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Rebecca Lilla
Hassanova

Balance of the Principles of Military Necessity and Humanity in International Humanitarian Law

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List of used abbreviations

UNSC	United Nations Security Council
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ENMOD	Convention on the Prohibition of the Military or Any Other Hostile Use of Environmental Changes
UNSG	United Nations Secretary-General
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Commission of the Red Cross
ICTY	International Criminal Tribunal for Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICJ	International Court of Justice
IHL	International humanitarian law
UN	United Nations
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties
UNGA	United Nations General Assembly
GC	Geneva Convention

Introduction

Any history of mankind chronicle or book shows that wars comprised the development from the period of ancient civilisations to the great world wars of the 20th century. Hardships from war affected concerned parties and non-combatants, whether civilians from participating or surrounding countries. The winning party was often so weakened from the actual fighting that it could not ultimately claim victory. Thus, the ancient and medieval doctrine of *bellum iustum* began to be created, and the legal regulation of *ius in bello* (i.e. the regulation of conditions within the conflict or the rules of fighting) followed.

From the beginning of the legal regulation of war, the subjects of such a conflict were aware of its deficits, as they understood from the bilateral nature of the conflict that the conflict would induce losses on both sides. However, what if the aggressor is aware of his inviolability because of his strength in international politics and, thus, arbitrarily violates generally accepted conventions and their provisions? International law has binding conventions addressing violations of international obligations, and many such conventions are also binding on the aggressor. However, the aggressor often violates international obligations and mandatory rules, which have a higher degree of binding force in the hierarchy of international sources while being binding *erga omnes* without the need for any ratified convention.[1] This concept of *ius cogens* is, furthermore, reflected in the practice of States.[2]

1 ▪ The issue exceeds the topic of the monography; however, some basic interpretation is necessary. The concept of erga omnes has been introduced into positive law in the case of Barcelona Traction by the International Court of Justice (ICJ) in 1970. The Court stipulated that *erga omnes* obligations requires all states to have a legal interest in their protection based on the level of their importance. *Erga omnes* norms are divided into *erga omnes* partes (obligations established for the protection of the collective interest of a group of states) or *erga omnes* of the international community; obligations in the Rome Statute of the International Criminal Court (ICC) concerns *erga omnes* obligations stemming from the jurisdiction over the most serious crimes. However obligations stemming from many human rights treaties often dealing with same values are considered *erga omnes* partes towards other states. *Ius cogens* have necessarily *erga omnes* status, though one cannot assume the opposite also applies. Source: De Wet.E.Jus Cogens and Obligations Erga Omnes. In: Shelton. D. The Oxford Handbook on Human Rights. 2013. p. 555.

2 ▪ Fourth report of the Commission for International Law on mandatory norms of general international law (*jus cogens*) prepared by the Special Administrator Dire Tladi, para 23. 'Hierarchy (of norms) [and] linked in turn with the idea of safeguarding via primacy what is most important, a supposedly universal, common core of human values'.

Prior experts such as Valentino, Huth and Croc[3] and Morrow[4] address the issue. Morrow notes the view that the impact of international law on armed conflicts is most visible in democratic and, at least, totalitarian or autocratic countries. From his analysis, if both parties to the conflict are signatories to international humanitarian law (IHL) documents such as the Hague or Geneva Conventions (GCs), their responsibility for action is more enforceable, and their armed conflict behaviour is more aware. Even so, the position and strength of the actors concerned on international platforms are likely to be important elements in enforcing rights.

First, an armed conflict is, in any case, terrible and cruel. Humanitarian law, also called the law of armed conflict, aims to ease the suffering from such conflict. Apparently, the first code of war was created by the Saracens based on the Qur'an.[5] Later considerations by lawyers such ad Grotius[6] or Vattel[7] are, however, more acknowledged. Over time, State parties felt the need to enact international, binding and, above all, contractual standards. The best-known and most important documents are the Hague and Geneva Conventions, including Protocols 1 and 2, which, to this day, play an important role in the regulation of armed conflict.[8]

Despite the condemnation of armed conflicts by States, this phenomenon did (and probably will) not die out. Aggression in human nature and the desire for power continue to cause bloody global struggles to this day. Armed conflict regulation, thus, remains necessary. Meanwhile, with the advent of modern technology influencing the means of warfare, there is a need for flexible application of the law.

All legally binding and non-binding sources applied are based on generally accepted principles, which are then reflected in a specific legal norm. The importance of the principles was emphasised by many academics, including Antonín Hobza, one of the first Czechoslovak lawyers devoted to international and humanitarian law.[9] The two primary principles (i.e. the principles of military necessity and humanity) and their intersection represent the essence of humanitarian law.[10]

The principle of military necessity is often understood as the party's right to conduct war. However, there is no need to confuse the principle with the right of *ius ad bellum* (i.e. the right of the subject; usually the traditional subject of international law—the State) to start and conduct belligerent activities, which is different from the *ius in bello* (i.e. setting the law in armed conflicts). The principle of military

3 ▪ Valentino, Huth and Croco, 2006, p. 342.
4 ▪ Morrow, 2007
5 ▪ Algae, 1977, p. 246.
6 ▪ Grotius, 1625;2005
7 ▪ Vattel, 1760;2014
8 ▪ War et al., 2003, p. 9.
9 ▪ Hobza, 1933, p. 206.
10 ▪ Author's note: The first universal rules were, however, adopted for humanitarian purposes in 1864 by the Geneva Conventions. It was not a question of whether military necessity exists; rather, it was the first time when states agreed on rules to put restrictions on the warring parties.

necessity was first mentioned in the Lieber Code of 1863 as a necessary measure to ensure the end of the civil war that was the subject of this legal regulation.[11] Later, the principle was included in the preamble to the St. Petersburg Declaration of 1868, which stipulates, that the only legitimate object of the belligerent States under this principle should be the weakening of the enemy's military forces; accordingly, they have the option of eliminating as many of them as possible.[12]

Opinions on the principle of military necessity differ in many aspects. Many people claim[13] that excessive attention is drawn to military necessity at the cost of the development of humanitarian law and the protection of war victims. The flexibility of the notion of military necessity under the laws of war has allowed combatants to legally justify virtually any action available to the belligerent party. Entities are reluctant to give up anything that gives them a military advantage. Hence, finding a compromise is always in the common interest, where entities can agree on certain measures that can then protect victims.

In this regard, the principle of humanity becomes usable. The preamble to the Hague Convention II of 1899, which adopted the law of armed conflict on the ground, contains a clause, the so-called Martens Clause, which some academics also consider as a separate general principle of law with an exclusive origin in international law.[14] The clause requires that in situations where no exact provision of the Convention can be used, subjects enjoy protection under the principles of the law of nations, which, per Martens, were obtained from the rules of civilised people, the laws of humanity, and the dictates of public conscience.[15] Such a provision was intended to prevent the belligerent parties from acting arbitrarily even without a precise provision for a situation. The text of this principle references the principle of humanity, establishing it in a binding form. Until recently, the principle is deemed outstanding, blocking acts that can, in some situations, be justified via the principle of military necessity.

The two basic principles of humanitarian law, thus, indicate the basic direction of all sources of a given area of law. This monograph, therefore, addresses the precise definition of this conflict, the search for the balance between the principles, and the subsequent resolutions. The organisation of this work provides a logical approach to understanding the issues of humanitarian law, from theoretical perspectives through implementation problems to current modern challenges on the battlefield and their legal regulation in international sources.

11 ▪ General Orders No. 100. Instructions for the Government of Armies of the United States in the Field. "Lieber Code". Art. 14. 1863. https://avalon.law.yale.edu/19th_century/lieber.asp#art14 (Accessed 15.1.2023.)
12 ▪ Declaration of renunciation of the use of explosive projectiles in time of war, up to 400 grams in weight. Opened for signature on November 29, 1968. Called the "St. Petersburg Declaration." Preamble.
13 ▪ See Zillman and Imwinkelried, 1976; Beaumont, 2009.
14 ▪ Dupuy, 1999, Para 119-128; Cassesse, 2000, p. 212.
15 ▪ Hague Convention II on the Laws and Customs of War on Earth. 1899. Preamble.

The study exhaustively investigates the overlap of the principles of military necessity and humanity in the legal field of IHL using empirical techniques such as conceptual and normative methods and teleological analysis of the current status of the application of these principles. It also addresses the case law of international courts and its interpretation, where courts repeatedly emphasise compliance and respect for binding IHL conventions in all circumstances. Meanwhile, an entity not being party to a particular conflict does not mean that it is not obliged to comply with requirements therefrom.[16] The nature of this explanation of the rules of the IHL conventions is as strongly connected with the usage of its general principles as the principles of military necessity and humanity.

The work provides a structured overview of the rights and obligation issues applied during an armed conflict, focusing mainly on theoretical conclusions in the field and their impact. The study employs methods of analysis, synthesis, and comparison to investigate primary sources and doctrine.

In analysing and evaluating the pertinent subject based on submitted opinions and acquired knowledge, the study is guided by the following two hypotheses:

1. The application of the principles of IHL is more effective than the application of specific treaty rules.
2. The consideration of the principle of military necessity and the principle of humanity in international treaties is not sufficient.

At this point, it is necessary to clarify the terms used in the work. Primarily two basic concepts must be clarified—humanitarian law and the law of armed conflict. Some authors distinguish between the two notions in way that they associate the concept of the law of armed conflict with the normative regulation of the Hague Conventions and the concept of humanitarian law with the normative regulation of the Geneva Conventions. Meanwhile, it is also possible to observe a greater use of the concept of the law of armed conflict among American authors, while the concept of humanitarian law is more closely associated with European authors. Theodor Meron, the prominent academic and judge stresses the concept of International humanitarian law because of its profound influence on human rights.[17] In reality, however, the terms are often interchanging and used as synonyms. Accordingly, this study will use both the terms the law of armed conflict and humanitarian law interchangeably. This decision aims to provide a clearer reader-friendly interpretation of the issues of the pertinent area of law.

16 ▪ The case of the legal consequences of the construction of a wall in the Occupied Palestinian Territory, the opinion of the International Court of Justice of 9 July 2004. General list n. 131. para. 158.

17 ▪ Meron, 2011, p. 43.

1.

Theoretical basis of international humanitarian law

1.1 Application of conventional and customary rules of humanitarian law to armed conflicts of a non-international nature

Dichotomy (i.e. the division into two separate parts) is relevant in different branches of law. from the basic division of law into public and private to the division into legal theory and application practice or, per some theorists, the so-called political reality.[18] In humanitarian law, some academics identify such a dichotomy, although many times without significant contrast. In this case, this division traditionally means two types of conflicts (international armed conflicts and non-international conflicts), which may also be subject to internationalisation.[19]

This dichotomy is based on the lack of State willingness to regulate internal armed conflicts, which, with the development of law, had been broken but resulted in different scopes of application of humanitarian law for international and national conflicts. It was based on a definite need for the internationalisation of conflicts with higher intensity. Although some authors criticise such internationalisation, the facts confirm the need to apply IHL in its entirety to such conflicts. First, the UN, as a major organisation in international aspects, has the task of monitoring compliance with mandatory standards by all States, not just those that have committed themselves to comply with them through ratification of conventions. Thus, during a breach of the commitments, the UN executive body, the Security Council, has the right to decide what measures, with or without the use of force, are to be used to ensure peace and general security.[20] Second, the reality and events in internal conflicts of States show the little attention paid to observing many principles, as the international community is not directly involved. Regular attacks on civilians and their inappropriate treatment violate humanity and proportionality principles.

18 ▪ Cox, 1998-99, pp. 15-42.

19 ▪ Author's note: The term internationalisation is used to present a circumstance where one elevates a national situation, and the international element is missing at the international level; Stewart, 2003, p. 315.

20 ▪ United Nations Charter. 1945. Art. 41, Art. 42.

Thus, given the nature of the conflict, there is a need for additional external oversight of compliance with IHL, especially through an organisation set up to preserve international peace (i.e. the UN). [21] Third, in the event of significant unrest in the context of internal conflict in one State, relations can easily be extended to entities outside the relevant State, and, thus, the conflict may become international.

In all cases, where armed struggles occur within one territory of the State, it is necessary to identify whether it is an armed conflict or just an internal security problem of the State. International law begins to apply only in cases where the conflict reaches a significant intensity of armed conflict. Per the Additional Protocol II of the GC[22] or relevant case law, such as the Tadic doctrine,[23] the intensity of armed violence must rise above the intensity of internal disturbances and tensions, such as riots or isolated and sporadic violence.[24] If the State apparatus and national law continue to operate during the unrest, it would be an exaggeration for State parties to enter into a conflict and apply international conventions.[25] However, in cases where a State has lost control of most of its territory or where enforcement authorities are not functioning, the question of an armed conflict and the need to apply international law can be considered.[26] The following examples, although part of the *ius ad bellum* argumentation, show the need for the application of international treaties:

1. An insurgent movement that seeks to overthrow the government or create its autonomous region, in both cases controlling a significant territory of the State
2. A compound State that is falling apart into its constitutive parts, with armed struggles between the governments of its member States
3. The complete disintegration of the legal order under the leadership of an armed faction in a significant territory of the State, while the government has lost full control over this territory

Despite the examples regarding the relationship between non-governmental and governmental bodies, there may be a conflict between several organised

21 ▪ Author's note: Notably, the oversight of the United Nations regarding the compliance with international law is limited.

22 ▪ Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. 8 June 1977. Art. 1. par 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'.*

23 ▪ Prosecutor v. Dusko Tadic, ICTY, Appeal on jurisdiction. No. IT-94-1-A. 2 October 1995. para. 70.

24 ▪ Cullen, 2015, p. 770.

25 ▪ Author's note: Naturally, it does not mean national law stops functioning in the relevant state.

26 ▪ Greenwood, 1997, p. 18.

non-State entities beyond government actors within the territory of a State. Meanwhile, such unrest can also result in the need to apply IHL.

The application of IHL may occur additionally in other cases (e.g. when the government identifies the hostile belligerent party or in the case of a unilateral declaration by a legitimate State authority). However, the identification of an internal armed conflict is influenced by many other factors, such as the existence of an organised armed party or the control of the territory.

The application of international treaties to internal conflicts has certain limits, given significant criticism from many States. Their arguments hinge on the principle of non-interference in the national affairs of the State based on the sovereignty of the State as an independent entity. Meanwhile, such interference occurs automatically when international standards are applied to internal conflict. Thus, the area of protection of victims' rights stems from international treaty law, and the regulation of conduct and methods of warfare stems mainly from customary law. This situation, however, means that most of the rules of IHL can be applied to non-international conflicts. [27]

Rules contained in international agreements applicable in such cases stem from fundamental principles and customary law. Indeed, the Hague Conventions,[28] the Common Art. 3 of the GCs, and the Protocol II of the GCs are notable.[29] However, some conventions have even been explicitly extended to apply to internal conflicts (i.e. the Common Art. 3 of the GCs, the Convention on Cultural Heritage,[30] Amended Protocol II on Mines of 1996,[31] and the Second Hague Protocol on Cultural Heritage of 1999).[32] Further, the ICC Statute has an exemplary list of such conduct that can be considered a war crime even in the event of a national armed conflict.[33]

In the conventions and their customary forms, IHL, when applied to internal conflict, have a prominent function, as it creates a dual system of norms to be applied to combat situations. However, national law is not derogated and, thus, continues to apply. In this case, it creates a dichotomy of two legal systems (national and international), which can complement each other. Nevertheless, in the context of the hierarchy of standards, Art. 27 of the Vienna Convention on the Law

27 ▪ Moore, 1974, p. 503.
28 ▪ Hague Convention on the Laws and Customs of Land Warfare of 1899 (II); The Hague Convention with respect to the Laws and Customs of War on Land 1907 (IV). 18. October 1907.
29 ▪ Additional Protocol to the Geneva Conventions of 12 September 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. (Protocol II). 08.06.1977.
30 ▪ Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol of 1954.
31 ▪ Protocol prohibiting or restricting the use of mines, traps, and other devices, as amended 3 May 1996, annexed to the Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons Which May Be Considered Excessively Harmful or Unbalanced.
32 ▪ Second Protocol to the 1999 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.
33 ▪ Rome Statute of the International Criminal Court of 1998.

of Treaties (VCLT) stipulates that the parties have no right to invoke provisions of national law as a justification for failure to perform a treaty. Thus, those provisions that contradict international law are overruled by international provisions that enjoy supremacy.[34]

The former President of the International Criminal Tribunal for the former Yugoslavia (ICTY) Antonio Cassese held that, in many cases, the two systems had converged, where internal dispute was now largely governed by rules and principles traditionally applied only to international conflicts.[35] The case law of the ICJ,[36] the Report of the UN Secretary-General (UNSG) of 1993,[37] the Statute of the ICTY,[38] the Statute of the International Criminal Tribunal for Rwanda (ICTR),[39] and the Additional Protocol to the GC introduced the principle of personal criminal liability for acts in articles of serious violations, even if committed during an internal armed conflict.

Meanwhile, the International Commission of the Red Cross (ICRC) study showed that the gaps in the texts of those conventions, which apply to armed conflicts even missing international elements (i.e. an internal State conflict), should be filled by analysis and customary law, not the creation of another conventional law.[40] Several rules of customary international law apply in situations of international and domestic armed conflict. This analysis, however, proves the scope to which practice has gone beyond existing conventional law and broadened the rules applied to armed conflict. The ICRC, thus, expressed the view that the presence of the already established law dealing primarily with international armed conflict is also suitable for application to domestic internal conflicts.

34 ▪ Vienna Convention on the Law of Treaties. 23. 5. 1969. United Nations Treaty Series. Vol. 1155, p. 331. Art. 27.

35 ▪ Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court. In: Moir. L. The Law of Internal Armed Conflict. Cambridge University Press. London. 2000. p. 51.

36 ▪ The case of Bosnia and Herzegovina, Application of the Convention on the Prevention and Punishment of the Crime of Genocide of the International Tribunal for the former Yugoslavia, Preliminary Objections of 11 July 1996. para. 31; Prosecutor v. Dusko Tadic, ICTY, 15 July 1999, IT-94-1-A, para. 141.

37 ▪ Report of the Secretary-General on paragraph 2 of Security Council Resolution no. 808 (1993). May 3, 1993, p. 13. para. 47.

38 ▪ Statute of the International Criminal Tribunal for the former Yugoslavia.

39 ▪ 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 1994 and 31 December 1994.

40 ▪ Henckaerts, 2000, p. 11. 'This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts'.

Moreover, scholars raise questions regarding the distinction between the two 'categories'—international and non-international. Although currently perceived as part of the already established framework of the law of armed conflict, the suitability of guaranteeing the distinction between armed conflicts of international and internal character has been questioned by scholars and practitioners.[41] Nevertheless, regarding Lubanga, the ICC noted that the distinction is an established part of the international law of armed conflicts and the statutory provisions of the Rome Statute. The Court, therefore, stipulates that it has no right to change the text of the provision in this sense (i.e. the distinction between internal and international conflicts will be applied in the exercise of the ICC).[42]

Despite many ambiguities, internal armed conflicts and the application of international law and its impact comprise IHL. Thus, it is necessary to address the topic marginally.

1.2 Concept of armed conflict within the framework of international and national case law

The precise definition and interpretation of terms in a given area are indispensable for a correct understanding of pertinent issues. Therefore, it is necessary to clarify the basic concept of IHL and 'armed conflict'. The first source of law that included the term 'war' was from 1863 (Lieber's Code). The notion of war means hostilities towards other parties issued by governments or States, which was previously widely understood as something that must be declared. 'War' was used until the second half of the 20th century, when the concept of armed conflict began to appear. However, the terms are identical in content.[43]

The most appropriate explanatory interpretation and definition of the term is as follows: An armed conflict is most likely to appear when the components of the enemy armed forces behave violently towards each other. Any territory of another State may be affected, and the situation where one army occupies another State is also considered. However, the accidental crossing of the border by military forces caused by an error by no means falls under the concept of an armed conflict. Armed conflict can also emerge within the territory of a single State, where the fighting intensity must also be considered. Although, in both conflict types (international and domestic), different founding elements determine the existence of armed conflict.

41 ▪ Cullen, 2015, p. 766.
42 ▪ Prosecutor v. Lubanga, Decision on the Confirmation of Charges of the Pre-Trial Chamber I of International Criminal Court of 29 January 2007, n. ICC-01/04-01/06-803, Para. 539.
43 ▪ Ondrej et al., 2010, p. 38.

This interpretation, although based on formal sources of international law,[44] is not derived from a specific definition in an international treaty, as binding treaties do not contain a precise definition of the term. Thus, it is necessary to refer to other important sources (e.g. the case law of international courts) when examining the issue.

1.2.1 Tadic doctrine

A useful guideline for interpreting 'armed conflict', which should be used as a starting point for analysing the term, is the ICTY judgement in the Tadic case. Hence, research on the issue must first address this doctrine; the next subchapter is devoted to an in-depth analysis of the concept of armed conflict, which is based on the knowledge from the Tadic doctrine.

The judgement in the Tadic case is significant in many respects. Judicial scholars and other scientific societies were aware of its importance at the time of the ongoing proceedings, as the verdict was the first to be issued by the ICTY. Thus, it addressed the questions of the legality of establishing the tribunal, the scope of its jurisdiction, and its authority in the international community.[45]

In the judgement, the Court found that an armed conflict exists whenever armed struggles or protracted armed violence occurs between different States, between government bodies and organised armed groups, or between such groups within a State.[46] However, this conflict's international nature has been significantly discussed, though the UN Security Council (UNSC) has considered the conflict in Yugoslavia as having international and national elements. The precise identification of a conflict as international or national is important in each case. Thus, the Board

44 See Geneva Convention of 1949 for the Protection of Victims of International Armed Conflict. Art. 2; Additional Protocol to the Geneva Conventions of 12 September 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. Art. 1; Rome Statute of the International Criminal Court of 1998, 1998. Art. 8bis. para 2.

45 Shooting, Danová and Urbanová, 2002, p. 108.

46 Prosecutor v. Dusko Tadic, ICTY, appeal on jurisdiction, No. IT-94-1-A, 2 October 1995, para 70. '*On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State ... Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict... There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups'.*

of Appeal judges referred to Joint Art. 3 (the so-called mini-convention), which has international and national scopes.[47]

Although Tadic's doctrine ultimately stated that the nature of the fighting was not only national but also international in essence, the interpretation mentions that it is important for the application of humanitarian law to take into account the distinction between national and international wars. The need for such a distinction is justified by the scope of general international law, which cannot be applied in absolute terms in national conflicts.[48]

The Tadic judgement did not declare a complete and automatic transfer of rules from international conflicts to non-international ones; instead, the fundamentals of a few essential provisions were suitable for practice. Further, several provisions from international armed conflict would be absurd to apply in non-international conflicts, especially provisions addressing the notions of occupied territory, prisoners of war, or transfer of civilians to occupied territory. In any framework of war crimes, it is more effective to create an enumeration of crimes relevant to international and internal conflicts and a brief enumeration relevant only to international conflict. A catalogue of war crimes is stipulated in Art. 8 of the Rome Statute of the ICC. This enumeration of illegal acts under the notion of war crimes encompasses adjustments of customary law and presents a more understandable demonstration of the already existing legal framework. [49]

Accordingly, the ICTY subsequently interpreted the term 'armed conflict' as described above, adding that the international nature of a dispute arises in cases where another State enters a conflict with its troops or a party to the internal conflict acts in the interest of another State. In such cases, a causal nexus emerges between the actions of the military or insurgent party and the interests of another State. However, to demonstrate such conduct on the part of the other State, that State must develop the necessary degree of control over the belligerent party. Whether such an entry can be considered as a so-called effective control and whether this action has a real impact on the creation of the conflict is an important issue for any conflict, and the court determines its necessity.[50]

The UN and its main body, the ICJ seek to interpret and complement the concept of armed conflict in-depth. Regarding Nicaragua, in a resolution of the UN

47 ▪ Statute of the International Criminal Tribunal for the former Yugoslavia. Art. 3.: *'The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property'.*

48 ▪ Ibid.

49 ▪ Cryer et al., 2006, p. 227.

50 ▪ Prosecutor v. Dusko Tadic, ICTY, 15 July 1999, IT-94-1-A, para. 117.

General Assembly (UNGA), the court also addresses the definition of aggression as an armed attack that includes the intervention of regular armed forces across the international border and the deployment of professional armed groups, non-professional gangs, or mercenaries acting in behalf of a State conducting acts of armed forces toward another State with such intensity as the actual armed attack conducted by regular military forces.[51] However, the ICJ complements the definition with rebel support via arms, logistical, or other support that significantly fuels the fighting.[52] Even so, aggression is primarily a matter of *ius ad bellum*; thus, there is no need for a detailed analysis of the judgement.

However, the Tadič case was also interesting regarding the interpretation of the territorial scope of the armed conflict concept. In this case, the defendant argued that the armed conflict occurred on the battlefield, and, in remote parts where there was no fighting, humanitarian law should not be applied. Such an understanding must be interpreted in the context of the traditional concept of the military. However, as the Court noted, the GCs or other sources of humanitarian law are silent on it, rendering the argument to be unfounded. Otherwise, places (Prijedor in Bosnia and Herzegovina) outside the fight or after the end of actual enemy activities would not be subject to humanitarian law. The given places, however, are those where the application of the provisions is necessary.[53]

In this case, the court also addressed the issue of the time scale of the armed conflict and the related application of humanitarian law. In this regard, the criminal tribunal found that the application of law and the extent of the armed conflict last until the conclusion of a general peace between the belligerent parties.[54] Although this interpretation is noted in humanitarian law, it is vague and insufficient. Therefore, the court did not give an exact answer as to the real end of the fighting; meanwhile, what exactly can be considered the conclusion of peace is unknown.

The case furnished many answers and ambiguities and, thus, several more questions. However, it established important foundations for humanitarian law and the tribunal's power to decide on armed conflicts within a country based on the interpretation of the ICTY Statute and the *opinio iuris*.[55] Further, the precise reasoning

51 ▪ Definition of aggression United Nations General Assembly Resolution. Art. 3314. (XXIX). 14. 12. 1974. Art. 3 (g).: *'The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein'.*

52 ▪ Nicaragua in the United States. Military and paramilitary activity in and against Nicaragua, ICJ, 27 June 1986, ICJ Reports No. 520., para. 195.

53 ▪ Prosecutor v. Dusko Tadic, ICTY, 15 July 1999, IT-94-1-A, para. 164.

54 ▪ Prosecutor v. Dusko Tadic, 2 October 1995, Appeal. No. IT-94-1-A., para. 70. '*International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved'.*

55 ▪ Sassoli and Olson, 2000, pp. 733-769.

of the judgement in certain matters is an important benefit and, thus, a milestone for experts on the issue.[56]

1.2.2 Application problems associated with the interpretation of the term

Given the shortcomings and many issues of the Tadič case in 1999, a more detailed analysis of the concept of armed conflict is needed regarding current application problems. When analysing the term, it is necessary to pay attention first to the content of the term 'armed' before the question of what is a conflict, especially in connection with the current situation in international relations.

Though expert opinions on the correct interpretation may differ, interpreting the first part of the term (i.e. armed) must be based on a certain intensity of the existing conflict. However, some legal sources disagree. Beyond national conflicts, the ICRC does not consider the intensity of the fights to be a defining element when there is a clear international element (i.e. a conflict between two States).[57] As noted, the connection between the actions of another State and the fights within the territory of one State is often not easily ascertained and can only be demonstrated by detailed evidence, which can induce an incorrect and late application of humanitarian law standards. The intensity of the fights is elementary in determining internal conflicts within a single State, but any intervention by external actors must be considered in every respect. The Association of International Law also agrees with this opinion.[58]

Regarding actual developments, the analysis of armed conflict raises questions regarding terrorist acts and whether they can be considered a conflict. Armed conflict traditionally differs from ordinary crimes; however, the aforementioned terrorist acts were, until 2001, not connected to IHL. After the terrorist attack in the US, however, the situation began to change, and the so-called war against terrorism American troops launched against terrorist groups influenced the field of law. Accordingly, many experts argue that entities that the law currently identifies as parties to the conflict have expanded to quasi-States, dissident armed groups, and groups representing the liberation movement.[59] Indeed, the agreement between the US and the Taliban militant movement of 29 February 2020 on the withdrawal of American troops from Afghanistan is notable.[60] It posits that the Taliban is the so-called Islamic Emirate of Afghanistan, which the US does not recognise as a State

56 ▪ Greenwood, 1996, p. 282.
57 ▪ Sandoz, Swinarski and Zimmermann, 1987, para. 62.
58 ▪ Association of International Law. Draft Report, Initial Report on the Meaning of Armed Conflict in International Law. Rio de Janeiro Conference. 2008, pp. 9-10., and pp. 23-24.
59 ▪ Author's note: It is currently a controversial opinion.
60 ▪ Rogers. APV. Terrorism and the Laws of War: September 11 and its aftermath. [online]. http://www.crimesofwar.org/expert/attack-turns.html. (Accessed: 5. 11.2020).

but is willing to consider as a party to negotiate an agreement. Art. 2 of the VCLT posits that an international agreement is 'an international agreement concluded between States in writing and governed by international law'.[61] Nevertheless, Art. 3 of the Convention does not stipulate that the Convention is affecting the agreements concluded between States and other subjects of international law.[62] However, Common Art. 3 of the GCs provides for the chance of binding agreements with non-State actors and motivates parties to the conflict to conclude humanitarian agreements with non-State actors. Even so, Art. 3 does not stipulate if agreements with such armed groups constitute some obligations under international law, domestic law, or any *sui generis* regime nor does it clarify whether such agreements may affect their legal personality.[63] Therefore, such a single bilateral agreement cannot be considered a sufficient basis for subjecting militant and terrorist groups to international law.[64] Arguably, it is necessary to create a binding formal and multilateral source, which precisely determines who has *de iure* an international legal personality. The creation of such a source is, nonetheless, unlikely, given that issues on the topic are currently being addressed on an *ad hoc* basis.

On the contrary, differences in the traditional understanding of the parties to an armed conflict are not new.[65] However, the issue of war against non-State entities, terrorism, and the application of IHL is relevant in the field of theoretical debates and subject to the scrutiny of various courts (e.g. Israel and the US). The Hamdan v Rumsfeld case, which was a matter of the US Supreme Court, is notable. The court sought to interpret the concept of armed conflict, its relation to the application of IHL, and the concept of international law subjects because the accused was allegedly a member of al-Qaeda. Hamdan was a Yemeni citizen detained in 2001 by US troops during the US-Taliban war in Afghanistan. For that conflict,

61 ▪ Vienna Convention on the Law of Treaties. 23. 5. 1969, p. 331. Art. 2.
62 ▪ Ibid. Art. 3.
63 ▪ Geneva Convention of 1949 for the Protection of Victims of International Armed Conflict. Art. 3.
64 ▪ Author's note: One can, however, argue that individuals are indirectly subjects of international law because they, as citizens of their own countries, are also bound by international law.
65 ▪ Author's note: In the 14th century, history has known different actors with similar rights as today's subjects of international law (e.g. in 1370 the so-called Stralsund Convention, which ended the war between the Association of German Business Towns and the Kingdom of Denmark and the Battle of Palási in 1757, which ended the war between the British East India Company and the Bengal Navajo). However, medieval subjectivity, unlike today, had a peculiar and different basis.
Editors of Encyclopaedia Britannica. East India Company. [online]. [cit. 12. 5. 2020]. https://www.britannica.com/topic/East-India-Company. Bunting. T. Battle of Plassey. Encyclopaedia Britannica. [online]. https://www.britannica.com/event/Battle-of-Plassey. (Accessed 12.05.2020).

even if we consider it as a non-international conflict (i.e. of an internal nature), IHL must be applied.[66]

The court first addressed the issue of the territorial scope of the armed conflict, ruling that in cases where foreign territories are invaded (and not necessarily involving fighting), they fall under the term 'occupied territory'.[67] In such cases, the interpretation of 'armed conflict' is so extensive that it can also elevate civil unrest to international conflicts, where the application of the provisions of humanitarian law is considered more important. Thus, in the traditional sense, the Common Art. 3 of the GCs applies to an internal conflict considered an armed conflict.[68] However, in this different explanatory sense, all other binding sources of IHL (treaties and customs) can be applied.

The extensive interpretation of the term is linked to US efforts to fight the terrorism that threatens the world and has so far caused much damage and suffering as effectively as possible. However, despite changes since the September 11 attack of 2001, some States continued to have a restrictive understanding of 'armed conflict'. In 2004, the UK issued a Handbook on the Law of Armed Conflict, which specifies that armed conflict must be distinguished from ordinary crimes and terrorist acts.[69] Such an interpretation is justified by the interests of the UK and its local political situation, based on constant unrest in Northern Ireland.

Although US and UK interpretations of 'armed conflict' are only teleological interpretations for the political needs of States, such differences must be illustrated in the concept analysis. The interpretation of the concepts of international law is in many cases different based on the political needs of an entity that interprets it. However, the interpretation is in all cases based on some constitutive elements (e.g. at least two opposing parties, planned operations to weaken the other party, gaining military advantage, and using weapons) that form the basis of any single interpretation of the concept of armed conflict and may refer to international and national conflicts.

66 ▪ Salim Ahmed Hamdan v. Donald H. Rumsfeld, Supreme Court of the United States of America, 29, June 2006, 548 US 557, No. 05.184.

67 ▪ Ibid. para. 18.

68 ▪ Geneva Convention of 1949 for the Protection of Victims of International Armed Conflict. Art. 3.

69 ▪ The Joint Service Manual of the Law of Armed Conflict. Publication 383. 2004 Edition. para. 3.5.1. 'State practice since 1949 indicates that banditry, criminal activity, riots, or sporadic outbreaks of violence and acts of terrorism do not amount to an armed conflict'. 16 'Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature 'do not amount to armed conflict'.

1.3 Attack

An analysis of the concept of 'attack' is needed when examining the law of armed conflict to correctly understand and interpret the topic of principles. There are many definitions in international documents, all pointing to the use of physical force against a military target. The attack must be interpreted as an act on the ground, in the air, or on water, exerting a negative effect on the object of the belligerent party, the civilian population, or the territory of the State. Meanwhile, all attacks should be planned, enhancing consideration of possible damages and prevention of international law violations.

The term is also mentioned many times in connection with the natural right of the State to self-defence, as the UN Charter provides for armed attack as one of the conditions for its application.[70] However, the UN Charter (mainly addressing *jus ad bellum*) in this case defines 'armed attack', not the 'attack'. The next subchapter primarily interprets 'attack', as per Art. 49 of the GC.

1.3.1 Detailed analysis of the term

The best-known interpretation is provided by Protocol I of the GC, which stipulates that an attack is a violent act against the enemy; it can be considered an offensive or defensive attack.[71] The mention of offensive and defensive attacks is *expressis verbis* intended to emphasise the obligation to comply with provisions of the GCs, even if the party merely defends itself.

According to a broad interpretation of Protocol I and its subsequent articles, an attack also covers one soldier with one weapon.[72] However, academic views on the interpretation differ. Fenrick[73] argues that the context of the provisions of the protocol cannot be interpreted using a single soldier's attack, positing that it must be a formation of at least the size of a division. Switzerland has issued a declaration on the ratification of the provisions of Art. 57 of the Protocol, highlighting that only the commanders of the battalion and higher functions meet the conditions for ordering an attack (i.e. conflict by a smaller group is not considered an attack).[74] However, such a blanket reference cannot be universally applied. The UK took a different approach in its statement of the declaration to ratify the Geneva Protocol:

70 United Nations Charter. 1945. Art. 51.
71 The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977. Art. 49. para 1.: *'"Attacks" means acts of violence against the adversary, whether in offence or in defence.'*
72 Ibid. Art. 57. para 2.
73 Fenrick, 1982, p. 102.
74 Swiss Federal Council. Embassy concerning the additional protocol to the General Agreement. 1981. para 52.

the commander must be assessed based on the information available to him. In this case, even a commander of a lower function, such as a unit commander, can be part of an isolated attack.[75]

Meanwhile, an important part of an 'attack' is achieving military advantage. However, the advantage must be assessed in its entirety (i.e. as part of the attack and all its parts along with the losses). All the components of such an understanding of the definition regard predetermined military operations based on violence.[76] However, the understanding of the concept is changing given the advent of modern technology and the increasing number of cyberattacks.

