is carried out for the benefit of those in need, and should not be an object to justify a particular humanitarian organization's existence, or be used as a tool for its visibility. Involving affected people improves the quality of the assistance through better identification of needs; it gives a feeling of ownership and thus contributes to acceptance of humanitarian assistance general and the activity and the presence of the given humanitarian organization in particular; and it also contributes to a sort of psychological recovery of affected people by feeling useful and important in forming the planning and implementation of humanitarian operations. In the long term, it builds capacities, experiences and provides training for local persons and organizations and contributes to ending the circle of aid-dependency.

In the growing competition and the diversification of humanitarian organizations, often the essence is lost, therefore the interest of the beneficiaries, the need for their involvement in planning and carrying out activities and efforts to build their capacities needs to be emphasized over and over again. This fact illustrates one of the drawbacks of the humanitarian world today. This is why this issue is emphasized in many documents prepared in preparation for the World Humanitarian Summit.

Another interesting observation is that playing more attention to local people's demands, involving them in planning and implementing operations was a part of each of the four themes of the Europe and Others consultation preparing up for the World Humanitarian Summit.

Building partnership with local stakeholders is also a strategy of Médecins du Monde, which acknowledgedly strives to develop a strategy of Alliances to move closer to populations in need.[97] However, Médecins du Monde acknowledges right away that finding partners that accept to work on the basis of neutrality is often challenging. Another challenge in working with local partners is different views on the level of acceptable corruption in dealing with local authorities. Médecins du Monde finds the Syria model, where their operations are remotely managed and principally run by local partners, a possible solution in the present situation where attacks against humanitarian personnel are increasing and needs to be further explored.[98] One possible way of further thinking would be to establish a new operating model

[93] Code of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief (hereafter Code of Conduct on Disaster Relief), 1994, available at https://www.icrc.org/eng/assets/files/publications/icrc-002-1067.pdf (last visited 29 January 2015), principle 6
[94] Code of Conduct on Disaster Relief, principle 7
[95] Code of Conduct on Disaster Relief, principle 9
[96] [96] Code of Conduct on Disaster Relief, principle 10
[97] Médecins de Monde, Serving the needs of people in conflict, Submission for the World Humaniarian Summit, Europe and Others Group Consultation, p.2.
[98] Médecins du Monde submission, p.3.

where the different stakeholders: international NGOs, local NGOs, governments, military, international organizations, diasporas, local communities and private sector are incorporated and find a way for steady cooperation.

For the Red Cross Movement, cooperation with local partners is easier tackled through strong cooperation with the red cross/red crescent national societies. As for the ICRC, the aim of cooperation with National Societies is not only to strengthen the effectiveness of own operations, but also to improve national societies' skills in dealing with and assisting victims of armed conflicts.[99] As a result, in more than one-third of ICRC operations, activities were carried out in partnership with the national society of the country concerned.[100]

Exploring the exact needs of the local population is always a challenge. Different groups are in need of different assistance, be they forcibly replaced, refugees, detained persons or persons with missing family members. Some organizations have standardized responses, others ad hoc responses, some have been present at the situation for a long time, others are new: all these and other factors define the reactions of humanitarian organizations.
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The ICRC, for example, assesses the needs through communicating, in cooperation with the national societies, with the local population in deciding on the most appropriate way of action, instead of following standardized procedures.[101] The ICRC also carries out activities which other organizations are not, such as visiting detainees. This is a rarely accepted activity for humanitarian organizations; Amnesty International also undertakes visits in some cases. The reason the ICRC has access to most places of detention is its confidentiality: it does not share its findings with the media or third parties. Detention visits is a big part of ICRC action: in 2013, 756.000 detainees were visited, of whom 23.000 were visited individually, in 96 contexts.

This reflects the **different approach** humanitarian organizations are taking: some are advocacy-drawn, others use the media as an asset, while others are based on the confidentiality modus operandi. We can't state which the best approach is: probably the presence of all the different kinds of organizations together contributes to a complex response to emergencies.

It is still difficult to **gauge the impact of international humanitarian assistance**. Assistance is often measured in terms of funding, which is turned into organizational capacity to implement projects. However, there is currently no standardized reporting on the services provided or their impact, especially over the long term. Affected people are routinely helped first and foremost by their community and national responders, but this help is difficult to measure and rarely reported.[102]

Players active in humanitarian response are: UN and its agencies, ICRC – Federation – NSs, NGOs (international and local, religious and secular), regional and international organizations, civil society. Others concerned on the ground: governments, non-state actors, military, private sector, local community. In 2013, the private sector contributed $5.6 billion to global humanitarian response. Its contribution has remained constant over the last four years, totalling about a quarter of global contributions.[103]

[99] ICRC annual report 2013, p.47.
[100] ICRC annual report 2013, p.47.
[101] ICRC annual report 2013, p.43.
[102] OCHA report 2014, p.7.
[103] OCHA report 2014, p.42.

Local organizations have less communication problems, less access problems, less cultural problems, have more long-term objectives which they can carry out. On the other hand, they more frequently face funding problems. In 2013, 93 national NGOs and 22 local NGOs received international humanitarian funds, compared with 294 international NGOs.[104] Regional organizations may be swifter in reacting to a problem, and they may be more preferred due to political reasons.

While accepting and using military assets in case of natural disasters seems a commonly accepted method, it is more ambiguous in case of armed conflicts. Approach to accepting military assistance in conflict situations is a great dividing line among humanitarian organizations.

"(T)he resurgence of State assertiveness and nationalism raised paradoxes. Weak States tended to generate instability because of their inability to maintain law and order and deliver critical services, while strong States at times undermined respect for State legitimacy by employing repressive means, creating volatility as well. States invoked national sovereignty to prevent outsiders, including humanitarian organizations, from interfering in internal affairs, yet were often not as assertive in assuming their responsibility to deliver key services. State assertiveness rose while critical threats to international security and stability, including "terrorism" and organized crime, became transnational in nature, requiring close international cooperation to resolve."[105]

5. Future challenges, questions to be answered

It seems that involvement of the local players, be it the local community, government, local NGOs or other organizations is a key question. This has been formulated in submissions of various humanitarian organizations in the run-up to the World Humanitarian Summit in 2016.[106] The debate is intertwined with the requirement that humanitarian actors are accountable to the local population who was affected by the disaster, crisis or conflict.

It is generally considered that financing approaches that undermine the abilities of the local organizations is counterproductive. In 2013, 93 national NGOs and 22 local NGOs received international humanitarian funds, compared with 294 international NGOs.[107] Whereas local organizations would ideally be more opportune to provide assistance in crisis, due to their proximity in place, time, culture and language, it seems that in the fierce competition between international organizations, the essence is often lost: the interest of the vulnerable population.
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Often local NGOs receive not only less funding, but less political attention, recognition, less access to information or to innovative technology. In certain cases it is natural that local humanitarian organizations are seen as lacking the impartial, neutral and independent nature of international humanitarian organizations, however, these considerations cannot be the reason for generally not using their capacities and possibilities for the benefit of the people in need. On the other hand, local governments and communities demand a greater role in handling their own emergencies, and they often see the dominance of international

[104] OCHA report 2014, p.42.
[105] ICRC annual report 2013, p.42.
[106] See for instance Christian Aid: Making the World Humanitarian Summit Worth the Climb, December 2014, available at file:///C:/Users/REKA/Downloads/[Christian%20Aid]%20Making%20the%20WHS%20worth%20the%20climb.pdf (last visited 14 January 2015)
[107] OCHA report 2014, p.42.

organizations as exerting political, economic or cultural influence on them. There is not one single solution to this dilemma, however, the humanitarian community must address the problem and try to strike the balance between the role of international and local players.

The increased presence of the military in so-called "humanitarian"[108] missions further complicates the picture. The presence and activities of multinational military missions already raises an intervention feeling among the local community which sometimes goes as far as considering them new type of colonizers. When activities of multinational military missions also involve humanitarian missions, be it food distribution or capacity building, the real goal of such humanitarian activities is questioned in the mind of the local players. Such thinking also results in demands for a larger role for local actors in addressing humanitarian problems.

The presence of military, while it also acknowledley bears advantages, also results in a narrower space for humanitarian workers. The blurring of lines between military and humanitarian activities poses a problem for humanitarian organizations and workers, be it international or national, which further complicates the picture.

How such a goal is to be reached is a question for discussion and will hopefully be a crucial agenda item at the 2016 World Humanitarian Summit. According to certain recommendations, the following measures could be taken: there should be a person in OCHA who is solely responsible for the inclusion of national NGOs at a certain level of emergency; for the definition of a certain budget to be included in international NGOs overall budget to be spent for the advantage of national NGOs.[109] Such a plan could also be explained by the fact that since local (ie. smaller) NGOs often face funding problems, their activities are more often driven by donors than by demands.

Generally there is a need to enhance disaster preparedness on the local level; international organizations should be an active partner of local communities, authorities and organizations to strengthen their capacities in this field. At the same time, international organizations, being neutral and independent are careful in choosing the local partners they cooperate with to uphold their neutrality. As for the Red Cross/Red Crescent Movement, the common fundamental principles which also bind their local partners, namely the national red cross/red crescent societies, these principles are a kind of guarantee for the neutrality of their local partner.

Realistically speaking it must be acknowledged that the great number of international humanitarian organizations, the competition among them, the far-reaching nature of disasters and emergencies that call for humanitarian action, the spin-off effect of conflicts and disasters are all arguments for at least the presence of international presence in emergency situations. However, this should not mean that international organizations are the only ones responding to such cases or that local players are not involved in humanitarian action; it is precisely this balance that needs to be found."

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For too long the humanitarian sector has been characterised by an aid financing model based on sudden inputs following public appeals; this encourages an emphasis on rapid service delivery, exaggeration of the agencies' own importance and understatement of the role of

[108] When it is carried out by the military, „humanitarian activities" are in fact not on a humanitarian basis, but ultimately for military purposes. See NATO CIMIC directive.

[109] Christian Aid report, p.4.

local people."[110] This also often means that organizations are often concentrating more on response to emergencies than on prevention or risk reduction. As for the donors, it is often more sexy to allocate money for major emergencies with visible results than for prevention activities which, even if successful, have invisible results.

5.1. Anti-terrorism legislation and humanitarian organizations

In many cases, it seems, the traditional methods humanitarian organizations applied simply do not work. Dialogue, an important tool highlighted by many organizations, a tool which in most cases brought results in the end, does not seem to work anymore. Although the question of who humanitarians should engage in dialogue with is approached differently by various organizations, some engaging in dialogue with all parties for the sake of having access to the population in need, to some denying or having to deny dialogue with certain groups, such as terrorist groups, with some groups it is totally senseless and apparently brings no results.

At the same time, several countries introduced anti-terrorism legislation aimed at, among others, cutting funding lines for terrorist organizations. However, the legislation often also affects humanitarian organizations. Two kinds of major problems arose from this.

In certain cases, *any* contact, including meeting and discussing with organizations listed as terrorists is seen as a criminal activity. This has a harmful effect on humanitarian organizations that, for the purpose of gaining access to affected people, are engaging in a dialogue with whoever is in control of the territory – often terrorist groups or organizations. Other humanitarian organizations are engaging in dialogue with terrorist groups to discuss detention issues, detention visits, training and education in human rights law or international humanitarian law or others.

Another issue is the exact meaning of assisting or abeiting terrorist organizations.

The second round of problems results from the cutting of funding lines for terrorist groups often affects non-terrorist, humanitarian, mainly muslim organizations.[111]

[110] Christian Aid report, p.8.
[111] http://projects21.com/2015/03/03/challenges-for-islamic-ngos/

4. Certain factors influencing respect for international humanitarian law*

Abstract

There are various mechanisms within and outside the sphere of international humanitarian law (IHL) which contribute to a better application, respect and enforcement of its rules. The present study takes stock of specific factors or mechanisms that may have an effect on better respect, taking into account also those that are less often mentioned. This analysis attempts to demonstrate that even though states could not agree on the setting up of a permanent mechanism that would allow them to meet regularly and discuss IHL-related issues (the so-called Compliance process), there are certain instruments which could lead to similar result in a better compliance with IHL. The UN's role with respect to international humanitarian law, either through the Security Council, or through the biennial reports submitted to the Secretary General on the status of implementation of the Additional Protocols, or through the fact-finding or enquiry commissions established by the Human Rights Council are examined. The International Criminal Court's role is also briefly analysed, bearing in mind the international politics within which it has to function. The International Humanitarian Fact-Finding Commission that has successfully completed its first mandate in 2017 on request of the OSCE is a string of hope if more frequently used, being a mechanism whose mission is to create an environment of respect for IHL. The emergence and role of soft-law documents in IHL is significant from two angels: it is filling a void caused by the fatigue of states in adopting new rules, at the same time these soft-law documents begin to have a similarly binding effect as legally binding obligations. These factors become especially interesting if we look at the main features of today's conflicts: most of them are non-international, fought mostly with the involvement of non-state armed groups. These groups are not involved in any of the mechanisms described, thus causing a discrepancy between the structure of the said mechanisms and real life. At the same time, the rules are there, and have to be applied by non-state armed groups as well. This reality gives training, both within state and non-state armed forces a special significance. States should also demonstrate their commitment to respect IHL more seriously by undertaking enquiries in cases of serious violations of IHL, as well as through exercising jurisdiction to try those alleged to have committed such violations, be their own nationals or not.

Introduction[112]

We are always struck by alarming accounts of IHL being more poorly respected than ever. Are we really living in a new era? Is respect for IHL really worse than before? Is it not only that with the live streaming of conflicts, spread of social media and the CNN-effect we are in a position to follow conflicts more closely, even live, and obviously news are only reporting

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[112] This article is based on a presentation delivered by the author at the Conference „Seminar Humanitäres Völkerrecht und die Europäische Union - Aktuelle Entwicklungen während des österreichischen Ratsvorsitzes", organized by the Austrian Federal Ministry for Europe, Integration and Foreign Affairs, the Johannes Kepler University Linz, the University of Graz, and the Austrian Red Cross on 29 January 2019 in Linz.

about disrespect, and not respect? We often announce a new age of warfare with new technology. Our new technologies are no doubt new, but so were the technologies announced as new earlier. If we asked delegates on the field, we would probably be surprised about the variety of actors and often such actors' willingness to engage in dialogue with each other. Today, we are witnessing terrible conflicts with terrible costs on civilians, but, unfortunately, this is not necessarily new. This may lead us to think that our fight today for better respect for IHL, for ensuring better enforcement for the rules is nothing new, and is a never ending engagement. The following article takes a broad look at what measures exist that enhance compliance with and enforcement of IHL, and what other factors could be relevant to create an environment where IHL is better respected.

1. Relevant enforcement and compliance measures and mechanisms

Enforcement is challenging in international law in general. As there is no global institutional framework for its ultimate enforcement, compliance with international law is largely left to the goodwill of states. While the basic principles of international law include the prohibition of the use of force and the *pacta sunt servanda* principle, if these would all be respected, there would be very few armed conflicts in the first place, and even if so, there would be no violations of the law applicable in armed conflicts. Armed conflicts are characteristically situations where rule of law suffers, peaceful settlement of international disputes have obviously failed, and the warring parties are each other's worse enemies. In such a situation to trust in the goodwill of states seems paradox. Still, although there are numerous manifestations of violations, IHL is often, probably more often than we would think, respected.

If it is true that international law generally lacks the teeth of effective enforcement, then this is even more true for international humanitarian law. IHL treaties, especially the 1949 Geneva Conventions and their Additional Protocols adopted in 1977 tend to have much weaker enforcement/compliance provisions than other fields of international law[113]. In many instances, non-respect for IHL has been explained with lack of reciprocity.[114] While inter-state relations are often based on reciprocity, this is not true to IHL obligations. Under international humanitarian law, parties' obligations are unchanged regardless of respect or lack of respect by the other side, in order to ensure protection of the victims.

Moreover, one has to take into consideration the fact that non-state actors often play an equally big role in armed conflicts, consequently have an influence on respect/non-respect for IHL, therefore traditional international law compliance mechanisms that are based on state-to-state relations (such as reporting, states meeting, etc.) may not be adequate in their case.

The Geneva Conventions and Additional Protocols include a few mechanisms aimed at facilitating compliance and enforcement, such as in common Article 1, in the grave breaches/war crimes regime, indirectly in the command responsibility concept, the obligations to make legal advisers available in the armed forces, and in mechanisms such as the Article 36 mechanism of Additional Protocol I. There are also mechanisms that are foreseen in treaty law but rarely used. Parties to armed conflicts rarely make use of the special agreements under Article 3 of the Geneva Convention. The reality is that a state that considers the belligerent party as "illegal" rebels is not inclined to enter into negotiations with the

[113] Y. Sandoz, 'How does law protect in war?', I. Problems in the implementation of international law in general and international humanitarian law specifically. https://casebook.icrc.org/law/implementation-mechanisms.
[114] The Roots of Behaviour in War; Understanding and Preventing IHL Violations, ICRC 2004, p. 9 and 13.

adversary, as it could consider such negotiation as a manifestation of its recognition. Even though special agreements were not intended to affect the status of the parties[115], there seems to be a general adversity towards its application.[116] In sum, it seems there is no specific mechanism foreseen under international humanitarian law that would force or further states to comply with its rules.

The above mentioned mechanisms do not prescribe a regular meeting of states parties, regular reporting, let alone the establishment of treaty bodies aimed at monitoring the implementation of the treaty rules. Recognizing this lacuna, the ICRC and the Swiss Government launched the "Compliance initiative"[117] where states discussed the possibility of establishing a regular, voluntary forum for states where issues related to compliance with IHL could be discussed, which, after numerous years of multilateral meetings and discussions, failed to come to a common agreement on the setting up of such a mechanism[118].

Although IHL treaties are lacking such compliance mechanisms, bodies outside the IHL sphere have certain instruments which have an effect towards better respect for IHL. First and foremost, one has to mention the powers and the practice of the UN Security Council *vis-à-vis ius in bello* violations. Let us remember at the outset that the UN was set up to maintain international peace and security, and not to ensure that armed conflicts are fought according to the rules. Still, while the Security Council had been silent on IHL matters for years[119], it has demonstrated increased interest and activity with respect to IHL violations after the Cold War, and with the proliferation of non-international armed conflicts and their severe consequences on civilians.[120] Whereas the Security Council can only invoke Chapter VII if international peace and security is jeopardized, an argument can be made that serious and mass humanitarian law violations may lead to a result of threatening international peace and security, hence the activation of Chapter VII. The Security Council regarded a situation where violations of international humanitarian law happen as a threat to international peace for the first time in its Resolutions setting up the two *ad hoc* Tribunals, in Resolution 808 (1993)[121] with respect to former Yugoslavia, and later on in its Resolution 995 (1994)[122] with respect to Rwanda. The Security Council then made a reference[123] to the possibility of systematic,

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[115] Article 3 common to the 1949 Geneva Conventions: „The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

[116] B. Clarke, 'Securing Compliance with International Humanitarian Law: The Promise and Limits of Contemporary Enforcement Mechanisms', 1 *Journal of International Humanitarian Legal Studies* 213 (2010), p. 215 (presentation of Rotem Giladi).

[117] The facilitators received mandate from Resolution 1 on "Strengthening Legal Protection for Victims of Armed Conflicts" unanimously adopted by the 31st International Conference in 2011 and Resolution 2, "Strengthening Compliance with International Humanitarian Law" unanimously adopted at the 32nd International Conference of the Red Cross and Red Crescent in 2015.

[118] H. Durham, 'Strengthening compliance with IHL: Disappointment and hope', December 14, 2018, Analysis / Generating Respect for IHL / Law and Conflict, available https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/.

[119] The first mention of international humanitarian law was made in the 1967 Resolution after the Six Days War in the Middle East. See Resolution 237 (1967), recommending for governments concerned to comply with the Geneva Conventions.

[120] M. Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law', 43 *Israel Law Review* 330 (2010), p. 331.

[121] "Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of "ethnic cleansing", Determining that this situation constitutes a threat to international peace and security,", *See* S/RES/808 (1993) 22 February 1993.

[122] "Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda, Determining that this situation continues to constitute a threat to international peace and security,", *See* S/RES/955 (1994) 8 November 1994.

[123] "Notes that the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may

flagrant and widespread violations being a threat to international peace and security without mention of any specific armed conflict.[124] Also, there are interpretations of the Geneva Conventions' common Article 1 "respect and ensure respect" provision saying that this customary rule being a "general principle" constitutes a legal ground for the Security Council to exercise its enforcement powers to ensure compliance "in all circumstances".[125]

Another example of the UN's (softer) measures to contribute to compliance with IHL is the biennial reports of the Secretary-General on the status of implementation of the 1977 Additional Protocols, prepared based on the request of the UN General Assembly. The Secretary-General requests states to provide, on a voluntary basis, information on the status of implementation of the Additional Protocols every two years. These voluntary national reports may be useful exercises for states to take stock of developments and lacuna in their implementing legislation or practice. These reports may also serve as a useful mirror of the state of implementation of IHL globally, although mention must be made that for the 2018 report only nineteen Member States submitted their national reports.[126]

There are many initially human rights bodies, most importantly the Human Rights Council that are also addressing IHL issues. The Human Rights Council (HRC) was established to "address situations of violations of human rights" and "make recommendations thereon".[127] Even though it is clear that the mandate does not cover IHL, nor does it mention armed conflicts, the HRC more than once examined IHL violations. It did also provide an extended understanding of human rights whereas it stated in its Resolution 9/9 (2008) that "conduct that violates international humanitarian law (…) may also constitute a gross violation of human rights".[128]

Whether examination of IHL violations by an essentially non-IHL body is good or bad for IHL can be regarded from many angles. Those in favour argue that the HRC is only filling the gap where IHL treaties are silent on enforcement mechanisms, and this is still better than nothing. In addition, such commissions or enquiries are usually tasked to merely cover the documentation and investigation of serious violations, to ensure some kind of accountability in the future. From this perspective, goes the argument, it does not matter whether these are IHL or human rights violations.[129] Those against claim that the experts sitting on the HRC commissions and enquiries are in most cases not trained in IHL, or are not even lawyers but diplomats,[130] and the HRC being over-politicized, it does not do any good for IHL. A more observational standpoint claims that the correlation between IHL and human rights law has grown so strong[131] that it is impossible to turn this trend to its reverse.[132]

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constitute a threat to international peace and security, and, in this regard, reaffirms its readiness to consider such situations and, where necessary, to adopt appropriate steps;" See OP 5, S.C. Res 1296, para. 5, U.N. Doc. S/RES/1296 (Apr. 19, 2000).

[124] *Supra* note 9, pp. 334-335. See S.C Res 808 at 2, U.N. Doc. S/RES/808 (Feb. 22, 1993).

[125] *Supra* note 9, p.340. See S.C Res 808 at 2, U.N. Doc. S/RES/808 (Feb. 22, 1993).

[126] See Report of the Secretary-General A/73/277 (30 July 2018) and the subsequent General Assembly Resolution A/RES/73/204 (9 January 2019).

[127] General Assembly Resolution A/RES/60/251 (3 April 2006), OP 3.

[128] Human Rights Council Res. 9/9, Annual Reports of the HRC, 9'" Sess., Sept. 9-24, 2008, A/HRC/RES/9/9 at 1 (Sept. 18, 2008).

[129] Zs. Binczki, 'Summary of the Conference on "Victims or Armed Conflicts at the Juncture of International Humanitarian Law and Human Rights Law" (presentation by Luc Côté), in: Marcel Szabó-Petra Lea Láncos-Réka Varga (eds), *Hungarian Yearbook of International Law and European Law 2017*, Eleven International Publishing, 2018, pp. 379-380.

[130] Ben Clarke, 'Securing Compliance with International Humanitarian Law: The Promise and Limits of Contemporary Enforcement Mechanisms', 1 *Journal of International Humanitarian Legal Studies* 213 (2010), p. 216 (presentation of Daphné Richemond-Barak).

[131] *Supra* note 5, p. 218 (presentation of Yuval Shany).

[132] *Supra* note 5, p. 216 (presentation of Daphné Richemond-Barak).

The establishment of the International Criminal Court (ICC) was obviously a huge step towards enforcement of IHL. Many thought that the ICC could have impact in two ways: directly through its own procedures, and indirectly through the inevitable effect it has on domestic legislation.

Many scholars and commentators were very satisfied with the Rome Statute having been drafted in a way that the UN has no or not too many influence over its jurisdiction or overall function. The Rome Statute foresees role for the UN – most importantly for this article's perspective – in two ways: in referring cases to the ICC and in the crime of aggression. In the first case, the UN's role is framed by its political possibilities of adopting a Security Council resolution on referral, similarly in the second case the determination of an act of aggression bears all the politics around making such a determination. Nonetheless these roles do not appear to give the possibility for the UN to intervene or influence the ICC's functioning too much. Marco Sassóli wrote in 2006: *"Once the ICC Statute has been universally accepted and the ICC functions effectively without too much direct interference by the UN Security Council and its permanent members, this geographical limitation will be overcome. The very credibility of international justice depends on this: justice which is not the same for everyone is not justice"*.[133] Today, we have come to understand that international politics and non-state parties have a larger influence over the ICC than we had anticipated. Campaigns against the ICC by certain states, either generally or linked to specific cases, are no doubt weakening the Court and making its space narrower. Even though the ICC is not and shall not be dependent on politics, and while it is making tremendous efforts to manoeuvre in the given circumstances, the ICC is not functioning in a political void.

In addition, although the withdrawal of some African states has fortunately not become a general tendency, one cannot avoid to face the legal question posed first and foremost by African states on the confronting legal obligations of the Rome Statute's non-recognition of head of state immunity and diplomatic immunity. The Rome Statute excludes the application of immunity of officials, including heads of states with respect to procedures in front of the Court, obliging States Parties to cooperate accordingly, including arresting persons enjoying immunity if they are wanted by the ICC. Several African states find this obligation in collision with customary and treaty international law obligations on diplomatic and head of state immunity and claim that the rules on immunity enjoy precedence over the Rome Statute obligation. This question has become crucial for the concerned states and their ability to cooperate with the ICC. Thus, the ICC's efforts and effects are constrained both by its capability to deal with the magnitude of cases, and by the inevitable politics around it.

There are also arguments saying that the International Criminal Court's inability to exercise jurisdiction to deal with some of the most severe cases led to the increased activities of bodies such as the Human Rights Council in IHL violations, as well as to the emergence of alternative bodies which serve the ultimate aim of assisting criminal accountability either on an international or national level. As an example of alternatives bodies, on the basis of the initiative of Liechtenstein, the United Nations General Assembly adopted resolution 71/248 on 21 December 2016 establishing the 'International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011' (IIIM). The IIIM was tasked to collect and document evidence of crimes committed in Syria, which can then be used in national or international criminal procedures. A similar mechanism

[133] M. Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', in: *Yearbook of International Humanitarian Law*, 10 (2007), pp. 45-73.

was later established in connection with crimes committed in Myanmar: on September 28, 2018, the UN Human Rights Council passed a resolution that calls for an independent mechanism to collect and analyze evidence in regard to the serious international crimes committed in Myanmar against Rohingya Muslims and other minorities since 2011. The resolution requests that the independent mechanism "prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes." The resolution mentions "most serious international crimes" and "violations of international law"[134], which would include human rights and humanitarian law violations.

Last but not least, mention must be made of the International Humanitarian Fact-Finding Commission (IHFFC), established by Additional Protocol I of 1977. The IHFFC is tasked to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol and facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol."[135] The IHFFC has demonstrated its great value in enquiry during its first mandate received from the OSCE in 2017[136] to investigate an incident in Eastern Ukraine, involving an OSCE car that drove over a landmine, the explosion resulting in the death of an OSCE paramedic and the injury of two other patrol members. The investigation revealed that the attack was most probably not directed against the OSCE[137], probably giving the OSCE a feeling of relative relief not being a target and an ability to carry out its important operations in the region. Because the IHFFC was established by Additional Protocol I of 1977, came into force and effectively created in 1991, and it received its first mandate only in 2017, there were several analyses why its enquiry capability had not been earlier used. Many stressed that one reason the IHFFC had not been used was the complicated trigger mechanism foreseen in Article 90 of Additional Protocol I. The IHFFC nevertheless proved that its activity can easily be triggered by an organization and not a state through the "good offices"[138] provision[139], and that it can contribute to the clarification of a situation and thus indirectly to fostering an attitude of respect for IHL. The IHFFC has also expressed its willingness to enquire into alleged violations of IHL in non-international armed conflicts, provided that all concerned parties agree.[140] In addition, one may argue that the setting up of *ad hoc* fact finding commissions by the Human Rights Council were meant to be a remedy for the earlier non-activation of the IHFFC, however, the existence of these *ad hoc* commissions may have also been the very causes of the inactivity of the IHFFC for long years.[141]

Summing up, it is probably fair to say that although IHL treaties are not specifically strong on

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[134] Human Rights Council Resolution A/HRC/39/L.22, September 28, 2019, OP 22.

[135] Article 90, par 2. c) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[136] As a basic framework for the cooperation between the two organizations, the OSCE and IHFFC concluded a general Memorandum of Understanding, see https://www.ihffc.org/Files/en/pdf/osce-ihffc-memorandum-of-understand.pdf.

[137] See the executive summary of the report following the investigation: https://www.osce.org/home/338361?download=true.

[138] "c) The Commission shall be competent to:
(…)(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol." *See* Article 90, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[139] R. Varga, 'Reinforcing Respect for the Additional Protocols: The 40th Anniversary as an Opportunity?' 40th Round Table on Current Issues of International Humanitarian Law: "The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives", Sanremo, 7-9 September 2017, p.5. available: http://www.iihl.org/wp-content/uploads/2017/11/Varga-REV.pdf.

[140] *See*: https://www.icrc.org/en/doc/assets/files/other/fact_finding_commission.pdf.

[141] *Supra* note 9, p. 343.

compliance and enforcement mechanisms, there are various other sources or procedures available where compliance with IHL can be examined or supported.

2. Emergence of soft-law documents aimed at assisting compliance with IHL

We are witnessing a decreased interest of states in law-making, and more appetite for soft law. Soft law documents in the realm of international law are generally understood as documents which have been adopted and agreed usually in the form of political declarations and do not have a legal binding effect. However, these texts are not completely without legal significance[142]: although usually they indicate voluntary commitments by the signatories to follow its contents, due to many circumstances and "a number of enforcing soft mechanisms such as shaming, conformity, persuasion, self-interest, opportunity, or fear are effective. From this perspective, soft or non-binding rules can be as coercive as binding rules and agreements. This is why it seems appropriate to refer to soft law also as 'non-binding coercions'(…)"[143] and are thus often seen as quasi-binding.

There are many soft-law documents in IHL, such as the Safe Schools Declaration, Montreux Document, Guideline on Direct participation in hostilities or the Vancouver Principles. Some of these have been prepared by States, some by international organizations or NGOs. Some can be endorsed by states, some cannot. All these documents are attempts at addressing questions of interpretations of the law that are considered challenging in contemporary conflicts, with the aim to come to an answer acceptable for all states, or at least, to identify divergence of opinions or to provide some sort of guidelines for application. The relative reluctance of states towards international law-making could be regarded as missed opportunity for states, as the vacuum left by them is filled with NGOs, academics or tribunals interpreting the law[144], and eventually bringing these actors in a position to contribute to the forming of new customary law. States should probably resume their functions in interpretation and law-making, while academics, tribunals, NGOs also have their own role. Michael Schmitt argues that because states have withdrawn from the role of law-making and interpretation, NGOs and academics form the law in a way that states in the end may then reject.[145]

The legal and political nature of soft law documents has also become an increasingly interesting question. While basically it should be clear that soft law documents do not have a legally binding nature, there are some soft law documents that may have received a quasi-binding nature due to the will of the parties having concluded it or due to pressure exerted over non-signatory states.

The IHL soft law documents mentioned above were undoubtedly adopted with the understanding that these do not have a binding effect. Many of these documents expressly say this[146]. Politically, however, there seems to be a tendency where such documents, even though

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[142] A. T. Guzman, T. L. Meyer, *International Soft law*, Journal of Legal Analysis, Spring, 2010: Volume 2, Number 1, pp. 172-173.

[143] F. M. Zerilli, *The rule of soft law: An introduction*, Focaal—Journal of Global and Historical Anthropology 56, 2010, pp. 5-6.

[144] 'Is the law of armed conflict in crisis and how to recommit to its respect?' 3 June 2016, ICRC. Available: https://www.icrc.org/en/document/law-armed-conflict-crisis-and-how-recommit-its-respect, comments by Michael N. Schmitt.

[145] *Supra* note 31.

[146] "while reflecting the ICRC's views, the Interpretive Guidance is not and cannot be a text of a legally binding nature." See Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, ICRC, May 2009, p. 10. https://shop.icrc.org/guide-interpretatif-sur-la-notion-de-participation-directe-aux-hostilites-en-droit-international-humanitaire-2601.html.

intentionally put in a non-legally binding form with non-legally binding language, become politically *quasi* binding, as a result of intensive, sometimes aggressive campaigning by states/NGOs/international organizations that have embraced the document and are often naming and shaming states that are not behaving the way the document prescribes.

Such effects of soft law documents may lead to several outcomes. If states are not expressing discontent with the document and follow practice akin to its contents, with all relevant conditions fulfilled, it may become customary law. From this perspective it makes no difference whether the soft law document can be or was endorsed by states or not, because it works the same: the 'rules' contained therein are referred to as those that should be followed or behaviours that States should and do adhere to. It may also lead to a situation where the state may simply feel that due to political or diplomatic pressure it actually has to follow the document, even though at the time of signature or adoption everyone declared it not to be binding, and its non-legally binding nature was probably one of the baits used to convince states to sign. This effect could equally work with documents that cannot be endorsed by states, if the document is often referred to as encompassing guiding behaviour in certain fields by a large number of actors and even more if political pressure is exerted to follow its contents.

Another layer of the same tendency is when there is mounting pressure on states that have not signed up to such documents. Those promoting the soft-law document often end up naming and shaming such states, even more, signing may appear in UN's[147], NGO's[148] or other bodies' recommendations, or even requirements. In the end, sometimes these documents are treated the same way as if they were legally binding. Hence, at their inception non-legally binding documents have become a sort of must-do for states.

Whether soft-law documents are contributing to better respect and compliance with IHL needs to be considered from different angles. On the one hand, specifically due to the fact that necessities of interpretation do not necessarily mean that the law has to be changed, and also considering states' unwillingness to make new law, the formation of soft-law documents, aimed at analysing different interpretations, experiences and practices may be a welcome development. On the other hand, one must realize the changing nature of such documents and recognize that they often, not always, reach far beyond as being mere recommendations, studies, interpretations. This may lead to a feeling of fatigue by states towards soft law documents, and hence a reluctance to adopt new ones.

3. Hopes and opportunities

There are certain trends that give cause to optimism and also opportunities that could be further explored.

Even though IHL is a part of international law, that is, a normative framework among states for behaviour in armed conflicts, the increasing role played by non-state armed actors in

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„We welcome the development of the Guidelines for protecting schools and universities from military use during armed conflict. The Guidelines are non-legally binding, voluntary guidelines that do not affect existing international law." See Safe Schools Declaration, http://www.protectingeducation.org/sites/default/files/documents/safe_schools_declaration-final.pdf.

[147] Report of the Secretary-General on the protection of civilians in armed conflict, S/2017/414, 10 May 2017, para. 14.

[148] https://www.hrw.org/news/2018/06/19/opportunity-ukraine-endorse-safe-schools-declaration.

armed conflicts[149] is also considered as a current feature.[150] There are authors who suggest that since non-state actors have not participated in the making of international law and have not consented to it, one cannot be surprised that non-state actors are not respecting the law – even though they are also bound by it–, thus there seems to be a need to adopt IHL rules that are more suitable to contemporary conflicts[151]. This is an argument which seems to be paradox. First, if we were to develop new law, non-state actors would not participate in its formation either. Second, many of the basic IHL rules are based on dictates of human conscience shared by the entire international community, therefore the argument that they have not consented to them seems unfounded. Third, if we were to embrace this argument, it would result in an endless debate on adequacy of sometimes century-old rules, instead of applying them. After all, the task of the lawyers is to apply existing rules[152].

In 2017, 17 international and 38 non-international armed conflicts took place worldwide.[153] Non-state armed actors do not participate in diplomatic conferences, intergovernmental meetings, the Compliance process, and are not benefiting from common training exercises, hence, don't have the same level of ownership towards international humanitarian law as states do[154]. The ICRC and certain NGOs, such as Geneva Call, make efforts in providing training for or engaging in dialogue with non-state actors. Geneva Call often concludes Deeds of Commitment with them, where the non-state actor voluntarily undertakes to provide training in IHL, or comply with basic IHL rules. Such Deeds of Commitment, although non-legally binding in nature, often serve as catalysts for the non-state actors to make efforts to comply with IHL.

Many thus claim that non-respect for IHL can be led back first and foremost to non-international armed conflicts, and highlight the importance of involving non-state armed groups.[155] Non-state actors, which may not have a strict hierarchy and bureaucratic system similar to states, have a more difficult time enforcing rules within their group. Even though there are armed groups that are not interested in respecting IHL, or their aim is precisely to cause as much terror and loss as possible, other groups are more serious about the IHL compliant ways they fight and about the perception they obtain, especially if they want to receive international recognition.

As the ICRC's "*The Roots of Behaviour in War*" study[156] has shown, combatants' illegal action are more frequently connected with a lack of specific orders not to violate the law[157]. While training provided for states' armed forces always includes IHL elements, this may not be true to trainings, if any, of non-state armed actors. At the same time, criminal responsibility is equally applied to individuals from state and non-state armed groups. This is why training/dissemination of IHL is equally important among armed groups, and while training

[149] The number of parties to armed conflicts has exponentially increased in the past decades. In Libya, by the end of the conflict, 236 armed groups were registered, while in Syria 1000 armed groups have been counted in 2014. See: The Roots of Restraint in War, ICRC 2018., p. 13.
[150] *Supra* note 28.
[151] T. P. Botchway; A. H. Kwarteng, 'Developing International Law in Challenging Times', 11 *Journal of Politics and Law* 53 (2018), p. 55.
[152] M. Kelley, 'Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare', *Independent Study Project (ISP) Collection*, 1618, 2013, p. 29.
https://digitalcollections.sit.edu/isp_collection/1618.
[153] A. Bellal, 'The War Report, Armed Conflicts in 2017', Geneva Academy of International Humanitarian Law and Human Rights, March 2018, p. 29.
[154] *Supra* note 42, p. 29.
[155] *Supra* note 5, p. 219 (presentation of René Provost).
[156] *Supra* note 3
[157] *Supra* note 3, p. 7.

itself may not necessarily have a direct effect on the correct application of IHL, it may have an indirect effect in helping prevent combatants enter into the cycle of violence[158]. Individual criminal responsibility examines the individual's actions, while combatants submit to an authority and are psychologically shifting their focus from conforming to their own moral sense to satisfying their superiors,[159] which means they assess their own actions *vis-à-vis* the morale of the group, and not according to their own moral standards. Socialization within armed groups thus has a direct influence on how fighters behave. Socialization can go both ways: individuals can be socialized to committing violations, but also to showing restraint.[160] This gives military training a particular importance at all levels, and makes us understand how important it is for commanders of non-state armed groups to understand the rules.

Due to new technologies, regular state armed forces also need a new approach in training. Understanding the specificities of remote-control technologies and the ability to carry out deadly attacks from thousands of kilometres away, trainers need to recognize this remoteness may have on decision-making. While studies have shown that humans find it difficult to kill their fellow human beings at close range[161], following movements and monitoring the situation on the ground from a far-away computer, and then adopting the decision whether or not to attack is done in a completely different psychological setting. Therefore, a firm knowledge of the rules and an adequate psychological state of mind could also contribute to IHL-compliant behaviour.

The position and importance of military legal advisers in the eyes of their commanders has also radically changed, to the positive. A couple of decades ago a military legal adviser in many countries was considered a necessary evil for the commander, someone who only puts obstacles to his plans and doesn't bring any benefits. Today (the ICC Rome Statute provided a tremendous help for that, not only by forcing states to voluntarily implement command responsibility provisions to their legislation, but also by making known that such concept exists, even though it had already existed in the 1977 Additional Protocol) legal advisers are often seen as useful contributors who can eventually help the commander prevent or avoid criminal responsibility, and also, equally important, help avoid bad public relations. It has been realized that IHL became an increasingly important factor on how military actions are judged by the public and the international community, and even big and powerful nations were forced to align their attitude to such expectations.

One serious demonstration by States to show they take IHL seriously would be to carry out genuine enquiries in case of alleged violations and make the results of such enquiries public[162]. Such voluntary enquiries would also be beneficial to close the credibility gap between alleged importance of IHL and the non-action on violations. We all remember the tragic attack at Kunduz hospital in Afghanistan in 2015. The US Air Force attacked a hospital operated by Médecins Sans Frontières (MSF) in Kunduz, resulting in the death of most of the patients and many of the medical staff.[163] On the MSF's call on the US to request an enquiry

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[158] *Supra* note 3, p. 11.
[159] *Supra* note 3, p. 7.: "the disappearance of personal responsibility is by far the most serious consequence of submission to authority. Although, under these conditions, the individual commits acts which seem to violate the dictates of his conscience, it would be wrong to conclude that his moral sense has disappeared. The fact is that it has radically changed focus. The person concerned no longer makes value judgements about his actions. What concerns him now is to show himself worthy of what the authority expects of him."
[160] *Supra* note 40, p. 25.
[161] *Supra* note 3, p. 10.
[162] 'Is the law of armed conflict in crisis and how to recommit to its respect?' 3 June 2016, ICRC. https://www.icrc.org/en/document/law-armed-conflict-crisis-and-how-recommit-its-respect, comments by Marco Sassòli.
[163] *See* https://www.msf.org/kunduz-hospital-attack.

from the International Humanitarian Fact-Finding Commission (IHFFC), the US responded that it saw no need for the IHFFC to carry out fact-finding, while it can do its own enquiry.[164] The US did carry out its own enquiry resulting in more than 3000 pages,[165] and made an executive summary public. Emphasising that it is not common US policy to make the results of its enquiries public, it is significant here that the US government felt that the incident was so severe it had to act, make the findings public, and understand lessons learnt. The result was still criticised as not being satisfactory because no serious accountability measures were adopted,[166] it may be a noteworthy example where a state realized it had to adopt special measures to seem credible, to identify lessons learnt and to show the world it took IHL protections seriously.

It has become apparent that international criminal justice cannot be exhaustive, neither in encompassing all the situations and cases due to political sensitivities, leaving entire conflicts or parties without criminal accountability, nor in numbers: it is impossible to try all those responsible. A very plausible effect of the International Criminal Tribunal for the Former Yugoslavia has been the *11bis* procedures, through which a larger number of perpetrators could be tried in domestic courts, and through which domestic capabilities have strengthened. This strengthening of domestic capabilities has welcome long-term effects in that numbers of judges, prosecutors, defence lawyers are trained in IHL and international criminal law, and become cognizant of the specificities of war crime trials. Handing over trials to domestic structures may also bear an important legitimizing factor for international or hybrid tribunals, as they need to build their own recognition within the local population.[167] Recognizing that domestic trials may be one way out of impunity, it would be important to put more efforts in increasing domestic capabilities, making domestic enforcement an increased sharp tooth .

We need to believe in domestic trials and universal jurisdiction. It is probably easier to apply the more efficient, organized and cheaper domestic mechanisms, than to persuade sovereign states that a case should be submitted to the ICC, or a new mechanism should be set up. Exercising universal jurisdiction may have its political sensitivities, but it shall not be forgotten as a means to fight impunity. Enforcement should go hand in hand with prevention, dissemination, training, dialogue, and international processes. If we look at the lack of understanding among states to initiate proceedings before the ICC in the Syria-case, and generally all the political attacks against the ICC, the only permanent international body available to try the most heinous cases, we realize that there is no global will to make use of this body. Even though alternative mechanisms see the light of day, we are still safe to say that international mechanisms alone will not be able to end impunity and ensure better respect for IHL.

4. Conclusion

The Compliance mechanism was meant to provide, among others, a forum for discussion on interpretation of the law, its application and best practices. The inability of states to agree on a voluntary forum for regular discussions on IHL was seen by many as a sad and characteristic demonstration of the unwillingness of states to simply sit down and engage in structured

[164] "Following the attack, we demanded an independent investigation by the International Humanitarian Fact-Finding Commission (IHFFC). In April 2016, the US military released its own investigative report. The request for an independent investigation has so far gone unanswered." *Supra* note 52.
[165] *See* https://www.nytimes.com/2016/04/30/world/asia/afghanistan-doctors-without-borders-hospital-strike.html.
[166] Only disciplinary measures have been adopted. *See*: https://www.bbc.com/news/world-us-canada-36164595.
[167] J. E. Mendez, 'Preventing, Implementing and Enforcing International Humanitarian Law', 39 *Study of Transnational Legal Policy* 89 (2008), p. 97.

discussions on IHL, hence their lack of interest in adopting procedures that would contribute to better respect of IHL.

The idea of the present article was triggered by the outcome of the Compliance process and attempted to demonstrate that the lack of common understanding of states in the Compliance process does not necessarily mean that all is lost. While a regular meeting of states would have greatly contributed to a lively discussion on new challenges to the application of and compliance with IHL, there are many other mechanisms available that directly or indirectly contribute to better respect of IHL, both within the frameworks of IHL and outside. It would be therefore important if states mapped these mechanisms and made better use of them.

The cornerstone of a successful application of IHL is that states and groups who are participating in conflicts understand the rules and enforce such rules within their own structures. Understanding the rules means that there is a general agreement on the contents, as well as on how to apply them in contemporary conflicts. Enforcing the rules means that there are internal structures available to enforce them, both within and outside the armed actors. These require an adequate and custom-tailored attitude towards training, and an effective enforcement mechanism, as well as the will of states and armed groups to face their own failures and examine, investigate them.

If we look at earlier projects, such as the Guidelines on direct participation in hostilities or the Montreux Document, even considering that not all states were happy with the outcome of such processes, we already witness a huge amount of work, involving states, academics, practitioners and IOs/NGOs from various geographic regions discussing specific IHL issues. Maybe states should continue with a step-by-step approach, with discussions centred around specific topics. We must also realize that even if such discussions result in heated arguments and disagreements, it is still a discussion on IHL. At the same time, we must not kid ourselves. IHL violations will occur as long as armed conflicts exist. The best we can do is keep IHL on the agenda, and initiate procedures that assist in our common understanding on the rules, their application, and generally in raising attention to IHL.

5. Case study : where the law fails : conflict related sexual violence: reasons, applicable legal provisions and humanitarian response

Introduction

> While both men and women, and boys and girls, can be victims of conflict-related sexual violence, the overwhelming majority of victims are politically and economically marginalized women and girls. It is estimated that at least one in five women refugees in complex humanitarian settings has experienced sexual violence and its effects, which include trauma, stigma, poverty, poor health and unwanted pregnancy. The real numbers are likely to be much higher, since data on sexual- and gender-based violence in humanitarian contexts remain sporadic and difficult to track, and incidents are often underreported. Where evidence is available, it shows a disturbing trend of sexual violence being employed as a tactic of war, and of armed actors profiting from these acts.[168]

When we think of rape or sexual assault, we mostly think of the terrible physical and direct psychological harm it causes. While in reality, it is even worse than that. Stigmatization often follows rape and sexual assault in many communities. Husbands send their wives away, communities expel the victims. Expelling victims often happens due to fear of diseases or for religious reasons. After ISIS raped Yazidi women as a strategy of war and forced them into sexual slavery, women who had survived and managed to escape were seeking forgiveness and re-inclusion in the community from their religious leaders. Their religious leaders decided that raped and sexually enslaved and abused Yazidi women should be forgiven by their families and embraced by the community.[169]

Not all communities have a similarly empathetic approach. Sexual assault is still followed by stigmatization and rejection. Therefore, it has been often extremely difficult for abused persons to carry on with their lives, let alone deal with the physical and mental damage the crime has caused. Stigmatization often prevents victims from seeking medical and psychological assistance, whereas if a case is reported within 72 hours, professionals can provide medical care to prevent HIV, pregnancy and sexually transmitted diseases.[170] It is not only women and girls who are victims of rape and sexual violence. Especially in detention, men and boys are also victims of this terrible crime.

The present article attempts to analyze why sexual violence is committed in armed conflicts, which kinds of armed actors are involved, what are the international legal prohibitions of this conduct, and how the international community and the humanitarian world is dealing with this phenomenon.

The nature and motivation of sexual violence in armed conflict

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[168] See: OCHA https://www.unocha.org/sites/unocha/files/GHO2019.pdf (last accessed 7 February 2021).
[169] MURAD, Nadia: *The Last Girl – My story of captivity and my fight against the Islamic State',* New York, 2017. 294.
[170] Sexual violence: A tragic and taboo scar of South Sudan's conflict. *ICRC,* 15 April 2016, https://www.icrc.org/en/document/south-sudan-sexual-violence-taboo-160414 (last accessed 7 February 2021).

Rape as a method of warfare has frequently been used in history as a means of expressing superiority over the enemy, destroying the enemy society or community, as a means to carry out genocide, or due to religious beliefs. ISIS religious leaders ruled that Yazidis were non-believers, and – unlike Christians, Shias, and others – can be systematically raped.[171] Still, "Former sabaya, they announced, would be welcomed back to society and not judged for what had happened to us. (…) because we had been raped, we were victims, not ruined women"[172] – writes Nadia Murad, Yazidi genocide survivor and 2018 Nobel Peace Prize winner. Hence, rape committed as a method of warfare has a long-term effect not only on the victim, but on the whole community.

Extensive studies have been carried out to shed light on the main motivations of sexual violence, the circumstances and the psychology of perpetrators and prevalence of sexual violence in armed conflict.

These studies have shown that sexual violence in armed conflict is carried out for three main reasons. Sexual violence may happen in armed conflict for strategic purposes, opportunism or because it is tolerated.[173] The underlying objective or motivation behind a strategic purpose may be manifold. It can include religious reasons, the expression of ethnic or tribal superiority, a means to destroy a whole group or simply to terrorize and demoralize enemy society. As a common element, there is a hierarchical or collective will behind. Sexual violence is also committed for individual reasons. In this case there is no underlying strategy, but rather a feeling of impunity or tolerance towards the commission of such acts. Studies also have concluded that rape is committed more often as practice (opportunism) than as a strategy.[174]

Therefore distinction shall be made between rape and sexual assault committed as a single act (due to opportunism or because it is tolerated) and rape and sexual assault committed as a method of warfare (for strategic purposes). The legal qualification does not make a difference between the two. Using rape and sexual assault as a method of warfare[175] could be witnessed in many conflicts, among others in Yugoslavia, Rwanda, Syria. None is better or worse than the other, but rape committed as a method of warfare is probably more difficult to prevent given its systematic and large scale feature. In terms of prevention, the type of prevention activities will depend on the context, the type of sexual violence, the motivation and other indicators.

While there may be a false presumption that sexual violence is an issue in conflicts including less developed countries primarily committed by non-state actors, sexual violence tends to be perpetrated in all kinds of conflicts, at least this is the assumption. However, these are committed with different degree, occurrence and variety.[176] Studies have shown that all

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[171] MURAD: *The Last Girl…* x.
[172] MURAD: *The Last Girl…* 295.
[173] DURHAM, Helen – BERNARD, Vincent: Editorial: Sexual violence in armed conflict: From breaking the silence to breaking the cycle. *International Review of the Red Cross,* 96. (2014) 894., 427–434., 428.
[174] WOOD, Elisabeth Jean: Conflict-related sexual violence and the policy implications of recent research. *International Review of the Red Cross,* 96. (2014) 894., 457–478., 458.
[175] Reference to rape as „method of warfare" is not made in a legal term as in the understanding of Additional Protocol I. See GAGGIOLI, Gloria: Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. *International Review of the Red Cross,* 96. (2014) 894., 503–538., 518.
[176] COHEN, Dara Kay – NORDÅS, Ragnhild: Sexual violence in armed conflict: Introducing the SVAC dataset, 1989–2009. *Journal of Peace Research,* 51. (2014) 3., 418–428. 418.

kinds of armed actors, be they state armed forces, non-state armed groups or multinational forces, have committed rape or sexual assault.[177]

At the same time, not all organizations engage in sexual violence. In Africa, out of 177 armed actors in 20 African civil wars between 2000 and 2009, 59% have not been reported to commit sexual violence.[178] Worldwide it can also be stated that out of all the types of armed organizations that commit sexual violence (state armed forces, rebel forces and pro-government militias) the majority has not been reported to carry out sexual violence,[179] while there is a higher probability that sexual violence committed by state armed forces is reported.[180]

In conclusion, contrary to general belief which attributes the commission of sexual violence primarily to non-state actors, all kind of armed actors, be it western or non-western, state or non-state, engage in sexual violence, in all kinds of conflicts. There is a higher latency when sexual violence is committed by non-state armed forces, but overall latency is still very high.

Prohibition and relevant rules in international law

Rape had been already prohibited in the Lieber Code of 1863, punishable by death. The 1899 and 1907 Hague Regulations protect the "family honour and rights" of the population of an occupied territory,[181] while the 1929 Geneva Convention provides that prisoners of war are entitled to respect for "their persons and honour" and that "women [prisoners of war] shall be treated with all consideration due to their sex".[182]

The 1949 Geneva Conventions and the 1977 Additional Protocols also prohibit rape, both explicitly, and also implicitly through prohibiting cruel treatment and torture, outrages upon personal dignity, indecent assault and enforced prostitution.

There is no definition in the Geneva Conventions or Additional Protocols of rape or sexual violence. The *ad hoc* tribunals, as discussed below, developed a definition in their jurisprudence, and the Rome Statute of the International Criminal Court includes a definition, although not universally accepted. A common element is that both men and women can be victims and perpetrators of rape or sexual violence. The definition of rape in all the mentioned sources includes invasion or penetration, and lack of consent or coercion. Sexual violence can take many forms, some are mentioned in the Geneva Conventions or Additional Protocols, in the jurisprudence of tribunals or the ICC Rome Statute, such as enforced prostitution, indecent assault, sexual slavery, forced public nudity, or sexual harassment such as forced stripping and mutilation of sexual organs.

Rape and sexual assault did not receive much attention in the Nuremberg and Tokyo Tribunals, nor after the wars that had followed. The ICTY and ICTR did, however, form

[177] DURHAM–BERNARD: Editorial: Sexual violence in armed conflict… 428. Particularly alarming is that humanitarian workers have also been committing acts of sexual violence. See for instance PP 15 of Resolution 3 adopted at the 32nd International Red Cross and Red Crescent Conference, 2015.
[178] WOOD: Conflict-related sexual violence… 459.
[179] WOOD: Conflict-related sexual violence… 459.
[180] COHEN–NORDÅS: Sexual violence in armed conflict… Abstract.
[181] 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, 1899, Art. 46; Convention (III) relative to the Opening of Hostilities, The Hague, 1907, Art. 46.
[182] Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, Art. 3.

important case law on the topic.[183] The definition, scope of application and qualification of rape and sexual assault was clarified and developed through the jurisdiction of the *ad hoc* Tribunals. As a consequence, today we understand that rape is a war crime both in international and non-international armed conflicts.[184] Also, following the ICTY's and ICTR's jurisprudence, it became clear that rape can constitute crimes against humanity under certain circumstances.[185] As confirmed in the *Akayesu* case by the ICTR, rape and other forms of sexual violence can "constitute genocide in the same way as any other act as long as they are committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such".[186] The ICTY in the *Kunarac* case confirmed that rape can also constitute torture.[187] Thus, it became clear that rape and sexual assault can qualify for any of the worst international crimes – war crimes, crimes against humanity, genocide and torture – making it clear that the international community does condemn this action as completely incompatible with acceptable basic human behavior and human conscience. The ICC's definitions of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence recognized as a war crime both in international and non-international armed conflicts brought some further clarity to their definition, in that these digest the development in definitions formed by the ICTR and ICTY. Still, the ICC does not define a minimum gravity threshold as to 'sexual violence'.[188]

Legal provisions protecting the civilian population in general

While the present study does not seek to analyze the very important jurisprudence of the Tribunals or the ICC, the following lines will provide an introduction to the provisions of the Geneva Conventions and their Additional Protocols that could be relevant to the prohibition of sexual violence. These provisions are binding on state parties and non-state parties to armed conflicts alike.

The Martens clause is the most fundamental rule ensuring that no one is left without protection. It states that „in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience".[189]

International humanitarian law treaties afford general protection to the civilian population, which may be seen as a background protection for all victims, including victims of sexual violence.

First, there are provisions aiming at the protection of civilians against the effect of hostilities, such as the rules applicable on means and methods of warfare. One basic principle is the principle of proportionality, according to which parties shall "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to

[183] For instance ICTY, *Furundzija* (Trial Chamber), Case no. IT-95-17/1, Judgment, 10 December 1998.
[184] DURHAM, Helen: Shining a spotlight on sexual violence in war: The 2018 Nobel Peace Prize. *Humanitarian Law and Policy Blog, ICRC*, 11 October 2018., https://blogs.icrc.org/law-and-policy/2018/10/11/shining-a-spotlight-on-sexual-violence-in-war-2018-noble-peace-prize/?utm_source=ICRC+Law+%26+Policy+Forum+Contacts&utm_campaign=c702cf6502-EMAIL_CAMPAIGN_2018_10_11_10_57&utm_medium=email&utm_term=0_8eeeebc66b-c702cf6502-74832713&mc_cid=c702cf6502&mc_eid=9d8d02d9bd (last accessed 7 February 2021).
[185] ICTY, *Kunarac* (Trial Chamber), Case no. IT-96-23 & 23/1, Judgment, 22 February 2001, para. 782.
[186] ICTR, *Akayesu* (Trial Chamber) Case no. ICTR-94-4-T, Judgment, 2 September 1998, para. 731.
[187] ICTY, *Kunarac* (Appeals Chamber), Case no. IT-96-23 & 23/1, Judgment, 12 June 2002, para.150; ICTY, *Delalić* (Trial Chamber) (Celebici Case), Case No. IT-96-21, Judgment, 16 November 1998, para. 495.
[188] GAGGIOLI: Sexual violence in armed conflicts… 506.
[189] See Article 1 (2) Additional Protocol I and preamble paragraph 4 of Additional Protocol II.

civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[190] The proportionality principle requires parties to weigh incidental damage to civilians against the military advantage anticipated. From the viewpoint of this principle, worth to mention that there is no difference made within the categories of civilians, thus women or children do not "weigh" more in the proportionality test than other civilians.[191] A prohibited method of warfare is terrorizing the civilian population[192] – rape and other forms of sexual violence could certainly be categorized as acts the primary purpose of which is to spread terror among the civilian population.

Second, international humanitarian law grants a basic protection to all civilians when it provides that civilians must be respected and humanely treated. The fundamental guarantees in Article 75 (1) of Additional Protocol I[193] are attempting to reach the same effect as the Martens clause, in that Article 75 (2) applies to those "who do not benefit from more favorable treatment". These basic rules are substantially the same in international and non-international armed conflicts.

Third, there are detailed rules in international humanitarian law with respect to detention which could have an effect of preventing or suppressing sexual violence. In an international armed conflict, prisoners of war must, in particular, at all times be humanely treated and protected, particularly against acts of violence or intimidation and against insults and public curiosity.[194]

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men.[195] Women in detention may be particularly vulnerable if they are not separated from men in confinement, or when men are guarding them. Geneva Convention III therefore requires that women need to be held in separate quarters and confinement, with separate sanitary facilities, and be guarded by women;[196] women should be searched by women in detention.[197] During internment, children must be kept with their families.[198]

Additional Protocol I also provides that – unless families are accommodated as family units – women be held in quarters separated from men's quarters, they shall be under the immediate supervision of women, and children be held in quarters separate from the quarters of adults.[199]

The rules applicable in non-international armed conflicts also provide protection for women in detention. Additional Protocol II provides that "except when men and women of a family are accommodated together, women shall be held in quarters separated from those of

[190] See Article 57. 2. *(ii)* Additional Protocol I.
[191] At the same time, eventhough in the legal assessment there is no difference between a child or woman as a civilian or a grown up man, political or other considerations may weigh children or women more. This is known as the CNN-effect, where public relations, media considerations may overwrite legal assessments.
[192] Article 51(2) of Additional Protocol I: "acts or threats of violence the primary purpose of which is to spread terror among the civilian population". This is also referred to as a customary rule, See CIHL Study Rule 2. Violence Aimed at Spreading Terror among the Civilian Population.
[193] Article 75 of Additional Protocol I has also been accepted as customary law.
[194] Articles 13 and 14, Geneva Convention III.
[195] Article 14(2), Geneva Convention III.
[196] Article 25, 29, 97, 76, 85, 108, 124 of Geneva Convention IV.
[197] Article 97 of Geneva Convention IV.
[198] Article 82 of Geneva Convention IV.
[199] Articles 75(5) and 77(4), Additional Protocol I.

men and shall be under the immediate supervision of women".[200]

Customary international humanitarian law provides for similar protection in cases of detention: it requires that "women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women", and "[c]hildren who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units",[201] both these obligations being applicable in international and non-international armed conflicts.

Fourth, there are specific rules to be applied during occupation: according to Article 27 of Geneva Convention IV, "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

Fifth, there is special protection afforded for especially vulnerable groups, such as women and children: Article 12 of Geneva Convention I and II on the general protection of the wounded and sick and the shipwrecked of the armed forces add a special reference to women: "Women shall be treated with all consideration due to their sex". Article 14 of Geneva Convention III on the general protection of prisoners of war also includes a special reference to women: "Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men".[202]

The above mentioned rules and prohibitions already set a framework of protection that could address the specific needs or situation of persons likely to be exposed to sexual violence.

2. Legal provisions expressly prohibiting rape and sexual violence/assault

The Geneva Conventions and Additional Protocols include both explicit prohibition of rape and other forms of sexual violence, as well as implicit prohibitions generally prohibiting humiliating and degrading treatment, for both international and non-international armed conflicts.

The most explicit prohibition of sexual violence in *international armed conflicts* is to be found in Article 27 (2) of Geneva Convention IV, which provides that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". This prohibition is preceded by a more general provision stating that "protected persons are entitled (…) to respect for their persons, their honour (…). They shall at all times be humanely treated (…)".

Article 75(2)*(b)* of Additional Protocol I prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault". Article 76(1) of Additional Protocol I explicitly provides that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault". A special protection of children is afforded by Article 77 (1), providing that "[c]hildren shall be the object of special respect and

[200] Article 5 (2), Additional Protocol II.
[201] Rules 119 and 120, Customary IHL Study.
[202] Other significant sources include Rules 8*(a)* and *(d)*, 23, 53 and 85(2) of the UN Standard Minimum Rules for the Treatment of Prisoners; Rules 19, 20, and 21 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

shall be protected against any form of indecent assault".

Implicit prohibitions applicable in international armed conflicts include prohibition of torture, violence to person and inhuman treatment.

Explicit prohibitions applicable in *non-international armed conflicts* include the prohibition in common Article 3 of the Geneva Conventions: prohibition of inhuman treatment, without any adverse distinction based on sex. This includes violence to life and person, including cruel treatment and torture, and outrages upon personal dignity, especially humiliating and degrading treatment. Additional Protocol II includes all the implicit prohibitions mentioned above, and an explicit prohibition for rape in Article 4(2)*e):* "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" with regard to any person not or no longer directly participating in hostilities, women and men alike. This is the first provision which prohibits rape against both women and men.

According to the ICRC Customary Law Study, the prohibition of rape and other forms of sexual violence are prohibited as per customary international law in both international and non-international armed conflicts: "Rape and other forms of sexual violence are prohibited".[203]

The Geneva Conventions and Additional Protocols also stipulate measures for repression of such crimes. It is important to underline that the primary responsibility to prevent and prosecute sexual violations lies with states. Common Article 1 of the Geneva Conventions obliges states to respect and *ensure respect* for the provisions of the Conventions. Furthermore, it is not only prohibited to commit the above acts, but states have additional obligations to prevent and repress or suppress violations of these rules, such as rape and sexual violence. The grave breaches regime of the Geneva Conventions[204] entail an obligation to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches". Rape and sexual violence are not *per se* grave breaches in the understanding of the Geneva Conventions. However, these may easily constitute grave breaches in the form or torture, inhuman treatment, or wilfully causing great suffering or serious injury to body or health, therefore the grave breaches regime may apply in specific cases to rape or sexual violence.

If rape or sexual assault constitutes a grave breach under the Geneva Conventions, the *aut dedere/aut judicare* obligation would be applicable, by which States are obliged to "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another [State party] concerned. (...)".[205] This practically means that States are obliged to exercise universal jurisdiction with respect to grave breaches, or extradite the person to a concerned state.

Obligation to repress violations is applicable only to grave breaches in the logic of the Geneva Conventions. If rape or sexual assault would not amount to a grave breach (ie. could

[203] Rule 93, Customary Law Study, ICRC.
[204] Article 50 of Geneva Convention I; Article 51 of Geneva Convention II; Article 150 of Geneva Convention III; Article 147 of Geneva Convention IV; Articles 11 and 85 of Additional Protocol I.
[205] Article 49 of Geneva Convention I; Article 50 of Geneva Convention II; Article 129 of Geneva Convention III; Art. 146 of Geneva Convention IV and Article 85(1) of Additional Protocol I.

not be covered by the categories listed as grave breaches in the Geneva Conventions), states are under an obligation to suppress *other* breaches of the Conventions. Suppression may mean a variety of measures, such as penal or disciplinary measures, the details and modalities of which are left to the state.

The requirement for states to ensure punishment of sexual violation also appears in numerous UN documents. UN Security Council Resolution 2467 of 2019 on sexual violence in conflict "(e)ncourages national authorities in this context to strengthen legislation to foster accountability for sexual violence, stresses the critical role of the domestic investigation and judicial systems of member states to prevent and eliminate sexual violence in conflict and to ensure accountability for those responsible (…)".[206]

Availability of sanctions in national penal codes is far from enough for addressing such crimes. States are required to disseminate international humanitarian law[207] both during peacetime and wartime. States are also under the obligation to adequately train their armed forces and to make legal advisers available to them. Translating these obligations to the need for preventing sexual assault, and considering also multinational military operations in complex settings, this would not only mean incorporating the adequate legal prohibitions into military training, but also entail raising the awareness of armed forces on how to tackle, report, document sexual violence committed in the theatre of war they are participating in.

According to an analysis of conflict-related rape, "The observed variation in conflict-related sexual violence strengthens the case for holding commanders accountable for sexual violence by their combatants".[208] This is true for rape committed due to any of the typical motivations outlined below, be it strategic, opportunistic or practice (tolerance). As commanders bear a significant role in preventing and addressing sexual violence in armed conflict, and it is also shown by various studies that commanders have a crucial role through training, setting the objectives, specific orders and disciplinary measure in preventing and addressing sexual violence in conflicts, states should also make specific efforts in training commanders, making them understand their obligations under international humanitarian law and prosecuting them as the case may be.

A gap between the legal norms and prevalence

The above mentioned rules give a strong indication that although not perfect, international humanitarian law provides a substantially thorough set of rules prohibiting rape and sexual violence. The question arises what would be the reason for the apparent gap between the adequate prohibitions and the reality in which sexual violence frequently occurs? The reasons can be manifold and can be partially led back to the reasons and motivations for sexual violence.

There may be groups that are using rape or other forms of sexual violence as a military strategy for various reasons, such as terrorizing the population, as a form of genocide or putting pressure on the adversary. In such cases legal prohibitions are not very effective until either a very real danger of sanctions or punishment is apparent, or until such groups seek international recognition where rape is obviously not accepted.

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[206] Security Council Resolution 2467 (2019) adopted on 23 April 2019, OP 3.
[207] Article 47 of Geneva Convention I; Article 48 of Geneva Convention II; Article127 of Geneva Convention III; Article 144 of Geneva Convention IV; Article 83 of Additional Protocol I; and Article 19 of Additional Protocol II.
[208] WOOD: Conflict-related sexual violence… 475.

There may be groups where rape is committed as a practice, because others are also doing it, or because it is tolerated within the hierarchy. In such cases training is of utmost importance, so is convincing the commanders that they have to undertake their duties and establish a culture within the hierarchy where rape and sexual assault is not tolerated.[209] This does not only mean the adoption of disciplinary sanctions, but also adequate training of troops at all levels, as well as clear orders and prohibitions. There may also be opportunistic reasons in which cases sexual violence happen as one-off incidents. These may be probably the easiest cases to tackle, if commanders agree with the unacceptable nature of sexual violence and make sure that the prohibition is enforced within the hierarchy.

However, with respect to all the above cases one observation has to be made. When we raise the problem of conflict-related sexual violence within "western" armed forces, this is often met with recognition of the severity of the problem only in remote countries or conflicts, combined with the lack of understanding of why "our" armed forces – where prohibition of sexual violence is incorporated in penal legislation and military manuals – should deal with this issue. Here two remarks must be made.

First, the fact that it is obvious that sexual violence is not accepted does not mean that this prohibition and moral standard should not be repeated over and over again. Sexual violence, although admittedly in relatively small numbers, is also occasionally committed by "western" troops. The scandal of UN troops' involvement of sexual abuse in the Central African Republic in 2013–2014 is a painful reminder. Still, recognition of the presence of instances of prohibited sexual conduct committed by also 'western' UN troops did not come about immediately. Only years after the painful crimes committed in the Central African Republic did the UN take action and improved funding and staffing addressing sex abuse cases. This immediately led to a 50% drop on the assaults of children in 2017. Also as a result of additional resources given to address this issue, by 2017, 92% of participating states looked into allegations of sexual crimes as opposed to 42% five years ago. The average time it took a country to appoint an investigator has fallen from 79 days in 2012 to 8 days in 2017. The general recognition of the phenomenon of sexual violence is now demonstrated: the UN now takes it as a fact that sexual abuse is committed by some of its own troops.[210]

The other reason western armed forces shall sacrifice time and attention to sexual violence is that many soldiers are involved in multinational operations where armed groups involved in the conflict may be involved in the commission of such acts. In such cases it is inevitable that troops in the multinational operation are adequately trained on how to recognize sexual violence, to sensitize them on how to report, how to document, whom to report to,[211] how to treat the victims, family members, be aware whether there are counseling centers operated by humanitarian organizations for victims available. If there is a lack of sensitivity towards the problem among multinational forces, victims may feel discouraged to

[209] For the need of commanders to introduce a zero-tolerance policy on sexual abuse, see OP 8, Resolution 3 adopted at the 32nd International Red Cross and Red Crescent Conference, 2015.
[210] "Last year, U.N. officials vowed to improve funding and staffing for sex abuse cases. Atul Khare, under-secretary general, said those efforts have led to a 50% drop in assaults on children by peacekeepers across the globe during the first 11 months of 2017 compared to the same period in 2016." "[chief of public affairs at the U.N. peacekeeping unit] said abuse charges against peacekeepers across the globe are handled more aggressively now, with 92% of participating countries looking into allegations, up from 42% five years ago. The average time it takes a country to appoint an investigator has fallen from 79 days in 2012 to eight days currently, he said. In addition, the U.N. has set aside $1.7 million to compensate victims. »We are witnessing a change in the mindset of both the member states and the U.N. itself,«.". See LOCKA, Christian – BHATTI, Jabeen: U.N. fails to stem rapes by peacekeepers in Africa, victims cry. *USA TODAY*, 16 Jan 2018.
[211] GAGGIOLI: Sexual violence in armed conflicts… 533.

report and seek assistance.

As an example of how states started recognizing and dealing with this issue, the United Kingdom, after a series of events attributed to the problem of sexual violence,[212] launched in 2014, with a second edition in 2017, the 'International Protocol on the Documentation and Investigation of Sexual Violence in Armed Conflicts', a protocol aimed at providing non-legally binding guidelines for the documentation of sexual violence, investigation, planning, identification of witnesses and survivors and storing of documentation.[213] The target audience of the Protocol was not primarily the armed forces, but its findings and guidelines may prove useful during the training and sensitization of armed forces on issues of sexual violence.

As obvious from the above described legal regulations, an adequate legal framework is in place to penalize sexual violence. At the same time, however satisfactory the legal prohibitions may be, impunity for such acts poses the biggest problem in addressing sexual violence.

Humanitarian action as a response to sexual violence

Even though certain organizations had already dealt with the question of sexual violence,[214] beginning with 2013–2014, there has been a boom in addressing sexual violence linked to conflicts and emergencies on high political levels. The UN, international agencies, governments have adopted special programs, strategies, calls for action, guidelines to address sexual violence.[215] In May 2019, the first international conference ever was organized in Oslo to end sexual and gender-based violence in humanitarian crises, where 21 donors pledged $363 million for 2019 and 2020 and beyond for activities to respond to and prevent sexual and gender-based violence.[216] In the humanitarian world, focus has been shifted from the

[212] 2013: Call to Action to mobilize donors, UN agencies, non-governmental organizations (NGOs) and other stakeholders on protecting women and girls in humanitarian emergencies, November 2013: event on "Protecting Girls and Women in Emergencies", June 2014: "Global Summit to End Sexual Violence in Conflict", co-chaired by the UK Foreign Secretary and Angelina Jolie, Special Envoy for the UN High Commissioner for Refugees (UNHCR); 2016: UK government issued 'Ending Violence against Women and Girls'.

[213] International Protocol on the Documentation and Investigation of Sexual Violence in Conflict; Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law, June 2014, Foreign and Commonwealth Office, United Kingdom, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf (downloaded 7 February 2021), second edition: https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf (downloaded 14 February 2021).

[214] See for instance: ICRC, Women and War: Implementation of the ICRC Pledge to the 27th International Conference, Report prepared by the ICRC for the 28th International Red Cross and Red Crescent Conference, 2–6 December 2003; LINDSEY, Charlotte: *Women facing war: ICRC study on the impact of armed conflict on women.* ICRC, October 2001.

[215] There had been relevant documents even before: UNHCR first published in 1995 the 'Sexual Violence against Refugees: Guidelines on Prevention and Response'. This lead to the adoption of the 2003 UNHCR "Guidelines for the Prevention of and Response to Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons". The Inter-Agency Standing Committee developed in 2005 the 'Guidelines for Gender-based Violence Interventions in Humanitarian Settings'. WHO adopted 'Mental Health and Psychosocial Support for Conflict- Related Sexual Violence: Principles and Interventions' in 2012. Available at: http://apps.who.int/iris/bitstream/10665/75179/1/WHO_RHR_HRP12.18eng.pdf (last accessed 7 February 2021). International Rescue Committee (IRC), UNICEF, Caring for Child Survivors of Sexual Abuse: Guidelines for Health and Psychosocial Service Providers in Humanitarian Settings, 2012. Available at: www.unicef.org/protection/files/IRC_CCSGuide_ FullGuide_lowres.pdf (last accessed 7 February 2021). UNHCR, Handbook for the Protection of Women and Girls, March 2008. Available at: www.unhcr.org/protect/PROTECTION/47cfae612.html (last accessed 7 February 2021).

[216] This was not restricted to sexual violence committed in armed conflicts only. See *Global Humanitarian Overview 2020.* OCHA, 2020. 24.

special needs of women to a broader approach focusing on the vulnerabilities of specific groups (be them girls, women, boys or men) on the basis of their sex.[217]

It has been acknowledged that for a long time, humanitarian organizations did not respond sufficiently to the needs of victims of sexual violence,[218] for multiple reasons: for lack of training, lack of resources – as opposed to the need of addressing more 'visible' needs, such as food or drinking water –, or for fear of being perceived as interfering with local traditions, customs, religion.[219] It took time for humanitarian organizations to realize the magnitude and long-lasting medical and other consequences of rape and other forms of sexual violence. When confronted with emergency situations, they had to deal with imminent tasks, such as safety or life/death medical questions, among which rape was seen as bad, but assisting rape victims was not a priority, because "one does not die of rape".[220] The potential of HIV infection as a possible consequence of rape and thus becoming a long-lasting medical issue, therefore possibly a question of mortality shifted the issue of assisting rape victims to a higher priority. This was followed by the recognition of the possibility of preventing infection with HIV post-rape within 72 hours. All these then led humanitarian organizations, such as the MSF, to focus specific programs on rape victims.[221]

The fact that men and boys may also be victims of sexual violence has still to be reflected in policy and practice of humanitarian organizations.[222] In the Democratic Republic of the Congo, a quarter of all the men reported being long-time exposed to sexual violence, two-thirds of which was conflict-related.[223]

The needs of victims may vary. Apart from the most obvious and primary medical and psychological support, victims most often need economic support as a result of them frequently being excluded from their families or communities,[224] awareness-raising for local communities to prevent stigmatization and expulsion of victims of sexual violence, dialogue with authorities or groups in control. Victims often find it difficult to seek help not only due to fear of stigmatization, but also for geographical or economic reasons due to the far-away medical assistance, costs of travel and other costs.

Therefore, the International Committee of the Red Cross (ICRC) has decided to take a proactive approach and presume that sexual violence does occur in armed conflict, unless a thorough assessment proves otherwise. This makes humanitarian staff prepared for dealing with victims and be able to take preventive action.[225] The ICRC and other humanitarian organizations have established consultation centers for victims, where they can seek moral,

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[217] DURHAM–BERNARD: Editorial: Sexual violence in armed conflict… 427.

[218] „Sexual violence as part of conflict is as old as humankind itself. As an aid organization, however, it is the ten-year delay between the direct exposure to large-scale sexual violence in Rwanda and Bosnia and the implementation of a specific aid response which concerns MSF." See DUROCH, Francoise – SCHULTE-HILLEN, Catrin: Care for victims of sexual violence, an organization pushed to its limits: The case of Médecins Sans Frontières. *International Review of the Red Cross,* 96. (2014) 894. 601–624., 610.

[219] DURHAM–BERNARD: Editorial: Sexual violence in armed conflict… 429.

[220] DUROCH – SCHULTE-HILLEN: Care for victims of sexual violence… 605.

[221] DUROCH – SCHULTE-HILLEN: Care for victims of sexual violence… 605.

[222] Resolution 3 of the International Red Cross and Red Crescent Conference, 2015, PP 8.

[223] SCHOPPER, Doris: Responding to the needs of survivors of sexual violence: Do we know what works? *International Review of the Red Cross,* 96. (2014) 894., 585–600., 594.

[224] The economic needs of victims may be complex and long-term. Economic need does not only mean immediate assistance, but also long-term, self-sustaining solutions, due to their eviction from their families, including taking away their means of business, land, etc. For the complexity of providing assistance to victims, see SCHOPPER: Responding to the needs of survivors of sexual violence…

[225] DURHAM–BERNARD: Editorial: Sexual violence in armed conflict… 430.

psychological, medical, economic and other kinds of assistance. However, it takes time until victims are aware of the availability of such assistance and dare approach them.

Challenges to provide assistance to rape victims emerge. Providing contraception and abortion availabilities to rape victims may hinder political recognition/public support and consequently funding of humanitarian activities. Sensitivities of the local communities remain to be challenging factors and push humanitarian organizations to adopt a strategy involving close communication with local leaders. This leads to important questions as to the role of women in the beneficiary society, the acceptance of abortion or victim blaming. The anonymity or invisibility of assistance provided to rape victims is an important factor, considering the stigma very often attached to rape within communities. This leads to a need of balancing the gains (medical) and losses (visibility and thus stigmatization) for victims linked to providing assistance to them. There is an additional challenge with respect to male victims, who may be even less reluctant to come forward and seek assistance.

Even though it is most difficult to address sexual violence when it is used as a strategy, differences in approaches cannot result in a hierarchy among victims, where victims of strategy-used sexual violence become more "important". In many cases, it is not easy to identify what type of sexual violence the victims had to endure, moreover, such a hierarchizing may have very unfortunate consequences to the efforts of reintegrating victims to their communities.[226]

The 32nd International Red Cross and Red Crescent Conference in 2015 addressed the topic of sexual violence in armed conflicts. Resolution 3 entitled "Sexual and gender-based violence: Joint action on prevention and response"[227] considers many aspects related to sexual violence. It recognizes that factors such as weakening of community protection mechanisms, disrupting services and family life, destruction of infrastructure or separation of families could lead to an increased risk of sexual violence.[228] It also encourages states to adopt preventive measures, ensure prosecution, and reminds commanders to ensure a zero-tolerance policy.

Summary

While we can say that the legal prohibition of rape and sexual violence in armed conflicts, together with the definitions articulated in the tribunals' jurisprudence is satisfactory, statistics show that sexual violence happens frequently in armed conflicts.[229] Commanders bear a significant role through training, orders, disciplinary measures, to prevent and address the problem of sexual violence.

Sexual violence is committed by all types or armed forces and armed groups, including peace-enforcement or peacekeeping troops. We must finally do away with the approach that sexual violence is perpetrated by "others". Sexual violence is not only a problem of remote conflicts and foreign armed forces or armed groups, but is a reality in the theatre of operations where our own troops are present. UN officials now take it as a fact that UN peacekeepers are committing sexual violence – hence preventive measures.

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[226] DUROCH – SCHULTE-HILLEN: Care for victims of sexual violence… 612–613.
[227] (32IC/15/R3) adopted at the 32nd International Conference of the Red Cross and Red Crescent, 8–10 December 2015, Geneva. See the text of the Resolution: http://rcrcconference.org/wp-content/uploads/2015/04/32IC-AR-on-Sexual-and-gender-based-violence_EN.pdf (last accessed 7 February 2021).
[228] PP 7 of Resolution 3.
[229] Sexual violence dataset: http://www.sexualviolencedata.org/dataset/ (last accessed 7 February 2021).

While prevention regimes (such as training and dissemination, as well as repression or suppression regimes) may be in place and may be adequate for one-off incidents, these are far from satisfactory for cases when rape is used as a strategy. In such a case, fighting the use of rape as a method of warfare is not only a legal issue.

Armed conflicts are complex situations, where constant care must be taken to prevent situations where victims may be especially vulnerable to rape and sexual assault. This is also true to the way humanitarian assistance is carried out, such as adequate measures taken in refugee or IDP camps.

It is often forgotten that rape and sexual violence can be perpetrated by and against women and girls, men and boys. We also must recognize the gravity of the secondary effects of rape and sexual assault, such as the future role and recognition of victim women/men in their own societies.

Addressing sexual violence is a multi-faceted task, requiring among others the involvement of lawyers, psychologists, sociologists, political scientists, health professionals, humanitarian workers, local leaders, religious leaders.

While we must accept that suffering, also of the civilian population during armed conflicts may be an inevitable and also legal consequence of armed conflicts, sexual violence is not an inevitable feature, therefore a zero tolerance policy must be pursued.

6. Enforcement of the Law of Armed Conflict; War Crimes

1. Meaning and Content of Implementation and Enforcement

1.1 Implementation

According to common Article 1 of the Geneva Conventions, "*The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.*" (emphasis added). The implementation and enforcement of the law of armed conflict ("ensuring respect") may encompass a wide range of measures. In this sense, implementation denotes a complex set of preventive measures aimed at securing compliance with the law, as well as coercive steps to be taken in cases of alleged or actual violations.

Measures serving implementation may include: diplomatic, legal, and administrative measures, and measures taken in peacetime (such as the establishment of control processes or mechanisms, codification), as well as measures taken during armed conflict.

Some of these are carried out within international institutions, organizations, or inter-state relations (e.g. the establishment of international monitoring mechanisms), while others are implemented exclusively at the domestic level. A significant portion of implementation measures appears as binding obligations in international treaties, while others are undertaken by states or international institutions on their own initiative – without a direct legal obligation (indirectly in fulfilment of the duty to "ensure respect") – in order to enhance the effectiveness of compliance.

A wide variety of measures may contribute to the effective implementation of international humanitarian law. This category also includes instruments not necessarily based on explicit legal requirements but which may directly or indirectly promote compliance:

a) Dissemination of international humanitarian law among armed forces, military training and preparation consistent with legal requirements, and the establishment of effective systems ensuring that legal considerations are integrated into planning and decision-making.

b) Action against individuals in cases of violations (and the creation of an appropriate legal framework), including national or international criminal and disciplinary measures, prosecution before civilian or military courts, or corresponding command-level disciplinary proceedings. This includes, for example, the exercise of universal jurisdiction (jurisdiction exercised irrespective of the place of the crime or the nationality of the perpetrator or victim).

c) Submission of disputes to international judicial bodies, such as the International Court of Justice.

d) Investigations into alleged violations not aimed at establishing legal responsibility. Such investigations may be conducted with the joint consent of states or by bodies established under international law or by international organizations (e.g. the United Nations, OSCE, EU), such as the International Humanitarian Fact-Finding

Commission established under Additional Protocol I, the OSCE Moscow Mechanism in relation to the war in Ukraine, or the Human Rights Council's fact-finding mechanisms (2009) concerning the Gaza conflict. The purpose of such investigations may be fact-finding or determining the occurrence of violations. They generally do not identify specific perpetrators or assign individual responsibility – often merely recording the occurrence of violations – but rather formulate broader findings or recommendations regarding accountability, responses to violations, or the prevention of recurrence.

e) Measures involving economic sanctions, arms embargoes, or various military actions adopted under the authorization of the UN Security Council against states or armed groups responsible for violations.

f) Claims for reparations in relation to violations.

g) Countermeasures taken by an injured state.[230] Also referred to as reprisals, i.e. acts that would otherwise be unlawful but are rendered lawful because they are taken in response to a prior unlawful act. Examples include the severance of diplomatic relations, embargoes, or blockades (the latter may be controversial depending on their implementation).[231]

h) Harmonization of differences in interpretation and application of the law between states (e.g. through intergovernmental conferences or initiatives such as the ICRC's Strengthening Compliance Initiative).

i) Continuous monitoring of compliance with relevant international treaties: tracking the conduct of parties, for example by third parties or international organizations. This may occur in peacetime (e.g. regular meetings of States Parties to a treaty) or during armed conflict (e.g. activities of the International Committee of the Red Cross or advocacy NGOs such as Human Rights Watch).

j) Media publicity exposing alleged violations. Although no obligation regarding media publicity appears in international treaties, its impact on uncovering and preventing violations can be significant, often prompting measures even beyond legal obligations. This is sometimes referred to as the "CNN effect": in the 1990s and 2000s, the U.S. news channel CNN pioneered live war reporting. This has influenced public sympathy or disapproval toward parties to a conflict, potentially conferring operational advantages or disadvantages. Media played a particularly significant role in the wars in Iraq and Afghanistan, where gaining and maintaining the support of the local population was an operational objective. As a result – precisely because of the CNN effect – anticipated reactions of local, domestic, or international public opinion have at times overridden strictly legal considerations in operational planning and execution, leading commanders to refrain even from operations that would otherwise be lawful.

[230] International Law Commission (2001): Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. United Nations, New York, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, see also: Palwankar, U. (1994):

[231] Implementation of International Humanitarian Law: Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law, International Review of the Red Cross, 76(534), 305–322; and see also: Sassòli, M. (2002): State responsibility for violations of international humanitarian law, International Review of the Red Cross, 84(846), 401–434.

k) Intermediary activities in armed conflict as provided for under international law (Geneva Conventions). Such roles may be performed by neutral states, including protecting powers, and/or independent humanitarian organizations, with the aim of ensuring compliance with the law of armed conflict.

1.2 Enforcement

The Geneva Conventions and their Additional Protocols expressly set out a number of obligations aimed at the enforcement of international humanitarian law.

Identical provisions of the Geneva Conventions (GC I: Article 49; GC II: Article 50; GC III: Article 129; GC IV: Article 146) provide that:

"*The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.*

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article."

The first paragraph of the above provisions refers to grave breaches of the Geneva Conventions, i.e. those acts defined as such in Articles 50/51/130/147 of the Conventions and Article 85 of Additional Protocol I (these have become war crimes). In respect of these acts, States are obliged to provide for penal sanctions. In the case of other (non-grave) violations of the Conventions, paragraph 3 requires States to take all necessary measures to suppress them - this does not necessarily entail an obligation to impose criminal sanctions.

In practice, this means that States are required to criminalize grave breaches, whereas for other violations they retain discretion as to the means by which they respond.

Additional Protocol I contains, in essence, three core obligations related to ensuring compliance:

- States must disseminate the Geneva Conventions and the Additional Protocols as widely as possible, including among the civilian population;
- legal advisers must be available to the armed forces in order to ensure that international humanitarian law obligations are incorporated into military operations;
- States must ensure that members of the armed forces receive appropriate training in international humanitarian law, and commanders in particular must ensure that their subordinates are aware of their obligations.

Article 82 provides:

"The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this

Protocol and on the appropriate instruction to be given to the armed forces on this subject."

Article 83 provides:

"1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population. 2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof."

Article 87(2) provides:

"In order to prevent and suppress breaches, the High Contracting Parties and the Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol."

In addition, Additional Protocol I was the first instrument to codify command (superior) responsibility.

These specific obligations - criminalization, dissemination of international humanitarian law among both armed forces and civilians, and the provision of legal advisers within the military – serve to promote compliance with, and ultimately the enforcement of, international humanitarian law.

The following section addresses enforcement in a narrower sense: the emergence of international crimes, international criminal justice, and national proceedings.

2. The Development of the Institutional Framework of Individual Criminal Responsibility

The principle of individual responsibility for violations committed during armed conflicts can be traced back to early civilizations. Although the Lieber Code applied during the American Civil War explicitly provided for individual responsibility,[232] the 1907 Hague Conventions did not address this issue. At the end of the First World War, the Allied Powers provided in the Treaty of Versailles for the trial of Kaiser Wilhelm II before an international tribunal, which ultimately did not take place.

Following the Second World War, the London Charter[233] established the Nuremberg Tribunal to prosecute war crimes, crimes against humanity, and crimes against peace. Shortly thereafter, the Tokyo Tribunal was established.

Decades later, ad hoc international tribunals were created to investigate international crimes committed in the former Yugoslavia and in Rwanda. This process culminated in the

[232] Varga, R. (2014): *Challenges of Domestic Prosecution of War Crimes with Special Attention to Criminal Justice Guarantees*. Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának Könyvei. Doktori értekezések (4). Pázmány Press, Budapest, pp. 30-35.

[233] Charter of the International Military Tribunal (1945): Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945, elérhető: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

establishment of the first permanent international court tasked with examining individual criminal responsibility for international crimes: the International Criminal Court (ICC).

Alongside the creation of international institutions, it must be emphasized that prosecution remains primarily the responsibility of States. International courts were not created to investigate all violations; they focus on the most serious crimes, and their proceedings often carry symbolic significance. The system of individual responsibility is thus best understood as a combination of international and national mechanisms.

2.1 Ad Hoc Tribunals after the Second World War: The Nuremberg and Tokyo Military Tribunals

After the Second World War, the victorious Allied Powers established the first international tribunals to hold senior political and military leaders accountable for war crimes and other offences. This was revolutionary in that criminal proceedings focused primarily on leadership.

The four major Allied Powers – France, the Soviet Union, the United Kingdom, and the United States – established the International Military Tribunal at Nuremberg (November 1945–October 1946) to prosecute the major war criminals of the European Axis. The Tribunal tried numerous high-ranking Nazi political and military leaders, as well as certain Nazi organizations.

The International Military Tribunal for the Far East (Tokyo Tribunal) was established in 1946 by order of General Douglas MacArthur, Supreme Commander for the Allied Powers, and operated from May 1946 to November 1948. It built significantly on the Nuremberg proceedings.[234]

These tribunals made a substantial contribution to the development of international criminal law. A major legal challenge was the absence of clear applicable international and domestic legal norms prohibiting the acts in question, with defendants arguing that they had acted in accordance with domestic law.

At Nuremberg, the interpretation emerged that norms contrary to fundamental justice cannot qualify as law. This approach is rooted in the Radbruch formula, which holds that laws that reach an intolerable level of injustice lack legal character ("where the conflict between positive law and justice reaches an intolerable level (…) the statute, as 'lawless law', must yield to justice"[235]).