However, the means of attack yield dilemmas. An attack comprising soldiers, weapons, tanks, artillery, aircraft, and other traditional means of war falls under the notion of armed attack. However, what about cyberattacks? Targeted operations to prevent the use of enemy computer networks are already a reality, and modern States dependent on computer networks can become paralysed by such an attack. A cyberattack can significantly affect communications, air traffic, energy supply, transport, distribution, and the financial market. Even so, normally this type of attack would be difficult to subordinate under the concept of violence and, thus, under a regular armed attack. However, if such attacks went unnoticed in the legal framework, there would be a gap in legal applications, endangering the protection of States and civilians. Thus, it is important to consider the interpretation of the concept of attack, especially in the case law of the international courts and their decision-making power. The last chapter of the monograph addresses the issue of technological development in-depth.

1.3.2 Indiscriminate attack

The commander of the attack must be aware of the details of the military object he is attacking. Such details include the residence of the civilian population in the vicinity or cultural monuments that may be affected by the attack. However, under customary law, an attack that is not distinctive or precisely targeted does not fall within the prohibited means of conducting combat. On the contrary, it is necessary to make a distinction between an indiscriminate attack and an attack carried out blindly. Such attacks, as it infringes on the principle of distinction, are, of course, prohibited. Likewise, planned attacks must meet the condition of proportionality. If an attack is likely to cause disproportionate damages (loss of civilian lives or damage to important cultural buildings) beyond a military advantage, it cannot be conducted. The same applies to indiscriminate attacks, causing huge unjustified

75 ▪ United Kingdom of Great Britain and Northern Ireland Declaration 2. 7. 2002 to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8. 6. 1977. Reservations c).

76 ▪ Rogers, 2012, p. 33.

losses. Such attacks are always prohibited. The rules regarding indiscriminate or inaccurately targeted attacks were already stated in the opinions of the Imperial Defense Committee of 1919 and the Hague Aviation Rules of 1923.[77] The mentioned documents address the method of bombing, which cannot be conducted if it can harm civilians. Thus, it can be deduced that such an attack is banned. However, none of these documents are legally binding.

For a long time, no treaty in a binding form addressed indiscriminate attacks, proving the State practice of some States in the 20th century.[78] Based on the available sources and the research of H. Blix[79] however, it is possible to summarise the usual customary rules for conducting an attack regarding the existence of indiscriminate attacks. There are three basic elements, which are also reflected in the Additional Protocols to the GCs:[80]

1. The target of the attack must be identified as a military object.
2. The attack must be aimed at such an object.
3. Weapons and methods of using them must be such that they are likely to hit the target.

The elements of the attack became part of binding treaties of an international nature; therefore, they were also included in the texts of many army manuals, where the principle of distinction between soldiers (the so-called combatants) and civilians is explicitly noted. This principle is considered among the key principles of civilian protection, even though violations of it remain today.

The trial in Sudan, where a significant African conflict is taking place, can demonstrate some proceedings addressing the interpretation of indiscriminate attacks. Violations of the law of armed conflict and the principle of distinction are not unique. The conflict between the Sudan Liberation Army and government forces in the area of western Sudan (i.e. Darfur) began in 2003. Government militia killed thousands and burned villages to overrule the 'rebels'. Despite various peace talk attempts, the establishment of a Special Criminal Court on the Events in Darfur, and an attempt at a Darfur Peace Agreement from 2006, the attacks and military activities continue.[81] UN human rights observers recognised armed youth in southern Sudan[82] and documented deliberate, ruthless, and brutal attacks on civilians, especially women and children, by the government and its forces.

77 ▪ Hanke, 1993, p. 24.
78 ▪ For example, many attacks during World War II.
79 ▪ Blix 1978, p. 48.
80 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977, Art. 51, para 4.
81 ▪ Darfur Peace Agreement, adopted 5 May 2006, [online], http://www.sudantribune.com/IMG/pdf/Darfur_Peac_Agreement-2.pdf, (Accessed 12.05.2020).
82 ▪ Report of the United Nations High Commissioner for Human Rights. Indiscriminate attacks against civilians in Southern Unity, April-May 2018.

Sudan is a State party to the African Charter on Human and People's Rights and more UN human rights treaties, such as the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Woman, and the Convention on the Rights of the Child. Nevertheless, Sudan is a party to the GCs and its Additional Protocols. Thus, Sudan is obliged to respect, protect, and ensure the fulfilment of the rights from the articles of the treaties. Moreover, all parties must abide by the rules of customary international law applicable in non-international armed conflict, including the principle of distinction. Hence, Sudan and rebel forces are responsible for all violations of human rights and humanitarian law committed by the armed forces under their control. From the UN report, there is a nexus between the acts by State military forces and associated forces behind investigated attacks.

However, the perpetrators of such acts have yet to be punished. The African Union has become increasingly bitter toward the ICC and its jurisdiction. In 2007, the ICC presented arrest warrants for two individuals. Ahmad Haroun (former Minister of State for the Interior of Sudan) and Ali Muhammad Al Abd-Al Rahman (a military senior leader). These Sudanese faced a tribunal based on allegations of perpetrating war crimes and crimes against humanity. Nonetheless, the Sudan government refused to cooperate and decided to investigate.[83] The first warrant to arrest the president of Sudan Omar Ahmad Al-Bashir was issued by the ICC in 2009. The second was issued in 2010. Both have been unsuccessful. The arrest warrant hinged on his criminal responsibility under Art. 25(3)(a) of the Rome Statute as an indirect perpetrator of alleged crimes against humanity, war crimes, and genocide.[84] Al-Bashir has not faced charges against him, despite regular reports of his extradition to Sudan.[85]

There have been some debates on the current war in Ukraine and the attack on Bucha. Some sources claim that approximately 20 civilian people died in the attack; some say 300 died.[86] The information is, therefore, unclear. However, there have been considerations on whether the attacks violate IHL. The ICC opened an investigation of alleged crimes committed regarding the Ukraine situation since November 2013 in March 2022. Ukraine is not a State Party to the Rome Statute but has exercised its rights to accept the Court's jurisdiction over alleged crimes under the Rome Statute per Art. 12(3) of the Statute.[87] If the investigation confirms

83 ▪ Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (1005), 22. April. 2008.

84 ▪ Report of the United Nations High Commissioner for Human Rights. Indiscriminate attacks against civilians in Southern Unity. April-May 2018.

85 ▪ Africa News. Sudan to hand former Leader Omar Al-Bashir, other officials to ICC. [online]. https://www.africanews.com/2021/08/11/sudan-to-hand-former-leader-omar-al-bashir-other-officials-to-icc/ (Accessed 20.09.2021).

86 ▪ Skynews. Ukraine war: What happened in Bucha and does it constitute war crimes? [online]. https://news.sky.com/story/ukraine-war-what-happened-in-bucha-and-does-it-constitute-war-crimes-12582047 (Accesed 12.04.2022).

87 ▪ Rome Statute of the International Criminal Court of 1998, Art. 12. para 3.

that civilians were killed in Bucha, it can be assessed as a prohibited indiscriminate attack, and the responsible perpetrators must be sanctioned.

Analysing the indiscriminate attack and its definition in the Geneva Protocol reveals obstacles based on several ambiguities and reasons concerning the division of Art. 51, which addresses the issue. The first and second paragraphs mention the principle of distinction on which the concept of the provision is based, but the third paragraph deals confusingly with the principle of proportionality. This seeming lack of interpretation of the concept of indiscriminate attack stems from the theoretical ambiguities to which the Convention subconsciously points. An indiscriminate attack is always prohibited, even if the principle of proportionality is met (i.e. the military advantage gained would be eminently greater than civilian losses).[88] However, some experts note the need to always consider the principle of proportionality; if it is not violated, they do not consider the indiscriminate attack to be prohibited. Although Art. 51 does not explicitly state that the attack accords the law if the principle is met, according to some, it could be partially deduced from its fourth paragraph.[89]

Therefore, the commander of a planned attack must cumulatively provide separate attacks on separate military targets, preventing undesirable damage as far as possible. If the damage caused is greater than the benefit obtained by the planned procedure, the attack cannot be carried out or must be changed.[90] Meanwhile, in all orders, the commander must have sufficient information to plan per humanitarian law.

1.4 Military objective

The term 'military objective', also called 'military object', is regularly part of the set of terms used in treaties regarding IHL. Thus, it warrants sufficient interpretation.

Military objective was first mentioned in the Hague Rules concerning the control of wireless telegraphy in times of war and air warfare.[91] Per the interpretation of the article on the military objective, the goal of the States was, presumably, to

88 ▪ Rauch, 1982, p. 68.

89 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977. Art. 51. para 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'.*

90 ▪ Rogers, 1982, p. 303.

91 ▪ Rules concerning the control of wireless telegraphy in times of war and air warfare. Prepared by the Commission of Lawyers in The Hague. December 1922 - February 1923. Art. 24.

rationalise the practice of the States. However, as the said document never became binding, such an interpretation was probably ignored in the creation of other later treaties. JM Spaight, a lawyer dealing with the issue of aviation rules, was among the first to compile a list of objectives that can be illegally attacked, thus negatively defining the concept of a military objective in more detail.[92] the Prime Minister of the UK, Chamberlain, has acknowledged the practical problem of a long-term inaccurate and unrecognised definition of the term.[93]

The 1949 GC also uses the term, but its interpretation is not documented. The only notable article is Art. 18, with the recommendation to place hospital facilities as far as possible from military facilities.[94] It was not until the Additional Protocol to the GCs in 1977 that the problem began to be addressed, thus defining the military objective in Art. 52 par. 2. For this Article, the following objectives shall be '*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'*.[95] The cited definition of military object was later used by the ICRC in other documents (e.g. Additional Protocol II, Protocol III to the Convention on Certain Conventional Weapons, and Protocol II to the Hague Convention on the Protection of the Cultural Heritage). Furthermore, many military manuals have adopted the mentioned interpretation from the GC.[96]

1.4.1 Detailed analysis of the term

Per J. Pictet, a military object must be *stricto sensu* interpreted as an element of obtaining a real or potential military advantage.[97] A military objective means restricting the conduct of attacks to objects that do not cause unwanted damage to the lives of civilians, protected buildings, or the environment. The character of a military objective is, thus, derived from important principles of IHL (i.e. the principles of distinction, proportionality, and humanity).

92 ▪ Spaight, 1924, p. 233.
93 ▪ Ibid. p. 258
94 ▪ Convention (IV) on the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Art. 18.: *'...In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives'.*
95 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977. Art. 52. para. 2. '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'.
96 ▪ For example, Argentina, Australia, Belgium, Canada, France, Germany, or Hungary.
97 ▪ Pictet, 1987, para. 1994.

With the development of each basic principle of IHL, the concept of the military objective also developed. In the 19th century, civilian dwellings and buildings closely connected with the army were allowed to be bombed during the siege, as such action weakened the enemy troops' and, thus, represented an advantage for the other side.[98] However, in the draft rules of the ICRC in 1956, the notion of civil objects began to emerge to a limited extent (e.g. government buildings, roads and communications of military importance, television stations, telephone and telegraph lines of military importance, industrial factories producing vehicles or machinery, or equipment producing energy used mainly by the military).[99] The current rules of the GCs stipulate that in case of doubt, objects that serve civilians in peacetimes, such as schools, churches, and family houses, should be considered protected.[100]

The final report of The US Department of Defense regarding the Gulf War calls for the protection of cultural and civilian targets from direct and moderate attack. Situations where such an objective is used for military purposes are considered exceptional.[101] Thus, with the development of the principle of humanity, protecting the civilian population and cultural monuments also developed, curtailing the scope of the term 'military objective'.

When examining the concept of a military object the principle of distinction should be mentioned. Although it is mostly noted regarding the distinction between combatant and civilian, it means much more. Generally, there is a distinction between civilian targets and military objectives. Industry and factories can be a huge military advantage. The commander of the attack must consider the principle of distinction. In attacks on industrial objects, such objects may represent an advantage for civilians. Thus, the commander must distinguish between a military and a political advantage that may arise during the combat.[102] International relations also come to the fore. Powerful States can use limited military operations, such as shows of force to induce reactions from opponent subjects. However, these operations are not cheap, and many of the military costs are less likely to be borne by weaker States. Moreover, in disputes regarding territorial demands, an opponent's resolve tends to be more evident and less significant for military actors. Therefore, military objective is less likely to rule over State behaviour in armed conflicts, given political objectives with immense impact on the decision-making process.[103]

98 ▪ Risley, 1897, p. 116
99 ▪ Commentary by the International Committee of the Red Cross on the draft rules for reducing the dangers of the civilian population in time of war, 1956.
100 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Art. 52, para. 3.
101 ▪ Final report of the United States Department of Defence to the Congress. Conduct of the Persian Gulf War. Washington, 1992, p. 611.
102 ▪ Henderson, 2009, p. 67.
103 ▪ Rapport, 2015, p. 206.

The principle of distinction must be applied when considering an attack on the enemy's arable land. According to some experts, it would be in absolute breach of the principle of distinction to consider such an area as a military objective,[104] and rightly so. In connection to the definition of the objective in the Additional Protocol, Art. 52, the attack on such an objective (i.e. attack on soil does not represent a direct military advantage and causes great damage to citizens). Therefore, based on the principle of distinction, it is necessary to distinguish a territory, such as a main road or highway of military importance from arable soil on which civilians directly depend.

Finally, the issue of the principle of proportionality emerges from examining the military objective and principle of humanity. On the analysis of the concept of military objective, proportionality is an important characteristic element. If the commander has already set the target of the attack as a military object, the principle of proportionality must be considered. No other principle of IHL can manifest so clearly the tension between the two key principles of military necessity and humanity. The damage an attack may cause must be subjected to a proportionality test relative to its advantage. The applied test, therefore, requires an evaluation of the expected civilian damage, expected military advantage, and whether the damage exceeds the advantage. Direct and indirect damages and benefits must be considered. However, indirect benefits and damages must be objectively linked to the attack and cannot be purely speculative.[105] The whole test must also consider the current facts that are decisive at that moment.

1.4.2 Changes in the interpretation of the term

The concept of a military objective applies to inanimate objects and spaces, enemy troops, and fighting persons.[106] Over time, however, the enemy soldier became a less important target than the means he uses during combat. Weapons, tanks, aircraft, and industrial factories producing and processing material or fuel for soldiers, came to the forefront of military objectives. As early as 1870, US courts recognised Confederate cotton and its processing sites as military facilities because its sale financed the Confederate army.[107] Customary law reflected the development of the concept. The tactics of the commanders of the troops were based on the right to destroy the enemy's material if it represents an advantage for the army and its

104 ▪ Wurker-Theis, 1990, p. 121.
105 ▪ Bothe, Partsch and Solf, 1983, p. 326.
106 ▪ Author's note: Based on the principle of distinction, developed in more detail in the following chapter, it is necessary to distinguish combatants (i.e. persons involved in battles) from civilians, though in some cases civilians can perform auxiliary work for combatants, even in military areas.
107 ▪ United States Department of the Air Force pamphlet. Commander's Handbook on the Law of Armed Conflict, 1980, p. 21.

destruction does not cause disproportionate citizen losses. Railways, accommodation for soldiers, arms shops, and factories producing military equipment, vehicles, aircraft and ships have, thus, become the most important military facilities.[108]

However, conceptual progress affected the interpretation of military objective, especially regarding the area of information technology and cyber warfare. According to many, cyberspace attacks are humane. Freezing accounts of certain groups or State funds that finance the army would prevent bloody fighting in fields. A precondition for collective enforcement measures is that they act against violators of international peace and security. Freezing assets by the resolution of the UNSC is initially a basic form of sanctioning targeting perpetrators or, in some cases, the government or *de facto* government officials. The question, however, emerges, as to whether cyber warfare falls under the conditions of military objective or affects the civilian population. Examples include freezing assets under Art. 41 of the UN Charter in many cases, such as the Resolution of 1173 against funds of the United National Total Independence of Angola,[109] Resolution of 1844 against specific violators of the arms embargo in Somalia,[110] or Resolution of 2624 against those threatening peace in Yemen.[111] The current motion for a regional resolution on the Russian aggression against Ukraine from February 2022, where the EU calls for a global sanctions regime to freeze the assets of the oligarchs close to the Russian leadership, is also notable.[112]

Application of such 'smart' sanctions does not oppress the population and yields precise action on perpetrators. Its population impact is, however, indirect. As freezing government accounts, personal accounts of government officials, and other funds in other countries prevent access to these resources, it does not address national funds and the enforcement of power to obtain them. Therefore, the application of the principle of distinction would be a problem. Civilians need finance and a functioning economy to survive. If government accounts are completely frozen, it could cause enormous damage, not to mention the damage within the limits of international trade, which, in many countries, depends on the economy of the State.[113]

Targeted attacks on individual State officials would be more effective, but such an attack would indirectly impact the civilian population. However, a well-targeted attack on the finances of conflict leaders can also run into legal obstacles. During

108 ▪ Spaight, 1911, p. 113.
109 ▪ Resolution 1173(1998) adopted by the Security Council at its 3891st meeting, on 12 June 1998.
110 ▪ Resolution 1844(2008) adopted by the Security Council at its 6019th meeting, on 20 November 2008.
111 ▪ Resolution 2624(2022) adopted by the Security Council at its 8981st meeting, on 28 February 2022.
112 ▪ European Parliaments motion for a resolution on the Russian aggression against Ukraine, 28.2.2022, n. B9-0123/2022. para 20.
113 ▪ Dunlap, 2000, p. 9.

the Kosovo conflict, attempts to attack the accounts of former Serbian President Milosevic were widely known. However, such efforts were thwarted given a lack of evidence of direct funding for the fighting from his funds.[114]

Cyberattacks can also be targeted at areas other than the finance of authorities leading the armed conflict. According to many, in the tactics of the planned fight, an object of attack can be considered, such as a bank, recreational facility, or business, to indirectly influence the middle and upper class of the population, who finance the State army. Cultural and educational buildings can also be considered military objects when such facilities spread malicious ideologies that stimulate combatant behaviour or induce armed conflicts. Moreover, government buildings with a direct or indirect impact or, in extreme cases, the personal property of those supporting the conflict could be considered.[115] However, such attacks are hampered by indirect effects on the civilian population, which can be consequentially disconnected from fulfilling basic needs. If the population rely on life necessities, the attack would raise ethical and legal issues, as it could indirectly induce the death of non-conflict citizens.

However, despite many current controversies, the 'military objective' scope cannot be precisely defined, although, its elements are easily recognisable. Therefore, the commander should, with sufficient certainty, correctly recognise the military objective of the attack in a traditional conflict. The list of examples of what such an objective represents is in many documents, though it should be noted that all of them have demonstrative character and must also be amended by legal answers for innovation and the development of new technologies. However, the application of the concept must always consider the principles that can be applied in concrete situations (i.e. the principles of distinction, proportionality, and humanity).

114 ▪ Ibid. p. 13.
115 ▪ Ibid. p. 14.

2.

Meaning of the term ‘principle’

A detailed understanding of the concept of principle is needed to conduct an accurate and critical analysis of the principles of military necessity and humanity. In practice and theory, different understandings of the term ‘principle’ stem from its different meanings, though closely linked. The difference in interpretations can be understood by considering the practical focus of the subject that interprets the term or its academic background.[116]

According to R. Pound, law and principles can be categorised per subject as follows. A philosophical lawyer considers legislation and empirical formulations as desires for ideals. However, the positivist interprets the law, as he grasps reality via observation verified by further observation. However, such observations through the eyes of lawyers are equally illusory and relative. Reality and the interpretation of law and its principles must always be understood in the self-interest of the dominant social class of time and place. When a realist tells us he is a realist, he justifies his thinking by finding reality in an emotional experience from the arguments of specific judges or officials, thereby submitting to the established tradition of the case law of recent centuries. Pound, thus, declares that the law that stems from the principles on which it is based and its interpretation always depends on the entity that interprets them.[117]

Regarding the origin of the term, ‘principle’ stems from the Italian word ‘principio’, which is currently little used in the colloquial Italian language. It means *beginning*. In some cases, the principle is also used as a synonym for the basic value, an element of the basic idea, or a progressive abstraction generalised from the data set and specific cases. Many judges use the term in different contexts: an element derived from a particular legal field, a tool, and an abstract rule applicable to specific cases.[118]

When analysing principles, we must first address the classification of sources as formal and material. It is, thus, possible to use other terms as direct and indirect, proximate and immediate, or remote and ultimate sources. Material sources are the origins of law that represent the basis and influence from which the formal law is made, as per Fitzmaurice. The formal, legal, and direct sources comprise the acts or facts where this content, from whatever material source it may be drawn, is

116 ▪ Holländer, 2006, pp. 154-155.
117 ▪ Pound, 1934, p. 529.
118 ▪ Alpa, 1994, p. 1.

clothed with legal validity and obligatory force.[119] However, even though such distinction may seem simple and understandable, the issue is not that easy to analyse, as ideas of what should be considered material and formal sources differ per scholar. Thirlway distinguishes material and formal sources regarding a particular rule that is alleged to be a rule of international law. The material source is simply the place where the terms of the rule are set out. It may be a treaty, a resolution of the UNGA, a proposal of the UN International Law Commission, a judicial decision, or even a statement in a textbook. In identifying a material source, no account must be taken of the legal authority of the textual instrument. It means a non-binding document can still be considered a material source for a law that has acquired the force of a binding law by another process.[120] Hence, a knock-down distinction between material and formal sources cannot be made. However, from both interpretations, material sources represent the basis for the formal sources of law. Furthermore, the requirements for a source to be considered material are looser than that for a source to be considered formal.

From the material view, legal principles are basic rules, the content of which is general and abstract. They are characterised by axiological colouration in content. Unlike other types of rules, such as a binding provision in an act or a convention, legal principles are not set per formal sources of law.[121] They represent the crucial rules to run the structure and are triggered by the legal justification of those empowered to take legal decisions in the process of the application of the law, in particular the judiciary. Additionally, they represent the integration instruments of the structure, as they bridge actual or potential legal gaps—the so-called *lacunae*. In international law, legal principles have many times been the subject of heavy scholarly debates grounded on the various interpretations ascribed to the term and the theoretical issues they present.[122]

Academics generally understand principles in the axiological and material sense as values that are vital in the theory of law. In any case, principles can also be reflected in a concrete form in the individual provisions. In the relevant provisions, they create various deeper and more specific values. Accordingly, given their deeper and more abstract nature, principles have a longer duration than the provisions in which they are reflected. It is often justified by their content, which is also moral and ethical. However, if such principles have existed over several centuries and within several legal systems, they seem to gain strong prestige and authority and become almost undeniable and irrefutable. That is, some principles seem to achieve legitimacy in themselves. Existence, validity, and power are at the same time tools for their general recognition and standardisation.[123]

119 ▪ Fitzmaurice, 1958, p. 153.
120 ▪ Thirlway, 2010, p. 96.
121 ▪ Svák, 2015, p. 36.
122 ▪ See Cohen and Schramm, 2013.
123 ▪ Jonas, 1985, p. 143.

Well-known lawyers, such as G. Radbruch (known for his Radbruch formula) and R. Pound[124] note the application of principles and interpret this source of law as an expression of the spirit of the legal system. Later, Fritz Schultz, a historian and lawyer, notes the individualisation of principles, which he connects with the tradition of those who connect principles with the spirit of the legal system.[125]

The principles considered as material sources are, therefore, closely linked to the natural law. The prominent academic, Dworkin, believed that legal principles are elements of natural law.[126] This law is a system of legal norms based on Roman law. It contains the basic principles of regulation of national and international law. Given natural law, the general principles of international law were transferred from the ancient system of law to the Middle Ages and later. In practice in current international courts, the judge may go beyond the scope of authoritative legal material to guide the decision in the court proceedings. For example, the Austrian Civil Code stipulates that if the code raises doubts about the law, the case must be decided following the natural principles of justice and law.[127]

However, principles can be considered material and formal sources. Regarding the former, principles from natural law influenced the establishment of many formal sources of law. However, many principles are explicitly stipulated in treaties. As in the form of general principles of law, they are mentioned in the enumeration of formal sources in the Statute of the ICJ. Nevertheless, the difference between general principles of law and principles of international law must be additionally analysed.

Eggett notes that General principles of law in the sense of Art. 38(1)(c) ICJ Statute were designed to function as rules, as expected.[128] The elaboration of a distinction between general principles of law and principles of international law in a legal structure has been a core conceptual instrument for numerous legal scholars.[129] However, the aspect of the position and use of these international principles is more significant than establishing principles of international law via specific procedures and meeting its particular requirements. Robert Alexy addressed the composition of principles from the constitutional rights perspective of and pursuant to proportionality evaluation.[130] The noted key difference grows even more visible in circumstances of conflict. When general principles of law crash, either one is assumed invalid or a valid exception is created. In situations where principles of international law conflict, the colliding principles are balanced against each other. An overruled principle of international law is not assumed to be invalid and can serve as a basis to overrule in a different situation. That is, conflicts of general

124 ▪ Author's note: one of the most quoted legal academics of the 20th century.
125 ▪ Alpa, 1994, p. 3.
126 ▪ Dworkin, 2001, p. 38.
127 ▪ Austrian Civil Code. General Bürgerliches Gesetzbuch. § 871.
128 ▪ Eggett, 2019, p. 198.
129 ▪ Dworkin, 2013
130 ▪ Alexy, 2000, p. 297.

principles of law are answered on a validity basis, while the battle between principles of international law is answered on the grounds of their value in a certain situation.[131]

Secondly, general principles of law and principles of international law are structurally different. General principles of law are established requirements, from which legal consequences emerge when accomplished. Dworkin describes a principle as a standard to be observed not because it will assist or assure economic, political, or social situations considered preferable but because it is a condition of morality. He noted that general principles of law apply as all or nothing. Either the requirements of these principles are fulfilled, and the result begins, or they are not, and the rule arising from the principle adds nothing to the situation.[132] This feature triggered Alexy to describe general principles of law as definitive commands, differentiating them from principles as optimisation commands. Thus, principles fail to contribute compulsory and effective grounds for a consequence accompanying analogously as rules, instead arranging *prima facie* arguments or first-order reasons for achieving a particular conclusion. Solely, they are considered advisory declarations that demand an aim to be acquired to the significant scope feasible in situations.[133]

Nevertheless, legal principles are part of positive formal law, although they are often used only as ancillary instruments. General principles of law recognised by civilised nations are explicitly mentioned in the ICJ Statute 38(1)(c) as formal sources of law. General principles recognised as formal sources are, however, known only under the terms of international law. Hence, the foundations of natural law represent the emergence of public order norms in formal international law. Formal law is, thus, the formal incorporation of moral considerations as positive law.[134]

Professor Jiří Boguszak rightly explained that 'Legal principles are rules of a relatively high degree of generality which are explicitly or implicitly or as a *'communis opinio doctorum'* immanent to a given law, branch of law, or legal institute'.[135] The principles provide a basis for further law-making and a guide to the interpretation of an individual more specific provision. Their origin can be derived from natural law, and they have high generality. Arguably, legal principles represent a general rule of conduct reflected in normative provisions in a more specific form. They express the general objectives and moral values of the law. Meanwhile, they optimise specific normative orders and prohibitions as far as possible (i.e. they abstractly express the intention or summary of various provisions).[136]

In connection with legal principles, general principles of law, which constitute an immanent part of international law, are notable. The monograph in the following chapters focuses primarily on this category of principles, given their position

131 ▪ Brasil, 2001, p. 70.
132 ▪ Dworkin, 1967, p. 23
133 ▪ Alexy, 2000, p. 297.
134 ▪ Weatherall, 2015, p. 108.
135 ▪ Boguszak, 2003, p. 241.
136 ▪ Vršanský, 2021, p. 109.

in international law and importance for the issue of IHL. Most of today's general principles from the law of nations (primarily from Roman law) are currently considered imperative principles of international law. They are, above all, the principles of equality, justice, and humanism. Respective States have implemented some principles into their national systems, making them general principles of their national law. However, the opposite also happened: through the application of the relevant principle in many countries, the principle has ultimately become a general principle of international law.[137]

The exact identification of the general principles of law remains unclear and, in many cases, depends on the background and knowledge of respective experts. First, it is important to recognise the existence of general principles of law, as per their explicit wording as sources of law under the Art. 38 of the Statute of the ICJ.[138] It follows that the Court may, in the case of general principles, refer to national and international law such that the general principle of law may stem from national and international legal systems. The identification of principles is, hence, based on their division into those that stem from national legal systems and those created within the international legal system.

The recognition of the principles can be conducted via a two-step analysis: identify the principles common to most national legal systems, and determine whether these principles are applicable in the international legal system.[139] However, as is the common practice in international courts and tribunals, principles must be recognised in several legal systems to be universal. Of course, such an examination does not warrant an analysis of the legal system of every country.[140] In some cases, it is also appropriate to probe the character of the principles that are not universal but regional or even principles applicable in bilateral relations. Can these principles be considered within the meaning of Art. 38 of the Statute as general principles of law?[141]

Previously, the rapporteurs of the International Law Commission have several times referred to general principles of law. Mr. Lauterpacht noted that international customs and, where appropriate, the general principles of law recognised by civilised nations govern the conditions for the validity of treaties, their performance, and their interpretation and termination. Moreover, the general principles on the

137 ▪ Zadorozhna, 2019, p. 157.
138 ▪ Statute of the International Court of Justice. Art. 38. para. 1 d).: '*subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.*
139 ▪ International Law Commission. First report on general principles of law. Marcelo Vázquez-Bermúdez. No. A / CN.4 / 732. para. 31.
140 ▪ International Law Commission. Second report on general principles of law. Marcelo Vázquez- Bermúdez. No. A / CN.4 / 741. para 27.
141 ▪ Lammers, 1980, p. 63.

termination of contractual agreements with illegal subject matters were also frequently mentioned.[142]

The relation between the general principles of law and customary international law, often described as unclear and even similar, deserves special attention. Indeed, international custom requires the existence of a general practice accepted as law, while being supported by a qualified *opinio juris*. However, the general principle of law need not be expressly and universally recognised by all nations.[143] Regarding general principles, it is not possible to speak of an explicit need for the practice of States (i.e. *usus neccessitatis*). Thus, per Judge Gaja, the principles are not curtailed by the framework of practical use.[144] Even so, the principles govern the application rather than build on it. The two sources of law must, thus, be considered different.[145]

A practical example of the close relation between customary law and general principles is the ICJ's advisory opinion on the Legality of the Threat or Use of Nuclear Weapons case, where the Court based its conclusions on an analysis of customary international law, IHL, and general international law. The Court noted the challenges in distinguishing customary international law from general principles of law. In this opinion, Judge Gevorgian agreed with the 2013 report by rapporteur Wood, who suggested that the dividing criterion may be the presence of the genuine State practice. Meanwhile, the opinion expressed that the concept of general international law includes general legal principles.[146]

General principles play an important role in the context of mandatory rules of international law. In the Commission's report on international law in 2019, its rapporteur noted that the general principles of law, such as the rules of customary international law, are universally applicable, but beyond the doctrine, there is little evidence to suggest that general principles of law can underpin jus cogens. In his report analysis, the rapporteur subsequently confirmed the conclusion that the concept of general international law includes general principles of law and suggested that these principles could serve as a basis for the creation of a peremptory norm.[147]

Peremptory norms are an integral part of international law because they are the framework of international law. However, it remains unclear whether these

142 ▪ Yearbook of the International Law Commission. 1953. Vol. II. No. A / CN.4 / 63. p. 90. paras. 105-106.
143 ▪ Cheng, 1953, p. 23.
144 ▪ Gaja, 2013, p. 364.
145 ▪ Andenas, 2019, p. 32.
146 ▪ Yearbook of the International Law Commission 2013. Vol. 1. 3184th meeting. July 23, 2013, p. 97. para. 21. 'The criterion might be the presence or the absence of actual State practice'.
147 ▪ First report of the International Law Commission on general principles of law. Marcelo Vázquez- Bermúdez. No. A / CN.4 / 732. para 74. 'General principles of law, like rules of customary international law, are generally applicable, but that there is little authority, apart from literature, to maintain that general principles of law can be the basis for a jus cogens norm'.

standards are in a *sui generis* category or whether they are only a semantic variation of the general principles. That is, if a general principle reaches a higher level of consensus or even unanimity, does it become a peremptory norm and, thus, part of *jus cogens*? Regardless of what the outcome of this distinction may be, there is a separate category or level of standards whose status is at a higher level than other principles, norms, and rules. However, the challenge in ascertaining the existence of such a norm and identifying its content for its application is the same as in the case of other principles. Irrespective of whether the source comes from a peremptory norm or a traditional principle under international or national law.[148]

2.1 Sources of legal principles

Art. 38 para. 1 (c) of the Statute of the ICJ classifies the general principles of law recognised by civilised nations as among the three main international law sources to be applied by the Court. Although the Statute is not *expressis verbis* a document setting out the binding sources of international law, academics and practitioners use this binding document to determine the main sources of law. As the Statute has a significant weight in professional circles, the analysis of 'general principle' will be derived primarily from its inclusion as a source of law based on this document. It is essential to define the status of general principles of law among other sources to properly understand the principles of IHL.

The dominant view interprets Art. 38 as a reference to legal principles developed in the framework of the *foro domestico* (i.e. national law). Meanwhile, different perspectives assume general principles must be defined for induction by selecting those principles generally recognised and transposed onto the international dimension. However, the fact that general principles can be derived from national legal systems does not consequently mean their roots are exclusively national. It is widely proposed that the general principles of law should refer to the principles of international law. According to this view, Art. 38 para. 1 letter (c) includes principles such as sovereign equality, self-determination, freedom of the seas, friendly relations between States, *uti possidetis iuris*, and the principles of humanity and military necessity. However, such principles were not obtained by induction but by abstraction and a combination of existing rules of international law.[149]

If a principle exists in national and international law, its origin is more likely in national law, given its likely longer development and wider practice. However, the application of the principle in international law does not automatically rest on the matter that the principle is common to numerous national systems. The

148 ▪ Bassiouni, 1990, p. 780.
149 ▪ Thirlway, 1990, pp. 1960-1989.

required minimum number of States applying the principle in international law is not specified for its application.[150]

According to the Statute, general principles of law are among the basic, main, and formally binding sources of law. Although the order of the sources of law in the article is not to be understood as hierarchically arranged, the first two sources of law are generally used primarily and, thus, the principles often acquire a substitute or ancillary character. Relative to international treaties and customs, general principles are the subject of a much more debatable doctrine. These discussions began with the incorporation of general principles in the Statute as a third source and continue in academic circles and among judges of international courts until today.[151]

The discussions concern many elements of the principles (e.g. their nature, applicability, and double applicability as material and formal sources of law). Such double applicability is derived from the views of some authors who identify these general principles with natural law. However, from a positivist perspective, such thinking induces the rejection of such a source as a true formal source of law. Some academics note that by adopting general principles of law as among the main sources of international public law, natural law scholars dominate among prominent judges and lawyers. Thus, the main developmental direction of law theory toward natural law is evident. Meanwhile, the principles used mainly in the case law of international courts were applied even earlier in arbitration proceedings and only later acquired a judicial character and subsequently a customary character.[152]

Notably, the applied general principles may differ per country. However, Descamps emphasises that it can only apply to certain rules of secondary importance, but the most important principles are of a customary nature and are, thus, generally binding and uniform. According to him, the basic principles of justice and injustice are strongly embedded in the minds of every human being and, thus, have the highest and most valued expression in the legal subconscious of civilised nations.[153] These views can be considered a highlight of the views of naturalistic theorists, such as H. Grotius, who spread similar ideas.[154]

However, based on the Statute of the ICJ, Art. 38, the meaning of principles became more formalised. In this context, decisions of international courts are the path to identifying general principles of law and are essential in the creation of this source of international law. However, there have been prior proposals for the ICJ's statutes to refer to general principles of law. The Statute of the Permanent Court of International Justice referred to principles as an additional source for treaties and customs. Moreover, various States have already suggested in their case law that judgements of the Court should be adopted under international agreements,

150 ▪ Gaja, 2012, para. 8.
151 ▪ Thirlway, 2010, pp. 113-114.
152 ▪ Büyük, 2018, pp. 70-86.
153 ▪ The term 'civilized' nations is not preferred today in academic circles as well as in the work of the International Law Commission because of its criticism.
154 ▪ Degan, 1997, p. 47.

customary international law, and general principles of law and justice. For example, Denmark, Norway, and Sweden propose that without a treaty or other express rules of international law, the Court should apply the general principles of law.[155]

On the contrary, Lapradelle, a French member of the ICJ's preparatory work committee, stated that the Court should not act as a legislature. He also stipulates that it would be too rigid and even unfair to demand the Court to consider only positive law. According to him, it should also be detrimental to consider whether the legal solution to the situation is fair and accords with equity. He notes that, if necessary for a fair legal solution, it is appropriate to express requirements of justice and equity in the judgement.[156]

Though, in connection with the general principles of law, the principles of equity are mentioned many times, the general principles of law are different from the general principles of fair justice. With the text of paragraph 2 of Art. 38, the general principles of law have taken on the nature of a positive right, while the principles of equity became sources of assistance that can be applied by a court only if the concerned parties agree. In the Statute of the ICJ, general principles are considered a separate source of law, which differs from conventional and customary law. However, principles are in the same group as fundamental sources. They differ from doctrine and jurisprudence because they are not in the same group. The approval of the parties is not necessary for the application of general principles of law, which signifies that those principles comprise the applicable international law of a positive nature.[157]

Furthermore, Art. 21 par. 1 of the Statute of the ICC stipulates that the court uses, as proper, the relevant treaties, principles, and rules of international law, along with accepted principles of humanitarian law. The expression principles and rules are incorporated into the third point; therefore, the Statute refers directly to the possibility of applying the general principles of international law. It enhances general principles of law; consequently, the court can legally apply the entire scope of criminal law, even from the national spheres or international practice.[158]

Every field of law has its determining principles. In cases where a particular principle stems from only a small number of examples of national law, it is often debatable whether the principle can be considered general. However, it is difficult to state what exact number of States should be sufficient to derive a general principle of international law. For some scholars, specifically from a positivist school, general principles of law, which originate exclusively in the national law of one legal system,

155 ▪ Documents presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice, Permanent Court of International Justice. Advisory Committee of Lawyers, pp. 129-301.