The London Charter defined the international crimes within the Tribunal's jurisdiction – crimes against peace, crimes against humanity, and war crimes (including conspiracy) – which became the foundation of modern international criminal law.[236]

It is also important to note that these tribunals lacked a solid international legal basis:

[234] Charter of the International Military Tribunal for the Far East (1946), Tokyo, 19 January 1946 (as amended 26 April 1946), elérhető: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf

[235] https://archive.org/details/Radbruch/mode/2up 'Gesetzliches Unrecht und obergesetzliches Recht', Salddeutsche Juristen-Zeitung I (1946) 105-8, 107

[236] The crime against peace later became the crime of aggression. At that time, the concept of genocide was not yet known in international criminal law.

they were not founded on a multilateral treaty, were not authorized by the UN Security Council, and were established without the consent of the affected states. This influenced both their functioning and their perception. Neither Nuremberg nor Tokyo could be fully impartial, as they dealt exclusively with crimes committed by the defeated powers. Nevertheless, their jurisprudence, principles, and lessons laid the groundwork for the development of international criminal law.[237]

2.2. UN Ad Hoc Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

Further significant milestones in the development of international criminal law were the ad hoc tribunals of the 1990s: the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR). The ICTY[238] and the ICTR[239] served similar purposes to their Nuremberg and Tokyo predecessors, but operated on a different legal basis, in a different context, and faced different challenges. In the first decade following the collapse of the bipolar world order, the international community was immediately tested by two serious and brutal conflicts. On the one hand, the war that broke out in the territory of Yugoslavia in 1990, and on the other hand, the 100 days of bloody ethnic violence in Rwanda in 1993, posed a challenge to the community of states.

In both conflicts, justice at the national level failed. At the same time, there was a strong demand for accountability from the international community, due in no small part to a collective sense of guilt that the international community had been unable to prevent or halt the commission of the most serious international crimes, including genocide, in both conflicts.

The ICTY, seated in The Hague, was established in 1993 by binding United Nations Security Council Resolution 827, with the purpose of prosecuting persons responsible for genocide, war crimes, and crimes against humanity committed in the territory of the former Yugoslavia since 1 January 1991.

The ICTR, seated in Arusha, Tanzania, began its operation on the basis of UN Security Council Resolution 955 adopted in 1994, while its Appeals Chamber operated in The Hague. The ICTR had jurisdiction over crimes identical in subject-matter to those of the ICTY, committed in the territory of Rwanda between 1 January 1994 and 31 December 1994.

The jurisdiction of both tribunals was concurrent with that of national courts, meaning that proceedings could be initiated before either forum. However, if the tribunals initiated proceedings in a given case, this automatically excluded the jurisdiction of domestic courts in

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[237] Ádány, T. V. (2011): A legsúlyosabb jogsértések miatti felelősségre vonhatóság nemzetközi jogi tendenciái, különös tekintettel a Nemzetközi Büntetőbíróság joghatóságának előfeltételeire [International law trends in accountability for the most serious violations, with special regard to the preconditions of the jurisdiction of the International Criminal Court], PhD dissertation, Pázmány Péter Catholic University, pp. 18–25.

238 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (1993), available at: https://ihl-databases.icrc.org/assets/treaties/555-IHL-88-EN.pdf, and see also: Act XXXIX of 1996 on the implementation of obligations arising from the Statute of the International Tribunal established for the punishment of acts committed in the territory of the former Yugoslavia that seriously violate international humanitarian law.

239 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 (1994), available at: https://ihl-databases.icrc.org/assets/treaties/565-IHL-90-EN.pdf, and see also: Act CI of 1999 on the implementation of obligations arising from the Statute of the International Criminal Tribunal established for the punishment of persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda between 1 January 1994 and 31 December 1994, as well as Rwandan citizens responsible for genocide and other similar violations committed in the territory of neighbouring States.

the same case, thereby granting primacy to the courts established by the United Nations.[240]

In defining the subject-matter jurisdiction of the ad hoc tribunals, the experiences of Nuremberg and Tokyo played a significant role. Accordingly, the substantive law of the two tribunals sought to include only those norms that unquestionably formed part of international law: the four Geneva Conventions of 1949, the Regulations concerning the Laws and Customs of War on Land annexed to the 1907 Hague Convention IV, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the Statute of the Nuremberg Tribunal as contained in the London Agreement of 8 August 1945.[241]

Among the long-term effects of the Yugoslav and Rwandan tribunals, one of the most significant was the approximation and partial merging of the previously largely distinct bodies of rules of humanitarian law applicable to non-international armed conflicts and international armed conflicts. In the *Tadić* case, the ICTY held that most rules of international humanitarian law apply irrespective of the nature of the conflict. It also declared that, from the perspective of customary law, the concept of war crimes is applicable in conflicts classified as non-international.[242] The law-developing work of the ICTR is particularly notable with regard to the interpretation of the concept of genocide. These judicial bodies built extensively on the principles established at Nuremberg, including the principle of individual criminal responsibility under international law. The jurisprudence of the two tribunals has since remained an important reference point in subsequent cases and has further strengthened the demand for the establishment of a permanent international judicial forum.

2.3. The International Criminal Court

The International Criminal Court, seated in The Hague (International Criminal Court, hereinafter: ICC or the Court), is the first permanent international criminal court, the founding treaty of which, the Rome Statute, was adopted in 1998, and it began its operation following its entry into force on 1 July 2002. The primary purpose of the establishment of the ICC is to ensure that individuals accused of the most serious international crimes, such as genocide, crimes against humanity, war crimes, and aggression, can be held accountable before an international forum. The ICC has had jurisdiction over the crime of aggression only since 2017. The Court currently has 124 member states.[243]

The establishment of the ICC constitutes a major milestone in the international system of justice, and (together with all the criticism relating to its activities) it is one of the cornerstones of international criminal law.

2.3.1. Jurisdiction of the ICC

The subject-matter jurisdiction of the Court extends to the crimes set out in the Rome Statute, thus it may act in cases of genocide, crimes against humanity, war crimes, and aggression.

According to its territorial jurisdiction, the ICC may act in cases where crimes are committed on the territory of States Parties to the Rome Statute.

240 Statute of the International Tribunal for the former Yugoslavia (1993), Article 9, and Statute of the International Tribunal for Rwanda (1994), Article 8.

241 Ádány, 2011, p. 26.

242 Sassòli, M. (2019): International Humanitarian Law: Rules, controversies, and solutions to problems arising in warfare, Cheltenham–Northampton: Edward Elgar, p. 17.

243 ICC States Parties, available at: https://asp.icc-cpi.int/states-parties

On the basis of personal jurisdiction, the ICC may act in cases where the person who committed the crime is a national of a State that has accepted the jurisdiction of the Court.

The temporal jurisdiction of the ICC extends only to crimes committed after the entry into force of the Statute, that is, after 1 July 2002. If a State becomes a party to the Statute after its entry into force, the jurisdiction of the Court applies only to crimes committed after that State becomes a party, unless the State makes a separate declaration accepting the jurisdiction of the Court for a different time period.

In addition, the Court may also initiate an investigation where the crime in question was not committed on the territory of a State Party and not by a national of a State Party, provided that the state concerned accepts the jurisdiction of the Court by means of an ad hoc declaration.

The UN Security Council may refer any situation to the Court under Chapter VII of the UN Charter.

With regard to non-States Parties, the ICC may therefore exercise jurisdiction in three cases:

(i) where a national of a non-State Party commits a crime falling under ICC jurisdiction on the territory of a State Party,
(ii) where a non-State Party accepts the jurisdiction of the Court by an ad hoc declaration in respect of a specific case or situation,
(iii) where the UN Security Council refers a situation to the ICC.

A specific feature of the ICC is the principle of complementarity. According to this principle, the ICC complements national judicial systems and intervenes only if the states concerned are unwilling or unable to carry out criminal proceedings. If a state conducts an investigation or proceedings lawfully under its own jurisdiction, the ICC does not intervene and cannot exercise jurisdiction.[244]

2.3.2. Composition and Procedure of the Court

The 18 judges of the ICC are elected by the Assembly of States Parties. The Hungarian judge of the ICC was Professor Péter Kovács (2015–2025).

Cases brought before the ICC generally arise when the crimes in question were committed on the territory of a State Party to the Rome Statute or by its nationals. However, states do not refer a single specific case to the Court, but rather a situation consisting of multiple cases. From these, the Prosecutor determines which cases to pursue, taking into account the type of acts, their gravity, the number of victims, and their impact. The Prosecutor may also select situations on his or her own initiative (*proprio motu*) from the territory of States Parties. [245]Similarly, the UN Security Council may refer situations to the Court; in such cases, it is not necessary for the state concerned to be a party to the Rome Statute, nor is its consent required.[246]

244 Ádány, 2011, pp. 191–192, and see also Varga, 2014, pp. 81–100.

245 Kovács, P. (2020): Bevezetés a Nemzetközi Büntetőbíróság joggyakorlatába [Introduction to the case-law of the International Criminal Court], Budapest: Pázmány Press, pp. 32–33.

246 Pursuant to Article 13(b) of the Rome Statute, the United Nations Security Council may refer a situation to the International Criminal Court under Chapter VII of the Charter of the United Nations, in which case the Court's jurisdiction exists irrespective of the accession to and consent of the State concerned to the Rome Statute; this constitutes an exception to the State-consent requirement laid down in Article 12(2). See: Rome Statute of the International Criminal Court (1998), Rome, 17 July 1998, available at: https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf

Before the ICC, specific "cases" are selected from the broader category of "situations," similarly to national criminal proceedings. If a state has lawfully conducted or initiated domestic proceedings, the ICC does not have jurisdiction.[247]

The ICC does not have its own enforcement body; it cannot itself carry out arrests or coercive measures. In this regard, it relies entirely on the cooperation of States Parties: States Parties are obliged to cooperate with the ICC. Likewise, convicted persons serve their sentences not in detention facilities of the ICC, but in facilities offered by States Parties.

A criticism raised against the ICC, particularly by African states, is that it mainly deals with African situations and cases.[248] Another controversial issue concerning the ICC is the issuance of arrest warrants against sitting heads of government or heads of state.[249]

2.3.2 Composition and Procedure

The ICC has 18 judges elected by the Assembly of States Parties. (Hungary's judge was Professor Péter Kovács, 2015–2025.)

Cases typically arise from "situations" referred by States Parties, the Prosecutor (*proprio motu*), or the Security Council. From these situations, specific cases are selected based on gravity, scale, and impact.

The ICC lacks its own enforcement mechanism and relies entirely on State cooperation for arrests and enforcement of sentences. Convicted persons serve sentences in States that have agreed to accept them.

Criticism of the ICC has included claims – particularly from African States – that it disproportionately focuses on African situations, as well as controversies surrounding arrest warrants issued against sitting heads of state or government.

3. International Crimes; Principles Concerning the Punishment of International Crimes

The following sections detail the principles accepted by international law regarding the punishment and conditions of liability for international crimes, as well as the characteristics and distinctions between these crimes.

3.1 Principles of Liability for International Crimes

3.1.1 The Nuremberg Principles

In 1946, the UN General Assembly approved and, in Resolution 95 (I), affirmed the

247 Kovács, 2020, pp. 32–33.

248 At present, there are 15 investigations before the ICC, of which 10 are African, 1 European, and 3 Middle Eastern or Asian. Of the African situations, six were referred to the ICC by the State concerned itself, two were initiated by the Prosecutor, and two were referred to the ICC by the Security Council. At present, one case is under active trial, and two other cases are approaching the end of the trial and are awaiting judgment—these are all African cases. The data reflect the situation as of September 2025.

249 This issue first arose in connection with the arrest warrant issued against Sudanese President Al-Bashir, and later in connection with the arrest warrants issued against Russian President Putin and Israeli Prime Minister Netanyahu. The Rome Statute of the ICC provides that head-of-state immunity does not apply in proceedings before the ICC—just as this was also true in proceedings before the ad hoc tribunals. At the same time, initially African States, and later other States and the legal literature, also raised the question whether this conflicts with diplomatic head-of-state immunity, and whether it renders diplomatic relations between those States impossible.

crimes and principles of international law recognized in the Charter and the judgments of the Nuremberg Tribunal. These "Nuremberg Principles" have themselves become part of customary international law and are considered the foundations of the modern international criminal justice system.

The Nuremberg Principles are as follows:

1. **Principle of Personal Responsibility**: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. It follows that international law can reach the individual directly; in particularly egregious cases, the mediating medium of national law is not required.
2. **Irrelevance of Domestic Law**: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
3. **Head of State Immunity or Official Capacity Does Not Exonerate**: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
4. **Superior Orders ("I was just following orders") is Not an Acceptable Defense**: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him. This principle responded to one of the most frequently used defenses by the Nuremberg defendants.
5. **Right to a Fair Trial**: Any person charged with a crime under international law has the right to a fair trial on the facts and law. This principle represented a massive step forward in its time.[250]
6. **Crimes Under International Law**: This principle enumerates international crimes: **Crimes against peace** (planning, preparation, initiation or waging of a war of aggression in violation of international treaties), **War crimes** (violations of the laws or customs of war), and **Crimes against humanity** (murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population).
7. **Complicity is also a Crime**: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.[251]
8.

3.1.2 Command or Superior Responsibility

In the proceedings of the International Military Tribunal at Nuremberg, German military and political leaders frequently argued that they were only carrying out issued orders. In response, the principle developed that the unconditional execution of orders does not exonerate a subordinate from liability.

The other side of this issue is the responsibility of the commander or superior (both military and civilian), which has both active and passive aspects.

On the active side, the superior orders an unlawful act, the execution of which involves the commission of a crime by the subordinate. In such cases, the superior may be

250 Ádány, 2011, pp. 20–21.

251 International Committee of the Red Cross: Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950, available at: https://ihl-databases.icrc.org/en/ihl-treaties/nuremberg-principles-1950

held liable as a perpetrator or co-perpetrator.

On the passive side, the question is more complex: to what extent can a crime committed by a subordinate – for which there was no order or to which no order applied – be attributed to the superior? In these instances, the superior may incur criminal or disciplinary liability for failing to prevent or repress the crime.

Superior responsibility did not yet appear in its modern form in the Nuremberg or Tokyo foundational documents. The doctrine entered practice through the judgment of the Tokyo Tribunal in the *Yamashita* case. General Yamashita's subordinates committed large-scale massacres of civilians and prisoners of war, looting, and intentional destruction of religious monuments during the Philippine campaign. The Tribunal interpreted Yamashita's responsibility not as complicity, but as **command failure**. It established that a commander has a duty to control and supervise subordinates, and the failure to do so is itself a basis for criminal responsibility.[252]

Command responsibility was first codified in Articles 86 and 87 of Additional Protocol I (1977) to the Geneva Conventions. According to Article 86, paragraph 2:

"*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*."

Based on the Protocol, the two most important factors for establishing this liability are: first, that the superiors knew or should have known in the circumstances that the person was committing or preparing to commit a violation; and second, that they failed to take all measures within their power to prevent or repress the violation.

A **superior** is someone who stands above the perpetrator(s) in a given hierarchy (chain of command or authority) and is effectively able (or would have been able) to exercise control over the subordinate(s). This relationship can be *de jure* (recognized and sanctioned by the relevant legal system) or *de facto* (based on a factual situation rather than legal regulation). The requirement of **effective control** means that at the relevant time, the superior must have possessed the ability to prevent or punish the crimes committed by subordinates. However, not every omission automatically triggers superior responsibility; it only arises if the conditions set forth in the Protocol are met.

The purpose of the principle is to place enhanced responsibility on commanders, in line with other provisions of the Protocol requiring proper education, training, and the issuance of orders to ensure compliance with humanitarian law. Superior responsibility is a stronger obligation with more severe consequences because a commander can be held criminally liable for an act they did not commit, did not intend to be committed, and potentially did not even know about.

252 The decision nevertheless remained highly disputed, because it was not proven that Yamashita actually knew, or could have known, about the crimes committed by his subordinates. In addition, it is important to note that the issue of proving the subjective element of the doctrine of command responsibility, the mens rea, i.e. the "guilty mind/intent", continues to raise complex problems of legal application to this day. See Kirs, E. (2017): Elöljárói felelősség az ICTY joggyakorlatában [Superior responsibility in the case-law of the ICTY], Miskolci Jogi Szemle, 2017/2, pp. 59–61.

This principle appears in the proceedings before the ICTY and ICTR, and also – in a slightly modified form – in the proceedings of the ICC. For the ICC, superior responsibility became stricter compared to Additional Protocol I in two respects:

1. Additional Protocol I applies superior responsibility specifically to military superiors. In contrast, the **Rome Statute** specifies that superior responsibility also applies to civilian superiors, provided the subordinate is under their effective authority and control.
2. Instead of the Protocol's phrasing ("knew, or had information which should have enabled them to conclude"), the Rome Statute uses the phrasing "**knew, or consciously disregarded information which clearly indicated, or should have known**" (depending on the military/civilian status), which sets a high standard of accountability.

This principle is reflected in national proceedings as well, with most states establishing commander responsibility in a similar manner. Section 145 of the Hungarian Criminal Code reflects the ICC's regulations:

Responsibility of Superior or Official Leader
Section 145: A person shall be liable in the same manner as the perpetrator of a crime defined in this Chapter:

a) a military superior or a person effectively acting as a military superior (together: superior), if a person under their effective subordination and control or effective authority and control committed a crime defined in this Chapter, and the superior knew of the commission or preparation of this crime, or **should have known based on the circumstances**, and failed to take measures within their power necessary to prevent the crime, or failed to report it immediately upon learning of the commission;

b) a person in a leading official position not falling under point a)... [details regarding non-military superiors].

3.1.3 International Crimes are Not Subject to Statutory Limitations

Under customary law, international crimes are not subject to statutes of limitations. The 1968 New York **Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity** explicitly provides that war crimes and crimes against humanity are imprescriptible. Although a large number of states have not ratified this specific Convention, the rule has acquired customary status and must be observed in national proceedings. The same rule is affirmed regarding genocide by the Genocide Convention, the jurisprudence of the ICTY and ICTR, and Article 29 of the Rome Statute for the ICC.

3.2 International Crimes

Currently, four main international crimes are categorized and distinguished: the **crime of aggression**, **war crimes**, **crimes against humanity**, and **genocide**.

In international law, these crimes are defined with relative clarity. While the *actus reus* (conduct) might be identical (e.g., murder can constitute a war crime, a crime against humanity, or genocide), it is vital to distinguish between them because the different legal categories rest on different contextual elements.

3.2.1 Aggression

Regarding aggression, it is important to distinguish between the **act of aggression** and the **crime of aggression**. An *act of aggression* is committed by a state and is essentially the use of armed force in violation of the UN Charter.

The *crime of aggression* appeared in the Nuremberg Charter as a "crime against peace." In the ICC Rome Statute, the crime of aggression was defined in detail only in 2017 because it was a politically sensitive issue. It concerns the criminal responsibility of individuals in a position to effectively exercise control over or to direct the political or military action of a State, who participate in the planning, preparation, initiation, or execution of an act of aggression.[253]

Since Nuremberg, there has been very little international practice regarding aggression, largely because it cannot be handled separately from violations of the UN Charter and raises sensitive foreign policy questions.

3.2.2. War crimes

War crimes are particularly serious violations of international humanitarian law (treaty law and customary law) for which the perpetrator bears individual criminal responsibility. These crimes can be committed both in an international and in a non-international armed conflict, although the range of possible war crimes is not identical in the case of the two types of conflict.[254] As a result, unlike genocide and crimes against humanity, war crimes can conceptually be committed only within the framework of an armed conflict. War crimes may be divided into the following groups: war crimes against persons requiring special protection; war crimes against persons providing humanitarian assistance and participating in peacekeeping operations; war crimes against property and other rights; prohibited methods of warfare; prohibited means of warfare.[255]

Article 8 of the **Rome Statute of the International Criminal Court** categorises war crimes as follows:

- Grave breaches of the 1949 Geneva Conventions, which are related to an international armed conflict;
- Other serious violations of the laws and customs applicable in international armed conflicts;
- Serious violations of common Article 3 of the four 1949 Geneva Conventions, which are related to a non-international armed conflict;
- Other serious violations of the laws and customs applicable in non-international armed conflicts.
-

Such crimes may be committed by anyone; thus, not only by combatants, but also by a civilian participating in the given armed conflict, or a member of a non-regular group. It is important that the same rules apply to every participating party in an armed conflict, irrespective of which party is the aggressor and which is the victim thereof; therefore, a war crime may be committed on any side by any person.[256]

253 Varga, R. (2024): The Russian-Ukrainian war: The possibilities of ensuring accountability, Hungarian Journal of Legal Studies, Vol. 64, Issue 4, p. 583.

254 International Committee of the Red Cross: War Crimes, ICRC Casebook Glossary, available at: https://casebook.icrc.org/a_to_z/glossary/war-crimes

255 United Nations: War Crimes, available at: https://www.un.org/en/genocide-prevention/definition

256 Varga, 2024, pp. 583–584.

Although the prohibition of certain conduct during armed conflicts can be traced back centuries, the concept of war crimes began to develop especially toward the end of the 19th century and the beginning of the 20th century, when international humanitarian law, also known as the law of armed conflict, was codified. The 1899 and 1907 Hague Conventions prohibit the belligerent parties from using certain means and methods of warfare (this is what we call Hague law), whereas the 1864 Geneva Convention (**Convention for the Amelioration of the Condition of the Wounded in Armies in the Field**) and the subsequent Geneva Conventions focus on the protection of persons who do not, or no longer, take part in the fighting (Geneva law). In the 1977 Additional Protocols, we find both types of rules.

Both Hague law and Geneva law define those acts which, if certain conditions are met, are regarded as war crimes. In the Geneva Conventions, the expression "grave breaches" was used instead of "war crimes". One reason for this is that the expression "war crimes" was used in the **Charter of the International Military Tribunal** (the Nuremberg Charter), which derives from Hague law, while the Geneva Conventions are built on Geneva law. Another reason is that although these acts are described as punishable acts by the domestic legal system of almost every country, the term "crime" may have different legal meanings from state to state. The third reason is to emphasise the difference between these flagrantly serious violations of law and the general crimes or misdemeanours defined under states' domestic law.

The term "war crimes/offences" was introduced by 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 1977, and it stated that grave breaches of the rules of humanitarian law qualify as war crimes. Both the Geneva Conventions and Protocol I understand "grave breaches / war crimes" only as acts committed in an international armed conflict. Protocol I includes both Geneva law and Hague law; therefore, the designation of violations was also unified. It is important to emphasise, however, regarding the relationship between "grave breaches" and "war crimes", that while every grave breach under the Geneva Conventions qualifies as a war crime, not every war crime is a grave breach.[257]

The ICTY and the ICTR, and the Rome Statute of the ICC, use the term war crime, and these documents are the first to recognise as war crimes acts that are committed in a non-international armed conflict.

3.2.3 Crimes Against Humanity

In the Nuremberg Charter, crimes committed against the civilian population were given a separate place. At that time, they were still tied to armed conflict as a "nexus," treated as an extension of war crimes. This requirement of a nexus to armed conflict eventually faded from customary law. In 1946, the UN General Assembly confirmed crimes against humanity as a new category of international criminal law. Genocide split off as an independent category in 1948, and apartheid followed in 1973.

The difference between war crimes and crimes against humanity is that while war crimes require the existence of an armed conflict, **crimes against humanity can be committed in both war and peace**. Their focus is not on operational military activity but on the crushing of human dignity and values.

257 Varga, 2014, pp. 35–37.

For a common crime (like murder) to become a crime against humanity, certain **contextual elements** must be present:

1. **Widespread or Systematic Attack**: The acts must be part of a widespread or systematic attack directed against any civilian population. "Widespread" refers to the large scale of the attack or number of victims; "systematic" refers to the organized nature and existence of a plan or policy.
2. **State or Organizational Policy**: The attack must be committed pursuant to or in furtherance of a State or organizational policy.
3. **Knowledge (Mens Rea)**: The perpetrator must have knowledge of the attack and that their act is part of that attack.
4. **Target**: The target must be a **civilian population**. Even if combatants are among the victims, the attack as a whole must be directed against civilians.
5.

3.2.4 Genocide

3.2.3. Crimes against humanity

In the constitutive instrument of the Nuremberg Tribunal, crimes committed against the civilian population were given a separate place. At that time, the commission of these crimes was still tied to armed conflicts; therefore, it was treated as a kind of offshoot of war crimes. The requirement of the existence of an armed conflict was at that time part of customary international law, but this slowly faded away. In 1946, **United Nations General Assembly resolution 95 (I)** (**"Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal"**) confirmed what was contained in the Statute of the Nuremberg Tribunal, including crimes against humanity as a new category of international criminal law. From this circle, in 1948 the crime of genocide separated and has since represented an independent category; then, in 1973, another specific offence – still within crimes against humanity – the crime of apartheid took on a separate form (**International Convention on the Suppression and Punishment of the Crime of Apartheid**). In the 1990s, the case-law of the ad hoc tribunals established then gave a further impetus to the development of international criminal law and contributed greatly to the crystallisation of the problematic constituent elements of crimes against humanity.[258] At present, the **Rome Statute of the International Criminal Court** places it among the four core international crimes and regulates it broadly.

The roots of crimes against humanity can thus be linked to war crimes, and significant overlaps can be observed. The difference between the two categories is that while war crimes follow from serious violations of the rules of warfare – thus, an indispensable condition is the existence of an armed conflict – crimes against humanity may be committed both in war and in peacetime. The aim of committing the crimes is not closely connected to operational military activity; rather, the crushing of human values and human dignity becomes the focus of these exceptionally inhumane and cruel acts.

A defining feature of crimes against humanity is that acts that are basically ordinary crimes become crimes against humanity if certain contextual elements are present. These are the following:

i, The crimes are part of a systematic, widespread and organised attack. The attack

258 Hoffmann, T. (2017): Az emberiesség elleni bűncselekmények nemzetközi és magyar jogi szabályozása [The international and Hungarian legal regulation of crimes against humanity], Állam- és Jogtudomány, 2017/1, pp. 37–38.

may be the commission of one and the same, or several different crimes (thus murder, rape, persecution)[259], and it may also be carried out without the use of violence (e.g. laws that severely discriminate against certain groups)[260]. An important characteristic of the attack is also its systematic nature, i.e. a kind of regular, planned implementation using resources. The "widespread" nature of the attack may, on the one hand, refer to the large number of inhumane acts committed; moreover, it may mean the repeated commission of different inhumane acts, or the exceptional intensity of a given inhumane act. Organisation refers primarily to the fact that decisions on the attack are made at a sufficiently high political level, so that it is linked, to a certain extent, to a given state (or to a de facto sovereign power in a given territory) and to its policy.

ii, The attack is motivated by a political, religious, or ethnic hostility, and this intent must also be proven in order for a given unlawful conduct to be classified as a crime against humanity. The perpetrator's intent is crucial for the legal qualification of the crime. To prove this, it is necessary to establish awareness regarding the attack. This awareness means knowledge of the objective facts related to the attack and acting in awareness of those facts.

iii, The victims may be a given group of the civilian population. Within the category of crimes against humanity, we classify exclusively inhumane acts committed against the civilian population. In the case of the existence of an armed conflict, the civilian population may include not only individuals enjoying protected status under international humanitarian law, but even persons with combatant status, provided that the given attack is directed primarily against the civilian population.[261]

3.2.4. Genocide

As the previous section also explains, the crime of genocide resonates very closely with the definition of crimes against humanity and shows similar characteristics. In both cases, the general legal interest protected by the crimes is human dignity, the fundamental moral value of humanity, and the crimes may be committed both in war and in peacetime. Pursuant to Article II of the **Convention on the Prevention and Punishment of the Crime of Genocide** (1948):

"*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

What distinguishes genocide from crimes against humanity is the special intent aimed at the destruction, in whole or in part, of a group that can be well distinguished according to certain characteristics. This intent must therefore be proven; in its absence, it is not possible to classify a given act as genocide. The perpetrator may be anyone, and the number of persons who became victims is not, in itself, determinative. The intent to commit genocide and its proof are crucial, but not a simple task.[262]

259 M. Nyitrai, P. (2006): Nemzetközi és európai büntetőjog [International and European criminal law], Budapest: Osiris Kiadó, pp. 187–192.

260 Hoffmann, 2017, pp. 40–42.

261 Hoffmann, 2017, p. 42.

262 M. Nyitrai, 2006, pp. 197–199.

Although the phenomenon itself was not new, since throughout human history there have been countless examples of it, the term "genocide" was first used by the Polish lawyer Raphäel Lemkin in 1944, during the Second World War, to name the mass and systematic murders that took place. The term was created by combining the Greek prefix *geno-* meaning race or tribe, and the Latin suffix *-cide* referring to killing.

Genocide as an international crime under this name was first recognised in 1946 by **United Nations General Assembly resolution 96 (I)** ("The crime of genocide"). In 1948, the United Nations convention on the prevention and punishment of the crime of genocide (hereinafter: the Genocide Convention) already codified it as an independent international crime. The International Court of Justice (hereinafter: the ICJ) has repeatedly found that the Convention defines principles that form part of general customary international law. The ICJ has also stated that the prohibition of genocide is one of the peremptory norms of international law, i.e. *ius cogens*, which always requires unconditional application. The concept of genocide is defined in the statutes of the ICTY, the ICTR, and the ICC in the same way as set out in the Genocide Convention.[263]

4. Individual responsibility for international crimes in national proceedings

A state's responsibility for violations of international law operates in two directions: on the one hand, the state itself bears international legal responsibility for its acts that violate international law (e.g. aggression); on the other hand, the state is obliged to proceed against those of its nationals who commit an international crime (e.g. a war crime), and to create the conditions for such proceedings, e.g. through appropriate legislation. The latter follows from common Article 1 of the Geneva Conventions ("**to respect and to ensure respect for the present Convention in all circumstances**"), and from other provisions of the Geneva Conventions cited above.

Criminal proceedings for the commission of an international crime may be conducted before national and international courts as well. The basis of these proceedings is that international law has defined war crimes, crimes against humanity and genocide as international crimes. In this section we deal with national proceedings related to international crimes.

4.1. National proceedings in relation to international crimes: bases in international law

By virtue of state sovereignty, it falls within the power of the state to determine which acts it considers punishable. The limit of this state discretion is that there are acts which, arising from international law, states are obliged to prosecute, such as, for example, those arising from human rights conventions (the prohibition of torture, for example, is *ius cogens* – a norm requiring unconditional application), and those arising from humanitarian law or other conventions.

If a state does not introduce an international crime into its domestic law (whether intentionally, or simply because a regulatory deficiency arises), it is possible to invoke international crimes before national courts as well, directly on the basis of international law. In this sense, therefore, states facilitate their own proceedings if they implement these acts

263 United Nations: Genocide, available at: https://www.un.org/en/genocide-prevention/definition

into their own legislation, but proceedings are not precluded if these have not been implemented.

According to the above, therefore, on the one hand there exists a responsibility of states, in respect of war crimes and other international crimes, to prosecute these acts; on the other hand, international law does not prescribe how they must do so. It is left to states whether they do so by incorporating these acts into their criminal codes (or into a separate statute), or whether they base the proceedings directly on a reference to international law. This is primarily a matter of legal system; in the overwhelming majority of European states, international crimes – including war crimes – have been implemented into the criminal code (or into a separate law). This is a simpler legal solution from the perspective of those applying the law. This also relates to the fact that international law determines only the concept and the substantive elements of international crimes, but not the sanction. Determining the sanction is the responsibility and task of states.

The jurisdictional basis of national proceedings relating to war crimes may be of two kinds:

a) ordinary jurisdiction;

Ordinary jurisdiction follows from state sovereignty: the state may proceed in the case of an act committed on its territory or by its national. The most general are the territorial and personal principles, i.e. that the state may punish a crime committed on the territory of the given state, or committed by its national. Under the criminal codes of states that follow the passive personality principle, the state may also proceed in the case of a crime committed to the detriment of its national.

b) universal jurisdiction, which has a basis in international law.

4.2. Universal jurisdiction

This jurisdiction is applied to crimes against which action by every state is justified or necessary because of the gravity of the crimes and their effect on the international community. A classic example is piracy at sea, since uniform action against it serves international interests. Universal jurisdiction is always based on an international legal prescription: it may be prescribed by customary international law or treaty norms. If it is prescribed by treaty, it is generally mandatory.[264]

Generally speaking, in cases of serious violations of international law, states have the possibility or obligation to exercise universal jurisdiction. Universal jurisdiction does not have a precise definition in international law; it is often interpreted as a basis that does not require a connection to the state, thus going beyond territorial or personal jurisdiction and the protective principle, yet the given state still has a basis for it, since jurisdiction in this case is linked to the nature of the crime. In other words, this jurisdiction may be exercised,[265] or must be exercised, by ‘any’ or ‘every’ state. The aim of universal jurisdiction is to avoid impunity and to prevent perpetrators of serious crimes from finding safe haven in third countries.

With regard to war crimes, universal jurisdiction appears in the 1949 Geneva

264 International Committee of the Red Cross: Universal jurisdiction over war crimes, available at: https://www.icrc.org/sites/default/files/document/file_list/universal-jurisdiction-icrc-eng.pdf

265 Varga, 2014, pp. 59–61.

Conventions. The Geneva Conventions introduced the concept of so-called grave breaches (see point 1).

In the case of grave breaches, the Geneva Conventions state universal jurisdiction (Articles 49/50/129/146):

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."

The reason for this is that these are crimes which, by their nature and in view of their social impact, require that states' jurisdiction should not be limited to the nationality of the perpetrators (personal jurisdiction) or the place where the crime was committed (territorial jurisdiction).

States apply different methods to ensure universal jurisdiction within the framework of their own national legal systems. Courts rely on their constitutional provisions, or directly on international law, when exercising universal jurisdiction. However, since the relevant provisions of international law are not necessarily automatically enforceable, most often national law clearly sets out the measures to be applied to war crimes. This includes the detailed and unambiguous definition of both the crimes and their constituent elements, and the related sanctions.[266]

Under the Geneva Conventions, a state may also transfer these cases for the purpose of proceedings to another state:

"It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ' prima facie ' case."[267]

This is the so-called *aut dedere, aut judicare* obligation: the state either proceeds itself, or transfers the proceedings to another state.

Appendix: Summary Table of International Crimes

	War Crimes	**Crimes Against Humanity**	**Genocide**
Legal Basis	Nuremberg/Tokyo, Customary International Law, Geneva Conventions, AP I, ICTY, ICTR, ICC Rome Statute	Nuremberg/Tokyo, Customary International Law, ICTY, ICTR, ICC Rome Statute	Customary International Law, Genocide Convention (1948), ICTY, ICTR, ICC Rome Statute
Applicability	Only during armed conflicts	Can be committed in both peace and war	Can be committed in both peace and war
Target Group	Anyone (depending on the specific crime)	Civilian population (in general)	Specifically defined groups: national, ethnical, racial, or religious groups

266 ICRC: Universal jurisdiction over war crimes.

267 Geneva Conventions, Articles 49/50/129/146.

	War Crimes	Crimes Against Humanity	Genocide
Intent / Mens Rea	Intentional or reckless violation	Intentional and systematic	**Specific intent** (*dolus specialis*) to destroy a group in whole or in part
Scale / Regularity	Isolated or mass violations	Widespread Or systematic commission	State or organizationally directed process, but can be an individual act
Statute of Limitations	No statute of limitations under international law	No statute of limitations under international law	No statute of limitations under international law
Domestic Legal Source	Criminal Code, Chapter XIV	Criminal Code, Chapter XIII	Criminal Code, Chapter XIII, Section 142

7. Collective responsibility for war crimes?

"There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs."

Hartley Shawcross[268]

Introduction

One great achievement in international law is the recognition of individual criminal responsibility,[269] as opposed to notions of collective guilt, collective responsibility or any forms of collective retribution.[270] It seems that different fields of international law – international humanitarian law, international human rights law and international criminal law –, although originating from different times, concepts and attitudes, mutually work toward an effective and enforceable international system of individual criminal responsibility.

In such a system, international humanitarian law provides the rules themselves, human rights law the frameworks of international and national accountability, and international criminal law, the "newest" element, the conditions for international enforcement should national efforts fail. Today we are still in a learning process of how to give effect to individual criminal responsibility on the international level: the establishment and experiences of international tribunals and the International Criminal Court (ICC), as well as experiences of national courts are all indicators of this learning process. Despite these achievements,

[268] Britain's Chief Prosecutor at the Nuremberg War Crimes Trials. in: "*Let the Tribunal do its Job*", New York Times, May 22, 1996, at A17.

[269] „We all celebrate the emergence of a human rights regime that recognizes the rights of the individual as distinct from, and sometimes even in opposition to, those of the state. We recognize and celebrate the emergence of a parallel system of personal legal accountability. And we should, therefore, agree that, in this modern age of individual rights and duties, it is untenable to blame an entire polis-the whole citizenry-for the wrongs committed either by individual criminals or by a criminal government." T. Franck, 'Individual criminal liability and collective civil responsibility: do they reinforce or contradict one another?', 6 *Washington University Global Studies Law Review* (2007) 567-574, at 569.

[270] Already after World War II, collective guilt was seen by many as primitive, irrational and bigoted. When the entire Dutch cabinet stepped down after failure to prevent or stop the Srebrenica massacres, this did not reflect negatively on the entire Dutch population. See T. O'Donnell, 'Executioners, bystanders and victims: collective guilt, the legacy of denazification and the birth of twentieth-century transitional justice', 25 *Legal Studies* (2005), at 632.

discussions about collective guilt and collective responsibility are often on the agenda, even if only theoretically, with no apparent practical results.[271]

In a great thought-provoking article on this issue, George Fletcher discusses collective guilt regarding the four crimes over which the International Criminal Court has jurisdiction, namely aggression, genocide, crimes against humanity and war crimes.[272] He refers to these four crimes as being collective in nature, because these are "deeds that by their very nature are committed by groups and typically against individuals as members of groups. Whatever the pretence of liberal international lawyers, the crimes of concern to the international community are collective crimes."[273] Therefore he raises the question whether guilt for these crimes can also be collective[274] and argues that collective guilt is possible, even though collective guilt cannot necessarily be translated into the language of criminal law for the purpose of mitigating punishment or sharing the criminal responsibility.

In the present article I seek to examine the theoretical possibility of collective guilt and responsibility for only one of the four crimes covered by the Rome Statute, for war crimes; and intend to lay out that war crimes are not necessarily collective in nature and therefore the notion of collective guilt and collective responsibility does not necessarily apply for them. I will argue with the notion of collective responsibility for war crimes on two levels: on a more specific level looking at the specificities and elements of war crimes, and on a more general level looking at where the acceptance of the notion of collective guilt and responsibility would lead.

This latter aspect is significant because the ultimate aim of criminalizing acts of concern to the international community is to decrease their occurrence; any theory which undermines this

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[271] In many writings collective responsibility means responsibility of a state or responsibility of criminal organizations or joint criminal enterprise. See for example K. Ainley, 'Collective Responsibility for War Crimes: Politics and Possibilities' Paper presented at the annual meeting of the "Theory vs. Policy? Connecting Scholars and Practitioners", New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans, LA, Feb 17, 2010. Also available at: http://www.allacademic.com/meta/p416608_index.html. Franck, however, makes a clear distinction between state responsibility and determination of people's collective guilt. See Franck, *supra* note 2, at 570-571. In the present article, however, the notion of collective responsibility is not meant to indicate state responsibility, rather the abstract responsibility of a state, nation or a group. This article does not seek to discuss the responsibility of (criminal) organizations either, although references to it are made below.

[272] G. P. Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt', 111 *The Yale Law Journal* (May 2002).

[273] Fletcher, *supra* note 5, at 1514.

[274] For another definition of collective crime: „Collective crime is an act committed by a significant number of the members of a group, in the name of all members of that group, with the support of the majority of group members, and against individuals targeted on the basis of their belonging to a different group." N. Dimitrijevic, *Duty to Respond – Mass Crime, Denial and Collective Responsibility* (Budapest: Central European University Press, 2011).

effort would weaken the fragile system of international repression which was so cautiously built up in the recent decades by an interaction of different fields of international law.

Are wars collective in nature?

Fletcher, referring back to Rousseau's explanation in the Social Contract of the two understandings of popular will, makes a distinction between the aggregative and associative understanding of "collective": the popular will in the aggregative sense is a sum of the will of individuals (*la volonté de tous*), in the associative term it is the will of the society as an abstract entity (*la volonté generale*), abstracted from the individual will.[275] If we talk of collective guilt and responsibility, we obviously have to mean the associative understanding of collective. We then have to see whether war is collective in the associative term, in other words, whether war is an expression of the will of the abstract state or society or whether it is simply an add-up of individual wills and actions.

Fletcher's starting point is that aggression, crimes against humanity, genocide and war crimes are collective in their character. He argues for this view by saying that war is a collective enterprise by its nature: as an example, the practice of taking and caring for prisoners testifies to the collective character of armed confrontation. According to his opinion, the nature of war entails that "[t]he person who goes to war ceases being a citizen and becomes a soldier in a chain of command." Additionally, "war suppresses the identity of the individual soldier and insulates him or her from criminal liability; on the other hand, the international legal order now holds individuals accountable for certain forms of immoral and indecent treatment of the enemy. When an individual commits a war crime, he or she breaks out, at least in part, from the collective order of war and emerges as an individual guilty of violating a prohibition adopted in the international legal community."[276]

As wars, by definition, are waged not between individuals but between states and/or non-state entities or groups, we can easily agree in general that war is collective in nature. At the same time we have to make a distinction between how a war is *started* and what acts are perpetrated *during* war, in other words, between aggression and war crimes and how much either of these is collective by nature. Namely, it may be possible to think of a situation where the nation as a

[275] Fletcher, *supra* note 5, at 1509.
[276] Fletcher, *supra* note 5, at 1518.

whole demands the starting of a war against another nation by expressing public opinion and putting pressure on its leaders. Although this may easily occur, the public will may not always be behind the leaders: the United Kingdom entering the war on the side of the US against Iraq seems to be a good example where the leaders of the state went opposite the will of the people and lead the nation into a war which the nation itself apparently did not want.[277] So was this a war collectively fought by the British against Iraq?

Taking the Rwandan genocide as another example, a great number of persons were tried for committing genocide, and in the public mind, it was the "Hutus" collectively who were massacring the Tutsis, therefore the war seemed to be a collective conflict between the Hutus against the Tutsis. This was a rare event where it was not only a military force or a militia carrying out the violations, but included a great part of the population themselves as perpetrators.

When we talk about the responsibility of the Hutus in general – which sounds like collective responsibility –, looking at the criminal procedures, we realize that responsibility of "the Hutus" really means responsibility of those Hutus who actually took part in the massacres themselves. In this case we are finally not talking about an abstract collective responsibility, but about a case where a big part of the population not only supported the crimes being committed, but also actively took part in it. This, in the end, is not collective responsibility, but the individual responsibility of a large number of a group: an add-up of individual responsibilities.[278]

While looking at war as a general term we may not come to an obvious conclusion as to whether it embodies the associative or aggregative will of the collective, we are in a much easier position when it comes to examining individual acts. In such cases our only task is to establish whether it was a one-off act by a soldier (then there is no question of collective responsibility), or whether it represented the will of the society or state in the associative

[277] Investigations are currently undergoing in the UK about Iraq (the "Iraq war enquiry"), including the run-up to the invasion of Iraq. The investigation conducted so far supports that at least a bigger proportion of the nation did not support the war. For an update on the enquiry, see The Iraq Inquiry, available at: http://www.iraqinquiry.org.uk/ (visited 2 February 2012)

[278] At the same time one has to acknowledge that genocide, *per definitionem*, often involves a whole group as perpetrators. Many writers therefore raise the question whether responsibility of criminal groups, such as the *Interahamwe*, would be the adequate response. "It is important to keep in mind that our claims apply to particular kinds of grave injustice, namely, those stemming from hatred of a group". „[…] notions of criminal responsibility rooted in ideas of individual guilt do not provide good models for devising a sound legal and moral approach to genocide." See: T. W. Simon, *The laws of genocide: prescriptions for a just world* (Westport: Greenwood Publishing Group, 2007), at 222 and 220 respectively. The responsibility of criminal organizations is, however, not the same notion as collective responsibility. Responsibility of organizations entail conditions such as active participation in the groups, the responsibility of its leaders, etc.

sense. In the latter case we have to go further and ask whether it was really the will of the society or only the will of a group of certain individuals who are leading the society but not representing the society's associative will.

On the other hand, it would be difficult to imagine a situation where a nation as a whole in its associative sense demands and agrees with the committing of war crimes. This, of course, also depends on what kind of war crimes we consider. A nation as a whole may support that the enemy is "wiped out" – which cannot be a legitimate aim of war or particular actions during war –, but it is difficult to imagine how a whole nation may want the delay of repatriation of prisoners of war. Until this point therefore it is certainly agreeable that it is *possible* that wars are collective in nature. However, as described below, we may come to a slightly different opinion when it comes to the results drawn from this statement.

The Polish farmer: a case study

Fletcher illustrates the conflict of collective and individual responsibility arising from three factors: (i) war being an alternative legal order, (ii) international law as a source of individual criminal responsibility and (iii) domestic law as a source of individual criminal responsibility, through the following example.[279]

A Polish farmer individually takes up arms against German troops invading his country and kills three German soldiers. In Fletcher's opinion, the farmer is guilty of murder under domestic law, because the farmer is acting alone, independently of the army, so the case falls outside the collective activity that defines the law of war. Fletcher's line of reasoning is that since an attack against a state is collective, a collective self-defence applies for the state that has been attacked, therefore the attacked state, acting through its army, has the right to fight back.

As the Polish farmer was not a representative of his army, he cannot invoke the collective right of self-defence and would have to rely, instead, on individual self-defence. As the German troops did not pose a threat to his personal safety, there was no individual self-defence situation. Fletcher therefore raises attention on the collective nature of the right to

[279] Fletcher, *supra* note 5, at 1518.

fight in order to lead to an understanding of the collective nature of the guilt that may appear once a war crime has been committed.