156 ▪ International Court of Justice. Proces-Verbaux, Annex No. 3, p. 295.

157 ▪ Cheng, 2006, p. 20.

158 ▪ Rome Statute of the International Criminal Court of 1998, Art. 21. par. 1 b): *'In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'.*

cannot be considered an autonomous source of international law. Furthermore, a rigid dualistic perspective would decline the use of the principles of national law directly in the system of international law. For similar implementation, there should be a distinct justification for their formal use, which is only possible if explicitly provided for in classical formal sources (i.e. in customs or conventions).[159]

According to D. Anzilotti, one of the leading lawyers of traditional positivism in international law at the start of the twentieth century, the most common and accepted way of determining binding provisions of international law is treaty law, which States adopt with their express consent. Beyond the conventional system, there are historically older customs often accepted by implicit consent. The general principles of law stipulated in the Statute of the ICJ are general principles of international law or generally acknowledged principles in the laws of civilised nations. These principles are implicitly recognised in international law, and the Court, therefore, considers them to be a formal source that must be applied. However, if the applicable principle is exclusively a principle of national law without an international element, such a principle can only be considered as an auxiliary source.

Thus, principles relevant only to the national legal order but are unknown to the international community cannot be regarded as general principles. Such principles are, therefore, not considered formal sources of international law. Notably, in the case of the application by a judge, he often determines the standard to apply, applying general or national principles in a particular case. However, in such an application, sufficient reasons must be given for applying a principle. It is possible to speak about judicial law-making in cases when a judge uses a specific national principle only for an individual case.[160]

Decisions of international and national courts, together with the doctrine of the most respected experts, are the most useful source for ascertaining the existence and application of general principles. However, currently, after the establishment of the UN Charter, the principles may also stem from the expressions of the international consensus expressed in the resolutions of the General Assembly and Security Council. Even so, as per Judge G. Fitzmaurice, the concept of general principles is fluid. Therefore, given the increased number of applications of the principles by the courts, it is necessary to pay attention to the predictability of the decision-making, primarily regarding the basis of the decision. Application of the principles can be considered quasi-legislative elements. Careful argumentation in the judgement could, thus, avoid causing possible harm.[161]

On the application of general principles, notably, given that general principles as a formal source of law can only be found in international law, the application of this source is only within international case law limits or international organisations and their bodies, such as the UN Special Rapporteurs. This application is

159 ▪ Ross, 1947, pp. 90-91.
160 ▪ Anzilotti, 1929, p. 117.
161 ▪ Fitzmaurice, 1973, p. 325.

a deficiency. A more widespread application of general principles at the practical level could bring moral clarity into practice. Moreover, the flexibility of the principles would allow for answering more promptly per the necessities of emergent situations.

The general principles of law as a source of international law have been noted in current case law on several occasions and in different jurisdictions. The application can be found in the advisory opinion of the Permanent Court of International Justice in the cases of the Greco-Turkish Agreement[162] and Chorzów Factory.[163] Regarding today's ICJ, the general principles of law have been applied in the case of the Corfu Chanel,[164] an advisory opinion on Reservations to the Genocide Convention,[165] an advisory opinion on the impact of the award of damages by the UN,[166] and the well-known case of Barcelona Traction.[167] Simultaneously, the European Court of Human Rights (ECtHR) in the case of Golder v. The UK cited Art. 38 para. 1 letter (c) of the Statute of the ICJ. The ECtHR noted that general principles of law should be considered when probing the European Convention on Human Rights (ECHR).[168] The examples show that States and international courts invoke principles as a source of international law on several occasions and in different contexts without questioning its relevance to international legal order. Therefore, as the application of general principles of law is approved by general public opinion, *inter alia*, the judge is entitled to apply it.[169]

2.2 Nature of legal principles

Principles are standards that translate moral and ethical values into legally binding provisions, which can be directly applied to specific situations. The values the principles represent are required by justice, decency, and goodness. These values must also be considered when interpreting specific provisions. Although the subjects are bound by the text of the laws, the interpretation of a specific text can be done in various ways. The provisions must also be interpreted via a teleological interpretation. Therefore, the intention of the author of the text reflects the systematic

162 ▪ Interpretation of the Greco-Turkish Agreement, PCIJ, 28 August 1928, PCIJ Ser. BN 16, p. 20.
163 ▪ Chorzów Factory, PCIJ, 26 July 1927. PCIJ Ser. AN 9, p. 31.
164 ▪ Corfu Chanel case, United Kingdom and Northern Ireland in Albania, PCIJ, 9 April 1949, p. 4, para. 18.
165 ▪ Reservations on the Genocide Convention, advisory opinion of the International Court of Justice. ICJ Reports 1951, p. 15, para 23.
166 ▪ The impact of the award of damages by the UN, ICJ, Advisory opinion, 13. 7. 1954. ICJ Reports 1954, p. 47, para 53.
167 ▪ Barcelona Traction, Light and Power Company Limited, ICJ, 5 February 1950, ICJ Reports 1970, p. 37, para 50.
168 ▪ Golder v. The United Kingdom, ECtHR, 21 February 1975. Ser. AN 18. para. 35.
169 ▪ Bos, 1984, p. 70.

position of the norm in the given legal area. However, in all interpretations, the values of law must be considered, which stems, in particular, from the principles of law.[170]

According to Simma and Alston, the general principles become valid per the general acceptance or recognition by States.[171] However, if it is possible to establish general principles only by their adoption, the only remarkable difference they would have from customary law would be the lack of the *usus* (i.e. requirement of an established practice). Some rights under the principles would, thus, be privileged, as fewer conditions would be sufficient to set such unwritten standards. Nonetheless, the general principles of international law have a customary character (i.e. they meet constitutive conditions of an international custom): the *usus longeavus* and *opinio juris*. Even so, the primary difference between custom and principle is within their scope. The custom can be exceptionally formed in a bilateral relationship,[172] but the principle must be generally recognised, and its content, unlike custom, represents the fundamental norms of the legal order. Of course, the balance between the elements of *usus* and *opinio juris* is not always identical, but it is neither in the case of customs nor in principles. Although the balance varies in every case, from examining the most relevant case law, the author argues that the weight of *opinio juris* exceeds in the case of principles.[173]

Some argue that the general principles of international law stem from a process of deduction or abstraction from existing rules of treaty and customary international law. The requirement of recognition would be met by referring to those rules that have already been adopted (or recognised) by States.[174] Others argue that recognition may take the form of acts of international organisations or similar instruments demonstrating consensus between States, such as a UNGA resolution. [175]

'Principle' and its relationship with 'rule' attract considerable attention from academics. This scope of fundamentals notes specific decisions on legal obligations in specific situations but varies in the nature of the direction they set. For Dworkin, the rule answers the question of what, while the principle answers the question why.[176] Some academics, however, see principles as abstract legal rules on which

170 ▪ Brostl, 1995, p. 24.
171 ▪ Simma and Alston, 1988, p. 102.
172 ▪ Author's note: According to the first element of the customary law, it would not be generally true. However, the history of international law has introduced rapid crystallisations of new rules and doctrines of customary international law, connected to the Grotian Moment notion.
173 ▪ See North Sea Continental Shelf Case; Gabčíkovo-Nagymaros case; Oil rig case and La-Grand case.
174 ▪ Palchetti, 2019, p. 50.
175 ▪ International Law Commission. First report on general principles of law. Marcelo Vázquez-Bermúdez. No. A / CN.4 / 732. para 173.
176 ▪ Dworkin, 2013, pp. 40-42.

a legal regime is based that can be applied to various specific situations, either to manage them on an ongoing basis or to address the challenges therefrom.[177]

There is no agreement in the legal literature on the differences between normative rules and principles. Some consider principles to be less unambiguous than rules, such as generalisations from the products of one or more law-making processes, or as the common denominator of many related pieces of legislation. However, not all principles have the same degree of abstraction; in any case, being general does not mean weaker normativeness.[178]

In 1984, the ICJ clarified the normative dimensions of the principles. In the case of the Gulf of Maine, the Court stated that the combination of rules and principles is no longer linked to the use of a double synonymous expression to express the same idea. The Court justified it by noting that, in that context, principles mean legal principles, which means that they also include rules of international law in which the application of the concept of principle may be justified by their more general and fundamental nature.[179]

It also regards the implicit acceptance of many principles by the international community, given the overall nature of the international legal system. The basis of this idea is that conventions comprise specific written provisions, the nature and purpose of the convention, and the intention of the parties involved. Thus, if there are doubts about the interpretation of the conventions, these elements are automatically used. With the express consent of the parties to the convention and its standards, the parties also give their consent to the nature of the convention and its character. Of course, it is possible to lay down the conventional rules for its interpretation, but the nature of the convention cannot be grasped in the specific text of any provision.

Similarly, there are generally accepted principles of international law. It is possible to set them explicitly, but their ethical and moral undertone will never be crammed between the lines of a text. Hence, a crucial principle of international law, the principle of *pacta sunt servanda,* set out in the VCLT and many other documents, can be cited as an example.[180] This principle concerns the binding nature of the conventions. Despite explicitly finding this principle in many documents, even in its absence, it can be found in the undertone of all binding conventions of an *erga omnes* or *inter partes* nature. If this rule did not exist, the international legal system would become a hypothesis.[181]

Some authors, such as former ICJ judge G. Herczegh, take the opposite view, arguing that the general principles are only specific rules of positive law stipulated

177 ▪ Fitzmaurice, 1957, p. 7. 'A rule answers the question "what"; a principle in effect answers the question "why"'.
178 ▪ Andenas, Chiussi and Cohesion, 2019, p. 23.
179 ▪ Canada in the USA, Delimitation of the Maritime Gulf Maritime Border, Report of the International Court of Justice of 1984, no. 246, para 78.
180 ▪ Vienna Convention on the Law of Treaties. 23. 5. 1969, p. 331, Art. 26.
181 ▪ Büyük, 2019, p. 70.

in a universal and comprehensible form. Thus, the general principles of international law are an abstraction of specific rules of international law. Hence, general principles should be sought in the context of international treaties and international customs. According to Herczegh, however, despite their derived nature, the general principles can be considered an autonomous, albeit derived, source of international law.[182]

According to Bassiouni, an academic and international criminal law expert, there are at least four functions that fulfil the general principles to consider them as a source of international law; they are complementary to other sources of international law: The principles serve as a source of explanation of conventional and customary international law, a method of introducing new norms of international law, an additional source, and a modifier of established international rules.[183]

An analysis of the report of the International Law Commission from 2019 on general principles reveals the following conclusions within the scope of application of the general principles of international law:[184]

First, one of the main tasks of the general principles is to bridge the gaps in the special regimes. In practice, conventions often act as a *lex specialis* regarding the general principles, often regarding the relevant customary law and general principles of law. Second, general principles of law may serve as an external source for a convention for its interpretation in compliance with the VCLT. Thus, when entering conventional obligations, the concerned parties stipulate not to behave contrary to universally accepted principles of international law. Third, general principles of law are of particular importance for the interpretation of conventions, in particular where a conventional rule is unclear or has an open structure, where the terms used in the convention have an acknowledged meaning under general principles of law, and the convention does not mention applicable law, which is important for the arbiter to seek rules introduced in a different part of international law to determine the dispute.

The function of general legal principles in bridging gaps in the absence of other sources of international law is significant, especially in the search for solutions to possible disputes. Such a function of bridging the *lacunae* may be in the context of resolving fundamental questions of law and the competent jurisdiction of the court. However, the extent of interpretation to which the general principles may be used has never been binding. Hence, the general principles can logically be extended to bridge gaps in conventional and customary international law and serve as an additional source. Accordingly, the general principles can be interpreted as a source of law, which in some respects exceeds and possibly replaces other positive sources of international law.

182 ▪ Herczegh, 1969, p. 22.
183 ▪ Bassiouni, 1990, p. 775.
184 ▪ International Law Commission. First report on general principles of law. Marcelo Vázquez-Bermúdez. No. A / CN.4 / 732. para. 66.

The principles of law also promote inter-systemic cohesion by bridging the gap between international law and national legal systems. This function of principles is linked to the nature of principles, as they represent the fundamental values of the international community, which inspire the international legal order. Thus, they bridge the gaps and harmonise differences in law. By embodying the important values of several legal systems, the general principles serve to create a viable system for application in court proceedings.[185]

According to General Attorney Christenson, the last function of the general principles is called the correction function. In this context, the principles apply to the repeal or modification of the provisions of convention or customary law in favour of a higher good or a more significant cause. Even though this potential function induces significant flexibility in the law, it is the most controversial of all possible functions. Meanwhile, this function embodies the importance of principles in the light of *ius cogens*, as the argument that general principles may, in certain circumstances, be used to regulate another source of law is the core of the *ius cogens* doctrine.[186]

It is indisputable that certain elements of natural law are contained in Art. 38 para. 1 letter (c). The article expands the notion of the source of international law above legal positivism, pursuant to which States and the international community are not bound by anything else beyond what they agree. Art. 38 (2) and the evidence that this provision does not stipulate the explicit consent of the States as a requirement for the recognition of the general principles refutes this view. States that do not recognise this principle or even question its effectiveness remain subject to this rule. Based on this type of source, international law can have its basis of validity extended above the consent of States to the scope of natural law, adopting a supranational and suprapositive nature.[187]

Hans Kelsen argued that the application of the general principles was possible only if there was no provision of convention or custom applicable. Thus, he expressed the hierarchy of principles in the pyramid of sources of international law. He included the principles as a secondary source, which cannot be used initially in the application.[188] However, such an understanding of the position of principles is wrong. Although we consider the Statute of the ICJ to be authoritative in recognising the sources of law, the principles cannot be classified as treaties and customs. Indeed, there is a reason for the order in which the sources of law are set out in Art. 38, but the principles are placed on the same level of formal sources of law as the treaties and customs mentioned.

International courts or arbitral tribunals and persons applying international law must act per the international law. The general principles are part of

185 ▪ Linderfalk, 2019, p. 101.
186 ▪ Christenson, 1987, p. 586.
187 ▪ Ethiopia in West Africa, Liberia in West Africa. The case of Southwest Africa, dissenting opinion of Judge Tanaka of 1966. ICJ Rep. 6. para. 298.
188 ▪ Kelsen, 2003, p. 393.

international law and must, therefore, be applied. In interpreting and applying the law, all factors must be considered and the case must be decided fairly. Where a general principle seems to be the most appropriate, it should be applied, independently of the existence of another rule. The principles complement international law and often set the right direction for its development. The nature of the general principles is, thus, unique in terms of sources of law.

2.3 Principle of distinction as an important element of humanitarian law

Each special branch of international law has its typical and distinctive characteristics. Each such subsystem has its policies, form of application, and own life, which may not be identical to the features of another or close subsystem.[189] IHL, as a special subsystem, is based on the basic humanitarian principles to which this monograph is devoted. These principles, concerned with the dignity of human beings, have evolved because of centuries-old wars, as they mirror the most universally accepted humanitarian standards. Additionally, most principles were also customary during the period of GC implementations. The noted rules can, thus, be understood as the essence of the humanitarian rules set out in the GCs. The ICJ considers these principles to be an expression of the basic standards of humanity applicable in all circumstances.[190] As a special and separate subsystem, it is necessary to clarify the principle of distinction as a basic principle of this sector to sufficiently clarify the noted core of humanitarian law and the issue of humanitarian law.

All principles and rules governing the humanitarian law would be meaningless if no distinction were made between armed forces and civilians (i.e. combatants and non-combatants). Such a distinction comprises important conventions and many declarations, such as the St. Petersburg Declaration, where the authors expressed the need to protect those who do not take part in the fighting.

Oppenheim in his work from 1940 also commented on the issue of distinguishing combatants, stipulating that such private entities, which are not part of the armed forces, are not directly involved in the fighting. They do not attack or defend; therefore no attack should be carried out on them. Meanwhile, he emphasised the importance of the development of the ethical and legal perspective that led to the introduction of such rules.[191] As Oppenheim argues, the combatants-non-combatant distinction has not always been an issue. Wars have been fought between two nations involving the entire population, including women, children, and the sick.

189 ▪ Yearbook of the International Law Commission 2006, Vol. II, Chapt. XII. Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, para. 247.

190 ▪ Nicaragua in the United States, Military and paramilitary activity in and against Nicaragua, ICJ 27 June 1986, ICJ Reports. No. 520, para. 220.

191 ▪ Oppenheim, 1940. p. 168.

Per the current definition, a combatant is a member of the armed forces of one of the parties to an armed conflict, except for medical and religious personnel.[192] Only combatants take part in the battles, and only they can be attacked. Only a member of an army or a different armed group can represent a human military target for the enemy. However, of course, civilians lose protection if he directly joins the ongoing fighting. Conversely, indirect assistants, such as civil servants, workers in factories producing weapons, or drivers transporting necessary material, cannot be considered combatants, even if they contribute to the ongoing fighting. The buildings in which such persons work, nonetheless, constitute a legitimate military objective.[193]

Thus, civilians therein may be injured or killed. However, such ancillary damages are always conditional upon the principle of proportionality. Therefore, in the event of an attack on a civilian driver of a military vehicle carrying material for combatants, the attack accords with the law. Conversely, if the attack is conducted on the same person without being in the vehicle, the attack would be prohibited, and its execution would be a gross violation of humanitarian law.[194]

The combatant in most cases represents a soldier who serves in the army of a State involved in an armed conflict. The specificity of the army and the military is the hierarchical position of its soldiers based on military rank. Persons with a higher rank can give orders to persons with a lower rank. Part of the military discipline is obedience to the order without objection or remarks. At first, this way of functioning within the army is not fully in line with human rights but is unique within the given system and, thus, represents a legitimate way of functioning. However, the problem arises if the issued order encounters obstacles, such as humanitarian law, where the combatant is bound by various restrictions that may be explicitly stated in provisions of binding documents, such as the ban on attacking civilians, or which result from the principles of humanitarian law, such as the principle of humanity. If the order is issued in violation of the law, the combatant of a lower rank may find himself in a problematic situation. Meanwhile, the jurisdiction of the ICC laid down in the Rome Statute provides that an entity carrying out an illegal activity is liable even if it has acted based on an order.

The combatant concept is, thus, closely linked to the principle of distinction, which is a rule of a customary nature in IHL. However, the principle is also connected with the term military objective, as the principle must be applied in the case of decision-making or differentiation, whether the object or subject of the attack is a military object. The principle of distinguishing between combatants and civilians

192 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts. 1977. Section II. Art. 43: *'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'.*

193 ▪ Kalshoven and Zegveld, 2001, p. 99.

194 ▪ Parks, 1990, p. 134.

is the core of humanitarian law and is found in many conventions.[195] It can be inferred implicitly from the St. Petersburg Declaration of 1868 and its Section 83 and the Hague Conventions and Art. 25 and explicitly in the Additional Protocol to the GC and Art. 48. It is also contained in the Convention on Certain Conventional Weapons[196] and the Ottawa Convention on the Prohibition of Anti-Personnel Landmines.[197]

The importance of the principle of distinction in the issue of combatants has been confirmed by important cases before international courts. The Kasseman Israeli military court case upheld the principle of distinguishing civilians from those involved in the fight as one of the basic rules of IHL.[198] Meanwhile, many States in their submissions, even in the case of the Legality of the Use of Threat, referred to the noted principle, while the ICJ declared the principle in its advisory opinion as one of the cardinal principles and as an insurmountable part of customary law.[199]

2.3.1 Principle of distinction and the appearance of combatants

The principle of distinction is reflected in specific provisions of international law. However, the distinction between entities is based on various elements. A crucial element in the application of the principle is the external resolution and recognition of the subject in contact with him on the battlefield or even outside it.

As the principle of distinction divides persons into combatants and civilians, to be effectively applicable, persons must be visually recognisable at first sight. For all persons directly or indirectly involved in the fighting and the population, it is necessary to recognise the combatant at first sight. Protocol I of the GCs obliges persons who are part of a military operation or attack or are planning any such attack to be distinguished from civilians in their appearance.[200] However, the Protocol no longer features the exact specification of such an appearance.

Uniforms, helmets, military insignia on clothing and carrying weapons openly are the main elements that distinguish combatants at first glance. Nevertheless, there are known cases of difficult distinctions between soldiers of individual parties from civilians, causing unnecessary losses. During the conflict in Afghanistan in 2001, Western US troops often find it challenging to distinguish the civilian population from the armed members of the fighting rebellion groups because of their clothing, which had typical elements of civilian clothing as part of their military

195 ▪ Author's note: The author intentionally divides subjects into combatants and civilians, as the term non-combatant is used for medical and spiritual personnel.
196 ▪ Protocol II to the Convention on Certain Conventional Weapons Art. 3, para. 2.
197 ▪ Preamble to the Ottawa Convention on the Prohibition of Anti-Personnel Landmines.
198 ▪ Kassem, Military Court in Ramallah, Israel, para. 271.
199 ▪ Legality of the threat of nuclear weapons, ICJ advisory opinion, 1996, n. 679, para. 434.
200 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Art. 43, para 3.

uniform. Such non-standard partial uniforms induced insufficient distinction, and American soldiers mainly relied on the sign of openly carrying a weapon. However, during the fighting, the opposing fighters recognised such an advantage and attacked the enemy many times by concealing the weapon (i.e. by perfidy). Their conduct was therefore no longer following the law.[201]

2.3.2 Issue of civilians involved in the fighting

If the combatant observes the rules of humanitarian law and sufficiently distinguishes himself in appearance and behaviour from civilians, it is easy to apply the principle of distinction. However, the problem arises in the case of volunteers who carry out or plan attacks without joining the armed forces. Such individuals often associate in groups. If such a group has a commander issuing orders and directly partakes in hostilities, they can be considered combatants, except for mercenaries who do not enjoy protection under international law. Proceedings beyond a command or constituting a mercenary group are prohibited by law, and the party for which they are fighting must prevent them from acting. If an independent, politically influential, and organised group is formed, it can become a legal part of the conflict and one of its belligerent parties. The lawfulness of direct participation in hostilities in non-international armed conflicts is governed by national law.[202]

Pursuant to the articles of the Protocol to the GC, a person directly involved in the fighting loses the status of a civilian and the protection that this status involves.[203] However, there is no precise definition of direct participation in fighting in a generally binding source. The ICRC study notes that hostilities occur in different forms and intensities in different geographical or political contexts. Whether certain conduct may be understood as a direct part of hostilities must be observed separately in each case. However, the study emphasises active and direct, which somehow refer to the quality of the individual participants involved. Decisive aspects are the exact conditions. Was it spontaneous, sporadic, or unorganised? Is it part of a continuous function? The answer to these questions may bring more clarity when applying the provisions. Overall, the notion of the hostilities must be described as a sum of all hostile acts.[204] For instance, per the First GC, when the issue concerns a protected person, such as temporary medical personnel, they must be respected and protected as non-combatants as long as the medical assignment lasts.

201 ▪ Whitman. B. Briefing. On Geneva Convention. EPW's and War Crimes. April 7, 2003. [online]. http://www.thetorturedatabase.org./document/cia-copy-dod-news-transcript-briefing-geneva-convention-epws-and-war-crimes? (Accessed 21.05.2020).

202 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Art. 47, para. 2.

203 ▪ Ibid. Art. 51 (3).

204 ▪ Melzer, 2009, p. 44

The Inter-American Commission on Human Rights interprets the term as acts that, by their nature or purpose, directly induce harm to enemy persons or another military objective.[205] Such a vague interpretation does not help in the analysis of the term. It is easy to include armed attackers in the definition, but cases of espionage, guarding of objects where the planning of attacks takes place, or drivers of vehicles carrying explosives are not so clear-cut. Specific situations must be analysed on a case-by-case basis.

Recognising groups or individuals conducting partisan attacks and operations is also often a problem. People involved in fighting often perform their jobs and participate in the group. Hence, even if they are detected, it is a problem to flexibly apply the applicable law to them. Moreover, even with proof, there is a real relation between the harmful result and his conduct. Otherwise, during civilian activities (i.e. employment and private activities), such a person enjoys the protection of a civilian, even in connection with the principle of humanity.[206]

The issue was also discussed at the Hague and GCs in 2003 and 2011. However, no consensus was reached in clarifying the position of civilians during their participation in the fighting. Nevertheless, the international community has confirmed that such persons are obliged to comply with IHL.[207]

Armed conflicts are divided into conflicts with an international element or national conflicts. In practice, such a division can also represent a significant difference in the position of civilians participating in the fighting. Treaties defining non-international conflict use the terms civilian and organised armed groups, though these concepts are not defined. The interpretation of these notions must, therefore, be done in good faith as per the meaning used in international conflicts.[208] Additionally, from the logic in Art. 3 of the GC, the terms used in international conflicts should be mutually exclusive categories in non-international conflicts.[209]

According to an ICRC survey conducted during the conflict in Rwanda, many military commanders noted that civilians assisting combatants (food and weapons, carrying messages, transport) did not lose their civilian status during a national conflict, as they are often forced to cooperate with the party exercising control. In the ICRC's view, during an international conflict, such persons commit acts that cause the loss of protection deriving from civilian status.[210] Under generally bind-

205 ▪ Inter - American Commission on Human Rights. 3rd. Report on human rights in Colombia. para. 811.
206 ▪ Rogers, 2012, p. 37.
207 ▪ International Committee of the Red Cross, Resolution 1, 28th International Conference 2003; International Committee of the Red Cross, Report from the 3rd International Conference of the Red Cross and Red Crescent 2011.
208 ▪ Vienna Convention on the Law of Treaties. 23. 5. 1969, Art. 31. para. 1.
209 ▪ Geneva Convention of 1949 for the Protection of Victims of International Armed Conflict, Art. 3.
210 ▪ International Committee of the Red Cross, Report on practice in Rwanda, para. 850.

ing law, there is not even a combatant status in national conflicts. However, the Inter-American Commission on Human Rights noted that the same conduct could not be considered differently because it was a national conflict. Regarding La Tablada, the Commission identified partisan civilian groups as a legitimate military objective but only during active participation in the fighting.[211]

Thus, in the conventions, one can find a precise answer to the question of the rights of an entity not primarily classified as a combatant but often acts so. The principle of distinction does not provide a detailed answer in this case. The core of the question represents the contradiction of two principles of IHL: the principles of humanity and military necessity. If the status of a person is unclear, it is necessary to start from the Martens Clause and its nature (i.e. if no rule addresses the case, it does not mean arbitrariness in decision-making). In such a case, the principle of humanity should apply, where the decision is more humanitarian to an unidentifiable person. However, the principle of humanity does not always go beyond the commander's duty to protect the safety of soldiers and his efforts to weaken the enemy if a potentially unidentifiable partisan entity may pose a major threat to a successful military operation. Therefore, each case must be carefully considered.

211 ▪ Argentina, the opinion of the Inter-American Commission on Human Rights, n. 11. 137, the common para. 810.

3.

Principle of military necessity

'The principle of military necessity allows measures that are genuinely necessary to achieve a legitimate military purpose and are not otherwise prohibited by international humanitarian law'.[212]

The roots of modern humanitarian law date back to the 19th century. The first steps were Dunant's publication Memories of Solferino from 1862, which inspired the GCs.[213] Another important document for humanitarian law and even more so for the principle of military necessity comes from this period. In this document, the principle of military necessity is explicitly mentioned for the first time. The document—the Lieber Code—was created by the scholar Lieber. It aimed to enact general principles of human morality, considering empirical facts. The result of his effort was a binding document that humanised the war and was issued by President A. Lincoln. The most significant progress was the establishment of the principle of military necessity as a general principle that still attaches an important element to armed conflict.[214]

The principle became noted and accepted in the international community and pursuant to the St. Petersburg Declaration of 1868, which states: *'The progress of civilisation should have the effect of alleviating as much as possible the calamities of war. The only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy'.*[215] As desired by the dictates of humanity, military necessity must be neglected. The provision declares that the sole valid aim that States should try to reach throughout the battle is to decrease the opposing party's military strength.

Military necessity has three-fold importance in regulating armed conflicts: First, the impossibility of taking any steps that are not militarily necessary; second, the law sometimes makes exceptions to its provisions, but only for justified military objectives; and third, it is an element of the rule of proportionality to

212 ▪ Translation of the definition of the International Committee of the Red Cross. [online]. https://casebook.icrc.org/glossary/military-necessity. (Accessed 12.09.2020).

213 ▪ See Dunant, 1959.

214 ▪ General Orders No. 100. Instructions for the Government of Armies of the United States in the Field. "Lieber Code", 1863.

215 ▪ Declaration of renunciation of the use of explosive projectiles, in time of war up to 400 grams in weight, Opened for signature on November 29, 1968. 'St. Petersburg Declaration'.

balance sometimes conflicting objectives of military success and humanitarian protection.[216]

The principle has helped to distinguish between acts considered materially crucial and, thus, *prima facie* permissible and acts considered materially unnecessary, and, thus, inadmissible. This distinction would generally apply, although measures deemed necessary to achieve a legitimate military objective could be immoral to be permissible, and those considered materially unnecessary for the same purpose could be safe enough to remain admissible. Nevertheless, military necessity in the material sense significantly affects how a specified standard of IHL is interpreted. It is regularly declared that military necessity and humanitarian considerations form the two fundamental normative bases on which the current IHL developed.[217]

Meanwhile, the broad doctrine of military necessity represents a theoretical justification for many ways of argumentation to distinguish between combatant and non-combatant. As per the US, Russia, and most militarily strong countries, military necessity is theoretically justified through regulated violence, laws, and customs of war resorting to all necessary measures to weaken enemy forces or induce their surrender as soon as possible. Military necessity allows for the destruction of property if required by a military objective, but does not allow unwanted and unregulated devastation of the entire enemy territory.[218] Given the challenges, there is a universal recognition that commanders being the decision-makers are allowed a considerable margin of appreciation. However, the doctrine is not aimed to enable circumstances in which the deciding commander is relieved of the obligation to respect the laws of war, although in the event of great military need, it gives great freedom and allows the soldier to determine the necessary measures and devastating effects.[219]

Society is evolving, and, with it, the law. Humanitarian law and traditional values such as the principle of military necessity are also influenced by many modern sources of law, such as the so-called soft law coming from several sources, including official State declarations. Notably, this soft law is not *stricto sensu* a source of international law, as it is not binding. However, an indirect effect cannot be ruled out. Thus, there is no reason to favour practice over unilateral declarations concerning the declared principles. Public statements of States concerning humanitarian consideration can, of course, be considered as only diplomatic statements without real content, but it does not mean they cannot at least implicitly affect the law and its development.[220] Meanwhile, international governmental organisations and their binding legislation indirectly (and often directly) pressure States in terms of humanitarian law. Similar documents, thus, create minimum requirements in

216 ▪ Rogers, 2012, p. 9.
217 ▪ Dinstein, 1982, p. 105.
218 ▪ United States Rules of Land Warfare, 1940, FM 27-10, para. 22-25.
219 ▪ Hyde, 1922, sec. 655.
220 ▪ Henckaerts, 2007, p. 477.

the practical application of the principle of military necessity but can subsequently form part of customary law.[221] Rules of special regional customary law from the said documents are, however, rules of customary international law that apply only in a limited number of States. It is, therefore, necessary to discover if there is a general practice accepted as law between the concerned States (i.e. *opinio juris*) to determine the existence and content of a rule of special international customary law.[222]

The specific content of humanitarian considerations is evolving, but modern IHL in its codification and development continues to be driven by the same need to define the normative limitation between the need for military action and humanitarian reasons for protection in every situation these two interests meet. The continuing relevance of military necessity in formulating new rules when modifying existing rules and the continued application of the Martens Clause enshrine the continuing importance of humanitarian considerations. This clause is the limit that underpins some of the most necessary rules and principles on conduct in hostilities. Examples include forbidding unnecessary damage and suffering, the principle of distinction, the definition of military objectives, and the protection of civilians and civilian targets from attacks.[223]

3.1 Limitations of the principle of military necessity

Even when the principle of military necessity was enacted in the Lieber Code, the creators realised that the principle could not be without restriction. Art. 16 of the said Code mentions that the application of the principle does not allow for cruelty, revenge, torture for confession, use of poisons, arbitrary and unrestricted devastation of the environment, or injury to the enemy other than during combat. Meanwhile, the article stipulates that the principle of military necessity is also limited by actions that would make it more challenging to return to peace. The Code notes that combatants do not cease to be human beings during combat; that is, they must continue to behave as ethically as possible, even when using the principles of military necessity.[224]

221 ▪ See Benvenisti, 2011.

222 ▪ Draft conclusions of the International Law Commission on the identification of customary international law with comments. GE.18-13644. Doc. A / 73/10. 2018 part. VII. Conclusion. 16. p. 154.

223 ▪ Hague Convention II on the Laws and Customs of War on Earth. 1899, Preamble.

224 ▪ General Orders No. 100. Instructions for the Government of Armies of the United States in the Field. "Lieber Code". 1863. Art. 16.: *'Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult'.*

The Lieber Code, an important document in the development of the law of armed conflict, established the principle of military necessity as a party's right to fight to weaken the enemy as soon as possible. The principle was subsequently abused in later battles and wars as a limitless right. A misinterpretation of the principle established the so-called Kreigsraison doctrine, used by German troops during World War II.[225] The soldiers justified their actions, violating many treaties and customs via the principle of military necessity, as they considered their actions to be lawful. The opposite was, however, true, and they were 'taught' about the limitations of the use of this principle by international criminal tribunals set up after the war. These courts were set up to punish such arbitrary conduct. Conduct based on the principle of military necessity is lawful only if it does not violate specific positive obligations arising from binding conventions and customs.[226]

A military objective is also clearly an important element in assessing the limits of the application of the principle of military necessity. According to some academics, such as H. Meyrowitz, a military objective is no longer an appropriate factor in assessing military necessity because its importance may be indefinitely extended, allowing for greater destruction because the content of war objectives expands on one or both sides of the conflict during the fighting.[227] Depending on the development of the fighting, the parties regulate the manner and objectives of their attacks. However, if the principle of military necessity is not considered per situation, its general application to any military target may justify arbitrary destruction without achieving a military advantage. In seeking a balance, it is, thus, appropriate for the belligerent parties to consider their political objectives and their legal obligations.[228]

The main difference between the so-called 'just' way of fighting and the classical utilitarian approach is that the first is based on moral aspects. Intentions and moral character are irrelevant in classical positive law. Traditional international law requires that armed conflicts must be conducted per the requirements of *ius ad bellum*, including the just reason for starting a war. Accordingly, only a war started with good intentions[229] could be conducted fairly. Nevertheless, there may be some legitimate wars that started following the law and, yet, violate the law (i.e. those in which the requirements of *ius in bello* are violated).[230]

The vision of IHL begins with armed conflict. The conflict assigns military necessity and imperatives to the military primordial, axiomatic State. In this vision, there is the legal regulation of war to mitigate the horrors of the fighting (i.e. the abuse of military necessity). These arrangements play a noble and important role, which must be respected by combatants and civilians while also protecting

225 ▪ Kalshoven, 1971, p. 366.
226 ▪ Cheng, 1953, p. 71.
227 ▪ Meyrowitz, 1994, p. 98.
228 ▪ Carnahan, 1998, p. 227.
229 ▪ For example, stopping general injustice, genocide, and torture.
230 ▪ Calhoun, 2001, p. 4.

combatants involved in the fighting. However, it is logically secondary because, otherwise, the armed conflict would not arise. The principle of military necessity, thus, clearly prevails within the limits of armed conflict.

One of the most important aspects of a proper analysis of a specific situation in an armed conflict is, thus, to balance between the principles of military necessity and humanity, considering the principle of proportionality. IHL provides for the obligation to consider the specific and direct military advantage of the selected operation over the expected, presumed, or accidental and incidental injury to civilians and civilian targets. It is generally understood that such analyses are ruled out. Different observers make different decisions, assessing the risks to civilian targets in different ways during this process. Per military lawyers, commanders have wide discretion and deserve great respect for their prompt analysis during combat.[231]

The main limitations of the principle of military necessity stem from the nature and purpose of humanitarian law. Humanitarian law today regulates organised violence such that the belligerent party can achieve a legitimate goal. It aims to ensure the protection of persons, property, and natural resources as far as possible against the violence of fighting in armed conflict. It offers an image of the conflict from the perspective of civilians and is reluctant to submit to military necessity. Where legal restrictions apply based on the influence of the principle of military necessity, other humanitarian provisions limit it and push it closer to peace. Given the existence of humanitarian law, one currently no longer exists without the other. In the event of an armed conflict, the principle of military necessity and its limitations apply, resulting from humanitarian law, particularly the principle of humanity as a counterpoint. Armed conflict and human dignity belong to the human world and, more specifically, to the same environment. However, the final deduction from the analysis of the principles may be distinct, established on the designation of a different relevant preference to the here analysed two principles.

A significant aspect of the limitation of the principle of military necessity is the accessibility of the chosen operation and technique of the attack, the material importance of the chosen military objective, and the scope and character of the harm that the mission can result. However, all elements should be analysed on the ground of the current situation during the planning of the operation regarding the *bona fide* of the commander. Per the evidence accessible to him at the time, if the commander sincerely believed that the operation decision he had taken was necessary to achieve the necessary military objective, his good intentions should not be analysed in light of further events. It would follow that it is not important to manifest whether the combatant achieved his stated military objective. In an active struggle, the emphasis on current knowledge and good faith in the need for action is particularly important. The challenges of the selected operation may force the combatant to choose another option, reformulate the military objective, or determine other available and relevant measures, combined with an evaluation of the

231 ▪ Newton, 2007, p. 896.

possible damage and an assessment of its proportionality, all in a short period and often based on stressful circumstances.[232]

Some authorities stipulate that the evaluation of a specific situation influenced by proportionality must be determined from the position of a reasonable commander or a reasonably well-informed combatant. As the president of the Supreme Court of Israel notes, the international courts deliberate mainly on the question of whether a reasonable military commander could have made a certain decision. Judicial assessment regarding military decisions must be in the scope of a traditional review of reasonableness. Hence, the real question is not what to do in such circumstances but whether the measure taken is one that a reasonable commander can take. [233]

Based on the US Air Force Military Manual, the principle of military necessity has four basic elements that determine its application: the force used must be regulated, the force of such use must be necessary and used as soon as possible to achieve the stated objective, the force must be proportionate to the objective pursued, and the use of the force cannot be prohibited.[234] These basic elements limit the destructive effects of combat to the level that is necessary to achieve a military goal or mission. The elements also affect how fighting is done, without bias to other limitations that may result from different applicable fields of international law. It means that the type and level of force allowed toward persons not granted protection from a direct attack must not go beyond what is requisite to achieve a legitimate military goal in the pertinent circumstances. The chosen level of force may be used only if it is strictly necessary to achieve a legitimate military objective. Moreover, the type and level of force used must achieve this goal. Such situation assessment and choosing necessary measures are military considerations.[235]

These conditions are exhaustive and prevent the arbitrary use of the principle. Given the conditions, the commander is obliged to evaluate each planned operation. Every attack must be considered relative to the principle of military necessity and cannot be the result of possible revenge. Even if we disregard the exact norms of IHL, this principle is not without limits. For example, some prohibited acts are not even necessary for the needs of military necessity.

The current limitations of the principle are mainly represented by the current Geneva law, initially Additional Protocols I and II of the 1977 GCs. However, the scope of the Additional Protocols differs, as Protocol I applies only in international armed conflicts and in the event of the application of the right to self-determination of nations under the rule of another State. Protocol II applies to national armed conflicts, such as civil wars. Although Protocol II is significantly shorter, it can be more extensive regarding some rules. Unlike Protocol I, it contains certain rules

232 ▪ Hayashi, 2010, p. 96.
233 ▪ See Barak, 2007.
234 ▪ United States of America, International Law- the Conduct of Armed Conflict and Air Operations. Department of the Air Force pamphlet. no. 110-31, 1976, p. 1-6.
235 ▪ International Committee of the Red Cross, Interpretative guidance on the concept of direct participation in hostilities under international humanitarian law, Geneva, 2009, p. 80.

for the protection of civilians in non-international conflicts, as with the rule demanding warnings.[236] Overall, it can be assumed that Protocol II is shorter, though more direct in content and, in some respects, more current than Protocol I. In connection with the restrictions on the principle of military necessity, Protocol II contains several direct restrictions on the conduct of hostilities and is, thus, more restrictive.[237]

According to some authors, the principle of military necessity is somewhat obsolete and, therefore, does not constitute a restriction for commanders. That is, the principle applies only when no norm of humanitarian law regulates a situation. The principle can, thus, be applied only in cases of an unclear customary law or *lacunae* (i.e. legal gaps).[238] However, general legal principles fulfil such a bridging function. Such a view can be justified by the issues linked with the principle of proportionality. For example, the problem represents the ambiguity related to the interpretation of this term, which means that the application of the principle is seldom homogeneous in academic circles. The principle also binds States that have not explicitly agreed to it, though when ratifying binding conventions, the subjects agree with each provision.

This opinion is problematic. Based on the noted opinion, the principle would have minimal impact, merely through the Hague and GCs, their protocols, and other important and binding humanitarian law treaties. Nevertheless, the relevant provisions are often precise and cover a wide range of issues, making the principle virtually irrelevant in recent years. The principle and its limitations represent the core and nature of armed conflict, although the principle of military necessity must prevail, as, otherwise, the conflict would not exist. The application of general principles of law is more flexible and often more appropriate than the application of specific provisions. The principle, being vague and possessing generality, is more adaptable to the situation and represents deeply rooted moral values, which the explicit provisions of the written law could not grasp.

In general, the principle of military necessity is limited by the principle of humanity. The breakthrough is humanitarian law, with the principle of proportionality playing an important role, seeking a balance between the two principles. The core of the principle of military necessity can be characterised in multiple ways: a guide in planning an attack, a reason to carry out attacks, an exception to carry out attacks in exceptional situations, and an element in the principle of proportionality in seeking balance in combatant and non-combatants rights.

236 ▪ Additional Protocol to the Geneva Conventions of 12 September 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. (Protocol II). 08.06.1977, Art. 11.
237 ▪ Luban, 2013, p. 324.
238 ▪ Oppenheim, 1908, p. 12.

3.2 Principle of military necessity and human rights

Given the in-depth analysis of the principle of military necessity and its application, the relation to fundamental human rights is notable. Human rights do not have much in common with humanitarian law, but they cannot be fully separated in material terms. Historically, humanitarian law has evolved on a separate track, which preceded the normative regulation of human rights law. This different track is derived from several sources, such as the traditions of humanitarianism, chivalry, and martial arts, which represented a desire to alleviate the suffering of the victims. However, the humanitarian side has much in common with human rights, as its source is humanity. Regarding content, humanitarian law regards compassion for victims and is not about recognising the individual as a bearer of rights, as is the situation with human rights. The philosophical motivation of humanity is the desire to reduce pain and suffering, not an order to respect human dignity. Meanwhile, human rights legislation (i.e. international treaties) is intended for periods of peace, relative to humanitarian law, which applies to periods of armed conflict, and is considered as *lex specialis* in nature, displacing the more general law under the special rule.[239] Hence, the special scheme takes precedence over general international law, as such special arrangements are more specific and profound in assessing the characteristics of the framework in which they are to be applied. The rules that constitute such a special regime are, in this case, treaties and principles of humanitarian law. Therefore, their application also yields a fairer result and often better reflects the intention of the entities. It means that human rights treaties are often derogated when a period of conflict arises.[240]

Meanwhile, the area of human rights law is primarily aimed at obliging States to respect human rights in their jurisdiction rather than applying the law in an international context, such as international armed conflicts. However, the human rights framework limits lethal force to those circumstances where force is more than mandatory and serves as a last resort to protect life; thus, humanitarian law enables force whenever it is reasonably related to a lawfully chosen and acceptable military aim to achieve a concrete and direct military advantage.[241]

However, there is an issue of military operations by States party to human rights treaties, where the military operations occur outside of the national territory. For example, the provisions on the scope of the International Covenant on Civil and Political Rights (ICCPR) do not bind States to any obligations outside their territories and jurisdictions.[242] The issue has been subject to consideration by scholars and

239 ▪ Parks, 2010, p. 797.
240 ▪ Yearbook of the International Law Commission 2006, Vol. II, Chapt. XII, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, para. 251. (7).
241 ▪ Newton, 2015, p. 736.
242 ▪ International Covenant on Civil and Political Rights. Art. 2.

judicial bodies. Some of the interpretations nonetheless differ. The interpretation stipulated in the Bankovic case judgement by the ECtHR stipulates that a State may not practice its jurisdiction clashing with another State's territorial jurisdiction without that State's approval, request, or acceptance, except for when the former is an occupying power, in which case it can exercise its authority in the pertinent territory, at least in particular questions. The ECtHR declared that NATO's aerial bombing of the city of Belgrade cannot be considered effective control by stipulating a difference between ground missions that can utilise adequate control and air force that the Court found did not resort to effective control in the pertinent case. The Court explicitly held that a State exercises its jurisdiction only in its territory or on its citizens. The exceptions represent those cases where the State exercises the public powers of government in the territory of a different State with a State's consent, invitation, or acquiescence or in which it exercises effective control.[243]

This interpretation, however, appears to be narrower than the interpretation by the Human Rights Committee under the ICCPR. In the interpretation, in the case of Lopez Burgos v Uruguay, the Committee states that anybody directly concerned by a State's decisions will fall under the scope of subjectivity to the State's jurisdiction, for the ICCPR.[244]

If we consider the limitations of the principle of military necessity from the aspect of common provisions (i.e. the breakthrough of human rights and humanitarian law), the mentioned principle is significantly limited. However, humanitarian law is significantly different from human rights, despite their influence on each other. Humanitarian law considers the principle of military necessity as an elementary principle that stems from the existence of an armed conflict. Humanitarian law, while having many limitations to the principle of military necessity, understands the huge challenges commanders face in their decisions. Regarding a legitimate application of the principle, commanders can interpret treaties formally and narrowly. The principle of military necessity is a cornerstone of the existence of armed conflicts. All the other aspects make sense because the needs of the struggle are relentless, and lawyers consider humanitarian law to be a body of legislation aimed at harmonising conflict, but only in questions where States are willing to allow the principle of military necessity to be limited by the principle of humanity. However, regarding the situation of an armed conflict and its exigencies, excessive enforcement and the primacy of the principle of humanity calls it into question.[245]

Human rights and humanitarian law take an interest in human dignity as their starting point, which is the ground of the enumeration of basic minimum standards of humanity. The ICRC commentary on the Additional Protocols explicitly declares

243 ▪ Bankovic v Belgium, Admissibility decision ECtHR, n. 52207/99, 19 Dec 2001, para. 60.
244 ▪ Lopez Burgos v Uruguay, General Comment of United Nations Human Rights Committee, No. 31. CCPR/C/13/D/52/1979, 1981. para. 88.
245 ▪ Luban, 2013, p. 328.

the common basis. Multilateral, bilateral, and regional human rights instruments and the GCs also have a common core of fundamentals. The aim of the basic norms that occur in both sources of the law is to protect humans from certain abominable acts that all civilised nations consider unacceptable in all circumstances.[246]

The principle of military necessity, as a customary and traditional principle of humanitarian law, finds many limitations in the field of human rights protection. These rights are reflected in the fundamental contents of the treaties of IHL. Nevertheless, some lawyers reject the application of human rights law in times of armed conflict because they are generally in conflict with the existing law of armed conflict, and their historical development is different. Allegations of the possibility of applying a set of human rights in armed conflict and the impossibility of such an application, however, have limitations. Recall that IHL conventions constitute the protection of human rights in specific situations in armed conflict. What is important is the Common Art. 3 of the GCs, which may be mentioned as the 'mini-convention', laying down required minimum arrangements for IHL for armed conflicts of a non-international nature. Simultaneously, Art. 75 of Additional Protocol I is significant, which enhances the material of the protection of human rights for persons discharged from more favourable treatment under the Conventions or this Protocol. Humanitarian law of the GCs explicitly represents a more favourable treatment of human lives and is, therefore, based on the conceptual basis of fundamental human rights.[247]

The changes and consequences of changes in the development of humanitarian law have also prompted significant shifts in human rights. The different interpretation in the area of arbitrary application of the principle of military necessity was first shown by changes in the status of the State as a traditional subject of international law. The departure from the traditional meaning of the State and its sovereignty began in particular when the Nuremberg Charter established the scope of its jurisdiction over crimes against humanity, whether they contradicted the national laws of the country where they were committed. Development continued with the creation of the UN and the emergence of standards of the highest strength—the so-called *ius cogens*. Further, in 1999, UNSG Kofi Annan proposed that sovereignty should be conditional on the protection of the human rights of the people of the State.[248]

The human rights law represents a kind of *lex generalis* to the IHL system being *lex specialis*. Meanwhile, the scope of some binding treaties does not end in times of armed conflict. Hence, the ICCPR and its non-derogable human rights under Art. 4 par. 2 of the Covenant, Art. 6 (right to life), Art. 7 (prohibition of

246 ▪ Memorandum of the International Law Commission 2020 on the General Principles of Law. 7. 8. 2020, no. A / CN.4 / 742, para. 121.

247 ▪ Meron, 2000, p. 239.

248 ▪ Annan. K. Secretary General Presents His Annual Report to the General Assembly. 1999. [online] http://www.un.org/News/ossg/sg/stories/statments_search_full.asp?statID = 28. (Accessed 12.08.2020).

torture or cruel, inhuman or degrading punishment, or medical or scientific experimentation without consent), Art. 8 para. 1 and 2 (prohibition of slavery and the slave trade), Art. 11 (prohibition of imprisonment for failure to fulfil an obligation), Art. 15 (principle of legality in criminal law), Art. 16 (recognition of subjectivity). and Art. 18 (freedom of thought, conscience and religion) are notable.[249] The issue is also interpreted by the Human Rights Committee in its general comment, where under no circumstances may the Parties invoke Art. 4 of the Covenant as a justification for conduct contrary to humanitarian law or mandatory international law. The Committee notes hostages, inflicting collective sentences, arbitrary deprivation of liberty, or departure from the basic principles of a fair trial, including the presumption of innocence.[250] It also confirms that the forcible transfer or deportation of civilians without reasons by international law in the arrangement of forced displacement by expulsion or similar violent decisions from the territory in which the involved persons are legitimately resident establishes a crime against humanity.[251] Taking hostages, applying collective sanctions by arbitrary imprisonment, or departing from the fundamental principles of a fair trial, such as the presumption of innocence, are measures even a State of emergency cannot justify. It can, therefore, be inferred therefrom; the scope of non-derivative rights goes beyond the list of those contained in Art. 4 par. 2. Thus, the Contracting Parties may not, under any circumstances, invoke exceptional circumstances, even during the existence of an armed conflict. These measures contradict humanitarian law and non-derogable standards.

Humanitarian law, as the *lex specialis*, defines the importance of human rights in times of armed conflict (e.g. the rights to life and liberty will be weakened in times of conflict, with the principle of military necessity applied during the conflict having a significant effect in this regard). The right to life for combatants is missing from the Additional Protocol. The right is stipulated only regarding the civilian population. However, human rights treaties have provisions addressing exemptions from certain derogable rights enhanced in the text of the conventions. For example, the ECHR and Fundamental Freedoms in its Art. 15 stipulates the derogation clause, enabling parties to the convention to derogate from certain provisions in case of an emergency, such as war.[252]

The principle of military necessity as a principle of humanitarian law is an important element in a commander's decision-making during a conflict; during a period of peace, there is no need to apply the principle. Thus, the outcome of the situation is different. Despite this important limitation, the ICJ interprets humanitarian law as an interpretative guide to human rights law, not as a substitute. Human

249 ▪ International Covenant on Civil and Political Rights, 1976, Art. 4. ods. 2.
250 ▪ General Comment of the Human Rights Committee no. 29: Article 4: Exceptions during an emergency, 2001, CCPR / C / 21 / Rev.1 /Add.11, para. 7.
251 ▪ Ibid. para. 13. d)
252 ▪ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15.

rights laws may also provide a lower level of protection during a conflict than in times of peace, but its orders and prohibitions cannot be completely denied.[253]

Scholars and international courts consider the relation between the two fields of law. The ICJ consider it in its Nuclear Weapons Advisory Opinion in 1996. The Court notes that while human rights law applies in armed conflicts, when it comes to the prohibition of arbitrary killing in Art. 6 of the ICCPR, the content of the prohibition must accord with humanitarian law as the *lex specialis*. Later, the ICJ addressed the relationship between human rights and humanitarian law in the case of Wall Advisory Opinion[254] or the Case Concerning Armed Activities on the Territory of the Congo in 2005. It concluded from the latter case that there are three different situations regarding the relationship of the pertinent fields: many rights may be entirely questions of IHL, others may be entirely questions of human rights, and there are matters that can be part of both branches. Therefore, to have a definitive answer, the Court must consider both branches and their rights arising from the material. They, nonetheless, seem to implement the complementarity idea, which, in traditional requirements, supports the conclusion that humanitarian and human rights law are two different yet complementary bodies of law. In cases where they cross, there is no consensus on which should prevail. The pertinent bodies do not cope with the issue of granting precedence to these bodies of law in situations when they govern the same issue in distinct ways and limit its scope to a declaration that these fields are supportive, not mutually exclusive.[255] Regarding the noted analysis, in the Congo case, the Court found that under the customary rule on belligerent occupation reflected in Art. 42 of the Hague Convention, Uganda was the occupying power in the Ituri region of Congo from 1998 to 2003 and was under the duty to secure respect for human rights law and humanitarian law. Uganda was, however, responsible for violating both laws.[256]

Although humanitarian law is considered as *lex specialis* and some human rights are not fully applicable during armed conflict, non-derogable rights continually apply in every situation. However, both branches of law contain peremptory norms. While there is consensus on the existence of some peremptory norms in the branches, there remains controversy on their content. As demonstrated by the decision of the ICJ in the Case Concerning the Arrest Warrant of 11 April 2000[257] and the ECtHR in the Al-Asdani v UK case,[258] the existence of a peremptory prohibition of torture does not necessarily mean the outweighing of other

253 ▪ Legality of the Threat and Use of Nuclear Weapons, ICJ Advisory Opinion, 1996, ICJ Report. para. 25.
254 ▪ Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory, ICJ Advisory Opinion, ICJ Reports 226, 1996.
255 ▪ Lubell, 2007, p. 650.
256 ▪ Democratic Republic of the Congo v Uganda, ICJ, 19. 12. 2005, para. 178.
257 ▪ Arrest Warrant of 11 April 2000, Democratic Republic of Congo v Belgium, ICJ Report 3. 2002.
258 ▪ Al-Adsani v UK 24 EHRR. ECtHR, Para. 273.

non-peremptory norms of international law. Moreover, some scholars, such as Anthony E. Cassimatis, note that theoretical conflict between certain peremptory norms is not excluded as well.[259]

The impact of human rights on humanitarian law has some limitations. In light of international law, human rights only apply to the obligation to ensure human rights within one's jurisdiction. States can be counted on to secure human rights in the territories they control; they cannot be expected to act positively in the jurisdiction of another State.[260] However, a State can be expected to respect human rights (i.e. not to violate them in the area of different States). The law of armed conflict is, thus, more extensive in many respects of international conflict than the content of human rights that complements it. With this interpretation, we come to the view that human rights obligations under treaties significantly impact the application of humanitarian law by imposing an obligation to respect a wider range of rights.[261] The ICRC and the ECtHR[262] consider that human rights law applies whenever a party to an armed conflict gains effective control of an area, regardless of formal territoriality tests.[263]

Both branches have a protective purpose. Human rights law seeks to protect human dignity and humanitarian law rests upon the principle of humanity and dictates of public conscience, as per the Martens Clause. Both regimes contain absolute rather than reciprocal obligations. Violations by one State of its obligations under a treaty do not allow another party to suspend its protective obligations under another treaty.[264]

States, international bodies, and courts emphasise the complementarity between IHL and human rights law. The noted principle that international human rights law proceeds to apply throughout conflicts and other emergencies has been proved also in international jurisdictions and human rights treaties.[265] However, many human rights institutes do not procedurally regulate any conventional rules of IHL. International human rights law can, therefore, provide a complement to humanitarian law. However, without clarifying the relationship between the two

259 ▪ Cassimatis, 2007, p. 630.
260 ▪ Author's note: Exceptions can be considered mandatory international rules, the violation of which concerns the international community.
261 ▪ United Nations Commission on Human Rights, General Comment no. 31. 80. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR / C / 21 / Rev.1 / Add.13. 2004, para. 3.
262 ▪ Loizidou v Turkey, ECtHR, Application n. 15318/89, 23. March 1995, para 62.; Banković v Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom. Application n. 52207/99, 12 Dec 2001, para. 71.
263 ▪ See Henckaerts and Doswald-Beck, 2005.
264 ▪ Prosecutor v Kupreskic, ICTY, N. It-95-16-T, 14 Jan 2000, para. 515.
265 ▪ Report of the Human Rights Committee on extrajudicial abbreviated and arbitrary executions. Use of armed drones for targeted killing, Ag.3. N. A / HRH / 44. / 38. GE.20-10777 (E). 2020, Part. III, para. 34.

systems, it is not possible to understand and apply the law to ensure full protection of the rights of the persons concerned, especially in the context of international armed conflict.

Increased attention to human rights in armed conflict, largely because of controversial reports of the Guantánamo Bay detention facility, has prompted academics to analyse the issue. A proposed solution to the question of which law is to be applied is to create an international convention that specifically addresses the overlap of the two systems. Another option is to interpret the relationship between each provision of humanitarian law and human rights and, based on the results, propose a recast of existing conventions. However, a theoretical analysis of the rules alone will not provide a clear picture of the interrelationships between the rules, as the different situations in which they apply must be considered.[266]

A specific human rights rule cannot be seen as just a theory, but the parties involved in a particular situation must also be considered. Many humanitarian laws and fundamental human rights treaties may have been ratified by the States concerned. Even if not so, it is not so worrying, because many humanitarian and human rights conventions are generally considered to be an expression of customary international law or are among the peremptory international law. Nevertheless, the problem may create specific humanitarian law or human rights treaties that only apply to countries in a particular region, such as Europe, America or Africa. Finally, before determining whether a human rights provision can complement a rule of humanitarian law in a given context, it is necessary to determine whether it is possible to derogate from the provision in question and whether the State has departed from it formally. Of course, such an exception is possible only to the extent strictly required by the emergency.[267]

Consequently, in analysing the impact of human rights on the principle of military necessity, it must be noted that the human rights of each combatant cannot be expected to be respected during the fighting. Although respect for humanitarian and human rights is restrictive during operation planning and conduct, the principle of military necessity must go beyond the overall picture; otherwise, no attacks could be conducted. However, combatants are obliged to conduct attacks such that they are not subsequently subject to investigation or possible criminal proceedings.[268] Regarding the legitimate scope, international human rights law should continue to apply in armed conflicts as a complement to IHL. These two fields operate at the same time during the existence of an armed conflict, whether it is preparation or an attack. The control of combatants through human rights is limited to emerging legal relations and situations and the required military discipline.[269]

266 ▪ Barnidge, 2007, pp. 86-94.
267 ▪ Olson, 2009, p. 459.
268 ▪ Momodu, 1986, p. 71.
269 ▪ Report of the Human Rights Committee on extrajudicial abbreviated and arbitrary executions, Use of armed drones for targeted killing, N. A / HRH / 44. / 38. Ag.3. GE.20-10777 (E). 2020, Part. VI., para. 87.

3.3 Principle of military necessity as an exception or justification

IHL has evolved to strike a fair balance between the principles of humanity and military necessity. It follows that the rules based on this process consider military necessity. Many treaty and customary rules of IHL presuppose a potential conflict between the two principles and explicitly allow derogations from the strict observance of these rules if required by military necessity. An example is the Hague Convention, which declares that, in combat, it is punishable to destroy or confiscate enemy property unless such actions stem from military needs.[270] Furthermore, under customary IHL, captured enemy and neutral merchant ships must be protected. However, they can be destroyed if military necessity precludes the seizure or dispatch of such vessels to decide whether they constitute prey of war and whether certain other conditions have been met in advance.[271]

Whether the application of the principle of military necessity justifies the State for its action and, if so, what the requirements are for the rules of international law concerning the responsibility of the State are notable. Further, whether the application of the principle of military necessity justifies an individual's conduct that would otherwise constitute a criminal offence under international law is a matter of international criminal law. The specific elements of the application of the principle, thus, regulate the content of the rules to which the principle is linked.[272]

The so-called *Kriegsräson* is an opinion known from World War II when the principle of military necessity was abused to carry out any military operation. The Kriegsräson posits that any relevant military action that is necessary for the successful end of the war takes precedence and invalidates all provisions and laws and customs, which prescribe the opposite procedure.[273] Some commentators who rightly reject such an opinion defend the scope of the principle of military necessity, which they consider to go beyond the explicit provisions in certain circumstances.[274] In the Hostage Case, German military officers defending argumentation rested upon military necessity, which, in their opinion, justified conduct, such as reprisal murder of civilians during the occupation. Nonetheless, the Military Tribunal declined the justifications based on the principle of military necessity and its false interpretation in allowing a combatant to use any proportion and character of force to urge the overall defeat of the enemy party with the minimum available cost of life, time, and expenses. It allows for depriving the life of combatants whose

270 ▪ The Hague Convention with respect to the Laws and Customs of War on Land 1907 (IV), 18.10.1907, Art. 23 (g).
271 ▪ Doswald-Beck, 1995, para. 139.
272 ▪ Report of the International Law Commission, 56 UN GAOR, No. 10. Doc. A / 56/10. 2001, paras. 80-84.
273 ▪ O'Brien, 1957, paras. 119-37.
274 ▪ See Stone, 1954.

destruction is unavoidable by the process of the armed conflict. However, it does not allow for the murdering of the innocent population for revenge or satisfaction of lust to kill. Moreover, property damage must be necessary by the course of the war. There must be a reasonable and direct connection between damage and the weakening of the enemy forces.[275]

According to J. Pictet, the principle of military necessity can be applied to cases where there is a real material impossibility of complying with the express provisions of the binding treaties. Pictet discusses that there is an implicit clause in every convention and law according to which no one must do what is not possible. This can be yet only implicit because if such a provision were made openly and explicitly, the risk of abusive and biased interpretations would be significant. Thus, when addressing the question of what is truly possible, the true material possibility must be considered. Even so, Pictet argued that no explicit or implicit clause in the laws of armed conflict would favour the principle of military necessity.[276]

Binding provisions of humanitarian law do not allow for any derogation from compliance with its standards given the application of the principle of military necessity unless such a possibility is expressly provided for in advance by exceptional provisions. The sole existence of these exceptions about the possibility of applying the principle of military necessity by interpreting a contrario suggests that other provisions do not provide any exception to the use of this principle to justify any action. Hence, the principle of military necessity does not justify conflicting conduct if the document, which governs the procedure, cannot be regarded as qualified.[277]

Accordingly, H. McCoubrey developed a theory supporting the idea that IHL makes it possible to derogate from rules and regulations on humanitarian grounds. According to him, some form of the principle of necessity, albeit not exclusively of military necessity, may dictate a change in the specific application of a humanitarian law without jeopardising the realisation of a fundamental military objective.[278]

As an exception, the principle of military necessity justifies certain conduct based on special IHL rules, which mandate conflicting conduct in so far as such conduct is required to achieve a military objective. Various aspects of such an opinion find support in the military handbooks of different States, which somewhat reflect their practice or their *opinio juris*. Such national military manuals generally regard the principle of military necessity as a principle of international law that allows for just the type and level of force not otherwise punishable by law but necessary to weaken the belligerent and enforced with the least possible time using human and material resources. Meanwhile, how these manuals define this principle seems to generally align with customary IHL. They also contain provisions stipulating that international law excludes exceptions to the principle of military necessity

275 ▪ Hostage Case, United States v List, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10. Case No. 7, 19.02. 1948, para. 1253.
276 ▪ Pictet, 1985, p. 88.
277 ▪ Hayashi, 2010, p. 56.
278 ▪ McCoubrey, 1991, p. 228.

for any other or weaker purpose of war. However, whether such provisions can be considered binding, even if they appear regularly in various military manuals, is questionable.[279]

The relationship between the principle of military necessity and the military economy regarding exceptions is worth probing. Proper management of resources by combatants is a matter of rational and prudent fighting. However, management is not an issue of international law, as there is no basis for the principle of military necessity from an economic perspective. Improper, irrelevant, or pointless operations conducted based on ill-defined military objectives may make it appropriate for the operation commander to exercise the principle of military necessity. Applying military necessity in such an operation is, in principle, not illegal but must comply with the principle of proportionality. Of course, if civilians, cultural objects, or other interests protected under IHL will be harmed by the operation, it cannot be conducted.[280]

An important element in the application of the principle is the military objective. The military objective must be of a military and significant nature during the planning of the attack. Although it often happens that the significance of the attack emerges secondarily, initial action during planning may not meet the requirements of the principle of military necessity. The military attack must be understood as an element with strategic, operational, and tactical value for offensive activities. These elements must be precisely defined. The attacks must demonstrate that they are not part of personal revenge, which constitutes a gross violation of humanitarian law.

However, an incorrectly selected military objective does not mean the conduct is illegal. It may only make the principle of military necessity inoperable. Meanwhile, destruction and confiscation of enemy property without a real military goal cannot justify the application of military necessity. The Hague Conventions prohibit the destruction or seizure of enemy property. The principle cannot, therefore, serve as an exception in this regard.[281]

The Hague Convention highlights the principle of military necessity as an exception in Art. 26. The article mentions the obligation of the commander of an attack conducted by aerial bombardment to warn the authorities of the evacuation of persons at the site of the bombing to prevent possible loss of civilian lives. The exception that relieves the commander of the obligation to warn the authorities is the principle of military necessity.[282] One primary military goal in applying the principle is to avert the risk of attacking aircraft and achieve the set military goal. Subjective elements influencing the situation, such as the supervision of an officer or the lack of friendly civilian residents likely to be harmed, must be considered.

279 ▪ Hayashi, 2010, p. 59.
280 ▪ Schmitt, 1997, p. 54.
281 ▪ The Hague Convention with respect to the Laws and Customs of War on Land 1907 (IV), 18.10.1907, Art. 23 (g).
282 ▪ Ibid. Art. 26.

The stipulation that the planned operation must be conducted mainly for military purposes is equally important because a belligerent party could exercise its geopolitical, demographic, ideological, or economic ambitions as legitimate military interests.[283]

As noted, a planned available and materially relevant measure, expected to cause the least damage, though considered appropriate, may unexpectedly cause disproportionate damage. In such a case, as soon as the damage is evident during the attack, the principle of military necessity must recede, and the combatant is obliged to choose another alternative or abandon his efforts and repair the damage.[284] The commander must gather information and spend some time evaluating it using all his ability and good faith to properly apply the principle of military necessity. The reality of active combat can sometimes require a degree of flexibility in assessing the given evidence by which a combatant must plan the outcomes and make prompt decisions. The principle also includes ideas about the awareness and formal capability of the combatant applying the principle. In this respect, the moral values of the combatant are particularly important.[285]

Meanwhile, the application of the principle of military necessity may be inadmissible in the same case, even if, at first sight, the provisions provide for its possible use. One provision may explicitly allow exceptions to the rule for military reasons, but another provision (usually the following) may restrict such exceptions. For example, Art. 53 of the GC IV prohibits the belligerent party from destroying the individual or collective personal property of private persons, the State, or a public institution, except where such destruction is necessary for military operations.[286]

From the noted conditions, one can deduce which action fulfils the conditions of the principle of military necessity. An action accords with the principle if

1. It is primarily executed for a specific military objective.
2. It is necessary to reach a military aim.
3. It is an advantage.
4. The military facility complies with IHL.
5. The method of implementation complies with IHL.

Within the noted elements, the first three points have already been analysed, but it is appropriate to analyse points 4 and 5. The application of the principle of military necessity is unacceptable if the goal for which the decision was adopted does not comply with IHL. It is the case if the commander decides from the influencing and possible decisions that are the least harmful, with damaging results that are not beyond the gained advantage. This stipulation, with the subsequent

283 ▪ Stone, 1954, pp. 622-623.
284 ▪ Gehring, 1980, p. 55.
285 ▪ Hayashi, 2010, p. 63.
286 ▪ Convention (IV) on the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art. 53.

requirement, makes military necessity an exception to the duty more than an exception of a breach of that duty. For example, Art. 4 of the 1954 Hague Convention on Cultural Property obliges, *inter alia*, a combatant to respect cultural property and its immediate surroundings located in its territory or territories of other Contracting Parties. The parties to this treaty aim to refrain from any action which, in the event of armed conflict, could expose such cultural property to destruction or damage.[287] Pursuant to another paragraph 2 of the same article, this obligation may be waived only in cases where such an exception is necessarily required by military necessity.[288] Regarding the principle of military necessity, as an exception, it should be noted that points 4 and 5 may not be fully met in certain circumstances. In such cases, it is possible to speak of an exception given the overriding principle of military necessity over the principle of humanity, though always considering the principle of proportionality.

The importance of the principle of military necessity used as an exception in connection with the observance of humanitarian law is mentioned in several important cases of international courts. A brief analysis of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case is appropriate. Many prominent academics commented on the case concerning the construction of the wall in Israel. In a statement annexed to the ICJ's advisory opinion, Judge Buergenthal noted that the establishment of Israeli villages on the west bank of Jordania violated the IV GC. Thus, the segments of the walls that Israel was building to protect the citizens have been *ipso facto* in violation of IHL.[289] The principle of military necessity as a reason for building a wall does not stand. As an exception to the application of the law, it can be applied only proportionately to protect the security interests of the military forces of the occupying force and only in the occupied area. An endeavour to broaden the notion of military necessity to protect the activities of Israeli residents of the pertinent area fails and violates this general principle. Some scholars disagree. According to Kretzmer, the theory seems to conflict with basic rules of IHL. However, this theory argues that the truth that the villagers live in an unlawful village should avert the belligerent party from taking any actions

287 ▪ Hague Convention for the Protection of the Cultural Heritage in the Event of Armed Conflict, 1954, Art. 4. (1).: '*The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property*'.

288 ▪ Hayashi, 2010, p. 87.

289 ▪ Wall of Israel, Legal consequences of the construction of the wall in the Occupied Palestinian Territory, Advisory Opinion of Judge Buergenthal, ICJ, 2004, 136, p. 244. 'It follows that the segments of the wall being built by Israel to protect the settlements are ipso facto in violation of international humanitarian law'.

to protect them. Finally, measures to protect settlers from serious violations of IHL may be necessary.[290]

Based on the analysis of the case and arguments, Israeli settlements in occupied Palestine indeed violate Art. 49 para. 6 of the GC IV. The wall and the application of various actions necessary for its construction can apply the principle of military necessity as an exception. Further, it follows that the main rule contained in those provisions continues to apply to the matters in question. That is, the principle of military necessity does not preclude the illegality of the wall, considering the principle of proportionality for the rights of one party over the other in the conflict.