Thinking in terms of international humanitarian law, however, it may be observed that the basic argument in this line of reasoning does not correspond to the basic understanding and principles of the law of war. It may be true that war is collective by nature: an act or a series of acts of a single person representing no one but himself cannot be considered as war. However, the very basic principle of the law of armed conflict is the principle of distinction: distinction shall be made between combatants and civilians, the former being legal targets, the latter not.

This distinction also entails that civilians are not to take part in the hostilities, and if they want to, they should join their armies and then make themselves recognizable for the enemy as combatants. But civilians taking part in the hostilities in civilian clothes, not being distinctable, would undermine the concept of distinction and so it is prohibited, under certain conditions, under both international and domestic law: not because of a lack of self-defence situation, but because feigning protected status.

The point therefore that is missing from the above example of the Polish farmer seems to be that the starting point, or underlying consideration, in international humanitarian law (IHL) is the balance between military necessity versus humanitarian considerations, not self-defence. IHL acknowledges that there is military necessity in an armed conflict, therefore makes acts permissible which are otherwise, in peacetime, not permissible. Military necessity is therefore very different from the notions of collective or individual self-defence.

The question of self-defence is not relevant in IHL as it is in ordinary criminal law, although the results may at times be similar. If we would think in traditional domestic criminal law terms, self-defence would be an important factor when a soldier is faced with a civilian pointing a gun at him: in this case we could argue that the soldier would have the right to attack this particular civilian because the soldier (or anyone, for that matter) always has the right to self-defence.

At the same time, the IHL explanation to this situation does not derive from self-defence, but from the fact that the civilian lost protection because he was taking a direct part in

hostilities.[280] In such a situation, according to the logic of IHL, it is not the existence of a self-defence situation that is to be examined to judge the legality of the soldier's act, but whether the civilian took a direct part in the hostilities or not.

We may easily realize the significance of the difference between the self-defence concept and the distinction concept in the example of deployment to the site of an attack: it has been mostly generally accepted that a civilian deploying to the place where he plans to attack is already considered as direct participation[281], therefore he can be attacked, whereas someone going to a place of attack is definitely not invoking an imminent self-defence situation in ordinary criminal law terms.

The rationale of this difference can also be demonstrated through weighing the legality of an attack under the proportionality principle under IHL. Whereas the self-defence concept concentrates on an imminent threat to one's life and acknowledges proportionate reaction as legal; in addition, it also excuses disproportionate responses due to the understandable shock one experiences under such threat, the IHL logic concentrates on the prohibition of attacking civilians and the requirement of an attack – to be more precise, the civilian casualties – to be proportionate compared to the military advantage anticipated. Therefore not every legal attack under IHL would be legal under the self-defence concept[282], and the other way around: not every legal or excusable act under self-defence would be legal under IHL[283].

A further difference between the outcomes of the two concepts appears with respect to the legality of attacking soldiers: in an armed conflict, it is equally lawful to attack a sleeping soldier who actually does not pose any imminent threat to the enemy, as it is lawful to attack him while he is in active combat. Therefore, if our starting point in the understanding of IHL would be self-defence[284], there would be different rules applicable to the party that attacks

[280] Article 51 (3) Additional Protocol I: „Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities".
[281] See International Committee of the Red Cross, *Interpretative Guidance on the notion of direct participation in hostilities under international humanitarian law* (May 2009, Geneva), at 67. Also available with the same title: 872 *International Review of the Red Cross* (2009)
[282] For instance in case a proportionate attack is carried out, resulting in the death of two civilians. In such a case the soldiers may not be under imminent threat (as required by the self-defence concept), therefore they may not be in a self-defence situation, while their action may be legal under IHL under the proportionality principle.
[283] A soldier cannot argue for the excusability of an excessive response the same way as it would be acceptable under self-defence: if a soldier is attacked, he may defend himself, but the legality of his reaction will be judged under IHL terminology, and not under the self-defence concept. For instance he cannot claim that due to the psychological shock (excessive response being excusable in case of self-defence) he bombed an entire house because he was shot at from that house. However it must be noted that self-defence, be it proportionate or not, cannot be used as an excuse for acts constituting violation of IHL.
[284] The present article does not discuss self-defence in the understanding of the right to go to war, i.e. *ius ad bellum*.

first in an actual combat situation, as usually the attacker is not in an imminent self-defence situation. Therefore it would be wrong to originate IHL rules from the concept of self-defence since that would result in a different outcome than that is put down in the IHL treaties.

Coming back to the case of the Polish farmer, one has to note that the only exception in IHL where a civilian becomes combatant if participates in the hostilities without being member of the army (or militant group) is *levée en messe*[285], which entails that the civilian population in unoccupied territories, on approach of the enemy, has the right to take up arms spontaneously and is not to be punished thereof, if they haven't had the time to organize themselves, provided that they carry their arms openly, hence, are distinctable[286].

There are two interesting issues in *levée en messe*. One is the acceptance of the right of the civilian population in this case to participate in the hostilities, an act otherwise not foreseen under IHL[287]. One may translate this permission as a right to "collective" self-defence, but again, there are significant differences if we look at this case from a self-defence point of view and an IHL point of view. If we regard self-defence and the collective nature of the attack/counter-attack, we have to examine whether the farmer was actually in a self-defence situation. As long as he was not, he was not entitled to fight back. If there was a group of Polish farmers, the situation would be the same.

Under IHL rules, however, we must examine whether the enemy was approaching, whether the farmers had time to organize themselves, whether the taking up of arms was spontaneous and whether they carried their arms openly. The soldiers threatening them personally is not an issue under *levée en messe*. The criteria are, obviously, very different.

A further remarkable issue about *levée en messe* is the strict condition of carrying arms openly. This condition further supports the argument that the basic consideration is the principle of distinction rather than self-defence. That is to say, the obligation of distinction is such an initial factor in this rule that the lack of carrying arms openly may deprive of the right to combatant status.

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[285] Article 4 A (6) GC III and Article 50 (1) Additional Protocol I
[286] See Article 4 A (6) of Geneva Convention III
[287] Although IHL does not prohibit civilians taking part in hostilities, the „combat immunity", namely the right for combatants to attack the enemy is restricted for combatants only. Therefore the logic of IHL starts from the presumption that combatants participate in hostilities, civilians don't.

Therefore we may conclude that the permissive acceptance of *levée en messe* does not derive from the acknowledgement of the right to collective self-defence of the civilian population in unoccupied territories, but should rather be seen as a practical derivation from the obligation of distinction, acknowledging that the population who is caught "by surprise" by the approach of the enemy, cannot join its armed forces to fight against it or organize the resistance simply due to a lack of time. Indeed, as the Commentary to the Geneva Conventions suggests, *levée en messe* can exist only for a short period of time, otherwise its *raison d'être* would vanish and the civilians taking up arms would simply be civilians taking a direct part in hostilities.[288]

It could therefore be argued that when deciding whether the Polish farmer acted rightfully, the decisive element should not be the existence of the threat to his personal security, i.e. the existence of an individual self-defence situation, but rather the conditions laid out by IHL, mainly the issue whether he could have been considered a *levée en messe*. The answer to this question is relatively easy: since he was acting alone, *levée en messe* cannot be applied to him[289].

Coming back to the initial argument for collective responsibility in this particular case, the result we come to may be the same (the farmer acted illegally), however, the way that lead us here is completely different. While Fletcher's line is that war being collective, only collectives (armies) can fight it, the IHL line is that it should be combatants fighting combatants only, otherwise civilians and other innocent persons would be harmed, therefore civilians loose protection if taking a direct part in hostilities because otherwise the principle of distinction would loose its credibility.

As a summary, although the result of the two examinations will be practically the same in case of one Polish farmer (self-defence – based: the farmer was not in a self-defence situation therefore attacking the soldiers was illegal; IHL – based: *levée en messe* can be applied only to "*en messe*": a group of persons, therefore attacking the soldiers was illegal since the farmer was acting along), we may come to two different results if we regard a group of Polish farmers (self-defence – based: no self-defence situation therefore the act is illegal; IHL – based: if those criteria which we have specified above are fulfilled, the act could be legal).

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[288] J. S. Pictet (ed.), *Commentary to the III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1960), at 68.

[289] According to the Commentary: „The provision is not applicable to inhabitants of a territory who take to the „maquis", but only to mass movements which face the invading forces". See *supra* note 19, at 67.

What is collective will?

If we want to establish that war is an expression of the associative collective's will, we have to face questions such as what about those parties or people who oppose the war, who approved the war (was it the government, the parliament or the result of a referendum), did those who oppose the war have a chance to actually do something against it,[290] do those who did not do anything for the war also share responsibility,[291] or how far a member's obligation go to prevent injustice[292]. We should then also examine the individual acts in war and whether these are acts representing the associative collective will or whether these are simply expressions of the individual's will, against the will of the associative collective.

Collective guilt and responsibility presuppose collective will. But what is collective will? Does the will of the government or the army necessarily represent the collective will of the nation or the citizens? Does non-action of citizens of a state to stop atrocities carried out by their government or armed forces represent a collective will to actually commit the atrocities?[293] What if we are talking about a suppressive state and every expression of discontent is harshly punished? How far do the obligations of citizens go to "escape" collective guilt?

When we talk about collective guilt, we usually think of events such as the Nazi persecution of Jews, gypsies and other groups. But if we think of collective guilt in relation to other events we may be less sure: for example are citizens of the United Kingdom responsible for mistreatment of prisoners in Iraq? Although they may have expressed disagreement, did they do everything in their power to stop it? Could they have protested more? Did they actually have the power to stop it?

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[290] Mellema argues that unless a moral agent (a member of the collective) personally contributes to a state of affairs in some suitably weak sense, the person escapes membership in a collective that bears moral responsibility for it. See G. Mellema, 'Collective Responsibility and Contributing to an Outcome', 25 *Criminal Justice Ethics* (Summer/Fall 2006), at 17 and 20.
[291] Larry May examines the basis for the responsibility of the individual for deeds committed by the collective in three factors: (1) attitudes of the individual that makes harm more likely to occur, for example sharing racist attitudes, (2) failure to act both on the individual and collective level, (3) roles and positions of persons within their communities. See L. May, *Sharing responsibility* (Chicago: University of Chicago Press, 1992), at 1. and 5. May argues that individuals should bear responsibility for the collective, even if they did not participate in it directly and could not have prevented it.
[292] „If I fail to do whatever I can to prevent them, I too am guilty." Karl Jaspers, *The Question of German Guilt* (New York: Capricorn Books, 1961), at 36.
[293] For a discussion on the responsibility of bystanders, see O'Donnell, *supra* note 3, at 636-637.

Furthermore, how can an entire nation be guilty? If the nation or most members of the nation actively contributed to the commission of the crimes, like in Rwanda, the collective guilt could be argued, but even in this case it was not *all* Rwandan Hutus who committed the crimes against Tutsis so the "collective" who are responsible would not be more than the sum of the individuals who did actually participate in the genocide. But would we establish collective guilt if the nation did not actively contribute but passively watched? How could a nation escape collective guilt in such a case and what would they have to do? Protest? How much and how? A member of the government or parliament can step down to protest but what can the ordinary citizen do? What if protesting is harshly punished? What if it reaches no result? What if some protest stronger than others?[294]

What is even more remarkable is that the argument towards collective guilt can be turned to its reverse: making war crimes a collective action and therefore attaching collective guilt to it, one may come to the conclusion that if the nation cannot be held guilty of a crime than the persons acting on its behalf cannot be guilty either. Lewis notes the danger in relying too heavily on collective responsibility: in his, view, this is a way to the view that responsibility does not really exist, or at least well on the way to finding it easy to ignore.[295]

Fletcher takes the Sharon-case as another example. In the *Sharon*-case, a complaint was filed in 2001 in Belgium against Ariel Sharon and others, Sharon Israeli Minister of Defence at the time of commission of the crimes and Prime Minister at the time of the proceedings, for alleged crimes – war crimes, crimes against humanity and genocide – committed against Palestinian refugees in Lebanese refugee camps in 1982. The case was filed by victims of the massacre based on universal jurisdiction.

Eventually, the Belgian courts refused the case, as a consequence of strong Israeli and US pressure. The case brought huge attention because it was raised in a state that had no link with the alleged perpetrator, the scene of the crimes or with the victims, therefore was a case of 'pure' universal jurisdiction.[296] Fletcher is of the opinion that „the worst part of this tendency

[294] For similar questions see J. McMahan, 'Collective Crime and Collective Punishment', *Criminal Justice Ethics*, (Winter/Spring 2008), at 7.
[295] H.D. Lewis, 'The Non-Moral Notion of Collective Responsibility', in P. A. French (ed), *Individual and Collective Responsibility* (Cambridge: Schenkman Books, 1998), at 130.
[296] For an analysis of the case, see D.R. Hurwitz, 'Universal Jurisdiction and the Dilemmas of International Criminal Justice: The Sabra and Shatila Case in Belgium', in D. Hurwitz, M. L. Satterthwaite, D. Ford (eds.) *Human Rights Advocay Stories*, (Foundation Press, 2009) and Amnesty International, *Universal Jurisdiction: Belgian Court has Jurisdiction in Sharon Case*

toward universal jurisdiction is the belief that if Sharon had been guilty of a crime against humanity, he could have been judged and sentenced in abstraction from the nation in whose name he acted as military commander. Belgium was not in a position to judge or even to think about the complicity of the entire Israeli nation in any crime Sharon might have committed."[297]

We can come to two conclusions from such a statement: (i) if we cannot suppose that the entire Israeli nation was guilty than the individual responsibility of the agent vanishes, (ii) they share responsibility: the agent and the nation. Both conclusions can be dangerous and go directly opposite one of the greatest developments in international law, individual criminal responsibility.

If we were to accept that an agent of a state can only be responsible for an international crime if the nation as a whole can be held responsible than this could be an easy way out for agents from responsibility. If we were to accept that responsibility is shared between the agent (individual) and the nation, then again we hit non-answerable questions such as how much the nation is guilty and what would be the proportion of guilt shared.

Fletcher further argues that whatever responsibility Sharon bore for the massacre in Lebanon, his responsibility is shared with that of his nation and therefore mitigated because he was acting as agent of the state. But how can one be sure about this? Talking in general terms, what if it is the individual will of the agent of the state to wipe out another group of people? What if this is his own personal belief and he uses the state he is representing to execute his plan and so the plan becomes state policy? How can we prove the difference?

And again, what result would such an approach have and where would such a theory lead? If we stick to individual responsibility in our example, the agent can escape responsibility if he steps down from office before the acts are committed, but if he doesn't step down, it makes it his own individual responsibility.

If wars are collective in nature, could this result in collective responsibility for war crimes?

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to Investigate 1982 Sabra and Chatila Killings (2002), available online at http://www.amnesty.org/en/library/info/IOR53/001/2002/en (visited 6 February 2012).

[297] G. P. Fletcher, *Romantics at War* (New Jersey: Princeton University Press, 2002), at 65.

While we may accept that in war a soldier is not acting on his or her own behalf but on behalf of the state, the point of the concept of individual criminal responsibility is exactly not to let such individuals hide behind the state's "will" or behind orders given by superiors in the name of the state. A state is only an abstract entity which cannot hold criminal liability; therefore it is unacceptable that individuals could commit atrocities in the name of the abstract state without any consequences.

Fletcher argues that the crimes under the Rome Statute are collective, because they are prosecuted for crimes committed by and in the name of the groups they represent. "(…) The individual offenders are liable *because they are members of the hostile groups* that engage in the commission of these crimes."[298] If we look at the nature of war crimes, we may come to the conclusion that this statement can easily be contested. Namely, it is argued that offenders are prosecuted for crimes committed by and in the name of the groups they represent. While this may sound correct for genocide and crimes against humanity where a specific intent (this can also be the intent of one person only, although it is difficult to imagine such a case) or the widespread or systematic nature of the act are constitutive elements of the crimes, these elements could make them "collective" in nature.

War crimes, on the other hand, can easily be committed out of a purely individual intent: someone wanting to loot an enemy civilian for his own benefit or behaving in an inhumane way with detainees out of personal cruelty. These acts can well be committed without a state intent being in the background. Naturally state intent may be in the background for example in case of torturing of prisoners to gain information, but it would be simplicist to say that all war crimes are part of a state policy.

The Rome Statute says: "[t]he Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes." [299] (emphasis added). McMahan argues that the reason for the formulation "in particular" is not the collective nature of the crimes but rather the limited resources of the ICC and the intention to deal with 'big' cases. Would this be otherwise and would the collective (state) element be required for war crimes, it would include corresponding

[298] Fletcher, *supra* note 5, at 1525.
[299] See Article 8 (1) of the Rome Statute of the International Criminal Court.

conditions in the elements of war crimes.[300] If we go through the elements of war crimes, it becomes apparent that none of them include any reference to the requirement of collectivity, systematic nature or any similar condition. That is why it is easy to agree with McMahan, having to add that crimes committed and explained as state policy are particularly dangerous because the perpetrators are hiding behind the state policy so it is increasingly important to prosecute them individually to make sure that everyone thinks twice before executing or forming such state policy.

The 'defence' of the collective element with respect to war crimes, saying that they had been committed in the name of the group the perpetrators represent and thus the individual's responsibility shall be diminished with that of the collective, is actually a reverse argument of the superior order defence. In the superior order defence, the subordinate is trying to defend himself from criminal liability by saying that he was given orders by his superior. Such a defence has, rightly, not been acceptable at and since the Nuremberg Tribunal.[301]

In the case of the "collective" defence, the leader (or superior) is defending himself by saying that he only executed the will of the group. As much as the law says in the superior order case that the subordinate shall not carry out illegal orders, the superior shall also not carry out an illegal "mandate" coming from the collective. In such a case the will of the collective, even if illegal, would remain to be a will without action. The justification is also similar: in the superior order case the soldier defends himself by saying he did not actually want to carry out that act, and in the "collective" defence case the superior may also say it was not his will, but the will of the collective. This is why it was so important not to accept the superior order defence and this is why, in my opinion, it is equally important not to accept the "collective defence" either.

Similar questions were raised when thinking about the forms of liability during the Nuremberg Tribunals. In order to overcome difficulties of proof, evidence and a big number of defendants, an attempt was made to determine criminal liability for acts committed by others based on membership in a *criminal organization*. However, due to the recognition that individual criminal responsibility requires personal culpability, it was accepted that mere

[300] J. McMahan, 'Collective Crime and Collective Punishment', *Criminal Justice Ethics* (Winter/Spring 2008), at 5-6.
[301] Nuremberg Charter, Article 8: „The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

membership in an organization was not enough in itself to base criminal responsibility for acts committed by (other) members of the organization, it also required knowledge of the criminal purpose or acts of the organization and that the person *voluntarily joined the group* or committed the acts himself. Even in this form, this solution remained to be strongly contested.[302]

Worth to note that a further development of the notion of criminal organization was the Prevention of Terrorism Acts in the United Kingdom[303], which stipulated that law makes certain organizations illegal and thus making mere membership a criminal offence. Here, however, the criminal offence stands not for certain acts committed by the organization but for membership alone. In such cases knowledge of criminal purpose of the organization or the commission of criminal acts was obviously not a condition for criminal liability of the member. These measures against the Irish Republican Army were then further developed by subsequent other counter-terrorism acts throughout the world following the 9/11 attacks, the examination of which extends the framework of the present article.

The above referred form of liability in the Nuremberg Tribunals can be seen as similar to the collective responsibility of a group, but is based on completely different logic and is more a form of indirect responsibility, therefore can not be considered as a form of collective responsibility.[304] The difference lies in that the above form of responsibility requires that the person is free to decide whether to join the group or not, which is not a choice one can make with regard to being a citizen or national of a country.[305]

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[302] See M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court, Genocide, Crimes Against Humanity and War Crimes* (Cambridge/Antwerp/Portland: Intersentia, School of Human Rights Research, 2002), at 300.

[303] Prevention of Terrorism (Temporary Provisions) Act 1989 (repealed), available online at: http://www.legislation.gov.uk/ukpga/1989/4/contents (visited 6 February 2012)

[304] The ICTY Statute and the decision in the *Tadiç* case also foresee the element of common design as a form of accomplice liability. This form of liability went so far in the *Tadiç* case that the Appeals Chamber held that criminal liability exists for acts that are not part of the common plan if it was foreseeable that members of the group would commit such acts and the accused willingly took that risk. However, these provisions „cannot be interpreted as including a concept of collective responsibility." See Boot, *supra* note 33, at 292 and 302.

[305] Significant discussions over conditions of holding an individual responsible for mere participation in a criminal organization unfolded exactly around this issue: whether there are escape routes for coerced and ignorant members of the organization. In the end, the Tribunal examined the criminality of the organizations and gave leeway for individuals on grounds of their role in the organization. As for background and discussions on the development of responsibility based on participation in criminal organizations at Nuremberg, see: T. W. Simon, *The laws of genocide: prescriptions for a just world* (Westport: Greenwood Publishing Group, 2007), at 227-234. Simon earnestly criticises the views that strongly stick to individual criminal responsibility and argues for the need to establish organizational responsibility. "[…] the failure even to consider organizations as criminal in contemporary debates over war crimes tribunals supports the claim that we have learned the wrong lessons from Nuremberg." See Simon, at 233.

The notion of responsibility of criminal organizations is therefore not to be confused with collective responsibility: in the case of responsibility of criminal organizations the member of the organization was aware of the criminal objective and joined voluntarily; and was thus not simply a member of a group or organization in the name of which persons or groups committed the atrocities.[306] Simon argues for a need for responsibility of organizations by indicating that "participants belonged to organizations, whose structures proved critical to carrying out genocide or a grave injustice."[307]

This, however, requires that such participants were not simply members of the group but were active members of it, contributing to the commission of atrocities. This is an enormous difference between responsibility of organizations and collective responsibility in that in the latter case merely being a member of the group would be enough for the responsibility of the members.[308] To put it bluntly, the difference is similar to that of the responsibility of the SS and the entire German nation.[309]

In the case of collective responsibility, we therefore again come back to the question how a citizen escapes collective responsibility if it was not his own will to be the part of the "group" at all. Obviously thinking about renouncing citizenship is not an answer to this question. Therefore accepting the rationale of responsibility of criminal organizations or members of such organizations is not the same as accepting the rationale of collective responsibility.

Similarly, thinking about guilt and responsibility for the My Lai massacres, many ask who was actually to blame for these obvious violations. Baier makes a sharp contrast between guilt and responsibility, claiming that Lt. Calley may have been guilty of murdering people at My Lai, but he was definitely not the (only) one responsible.[310] But again, the author runs into asking how far society may be held responsible for these acts and what the criteria for such

[306] This question raises the issue of objective responsibility as well. For a discussion on objective responsibility, see B. J. Gellér, *Nemzetközi Büntetőjog Magyarországon, Adalékok egy vitához* (Budapest: Tullius Kiadó, 2009), at 192-193.
[307] Simon, *supra* note 36, at 240.
[308] Mellema, on the other hand, argues that noone is a member of the collective unless he/she has done something or omitted to do something that warrants membership in the collective. See G. Mellema, 'Collective Responsibility and Contributing to an Outcome', 25 *Criminal Justice Ethics* (Summer/Fall 2006), at 17.
[309] „Organization responsibility occupies a more realistic and more defensible middle position between […] holding an entire nation morally responsible and Nuremberg Tribunal's ultimately holding only a few leaders criminally guilty. Whatever the complicity of the nation's population might be, atrocities on a mass scale are carried out, generally, not by the population as a whole but through organizations within a nation state." See Simon, *supra* note 36, at 242.
[310] K. Baier, 'Guilt and Responsibility', in L. May and S. Hoffmann (eds), *Collective responsibility: five decades of debate in theoretical and applied ethics* (Savage, MD: Rowman and Littlefield Publishers, 1991), at 203.

responsibility are.[311] He finally comes to the conclusion that members of the society can escape collective responsibility by formulating objections or engaging in civil disobedience, furthermore, even those who agreed with the war may escape collective responsibility since they may not have agreed to the commission of war crimes.[312]

When breaking down collective responsibility to the individual, we thus run into cases where the innocent individual would also share the responsibility of those who are not innocent.[313] And so finally, we come to a similar conclusion: we may want to say in general that collective responsibility exists, but when we try to break it down and go into details, we are left with no meaning to it.

Therefore we may conclude that although wars are indeed collective in nature, it does not follow that war crimes are also collective in nature. While it may be easy to imagine some war crimes as being an articulation of a collective will, neither the formulation of the grave breaches in the Geneva Conventions and their Additional Protocols, nor war crimes listed in the Rome Statute include any required elements of collectivity.[314]

What's the point?

The reason individuals were directly made subject to criminal liability under international law was to ensure that international law cannot be neglected through hiding behind the abstract's will by persons responsible for states' legislation or for government orders given to individuals. While Kelsen held that international offences were attributable to the state only[315], and in earlier times obeying government orders resulted in that individuals remained immune from criminal prosecutions, the Nuremberg Charter[316] and subsequent international instruments[317] expressly established that the official capacity of defendants was not an accepted ground to excuse them from criminal responsibility. While the immunity of a person

[311] Baier, *supra* note 41, at 209-210.
[312] Baier, *supra* note 41, at 216.
[313] „Concluding from these cases that the innocent somehow share in the wickedness of the guilty would be foolish. (…) [e]ven the most ardent defenders of collective responsibility must concede that these arguments are fallacious. Once again, moral responsibility belongs essentially to the individual." See G. F. Mellema, *Collective Responsibility* (Amsterdam – Atlanta: Editions Rodopi B.V., 1997), at 36-37.
[314] See also M. Boot, *supra* note 33, at 304.
[315] H. Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law', *Jewish Yearbook of International Law* (1948), at 226. and 230-231.
[316] Nuremberg Charter, Article 7: „The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."
[317] See Article 7(2) of the Statute of the ICTY, Article 6(2) of the Statute of the ICTR and Article 27(1) of the Rome Statute of the ICC

because of his official capacity is not exactly the same question as collective responsibility, it shall be realized that criminal responsibility was brought down to the individual's level precisely because acts, in the end, are committed by individuals.

Some experts argue that there is an excess of responsibility for war crimes as opposed to individual responsibility, in that not only the person who actually perpetrated the act should be held responsible, but also those who created an environment and scheme in the framework of which such atrocities had been committed.[318] One can fully agree with such an opinion in the case of certain kinds of war crimes, noting, that this does not establish collective responsibility as such, it rather places a responsibility on the individual in a different form or means a different mode of liability – be it command responsibility or responsibility based on the notion of joint criminal enterprise – to persons other than those who actually, directly carried out the acts.[319]

"International criminal law has been regarded as controversial and innovative precisely because it makes individuals liable for infractions of international law's most fundamental norms. The International Military Tribunal at Nuremberg declared in its final judgement that the hideous crimes under investigation were committed 'not by abstract entities but by men'."[320] It was exactly the acknowledgement of individual criminal responsibility that was such a landmark step at the Nuremberg tribunals, following the similar provision of the Treaty of Versailles.[321]

The Draft Code of Offences against the Peace and Security of Mankind, drafted by the International Law Commission in 1951, also foresaw individual criminal responsibility for offences against the peace and security of mankind, and it did so exactly after the events in relation to which collective responsibility is most often cited.[322] The Nuremberg Charter did not only accept individual criminal responsibility, but also negated the possibility of defence

[318] See for example Ainley, *supra* note 4, at 6-7.
[319] The view that this is a specific form of liability was underlined in the *Tadiç* case: „[The ICTY statute] does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of his plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable." See *Prosecutor v Tadiç*, Appeals Chamber, Judgment of 15 July 1999, para 190
[320] G. Simpson, *Law, War and Crime, War Crime Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), at 55.
[321] For more on the Nuremberg and Tokyo Tribunals and their heritage, see E. Greppi, 'The evolution of individual criminal responsibility under international law', 835 *International Review of the Red Cross* (1999), at 533-536.
[322] See Greppi, *supra* note 52, at 539-540.

on the ground of having been acted as Head of State or a government official or under the orders of the government or a superior.[323] Principle IV adds: "provided a moral choice was in fact possible to him". This means that if the person had no choice but to commit the acts (e.g. whether he had the possibility to refuse the order or he put his own life in imminent risk if he did so) he may escape liability.

So then how can we talk about collective responsibility if in fact law recognizes that it is possible that certain individuals did not have another choice? This question can only be answered on the individual's level by judging whether he had a choice or not to not commit the acts. But if we start looking at the motives and possibilities of individuals, we cannot talk about collective responsibility anymore.

Whereas discussions on collective moral or social responsibility do have their places[324], if we would accept that there are collective wrongdoings and collective guilt in any kind of criminal terms, what would be the next step? A wrongdoing must be punished, but by whom and who would be punished? Collective wrongdoing would call for a collective punishment of a state or certain groups of people which is very difficult to prove and to imagine in international law. Would that not lead to an indiscriminate punishment that would further tension?[325] What body would establish the collective responsibility of an entire state or group based on what criteria? Under what circumstance could certain individuals, not agreeing with collective will and belonging to that group, escape such a responsibility? How could we avoid that such a body is politicized? With the UN's inability to respond to gross violations due to a lack of interest of states the UN would undoubtedly not be fit for such a task. Although politics surround the International Criminal Court as well, in the end, persons are hoped to be prosecuted based on purely legal basis, in accordance with the rule of law.

Another remarkable aspect is the lack of mechanisms in international law for holding a state responsible for war crimes *vis-à-vis* a victim. If we put responsibility for violations of the law of war in contrast with violations of human rights, we come to an interesting observation. In

[323] Principles III and IV, „Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal", adopted by the International Law Commission of the United Nations, 1950, see also Greppi, *supra* note 52, at 535.
[324] May argues that in case individuals would have a feeling of shared responsibility for what their communities are doing, this could prevent many wrongdoings. See May, *supra* note 22, at 8-9. This, however, is part of a socio-ethical, not legal, consideration.
[325] O'Donnell notes that in a post-conflict situation the ascription of collective guilt would negate the possibility of reconstruction or rehabilitation. She sees the danger in tempting to consider that large-scale problems need large-scale solutions and thus synonymising large-scale with sweeping or indiscriminate. See O'Donnell, *supra* note 3, at 634

case of war crimes there is an institutionalized individual criminal responsibility and no institutionalized state responsibility (in other words there is no specific court to establish state responsibility for grave violations of IHL), while in the case of human rights violations there is both institutionalized individual and state responsibility.

Let's think of two examples. If a war crime is committed, an individual may be held responsible either in front of a national or an international court. Although we speak of the responsibility of a certain state for violating IHL treaties, this is not an institutionalized legal category, only in the general understanding of state responsibility for any violation of international law. For a human rights violation we either have an individual accountable in front of a national court (e.g. for slander against good name) or a state in front of an international body, such as the European Court of Human Rights (ECtHR).

There is no similar mechanism establishing state responsibility for war crimes as the ECtHR does for human rights violations *vis-à-vis* an individual. The reason would be that the original idea of human rights is that the state should not abuse its powers against the individual so it is understood to be a protective measure given to the citizen against the state. Therefore the ECtHR is to hold states responsible *vis-à-vis* claims of individuals. There is no such mechanism for war crimes, partially because it is not self-evident that war crimes are committed by states.

At the same time, holding states responsible for human rights violations has only partially been effective. Human rights law also lacks the sharp teeth of a more effective mechanism. As Simpson puts it, "[t]he move to individual responsibility, then, in international criminal law, (…) has also been hailed as a way of giving human rights law the bite it was thought to lack".[326] Höffe adds, that "the difference between citizens and aliens no longer applies because the term 'crime,' both public and private, was not focused on citizens but on human beings." Thus, a system of human rights or a universal human criminal law was already evident in Roman times, though admittedly only regarding an objective not a subjective conception of law. "Whether morality, arson, theft or damage to property" were concerned, in

[326] Simpson, *supra* note 51, at 57.

all of these questions, Romans merely sought "the ethical responsibility and not the personal status of the perpetrator".[327]

So what's the point in recognizing the notion of collective guilt and responsibility for war crimes? While individual criminal responsibility has a result in that an individual can be held criminally liable and be punished, a collective cannot bear criminal responsibility therefore collective responsibility would be a theoretic notion with no practical results or consequences, even more, it could divert attention away from individual responsibility.[328] So what purpose would the acceptance of the notion of collective guilt or collective responsibility serve? State policy is formed and executed by individuals and since the state is an abstract entity, the best solution there is, is to catch the individuals. If in the end there is not one individual willing to execute a cruel state policy fearing criminal punishment, we have reached our goal.

Law and enforcement should work together and law can only be effective if it can be enforced. International law generally suffers from a lack of top-down enforceability. The measures available in international law to enforce its rules are weak, hazy and not effective. It is precisely individual responsibility under international criminal law that makes international norms enforceable. This notion is a rare but welcome constraint on national sovereignty.[329]

This question gets particular relevance today as the International Criminal Court starts functioning. It is concentrating on punishing individuals and it puts the primary responsibility of prosecution on national courts who are also dealing with individuals. This system is hoped to result in an increased activity of prosecution of war crimes around the world, both on the international and national level. Moreover, to look at a broader picture, collective responsibility would not help peace-process either. To stigmatize a whole nation as guilty in committing a crime is a seed for further violence and hostilities.[330]

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[327] O. Höffe*:* 'Moral Reasons for an Intercultural Criminal Law. A Philosophical Attempt', 11:3 *Ratio Juris,* (September 1998) 206-27, at 210.

[328] „Once a group is identified as collectively responsible for a harmful situation, we forget about the individual actions which lead to this situation." Mellema, *supra* note 44, at 37.

[329] See Simpson, *supra* note 51, at 55.

[330] „An important idea behind the notion of individual criminal responsibility for certain conduct is to avoid stigmatizing a particular group of people as criminal, including, for instance, a particular party to an armed conflict, as this may make future peace and reconciliation more difficult to achieve." See Boot, *supra* note 33, at 304.

Furthermore, it seems there is anyway too much mitigating factor for crimes committed in war and mostly only a small proportion of the real perpetrators are held responsible.[331] So it seems neither correct nor helpful to engage in a discussion over collective responsibility, because "[o]nly individualized justice could ensure the relevance and meaningfulness of international law. Abstract entities were out, flesh and blood human beings were in".[332]

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[331] "There is already altogether too much mitigation of legal liability for criminal action in war. A single act of murder in domestic society is treated as a serious matter by the law. For a variety of reasons—retribution, social defense, deterrence, and so on—it is held to be of great importance to bring the murderer to account. When an unjust war is fought, the result may be the wrongful killing of many millions of innocent people—murder millions of times over—but who is ever brought to account?" See McMahan, *supra* note 25, at 11. See also: "when unjust wars are fought and vast numbers of innocent people are slaughtered, it usually turns out, by some sort of legal alchemy, that no one is responsible, no one is guilty, no one is liable, and no one is punished—a happy outcome for all those whose guilt is reciprocally diminished by the guilt of others until there is none left for anyone at all." See McMahan, *supra* note 25, at 11.
[332] Simpson, *supra* note 51, at 56-57.

8. Domestic procedures on serious international crimes: interaction between international and domestic jurisprudence and ways forward for domestic authorities

Introduction

The Hungarian Public Prosecutor's Office rejected an application related to the eventual responsibility of Hungary's ex-minister of interior for persecutions on political ground and other inhuman acts possibly constituting crimes against humanity committed after the 1956 revolution.[333] The rejection by both the Metropolitan and Public Prosecutor's Office was followed by great astonishment among criminal and international lawyers in Hungary[334], mainly because the decision simply omitted to genuinely examine whether the acts could constitute crimes against humanity, resulting in rejection of the complaint due to elapse of time.

This case demonstrates a problem that is not restricted to Hungary only, namely the uneasiness of prosecutorial and judicial institutions to deal with international law. This phenomenon has already appeared in several states; some states already overcame this problem, some didn't. The aim of the present article is to examine why domestic prosecutors and courts are reluctant to apply international law, to study whether there is interaction between international and national jurisprudence and to see what measures could assist in overcoming this problem.

Why are there only so few domestic procedures on serious international crimes[335]?

A common characteristic of repression of war crimes is the relatively meagre number of national procedures. In fact, there are few other international obligations that are so poorly

[333] „The Biszku-case", Municipal Prosecutor's Office, NF 27942/2010/1 (29 October 2010) and Public Prosecutor's Office, NF. 10718/2010/5-I (1 March 2011)

[334] For an analysis of the case, see Gellér Balázs' opinion in the following articles: Kulcsár Anna: Biszku-ügy: mégis nyomozni kellene, Magyar Nemzet, 15 November 2010 (available at: http://mno.hu/migr_1834/biszku-ugy_megis_nyomozni_kellene-203673, downloaded on 29 January 2012); Kulcsár Anna: Új feljelentés készülhet a Biszku-ügyben, Magyar Nemzet, 20 June 2011 (available at: http://mno.hu/migr_1834/uj_feljelentes_keszulhet_a_biszku-ugyben-191445, downloaded on 29 January 2012); 'Pénzbírság várhat Biszkura egy büntetőjogász szerint', at http://www.origo.hu/itthon/20110127-penzbirsaggal-vegzodhet-a-biszku-elleni-vademeles.html (downloaded on 29 January 2012) and the opinions of Gellér Balázs, Gellért Ádám, Hoffmann Tamás and Lattmann Tamás in: Albert Ákos: ' "Nagy kihívás", de nem lehetetlen Biszku megvádolása', at http://www.origo.hu/itthon/20101125-nem-csak-biszkut-vadoltak-a-nemzetkozi-jog-alapjan.html (downloaded on 29 January 2012)

[335] By serious international crimes, the present article refers to war crimes, crimes against humanity and genocide.

complied with as the obligations on repression and effective application through judicial enforcement.[336] At the same time, effective prosecution of the perpetrators of the most serious crimes cannot be achieved without the input of domestic courts[337], because "[e]ven with the creation of new international tribunals in this decade, national tribunals remain essential in deterring and remedying violations of the laws of war."[338] As the Office of the Prosecutor of the ICC put it, there is a risk of "an 'impunity gap' unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used"[339].

The relatively small number of national procedures may have several causes. First, such crimes are usually not isolated, therefore with one case there are several accused which leads to loads of cases to be tried. Second, procedures concerning serious international crimes require special knowledge of international law and international jurisprudence, it calls for a special application of national law in conjunction with international law, and the primary and secondary sources may be difficult to access mainly because of language problems. Third, such procedures tend to be expensive and time-consuming: because of the distance in place and time between the place of the procedure and where the crime was committed, evidence is difficult to reach, witnesses live far away and often don't speak the language of the place of the procedure and finally, cooperation with other states' authorities is necessary and thus the proceedings are dependent on the cooperation of the state of *locus delicti*. Due to these reasons it is not difficult to imagine why a prosecutor or a judge would be hesitant to have a case concerning serious international crimes.

Still, probably the biggest challenge is that although - due to the transformation of international treaties into the national legal order - prosecutors and judges are technically applying national law during the procedure, they are, in the end, in need of specialized knowledge of international law. It is not enough to find one's way around the Geneva

[336] See Ward N. Ferdinandusse (2006), Direct Application of International Criminal Law in National Courts, The Hague, TMC Asser Press, p. 95.
[337] On the importance of domestic procedures, see for instance Joseph Rikhof, 'Fewer places to hide? The impact of domestic war crimes prosecutions on international impunity', Conference Paper, 22nd International Conference of the International Society for the Reform of Criminal Law held in Dublin, Ireland from 11 July - 15 July, 2008, available at: http://www.isrcl.org/Papers/2008/Rikhof.pdf (downloaded on 27 January 2012)
[338] Ruth Wedgewood (2000), National courts and the Prosecution of War Crimes, in: Substantive and Procedural Aspects of International Criminal Law – The Experience of International and National Courts, Volume I, The Hague, Kluwer Law International, p. 393.
[339] See: Paper on Some Policy Issues Before the Office of the Prosecutor, ICC, September 2003, p.3, available at: www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf. (Downloaded on 10 January 2012)

Conventions or other relevant international treaty only, the prosecutor/judge also needs to know the corresponding literature, international jurisprudence and other related international norms in order to effectively deal with war crimes or other international crimes cases.[340] Therefore prosecutors/judges require specialized training in international law and international criminal law in order to conduct effective and high standard national criminal proceedings.[341]

Furthermore, trying a case concerning serious international crimes is not necessarily a motivating factor for the prosecutor or judge. It usually does not assist in his/her career, and because of the legal specificities and the length of the procedure, it does not help much the statistics of judged cases. Being an expert in international law or war crimes cases does not bring them further in their career path nor are they compensated in any other way for taking up such a difficult task. Prosecutors therefore may tend to drop charges based on alleged lack of jurisdiction, the denial of the international law character of the crime[342] or simply trying to extradite the person instead of prosecuting him domestically. Judges usually try to get rid of cases through putting restrictive interpretation on jurisdictional issues or trying to apply non-corresponding ordinary crimes instead of the international crime. The question gets even more complicated when it comes to trying own nationals or nationals of a friendly or powerful nation. In such cases political considerations also come in, and the prosecutor may well decide to drop the charges, or the judge may try to find reasons to exclude its jurisdiction or to exclude the criminality of the accused. Even democratic states have these considerations, and, as history has shown, they are not better in prosecution their own people than non-democratic countries.[343] A comparative analysis of behaviour of national judges has shown that judges are reluctant to apply international law if they consider that this would injure national interests.[344] Recognizing the problem of independence of national courts when dealing with

[340] For a discussion on the necessary elements to ensure effective domestic application of international criminal law, see Gellér, Balázs József (2009), Nemzetközi Büntetőjog Magyarországon, Adalékok egy vitához, Budapest, Tullius Kiadó, pp. 81-83 and 84-90.

[341] Regarding a need for international law training for judges/prosecutors, see Mettraux, Guénaël: Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes (2006), Journal of International Criminal Justice (4), 362-371, p. 371. See also Varga, Réka, Háborús bűncselekményekkel kapcsolatos eljárások nemzeti bíróságok előtt, in: Kirs, Eszter (ed.) (2009) Egységesedés és széttagolódás a nemzetközi büntetőjogban, Studia Iuris Gentium Miskolcinensia, Tomus IV, Miskolc, Bíbor Press, pp. 91-111.

[342] This is exactly what happenned in the *Biszku*-case (see footnote 2), where the prosecution did not raise charges arguing that the acts in question did not constitute crimes against humanity therefore prosecution is time-barred. Remarkable, that the prosecution did not examine nor did it explain why it had come to this conclusion, it simply stated so. See also Varga, Réka, A nemzetközi jog által büntetni rendelt cselekmények magyarországi alkalmazása (a Biszku-ügy margójára) (2011), Iustum, Aequum, Salutare (2011/4), available at: http://www.jak.ppke.hu/hir/ias/20114sz/02.pdf (downloaded on 30 January 2012)

[343] For an analysis of „minimalism and selectivity" of war crimes cases by national judicial authorities, see Ferdinandusse (2006), pp. 89-98.

[344] Benvenisti, Eyal, Judicial Misgivings Regarding the Application of International Law: An Analysis of

international law, the Institute of International Law adopted a Resolution calling on national courts to maintain their independence while interpreting and applying international law, determining the existence and content of international law, both treaty and customary or when deciding about the adjudication of a question related to the exercise of the executive power.[345]

Numerous states acknowledged these difficulties and took measures to overcome them. Many states concentrate procedures relating to serious international crimes to one bench or one specific court, hire experts to advise them on international law matters and systematically collect material and documents for their own consultation. Unfortunately it seems that virtually none of these measures have been taken in Central European countries yet, leaving prosecutors and judges with a difficult task. Nonetheless, when confronted with the issue of lack of preparedness of the judiciary to try serious international crimes, these states tend to deter the problem as being the business of the judges in which the state cannot and should not intervene – referring to the independence of the judiciary. It has to be noted that preparing and training judges to stand the difficult test of trying war crimes and other serious international crimes requires state intervention in many fields and is also a state responsibility. It needs determination, money for training and funds to allocate personnel for these special cases; furthermore, it requires the adoption of internal measures to assign such cases to specifically trained prosecutors and judges and forming an environment that makes it motivating for them to engage in these procedures.

States which are more experienced in this field have established exclusive competence for serious international cases. In Germany, it is the office of the federal prosecutor that is competent for prosecution[346], in Belgium the federal prosecutor[347], in Netherlands a special unit was established for prosecution. Still, it is not enough to assign one specific body but it must also be ensured that trained personnel are ready to accept the assignment. This is what is mostly lacking in Central European states. While in Hungary the Metropolitan Court and the Public Prosecutor have exclusive jurisdiction, there are no special units or specially trained personnel to deal with cases concerning crimes under international law. This negligence in

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Attitudes of National Courts (1993), 4 *EJIL*, p. 159.

[345] Institute of International Law, Resolution adopted at the 66th session in 1993 in Milan: „The Activities of National Judges and the International Relations of their State", available at: http://www.idi-iil.org/idiE/resolutionsE/1993_mil_01_en.PDF (Downloaded: 27 January 2010)

[346] The Federal prosecutor (Generalbundesanwalt), which has exclusive competence, has a specialized unit. See § 120 Abs. 1 Nr. 8 Gerichtsverfassungsgesetz (GVG): cases based on the Code of International Crimes are under the jurisdiction of the Oberlandsgericht and § 142a Abs 1. GVG: the federal prosecutor has exclusive jurisdiction

[347] Artikel 144*quater* of the Code of Civil Procedure (Gerechtelijk Wetboek), inserted by Article 25 of the Act of 5 August 2003, M.B., 7 August 2003

fulfilling international obligations obviously tells us something about the system, not the individual judges or prosecutors[348].

As a consequence, misinterpretation of international law in domestic procedures can most probably be cited from many countries. In Hungary, the Supreme Court opined in the *Korbély* case that the interpretation of common Article 3 of the Geneva Conventions should be drawn from Additional Protocol II.[349] What makes this opinion even more appalling is that this was formulated in connection with events that happened in 1956, before Additional Protocol II was even adopted. Although the Supreme Court fortunately later corrected this reasoning[350], it remains to be an uneasy mishap. In Estonia for instance, there is hardly any case-law, the only ones existing are related to genocide and crime against humanity committed by the Stalinist regime. Here retroactivity questions appeared, because the acts were committed between 1941 and 1949, however, the most important question, whether these acts were considered criminal according to general international law at the time was not analyzed by the national courts at all.[351]

Effective application of international law further requires that courts interpret national law in conformity with international law. This is the so-called principle of *consistent interpretation*, and it has become, according to some authors, a general principle of law.[352] This principle assists in reaching that national law does not put obstacles on the application of international law. The Hungarian Constitutional Court in its decision of 1993 also acknowledged this rule by opining that "the Constitution and domestic law must be interpreted in a manner whereby the generally recognized international rules are truly given effect."[353] On the other hand, in case of procedures related to crimes committed abroad, legal correctness is only one aspect, because „[n]ot only legislators and authors of constitutions need to be culturally open, given that they formulate the human rights and the criminal law subject thereto. Criminal judges must also be culturally open so that they can assess the perpetrators and victims in criminal

[348] Ryngaert argues that domestic authorities can be equally equipped as international courts to try serious international crimes if the state arranges for specialized personnel. See Ryngaert, Cedric, Universal Jurisdiction in an ICC Era, A Role to play for EU Member States with the Support of the European Union (2006), European Journal of Crime, Criminal Law and Criminal Justice, Vol. 14/1, 46-80, p. 68
[349] Hungarian Supreme Court, Judgement of 5 November 1998
[350] Hungarian Supreme Court's review bench, Judgement of 28 June 1999
[351] Presentation of Estonian participant at the Conference „The Role of the Judiciary in Implementation of International Humanitarian Law", October 2007, Budapest. Copy on file with the author
[352] See more on the principle of consistent interpretation at Ferdinandusse (2006), pp. 146-153.
[353] Hungarian Constitutional Court, Decision 53/1993 (13 October 1993)

proceedings arising from typical cultural conflicts equally."[354] Cultural openness requires that persons handling these cases – be it defence lawyers, police investigators, prosecutors or judges – are aware of the historical and cultural environment in which the crimes had been perpetrated, of the traditions of the given society in which the perpetrator/victim/witness live, of the potential security risks for victims and witnesses if they testify and several other factors. These, again, all require a special approach and specific preparation.

Effects of jurisprudence of international tribunals on domestic war crimes procedures

Definition of the contents of customary rules and reference to a certain rule as customary are typical fields where domestic courts rely on or refer to judgements and decisions of international tribunals. Especially if we look at the development of jurisprudence on crimes committed in non-international armed conflicts, an eventual obligation to prosecute these crimes or universal jurisdiction applicable to such crimes, we may witness the important influence of international jurisprudence on national case law. The same is true with regard to the elements of crimes. Since the treaties usually do not describe the elements of crimes with the same precision as national law does, state courts are left with definitions formulated in annexes to statutes of international tribunals, as is the case with the International Criminal Court, with the case law of such tribunals or with respective literature. In fact, these are the only sources national courts can reach to, to define elements of serious international crimes.

Making reference to decisions of international tribunals and courts may be problematic, because certain criminal law principles may have different interpretations on the national and the international level: the question is, whether these two interpretations have any effect on each other. The ICTY, for example, pointed out that although *nullum crimen sine lege* is a general principle of law, some factors, such as the specific nature of international law, the fact that there is not one authority as legislator in international law and the supposition that the norms of international law will be implemented in national systems leads to the fact that the legality principle is different in international law than in national law when it comes to their application and standards.[355]

[354] Höffe, Otfried, Moral Reasons for an Intercultural Criminal Law. A Philosophical Attempt (1998). Ratio Juris, Vol. 11. No. 3 September 1998 (206-27), Oxford, Blackwell Publishers, p. 216.
[355] *Prosecutor v Delalic et al*., Judgement, Case No. IT-96-21-T, Trial Chamber II, 16 November 1998, para 431.

The applicability of the *nullum crimen sine lege* principle to the interpretation of crimes before domestic courts came up in front of the European Court of Human Rights as well. In the *Jorgić*-case, the Court found that a stricter interpretation of genocide by the ICTY and ICJ can not be relied on in front of domestic courts, because these judgments were delivered after the offence had been perpetrated. If, however, an interpretation was consistent with the essence of the offence in question and was reasonably foreseeable, such an interpretation was legal.[356] This argument is valid only, however, if the state adopted the international law definition of genocide in its legislation and applied a stricter regime during the proceeding. Nothing prevents a state from adopting a stricter understanding of an international crime in its penal code: in this case one cannot talk about violation of the *nullum crimen sine lege principle*.[357] The effect of *nullum crimen sine lege* on concepts of criminal responsibility and defences is also contested.[358] In the end, it seems that "the *nullum crimen* principle outlaws any deviant practice under jurisdictions as well, at least as far as the general parts of criminal law are concerned."[359] We can therefore conclude that there is no uniform understanding which could lead to a uniform application of international criminal law within the boundaries set by international law.

When it comes to criminal procedural law aspects, we can witness influence exerted by international procedures to domestic procedures and *vica versa*. Due to specificities of trying serious international crimes, certain human rights standards on criminal procedure had been modified. Reasons to such modifications were the followings: the complexity and volume of war crimes prosecutions, security risks in countries concerned, consequences of investigations for national security, high level leaders as accused, the truth-finding and reconciliatory functions of international criminal tribunals and the great dependency of international courts on national jurisdictions and law enforcement officials.[360] Certain rules therefore, although originating from domestic procedural rules, may have been adapted to the specificities of international crimes trials, for instance the rules relating to the protection of witnesses. Although protection of witnesses has been known in domestic procedures as well, it has been widely developed in international cases. Thus, the protection of witnesses "may very well be

[356] *Jorgić v Germany*, European Court of Human Rights, Judgement of 12 July 2007, Application no. 74613/01 paras 112 and 114.
[357] See Ferdinandusse, Ward, The Prosecution of Grave Breaches in National Courts (2009), Journal of International Criminal Justice 7, 723-741, p. 736
[358] See Fletcher, George P., Basic Concepts of Criminal Law (1998), Oxford/New York, Oxford University Press, p. 107.
[359] van der Wilt, Harmen, Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court (2008), International Criminal Law Review 8, 229-272, p. 260.
[360] Sluiter, Göran: The Law of International Criminal Procedure and Domestic War Crimes Trials (2006), International Criminal Law Review, Issue 6, 605-635, p. 626.

said to have developed as a point of departure, or international standard, which is capable of influencing domestic war crimes trials. At least, one could say that the rules also have relevance in relation to national prosecutions of war crimes."[361] This is manifested in various domestic cases. For instance, in the *Van Anraat* case[362], the Dutch court considered *proprio motu* the ICTY law in relation to rules on protection of witnesses, although the ICTY statute having no binding effect on the Netherlands.[363] This makes sense, as domestic international crimes procedures are also in need of specific procedural rules, and they gain inspiration from international cases, even if these are not binding on them.[364]

Possible ways forward: war crimes units[365]

Recognizing the difficulties in trying serious international crimes, of which only a few have been mentioned above, a number of states have set up specialized units within their investigative authorities (police and prosecution), immigration services and courts to deal with cases concerning international crimes. Such units allow for the concentration of information, experience, know-how, expertise and good relations with other similar units, with international organizations and within the state authorities.[366] Recognizing the boosting effect of war crimes units on effective domestic procedures, the EU Council adopted several decisions supporting the formation of such bodies.[367] These units usually comprise of police officers, prosecutors and immigration officials – either in one single unit or in separate units within the respective authorities, but working in close cooperation; usually separate units exist in courts. As to the size of the units, the word "unit" is often misleading, as these mostly

[361] Sluiter (2006), p. 627.
[362] LJN: BA4676, Court of Appeal The Hague, 2200050906 - 2, judgement of 9 May 2007
[363] See Sluiter (2006), p. 629.
[364] "If one acknowledges possible shortcomings of the domestic law of criminal procedure in respect of war crimes investigations and prosecutions this may change views as to the incompatibility between the law of international criminal procedure and domestic law of criminal procedure. Especially, if one adopts the legitimate position that domestic law of criminal procedure has not been developed for and is to a certain degree ill-suited to deal with war crimes investigations and prosecutions there is from a national perspective a vacuum, where international criminal procedure can fulfil a useful gap-filling function, in spite of possible conflicting models of criminal procedure." "International criminal procedure may in spite of all its flaws fulfil an important gap-filling function and serve as important point of reference for participants in domestic war crimes trials with an open eye and mind for procedural solutions and approaches coined in other systems. In this light, the 'legislator' in the field of international criminal procedure should become aware of its relevance and impact beyond the scope of international criminal trials." See Sluiter (2006), pp. 634-635.
[365] In the framework of this article, „war crimes units" also mean units dealing with other serious international crimes, such as crimes against humanity, genocide or torture.
[366] See REDRESS/FIDH, Strategies for the effective investigation and prosecution of serious international crimes: The practice of specialized war crimes units, December 2010 (hereafter REDRESS/FIDH report), p. 9
[367] Preamble, Council Decision 2002/494/JHA, 13 June 2002: "The investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law." Article 4, Council Decision 2003/335/JHA 8 May 2003: "Member States shall consider the need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question."

consist of one or two persons only. The personnel of such units participated at specialized trainings organized by international organizations, the Interpol or by experts of their own countries with experience in international tribunals or elsewhere.[368] Exchange of information or study trips among units are also contributing to training and further education of personnel of the units. As for the expenses, although it is true that procedures related to international crimes are usually bearing high expenses, the setting up of units and their training have very low costs. Setting up of the units is merely an administrative measure, with personnel of the units being assigned to other cases as well. Trainings provided by international organizations or NGOs, such as the ICRC, OSCE or FIDH/REDRESS, are usually either free of charge or financial support is available.

The first war crimes units were set up with respect to investigation and prosecution of suspects with respect to Nazi crimes. Such units had been set up in Germany in 1958[369], in the US in 1979[370], in Canada in 1985[371], in Australia in 1987[372], in the UK in 1991[373] and in Poland in 1998[374]. However, these units finally ended up prosecuting only a very small number of suspects. In the United Kingdom for instance, out of 376 investigations, only one prosecution took place. The expenses connected to this one conviction reached an absurd sum: the cost of investigation only in the first three years was 5,4 million GBP.[375] Not many states can afford this. Probably this was the main reason why most of these units were finally called off or reorganized.

An impediment of the setting up of specialized units could be that procedures related to war crimes, crimes against humanity and genocide are very rare compared to ordinary cases. Most of the domestic cases were related to crimes committed in one specific state or related to one

[368] See REDRESS/FIDH report, pp.10-11
[369] The Central Office of the State Justice Administration for the Investigation of National Socialist Crimes (Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen) www.zentrale-stelle.de/servlet/PB/menu/1193355/index.html?ROOT=1193201 (downloaded on 10 January 2012)
[370] US Department of Justice Human Rights and Special Prosecutions Section, www.justice.gov/criminal/hrsp/about/ (downloaded on 10 January 2012)
[371] Canadian Department of Justice, Crimes Against Humanity and War Crimes Program. In 1987, the Department of Justice Canada, the Royal Canadian Mounted Police and Citizenship and Immigration Canada were given specific mandates to take appropriate legal action against alleged Second World War crime suspects believed to be in Canada. In 1998, the Government expanded its war crimes initiative to modern (post-Second World War) conflicts, because there was no real distinction between the process and policy applicable to WWII and Modern War Crimes. See www.justice.gc.ca/eng/pi/wc-cg/wwp-pgm.html (downloaded on 11 January 2012)
[372] Blumenthal, David A. and McCormack, Timothy L.H. (eds), The Legacy of Nuremberg: Civilising influence or institutionalized Vengeance? (2008), Leiden, Martinus Nijhoff Publishers. See Review by Ben Batros (2009), Journal of International Criminal Justice, 7 (2): 440-442.
[373] See War Crimes Act 1991
[374] The Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation (IPN). See www.ipn.gov.pl/portal/en/35/1/Brief_history.html (downloaded on 11 January 2012)
[375] See http://news.bbc.co.uk/2/hi/uk_news/309814.stm (downloaded on 12 January 2012)

specific situation which for any reason had a connection with the prosecuting state: either historical links (such as between Rwanda and Belgium and France), geographical proximity, a legislation open to universal jurisdiction cases (like in Belgium) or the fact that many immigrants arrived from the conflict as a result of advantageous immigration policies (e.g. Sweden). At the same time, in Western Europe, nearly all the states already had such cases, therefore it can be generally stated that for this or that reason all or most states will have to face such procedures. In addition, the number of processes related to war crimes perpetrated by own soldiers in the framework of multi-national military missions has also decreased. The challenges to investigating and prosecuting crimes committed by own soldiers may be less demanding due to the easier availability of the suspect and evidences, still, in substance, these bear a significant similarity with cases where the perpetrator was not an own national.

An additional motive for states to set up war crimes units to allow effective procedures was that none of these states wanted to be seen as a safe haven for criminals committing such crimes. The more states establish a set-up allowing for such procedures, the more other states will be considered as safe havens. This is especially true for Central and Eastern European countries, where no such units exist, whereas most of the Western European countries either have such units or are otherwise dealing effectively with serious international crimes. Consequently, the more effective Western European countries become, the more Central and Eastern European countries will be considered as safe havens.

In the endeavour to avoid that a state becomes a safe haven, the *immigration authorities* also have an important role to play. The part played by immigration authorities is often underestimated in inexperienced states. At the same time, if we think of it, it is just logical that in cases where the perpetrator is a national of a foreign country, it is the immigration authorities that can stop the influx of such persons into the country without being noticed. Therefore their training and close cooperation with other law enforcement authorities is inevitable.

Correspondingly, war crimes units or small teams had been set up within immigration authorities in various countries to avoid that a person suspected of having committed a serious violation of international law can enter the country unnoticed and eventually seek asylum,

refugee or other status.[376] The personnel of such units are often specialized in specific countries or contexts and work closely with law enforcement authorities. In other cases, personnel of war crimes units merely advise immigration officials or carry out specific methods, such as special interviewing techniques, to go through immigration/citizenship/refugee requests in order to sort out possible suspects of serious international crimes[377]. The action specialized units may take varies from refusal to enter the country, revoking citizenship or refugee status, refusal of granting refugee status or eventually handing the person over to the police.

In addition, immigration authorities may also be useful for ongoing cases in that they may be able to track potential victims and witnesses. In Denmark, for example, the Special International Crimes Office has access to the files of the immigration authority through which it can track down potential victims and witnesses[378]. This resulted in subsequent investigation in 22 cases.

It must be noted, however, that numbers of investigations resulting from reports of immigration authorities vary. In the UK, although many possible suspects have been detected and were refused to enter the country, referral to the police and eventual investigations took place only in a relatively small number of cases.[379] The numbers give more way to optimism in the Netherlands, where immigration authorities refused to grant asylum due to possible involvement in serious international crimes in approximately 700 cases, and in 2009, 43 cases have been examined by the police and prosecution that had been referred to them by the immigration authorities, out of which 3 were pending before courts, 2 were in the investigation phase and 38 in the preliminary investigation phase[380]. In Denmark, one third of

[376] See REDRESS/FIDH report, pp. 11-12.
[377] Such techniques may include interviewing the applicant about previous jobs during which suspicion may be raised if the asylum seeker was a member of the army or militant group at a time when that army/militant group was known for commission of serious international crimes, or if the person was a member of the government or held important posts in a regime known for grave abuses.
[378] See p. 2 in: http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (downloaded on 18 January 2012)
[379] For the UK, see „Exclusive: Britain: A 'safe haven' for war criminals; More than 50 people wanted for murder and torture living here free from prosecution, campaigners say", The Independent, 6 April 2010, available at http://www.independent.co.uk/news/uk/home-news/exclusive-britain-a-safe-haven-for-war-criminals-1936707.html (downloaded on 14 January 2012). The article claims that among the war crimes suspects living in Britain are Saddam Hussein's senior official, a Congolese police chief and a member of the Criminal Investigations Department in Zimbabwe under Robert Mugabe. The article also claims that while during the period 2005-2010, 500 applications have been turned down due to fear that the applicant had been involved in the commission of war crimes, only 51 names have been forwarded to the Metropolitan Police, and no prosecution took place.
[380] See REDRESS/FIDH report, pp. 14-15

the cases investigated by the Special International Crimes Office have been reported by the Danish Immigration Service[381].

It is important to realize that the number of prosecutions is not the only factor demonstrating the successfulness of war crimes units within immigration authorities. Their tasks are usually twofold: on the one hand, to ensure prosecutions and track down possible victims and witnesses, on the other hand, to be aware if a person suspected of having committed a serious international crime entered or is present in the country. This second factor is important in order to be able to take action: send back to the state of origin or extradite to a state which has an interest in prosecuting the person, or eventually hand over to an international court should such a request be made.

Special units set up in the *investigation and prosecution authorities* usually comprise of a couple of persons within the police and/or prosecution dealing exclusively with war crimes cases. In Denmark, the unit comprises of 17 persons (including both investigators and prosecutors) and is a part of the Danish Prosecution Service[382]; in Belgium, one senior prosecutor is supervising a team and five police officers are dealing only with serious international crimes; in the Netherlands, 30 investigators and four prosecutors are dealing exclusively with international crimes[383]; in Germany, two prosecutors are assigned permanently and four prosecutors temporarily, and seven investigators are working on war crimes cases; in Sweden, the police has a 10-member unit and four prosecutors working on international crimes cases.[384] Investigations into such crimes can often be lengthy, however, the Danish unit's demonstrated aim is to be able to determine within 12 months whether there is sufficient evidence to prosecute or else investigation should be halted. In 2009, 22 cases have been decided and this goal was met in 16 cases[385].

Although one can rarely speak of a unit set up within *courts*, in most states a designated court has exclusive competence for international crimes cases and it is the same judge(s) that are

[381] See http://www.sico.ankl.dk/page34.aspx (downloaded on 18 January 2012)
[382] SICO (Special International Crimes Office), since its esablishment in 2002, has opened investigations in 237 cases related to crimes that have taken place in around 30 countries; out of these, 172 cases have been concluded until 2009. See http://www.sico.ankl.dk/page34.aspx (downloaded on 18 January 2012). The majority of the cases are related to the Middle East, followed by the former Yugoslavia. See 2009 Annual Report 2009 – Summary in English available at: www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (downloaded on 18 January 2012)
[383] Such a high number of persons assigned only to international crimes may be explained by the fact that the Netherlands is a specially affected state due to its favourable immigration policy and its determination to carry out effective war crimes procedures
[384] See REDRESS/FIDH report, pp. 17-18
[385] See http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (downloaded on 18 January 2012)

carrying out the procedures. Such a system allows that a trained and experienced judge is dealing with such cases and also contributes to consistent judicial practice.

The result of the overall work of specialized units is nevertheless striking: out of 24 convictions on account of serious international crimes, 18 involved investigation and prosecution undertaken by specialized units.[386] The International Federation for Human Rights (FIDH) and REDRESS, in their project to map the work of existing units and assess their usefulness[387] have gone as far as declaring that "it will be difficult, if not impossible, to successfully prosecute a suspect of serious international crimes without special arrangements"[388]. Indeed, numbers show that the number of investigations, prosecutions and eventual convictions are much higher in states having a specialized unit and cases are concluded within much shorter time if units exist. In Finland, for instance, *ad hoc* resources were provided for an ongoing case, which resulted in that investigation and prosecution was concluded within three years, and the trial was concluded within 10 months[389]. In most countries these time-frames would be highly praised even for an "average" domestic case, let alone for a case involving an international crime. It goes therefore without question that the setting up of units dealing with serious international crimes requires relatively little effort and results in huge advantages.

Recommendations for Hungary

Although it is clear that Hungary is not and probably will not be facing an influx of serious international crimes suspects on its territory or a mass amount of international crimes cases, it should nevertheless not neglect its international obligations. Besides, cases concerning international crimes occasionally did show up and at these occasions the Hungarian system has mostly demonstrated an instable ability to deal with them. What mostly seems to be lacking in Hungary is the recognition of the problem and the will to make it do. Arguments

[386] See REDRESS/FIDH report, p. 18
[387] REDRESS/FIDH report
[388] REDRESS/FIDH report, p. 21
[389] See *Prosecutor v Francois Bazaramba* (R 09/404), judgment of June 2011. The case raised huge media attention. It was unique in its kind in Finland. Around 100 witnesses had been heard in the pre-trial phase, most of them abroad; 68 witnesses were heard by the court (out of whom only one lived in Finland). The court proceedings included court sessions in Kigali and Dar es Salaam to hear witnesses, and a site visit in Nyakizu, Rwanda, where the crimes were committed. Finland's Minister of Justice, Tuija Brax, said in an interview that the Nordic country was both capable and ready to host the trial. "We have specialists and lawyers working in international fields and expertise in international criminal cases ... It's a global world, and we're not an isolated island," See http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol04issue12.html#rw1 (downloaded on 18 January 2012) and Press Release of the District Court of ITÄ-UUSIMAA of 11 June 2010 available at http://www.adh-geneva.ch/RULAC/pdf_state/Finland-decision.pdf (downloaded on 18 January 2012)

relating to the absence of finances, small number of cases or the lack of national interest usually outdo any considerations about how the system could be improved without investing much money in it.

Due to the relatively small number of ongoing or possible cases and the meagre financial possibilities it is naturally not viable to set up units composed of several persons in each authority: immigration, police, prosecution and the courts. Still, several measures could be adopted which do not require the allocation of serious funds. These are for instance:

(i) the *setting up of units* in each authority with designating personnel who have gathered knowledge and information to be able to deal with international crimes cases. Such personnel may not have to be assigned to such cases exclusively but would have exclusive competence for war crimes and other serious international cases. Within the immigration authority this could mean that in case of any suspicions about an applicant's involvement in international crimes – which requires that all the personnel is informed to a basic extent about what could be a 'suspicious case' - his/her application could be run through the "war crimes unit", who could, should the need arise, undertake additional interviews with the person. Within the police and prosecution, this would obviously mean that investigation would be carried out by the unit or under the supervision or with the assistance of such unit.

(ii) *training* could be provided by taking advantage of trainings, conferences, workshops organized by international organizations and NGOs,[390] visiting other units to gather experience, seeking cooperation with academic institutions in Hungary and abroad and taking advantage of the experiences of Hungarians who had been working at international tribunals or courts. This also includes the encouragement of relevant personnel for temporary posting to international courts and tribunals. Worth to note, that similar units of several countries are organizing conferences and workshops to enable exchange of experience of their staff[391].

(iii) the adoption of adequate *legislation* to provide an adequate framework for such procedures, including taking into account the specificities of such trials, such as absence of the suspect (mainly in universal jurisdiction cases), the place of commission of the crimes being abroad, protection of victims and witnesses, etc.

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[390] For instance the Interpol, the Institute for International Criminal Investigations or the Joint Rapid Response Team are regularly offering such training possibilities.

[391] For example, the Nordic countries organized a conference early 2009, followed by two other events in the same year, seeking ways to further cooperate. See p.3 in: http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (downloaded on 18 January 2012)

(iv) develop *cooperation* lines where nonexistent and increase cooperation where already exists between immigration and investigation (police and prosecution) authorities in order to gain from each other's information on suspects, victims and witnesses. Cooperation is also important among units of different countries[392], especially bearing in mind that investigations and prosecutions are often carried out by several countries related to the same situation, such as crimes committed in Rwanda, Afghanistan, ex-Yugoslavia or Iraq. Sharing of information and cooperation among the units could substantially ease the work of the authorities[393]. It can even happen that two countries are investigating in the same incident which means they could benefit from each other's witness testimonies, documents or other relevant information.

As a conclusion, it would be simplicist to blame the individual prosecutors or judges for failing to adequately engage in questions concerning international law with which they had not met before. This problem requires a complex attitude from the state, and examples of many countries demonstrate that if there is a determination to invest a minimal effort in creating units and training personnel, states may be in a much better position when confronted with cases on international crimes.

[392] The EU Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes (created by decision 2002/494/JHA, of 13 June 2002, of the Justice and Home Affairs Council and reaffirmed with Council Decision 2003/335/JHA**)** brings together experts from ministries of justice, police investigators and prosecutors to share information and expertise on procedures related to these international crimes. Hungary already has a contact point for this network. The network often organizes events and conferences and facilitates the cooperation among states for the sharing of experiences. See http://www.eurojust.europa.eu/gen-network.htm (downloaded on 25 January 2012). In July 2011 the EU network established a permanent secretariat in the Hague.

[393] Taking Rwanda as an example, only in Europe around 10 countries have carried out investigations related to the genocide. See REDRESS/FIDH report, pp. 24-25.

9. Effects of war crimes in the Rome Statute on the system of national prosecutions, *With particular emphasis on universal jurisdiction*[394]

Introduction

As the International Criminal Court's (ICC) first president, Philippe Kirsch said: the Court would be truly successful if no case were brought before it, as this would mean either that international crimes are not committed anymore or that states are able and willing to investigate them.[395] The ICC stands as a significant milestone in the broader international project aimed at establishing global justice and enhancing accountability for international crimes.[396] However, inherent challenges arise from the interplay between the ICC, its complementary principle and the complexities of national lawmaking. The interplay between the Court's jurisdiction and the complementarity principle, which emphasizes the primacy of national legal systems in prosecuting international crimes, introduces complexities that reflect the potential tensions between international and domestic legal frameworks. Notwithstanding these challenges, we must underline the pivotal role of national courts in investigating and prosecuting core international crimes, with the ICC serving as a potential jurisdictional authority if states fall short in fulfilling their prosecutorial duties.

The paper assesses the effects of war crimes in the Rome Statute on the readiness of domestic courts to handle war crimes cases, highlighting the limited number of national procedures and the complexities associated with prosecuting such crimes. This is then followed by a discussion on the re-emergence of universal jurisdiction, a vital tool in the context of the Russian-Ukrainian conflict which by complementing the efforts of the ICC is starting to take center stage in Europe and overseas.

Effects of international law on national lawmaking and national jurisprudence: the ICC complementarity principle

The Rome Statute of the ICC and its complementarity provision[397] illustrate potential challenges arising from disparities between international and national lawmaking. States are obligated to enact legislation enabling their courts to prosecute war crimes, aligning with the Geneva Conventions and Additional Protocol I. The Rome Statute's complementarity provision emphasizes the significance of national courts' actual investigations and prosecutions[398], with the ICC potentially assuming jurisdiction if a state fails to or does not prosecute.[399] Unlike the Geneva Conventions, which lack a clear standard for implementation and offer no direct consequence for non-compliance,[400] the Rome Statute establishes a tangible effect: the ICC can take over a case if a state neglects its prosecutorial obligations.[401] In fact, the complementarity principle was one of the main reasons why states examined

[394] The author would like to thank Ms. Dalma Wéber for her assistance in the background research.
[395] Kardos and Lattmann, 2013, p.377.
[396] Reynolds and Xavier, 2016, p.960.
[397] ICC Rome Statute, Article 17: „1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (…)"
[398] Holmes, 2002, p.668.
[399] Bárd, 2003, p.320 ff.
[400] Varga R., 2007
[401] Robinson, 2010, p.25. and Varga R., 2006, pp.95-98.

whether their national laws were adequate to apply international criminal law.[402] The interplay between the Geneva Convention's obligation and the Rome Statute's complementarity provision highlights a complementary relationship, with the latter reinforcing the former's weight.[403]

Although the „threat" that the ICC complementary principle boosts jurisdictional states to proceed was seen as one of the great achievements of the Rome Statute,[404] the ICC is not intended as an appellate court freely taking cases from national courts.[405] While the criteria of inability and unwillingness make sense in many cases, they should not be and are not wielded as a freely useable discretionary tool by the ICC. Fundamental differences exist between the ICC's complementarity approach and the jurisdictional primacy of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The ICC[406] aims to refrain from extensive scrutiny of domestic proceedings, limiting itself to fundamental questions rather than engaging in detailed revision.[407]

Can international law be really directly applicable?
Treaty law

Adequate national implementation of core international crimes is thus a prerequisite of domestic procedures. The primary reason when states refuse to implement international humanitarian law treaties is the argument that, based on states' constitutions, international law automatically becomes part of domestic law upon promulgation (dualist systems) or publication (monist systems). However, this provision often fails to address challenges faced by states in applying humanitarian law treaties because in numerous instances, there is no clear-cut distinction between monist and dualist approaches, but rather a combination of both.[408] Furthermore, direct application of international law by national judges may cause problems. When a state becomes party to a treaty without adopting implementing legislation, the promulgation alone may not be enough for judges to try someone for war crimes directly based on these treaties.[409] This paper interprets direct applicability as requiring the application of international law, i.e., the promulgated treaty. Consequently, if the treaty rules are not implemented into existing internal norms (e.g., the Criminal Code), judges may have

[402] Bárd, 2003, p.320 ff.
[403] Varga R., 2014, pp.81-82.
[404] Robinson, 2010, p.25. and Varga R., 2006, pp.95-98.
[405] Van der Wilt, 2008, p. 232. and p. 257: „The International Criminal Court is not expected to repair unfair trials, as it is not meant to be a human rights court, nor is it in a position to mitigate or aggravate sentences, imposed by domestic courts." and see Holmes, 2002, p.673 and see Varga R., 2014, p.83
[406] . The ICC's complementarity principle means it acts as a court of last resort, intervening only when national systems are unable or unwilling to genuinely prosecute crimes. In contrast, when ICTY and ICTR conducted trials, they enjoyed primacy to national proceedings.
[407] Holmes, 2002, p.668.
[408] Constitutions of Bosnia-Herzegovina, Estonia and Hungary recognize general principles of international law. The Constitutions of Macedonia, Poland, Slovakia and Slovenia say that self-executing treaties are directly applicable. The Croatian, Lithuania, Estonian and Slovak systems (although the Slovak Constitution mentions promulgation of international treaties, many Slovak authors argue that the Slovak system is monist) seem to be monist or have monist elements in their Constitutions. The Bulgarian, Czech, Hungarian and Polish Constitutions are dualists or have dualist elements: the Bulgarian Constitution says that ratified, promulgated and in-force treaties are part of national law, the Czech Constitution refers to promulgated treaties, the Hungarian and Polish Constitutions mention publication of international treaties. See Varga R, 2014. p. 81.
[409] By 'direct application of international law by domestic courts', the present study means application by domestic courts of rules of international treaties that were ratified by the given state but its provisions had not been implemented into national law. For instance, applying a grave breach of the Geneva Conventions in a criminal procedure in a state that had ratified the Geneva Conventions but did not implement that specific grave breach into its penal code. Similarly, direct application could also mean an application of a customary rule without it having been implemented into national legislation. See Varga R, 2014. p.118.

to apply the Geneva Conventions/Additional Protocols directly, creating complexity due to constitutional issues and the differences between international and national law systems.[410]

International law often lacks detailed regulations needed for effective judicial application,[411] leading to questions about references for elements of crimes, sanctions, consideration of international case law and customary law. Depending on the state's legal system, judges may either successfully address these issues through direct application or struggle due to unclear domestic legislation, potentially leading to very lengthy procedures or dropped charges. If a state adopts inadequate implementing legislation, it may face challenges enforcing international treaties, raising questions about breaches of international obligations.[412] Degan notes that a national judge cannot give direct effect to international obligations unless authorized by national law.[413] The level of authorization depends on both national legislation and judges' willingness to apply international law. In theory, if international law is part of the national legal order, it becomes directly applicable, but challenges arise when elements necessary for adjudication are drawn from non-treaty sources. For instance, the Elements of Crimes in the ICC Rome Statute, though not binding, serve as interpretative aids during ICC proceedings[414] and could guide national courts.[415]

Customary law

The issue of directly applying international law becomes more intricate with customary law, especially in cases of universal jurisdiction where in many cases the jurisdictional bases is founded on customary international law. Degan notes that, without national authorization, the *nullum crimen sine lege* principle hinders judges from implementing the *aut dedere aut judicare* principle based on customary international law or treaties. A potential solution lies in the transformation of accepted customary law into the national legal framework, as exemplified in the Hungarian Fundamental Law that accepts generally recognized rules of international law as part of the national legal order.[416] While debate exists about whether this includes *ius cogens* or customary international law, such a transformation could facilitate judges' application of unwritten, binding international law.[417] Even in case a state transforms customary law into its national legal order, the questions of adequate implementation measures are relevant.

Certain states find customary law elusive and vague, or even controversial: the Dutch Supreme Court in the Bouterse case[418] rejected reliance on customary law conflicting with national law. Van der Wilt acknowledges the lack of precision in rules of international customary law but argues that if certain standards, like the prohibition of torture as *ius cogens*, require states to prosecute perpetrators, domestic legal impediments may not excuse neglecting such obligations.[419]

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[410] Kis and Gellér, 2005, p.364. and see Varga R., 2014, pp.119 and see the ministerial explanation to the German Völkerstrafgesetzbuch.
[411] As for collision of direct application of the Rome Statute with the principle of legality, see Cottier, 2005, p.4.
[412] Wiener, 1995, p.203.
[413] Degan, 2005, p.212.
[414] Dörmann, 2003, p.8.
[415] Varga R., 2014, pp.119-121.
[416] The Fundamental Law of Hungary, 25 April 2011, Article Q para 3
[417] Varga R., 2014, pp.122-123
[418] Supreme Court of the Netherlands, nr. HR 00749/01 CW 2323 LJN: AB1471, NJ 2002, 559
[419] Comment of Harmen van der Wilt, Bouterse-case, ILDC 80 (NL 2001), C5.

The elusiveness of customary law should not impede its application, given its equal binding status with treaty law. The identification whether a norm is customary and consequently its enforcement lies – among others – with the state, and while it may be unrealistic for the legislature to systematically implement customary law, judges bear the responsibility to determine its customary nature.[420] The elusiveness of customary law warrants cautious determinations by judges, favoring a restrictive rather than a broad approach.[421]

Are domestic courts really ready to try war crimes cases?

The limited number of national procedures hampers the effective prosecution of serious war crimes, necessitating collaboration between national authorities, the international community, and the ICC to avoid an "impunity gap."[422] Several factors contribute to the practical challenges in prosecuting war crimes. First, war crimes are typically interconnected, resulting in multiple accused and numerous cases to be tried.[423] Secondly, the processes for handling war crimes require expert understanding of international law, legal precedents, and the application of domestic law with a view to international law. Accessing primary and secondary sources can often be challenging due to physical unavailability or language barriers, despite the internet. Third, war crimes procedures are often costly and time-intensive. The geographical and temporal distance between the crime scene and the trial location makes evidence retrieval difficult, witnesses may be distant and speak different languages, and cooperation with other states' authorities is crucial, making proceedings dependent on the cooperation of the state where the crime occurred. These complexities may contribute to judges' hesitancy in handling war crime cases.[424]

Although prosecutors and judges technically apply national law during procedures due to the promulgation of international treaties, they require specialized knowledge of international law. Merely navigating relevant international treaties is insufficient; familiarity with literature, international jurisprudence, and related international norms is essential for effective handling of war crimes cases.[425]

Furthermore, trying war crime cases is not necessarily a career motivator for judges. The legal intricacies and lengthy procedures – although the result of such procedures may be seen in itself as a professional success, especially in cases involving novel legal questions – may not

[420] The UNGA resolution A/CN.4/716 outlines guidance for national judges in identifying customary international law through a two-element framework: general state practice and 'acceptance as law' (*opinio juris*). Judges must evaluate consistent and widespread state actions and determine if these are undertaken out of a sense of legal obligation. Treaties, while not as such establishing customary international law, but as a result of codification of customary international law, or through their acceptance, can indicate state practice and legal acceptance, alongside resolutions of international organizations, judicial decisions and scholarly writings, which all provide valuable evidence. This holistic approach ensures that the identification of customary international law is firmly rooted in both practice-evidenced state behavior and the belief that such practices are legally binding. Institutions like the International Court of Justice and the International Law Commission (ILC) have institutionalized this methodology to ensure stability and legitimacy, addressing the risks posed by divergent national interpretations. In 2016, the ILC adopted draft conclusions on identifying customary international law and sought governmental comments by January 1, 2018 (see UNGA resolutions 71/140 and 72/116). Several states submitted their observations, reflecting broad international participation in refining the draft conclusions. These responses and the respective resolutions ensure a comprehensive and widely supported framework for identifying customary international law. Courts and tribunals assess widespread, consistent state practice and evidence that states regard such practice as legally obligatory. Sources such as treaties, diplomatic communications and international resolutions help substantiate these elements.

[421] Varga R., 2014, p.123.

[422] Kirs, 2012, p.19. and see ICC, 2003, p.3.

[423] Kirs, 2012, p.19 and see Kirs, 2008, p.31.

[424] Varga R., 2014, pp.158-159.

[425] Mettraux, 2006, p.371

contribute significantly to judges' career statistics in an environment where case statistics themselves define or contribute to career advancements.[426]

Additionally, political considerations often come into play when dealing with own nationals or nationals of powerful nations, leading to potential dropping of charges or attempts to exclude the criminality of the accused.[427] A comparative analysis of national judges' behavior reveals reluctance to apply international law when perceived to injure national interests.[428] Recognizing the problem of the independence of national courts when dealing with international law, the Institute of International Law in its document emphasized maintaining their independence. Prosecutors and judges play crucial roles, impacting the success of national processes[429] as it hinges on their decisions. Prosecutors may opt to drop charges citing a purported lack of jurisdiction, denying the international law character of the crime, or attempting extradition rather than pursuing domestic prosecution. Judges, on the other hand, may adopt a restrictive interpretation of jurisdictional issues or apply ordinary crimes instead of recognizing the international nature of the offense.[430]

Some states address these challenges by hiring experts, and systematically collecting materials on international law. Unfortunately, Central European countries often lack such measures, leaving prosecutors and judges to navigate these difficulties themselves. While states may attribute the lack of judiciary preparedness to judicial independence, it is essential for states to intervene, providing training, funds, and a motivating environment for judges. This emphasizes the state's responsibility to ensure effective prosecution of grave breaches, as mandated by international law. Judges' reluctance to apply international law directly due to perceived distance and lack of influence underscores the significance of national jurisprudence in the formation of customary law.[431] Courts applying international law contribute to a dialogue on experiences and lessons learned, enhancing mutual efforts. For effective implementation, courts must interpret national law in alignment with international law, following the principle of consistent interpretation.[432] The Hungarian Constitutional Court emphasized this in 1993, stating that the constitution and domestic law should be construed to give effect to generally recognized international rules.[433] Judges need awareness of international law for this rule to be effective.

Furthermore, legal correctness is just one facet of international criminal proceedings. Criminal judges must also exhibit cultural openness to fairly assess perpetrators and victims in cases stemming from cultural conflicts.[434] While the insertion of the *aut dedere aut judicare* principle in treaties reflects the international community's belief in states' capability to address international crimes exercising universal jurisdiction,[435] it remains crucial to assess whether

[426] Varga R., 2014, p.159.
[427] Ferdinandusse, 2006, pp.89-98.
[428] Benvenisti, 1993, cited in Benvenisti, 1994, p.424. and see Varga Cs.,2009, pp.148-150.
[429] Institute of International Law, 1993
[430] This is exactly what happened in Hungary at the Biszku-case, where Prosecution did not raise charges arguing that the acts in question did not constitute crimes against humanity therefore prosecution is time-barred. Remarkable, that the prosecution did not examine nor did it explain why it had come to the conclusion that the acts were not crimes against humanity, it simply stated so. See Municipal Prosecutor's Office, NF 27942/2010/1 and Public Prosecutor's Office, NF. 10718/2010/5-I. For an analysis see Varga R., 2011
[431] ICTY, Trial Chamber, Tadic, 7 May 1997, papa 642., refers to the judgment of the French Cour de Cassation in the Barbie case, and ICTY, Trial Chamber, Furundzija, 10 December 1998, para 194, refers to British military courts. See Ferdinandusse, 2006, p.111.
[432] Ferdinandusse, 2006, pp.146-153.
[433] Hungarian Constitutional Court, Decision 53/1993 (13 October 1993). For a critical analysis, see Ádány and Varga R., 2021
[434] Höfe, 1998, p.216.
[435] Ryngaert, 2006, p.53.

those applying the law possess the necessary knowledge, experience, and language skills for effective war crimes procedures. The availability of literature and legal commentaries in languages foreign to prosecutors and judges is a vital consideration for effective application.

All states must comply to end impunity, signaling a commitment to that universally accepted belief that war crimes violate fundamental principles. Establishing a capable system to prosecute war criminals is a crucial step in this regard.[436]

Case study: the "renaissance" of war crimes procedures and universal jurisdiction in the context of the Russian-Ukrainian conflict

The relevance of establishing mechanisms ensuring the effective prosecution of war crimes already in peacetime was often questioned. However, due to the sudden turn of events in February 2022 the importance of the principle of universal jurisdiction regained its priority. The war in Ukraine has reinvigorated international efforts towards criminal justice.[437]

Not being party to the Rome Statute itself, Ukraine has consented to permit the ICC to conduct an investigation into the situation within the country for crimes under the jurisdiction of the ICC allegedly committed on its territory. In 2014 and 2015 Ukraine submitted a declaration recognizing the Court's jurisdiction to identify war crimes and crimes against humanity committed within its territory starting from 21st November 2013, to prosecute suspects, and to conduct proceedings. Furthermore, Ukraine committed to collaborating with the ICC throughout the entirety of the proceedings.[438]

Following the referral of 43 party states, which served as the trigger of the procedure, the ICC opened an investigation in the territory of Ukraine in March 2022 over war crimes, crimes against humanity and genocide. Aggression does not fall under the jurisdiction of the ICC in this case, as the ICC has jurisdiction over this crime only with respect to states parties to the Rome Statute. In March 2023 the ICC issued an arrest warrant against Vladimir Vladimirovich Putin, President of the Russian Federation and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation in response to the forcible transfer of Ukrainian children to Russian territory.[439] The ICC's specific mandate and limitations – having no enforcement powers of its own – advocates for enhanced cooperation between the Court and states.

However, as stated above, the ICC is not expected to try a big number of cases. It serves as a fallback-option, in case other jurisdictions are not exercised, following from the so-called complementarity principle, according to which the ICC will only have jurisdiction, if the concerned state is unwilling or unable to carry out a procedure.[440] Hence, states have the primary responsibility to try core international crimes. Jurisdictions exercised by states may be founded on general jurisdictional basis (national, territorial or passive national bases) or universal jurisdiction. During or after armed conflicts the state(s) with general jurisdictional basis are often either not in a position to carry out procedures or do not want to carry out

[436] Varga R., 2014, pp.163-164
[437] Universal jurisdiction refers to a type of jurisdiction that states can exercise, based on international law, regardless of the location of the crime or the nationality of the perpetrator or victim. A classic example is maritime piracy, where coordinated action serves the interests of the international community. Universal jurisdiction may be established by customary international law or treaty-based international legal norms.
[438] Varga R., 2022
[439]International Criminal Court. (n.d.). Situation in Ukrain, see also: Congressional Research Service, 2023, pp.1-2
[440] Articles 1 and 17, Rome Statute

procedures, or only with respect to the nationals of the "enemy". Universal jurisdiction is thus a crucial tool in the fight against impunity and is complemented by the ICC in addressing crimes against humanity, genocide, and war crimes.[441]

In a noteworthy response to the heinous acts committed, several countries throughout Europe and overseas initiated investigations at the national level into international crimes carried out in Ukraine based on universal or extraterritorial jurisdiction.[442] Above all, however, its Ukraine's and Russia's primary responsibility to ensure that there are domestic prosecutions for war crimes.

Procedures in Ukraine

More than one year after the outburst of the war in Ukraine, the Office of the Prosecutor General of Ukraine has documented around 108,904 incidents of potential war crimes as of 29 September 2023.[443] Additionally, Ukrainian Prosecutor General Andriy Kostin stated that up until 16 July 2023 Ukrainian courts already successfully convicted more than 50 Russian nationals for their involvement in war crimes.[444] Although Ukraine did incorporate universal jurisdiction, and the definition of war crimes, crimes against humanity, genocide and torture into its Criminal Code[445] it does not cover all of them.

Part 1 Article 8 of the Ukrainian Criminal Code states that "foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code".[446] The Criminal Code takes into consideration first and foremost the grave breaches defined by the four Geneva Conventions and its Additional Protocols, the corner stone(s) of international humanitarian law. However, not all war crimes are listed in the Geneva Conventions and the Additional Protocols. War crime definitions of the Criminal Code are narrower than those of the Rome Statute – which is logical, given that Ukraine is not a party to the Rome Statute. Currently, based on its Criminal Code, Ukraine has the authority to pursue legal action against war crimes such as willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation, taking of hostages etc. A great deal of cases including using people as human shields, sexual violence committed in armed conflict, crimes against cultural objects, crimes against humanitarian missions – like shelling evacuation buses – is not criminalized by the Criminal Code.

In addition, the application of universal jurisdiction for war crimes is feasible only when the individuals involved are present on Ukrainian territory. This implies that Ukraine can initiate criminal proceedings against foreigners or stateless individuals exclusively when they are present within its borders.[447] While this approach enhances the efficiency of the principle, there is a drawback. Generally there is a lapse of time between the commencement of the investigation and the formal declaration of an individual as a suspect of committing a crime.

[441] Paulet, 2017
[442] TRIAL International, 2023, p.10.
[443] Congressional Research Service, 2023, Summary
[444] RFE/RL's Ukrainian Service, 2023
[445] Amnesty International, 2012, p.21
[446] Official Translation of the Criminal Code of Ukraine, 2021, Part 8. Article 1. see also Institute for War & Peace Reporting, 2022
[447] Institute for War & Peace Reporting, 2022

During this period, the suspect has the opportunity to leave Ukraine's territory.[448] Should this happen and perpetrators escape and settle elsewhere, according to Amnesty International's 2012 survey on universal jurisdiction, more than 80% of the 193 UN states can 'exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law.'[449] The urge to avoid any "impunity gap" prompted states worldwide to collectively act against grave atrocities, each according to their own capacity.