3.3.1 Tu quoque

Regarding the principle of military necessity, abused throughout history, sometimes the *tu quoque* defence is mentioned. This justification is based on an appeal that the enemy has committed comparable actions. It is occasionally structured to justify action by claiming that the enemy started the conflict. Special elements of associated conduct throughout World War II were not investigated at the rials of Nuremberg given a recognised sensibility to such an appeal. The ICTY Chamber declared that the proof that the enemy party to a conflict is responsible for executing atrocities is, alone, insignificant because it does not contribute, manifest, or contradict any of the claims showed in the accusations against the alleged perpetrator. Pursuant to the Trial Chamber, *tu quoque* is irrelevant in questions regarding IHL, which comprises obligations that are *erga omnes*.[291]

The ICTY in the case law has noted that when stipulating if there was an attack toward a certain civilian population, it cannot be sufficient that the belligerent party also conducted atrocities on its enemy's civilian population. The presence of an attack from one party toward the other party's civilian population cannot explain or mitigate the actions of the other party toward the civilian population of the enemy. Additionally, it cannot replace the deduction that the other party's troops were attacking a civilian population. Every attack against the enemy's civilian population must be identically illegal, and offences conducted under this attack can, if further circumstances are fulfilled, result in crimes against humanity. [292]

290 ▪ Kretzmer, 2005, para. 93.
291 ▪ Schabas, 2006, p. 339.
292 ▪ Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, ICTY Appeals Chamber, 12.06.2002, IT-96-23, Para. 87.

4.

Principle of humanity

The principle of humanity stipulates that every person should respect the fact that he or she belongs to the human species, regardless of any other circumstances. During armed conflicts or peaceful times, the application of the principle of humanity reflects the complete international protection of human rights. Separate branches of law including IHL, international human rights law, or asylum law apply the principle of humanity in their exact provisions. Therefore, separate relations between public authorities and people under national or international jurisdiction reflect the principle. Meanwhile, the principle is further reflected in the law of international organisations, particularly in the law of the UN. Thus, per the universal character of the principle of humanity, the principle can be regarded as a sectoral and general principle of law. Moreover, research on the nature of the principles of international law along with the analysis of the nature of the principle of military necessity supports the notion. In the theory of law, the right objectives establish justice and good. These values represent the humanity of the people. The principle of humanity likewise represents the foundations of law and, thus, represents one of the general principles of law that has to be generally applied. Consequently, the core content of the concept of humanity justified the statement that the principle of humanity must be considered as a general principle of law.[293]

The principle of humanity represents the counterweight to the principle of military necessity on the scales of Iustinia in the field of humanitarian law. It reminds both sides of the conflict of the natural humanity of the combatants (i.e. human participants of cruel actions). However, many experts argue about whether it is an independent general principle of law. Several other questions also emerge: Can it be considered a source of new rules and amendments? Can it bridge the *lacunae* in the already existing legislation? Does it ease the interpretation of the specific provisions of international law of armed conflict? What are the repercussions in case of a breach of this principle? Is the principle of humanity more feasible in certain categories of operations, such as peace operations, or certain fields, such as the use of weapons? Currently, the international community is moving toward the humanisation of IHL. Therefore, these questions must be considered when considering diversification of the mandates of military operations and diversification of

293 ▪ Author's note: The opinion is currently criticized by many academics, although it is also shared by important experts (e.g. M. Vázquez Bermúdez, Diego Valaderas Vasconcelos Neto, Thomas Weatherall.)

legal regimes that do not apply to it, in particular in the application of the humanitarian law in question.[294]

International courts have resorted to the application of general principles in many cases. In some cases, judges tend to refer to principles derived from the national law of several legal systems or even several States. Nevertheless, at other times, it was impossible to find a link between national and international law on such principles. The justification was always found in the peculiarities of the exact case. In some of the cases, the court referred to the general and generally accepted principles (e.g. in the case of the principle of humanity as to the elementary considerations of humanity, which permeate international law).[295] Accordingly, as per scholars and judges, the principle of humanity need not be directly derived from another legal system because it includes the most essential case decision-making idea: humanity. Nonetheless, per its conditions, the Martens Clause applies when the *lex scripta* is silent. [296]

The principle of humanity represents one of the fundamental and binding principles of IHL. Hence, it has wide application potential. First, it can act as an interpretative rule to interpret other provisions included in international treaties. All rules of IHL must be interpreted in light of the principle of humanity. Second, with gaps (i.e. *lacunae*), the principle may have a complementary or replacing function.

The next chapter of the monograph probes the exact analysis of the claimed nature and characteristics of the principle of humanity, mainly considering the Martens Clause as the most important source of the principle of humanity.

4.1 Analysis of the nature of the principle of humanity

The principle of humanity can be considered as awarded with a wide scope of application: it is applied in various circumstances, even in times of armed conflict and peace, and in relations between the public authorities and all citizens subject to the jurisdiction of the State concerned. Furthermore, the principle has a legendary impact when subjects are in positions of vulnerability or even in hopeless situations, as verified by pertinent provisions of various treaties that comply with the international protection of human rights.[297]

Regarding such protection, the Charter of the UN is notable. It includes, *inter alia*, provisions addressing humanitarian issues, promoting respect for human

294 ▪ Tsagourias, 2018, p. 54.
295 ▪ United Kingdom and Northern Ireland in Albania, Corfu Chanel case, ICJ, ICJ Reports. 1949, para. 22. “Elementary considerations of humanity”.
296 ▪ Schmitt, 2010, p. 801.
297 ▪ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, Art. 17 (1); Convention on the Rights of the Child, 1989. Art. 37 (b).

rights for all.[298] The Charter stipulates that the General Assembly initiates special examinations and makes recommendations to assist in the implementation of human rights.[299] It further declares that to establish conditions of stability, the UN promotes universal appreciation for human rights and fundamental freedoms for all, regardless of race, sex, language or religion. The aim is to secure the necessary conditions for peaceful and friendly relations between nations.[300]

Other provisions of the UN legislation also reflect the principle of humanity. The principle establishes a whole jurisdiction for the international protection of people, covering separate fields of law and their converging trends. Areas of IHL, international human rights law, and international refugee law enhance the principle of humanity in their provisions. For example, in the judicial assessment of the principle, some issues are issues of rights arising explicitly from the protection of human rights, some explicitly from humanitarian law, and some may be a matter of both.[301] In fact, there is a tendency to think about the principle of humanity only in the IHL context.

Indeed, there is no doubt that the principle is among the most significant principles in the field of humanitarian law. In particular, it is applied mainly to the matters of civilians and *hors de combat,* who must be dealt with especially carefully per the principle of humanity. The humane care of civilians and combatants is stipulated, among other things, in the GCs for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field from 1949.[302]

The lasting ideas of the natural law and the emergence of human conscience accord with the principle of humanity, reflected in conventional and customary international law. Treatment of human beings must in all circumstances be conducted per the principle of humanity, which is part of the *corpus juris* of the international protection of human rights (including IHL, international human rights law, and international refugee law), conventional law, and customary law. Furthermore, the principle is applied at the global (e.g. UN) and regional (e.g. Council of Europe) levels. The principle, which has general relevance in IHL, is, thus, extended to the principles of international human rights law.[303]

Many significant international courts, such as the ICJ, rely on the principle of humanity in several of its decisions. In the resolution on the Preah Vihear temple, the ICJ ordered the establishment of a temporary demilitarised zone around the temple as part of the world's spiritual and cultural heritage, hence extending the protection to the area concerned, the surroundings, and even to local people. Everything is based on the principle of humanity under a modern interpretation of

298 ▪ Charter of the United Nations, Art. 1 Para. 3.
299 ▪ Ibid. Art. 13 para. 1 letter b.
300 ▪ Ibid. Art. 55c; Azud, 1986, p. 138.
301 ▪ Legal consequences of the construction of the wall in the Occupied Palestinian Territory. The Wall of Israel case, ICJ advisory opinion, 9.7.2004, General letter no. 131, para 106.
302 ▪ Henckaerts and Doswald-Beck, 2005, p. 23.
303 ▪ Commission for Human Rights, General comment. no. 31. 2004, para 11.

the *ius gentium*.[304] Per such currently applied 'law of nations', the territory and the people should fall under the same legal regime in similar matters.

As noted, the principle of humanity is formed in compliance with the values of natural law. It is, thus, part of the fundamental classical ideology on the humane treatment and preservation of peaceful social relations on international grounds. In implying this principle, the international community demonstrates the need to protect persons in vulnerable situations, particularly, in explicit and implicit application in binding and non-binding international treaties. Eventually, as a cosmopolitan project, *jus gentium* proved to meet the demands of society. Therefore, it was promoted and expanded as a regulation of international community relations formed by socially organised people in developing States, mostly by prominent legal thinkers, such as Vitoria, Gentili, Suarez, Grotius, Puffendorf, and Wolff. [305]

Populations in their social environment, where the role of the State is to protect all those under its jurisdiction, are considered the constitutive element of a State. This protection corresponds to the minimal ethical status, which is generally considered to be the international community of the present. During the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 [306] it was challenging to contemplate that the protection of human rights would begin to be universally distinguished on the day of its adoption or even shortly in practice. The reality is that States have been obliged to protect the integrity of the population from oppression. systematic attacks, and discriminatory or arbitrary treatment even before the codification of these rules based on customary law and the general principles of international law. However, the international community has long addressed the issue of human rights protection only on certain questions (e.g. IHL, diplomatic protection, or the protection of foreigners). However, the question of human rights regarding one's citizens (i.e. the jurisdiction of the State) fell without restriction under the sovereignty of the State until the end of World War II. Nonetheless, important national documents of some States could indirectly influence the development of the law; hence, some conduct, which today is considered a serious violation of IHL under various international treaties and conventions has already been customarily prohibited by general international law. Within this frame of reference, the general recognition of the principle of humanity can be mentioned.[307]

Current international law (treaty and customary law) is often characterised by the emergence and development of peremptory norms (*ius cogens*) and increased applicability of the principle of humanity on a virtually universal scale. Serious human rights violations, crimes against humanity, and acts of genocide infringe the universal prohibitions of the *ius cogens* norms. Humanity, an element of the new

304 ▪ Cambodia in Thailand, Request for interpretation of the decision in the Preah Vihear Temple case, dissenting opinion of Judge Antonion A. Cancado Trindade, 1962. Interpretation of the Judgment 11 November 2013, 2015, para 114-117.
305 ▪ Trindade, 2017, p. 71.
306 ▪ UDHR, United Nations Organisation, DE01 / 48. New York, 10.12.1948.
307 ▪ Pictet, 1966, pp. 29-30.

ius gentium of the 21st century, thus extends beyond the entire jurisdiction of the current international law.[308]

The case law of the contemporary international courts approves the existence and binding force of the principle of humanity as a general principle of international law. International courts recognise the existence of the principle since the case law frequently refers to the principle in circumstances of uncertainty or lack of sources.

The principle has been repeatedly mentioned by the ICTR. In the case of J.-P. Akayesu, the tribunal adjudicated that the interpretation of the term crime against humanity had been recognised before the Nuremberg courts (1945-1946).[309] In the tribunal summons in 1915, the governments of Russia, Great Britain, and France jointly issued a statement concerning the murders of the Armenian population in Turkey and declared them as 'crimes against humanity and civilisation, for which all the Turkish government members as well as its agents are responsible'.[310] The same ICC for Rwanda in the case of J. Kambanda stipulated that, in all historical periods, genocide has caused massive losses of humanity, and humanity can be considered a victim.[311] Indeed, these concepts regarding those referring to such crimes, while referring to humanity as a victim, appear much earlier in history and are closely linked to the principle of humanity. Moreover, the mentioned tribunal in its judgements stated many times the importance of the Martens Clause.

The *jurisprudence constante* of the Inter-American Court of Human Rights also proved the existence and importance of the principle of humanity. The Court declared that the principle is applied even more strongly if persons are in a bad situation or a situation of significant vulnerability. The Inter-American Court held that some acts classified as inhuman or degrading treatment have frequently been subsequently considered as torture based on the expanding need for protection, which must be accompanied by a faster and more intensive response to crimes. Development of the terms and their interpretation have, thus, been affected, Hence, the fight against torture or violations of other fundamental human rights ultimately comprises a struggle to guarantee that the principle of humanity prevails.[312]

308 ▪ Elias, 2002, pp. 11-12.

309 ▪ Prosecutor in Jean-Paul Akayesu, ICTR, 2.9.1998, No. ICTR-96-4-T, para. 565. *„Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal character. In fact, the concept of crimes against humanity had been recognized long before Nuremberg. "*

310 ▪ Clark, 1990, p. 177.

311 ▪ Prosecutor v Jean Kambanda, ICTR, 4.9.1998, ICTR-97-23-S., para 15. „*But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity. "*

312 ▪ Maritz Urrutio in Guatemala, Inter-American Court of Human Rights, 27.12.2003, para 5; 87. "The ineluctable fight against torture -" a form of hell that has accompanied our civilization "- and other grave human rights violations represents, in the final analysis, the daily fight to" ensure that the principles of humanity prevail. "

The ICTY has also paid attention to the principle of humanity in its judgements. In the Mucic case, the tribunal held that IHL and international human rights law were based on their common interest in protecting human dignity.[313] In this case, the tribunal described the inhuman treatment as intentional or unintentional. Further, it can be considered as an omission that has resulted in serious mental or physical suffering or harm. Consequently, such conduct constitutes a serious attack on human dignity.[314]

In all the noted cases, the court dealt with the notion of the principle of humanity. The interpretation of this principle is often inconsistent in case law. It could be understood as a fundamental principle of the prohibition of inhuman treatment laid down in Art. 3 common to the four GCs of 1949. Moreover, this principle can also be applied to humanity in its entirety in circumstances of common, universal, and direct interest. Finally, the same principle can be also used to improve the specific quality of humanity.

4.2 Martens clause

'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience'. [315]

The Hague Conventions on the Laws and Customs of Ground Warfare present a permanent legacy.[316] It is particularly represented in the provisions declaring the prohibition of weapons that can cause unnecessary damage or suffering. However, it is mostly relevant in the preamble of the document stipulating the famous Martens Clause. Since its establishment, the Martens Clause has been invoked many times on significant court grounds, such as the Nuremberg Criminal Court, the ICJ, or even in specialised human rights institutions. The clause has commonly been found, although usually in a revised structure, in a lot of humanitarian law treaties,

313 ▪ Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo, ICTY, 20.2.2001, No. IT-96-21-A, para. 149.
314 ▪ Ibid. para 543.
315 ▪ Preamble to the Hague Convention on the Laws and Customs of War of the Ground Wars of 1899 (II).
316 ▪ Hague Convention on the Laws and Customs of Land Warfare of 1899 (II) .; The Hague Convention on the Laws and Customs of Ground War of 1907 (IV).

such as the GCs[317] or in the preamble of the Convention on the Prohibition of Restrictions on the Use of Certain Conventional Weapons.[318] The rephrased Martens Clause was also stipulated in the Resolution XXIII of the Teheran Conference on Human Rights of 1968 and is cited or differently mentioned in respective internal military manuals, together with those in Germany, the UK, and the US.[319] For more than a century, this legacy of Friedrich Martens remains current and valid.

Scholars and practitioners, nevertheless, face regularly the issue that there is no universally accepted interpretation of the Martens Clause. Consequently, it is reliant on different interpretations, narrow or widespread. Regarding a restrictive interpretation, the clause predominantly performs as an expression of a fact that the customary international law continues to apply even after the adoption of a precise rule from a conventional provision. A broader and more accurate interpretation is also feasible, explaining that as few international treaties related to humanitarian law are always complete; the Martens Clause provides something that can be explained as a restriction. Explicitly, it means that if something is not *ipso jure* prohibited by the treaty, it cannot be considered as *ipso facto* allowed. The broadest interpretation is that certain behaviour in armed conflict is assessed based on the binding treaties and customs, the principles of international law, and the aspects of ethics in the clause.

The primary objective of the clause was to legitimately expand the protection of civilians and combatants in all circumstances, including those to which the provisions of a specific treaty cannot be applied or remain silent. Until recently, the Martens Clause referred to 'principles of international law, as they result from the usages established between civilised nations', 'laws of humanity' and the 'requirements of public conscience'.[320]

The Martens Clause stipulates that the principles of international law, the laws of humanity, and the requirements of public conscience proceed to apply despite the emergence of new situations that are not so far normatively regulated by the international community. Therefore, this clause (considered part of the general international law) significantly contributes to the hermeneutics of humanitarian law. The 'laws of humanity' and the 'requirements of public conscience' to which

317 ▪ Geneva Convention relating to the Treatment of Prisoners of War. (III.) 1949. Art. 62. *"... the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience'.*

318 ▪ Convention on the Prohibition of Restrictions on the Use of Certain Conventional Weapons, which may be considered excessively harmful or have a distinctive effect. Preamble. "*Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.*

319 ▪ Meron, 2000, p. 78.

320 ▪ Trinity, 2001, p. 59.

Martens refers are associated with the realm of the righteous elements. Briefly, the Martens Clause in its entirety has been conceived and reaffirmed in favour of the whole human race, thus ensuring its lasting significance.[321]

4.2.1 Origin of the clause

To begin with, there are two versions of the created clause. The conceptual differences between these two versions of the Hague Peace Conferences warrant an explanation. The version of the clause in the Hague Convention of 1907 varied in some aspects from the clause in the Convention of 1899. 'Inhabitants' was replaced by 'nation', and the older term 'law of nations' was replaced by 'international law'. Finally, 'dictate' took precedence over 'requirement'. Although both versions of the clause refer to 'laws of humanity', it has become common practice to use 'principle of humanity'.

The Martens Clause was designed and created by the Russian delegate to the Hague Peace Conference, named after its creator, the prominent lawyer, Fedor Fedorovitsch (Frédéric / Friedrich) Martens. Nonetheless, the clause stems from natural law, which was already well-known to the international community. In the preamble of the Hague Convention, this natural right is rhetorically and morally expressed in sharp language. It is justified by the strong effort of the creators to influence the formation and interpretation of the *jus ad bellum* and *jus in bello* (i.e. IHL). These features, thus, partially counterbalance the rather vague legal content of the clause.[322]

For some, the normative formula is considered a real mantra; for others, it is just a convenient safety provision without tangible significance. Its application is, moreover, considered arbitrary. According to some, the clause is considered a primary interpretative manual by what the core nature of public international law established. Others see it as a formula of a potential moral value that has no legal effect.[323]

The clause was formulated during a lively discussion at the Hague Conference in 1899 in the body of a second commission (led by Martens himself) dealing with the status of combatants, reciprocal rights, and responsibilities of the intervening forces in defending the population on the question of *levé en masse*.[324] These questions were later addressed in Art. 1 and 2 of the Hague Convention. The questions were yet known to be controversial, as it was those articles that blocked the ratification of a Convention in Brussels in 1874. In Hague, this discussion was ranked

321 ▪ Ibid., 2001, p. 53.
322 ▪ Grose, 1788, p. 127.
323 ▪ Eyffinger, 2012, p. 25.
324 ▪ Author's note: Levée en masse: a French term that dates back to the 18th century of the revolutionary period, meaning a spontaneous uprising of the civilian population against invasive forces.

last to push the issues through and complete the ratification. The substance of the key provisions, supplemented by the most qualified humanitarian arguments, was to minimise the horrors of a conflict for the harmless and innocent civilians of the affected territories. The initial proposal was to enable the invaded country to be called upon to recognise the rights and claims made by the attacker, while its population was instructed to refrain from taking part in future hostilities, thus reducing civil disorder. Everything concluded under certain limits. Naturally, such standards did not accept many small and weaker countries; thus, it was challenging to find a compromise between the demands of the great powers and the challenges of small States.[325]

The Conference, in the spirit of a unanimously advocated definition and regulation of the term military practices, adopted many articles. However, the adoption of a comprehensive convention seemed unattainable, as the conference members did not want to leave the resolution of possible unforeseen matters not covered by the written law to the discretion of army commanders.[326]

Despite all the political problems that Martens had to solve, the current clause cannot be considered a mere 'diplomatic trick' applied to reach a compromise between the various interests of the countries. The creation of the final solution in the preamble influences the Convention and provided it with the maximum legal guarantee. The clause, which has separate legal ground and nature, has filled the vacuum in IHL and is, therefore, later codified by other conventions and regulations. The clause is not new. Martens created only a reminder of the already established principles of international law. Indeed, it would be highly unexpected that a group of well-educated scholars, including prominent members (Lammasch, Nigra, Rolin, Renault, Descamps, Stancioff),[327] who were well-informed in the matter, would accept the introduction of new sources of law without any comments. The representatives of the countries at the Hague Conference only accepted the clause, which was based on a solid foundation of the already proven principles. It should be noted that in the end, Martens never invoked the clause as 'his' in his late articles, monographs, and private correspondence.[328]

4.2.2 Nature of the clause

The main and significant advantage of the clause, which Martens may not have expected, is that its content affects the issues of the laws of humanity for the first time as an ethical question and a question of positive law (so to speak), precisely from a noticeably positivist view. Formerly, international conventions and agreements merely

325 ▪ Ibid. p. 28.
326 ▪ Pustogarov, 1999, pp. 125-135.
327 ▪ Author's note: Their efforts are reflected in highly accepted publication (e.g. The Oxford Handbook).
328 ▪ See Pustogarov, 1996.

declared the significance of such regulations or humanitarian considerations. Subsequently, during an armed conflict, States could not be contented with strict legal norms to uphold the law but must also consider the principle of humanity. Based on the clause, where not everything that is not forbidden can be interpreted as allowed, the actors involved in the fighting began to be influenced as they were obliged to consider the moral aspect of their conduct. Despite the lack of international courts with binding jurisdiction, investigative institutions, or commissions of inquiry, such a transfer of the decision-making process to the combatant was a significant innovation, which is still being discussed in professional circles today. Briefly, such a decision involves an ethical aspect, where the subject decides whether the planned action accords with the principle of humanity. Additionally, the Martens Clause for the first time declared that there are principles or rules of customary international law that are based on the usage of States (the so-called *usus*) and stem from the laws of humanity and the requirements of public conscience. Thus, Martens should be commended for developing such an ingenious combination of natural and positive law.[329]

A significant group of scholars, including some judges, claim that the clause has had a significant influence on sources of international law.[330] Indeed, from this perspective, it has expanded its sources in the field of IHL. Distinctively, in the case of the Legality of the Use of Threat, judge Weeramantra expressed his opinion that the clause established two new sources of law: the laws of humanity and the dictates of public conscience.[331] It consequently appears that the general principles of law generally acknowledged by States enhance the principle of humanity and the notion of conscience therein. Thus, inhuman weapons and weapons that insult the public conscience must be assessed as prohibited.[332] Conversely, following the dissenting opinion of Judge Shahabudden in the pertinent case, the Martens Clause alone makes the principle of humanity *en bloc* a principle of international law, and the exact content of the principle must be interpreted by the courts based on relevant requirements.[333] For that reason, the court ruled that the legislation applicable and the core of the principles of armed conflict is humanitarian thinking, which means carrying out armed hostilities to meet strict requirements.[334]

329 ▪ Holland, 1909, p. 10.
330 ▪ Roling, 1961, p. 485.
331 ▪ Legality of the threat or use of nuclear weapons, dissenting opinion of Judge Weeramantry, 1996, ICJ Reports, p. 264.
332 ▪ International Law Commission, First report on general principles of law, Marcelo Vázquez-Bermúdez, No. A / CN.4 / 732, para 244. *'General principles of law recognized by civilized nations would therefore seem to embody the principles of humanity and the public conscience. Inhuman weapons and weapons which offend the public conscience are therefore prohibited'.*
333 ▪ Legality of the threat or use of nuclear weapons, dissenting opinion of the Shahabudden, 1996. ICJ Reports, p. 184.
334 ▪ Legality of the threat or use of nuclear weapons, ICJ, 1996, ICJ Reports. no. 697, para 95. '*Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict - at the heart of which is the overriding consideration of humanity - make the conduct of armed hostilities subject to a number of strict requirements'.*

On the ground of national and international courts, the Martens Clause has been cited many times. The cases concerning the application or interpretation of the clause can be categorised into three classes. The first class represents the cases that are by far the broadest. These include litigation where the clause has been applied to verify or strengthen the interpretation of other international rules of humanitarian law. The second class of cases represents litigations where the clause was invoked to design the original structure of the existing provisions of humanitarian law, as per the principle of humanity stipulated in international human rights standards. The third class of cases represents the disputes where the clause was used in the *acontrario* interpretation of humanitarian law treaties.[335]

The Supreme Court of Norway in the Klinge case in 1946 presents an example of the national application of the clause.[336] A former Gestapo member was charged with torturing Norwegian patriots. The valid normative dealing with the issue was stipulated in the Norwegian Criminal Code of 1902 and the Royal Decree of 1945. The Norwegian court, based on the proven violations, sentenced the perpetrator to capital punishment, which was imposed on such crimes at the time. The defendant appealed with the argumentation that the retroactive applicability of the 1945 Act to acts committed during World War II is prohibited. This appeal and arguments were rejected, with the court referring to the long-standing principle of humanity and the dictates of public conscience as part of the preamble to the Hague Convention.[337] The court, thus, declared the customary character of the Martens Clause. These examples belong to the category of cases where the clause was used as a strong argument. Further, the interesting thing about the case is the fact that right after the end of World War II, there were no binding international rules on specifically punishing similar crimes, which means that the case was up to the jurisdictions of each State.

A similar approach was used in the case law of the International Tribunal for the former Yugoslavia. The Martič case was similarly issued in 1996 under Article 61 of the Rules of Procedure of that court. Martič, the former president of the Republic of Serbia, was accused of ordering the shelling of Zagreb in May 1995, murdering an innocent population. Such conduct is contrary to the provisions of IHL. The Trial Chamber declared that the shelling was a war crime, as it infringed upon customary law and treaty provisions prohibiting attacks on civilians, in particular attacks on civilians by reprisals. In that respect, the Tribunal argued regarding the limitations of the principle of military necessity (i.e. the principle of humanity), noting that the Martens Clause could be regarded as the most important source of the principle of humanity.[338] The tribunal's clause served as a supplementary argument in criminal proceedings in this kind of consideration.

335 ▪ Cassese, 2000, p. 202.
336 ▪ Kriminalassistent Karl-Hans Hermann Klinge. Eidsivating Lagmannsrett v Supreme Court of Norway, Supreme Court of Norway of 8.12. 1945, para. 11.
337 ▪ Ibid. p. 12.
338 ▪ Prosecutor in Martič, ICTY, no. IT-95-11-R61, para. 13.

The ICJ's advisory opinion issued in 1996 regarding the Legality of the Threat or Use of Nuclear Weapons is from a formal perspective considered as having great importance. In a comprehensive examination of the case details, even in this case, the reference to the clause was essentially made *ad abundatiam*, solely to reinforce the argument based on internationally binding standards of the merits.

In this case, the court mentioned the clause several times when examining the international rules (IHL) applicable to the threat or use of nuclear weapons. First, after interpreting two basic principles of humanitarian law (dealing with the protection of civilian population and the prohibition of any technique or methods of combat that cause unreasonable suffering to combatants), the court cited the clause, stating that the clause could be considered as an effective instrument when referring to the fast development of military technology.[339] Furthermore, in the judgement, the ICJ refers to the Martens Clause, which continued existence and applicability cannot be called into question. Finally, it represents a confirmation that the principles and rules of humanitarian law are applicable to the questions of nuclear weapons.[340]

Accordingly, regarding the position of the clause as a foundational provision and its importance in the evolution of humanitarian law, one would first assume that the clause is obsolete. Quite the contrary. The relevant doctrine transforms the clause into a progressive interpretation enabling protection for current armed conflicts. Concretely, the protection of the environment in non-international conflicts through the means of the Martens Clause is the actual theoretical postulate that established new directions, though pushing the traditional boundaries of the application of the clause. The dictates of public conscience can be, in this sense, applied to more *extraordinary* situations, which suffer from the *lacunae* caused by the fast development of societal and technical innovations.[341]

4.3 Application of the principle of humanity in some specific situations

Certain terms represent the core of the humanitarian law and must be always considered when addressing an armed conflict issue. Especially, when a certain situation is not governed by any specific rule. The traditional approach was based on two fundamental norms, which later became fundamental principles: the principles of military necessity and humanity. Per one interpretation, the core of the principle of military necessity implicitly deduces the existence of the principle of humanity. It means that the attainment of a valid and legal military objective *acontrario* prohibits the attainment of an invalid and illegal military objective. It, thus,

339 ▪ Legality of the threat or use of nuclear weapons, ICJ, 1996, ICJ Reports, para 78.
340 ▪ Ibid. para. 87.
341 ▪ Smith, 2019, p. 185.

implicitly expresses the need for humanity, thereby prohibiting suffering, injury or destruction not needed to achieve a legally acceptable military goal. The concept of humanity results in a particular ban on unreasonable suffering and consequently several exact provisions. The notion reaffirms the fundamental protection of civilians and cultural heritage from an attack throughout the course of an armed conflict. However, this protection of the civilian population does not prevent possible and necessary accidental civilian casualties that may occur during legal attacks on military objectives.[342]

In any armed conflict, people are injured or killed and their property is often damaged or destroyed. Thus, to prevent suffering, explicit rules of humanitarian law have been stipulated. Explicit provisions have reformulated these principles into clear provisions that can be applied to fighting-induced situations. However, if the treaties and conventions are to be put into practice, they must recognise the existence of an armed conflict and seek to maximise the protection of civilians not directly involved in it. One way in which the conventions meet the needs of humanity with the practical necessities of war is to accept the possibility of concomitant or accidental damage to civilian property and injury to civilians, even if military operations are directed against military objectives. The first example of this process is the ban on excessive accidental losses for civilians and important buildings, such as historic buildings. The prohibition of excessive accidental losses, thus, implicitly accepts the occasional necessity of accidental losses that are not excessive.[343]

There are many interpretations of the principle of humanity. According to one, it is a guiding and restrictive principle in many cases, which also seeks a balance with the principle of military necessity, often interpreted as the reason for carrying out any attack. The principle is, thus, applied in many specific situations and has a strong connection with terms such as the *hors de combat* persons or prisoners of war. The following subchapters are devoted to the noted connections regarding the application of the principle of humanity.

4.3.1 Protection of persons hors de combat

The principle of humanity is also applicable to the *hors de combat* person (i.e. persons out of combat). They are explicitly identified as persons who do not pose a direct threat and are most likely in a vulnerable position, thus needing protection. The explicit protection of these persons is provided for in the GCs for the Amelioration of the Condition of the Wounded and Sick in Armed Forces and other relevant humanitarian documents.

Traditionally, only combatants are classified among this category of persons in international law. However, some doctrinal views differ. According to some, the

342 ▪ Gehring, 1980, p. 53.
343 ▪ Fenrick, 1982, p. 92.

non-combatant conditions also apply to wounded and sick combatants and civilians injured during the fighting in the territory. This view is also supported by the case law of international courts, which understood the concept frequently in a more extensive sense than the GCs. In the case of Tadic, the ICTY explicitly stated that the concept of protected persons should also include persons who do not fall within the narrow interpretation of the terms of the GC. The court had in mind the decisive conditional criterion to aid an entity outside the fight. According to the ICTY, such a person does not need to have citizenship or the nationality of one of the belligerent parties.[344] With such wide and loose criteria, the provided protection can be done more effectively on the battlefield.[345]

The conditions are explicitly set in Art. 3 of the GC, which stipulated that *hors de combat* must lay down their weapon, end attacking' activities on the battlefield, and demonstrate their clear intention to surrender to the enemy. Thus, they should be treated humanely, considering non-discrimination as well. The party to the conflict and the Red Cross or another humanitarian organisation can help them. These persons must be removed from the battlefield and subsequently treated well and protected from further attack and possible damage based on applying the principle of humanity in a specific provision. Meanwhile, these persons, as they demonstrate their intention to be rescued and no longer participate in the fighting, do not constitute a legitimate military objective. This categorisation is also met by persons unconscious or in poor health who cannot express their intent to get protection. However, if such a person is medically fit, he must refrain from hostile action or attacks. Accordingly, the subjects include persons who actively surrender and the sick and wounded who express their intention to surrender (i.e. a combatant who continues to fight despite his injury is not a person hors de combat).[346]

As noted, this category of people includes people who show a clear interest in being saved and do not continue the fight. The rule stems also from treaty law, such as the Hague Conventions, GCs, and military manuals of several States.[347] The traditional manifestation of a clear surrender is the folding of weapons, raising of hands, raising of a white flag, or other apparent evidence of such intent. However, during the fighting, a combatant may not have the opportunity to show his surrender despite his internal decision to do so (e.g. a combatant who emergency-parachuted out of a fighter plane). If a combatant jumped out of an aircraft to save his life because his aircraft had failed or was shot down, he should be given the opportunity

344 ▪ Prosecutor v. Dusko Tadic, ICTY, 15.7.1999, IT-94-1-A, para 166. 'Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons'.

345 ▪ Authors note: The noted protection is regularly provided by other people, such as humanitarian actors on the ground.

346 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Art. 41, para 1.

347 ▪ For example, Argentina, Australia, Belgium, Canada, Germany, Italy, Lebanon, Morocco, Peru, the Russian Federation, the UK, and the US.

to surrender, (i.e. he cannot be shot down during a fall). On landing, this person must clearly state his intention not to fight. If the combatant does not express his clear intention to surrender after the fall and tries to escape, destroys important documents, or attacks the enemy, he cannot be classified as a person outside the fight and, thus, will not be protected. Moreover, in the case of airborne units sent to parachute on the battlefield; an attack on such combatants can also be conducted during their fall.[348]

The use of surrender marks should also constitute protection for those persons. If a white flag is raised on the vehicle or boat, it is prohibited to attack the enemy. However, persons who have used such a sign to prove their intention have to get off such vehicles independently. Such persons are protected by a white flag. Of course, injured persons may not use such means. In such a case, the enemy must move closer and examine the circumstances. If a combatant approaching a white flag is attacked, it is a violation of humanitarian law by misusing its protected emblem.[349] What happens if a combatant raises a white flag but has not received permission for such an action from the commander who then issues an order to stop the incoming enemy party? The answer cannot be found in the conventions. The party approaching the white flag for inspection did not violate any rights. However, the person in charge of the unit should be aware of the actions of his combatants. Their arbitrary action is a violation of military discipline, but the ultimate responsibility for their actions lies with their commander.[350] Even in such a case, a possible shooting at approaching combatants can also constitute a violation of international law.

Signs protecting *hors de combat* are also mentioned in humanitarian law in connection with perfidy. Although deception and various other tactical operations are rightly allowed, betrayal is not one of them. The GCs expressly provide that killing, injury, or capture of an enemy using perfidy is prohibited. It must be understood as conduct that confirms the enemy of a fact that such conduct constitutes protection under international law. If the enemy misleads the combatant to apply the principle of humanity (mirrored in the specific provisions of humanitarian law) to betray his trust, he also fulfils the conditions for perfidy. Specific cases include misusing of emblems for surrender, such as a white flag, the pretence of injury or illness, the misuse of the other party's emblems, the misuse of Red Cross or another humanitarian organisation emblems, and the disguise as a civilian non-combatant.[351] The issues in situations of perfidy will be more precisely analysed in Chapter 4.3.3.

348 ▪ Oeter, 2008, p. 178.

349 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Art. 38, para 1.

350 ▪ Author's note: However, superiors cannot be convicted on the basis of strict liability by virtue of their position alone, as stipulated in the judgment of the case of Semanza before the ICTR. n. ICTR-97-20-T. 23.5.2003, para 404.

351 ▪ Sandoz, Swinarsku and Zimmermann, 1987, para. 1500.

In connection with persons who surrender to the enemy, it is also appropriate to mention the principle of military necessity. If combatants of the enemy army surrender, the principle of military necessity has been fulfilled, as the objective of weakening or breaking the enemy has been fulfilled by this act. The military goal of killing enemy combatants in all circumstances cannot be legitimate. In the event of a surrender, these soldiers do not pose a threat, and further violence against them is unnecessary, unacceptable, and prohibited. From the moment they surrender, the principle of humanity must be applied. They must be protected and treated with respect.[352] The systematic murder of the surrendering combatants is, thus, considered a criminal offence under international law. Some historical and recent events note the unauthorised use of such combat techniques.[353] The noted protective rules related to the condition of persons *hors de combat* (i.e. the obligation to treat them humanely, not to attack them, the obligation to protect them) are based on provisions existing in international treaties and military manuals, but their origin is customary. Thus, treaties only codify these questions answered by the application of the general principles of law. However, the issue of the codification of such customary rules is an independent topic itself.