Procedures in Europe and overseas

From the onset of Russia's invasion of Ukraine in February 2022, several Central European states have initiated multiple criminal investigations focusing on war crimes, crimes against humanity and aggression. Germany, Sweden, Spain, and Switzerland, as well as Canada, have also initiated investigations within their respective national justice systems.[450]

Europe

In recent years, there has been a resurgence of interest in universal jurisdiction, particularly in Europe. In 2022 a former Iranian prosecutor was put on trial in Sweden and found guilty of war crimes committed in 1988. In the same year, a breakthrough occurred in the Laurent Bucyibaruta case as a former Rwandan prefect was sentenced in France for his involvement in the 1994 genocide. Furthermore, in the Netherlands a former Kabul prison commander was convicted of war crimes perpetrated in Afghanistan in the 1980s, and life imprisonment sentence for a former Ethiopian official implicated in war crimes during the late 1970s was affirmed by the Hague Court of Appeal.[451] Germany, France and Sweden, for instance, have also developed a quite extraordinary expertise in investigating international crimes in connection with the Syrian armed conflict. These countries launched "structural investigations" through specialized war crimes units dedicated to gather evidence. Therefore, now with the ongoing war in Ukraine, all these experiences and knowledge are made very good use of since public prosecutors across Europe and Canada have initiated structural investigations. Although these specific procedures do not target individuals or incidents from the outset, but focus on the collection of evidence, it is crucial to proactively build cases for future criminal proceedings.[452]

Moreover, also countries lacking experience in investigating international crimes have initiated legal proceedings in response to the conflict in Ukraine. Poland, Romania, Slovakia and Latvia, due to the enormous and constant waves of Ukrainian refugees fleeing the war zone, started recording testimonies to safeguard essential evidence for potential future cases. However, this multifaceted initiative also has its drawbacks. It could cause duplication or over- documentation of the cases as well as the re-traumatization of victims.

Therefore, there was a need to harmonize these efforts and establish a unified, properly coordinated investigation team. The Joint Investigation Team (JIT) was established by Lithuania, Poland and Ukraine with the support of the European Union Agency for Criminal Justice Cooperation (Eurojust) and it now includes seven European countries, the European

[448] *Ibid.*
[449] Amnesty International, 2012, p.2.
[450] Congressional Research Service, 2023, p.15.
[451] TRIAL International, 2023, pp.10. – 11.
[452] *Ibid.*

Union Agency for Law Enforcement Cooperation (Europol) and the ICC.[453] This initiative is also fostered by the work of the United Nations Independent International Commission of Inquiry for Ukraine. The Commission's findings are shared with both the JIT and the ICC separately.[454]

Canada and the United States

Canada plays a fundamental role in the investigation into alleged war crimes in Ukraine. Canada was the first nation to integrate the crimes defined in the Rome Statute into its domestic laws through the Crimes Against Humanity and War Crimes Act (CAHWCA) in 2000. The CAHWCA officially criminalizes genocide, crimes against humanity and war crimes based on international law, including the Rome Statute. By defining these offenses in Canadian law, Canada can utilize the complementarity provisions of the Rome Statute. Additionally, the legislation incorporates universal jurisdiction, allowing Canada to prosecute individuals within its borders for crimes outlined in the CAHWCA, irrespective of their nationality or the location of the crimes.[455]

In March 2022 Canada was among those 43 states that referred the situation in Ukraine to the ICC, coinciding with the Royal Canadian Mounted Police (RCMP) launching the first real-time war crimes investigation in Canada's history. Ukrainian Canadians actively contribute by collecting war crimes testimonials to potentially prosecute war crimes in Ukraine. Despite the geopolitical complexities the RCMP investigation remains crucial for victims.[456]

The United States (not a party to the Rome Statute) is now initiating prosecutions focusing on Russian nationals involved in committing war crimes during the conflict in Ukraine. U.S. law made war crimes punishable under federal criminal law but limited its national courts' jurisdiction to active and passive personality jurisdiction.[457] The indictment details the actions of four defendants, all identified as members of the Russian military or Donetsk People's Republic. They allegedly abducted and mistreated a U.S. civilian, violating the Geneva Convention. The charges, under the U.S. War Crimes Act of 1996, include unlawful confinement, torture, inhuman treatment, and criminal conspiracy. The conspiracy charge, unusual in international law, is brought under the U.S. statute. The indictment, though a significant move towards accountability, faces challenges due to the defendants' absence and difficulties in gathering evidence from an active war zone. The indictment is intended to expose Russia's conduct and could affect the defendants' future international travels.[458]

Furthermore, a proposal aiming to broaden the jurisdiction of U.S. courts over war crimes by including individuals 'present in the United States, regardless of the nationality of the victim or offender' was approved and enacted into law in January 2023. This modification enables U.S. prosecutors to file charges against foreign nationals, extending to those accused of war crimes in the ongoing conflict occurring after the enactment of the legislation.[459] While the recent legislative changes to the U.S. war crimes statute fall short of granting full universal jurisdiction, they extend jurisdiction based on presence in U.S. territory. This expansion

[453] *Ibid.* and see also Eurojust, 2023
[454] Van den Berg and Deutsch, 2023 and see also Varga R. and Újvári, 2023, pp.50-51.
[455] Government of Canada, 2023
[456] Banerjee and Levin, 2023
[457] Congressional Research Service, 2023, p.24.
[458] Anderson and Orpett, 2023
[459] Congressional Research Service, 2023, p.24.

facilitates the Justice Department's prosecution in cases where it is well-equipped to investigate and bring charges.[460]

Conclusion

The complicated interplay between the ICC Rome Statute and national criminal legislations boosts national prosecutions, and also have a triggering effect on the application of universal jurisdiction. These also underscore both the challenges and opportunities in addressing war crimes.

In the face of the ongoing armed conflicts, it is crucial for nations to address gaps in legislation, enhance judicial preparedness, and foster international cooperation. The effective prosecution of war crimes demands a comprehensive approach that aligns national laws with international standards, navigates challenges in applying international law directly, and makes use of universal jurisdiction to ensure justice prevails even in the most complex situations.

Coming back to Philippe Kirsch’s statement, cited at the beginning of this paper: the ICC’s success is not necessarily measured in the number of procedures the ICC itself carries out, but in that states are taking on their responsibility to punish perpetrators.

[460] Anderson and Orpett, 2023

10. Facilitating War Crimes Procedures in Hungary: The New Criminal Code and Lex Biszku

Hungary witnessed a number of challenges and adopted a number of measures in 2012 with respect to implementation and domestic application of international law. The present article concentrates only on two issues: the provisions of the new Criminal Code dealing with war crimes, and the entry into force of *Lex Biszku*[461], declaring the non-applicability of statute of limitations for grave breaches and crimes against humanity and its effects on application of international law in front of domestic courts.

The adoption of both pieces of legislation were intended to facilitate domestic procedures with respect to serious international crimes, and, although both legislation could ultimately contribute to this goal, there seem to be some shortcomings as well. The present note seeks to provide a constructive criticism to both pieces of legislation.

I. The new Criminal Code and its provisions related to the prosecution of war crimes

The relevant Chapters of the new Criminal Code[462] were intended to reflect the provisions of the Rome Statute and provide for a full implementation of the grave breaches – war crimes regime. All in all, the new Code is an important step forward in the repression of serious international crimes[463]. However, as the Ministerial explanations attached to the draft law describe, a specific intention was to shorten the provisions of the Rome Statute[464], which, unfortunately, resulted in that certain provisions were completely left out.

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[461] Law nr. CCX of 2011 on the prosecution and non-application of statute of limitations of crimes against humanity and the prosecution of certain crimes committed during the communist dictatorship. The law entered into force on 1 January 2012.
[462] Law nr. C of 2012 (hereafter: Criminal Code). The Criminal Code enters into force on 1 July 2013. The specific provisions under consideration will be identified in the subsequent footnotes.
[463] A draft international crimes code was prepared in 2003 by Norbert Kis and Balázs Gellér on request of the Hungarian government, with the view to adopt all international crimes and conditions of their punishment within that code in a solution close to the German *Völkerstrafgesetzbuch*. However, the government finally did not adopt the draft code and chose to leave these crimes in the Criminal Code. See Kis N. – Gellér B., *A nemzetközi bűncselekmények hazai kodifikációja de lege ferenda* (Domestic codification of international crimes de lege ferenda), in: Wiener A. Imre Ünnepi Kötet, KJK-Kerszöv, Budapest 2005, and Gellér B.J., *Nemzetközi Büntetőjog Magyarországon, adalékok egy vitához* (International criminal law in Hungary, addenda to a debate), Tullius Kiadó, Budapest 2009.
[464] See http://konyvtar.bpugyvedikamara.hu/wp-content/uploads/2012/02/BTKeloterjesztes-indokolas.pdf (last visited on 3 December 2012).

A detailed analysis of the new provisions may be interesting not only to take account of the new Hungarian legal environment when it comes to prosecution of war crimes, but also considering that many states in Europe had accepted similar provisions in new or amended Criminal Codes and are often constantly amending them either to reflect changes in international law or in response to actual criminal proceedings which had eventually shown shortcomings or inaccuracy in the legislation.

The new Criminal Code enters into force on 1 July 2013. The Code contains provisions relevant to the punishment of war crimes in both its General Part and Special Part. The closing provisions include the definition of armed conflict[465]. For the purposes of the Code, the term "armed conflict" includes conflicts described in Articles 2 and 3 of the 1949 Geneva Conventions, Article 1 (4) of 1977 Additional Protocol I and Article 1 of 1977 Additional Protocol II. The term also covers state of emergency with extraordinary measures, state of emergency, and, in case of war crimes and crimes committed by members of the armed forces, operations (according to the terminology of the Code: "use of Defence Forces") carried out by the Hungarian Defence Forces abroad[466].

The inclusion of situations defined by common Article 3 of the Geneva Conventions in the understanding of armed conflicts is plausible. This is one of the important developments of the new Code compared to the previous regulations, which only referred to the 1977 Additional Protocol II. With this new, extended rule, Hungary stepped in line with most states in Europe that consider crimes committed in both kinds of conflicts the same way. At the same time it may be worth to mention that the extension of the definition of armed conflict to operations of the Hungarian Defences Forces abroad may be at times controversial. Foreign missions may also include peace-keeping missions or missions that accomplish merely training tasks; application of the law of armed conflict to such situations could be highly questionable.

Provisions in the General Part include the provision confirming the *nullum crimen sine lege* principle, making an exception to crimes that are to be punished based on generally accepted

[465] Criminal Code, Article 459 (1).
[466] Criminal Code, Article 459 (1) 10.

rules of international law, ie. customary law[467]. This provision foresees that procedures directly based on customary law are not in violation of the *nullum crimen sine lege* principle, since they were punishable at the time by international customary law. As the Hungarian Constitutional Court rightly stated in 1993, international law requires the observation of the *nullum crimen sine lege* principle within its own system, ie. international law demands that war crimes (or crimes against humanity) are to be punished at the time of their commission according to international customary law. Through the criminal jurisdiction exercised by Hungary, actually the criminal jurisdiction of the international community is exercised, based on the conditions and within the guarantees defined by the international community[468].

At the same time, the subsequent paragraph of the Code confirms the *nulla poena sine lege* principle, without any special rule for crimes to be punished under international law[469]. The question then would raise, what sanction could the judge apply in case of a crime to be punished under international law, but not punishable under Hungarian law. The answer is to be found in the next article, which states that "[t]he new criminal code shall be applied with a retroactive effect in case of crimes to be punished based on generally accepted rules of international law, in case the act was not punishable by the Criminal Code at the time of commission of the act."[470] This means that in case of an act perpetrated before entry into force of the Code, the judge will apply the Code retroactively, including the sanctions. However, if the prosecutor or judge is confronted with a case involving a crime under international law that is not stipulated in the present Code, he/she would have to directly rely on the text of the international treaty or on customary law.

Regarding jurisdiction, the Code states that it shall be applied for an act committed by a non-Hungarian citizen abroad "in case of crimes formulated in Chapters XIII or XIV, or any other crime whose prosecution is prescribed by an international treaty promulgated in law."[471] Chapter XIII of the Code includes crimes against humanity – a form of which is genocide –, while Chapter XIV includes war crimes. In such cases the criminal procedure shall be initiated by the Prosecutor General[472]. Although this provision seeks to provide for universal

[467] Criminal Code, Article 1 (1):„Criminal responsibility of the perpetrator may only be confirmed for acts – excluding acts that are punishable based on generally accepted rules of international law – that were punishable by law at the time of commission of the act.".
[468] See decision nr. 53/1993 of the Hungarian Constitutional Court, para V.2.
[469] *Supra*, Article 1 (2).
[470] *Supra*, Article 2 (3).
[471] *Supra*, Article 3 (2) ac).
[472] *Supra*, Article 3 (2) a) ac) and Article 3 (3).

jurisdiction in case of international crimes, it may not be complete. First, not all international crimes are covered in Chapters XIII and XIV (see comments forthcoming). Second, this does not seem to cover universal jurisdiction based on customary law. While the Constitution says that "Hungary accepts generally recognized rules of international law", the Code specifically says "international *treaty* promulgated in law" (emphasis by the author), and customary law is clearly not an international treaty. Although we may argue that in case of contradiction, international law prevails, this could cause problems during application in individual cases.

Regarding statute of limitations, the Code makes an exception from the general rule in several cases out of which two exceptions are relevant for the prosecution of war crimes: (i) in case of exceptions stipulated by the law closing out statute of limitations for certain crimes, (ii) crimes defined in Chapters XIII and XIV[473]. Evidently the objective was to close out statute of limitations for war crimes and certain other international crimes. In case international treaty binding on Hungary provides for the non-application of statute of limitations for a crime that is not included in the Criminal Code, the first exception should be applicable, because the international treaty must have been promulgated in law. The theoretical question again stands if non-applicability of statute of limitations would be based on customary law, this international provision could not be applied based on the Criminal Code. At the same time, the formulation of the relevant sentence: "exceptions stipulated by *the* law closing out statute of limitations…" (emphasis by the author), instead of by *a* law, may also refer to one specific law, probably *Lex Biszku*, which, as discussed below, basically repeated the provisions, but not entirely, of the 1968 Convention on the non-application of statute of limitations.

The Criminal Code does contain the non-applicability of defence of superior order: Article 130 (1) stipulates that "[t]he soldier is not punishable for an act executed based on an order, except if he knew that he committed a crime through executing that order." Although the law does not expressly say that in case of international crimes the soldier may not claim that he did not know he was committing a crime, this interpretation can be said to be widely accepted in practice.

Regarding specific crimes, the new Code includes important developments in order to cover all grave breaches and war crimes; however, the list is still not fully comprehensive. Article 149 deals with attacks on protected persons, but left out the following crimes: prohibition of

[473] *Supra*, Article 26 (1) and (3).

starvation of the civilian population, prohibition of inhumane and degrading treatment and punishment, and prohibition of deporting own citizens to occupied territories and unlawful deportation or displacement of the population of occupied territories.

Article 153 provides for the prohibition of attacks against protected objects. The provision seems to confuse protection of non-defended localities with protection of objects and is also not clear on proportionality. The provision suggests that only those attacks are prohibited that are directed against objects that are not military objectives *and* are non-defended, and it only prohibits attacks that are not in conformity with the proportionality principle in case of non-defended localities. It is important to note that as in case of installations or buildings designed for the treatment of sick and wounded, belonging to the armed forces, they can be defended, ie. their defence does not deprive them of protection[474], and the proportionality principle does not only apply for non-defended localities. It seems that the legislator confused the notion of protected objects (or non-military targets) with non-defended localities[475].

At the same time, the provision correctly included protection of cultural property, including property under special and enhanced protection. It also stipulates prohibition of use of cultural property for hostile purposes and looting and destruction of cultural property. It also provides for the protection of the natural environment.

Article 157 prohibits abuse of emblems protected by international law. The provision states that abuse of the red cross, red crescent, red crystal or other emblems serving a similar purpose and protected by international law are punishable, in case a more serious crime had not been committed. The Code left out the prohibition of the abuse of the white flag, and emblems or uniforms of hostile forces or the UN[476]. It may be that the provision "emblems serving a similar purpose" was meant to indicate these; this could be likely in the case of the white flag, however, it could be difficult to accept that emblems or uniforms of hostile forces or the UN should be understood as emblems serving a similar purpose to the humanitarian meaning of the red cross, red crescent or red crystal.

[474] See Article 13 (2) of Additional Protocol I of 1977.
[475] The controversies mentioned in the present pages have all been raised in a document submitted to the government for consideration prepared by the International Law Department of the Pázmány Catholic University, of which the present author drafted many of the recommendations related to the section on war crimes. The document also included several recommendations which were eventually adopted in the final text – whether or not as a result of the mentioned document – such as inclusion of common Article 3 in the definition of armed conflict and the provision with respect to the protection of the distinctive emblems.
[476] See Article 8.2 (b) vii) of the Rome Statute of the International Criminal Court.

The other plausible and important improvement of the new Code is the manifestation of command responsibility. Article 159 basically adopted the text of the Rome Statute regarding responsibility of the military commander. Regarding responsibility of a civilian leader, the Code uses the term "official person or foreign official person in a leadership position", providing an even more comprehensive definition.

All in all, the new Criminal Code follows the approach of extensive codification of international crimes and conditions of their punishment[477] as opposed to leaving it to prosecutors and judges to directly apply international law[478]. As generally pointed out by many writers[479], and considering the Hungarian legal traditions and the earlier decisions of the Hungarian Constitutional Court giving a guideline on the treatment of international crimes within the Hungarian legal system[480], this seems to be the correct way.

As one of the drafters of the Code noted, since the Hungarian Constitutional Court stated that the principle of legality must also be complied with by international crimes, codification is the best means to ensure compliance with that principle. He further stated that the *nulla poena* principle was a constraint to the direct application of international law by domestic courts[481].

At the same time, however extensive implementation may be, direct application by prosecutors and judges cannot be fully avoided, because written text can never provide for such a precise mirror of the international obligations as judicial application, considering the different logic of the two fields of law and the changing nature of international law. As Imre

[477] Similarly, one of the reasons for the adoption of the German *Völkerstrafgesetzbuch* was it providing a link between international law and national criminal legislation which is required for German courts to adjudicate in a concise manner acts violating international law, and to consolidate international criminal law into the German legal order, in order to ease the work of adjudicators. See *supra* note 4, Kis & Gellér, p. 364 and the ministerial explanation to the German *Völkerstrafgesetzbuch.*

[478] By 'direct application of international law by domestic courts', the present author means application by domestic authorities of rules of international treaties that were ratified by the given state but its provisions had not been implemented into national law. For instance, applying a grave breach of the Geneva Conventions in a criminal procedure in a state that had ratified the Geneva Conventions but did not implement that specific grave breach into its penal code. Similarly, direct application could also mean application of a customary rule without it having been implemented into national legislation.

[479] See for instance Statement of V.-D. Degan, Institut de droit international, Annuaire, Volume 71, Tome II, Session de Craccovie, 2005 – Deuxième partie, Editions A. Pedone, Paris, p. 212, W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, TMC Asser Press, The Hague 2006, p. 36, or R. Varga, *The domestic prosecution of war crimes with special attention to criminal justice guarantees*, PhD dissertation, available at : https://jak.ppke.hu/uploads/articles/12332/file/Varga_Reka_PhD_VEGLEGES.pdf (last visited on 2 January 2013). As for collision of direct application of the Rome Statute with the principle of legality, see M. Cottier, 'Die „Umsetzung" des Römer Statuts hinsichtlich der Kriegsverbrechen', *Jusletter*, 14 Maerz 2005, p. 4. In this article, Cottier asks whether it is compatible with the principle of legality that the Swiss military penal code refers to crimes defined in international treaties and it does not define the elements of crimes in the national penal code.

[480] See for instance Constitutional Court decisions nr. 53/1993, and 36/1996.

[481] See *supra* note 4, Gellér, pp. 58-60.

Wiener pointed out, the determination of specific features of international crimes required such a detailed and well-founded interpretation that it could be done more precisely on the level of application than on the level of the legislator that is only capable of an abstract formulation.[482] Therefore, it seems, an extensive implementation, mixed with effective judicial application could result in full compliance with the relevant international obligations.

II. The Biszku-case: attempts at domestic application of international law and Lex Biszku[483]

1. Introduction

The present pages are not intended to provide a full overview and analysis over the Biszku-case, but are merely aimed at providing an illustration of the difficulties of direct application of international law and the legislator's effort in finding a solution.

The decision of the prosecution in the Biszku-case sent waves of astonishment around international lawyers in Hungary. The decision in question puts a mirror to the way international rules on serious international crimes are applied, or rather often not applied, in Hungary. The present lines will provide a general overview over the hurdles around direct application of international law.

In the first phase of the Biszku-case, a request for initiation of investigation was filed by international criminal lawyer Ádám Gellért to the prosecutor's office against Béla Biszku, former Minister of Interior in Hungary after 1956, for acts constituted during political persecutions after 1956, which qualify, according to the request, as crimes against humanity, namely persecutions on political ground, murder and other inhuman acts[484]. The claimant argued that although criminal proceedings against Biszku cannot be initiated based on domestic law due to elapse of time, nothing closes out prosecution based on international law, namely international customary law related to crimes against humanity, Article 6 c) of the Nuremberg Charter and the 1968 New York Convention on the Non-Application of Statute of

[482] See Wiener A. I., 'Büntető joghatóság és nemzetközi jog' (Criminal jurisdiction and international law), XXXV *Állam-és Jogtudomány* 1993, p. 205.
[483] The main findings of the present chapter were published in Hungarian under the following citation: Varga R., 'A nemzetközi jog által büntetni rendelt cselekmények magyarországi alkalmazása (a Biszku-ügy margójára)' (Application of international crimes in Hungary – Notes on the Biszku-case), VII/4 *Iustum, Aequum, Salutare* 2011, pp. 19-24.

[484] Legal opinion including a request for initiation of investigation, 21 October 2010. Available at: http://nemzetkozi-jog.blogspot.hu/2010/10/jogi-allaspont-az-1956-os-megtorlasokat.html (last visited on 2 January 2013).

Limitations for War Crimes and Crimes Against Humanity. The Municipal Prosecutor's Office rejected the request[485]. Its main argument was that the acts referred to in the request did not constitute crimes against humanity[486]. In the decision, nor did the prosecutor go into details of the elements of crimes against humanity, nor did it examine or explain why it came to such a conclusion.

After the claimant filed a complaint against the decision, basically arguing that the decision lacked substantial arguments[487], the Prosecutor General's Office rejected the complaint formally referring to non-observation of the deadline for complaint, but also upheld the previous decision in substance[488], and although *ex officio* providing a completion of the arguments of the first instance decision, substantially not shedding light as to the substantial arguments of the prosecution as to why the referred acts did not constitute crimes against humanity.

This second decision, for reasons unimaginable to the present author, undertook to analyze the acts in light of the Geneva Conventions, although the request did not even mention the Geneva Conventions and it seems to be clear that the acts cannot fall under its scope of application due to a lack of presence of armed conflict in the years after 1956. The decision concluded that the acts in question could not constitute grave breaches of Geneva Convention IV, namely depriving a person of the rights of a fair trial, because it cannot be concluded from the decisions of the Central Party Political Committee at the time, ordering that the prosecution and the Ministry of Interior sees to it that the guilty counter-revolutionaires receive adequate punishment, that the acts of the prosecutors and judges constitute acts described under Article 147 of Geneva Convention IV. The decision further notes that Article 146-147 refer to procedural guarantees and the right to defence, while the request does not specify such acts[489].

Notwithstanding the fact that war crimes or crimes against humanity are to be pursued *ex officio*, therefore arguing that specific acts were not included in the request does not stand, it

[485] Decision of the Municipal Prosecutor's Office nr. NF. 27942/2010/1 dated 29 October 2010. Available at: http://nemzetkozi-jog.blogspot.hu/2010/11/fovarosi-fougyeszseg-dontese-biszku.html (last visited on 2 January 2013).
[486] *Supra*, p. 5.
[487] Complaint against the decision of the Municipal Prosecutor's Office, 16 November 2010. Available at: http://nemzetkozi-jog.blogspot.hu/2010/11/panasz-fovarosi-fougyeszseg-biszku.html (last visited on 2 January 2013).
[488] Decision of the Office of the Prosecutor General nr. NF 10718/2010/5-I dated 17 December 2010. Available at: http://nemzetkozi-jog.blogspot.hu/2011/01/legfobb-ugyeszseg-elutasitotta-biszku.html (last visited on 2 January 2013).
[489] *Supra*, p.4.

is a mystery why the decision turned to the examination of the Geneva Conventions instead of formulating substantive arguments as to why the acts would not constitute crimes against humanity.

Finally, after some legal debate around the adequacy of the deadline of the complaint, the complaint was rejected[490], which meant the end of this specific procedure, bearing in mind that no further possibilities existed for further appeals or complaints.

The 1968 UN Convention on the non-application of statute of limitations for certain serious international crimes, like all other ratified/signed and promulgated treaties in Hungary, had become part of the Hungarian legal system with its promulgation in the official gazette, although it may not have been correctly implemented. Lack of implementation, however, does not suggest that the provisions of the treaty were not in force in Hungary – it probably merely made its application more difficult. This consequently means that notwithstanding the presence of implementing legislation, Hungary is obliged to punish international crimes – therefore the prosecutors and judges are obliged to apply rules related to the punishment of international crimes – in a way stipulated by international law, even if they are not provided for in the Hungarian Criminal Code. The Constitutional Court in Hungary declared that the elements of war crimes and crimes against humanity[491], and conditions of punishment thereof, are defined by international law[492]. The same is declared in international law by stipulating that a state cannot refer to its domestic legislation – or lack of it – to justify non-compliance with international law.[493]

The confusion to this end in the Hungarian legislation and practice are perfectly reflected in the decisions of the prosecution, and in the fact that not even the second decision was willing to make it right. The following lines provide a brief overview of some of the considerations with respect to domestic implementation and application of international rules related to prosecution of war crimes with special attention on how Central European states dealt with the question, arriving at suggested solutions for Hungary.

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[490] Decision of the Office of the Prosecutor General nr. NF 10718/2010/11-16/III. dated 1 March 2011.
[491] Worth to note that in Hungarian legislation a general confusion had been present around the exact translation of 'crimes against humanity'. At certain pieces of legislation it was called 'emberiség elleni bűncselekmények' (crimes against mankind), at other places 'emberiesség elleni bűncselekmények' (crimes against humanity), without any logic. Fortunately the new Criminal Code is now consequent in using the term "emberiesség elleni bűncselekmények', which is, in the view of the present author, the correct formula.
[492] See Constitutional Court decision 53/1993 (X.13.).
[493] See Kovács P., *Nemzetközi Közjog* (International Public Law), Budapest, Osiris Kiadó 2006, pp. 62. and 441.; M. N. Shaw, *International Law*, Cambridge University Press, Fifth Edition, Cambridge 2003, p. 124.

2. Transformation – implementation – application

First, it is important to differentiate between legal considerations and practical considerations. From a legal point of view, the difference between transformation and implementation stands in that transformation means that the international treaty is made part of the Hungarian legal order through promulgation (and it is in force from then on), while implementation means that the international treaty, already part of the Hungarian legal order, will be made 'digestible' for application through incorporation of the said provisions for instance in the criminal legislation or through giving a practical and precise legal framework to the often general provisions stipulated in international treaties, naming those responsible for the execution of such provisions and so on. Examples to the former are the inclusion of elements of crimes, non-applicability of statute of limitations or excluding immunities for certain crimes in the criminal code. Examples to the latter may be rules on the use of the red cross emblem: while international law stipulates that medical services of the armed forces shall use the emblem, the implementing legislation would include details over who is responsible for painting the red crosses, who keeps record over users, and so on.

This question is the essence of the issue of direct applicability of international law in domestic systems. It is notably up to the state to decide how detailed implementation measures it wishes to adopt – if any. Certain states only adopt implementation measures with respect to non-self executing rules (typically Anglo-Saxon states, where it mostly really works[494]), others include nearly all international obligations into the respective legislation, for instance in criminal legislation (typically continental legal systems[495]).

However, generally Central European states had started to argue without further examination or research, for reasons unknown but most probably partly due to a hesitance in taking on the Sisyphus task of detailed implementation, that international obligations are directly applicable, and consequently, no implementation was necessary. At the same time, the vast majority of prosecutors and judges were not willing to proceed directly based on the ratified and promulgated international treaties and thus to deal with all the difficulties arising from

[494] See for instance United Kingdom, Geneva Conventions Act 1957 (as amended in 1995 and 2001).
[495] For instance Germany adopted a specific law on international crimes, incorporating the grave breaches of the Geneva Conventions and the Additional Protocols and the crimes of the Rome Statute. See: Gesetz zur Einführung des Völkerstrafgesetzbuches, *Bundesgesetzblatt.* 2002, Teil I., No. 42, 29 June 2002. 2254-2260.

direct application all by themselves, which was followed by the fact that most prosecutors and judges at the time could not have dealt with this task due to a lack of knowledge of the international legal framework and the lack of knowledge of foreign languages, which was important considering that most secondary sources were and are still only available in foreign languages. Important to note that this was probably not the fault of the individual prosecutors or judges but shed light on the defects of the systems.

Most of these states started to amend their criminal codes or adopt new ones in the years 2000[496], however, the new or amended criminal codes, although all showing significant progress, have still had some shortcomings in the repression of international crimes. Although such shortcomings could be filled by a direct application of international law by prosecutors and judges, they were still mostly reluctant, probably understandably, to include direct references to international treaties in their decisions.

Therefore the situation at present is that although important steps had been taken toward a full implementation of the grave breaches – war crimes regime, its implementation is not always fully complete, which would not be a problem would prosecutors and judges be willing to fill in the gaps by direct references to international law.[497] Therefore the prosecution in Hungary could have easily solved the issue in the Biszku-case by directly referring to the 1968 UN Convention and other international legal provisions with respect to the qualification of the crime and the non-applicability of the statute of limitations, but it didn't. This is an important aspect because not making the fulfilment of international obligations possible – through being able to proceed in the case of international crimes – is a violation of our international obligations.[498]

Coming back to repression obligations, it must be considered that even in case of the adoption of detailed implementation measures it cannot be avoided that prosecutors and judges have to work with international law to a certain extent, since interpretation of the elements of crimes, commentaries of the relevant treaties, the decisions of international tribunals and courts –

[496] Lithuania adopted a new criminal code in 2000, Estonia in 2001, Slovakia in 2005, while Poland amended its criminal code in 2009.
[497] The aversion of prosecutors and judges to directly apply international law is not only typical to this region. See E. Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 *European Journal of International Law* 1993, p. 159.
[498] See Y. Dienstein, Defences *in* G. K. McDonald & O. Swaak-Goldman (Eds.), *Substantive and procedural Aspects of International Criminal Law – The Experience of International and National Courts*, Volume I, The Hague, Kluwer Law International 2000, p. 382.

although not binding but certainly guiding – are all parts of the body of international law to be considered and are thus to be regarded during such procedures.[499]

This is how we arrive at the practical considerations. Although legally the international treaties are in force for Hungary, since the prosecutors and judges are mostly willing to proceed based on what is stipulated in their criminal codes, it may be more effective to decide for a detailed implementation – and this does not only mean the criminal code.

The Hungarian Parliament, as a result of such effort, adopted a law in 2011 which entered into force on 1 January 2012, the so-called *Lex Biszku*,[500] which deals with a similar question. The law basically repeats the main provisions of the 1968 UN Convention on the non-application of statute of limitations and includes a translation of the relevant provisions of the Nuremberg Statute, ie. the definition of crimes against peace, war crimes and crimes against humanity. The law thus expressly says that crimes to which no statute of limitation shall apply as per the rules of international law shall not elapse, even if at the time of the commission of the act, prescription was applicable to them based on domestic law[501]. The law then lists such crimes, and includes crimes against humanity as described in Article 6 c) of the Nuremberg Charter, grave breaches committed in international armed conflicts as described in Article 2 of the Geneva Conventions, and grave breaches (*sic*!) committed in non-international armed conflicts as described in Article 3 of the Geneva Conventions[502].

The direct trigger of the law was the already mentioned decision of the Office of the General Prosecutor in the Biszku-case[503]. However, no matter what the direct trigger was, the law seems to be somewhat short-sighted and at certain instances legally wrong. First, whether or not the legislator specifically had the Biszku-case in mind, there seems to be no reasonable ground to pick and choose certain crimes the UN Convention referred to and not to mention others[504]. The Convention namely also mentions eviction by armed attack or occupation and

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[499] See VARGA RÉKA: Háborús bűncselekményekkel kapcsolatos eljárások nemzeti bíróságok előtt (War crimes procedures in front of domestic courts), In: KIRS ESZTER (ed.): *Egységesedés és széttagolódás a nemzetközi büntetőjogban*. Miskolc: Studia Iuris Gentium Miskolciensia – Tomus IV, Bíbor Kiadó (2009), 107.
[500] Law nr CCX of 2011 on the punishability of crimes against humanity and non-observation of statute of limitations and on the prosecution of certain crimes committed during the communist dictatorship.
[501] *Ibid*, Article 1.
[502] *Ibid*, Article 1 a)-c).
[503] See http://fn.hir24.hu/itthon/2011/10/19/benyujtottak-a-lex-biszkut/ (last visited on 3 January 2013).
[504] According to the author of the law, these crimes were left out since they were anyway regulated in the criminal code, including barring the statute of limitation. See http://www.es.hu/gellert_adam;a_biszku-ugyhoz;2011-12-14.html (last visited on 4 Januaryy 2013). This approach, however, causes confusion in the view of the present author and is not a wise solution for codification. If the barring of statute of limitations for certain crimes is already incorporated in the criminal code, then the

inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the Genocide Convention. If the goal of the legislator was to repeat clearly what the UN Convention, already in force, had to say, then this should have been done in a complete way.

Second, reference to violations of the Geneva Conventions in non-international armed conflicts as defined in common Article 3 as grave breaches is simply wrong. The grave breaches regime only applies to international armed conflicts. Although there is a general tendency to treat violations committed in both kinds of conflicts the same way – this is embodied for instance in the Rome Statute of the International Criminal Court and in several domestic legislation – however, this was not the case at the time the UN Convention was adopted and at the time Biszku committed the alleged crimes. Including Article 3 violations to crimes that are not subject to statute of limitation may have been well thought to be a progressive step, but it cannot be done retroactively. The law entered into force on 1 January 2012 and thus applies to procedures starting after this date, and nothing closes out its application to crimes committed in non-international armed conflicts that were committed at a time when international law did not lift statute of limitations for Article 3 violations. In this regard, therefore, the law has a retroactive effect that is not in conformity with the principle of legality.

Third, probably the main problem with the law is that it only concerns a small part of the rules related to the repression of serious international crimes, and although it's goal is undoubtedly to be supported, it could, in the long run, unfortunately result in more negative effects than bring results. It is not necessarily wise to grab one detail and regulate that alone while leaving the rest of the international rules unregulated. Moreover, the text of the law seems to suggest that the provisions therein are constitutive instead of being declarative[505]. This may result in that the prosecutors and judges will, from now on 'justifiably', require that *all* international obligations and what the prosecutor and judge should do are expressly stated, as a matter of fact, 'translated', into a Hungarian implementing law (and we are not talking of transformation here), and this may lead to the undesired effect that they will be even more reluctant to directly regard international law itself.

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same should have been done with crimes against humanity, and this should have been done through amending the criminal code and eventually including the elements of crimes against humanity in it.

[505] For a detailed discussion on this problem see Varga, Csaba, Nehézségek az alkotmányos átmenetben - Belső ellentmondások az elévületlenség és elévülhetetlenség törvényi megerősítésében (Difficulties in constitutional transition – Contradictions Built in the Statutory Confirmation of that a Crime has not Passed and/or cannot Ever Pass Statutory Limitations), in: 4 Iustum, Aequum, Salutare (2011).

Notably, as already mentioned, statute of limitations is only one of the possible issues. Similar problems could be caused by having to proceed based on a crime formulated in international law and not named in the criminal code or the contents of the crime or the formulation of it being different from the corresponding international rule.[506] Similarly, in some countries the question arose whether it would be compatible with the principle of legality if the domestic criminal legislation would include a crime through a general reference to the international rule, but not include all the elements of the crime.[507] The new Hungarian Criminal Code also has references to international law.[508] Such references are understandable, since in many cases the definition of weapons or cultural property as protected by international law are stipulated in treaties including a long definition and related rules about what property is exactly protected and under what circumstances. The repetition of whole international treaties or parts of treaties should be obviously avoided and the international regulations remain the background for the precise definitions.

Eventually, Lex Biszku reached its goal, and the office of the General Prosecutor initiated investigations against Béla Biszku, who is currently under house arrest, but interestingly not for the crimes that were indicated in the original request, but for alleged participation in the volley-fires in 1956[509].

Unfortunately, and regrettably largely justifying the above mentioned concerns, both the prosecutor's office[510] and the media[511] have proclaimed that the initiation of the investigation against Biszku was made possible by Lex Biszku – a statement that is legally clearly wrong. Some, but only few experts noted that proceedings had long been possible based on international law, and although several newspaper articles were written by lawyers on the

[506] Although the new Criminal Code included most of the serious international crimes, as it was stated in the first half of the present article, certain crimes are still missing. Even more, with the rapid development of international criminal law, it may easily happen that new crimes are formulated either in customary law or in treaty law and the legislator may not always be following such developments through amending the Criminal Code. In such cases binding international law has to be obeyed, and the prosecutor and judge will be left with the materia of international law.
[507] For a discussion on the Swiss criminal code, see: MICHAEL COTTIER: Die „Umsetzung" des Römer Statuts hinsichtlich der Kriegsverbrechen. *Jusletter*, 14 Maerz 2005. 4. Available at: www.trial-ch.org/fileadmin/user_upload/documents/jusletter_michael_cottier.pdf (last visited on 15 November 2011).
[508] See for instance Article 153 (2) b), which concerns punishment of attacks directed against "cultural property protected by international law", or Article 153 (3) which prohibits the use for military goals of "cultural property protected by international law", or Article 155 (1) prohibiting the "use of weapons prohibited by international law" (…), or Article 157 prohibiting the abuse of "other emblems protected by international law".
[509] According to the prosecutor's office, the reason was that not enough evidence could be collected for Biszku's participation in the persecutions after 1956, while there seemed to be enough evidence for the Volley-fire cases. See http://mno.hu/belfold/biszkunak-megsem-all-olyan-rosszul-a-szenaja-1104742 (last visited on 3 January 2013).
[510] See http://mno.hu/belfold/biszkunak-megsem-all-olyan-rosszul-a-szenaja-1104742 (last visited on 3 January 2013).
[511] See for instance http://index.hu/belfold/2012/09/10/rendorok_vittek_el_biszku_belat/ (last visited on 3 January 2013).

Biszku-case[512], as of today, only one legal opinion was published in a legal periodical about Lex Biszku[513]. A detailed discussion would be highly desirable focusing on the application of international law by prosecutors and judges, in all its aspects, and what mechanisms should be implemented to further this goal[514].

Worth to add that this problem was not new: similar problems were raised in Hungarian legislation and application related to the definition of armed conflicts – n.b. in the Korbély-case, where the Supreme Court made incorrect statements as to the applicability of Article 3 and Additional Protocol II, although the decision was later corrected – related to the list of crimes to which universal jurisdiction applies, or the handling and application of unwritten customary law. Although the Basic Law of Hungary, similar to the previous Constitution, states that Hungary accepts general principles of international law[515], certain pieces of legislation still only refer to international treaty[516].

It is therefore still questionable how prosecutors and judges will handle customary law considering that in many cases they have not shown much willingness to apply written international law either. How will they define what is the contents of uncodified customary law, since when they apply, and so on? The decision of the prosecution in the Biszku-case also testifies to the non-observance of international customary law, by not even referring to international law and simply considering the act as an ordinary crime.

3. What solution shall be chosen? Implementation or direct application?

In view of all the consideration mentioned above, it is submitted that basically two basic ways could come into question:

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[512] See Kulcsár Anna, Biszku-ügy: mégis nyomozni kellene (interview with Gellér Balázs), in: Magyar Nemzet, 25 November 2010; Gellér Balázs, Pénzbírság várhat Biszkura egy büntetőjogász szerint, available at: http://www.origo.hu/itthon/20110127-penzbirsaggal-vegzodhet-a-biszku-elleni-vademeles.html (last visited on 4 January 2013), Lattmann Tamás, A múlt árnyai a jelen homályában, Az emberiesség elleni bűncselekmények elévülésének kizárását kimondó törvényjavaslatról, in: Élet és Irodalom, 25 November 2011; Hoffmann Tamás, A jelen árnyai, in: Élet és Irodalom, 27 January 2012; Magyar Gábor–Magyar György, Koncepciók, Biszku Béla büntetőjogi felelősségre vonásáról, in: Élet és Irodalom, 7 December 2012; and articles written by the expert who drafted the law: Gellért Ádám, Biszku-ügy: lezáratlan igazságtétel, in: Magyar Nemzet, 4 April 2011; Gellért Ádám, Emberiesség elleni elévülhetetlen bűncselekmények, in: Magyar Nemzet, 9 May 2011; Gellért Ádám, A Biszku-ügyhoz, in: Élet és Irodalom, 16 December 2011.

[513] Varga, Csaba – Varga, Réka, Alkotmányosság, jogszerűség, nemzetközi és belső jog ütközésének kavalkádja - Két esettanulmány egyetlen törvénykezdeményezés példájában, in: 4 Iustum, Aequum, Salutare (2011) 9-24.

[514] Regarding an analysis of relevant mechanisms and how such mechanisms could be incorporated into the Hungarian system, see Réka Varga, Domestic procedures on serious international crimes: interaction between international and domestic jurisprudence and ways forward for domestic authorities, in: 9 Miskolc Journal of International Law (2012) 54-68.

[515] „Hungary accepts the general principles of international law (…)." Basic Law of Hungary Article Q) (3).

[516] See the discussion on the new Criminal Code above.

(i) either there is a general tendency towards the direct application of international law by prosecutors and judges, instead of adopting implementation measures. This is, however, only viable, if prosecutors and judges receive adequate training regarding international law and supposing they speak foreign languages which is inevitable mainly because of the secondary sources. Considering the structure of training for prosecutors and judges – currently lacking international law, the lack of specific units dealing with serious international crimes and the fact that many don't speak foreign languages, this solution may take decades to be workable.

(ii) or there is a tendency to implement all international obligations, but this would require that really *all* obligations are put in implementing legislation. This, however, is a difficult, if not impossible task, considering the rapidly developing body of international law, and has an effect on a series of already existing legislation, including the constitution.[517] In addition, there remains the question of implementation of customary international law – how can their content be defined, since when do they apply, and so on.

Most Western European states have chosen a middle solution. Partly depending on their legal systems, they chose to implement certain treaty regulations – in general it can be stated that Anglo-Saxon systems require less implementation measures than continental systems – and, in parallel, prosecutors and judges received adequate training. Moreover, small task forces or units had been established within the police authorities, prosecution and courts, and, in certain cases within immigration authorities, to deal with serious international crimes, thereby allowing the concentration of knowledge and experience to such units[518]. Specific training in international law received weight in these countries after they also experienced that despite exhaustive implementing legislation, prosecutors and judges cannot completely avoid having to directly deal with international law.

In Central Europe we cannot really speak of systematic solutions due to the fact that not many war crimes procedures had taken place[519], with the exception of Poland, where prosecutors

[517] The Rome Statute for instance expressly closes out immunity of heads of state and others regarding the crimes stipulated therein. Although the Rome Statute does not oblige states to implement its crimes, most states nevertheless do it, which implies subsequent changes in the constitution. This has caused many problems in a series of countries, even caused delays in the ratification of the Rome Statute, or, in the case of Hungary, this is probably the main reason for the non-promulgation in Hungary.
[518] See FIDH/REDRESS, Strategies for the effective investigation and prosecution of serious international crimes: The practice of specialized war crimes units, December 2010.
[519] In most states the criminal procedures related to the crimes committed during the communist era were solved based on national law, except in Hungary, where the corresponding Constitutional Court decision made procedures based on ordinary crimes impossible due to elapse of time, leaving reliance on international law the only remaining solution. However, for

and judges were faced as a result of the procedures related to alleged war crimes committed by Polish soldiers in Afghanistan[520] with the actual problems of application of the grave breaches regime.

For Hungary, the present author holds the second option more realistic, with the reservation that, as already mentioned, implementation does not fully prevent prosecutors or judges having to directly rely on international law as well. Although the new Criminal Code had taken important steps in this regard, references to international treaties, leaving out customary law, may give rise to problems, notwithstanding the Basic Law's clear regulation.

Therefore, in addition to the need to regularly overview domestic legislation and the development of international law in order to ensure as comprehensive implementation as possible – a daring task! –, efforts should be taken towards ensuring the adequate training of those prosecutors and judges who would likely be assigned to deal with such procedures. It has to be taken into consideration that such procedures may not only come up with respect to past Nazi or communist crimes, but also, and increasingly with the passing of time, in relation to Hungarian soldiers serving in foreign operations, or due to the eventual application of universal jurisdiction.

It must also be taken into consideration that although the obligation to exercise universal jurisdiction for grave breaches has been present for Hungary since the ratification and entry into force of the Geneva Conventions in 1954, Hungary would be probably not ready to carry out such procedure effectively, lacking adequate practical measures and background. At the same time, the international trend seems to be that members of the international community expect states to give effect to this form of international justice as well.[521]

Another argument for the adoption of exhaustive implementation measures is that those applying the law would need an indeed creative approach in case they are proceeding in a case not included in the criminal code, only in international law: what sanctions would they

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whatever reasons, only very few procedures were initiated and the failure in solving the issue left it coming up and up even decades after the 1990 changes – the Biszku-case being one example.

[520] The criminal procedure was initiated against seven Polish soldiers serving in Afghanistan for alleged war crimes (attack on civilians). Source: www.freerepublic.com/focus/f-news/2728722/posts (last visited on 14 November 2011), and www.nytimes.com/2007/11/29/world/europe/29poland.html (last visited on 14 November 2011).

[521] See Report of FIDH/REDRESS: *Extraterritorial Jurisdiction in the European Union, A Study of the Laws and Practice in the 27 Member States of the European Union*. December 2010. Available at: www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf (last visited on 15 November 2011).

have to apply (now solved by the new Criminal Code), how they should apply the general part of the criminal code for crimes to which different rules apply when it comes to participation, modes of perpetration, and so on. This cannot be expected from prosecutors and judges, considering the approach they had already shown and the requirements of our legal system, especially in light of legality principles, such as *nullum crimen sine lege certa*.

Finally it must be mentioned that as other states' examples show, once this problem had been identified, it does not take unimaginable efforts, money or manpower to improve the situation. Every state, every member of the international community has the obligation to effectively pursue cases involving the most serious international crimes and the rarity of such cases or the low eventuality of them coming up is certainly not an excuse.

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11. The Russian-Ukrainian War: the possibilities of ensuring accountability

Introduction

In international law, the revival of international and national mechanisms that ensure accountability is always connected to a specific conflict or crisis situation and appears as a reaction to it. This was the case with the Nuremberg and Tokyo tribunals: these two bodies were created in response to the crimes committed during the Second World War. Their effects on the development of international criminal justice is enormous: these remain the foundations of the international individual criminal accountability system. The system of international criminal justice is based on three pillars: (i) international law created international crimes that all states are obliged to punish, (ii) permanent and *ad hoc* international criminal tribunals were established, (iii) the main fora for proceedings related to international crimes should still be national courts. The International Court of Justice (hereinafter: ICJ) is a separate body that settles legal disputes between states, and can only act in certain cases.

In connection with the Russian-Ukrainian war, the demand emerged that crimes committed during the conflict should not remain unpunished. We should not forget that the essence of the present system is to ensure that there is no impunity for international crimes.[522] The mechanisms available today are much more advanced than they were after World War II. Given that such procedures are relatively rare and quite difficult from both a legal and practical point of view, the cooperation of states is necessary for them to be truly effective. At the same time, it is also important that whenever we discuss accountability, whether state responsibility or individual criminal responsibility, there should be a clear international legal basis for whatever solution is chosen. In the following, in addition to describing the possible forums, procedures and types of crimes, the possibilities of cooperation between states will also be discussed.

Jurisdiction-related issues and national procedures

If the issue of prosecuting perpetrators for international crimes arises, the first thing to be clarified is which forum should be taken into consideration. Such a trial can be brought both before national courts and international fora. Regarding national procedures, resort to ordinary (personal, territorial, passive personal) or universal jurisdiction is possible, while at the international level, the International Criminal Court (hereinafter: ICC) has jurisdiction with respect to certain international crimes.

Ukraine has so-called ordinary jurisdiction to prosecute criminals at the national level. Based on this jurisdiction, Ukraine can act regarding international crimes committed on its territory (territorial jurisdiction), while according to personal jurisdiction, it is entitled to act in the case of illegal acts committed by its citizens (personal jurisdiction). The reason this is called ordinary jurisdiction is that this flows from state sovereignty, whereby every state is entitled to exercise jurisdiction over its territory and nationals.

[522] Moffet (2015) 289.

Universal jurisdiction is a special kind of jurisdiction. On the basis of universal jurisdiction, if international law provides authorization, a state can carry out prosecutions in the case of certain international crimes in cases where otherwise it would not have ordinary jurisdiction.[523] This also serves the purpose that perpetrators of the most serious international crimes cannot escape prosecution. Although universal jurisdiction is an international legal obligation, its application often runs into political obstacles.[524] On the basis of universal jurisdiction, in connection with the Russian-Ukrainian conflict, national proceedings have been initiated in approximately twenty states around the world, including in very distant countries, such as Canada.

In most cases national procedures encounter several difficulties concerning prosecution for international crimes. Some of these are legal obstacles (the implementation of individual international crimes into national law, the fullest possible development of the structures of different kinds of responsibility), while others are practical: it can be particularly difficult to find witnesses and obtain evidence during proceedings in states far away from the scene of the crime. It can also be generally concluded that a procedure can work successfully in remote states if cooperation between the authorities has already been established and works smoothly, such as clear coordination mechanisms between investigative bodies, prosecution authorities, courts or immigration offices. For this purpose, several states have created war crimes units,[525] the aim of which is precisely this kind of coordination.

While criminalization of three core international crimes – war crimes, crimes against humanity and genocide – are relatively uniform in most countries, there are great differences among states regarding the criminalization of aggression at the national level. While – among others – the Hungarian Criminal Code does not penalize the crime of aggression (it does, however, penalize the other three categories of crimes regulated by the Rome Statute),[526] Lithuania and Poland do, and have initiated national proceedings for the crime of aggression.[527]

Due to the initiation of national proceedings before national courts, the need for judicial cooperation among states arose within the European Union (hereinafter: EU), in order to share evidence and coordinate the proceedings to avoid duplication of efforts and to guarantee efficiency. In this regard, it is important to note that since 2016, the number of investigations and indictments regarding genocide, crimes against humanity and war crimes has increased rapidly in the EU countries. Between 2016 and 2021, the number of newly initiated cases in the Member States increased by 44% overall. All of this is partly due to events that have occurred relatively close to the borders of the EU (e.g., the current Russian-Ukrainian conflict or the Syrian civil war that broke out in 2015) and caused waves of migration in the direction of the Member States.[528]

In order to coordinate the above-mentioned procedures initiated in domestic courts of the Member States, the EU took up a coordinating role. As an international network, the primary task of the European Union Agency for Criminal Justice Cooperation (EUROJUST), the

[523] Varga (2014) 51-53.
[524] One example is the case of former Prime Minister Ariel Sharon, who was sued in Belgium for an international crime allegedly committed in a refugee camp in Lebanon. The case stirred up a huge diplomatic debate, and eventually Belgium amended its national law on universal jurisdiction. See link1.
[525] Varga (2014) 228.
[526] Act C of 2012 on the Criminal Code 14-156. §
[527] McDougall (2023) 214-15.
[528] Link2.

judicial cooperation agency of the EU, is to assist and coordinate the proceedings of national authorities across borders, as well as to support cooperation frameworks.[529] In order for EUROJUST to be able to help Member States ensure accountability, on May 30 2022, the amendment of the previous EU regulation was adopted, which enables EUROJUST to fully coordinate the investigations that had already been launched, by being authorized to preserve and analyse evidence. Consequently, the EU seems to be taking a very uniform and decisive action concerning accountability. This reinforces the relevant rules and the pursuit of the goal of 'no impunity' for international crimes.

In addition, several Member States of the EU joined the so-called Joint Investigation Team (JIT), which ensures real-time, cross-border information sharing between law enforcement agencies and courts. In March 2022, Poland, Lithuania and Ukraine set up a JIT, which was later joined by Estonia, Latvia, Slovakia, Romania and the ICC, creating a complex network of cooperation.[530] The main purpose of this network is to collect and exchange evidence. The JIT is currently investigating the most serious crimes together with the Ukrainian authorities.[531]

Potential crimes

Prosecution for international crimes can generally be carried out – on the basis of the Rome Statute establishing the ICC – for genocide, crimes against humanity, war crimes, and crimes of aggression.[532] These are separate crimes, many of them originating from the Nuremberg trials and some of them originating from treaty law.

To provide a brief description of these crimes, it must be mentioned that since the outbreak of the war, the international community has been concerned with answering the question of how Russian state leaders, including Vladimir Putin, could be held accountable for the crime of aggression.[533] With regard to aggression, a distinction must be made between the *act* of aggression by states, which is committed by a state by unlawfully resorting to use of force,[534] and the *crime* of aggression punishable by Article 8bis of the Rome Statute, which is committed by a person who has influence over the political or military actions of a state, by planning, preparation, initiation or execution of an act of aggression in a manner that seriously violates the Charter of the United Nations (hereinafter: UN Charter).[535]

According to the Rome Statute, a war crime is defined as the range of crimes listed therein that represent the most serious violations of international humanitarian law. These can be committed by both combatants and civilians. These acts are committed in an armed conflict.
Concerning the Russian-Ukrainian conflict, crimes against humanity may arise as an additional possible criminal category. The condition required for this category of international crime is that the perpetrator commits the punishable act as part of a widespread or systematic attack. Crimes against humanity can be committed both during armed conflict and in peacetime.

[529] Regulation (EU) 2018/1727 of The European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, Article 4
[530] Link3.
[531] Marchuk (2022) 801.
[532] Rome Statute of the International Criminal Court, Articles 6,7,8, 8bis
[533] Atadjanov (2022) 183–84.
[534] UN Charter Article 2 paragraph (4)
[535] Ádány (2011) 95.

Finally, in connection with the current conflict, prosecution for the commission of genocide may also arise. Pursuant to Article 6 of the Rome Statute – in accordance with the provisions of the 1948 Genocide Convention[536] – the crime of genocide is defined as an act committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Genocide means in particular the killing of members of a protected group; causing serious harm to the physical or mental integrity of group members; or intentionally forcing the group into living conditions that could cause the group's total or partial physical destruction. In the case of genocide, it is an essential condition for the establishment of guilt – thus distinguishing it from other categories – that the perpetrator commits the acts with the intention of the complete or partial destruction of a protected group. To establish guilt, it is sufficient if the special intent required on the part of the perpetrator is realized regardless of the result.[537] Among the four categories of international crimes discussed, the crime of genocide is perhaps the most difficult to prove, due to the proof of the special intent required on the part of the perpetrator.

Concerning the aforementioned crimes, the ICC has jurisdiction to act in the case of war crimes, crimes against humanity and genocide, but not, in the current situation, regarding the crime of aggression. The reason being that although neither Russia nor Ukraine are parties to the Rome Statute, Ukraine's declarations[538] allow the ICC to proceed in the case of the first three crimes, but in the case of aggression, the ICC can only act in relation to a state party.

Current proceedings before the ICC

Based on the above, in addition to national proceedings, the ICC has jurisdiction over three international crimes. Although Ukraine and Russia are not parties to the Rome Statute, due to Ukraine's declarations, the ICC has jurisdiction over the present conflict. In relation to acts committed on the territory of Ukraine, 45 states addressed the ICC Prosecutor General with a request to open an investigation into the crimes committed on the territory of Ukraine under its jurisdiction. This sped up the ICC's procedure and so investigations commenced.

Before the ICC initiates proceedings against identified suspects, first it examines so-called situations (e.g., the situation in Ukraine) which means that a preliminary examination is developed into a formal investigation by the Office of the Prosecutor, not against individual suspects, but generally in the given situation with the aim to identify specific crimes and specific suspects.[539] In relation to the situation in Ukraine, the ICC Prosecutor General opened an investigation on March 2, 2022 – subject to Ukraine's unilateral submission – concerning possible international crimes committed on the territory of Ukraine beginning on 21 November 2013. In the spring of 2022, the ICC investigation team began its work in Ukraine, and the Prosecutor General visited Kharkiv in June.[540] It is important to remember that the ICC is authorized to investigate violations committed by any citizen, including Russian or others, for acts committed on the territory of Ukraine.

An important aspect of the ICC procedure is that this judicial forum does not and cannot aim to detect every single international crime. Furthermore, the ICC has complementary jurisdiction; consequently, if the state(s) concerned act(s) under national competence based on

[536] Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948, Article II.
[537] Quénivet (2022) 144.
[538] Link4.
[539] Link5.
[540] Link6.

territorial, personal or universal jurisdiction, the ICC cannot seize the case.[541] If a state is unable or unwilling to conduct an impartial and fair criminal trial, the ICC may take the case. Due to the limitations of capacity, the ICC acts mostly in emblematic cases involving significant, high-level perpetrators.[542]

The idea of setting up a tribunal on the crime of aggression

As a result of the Russian-Ukrainian conflict and given that there is currently no international forum with jurisdiction over the crime of aggression, the idea of setting up a special tribunal for the crime of aggression is gaining more and more attention.[543] According to the initial proposal[544], such a special tribunal would be established on the model of the Nuremberg Tribunal. Subsequent ideas suggested that it would be the result of an agreement between Ukraine and the United Nations (hereinafter: UN).[545] The idea of a hybrid court was also raised, according to which a court with international features would be established within the Ukrainian jurisdiction, under its umbrella.[546]

The first version of the idea (an international ad hoc tribunal of aggression) would have symbolic significance, since aggression, 'the crime of crimes', could well justify the demand for accountability. However, according to current international rules, there would be no international legal basis for the establishment of such an ad hoc tribunal without a resolution of the UN Security Council, or without the agreement of all the states concerned. The creation of such a tribunal by concluding a treaty between states, but without Russia, would not be grounded in international law, even if the UN General Assembly authorized the UN to conclude such an agreement with Ukraine, since the UN General Assembly does not have binding power on all states.[547] At the same time, the issue is constantly on the agenda in UN forums, in the EU and the Council of Europe (hereinafter: CoE), with several alternative ideas.

The second version of the idea, the hybrid tribunal, would operate on the basis of Ukrainian jurisdiction. This would be conceivable in international law. At the same time it could raise many internal legal and practical problems for Ukraine. Its other main problem would be that it does not offer a solution to the question of how Russian state leaders – due to their immunity – could be brought to court.[548]

Ensuring accountability for the act of aggression – establishment of state responsibility

Separate from the above-discussed individual criminal liability is the responsibility of the state for violations of international law. By attacking Ukraine, Russia violated one of the most important norms of international law: the prohibition of the use of force. The International Court of Justice (ICJ) is the forum that has jurisdiction, under certain conditions, over international legal disputes between states. However, the ICJ does not have jurisdiction over the question of aggression in connection with the Russian-Ukrainian war.[549] Recognizing this, in order to prove the illegality of the 'special military operation' launched by Russia, Ukraine

[541] Ádány (2012) 62.
[542] Kotecha (2020) 118.
[543] McDougall (2023) 211-14.
[544] Link7.
[545] Sterio (2023) 499.
[546] Dannenbaum (2022) 863.
[547] Atadjanov (2022) 182.
[548] Link8.
[549] Green et al. (2022) 8.

initiated proceedings before the ICJ, with a legal twist: not based on reference to the use of force (where the ICJ has no jurisdiction), but based on Russia's alleged violation of the Genocide Convention.[550] Ukraine requested the ICJ to determine that Russia had violated the Genocide Convention, since it cited Ukraine's alleged genocide as the reason for launching the 'special military operation'. According to Ukraine, genocide did not happen, and this cannot be the reason to launch an attack against another state.[551]

Concluding Remarks

As a result of the Russian-Ukrainian war, an exceptionally large coalition has been formed in the Western world in order to enforce accountability. These issues are constantly on the agenda in different platforms of the European Union, the Council of Europe, the United Nations and the Organization for Security and Co-operation in Europe. The EU is actively trying to coordinate the efforts of its Member States and cooperate with the ICC. These procedures are also of great symbolic importance, and even though this is possibly less important in the current situation, they also contribute to the further development of international criminal law.

[550] Link9.
[551] Hoffmann (2022) 217-18.

12. Rules and obligations under humanitarian law relating to the International Committee of the Red Cross

Foreword

The norms of international humanitarian law impose obligations on the parties to the conflict regarding how they must conduct themselves during war: they afford protection to certain particularly vulnerable persons, prohibit certain methods and means of warfare, and generally afford protection to the civilian population not taking part in hostilities, as well as to prisoners of war, wounded and injured soldiers who are no longer taking part in hostilities. The rules include both prohibitions and obligations to act or perform certain acts.

Compliance with the rules of humanitarian law is the responsibility of states; thus, it is their responsibility, for example, to ensure that protected persons are not targeted, that the civilian population receives adequate care and, where necessary, aid, or, for instance, that prisoners of war are treated appropriately.

In reality, however, states (or non-state actors) involved in armed conflict are not always able to fulfil their obligations, particularly with regard to rules concerning active conduct and behaviour. In most cases, this is due to a lack of resources (whether material or human), but it may also be due to a lack of adequate knowledge of the rules (though this does not, of course, exempt them from their obligations); however, it also happens that a lack of political will is the cause of the failure to fulfil these obligations.

It is also self-evident that, in the event of war, it is in certain cases particularly difficult for the parties involved in the fighting to reach certain areas, to provide adequate information, to document events, or to verify the legality of their own authorities' actions (see the treatment of prisoners of war).

Precisely because the parties involved are not always able to fulfil these obligations in full, the work of humanitarian organisations operating during armed conflicts takes on greater significance and becomes extremely important. Often, complementing or replacing the work of the authorities, humanitarian organisations provide the civilian population or detainees with adequate food or medical care, report instances of inhumane treatment of detainees to the authorities, and carry out other activities aimed at assisting and protecting the victims of war.

The International Committee of the Red Cross (hereinafter ICRC) is specifically mentioned in international humanitarian law conventions. The reason for this is that the ICRC operates under an international mandate, according to which its primary task is to protect and assist victims of armed conflicts.

All humanitarian law norms relating to the ICRC are built around the same fundamental principle: as the ICRC is an independent and impartial humanitarian organisation operating under an international mandate, those involved in hostilities have a duty to facilitate its work.

In this chapter, we shall review the legal provisions relating to the ICRC found in humanitarian law conventions. However, in order to understand these provisions, we must first briefly review the ICRC's mandate, activities, mode of operation and rules of operation.

1. Introduction: the International Red Cross and Red Crescent Movement

1.1. The Red Cross and Red Crescent Movement

The ICRC is a founding member of the International Red Cross and Red Crescent Movement (hereinafter: the Movement). The members of the Movement are as follows:

a.) the ICRC
b.) the national Red Cross and Red Crescent Societies operating in every country (such as the Hungarian Red Cross)
c.) the International Federation of Red Cross and Red Crescent Societies (hereinafter referred to as the Federation)

The members of the Movement are separate and independent organisations, but they operate according to the same fundamental principles:

1. Humanity:	its aim is to prevent and alleviate human suffering, and to protect life and health;
2. Impartiality:	its activities are guided solely by the extent of need; it makes no distinction on the basis of nationality, race, religion, class or political opinion;
3. Neutrality:	it does not take sides in hostilities and does not become involved in political, racial, religious or ideological disputes;
4. Independence:	is independent of all governments;
5. Voluntary:	a voluntary aid organisation which must not aim to make a profit;
6. Unity:	there may be only one national Red Cross/Red Crescent Society in each country, which extends its activities throughout the whole territory of the country;
7. Universality:	the Movement extends throughout the world.[552]

In accordance with the principles set out above, a national Red Cross/Red Crescent Society has been established in every country, such as the Hungarian Red Cross (hereinafter referred to as the national society), the aim of which is to assist and support the humanitarian work of state bodies, in accordance with the needs of the population of the country concerned. The national societies are independent organisations which cooperate with the authorities by offering their own services and programmes, such as organising blood donations, social activities, soup kitchens, emergency aid during natural disasters and armed unrest or conflict, and the promotion of humanitarian ideals and international humanitarian law[553] .

It should be noted that the activities of national Red Cross societies and the rules governing them are also mentioned in the Geneva Conventions, but we will not go into further detail regarding these rules here.

The Movement's highest decision-making body is the International Conference of the Red Cross and Red Crescent (International Conference), which is normally held every four years.

[552] The Statutes of the International Red Cross and Red Crescent Movement (hereinafter: the Statutes), preamble (adopted by the 25th International Red Cross Conference, Geneva, October 1986), IRRC, no. 256, January–February 1987, pp. 25–59.
[553] Statute, Article 3, paragraphs 1–3

The International Conferences are attended by members of the Movement and the States party to the Geneva Conventions; this is the principal forum for cooperation between the States and the Movement. Resolutions adopted at the International Conferences do not constitute international treaties and are therefore not legally binding on states; however, as states participate in the adoption of these resolutions, they thereby indicate that they agree with their content and consider them to be worthy of observance.

1.2. The International Committee of the Red Cross (ICRC)

The ICRC is a founding member of the International Red Cross and Red Crescent Movement, which has been in operation for over 150 years, since 1863. The organisation (legally a company registered in Switzerland with an international mandate – most akin to an international organisation) was granted an international mandate by the 1863 Geneva Diplomatic Conference, initially only to maintain communication between national Red Cross societies[554] .

As we shall see below, the 1949 Geneva Convention already lays down detailed rules concerning the ICRC (it should be noted that the Geneva Conventions, as international treaties, primarily impose obligations on the signatory states. This does not, however, mean that they cannot impose obligations on the ICRC as well[555]).

The Statute of the International Red Cross and Red Crescent Movement was adopted in 1986, clearly setting out the mandate of the Movement's participants, and thus the role of the ICRC: as a neutral, independent and impartial organisation, to protect and assist the victims of war. Although the Statutes were not drawn up in the form of an international convention, they were nevertheless adopted and signed by states as an expression of their will, and are therefore legally binding[556] .

<u>The main activities of the ICRC:</u>

The aim of the ICRC's activities is to assist and protect the victims of war. Within this mandate, it carries out the following main activities:

- providing food, drinking water, medical supplies and services to those in need;
- visiting prisoners of war and civilian detainees;
- teaching and disseminating humanitarian law standards to military personnel and the civilian population in both wartime and peacetime (preventive activities);
- maintaining contact and confidential dialogue with the relevant authorities in order to assist those in need;
- tracing missing persons, reuniting families separated by war, and maintaining contact between families.

The ICRC's budget (approximately 1 billion Swiss francs in 2006) consists largely of donations from states, but it is also supported by national Red Cross and Red Crescent societies and private individuals.

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[554] Francois Bugnion: The International Committee of the Red Cross and the Protection of War Victims, ICRC-Macmillan (2003), pp. 16–19
[555] Bugnion, op. cit., p. 317
[556] Bugnion, op. cit., pp. 369–370

The ICRC emblem (in French-speaking countries, the text below the logo reads: ‘CICR’):

ICRC

2. The international legal basis for the ICRC’s activities

The international legal basis for the ICRC’s activities can be categorised as follows:

2.1. During international armed conflicts

i. Geneva Conventions and Additional Protocols: obligations relating to specific activities

The 1949 Geneva Conventions[557] and the 1977 Additional Protocols[558] only set out an explicit obligation for states to facilitate the ICRC’s activities in the event of an international armed conflict; these rules indirectly authorise the ICRC to carry out its tasks. These authorisations are not general in nature, but relate to specific activities of the ICRC (visiting prisoners of war and civilian detainees), and will therefore be discussed in later chapters.

ii. General obligation to cooperate

Article 81 of the First Geneva Convention establishes a general obligation on states:

“The Parties to the conflict shall, by all means at their disposal, facilitate the International Committee of the Red Cross in the performance of the humanitarian tasks entrusted to it by the Conventions and this Protocol for the protection and assistance of the victims of the conflict; (…)”[559] (humanitarian task = humanitarian activity)

This rule therefore generally stipulates, in addition to the rules relating to specific activities of the ICRC, that the Parties must enable the ICRC to carry out its duties.

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[557] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed at Geneva on 12 August 1949 (hereinafter: I.GE), The Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Naval Forces, signed at Geneva on 12 August 1949 (hereinafter: II.GE), The Convention relative to the Treatment of Prisoners of War, signed at Geneva on 12 August 1949 (hereinafter: III. GE), The Convention relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949 (hereinafter: IV. GE). In Hungary, the four Geneva Conventions were promulgated by Decree-Law No. 32 of 1954

[558] The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), signed on 8 June 1977 (hereinafter: Protocol I), The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (hereinafter: Protocol II).
Promulgated in Hungary by Decree-Law No. 20 of 1989 on the promulgation of Additional Protocols I and II to the Conventions concluded in Geneva on 12 August 1949 relating to the protection of victims of war

[559] I. KJ, Article 81(1) (emphasis added by the author)

iii. Right to offer humanitarian assistance

Articles 9, 9, 9 and 10 of the Geneva Conventions also refer to the activities of the ICRC:

"The provisions of this Convention shall not prevent the humanitarian activities carried out by the International Committee of the Red Cross (…) with the consent of the Parties to the conflict, with a view to the protection of the wounded and sick, and of members of the medical and religious personnel, and to the assistance to be rendered to them."

Furthermore, according to Article 81 of the First Geneva Convention:

"(…) the International Committee of the Red Cross may, with the consent of the Parties to the conflict concerned, carry out other humanitarian activities for the protection of the victims of the conflict."

iv. Statute

The ICRC's "constitutive document" is the Statute, which was adopted by the States party to the Geneva Conventions and the members of the Movement. As mentioned above, the Statute does not in itself constitute an international treaty and therefore does not have binding force; however, as it has been signed by States, they have undoubtedly undertaken to comply with the provisions set out in the Statute.

The Statute states that the ICRC is an independent humanitarian organisation recognised by the Geneva Conventions, whose aim is to ensure the protection of military and civilian victims at all times, but particularly during international or other armed conflicts or internal disturbances[560] .

2.2. During non-international armed conflicts

i. The right to offer humanitarian assistance as laid down in the Conventions

Common Article 3 of the Geneva Conventions, applicable in non-international armed conflicts, authorises the ICRC to offer its humanitarian services for the benefit of victims:

"An impartial humanitarian organisation, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."

Article 18 of the Second Geneva Convention similarly refers to Red Cross (Red Crescent, Red Lion and Sun) organisations (the term 'Red Cross organisations' includes members of the Movement, including the ICRC)[561] , which may offer their services; indeed, relief operations may be launched to meet the needs of the civilian population, with the consent of the Parties. By this we mean relief operations carried out by the ICRC or other impartial humanitarian

[560] Statute, Article 5(1) and (2)(d)
[561] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (Ed. Sandoz, Swinarski, Zimmermann), ICRC, Martinus Nijhoff Publishers, Geneva, 1987, (hereinafter: Commentary on Additional Protocol II), p. 1477, para. 4872

organisations[562] . This naturally in no way affects the ICRC's right, laid down in Common Article 3, to offer its humanitarian services[563] .

We can see that, although there is no explicit obligation on the part of the authorities to authorise and facilitate the ICRC's activities in the absence of an international armed conflict, the ICRC is entitled to offer its services, which are accepted by the authorities in the vast majority of cases.

ii. Statute

The Statute itself makes no distinction between international and non-international conflicts as far as the ICRC's activities are concerned, but lists as one of its tasks the protection of victims in international and other armed conflicts, and indeed during internal disturbances[564] .

The ICRC may make any other humanitarian offer that is compatible with its mandate and with its status as a neutral and independent organisation, and may consider any matter to be worthy of examination by such a neutral body[565] .

3. Rules relating to prisoners of war and civilian detainees

Perhaps one of the most extensively developed parts of the rules relating to the ICRC concerns prisoners of war and civilian detainees. As a detailed description of these rules can be found in another chapter, in this chapter we shall merely review the rights and obligations these rules impose on the Parties in relation to the ICRC.

3.1. Visiting prisoners of war

The most important legal basis for the ICRC's visits to prisoners of war is Article 126 of Protocol III, which states:

"Representatives or delegates of the Protecting Powers shall be entitled to visit all places where prisoners of war are held, in particular places of internment, detention and work; they may enter all premises used by prisoners of war.

They shall also have the right to visit the places of departure, transit or arrival of prisoners of war who have been transferred. They may communicate with prisoners of war, and in particular with their representatives, without witnesses, and, if necessary, through the intermediary of an interpreter.

Representatives and delegates of the Protecting Powers shall be free to choose the places they wish to visit; the duration and frequency of such visits shall not be restricted. They may be prohibited only for imperative military reasons, exceptionally and temporarily.

The delegates of the International Committee of the Red Cross are entitled to the same privileges. The appointment of these delegates requires the consent of the Power under whose authority the prisoners of war to be visited are held."

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[562] Commentary on II. KJ, p. 1479, para. 4879
[563] Commentary on II. KJ, p. 1480, paras. 4891–4892
[564] Statute, Article 5(2)(d)
[565] Statute, Article 5(3)

As we know, the institution of the Protecting Power has been used by the Parties in very few cases, and in recent decades it has not been used at all. The rule quoted above therefore imposes a clear obligation on States to allow ICRC delegates access to the places where prisoners of war are held and to enable the delegates to speak with the prisoners of war in private. Thus, if the ICRC submits a request to this effect to the authority holding the prisoners of war, that authority is obliged to grant this access.

To reiterate, we must note that visits to prisoners of war naturally only apply in the context of an international armed conflict, as the category of 'prisoner of war' exists only in such a conflict. Thus, the following rules naturally apply only to international armed conflicts.

Based on the article cited above, the ICRC has established the following procedure for visiting prisoners of war:

- The ICRC notifies the detaining authority of which prisoner-of-war camp it intends to visit, and at what time or during what period; the dates are, of course, agreed with the detaining authority. The ICRC agrees with the authority on the names of the delegates who will carry out the visit;
- Pursuant to Article 126 of Protocol III, the ICRC has established three principles which form the basis for the visit:

1. the ICRC must be allowed to visit all premises at the location and meet with all prisoners;
2. it must be able to speak to prisoners in private, without witnesses;
3. it must be able to repeat the visit at any time[566] .

Only if all the conditions listed above are met can the ICRC carry out its humanitarian tasks: to assess the conditions of detention, to determine whether they comply with the provisions of the Third Geneva Convention, to prevent the enforced disappearance of prisoners, inhuman treatment of them, etc. Thus, the ICRC will only commence visits to prisoners of war if these conditions are met. The ICRC also usually requests to receive a list of prisoners before the visit begins, or, if no such list is available, to be allowed to compile one during the visit. In addition, the ICRC usually requests permission to distribute aid parcels during the visit.

The procedure for visiting prisoners of war is usually as follows:

At a pre-arranged time, ICRC delegates (usually accompanied by a medical delegate and interpreters, if necessary) visit the place of detention, where:

1. The ICRC delegates first hold a confidential meeting with the commander of the place of detention, during which they inform the commander of the procedure for the visit and its confidential nature (we will discuss the issue of confidentiality further below). The commander may inform the ICRC if he has encountered any problems relating to the treatment of prisoners of war.

2. The ICRC delegates then visit the places of detention. During the visit, the delegates may visit all areas, including sleeping quarters, washing facilities , work areas, the

[566] Bugnion, op. cit., p. 583

kitchen, punishment cells, etc. At this stage, the detaining authority usually accompanies the delegates.

3. ICRC delegates hold private interviews with any prisoners of war who request them, without witnesses. The interview provides an opportunity for prisoners to express their complaints and grievances frankly. Naturally, in a prisoner-of-war camp housing many thousands of detainees, this is arranged through collective consultation or with the assistance of representatives. During these confidential discussions, the delegates may only discuss the conditions of detention and their consequences with the prisoners; the ICRC assures the detaining authority of this.

4. Finally, the delegates hold a further meeting with the commander, during which:

- inform him of their general observations and any objections (e.g. there are not enough washing facilities for the detainees), and possibly make suggestions for resolving any problems;
- they mention which comments they will report to the prison governor's superiors.

After the visit, the delegates draw up a report containing the main observations, recommendations and concerns. The report will be sent by the ICRC exclusively to the competent authority (in accordance with the principle of confidentiality). If necessary, the ICRC may offer its assistance in the report to resolve any issues that have arisen, should the detaining authority be unable to do so (e.g. the ICRC offers to build sanitary facilities if the detaining authority lacks the financial resources to do so). In the report, the ICRC, where necessary, calls on the Party to comply with the relevant provisions of the Third Geneva Convention (e.g. providing prisoners with food of sufficient quantity and quality). If such incidents have occurred, it informs the commander of any instances of ill-treatment (provided the prisoner concerned has consented to this. It is important to note that in many cases, ill-treatment occurs without the commander's knowledge; in such instances, it is also in the commander's interest to be made aware of these matters).

One of the fundamental principles of the ICRC's work is that it treats everything seen or heard during its visits as confidential. This means that it shares its observations only with the detaining authority or its superiors; it does not disclose them to the media or to other states, even if the observations are positive. However, the fact of the visit itself may be made public. This principle of confidentiality is usually the guarantee that, as the sole humanitarian organisation, ICRC delegates are granted access to countless detention facilities for prisoners of war (e.g. Guantanamo, Iraq, Afghanistan, etc.). It is important to note that the principle of confidentiality is reciprocal: the detaining authority may not disclose or share the ICRC's reports with other states.

However, the question arises as to why the authorities would allow the ICRC to visit prisoners of war, and if they do allow it, what impact might the ICRC's visits have on the lives of detainees if they are not made public: what coercive force will influence the detainee to change any poor conditions.

In response to the first question – apart from the fact that this is an obligation under international law which the contracting states are bound to fulfil – we can simply state that there are mainly political and diplomatic reasons for this: it reflects very badly on a state's reputation if it does not allow the ICRC to visit its prisoners of war, as this is an obligation

under international law. In most cases, allowing such visits does not usually cause any problems.

In answering the second question, we must understand that in most cases it is not in the detaining power's interest to mistreat its prisoners of war. The best example of this is what happened at Abu Ghraib prison in Iraq: the cruel and degrading treatment that took place there shocked even the majority of the US military, as such acts demoralise and undermine discipline within the army, which is in no one's interest. Since then, an analysis of the events at Abu Ghraib has formed part of US military training.

Of course, it may happen that the detaining power deliberately violates the rules of the Third Geneva Convention. In such cases, the ICRC can only repeatedly (and confidentially) urge the detaining power to comply with the rules, but even then it cannot bring the matter to public attention. Clearly, as humanitarian law has no enforcement mechanism (with the exception of the International Criminal Court; however, as we shall see later, the ICRC cannot testify before the court either), a detaining power that notoriously violates the rules can only be persuaded to see reason through the means of humanitarian diplomacy.

3.2. Visiting civilian detainees in the event of an international armed conflict

The treatment of civilians in the event of an international armed conflict is governed by the Fourth Geneva Convention.

Article 143 of the Fourth Geneva Convention states:

"Representatives or delegates of the Protecting Powers shall be entitled to visit any place where protected persons are present, in particular places of internment and detention, as well as places of work.

They may enter all premises used by protected persons and, if necessary, communicate with them without witnesses and with the assistance of an interpreter.

Such visits may be prohibited only for imperative military reasons, exceptionally and temporarily. The duration and frequency of visits shall not be restricted.

Representatives and delegates of the Protecting Powers shall be free to choose the place they wish to visit.

The Detaining or Occupying Power, the Protecting Power and, where applicable, the Home Power of the persons to be visited may agree that the compatriots of persons held in custody (internees) may also take part in these visits.

The delegates of the International Committee of the Red Cross shall enjoy the same privileges. The appointment of such delegates shall require the consent of the Power under whose authority the territories in which they intend to carry out their activities fall."

This rule essentially grants the ICRC the same rights as in the case of prisoners of war, and imposes the same obligations on the detaining authority as set out above[567] . The same rules

[567] The cases and conditions for the detention of the civilian population are governed by Articles 41–43, 68 and 78 of the Fourth Geneva Convention; a detailed discussion of these can be found in another chapter.

apply to civilians who have been charged with offences[568] , as violations of the occupying power's criminal laws are often committed out of patriotic motives, and it is therefore advisable to keep such detainees separate from those who have committed 'ordinary' criminal offences[569] , and it is thus justified that the ICRC should be able to visit them.

The ICRC's special status is reinforced by Article 142(3) of the Fourth Geneva Convention: this article guarantees the activities of other organisations (visiting prisoners, providing them with aid, etc.), but (3): this article guarantees the activities of other organisations (visiting prisoners, providing them with aid, etc.), but expressly states that the ICRC's "special position in this field must at all times be recognised and respected"[570] .

The procedure and conditions for visiting civilian detainees are the same as those for prisoners of war.

3.3. Visiting detainees in the event of a non-international armed conflict

As we have seen in the previous chapters, different rules apply in non-international armed conflicts than in international armed conflicts.

We have already mentioned above that Common Article 3 authorises the ICRC to "offer its services to the Parties to the conflict"[571] . However, this is merely a right to offer services, which in itself does not oblige the Parties to the conflict to accept it. In practice, however, the warring parties often accept the ICRC's humanitarian assistance.

Although Article 18 of Additional Protocol II does not expressly mention the ICRC, Article 18 cannot be interpreted as in any way restricting the ICRC's right to offer its humanitarian services as laid down in Common Article 3[572] .

With regard to visits to detainees (in non-international conflicts, we cannot speak of prisoners of war), we can therefore conclude that in the event of a non-international conflict, there is no explicit obligation for the Parties to authorise visits by the ICRC. However, if they do authorise such visits, they shall take place as described in the provisions concerning prisoners of war.

3.4. Other assistance provided to detainees

The ICRC's activities in relation to detainees are not limited to visiting them. Although it is the duty of the detaining authority to ensure that detainees are provided with what is required under humanitarian law, if it is unable to do so (either due to organisational or financial constraints), the ICRC offers its assistance and, where necessary, financial support.

The ICRC's support is most often provided in the following areas: assisting detainees in maintaining contact with their family members (conveying messages, organising family visits), providing material resources such as food or water, sanitary facilities and equipment,

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[568] Geneva Convention IV, Article 76
[569] Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war, ICRC, Geneva, 1958 (ed. Jean S. Pictet) (hereinafter Commentary on the Fourth Geneva Convention), pp. 363–364.
[570] IV GC 142(3)
[571] I–IV GC 3(2)
[572] Commentary on the Second Geneva Convention, p. 1480

and registering detainees for the Central Tracing Service. These activities also involve the detaining authority, as it must ensure that the ICRC has access to the detainees.

Registration of prisoners, communication of information

In the case of both prisoners of war and civilian detainees, it is extremely important that they are able to send messages to their family members to let them know that they are alive. It is equally important that there is a centralised system which registers prisoners and can provide information to family members regarding the whereabouts of their loved ones.

Article 122 of the Third Geneva Convention obliges states to establish a national Information Bureau through which they can keep a register of prisoners of war. Of course, the Information Bureau only serves a purpose if it can forward the information to the prisoner's home state. Thus, under Article 123 of the Third Geneva Convention, the Parties are obliged to establish a Central Prisoner of War Information Bureau in a neutral state.

Under Article 123, the ICRC may propose the establishment of such a bureau. In practice, since 1929, the ICRC has offered the services of its permanent Central Tracing Service to the belligerent parties, who generally make use of them.

The task of the Office/Service is to collect the information necessary for the identification of detainees and to forward this information to the detainee's home country. Similar provisions apply to civilian detainees[573] .

Immediately after capture, but no later than one week thereafter, prisoners have the right to send a message to their family members and to the Central Office to inform them of their capture, place of detention and state of health[574] . This provision is also intended to ensure that family members are informed of the prisoner's whereabouts.

Notifying the ICRC's Central Tracing Service is important not only for maintaining contact between the prisoner and their family members. In this way, the ICRC receives information about the arrival of new prisoners and can thus visit them to check whether the conditions of their detention comply with those set out in the Third Geneva Convention. Although the Geneva Conventions do not specify a fixed deadline within which the detaining authority must notify the ICRC, the ICRC usually concludes an agreement with the detaining authority, typically setting a timeframe of 24 to 48 hours. Similar agreements are also usually reached in cases of non-international armed conflict, although in such cases there is no legal basis for the parties' obligations laid down in the Conventions.

Maintaining contact with family members

Under Articles 70–71 of the Third Geneva Convention, prisoners of war have the right to maintain contact with their family members, which is usually done through written messages. In many cases, however, the detaining authority lacks the necessary infrastructure to facilitate the sending and receiving of such messages.

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[573] IV GC, Article 140

[574] Geneva Convention III, Article 70. Regarding civilian detainees, see Geneva Convention IV, Article 106

[575]In such cases, the ICRC organises the communication: during its visits, it distributes so-called Red Cross messages (essentially simple postcards)[576] to detainees, who fill them in, and the ICRC undertakes to forward them to the designated family members. Naturally, the ICRC first submits the messages to the detaining authority for censorship, then delivers them; similarly, messages from family members are handled in the same way.

In non-international conflicts, the rules regarding contact with family members are naturally not as detailed. However, under Article 5(2)(b) of Additional Protocol II, detainees have the right to send and receive postcards. The detaining authority may, however, limit the frequency of such correspondence. Common Article 3, meanwhile, prescribes general humane treatment of detainees. In the case of non-international conflicts, however, there is no obligation to establish an information bureau. The right to offer the ICRC's humanitarian services naturally applies here too, and there have been instances where the parties have used the ICRC's Central Tracing Service in the context of internal conflicts.

Relief consignments

It is always the responsibility of the detaining authority to ensure the proper care of prisoners: to provide adequate accommodation, medical care, clothing and hygienic conditions[577] . However, the detaining authority does not always have the means to do so, and in certain cases has no intention of doing so.

The right of prisoners of war to receive parcels is established by Article 72 of the Third Geneva Convention. If the delivery of parcels is prevented by military operations, the ICRC is authorised to deliver the parcels to the prisoners[578] . The Third Geneva Convention generally obliges the detaining authority to facilitate the work of aid organisations, and indeed the Convention reaffirms the ICRC's special status in this regard[579] .

Similar rules apply to civilian detainees. They too may receive parcels; the ICRC may assist in their delivery[580] ; in the case of civilian detainees, there is also an obligation to facilitate the work of aid organisations and to recognise the special status of the ICRC[581] .

Release of prisoners of war upon the cessation of hostilities

Prisoners of war and civilian detainees must be released and repatriated once hostilities have ceased[582] . Although there are no specific rules regarding the ICRC's role in the release of prisoners, in practice the ICRC has participated in or coordinated countless such operations since the First World War. The legal basis for this is the right to offer humanitarian assistance

[575] In addition to the transmission of messages, visits by family members are also particularly important for those in long-term captivity. In many cases, however, family members either have no means of travelling or are unable to do so because it is not possible to pass through military checkpoints or due to restrictions on the movement of civilians (this is a major problem, for example, in the Palestinian territories, where the Palestinian civilian population cannot move freely). Thus, the ICRC's intervention is necessary to make these journeys possible: the ICRC organises and transports family members to and from the prison using its own vehicles; in such cases, the ICRC agrees in advance with the military authorities on who will travel, where and when; the authorities are obliged to authorise and facilitate this, unless it is not possible for important military reasons or security considerations.
[576] See Annex IV/C to the Third Geneva Convention
[577] Articles 15, 22, 25, 26, 27, 29, 30, 31 et al. of Protocol III; Articles 81, 85, 89, 90–92 et al. of Protocol IV.
[578] III. GE, Article 75
[579] III. GE, Article 125
[580] IV. GE, Articles 108, 109, 111
[581] IV. GE, Article 142
[582] III. GE, Article 118, IV. GE, Articles 133–134

laid down in the Conventions[583] . The ICRC usually participates in the release and repatriation of prisoners: either as an observer, a neutral intermediary, or in other cases the ICRC itself assists with the repatriation. However, as we have noted, the Parties are not bound by any rule to accept this offer, and there have been instances where the ICRC has been excluded from this process[584] .

4. Other obligations regarding the ICRC for armed forces

4.1. Prohibition on armed escorts

The ICRC is a neutral, impartial, humanitarian organisation. As such, it is vital for it to preserve its neutrality, both for the safety of its delegates and to ensure that, as a neutral organisation, it has access to victims. Thus, the ICRC refrains from any activity that could call into question its impartiality and neutrality.

In many cases, acting in good faith, armed forces offer to provide an armed escort for ICRC delegates or for a specific delegation or aid convoy. However, precisely in order to preserve its neutrality and impartiality, the ICRC cannot accept such an offer, as this would call into question its very neutrality and impartiality. This principle was adopted by the Movement at the 1995 Council of Delegates (in which the members of the Movement participate), and brought to the attention of the 26th International Conference of the Red Cross and Red Crescent (in which the States party to the Geneva Conventions also participate), to which the States raised no objections and took note of this rule[585] .

4.2. Ensuring access to victims

The ICRC's activities are in vain if it cannot gain adequate access to victims.

In the most typical cases, in occupied territories where the occupying power restricts the movement of the civilian population, sets up military checkpoints and otherwise influences the lives of civilians, it is not always an easy task for the ICRC to reach the civilian population in need.

The Fourth Geneva Convention, which lays down rules regarding the treatment of the civilian population, generally stipulates that every contracting state has a duty to allow aid convoys to pass through its territory and to guarantee their safety[586] (in the case of ICRC aid convoys, this naturally cannot mean an armed escort, but rather a commitment that the armed forces will allow the convoys to pass through military checkpoints, will not attack the convoy, and will instruct their commanders to issue orders to this effect to their subordinates).

This rule is based on the obligation that the occupying power must provide the occupied population with food and medical care[587] . If it is unable to fulfil this, it must accept and authorise the offered aid consignments[588] . Article 59 of the Fourth Geneva Convention

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[583] I–IV. GE, Articles 9/9/9/10
[584] Bugnion, op. cit., pp. 689–690
[585] Resolution 4 of the 26th International Conference (adopted by the 26th International Conference of the Red Cross and Red Crescent, Geneva, December 1995: http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMRX, downloaded 22 April 2007)
[586] General obligation: GE IV, Article 23; specific obligation regarding the civilian population in occupied territory: Article 59(3)
[587] GE IV, Article 55(1)
[588] GE IV, Article 59(1), KJ I, Article 70(1)

specifically mentions the ICRC as an organisation that sends relief consignments. Naturally, the power through whose territory the consignments pass may search the consignment and may restrict its transport to a specific time and route[589] .

The distribution of aid convoys takes place under the supervision of the Protecting Power; this task may also be delegated to the ICRC[590] , which is the case in most instances.

The personnel of the organisation providing aid also enjoy protection and must not be attacked. However, for their own safety, those involved in the transport and distribution of aid must comply with the security regulations of the relevant authority. The provision of aid shall in no way be regarded as a hostile act or as interference in the conflict[591] .

In the case of non-international armed conflicts, Additional Protocol II establishes the following rule: where the civilian population is suffering from a shortage of food or medical care, relief operations may be organised to assist them with the consent of the authority concerned[592] . Naturally, in such cases, the ICRC may offer its assistance[593] .

5. Other rules of humanitarian law relating to the ICRC

5.1. The ICRC's immunity from testifying in court proceedings

The question arises as to whether ICRC staff may be called as witnesses in court proceedings, or whether the ICRC's reports, records and documents may be used as evidence. This question has frequently arisen, among other instances, both before national courts investigating crimes committed during the South Slavic crisis and before the ad hoc International Tribunal established to punish similar crimes committed in the territory of the former Yugoslavia[594] . The International Tribunal for the Former Yugoslavia, in the *Simic* case, held that the ICRC is exempt from the obligation to testify[595] .