4.3.2 Prisoners of war

If a combatant is involved in the fighting, and, subsequently, surrenders to the enemy, he becomes a person out of battle and, hence, enjoys a prisoner-of-war status. The concept of *hors de combat* is, thus, closely linked to the concept of prisoner of war. Prisoners of war are held captive for not continuing the fighting, not to sanction them for their initial participation. The fact that, theoretically, protect prisoners of war must be protected by moving them from the battlefield and, subsequently, treating them, giving them food, and ensuring security and basic hygiene needs is not questionable. The existence of unusual and, above all, unfavourable conditions that emerge in the territory of the fighting proves that the practical implementation of this protection is problematic. The evacuation of such persons to prisoner-of-war camps presents challenges, and their release, if they are not injured, jeopardises the carrying out of further operations. However, the obligation to respect people's safety must in any event outweigh the other interests of the party. Even regarding time, personnel, or financial demands, these persons are entitled to adequate living conditions. If it is not possible to create such conditions, the party is obliged to release these persons under the circumstances that such release is safe (e.g. from a minefield). In circumstances that justify a long journey of such persons to a safe environment, the releasing party should provide sufficient water

352 ▪ The Hague Convention with respect to the Laws and Customs of War on Land 1907 (IV), 18.10.1907, Art. 23 (d).
353 ▪ Cryer, 2002, p. 63.

and a map with a marked route or information to ensure survival.[354] Hence, the theory also posits the extraordinary circumstances that armed conflict brings. The principle of humanity regarding issues protecting prisoners of war prevails over the principle of military necessity.

Nevertheless, the humanitarian treatment of prisoners of war was accentuated in the late nineteenth century. Today, the correct and fair treatment of such persons is one of the basic provisions in the conventions of humanitarian and customary law.[355] In cases where combatants are captured by civilian armed or military groups that are insufficiently trained and informed about the rights they have to respect, captives are in a vulnerable position, and their rights can easily be violated. When combatants are captured, their identity is first registered. If they are medically fit, interrogations can then be held. However, in all cases, the principle of humanity must be considered in ensuring fair living conditions and moral and ethically appropriate conditions for their survival and recovery.[356] A widely known case at the Nuremberg Military Tribunal (i.e. Hostages case) addressed the notion of prisoners of war regarding the principle of humanity. A short analysis of the case will be given in the later Chapter 5.1.1.

Prisoners of war should be protected against violence and insults and treated humanely in all circumstances. Repression against such persons is also prohibited. They may not be discriminated against under any circumstances. Regardless of their age or gender, their honour must be preserved. The GC also lays down the conditions for the treatment of prisoners after the end of an armed conflict. Prisoners may not be abused or punished even after peaceful relations have been established. Moreover, they must be released immediately.[357] However, practically, some circumstances can be questionable (e.g. filming and showing such persons on television). Prisoners' right to privacy and the right to freedom of expression via television by referring to what is happening in the world must always be considered. If the depicted prisoners of war are not identifiable, the television has not violated their rights, and the right to free filming outweighs the interests of the prisoners. However, the circumstances of such persons must be considered, as the shooting of prisoners in degrading situations could already be considered prohibited.[358] In such cases, technology can help. As in the case of masking the face of such persons, it is not possible to identify them, and their right to privacy would be respected. However, what about the recordings by the fighting party holding the prisoners? In such

354 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Art. 40.
355 ▪ Oppenheim, 1952, p. 367.
356 ▪ Mumuney. QA International Humanitarian Law and Prisoners of War. 2009. [online]. http://dx.doi.org/10.2139/ssrn.1432722. (Accessed 4.9.2020).
357 ▪ Geneva Convention relating to the Treatment of Prisoners of War. (III.), 1949, Art. 118.
358 ▪ Independent. Macintyre. D. Chilling Images "breach Geneva Convention". [online], https://www.independent.co.uk/news/world/middle-east/chilling-images-breach-geneva-convention-112116.html (Accessed 24.3.2023).

a case, it is not possible to speak of any interest of the party in the right to the free dissemination of information, as in the case of a television station. The violation of prisoners' right to fair conditions must be furthermore considered.[359]

The prisoner-of-war status belongs to persons after they give up (i.e. after they become a *hors de combat* person). Medical and religious personnel cannot become prisoners of war. In practice, the question arises regarding the status of members of paramilitary groups or civilians who have actively participated in the fighting. In case of ambiguity, it is still necessary to act in favour of such persons based on the principle of humanity. Therefore, even in situations where a subject is, at first sight, an unidentifiable person, the subject enjoys protection under the status of a prisoner of war. Subsequently, only a competent court or a tribunal is entitled to decide otherwise in case of doubt.[360]

4.3.3 Perfidy

Perfidy means actions that try to persuade the opposing combatant that there is an obligation to grant protection under the rules of international humanitarian. These acts are displayed with the intent to betray confidence. Many acts fall under the notion, such as improper use of the emblem of the Red Cross, usage of protective symbols or emblems, or even the use of enemy uniforms.[361]

Kant notes that truthfulness is a duty that must be regarded as the basis of all duties founded on convention, and the laws of such duties would be rendered useless and uncertain if even the slightest exception to them were admitted. He understood this duty as something applicable to all humans. He concludes that the fundamental principle of deception is inconsistent with bringing human conduct under shared laws.[362] In the broad interpretation, the act of perfidy falls under the notions that violate the principle of humanity. Continuously, abusing the protection of civilian status most certainly falls under prohibited acts, which also breaches the principle of humanity.[363]

Deceiving the enemy by illegal means of combat was a case of the German major Skorzeny, who was ordered to cross the American military line during the Ardennes offensive by changing into American uniforms, using American weapons, and using American vehicles. The tactic was to penetrate as much as possible between the enemy troops while avoiding contact with the troops. Although this unit was eventually not used for the planned operation and was deployed as an infantry brigade in the attack on Malmedy, members of the planned unit faced charges

359 ▪ Solis, 2016, p. 46.
360 ▪ Geneva Convention relating to the Treatment of Prisoners of War (III.), 1949, Art. 5.
361 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Section II, Art. 37-39.
362 ▪ See Ripstein, 2021.
363 ▪ Mattox, 2002, p. 6.

before the US military court in Germany after the end of the war.[364] For lack of evidence, they were not convicted of such planning. Nevertheless, the judgement, especially in the argumentative part, could long be used as a precedent, noting that enemy uniforms cannot be used during combat but can be used in planning an attack. However, this precedent became unnecessary after the adoption of Protocol I and its Art. 39, which provides for an absolute ban on the use of uniforms and other typical features of the enemy party or the neutral party to the conflict.[365]

However, remain several cases of illegal use of enemy uniforms. In 1995, during the UN peacekeeping mission in Bosnia and Herzegovina, Serbian soldiers managed to capture more than 400 UN troops, along with combat vehicles and tanks. Their weapons and clothing were misused and Serbian combatants disguised in French uniforms attacked and took control of the bridge considered a major military facility in Sarajevo.[366]

During the mission in Bosnia and Herzegovina, distinguishing between the soldiers was problematic. The external distinction between soldiers was different from American soldiers serving in Sarajevo and other mission soldiers. In Sarajevo, the Americans were subject to NATO regulations with different policies and measures than other soldiers. According to the evidence, the Americans wore soft hats and could visit the city and eat in restaurants. The biggest problem, however, was that they did not wear the distinctive features of the mission on their uniforms beyond the conspicuous American flag. This approach was contrary to uniform distinction and posed a risk, as the combatants were easily identifiable to any terrorist aiming to kill an American soldier. Indeed, excessive American patriotism outweighed the safety concerns of soldiers.[367]

Perfidy is also linked to a strict ban on the misuse of enemy and neutral party emblems, flags, and insignia, with many binding conventions prohibiting the misuse of the UN, Red Cross, and Red Crescent emblems; protecting signs of cultural heritage; or a white flag.[368] Brussels Declaration, the Oxford Manual, or the Hague Conventions explicitly prohibit the misuse of signs, emblems, flags, and uniforms of the enemy party. However, they do not contain the exact specification of what can be understood as misuse in the documents. Many military manuals, inspired by the noted conventions, do not define the concept in-depth, leaving the interpretation to judges in contentious cases or combatants. However, there are exceptions in military manuals of the UK and Belgium. The UK manual forbids the use of the noted enemy elements to conduct deception. Further, the use of an enemy uniform

364 ▪ The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Vol. IX, 1949, pp. 90-93.
365 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Art. 39.
366 ▪ Financial Times, Martin. H, [online]. https://casebook.icrc.org/case-study/bosnia-and-herzegovina-using-uniforms-peacekeepers (Accessed 20.5.2023).
367 ▪ Baumann, 2004, p. 134.
368 ▪ Ibid. Art. 38. para 1.

for the aim of sabotage is in the same category of conduct as espionage.[369] The Belgium manual highlights demonstrative examples of what can be considered misuse of hostile elements (e.g. conducting an attack while wearing enemy uniform or carrying out an attack from a seized enemy combat vehicle). The manual stipulates that wearing a uniform for gathering information and conducting sabotage is not prohibited (although in the event of capture, the person also loses the status of a prisoner of war). The problem, however, is that such a way of fighting can create panic to such an extent that troops can start attacking their combatants.[370]

These methods of perfidy are forbidden. A combatant who attempts to obtain information on the territory of the enemy in his uniform is not considered a spy, and, in the event of capture, enjoys the status of a prisoner of war with all the rights that belong to this position. Otherwise, if the fighting entity violates the law and is not distinguished from civilians by external features, this status does not belong to him, and he can be punished in case of capture under the law of the enemy party. However capital punishment on the grounds of a military tribunal and perpetrated as revenge is in all cases forbidden. [371]

4.4 Principle of humanity today

Even currently, the courts invoke the principle of humanity, often either exactly quoting the Martens Clause or implicitly referring to it, to clarify the idea that one should not be blind to this principle when interpreting international rules.[372] The principle is implicitly (explicitly) applied as a universal guideline to interpret specific international rules for a better understanding of the essence of modern humanitarian law but mainly as a regulatory norm for situations in armed conflict.

The Martens Clause and its principle of humanity is also an important element for a more flexible application of law to the current rapidly changing period. A basic element this principle represents is the idea that not everything that is not forbidden is allowed. Accordingly, we automatically restrict any combatant action in an armed conflict, even without the explicit existence of any provision in a binding convention. Hence, the principle of humanity can have, so to speak, 'extraordinary' application, affecting relationships to which the law does not know the exact answer.

In any case, the principle of humanity, as a general principle of international law that includes moral and ethical aspects, is closely linked to the Martens Clause. First, the clause is an essential source of this general principle, which developed

369 ▪ United Kingdom Military Manual, para. 682.
370 ▪ Belgian War Law Manual, para. 645.
371 ▪ International Committee of the Red Cross, Customary International Humanitarian Law, Vol. II, Chapter 18, Section F, Rule. 62.
372 ▪ United Kingdom and Northern Ireland in Albania. Corfu Chanel case, ICJ, 1949, ICJ Reports. para. 22.

mainly after World War II from its interpretation and application by the ICJ in many cases. Thus, the Martens Clause's status as a crucial and powerful historical source of the principle cannot be questioned. Second, there is scope for the argument that the clause is a *lex specialis* regarding this general principle of international law, which the ICJ promotes, as it refers only to humanitarian law, while the principle covers the entire scope of rules of international law.

The area of sources of law is also affected by the existence of the clause. If the traditional historic core of the clause and the goals of its creator are disregarded and considered only as a provision of the current legal dimension, it has some implicit influence on the historical foundations of international law, particularly on the law enforcement procedure. We can state with certainty that this clause (i.e. the law of humanity and the dictates of conscience) is in the same position as the *usus* of States (i.e. national practice).[373]

Fundamentally, we could say that, in the area of law of the armed conflict, humanitarian requirements must effectively face convincing normative requirements before they can be implemented into factual practice. What would be the intention of demanding apriori State practice to create a general ban when, for example, the use of extremely deadly weapons or methods of combat cause unreasonable suffering or is seriously endangering civilian lives? Waiting for the so-called *usus longeavus* would mean legally entering only after thousands of civilians were killed or their life was threatened. Thus, the original and historically long-known principle of humanity as a formal source of international law in the field of humanitarian law serves as a universal and up-to-date protection against the greatest atrocities of war.

373 ▪ Cassese, 2000, p. 213.

5.

Principles applied by international judicial bodies

IHL is evolving to mirror the character of conflict and the values of its participants. Since its development in the 19th century, it has consistently moved towards conflict humanisation. The establishment of international criminal courts is closely linked to the development of international criminal law. The foundation of individual criminal responsibility based on international law has, however, encountered two major issues. First, in traditional international law, States, not individuals, had an absolute subjectivity. Thus, the establishment of provisions associated with punishing the violation of international humanitarian treaties had to prescribe the acceptance of individual subjectivity in international law. Afterwards, it was important to control States' threatened perspectives toward external interference, which is certainly embedded in the traditional concept of sovereignty.[374]

IHL and international criminal law are related in purpose but significantly distinct in scope and results. Humanitarian law is mainly applied to States and other parties to an armed conflict; therefore, it lays out the predicted basic elements of armed conflict. Additionally, certain violations may lead to reimbursement or similar reparation. International criminal law is applied to individuals; it lays out conditions for violations inducing the most severe crimes of interest to the international community *en bloc*, and it may result in the detaining of a perpetrator.[375]

The Versailles Peace Treaty from 1919 made the first attempts to establish responsibility under international law and set up a basis for further international criminal courts and tribunals.[376] It was followed by subsequent prosecutions after the end of World War II in Nuremberg, which was replaced by four decades of silence in international criminal justice. It was changed in 1993 when the UNSC created the ICTY, applying humanitarian law. In the years, *ad hoc* tribunals have been established to address international and non-international conflicts. In 2002, a permanent court, ICC, was established to tackle the humanitarian law application on the battlefields.[377]

In international law, judicial decisions are considered additional means for the determination and interpretation of legal rules. The decisions of international

374 ▪ Werle and Bung, 2010, p. 1.
375 ▪ Cryer et al., 2006, p. 227.
376 ▪ Versailles Peace Treaty, 1919, Art. 227-230.
377 ▪ Schmitt, 2010, p. 817.

courts are mainly used as persuasive evidence. Nevertheless, international courts necessarily do not have to follow a formal doctrine of precedent, though, naturally, to develop a coherent body of jurisprudence, the courts generally do so.[378]

Court decisions are not direct sources of law. However, the interpretation by jurisprudence is considered a valuable asset to the content of international law in force. Additionally, their decisions represent part of the evolution in filling the gaps in IHL. International case law of the international courts is, thus, significant in determining the legal framework of principles of humanitarian law as well. It is specifically true regarding the balance between military necessity and humanity. The principles of military necessity and humanity have been part of the argumentation of the international court many times. Therefore, with special regard to modern international and non-international armed conflicts, incorporating judicial decisions and their textual analysis regarding the provisions of treaties used as a basis for the decision should always be considered. The respective jurisprudence has been mentioned in the text many times; however, some of the most relevant court decisions addressing the balance of humanitarian principles, with their detailed analysis, are worth noting.

5.1 International Military Tribunal at Nuremberg

The milestone of criminal justice became the International Military Tribunal at Nuremberg with its Charter, which provided the basis for sanctioning major war criminals. In 1945, 19 States ratified the noted Charter, which provided for jurisdiction over war crimes against civilians and crimes against humanity. The Tribunal embraced the premise that the Hague Regulations had become declaratory of the laws and customs of war. Further, the Charter codified 'crimes against humanity', which began to apply irrespective of the normative regulation of the States.[379]

Formal objections that could have been raised to the question of the legality of the Tribunal on the basis that it was an international instead of a national tribunal or similar objections raised to the competence of civilian judges to decide over military questions were sufficiently answered via a theoretical analysis by Major Cowles, who was in the US Army Advocate General's Department. He highlighted that a military tribunal with mixed inter-allied personnel may properly be established by the commanding general of cooperating forces; the personnel of military commissions have usually been commissioned officers. Therefore, Cowles stipulates that there is no legal objection to the use of qualified civilians.[380]

378 ▪ Statute of the International Court of Justice, Art. 59.
379 ▪ See Charter of the International Military Tribunal at Nuremberg, 8.8.1945, Stat. 1546.
380 ▪ See Trial of War Criminals by Military Tribunals, American Bar Association Journal, Vol. 30. No. 6, 1944, p. 330.

It was previously stated in the case of the German Saboteurs in the Supreme Court of the US in 1942 that it is accepted international law, conventional, and customary that a belligerent has authority to try and punish individuals for crimes that constitute violations of the laws and customs of humanitarian law and laws of humanity when such persons fall within his power.[381] Germany could not shield the saboteurs in the US during the war by accepting their acts as its own, not, like any other State, shield an ordinary murderer in the US by declaring his act an act of State. There are limits to a State's act. If atrocities of World War II were considered acts *ultra vires*, they could confer no immunity upon individuals.

The Nuremberg Tribunal had jurisdiction to try individual defendants, but it could not find them liable unless it could determine that the alleged acts of a State were *ultra vires* and, consequently, not acts of the State. The Tribunal, however, found that the sincere renunciation of war as a method of national policy necessarily enhanced the assumption that such a war is illegal in international law, and its perpetrators are committing crimes.[382] The idea was, however, later elaborated, when military and naval officers in Nuremberg were found to be personally responsible for the signature or issuance of orders that violated humanitarian law.[383]

5.1.1 The Hostages case

The case got its name from the issue it addressed; however, it is also known as the trial of Wilhelm List and others or the Southeast Case.[384] It was the seventh of the 12 trials for war crimes that the United Stated processed in their occupied zone in Nuremberg after World War II. The case addressed convictions of the perpetrators dealing with war crimes and crimes against humanity. The offences of the 10 accused officers were mainly reprisal murdering, allegedly to preserve order in the occupation zones of Greece, Yugoslavia, Norway and Albania. The alleged acts included killing hundreds of thousands of civilian people by German militia; plundering and looting of public and private property and devastating many cities and villages in Norway, Yugoslavia, Albania, and Greece; drafting and conducting orders refusing enemy combatant groups the rights of prisoners of war; and executing surrendered troops. Further, perpetrators were tried for killing, torture, imprisonment in concentration camps, use of forced labour, and deportation of civilians.[385]

381 ▪ German Saboteurs, Ex parte Quirin, Supreme Court of the United States, 9142, para. 317.
382 ▪ Judgment of the International Military Tribunal, 1.10. 1946, The American Journal of International Law, Vol. 41, 1947, p. 218.
383 ▪ Varga, 2014, p. 26.
384 ▪ Author's note: The name 'Southeast case' was from the fact that all the defendants had been German commanders leading troops during the Balkans Campaign of Nazi Germany.
385 ▪ Hostages, United States v List, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Case No. 47, 19.02. 1948.

The judges of the US Military Tribunal in Nuremberg (a Nuremberg Tribunal) had rather more conservative perspectives than the prior judges who presided over the trials. They were inclined to handle the process with considerable suspicion. They had to analyse two questions. One regarded partisans as lawful combatants, including the details of how the appearance of these partisans can sufficiently distinguish them from civilians. Consequently, this question addresses partisans' status as prisoners of war. The second question explicitly addressed the killing of civilian hostages and retrospective reprisals against civilians as a lawful defence against guerrilla attacks.

On the first question of the status of partisan fighters, the court concluded based on Art. 1. of the Annex to the Hague Regulation of 1907[386] that combatants, being part of a militia or volunteer corps and despite avoiding the traditional army, are legitimate combatants if they are subordinated to and ordered by a commander, have some distinctive insignia that can be recognised from a distance, have weapons, and adhere to the laws and customs of war.[387] The Tribunal adds that partisans may render great service to their country and can become heroes; however, each situation must be determined by case-by-case evaluation of the evidence before the Court.

The second question on hostage-taking and retrospective killing of civilians as reprisals for guerrilla action given the plea of military necessity is more interesting. The alleged perpetrators justified the murdering of the innocent population and the total damage of villages by military necessity. The argument rested upon the wrong interpretation of the principle as permission to use any degree and method of force to ensure the success of a military operation with the minimum achievable expense of time, life, and money. Moreover, the defendants stated that the principle allows for the destruction of the life of any armed enemies and other persons whose destruction is coincidentally unavoidable during armed conflicts.[388]

The Tribunal in the judgement elaborated on the matter of military necessity and its wrongful interpretation as Kriegsräson of committing any act during an armed conflict. The analysis of the tribunal was based on facts, which showed that, after the capitulation of Yugoslavia and Greece, one of the main defendants stayed at the territory as a commander. However, resistance movements developed and occupying forces regularly faced uneasy situations from guerrilla actions. The High Command, therefore, conducted an operation of intimidation and terrorism as a substitute for lacking the necessary number of troops. These actions were based on the wrong interpretation of the principle of military necessity as permission to do anything to win a battle. The commander's duty was to maximally weaken the enemy force's territory and punish those fighters who attacked his troops or

386 ▪ Annex to the Convention (IV) respecting the Laws and Customs of War on Land, Section I: On Belligerents - Chapter I: The Qualifications of Belligerents - regulations: Art. 1.

387 ▪ Hostages, United States v List, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Case No. 47, 19.02.1948, part. III, p. 59.

388 ▪ Ibid. part IV, p. 66.

sabotaged the transport or communication line as *francs tireurs*. The commander could also take precautions against those suspected of participation in resistance partisan movements, such as registration, limitation of movement, or curfew regulation. If supplying troops were not available for such measures, the commander of the occupying unit could limit its missions or leave the country. However, no circumstance or rule permits international law violation. The provisions of international law must, therefore, be obeyed, even amid the loss of a certain fight or armed conflict. The tribunal additionally noted that, unless the necessity for urgent conduct is affirmatively declared, the murder of hostages or reprisal of prisoners without a fair trial is illegal.[389]

The judges of the tribunal stipulated their definition of military necessity in the case of hostages to an open-minded extent based on the fact that they claimed they had no right in setting the fundamental elements about the level of danger and cost militaries must consider and, thus, left it to the States and commanders. Hence, the hostage rules are not a re-evaluation of the principle of military necessity, as it is a doctrine of respect to military decision-making on what can be considered militarily necessary in reality.

The judgement of the Tribunal in the hostages case provided important references to developing the concept of principles of IHL, especially of the concept of military necessity. The US Military Tribunal in Nuremberg prosecuted German high-ranking military commanders charging the defendants with committing acts, which violated IHL. These violations rested upon unlawful and wilful acts that fall under the term of crimes against humanity.[390]

5.2 International Court of Justice

As one of the most influential judicial organs of public international law, the ICJ supports the proper interpretation of the fundamental values of the international community expressed in IHL. Given its special institutional characteristics, the ICJ's normative relationship with IHL has exceptional legal consequences on States that must not be disregarded via improper implementation or legislation of IHL in international or non-international armed conflicts or by the key persons led by the most basic humanitarian guarantees. As the principal judicial organ of the UN, the ICJ has a normative interpretative authority and a certain legislative right in recognising the rules of law and acknowledging their character like customary rules, *erga omnes*, and *jus cogens*, that overlap those that national courts, *ad hoc* international criminal courts, or transitional situations may have in their case law. Thus, many scholars rightly posit that the ICJ's statements on the character and scope of IHL

389 ▪ Ibid. part IV, p. 64.
390 ▪ Ečer, 1946, p. 19.

have an extensive general influence on progressive evolution and normative consolidation than different court judgements.[391]

Given the short and evasive allusion to the elementary considerations of humanity in the first decision ordered in 1949 in the Corfu Channel Case, the ICJ has had to address issues of humanitarian law in two main and significant cases: the case of Paramilitary Activities in Nicaragua and the case of the Legality of the Threat or Use of Nuclear Weapons. Therefore, they will be further analysed below.[392]

5.2.1 Paramilitary activities in the Nicaragua case

In 1979, a coup took place in Nicaragua, overthrowing the right-wing Somoz regime and establishing a left-wing Sandinista revolutionary movement. The political situation yielded a civil war between the Sandinistas and the counter-revolutionaries, called as Contras. The US and the then USSR, however, showed political interest in the national conflict. In 1981, President Reagan ended the agreed economic aid to Nicaragua because the Sandinista government was providing military support to the armed opposition fighting in neighbouring El Salvador against their government, with which the US maintained friendly relations. That same year, President Reagan signed a secret decision authorising the CIA to support the Contras trying to overthrow the Nicaraguan government. The Contras and the US established a friendly relationship, and the US agreed to grant a 19-million-dollar military aid. Moreover, over the next two years, additional funding of 54 million dollars was provided. The US helped the group with military training and logistics. Direct involvement of the US has also been reported in several operations, such as the mining of Nicaraguan ports, an air strike on a Nicaraguan military training base, or perpetrating an oil pipeline explosion. Even so, the Contras terrorised the civilian population of Nicaragua and committed crimes against humanity.[393]

The importance of the decision is, however, in the strengthening of the noted humanitarian considerations in the case. The court noted that certain universal and well-acknowledged principles of concretely elementary considerations of humanity are even more strongly exacting in peace than in war. It explicitly mentions the strong humanitarian element in armed conflicts and the strong cooperation of human rights and humanitarian law. Consequently, the mere absence of an express provision of humanitarian law does not necessarily justify an action based on military necessity. Battlefield measures must identically mirror the respect for the value of humanity. In this case, Nicaragua has not explicitly cited the principles of

391 ▪ Lauterpacht, 1982, p. 61.
392 ▪ Chetail, 2003, p. 235.
393 ▪ Nicaragua in the United States, Military and paramilitary activity in and against Nicaragua, ICJ, 27.6.1986, ICJ Reports, No. 520, para 85.

humanitarian law, despite knowing acts violating its provisions on its State territory. The case, however, dealt with principles indirectly. [394]

The Court later mentions Art. 3 of the GC of 1949, which is common to all four GCs of 1949. It defines certain rules to be applied in the armed conflicts of a non-international character, under which the case of Nicaragua falls. Therefore, it is natural that these rules, as a representation of elementary considerations of humanity, also represent a minimum basis in the event of an international conflict. The court adds that, on this basis, it is necessary to apply the rules and principles of IHL without deciding what position represents certain States and whether they are multilateral treaty reservations.[395]

The court rejected the argument of the US that the right to collective self-defence justified its mission in Nicaragua, and it aimed to overthrow the government of Nicaragua through aid to the Contras. The Court decided that the USA violated the sovereignty of another State and breached the principle of non-interference in the internal affairs of another State. The acts of Contras may be considered as violating the principle of humanity; however, such acts cannot be directly imputable to the US. Hence, the support the US gave to the paramilitary group could not be considered a breach of humanitarian law.[396]

5.2.2 Nuclear weapons case

In 1994 the UNGA adopted a Resolution, pursuant to which the UNSG requested an advisory opinion from the ICJ, to the question: Is the threat or use of nuclear weapons permitted by international law in any circumstances? The Court had to analyse the broad scope of rules of accessible international law to answer the question.

The court held that the use of nuclear weapons must accord with the relevant principles and rules of international law, particularly humanitarian law. The Court, therefore, had to identify, interpret, and apply the existing principles and rules. Some States argued that the possession of nuclear weapons is an unlawful threat to use force. The possession may yield a conclusion that the States are prepared to use them at any time. The question in this matter was whether this threat can be considered as contrary to Art. 2 of the UN Charter.[397] When this threat is designed as a method of defence, it would not automatically violate principles of necessity and proportionality.[398]

394 ▪ Ibid. para 215.
395 ▪ Ibid. para 114; 218.
396 ▪ Elbert, 2019, p. 71.
397 ▪ United Nations Charter, 1945, Art. 2. para 4.*:'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.*
398 ▪ Legality of the Threat and Use of Nuclear Weapons, ICJ Advisory Opinion, 1996, ICJ Report, Para. 48.

The Court ruled especially that the right of self-defence is always subject to the conditions of necessity and proportionality. However, it also emphasised that the use of force in self-defence must meet the conditions of the law applicable in the armed conflict, especially the principles and rules of IHL. The Court stipulated that the character of nuclear weapons and the connected dangers must be borne in mind by all States believing they can exercise a defensive nuclear response per the principles of humanity, military necessity, and proportionality.[399]

The Court stated that the standard is for weapons of mass destruction to be declared illegal by specific instruments, and, regarding nuclear weapons, there is no treaty of general prohibition. Further, some treaties tackle the possession, deployment, and testing or manufacture of nuclear weapons, which is an increasing concern when dealing with such weapons. However, there is an attempt for a general prohibition.[400]

Military necessity limits the principle of distinction, characterised as one of two fundamental principles of the humanitarian law by the Court in the pertinent case. The Court confirmed that States cannot consider civilians in any circumstances as the object of an attack; consequently, they are prohibited to use weapons incapable of distinguishing between military and civilian targets.[401]

The Court notes directly the principle of humanity and the text of the Martens Clause, as it prohibits unnecessary suffering or harm to combatants; correspondingly, weapons that aggravate suffering are prohibited. The Court also considers the view that nuclear weapons can never be compatible with the principles of humanitarian law. Therefore, such weapons must be prohibited. The argument rests upon the basis that during their use, nuclear weapons cannot make a distinction between civilians and combatants, especially on the question of what falls under a 'military objective'. These weapons cannot be controlled and restricted. Hence, they could kill and destroy indiscriminately and additionally cause blasts, heat, and radiation that could affect the surrounding life, including humans, animals, and nature. The casualties would be enormous. Thus, nuclear weapons should be prohibited based on the fundamental principle of humanity, despite the absence of any explicit conventional prohibition.[402]

Finally, in the case, the ICJ argues that human rights bodies are not asked to apply treaties concerning humanitarian law directly but rather use humanitarian law principles as a method of interpreting how the provision of their treaty applies. The Court acknowledged that human rights law is conditioned by the *lex specialis* of humanitarian law. Reprisals have long been an aspect of the latter, setting

399 ▪ Ibid. Para. 47.
400 ▪ Grief, 1997, p. 683.
401 ▪ Legality of the Threat and Use of Nuclear Weapons, ICJ Advisory Opinion, 1996, ICJ Report. Para. 78.
402 ▪ Ibid. Para 92.

conditions for their application as accepted. Human rights law, accordingly, is not obliged to deprive reprisals of their customary character.[403]

The Court decided that the threat or use of nuclear weapons should also accord with the IHL, particularly to its principles, such as the principles of military necessity and humanity. However, the Court did not prohibit nuclear weapons. In extreme circumstances of self-defence, where the survival of a State would be at stake, nuclear weapons can be used per the law.[404]

5.3 International Criminal Tribunal for the Former Yugoslavia

The ICTY can be considered among the pioneering institutions in the branch of international criminal justice. Its case law has established many influencing legal precedents and helped remarkably in the evolution of numerous fields of substantive but procedural international criminal law. Since the establishment of the ICTY, it has been frequently highlighted that regardless of the criminal and dreadful nature of the atrocities conducted in former Yugoslavia, proceedings conducted before the ICTY must respect the principle of a fair trial in every aspect.[405]

The ICTY has indicted mostly Serbs, Croats, and a few Muslims. Based on the current situation of war crimes since 1991, the proportion of ICTY cases seems logical. From the evidence from the ICTY, troops of the Yugoslav army, supported by Bosnian Serb guerillas during the 1992–1995 Bosnian war period, conducted most violations of humanitarian law. These violations included many noted atrocities such as murder in the city of Srebrenica. Balkan States and the international community have demanded a wider scope for the Tribunal's indictments and prosecutions. The ICTY Charter is, sometimes, impeded by issues of international legal precedent; even so, the statute that founded the Tribunal enumerated dozens of specific actions that may be considered war crimes. It has often been treated carefully on untested legal grounds, distinguishing between the planners and perpetrators of these crimes.[406]

The ICTY has made much improvements in the application and interpretation of humanitarian law. The notion of 'associated with' regards the nexus between the behaviour of the combatant and the conflict. The ICTY in this sense affiliates the conditions that the behaviour must be closely related to the conflict. Consequently, it is not necessary to conduct military operations at the time and area of the pertinent law violation. Violations can be distant in the space and time of the actual hostilities. When evaluating such issues, consider elements such as the status of persons, the status of the victim, and the circumstances of the military

403 ▪ Gowlland-Debbas and Kalshoven, 2004, p. 361.
404 ▪ Legality of the Threat and Use of Nuclear Weapons, ICJ Advisory Opinion, 1996, ICJ Report. Para. 105. E.
405 ▪ Holá, Smeullers and Bijleveld, 2009, p. 80.
406 ▪ Rojansky, 2000, p. 14.

objective of a mission on whether it was executed under a person's regular official responsibilities.[407]

On the application of principles, the ICTY has recognised many principles as customary law, sometimes without explaining the proof of State practice and *opinio iuris* approving this decision. Nevertheless, it has had sufficient grounds for assuming that the customary principle was accurately introduced during a crime. In particular, the noted cases have usually elaborated principles established in provisions of the GCs almost generally understood as customary law or general principles of law that have been well-known and applied from the time of the Nuremberg proceedings.[408]

Regarding the principles as the topic of the monography, the ICTY has, to date, not expressly defined the principles of military necessity and humanity. Further, it has not addressed the conditions of the principles in any scope. However, the tribunal's different chambers have not abandoned creating factual determinations about the presence of military necessity per se in the context of concrete cases.[409] In justification of its perspective, the ICTY implicitly referred to the changing balance between military necessity and humanity. Based on the opinion of the tribunal, a human-oriented attitude has replaced a State sovereignty-oriented attitude, blurring the distinction between civil wars and international wars.[410]

Military necessity has been referred to as a possible defence to charges of crimes against humanity in the Blagojević case. It is profoundly stipulated that certain oppressions may cover property crimes. In the mentioned case, the Trial Chamber accepted that attacks on civilian property could sometimes be justifiable within the context of crimes against humanity, supporting its opinion regarding the recognition of military necessity as a defence to the war crime of destruction of civilian property. Correspondingly, obligatory transport or movement of civilians, identified as a crime against humanity in the jurisprudence of the ICTY, can be justified based on prevailing (i.e. necessary military grounds).[411]

The cases analysed below are the Strugar and Galic cases. They are worth mentioning on grounds of the argumentation of the judges in the decisions of the cases. It is, however, inevitable that some cases are traditionally considered as more fundamental as the Tadic case. As the Tadic case was analysed in-depth in the prior chapters, it is not necessary to address it further.

407 ▪ Cryer et al., 2006, p. 238.
408 ▪ Meron, 2006, p. 407.
409 ▪ Hayashi, 2010, p. 101.
410 ▪ Schmitt, 2010, p. 820.
411 ▪ Prosecutor v. Vidoje Blagojević, ICTY trial chamber I, 17.1.2005, IT-02-60-T, Para 593.

5.3.1 Strugar case

Pavle Strugar, a retired Lieutenant-General of the Yugoslav Peoples' Army, was charged with crimes allegedly committed on 6 December 1991 during his previous military campaign in the area of Dubrovnik in Croatia. The Prosecutor stated that at the time of an illegal artillery shelling by the Yugoslav army, on the historic Old Town of Dubrovnik in December 1991, some civilians were killed and some were critically wounded, beyond damage to a few historic and culturally important buildings. Regarding the attack, Strugar was prosecuted for murder, cruel treatment, attacks on civilians, and devastation or intentional damage to buildings devoted to religious, artistic, or scientific purposes. The Court in the text stipulated that the principle of military necessity cannot serve as justification for such acts.[412]

The Court notes the crime of attacks was interpreted as an attack that resulted in deaths or severe injury to civilians or destruction to civilian objects. The actions had been deliberately managed by being aware of destruction, as it was out of the question to claim ignorance of civilians or their property being attacked, thus ruling out the justification based on the principle of military necessity. The Court continues with the rejection of any exemption based on military necessity. It also emphasises that there is an absolute prohibition of conducting an attack on civilians and civilian objects in customary international law. Hence, the Chamber observed that there was no attainable military necessity for conducting the attack on the pertinent town in December 1991. Later, the Chamber declared that criminal liability for illegal attacks demands evidence of a concrete consequence, specifically of the damage to civilian objects or the injury or death of civilians.[413]

The decision declared that every charged crime in the indictment is genuinely committed, but Strugar was not held liable under Art. 7 (1) for ordering or launching the attack on the Old Town of Dubrovnik. Nevertheless, he was sentenced pursuant to his responsibility as a superior under Art. 7 (3) of the ICTY Statute. The Court was of the opinion that he knew or had reason to know that forces under his command were committing the crimes or had done so and failed to take necessary and preventive measures to avoid the execution of actions or discipline the subordinating combatants involved.[414]

Regarding the interpretation of military objective, as codified in Art. 52 of the Additional Protocol,[415] any attack against nonmilitary objectives is unneces-

412 ▪ Prosecutor v. Pavle Strugar, ICTY trial chamber II, 31.1. 2005, IT-01-42-T.