The Rules of Procedure and Evidence of the International Criminal Court also stipulate that the ICRC cannot be compelled to give evidence, produce documents or provide information in any other way[596].

Generally, before the ICRC begins operations in a country, it concludes a so-called headquarters agreement with the government concerned. In this headquarters agreement, the ICRC stipulates that neither its delegates may be summoned as witnesses nor its documents used in court proceedings, as they are confidential. Thus, the ICRC enjoys immunity from testifying before national courts in ongoing proceedings; this naturally includes military court proceedings or disciplinary proceedings as well.

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[589] GC IV, Article 59(4)
[590] GE IV, Article 61(1)
[591] I. KJ, Article 70(1), Article 71
[592] II. KJ, Article 18(2)
[593] Geneva Conventions, Common Article 3
[594] The *International Criminal Tribunal for the Former Yugoslavia* (hereinafter: ICTY), established to punish acts committed in the territory of the *former* Yugoslavia that constitute serious violations of international humanitarian law. In Hungary, the obligations arising from the Statute of the Tribunal and the Statute itself are set out in Act XXXIX of 1996.
[595] *Prosecutor v. Simić,* ICTY, Trial Chamber, 27 July 1999, IT-95-P
[596] The International Criminal Court (hereinafter: ICC) Rules of Procedure and Evidence, Rule 73, were adopted by the States Parties to the Rome Statute establishing the ICC at their meeting held from 3 to 10 September 2002 (http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf. Downloaded 22 April 2007). In Hungary, the National Assembly ratified the Rome Statute establishing the ICC (Resolution No. 72/2001 (XI.7) of the National Assembly), but it has not yet been promulgated.

5.2. The use of the Red Cross and Red Crescent emblems

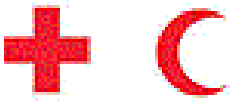
As we have seen in the previous chapters, the Red Cross and Red Crescent emblems serve as symbols of the medical service of the armed forces. Horrified by the sight of soldiers killed or wounded in the Battle of Solferino in 1859, the Swiss businessman organised voluntary medical societies to assist them, and subsequently (out of respect for Switzerland, by inverting the colours of the Swiss flag) the Red Cross emblem became the symbol protecting the army's medical units.

The founding of the International Committee of the Red Cross (the predecessor of the ICRC) stemmed from the same idea: there was a need for a neutral organisation that would carry out its humanitarian tasks with the sole aim of serving the interests of wounded and injured soldiers, and would liaise with national aid societies. Later, the ICRC's activities came to cover all victims of armed conflict.

The Red Cross emblem thus became the symbol used to identify and protect military medical units and Red Cross workers.

At the request of the Ottoman authorities, the red crescent emblem was subsequently recognised in the 1929 Geneva Convention; this became a symbol with exactly the same meaning as the Red Cross emblem (according to the Ottoman authorities, the Red Cross had religious connotations for their troops, which is why they wished to use the red crescent. It should be noted, however, that there were no religious considerations behind the adoption of the Red Cross emblem).

Thus, the two emblems currently in use are the Red Cross and the Red Crescent[597] .



(The Red Cross and the Red Crescent)

The emblems essentially serve a protective purpose: they protect military medical units and members of the Red Cross/Red Crescent movement; it is forbidden to attack them, as they are not military targets and do not engage in hostile activities, but only in medical and humanitarian work. Attacking a person, object or vehicle marked with these emblems constitutes a war crime[598] .

In order to preserve the authenticity of the emblems, it is of the utmost importance that they are used only by those who are entitled to do so under the Geneva Conventions. For this very reason, the fraudulent use of the emblems (i.e. use which leads the enemy to believe that the user is entitled to protection under the Conventions), if it causes death, also constitutes a war crime[599] .

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[597] General Provision I refers to the emblem of the red lion and sun, which was included in the 1949 Conventions at Persia's suggestion, but is no longer used by anyone today.
[598] Section 164 of the Criminal Code, Articles I–IV of the GE, Articles 50/51/130/147, Article 85(3)(a) of the KJ
[599] I. KJ, Article 85(3)(f)

In peacetime, the emblems are used by organisations of the Red Cross and Red Crescent Movement as an indicative sign to show their affiliation with the Movement. Furthermore, in peacetime, the emblem may only be used by ambulances and first-aid stations that are specifically engaged in providing free care to the sick and injured, and even in such cases only with the express permission of the national Red Cross society (in Hungary, the Hungarian Red Cross)[600] . As in Hungary, ambulances and all other healthcare services are paid for by social security, they are not considered free of charge; consequently, in peacetime in Hungary, practically no one other than the military medical service and members of the Red Cross movement may use the Red Cross and Red Crescent emblems.

In December 2005, the member states adopted a new, third emblem, the red crystal. The adoption of the new emblem was necessitated by several reasons. On the one hand, in certain countries the Red Cross or Red Crescent emblem had become a specific target for attack (the Red Cross is regarded as an insult by certain groups in some Islamic countries, whilst the wearing of the Red Crescent by 'infidels' also made those wearing it targets, e.g. in Afghanistan or Iraq). On the other hand, many national societies found it problematic that none of the previous emblems were deemed acceptable. For this reason, for example, the Israeli National Society used the red Star of David, whilst Kazakhstan wished to use both the red cross and the red crescent, as its population is divided equally between Muslims and Christians.

However, under the provisions of the Geneva Conventions and the Statutes of the Movement, only a national society that uses one of the recognised emblems can be a member of the Movement – and this made it impossible for a national society that had been carrying out important work for decades, such as the Israeli Red Star of David National Society, to become a member of the Movement. This, however, was incompatible with the Movement's fundamental principle of universality.

For a decade, the ICRC had been urging countries to adopt a third emblem, which could provide a solution to the above problems. The result of this process was the adoption of the red crystal. To this end, states adopted a Third Additional Protocol[601] , which accepts the third emblem, the red crystal, and stipulates that this emblem has the same meaning as the red cross and the red crescent: it may be used in the same circumstances and enjoys the same protection. Any national society may decide to use the red crystal (in which case, however, it may use only that). The ICRC and the Federation (whose logos remain unchanged) and the medical units of the armed forces may also use the red crystal temporarily in times of war if this better ensures their protection. In peacetime, national societies may also use the red crystal by incorporating their own, previously used logo into it. In the event of war, however, only the 'blank' red crystal is permitted (see illustration).

[600] Article 44(4) of the First Geneva Convention, Section 5 of Act XL of 1993 on the Hungarian Red Cross, Section 14(2)(b) of Government Decree 218/1999 on certain administrative offences.

[601] Additional Protocol to the Geneva Conventions signed on 12 August 1949, relating to the adoption of an additional distinctive emblem (2005). Promulgated in Hungary by Act LXXVI of 2006. The name 'Red Crystal' was adopted by the States Parties to the Geneva Conventions and the members of the Movement in Resolution 1, adopted at the 29th International Conference of the Red Cross and Red Crescent (http://www.icrc.org/Web/Eng/siteeng0.nsf/html/international-conference-resolution-220606 Downloaded 3 May 2007).

(The red crystal)

As a result of all this, at the extraordinary International Red Cross and Red Crescent Conference held in June 2006, the Movement was able to admit the Israeli National Society as a member, and the states authorised the ICRC, by way of exception to the relevant rule of the Statute, to admit the Palestinian Red Crescent Society as a member. This appeared to resolve a decades-long dispute, and in accordance with the Movement's fundamental principle of universality, every national society could become a member of the Movement; meanwhile, the 'users' of the emblems were given a new symbol regarded by all as completely neutral.

5.3. Searching for missing persons

Experience from many conflicts shows that, after the end of a war, the process of coming to terms with and coming to terms with the experiences of war is greatly hindered if family members do not know what has happened to their loved ones. The mourning process is essential both in a cultural sense and for emotional peace of mind and coming to terms with loss; this is only possible if relatives are able to bury their deceased loved ones. A particularly serious problem during the South Slavic crisis was that hundreds of thousands of people went missing, and their relatives have not known for years – and in many cases still do not know – what happened to their loved ones. Dozens of mass graves contain unidentified bodies, which can only be identified after a very lengthy and costly procedure.

This is precisely why it is so important to accurately record prisoners, those who died in captivity and those who fell on the battlefield. Article 33 of Additional Protocol I stipulates that, as soon as possible and at the latest upon the cessation of hostilities, the States party to the conflict are obliged to search for missing persons and make all necessary information available. To this end, they must register persons who have been captured, imprisoned or otherwise detained, and facilitate the search for missing persons.

This information must be sent either directly or via the Protecting Power, the ICRC Central Tracing Agency or the national Red Cross/Red Crescent societies[602] . The ICRC Central Tracing Agency collects and processes information on missing persons so that, once identification has taken place, it can inform relatives of the fate of their loved ones. Therefore, if information is not provided via the ICRC, the Parties are obliged to send it to the ICRC as well.

The difficulty and complexity of the task is illustrated by the fact that in Bosnia and Herzegovina, some ten years after the war, there are still 17,000 missing persons on record.

To facilitate identification, the Parties are obliged to include certain minimum elements on soldiers' identification badges and identity cards[603] .

Summary

[602] I. KJ, Article 33
[603] I. GE, Article 17(3)

One of the core principles of humanitarian law is to provide protection to those in need even in situations of war: wounded and injured soldiers, prisoners of war, non-combatants and the civilian population.

The ICRC is a neutral and impartial humanitarian organisation with an international mandate; in order to carry out its activities effectively, it must be granted access to victims. For this reason, international humanitarian law relating to armed conflicts imposes an explicit obligation on the parties to ensure that the ICRC has access to victims.

In the case of non-international armed conflicts, the ICRC may offer its humanitarian services to the parties, who, although not obliged to accept them, nevertheless make use of them in many cases.

It is important to note here that several of the above-mentioned rules have become part of customary international humanitarian law. The significance of this is that, regardless of the ratification of a particular convention, the customary law norm is binding on all. Examples of such customary rules include (without being exhaustive):

- The personnel of humanitarian organisations must be respected and protected.
- Objects used for humanitarian relief operations must be respected and protected.
- The Parties to the conflict must do everything possible to trace missing persons and inform their relatives of their fate.
- In the event of an international armed conflict, the ICRC must be allowed access to prisoners of war to ascertain the conditions of their detention and to assist them in maintaining contact with their families.
- In the event of a non-international armed conflict, the ICRC may offer its humanitarian services to visit detainees in order to ascertain the conditions of their detention and assist them in maintaining contact with their family members.[604]

We can therefore see that many of the rules set out in the Geneva Conventions and Additional Protocols mentioned above have become part of customary law, and are thus generally accepted and to be followed by the international community.

The purpose of the rules mentioned in this chapter is none other than to alleviate the suffering of those who have fallen victim to war – a purpose which does not conflict with military objectives and necessity, but which is in accordance with the general principle of humanity accepted by civilised nations. Armed forces play a primary role in the implementation of these principles; it is therefore very important that they are aware of and comply with such rules.

[604] Henckaerts - Doswald-Beck: Customary International Humanitarian Law, Volume I. (ICRC, Cambridge University Press-2005), Rules 31, 32, 117, 124 (translated by the author). n.b.: The compendium of customary international humanitarian law was compiled by the ICRC at the request of states. Its aim was to compile, on the basis of international practice, those rules of humanitarian law that qualify as customary law. Naturally, the volume is not legally binding; it is merely a description of existing customary norms.

13. FUNDAMENTAL PRINCIPLES OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT AND HUMANITARIAN ACTIVITIES FOR MIGRANTS[605]

The components of the International Red Cross and Red Crescent Movement (Movement) operate based on their seven fundamental principles, including neutrality, independence and impartiality, and have a unique international legal background. The Movement's founding body, the International Committee of the Red Cross (ICRC) operates based on the confidentiality principle, which includes a confidential, non-disclosed dialogue with concerned authorities regarding their responsibilities based on international law and ways in which the ICRC can assist vulnerable persons. Due to its neutrality, the Movement does not take position on the handling of the migration problem, but is focused solely on assisting vulnerable people. The Movement is present all along the migration route – source, transit and target countries – and thus has a unique opportunity to assist those in need. The national red cross/red crescent societies assist people on the move and in detention, while the International Federation coordinates national societies' activities. The ICRC's focus of attention regarding migrants is threefold: restoring family links, protecting detained persons, and providing assistance in the identification of dead bodies and ensuring a decent funeral.

1. The International Red Cross and Red Crescent Movement

The International Red Cross and Red Crescent Movement (hereinafter: Movement) is a universally recognised international humanitarian network with a 150 years' tradition, consisting of three components: the International Committee of the Red Cross (hereinafter: ICRC), the International Federation of Red Cross and Red Crescent Societies (hereinafter: Federation), and national red cross and red crescent societies. The founding body of the Movement is the ICRC, which in the legal sense is an association registered in Switzerland but has a *sui generis* status since, in a way unique among humanitarian organisations, it has an international legal mandate with respect to some of its activities, thus, it resembles an international organisation.

The legal basis of the Movement is the Statutes of the Movement, which is formally a resolution adopted at the 25th International Conference of the Red Cross and Red Crescent[606] (hereinafter: International Conference) in 1986 and which was amended several times.[607] The resolution does not qualify as an international treaty, it is rather of a *soft law* nature, but since it was adopted by all the states present by consensus, it has very high significance and is also binding for the states to some extent.

The division of responsibilities within the Movement is laid down in the Seville Agreement adopted in 1997.[608] The agreement stipulates that the members of the Movement perform their

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606 The participants of the International Conference were the participants of the Movement and the states parties to the 1949 Geneva Conventions.

607 *Statutes of the International Red Cross and Red Crescent Movement* adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006.

608 *Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement (The Seville Agreement)*, adopted at the Council of Delegates, Seville, 25-27 November 1997.

activities in cooperation with each other and lays down which component ('lead agency') has the leading role in certain cases. This does not mean that the other components must not be active in the situations concerned, but it is always one component that is responsible for the coordination, the policy and the leading role in general.

Accordingly, in the case of armed conflicts and internal strife the lead organisation is ICRC[609], in the case of technological or natural disasters the Federation acts as the lead agency[610], while a national society may coordinate international efforts within its own territory as a lead agency in any situation where the two other components do not take the role of the lead organisation.[611] The ICRC and the Federation help national societies in every case and cooperation between the components is generally always active.

The international legal background is comprised of the Geneva Agreements of 1949 and the Additional Protocols of 1977. The Geneva Agreements of 1949 authorise ICRD to the following in the case of international armed conflicts: visiting prisoners of war[612], visiting civilian detainees[613] and providing humanitarian aid in general[614]. In other cases, i.e. in non-international armed conflicts and at times of peace (also including internal strife below the level of armed conflicts) the states recognise what is referred to as the "right of initiative"[615], which means that ICRC may offer its assistance and service but the states are not legally obliged to accept it.

In the case of national societies, the states must accept humanitarian help in the case of international armed conflicts.[616]

In relation to this, two considerations are worth mentioning. On the one hand, although in the case of international conflicts there are international agreements obliging states to provide access for ICRC to e.g. prisoners of war camps, this is clearly only implemented if the state in fact cooperates, in other cases ICRC is unable to impose access. The same holds for access to territories controlled by parties to conflicts: if the parties deny access to ICRC, the organisation is not only unable to enter the territory but entry would even be dangerous to its delegates.

On the other hand it can be stated in general that considering the almost 150 years' past of the organisation, its neutrality and efficiency repeatedly proven and acknowledged in the course of its history and its *modus vivendi* based on the confidential dialogue to be outlined in what follows, states usually have a positive approach to ICRC's requests and are cooperative. This has several reasons: on the one hand ICRC represents humanitarian considerations and values that the states, too, can identify with and, on the other hand, cooperation with ICRC is often in the states' own interests as well. Not insignificantly, a state that considers itself civilized and

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609 Cf. Article 5.3.1 of the Seville Agreement
610 Cf. Article 5.3.2 of the Seville Agreement
611 Cf. Article 5.3.3 of the Seville Agreement and Article 3.3 of the Statutes of the Movement
612 Article 126 of the Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (Geneva Convention III); JEAN-MARIE HENCKAERTS, LOUISE DOSWALD-BECK: Rule 124, *Customary International Humanitarian Law*. Cambridge, ICRC-Cambridge University Press, 2005
613 Article 76 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August, 1949 (Geneva Convention IV); HENCKAERTS- DOSWALD-BECK Id., Rule 124
614 Articles 5 and 81 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)
615 Common Article 3 (2) of the Geneva Conventions of 1949; Article 5.3 of the Statutes of the Movement
616 Articles 17 and 81 (1-2) of the Additional Protocol I

humane in the international community must be willing to cooperate with an organisation of such high prestige.

2. Humanitarian organisations in general

Humanitarian organisations can be grouped in several ways[617]. According to the nature of their activities, one grouping is into the following two categories: legal protection organisations and assistance organisations. Legal protection organisations speak up, examine situations or state practices or analyse procedures for the protection of some basic human, humanitarian or other rights. Often they use the publicity to be able to exercise influence on the state or the organisation concerned, in the course of which they reveal unlawful practices, call upon the state concerned to comply with the law and formulate recommendations.[618] Thus, sharing the facts they have revealed with the media and making them public are key elements in their operation and success.

Classic humanitarian aid organisations help persons or groups of people who are in need or in sensitive or vulnerable situations. Probably much rather than in the case of the previous group of legal protection organisations, their success depends on the cooperation of the state or group concerned in that if they are denied access to those in need (be it about aid in an armed conflict where the area concerned may only be entered with the permission of the state or non-governmental organisation concerned so as to access the people in need), they are unable to efficiently perform their activity or, if they are denied permit to carry out a specific activity (e.g. setting up free meal facilities) or authorities are not cooperative, they are hindered or prevented from performing their tasks.

It is often the case that both legal protection and humanitarian assistance organisations perform state responsibilities basically since the protection of human or humanitarian rights and providing help to those in need are both state responsibilities. In many cases, however, the state is unable to (e.g. the state does not operate efficiently enough or lacks the means at the time of war or, at times of peace it lacks of money /capacity/expertise, etc) or unwilling to (in an ethnic, religious, etc. conflict it expressly does not want to provide for the opposing group; its conduct is intentionally unlawful and abusive) perform these tasks. It is exactly these shortcomings that humanitarian organisations point out to and attempt to remedy, or at least help in remedying.

It is basically very rare that the two kinds of humanitarian activity can be performed simultaneously.[619] The fundamental and very pragmatic reason for this is that if an organisation is e.g. a legal protection organisation and using the publicity, the media, etc. it often very harshly criticises a state or a group, it is very difficult for the organisation to get support, access or cooperation from this very same criticised state.

Essentially the Red Cross Movement is a community of assistance organisations but their activities also include legal protection elements. Both ICRC and national societies are also very often active in the dissemination of humanitarian law. ICRC has numerous prevention programmes aiming at increasing the sensitivity of various target groups, e.g. soldiers, policemen, university circles or the general public for humanitarian law. ICRC regularly

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[617] Cf. e.g. P.J. SIMMONS: Learning to live with NGOs. In: *Foreign Policy*, no. 112 (Autumn 1998), pp 82-96, 85

[618] Human Rights and Advocacy NGOs, United States Institute of Peace, http://www.usip.org/node/5630

[619] There are certainly exceptions where one and the same organisation performs both kinds of activity, e.g. HART combining aid with advocacy, cf. http://www.hart-uk.org/about-us/aid-and-advocacy/, or e.g. ICRC itself both providing aid and performing legal protection, although doing the latter without using the publicity.

consults the states about the interpretation of certain issues of humanitarian law and often calls attention to the importance of compliance with humanitarian law, which latter are legal protection types of activities.

Unlike in the case of the other organisations, however, all the above activities, i.e. the dialogue with the states, are performed in the form of a strictly confidential dialogue.[620] Accordingly, ICRC does not disclose the contents of the discussions with authorities and the states concerned must not do so, either. Confidential dialogue, which is one of the fundamental pillars of ICRC's activities, is the guarantee in the case of ICRC that the dialogue is honest and does not jeopardise access to victims. In this way, even though ICRC lacks the means of exercising pressure by publicity, it does have the means of access to victims, which is a core element of its activities.[621]

The aim of confidential dialogue is to enable ICRC to communicate its concerns to the state concerned about compliance with humanitarian law and call upon the state to put an end to unlawful conduct, as well as to support the state in a constructive way in establishing lawful conduct. In practice, this dialogue may mean various different things: often a fruitful dialogue concerning the interpretation of law, the legal analysis of situations or assistance or practical advice in drawing up national legal provisions.

Exceptions to the above have been very rare. If the detaining authority makes part of an ICRC report public, for example, ICRC reserves the right, after due consideration, to publish the complete report.[622] Exceptions to confidentiality may only be made if the infringements committed are extremely severe, the confidential dialogue conducted with the state concerned and other methods have failed despite repeated attempts and no further success is expected either of this or other methods, or if the advantages to be gained by publicity by far outdo the disadvantages the victims suffer if ICRC is forced out of the area or denied access to the victims.[623] If ICRC decides to break with the principle of confidentiality in a case, it either involves a third party in the dialogue or makes the case public, in the course of which it either reports about the legal infringements revealed or gives an account of the quality of the dialogue conducted with the authority concerned.[624] Only very few such cases have been documented.

It has very much been disputed until today if it was the right decision by ICRC during World War II not to make what it experienced in concentration camps public.[625] According to the ICRC's arguments it was not worth using publicity in that case because by the time ICRC had got into concentration camps, it was more or less public what had been going on there; what is more, ICRC itself could not experience genuine reality there as it was presented a pretended

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[620] Cf. e.g. *Confidentiality: key to the ICRC's work but not unconditional*, an interview with Dominik Stillhart, 20.09.2010, https://www.icrc.org/eng/resources/documents/interview/confidentiality-interview-010608.htm

[621] For more details on confidential dialogue, see: 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 (ICRC's confidential approach). December 2012. In: *International Review of the Red Cross*, Reports and Documents, Volume 94 Number 887 (Autumn 2012) – Cf. e.g. p. 1137 for the precise meaning of confidential dialogue

[622] Interview with D. Stillhart, Cf. footnote 15

[623] Interview with D. Stillhart, Cf. footnote 15

[624] ICRC's confidential approach, p. 1140

[625] ICRC did not only fail to make its experience public but it practically refused to give a testimony before the Nuremberg Military Court. During the whole proceedings, ICRC permitted evidence from three delegates only, and even so the delegates did not appear in person but provided written testimonies which did not contain any specific information about the alleged violations committed by the accused. Cf. STÉPHANE JEANNET: Recognition of the ICRC's long-standing rule of confidentiality - An important decision by the International Criminal Tribunal for the former Yugoslavia. In: *International Review of the Red Cross*, No. 838, p. 403-425.

reality. Thus, using publicity would not have brought great advantage, ICRC argues, but would have meant losing the limited access they had.

3. Fundamental principles

There are seven fundamental principles guiding the Movement's activities. The fundamental principles were adopted at the 20th International Conference[626] exactly five years ago; they have been guiding the Movement's activities to this day and many of them have become benchmarks accepted by many other humanitarian organisations as well. In practice, the fundamental principles are not merely empty slogans but are the benchmarks and constraints for every activity. From all fundamental principles, humanity is the most essential one.

In brief, the fundamental principles are as follows:

1. Independence: the Movement is independent; national societies must maintain their autonomy;
2. Neutrality: the Movement may not take sides in hostilities or politically and may not engage in disputes of a political, racial, religious or ideological nature;
3. Impartiality: the Movement is only guided by the needs of those in distress, giving priority to the most urgent cases of distress;
4. Humanity: the Movement endeavours to alleviate human suffering;
5. Voluntary service: financial gain may not be an objective; the movement operates on a voluntary basis;
6. Universality: the Movement is present and active worldwide;
7. Unity: there can be only one national society in a country, active throughout its territory.

From the above basic principles, most humanitarian organisations identify with the principles of independence, neutrality, impartiality and humanity. Given the nature of the other fundamental principles, these make sense in the context of the Movement only.

The above fundamental principles have specific meanings in the operations of humanitarian organisations. The fundamental principles show guidance in issues like whether it is acceptable that, for the sake of the safety of the organisation's staff they should be protected by soldiers, whether they should accept military entourage for the protection of humanitarian consignments, to what extent a donor (whether or not it is a government) should be allowed to influence what the money donated should be spent on. Similarly, it is exactly considering the principle of impartiality that the components of the Movement do not take stance regarding the method of handling the migration crisis, including issues like whether or not to close up borders or how to treat the migration issue. The only exception to this is if a certain policy has human suffering as a consequence: in that case authorities' attention is drawn to a specific problem within the framework of confidential dialogue, whereby solutions are suggested or assistance is provided.

Thus, throughout their activities, the international and national components of the Movement strive for compliance with the fundamental principles. Considering their legal character, the fundamental principles are not binding international legal norms but because they were adopted by consensus at the International Conference with the states participating, they are nevertheless binding for the states. Accordingly, in the cooperation of a national society with

[626] The fundamental principles of the Red Cross and Red Crescent Movement, adopted at the 20th International Red Cross Conference in Vienna, 1965.

authorities, the constraints of the cooperation, too, are determined by these fundamental principles. Often this may be a sensitive issue since, on the one hand, national societies operate totally according to the legislation of their own state (international components often enjoy special treatment, privileges and immunities), and on the other hand authorities may not do anything endangering the independence of national societies, e.g. they must not interfere with their specific activities.

In practice, for example, access to documents of national societies or to personal information managed by them may be a sensitive issue, especially if these are related to persons who went missing during the war and the search for whom was initiated with the national societies, because in view of their independence and the confidentiality principle, tracing service documents are confidential and at the same time national societies have to cooperate with their own authorities. In such cases states often accept the fact that the humanitarian mission served by the tracing service is more important that the state's right of access, with the exception of certain priority cases like e.g. criminal procedures.

The fundamental principles thus serve the victim-centred, efficient operation of humanitarian organisations. As mentioned above, the majority of humanitarian organisations identify with the same fundamental principles, while there are differences in their practical implementation. We can say that the Movement and especially ICRC'S practice serve as guidance for many humanitarian organisations, even though they often divert from that practice.

4. Principles of cooperation within the Movement and with other humanitarian organisations

The performance of tasks within the Movement's components is regulated by the Seville Agreement adopted in 1997, as outlined above.

The relations of the Movement's members with other organisations are most varied, depending on the situation. The most delicate situation is always an armed conflict, where cooperation is often limited to *cooperation per se* (i.e. being aware of what the other organisation is doing), and not necessarily including *working together*; the best way to understand this is through ICRC's activity in an armed conflict. The reason for keeping a certain distance is among others the fact that it is important for ICRC that the local population should see the division of tasks and organisations' identities clearly. It has been often observed that the local population mixes UN aid organisations (i.e. those who help) with UN peacekeeping or peacemaking missions (i.e. those who shoot) and consequently lose trust in UN aid organisations as well. In such cases it is especially important for ICRC not to be identified with the UN but make it clear that it is about two totally independent organisations.

So, depending on the situation it can happen that there is no cooperation whatsoever with other aid organisations, specifically so as to keep identity. In less sensitive situations, if the situation so requires, closer and more open cooperation can be implemented, certainly by keeping the integrity of every organisation.

The cooperation related to the migrant crisis is somewhat 'more open' than that at the times of armed conflicts. In general migration is not in the range of the Movement's activities (with the exception of what follows), but if they see that there are fields where other humanitarian organisations do not help or are unable to help efficiently enough, the Movement's components activate themselves where possible.

5. The migrant situation from a humanitarian point of view

Thus the sole objective of the activities is helping those in need; no other considerations may come into question with reference to the Movement's humanitarian activities. According to the above, this can be interpreted to mean in relation to the migration crisis that the Movement does not encourage or discourage migration[627]; it does not comment on how respective states handle the migration crisis, whether they welcome migrants or whether or not they close up their borders, but instead it focuses on the necessity that people in trouble should receive appropriate care and assistance.

As has been experienced lately, not even specifying the problem in this issue could be done without giving it a political hue. In the terminology of ICRC and the whole Movement, every person who was forced to leave their homes for any reason is referred to as 'migrant': the term covers refugees, asylum seekers, migrants and economic immigrants irrespective of why and for what reason they left their homes and where they are heading and irrespective of the fact that certain categories enjoy international protection.[628] From ICRC's point of view, from the humanitarian aspect all the people on the move face the same problems: they are far away from their homes, they may require medical help, family members get lost from each other, they do not understand the language of the foreign country and especially those in a sensitive position – children, women, expectant women, old age persons, etc. – are even more prone to misuse and need even more attention and help.[629]

The Movement's activities related to migrants strive to respond to these demands and provide help, and their dialogue with authorities is shaped accordingly. Cooperation with authorities is similarly based on the confidence principle: it thus comprises four-eye discussions whose contents are not made public. If ICRC formulates criticism, it shares it only with the state concerned and the point is to improve the assistance and care for and the circumstances of migrants. In order to achieve this, ICRC supports authorities' work by constructive recommendations beyond its own activities.

In relation to the migrant crisis we have evidenced in many cases how the adherence of the Movement's members to the fundamental principles has borne fruit and what benefits the general trust in the Movement has. The Red Cross emblem is the second best known symbol in the world. It was interesting to experience that, wherever the migrants had come from, they turned to Red Cross organisations with confidence right away because they were familiar with the organisation. In Hungary, this was evident in relation to the migrant crisis several times: it happened numerous times that migrants trusted only the staff of the Red Cross, which often helped the conflict-free solution of sensitive situations.

The weight of the migrant crisis is also indicated by the fact that in October the ICRC President and the UN Secretary General issued a joint statement[630] in which they drew the attention of the states to the serious human impact of today's conflicts, including the fact that this year the highest number of persons have been displaced since the Second World War. Such a joint statement has been unprecedented, knowing ICRC's legendary attitude of keeping the distance from other organisations so as to protect its independence. In this

[627] ICRC – Activities for Migrants (ICRC Activities for Migrants), ICRC-Geneva, September 2015, p. 2
[628] International Federation of Red Cross and Red Crescent Societies, Policy on Migration, 2009
[629] ICRC Activities for Migrants
[630] Cf. https://www.icrc.org/en/document/conflict-disaster-crisis-UN-red-cross-issue-warning

situation it became clear, however, that a political solution was required, the joint statement being a means of awareness-raising in order to facilitate the former.

It can be stated in general that, for several years, ICRC has considered the Syrian crisis the most severe humanitarian problem and has once again raised the awareness of the states to this situation.[631] The serious consequences of the Syrian crisis[632] and the close to unbearable extent of human suffering caused by the conflicts in the world in general, as well as the insufficient response to these were among the main issues discussed at the preparatory sessions of the World Humanitarian Summit as well[633]. Here, too, political decision makers' awareness was raised to the fact that humanitarian organisations had reached the utmost of their capacity, they were unable to keep pace with the demands caused by the conflicts, and it was emphasised that it was up to the states to eliminate the crisis centres by political solutions, which nobody else could do for them.[634] This kind of awareness raising, the fact that all humanitarian organisations without an exception agreed on the question of severity and the factor that it was humanitarian organisations pointing out to the inevitability of a political-military solution to the humanitarian problems all highlighted the uniqueness and severity of the situation.

It is a major advantage of the Movement in responding to the humanitarian problems caused by the migration that the Movement, especially ICRC and national societies, has been present in Afghanistan, Iraq and Syria, i.e. in the areas where migrants leave from, for decades. This means that the Movement has a major overview of the conflicts there, as well as of the problems, cultural aspects and tendencies. The Movement is similarly present, mostly through the national societies, in the transit and target countries and, covering the whole migration route they are able to respond to the specific demands. It can thus be stated that the major instrument the Movement has in the migration case is its presence along the whole migration route,[635] whereby it is able to bridge the gap between the respective stations, especially by assistance and protection activities, as outlined below.

6. Concrete activities in relation to migrants

As regards concrete activities in relation to migrants, Members of the Movement, depending on their nature and the division of tasks, perform various types of activities.

In the situation that developed in Hungary in October 2015, the *Hungarian Red Cross* mainly provided psychological support, toilet articles and first aid at the refugee reception centres and transit zones, while they distributed water, food packages, sanitary and child care articles, baby food, warm clothes and blankets at the entry and exit points of the southern and western

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[631] In Syria, the Movement is by far the most significant humanitarian organisation, which suffered serious losses in the crisis: in five years 58 of their staff lost their lives in the conflict while trying to save human lives. Cf. Address of ICRC President Peter Maurer at the Syrian Donor Conference in London, 4 February 2016 https://www.icrc.org/en/where-we-work/middle-east/syria

[632] Some figures indicating the severity of the conflict: 8 million people have been displaced, 12 million require urgent help, four out of five Syrians live in poverty and the primary care system is on the verge of collapse. Cf. Syria crisis, ICRC https://www.icrc.org/en/where-we-work/middle-east/syria

[633] The reports of preparatory meetings can be found at: https://www.worldhumanitariansummit.org/whs_Consultation_Reports

[634] Cf. e.g. World Humanitarian Summit, Regional Consultation for Europe and others (Budapest, 3-4 February 2015), Final Report: "Participants underscored the duty of governments to protect vulnerable groups and of all parties to a conflict to respect international humanitarian law (IHL)" (p. 13), "Use the Summit as a 'cry for humanity' to protect and preserve the dignity of people affected by conflict and disaster." (p. 13).

[635] ICRC Activities for Migrants, p. 3

borders. Beyond these, for years they have regularly sent aid donations to guarded camps, refugee reception centres, communal accommodations, homes for unaccompanied minors and other places and provided health assistance where necessary; they have furthermore helped tracing family members who had lost contact and restoring family links.[636]

The good relations with partner national societies were a great advantage and could be used for coordinating assistance activities in areas near the fence and/or border as well as for exchanging experience. Experts were, for example, sent to the Croatian Red Cross for experience exchange. The first aid team of the Croatian Red Cross helped the work of the Hungarian Red Cross at the external collection point at Röszke, while the latter sent emergency aid teams to the camp at Slavonski Brod operated by the Croatian Red Cross. The Austrian Red Cross delegated an expert to its Hungarian partner organisation to help organised care with their experience.

The main task of the *Federation* is coordinating national societies' activities. In Hungary, the Federation donated tents financed from the Disaster Response Emergency Fund, and it donated immediate support of CHF 322.365 to the Hungarian Red Cross, from which the organisation made preparations to care for some 72,000 people. The funds furthermore financed the procurement of tents suitable for accommodation equipped with bedding supplies, sanitary and baby care supplies, durable food products, water supplies, clothing, first aid equipment and other aid articles and helped fill up stocks to be able to flexibly respond to fast changing circumstances. Further help for these activities came through a call for help issued by the Federation, which targeted collecting some CHF 3.5 million in order to finance the care for some 120,000 people for several months. Due to the changes in the situation the action was stopped with some 29% coverage only, including significant donations from the Swedish, British and Dutch Red Cross organisations.

The Federation similarly provides support to the 28 countries along the migration route engaged in the care for refugees and migrants. Five calls for help have been issued lately aimed to raise support for, among others, Slovenia, Croatia, Serbia, Macedonia and Greece. In the past days a migration conference has been convened in London where 38 European countries are to be represented by almost a hundred delegates. The conference aims to organise standard and coordinated Red Cross-Red Crescent aid operations for people arriving in transit and target countries, in the areas of social support, health care and the restoration of family links.[637]

ICRC's specific, migration-related activities can be grouped into three major categories: (i) restoring family links, (ii) activities for detained migrants protecting and ensuring their circumstances, (iii) assisting in the identification of and decent funeral for the deceased. In the migration issue in general ICRC does not have a leading role within the Movement, but it does have a leading role in the three fields mentioned. ICRC and national societies have ample experience and relations in all the three fields, which can be well exploited in the migration situation.

(i) Restoring family links: In the migration situation in often happens that family members staying at home have no information of those who left home or family members lose one

[636] Source: www.voroskereszt.hu, as well as written communication by the Hungarian Red Cross. I hereby wish to thank Alice Szél of the Hungarian Red Cross for the information.
[637] Source: www.ifrc.org, as well as written communication by the Hungarian Red Cross. I hereby wish to thank Alice Szél of the Hungarian Red Cross for the information.

another on the way. In such cases, especially considering that the Movement has much experience in the restoration of family links during armed conflicts and in view of its worldwide network, ICRC and national societies actively cooperate in helping family members find one another.[638]

Importantly it does not only have psychological impacts if one lacks information about family members; the economic and legal consequences are also important. If a family member has deceased it is very important to establish death especially so as to enable relatives to have certainty and bury their beloved one. From the administrational and legal aspects declaration as deceased is important considering widow's allowances and inheritance. The Movement has set up a Family Links Network, in the operation of which both ICRC and national societies have a role. The Network is unique in the world because it is global and because both national societies and ICRC have gained vast experience in tracing, national societies are in connection and, because of the confidentiality principle, migrants have confidence in the Network and are ready to give their personal data knowing that these will not be revealed to authorities. This know-how was originally worked out for the times of armed conflicts but has been adapted to the special needs of migrants, too.

Restoring family links comprises many things including making phone calls possible, writing messages which are sent to the addressees by the Red Cross network, making tracing requests on the basis of which a national society or the ICRC starts tracing the missing family member, registering certain persons so as to prevent their getting lost, providing help in family reunification as well as providing assistance to authorities in finding missing migrants.

In addition ICRC set up a website under the name Trace the Face[639] especially for the situation caused by migration, with the help of which migrants can upload photos and on the basis of these identify their families and make contact with them.

There is great emphasis in the case of the Tracing Service in general on confidential data management; data are revealed to authorities and sometimes even to those who have been successfully traced only with the Service's consent. For this reason, in view of the nature of the organisation's activities, not even Hungarian authorities (with the exception of court requests) may have access to the documents of the Hungarian Red Cross Tracing Service. In the migration situation, however, national societies often perform tracing in cooperation with authorities. It should be noted that authorities do not have any access to ICRC documents (not even in the case of court requests).[640]

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[638] ICRC Activities for Migrants, pp 6-7

[639] http://familylinks.icrc.org/europe/en/Pages/Home.aspx

[640] In the case of ICRC it has more serious legal grounds why authorities may have no access to the documents. In many cases, the ICRC representative office signs a Headquarters Agreement with the recipient country, which grants diplomatic privileges and immunities to the representative office, including the inviolability of documents. ICRC has similar agreements with international courts and tribunals; what is more, ICRC's immunity towards international courts and tribunals is recognised as a case law norm. Cf. e.g. STÉPHANE JEANNET: Recognition of the ICRC's long-standing rule of confidentiality - An important decision by the International Criminal Tribunal for the former Yugoslavia. In: *International Review of the Red Cross*, No. 838 (2000), pp. 403-425; ICTY, *The Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT 95-9. PT, in the Trial Chamber, Decision of 27 July 1999; it is laid down in the Rules of Procedure and Evidence of the International Criminal Court that: "The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement" (Rule 73 (4), in: Rules of Procedure and Evidence).

At the other end of the process, family members staying at home and other family members, too, are helped in coping with the situation caused by losing their beloved ones. In the case of death they wish to make sure that the deceased persons are identified, an appropriate funeral is ensured or the corpse is returned, the death certificate is issued or the national authorities or family members are informed (these are often performed via the Movement).

(ii) Visiting detainees: ICRC traditionally plays a serious role in this field. Foreigners are a separate category in need of protection in the case of an armed conflict, and ICRC has been visiting this category of persons for a long time. In many cases there are other detainees, too, at these places of detainment and ICRC delegates often visit them as well for humanitarian and practical reasons (i.e. there would be outrage at a prison if cell mates were not visited). If national societies visit persons detained in relation to migration, ICRC provides support to the national societies by good practice transfer, experience exchange and training.

The main purpose of visiting detainees is checking the conditions of detention, monitoring compliance with the principle of fair procedure and other international legal provisions with special regard to the non-refoulement rule, ensuring contact with the external world and forwarding messages to family members.[641] Confidential and constructive dialogue with detaining authorities is a main principle here, too: confidential, so the outcome of the visits may not be disclosed to the press by either ICRC or the state; only the fact that ICRC visits the detainees may be made public. And constructive, i.e. the aim is to improve the detainees' conditions of detainment by constructive recommendations and offering help. ICRC is of the view that detaining migrants should be only the last solution because administrative detention may have very serious effects on detainees' psychological condition since the procedure is uncertain, they are worried about their future and have lost their family members.[642] Detention must be necessary, reasonable and proportionate. Since administrative detention does not have criminal punishment as a purpose, in ICRC's opinion it should be as free as possible, e.g. even if leaving the premises is not permitted, free movement within the institution should be allowed where possible.

(iii) Identifying the deceased and ensuring a decent funeral: Unfortunately death cases take place in very high numbers along the migration routes. The authorities concerned are not always able to keep pace with the tasks, and the duties related to the identification of the deceased, the transportation/return of the corpses or to providing a decent funeral are immense burden on them. ICRC seeks to help authorities' work among others by putting its international network at disposal and providing expertise.[643]

Identifying corpses is a most time consuming and meticulous work, and is made more difficult by circumstances like establishing contact with the authorities of the country of origin, having to take DNS samples from family members staying at home for the identification, and setting up and operating a database which makes it possible to share information necessary for the identification, etc.[644]

Beyond the above activities, the components of the Movement certainly perform classic aid work as well, mainly through the national societies along the migration route, e.g. by

[641] ICRC Activities for Migrants, p. 5
[642] ICRC Activities for Migrants, p. 5
[643] ICRC Activities for Migrants, p. 7
[644] Cf. e.g. https://www.icrc.org/en/document/resources-commitment-needed-care-for-migrants

providing water, food and blankets. National societies seek to maintain close relations with migrants or their representatives in order to know what they are in need of.

In addition to the above, the Movement's components strive for dialogue with authorities certainly also in relation to migration issues. In a close cooperation with states it is an important factor that it is the states that are primarily responsible for the security of persons in their territory and jurisdiction. Thus, ICRC only raises their awareness of their obligations within the framework of a confidential dialogue or offers support. The aim of the dialogue is to make sure that the states guarantee migrants' security and the preservation of their human dignity, and alleviate their suffering.

14.Annex

Selected provisions of the 1949 Geneva Conventions and 1977 Additional Protocols

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Preamble

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, have agreed as follows:

Chapter I. General Provisions

Art 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Art. 5. For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation.

Chapter VIII. Execution of the Convention

Art. 47. The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.
Chapter IX. Repression of Abuses and Infractions

Art. 49. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following, of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Art. 50. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.
Art. 53. The use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or the designation " Red Cross " or " Geneva Cross " or any sign or designation constituting an imitation thereof, whatever the object of such use, and irrespective of the date of its adoption, shall be prohibited at all times.

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Art 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:[

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:
(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend

shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Art 5. The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Art 12. Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Art 13. Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

Art 14. Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or

without its own territory, of the rights such capacity confers except in so far as the captivity requires.

Section II. Release and Repatriation of Prisoners of War at the Close of Hostilities

Art 118. Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

Part VI. Execution of the Convention

Section I. General Provisions

Art 129. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed. or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

Art 130. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Convention (IV) relative to the Protection of Civilian Persons in Time of War.

Geneva, 12 August 1949.

Art. 2. In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

Art. 33. No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

Art. 34. The taking of hostages is prohibited.

Art. 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Art. 76. Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

Art. 78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

Part IV. Execution of the Convention

Section I. General Provisions

Art. 143. Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work.

They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.

Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted.

Such representatives and delegates shall have full liberty to select the places they wish to visit. The Detaining or Occupying Power, the Protecting Power and when occasion arises the Power of origin of the persons to be visited, may agree that compatriots of the internees shall be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties.

Art. 146. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or
property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious

injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

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

PART I. GENERAL PROVISIONS

Art 1. General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Art 4. Legal status of the Parties to the conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Part III. Methods and Means of Warfare Combatant and Prisoners-Of-War

Section I. Methods and Means of Warfare

Art 35. Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

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

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Art 36. New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Art 37. Prohibition of Perfidy

1. It is prohibited to kill, injure or capture an adversary y resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
(b) the feigning of an incapacitation by wounds or sickness;
(c) the feigning of civilian, non-combatant status; and
(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Art 38. Recognized emblems

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

Art 39. Emblems of nationality

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

Art 40. Quarter

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Art 41. Safeguard of an enemy hors de combat

1. A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.

2. A person is hors de combat if:
(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

Section II. Combatants and Prisoners of War

Art 43. Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Art 44. Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and
(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities .

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Art 46. Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Art 47. Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Part IV. Civilian Population

Section I. General Protection Against Effects of Hostilities

Chapter I. Basic rule and field of application

Art 48. Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Art 50. Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Art 51. - Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
(a) those which are not directed at a specific military objective;
(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:
(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

Chapter III. Civilian objects

Art 52. General Protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

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

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Art 53. Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
(b) to use such objects in support of the military effort;
(c) to make such objects the object of reprisals.

Art 54. Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
(a) as sustenance solely for the members of its armed forces; or
(b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Chapter IV. Precautionary measures

Art 57. Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:
(a) those who plan or decide upon an attack shall:
(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;
(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Art 58. Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
(b) avoid locating military objectives within or near densely populated areas;
(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Art 86. Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. 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.

Art 87. Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Part I. Scope of this Protocol

Art 1. Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 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) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Part II. Humane Treatment

Art 4 Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any or the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:
(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Art 5. Persons whose liberty has been restricted

1. In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained;
(a) the wounded and the sick shall be treated in accordance with Article 7;
(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;
(c) they shall be allowed to receive individual or collective relief;
(d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;
(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

Part III. Wounded, Sick and Shipwrecked

Art 7. Protection and care

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Art 9. Protection of medical and religious personnel

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

2. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

Art 10. General protection of medical duties

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.

4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

Art 12. The distinctive emblem

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

Part IV. Civilian Population

Art 13. Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

Art 14. Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Art 16. Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Art 17. Prohibition of forced movement of civilians

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Art 18. Relief societies and relief actions

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Part V. Final Provisions

Art 19. Dissemination

This Protocol shall be disseminated as widely as possible.