413 ▪ Prosecutor v. Pavle Strugar, ICTY interlocutory appeal, 22.11. 2002, IT-01-42-AR72, Para 280.

414 ▪ Ibid. Para 250, 259, 270.

415 ▪ The first additional Protocol no. 1 to the Geneva Convention of 1949. 1977. Art. 52, para. 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'.*

sary. The ICTY correctly stipulated that the shelling was arbitrary or indiscriminate and that the destruction of the Old Town was not justified by military necessity. Civilian objects may be damaged in the course of incidental damage. For instance, Building A is a civilian object that is damaged because of an attack aimed at Soldier B, a healthy, non-surrendering enemy soldier and a legitimate military objective. Damage to Building A creates partially accidental civilian damage. Moreover, such damages are proportionate to the military advantage expected by Combatant B's disablement. Damage to Building A is, therefore, justified by military necessity per the preventive measures taken. Thus, the damage is considered necessary to gain military advantage and also in compliance with IHL.[416]

This case elaborated that combatants must respect human rights. Hence, every single soldier must know the basic principles of humanitarian law. Commissioned and non-commissioned officers must be aware of rights when giving orders. Operational law, however, emphasises mainly the rule of proportionality and finding the right balance between the principles of military necessity and humanity. For a proper application of humanitarian law, it is often helpful to have military lawyers who are excessively acquainted with the international humanitarian framework and are frequently responsible for guaranteeing the legal conduct of commanders regarding their combatants.[417]

5.3.2 Galic case

On 5 December 2003, the ICTY decided upon the case of Major-General Stanislav Galić. The decision stated that Galic is guilty of murder and crime of terror upon civilians based on the breach of the provisions of humanitarian law. He was found guilty in question of inhumane acts declared to be crimes against humanity. The accused was convicted for his role in events arising from the siege by the Bosnian Serb Army of Sarajevo from 1992 to 1994. Galic Commanded the Sarajevo Romania Corps and ordered those forces to conduct a campaign of shelling and sniper attacks to spread terror among civilians. Thousands of civilians were killed or injured. Given sufficient evidence, he was sentenced to 20 years of imprisonment.[418]

In the Galic case, the Court elaborated on the opinion in the Blaskić case, where the Trial Chamber declared in connection to the *actus reus* that the conducted hostilities must have resulted in deaths or severe injuries to the population or damage to the property of the civilians. Attacking civilians and their property is a crime when it cannot be justified with the principle of military necessity. Related to the *mens rea*, the Court stated that the perpetrator of this attack must have been aware of the actions and it must have been commanded deliberately. Additionally,

416 ▪ Hayashi, 2010, p. 116.
417 ▪ Lagos Pola and Carnero Rojo, 2005, p. 139.
418 ▪ Gall, 2004, p. 789.

the court analyses that in the pertinent situation when it was impossible not to know the circumstances of the attack, the civilians and their civilian property cannot be attacked based on the principle of military necessity. In deciding the question of whether launching the attack can be considered proportionate, it is compulsory to decide whether a reasonably correctly informed combatant in the pertinent situation of the specific perpetrator, appropriately using the facts and evidence accessible to him, could have anticipated disproportionate civilian damages from the consequences of the ordered attack. Nevertheless, the Court did not adhere to the opinion that the prohibited behaviour stipulated in Art. 51(2) of Additional Protocol I[419] is profoundly characterised as targeting civilians when not justified by military necessity. The rule in the article stipulates in simple and understandable wording that civilians should not become a military objective. It does not mention any exceptions. Specifically, it does not observe derogating from the relevant provision by turning to the justification based on the principle of military necessity.[420]

The pertinent case elaborated on 'principle of military necessity'. However, the most interesting finding is that the ICTY was the first court to declare terror as a war crime, which is a vital understanding of the notion of terror. The tribunal also highlighted that the prohibition on terrorising a civilian population concerns just those cases when the mission was aimed to cause terror.[421] Therefore, in more than one aspect, we can consider the Galic case as a step forward in the 'evolution of law'. Additionally, some may call the case a milestone in criminal procedural law.

5.4 International Criminal Tribunal for Rwanda

The ICTR was founded by the UNSC to arrest and prosecute perpetrators accountable for certain crimes, such as genocide and major breaches of IHL committed between 1 January 1994 and 31 December 1994 in the territory of Rwanda and its bordering States. The UN took the plunge when it prepared and accepted the ICTR Statute. Given that the conflict in Rwanda was internal, the Council faced the question of war crimes in a conflict of internal character. The Council incorporated in the document severe violations of Art. 3 and fundamental rules of the Additional Protocol II, hence explicitly acknowledging the punishment of these prohibitions.

First, Art. 3 of the ICTR Statute stipulates that the ICTR does not require any nexus with armed conflicts, though the optimistic aspect is balanced by a considerably more difficult notion of crimes against humanity. Thus, converse to the

419 ▪ The first additional Protocol no. 1 to the Geneva Convention of 1949, 1977, Art. 51, para. 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'.*

420 ▪ Prosecutor v. Stanislav Galic, ICTY trial chamber II, 5.12.2003, IT-98-29-T, Para 42.

421 ▪ Schmitt, 2010, p. 818.

definition of Nuremberg, the ICTR Statute demands evidence that every aforesaid crime was committed as an element of an extensive or planned assault against any civilian group on different grounds (national, political, ethnic, racial, or religious).[422]

The Rwanda Statute contains no provisions resembling Art. 3 of the Yugoslavia Statute,[423] which granted the ICTY jurisdiction over infringements at the fourth Hague Convention and its annexed Regulations; it has been also used in the internal elements of the hostilities in the former Yugoslavia. The negligence mirrors the preceding interpretation (denying war crimes in internal conflicts). Nevertheless, war crimes under the Hague regulations (i.e. those committed when during combat) should be convictable when conducted in an internal armed conflict. It is especially significant in connection to non-discriminating weapons and the breach of the basic principles of IHL.[424]

The tribunal continued to accept a profound scope of international rules on armed conflicts into the framework of internal armed conflict. Unquestionably, more similar rules have become part of the customary law suitable for non-international conflicts. The question of the principles of IHL is, thus, likewise a topic on the fore of the ICTR. Based on its jurisprudence, the ICTR judges consider the character of such principles with less limiting influence because of the less significant position of general principles of law in the law of the ICTR. Given that the hostilities in Rwanda were non-international, and (as the Secretary-General stated when the ICTR Statute was introduced) Rwanda had ratified the pertinent IHL treaties, an integral element of the Rwanda legal framework, it is not principally important to examine whether a breach of the ICTR Statute was a breach of general principles of law or customary law. It is enough that the treaties were violated. The tribunal's contribution to the better understanding of customary law has, however, been relevant, as the chambers have occasionally dealt with the customary status of numerous principles of law.[425]

422 ▪ Law Reports of Trials of War Criminals, 1949, p. 135.

423 ▪ Updated Statute of the International Criminal Tribunal for the former Yugoslavia. 25 May 1993. Art. 3.: *'The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property'.*

424 ▪ Pérez-León Acevedo, 2017, p. 149.

425 ▪ Meron, 2006, p. 419.

5.4.1 Case of Akayesu

The decision in the Akayesu case marks the first time an international criminal tribunal has charged and convicted an individual for genocide and international crimes of sexual violence. The case arose out of the atrocities of killing approximately a million Tutsi in Rwanda in 1994. Akayesu was mayor of the Taba Commune and one of its most influential citizens in the year 1994 when genocide overtook the tiny mountainous territory of Rwanda. At least two thousand died in this commune on the orders of its mayor. Hence, the primary allegations against Akayesu were not that he engaged in acts of violence. He was subject to accusations concerning commanding, encouraging, or initiating international crimes.[426]

The ICTR correctly stipulated, in the case of J.-P. Akayesu, that the notion of crimes against humanity had already been interpreted in-depth before the Nuremberg Tribunal. The decision declares that in 1915, France, Great Britain, and Russia made an official statement concerning the atrocities committed on the Armenian inhabitants in Turkey, condemning them as crimes against humanity and civilisation based on which every Turkish government member is liable jointly with its liaisons involved in the committed massacres. The Martens Clause helped the development process. Even so, expressions similar to that of those crimes, implying victimised humanity, were introduced much earlier in the history of humanity.[427] The Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties from 1919 created by delegates from several States introduced the Paris Peace Conference, citing offences against the laws of humanity.[428]

The Court in its argumentation also analysed general principles of law applicable in criminal procedures, such as *unus testis, nullus testis* (one witness is no witness), the principle of double jeopardy, the principle of *non bis in idem*, the principle of *concours ideal d'infractions*, principles of individual criminal liability, the principle of the liability of a commander for the acts of his subordinates, or the principle of *nullum crimen sine lege.* As noted, the decision addressed an entire scope of principles of criminal procedure; it, however, omitted the principle of military necessity. Nevertheless, this decision can be seen as interesting regarding the Martens Clause and the principle of humanity. Overall, the decision has recognised the application of general principles as a matter of justice and fairness to victims and witnesses, given that these principles are recognised in all legal systems throughout the world. Under the interpretation of the ICTR, the scope of general principles enhances Martens Clause (i.e. the principle of humanity).

Additionally, the court in this case confirmed that customary international law imposes criminal liability for serious violations of the Common Art. 3, as enlarged

426 ▪ Van Schaack, 2008, p. 1.
427 ▪ Prosecutor v. Jean-Paul Akayesu, ICTY Chamber I, 2.9.1998, ICTR-97-4-T, Para 565-566.
428 ▪ Report of the Commission on the Responsibility of the Authors of the First World War and on Enforcement of Penalties, 29.3.1919, American Journal of International Law, Vol. 14, 1995, Doc. N. 43, pp. 159-160.

with other general principles and rules ensuring the security of victims of non-international armed conflict, and violating particular elementary principles and rules regarding instruments and techniques of fighting in civil conflict.[429]

5.5 International Criminal Court

Liability, not just of the States but of individuals, was introduced as a principle of international law, enabling grave IHL violations to be prosecuted by international tribunals founded for that aim. International criminal law stipulates different methods for the execution of IHL beyond seeking to stop or at least control the widespread violation of human rights and mass atrocities. The evolution of humanitarian law has been conducted by creating principles and ratifying international treaties intended to be universal and applicable to cases of its violation. The provisions stipulated in the establishing documents of international criminal courts and their application of law mirror the progress and similarly highlight the direct relationship between the object and aim of the humanitarian law and the establishment of these courts. The case law of these courts, though not resulting from an independent legislative procedure, is an exceptionally handy supplementary method of developing the existence of a rule of law, its interpretation, and its limits.

Much of the principles of humanitarian law are emphasised in the case law of the ICTY and ICTR. The case law clarifies the provisions incorporated in establishing documents considering the progress in the field of positive law and many explicit rules of the universal agreements applied to restrict cruelty. These principles were born in mind when the 1998 conference convened in Rome under the umbrella of the UN, which ratified the Statute of the ICC. The ICC is proclaimed as remarkable progress in the field of international criminal law and justice. Established by the Rome Statute, the ICC is a unique legal apparatus regarding its wide jurisdiction over war crimes, crimes against humanity, genocide, and the crime of aggression.[430] To date, there have been 31 cases before the ICC.

Considering that war crimes are severe violations of humanitarian law, it is generally required to apply the suitable principles of humanitarian law to analyse international criminal law in this field. Accordingly, Art. 8 of the ICC Statute declares the provisions of the applicable Geneva law and refers to the already accepted legal framework of international law. Art. 8 of the Rome Statute, enhances a lack of well-known notes to the underlying framework of humanitarian law. Aside from the textual recommendation to the military necessity in the grave infringement rules, the notion is regularly referenced in aspects of other offences conducted through international and internal armed conflicts. Military necessity, for instance,

429 ▪ Ibid. Para 612.
430 ▪ The Commonwealth: International Humanitarian Law and International Criminal Justice: An introductory Handbook, 2014. p. 3.

is explicitly enhanced in the provisions of conditions conducting the war crime of deporting the civilian population on the basis that aspects require that the commander's order could not be justified by the security of these civilians or military necessity.[431] As stated in Art. 8 (2), the first classification of crimes defined in respect of situations of international armed conflict is grave breaches of the 1949 GCs. The other classification addresses other significant infringements of the law of armed conflicts.[432] The remark on international law could direct one to interpret that an individual encounters liability in all cases infringing on principles of the humanitarian law, as with the principle of distinction between combatants and civilians, the principle of proportionality, the principle of military necessity, or the principle of humanity.[433]

In remarkable contradistinction to the wording relevant to the *ad hoc* tribunals, the Rome Statute dispenses with a relatively comprehensive justification codification consisting of voluntary intoxication, insanity, duress, necessity, higher-level orders, and official ranking. Its rules are beneficial to the courts in recognising relevant principles. It may be concluded that there is an assumption that the stipulation of justification in the Rome Statute accords with customary law. However, the jurisprudence of all international criminal courts has not been compatible without any exception to the provisions of the Rome Statute.[434]

It is universally understood that, within the matter of positive IHL, military necessity has no position outside explicit extraordinary clauses. It excuses alterations from the exact formula of a rule if the rule anticipates exceptions based on military necessity. Therefore, the Rome Statute raises numerous challenging questions regarding the possible application before the ICC proceedings of military necessity, not just as a justification but also as a basis for excluding criminal responsibility.[435] Regarding certain interpretations of the principles of law, the case law of the ICC does not explicitly address principles of military necessity and humanity. Nevertheless, some cases mention the issue of general principles of law or the principles of IHL, mainly in connection with Art. 21 (1) of the Statute.[436] Below are three examples of cases that address the issue of principles.

431 ▪ Newton, 2015, p. 742.
432 ▪ Rome Statute of the International Criminal Court of 1998, Art. 8, para 2.
433 ▪ Gutierrez Posse, 2006, p. 81.
434 ▪ Schabas, 2006, p. 326.
435 ▪ Rome Statute of the International Criminal Court of 1998, Art. 31.
436 ▪ Ibid. Art. 21. para 1, b): *'The Court shall apply: (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;'*

5.5.1 The case of Bosco Ntaganda

In the case against Bosco Ntaganda, who was initially indicted together with Lubanga, the hearings before the Court occurred in 2014; more than 69,000 pages of evidence were considered. The perpetrator was convicted for war crimes and crimes against humanity allegedly committed by troops of the Patriotic Front for the Liberation of Congo between 2002 and 2003. The charges included murder, destruction of property, rape, and sexual slavery of civilians. Pursuant to Art. 25, the Court held Ntaganda liable for ordering the pertinent crimes, and pursuant to Art. 28, a military commander was liable for the crimes committed by his subordinates.[437]

The Court in this judgement allows for analysing military necessity regarding the actions perpetrated by the combatants of Ntaganda. It finalises its decision, noting that assaults of combatants cannot be justified by military necessity, as there exists no evidence of any ensured preventive actions before the measures of displacement that were performed or any grounds associated with the behaviour of military missions. Moreover, the method used through the two attacks and the modus operandi shows that the fighters were not in a situation to relocate civilians, as additionally illustrated by the significant number of civilians who were relocated.[438] Later, the Court continued with the assumption that the destruction of infrastructure was not required by military necessity based on the fact that soldiers used incendiary grenades and burned houses with people inside. The evidence does not indicate that the combatants made a distinction between military and civilian objects while shelling the densely populated villages including civilians. Further, the Court stipulated that justifying military necessity cannot be used in cases where for certain crimes the perpetrator lacked the *mens rea*. The mental element of the commander when launching an attack is notable. Based on the ICC Elements of Crime, obtained and accessible information can shed light on the fundaments of the decision of the commander. It is also in compliance with the principles of humanitarian law and the practice of the States.[439]

Ntaganda faced additional allegations regarding an attack directed towards a church based on his instructions to destroy it if necessary. The Court noted that Ntaganda must have known the nature and purpose of the religious building given that he had been at this location in person. Moreover, regarding the attacks, he was also aware that the destroyed property belonged to civilians, the factual circumstances establishing the status of the property as protected under the law of armed conflict, and the destruction thereof was not required by military necessity.[440]

437 ▪ Van Oijen and Dorsey, 2014, p. 248.
438 ▪ Prosecutor v. Bosco Ntaganda, ICC Appeal against Trial Chamber II, 9.6.2014, ICC-01/04-02/06, Para 68.
439 ▪ International Criminal Court, Elements of Crime, 2013, p. 13.
440 ▪ Ibid. Para 130.

5.5.2 The case of Bemba Gombo

The issue at hand concerned a former military commander Jean-Pierre Bemba for crimes against humanity by allegedly giving out an order for actions containing rape, killing, and pillaging perpetrated by soldiers in the Central African Republic between October 2002 and March 2003. On the judgement, despite certain evidence, in 2018 a greater part of the Appeals Chamber of the ICC reversed his conviction.[441]

The case started with raised questions regarding the scope of the principle of complementarity, as the court of the Central African Republic intentionally refused to continue the trial to begin the proceedings before the ICC.[442] It later mainly addressed the core of the command liability derived from the principle of responsible command, which demands that military commanders guarantee conformity by their subordinates with the laws and customs of war. The Court noted that the principle of responsible command first took shape in the Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 Fourth Hague Convention[443] and several post-World-War-I international conventions, together with the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and the Convention Relative to the Treatment of Prisoners of War.[444]

The decision also considered the IHL principles and internationally recognised human rights standards. The judgement noted the principle of distinction, though not explicitly, when stipulating that the civilian population comprises all civilians and not armed force members. The Tribunal later refers to principles and rules of international law, including the established principles of international law of armed conflict. Applicable treaties were also analysed, such as the GC 1949 or the VCLT, besides applicable case law of other criminal courts, which affirm principles of humanitarian law. Regarding the interpretation of certain notions necessary for the proper analysis of the case, the Tribunal reached for prior interpretations, such as the interpretation of the notion of *armed conflict* in the Tadic case, or the term *organised armed group*, as interpreted in the Lubanga case.[445]

Finally, considering the principles and rules of humanitarian law and mirrored in international instruments, the Chamber adds that organised armed groups must

441 ▪ Prosecutor v. Jean-Pierre Bemba Gombo, ICC Appeal against Trial Chamber III, 8.6.2018, ICC-01/05-01/08.

442 ▪ Béres, 2021, p. 106.

443 ▪ The Hague Convention with respect to the Laws and Customs of War on Land 1907 (IV). 18. October 1907. Art. 1. *'The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: - 1. To be commanded by a person responsible for his subordinates;'*

444 ▪ Williamson, 2008, p. 304.

445 ▪ Prosecutor v. Jean-Pierre Bemba Gombo, ICC Appeal against Trial Chamber III, 8.6.2018, ICC-01/05-01/08, para. 218.

be under responsible command. Respect for the responsible command to some extent requires the arrangement of troops, including the capability to invoke discipline and the potential to arrange and perform military operations.[446]

5.5.3 The case of Gbagbo

When former Ivorian leader Laurent Gbagbo stepped into court on February 19 2013, he became the first head of State to be prosecuted before the ICC. The Prosecutor brought certain charges of crimes against humanity (murder or attempted murder, rape, other inhumane acts, and persecution) regarding actions from the beginning of 2011, which was heralded as a period of violence that resulted in a loss of life and property and internal displacement, migration, and injury. Gbagbo was allegedly responsible for acts related to the post-electoral violence in Côte d'Ivoire from 16 December 2010 to 12 April 2011. These crimes were allegedly conducted during and after a pro-Ouattara march at a women's demonstration in Abobo by attacking an intensely populated area in Abobo and Yopougon. In 2019, however, most of the ICC Chamber acquitted Gbagbo and his companion Blé Goudé from all charges; the Appeals Chamber confirmed the decision in 2021.[447]

Regarding the decision, the acquittal divided lawyers and scholars. On the topic of principles, the dissenting opinion of Judge Herrera Carbuccia must be mentioned. The judge noted that pursuant to Art. 2. of the Statute, general principles of law derived by the Court from national legislation may only be implied if there is a *lacunae* in the fundamental sources of law when analysing certain issues. The mentioned implementation must also comply with applicable international law, as described by Art. 21, and internationally recognised human rights law. Consequently, the application of such external sources of law is restricted and solely supplementary to the fundamental sources and human rights recognised internationally. Consistently, national jurisprudence or law-making, even if representing general principles of law, cannot be applied if it does not accord with the Statute or impediment to human rights recognised internationally.[448] Hence, Judge Carbuccia reflected the supremacy of international law, even on internal provisions reflecting general principles of law.

446 ▪ Ibid. Para 234; See also Cullen, 2015. p. 766.

447 ▪ Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, ICC Trial Chamber, 15.1.2019, ICC-02/11-01/15.

448 ▪ Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, dissenting opinion of Judge Herrera Carbuccia to the ICC Chamber's Oral Decision, 15.1. 2019. ICC-02/11-01/15, para 14.

5.6 European Court of Human Rights

The ECtHR is situated in Strasbourg and was established by the European Convention. According to the Art. 32 of the mentioned Convention, the ECtHR has jurisdiction over all matters of interpretation and application of the Convention. According to Art. 47, the ECtHR can give advisory opinions on the interpretation of the Convention or its Protocols at the request of the Committee of Ministers.[449] As noted, IHL and human rights law are two separate fields of law. They still overlap and influence each other to a great extent. The rising importance of human rights has undoubtedly affected the development of humanitarian law. Meanwhile, humanitarian law may be used to determine the scope of human rights law.

The principles of military necessity and humanity are universal. These principles can be used on the battlefield and in tribunals and courts such that they are not influenced by the legislative framework of an institution applying them (i.e. they are generally accessible to all international courts). Nevertheless, the legal framework may influence how courts resort to them. For example, how much room does the wording of a convention leave for interpretation and how often and in what way does the legal document in question refer to rules outside of its system? Even so, the question is whether there is a general possibility for human rights courts to refer to international law rules outside of their competence. Hence, two basic paths can be identified. Using international law as an interpretative aid or using it in cases when the convention refers to outside legal rules.[450]

Within human rights law, international human rights bodies and courts have made an important contribution to the development and enforcement of human rights law, which has ensured that enforcement mechanisms for human rights are much more developed than those for humanitarian law. There are several monitoring bodies and courts established by human rights treaties for individuals or States to bring their human rights complaints. Many cases before the ECtHR have addressed situations interpreting humanitarian law as armed conflicts (international or non-international). Until today, the ECtHR has not been eager to openly interpret such notions.[451]

In the past, some States have argued that human rights law is not applicable during armed conflicts.[452] However, these arguments are regularly questioned by

449 ▪ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 32. (1): *'The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47'.;* Art. 47. (1): *'The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto'.*

450 ▪ Pinzauti, 2008, p. 1045.

451 ▪ Freundlich, 2017, p. 1.

452 ▪ Legality of the Threat and Use of Nuclear Weapons, ICJ Advisory Opinion, 1996, ICJ Report, para. 24.

scholars and the jurisprudence of international courts. The ECHR and its Art. 15 provide for derogations (on certain provisions) for emergency periods.[453] Reasonably, the rest of the provisions apply in the course of armed conflicts. Mainly established on identical reasoning, the ICJ rejected the questions and declared that human rights law continues to apply in conflict.[454]

5.6.1 The case of Isayeva

The case concerned Russian military operations in Chechnya, specifically the bombardment on 4 February 2000 of a village of Katyr-Yurt with heavy combat weapons. The case had been decided before the ECtHR on 24 February 2005. The Court did not directly mention any instruments of humanitarian law but addressed civilians and the need to avoid or minimise, to the greatest extent possible, harm to them when planning military operations. However, with certainty, we can derive from the judgement indirect application of the principles of military necessity and humanity.

The details concerning the bombardment of the noted village in Chechnya and the resulting inspection were fractionally contended. The Court stipulated that a bomb dropped from a Russian army plane exploded close to the applicant's car while they were attempting to flee the battle in Katyr-Yurt. Consequently, the applicant's son and three nieces were killed, and the applicant and other family members were injured. Relying on Art. 2 of the ECHR,[455] the applicant alleged that the right to life and the right to life of her son and other family members was infringed by the wrongful conduct of the Russian military.[456]

The Court noted that under such circumstances the combatant's decisions were important beyond doubt to minimise the risk to the civil population, the State, and the lives of soldiers. This risk could not have been minimised by other methods, and the combatant's decisions were, therefore, proper to the resistance put up by the enemy combatants. The combat weapons were directed against previously

453 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15. (1): *'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.*

454 Legal consequences of the construction of a wall in the Occupied Palestinian Territory, ICJ Advisory opinion, 9.7.2004, General list n. 131, para 86.

455 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 2. para. (2): '*Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection'.*

456 Evangelista, 2020, p. 347.

designated objectives (i.e. military objective was properly identified). A balance must be accomplished between the goal desired and the mechanism applied to reach it. The Court examined whether the activities in the case were nothing but necessary for achieving the announced purpose.[457]

Later, the judgement elaborated on the matter of necessity. Any application of force must be no more than necessary for the accomplishment of one or more of the goals of achieving military advantage and ensuring combatant and civilian safety. The Court even stipulated a more rigid and more compelling test of necessity, which must be applied than that usually employed when considering whether State conduct is 'necessary in a democratic society' under Art. 8 to 11 of the ECHR.[458] The Court ruled that the force must be necessary and strictly proportionate to the achievement of the permitted aims. Hence, the Court indirectly applied IHL principles.

5.6.2 The case of Hassan

The case of Hassan concerned the applicant's brother and his arrest and detention at Camp Bucca in Iraq by British military forces. The applicant noted that the caption and later detention had been discretionary and illegal, absent procedural safeguards. The pertinent situation represented the first case where a ratifying State had demanded the Court disregard its obligations under Art. 5 ECHR[459] or some other method to apply it regarding the right of arrest and detention under humanitarian law. In the current situation, the Court noted that the applicant's brother was under the jurisdiction of the UK at the time of his arrest by British troops in April 2003 until his release from the bus that had taken him from Camp Bucca within army transportation to a drop-off station in May the same year. The Court later stipulated that there had been no violation of Art. 5. The ECtHR's main improvement

457 ▪ Isayeva v. Russia, ECtHR former first section, 24.2.2005, Application n. 57950/00, para. 106.

458 ▪ Ibid. para. 173.; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8. para. 2.: *'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.*

459 ▪ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 81.a) : '*the lawful detention of a person after conviction by a competent court;"* b) *„the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law';* c) *'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so';* and d)*'the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;'*

in the matter of law interpretation was setting out some conditions for interpreting Art. 5 regarding the applicable humanitarian law.[460]

It noted that the detention of civilians can be considered authorised when necessary for imperative reasons of security. In the case in question, given that Tarek Hassan was captured as an alleged combatant, Art. 5 was changed for IHL applied as a *lex specialis,* or altered to integrate or enable the arrest and detention of actual or alleged combatants in compliance with the Third and Fourth GCs. Therefore, there was no infringement by the UK regarding the arrest and detention of Tarek Hassan.[461]

On the matter of the principles of military necessity and humanity, the Court made some interesting remarks. The key consideration was that the correct applicable law is defined by balancing military necessity and humanitarian considerations. Thus, there is no possibility for justification based on military necessity beyond the treaty rule, which fundamentally considered military requirements. An additional underlying rule is that this branch of law was established not on rights but on the obligations of parties to a conflict. Furthermore, the provisions relevant to an individual were based on his relative position to certain fighter troops (e.g. being a combatant or merely a civilian). The Court also noted that while citation was regularly made to the principles of IHL, the Court does not consider them as legal rules because the rules were to be proven in treaty articles that stipulate the wording of those principles in legally binding form. It then became obvious that the internal compliance of IHL was remarkably diverse from that of the law of human rights.[462]

460 ▪ Hassan v. The United Kingdom, ECtHR Grand Chamber, 16.9.2014, Application n. 2975/09, Para. 104-107.
461 ▪ Ibid. Para. 88.
462 ▪ Ibid. Para. 92.

6.

Armed conflicts and the principles of humanitarian law

Technological developments have induced many changes in the environment of people and their relationships and everyday life. New technologies are causing many changes in the armed conflict. Foreign and security interests of States put pressure on the creation of innovative and intelligent weapons that can effectively fulfil these interests. Cybercrime also significantly impacts combatant behaviour and the situations that arise during conflicts.

In examining the pertinent issue of the law of armed conflict, it is necessary to examine the sources of law and their scope of applicability in an ever-changing environment. The law should be flexible enough to apply to new legal relationships and new legal facts. However, legal certainty must still be respected, and the law must be sufficiently rigid. The entity must be confident in the application of the law. Thus, State parties as legislators of international conventions must find the right balance between flexibility and stability. The problem is regularly known in terms of the written law, namely the law of conventions. The international custom, as an unwritten source of law, is different in this respect. Its constitutive elements *opinio juris* and especially *usus longeavus*, given their nature of general recognition and long-term use, satisfy the element of legal certainty. It is appropriate to mention the so-called 'immediate custom' that can many times respond flexibly to the needs of the law by immediate creation in response to the risen need. The moment of the creation of such a custom is called the Grotian's moment. Such a custom can be created based on a unilateral act supplemented by an *opinio juris* or only based on an *opinio juris*. Even so, disproportionately increasing the legal force of the *opinio juris* can easily induce the abuse of rights.[463]

Every scholar will come across general principles of law when seeking the most appropriate source of IHL in balancing flexibility and rigidity. The principles of the Statute of the ICJ are among the sources of international law and are the main and binding sources of humanitarian law. The principles are reflected in specific provisions but are often explicitly mentioned in recommendatory and binding conventions. The principles should, however, enhance more than the relevant provisions of the conventions. They represent a set of norms and rules and ethical and moral aspects. As the principles cover many provisions and the moral aspect, they represent values that are much more flexible and do not depend on the period

463 ▪ Krivokapic, 2017, p. 82.

in which they are located. Their long-term existence and stability of their application represent legal certainty for entities reaching for them. Such a rule of conduct provides support for both parties to the conflict, as it is uniform and binding even without the existence of a conventional document. The principles from several provisions can be a response to a battlefield situation for both belligerent parties.

Current development and autonomous weapon and drone usage subsequently meant that the combatant is not present on the battlefield, and, thus, the loss of human lives is reduced or minimised. Currently, armed conflict is dehumanised (i.e. the factor of humanity and ethics in fighting is missing).[464] As the combatant does not come into contact with the enemy, he does not experience the same situations as during direct combat. Ethical and moral issues, thus, play a minimal role. Like other new situations, the law should respond to this 'shortcoming'. The principles enhance more than the explicit provisions in written conventions. The principles of military necessity and especially humanity include a significant element of ethical issues. The application of these principles during the planning of an attack, thus, replaces this missing element, which was an automatic part of the armed conflict in the past. With such an application of the principles, there is also an automatic filling of the lacunae (i.e. gaps in law). Consequently, this interpretation means that, although written law often cannot respond sufficiently and promptly to new technologies and the current development, principles can make up for the lack of a specific provision. The general principles of international law, thus, acquire a timeless character.

Based on this assumption, existing rules are, arguably, not obsolete and are sufficiently adaptable for application in new situations. For lawyers, it is necessary to examine how these rules can be interpreted, modified, and applied in the context of technological developments. However, the real danger to IHL may be the impact of ideological interpretations that violate the law. Hence, a critical analysis of the exact content of each individual term is more than appropriate.

6.1 Modern combatant

Modern technology and modern armed conflict have many interesting aspects. Currently, there are automated weapons, drones, and medical technology to improve the physical fitness of combatants. Better endurance or faster recovery can increase the belligerent party's advantages in achieving military goals. Improvements can take various forms, including improvements in the performance of soldiers with weapons since the creation of the first crossbow. However, the line between a combatant and his weapon is beginning to intersect based on the conveniences of modern technology. Destroyed limbs and other missing organs are already being

464 ▪ Wagner, 2014, pp. 1371-1425.

replaced by artificial prosthetics and intelligent replacements. The so-called exoskeletons form an outer skeleton to increase a soldier's strength.[465]

Developments in biomedicine and bioengineering create revolutionary circumstances for armed conflicts and change the behaviour of combatants. The ability of the current legal framework to effectively cover the extent of emerging legal relationships is minimised. Legal questions arise in cases related to persons using the technology inside their bodies (i.e. hybrid or robotic organisms). An example is the case of soldiers having a chip in their brains to communicate with others or control machines and drones. Similar uses of technology can pose various legal problems. Such combatants (in effect cyborgs) raise the primary question of whether this subject can be subordinated under the term combatant. As the insertion of chips into soldiers' brains has already been tested in the USA, such fiction can soon become a reality.[466] How should the law be applied in such cases? Can we consider such persons as combatants in the classical sense, or is there a need to create a new concept with a new content of rules?[467]

Regarding technologically improved combatants, their lives should be more protected by this technology. The capture of 'chipped' soldiers presents challenges as well. Humanitarian law sets out the fundamental rights of such persons, with the principle of humanity being important in this regard. In capturing these soldiers, unprecedented threats to the enemy party come into play. These prisoners can be easily found using devices and a chip in their body; therefore, the position of the enemy can be consequently identified. Hence, in relevant cases, the principle of humanity (considering such soldiers to be traditional combatants worthy of protection as prisoners of war) runs into the principle of military necessity, which would not be probably fulfilled in the case of the capture of similar at-risk persons. Finding a balance between these principles is thus far the only way to deal with such a situation, as both conventional and customary law is silent in this regard.[468]

In practice, it is necessary to set the question of whether it is realistic to distinguish a combatant with a chip in the body from a combatant without one. The likelihood of the existence of any device to recognise such soldiers on the battlefield is currently small. However, after incorporating hybrid soldiers on the battlefield it will be certainly greater. Assumedly, devices will be created to deactivate the location or functioning of the chips. Such a device can recognise the existence of a chip in the body of a soldier and eliminate its functioning, protecting the interest of the capturing party. In this regard, although technologically hybrid soldiers are

465 ▪ Newsweek. Cuthbertson. AUS Military Plans Cyborg Soldiers with New DARPA Project. [online]. https://www.newsweek.com/us-military-plans-cyborg-soldiers-new-darpa-project-418128 (Accessed 20.9.2022)

466 ▪ Computerworld. Gaudin. S. DARPA: We're on the Cusp of Merging Human and Machine. [online]. https://www.computerworld.com/article/3168840/darpa-we-re-on-cusp-of-merging-human-and-machine.html (Accessed 20.9.2022)

467 ▪ Haraway, 1984, p. 149.

468 ▪ McAllister, 2019, p. 73.

currently still being tested, irrespective of whether they will be used on the battlefield, it will probably be necessary to create a new category of people who will enjoy a different range of rights than traditional combatants. Accordingly, given the noted conveniences, the scope of some rights of modern entities will also be somehow limited. By acquiring hybrid technology, they cannot enjoy some of the traditional rights that belonged to them when it was still possible to classify them as a traditional combatant. Nevertheless, until there is an explicit document setting out the rules, the noted opinions are merely hypotheses. Thus, new legal relations currently available regarding the battlefield are general principles of international law. However, commanders, observe the principles obligatory, assuming that subjects remain combatants in the traditional sense.

6.2 Development of basic concepts

After various word-shaking events, traditional definitions of armed conflicts began to be slowly changed and updated. The basic concepts needed to be expanded in content to include new situations. For example, it is not easy to decide whether there is an armed conflict. However, this problem is not new. The main distinction between the past and the present is that, today, it is challenging to spot the enemy and his attack even visibly. Consequently, it is challenging to attribute legal status to certain situations. Thus, specific situations dealing with new concepts in the field of technology on battlefields and content-related concepts of the law of armed conflict will be analysed in the following subchapter.

The concept of a military objective is one of the basic concepts of the issue of armed conflict, which must be clarified in light of new development. This important concept in the context of armed conflicts was introduced only by later sources of the 20th century. Currently, in the practical understanding of combat, it is one of the basic ideas that commanders must first think about. The concept is based on the basic principle of distinction, which aims to protect the civilian population and buildings. The most recent change concerns the fact that 'target' is no longer limited to people involved in the fighting. Nowadays it mainly means used products and facilities, such as weapons, armoured vehicles, and combatant resources (e.g. factories producing weapons or necessary fuel). The importance of this concept was recognised by the Hague Convention on the Bombing of Naval Forces, recognising for the first time that a military object as a target of an attack must ensure more advantage than a city or other inhabited areas defended. The document also mentions industrial buildings with military value.[469] The most current is the law of the Hague Protocol 1, which defines a military objective as an object that by its nature, location, focus, or use contributes to military action and adds to the other party's

469 Ibid. p. 98.

advantage in case of partial or complete destruction or neutralisation.[470] Though the definition is not constructive and the definition associated with demonstrative examples may be more appropriate, the interpretation of the term by such a definition sets the boundaries for commanders. Meanwhile, commanders must keep in mind that a military objective represents the property of the army and objects and resources that the enemy can use and, thus, contribute to its success. In all cases, care must be taken regarding objects serving the civilian population. Therefore, regarding water, electricity, or other supplies used by combatants and civilians, such objects cannot be the target of an attack. The concept evolved to be refined by every significant event per the modernisation in militant spheres. Given state-of-the-art technologies, the attempt to define 'military objective' precisely cannot yet be considered. For example, advanced cyber weapons can only be used to attack modern countries that are technologically dependent. However, even in many modern countries, cyber-fighting would probably be ineffective, as countries would continue to use alternative older technology that would meet the requirements and be sufficient for providing the basic functions of the State.[471]

Terrorism also had a significant impact on humanitarian law and its conceptual development. Although the norms of humanitarian law prohibit conduct that can be classified as a terrorist act, the objectives and content of the regulation of these crimes are different. Problems also arise in this regard because, during an armed conflict, a terrorist act may be conducted, which, under humanitarian law, could be considered a legitimate attack. However, if such conduct is conducted by a terrorist group, it cannot be recognised as legitimate. They relate to the typical nature of the law, as acts called terrorist acts are generally prohibited, but attacks during an armed conflict, subject to certain conditions, are not. The subjects of the legal relationship are also significantly different. The belligerent parties in the conflict should endeavour as far as possible to grant amnesty to those involved in the fighting, although prosecution is also not excluded.[472] However, terrorist acts are mostly conducted by terrorist groups considered non-State entities, for which the possible amnesty is out of the question.

The growing number of terrorist acts has led to the overlap between counter-terrorism and humanitarian law standards. Many countries have declared war on terrorism and act accordingly. Soldiers purposefully search for terrorist groups and impede their plans. However, there are many problems in applying humanitarian law to terrorism. As noted, the subject of such acts is significantly different; thus, it is also questionable whether to consider a terrorist group member as a traditional combatant. The problem also arises in the question of the territorial application of humanitarian law. The declaration of global war is probably exaggerated and

470 ▪ The first additional Protocol no. 1 to the Geneva Convention of 12 August 1949 and relating to the protection of victims of international armed conflicts, 1977, Art. 52, para. 2.
471 ▪ Dunlap, 2000, p. 15.
472 ▪ Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. (Protocol II), Art. 6.

does not meet the conditions of armed conflict in every country. Finally, territorial jurisdiction (i.e. *ratione loci*) is notable, as a level of territorial control is needed to conduct attacks.[473]

Indeed, armed conflict affects people and objects. The need to protect cultural heritage during wars is based on the principle that these objects belong to the common property and heritage of all mankind. However, many conflicts induce the destruction or loss of important cultural property. In light of developments in the field of the law of armed conflict, the protection of this heritage became binding quite late. The first ideas of protection were outlined only after the Napoleonic Wars. The principle of banning the transfer of such property to foreign States was not established until the Congress of Vienna in 1815.[474] However, with the development of technology along with new sources and the establishment of the cultural heritage definition, protection has improved. The exact nature of assets protected as cultural property by various treaties is an important issue for commanders and their military planning and legal and cultural personnel, as it affects how they conduct operations. Given how treaties have evolved, the definition of cultural values is not clear. The World Heritage List, which meets the requirements for special protection, and the published lists remain helpful. Thus, the military personnel working on the planning of the operation can easily identify monuments. The problem is the identification of cultural monuments that are protected based on definitions in documents that cannot be clearly applied, such as the Hague Regulations and Protocol 1 or the Convention on Cultural Heritage Again. If States publish lists of specific assets they consider to be protected under the Convention, the role of military personnel on the question of identification would be much easier. However, the problem arises regarding all other assets that are not on the published lists and yet have a cultural character. Development and modernisation in the field of concepts thus often causes ambiguity and problem in application.[475]

The context of the notion of 'posthumanism' must also be further analysed to understand how technology contributes to understanding improvement in individuals (to analyse the content of important concepts for the appropriate incorporation of new realities). IHL aims to mitigate the costs of ongoing fighting during armed conflict. The concept enhances the term 'humanity'. Improving the fate of combatants and non-combatants affected by the fighting is closely linked to the humanity of these entities. If a modern hybrid entity does not fall within the concept of man, it is challenging to grant him protection under the provisions of that law. Therefore, the interpretation of the term human being must be adjusted in the current

473 ▪ Selected current challenges of the law of armed conflict and humanitarian law. UPJŠ. [online]. https://www.upjs.sk/public/media/2712/Vybran%C3%A9%20aktu%C3%A1lne%20v%C3%BDzvy%20pr%C3%A1va%20ozbrojen%C3%BDch%20konfliktov%20a% 20pr% C3% A1va% 20humanit% C3% A1rneho.pdf (Accessed 27.10.2020).

474 ▪ Publication of the Ministry of Defense of Germany of 1964, Germany, der Schutz von Kulturgut bei bewaffneten Konflikten, Zdv 15/9, p. 9.

475 ▪ Rogers, 2012, p. 203.

technologically advanced period for the emerging new legal relationships. Further, the interpretation of such a concept concerns the principles of distinction and proportionality, as, in such cases, it is challenging to identify and distinguish between the various subjects during the fighting. Finally, in the analysis of such entities, it is still necessary to consider the element of personal identity, which is clearly important in assessing the humanity of such entities.[476]

Cyber organisms are the future. With technological advancement, a stronger link is created between technology and the physical body. A person's abilities can be improved through body augmentation, heralding the rise of the so-called post-human subject after a certain threshold of a computer-controlled body. Of course, it is not as easy as improving inanimate devices, as research remains in the early stages.[477]

6.3 Battlefield technology

Currently, armed conflict no longer incorporates two traditional armies facing one other on a wide plain. Armed struggles often occur in densely populated and challenging-to-access areas, and non-State actors often become entities. Significant changes erase the content of the concepts identified thus far on the battlefield and change the nature of the fighting. Current weapons enlarge the distance between the combatant and his aim such that the battlefield can be understood to be everywhere.[478]

The categorisation of a situation as an armed conflict is important because it is possible to apply humanitarian law, which regulates hostilities, and makes it possible to derogate from many peaceful rules of international law. It allows for the use of military force, destruction, and detention. Although there is no definition of armed conflict in the treaties of international law, based on the case law, it is the creation of armed struggles or protracted armed violence between government bodies, organised armed groups, or between such groups within the State.[479]

Robots and cyberattacks as current techniques and methods of combat raise three questions regarding international conflicts. First, the question as to whether the use of such methods can be understood as armed forces emerges. The bombing and usage of combatants are naturally seen as the use of force. Similarly, when robots are deployed for bombing, it should be interpreted as the use of armed force. However, this issue is more important in the situation of the application of cyber weapons given the absence of physical destruction or damage to military or civilian infrastructure (so-called kinetic effects). The determination of the existence of an

476 ▪ Saxon, 2013, p. 2.
477 ▪ Benjamin, 2016, p. 186.
478 ▪ Kaldor, 2012, p. 87.
479 ▪ Prosecutor v. Dusko Tadic, ICTY, 15.7.1999, IT-94-1-A, para. 70.

armed conflict must be based solely on the prevailing evidence of the *de facto* existence of hostilities between combatants.[480] In reality, however, nothing can preclude a cyberattack from being understood as an armed conflict, based on the notion of armed, which includes dynamic actions that lead to violent and destructive results. That is, armed conflict occurs when State action is considered unacceptable coercive action by the victim's State. Such coercion occurs during cyberattacks. The concept of armed attack can, thus, clearly be applied.[481]

Questions also arise regarding a cyberattack on the State by a non-State entity. In such a case, Common Art. 3 of the GCs could apply. It will be challenging to classify such a cyberattack as an international armed conflict, as it is uncertain whether the attacking groups are organised. For intensity conditions, cyberattacks with the most significant results can be considered an international armed conflict.[482]

The Tallinn Manual 2.0 presents a significant modernisation in the application of the right to cyber operations.[483] The manual was justified using the results of an internal survey of cybersecurity and infrastructure of defence conducted by the NATO team. The content of the document is devoted to the analysis of *ius ad bellum* and *ius in bello* regarding cyber ways of fighting, while correctly interpreting the problems of the area. In creating the text, the creators were inspired by existing documents in the field of humanitarian law, namely the San Remo Handbook on International Law Applicable to Armed Conflicts at Sea[484] and the Handbook of International Law applicable to air and missile combat.[485] The content of the Tallinn Manual is also largely devoted to attacks outside armed conflict, as the status of cyberattacks raises to the level of conventional threats. The manual has garnered critical acclaim in some academic circles. Despite its relevance to the needs of the current way of conducting combat, the manual is not binding and is not considered one of the most inspiring sources of NATO legislation for further creation of conventions.[486]

Since the beginning of the 21st century, IHL has dealt with new issues (e.g. war on terrorism, cyber warfare, and army robotisation). Targeted killing by drones and many allegations of cyberattacks show the need to use new technology and methods of combat. While innovations in armament technology are as old as war itself, the rise in such improved technologies as military robotics or cyber warfare tools, such as autonomous weapons, has raised elementary questions connected to the application of humanitarian law to armed conflict in the future.

Autonomous weapons pose a significant threat to many rights, such as the right to life, the right to dignity, and the right to privacy. They also increase the risk

480 ▪ Prosecutor v. Boškoski and Tarčulovski, ICTY, 10.7.2008, IT-04-82, para. 174.
481 ▪ Boothby, 2014, p. 364.
482 ▪ Geiss, 2013, pp. 627-645.
483 ▪ Tallinn Manual 2.0. on international law applicable to cyber operations, 2017.
484 ▪ San Remo Handbook on International Law Applicable to Armed Conflicts at Sea, 1994.
485 ▪ Handbook of international law applicable to air and missile combat, 2009.
486 ▪ Eichensehr, 2014, p. 586.

of fighting, as the belligerent parties can fight faster and easier. Per some experts, such weapons cannot comply with the rules of humanitarian law. Notably, regarding the right to dignity, it should be unacceptable for a machine to decide on the question of the life and death of a particular person. Therefore, some experts claim such machines without meaningful human control can induce gaps in the law and directly violate the rights of the victim in the event of an attack.[487]

Currently, the military employs drones for operations. Such devices provide greater protection for combatants and greater accuracy and effectiveness of the attack. Drones were used during the Afghanistan fighting for the targeted killing of selected persons, the sending of missiles, and reconnaissance and information gathering. The law of armed conflict applies to their use; the most challenging issue regards military purpose, the principle of proportionality, perfidy, or *hors de combat* persons.[488]

Using robots and cyber weapons complicates proving State involvement in operations. An armed conflict can occur if a State attacks another. However, the application of these weapons complexifies the attribution of missions to a particular entity. For example, locating and stopping a cyberattack is much more challenging if the attack crosses international borders. Attackers, almost always, target their attacks on servers in multiple countries and conduct cyberattacks indirectly. Many times, they will abuse the enemy's resources toward themselves by taking control of their computers in the enemy State and starting an attack from within the victim's borders. This complication of the technical task affects the legal application, especially in matters of who is responsible for such an offence. Without proof of the origin of the attack, it is unlikely for an armed conflict to be declared.[489]

Current challenges in applying and interpreting the humanitarian law in force to new technologies and new situations bring up suggestions that new rules must be adopted, which includes legal relations concerning cyber-fighting. Some suggest a ban on the development and subsequent use of such weapons. A total ban is preferred by NGOs, according to which such weapons can easily become unmanageable and cause enormous damage. The closest to achieving such a ban is when provisions of the Ottawa Convention declared the use of anti-personnel mines as a war crime. These mines cannot differentiate between combatants and civilians, and their presence extends beyond a conflict, resulting in possible injuries for civilians. This technology is a subject of a ratified Convention and, hence, the application can be forthcoming in becoming a customary law. Nevertheless, it is questionable that the ban has gained customary status already, given the vast amount of States that have not ratified the Convention, and the clashing application along with notable military powers.[490]

487 ▪ Chengeta, 2015, p. 6.
488 ▪ Melzer, 2009, p. 419.
489 ▪ Lin, 2012, pp. 515-531.
490 ▪ Ottawa Convention of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, UN Treaty Series n. 241.

However, there are significant differences in normative proposals. Regarding the issue, there are mainly three opinion directions. The first group is fighting for total prohibition and the creation of a prohibitive convention. The second group argues for a framework of normative management of armaments, which limits just the particular nature of autonomous weapons or limits the extent to which they can be applied. The third group argues based on an adaptive-normative opinion linked to the progressive development of manuals of military conduct, established on traditional legal and moral principles to manage armaments and war. Therefore, the differences concern four key aspects: definitions of enhancing autonomy, accountability, weapons review, and human control.[491]

However, legislation on arms control and restriction requires an environment conducive to the conclusion of agreements. Despite a clear interest in combating the proliferation of weapons of mass destruction, the strongest States continue to aim to improve their arsenal. As the development of arms control shows, conventions regulating new technologies are regularly established after they have been used for some period and show problems or shortcomings in current laws or dangers to national or international security.[492] The application of the principles currently appears to be the only and, arguably, effective way of solving legal problems on the battlefield.

6.4 Technology and principles of humanitarian law

Applying IHL to new technologies and means of warfare can be challenging. However, even if the weapons and the way of fighting can change, the main intention (i.e. to break the enemy) is far from new. At the same time, the law has long-known universally applicable solutions to relations arising based on this intention (i.e. principles that easily adapt to the needs of the situation). Many States likely want to retain some leeway in enforcing the law. Problems usually arise when such a development raises wider questions about the acceptability of moral borders in the implication of technology to military goals. Thus, the application of the general principles is somewhat neglected. Currently, important non-governmental entities that lobby to achieve a humane vision and a more moral view of resolving and conducting armed conflicts are already influencing this area.[493]

However, IHL can respond to current conflicts, as its principles can be adapted to new problems. Essentially, the true risk to the law of armed conflict is the risk of ideological interpretations that violate the law. The problems are not that the law is obsolete, but its incorrect interpretation. Current law provides an effective and up-to-date established regime that can be properly applied. The issues arising

491 ▪ Cavelty, Fischer and Balzacq, 2016, pp. 457- 468.
492 ▪ Sitaraman, 2009, p. 73.
493 ▪ Stewart, 2009, pp. 271-298.

when dealing with new technologies show that it is not so much a question of the relevance of the legal regime but issues regarding implementation, interpretation, and extension of the present international conventional law.

The question of the application of the principle of distinction by contemporary robots is noted many times in professional circles. Autonomous weapons systems must distinguish a combatant from a non-combatant if the party wants to use them effectively during a conflict. After activating these robotic systems, however, the device should independently select and attack targets without further intervention by a human operator.[494] Distinguishing fighters should not present any challenges, as long as their operating system can recognise uniforms and distinguish combatants from those protected by immunity (e.g. medical, religious personnel, and wounded non-combatant). However, finding the difference between combatants directly involved in hostilities and those who cannot be considered traditional combatants but are fighting without any external distinction will be a major challenge. Robotic weapons must distinguish between civilians and soldiers from non-State armed groups, as they carry on a continuous combat task (i.e. create or conduct activities or operations that do not involve direct participation in battlefield action). Meanwhile, they must distinguish between civilians directly involved in hostilities and causing harm to a party to the conflict. Such civilians, of course, lose protection from direct attacks for the period of this participation.[495]

Perhaps, the appropriate method for distinguishing persons is to recognise the activity according to human movement. If a person's actions are hostile, the robotic system can calculate the probability of an attack. Such a decision can trigger the possession of a weapon or other physical danger to persons and the loading of charges and explosives. However, it is questionable whether, for example, carrying a weapon could be considered hostile. An automated system that recognises a weapon a person is carrying must, thus, distinguish such conduct, which does not automatically mean that its holder is a military object.[496]

New means and methods of waging war are also a challenge to the analysis of the principle of proportionality. Proportionality regards the requirement to balance the harm caused to the civilian population and the purpose of the attack. However, applying this principle to cybernetic attacks is complex. It raises the question of what damages should be considered in the proportionality analysis. Cyberattacks, for instance, induce different types of immediate effects: destruction, data corruption, system damage, or damage to State infrastructure. All such elements must, therefore, be considered in light of the principle of proportionality.[497]

When analysing the application of this principle, the evidence obtainable by the machine and when it is obtained (throughout programming or during an attack)

494 ▪ Bhuta et al., 2016, p. 25.
495 ▪ Boothby, 2014, p. 51.
496 ▪ Pomés, 2017, p. 213.
497 ▪ Roscini, 2014, p. 52

is important. The information is not the same depending on the selected moment, and the qualification of the attack may differ. The interpretation of the principle of proportionality and the precautionary principle applies to this case primarily during the decision on the attack. Consequently, if, in the same circumstances and with the same information, the commander has taken the same decision, an extraordinary change of conditions cannot *ipso facto* be adequate if the attack is declared a violation of law. New smart weapons could induce developments in this regard, as their sensors will allow them to obtain real-time information. This capacity is, thus, reflected in the interpretation of the principle of proportionality, as the moment at which the correct action can be taken will recede within some seconds before the intended attack.[498]

Thus, contradictory, autonomous systems could also induce a strengthening of the precautionary principle. Increasing the information available can strengthen the duty to do everything possible to protect civilians. This result is valid mainly for the application of drones, with which combatants already have much experience.[499] The use of such robots strengthens the observance of the principle. This reinforcement is based on several reasons: the information is real-time, the system is autonomous, and the attacker is safe. Each aspect reinforces the precautionary principle, as it applies the probability of waiting for the right moment of attack before it is launched.[500]

However, in any technological development in the field of weapons, whether robots or cyber weapons respect the principles of military necessity and humanity is worth considering. While the need to protect combatants from damage remains a paramount element for any military and new weapons technology, combatants will not have an unlimited choice of means of war.[501] This issue is particularly urgent given the development of deadly autonomous weapons systems. One implication may be that people will no more have to be included in the direct use of the armed forces.

The principle of military necessity requires that the belligerent parties use only the force important to achieve a certain and proportionate military objective. If new weapons work within the limits of this rule, they must be programmed to correctly analyse military necessity, recognise it on the battlefield, and perform only actions that achieve a military goal. For new weapons to comply with the principle of military necessity, the level of force used will be considered necessary if it is appropriate and focused on the military object. Other rules of humanitarian law may not be violated by recourse to military necessity. However, if, for example, no one is in control of the robotic, there is a good chance that it will cause disproportionate damage that violates the principle of military necessity.

498 ▪ Pomés, 2017, p. 217.
499 ▪ See Kis, 2021
500 ▪ Herbach, 2012, pp. 3-20.
501 ▪ Additional Protocol to the Geneva Conventions of 12 September 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Art. 35.

The tension between the principles of military necessity and humanity is one of the main characteristics of humanitarian law. There are considerable disagreements on issues requiring a balance between these principles. There is disagreement as to the extent to which existing circumstances, including advances in military technology, should influence military decisions. These discussions are evidence of a shift from a military approach to an approach that is increasingly humanitarian-friendly.[502]

The principle of humanity and other general principles of IHL can be included among the peremptory norms of international law. In many respects, the principle of humanity is the basis and source of IHL. Principles such as the principle of distinction or proportionality, mentioned in the context of technology, are based on the principle of humanity. Meanwhile, many other provisions and rules aim to preserve the value of humanity. Without the principle of humanity, armed conflicts where the enemy will be treated inhumanely is highly likely. The principle means upholding the idea that, even given armed conflict, every combatant remains a person worthy of respect and human dignity. However, what if a situation arises that some combatants no longer fall completely under the classic notion of man?[503]

The principle of humanity does not forbid advanced technology development and use. Indeed, military technology drives technological advancement. The only question is whether such advanced technology accords with current legislation. There are three main lines of opinions on new weapons and the principle of humanity. The first argues that giving weapons autonomy to decide on whom to kill is inhumane, violates the dignity of combatants and civilian victims, and contradicts the principle of humanity. The second argues that the potential unlikelihood of giving up when these weapons are applied is inhumane and that the application of new autonomous weapons embodies the application of force to the scope that all deaths resulting from them are meaningless and, thus, violate the principle of humanity. The third view is positive: the use of new technologies may accord with the principle of humanity, despite the depersonalisation of their use. It notes that there is only a need for proper programming of such robotic machines.[504]

Throughout its history, IHL has shown considerable ability to adapt its functional rules to meet the challenges posed by newly developed weapons systems. This area of law is based primarily on general principles and generally applicable rules for different weapons rather than focusing on one technology. The existing rules, in particular the general principles, can, thus, respond to new technology, despite the considerable differences of opinion that exist in interpreting these rules.

502 ▪ Clark, 2001, p. 444.
503 ▪ Connell, 2011, pp. 78-100.
504 ▪ Database of International Humanitarian Law, International Committee of the Red Cross. [online]. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule17 (Accessed 26.10.2020).

Conclusion

Humanitarian law is about behavioural assessments. It is ubiquitous in current conflicts: UNSC resolutions, demonstrator flags, speeches by politicians, newspapers, NGO reports, and military manuals. People with distinct cultural and intellectual backgrounds, emotions, and political views agree that in an armed conflict, killing an enemy soldier on the battlefield is not the same as killing women and children because they belong to the enemy. Conversely, no criminal justice system gives a bank robber different legal qualification when killing a security or bank customer.[505]

This controversy only proves that armed conflict is not a standard legal situation and is subject to moral constraints and non-standard solutions to legal facts. The existence of an armed conflict and the reasons for its outbreak are often based on moral arguments. However, every humanitarian worker confirms that even the most basic moral arguments are met with many counter-arguments about protecting victims when they meet a combatant on the battlefield. There are arguments based on the principle of humanity as well as on the principle of military necessity). The IHL role is to balance between these two principles, limit the interests of the other, and, more importantly, place all human beings on an equal footing.

Even so, a specific legal situation must be identified per a correct analysis of the basic term of armed conflict, which is the cornerstone of the issue, the analysis of which is addressed in Chapter 1.2. The author interpreted the term as follows: Armed conflict most likely emerges when elements of enemy armed forces act in military operations directed against each other. Any territory of another State may be affected, and situations such as one army occupying another State may also be considered. It is possible to include such a concept of national conflicts that exist on the territory of a single State, provided the condition of significant fighting intensity is met. Despite the existence of many interpretations of the term in the doctrine of international law, the case law of the ICJ, or the military manuals of individual States, there is no explicit definition. As many such interpretations are strongly influenced by the political needs of strong States, the interpretation of the term in the case of Tadič by the ICJ can be considered the most significant point of reference. In all cases, however, the basic elements of the concept are as follows: two opposing sides; planned operations to weaken the other party; gaining an advantage for yourself and using weapons.

505 ▪ Sassoli, Bouvier and Quintin, 2012, p. 4.

In the search for the most appropriate source of IHL, every academic will come across general principles of law. The principles of the Statute of the ICJ are among the formal sources of international law and are the main and binding sources of humanitarian law.[506] The principles are reflected in specific provisions but are often explicitly mentioned in binding and recommendatory conventions. However, the principles are more than just the relevant convention provisions. They represent a set of norms and rules and ethical and moral aspects. They represent the origin of each provision, which sets out the rule of conduct in the relevant legal relation or situation. As the principles cover many provisions and the moral aspect, they represent values that are much more flexible and independent on period. The long-term existence and stability of their application also represent legal certainty for entities reaching them. Such a code of conduct constitutes support for both parties to the conflict, whereas it is uniform and binding even without the existence of any conventional document. The principles can also be a response to the situation on the battlefield for both sides of the conflict because they are the basis of several provisions.

The general principles, as a formal source of international law, which the academics identify as a non-exhaustive set of standards, are often implicit. They are relatively vague and do not set a precise rule of conduct in each legal relation, leaving room for discretion. However, such a space can be (and often is) misused for arbitrary interpretation of specific principles. Even so, when correctly interpreted, the principle represents much more values and formulations of rules of conduct than explicit legal provisions establishing an order, prohibition, or authorisation. The same principle can, thus, be implicitly reflected in many provisions of different meanings. The content of the values the principles represent is, thus, much deeper and broader than the content of other sources of international law.

The nature of many general principles stems from natural law. This origin, thus, adds a broader and more flexible character to the principles. A principle is a flexible source of law. Some principles are specific, but most can be applied to the law in force during peace and armed conflict. Their ability to adapt is, therefore, a response to current changing trends in armed conflict. Indeed, many provisions of international treaties can, if correctly interpreted, respond to new technologies, but general principles are applicable in all circumstances. A fighter who interprets the principles of IHL correctly can regulate himself as per the law requirements without knowing any provision of humanitarian law. Such an application of the principles is, therefore, simpler than the application of every single provision of law.[507]

Provisions of IHL, whether a treaty or customary law, stem from the most important general principles of international law. The principles of proportionality, distinction, military necessity, and humanity. The last two are particularly

506 ▪ Author's note: However, many Central and Eastern European authors consider the principles as auxiliary sources of law.

507 ▪ Iurlaro, 2019, p. 286.

significant and can be considered the core of humanitarian law. IHL is an attempt to limit the actions of parties in armed conflicts by seeking a fair balance between the principles of military necessity and humanity. Both principles stem from international treaties, international customs, and, especially, natural law, whose dictation stems from the ethics of humanity.

During an armed conflict, the parties often employ the principle of military necessity to authorise an attack. However, the law stipulates the obligation to consider a specific military advantage by analysing a suitable military object and the possible collateral damage the attack may cause. The principle of military necessity is limited by the principles of humanity and proportionality. Given humanitarian law, it is, thus, not possible to apply the principles separately. As different commanders decide differently, the law should also serve as an aid during such calculations of the planned operation. Although the conclusions may be different, to find the right decision, each commander must pay attention to the principles of military necessity and humanity. Chapter 3 and 4 deals in-depth with the two principles and their breakthrough.

Chapter 5 addressed the case law omitted in the previous chapter but was still worth noting in seeking the balance between the main principles of humanitarian law. The applicable case law of the international courts revealed that for an act to be guilty of a war crime, there must be a link between the crime and the armed conflict. Not all crimes during armed conflict are war crimes. Ordinary criminal acts, like murder, rape or robbery cannot become war crimes purely based on the situation of armed conflict on the territory of the crime. Sadly, these acts continue to be perpetrated without a link to the conflict. The important element when dealing with exact cases is the nexus between certain acts and the armed conflict.[508]

Further, while horrific infringements frequently continue in many conflicts, the application amidst numerous States has been to ensure more significant pressure on humanitarian considerations. The current mass media, internationalisation, and democratisation yield a world where images of civilian suffering are easily obtainable (though censorship and propaganda remain). Additionally, technological development has increased anticipations of the accuracy of attacks. Combatants who propose exact missions know that situations causing serious civilian casualties can destroy the support of their own civilians, support partners, and the international community. Informal proof demonstrates acknowledging international criminal justice institutions is inducing considerable acceptance among military commanders. Reciprocally, the challenges of the asymmetric combat against non-State actors without considering humanitarian law have caused a few governments to refuse or limit the usage of humanitarian law, establishing new situations of pressure.[509]

508 ▪ Schabas, 2016, p. 207.
509 ▪ Pfanner, 2005, p. 164.

Notions such as military necessity, humanity, or proportionality are not static; they develop as State practice provides for the clarification of the applicable law. As State practice adds to the evolution of its relevant case law and application to combat, the aspects of these notions of IHL are improving in conjunction with the evolution in the area of international criminal justice. Consequently, it will have an influence even on the interpretation of the notion of armed conflict. [510]

Per some authors, the principle of military necessity is somewhat obsolete and, therefore, does not represent a real restriction for commanders. They note that the principle applies only when there is no norm of humanitarian law regulating the situation. The principle could, thus, only be applied in cases of unclear customary law or the case of *lacunae* (i.e. legal gaps).[511] Indeed, as with technological development, there are currently huge gaps in humanitarian law; thus, the principle would have space to evolve in the future. However, if the principle had been applied only in the absence of an express rule, it would have been little used in modern law. Arguably, the principle stems from the nature of armed conflict. Hence, when a conflict arises, the principle of military necessity automatically applies, without which the conflict would not exist. Therefore, in all circumstances of an armed conflict, this principle takes precedence over other principles of humanitarian law. However, combatants are not unrestricted in attacking, and the restrictions are based on the interpretation of the principle of military necessity. The conduct of a fighter accords with the principle if it constitutes an advantage and primarily targets a specific military objective that accords with humanitarian law.

The only legitimate goal of the parties in an armed conflict may be to weaken the enemy's military strength. However, it does not mean international law is silent during the existence of fighting. The law imposes limits on such actions of the parties. Some classify such provisions as goodwill among the fighters or as humanity itself. The principle of military necessity is, thus, primarily limited in humanitarian law by the principle of humanity and the Martens Clause, which stipulates that not everything that is not forbidden is allowed. The conduct of combatants in conflict is, thus, limited by international treaties, customs, and general principles as formal sources of law and implicit ethical and moral principles from the nature of law. However, if we consider humanitarian law to be a breakthrough of the principles of military necessity and humanity, we will always find answers to the questions on the battlefield in them and their correlation. From the analysis, the two principles must be applied in each case, but they can never impose the obligation to act contrarily. Ethics and morality, as the main element of the principle of humanity, are significant elements in armed conflict.

The principle of humanity and its origin in the Martens Clause is an important element for a more flexible application of the law to the current rapidly changing period. Again, among the basic elements this principle represents is the idea that

510 ▪ Cullen, 2015, p. 776.
511 ▪ Oppenheim, 1908, p. 12.

not everything that is not forbidden is allowed. Hence, we limit any action of a combatant in an armed conflict by default, even without any provision in a binding convention.

The general principle of humanity (i.e. respect for human dignity) is the fundamental support and *raison d'être* of IHL and human rights law; it is, indeed, of certain particular significance that it permeates the entire body of international law. This principle discourages interference with human dignity, whether by an illegal attack on physical bodies or by humiliating and degrading the honour, self-esteem, or mental well-being of a person.[512]

The principle of humanity, a basic and binding principle of IHL, has various possibilities of application. First, it can act as an interpretative rule for the need to interpret other provisions based on international treaties, as the rules of IHL are to be interpreted in the spirit of the principle of humanity. Second, regarding gaps (i.e. *lacunae*), the principle may fulfil the complementary or replacement function. Third, in connection with the system of international sources, if we consider the principle to be a source of ordinary character, it can relax the requirements for *usus longeavus*, while increasing the *opinio iuris*.

In this respect, there is no doubt that the principle is one of the most important in the field of humanitarian law. It applies to issues of civilians and non-combatants, which must be dealt with per the principle of humanity. The existence and binding force of the principle of humanity as a general principle of international law is also confirmed by the case law of current international courts. In cases of uncertainty or lack of sources (or *lacunae*), international courts frequently refer to the principle of humanity. Therefore, they undoubtedly recognise its existence and importance.

Infusing the improvement and interpretation of humanitarian law and war crimes is the balance between military and humanitarian considerations. Fighters may put stronger significance and weight on military aspects at the cost of humanitarian considerations. Reciprocally, those fortunate not to have been a part of a conflict may disregard or underestimate military necessity when pronouncing declarations about humanitarian law and war crimes.

Humanitarian law includes balancing the principle of military necessity and the principle of humanity; it is, however, obvious that the importance attributed to these principles has shifted through the years toward a liberal direction. This shift has been correctly called the humanisation of humanitarian law. Many aspects contributed to this change, including the growing accent in international law and relations on the protection of humans, unlike an absolute focus on State interests. It ensured stricter law on the battlefield, protecting numerous categories of victims

512 ▪ Report from the 19th meeting of the International Law Commission IV / 1, 6.6.1945, para. 183.

and application of limiting law in more situations, including non-international armed conflicts.[513]

Commanders over time have acknowledged that the humanising effect of the rules for actions in the conflict is an essential aspect of a combat-successful unit that should not be neglected or underestimated. A successful commander creates plans and instruction *a priori* to the start of an operation and establishes a professional creed to empower combatants as the conflict evolves. As Yoram Dinstein in 2010 interprets, each of the norms of humanitarian law is a parallelogram of violence. It challenges an unavoidable clash between the requests of the principles of military necessity and humanity, accomplishing a balancing formula.[514]

These principles of humanitarian law are important in encouraging significant changes in the field of human rights. Formally, human rights had little to do with humanitarian law, but, materially, they cannot be completely separated. A shift in the field of application, based on several references to the principle of military necessity, was first confirmed by changes in the State's status as a subject of international law. Changes in the traditional understanding of the State and its sovereignty began for the first time when the Nuremberg Charter established the scope of its jurisdiction over crimes against humanity, whether they are contrary to the national laws of the country where they were committed. The ICC has also emphasised that humanitarian law is a *lex specialis* to human rights law during armed conflicts. Human rights laws are designed for peaceful times, unlike humanitarian law for armed conflict periods; it is, therefore, *lex specialis*, displacing the more general law under the speciality rule. Hence, human rights laws are often derogated from when conflict arises.[515]

Military law enforcement operations in peacetime have much in common with hostilities during armed conflicts. The basic principles of distinction and humanity are similar in both operation types. The same applies to various other general principles, such as proportionality and efficiency. Existing differences in the implementation of these principles within the law enforcement and hostility management paradigm are, thus, a matter of interpretation (i.e. they do not affect their full applicability).[516]

However, the main difference from human rights law can be observed in the area of State jurisdiction, as in the case of humanitarian law the parties to the conflict should observe, such a *lex specialis*, in their State and the armed conflict territory. Humanitarian law, thus, has a broader scope in territorial terms than the classical peaceful protection of human rights. Regarding the content of rights, the scope of rights is, of course, narrower, as human rights cannot be expected to be applied as much during fighting as during peace. Otherwise, armed conflicts could

513 ▪ Cryer et al., 2006, p.224.
514 ▪ Dinstein, 2010, p. 5.
515 ▪ Parks, 2010, p. 797.
516 ▪ Fleck, 2010. p. 125.

not exist. IHL has such a strong link with human rights. The principle of military necessity, as a customary and traditional principle of humanitarian law, finds many limitations in the field of human rights protection; these rights are frequently reflected in the content of the treaties of international humanitarian law under the principle of humanity.

It is not an exaggeration that the rules of combat balance humanitarian goals with the completely legal aim to conduct an operation. The law precisely fixes the freedom for military commanders, and scholars balance the demands of the operation contrarily to the humanitarian imperative of the law. Therefore, the elementary norm for the range of rules relevant in an armed conflict is to find a balance between the possibility of commanders legally achieving the military goal of the operation and the necessity to follow to the broadest extent of the ever-lasting value of humanitarian considerations. As Newton states, the Hague law starts with the military operation and allays the unrestricted responsibility of combatants formed on humanitarian grounds; the Geneva law starts with unnatural humanitarian principles. As per the necessities of the military missions.[517]

As noted, the principles can be applied without the existence of a treaty or an explicit provision dealing with the situation that has arisen. The principles apply *erga omnes* (i.e. they are generally accepted). Meanwhile, for military calculations, they are easy to understand and very flexible. Such a character is welcome in the current rapidly changing age of technology. The principles and search for their breakthrough can, thus, be applied to computer technology, drones, autonomous weapons, or cyber warfare. The principles of humanitarian law are timeless and stem from traditional international law while responding most adequately to the needs of the modern world. The opinion of the public and some experts that the current humanitarian law is obsolete is incorrect. Key personalities of international law, such as Kelsen, Grotius, Vattel, and Martens posited the importance of natural law. Over time, these academics have furnished the basis of today's law, the principles of which still apply today.

Accordingly, the principles of humanitarian law can respond promptly to situations that have arisen, but the extent of their application and knowledge on the battlefield is insufficient. Despite the current war on the territory of Ukraine, there remains space and time to apply these principles on the battlefield. Perhaps, the principles of humanitarian law are not prevalent in usage because of the ambiguity related to the application. The inconsistency in the interpretation of these principles stems from the theory and differences in comprehension of the issue by academics. The conceptual chaos from the analysis of the concepts of principles can subsequently easily yield their arbitrary application, which, in the field of the law of armed conflict, can cause immense damage. Many principles are only implicit in the provisions of humanitarian law treaties, but despite the problems of interpretation, they should also be explicitly set out in binding conventions, thus

517 ▪ Newton, 2015, p. 735.

emphasizing their importance. As in the preamble of the 1899 Hague Convention, modern conventions must be based on the existence of principles. Hence, principles can help combatants exercise their power of reason, i.e. the combatant must know that he must reach for the principles of military necessity and humanity in case of ambiguities or in circumstances to which he does not know the answer.

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